IRAN-UNITED STATES CLAIMS TRIBUNAL

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126

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** CONCURRING OPINION of _____

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** SEPARATE OPINION of Mr Ameli

- Date 6 Aug 1993

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- Date _____

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- Date _____

_____ pages in English _____ pages in Farsi

2

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In His Exalted Name

DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE No. 367
CHAMBER TWO
AWARD No. 548-367-2

KAYSONS INTERNATIONAL CORPORATION,
Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
THE MINISTRY OF INDUSTRIES AND MINES,
THE ALBORZ INVESTMENT CORPORATION,
THE TOLID DARU COMPANY,
THE KAYVAN COMPANY,
THE TOLYPERS COMPANY,
THE PAYEGOZAR COMPANY,
THE PAKHSH ALBORZ COMPANY, and
THE KBC COMPANY,
Respondents.

IRAN-UNITED STATES CLAIMS TRIBUNAL
دیوان داوری دعاوی ایران - ایالات متحده
FILED ثبت شد
DATE 6 AUG 1993
تاریخ ۱۵ /۵/ ۱۳۷۲

SEPARATE OPINION OF KOOROSH H. AMELI

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1. Since I concur in the present Award as to all but its determination that the Tribunal has jurisdiction over the Claimant in this Case, the present Opinion is limited to my reasons for dissenting from that determination, as in my opinion, under Article VII of the Claims Settlement Declaration the Tribunal lacks jurisdiction over the Claimant corporation due to

the fact that the true ownership of its majority interest belongs to Nassrollah Khosrowshahi or to him and his brothers, who are solely Iranian nationals.[1]

2. On jurisdiction over the Claimant in this Case, the Tribunal has held:

> "15. The Tribunal is satisfied, on the basis of the evidence before it, that ... the Claimant has shown, at least prima facie, that Faith Lita Khosrowshahi and her children have owned at all relevant times 60% of Kaysons' capital stock. Although the Respondents suggest that Nassrollah Khosrowshahi is the true owner of Kaysons, they have failed to present any evidence to that effect.
>
> 16. Based on the above, the Tribunal is satisfied that the Claimant is a United States national within the meaning of Article VII, paragraph 1 of the Claims Settlement Declaration. The Tribunal is also satisfied that the Claim has been owned continuously by a national of the United States during the requisite period, in accordance with Article VII, paragraph 2 of the Claims Settlement Declaration. Consequently, the Tribunal finds that the Claimant has standing to bring its claim before this Tribunal."

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[1] As indicated in paragraph 4 of the Award in this Case, the Tribunal by its Order of 3 May 1990 extended to the present Case its determination of dominant and effective nationality of Mrs. Khosrowshahi and the children in Faith Litha Khosrowshahi, et al. and Government of the Islamic Republic of Iran, et al., ITL No. 76-178-2 (22 Jan. 1990), reprinted in 24 Iran-U.S. CTR 40. Although I disagree with that determination and its extension to this Case, I do not find it appropriate to set forth my reasons here, as both decisions have been made by the former composition of this Chamber and my predecessor Dr. S.K. Khalilian has dissented from them and for his reasons has referred to the Dissenting Opinion of Iranian Arbitrators in Case A18, Decision No. 32-A18-FT (6 April 1984), reprinted in 5 Iran-U.S. C.T.R. 275.

The exclusive Iranian nationality of Nassrollah Khosrowshahi in the relevant period is confirmed in para. 13, n. 3 of the Award, citing Nassrollah Khosrowshahi and Government of the Islamic Republic of Iran, et al., Award No. 341-371-3 (18 Dec. 1987), reprinted in 17 Iran-U.S. C.T.R. 266.

However, the Tribunal's holding as to the share ownership of the Claimant, and thus its nationality and the Tribunal's jurisdiction, is fundamentally erroneous.

3. In the Award in this Case the Tribunal does not appreciate the weight of the law or the evidence on beneficial ownership, although it correctly recognizes that evidence of not only nominal but also beneficial ownership of shares in a U.S. corporation must be presented in order to satisfy the United States nationality requirements of Article VII, paragraph 1 of the Claims Settlement Declaration.

4. In the present Award the Tribunal also disregards its own Order of 1 October 1991 where it directed "the Claimant to respond to the Respondents' request [for production of certain corporate documents] when it files its rebuttal evidence and brief, either by submitting each of the said documents or explaining why it cannot be made available [and cautioned that] should the Claimant fail to submit these documents or to explain to the satisfaction of the Tribunal why they cannot be made available, the Tribunal may draw adverse inference." In the Award the Tribunal does not even refer to the Order just mentioned, let alone examine whether or not the Claimant has satisfactorily complied with the Order and thus whether or not the Tribunal should draw the adverse inference mentioned in the Order.

5. Moreover, the Tribunal's leading decisions[2] on the requirement of proof for United States nationality of U.S. companies under Article VII(1) have demonstrated that although "capital stock" includes both voting and non-voting stock, evidence of ownership of 50% or more of the voting stock of U.S.

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[2] Flexi-Van Leasing, Inc. and The Islamic Republic of Iran, Case No. 36, Chamber One, Order of 15 December 1982, reprinted in 1 Iran-U.S. C.T.R., 455, 461 and General Motors Corporation, et al. and The Government of the Islamic Republic of Iran, Case No. 94, Chamber One, Order of 18 January 1983, reprinted in 3 Iran-U.S. C.T.R. 1, both by President Lagergren.

corporations by U.S. nationals must be presented in order to satisfy the United States nationality requirements under Article VII(1). In Flexi-Van, the Tribunal also held that evidence of United States nationality of beneficial owners of U.S. corporations must also be presented in addition to that of the record/nominal share owners in the event such holdings are more than 5% of the company's voting shares. 1 Iran-U.S. C.T.R. 459. Although these leading decisions deal with U.S. corporations whose shares are publicly traded in stock exchange houses, a fortiori they should also be applied with regard to U.S. closely held corporations, whose books and records are not open to the public or in principle binding on third parties and are thus susceptible to manipulation. In Rondu Holdings, Inc. and The Islamic Republic of Iran, Award No. 137-312-2 (29 June 1984), reprinted in 7 Iran-U.S. C.T.R. 26, 29, where the Claimant was a New York closely held corporation, the Tribunal held that the evidence did not support "the degree of ownership and control required by Article VII, paragraph 1, of the Claims Settlement Declaration." Even in James M. Saghi, et al. and The Islamic Republic of Iran, Award No. 544-298-2 (22 January 1993), paras. 18-26, involving U.S. natural persons and their direct claims under Article VII(1), the Tribunal has also recently confirmed that it would favor beneficial over nominal ownership for jurisdictional purposes. In that case, the Tribunal held:

> "18. In past awards, the Tribunal has favored beneficial over nominal ownership of property for a variety of purposes. For example, American claimants have proven their control of non-American entities via beneficial ownership in order to establish their standing to bring indirect claims on behalf of those entities under Article VII, paragraph 2 of the CSD."

6. The Claimant, Kaysons International Corporation, initially named Kaysons International Trading Co. Inc., was organized under the laws of New York on 14 September 1953 as a sole proprietorship by Nassrollah Khosrowshahi with a paid in capital

of $40,000. Kaysons' Certificate of Incorporation at the time authorized 200 shares, of which 40 had been issued to Mr. Khosrowshahi. Six months after Kaysons' incorporation, Mr. Khosrowshahi was issued an additional 60 shares, increasing the paid in capital to $100,000. On 30 April 1956, three weeks after Mr. Khosrowshahi's marriage under the laws of New York on 12 April 1956, the remaining 100 shares were issued to his wife, Mrs. F.L. Khosrowshahi. The Certificate of Incorporation was amended on 25 July 1960, increasing the number of authorized shares from 200 to 600 of the same class, although no new shares were issued and no conversion of shares was made at the time.

7. Kaysons alleges that on the basis of the 1960 share increase authorization, on 20 April 1976 the shareholding of Mr. Khosrowshahi was reduced from 50% to 16.66%;[3] the shares of his wife were decreased from 50% to 33.33%; and on the same date their four children and the Irmer Company[4] were admitted as new shareholders to this closely held corporation. Thus the new share certificates were allegedly issued on 20 April 1976 to all shareholders as follows:

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[3] Mr. Khosrowshahi's new 16.66% shareholding as a consequence of the alleged 1976 re-structuring of Kaysons' share ownership is noteworthy, as it corresponds with exactly one-sixth of Kaysons' stock, which accords with the long-standing tradition of the Khosrowshahi brothers and their immediate families to distribute their property in six equal portions. In a parallel proceeding before the Tribunal (Case No. 178) where the alleged majority shareholders of Kaysons are Claimants (i.e. Faith Lita Khosrowshahi and the children), this tradition is invoked by the Claimants for the extent of their share ownership in KBC. Moreover, as indicated in paragraph 13 of the Award, the Respondents invoke the documents of Case No. 178 in the present Case, and thus I find it appropriate to refer to them in this Opinion.

[4] In its written pleadings in this Case, the Claimant made no assertion as to the status of the Irmer Company, the identity of its shareholders or their nationality. In the Hearing, however, the President of Kaysons, N. Khosrowshahi stated that Irmer belonged to his brothers, who are solely Iranian nationals.

Shareholder	Number of Shares	Paid Capital
Irmer Company	140	$86,800
N. Khosrowshahi	100	$100,000
Faith Khosrowshahi	200	$162,000
Susanne Khosrowshahi	40	$24,800
Faith as guardian for Marcene Khosrowshahi	40	$24,800
Faith as guardian for Kevin Khosrowshahi	40	$24,800
Faith as guardian for Cameron Khosrowshahi	40	$24,800

8. The Tribunal's determination that the Claimant is a United States national is based on contested documentary evidence listed in paragraph 11 of the Award, without any discussion of the problems involved. These documents include a copy of Kaysons' share register, share certificates of Mrs. Khosrowshahi and the children, Kaysons' corporate income tax returns for 1975 and 1976, redacted corporate income tax returns for 1979 and 1980, annual reports for 1976 and 1977 and redacted[5] annual reports for 1979 and 1980.

9. Although the Award does not mention and thus does not rely on the affidavits of Kaysons' corporate secretary and corporate attorney, the implausibility of their story demonstrates the questionable nature of the documentary evidence noted above as well as supporting my opinion that the Tribunal should have drawn adverse inference concerning the true ownership of Kaysons' majority shares. Thus a description of their "affidavits" is useful here.

10. In support of its contention the Claimant has presented affidavits from its corporate secretary, Phyliss Ball and its

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[5] Paragraph 11 (g) of the Award inadvertently fails to mention that the 1979 and 1980 annual reports were also redacted.

corporate attorney, Richard T. Blancato. However, due to their employment with the Claimant, the Tribunal by its Order of 8 October 1992 did not allow them to make the declaration provided for in Note 6(a) to Article 25 of the Tribunal Rules[6], thereby rejecting their testimony and considering their statements as part of the presentation of the Claimant's case. In their "affidavits", both Ms. Ball and Mr. Blancato describe the circumstances of the new share issuance and admission of new shareholders in this closely held corporation as if Kaysons had been the sole proprietorship of N. Khosrowshahi and there had been no necessity for a resolution of the board of directors or for a shareholders meeting under its bylaws and the New York Business Corporation Law.

11. In her "Affidavit", Ms. Ball states that:

> "3. In 1976, Dr. Nassrollah Khosrowshahi told me that he wanted to issue additional shares of Kaysons stock and asked me to handle the matter. The stock issuance was handled by the company's corporate attorney, Richard Blancato."

12. In his "Affidavit", Mr. Blancato states that:

> "8. In 1976, Dr. Nassrollah Khosrowshahi told me that he wanted to issue additional shares of Kaysons stock and asked me to handle the matter."
>
> 9. Mr. and Mrs. Khosrowshahi surrendered their old share certificates to my office. On or about April 20, 1976, I directed a secretary [to] type the names of the new shareholders onto new share certificates. The secretary made entries on the Share Register described above to record the new issuances. New shares [to all shareholders] were

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[6] Article 25, Note 6(a) of the Tribunal Rules: "Before giving any evidence each witness shall make the following declaration: I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth."

issued as [stated in para. 7 of the present Opinion]."

13. Such a scenario is not credible. According to paragraph 7 of the Certificate of Incorporation, Kaysons shall have three directors. Under paragraph 8 of the Certificate of Incorporation the initial directors until the first annual meeting of the stockholders were Bertran M. Siegeltuch, Fay Tulman and Walter M. Weisberg, and under paragraph 9 each director agreed to take one share in the corporation. The Claimant has not indicated the name of its board members for 1976. Nor does the unnotarized photocopy of certain pages of its Share Register indicate that the initial or subsequent directors had any share in the corporation. Therefore, the corporate attorney and the corporate secretary treated N. Khosrowshahi as the sole shareholder in total control of the corporation. Otherwise, they should have demanded a board resolution from him for the requested changes.

14. Moreover, two other points cast serious doubt on the credibility of the Claimant's theory on the share ownership of Kaysons, namely its failure to (a) produce documents ordered by the Tribunal, and (b) meet the requirements of the applicable law.

a. <u>Failure to Produce Evidence</u>

15. By their letter dated 6 August 1991, the Respondents reiterated their request of 3 October 1990 for production of certain corporate documents by the Claimant. The Tribunal by its Order of 1 October 1991, taking note of the Respondents' submission of 6 August 1991 and the Claimant's objection of 19 September 1991, directed the Claimant to produce the corporate documents requested by the Respondents. The documents whose production was thus ordered included (1) minutes of the shareholders' general meetings from 1970 to 1981, (2) records of any share transfer together with relevant banking and financial records concerning such sale and purchase of shares and payment therefor, (3) reports of Kaysons' auditors from 1970 through

1981, (4) Kaysons' Corporate Income Tax Returns from 1970 through 1981 together with any document annexed thereto, and (5) any other document which must have been submitted to the local authorities in this respect. The Order also stated:

> "The Tribunal expects the Claimant to respond to the Respondents' request when it files its rebuttal evidence and brief, either by submitting each of the said documents or explaining why it cannot be made available. In this connection the Tribunal notes that the Claimant has the burden of proving its nationality. Should the Claimant fail to submit these documents or to explain to the satisfaction of the Tribunal why they cannot be made available, the Tribunal may draw adverse inference". (Emphasis added.)

16. As noted by the Order of the Tribunal, the Claimant's burden of proof was clearly not limited to the production of the documents requested by the Respondents. Among the helpful other evidence which should have been in the possession of the Claimant, one can name the bylaws of the corporation and the individual tax returns of Kaysons' allegedly majority shareholders. The bylaws could provide the company's rules regarding the holding of board and shareholders' meetings, and the required actions involved in the company's decision-making process. The individual income tax returns of the alleged shareholders would demonstrate their ownership interest in Kaysons, in case dividends were distributed.[7]

17. The Claimant furnished very little of the evidence ordered by the Tribunal. It did not produce a copy of the minutes of any meeting of the shareholders or board of directors, nor their resolutions or the written consent of the shareholders or directors for the actions taken without a meeting, in place of the minutes, and yet it gave no explanation for this failure.

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[7] In this respect, the Claimant alleges that no dividend was distributed during the company's life. Such a statement simply does not seem credible. See, paras. 24-26, infra.

Nor did the Claimant produce the annual reports, financial statements or tax returns for 1970 through 1974 and 1981, again without any explanation. Finally, the Claimant did not provide a satisfactory explanation for its failure to provide a copy of its banking records. In these circumstances the Tribunal should have drawn adverse inference rather than find that the Claimant has made a prima facie case. This is particularly true since there is no doubt that the Claimant should have had the documents at its disposal if its allegations were true. The explanation for not producing the requested evidence in accordance with the Tribunal's Order was in some cases non-existent and in others, not satisfactory at all.

18. Regarding the minutes of meetings of the board or shareholders from 1971 through 1981, no document whatsoever was presented. The Claimant alleges that since Kaysons is a closely held corporation, no such meetings have taken place and no minutes have been kept. This is clearly not convincing. As will be discussed below, New York law requires that such meetings be held and their minutes maintained, or that at least the written consent of the shareholders or directors for actions taken without a meeting be maintained. It is simply impossible that no minutes or written consent exists unless the alleged share transfer did not take place. In particular, the Claimant has represented that since 1976 the Irmer Company has been a shareholder in Kaysons. This not only disqualifies Kaysons from regarding itself as a family corporation, but also makes it incumbent on Kaysons to keep regular and full records of board and shareholders meetings after that date. Therefore, the allegation that no minutes exist is not credible.

19. No bank statements or canceled checks have been produced to indicate the payment, the payer and the date of the transaction in confirmation of the unnotarized photocopy pages of the Share Register. In the event that the transaction took place as alleged, it would be highly unlikely for a corporation not to keep its own bank statements and canceled checks, especially for

such an important event in its history. The Claimant contends that its banks send their records to storage after four years and destroy them three years later. At the Hearing the Claimant also added that in 1982 its office location was moved and that it is therefore possible that the records have been lost. In contrast, however, I find that the Claimant has maintained a copy of its transactions with the Respondents going back to the same period as the alleged share transfer, not only limited to the records of its accounts receivable but also including the corporate and banking records for the alleged payment of at least one Kayvan counter-claim going back to June 1976 that the Claimant filed on 12 October 1992, although the payments were to the personal accounts of Nassrollah Khosrowshahi's brothers Javad, Majid and Kazem and were never returned to Kayvan. In the circumstances, it would have been extremely careless for the Claimant and its corporate attorney not to maintain such documents, if they existed, in support of their alleged share transfer of 1976, when only two years later the Islamic Revolution and subsequent events disrupted their relation with the Respondents to the extent that, as alleged, in 1979 and 1980 they lost virtually all their Iranian business and in 1981 had to institute the present proceedings. Consequently, it does not seem credible that the Claimant did not maintain the bank statements and canceled checks -- unless, of course, no such payments for the alleged share transfer were made at all.

20. As to the requested audit reports, the Claimant filed unnotarized redacted copies of its annual reports for the years ending 31 March 1980 and 31 March 1981. They have, however, been so heavily redacted that they are rendered meaningless. The annual reports for the years ending 31 March 1976 and 31 March 1977 were only submitted three weeks after the Hearing, thereby depriving the Respondents of the opportunity to examine and comment upon them in the course of their written and oral pleadings. Moreover, the 1977 annual report did not indicate the number of issued and outstanding shares, unlike the 1976 report that was issued for the period before the alleged new share

issuance and share transfer. The auditors did not comment on this discrepancy, and the Claimant's simplistic explanation of writing style seems unreasonable. Nor was any reason given for the refusal to produce the annual reports for all the years ordered.

21. Regarding the corporate tax returns, again they were filed only for the two financial years ending March 1980 and March 1981. They too have been so heavily redacted that they are rendered meaningless. The tax returns for the financial years ending March 1976 and 1977 were only shown to the Tribunal at the hearing and were not submitted to the Tribunal until three weeks after that time. The Claimant's action deprived the Respondents of the opportunity to examine and comment upon the 1980 and 1981 tax returns prior to the date the Award was rendered, and to do the same with the 1976 and 1977 tax returns prior to the hearing. Among the redacted parts of the 1980 and 1981 tax returns is Schedule C on Dividends. Had this part of the declaration not been deleted, it would have indicated whether dividends were distributed; and if so, the Tribunal could have sought -- or taken note of the absence of -- evidence of the percentage in which they were distributed, or evidence of the relevant withholding taxes, in order to determine the percentage of the holdings of all Kaysons' shareholders. As the financial statements for the same years are also heavily redacted, the Claimant has kept both the Respondents and the Tribunal in the dark as to whether it declared and distributed dividends in those years as well as for the other years for which it was ordered to produce the tax returns and financial statements. Similarly, no reason was given for such refusal other than the incredible assertion that Kaysons has not declared dividends over its entire life and the further implicit position that the Tribunal should take such assertion on its face without being given the opportunity to examine the tax returns and financial statements for all the years ordered.

22. Therefore, the Claimant did not file many of the documents ordered by the Tribunal. Whatever the reason for this failure, the Tribunal may decide cases only on the basis of credible evidence. Noncompliance with an order of the Tribunal giving warning of adverse inference should at least make it very difficult for the Tribunal not to observe its own order, not to live up to the expectation it has already raised for the other party and not to vindicate the integrity of its process. Even apart from such an order, Tribunal practice confirms that as a matter of principle adverse inference may be drawn from a party's failure to submit evidence which is likely to be at its disposal or should have been at its disposal according to municipal legal requirements or the normal course of business.[8]

23. Aside from its failure to produce most of the ordered documents, the Claimant has presented no evidence of the participation of the children or even Mrs. Khosrowshahi as shareholders of Kaysons at any time between 1976 and 1981, or before or after that period, be it voting in person, voting by proxy, requesting information as to the accounts or activity of the company, or making proposals to or any correspondence with the company concerning the outcome of their investment in the company and its management that has allegedly resulted in no profit or declared dividends for distribution in the life of their investment.

24. It should be noted that the allegation that there was no profit and that no dividends were declared and distributed is incredible. First, whether or not Kaysons declared any dividends was for the requested documents to indicate rather than for the Claimant merely to contend. Second, such statement, in the face of Mr. Khosrowshahi's extremely optimistic view of Kaysons'

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[8] See, e.g., Arthur J. Fritz & Co. and Sherkat Tavonie Sherkathaye Sakhtemani, et al., Award No. 426-276-3 (30 June 1989), reprinted in 22 Iran-U.S. C.T.R. 170, 180, para. 42 ("The Tribunal notes that it is an accepted principle that an adverse inference may be drawn from a party's failure to submit evidence likely to be at its disposal").

financial position during the 1970s, seems unreasonable. Mr. Khosrowshahi stated in the Hearing:

> "As the KBC and Alborz group's fortunes prospered over the years, so did Kaysons. Our relationship was mutually beneficial and by the mid-seventies Kaysons was doing extremely well, as were the KBC and Alborz group ... ".[9] (Emphasis added.)

25. Indeed, part of Kaysons' claim in this Case is for lost profits due to a disruption of business from 1979. In the Statement of Claim, the Claimant has stated in this respect that:

> "The magnitude of only one aspect of Kaysons' business with Alborz -- the procurement and supply of raw materials, machineries and spares -- and the dramatic, sudden collapse of this business after Iran's take-over, can be illustrated by the following table which shows the annual sales to Alborz by Kaysons during the last several years:

Year Ending March 21	Value of Purchases
1975	$12,219,559
1976	$13,221,461
1977	$14,594,886
1978	$12,984,447
1979	$12,362,033
1980	$ 7,736,770
1981	--

> The level of Kaysons' activity is further demonstrated by the fact that prior to take-over of Alborz, Kaysons was handling approximately 3000 different items on behalf of the Group."

26. Therefore, if Kaysons was doing extremely well, it is fair to conclude that dividends must have been distributed. Moreover, the Claimant has not alleged that the profits were reinvested in the company, which action in itself would require a decision by the board of directors or by a shareholders' meeting. Consequently, the financial reports presented by the Claimant do not seem credible, either.

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[9] Transcript of Hearing, p. 22.

b. Legal Requirements

27. A crucial debate between the Parties, with direct effect on the proof of share ownership of Kaysons, has been the legal requirements for Kaysons to observe certain rules and keep relevant documents. There is no doubt that the argument is a pertinent one. If Kaysons was under a legal obligation to observe corporate formalities and keep certain documents, and yet did not do so, there can be no excuse for a failure on its part to submit necessary documents, and this would require dismissal of the claim. Moreover, in that situation the Tribunal would be justified in disregarding Kaysons' corporate shell.

28. The arguments in this regard center mainly on whether, in the alleged transfer of share ownership of 1976, the legal and corporate requirements were observed.

29. The requirement to observe corporate regulations mainly emanates from the applicable law, in this case, the law of New York, which is the place of incorporation and business of Kaysons. The certificate of incorporation and bylaws of the company, too, normally contain such legal requirements. Furthermore, these instruments may contain additional requirements laid down by the shareholders to be carried out by officers of the corporation in the same manner as the general legal requirements. For instance, a main feature of closely held corporations is to prevent outsiders from obtaining share ownership in or control of the corporation, to secure the delectus personae of the corporation and to preserve its management structure. This aim is usually achieved by securing the consent of the board of directors or the remaining shareholders for the transfer of any shares to outsiders as provided in the bylaws of the corporation. As the Claimant has not produced its bylaws, however, it is not possible to determine whether such restrictions for the share transfer of 1976 have been observed by the corporation. Kaysons has provided a copy of its Certificate of Incorporation, but not its bylaws. Thus, as

in many other instances, it has kept the Tribunal in the dark as to the nature of its internal requirements for corporate actions.

30. The most important requirement in this respect is that companies are under an obligation to keep records of meetings of their shareholders and board of directors. To hold such meetings and to keep the record of their proceedings, is an important requirement in almost every legal system, in order to respect the company's separate legal personality. In order to gain such respect and to show that the company is a person distinct from its shareholders, the legal requirements imposed by law must be observed. Otherwise, tribunals would be free to put aside such separation and disregard actions allegedly taken by or within the corporation.[10]

31. In this Case, Kaysons openly admits that it has not observed the legal requirements. It contends that no shareholders meetings were held and that at most such meetings were informally held among the parents and the children at their dinner table in Mr. Khosrowshahi's house in New York. In its written pleadings and at the Hearing, the Claimant contended that since Kaysons is a closely held (or family) corporation, such legal requirements do not apply to it. This suggestion, however, does not seem justified. First, from 1976, the Irmer Company, not a natural person, became a shareholder in Kaysons. With this development, it would be hard for Kaysons to qualify itself as a family

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[10] As the International Court of Justice confirmed in the case concerning the Barcelona Traction, Light and Power Company (Belgium v. Spain) (New Application), the actions of a company must be taken by its duly appointed directors and managers, and that the shareholders of a company may not take actions of a corporate character, as if they are deciding on their personal property: "It is a basic characteristic of the corporate structure that the company alone, through its directors or management acting in its name, can take action in respect of matters that are of a corporate character. ... Ordinarily, no individual shareholder can take legal steps, either in the name of the company or in his own name ..." 1970 ICJ 1, 34 (para. 42). See, also, Separate Opinion of Judge Oda in the case concerning Elettronica Sicula (ELSI) (U.S.A. v. Italy), 1989 ICJ 12, 83-84.

corporation. Second, and more important, New York law does not support such a position. In this respect, the New York Business Corporation Law does not distinguish between closely held corporations and corporations whose shares are publicly traded.

32. Section 624 of the New York Business Corporation Law ("BCL") that was enacted in 1961 with effect from 1963, which deals with books and records and prima facie evidence, provides:

> "§ 624(a) Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its shareholders, board and executive committee, if any, and shall keep at the office of the corporation in this state or at the office of its transfer agent or registrar in this state, a record containing the names and addresses of all shareholders, the number and class of shares held by each and the dates when they respectively became the owners of record thereof.
> ...
> (g)The books and records specified in paragraph (a) shall be prima facie evidence of the facts therein stated in favor of the plaintiff in any action or special proceeding <u>against</u> such corporation or any of its officers, directors or shareholders." (Emphasis added.)

33. According to Section 708 of the BCL, actions by a company must be taken by the board in a board meeting. Section 708 was amended in 1974 to the effect that, if so authorized by the certificate of incorporation or bylaws of a company, a board may act without a meeting if all the members of the board consent in writing to such action:

> "§ 708(b) Unless otherwise restricted by the certificate of incorporation and the by-laws, any action required or permitted to be taken by the board or any committee thereof may be taken without a meeting if all members of the board or the committee consent in writing to the adoption of a resolution authorizing the action. The resolution and the written consents thereto shall be filed with the minutes of the proceedings of the board or committee."

34. In commentaries made on Section 708 by distinguished writers, it is emphasized that courts will construe the requirements of this Section strictly. In his scholarly commentary on this Section, Professor Jerome P. Weiss states that:

> "The amendment will enable boards and committees to deal with problems which arise between regular meetings, ... One possible difficulty is that the new provision will probably be construed strictly. Consequently, informal board of directors action which might have been sustained under preexisting case law now runs the risk of being held ineffective because of non-compliance with the statutory provisions."[11] (Footnote omitted.)

35. In the same manner, Henn and Alexander write in their treatise on corporations:

> "Traditionally, directors can exercise their management functions only when duly convened as a board. Directors vote per capita and, except under a rare statute, may not vote by proxy. The vesting of management in the board, rather than in the directors individually, is usually justified on grounds of the value of consultation, deliberation and collective judgment. Even absent statutory exceptions, courts have sometimes upheld informal directors action, especially in closely-held corporations. A growing number of statutes provide that directors may act without a meeting by unanimous written consent. Such statutes vary widely in language and have been strictly construed."[12]

Henn and Alexander then refer to a case from Wisconsin, upheld by the U.S. Supreme Court, where a similar statute exists. The passage is as follows:

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[11] Weiss, Survey of New York Law, Part Two --Commercial Law: Business Associations, 26 Syracuse L. Rev. 197, 197-198 (1975).

[12] H. Henn & J. Alexander, The Laws of Corporations, 564-65 (3rd ed. 1983).

> "Village of Brown Deer v. City of Milwaukee, 16 Wis.2d 296, 114 N.W.2d 493(1962), cert. denied, 371 U.S. 902, 83 S.Ct. 205, 9 L.Ed.2d 164 (1962), held that the corporation's president, who was also its majority shareholder and one of its 11 directors had been accustomed to resolving corporate problems alone with only infrequent board of directors meetings, had no authority to sign an annexation petition in its behalf, where the written consent of all the directors required by Wisconsin statute permitting board of directors action without a meeting was not obtained. The court construed the statute as preempting the field and prohibiting corporations from acting informally without complying with the statute."[13]

36. Therefore, the 1974 amendment did not change the basic requirement that actions taken by a corporation must be taken by the board, nor did it change the requirement that minutes be kept of board meetings. It is also to be noted, as is clear from the statute and the commentaries, that the leave to take action without a formal board meeting needs to be authorized by the certificate of incorporation or bylaws of the company, and that such leave, together with the written consent of the board members to take action without a formal board meeting and the resolution authorizing the action, must in any event be filed with the minutes of the proceedings of the board.

37. Thus, the change not only did not ease Kaysons' burden of proof, it in fact added the requirement to provide proof of the contemporaneous written consent of the members of the board to take a particular action in case, as alleged by Kaysons, no board meeting was convened. In any event, none of the required documents, including the minutes of the board meeting, have been presented. Kaysons' burden was particularly heavier in the face of the fact that it has not provided the bylaws of the company, which would indicate any additional requirement for taking actions in the company.

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[13] Id., n. 8.

38. Moreover, as paragraph 8 of Kaysons' Certificate of Incorporation foresees, Kaysons should at least hold annual meetings of the stockholders, although a copy of the bylaws indicating further details has not been filed with the Tribunal. Section 615 of the 1961 New York Business Corporation Law, concerning "written consent of shareholders, subscribers or incorporators without a meeting," provides for a similar written consent of all holders of voting shares for actions taken by the shareholders without a meeting, as follows:

> "§ 615(a) whenever under this chapter shareholders are required or permitted to take any action by vote, such action may be taken without a meeting on written consent, setting forth the action so taken, signed by the holders of all outstanding shares entitled to vote thereon."

Enactment of this Section goes even further back than the New York Stock Corporation Law of 1923, the predecessor of the 1961 BCL.

39. Further, the provisions of Section 615 are not limited to New York law. They have also been adopted by the American Bar Association's Model Business Corporation Act of 1969 as follows:

> § 145. "Action by Shareholders Without a Meeting. - Any action required by the Act to be taken at a meeting of the shareholders of a corporation, or any action which may be taken at a meeting of the shareholders, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the shareholders entitled to vote with respect to the subject matter thereof."

Similarly, this provision has been maintained without significant change in the 1984 version of the ABA Model Act as follows:

> § 7.04. "Action Without Meeting.-
> (a) Action required or permitted by this Act to be taken at a shareholders' meeting may be taken without a meeting if the action is taken by all the shareholders entitled to

> vote on the action. The action must be evidenced by one or more written consents describing the action so taken, signed by all the shareholders entitled to vote on the action, and delivered to the corporation for inclusion in the minutes or filing with the corporate records."

40. Therefore, any of the alleged changes in the shareholding structure of Kaysons must have been accompanied by either a copy of the minutes of the relevant meetings of the shareholders or board of directors, or by the written consent and signature of all the shareholders or directors for the actions taken without a meeting.

41. The only explanation offered by Kaysons for its disregard of the law is that it is a closely held corporation. As mentioned before, this is no justification, as New York law, inter alia Sections 624, 708, 615 of the New York BCL, not only does not distinguish between business corporations in this sense, but the legislative history of Sections 615 and 708 also indicates that they have been intended to address and regulate in particular the problems of small corporations. See, McKinney's Consolidated Laws of New York, Annotated, Business Corporation Law, §615.

42. Therefore, it is clear that if any action to change the shareholding structure of Kaysons took place in 1976, it was in violation of very important provisions of the applicable law. This fact alone would render the action ineffective. As the Tribunal held in McHarg, et al. and Iran, a failure to transfer shares in a manner conforming with the applicable law makes such transfer invalid:

> "Bearing in mind that WMRT/Iran was incorporated in Iran and therefore that any transfer of its shares is governed by the laws of Iran, the Tribunal decides that Juneja's letter is insufficient to show that he validly transferred his shares to the

> corporation or to the remaining four shareholders."[14]

43. In Sola Tiles, there was a dispute between the parties on the ownership of shares of the claimant company, Sola Tiles, a California closely held corporation. The company had presented the share certificates and the minutes of a special meeting of the board of directors of the company, to demonstrate that its shares belonged to United States nationals. The Tribunal accepted the Claimant's version, but only "in the absence of any indication to the contrary":

> "Under California law, the issuance of share certificates evidences ownership; it does not create it. In the absence of any indication to the contrary, the Tribunal infers that the number of shares issued to the three owners of Sola on 6 September 1979 reflected the division of ownership between them....
> The record supports this inference. A letter dated 1 March 1983 from the Vice-President of City National Bank of Los Angeles confirms that on 21 May 1979 a joint bank account was opened in the names of all three owners ... On 21 June 1979, the bank received the corporate documents of Sola, the first account was closed and a new account opened in the name of Sola Tiles Inc., with both Solomon Brothers and Mr. Hachamoff named as signatories. The Claimant has filed a copy of the signature card with the Tribunal."[15]

44. In the present Case, however, several factors exist which should lead us to the conclusion that the Claimant's account of the transfer of the ownership of Kaysons' shares cannot be reliable, or at least valid. These factors are not limited to

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[14] McHarg, Roberts, Wallace & Todd and The Islamic Republic of Iran, Award No. 282-10853/10854/10855/10856-1 (17 December 1986), reprinted in 13 Iran-U.S. C.T.R. 286, 302.

[15] Sola Tiles, Inc. and The Government of the Islamic Republic of Iran, Award No. 298-317-1 (22 April 1987), reprinted in 14 Iran-U.S. C.T.R. 223, 227.

those discussed above. There are also other questions casting doubt on the Claimant's contentions in this respect.

45. One question is the status of the Irmer Company. The Claimant has not offered anything with regard to that company, while as a significant shareholder of Kaysons, it would be helpful and necessary for the Tribunal to be informed of its status.[16]

46. Another question is why, contrary to paragraph 3 of the Certificate of Incorporation and the Amendment thereto calling for equality of all shares of the same class, Mr. Khosrowshahi has paid $1000 per share, Mrs. Khosrowshahi has paid $1000 per share for the first 100 shares and $620 per share for her remaining 100 shares, and the other shareholders have paid $620 per share. The Claimant contends that all old share certificates were surrendered and canceled and new share certificates were issued to all old and new shareholders. Even if Mr. Khosrowshahi had directly transferred his old shares to the new shareholders, he personally, rather than the company, should have retained any loss or profit on the share transfer. Although by the 1960

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[16] The identity of Irmer's shareholders would be helpful for several reasons. For instance, in accordance with Article 129 of the Iranian Commercial Code as amended, no managing director or member of the board of directors should directly or indirectly through other companies be interested in a transaction with or for the company, unless such interest is disclosed to the board and the board permits it, immediately informs the auditors and reports the matter to the next general shareholders meeting for approval together with the special report of the auditors on the matter; moreover, the interested managing director or board member shall have no vote on the matter before the board or the shareholders meeting. By not disclosing the shareholders of Irmer until the Hearing, the Claimant has deprived the Respondents of this possible line of defence and inquiry with regard to its contract claims, in particular where the financial reports of the Alborz Group companies before the Tribunal in a parallel proceeding (Case No. 178, Faith Khosrowshahi and the children against Iran for expropriation of their shares in Alborz Group) do not reflect any of those transactions with Kaysons in which Javad (Managing Director), Ahmad and Majid Khosrowshahi, members of the Board of Directors of Alborz in the relevant period, were interested by virtue of their shareholdings in Kaysons through Irmer.

Amendment to the Certificate of Incorporation the authorized shares of the company were increased from 200 to 600, according to the Claimant no new shares were issued until 20 April 1976. By 1956 the company had issued all its 200 authorized shares for $1000 each. It is clear therefore that each old share should have been converted to three new shares in the 1976 issue, but the principle of equality of shares of same class, provided for under paragraph 9 of the Certificate of Incorporation, has obviously not been observed. If the purpose of the whole new share issue was to increase the company's capital, as has been alleged, it should have been reflected as an increase in the value of the new shares with due consideration of the company's turnover of $13 million, rather than as a decrease from even the share value transacted 20 years earlier.

47. Moreover, under Section 504(d) of the BCL, the consideration for new shares without par value must be fixed by the board of directors unless the certificate of incorporation reserves to the shareholders the right to fix such consideration. On "Consideration and payment for shares," Section 504(d) of the BCL provides:

> "Shares without par value may be issued for such consideration as is fixed from time to time by the board unless the certificate of incorporation reserves to the shareholders the right to fix the consideration. If such right is reserved as to any shares, a vote of the shareholders shall either fix the consideration to be received for the shares or authorize the board to fix such consideration."

48. Paragraph 4 of Kaysons' Certificate of Incorporation also requires a resolution of the board of directors for fixing the consideration for shares without par value. Paragraph 4 provides:

> "The capital of the Corporation shall be at least equal to the sum of the aggregate par value of all issued shares having par value, plus the aggregate amount of consideration received by the Corporation for the issuance of shares without par value, plus such amounts as, from time to time, by resolution of the Board of Directors, may be transferred thereto."

The Claimant has also provided no evidence of the resolution of the board of directors, to establish that this provision was observed.

49. Further, Kaysons has been under the control of a non-United States national since its incorporation in 1953. Mr. Khosrowshahi, an exclusively Iranian national, has been Kaysons' President and its controlling true shareholder throughout this period. Mr. Khosrowshahi's control of Kaysons' operations has been tied to Kaysons' exclusive business for Alborz and KBC, the Iranian companies founded by his father and brothers.

50. The ownership interests of Mr. Khosrowshahi together with the ownership interests of his brothers through the Irmer Company have been sufficient to control Kaysons, even if the 1976 share transfers actually took place as alleged. There can be no dispute that until 20 April 1976 Mr. Khosrowshahi was the controlling shareholder of Kaysons as he held 50% of the shares and was also President of the company, while the other 50% was held by his wife who had no position in Kaysons. Even if the 1976 share transfers truly took place, Mr. Khosrowshahi and his brothers through Irmer held a 40% share in Kaysons in addition to retaining the presidency of the company -- a situation that was maintained unchanged from 1953 to the date the claim arose and indeed up to the present time. In the period following April 1976, including the time the claim arose, Mr. Khosrowshahi and his brothers clearly controlled Kaysons, whose alleged business was exclusively for Alborz and KBC, the Iranian companies founded by them and their late father. This control is more apparent

when we take into account Mr. Khosrowshahi's true contribution to the capital stock of 50%, which together with his brothers' contribution of 23.24% amounts to 73.24% of the shares.

51. Mrs. Khosrowshahi held only 33.33% of the shares, which were originally paid for by her husband three weeks after their marriage on 30 April 1956; or at any rate, the shares were paid from their joint property. In either event, therefore, Mr. Khosrowshahi has a matrimonial ownership interest in these shares under New York law, especially for the purpose of estate planning, separation and divorce. The joint property interest of Mr. and Mrs. Khosrowshahi over the 33.33% shares is further supported by the fact that they file joint tax returns with the United States tax authorities as admitted by Mrs. Khosrowshahi's counsel in Case 178. (Case 178, Transcript of Hearing, p. 235.) Mrs. Khosrowshahi has held no position in Kaysons at any time. There is no evidence that she ever voted these shares in person or by proxy, as no minutes of the shareholders meetings, or her written consent or signature without a meeting or copy of the Minutes Book, has been provided.

52. Similarly, there is no evidence that Mrs. Khosrowshahi has ever voted the shares of the three children whose guardianship she claims, while under New York law parental guardianship is the joint right of both parents, not alienable without the approval of local court especially where the parents are not divorced, separated or under any incompetency. The claimed guardianship of those shares is also questionable in light of the fact that such status has been maintained even since all the children reached the majority age of 18 years under New York law, Marcene by 27 May 1979, Kevin by 20 August 1982 and Cameron by 18 October 1987. Moreover, Mrs. Khosrowshahi has not been a business person even aside from Kaysons. Her unsubstantiated assertion in the sequential hearing of Case 178 that she gave American women in Iran a tour of the Alborz Group of companies and its business relations with Kaysons and other American companies, as a support

for her United States nationality, at least indicates only a one time social role in Alborz rather than Kaysons.

53. Based on the foregoing, it is axiomatic that the alleged 60% shares of Kaysons in the names of Mrs. Khosrowshahi and the children are non-voting and in the control of Mr. N. Khosrowshahi, the President of the corporation. No documentary evidence showing that Mrs. Khosrowshahi and the children have ever exercised their voting right or control has been submitted to draw a contrary conclusion.[17] This conclusion is further supported by drawing adverse inference from the Claimant's failure to comply with the Tribunal Order of 1 October 1991 for the production of documents requested by the Respondents. In light of the requirements of Sections 615, 624 and 708 of the New York Business Corporation Law, the copy of certain corporate documents, not corroborated by other corporate documents required under local law for the actions taken by the company and unsupported by external documentary evidence, cannot sustain any notion of prima facia finding of ownership on the basis of the present evidence in a proceeding by the company. Although pursuant to Article 25, paragraph 6 of the Tribunal Rules the Tribunal is free to determine the materiality and weight of the evidence offered, it cannot ignore the impact of the failure of the Claimant to produce evidence whose production it has ordered,

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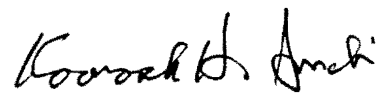
[17] The U.S. courts have recognized that in a situation where parents have paid for the stock in the name of their children and have retained control over the stock, it is quite likely that the parents be deemed to be the actual shareholders even where the children were listed on the company's books as having legal title to the shares. See, Klein v. Klein, 226 N.Y.S. 2d 581 (1962). During the course of the proceedings in the present Case the Claimant suggested that the ruling in Klein was overruled to some extent in a later case, the Matter of Carroll, 474 N.Y. S. 2d 340 (App. Div. 2d Dept. 1984). However, it seems that the issue in Carroll was limited to the validity of a gift of certain share certificates in the context of a decedent's estate, and to whether the actual delivery of the certificates prior to death was needed in order for the gift to be regarded as complete, whereas the ruling in Klein, unaffected by Carroll, related to control over the stock owned by joint tenants, a situation similar to the present Case, rather than to physical delivery of share certificates.

as well as the requirement of the local law to the effect that even where the relevant procedures have been observed by the company a prima facie finding may be made thereon only against the company, its directors or shareholders, rather than in their favour, in a proceeding brought by the company itself.

Conclusion

54. For all these reasons, in my opinion the Claimant has been unable to prove that the majority of its voting stock has been beneficially owned by nationals of the United States, and that consequently, the Tribunal should have dismissed the Case for lack of jurisdiction over the Claimant.

Dated, The Hague
6 August 1993



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