

ORIGINAL DOCUMENTS IN SAFECase No. 197Date of filing: 28/6/90**** AWARD**- Type of Award Award- Date of Award 28 June 9030 pages in English35 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:** _____

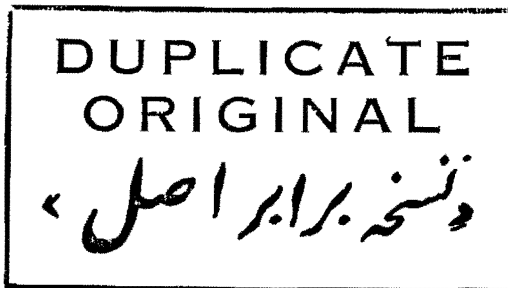
- Date _____

_____ pages in English

_____ pages in Farsi

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان دآوری دعاوی ایران - ایالات متحدہ



CASE NO. 197

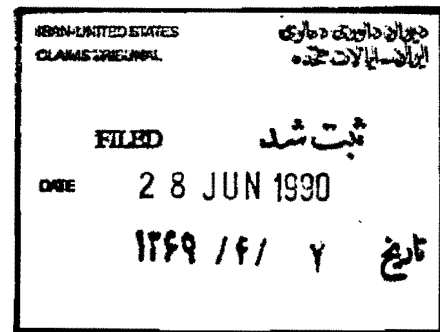
CHAMBER TWO

AWARD NO. 486-197-2

CBS INCORPORATED,
Claimant,

and

THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN,
CBS RECORDS SSK, and
THE FOUNDATION FOR THE OPPRESSED,
Respondents.



AWARD

Appearances:

For the Claimant : Mr. Robert B. McKay,
Attorney,
Mr. John Dolan,
Vice-President of CBS Records
International,
Mr. Clemens van Nispen,
Attorney,
Mr. Lawrence Gooch,
Witness.

For the Respondents : Mr. Ali H. Nobari,
Agent of the Islamic Republic
of Iran,
Dr. J. Niaki,
Legal Adviser to the Agent,

Mr. Seifollah Mohammadi,
Legal Adviser to the Agent,
Mr. Ali Ghassemi,
Assistant to the Agent,
Mr. Hossein Tabaie,
Attorney for CBS Records SSK,
Mr. Abbas Khajeh-piri,
Mr. Mohammad Hossein Mokhberi,
Representatives of the Founda-
tion for the Oppressed,
Mr. Robert Ashley Jones,
Expert Witness,
Mr. John Allday,
Witness.

Also present : Ms. Lucy F. Reed,
Agent-Designate of the Govern-
ment of the United States of
America,
Mr. Michael F. Raboin,
Deputy Agent of the Government
of the United States of
America.

I. INTRODUCTION

1. On 7 January 1982 the Claimant, CBS INCORPORATED (also "CBS"), a New York corporation, filed a Statement of Claim against the Respondents, the ISLAMIC REPUBLIC OF IRAN ("Iran") and CBS RECORDS SSK ("CBS SSK"). Subsequently, the Claimant also named as Respondent THE FOUNDATION FOR THE OPPRESSED ("the Foundation").¹ The Tribunal accepts the addition of the Foundation as a Respondent. The Claimant seeks recovery of a total of US\$2,186,074.58 for five separate Claims.

2. The first Claim, which is directed against CBS SSK, seeks recovery of US\$778,000, plus interest, representing the total amount of a loan extended to CBS SSK by the Claimant's German subsidiary, CBS Schallplatten GmbH ("CBS German Subsidiary") in the period between December 1977 and December 1978.

3. The second Claim against CBS SSK seeks US\$160,926², plus interest, in compensation for the alleged

¹ The Foundation, which had filed a Statement of Defence on 29 November 1982, was named as Respondent in the Claimant's submission of 29 February 1984.

² The request for compensation for this Claim changed repeatedly in the course of the proceedings. In its Statement of Claim, the Claimant originally sought compensation in the amount of US\$188,000, which represented the US dollar equivalent of 371,556 Dutch Guilders (Hfl.) at the exchange rate of US\$0.5059 to the Guilder. In its submission of 21 August 1986, the Claimant maintained that the correct exchange rate was US\$0.75 to the Guilder, and consequently raised the claimed amount to US\$278,667. At the Hearing, the Claimant conceded that that part of the Claim based on invoices originally issued in US dollars, which the CBS Dutch Subsidiary had converted into a total of Hfl. 204,702 for accounting purposes, should be valued at the original total invoiced amount of US\$83,656. Further, for the remainder of the Claim, which reflects the amounts originally invoiced in Guilders and totals Hfl.166,854, the Claimant accepted the exchange rate of US\$0.4631 to the Guilder (average of 1978), resulting in a Claim for
(Footnote Continued)

nonpayment of various invoices issued for goods sold and delivered to CBS SSK in 1977 and 1978 by the Claimant's Dutch subsidiary, CBS Grammofoonplaten B.V. ("CBS Dutch Subsidiary").

4. The third Claim against CBS SSK seeks payment of US\$69,000, plus interest, for services allegedly rendered to CBS SSK in 1977 and 1978 by the Claimant's French Subsidiary, CBS International S.A. ("CBS French Subsidiary").

5. The fourth Claim against CBS SSK is brought on behalf of CBS Records International ("CRI"), an unincorporated division of CBS. The Claim is based on the alleged indebtedness of CBS SSK to CRI in the amount of US\$43,148.58, plus interest, representing the sum CRI allegedly reimbursed the Claimant's Israeli subsidiary, CBS Records (Israel) Ltd. ("CBS Israel"), in 1979 for monies purportedly owed the latter by CBS SSK.

6. The Claimant's fifth Claim is directed against Iran and the Foundation for the Oppressed, rather than CBS SSK. This Claim, for a total of US\$1,135,000³, plus interest, arises out of the alleged expropriation by Iran, acting through the Foundation, of the Claimant's 66 percent ownership interest in three Iranian private joint stock companies, CBS SSK, Pakhsh Ahang Iran SSK and April Music SSK (collectively, "the CBS Iranian Companies"), formed pursuant

(Footnote Continued)

US\$77,270. Accordingly, the total request for compensation for this Claim has been adjusted downward to US\$160,926.

³ The original amount claimed was US\$1,445,000, amended to the present figure in the Claimant's submission of 21 August 1986.

to a joint venture agreement entered into by CBS with Iranian partners in 1976.⁴

7. The Respondents deny that a compensable taking of the CBS Iranian Companies has occurred, and contest, for jurisdictional, evidentiary, and substantive reasons, that CBS SSK should be liable either for the repayment of the loan or the other debts claimed by CBS.

8. The CBS Iranian Companies collectively brought Counterclaims for damages suffered as a consequence of their alleged mismanagement and abandonment by the managers appointed by the Claimant.

9. Both Parties seek costs in connection with the arbitration.

10. A Pre-Hearing Conference in this Case took place on 22 July 1985. A Hearing was held on 30 January 1990.

⁴ This Claim is based alternatively on tortious interference by the Foundation with the Claimant's rights under the joint venture agreement. Originally, CBS brought several other alternative claims, which it then abandoned with its submission of 21 August 1986: for conversion by Iran of the CBS Iranian Companies' assets, in the amount of US\$1,863,799 (amended to US\$1,230,107 in the Reply of 29 February 1984); for US\$1,863,799 (also amended to US\$1,230,107) as compensation for the alleged deprivation of CBS' contractual rights under the joint venture agreement. CBS also abandoned a Claim against CBS SSK for unpaid products and equipment in the amount of US\$131,000.

III. FACTS⁵

11. On 1 October 1976 CBS, through its division CRI, entered into a joint venture agreement ("the Agreement") with Technisaz SSK ("Technisaz"), an Iranian private joint stock company, and with the four shareholders of Technisaz, Dr. Mehdi Boushehri, Mr. Sarkis Safarian, Mr. Taghi Emami, and Mr. Seyed Vossough. On this date Boushehri was the largest shareholder of Technisaz, with a 40 percent ownership interest in this company.

12. Pursuant to the Agreement, three Iranian corporations were established during the period between 26 December 1976 and 3 May 1978: CBS SSK, Pakhsh Ahang Iran SSK ("Pakhsh Ahang") and April Music SSK ("April Music"). CBS SSK had a capital stock of 55,000,000 rials⁶ divided into 5,500 registered shares of 10,000 rials each, Pakhsh Ahang had a capital of 12,500,000 rials, divided into 1,250 registered shares of 10,000 rials each, and April Music a capital of 1,000,000 rials, divided into 1,000 registered shares of 1,000 rials each. In accordance with the Agreement, CBS contributed in cash 66 percent of the share capital of each company and therefore received 66 percent of the shares, and Technisaz paid in cash the remaining 34 percent of the capital, thus acquiring a 34 percent ownership interest in the Companies. The CBS Iranian Companies were set up to engage in the business of recording, manufacturing, importing, exporting and marketing tapes and records, and publishing music, in Iran.

⁵ More detailed consideration of certain facts is given, as appropriate, in connection with the jurisdiction and the merits of the Claims set forth in Sections III and IV below.

⁶ The capital stock of CBS SSK was increased from the initial 12,500,000 rials to 55,000,000 rials on 4 April 1977.

13. The Agreement provided that each of the CBS Iranian Companies would have six directors, four of whom would be selected by CBS and two by Technisaz. CBS also had the right to designate the auditor, the inspector, the general manager and the attorney for each company, as well as to appoint the Certified Public Accountants who were to audit the annual financial statements. The Agreement further provided that CBS would have the general day-to-day authority and responsibility for the operations of the CBS Iranian Companies.

14. On 28 November 1977 the Claimant and CBS SSK signed a Loan Agreement, under which the Claimant undertook to make funds available to CBS SSK on demand and upon certain terms and conditions. The Loan Agreement provided in Paragraph 1 that the maximum amount CBS SSK had the right to borrow from the Claimant should at no time exceed the equivalent of US\$660,000, and, further, in Paragraph 7, that the Claimant would not be required to extend any loans to CBS SSK unless the latter was also simultaneously borrowing from Technisaz. Pursuant to this provision, the Claimant was not obliged to lend an amount greater than 194 percent of the US dollar equivalent of the funds at that time borrowed by CBS SSK from Technisaz. The Contract specifically provided that the money to be borrowed by CBS SSK could be furnished by the Claimant directly or indirectly. The Parties agreed that the loans would bear an annual interest of 14 percent from the effective date of the borrowing to the effective date of the repayment, and that all amounts borrowed by CBS SSK would be repaid in full not later than 30 November 1979. At various stages during the period between December 1977 and December 1978, the CBS German Subsidiary lent a total of US\$778,000 to CBS SSK. None of this amount has been repaid by CBS SSK.

15. The Claimant alleges that, on account of the well-known events related to the Islamic Revolution, CBS

expatriate personnel were withdrawn from Iran in December 1978 and January 1979. According to the Claimant, a Revolutionary Committee occupied the premises of the CBS Iranian Companies in February 1979 and began to use these premises as its headquarters.

16. In July 1979 all shares in Technisaz held by the company's largest shareholder, Mehdi Boushehri, were formally confiscated pursuant to Section B of the Law for the Protection and Development of Iranian Industry of 5 July 1979, and were transferred to the Foundation. The Claimant contends that the Foundation also took complete control over Technisaz. While Respondents do not contest that the shares in Technisaz formerly belonging to Boushehri were confiscated and transferred to the Foundation, they deny that the latter controls Technisaz. The Respondents contend that the Foundation exercises only the functions of an ordinary shareholder.

17. On 1 August 1979 Mr. Safarian, one of the minority shareholders in Technisaz, on behalf of the Board of Directors, notified the shareholders of the CBS Iranian Companies of ordinary and extraordinary meetings of the shareholders, to be held at the premises of Technisaz on 21 August 1979. The notice was sent by telex to the Claimant as major shareholder, to the other foreign shareholders (three subsidiaries of CBS), to Technisaz, and to the Foundation, who now appeared as holder of one share in the CBS Iranian Companies. The notice indicated that, as the meetings were being called for the second time, the attendance of any number of shareholders entitled to vote would constitute a quorum allowing the passage of valid resolutions, in accordance with the Articles of Association of the Companies.

18. The ordinary and extraordinary shareholders' meetings of CBS SSK were held as scheduled. The Claimant submitted proxies for vote at those meetings. It maintains,

however, that the Foundation refused to recognize these proxies, so that the meetings were held without the attendance of CBS' representatives. The Respondents deny that representatives of CBS were refused admittance and contend that the foreign shareholders' representatives themselves refused to attend the meetings, as they considered the proxies not to be valid. The meetings were thus held in the presence of the Iranian shareholders only. These shareholders were Technisaz, the Foundation, and three of the four original shareholders in Technisaz: Mr. Safarian, Mr. Emami and Mr. Vossough. The "Extraordinary General Meeting" of CBS SSK resolved to reduce the number of directors of the company from six to five. Subsequently, the "Extraordinarily Held Ordinary General Meeting" elected a new Board of Directors, composed of the Foundation, Technisaz, Mr. Safarian, Mr. Emami and Mr. Vossough.

19. On 24 September 1979 the Claimant sent a telex to CBS SSK and the Foundation, in which it stated, inter alia, that

[y]our improper refusal, without precedent, to recognize the proxies submitted for vote at the August 21st 1979 meeting has effectively eliminated any control by CBS over the destiny of the [CBS Iranian Companies].

Further, the Claimant requested CBS SSK and the Foundation to agree to an ordinary general meeting of all shareholders, to be held in Paris in October 1979, for the purpose, among other things, of examining the financial status of the CBS Iranian Companies and electing new directors. A reply telex from Technisaz, dated 8 October 1979, made clear, however, that the Iranian shareholders would not agree to attend a meeting in Paris, but only in Tehran. In a telex dated 5 November 1979, sent to Mr. Safarian, the Claimant, referring to the seizure of the American Embassy in Tehran and pointing out how unsafe it would be for the American

partners to come to Iran, renewed its request for a meeting outside the country. CBS indicated that "[v]irtually any meeting place outside of Iran would be acceptable to us." It does not appear that the Claimant ever received a reply to this communication. By telex of 24 December 1979, which was also sent to CBS, the Foundation called ordinary and extraordinary general meetings of the shareholders of the CBS Iranian Companies, to be held in Tehran on 5 January 1980.

20. The Claimant contends that the Foundation, after seizing all shareholdings in Technisaz, substituted itself as CBS' joint venturer, and took complete control of the business operations of the CBS Iranian Companies in 1979. The Claimant maintains that the Foundation has controlled and operated the Companies against the Claimant's wishes ever since, never accounting for their operations, nor remitting any proceeds therefrom to the Claimant, thus depriving CBS of its proprietary interest in these Companies. The Claimant states that this alleged deprivation certainly occurred by 21 August 1979, when the Board of Directors selected by CBS was ousted and replaced by Directors of the Foundation's own choice and constituted an expropriation of its proprietary interests.

21. The Respondents deny that an expropriation of the Claimant's 66 percent ownership interest in the CBS Iranian Companies has occurred, and contend that, on the contrary, CBS' shareholder rights have always been and still are respected. The Respondents further argue that the Claimant intentionally abandoned the CBS Iranian Companies because of their precarious financial situation and the unfavorable prospects. The Respondents allege that the Claimant willfully refrained from exercising its shareholder rights by failing to attend the Companies' shareholders' general meetings, to which it had always been invited.

III. JURISDICTION

22. The Claimant, a publicly held New York Corporation, has provided evidence, including a certificate by the Secretary of State of New York, copies of relevant pages from Forms 10-K filed with the Securities and Exchange Commission and proxy statements issued during the relevant period, establishing to the Tribunal's satisfaction that the Claimant is a national of the United States as defined in Article VII, paragraph 1, of the Claims Settlement Declaration. The Claimant has further submitted evidence, including an auditor's certificate, attendance sheets of general meetings of shareholders, lists of subsidiaries filed with the Forms 10-K, share certificates and a certificate sworn to by the Claimant's Assistant Secretary, showing that during the relevant period the Claimant wholly owned CBS International S.A., its French Subsidiary, as well as CBS Columbia A.G., a CBS Swiss subsidiary, which in turn wholly owned CBS Schallplatten GmbH, the CBS German Subsidiary, and CBS Grammofoonplaten, the CBS Dutch Subsidiary. Consequently, the Claimant is entitled to assert indirect claims on behalf of its German, Dutch and French Subsidiaries, in accordance with Article VII, paragraph 2, of the Claims Settlement Declaration. The Tribunal is further satisfied that CBS Records International at all times has been a division of the Claimant, with no corporate existence separate from the Claimant.

23. The Tribunal is also satisfied that it has jurisdiction over the subject matter of the Claims in that they all arise out of debts, contracts, expropriations, or other measures affecting property rights, as required by Article II, paragraph 1, of the Claims Settlement Declaration. Moreover, there is no dispute that the Claims at issue were continuously owned by nationals of the United States during the requisite period, and were outstanding at the date of the Claims Settlement Declaration.

24. To establish its jurisdiction, the Tribunal must also determine whether the Claims are directed against "Iran" as defined in Article VII, paragraph 3, of the Claims Settlement Declaration. The Claimant has named the Government of the Islamic Republic of Iran, the Foundation for the Oppressed and CBS Records SSK as Respondents. There is no dispute, and the Tribunal has already found, that the Foundation for the Oppressed, or Bonyad Mostazafan, is an instrumentality controlled by the Government of Iran. See Hyatt International Corporation, et al. and Islamic Republic of Iran, et al., Award No. ITL 54-134-1 at 31 (17 Sept. 1985), reprinted in 9 Iran-U.S. C.T.R. 72, 94. The Claimant argues that in 1979, CBS SSK, together with the other CBS Iranian Companies, became an entity controlled by the Government of Iran, as the Foundation, following the confiscation of the shares of Dr. Boushehri, assumed management and control of Technisaz, which held a 34 percent ownership interest in CBS SSK, and proceeded to take complete control over the latter by systematically excluding the Claimant from any meaningful participation in its affairs. The Respondents maintain that CBS SSK is a private joint stock company, in which the Foundation, as in Technisaz, exercises only the functions of an ordinary shareholder. Thus the Respondents conclude that claims against CBS SSK are not subject to the jurisdiction of the Tribunal.

25. The evidence indicates that the Foundation not only acquired all shares in Technisaz belonging to this company's largest shareholder, Mehdi Boushehri, but also that it took complete control over Technisaz. The Claimant produced in evidence a letter, signed by a representative of both Technisaz and the Foundation, sent by Technisaz to Rank Xerox Ltd., London on 17 March 1980, wherein, inter alia, it is stated:

[A]ccording to the decree of the Islamic Supreme Court of Iran all belongings of Dr. Bushehri has been confiscated, and the Mostazafin Foundation is

in charge of managing and controlling Dr. Bushehri's belongings. . . . At the present, Technisaz SA. is an offiliated [sic] company to Mostazafin Foundation. [emphasis added]

The Claimant has submitted a second letter, dated 16 April 1980, sent directly by the Foundation again to Rank Xerox Ltd., where the Foundation, inter alia, states:

As you are well aware Dr. Bushehri was the Chairman of the Board of Directions [sic] of Rank Xerox (Iran) and one of its registered shareholders, and Dr. Bushehri was of [sic] the main shareholders of Technisaz SA. Co. . . . At the present, Technisaz SA. Co. is an affiliated company to Mostazafin Foundation and under its complete management. [emphasis added]

In the Tribunal's view, this establishes prima facie evidence that Technisaz was by 19 January 1981, the date of the Algiers Accords, an entity controlled by the Government of Iran through the Foundation for the Oppressed. The Respondents have proffered no evidence in rebuttal thereto. Such evidence of non-control, if it exists, would be accessible to the Respondents and could have been produced by them.

26. By controlling Technisaz, the Claimant's joint venturer in the CBS Iranian Companies operation, the Foundation also controlled Technisaz' shareholdings in CBS SSK. The Tribunal now must determine whether the Foundation, through this involvement in CBS SSK, brought the latter under governmental control. As the Claimant had a 66 percent ownership interest in CBS SSK, the 34 percent interest held by Iran in CBS SSK through Technisaz was clearly not, by itself, sufficient to constitute control. However, it is generally accepted that a Government can take control of a legal entity by means other than acquiring ownership of capital stock or other property interests. See Eastman Kodak Company, et al. and Islamic Republic of Iran, Award No. 329-227/12384-3, para. 50 (11 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 153, 167. The management of a company

by persons appointed by some public authority, or the supervision or control of a company's operations by the Government or some governmental entity, are, inter alia, also indicia of control. See Emanuel Too and Greater Modesto Insurance, et al., Award No. 460-880-2, para. 17 (29 Dec. 1989). The question whether a corporation was controlled by the Government of Iran on the date of the Algiers Accords so as to be included within the definition of "Iran" in Article VII, paragraph 3, of the Claims Settlement Declaration is one of fact, and the issue is not just whether the entity existed in private form or whether it was formally nationalized or expropriated. See DIC of Delaware, Inc., et al., and Tehran Redevelopment Corporation, et al., Award No. 176-255-3 at 15 (26 Apr. 1985), reprinted in 8 Iran-U.S. C.T.R. 144, 154. In establishing whether Iran had in fact the predominance, that is the power or authority to manage, direct, oversee or administer CBS SSK, thus making it a "controlled" entity within the meaning of the Claims Settlement Declaration, the Tribunal therefore will have to take into account all pertinent circumstances of this Case.

27. The Tribunal notes that in the joint venture agreement of 1 October 1976, the founders of the CBS Iranian companies had agreed that CBS was to have extensive control and management powers, including the right to select four of the six directors of the Companies and to appoint all of the other key personnel. At the 21 August 1979 ordinary and extraordinary meetings of CBS SSK, however, the number of directors of this Company was reduced from six to five, and, moreover, a new Board of Directors, composed of Technisaz, the Foundation, and three shareholders of Technisaz, was elected without the consent of the Claimant. New inspectors and an executive director were also elected. The Minutes of the "Extraordinarily Held Ordinary General Meeting" of CBS Records SSK are indicative of the influence exercised by the Foundation:

The general meeting permitted the Board of Directors to adopt decision as well as necessary methods, through reviewing all the contracts of the company, . . . including the contracts concluded between individuals and foreign and domestic institutions, which are not in the interests of the company and are inconsistent with the objectives and strategy of the Islamic Revolution of Iran.

28. The evidence submitted in this Case establishes that after 21 August 1979, CBS no longer controlled CBS SSK, and that that control in fact was being exerted by the Foundation. In particular, from 21 August 1979 on, nearly all shareholder meetings of the company, the name of which was changed to Iran Record, have been called by the Foundation. While the Claimant continued for some time to receive invitations to shareholders' meetings, it received no reports or accountings of the activities of the company and had no other involvement with it. Based on the foregoing, the Tribunal finds that CBS SSK was by the date of the Algiers Accords an entity controlled by the Government of Iran for purposes of establishing the Tribunal's jurisdiction, and, therefore, that claims directed against CBS SSK are claims against "Iran" as defined in Article VII, paragraph 3, of the Claims Settlement Declaration.

29. A further objection to the Tribunal's jurisdiction raised by the Respondents is that Paragraph 9 of the Joint Venture Agreement between CBS and Technisaz contains a forum selection clause which excludes the Tribunal's jurisdiction over the Claims. The Tribunal need not address the issue whether such a clause in the Agreement between CBS and Technisaz is relevant to the Claims brought by CBS against Iran, the Foundation and CBS SSK, as the provision invoked by the Respondents does not even concern the settlement of disputes between the Parties. It simply describes the procedure to be followed in the event of divestiture of a part or all of the shares of the CBS Iranian Companies as a consequence of, inter alia, a decree by some governmental

authority, or a decision by an Iranian court. The Respondents' argument is also disproved by Paragraph 24 of the Agreement, which provides that

any dispute between the parties hereto arising out of this agreement if not settled directly shall be finally settled by arbitration under the rules of conciliation and arbitration of the International Chamber of Commerce, Arbitration Board, sitting in Paris.

The Tribunal has already found that such a provision does not fall within the scope of the forum clause exclusion contained in Article II, paragraph 1, of the Claims Settlement Declaration. See Stone and Webster Overseas Group, Inc. and National Petrochemical Company, et al., Award No. ITL 8-293-FT at 8 (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 274, 278.

30. Based on the foregoing, the Tribunal holds that it has jurisdiction over CBS' claims.

31. The Tribunal's jurisdiction over the Counterclaims asserted by CBS SSK, Pakhsh Ahang and April Music will be considered, to the extent required, together with the merits of the Counterclaims, Section IV.F., infra.

IV. THE MERITS

32. As the Tribunal noted under similar circumstances in Sedco, Inc., et al. and Iran Marine Industrial Company, et al., Award No. 419-128/129-2, para. 34 (30 Mar. 1989), the expropriation Claim against Iran, if meritorious, requires a determination of the value of the CBS Iranian Companies on the date the Tribunal finds they were taken. This determination cannot be made until the outcome of CBS' claims against CBS SSK are resolved, because those claims, to the extent found meritorious, will reduce CBS SSK's value

proportionately. Accordingly, the Tribunal considers it appropriate to decide the merits of those claims and to award any amounts which may be owed thereunder before considering the expropriation Claim.

A. The Loan Claim

33. The Claimant seeks recovery of US\$778,000, representing the total amount lent by the CBS German Subsidiary to CBS SSK in several payments between December 1977 and December 1978. The Claimant further seeks interest at the contractually-stipulated rate of 14 percent per annum on the various sums from the effective date of the borrowing through the date on which repayment is effected.

34. The Tribunal is satisfied, and the Respondents do not deny, that the loans at issue were extended as follows:

<u>Amount US\$</u>	<u>Value Date</u>
231,000	1 December 1977
99,000	31 January 1978
66,000	24 February 1978
66,000	12 May 1978
200,000	6 November 1978
116,000	22 December 1978
<hr/>	
Total 778,000	

35. The Respondents, however, object that in Paragraph 1 of the Loan Agreement, the Parties agreed that the total amount of the loans at no time would exceed US\$660,000. They further argue that, according to Paragraph 7 of the Loan Agreement, the Claimant had no right to lend CBS SSK a sum exceeding 194 percent of the amounts borrowed by CBS SSK from Technisaz. They contend that, as Technisaz had made available to CBS SSK funds totalling 16,743,300 Rials, the Claimant should not have lent CBS SSK more than 32,482,002

Rials, or, approximately, US\$460,000. The Respondents conclude that any loan extended by the Claimant in excess of this sum cannot be binding on CBS SSK.

36. The Tribunal disagrees. The sole purpose of Paragraphs 1 and 7 of the Loan Agreement, see para. 14, supra, was to limit the amount CBS SSK had the right to borrow and the Claimant was obliged to lend. These provisions, however, do not bar the Claimant from recovering the amounts it in fact lent to CBS SSK in excess of its obligation and which CBS SSK accepted.

37. The Respondents also appear to contend that, in light of CBS SSK's undercapitalization, the loans represented, in fact, a contribution to the company's capital and therefore should be regarded as equity, and not as debt. The Tribunal notes that there is no evidence on record showing that the loans were carried as equity, and not as loans on the account books of CBS SSK and the CBS German Subsidiary. The Tribunal further notes that there is also no proof of any action by either Party to convert the loans to equity. Accordingly, the Tribunal finds no basis on which to characterize the loans as equity rather than loans. See Sedco, supra, para. 41.

38. Finally, the Respondents argue that the Tribunal should not award recovery of the loans for the reason that, in 1979, they could not have been repaid without liquidating CBS SSK. The Respondents further argue that, even upon a liquidation, in view of the company's precarious financial position, there would have been no possibility of the loans being repaid. The Tribunal has previously held that the hypothetical ability (or inability) of an entity controlled by Iran to pay an award rendered against it for a valid debt is irrelevant in determining the amount of the award. See Sedco, supra, para. 42. Iran undertook in the Algiers Accords to pay the debts of its controlled entities and to

maintain the Security Account for that purpose. In Sedco, the Tribunal further held that this undertaking of Iran clearly applies to "all" debts of such a controlled entity whether or not that entity would have been placed into bankruptcy through enforcement of the debt. Id. The same reasoning applies here, and, accordingly, the Respondents' argument is rejected.

39. Based on the foregoing, the Tribunal holds that the loans are valid and enforceable debts, and awards their combined sum in the amount of US\$778,000 to the Claimant.

B. The Dutch Subsidiary Claim

40. The Claimant seeks compensation in the amount of US\$160,926, plus interest, for unpaid invoices covering goods sold and delivered to CBS SSK in 1977 and 1978 by the CBS Dutch Subsidiary. The claimed amount is composed of US\$83,656, representing the invoices originally issued in US dollars, and of US\$77,270, representing the dollar equivalent of the invoices originally issued in Dutch guilders. See footnote 2, supra. The Claimant has presented the invoices and account summaries sent by its Dutch Subsidiary to CBS SSK, as well as, to a great extent, the relevant shipping documents, and, in several cases, certificates of origin.

41. The Respondents dispute the accuracy of the accounts presented by the Claimant. The Respondents have submitted an undated reconciliation statement, prepared by CBS SSK as per 31 October 1978, which indicates that in CBS SSK's books the accounts of CBS SSK and of the CBS Dutch Subsidiary showed discrepancies, mainly due, apparently, to overbilling. An amount of Hfl.340,760 is entered as the adjusted balance owed by CBS SSK to the CBS Dutch Subsidiary. Further, the reconciliation statement shows various

amounts, totalling Hfl.4,536, as "invoiced not received". The Tribunal notes that the Claimant produced in evidence the six invoices relating to these amounts. However, five of these invoices lack shipping documents, and the shipping documentation for the sixth invoice, for Hfl.464.55, is incomplete. The Tribunal further notes that an amount of Hfl.9041, related to invoice No. 10930 of 31 January 1978, is entered with the indication "returned." This invoice was originally issued in the amount of US\$3,965.25 and later valued at Hfl. 9041 by the CBS Dutch Subsidiary. The Respondents contend that the goods covered by this invoice were returned to the CBS Dutch Subsidiary. In support of this allegation, the Respondents submitted a letter dated 2 August 1978, allegedly sent by CBS SSK to the Foreign Transaction Department of Bank Tehran, by which the Respondents maintain that CBS SSK instructed the Bank to take the necessary steps to have these goods returned.

42. The Claimant's documentary evidence shows that CBS SSK is indebted to the CBS Dutch Subsidiary for goods shipped between August 1977 and August 1978. At the same time the Respondents have made out a prima facie case that the entries on the reconciliation statement are correct. In the absence of any contradicting evidence or a challenge by the Claimant, the Tribunal accepts the figures contained therein and will adjust the amount owed to the Claimant accordingly. The Tribunal therefore accepts the adjusted balance of Hfl.340,760, from which it deducts Hfl.4,536 (goods invoiced and not received). To reach the correct amount of the unpaid guilder invoices, the Tribunal further deducts Hfl.204,702, which represent the original US dollar invoices valued in guilders (US\$83,656; see footnote 2, supra). The correct guilder amount owed by CBS SSK is therefore Hfl.131,522, which the Tribunal converts to US\$57,462 at the exchange rate of US\$0.4369 to the guilder (the average rate during the period August 1977 through August 1978, when the invoices were issued). The total

amount of invoices expressed in dollars is US\$83,656. The Tribunal deducts US\$3,965 from this amount for goods returned. Consequently, the correct amount to be granted for the dollar invoices is US\$79,691. The Tribunal therefore awards a total of US\$137,153 for this Claim (US\$79,691, plus US\$57,462).

C. The CBS French Subsidiary Claim

43. The Claimant contends that CBS SSK is indebted to the CBS French Subsidiary in the amount of US\$69,000 for services rendered in 1977 and 1978.

44. This Claim is scarcely developed. The Claimant has not indicated the nature of the services allegedly rendered by its French Subsidiary to CBS SSK. Moreover, the only evidence proffered by the Claimant consists of five ledger sheets, without any supporting or supplemental documentation, such as invoices or correspondence between the Parties. The Tribunal notes that, although debit notes are indicated on the ledger sheets, they have not been produced in evidence. The Tribunal further notes that the ledger sheets show that the whole amount of the Claim, expressed in its value in French Francs, was written off as per 31 October 1979. The Claimant has offered no explanation in this respect.

45. Based on the foregoing, the Tribunal holds that the evidence before it is not adequate to establish the existence of a valid and enforceable debt of CBS SSK. Accordingly, the Claim is dismissed for lack of proof.

D. The Claim on Behalf of CRI

46. The Claimant contends that in 1979, CRI reimbursed CBS Israel amounts owed the latter by CBS SSK for products sold in 1977 and 1978. This Claim totals US\$43,148.58, plus 12 percent interest from 1979.

47. The Claimant submitted nineteen invoices and debit notes issued by CBS Israel between September 1977 and August 1978 (totalling, however, US\$42,273.52). Seven invoices for a total of US\$24,324.40 are addressed to the National Iranian Radio and Television, with no reference to CBS SSK. Such invoices are unrelated to this Case and therefore must be disregarded.

48. The Tribunal finds that the Claimant has offered no proof that CRI actually reimbursed CBS Israel any sums owed the latter by CBS SSK. In light of the discrepancies pointed out above, the Tribunal is unable to understand how the amount of US\$43,148.58 was arrived at. The only evidence submitted by the Claimant which mentions this amount is a three-line memorandum, dated 12 March 1984, sent by CBS Israel to CRI, the caption of which reads: "YOUR PAYMENT U.S.\$43,148.58 - APRIL 9, 1979 CBS IRAN DEBT TO CBS ISRAEL". The Claimant, however, has failed to submit any corroborating evidence, such as bank statements, payment orders, excerpts from the books or contemporaneous correspondence between CRI and CBS Israel. Such evidence, if existing, should have been accessible to the Claimant, and could have been produced by it. In view of these circumstances, this Claim must be dismissed for lack of proof.

E. The Expropriation Claim

49. For CBS to recover compensation for the alleged expropriation of the CBS Iranian Companies it must establish that acts attributable to Iran have deprived it of a valuable property interest in the Companies prior to 19 January

1981. The Tribunal need not decide that issue in this Case, however, because it is not satisfied that the CBS Iranian Companies had a positive net worth on the date any such deprivation may have occurred.

50. The Claimant seeks to recover the fair market value of its 66 percent interest in the CBS Iranian Companies, viewed as a going concern. The Claimant relies on a valuation made for CBS by a consultant, a partner in an independent certified public accounting firm. In the consultant's view, in light of an increase in the net sales of the CBS Iranian Companies from approximately US\$145,000 during the fiscal year ended 31 October 1977, to approximately US\$2,890,000 during the following fiscal year ended 31 October 1978, and given CBS' continuing support, the CBS Iranian Companies should be viewed as a going concern as of the end of 1978 and into 1979. In his valuation, the consultant first calculated a "pro forma after-tax profit" of the CBS Iranian Companies in the amount of US\$202,300. He arrived at this figure by calculating an overall percentage of after-tax profits to net sales realized in 1978 by all of CBS' foreign subsidiaries engaged in the manufacture and sale of records and tapes, and applying that percentage to the amount of net sales realized by the CBS Iranian Companies during the fiscal year ended 31 October 1978. The consultant then multiplied the "pro forma after-tax profit" so computed by a price/earnings ratio which he deemed appropriate. The consultant concluded that the value of the CBS Iranian Companies as of early 1979 was US\$1,719,550, and that CBS' 66 percent ownership interest therefore amounted to US\$1,135,000. The consultant also proposed an alternative approach of valuation, based on the projections which originally convinced CBS' senior management to invest in Iran. He suggested a valuation consisting of the projected net profit of the CBS Iranian Companies for five years, discounted at 20 percent, or US\$968,000, plus a "terminal value" of the Companies, calculated to be

US\$1,218,000 (equal to five times the discounted projected net profit for the fifth year). This alternative approach results in a total value of the CBS Iranian Companies of US\$2,186,000, which would entitle the Claimant to an award of approximately US\$1,442,000, representing its 66 percent interest.

51. The Respondents object to these valuations. They deny that in early 1979 the CBS Iranian Companies could be considered as a going concern, and argue that the value of Claimant's shareholdings in the Companies should be determined for compensation purposes at nil. In support of their arguments, the Respondents submitted a report prepared by the accounting firm of Ernst and Whinney.

52. Upon analysis, the Tribunal finds that it cannot rely on either of the valuation methods proposed by the Claimant. Almost all the factors which could have influenced negatively the value of the CBS Iranian Companies have not been taken into account. The consultant's first valuation approach is based on a hypothetical "pro forma after-tax profit" of US\$202,000, obtained by referring to the after-tax profits realized by all CBS subsidiaries engaged in the manufacture and sale of records and tapes elsewhere in the world in 1978. That such an approach, which ignores the circumstances of the investment in question, is unrealistic is evidenced by the actual results of the CBS Iranian Companies. The consolidated income statement for the financial year ended 31 October 1978 shows that the Companies suffered a net loss of US\$606,785. The second valuation approach proposed by the Claimant's consultant is based on projected data contained in marketing plans prepared by the Claimant before the commencement of any activity in Iran. These plans, in light of the difficulties encountered by the CBS Iranian Companies since their inception, proved to be over-optimistic. For instance, the projected net profits for the first and second year of

operations were US\$40,000 and US\$262,000, respectively, whereas the actual results were a net loss of US\$432,575 for the period from 26 December 1976 to 31 October 1977, and, as already seen, a net loss of US\$606,785 during the following year. CBS' consultant describes the substantial increase of the Companies' net sales during this year as a favorable and encouraging circumstance. The Tribunal notes, however, that the value of a company is affected not only by turnover, but also by profitability. The CBS Iranian Companies had no history of past profits, apart from a small profit of US\$58,000, realized during the third quarter of 1978, and mainly attributable, apparently, to an exceptionally popular release. In the next quarter, however, the Companies again incurred losses. Further, evidence on record shows that by 31 October 1978, the CBS Iranian Companies had lost over 50% of their share capital, and that their financial statements presented a deficit of US\$67,749 on shareholders' equity. The Claimant's valuations also underestimate the adverse effects of the Islamic Revolution on the music market, and thus on the CBS Iranian Companies' future business. In particular, in view of the policy of the new Iranian Government against music, especially Western music, which constituted a substantial part of the CBS Iranian Companies' field of operation, the expectations for these Companies were greatly diminished. Not only did the CBS Iranian Companies have no history of past profits, but they also lacked reasonable prospects to achieve profits in the future. Moreover, CBS SSK owed the Claimant US\$788,000, plus interest, as a result of loans, which amounts must be deducted from the assets of the CBS Iranian Companies. CBS SSK's debts to the CBS Dutch Subsidiary are additional liabilities that likewise must be taken into account.

53. In light of all the evidence presented in this Case, the Tribunal holds that on the date of a possible taking, the CBS Iranian Companies had no value, and that therefore the Tribunal need not determine whether or when

they were taken by the Respondents. Accordingly, CBS' Claim against Iran and the Foundation is dismissed.

F. The Counterclaims

54. CBS SSK, Pakhsh Ahang and April Music filed Counterclaims against the Claimant and CRI for damages and losses allegedly suffered by each company as a consequence of mismanagement and misuse of power by the managers appointed by the Claimant, as well as for losses allegedly incurred by the Companies as a result of their abandonment by these managers. Under this caption, the Respondents also seek recovery of an amount representing alleged liabilities of the CBS Iranian Companies to "various firms", as well as a sum described as "finalized taxes with delayed payment damages." The CBS Iranian Companies seek compensation in various Rial amounts.

55. Pakhsh Ahang and April Music have not been named as Respondents in this Case. The Claims Settlement Declaration permits counterclaims to be brought only by a respondent against whom a claim has been asserted. See Sedco, Inc. and National Iranian Oil Company, et al., Award No. 309-129-3, para. 219 (7 July 1987), reprinted in 15 Iran-U.S. C.T.R. 23, 90. Accordingly, the Counterclaims brought by Pakhsh Ahang and April Music must be dismissed as being outside the Tribunal's jurisdiction.

56. The Tribunal notes that, apart from alleging that the foreign managers violated Article 141 of the Commercial Code of Iran by not calling an extraordinary general meeting of the shareholders after CBS SSK had lost over 50 percent of its share capital, CBS SSK does not indicate the acts and omissions for which it reproaches the foreign managers, and that allegedly led to the damages it claims to have suffered. At any rate, CBS SSK tendered no evidence to prove

its alleged damages. Accordingly, the Tribunal must dismiss CBS SSK's Counterclaims for lack of proof. In view of this finding, the Tribunal need not decide the jurisdictional issues related to these Counterclaims.

V. INTEREST

A. The Loan Claim

57. In order to compensate the Claimant for its loss, the Tribunal grants the contractually stipulated interest rate of 14 percent per annum on each loan, running from the effective date of every loan through 30 November 1979, the contractually specified final date for repayment of all monies lent pursuant to the Loan Agreement. From the period starting 1 December 1979, the Tribunal awards simple interest on US\$778,000 at the rate of 10 percent per annum. While the Claimant requests interest at 14 percent to the present, the Tribunal finds that the loan was intended by the Parties to be of quite limited duration and that award of interest as requested by the Claimant would be unforeseen by the contract and inequitable.

B. The Dutch Subsidiary Claim

58. The Claimant seeks interest at a rate of 12 percent per annum from 31 January 1979. However, there is no evidence showing that this rate had been agreed upon by the Parties, thus justifying such a request. The Tribunal determines that interest at the rate of 10 percent per annum is appropriate to compensate the Claimant for its loss. The Tribunal therefore awards such interest, which shall run on the total sum of US\$137,153 from 31 January 1979, as requested by the Claimant.

VI. COSTS

59. Each Party shall bear its own costs of arbitrating this Claim.

VII. AWARD

60. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

a. The Respondent, CBS RECORDS SSK, is obligated to pay the Claimant, CBS INCORPORATED, the amounts of

i) Seven Hundred Seventy Eight Thousand United States Dollars (US\$778,000), plus simple interest, calculated as follows:

on US\$231,000 from 1 December 1977 to 30 November 1979 at an annual rate (365-day basis) of 14 percent, and thereafter at an annual rate (365-day basis) of 10 percent;

on US\$99,000 from 31 January 1978 to 30 November 1979 at an annual rate (365-day basis) of 14 percent, and thereafter at an annual rate (365-day basis) of 10 percent;

on US\$66,000 from 24 February 1978 to 30 November 1979 at an annual rate (365-day basis) of 14 percent, and thereafter at an annual rate (365-day basis) of 10 percent;

on US\$66,000 from 12 May 1978 to 30 November 1979 at an annual rate (365-day basis) of 14 percent, and

thereafter at an annual rate (365-day basis) of 10 percent;

on US\$200,000 from 6 November 1978 to 30 November 1979 at an annual rate (365-day basis) of 14 percent, and thereafter at an annual rate (365-day basis) of 10 percent;

on US\$116,000 from 22 December 1978 to 30 November 1979 at an annual rate (365-day basis) of 14 percent, and thereafter at an annual rate (365-day basis) of 10 percent,

up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

- ii) One Hundred Thirty Seven Thousand One Hundred Fifty Three United States Dollars (US\$137,153), plus simple interest at an annual rate (365-day basis) of 10 percent from 31 January 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

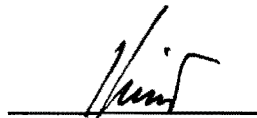
These obligations shall be satisfied by payment out of the Security Account established pursuant to paragraph 7 of the Declaration of the Democratic and Popular Republic of Algeria of 19 January 1981.

- b. The expropriation Claim of CBS INCORPORATED is dismissed on the merits.
- c. All other Claims of CBS INCORPORATED are dismissed for lack of proof.
- d. The Counterclaims of PAKSH AHANG IRAN SSK and APRIL MUSIC SSK are dismissed for lack of jurisdiction.

- e. The Counterclaims of CBS RECORDS SSK are dismissed for lack of proof.
- f. Each Party shall bear its own costs of arbitration.
- g. This Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

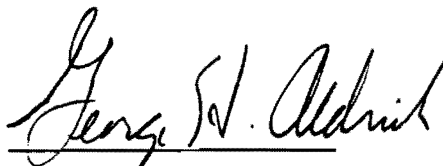
Dated, The Hague

28 June 1990




Robert Briner
Chairman
Chamber Two

In the Name of God



George H. Aldrich



Seyed Khalil Khalilian

I dissent to the enforcement of the Claimant's loan without taking CBS SSK's solvency or insolvency into account. In para. 38, the majority invokes Sedco in order to find this approach to be justified, but I also set forth in detail my reasons for dissenting to that finding in the said Case. See Sedco, Inc. and Iran Marine Industrial Company, Award No. 419-128/129-2 (Khalilian, Dissenting/Concurring Opinion, paras. 9-14).