

ORIGINAL DOCUMENTS IN SAFE

Case No. 276

276-101

Date of filing: 30 June 1989

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

** DECISION - Date of Decision _____
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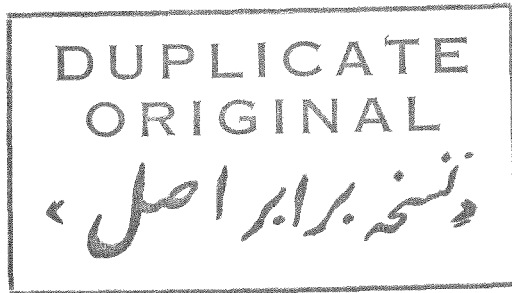
** CONCURRING OPINION of _____
 - Date _____
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** SEPARATE OPINION of _____
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** DISSENTING OPINION of R.C. Allison
 - Date 30 June
15 pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

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CASE NO. 276

CHAMBER THREE

AWARD NO. 426-276-3

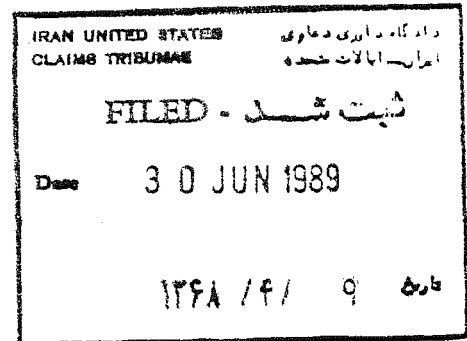
ARTHUR J. FRITZ & CO.,

Claimant,

and

SHERKATE TAVONIE SHERKATHAYE
SAKHEMANIE (Cooperative Society
of Construction Companies) and
THE GOVERNMENT OF THE ISLAMIC
REPUBLIC OF IRAN,

Respondents.



DISSENTING OPINION OF RICHARD C. ALLISON

1. My colleagues, expressing the view that STSS was not controlled by the Government of Iran on 19 January 1981, dismiss the claim of Arthur J. Fritz & Co. for lack of jurisdiction. I respectfully disagree with this conclusion.

2. STSS challenges the Tribunal's jurisdiction to hear this Case on the ground that it has never been a controlled entity of Iran as required by Article VII of the Claims Settlement Declaration. STSS argues that it is a cooperative company most of the members of which are private construction firms. As proof, it submits a list of its membership as of 1986, showing that it consisted of 237

companies of which forty-nine were government-controlled companies. Thus, STSS argues that Iran's influence over the management of the company has only been that of a minority shareholder.

3. STSS further argues that it has always been managed pursuant to its Articles of Association, a copy of which it appends to its Memorial. Under its Articles the governing organs of the cooperative are the General Assembly, the Board of Directors and the Auditors. According to Article 7 of the Act of Cooperative Companies, "The General Assembly is the highest authority for making resolutions and enforcing the wishes of the members for running the company in which all members may participate and vote on the items of the agenda." Article 24 of STSS' Articles further specifies that "each member regardless of the number of shares . . . has only one vote in the General Assembly." Article 31 thereof gives the General Assembly the duty of appointing the Board of Directors and Auditors and replacing them. The Board of Directors, in turn, according to Article 44, "is the lawful representative of the company." Thus, STSS contends that it is, and always has been, a private cooperative managed by its Board of Directors. As further proof, STSS submits the minutes of its General Assembly meetings for 1979 and for 1981-1986, asserting that they establish that during that time the members had managed the cooperative, including appointing new Boards of Directors, and further showing that the General Assembly appointed a new Board of Directors in September 1979, at a time when, according to Claimant, control of STSS had been taken over by the Government of Iran.

4. While the Claimant concedes that the form of the cooperative under the Articles of Association is one of a private organization, it argues that intervention by Iran after the Revolution in the management and assets of the cooperative effectively deprived the then management of real

control over the organization and placed it in the hands of Iran. As proof of this interference, Claimant submits a copy of the Report of the 15th Annual Assembly of STSS in 1985 (the "STSS Report") wherein the Board of Directors described the events of 1979-80 in general terms. The STSS Report states that "[a]s advised to you in the reports of the previous years, after the events that led to the taking control of the assets of the Cooperative Society by the representative of the Islamic Revolutionary Public Prosecutor, the Society was beset by problems in discharging its liabilities to various banks."¹ Emphasis added. The STSS Report goes on to state that "nearly all the inventory of the Society had been sold under the supervision of the representatives of the Revolutionary Public Prosecutor and the creditor banks to pay part of the debt owed to the group of commercial banks and the Iran and Germany Bank." It further noted that "[n]o sale was made without the approval of the representative of the Islamic Revolutionary Public Prosecutor." These events, as summarized by the STSS Report, were "sufficient to prevent the Society from tending to its principal operations, namely the supply and distribution of construction machinery and materials." Fritz contends that Iran had taken de facto control over the cooperative without the necessity of displacing its Board of Directors.

5. As an example of Iran's assertion of this control, the Claimant points out that in September of 1980 Iran took for its own use seventy-nine trucks owned by STSS. In describing the taking of these trucks, the STSS Report noted:

The authorities of the Ministry of Roads [and Transportation], in the process of taking delivery of the trucks, took over the trucks and spare

¹All of the creditor banks were owned and controlled by the Government of Iran.

parts available on the site, as well as the workshop itself and all equipment and tools therein without delivering even a copy of the inventory of the items they took over to the representative of the Cooperative Society and thus dispossessed the employees of the Society from the workshop.

6. The Claimant also suggests that STSS may have been controlled by Iran through its membership. According to the affidavit of Abdol Majid Aalam, formerly Chairman of the Board of STSS, many member companies of STSS "were assigned to the Poor People's Foundation during the period 1979-80." While the Claimant provides no independent listing of the members controlled by Iran, it questions the reliability of the Respondents' listing of November 1986.

7. Although Respondents contest the significance of Claimant's allegations of the involvement of the Revolutionary Prosecutor in the operations of the cooperative, they admit that in the summer of 1979 the Revolutionary Prosecutor attached STSS' warehouse and the goods therein because of the failure of STSS to meet certain debt obligations to Iranian banks. As described by STSS, this attachment was only "to protect the interests of banks including Bank Tejarat." Respondents allege that, pursuant to negotiations between STSS and the banks, the attachment was lifted in the Spring of 1980. At that time, pursuant to a request from the creditor banks, the Revolutionary Prosecutor appointed a representative to oversee the sale of the materials and goods in the cooperative's warehouse and repair shops and to distribute the proceeds of this sale to the creditor banks. Respondents contend that, once the attachment was lifted, "the only cause for the presence of the representative of the Revolution [sic] Public Prosecutor was to supervise over the sale of the properties of STSS in order to pay its debts to the banks." They further contend that the representative was not authorized to, and did not, intervene in the daily affairs of STSS or in its management.

The Respondents compare the prosecutor's involvement to that of a trustee in a bankruptcy, appointed by a court to protect the interests of creditors, and argue that if such involvement constitutes control "then all bankrupt companies or companies that file a petition for bankruptcy must be considered as government owned companies." In fact, however, despite the existence in Iran of a well developed system of bankruptcy legislation, this system was neither invoked nor applied in the case of STSS.

8. In support of its allegations STSS submits correspondence among STSS, the Revolutionary Prosecutor and the creditor banks in which the lifting of the attachment and the order for the sale of the goods are described. In one of these documents, a letter to Bank Tejarat dated 15 November 1981, STSS in negotiations subsequent to the sale of the goods informed the banks that "[t]he presence of the Public Prosecutor's Representative in the company has been merely for supervision over proper arrangements for sale of the goods." STSS further submits the order of the Revolutionary Prosecutor, dated 21 April 1980, appointing two representatives to "take the necessary and speedy action on the sale of the materials and goods."

9. As to the seventy-nine trucks taken by Iran, the Respondents contend that the members of STSS made the decision to give these trucks to Iran due to the war between Iran and Iraq. For support of this contention the Respondents refer to the 1985 Report of the STSS Board of Directors which states that the officials "then in charge of the Cooperative Society, based on the recommendation of the board of directors of the syndicate of construction companies, and after an authorization was issued by the office of the revolutionary public prosecutor, agreed to make 79 trucks . . . available for the use of the Ministry of Roads and Transportation." Emphasis added.

10. As made clear by prior Tribunal awards, the issue of control is one of fact. DIC of Delaware, Inc., et al. and Tehran Redevelopment Corp., et al., Award No. 176-255-3, p. 15 (26 Apr. 1985), reprinted in 8 Iran-U.S. C.T.R. 144, 155. As such, it is not necessary for there to be a formal act of expropriation for control to be established nor does the private structure of an organization necessarily give rise to the conclusion that control does not exist. See id.; Cal-Maine Foods Inc. and The Government of the Islamic Republic of Iran, et al., Award No. 133-340-3, pp. 10-11 (11 June 1984), reprinted in 6 Iran-U.S. C.T.R. 52, 58-59. The issue is whether Iran exercised actual control over an organization on the critical date.

11. While disputed by the Respondents in this Case,² it is also clear (and the Tribunal so holds) that the relevant time for determining whether an entity is controlled by Iran is the effective date of the Algiers Accords, 19 January 1981. Article II, paragraph 1, of the Claims Settlement Declaration provides that the Tribunal has jurisdiction over "claims of nationals of the United States against Iran . . . if such claims . . . are outstanding on the date of this Agreement" Numerous awards establish that this provision confers jurisdiction over a respondent if it was a controlled entity at 19 January 1981. See, e.g., Continental Grain Export Corp. and Union of Consumers' Cooperatives for Iranian Workers, Award No. 243-112-1 (6 Aug. 1986), reprinted in 11 Iran-U.S. C.T.R. 292;

²STSS argues that, in order for the Tribunal to have jurisdiction over the claim, Claimant must establish that STSS was controlled continuously by Iran from the date of the Algiers Accords up to the date of the Award. The Respondents are so sure of this point that they saw "no need to enter into a legal discussion on the matter." Thus, STSS argues that, even if it was controlled prior to or concurrently with the Algiers Accords, it now is independent and cannot be a party to a Tribunal proceeding.

Kimberly-Clark Corp. and Bank Markazi Iran, et al., Award No. 46-57-2 (25 May 1983), reprinted in 2 Iran-U.S. C.T.R. 334. This in turn means that jurisdiction exists even if subsequent to the effective date of the Algiers Accords Iran's control over the entity was relinquished.

12. With these considerations in mind, an analysis of control here should start with an examination of the structure of STSS. This structure, as reflected in its Articles of Association, at least theoretically vests control in the members of the cooperative via their equal votes at the General Assembly and their ability to appoint the Board of Directors, the body authorized as the "lawful representative" of the cooperative.

13. While the Articles of Association give the Ministry of Commerce certain authority to call an Extraordinary General Assembly if it deems it necessary and, if no legal quorum for such meeting is reached, the authority to represent the members in deciding on the dissolution of the cooperative and the appointment of liquidators, this authority does not obviate the fact that the Articles call for management of STSS by bodies made up of, or elected by, the members. In at least one prior award the Tribunal has determined that such a cooperative structure does not negate private control. American Housing International Inc. and Housing Cooperative Society, et al., Award No. 117-199-3 (19 Mar. 1984), reprinted in 5 Iran-U.S. C.T.R 235.

14. Given that control of STSS by virtue of its Articles of Association is vested in bodies made up of, or elected by, its member companies, the next step in determining control is to determine whether the members themselves are controlled by Iran, in turn making STSS a government-controlled entity. The STSS list as of November 1986 shows that on that date only thirty-six percent of the shares in STSS were held by forty-nine member companies that are controlled by

Iran. Claimant disputes the accuracy of the STSS list and further argues that a majority in number is not required in order to exercise de facto control, a point that has abstract validity but has not been proven in this Case.

15. If the structure of STSS and the composition of its membership do not necessarily compel the conclusion that it was controlled by Iran, the issue comes down to whether the intervention of the Revolutionary Prosecutor in the Summer of 1979 and thereafter transferred real control of STSS from the Board of Directors and the General Assembly to the Revolutionary Prosecutor and his designees.

16. From a review of the evidence it is possible, though with some difficulty, to piece together the role of the Revolutionary Prosecutor in STSS' affairs. The record, insofar as it relates to control over STSS, is largely composed of documents generated by STSS, certain of its creditors and the Office of the Revolutionary Prosecutor. Many of these documents were entered into the record by the Respondents although one key document, the 1985 Report of the STSS Board of Directors referred to above, was obtained and offered into evidence by Claimant. A review of this evidence as a whole reveals that there are significant gaps in the material that was presented to the Tribunal by STSS. This fact can be illustrated by reference to several of the documents themselves:

(a) The STSS Report was filed by Claimant with the Tribunal in September 1986. It was presented to the STSS members by the Board of Directors that had taken office in August/September 1981, and it states on the first page that

as a result of what transpired (as reported earlier), nearly all the inventory of the Society had been sold under the supervision of the representatives of the Revolutionary Public Prosecutor and the creditor banks to pay part of the debt owed to the group of commercial banks and the Iran

and Germany bank. No sale was made without the approval of the representative of the Islamic Revolutionary Public Prosecutor. [Emphasis added.]

Despite the reference to earlier reports which clearly would have been highly instructive on the issue of control, no such report was presented to the Tribunal by the Respondents.

(b) The STSS Report at page two further states:

You [i.e., the members of the Society] were advised through the reports of the previous years that after the war imposed on Iran by Iraq broke out in Aban 1359 (September 1980), the people who were then in charge of the Cooperative Society, based on the recommendation of the board of directors of the syndicate of constructions companies, and after an authorization was issued by the office of the revolutionary public prosecutor, agreed to make 79 trucks which were in the workshop of the Society available for the use of the Ministry of Roads and Transportation. The authorities of the Ministry of Roads [and Transportation], in the process of taking delivery of the trucks, took over the trucks and spare parts available on the site, as well as the workshop itself and all equipment and tools therein without delivering even a copy of the inventory of the items they took over to the representative of the Cooperative Society and thus dispossessed the employees of the Society from the workshop. [Emphasis added.]

Again, it is evident that the earlier reports would have cast considerable light upon the incident described above as well as the role of the Revolutionary Prosecutor in authorizing the delivery of the Society's property to the Ministry of Roads and Transportation without the normal formalities. No such reports were provided to the Tribunal by the Respondents.

(c) Most importantly, at page five of the STSS Report there appears the following:

As advised to you in the reports of the previous years, after the events that led to the taking control of the assets of the Cooperative Society by the representative of the Islamic Revolutionary Public Prosecutor, the Society was beset by problems in discharging its liabilities to various banks. [Emphasis added.]

17. Although it seems obvious that the "reports of the previous years" referred to in the STSS Report would have provided the Tribunal with insight into what had taken place during and after 1979 when the Revolutionary Prosecutor took "control of the assets" of the Society, Respondents did not provide the Tribunal with copies of these reports. This is all the more striking in light of the fact that the Respondent Society did file with the Tribunal copies of minutes of the meetings of the Society's members held on 25 December 1979, 10 August 1980, 5 September 1981, 21 August 1982, 4 September 1983, 25 August 1984, 10 July 1985, and 14 July 1986. These minutes were presented by STSS to indicate that during those years meetings of the members of the Society were being held and the members were taking the actions ordinarily taken at such meetings (including election of directors, naming of accountants and review of financial statements). What Respondents failed to provide, however, were the reports of the Board of Directors that were presented to these same meetings.³ As is evident from the one such report that the Claimant was able to produce to the Tribunal, this type of report is genuinely informative with respect to the status and affairs of the Society, unlike the minutes which are a skeletal recitation of actions normally taken at members' meetings. The fact that Respondents saw fit to provide the Tribunal with copies of the routine minutes and to withhold the informational reports that are

³For instance, the minutes of the critical 5 September 1981 meeting state: "The Board of Director's report (that is fully enclosed) was read out by Eng. Abolfazl Nasehi." Emphasis added.

incorporated in them by reference leads to a compelling inference that such materials would not have served the Respondents' purposes in this Case. When a party in possession of evidence that is clearly relevant and would be of assistance to the Tribunal opts to make a selective presentation apparently designed not to illuminate the facts but only to support its own arguments, that party assumes the risk that the Tribunal will reach its own conclusions as to the content of the material withheld. See Concurring Opinion of Richard M. Mosk in Ultrasystems Inc. and The Islamic Republic of Iran, et al., Award No. 27-84-3, p. 2 (4 Mar. 1983), reprinted in 2 Iran-U.S. C.T.R. 114, 115. See also Raygo Wagner Equipment Co. and Star Line Iran Co., Award No. 20-17-3, p. 6 (15 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 411, 412-13 (majority rejected respondent's jurisdictional objections because respondent did not submit sufficient evidence in support of its position where such evidence was likely to be in its possession and could have been produced by it); Dissenting Opinion of Howard M. Holtzmann in J.I. Case Co. and The Islamic Republic of Iran, et al., Award No. 57-244-1, pp. 7-12 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 66, 69-72 (party opposing assertion by other party has "duty to bring forward relevant evidence within its control"); D. Sandifer, Evidence Before International Tribunals 147 (1975); Code of Civil Procedure of Iran arts. 300-02 (M. Sabi trans. 1972).

18. Based, however, upon the record as it stands without the assistance that Respondents clearly could have provided, it can fairly be concluded that, probably due⁴ to STSS'

⁴ Respondents have not disclosed what particular circumstances gave rise to the Prosecutor's involvement in the Society although it is noted that the basic regulation governing the Revolutionary Prosecutor's activities (Official Gazette No. 10039-2/5/1358) mentions the investigation of alleged economic crimes, not civil
(Footnote Continued)

inability or unwillingness to meet various payments due to Iranian government banks, in approximately August of 1979 the Revolutionary Prosecutor intervened in the cooperative's affairs, attached its warehouse and workshop and the materials and equipment therein, and brought its activities to a halt. In February of 1980 STSS wrote to Bank Tejarat informing it that his intervention was preventing STSS from carrying out its corporate purposes. On 16 March 1980 STSS wrote to the Revolutionary Prosecutor complaining that he was preventing STSS from doing business and was causing harm to its materials and equipment since they were being exposed to the weather. STSS, therefore, requested him in that letter "to issue instructions for withdrawal of the aggression from the Company's warehouse and workshop." Two days later Bank Tejarat also wrote to the Revolutionary Prosecutor requesting him to lift the attachment and order the property sold, the proceeds to be distributed to the government banks and other parties whom the government deemed fit. On the basis of this correspondence on 21 April 1980 the Revolutionary Prosecutor appointed two representatives to "take the necessary and speedy action on

(Footnote Continued)

obligations, as the purpose of his office. Moreover, the STSS letter of 18 February 1980 to Bank Tejarat reads in part:

Unfortunately, due to the problems which arose at the early days of month of the current year August 1979 its activities have unjustifiably been stopped regarding which certain steps have also been taken. (photo-copies of letters from Public Prosecutor of the Revolution and the proces-verbal concerned are attached), and the relevant file, classified under No. 1519, is available in the Public Prosecutor's office. [Emphasis added.]

Although Respondent STSS filed the letter with the Tribunal, it neglected to provide the attachment which would have made the letter meaningful. In any event, it is abundantly clear from the record that a principle concern of the Prosecutor in this instance was to assure that the Society's indebtedness to the government-controlled banks was paid.

the sale of the materials and goods existing in [STSS'] ware-house and repair-shops" and to "pay the debts of the Company especially to its major and principal creditor Bank Tejarat."

19. By the time the new Board of Directors for STSS was appointed in September of 1981, nearly all of STSS' materials and equipment had been sold by or under the supervision of Iran's representatives. As stated in the 1985 STSS Report, "[n]o sale was made without the approval of the representative of the Islamic Revolutionary Public Prosecutor." As further established by the later correspondence between STSS and the creditor banks, the proceeds of these sales in fact went to the government banks to settle partially STSS' debts to them.

20. In September of 1981 a new Board of Directors was appointed. Thereafter, according to the STSS Report, pursuant to negotiations with the representative of the Revolutionary Prosecutor, the new management of STSS "assumed direct charge of the affairs of the Society and consequently of its sales." Emphasis added.

21. In my view the STSS Report and the correspondence among the cooperative, its creditors and the Revolutionary Prosecutor leave little doubt as to who was in charge on 19 January 1981. The STSS Report (i) describes the Revolutionary Prosecutor's 1979 attachment of the warehouse and repair shop as "the taking control of the assets" of the cooperative and (ii) states that, after September 1981, the new Board "assumed direct charge" of the Society. The conclusion that control of the Society lay with the government's Revolutionary Prosecutor in January 1981 is unavoidable. The simultaneous existence of a management structure bereft of the power to deal with the Society's properties or to carry out its fundamental purposes does not alter this fact. Nor does the fact that the Society's Board

of Directors made pleas for the relaxation of the Revolutionary Prosecutor's grip upon the Society.⁵ This merely emphasizes the Board's impotence in the face of governmental measures that had removed from the Board control over the sole functions of the Society, namely, the acquisition, storage and distribution of materiel.

22. None of the letters among STSS, the banks and the Revolutionary Prosecutor submitted by the Respondents suggests that the Board had control of the Society's business or was even able to assert its interests and rights during this time. Indeed, only five of the letters submitted are dated, and reflect events, prior to September 1981, the time when the Board apparently was able to regain control of the Society's affairs. Several of these letters deal with the initial attachment of STSS' assets and the appointment of the representatives of the Revolutionary Prosecutor to oversee the sale of those assets. These letters, which described the attachment as causing STSS' business to have been "unjustifiably . . . stopped" and the assets attached as "the nucleus of [STSS'] activities," simply confirm that Iran was firmly in control of the Society at that time. Two of the letters that were written by STSS seem to be pleas on the part of the then Board for the government-owned banks to use their influence to permit STSS to regain control over its affairs. No document in the record points to any instance in which the Board was able to manage the affairs of the Society or represent it in an official capacity between 1979 and September 1981.

⁵See, e.g., STSS' letter of 16 March 1980 to the Revolutionary Prosecutor, in which the Society states that its members have had to seek material and machinery from other sources while the Society's supplies were stored in the open air exposed to the weather.

23. Form is elevated over substance when the observance of corporate rituals by the STSS membership is regarded as signifying actual control over STSS' assets and activities at a time when the Society's Board literally lacked the authority to bring its property in out of the rain without the authorization of the Revolutionary Prosecutor.

24. I, therefore, conclude that STSS was an entity controlled by Iran as of 19 January 1981 under the terms of Article VII, paragraph 3, of the Claims Settlement Declaration.

Dated, The Hague
30 June 1989


Richard C. Allison