WILLIAM BIKOFF and GEORGE EISENPRESSER, *Claimants*

v.

THE ISLAMIC REPUBLIC OF IRAN, *Respondent*

(Case No. 82)

Chamber Two: Riphagen, *Chairman;* Aldrich, Shafeiei, *Members*

Signed 22 *June* 1984 [1]

AWARD NO. 138-82-2

The following is the text as issued by the Tribunal:

APPEARANCES

For Claimants:
Mr. William Bikoff
Mr. George Eisenpresser
Mr. Stuart Jackson
Mr. Thadd Blizzard
Mr. Martin Lichten
Attorneys for Claimants

For Respondent:
Mr. Mohammad Eshragh
Agent of the Islamic Republic of Iran
Mr. Akbar Shirazi
Legal Adviser to the Agent
Ms. Farzin Faridani
Attorney for the Ministry of Mines and Metals
Mr. Mahnaz Mokhtari
Mr. Mehdi Hosseni
Representatives of the Ministry of Mines and Metals
Mr. Mohammad Tehrani
Attorney for the Islamic Republic of Iran
Mr. Paul Starr
Assistant to the Attorney
Mr. Taher Nejad
Mr. Reza Ashraf
Representatives of the Islamic Republic of Iran
Mr. Mohammad Mallakpour
Mr. Hasan Shayari

[1 Filed 29 June 1984.]

Also Present: Mr. John Crook
Agent of the United States of America

AWARD

I. THE CLAIM

The Claimants, William Bikoff and George Eisenpresser (respectively, "Bikoff" and "Eisenpresser"), both nationals of the United States of America, have brought this claim against the Islamic Republic of Iran alleging an expropriation of their property without compensation by the Respondent. The Claimants contend that the Respondent, acting through its Ministry of Mines and Metals (the "Ministry"), deprived the Claimants of their "investment and interest" in certain copper reserves located in the Cheshmeh Shirin area of Iran. In compensation for this expropriation, the Claimants seek damages in excess of $450 million.

In their Statement of Claim, the Claimants alleged that the Tribunal had jurisdiction over their claim based on their control of Zarshouran Mining Company, Ltd. ("ZMC"), an Iranian company which had been granted certain exploration and exploitation rights in Cheshmeh Shirin by the Ministry. In subsequent filings and also at the hearing, the Claimants contended that if the Tribunal did not have jurisdiction over their indirect claim for expropriation of the property of ZMC, it did have jurisdiction over their direct claim for injury to their property resulting from the Respondent's expropriatory actions.

The Respondent, through the Ministry, contends that the Tribunal lacks jurisdiction over the Claimant's indirect claim on the ground that they did not control ZMC and that the Tribunal lacks jurisdiction over the Claimants' direct claim on the ground that there has been no expropriation of the Claimants' shares in ZMC. On the merits, the Ministry asserts that there has been no expropriation of ZMC's mining rights, and that, even if there had been an expropriation, no compensation would be due as these mining rights were worthless. In a Supplement to the Statement of Defense filed 22 November 1982, the Ministry asserted a counterclaim against the Claimants for social security payments and taxes allegedly due and owing by ZMC to the Government of Iran.

A hearing was held in this case on 27 and 29 February 1984.

II. STATEMENT OF FACTS

ZMC was incorporated under the laws of Iran in May 1970 for the purpose of exploring for, extracting, selling and exporting mineral ore. Shortly after its incorporation, the Company acquired from Zamin Shenas Company exploration permits and discovery and exploitation licenses relating to the Cheshmeh Shirin Copper Mine located in the Cheshmeh Shirin area of Iran. Following several years of exploratory studies in the area, ZMC was issued a new exploitation license in 1973 by the Ministry. Pursuant to this license, which was valid for a period of 15 years and whose validity was conditioned upon the Company's compliance with the Iranian Mining Law, ZMC was obligated to extract certain minimum amounts of copper ore yearly and to pay an annual 7% royalty to the Ministry based on the value of the ore extracted and sold. Payment of the royalties was to be guaranteed by a letter of guaranty, which the Company duly opened in favor of the Ministry with the Bank of Iran and Russia.

The Claimants allege that following the issuance of this exploitation license by the Ministry, ZMC undertook extensive mining activity at the Cheshmeh Shirin Mine, establishing a worksite, employing at one point almost 100 miners, purchasing equipment and investing large sums of money in mining, extracting and exporting ore. Pursuant to a contract allegedly involving one of Iran's largest ore exporters, the Claimants maintain that they indirectly sold approximately 13,500 tons of copper ore from 1973 up to the spring of 1978.

The evidence produced by the Claimants, however, in support of these allegations is meager and consists primarily of affidavits. Despite the fact that the Company maintained offices in both Tehran and New York, the Claimants, alleging that all ZMC's documents were destroyed during the Iranian Revolution, have been unable to produce contemporaneous documents establishing the existence and extent of mining operations at Cheshmeh Shirin, the amount of copper ore extracted or the quantity and value of the copper ore sold. Although the Claimants maintain that the mining operations conducted by ZMC were extensive, they have been unable to produce—outside of affidavits—any documentary evidence that such mining operations occurred after 1974.

The Ministry, however, has submitted extensive, convincing documentary evidence indicating that after 1974 ZMC did not exploit the mine. Contemporaneous reports prepared by officials of the Ministry

from 1975 to 1979 following their annual site visits to the Cheshmeh Shirin Mine state that no mining activity was being undertaken at that mine. Testimony at the Hearing from private citizens who lived near the mine indicate that from 1974 onwards, ZMC performed neither exploration nor exploitation. The company formerly owned by the alleged middleman in the sales of copper ore from the Cheshmeh Shirin Mine has stated that it never heard of ZMC and had never purchased ore from that mine. Finally, with the exception of two royalty payments made in 1973 and early 1974, amounting to 14,000 Rials (approximately U.S. $200), ZMC failed to pay the royalties required under the exploitation license granted by the Ministry.

In August 1980 the Ministry, having received no royalty payments since 1974, and having received no response from ZMC regarding non-payment, drew on the letter of guaranty in the amount of 250,000 Rials (approximately U.S. $3,500) established by ZMC to guarantee its royalty payments. An amount of 140,116 Rials was deducted, and the remainder is held in escrow. Shortly thereafter, on 3 November 1980, the Ministry, acting on the basis of Iranian law, cancelled ZMC's exploitation permit on the grounds that, in violation of the provisions of the permits and of the applicable mining law,[1] the mines were not being exploited and the 7% royalty payments were not being made.

III. JURISDICTION

Apart from the question of the Claimants' control over ZMC, there are no serious jurisdictional issues in this case. Bikoff and

[1] The relevant provisions of the Mining Law of Iran (1957) provide as follows:
Article 10:
If the holder of an exploitation licence should not act in accordance with the provisions of the law and regulations concerned, the Ministry of Industries and Mines can cancel the licence in question . . .
The Regulations Governing Exploitation of Mines provide in relevant part as follows:
Article 10:
The exploiter of a mine is duty bound to pay at the due date indicated in his license or permit the minimum Government duty on the basis of percentage and minimum volume of production stated in his exploitation permit or license or that designated by the High Council of Mines.
Article 13
In the event that an exploiter fails to pay the Government duties on time, he shall be liable to payment of the lawful fines chargeable to delays, and should delay in payments exceed 3 months, the Government fees will be taken from his guaranty and, in addition, he will be dealt with as per article 10 of the Mining Law.
Article 19
The mine must not remain inactive for more than 6 months or else the exploiter's license or permit will be cancelled as provided in article 10 of the Mining Law.

Eisenpresser are, and at the relevant times were, United States nationals within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration, and the Ministry admits that it is included within the definition of Iran in Article VII, paragraph 3, of the Declaration.

In regard to the question of control of ZMC, the evidence submitted establishes that from the date of the alleged expropriation until 19 January 1981, the Claimants jointly were the record owners of no more than one third of the shares of ZMC.[1] The Claimants assert, however, that as a result of both their extensive financing of the Company and a series of shareholder and board of director actions transferring total management of the Company to them, the Claimants were both the beneficial owners of two thirds of the Company and exercised full control over ZMC. On this basis, Bikoff and Eisenpresser maintain that they "controlled" ZMC within the meaning of Article VII, paragraph 2, of the Claims Settlement Declaration.

The evidence to substantiate this argument consists primarily of three documents. The first, a power of attorney executed on 1 June 1970 by Morteza Torkan, an Iranian shareholder of ZMC who was Bikoff's brother-in-law and subsequently the record owner of 50% of the shares of the Company, authorized Bikoff to perform "... all affairs pertaining to [Morteza Torkan] in the Zarshouran Mining Company". The second, a resolution of the Board of Directors of ZMC dated 7 June 1970, empowered Bikoff "... to act with full authority to negotiate ... any business or relationship that [he] may deem of benefit to Zarshouran Mining Co., Ltd. and its shareholders". Pursuant to this resolution Bikoff, as managing director, was also empowered "... to sign contracts, assign its interests, raise capital, negotiate loans and to engage in any act as managing director in which in his estimation the Company will gain and enjoy benefit". The final document, a power of attorney executed by Morteza Torkan and his brother Yusef Torkan on 4 September 1971, empowered Bikoff to "... conclude and enter, negotiate any agreement and contract in respect of Copper Mines of Semnan (Cheshmeh Shirin) ... that [he] deems advisable, having the right and title of receipt of funds". At the hearing, Morteza Torkan also testified that since Bikoff and Eisenpresser had jointly contributed 66-2/3% of the capital required by the Company, they were considered by all the

[1] Although there is some evidence that Bikoff's record ownership of one sixth of ZMC was reduced, this issue is irrelevant to the Tribunal's determination of the question of the Claimants' control over ZMC.

shareholders to be the beneficial owners of two thirds of ZMC. Little evidence, however, has been provided regarding the actual amount contributed to the Company by either Bikoff or Eisenpresser.

While it is clear that these documents and corporate actions transferred some authority over the Company to Bikoff, they did not give him and Eisenpresser the degree of control required by Article VII, paragraph 2, of the Claims Settlement Declaration. Neither of the powers of attorney was irrevocable or transferred voting control to Bikoff. The resolution of the ZMC Board merely authorized Bikoff as managing director to perform functions normally required in the ordinary course of the Company's business — functions routinely exercised by a managing director of any company. The resolution did not interfere with or oust the power of the majority shareholders to remove Bikoff as managing director or to restrict his powers as managing director. Furthermore, this resolution did not grant Bikoff unlimited control over ZMC. Pursuant to the Company's Articles of Association, all significant corporate actions had to be authorized by both the managing director and the President of the Company's Board.

It is also significant that the evidence submitted in the case showed that neither Bikoff nor Eisenpresser actually controlled the operations of ZMC. The Claimants have admitted that they made only occasional visits to Iran, and the evidence indicated that decisions regarding the daily management of the Company and its mining operations were made by Morteza Torkan, the largest shareholder of record. There is a total absence of evidence — either reports, instructions or other communications — to indicate that the Claimants were kept informed of the Company's operations or that they took part in decisions regarding them.

The Tribunal, therefore, holds that the Claimants have failed to prove that they controlled ZMC at the time the claim arose within the meaning of Article VII, paragraph 2, of the Claims Settlement Declaration. The Tribunal does not have jurisdiction over their indirect claim for expropriation of the property of ZMC.

As an alternative basis for the Tribunal's jurisdiction, the Claimants contend that the alleged expropriation by the Ministry of the sole substantial asset of ZMC — its exploitation license — caused injury to their property interests in the Company and that the Tribunal has jurisdiction over their direct claim for the diminution in value of their property interests in ZMC resulting from the revocation of ZMC's exploitation license. The Claimants do not allege — nor does the

evidence establish — that ZMC itself has been expropriated or that their shares in the Company have been taken. Their direct claim is based solely on an alleged injury to the Company, damage to the Company's economic interest by means of a deprivation of one of its assets. Such allegations give rise only to an indirect claims — the claim of ZMC. The Tribunal, therefore, holds that this alleged alternative basis of jurisdiction is not an alternative and that the Tribunal has no jurisdiction over the claims in this case.

IV. THE COUNTERCLAIM

Since the Tribunal has held that it lacks jurisdiction over both the direct and indirect claims of the Claimants, the counterclaim allegedly arising out of those claims must be dismissed for lack of jurisdiction.

V. COSTS

Each party shall be left to bear its own costs of arbitration.

AWARD

THE TRIBUNAL AWARDS AS FOLLOWS:

The claims of Claimants, William Bikoff and George Eisenpresser, relating to the Government of the Islamic Republic of Iran are hereby dismissed for lack of jurisdiction.

The counterclaim of the Respondent, the Islamic Republic of Iran, is hereby dismissed for lack of jurisdiction.

Each of the parties shall bear its own costs of arbitrating this claim.

TIME, INCORPORATED, *Claimant*

v.

THE ISLAMIC REPUBLIC OF IRAN,
THE BANK OF INDUSTRY AND MINES,
SHERKATEH CHAP VA NASHREH DANESHEH NOW,
Respondents

(Case No. 166)

Chamber Two: Riphagen, *Chairman;* Shafeiei, Aldrich, *Members*

Signed 22 *June* 1984 [1]

AWARD NO. 139-166-2

The following is the text as issued by the Tribunal:

APPEARANCES

For Claimant:	Mr. David Branson Attorney Mr. Robert Ellis Representative
For Respondents:	Mr. Mohammad K. Eshragh Agent of the Islamic Republic of Iran Mr. Saifollah Mohammadi Legal Adviser to the Agent Mr. Ali Khalili Representative of Nashreh Danesheh Now Mr. Javad Ziaie Representative of the Bank of Industry and Mines
Also present:	Mr. John B. Reynolds, III Ms. Elizabeth J. Keefer Advisers to the Agent of the United States of America

[1] Filed 29 June 1984.]

AWARD

I. THE CLAIMS

The Claimant, a New York corporation, claims for U.S. $905,597, allegedly due pursuant to a contract between the Claimant and the Respondent company, Sherkateh Chap Va Nashreh Danesheh Now ("Danesheh Now"), plus interest and costs. The contract dated 21 September 1976, stated that the Industrial and Mining Development Bank of Iran (a predecessor of the Respondent, Bank of Industry and Mines) had caused the company to be formed to carry out a project " . . . to establish in Iran a high quality modern publishing structure for the development, production, publication and distribution of books, magazines, and other print and non-print materials . . . ". The contract prescribed the terms and conditions under which the Claimant would " . . . render expert advice in connection with the management and supervision of the Project . . . ". The contract specified a term of 42 months from 15 September 1976, that is until 15 March 1980.

Compensation to the Claimant was provided by the contract in two forms, first, payment or reimbursement of the costs of providing the expert advice, including salaries and allowances of both on-site and off-site personnel, overhead, travel costs, relocation costs and consultant costs, and second, a fee of U.S. $2,250,000, payable in six semi-annual installments of U.S. $375,000 each, with the first due on signature of the contract. The claim is for the one unpaid U.S. $375,000 installment of the fee and for invoiced but unpaid costs from July 1978 to September 1979, totalling U.S. $530,597.

Danesheh Now denies liability, alleging that the Claimant did not properly perform its duties and withdrew its personnel prematurely, thus damaging Danesheh Now, and counterclaims in the amount of U.S. $2,480,000.

A hearing was held on 11 April 1984 at which all parties were represented.

II. JURISDICTION

The Claimant has proved to the satisfaction of the Tribunal that it has been at all relevant times a national of the United States. It is admitted that the Respondent, Bank of Industry and Mines, was

nationalized, along with other Iranian banks, in June 1979, and it thereby became an instrumentality of the Government of Iran. Evidence has been presented showing that, at the time of its registration in 1976, Danesheh Now had issued 10,000 shares of stock, of which 9,998 were owned by the predecessor of the Bank of Industry and Mines. The Respondents do not contend that significant changes occurred in share ownership prior to the dissolution of Danesheh Now on 18 April 1980, and they acknowledge that the Bank of Industry and Mines was appointed liquidator of Danesheh Now. The Tribunal cannot accept Respondents' argument that ownership of Danesheh Now by a Government-owned bank is inadequate to establish control for the purpose of jurisdiction. *See* Award No. 55-165-1 (*Economy Forms Corporation v. The Government of the Islamic Republic of Iran, et al.*) dated 14 June 1983.[1]

The Tribunal concludes that the claim against Danesheh Now is a claim against "Iran" as defined in Article VII, paragraph 3, of the Claims Settlement Declaration.

Danesheh Now also contends that the failure of the Claimant to present evidence of its claims to the liquidator within a six-month period provided by Iranian law relating to the liquidation of companies is a bar to the maintenance of its present claims, apparently on the theory that any claims were waived prior to the date of the Claims Settlement Declaration and therefore were not outstanding on that date. However, the Tribunal cannot agree that the existence of a local remedy (in addition to the contractually-provided ICC arbitration remedy) affects the jurisdiction of the Tribunal. *See* Award No. 21-132-3 (*Rexnord Inc. v. The Islamic Republic of Iran, et al.*) dated 10 January 1983.[2]

III. THE MERITS

A. The Invoiced Costs

The evidence in this case indicated that the invoices covering the months of July through November 1978 were approved by Danesheh Now with certain minor adjustments. The approved total of those five invoices was U.S. $235,047. This total was not, however, paid, apparently initially because of disruption of banking services caused

[1 3 IRAN-U.S. C.T.R. 42.]
[2 2 IRAN-U.S. C.T.R. 6.]