IRAN - UNITED STATES CLAIMS TRIBUNAL

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IRAN-UNITED STATES CLAIMS TRIBUNAL

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CASE NO. 244

CHAMBER ONE

AWARD NO. 57-244-1

J.I. CASE COMPANY,
Claimant,
and

THE ISLAMIC REPUBLIC OF IRAN;
SHERKAT SAHAMI ETTEFAGH and
EUROPE CO.,
Respondents.

DISSENT OF HOWARD M. HOLTZMANN

In this case the Claimant asserts that the Islamic Republic of Iran prevented two private Iranian companies from making payments owed to the Claimant for purchases of goods. Such government action falls within the meaning of "measures affecting property rights" for which Iran is liable to United States nationals. Claims Settlement Declaration, Article II, paragraph 1.

The Claimant, because of circumstances prevailing since the Iranian Revolution, was unable to present direct evidence of the inner workings of either the Iranian government or the two Iranian companies; it therefore relied on indirect evidence presented through credible witnesses to support its claim. The Iranian Government, which was in exclusive possession and control of evidence which would

either prove or disprove the claim, failed to produce that evidence. Under established principles governing international tribunals, the failure of the Iranian Government to produce the evidence available to it compels the Tribunal to give full probative weight to the evidence presented by the Claimant and, on the basis of that evidence, to grant the claim. Instead, the majority Award, although frankly acknowledging that there is no evidence which contradicts the Claimant, denies the claim. I think that is incorrect and I respectfully dissent.[1]

The factual background of this claim is relatively simple. The claimant, J.I. Case Company ("Case") is a manufacturer of tractors and other equipment. Before the Iranian Revolution it marketed its tractors in Iran through an Iranian company, Sherkat Sahami Ettefagh ("SSE"); it marketed its trenchers and line-laying equipment through another Iranian company, Europe Co. ("EC"). SSE and EC were not related to each other. Each of these distributors purchased material from Case and resold it in Iran. Case typically extended credit to these distributors, permitting them to pay in installments over a period of years. SSE's obligations to pay future installments were evidenced by promissory notes or, in one transaction, by invoices. EC's obligations were evidenced by a sight draft.

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[1] This dissent deals only with my views on what I consider to be important issues relating to evidence and proof. I do not consider it necessary to write with respect to other issues raised by the Award.

The present claim arose out of several sales of tractors and one sale of spare parts to SSE and one sale of trenchers to EC. It is uncontested that Case delivered the goods sold and that it was not fully paid for those sales. As to the sales of tractors to SSE, all of the promissory notes due before the Revolution were paid. After the Revolution, however, no payments were made. As to the sale of spare parts to SSE, payments on the invoiced amounts were due after the Revolution and were never paid. Similarly, before the Revolution EC made partial payment of its sight draft, but after the Revolution the remaining balance due to Case was not paid. The fact that SSE and EC made partial payments demonstrates that they were satisfied with the quality of the goods, and no evidence of any complaints was presented. The details of these various transactions are summarized in the majority Award and need not be repeated here.

Case presented evidence that SSE and EC each attempted to pay their debts to Case but were prevented from doing so by the Government of Iran. With respect to SSE, Cases's Sales Manager for the Middle East, Mr. R.S. von Kotzebue, testified at the Hearing that he had spoken by telephone with Mr. Tavakoli, the Managing Director of SSE, and that Mr. Tavakoli explained that he had been required to give the Iranian Government information concerning all of SSE's debts to its United States suppliers and that thereafter he had attempted to make payment, but his bank had been prevented by the Government of Iran from transfering funds to Case.

Mr. von Kotzebue's memory of that telephone conversation is confirmed by a telex which he sent contemporaneously from his office in Athens to Case's headquarters in the United States reporting on the matter. The telex, which was introduced in evidence, stated:

> I talked with Mr. Tavakoli and was informed that he had to give all details about outstandings from U.S. companies to the Government and was not permitted to make any more payments to us. . . . He will do anything possible to make sure we get paid.

Mr. von Kotzebue testified that SSE was one of Cases's oldest foreign distributors, that it had always paid its debts in the past, that Case had accorded it the highest credit rating.

As to the debts owed by EC, Mr. G. van Alkemade, Cases's Sales and Finance Manager for Africa and the Middle East, testified at the Hearing that he had spoken by telephone with a Mr. Firouzgar, an individual he knew to have been an executive of EC, who told him that the Iranian Central Bank had prevented transfer of funds to Case. Mr. von Kotzebue testified that during a trip to Iran in August 1982 he had met with a Mr. Shafeiei, EC's former Sales Manager, who confirmed that EC's attempts to transfer

payments to Case had been prevented by the Iranian Central Bank.[2]

Both Mr. von Kotzebue and Mr. Van Alkemade were credible witnesses whose testimony was not rebutted. The majority's Award does not question their veracity. Moreover, the credibility of their testimony must be weighed in the light of events in Iran following the Revolution. Case's experience was not unique. In various situations, the Government of Iran prevented payments, sometimes pursuant to decrees which have reached the outside world, and, apparently, sometimes by other means. Indicative of prevailing Iranian attitudes is a decree of August 1980, issued by the Chief Justice of the Islamic Republic of Iran, which referred to those "who did not take part in the country's after revolution developments" and stated "you are informed that you should refrain from payment of any kind of money to such people." It would be naive to ignore such conditions in Iran.

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[2] The testimony by Mr. von Kotzebue and Mr. van Alkemade concerning what others said to them would be considered "hearsay" under the Anglo-American rules of evidence. However, the technical rules governing the admissibility of hearsay evidence do not apply in proceedings before international tribunals, just as they do not apply under civil law. D. Sandifer, Evidence Before International Tribunals 366-72 (rev. ed. 1975). "The [international] tribunal is free, in the exercise of its general powers in this respect, to attach such weight to hearsay evidence, once admitted, as it deems proper under all the circumstances of the case." Id. at 369. In view of the unchallenged credibility of the witnesses who testified, and considering that all other evidence that might have confirmed or contradicted their testimony was controlled exclusively by the Respondents, who failed to submit it, Case's evidence is entitled to be given "full probative force." Witenberg, infra, at 50.

As the Award accurately states, in response to Claimant's evidence, the Government of Iran merely "advanced the hypothesis that SSE and EC did not pay either because they were without sufficient funds, or because the goods were not in conformity with the orders." Neither the Government of Iran, nor any other Respondent, presented any evidence whatsoever with respect to those bare conjectures.[3]

The Government of Iran had several means, all exclusively within its control, by which it might have elucidated the circumstances of the case. Most significantly, it could have presented Mr. Tavakoli as a witness. Mr. Tavakoli was in a unique position to confirm or deny the conversation with Mr. von Kotzebue; he could have told whether or not SSE had funds to make payment, what efforts it made to effectuate payments, and whether the Government of Iran interfered to prevent payment. SSE's Statement of Defence confirms that SSE continues in business and that Mr. Tavakoli continues as its Managing Director. Iran was thus in a position to produce Mr. Tavakoli as a witness. It failed to do so. Whether SSE had, or did not have, sufficient funds to pay Case could also have been shown by SSE's relevant books of accounts and by its income tax records. In addition, if the goods delivered did not conform to the orders, as the Government of Iran now speculates, there

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[3] The Award correctly states that the Government of Iran asserted that "none of its foreign exchange restrictions barred payment for the goods sold and delivered." Thus there is no issue in this case with respect to exchange control regulations.

would surely be some documentation of complaints in SSE's files. The Government of Iran has access to all such financial and other business documents; it produced none.

As to EC, the Government of Iran could also have produced at least one competent former executive of that company as a witness, or explained why it could not do so. In this connection, it should be recalled that Mr. von Kotzebue had been able to locate and speak with such an individual as recently as August, 1982. Moreover, even if EC is no longer in business, the Government of Iran has access to its annual tax records for the period before it ceased trading, and these would indicate the extent of EC's income or losses and thus shed light on whether it was able to pay its debts to Case. The Respondents provided no such evidence.[4]

The international law which governs situations such as this is well established. It makes clear that, while a party asserting a fact has the ultimate burden of persuading a tribunal of its truth, this does not mean that the opposing party has no duty to bring forward relevant evidence

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[4] The Award, in summarizing the contentions of the parties, notes the assertion by the Government of Iran that EC is "untraceacble as a company existing in Iran." The Government of Iran has, however, stated in another case before this Chamber that it maintains a system for registering all corporations from which it can obtain information concerning corporations which are no longer in existence. See Mark Dallal and Islamic Republic of Iran, Award No. 53-149-1, and Dissent of Howard M. Holtzmann.

within its control. Thus, in the Parker Case (U.S. v. Mex.), 4 Rep. Int'l Arb. Awards 35 (1926), the Commission stated:

> The Commission denies the "right" of the respondent merely to wait in silence in cases where it is reasonable that it should speak. To illustrate, in this case the Mexican Agency could much more readily than the American Agency ascertain [certain relevant facts].

Id. at 39. The Commission emphasized that negative inferences may properly be drawn from a party's silence in the face of prima facie evidence, when further evidence could be brought forward by that party:

> While ordinarily it is encumbent upon the party who alleges a fact to introduce evidence to establish it, yet before this Commission this rule does not relieve the respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be.
>
> . . . In any case where evidence which would probably influence [the Commission's] decision is peculiarly within the knowledge of the claimant or of the respondent Government, the failure to produce it, unexplained, may be taken into account by the Commission in reaching a decision.

Id.

That principle was applied repeatedly by the various Mexican Claims Commissions. See A. Feller, The Mexican Claims Commissions 1923-1934 at 260-263 (1935). In the Kalklosch Case (U.S. v. Mex.), 4 Rep. Int'l Arb. Awards 412 (1928), indirect evidence was accepted as establishing the claim, when the respondent failed to submit the only direct

evidence that would have proved or disproved the claimant's allegations. The Commission found that the missing evidence could have been located and produced by the respondent, and that the respondent's unexplained failure to do so warranted recovery on the basis of the evidence submitted by the claimant. Id. at 414. See also the Hatton Case (U.S. v. Mex.), 4 Rep. Int'l Arb. Awards 329, 332 (1928) (where respondent had access to evidence which would confirm or contradict the claimant's assertions, but did not produce it, "the Commission should accept without question the claimant's allegation" even though the claimant's evidence was incomplete).

This approach has been widely adopted by other international tribunals. See Lighthouses Arbitration (Permanent Court of Arbitration), Claim No. 6, 23 Int'l L. Rep. 677 (1956); Grant-Smith Claim (Anglo-Italian Conciliation Commission) (1952), 22 Int'l L. Rep. 966 (1955); Janin v. Etat allemand (Franco-German Mixed Arbitral Tribunal), 1 Recueil des Décisions des Tribunaux Arbitraux Mixtes 774 (1922); De Lemos Case, reported in J. Ralston, Venezuelan Arbitrations of 1903 at 302, 319 (1904). See also B. Cheng, General Principles of Law as Applied by International Courts and Tribunals 324-326 (1953).

Witenberg, in his study of proof before international tribunals, cites the Parker Case and the numerous cases which follow it, and concludes that from the duty of parties

to cooperate in the production of evidence flows the consequence that a party asserting a fact need only commence the proof by producing some credible evidence; this being done, the obligation to produce evidence passes to the party denying the fact:

> [I]l incombe aux Etats litigants de collaborer à la preuve. Ce principe est d'inspiration anglo-saxonne. On a vu qu'en droit anglais l'obligation du demandeur est moins de prouver que d'apporter un commencement de preuve. Ce principe est passé très tôt en droit international arbitral. Il y a aujourd'hui trouvé sa forme de grand principe général.
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> Ainsi l'Etat demandeur -- plus exactement l'Etat qui allègue un fait -- a, certes, l'obligation de l'établir. Mais cette obligation ne s'étendra pas à la preuve complète du fait allégué. Car l'Etat, déniant le fait articulé, ne pourra se borner à une position d'attentisme. Il a, lui aussi, l'obligation de collaborer à la preuve.[5]

Witenberg, La Théorie des Preuves Devant les Juridictions Internationales, 56 Recueil des Cours (Hague Academy of International Law) 5, 47-48 (II-1936)(footnote omitted; emphasis in original). Thus, when a party fails to produce

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[5] Unofficial translation:
It is incumbent on litigating States to cooperate in the submission of proof. This principle is of Anglo-Saxon inspiration. We have seen that in English law the obligation of the plaintiff is less that of proving than of commencing the proof. This principle passed very early into the law of international arbitration. It is today a major general principle of that law.

Thus, the plaintiff State -- more exactly, the State that alleges a fact -- has, certainly, the obligation of establishing it. But this obligation does not extend to the complete proof of the fact alleged. For the State denying that fact may not limit itself to a position of waiting and doing nothing. It, too, is obligated to cooperate in the submission of proof.

evidence that is within its control, a tribunal may base its decision on the "commencement of proof," without requiring "complete proof":

> Le juge international pourra former sa représentation du fait sur un commencement de preuve si l'Etat défendeur ne collabore pas à la procédure de preuve. Comme le déclare l'arrêt Parker, le gouvernement défendeur n'a pas le droit "d'attendre en silence lorsqu'il serait raisonnable qu'il parlât". S'il le fait, s'il réduit sa défense à un attentisme passif, le juge tiendra pour suffisants les éléments de preuve apportés par le gouvernement demandeur; il attachera pleine force probante à ces éléments; et il formera sur lesdits éléments sa représentation des faits litigieux.
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> . . . Le commencement de preuve, apporté par l'Etat demandeur, suffira à mettre à la charge du gouvernement défendeur la preuve contraire. En d'autres termes, le commencement de preuve, la "prima facie evidence", fera tenir pour vrai -- et jusqu'à preuve contraire -- le fait articulé.[6]

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[6] Unofficial Translation:

> The international judge may base his findings of fact on a commencement of proof if the defendant State does not cooperate in the process of the submission of proof. As the Parker decision declares, the defendant government does not have the right "to wait in silence in cases where it is reasonable that it should speak." If it does so, if it reduces its defense to passive waiting, the judge will accept as sufficient the proof submitted by the plaintiff government; he will give full probative force to the elements of this proof; and he will base his findings of disputed facts on those elements.
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> . . . The commencement of proof, submitted by the plaintiff State, will suffice to shift to the defendant government the burden of proving the contrary. In other words, the commencement of proof, "prima facie evidence," will establish as true -- until proof to the contrary -- the fact asserted.

Id. at 50. See also D. Sandifer, Evidence Before International Tribunals 108, 115-18, 130-31, 150-51, 172-74 (rev. ed. 1975); Witenberg, Onus Probandi devant les juridictions arbitrales, 55 Rev. de Dr. Int'l Pub. 321, 331-35 (1951).

As noted above, Case presented testimony by witnesses at the Hearing, together with a telex that had been sent by one of the witnesses confirming the facts to which he testified. The evidence is sufficient to constitute prima facie proof of the facts alleged: "It does not create a moral certainty as to the truth of the allegation, but provides sufficient ground for a reasonable belief in its truth, rebuttable by evidence to the contrary." B. Cheng, supra, at 324 (footnote omitted). Here no rebuttal evidence was produced.

In view of the foregoing, I would hold the Government of Iran liable to pay the outstanding debts of SSE and EC to Case, together with interest thereon from the date each amount was due to the date the Escrow Agent instructs the Depository Bank to pay the Award. I would also hold that the Government of Iran should bear Cases's reasonable costs of arbitration pursuant to Articles 38 and 40 of the Tribunal Rules.

Dated, The Hague
27 July 1983

Howard M. Holtzmann