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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 129
CHAMBER THREE
AWARD NO. ITL 59 -129-3

SEDCO, INC.,

Claimant,

and

NATIONAL IRANIAN OIL COMPANY
and the ISLAMIC REPUBLIC OF IRAN,

Respondents.

INTERLOCUTORY AWARD

Appearances

For the Claimant:

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Attorney for Claimant
Mr. Carl F. Thorne
President,
SEDCO International, S.A.
Mr. Paul Franzetti
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Mr. Herman E. Malone
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For the Respondents:

Mr. Alahyar Mouri
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Financial Representative
Mr. Abdol Hamid Bigdeli
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Mr. Mehdi Sadri
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Mr. Mohsen Shahrestani
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Mr. Mostafa Zaynoldin
Representative of the National Iranian Oil Company
Mr. Hossein Piran
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Representatives of Social Insurance Organization

Also present:

Mr. John R. Crook
Agent of the United States of America
Mr. José Alvarez
Assistant to the Agent

I. INTRODUCTION

The present Interlocutory Award addresses the standard of compensation to be applied in determining any compensable damages resulting from expropriation as discussed in the previous Interlocutory Award in this Case. Interlocutory Award No. ITL 55-129-3 (28 October 1985). The Tribunal found in that Interlocutory Award, inter alia, that it has jurisdiction over "the direct Claim of SEDCO, Inc. for its shareholder interest in SEDIRAN Drilling Company" ("SEDIRAN") and that this shareholder interest "was expropriated by the Islamic Republic of Iran on 22 November 1979."

The previous Interlocutory Award fully summarizes the previous proceedings in this Case. Subsequent thereto, however, Claimant SEDCO, Inc. ("SEDCO") has further addressed the present issue in a submission filed on 13 December 1985, "Calculating Liquidation Value of Sediran Drilling Company as at 22 November 1979." On 19 December 1985 the Agent of the Islamic Republic of Iran filed a letter urging, inter alia, that this submission be rejected as untimely and prejudicial to Respondents. By its Order filed 6 January 1986 the Tribunal accepted Claimant's submission in part and rejected it in part, and also invited Respondents to file any further comments they might have on it by 14 March 1986, which was done.

II. CONTENTIONS OF THE PARTIES

Claimant contends that its expropriation claim is governed by Article IV(2) of the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran ("Treaty of Amity"):[1]

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[1] Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, signed 15 August 1955, entered into force 16 June 1957, 284 U.N.T.S. 93, T.I.A.S. No. 3853, 8 U.S.T. 899.

> Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

In SEDCO's view, Article IV(2) requires payment of the "Full Equivalent of the Property Taken," meaning "the fair market value of expropriated property, a value which includes lost profits."[2] In Claimant's view the Treaty of Amity was in

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[2] In the event, however, Claimant has not sought the value of SEDIRAN as a going concern. Instead it seeks only its 50 per cent share of what it calls "the Company's liquidation value as at 22 November 1979", assuming, "in effect, the winding up of Sediran's affairs and the disposition of its assets - most of which were movable - on the open market."

The assets of SEDIRAN consisted principally of ten drilling rigs and associated transportation equipment, spare parts and camps. SEDIRAN's assets also included, however, warehouse facilities, land and other fixed assets. Furthermore, the assets of SEDIRAN listed by SEDCO in a reconstructed balance sheet as of 22 November 1979 encompass as well a substantial amount of receivables based on allegedly unpaid invoices submitted under two drilling contracts.

With respect to the drilling rigs, Claimant additionally seeks damages for the loss of use of the rigs for a nine month period, the time allegedly needed to replace a rig. Claimant labels this part of its claim as damages for "lost profits." This loss appears, however, to be a direct loss resulting from the unavailability of the rigs to Claimant for use elsewhere and as such is damnum emergens.

According to Claimant, the liquidation value thus asserted constitutes "the absolute minimum measure of damages", whereas "[a]ny considered analysis based upon the valuation of Sediran as an ongoing business enterprise as at 22 November 1979 . . . would yield a higher equity value."

(Footnote Continued)

force at the time of the expropriation and continues to be in force today.

Alternatively, SEDCO claims to be entitled to full ("prompt, adequate and effective") compensation by virtue of customary international law. SEDCO contends that in the case of an ongoing business enterprise like SEDIRAN the full market value means going concern value including not only net assets but also good will and anticipated future earnings.[3]

Noting that in any event "unlawful takings are subject to the strictest compensation requirements," Claimant argues further that the expropriation of SEDIRAN was unlawful on three grounds: (1) because Iran failed to pay compensation, (b) because consequently it violated the Treaty of Amity, and (3) because Iranian law was incorrectly applied to SEDIRAN.

Respondents deny the applicability of the Treaty of Amity as a result of (1) the changes in U.S.-Iranian relations since the Iranian Revolution, (2) the signing of the Claims Settlement Declaration and (3) the fact that the

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(Footnote Continued)

SEDCO also claims interest computed from the date of the taking.

Claimant originally valued the property as of 30 June 1979, the last day of the last financial year for which SEDIRAN's accounting records are fully available. After the Tribunal found that the expropriation took place on 22 November 1979, Claimant submitted on 13 December 1985 a new balance sheet adjusted to reflect the situation on the date of the taking. No adjustments have been made, however, to the alleged value of the oil rigs as of 30 June 1979. In addition to adjustments reflecting the finding concerning the date of expropriation, Claimant purported to make certain modifications (an increase of $4,602,072) to its earlier calculation of damages. These other changes were rejected as untimely in the Tribunal's Order of 6 January 1986.

[3] But see note 2 supra.

Treaty of Amity's protections allegedly do not extend to non-U.S. nationals. Moreover, Respondents argue, the reference to "just compensation" to be found in the Treaty of Amity "embodied nothing but the prevailing principles and rules of international law and that international law has experienced a lot of evolutions so far, and therefore the 'just compensation' notion evolved along with the international law and, above them all, in line with U.N. Resolutions." The standard of "full" (or "prompt, adequate and effective") compensation in fact has never been the standpoint of international law, Respondents assert. Customary international law, according to Respondents, requires "appropriate" compensation to be measured in the light of all the circumstances of the case, and assessed with "unjust enrichment" as the guiding principle. Should any enrichment on the part of Respondents entitling Claimant to compensation be found, such compensation should be calculated according to the net book value of the company, a valuation basis allegedly widely used in compensation settlements in the oil industry.

III. CONCLUSIONS OF THE TRIBUNAL

The Parties disagree on the applicability of the Treaty of Amity to this Case. The Tribunal notes, however, that in Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2 (19 March 1986) the Tribunal held that Article IV (2) of the Treaty was "clearly applicable to [the investment at issue in that Case] at the time the claim arose" and that "whether or not the Treaty is still in force today, it is a relevant source of law on which the Tribunal is justified in drawing in reaching its decision."[4] We find the reasons set

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[4]The only objection raised in this Case not addressed by the award in Phelps Dodge, namely the application of the Treaty of Amity to non-U.S. nationals, is no longer relevant given the holding in the previous Interlocutory Award in this Case that the claim concerning the expropriation of SEDIRAN is a direct shareholder claim of SEDCO.

forth in that Award, at 14-16, convincing and therefore conclude that the rule of law set forth in Article IV (2) of the Treaty is applicable to the issue of compensation due Claimant in the present case for the taking of its property on 22 November 1979.

It is nonetheless necessary, however, to consider what is the applicable standard of compensation under customary international law due to Respondents' argument that the said Article simply incorporates customary law as it may exist from time to time.

As Claimant seeks only the liquidation value of its equity interest in SEDIRAN[5] the scope of this Interlocutory Award necessarily extends only to the determination of the standard of compensation to be applied in deciding that claim.

Although Respondents argue otherwise , it is the Tribunal's conclusion that "the overwhelming practice and the prevailing legal opinion" before World War II supported the view that customary international law required compensation equivalent to the full value of the property taken. See Dolzer, "New Foundations of the Law of Expropriation of Alien Property", 75 Am. J. Int'l L. 553, 558-559 (1981). It is only since those days that this traditional legal standpoint has been challenged by a number of States and commentators.[6]

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[5] See note 2 supra.

[6] See, e.g., Dolzer, "Expropriation and Nationalization", in 8 Encyclopedia of Public International Law 214 (1985), who, when summarizing the current situation, has stated that "the opinions expressed by industrialized States and developing States with respect to the rules of international law are widely divergent, and the conduct of States in actual practice coincides with none of these expressed views." Id. at 216.

Assessment of the present state of customary law on this subject on the basis of the conduct of States in actual practice is difficult, inter alia, because of the questionable evidentiary value for customary international law of much of the practice available. This is particularly true in regard to "lump sum" agreements between States (a practice often claimed to support the position of less than full compensation), as well as to compensation settlements negotiated between States and foreign companies. Both types of agreements can be so greatly inspired by non-judicial considerations - e.g., resumption of diplomatic or trading relations - that it is extremely difficult to draw from them conclusions as to opinio juris, i.e., the determination that the content of such settlements was thought by the States involved to be required by international law.[7] The International Court of Justice[8] and international arbitral tribunals[9] have cast serious doubts on the value of such settlements as evidence of custom. As this Tribunal itself has stated in another context, "considerations underlying settlements often include factors other than elements of law." United States of America and Islamic Republic of Iran, Decision No. DEC 8-A1-FT (14 May 1982), reprinted in 1 Iran-U.S.C.T.R. 144 at 151. The bilateral investment treaty practice of States, which much more often than not reflects the traditional international law standard of compensation for expropriation, more nearly constitutes an accurate measure of the High Contracting Parties' views as to customary international law, but also carries with it some of the

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[7] As regards settlements between a State and a foreign company, the latter's practice in any case could not be interpreted necessarily to reflect opinio juris of the State of its nationality.

[8] See, e.g., Barcelona Traction (Belg. v. Spain), I.C.J. Rep. 1970, p. 3, at 40 (Judgement of 5 Feb. 1970).

[9] See, e.g., Kuwait v. The American Independent Oil Company ("AMINOIL"), paras. 156-157 (Reuter, Sultan & Fitzmaurice arbs., Award of 24 Mar. 1982), reprinted in 21 Int'l Legal Mat'ls 973, 1036 (1982).

same evidentiary limitations as lump sum agreements. Both kinds of agreements involve in some degree bargaining in a context to which "opinio juris seems a stranger."[10]

Those arguing that there has been an erosion of the traditional international law standard of full compensation often cite also resolutions and declarations of the United Nations General Assembly. Respondents in this Case, for example, refer in particular to the Declaration on the Establishment of a New International Economic Order[11] and the Charter of Economic Rights and Duties of States ("Charter")[12], as well as the earlier Resolution 1803, of 14 December 1962, on Permanent Sovereignty over Natural Resources.[13]

United Nations General Assembly Resolutions are not directly binding upon States[14] and generally are not evidence of customary law.[15] Nevertheless, it is generally accepted that such resolutions in certain specified circumstances may be regarded as evidence of customary

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[10] AMINOIL, supra note 9 at para. 157.

[11] G.A. Res. 3201, 28 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974), reprinted in 13 Int'l Legal Mat'ls 715 (1974).

[12] G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974), reprinted in 14 Int'l Legal Mat'ls 251 (1975).

[13] G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5344 (1962), reprinted in 57 Am. J. Int'l L. 710 (1963).

[14] According to Article 11 of the United Nations Charter they are only non-binding recommendations. Reprinted in I. Brownlie (ed.), Basic Documents in International Law 2 (1978). Nor are such resolutions included among the accepted sources of international law as listed in Article 38 of the Statute of the International Court of Justice. Reprinted id. 267.

[15] Schwebel, "The Legal Effect of Resolutions and Codes of Conduct of The United Nations," 7 Forum Internationale (1985).

international law or can contribute - among other factors - to the creation of such law. See, e.g., de Aréchaga, "International Law in the Past Third of a Century", 159 Recueil des Cours 1, 30-34 (1978); Akehurst, "Custom as a Source of International Law," 47 Brit. Y.B. Int'l L. 1, 5-7 (1974-75); I. Brownlie, Principles of Public International Law 14-15, 696-697 (1979).

There is considerable unanimity in international arbitral practice and scholarly opinion that of the resolutions cited above, it is Resolution 1803, and not either of the two later resolutions which at least reflects, if it does not evidence, current international law. See Texaco Overseas Petroleum Company/California Asiatic Oil Company and Libyan Arab Republic ("TOPCO") (Dupuy arb., Award of 19 January 1977), paras. 86-88, reprinted in 17 Int'l Legal Mat'ls 1, at 30 (1978); AMINOIL, supra, para. 143, 21 Int'l Legal Mat'ls at 1032; Chilean Copper Case (L.G. Hamburg 1973), reprinted in 12 Int'l Legal Mat'ls 251, 276 (1973); Separate Opinion of Judge Lagergren in INA Corporation and Islamic Republic of Iran, Award No. 184-161-1 (15 August 1985); I. Brownlie, Principles of Public International Law 14-15 (1979); R. Dolzer, Eigentum, Enteignung und Entschädigung im Geltenden Völkerrecht 53-54 (1985).

The pertinent part of Resolution 1803 provides:

> Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication . . . . (Emphasis added.)

This provision has been argued, on the one hand, to express the traditional standard of compensation with different words and, on the other hand, to signify an erosion of this standard.[16]

Those learned writers who have argued, however, that the adoption of Resolution 1803, against the background of general recognition of the permanent sovereignty of States over natural resources, evidenced or brought about a change in customary international law so that less than full compensation should be the applicable standard, have focused mainly on the possible impact of the Resolution on the issue of compensation in the context of a formal systematic large-scale nationalization, e.g., of an entire industry or a natural resource, a circumstance not argued by either of the Parties to have been present in the instant case.[17]

Opinions both of international tribunals and of legal writers overwhelmingly support the conclusion that under customary international law in a case such as here presented - a discrete expropriation of alien property - full compensation should be awarded for the property taken.[18] This is true whether or not the expropriation itself was otherwise lawful. This conclusion is illustrated by the award rendered in Libyan American Oil Company and Libyan Arab Republic ("LIAMCO") (Mahmassani arb., Award of 12 April

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[16]For a more detailed discussion presenting arguments for both views, see, on the one hand, Separate Opinion of Judge Holtzmann in INA Corporation and Islamic Republic of Iran, Award No. 184-161-1 (15 Aug. 1985), and, on the other hand, Separate Opinion of Judge Lagergren filed in the same case.

[17]Such writers, in arguing for a standard of "partial" rather than "full" compensation, also have concentrated on discounting elements of damage not claimed here, such as lost profits or value as a going concern.

[18]As some of these opinions are expressed in the context of large-scale nationalization cases, they should a fortiori weigh heavily in a case such as the one here presented.

1977), reprinted in 20 Int'l Legal Mat'ls 1, probably the only one among the recent arbitrations concerning nationalization of oil concessions which can be argued in any way to have expressed doubt about the traditional standard of full compensation.[19] The arbitrator in LIAMCO found that the concessionaire had been lawfully deprived of its property and went on to state that "there is no difficulty [in concluding] that the indemnity shall include as a minimum the damnum emergens, e.g. the value of the nationalized corporeal property, including all assets, installations, and various expenses incurred."[20] Compensation at full value for damnum emergens thus was held as an undisputed minimum standard even in what the arbitrator regarded as a lawful nationalization.

Full compensation as the standard to be applied in expropriations such as was suffered by the Claimant here finds express support even among scholars who otherwise appear to view with sympathy the position of developing nations for a standard requiring less. Brownlie has concluded that "[e]xpropriation of particular items of property [as distinct from nationalization] is unlawful unless there is provision for the payment of prompt, adequate, and effective compensation." I. Brownlie, Principles of Public International Law 538 (1979). See also Amerasinghe, "The Quantum of Compensation for Nationalized Property", in III

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[19] Cf. Clagett, "The Expropriation Issue Before the Iran-United States Claims Tribunal: Is 'Just Compensation' Required by International Law or Not?", L. & Pol'y Int'l Bus. 813, 858 (1984); Gann, "Compensation Standard for Expropriation," 23 Col. J. Transnat'l L. 615, 633 (1985).

[20] LIAMCO, p. 32, 21 Int'l Legal Mat'ls at 67. This statement of principle was made in connection with a general discussion concerning international law on the subject, and was reached without regard to the fact that in that particular case the claimant's right to full compensation for its assets was further strengthened by a contractual provision according to which the concessionaire had the right to remove his physical assets after termination of the concession. LIAMCO, p. 155, 21 Int'l Legal Mat'ls at 79.

Valuation of Nationalized Property in International Law 91, 114 (R. Lillich ed. 1975) ("The argument that the law has changed has been made, not in regard to what may be called an 'individual expropriation' . . . but in regard to the case of nationalization"); H. Lauterpacht, Oppenheim's International Law 352 (8th ed., 1955).

Finally, that international law requires full compensation in cases such as that now before us is supported by the practice of this very Tribunal. Thus in one case concerning expropriation of Claimant's 50 per cent share in an Iranian entity created for the purpose of performing certain engineering and architectural services, the Tribunal stated that "Claimant is entitled under international law and general principles of law to compensation for full value of the property of which it was deprived." Tippets, Abbett, McCarthy, Stratton and Islamic Republic of Iran, Award No. 141-7-2 at 10 (29 June 1984).[21]

The Tribunal thus holds that Claimant must receive compensation for the full value of its expropriated interest in SEDIRAN, as claimed, whether viewed as an application of the Treaty of Amity or, independently, of customary international law, and regardless of whether or not the expropriation was otherwise lawful.[22]

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[21] In practice this Tribunal has not applied "partial" or less than "full" compensation in any case. This was done neither in INA Corporation and Islamic Republic of Iran, Award No. 184-161-1 (13 Aug. 1985), nor in American International Group and Islamic Republic of Iran, Award No. 93-2-3 (19 Dec. 1983), reprinted in 4 Iran-U.S.C.T.R. 96, both of which concerned nationalization of insurance companies. In Award No. 93-2-3 the Tribunal valued the company as a going concern, holding that "even in a case of lawful nationalization the former owner of the property is normally entitled to compensation for the value of the property taken." Id. at 14-15, 4 Iran-U.S.C.T.R. at 105.

[22] Claimant also has claimed interest at the rate of 12 per cent from the date of the taking. In previous cases
(Footnote Continued)

IV. Award of the Tribunal

For the foregoing reasons,

THE TRIBUNAL HEREBY AWARDS AS FOLLOWS:

SEDCO, INC. is entitled to be compensated, as claimed, for the full value, if any, of its equity interest in SEDIRAN Drilling Company which was expropriated on 22 November 1979.

The quantum of compensation and the rate of interest will be determined in a subsequent Award.

Dated, The Hague,
27 March 1986

Nils Mangård
Chairman
Chamber Three

In the name of God

Charles N. Brower
Separate Opinion

Parviz Ansari Moin
Dissenting Opinion

(Footnote Continued)
where a compensable taking of property has been found the Tribunal always has awarded interest from such date. In accordance with this practice and the relevant principles of international law Claimant is entitled to interest from the date of the taking, 22 November 1979. The rate of interest will be decided in the subsequent award on the quantum of damages.