IRAN-U... TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

38-79
۳۸-۷۹

ORIGINAL DOCUMENTS IN SAFE

Case No. 38 Date of filing: 18 APRIL 84

** AWARD - Type of Award _____
- Date of Award _____
_____ pages in English _____ 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 MR. MOSK

- Date 17 APR 84
20 pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

- Date _____
_____ pages in English _____ pages in Farsi

R/12

CASE NO. 38

CHAMBER THREE

AWARD NO. 122-38-3

SCHERING CORPORATION,

Claimant,

v.

THE ISLAMIC REPUBLIC OF IRAN;

Respondent.

DISSENTING OPINION OF RICHARD M. MOSK

I dissent to the Award in this case.

Schering Corporation ("Claimant") and its related companies (collectively "Schering") are major manufacturers and vendors of pharmaceutical products throughout the world.

Claimant and its parent company are United States corporations. Schering had been doing business in Iran for a number of years. It did so, in large part, through a subsidiary in Iran, Schering Corporation (Iran) Ltd. ("company" or "Schering Iran"), which in turn utilized an Iranian distributor. As part of the importation process, whenever Schering shipped goods to Iran, Schering obtained approval for payment in foreign exchange. It was obviously Claimant's intention to do business in Iran (by itself or through related companies) in order to generate income and profits for itself.

Claimant has established that, through no fault of its own, it did not receive substantial amounts of foreign currency for products and services supplied in Iran. That Schering Iran may have some of these monies is of little consequence to Claimant, as such monies cannot be converted under current Iranian law and practice into a foreign currency and transferred out of Iran. Despite the obvious injustice of this situation, the Tribunal has rejected all but a small portion of the claim. I shall discuss a number of issues which I believe the Tribunal either did not discuss adequately or decided incorrectly.

STANDARD OF PROOF

In my view, the Tribunal has either weighed the evidence incorrectly or has imposed on Claimant an unduly

strict standard of proof in this essentially commercial case. This is especially so in view of the Respondent's failure to produce relevant evidence. See William L. Pereira Associates, Iran v. Islamic Republic of Iran, Award No. 116-1-3 (Concurring Opinion of Richard M. Mosk) (March 19, 1984). It is regrettable that the Tribunal has never discussed the standard of proof it imposes on parties.

A striking example of the Tribunal's errors is the Tribunal's conclusion that four Schering drafts (referred to in the Tribunal's opinion as "several additional drafts") were not, prior to the time the Workers' Council took over control of Schering Iran, presented to the proper authorities for the purpose of exporting the amounts of the drafts in foreign currency.

The Tribunal acknowledges that shortly before the alleged presentation of these four drafts for transfer in foreign exchange, two other drafts were submitted for such transfer and were rejected improperly. As to the four drafts alleged by Claimant to have been submitted and rejected, the Respondent's only "evidence" of non-submission is Bank Markazi's bare assertion that it did not receive such drafts. Substantial evidence contradicts this assertion. For over a decade such drafts were routinely submitted for payment, having been approved by Bank Markazi

prior to the importation of the pharmaceuticals.[1] Shortly before the alleged rejection of the four drafts, Claimant submitted and Bank Markazi improperly rejected two other drafts. Two contemporaneous memoranda to the file by the company's Controller indicate that the four drafts were submitted for payment and rejected. Schering Iran's records and audit reports show that these four drafts were valid, submitted for payment and rejected. These company records were kept in the ordinary course of business, were in the

---

[1] The foreign currency regulations of Iran have required that all imports of authorized goods receive prior approval by the Ministry of Economy and the Central Bank. Medicines were classified as "authorized" goods under Iranian import regulations. The foreign currency regulations also provided that "[a]ll orders for imports must be registered with the Bank Markazi Iran through an authorized bank registration effected against a pro forma invoice." For a fee, Schering Iran registered such imports. This is evidenced by the Foreign Trade Bank registration number entered on the sample invoice submitted. Claimant contends that for thirteen years, customs officials would not clear goods for entry without evidence of Bank Markazi's approval in the form of a bank registration number. The bank registration number, in addition to authorizing the entry of the goods, also authorized the foreign currency transfer necessary for payment. As the foreign currency regulations state, "[a]pproval of the shipping documents by the authorized banks represents approval of the foreign exchange transfer." Thus, the foreign currency transfer did not appear to require any approval of the Central Bank after issuance of the registration number. See Foreign Currency Regulations, ECHO of Iran Supplement No. 188 (1972). These foreign currency regulations pertaining to imports remained in force throughout the relevant periods of this dispute. See the International Monetary Fund's Annual Report on Exchange Arrangements and Exchange Restrictions for the years 1974-1981. In essence, the Government of Iran, to encourage imports, promised foreign suppliers that when a bank registration number was obtained for a specific import transaction, the necessary foreign exchange transfer for payment was authorized. See F. Mann, The Legal Aspect of Money 405, 496-499 (4th ed. 1982).

handwriting of the company's Controller and were prepared long before this litigation was commenced. These records indicate that the four drafts were submitted prior to the time that the Workers' Council began interfering with the company's business. The company's employees suggested that such drafts were submitted and not approved. There is no plausible explanation as to why the drafts would not have been submitted in the ordinary course of business or as to what was done with the drafts if they were not submitted as alleged.

The material submitted by Claimant at least constitutes prima facie evidence that the drafts were submitted. Claimant explained that the Workers' Council prevented Claimant from obtaining more evidence in Iran. A mere assertion that the drafts were not received cannot be deemed to be an adequate rebuttal. Indeed, the relevant Iranian banks should have records listing the submissions of drafts for foreign exchange transfers during the period in question; yet, they failed to produce them. Such records would likely indicate if the drafts in question were submitted or not.

Under these circumstances, applying any reasonable standard of proof, a fact-finder should have concluded that the four drafts in question were submitted for payment in foreign exchange and rejected.

Parenthetically, it is questionable as to whether the Tribunal should have imposed upon Schering Iran an obligation to make a further demands upon Iranian banking authorities. It appears to have been Iran's policy to preclude foreign exchange transfers except perhaps by permitting the issuance of letters of credit in foreign currency to pay for goods to be imported in the future. At the time in question, it was clear that there would be no approval of any foreign exchange transfer for goods already imported.

JURISDICTION

I question the Tribunal's frequent practice of deciding cases on the merits without deciding jurisdictional issues. Normally the merits of a case should not be reached unless the Tribunal has established its jurisdiction to hear the case. In this case the Tribunal is unwilling to decide jurisdictional issues on the theory that the Claimant will not prevail on the merits. Accordingly, I will discuss the jurisdictional issues whether or not addressed by the Tribunal.

Claim of Schering Corporation (Puerto Rico)

One of the claims is based on a claim by Schering Corporation (Puerto Rico), which is a United States corporation that is wholly-owned by Schering Plough, the parent company of Claimant. Claimant asserts that Schering Corporation (Puerto Rico) assigned its claim to Claimant before the filing of the claim, and thus the claim is one

that has been owned continuously by a United States national from the date on which the claim arose to January 19, 1981, as required for Tribunal jurisdiction by the Claims Settlement Declaration.[2] Article VII, paragraph 2. The document of assignment is labelled a "Power of Attorney." By that document Claimant was given the authority by Schering Corporation (Puerto Rico) to maintain any claim of Schering Corporation (Puerto Rico) in the name of Claimant and to "recover and receive" all sums owing. Whether this document constituted an assignment or a power of attorney, it is clear that the claim being asserted has been owned at the appropriate times by a United States national which has a right to make the claim. Either Claimant was the assignee of the claim of Schering Corporation (Puerto Rico) or it was bringing the claim on behalf of Schering Corporation (Puerto Rico). In either situation the claim is a claim of a United States national over which the Tribunal has jurisdiction.

In the event of any doubt about this issue, the Tribunal should have granted Claimant's request for an amendment adding Schering Corporation (Puerto Rico) as a party. Such an amendment would cause no prejudice to Respondent and would not be barred by the provision of the

---

[2] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran.

Claims Settlement Declaration requiring that claims be filed by January 19, 1982. American International Group, Inc., et al. v. Islamic Republic of Iran, et al., Award No. 93-2-3, (December 19, 1983); Article 20, Tribunal Rules.

The Foundation For The Oppressed

With regard to the Claimant's claim against Firooz Corporation, which corporation had been taken over by The Foundation for the Oppressed, Respondent has denied that the Tribunal has jurisdiction over the claim, because, according to Respondent, The Foundation for the Oppressed is not an agency or instrumentality of, or entity controlled by, the Government of Iran - which status is a jurisdictional requirement under Article II, paragraph 1, and Article VII, paragraph 3, of the Claims Settlement Declaration.

The "Legal Bill concerning the Articles of Association of The Foundation for the Oppressed ("Bonyad Mostazafan") as approved by the Revolutionary Council of the Islamic Republic of Iran," dated July 13, 1980,[3] states that the Foundation was established by the order of Imam Khomeini and with the approval of the Revolutionary Council. The Foundation instigates and implements, along with other governmental agencies, the confiscation of private property. It

---

[3] The Foundation was established on March 5, 1979. The cited Articles of Association supersede an earlier version adopted on June 29, 1979. See Articles of Association, Article 39, reprinted in G. Vafai, VIII Commercial Laws of the Middle East, Iran, Book 2 at 5, 16 (1982).

also manages and operates such confiscated properties. Upon the dissolution of the Foundation, its properties are to revert to the Government. Its President and Council are appointed by Imam Khomeini.

The suggestion in this context that there is some distinction between officials in their religious capacity and in their governmental capacity has no merit. See Iranian Constitution, Articles 1-5, 94, 96, 107.

Thus, The Foundation for the Oppressed is an agency or instrumentality of, or entity controlled by, the Government of Iran, and consequently the Tribunal has jurisdiction over it.

Schering Iran

It is contended that the Tribunal has no jurisdiction over a claim based on amounts allegedly owing to Schering Iran, even though Schering Iran is a subsidiary of Schering, because such a claim would, in effect, be by an Iranian company against its own Government. The claim, however, is an indirect claim by Claimant, a United States national, which claim is authorized by the Claims Settlement Declaration. Article VII, paragraph 2; see Starrett Housing Corporation v. Government of the Islamic Republic of Iran, Interlocutory Award No. 32-24-1 (December 19, 1983) and the concurring opinion thereto by Howard M. Holtzmann (December 20, 1983). Thus the Tribunal has jurisdiction over the claim.

Workers' Council

There is evidence suggesting that the Workers' Council is an agency or instrumentality of, or entity controlled by, the Government of Iran. Unfortunately, Respondent has produced little evidence on the past and present status of the Workers' Councils.

Workers' Councils were organized pursuant to Article 104 of the Iranian Constitution "[i]n order to ensure Islamic equity and collaboration in preparation of programs and to bring about the harmonious progress of all units of production. . . ." (Algar trans. 1980). In June 1980 there was enacted a "Legal Bill Establishing Islamic Workers' Councils for Manufacturing, Industrial, Agricultural and Service Units."[4] (Translation supplied to Tribunal). Article 4 thereof provides that one of the purposes of the Workers' Councils is to "buttress the foundations of the Islamic Republic of Iran." Article 8 provides that the Workers' Councils are to "increase the people's sense of their duty to safeguard and defend the Revolution. . . ." "The Ministry of Labor and Social Affairs is responsible for holding elections and seeing that they are properly conducted, and for deciding the exceptions to this Article." Id. at Article 7. There are to be "supervisory board[s]" of Workers' Councils in various

[4] There were earlier directives regarding the formation of Workers' Councils.

regions which contain a "governmental representative, selected by the Ministry of Labor and Social Affairs," who is to serve as "president of the supervisory board for council affairs." Id. at Articles 10-12. The Office of Employment determines where such boards are to be convened. Article 13 provides that "[i]n order to establish supervisory boards for council affairs, regulate their programs and oversee their activities, as well as to provide the necessary coordination, a bureau to be known as the 'coordination bureau over the supervisory boards for council affairs' will be created within the Ministry of Labor and Social Affairs." Article 16 provides that the Ministry of Labor and Social Affairs is responsible for insuring that the laws concerning the Workers' Councils "are properly implemented." Subsequent laws were enacted concerning the formation and operation of the Workers' Councils.

The Workers' Councils are not just private labor organizations subject to Government regulation. They are not created solely to provide harmonious employer-employee relations. Rather they appear to be Government creations, subject to Government supervision and regulation. Unlike general labor regulatory laws that deal with independently created labor unions - founded solely to protect the rights and interests of workers - Iranian law has basically required the formation of Workers' Councils, dealt with their internal operation and specified that they serve more

than the interests of the workers.[5] Indeed, at the Hearing, counsel for Iran likened the Workers' Councils to various workers' organizations, including Russian "soviets." Moreover, in a memorandum to the management of Schering Iran, a representative of the Workers' Council of Schering Iran stated with reference to company business that he was "responsible to [the] Iran revolutionary government and people."

The Tribunal fails to discuss fully the applicable laws and evidence concerning the Workers' Council. In view of the absence of any significant evidence from the Respondent on the issue, the Tribunal should have concluded that the Workers' Council was an entity controlled by the Government of Iran and is therefore subject to the Tribunal's jurisdiction.

EXCHANGE RESTRICTIONS

Claimant has based its claim, in part, on the alleged invalidity of Iran's exchange control regulations, both on their face and as applied. The Tribunal avoids this issue by asserting that the failure of Claimant to obtain its money in foreign currency was not based on Iran's foreign exchange control regulations. It cannot be said that the existence of such regulations played no role in the

---

[5] The Workers' Council in this case justified its actions against its own company by accusing it and its "foreign partners" of having "selfish, imperialist motives" and of intending to "gain higher profits and plunder the Iranian people."

inability of Claimant to obtain its monies. Those regulations most likely influenced the Workers' Council's actions. Moreover, as discussed above, I believe that certain drafts to be paid in foreign exchange were submitted to, and rejected by, Iranian banking authorities. Also, both parties raised the issue as to the validity of the Iranian exchange restrictions. Accordingly, even though the Tribunal rendered no decision with regard to Iran's foreign exchange regulations, I will discuss those regulations and their application.

Even if Iran's foreign exchange restrictions were valid, they should not have been applied in this case. As noted above, the documents relating to the importation of the goods in question constituted approval of foreign exchange transfers. It is also important to recognize that the Tribunal, by holding illegal Bank Markazi's refusal to approve the conversion of two drafts, acknowledged that there are at least some restrictions on the right of Iran to impose and enforce its foreign exchange restrictions.

The exchange restrictions could constitute a taking subject to compensation under international law. This is dependent upon such factors as whether such restrictions are non-discriminatory, whether such restrictions are justified on bona fide economic grounds and whether such restrictions, in effect, extinguish a foreign national's enjoyment and use of its currency. See M. Shuster, The Public International

Law of Money 73 et seq. (1973); F. Mann, The Legal Aspect of Money 472 et seq. (4th ed. 1982). These factors were not addressed adequately in this case.

Whether or not the Iranian exchange restrictions constitute a compensable taking under customary international law, they clearly violate the Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, signed August 15, 1955, entered into force June 16, 1957, 284 U.N.T.S. 93, 8 U.S.T. 899, T.I.A.S. No. 3853, ("Treaty of Amity") and the Articles of the Agreement of the International Monetary Fund, signed July 22, 1944, entered into force Dec. 27, 1945, 2 U.N.T.S. 39, as amended ("Fund Agreement"), to which both Iran and the United States are original parties. The terms of the Treaty of Amity remain binding on Iran. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) 1980 I.C.J. 3, 28 (Judgment of May 24, 1980); ITT Industries, Inc. v. The Islamic Republic of Iran, Award No. 47-156-2 (Concurring Opinion of George H. Aldrich) (May 26, 1983); American International Group Inc. et al. v. Islamic Republic of Iran et al., Award No. 93-2-3 (Concurring Opinion of Richard M. Mosk) (December 30, 1983).

The terms of the Treaty of Amity and the Fund Agreement can be invoked by Claimant. See American International Group Inc. et al. v. Islamic Republic of Iran, et al., (Concurring Opinion of Richard M. Mosk), (December 30, 1983); Kalamazoo Spice Extraction Co. v. The Provisional

Military Government of Socialist Ethiopia __ F.2d __, No. 82-1521 slip op., (6th Cir. March 9, 1984); American International Group Inc. v. Islamic Republic of Iran, 493 F. Supp. 522 (D.D.C. 1980).

Article VII of the Treaty of Amity provides as follows:

> 1. Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party, except (a) to the extent necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people, or (b) in the case of a member of the International Monetary Fund, restrictions specifically approved by the Fund.
>
> 2. If either High Contracting Party applies exchange restrictions, it shall promptly make reasonable provision for the withdrawal, in foreign exchange in the currency of the other High Contracting Party, of: (a) the compensation referred to in Article IV, paragraph 2, of the present Treaty, (b) earnings, whether in the form of salaries, interest, dividends, commissions, royalties, payments for technical services, or otherwise, and (c) amounts for amortization of loans, depreciation of direct investments and capital transfers, giving consideration to special needs for other transactions. If more than one rate of exchange is in force, the rate applicable to such withdrawals shall be a rate which is specifically approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, an effective rate which, inclusive of any taxes or surcharges on exchange transfers, is just and reasonable.
>
> 3. Either High Contracting Party applying exchange restrictions shall in general administer them in a manner not to influence disadvantageously the competitive position of the commerce, transport or investment of capital of the other High Contracting Party in comparison with the commerce, transport or investment of capital of any third country; and shall afford such other High Contracting Party adequate opportunity for consultation at any time regarding the application of the present Article.

It would appear that given such a treaty provision, the state promulgating exchange restrictions has the burden to justify their existence. See Note, Foreign Exchange Controls: A Survey of the Legal Protection Available to the American Investor, 49 Notre Dame Law. 589, 607 (1974). In the instant case there is no evidence suggesting that the restrictions were "necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its [Iran's] people." (Emphasis added). Neither is there a showing of any approval of such restrictions by the International Monetary Fund. There is no evidence before the Tribunal concerning conditions which might justify Iran's foreign exchange regulations. Indeed there are reports that Iran's foreign exchange reserves have, at the relevant times, been adequate. See 130 U.S. Cong. Rec. S.1679, S.1680, S.1683, n. 33 (daily ed. Feb. 27, 1984).

Since the Tribunal can only act on evidence before it (D. Sandifer, Evidence Before International Tribunals 397-402 (Rev. ed. 1975)) a conclusion that Iran's foreign exchange restrictions comply with the Treaty of Amity could not be justified.

Even if Respondent had shown such necessity for its foreign exchange restrictions, it is still obligated under the Treaty of Amity to provide for prompt and reasonable withdrawal of currency in dollars. There is no evidence

before the Tribunal in the instant case that any such provision has been made. Thus, the Iranian foreign exchange regulations violate the terms of the Treaty of Amity.

Moreover, these foreign exchange restrictions violate the terms of the Fund Agreement. In 1974, Iran, in essence, eliminated its then-existing exchange controls. Thereafter, in order to reintroduce foreign exchange restrictions relating to current transactions, Iran needed the approval of the International Monetary Fund, by virtue of Article VIII of the Fund Agreement. See Evans, Current and Capital Transactions: How the Fund Defines Them, 3 Fin. & Dev. 30, 31 (1968); J. Horsefield, The International Monetary Fund 1945-1965 - Volume I: Chronicle 248-50 (1969). There is no evidence that such approval has been given. See 130 U.S. Cong. Rec. S.1679, S.1681 (daily ed. Feb. 29, 1984).[6]

In short, the Government of Iran, by enacting the foreign exchange regulations at issue, by making no provision for the foreign exchange of monies, and by not applying any articulated grounds for decisions with respect to the repatriation of money is in violation of the terms of the Treaty of Amity and of the Fund Agreement.

---

[6] The transactions in the instant case were clearly current transactions. See Article XIX(i), Fund Agreement.

STATE RESPONSIBILITY

Claimant asserts that even if the Workers' Council was not technically an agency or instrumentality of, or entity controlled by, the Government of Iran, the Government of Iran still is legally responsible under international law for the actions of the Workers' Council.

A state may be responsible under international law for its failure to protect an alien from injury from activities which are criminal or generally recognized to be criminal or which are offenses against public order, when the state, inter alia, fails to take reasonable measures to prevent or detect such conduct or to impose sanctions upon those responsible. See, e.g., Restatement (Second) of Foreign Relations Law of the United States §183 (1965). Moreover, under certain circumstances a state may have a duty to offer greater protection to aliens when it is aware of substantial hostility directed towards those aliens. See Yates, "State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era", in International Law of State Responsibility for Injuries to Aliens 213, 232 (R. Lillich ed. 1983).

In the instant case, the evidence shows that the Workers' Council took over control of Schering Iran. It demanded and obtained signatory powers on bank accounts and appropriated company money. The Workers' Council justified its actions as being necessary against perceived "imperialist motives" of the company and its "foreign

managers." The Workers' Council's threat to take company monies unless certain actions were taken and its taking of such monies, as well as other actions, were acts contrary to public order and Iranian law .

In addition, the Respondent was aware of hostility towards Americans in Iran. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) 1980 I.C.J. 3, 32-33 (Judgement of May 24, 1980). In 1980, Claimant's United States bank made inquiries to Iranian State banks concerning payments on drafts. Normally such inquiries would have been made by Schering Iran. The inquiries by Claimant's bank arguably should have put Respondent on notice of the actions directed at Schering.

It is unfortunate that the Tribunal has failed to discuss in any detail the facts and legal questions surrounding the issue of state responsibility raised by the Claimant.

CONCLUSION

The Tribunal has denied most of Claimant's claims with an opinion that deals erroneously and inadequately with the contentions, facts and law. The Tribunal's opinion, issued over a year and a half after the hearing in this case, should be evaluated in large part for the issues it avoids and its failure to articulate the standards it applies.

For the foregoing reasons, I dissent from the Award.

Dated, The Hague
17 April 1984

Richard M. Mosk