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IRAN-UNITED STATES CLAIMS TR

دیوان داوری دعاوی ایران - ایالات متحده

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Case No. 38 Date of filing: 6 JUN 84

** AWARD - Type of Award _____
- Date of Award _____
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** DECISION - Date of Decision _____
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** CONCURRING OPINION of _____

- Date _____
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** SEPARATE OPINION of _____

- Date _____
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** DISSENTING OPINION of _____

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dissenting opinion of Mr. Mosk

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DUPLICATE ORIGINAL
«نسخه برابر اصل»

CASE NO. 38

CHAMBER THREE

AWARD NO. 122-38-3

SCHERING CORPORATION,

Claimant,

v.

THE ISLAMIC REPUBLIC OF IRAN;

Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده

FILED - ثبت شد

Date ۱۳۶۳ /۳/ ۱۶ تاریخ

6 JUN 1984

No. 38 شماره

DISSENTING OPINION OF RICHARD M. MOSK

NOTIFICATION OF CORRECTION

Attached are the corrected pages 1, 2, 6, 9, 15, 16, 17, and 18 of the English version of the Dissenting Opinion of Richard M. Mosk, filed on 18 April 1984, together with an explanatory memorandum.

The Co-Registers

MEMORANDUM

TO: The Co-Registrars

FROM: Richard M. Mosk

DATE: 18 May 1984

RE: NOTIFICATION OF CORRECTION

Attached please find the corrected pages 1, 2, 6, 9, 15, 16, 17 and 18 of the English version of my Dissenting Opinion in Case No. 38, filed on 18 April 1984.

The corrections made are:

Page 1, first sentence "from" instead of "to."

Page 2, line 6: sentence should read "Whenever Schering shipped goods to Iran, as part of the importation process, Schering obtained approval for payment in foreign exchange."

Page 6, line 18: add comma between "issues" and "whether."

Page 9, line 24: "therewith" instead of "thereto."

Page 15, line 1-2: "___F.2d___, No..." should be 729 F.2d 422 (6th Cir. 1984).

Page 16, line 18: first word "As" instead of "Since."

line 20: add comma after "1975))."

Page 17, line 20: add comma between "money" and "is."

Page 18, line 26: "It" should be "The Workers' Council."

Richard M. Mosk

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 from 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. Whenever Schering shipped goods to Iran, as part of the importation process, 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

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

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 dist nction 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 therewith by Howard M. Holtzmann (December 20, 1983). Thus the Tribunal has jurisdiction over the claim.

Military Government of Socialist Ethiopia 729 F.2d 422 (6th Cir. 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).

As 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.

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[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. The Workers' Council 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