IRAN-UNITED STATES CLAIMS TRIBUNAL

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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.

SEPARATE OPINION OF JUDGE BROWER

The Tribunal today fulsomely reconfirms that customary international law continues to mandate without qualification that full compensation be given for expropriation.

The Tribunal's earlier rulings logically foreordained the instant holding. American International Group and Islamic Republic of Iran, Award No. 93-2-3 (19 December 1983), reprinted in 4 Iran-U.S. C.T.R. 96 (held, following programmatic nationalization of insurance companies found to be otherwise lawful, 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" and expropriated interest therefore valued as a

"going concern");[1] Tippetts, Abbett, McCarthy, Stratton and Islamic Republic of Iran, Award No. 141-7-2 (29 June 1984) ("Claimant is entitled under international law . . . to compensation for full value of the property of which it is deprived"). Nonetheless the present Interlocutory Award is pertinent in its own right as a thoughtful iteration of the basic rule, a careful delineation of its provenance and a clarion of its reaffirmation.

I write separately in order more fully to reinforce certain of the salient points treated in the Interlocutory Award, and also to touch on an issue it does not discuss, namely that of appropriate remedies.

I. THE APPLICABILITY OF THE TREATY OF AMITY

As the Interlocutory Award notes, Respondents in this Case argue that the 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August 1955, entered into force 16 June 1957, 284 U.N.T.S. 93, T.I.A.S. No. 3853, 8 U.S.T. 899 ("Treaty of Amity"), is no longer applicable as a result of (1) the changes in U.S.-Iranian relations since the Iranian Revolution, (2) the signing of the Claims Settlement Declaration and (3) the fact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 Treaty of Amity's protections allegedly do not extend to non-U.S. nationals.

I naturally welcome the Tribunal's abandonment, first in Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2 (19 March 1986), and now in the present Interlocutory Award, of its reluctance during the past five years to rule on the applicability of the Treaty of Amity to

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[1] This Award was issued by the same Chamber (Three) on the basis of a majority likewise including Chairman Mangård.

disputes before us.[2] I believe, however, that a fuller conclusion as to its applicability is in order.

As to Respondents' first objection, the Treaty of Amity never has been terminated. Iran has not given notice of termination under Article XXIII of the Treaty of Amity[3] or as might otherwise be provided by international law.[4] See Vienna Convention on the Law of Treaties, Arts. 54(a), 65 and 67, U.N. Doc. A/Conf. 39/27, opened for signature 23 May 1969, entered into force 27 January 1980, reprinted in 8 Int'l Legal Mat'ls 679 (1969) ("Vienna Convention"). As stated by the International Court of Justice in United States Diplomatic and Consular Staff:

> [A]lthough the machinery for the effective operation of the 1955 Treaty has, no doubt, now

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[2]The applicability of the Treaty of Amity was not considered fully in INA Corporation and Islamic Republic of Iran, Award No. 184-161-1 at 9 (13 Aug. 1985), where Respondent did not contest the "continued validity and effect of the Treaty" and the Tribunal concluded that it "must therefore assume that for the purpose of the present case the Treaty remains binding as it is drafted."

[3]Article XXIII of the Treaty of Amity provides:

> 1. . . . .
>
> 2. The present Treaty shall enter into force one month after the day of exchange of ratifications. It shall remain in force for ten years and shall continue in force thereafter until terminated as provided herein.
>
> 3. Each High Contracting Party may, by giving one year's written notice to the other High Contracting Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter.

[4]See Concurring Opinion of Judge Mosk 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 at 112-116.

> been impaired by reason of diplomatic relations between the two countries having been broken off by the United States, its provisions remain part of the corpus of law applicable between the United States and Iran.

1980 I.C.J. at 28. Iran itself as late as June of 1981 maintained in written pleadings that the Treaty of Amity remained in effect.[5] See Brief for Intervenor-Respondent The Islamic Republic of Iran at 13, 29, 45, Dames & Moore v. Regan (U.S. Sup. Ct.). Certainly for all times relevant to claims before this Tribunal the Treaty of Amity has remained in force between the States Parties.[6]

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[5]Although not pleaded by Respondents, I note that the Islamic Republic News Agency (IRNA) reported in "Ann. of Iran's Abrogation of U.S., Soviet Friendship Agreements," 4 Daily News 18-19 (No. 259, 11 Nov. 1984) that "ON NOVEMBER 10, 1979 IRAN'S 'REVOLUTION COUNCIL' DECIDED TO ABROGATE IRAN'S AGREEMENTS WITH BOTH THE SUPERPOWERS . . . . FOLLOWING THE SEIZURE OF THE U.S. DEN OF SPIES IN TEHRAN (ON NOV. 4, 1979) AND RUPTURE OF DIPLOMATIC RELATIONS BETWEEN TEHRAN AND WASHINGTON THE FRIENDSHIP AGREEMENT OF 1955 SOUNDED AS SOMETHING VIRTUALLY UNWANTED AND UNJUSTIFIED. THE AGREEMENT WAS ABROGATED AND RIGHTLY SO BECAUSE THE UNITED STATES HAD FROZEN IRAN'S ASSETS IN AMERICAN BANKS. THE AGREEMENT HAS SINCE BEEN NULL AND VOID." This single unilateral indication, accepted arguendo, does not by itself accomplish termination of the Treaty under either its own provisions or the Vienna Convention.

[6]Even if the Tribunal were, arguendo, to find the Treaty of Amity has been terminated since the signing of the Algiers Accords, such a termination would not affect rights which vested under the Treaty in the past. Article 70(1) of the Vienna Conevnetion, supra, provides:

> 1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present convention:
>
> > a. . . . .
> > b. does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

As to the second objection, the Respondents have misconstrued the effect of the Claims Settlement Declaration. Article V of the Claims Settlement Agreement provides that the "Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable . . . ." The Treaty of Amity is part of the corpus of international law existing between the United States and Iran and as a treaty supersedes, where contrary, applicable custom. Moreover, inasmuch as the Algiers Accords terminated certain litigation in U.S. courts and transferred such disputes to this Tribunal for adjudication, the right of plaintiffs in U.S. courts to assert their rights personally under the Treaty of Amity also were transferred to this forum. See American International Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. 522, 525 (D.D.C. 1980) ("the right of individuals and companies to enforce a private right of action in a United States court under the property protection provisions of a treaty of friendship, commerce, and navigation has consistently been upheld"), vacated on other grounds, 657 F. 2d 430 (D.C. Cir. 1981); Kalamazoo Spice Extraction Co. v. Government of Socialist Ethiopia, 729 F. 2d 422 (6th Cir. 1984).

Finally, the Respondents' third objection is not relevant because only Claimant's direct claim is before the Tribunal, i.e., SEDCO's claim for its expropriated shareholder's interest in SEDIRAN. See Interlocutory Award No. ITL 55-129-3 at 25-26 and 43. SEDCO's shareholder interest in SEDIRAN was the property of SEDCO and thus

"Property of nationals and companies" within the meaning of Article IV(2) of the Treaty of Amity.[7]

II. THE STANDARD OF COMPENSATION

A. The Standard of Compensation Under the Treaty of Amity

Claimant relies on Article IV(2) of the Treaty of Amity:

> 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.

This provision of the Treaty of Amity should be interpreted so that "ordinary meaning be given to the terms of the treaty in their context and in the light of its object and purpose."[8]

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[7] The Tribunal therefore need not decide at present the applicability of the Treaty of Amity to the "interests" of U.S. nationals in property of non-U.S. nationals who may possess a direct claim.

[8] See Art. 31, Vienna Convention, supra. The States Parties have declared in the past that the Vienna Convention, although not directly applicable by its terms, provides the governing law as to interpretation of the Algiers Accords. See, e.g., Transcript of 8 Mar. 1982 (Footnote Continued)

Article IV(2) plainly states that "property shall not be taken . . . without the prompt payment of just compensation." The Article immediately continues "[s]uch compensation . . . shall represent the full equivalent of the property taken . . . ." The Tribunal in INA Corporation and Islamic Republic of Iran, Award No. 184-161-1 at 10 (13 August 1985), applying the Treaty of Amity, held "that the words 'the full equivalent of the property taken' entitle the Claimant to be granted compensation equal to the fair market value of its shares . . . as of the date of nationalization" and that "'[f]air market value' may be stated as the amount which a willing buyer would have paid a willing seller for the shares of a going concern, disregarding any diminution of value due to the nationalization itself or the anticipation thereof."[9]

This interpretation of the Treaty of Amity is confirmed by its drafting history. Between 1946 and 1954, the year the Treaty of Amity was concluded, the United States had concluded eight similar Treaties of Friendship, Commerce and Navigation and each treaty contained a provision similar if not identical to Article IV(2). Commercial Treaty between United States-Republic of China, done 4 November 1946, entered into force 30 November 1948, 25 U.N.T.S. 69, T.I.A.S. 1871; United States-Denmark, done 1 October 1951, entered into force 30 July 1961, 421 U.N.T.S. 105, 12 U.S.T. 908, T.I.A.S. 4797; United States-Greece, done 3 August 1951, entered into force 13 October 1954, 224 U.N.T.S. 279,

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(Footnote Continued)
Hearing in Case A1 at 88 (filed 11 Mar. 1982). I see no justification for distinguishing the task of interpreting the Treaty of Amity.

[9]The Tribunal in INA Corporation at 10 further held that claimant there was entitled to interest on its judgment from the date of nationalization to the date of payment.

5 U.S.T. 1829, T.I.A.S. 3057; United States-Ireland, done 21 January 1950, entered into force 14 September 1950, 206 U.N.T.S. 269, 1 U.S.T. 785, T.I.A.S. 2155; United States-Israel, done 23 August 1951, entered into force 3 April 1954, 219 U.N.T.S. 237, 5 U.S.T. 550, T.I.A.S. 2948; United States-Italy, done 2 February 1948, entered into force 26 July 1949, 79 U.N.T.S. 171, T.I.A.S. 1965; United States-Japan, done 2 April 1953, entered into force 30 October 1953, 206 U.N.T.S. 143, 4 U.S.T. 2063, T.I.A.S. 2863; and United States-Ethiopia, done 7 September 1951, entered into force 8 October 1953, 206 U.N.T.S. 41, 4 U.S.T. 2134, T.I.A.S. 2864.

United States Government representatives both prior to and following the conclusion of the Treaty of Amity with Iran stated that the object of these identical property protection provisions was to ensure "that compensation shall be payable on the basis of the full value of the property taken at the time of the taking." Commercial Treaties with Colombia, Israel, Ethiopia, Italy, Denmark and Greece: Hearing Before the Senate Comm. on Foreign Relations, 82d Cong., 2d Sess. 12 (1952) (Statement of the Office of the Legal Adviser of the U.S. Department of State). See also Senate Executive Report No. 9, Commercial Treaties with Iran, Nicaragua and The Netherlands, 84th Cong., 2d Sess. 8 (1956) ("the Iranian treaty is an abridged and simplified version of the usual type of treaty"). A few years before the conclusion of the Treaty of Amity the U.S. Congress in enacting on 5 June 1950 the Act for International Development, Public Law 535, 81st Cong., 2d Sess., stated in the findings of that Act that "[t]echnical assistance and capital investment can make maximum contribution to economic development only where there is . . . due respect for the legitimate interest of the peoples of the countries . . . from which the assistance and investments are derived . . . [i]t involves confidence on the part of investors, through

intergovernmental agreements or otherwise, that they will not be deprived of their property without prompt, adequate, and effective compensation. . . ." Learned publicists likewise gave the same meaning to these provisions at that time. See Walker, "Treaties for the Encouragement and Protection of Foreign Investment, Present United States Practice," 5 Am. J. Comp. L. 229 (1956); R. Wilson, U.S. Commerical Treaties and International Law 95-125 (1960). See also Wilson, "Property-Protection Provisions in United States Commercial Treaties," 45 Am. J. Int'l L. 83 (1951); Wilson, "A Decade of New Commercial Treaties," 50 Am. J. Int'l L. 927 (1956). Thus, Iran could not help but have had notice of the meaning to be attributed to Article IV(2) of the Treaty of Amity.

It appears that the Government of Iran was even more explicitly made aware of the position of the United States on the issue of compensation for expropriation. On 15 September 1951, W. Averell Harriman, U.S. Special Envoy to Iran, wrote to Dr. Mossadegh, Prime Minister of Iran, that "in the view of the United States Government the seizure by any government of foreign-owned assets without either prompt, adequate and effective compensation or alternative arrangements satisfactory to the former owner is, regardless of intent, confiscation. . . ."[10]

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[10]Letter from Mr. Harriman to Dr. Mossadegh, 15 September 1951, reprinted in British Royal Institute of International Affairs, Documents on International Affairs 510 (1951), quoted in G. White, Nationalisation of Foreign Property 184 (1961).

It further seems clear that at the start of negotiations for the Treaty of Amity, the Iranian Foreign Ministry requested from the United States copies of similar treaties concluded by the United States. Message from U.S. Embassy, Tehran, to Secretary of State, U.S. Department of

(Footnote Continued)

Quite simply, Iran and the United States anticipated a case such as this and, after appropriate negotiations with full appreciation of the other's view, drafted as clearly as possible a provision requiring full compensation in the event of a taking.

B. The Respondents' Argument Concerning Customary International Law

Given the above analysis, the Tribunal might well have concluded that consideration of customary international law regarding compensation in the event of expropriation was unnecessary. Respondents' forceful and imaginative argument in this Case, however, to the effect that Article IV(2)

(Footnote Continued)
State (16 July 1954). Likewise, during the negotiations the Iranian delegation made comparisons between drafts under consideration and other Treaties of Friendship, Commerce and Navigation concluded by the United States. See, e.g., Message from U.S. Embassy, Tehran, to Department of State (16 October 1954).

Mr. William M. Rountree, Deputy Chief and later Charge d'Affaires ad Interim of the United States Embassy in Iran (1953-55), and Mr. William H. Bray, Jr., Economic Counsellor at the United States Embassy in Iran (1954-56), apparently negotiated the Treaty of Amity on behalf of the United States. Sworn affidavits of theirs presented to this Tribunal state that "[b]ased on the Iranian's familiarity with these other [bilateral Friendship, Commerce and Navigation] treaties and discussions during the negotiations, I have no doubt that the Iranians were aware of the United States' view of the requirements of international law and knew that the bilateral Treaties of Friendship, Commerce and Navigation entered into by the United States reflected this view."

These affidavits and diplomatic messages were filed in Case No. 56 before this Tribunal, in which both of the present Respondents also are Respondents and in which oral and written proceedings have been concluded. Under these circumstances, I believe it appropriate to refer to these here, while noting that my conclusions are arrived at independently of them.

"embodied nothing but the prevailing principles and rules of international law" and therefore its standard for compensation would change as customary international law changed, compels one to address squarely the position of customary law.

Respondents rely on the provision of Article IV(2) to the effect that property "shall receive the most constant protection and security . . . in no case less than that required by international law" and the fact that it is not expressly limited to, e.g., "present" requirements of that law. See R. Wilson, The International Law Standard in Treaties of the United States 92-105 (1953). One might wonder, if Respondents were correct, what was the purpose of entering into such a Treaty in the first place. Apart from that, it is at least arguable that even if the cited clause were to be regarded as incorporating international law generally as to the "protection and security" obligations binding each High Contracting Party, this need not affect the specific requirements, appearing in the subsequent sentences of the Article, regarding the amount and form of compensation due in the event of a taking. Against this it must be acknowledged that those subsequent sentences refer to a qualitative aspect of taking as well as to compensation.

In any event I concur that in 1955 and to this day customary international law would entitle Claimant to full compensation, i.e., the full equivalent of the property taken, regardless of whether or not the taking was lawful.

In seeking to ascertain customary law on this question as of 1955, I rely primarily on judicial precedents, given the difficulty of ascertaining relevant state practice in this area at that time. In this sense, I agree with the reservations expressed in the Interlocutory Award in regard

to lump sum settlement agreements[11] between States. I would only add that where juridical concerns are more involved, as when the disputes are capable of being referred to enforceable arbitration, then settlements more closely approximate full compensation. See, e.g., Seidl-Hohenveldern, "Austrian Practice on Lump Sum Compensation by Treaty," 70 Am. J. Int'l L. 763, 766-67 (1976).

Although Respondents argue to the contrary[12], a long line of judicial and arbitral precedents indicate that customary international law as of 1955 required that an expropriating government pay damages equivalent to the full value of the property taken irrespective of whether or not the expropriation was regarded as lawful.

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[11]"[A] 'lump sum' . . . settlement involves an agreement arrived at by diplomatic negotiation between governments, to settle outstanding international claims by the payment of a given sum without resorting to international adjudication." Re, "Domestic Adjudication and Lump Sum Settlement as an Enforcement Technique," 58 Am. Soc'y Int'l L. Proceedings 39, 40 (1964).

A particularly dramatic example of why such settlements are suspect as guides to the substance of customary international law is provided by United States settlements with Eastern European States following World War II. Most such settlements provided compensation at a rate of less than 40 cents on the dollar. See 1974 Digest of United States Practice in International Law 424. A proposed settlement of claims against Czechoslovakia at a rate of approximately 42 cents per dollar was rejected (see Section 408 of the Trade Act of 1974, Pub. L. 93-618), however, and the settlement eventually reached provided payment at 100 cents on the dollar. See Czechoslovakian Claims Settlement Act of 1981 Pub. L. 97-127 (not codified, reprinted in 22 U.S.C.A. §1642 note), Agreement Between the United States and Czechoslovakia on the Settlement of Certain Outstanding Claims and Financial Issues (not printed), entered into force 2 February 1982.

[12]Respondents cite to Schachter, "Compensation for Expropriation," 78 Am. J. Int'l L. 121 (1984) and authorities cited therein.

The Permanent Court of International Justice stated in the Chorzòw Factory case, where Poland had seized a nitrate factory owned by nationals of Germany, that an unlawful expropriation yields "a sum corresponding to the value which a restitution in kind would bear" and "damages for loss sustained which would not be covered by restitution in kind or payment in place of it," and that where the taking is lawful damages should equal "the value of the undertaking at the moment of dispossession, plus interest to the day of payment." Chorzòw Factory (Indemnity) (Ger. v. Pol.) [1928] P.C.I.J., Ser. A, No. 17, at 47-48 (Judgment of 13 September 1928). Likewise, the Permanent Court of Arbitration held that the Norwegian owners of ships expropriated by the United States during World War I were entitled to "just compensation" under international law; such compensation equalled the "fair actual value of the property . . . at the time and place it was taken." Norwegian Shipowners Claims (Nor. vs. U.S.), I Rep. Int'l Arb. Awards 307, 334-35, 338 (Anderson, Vogt & Valloton arbs., Award of 13 October 1922). Numerous other arbitral decisions confirm these statements as the customary rule existing as of 1955.[13]

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[13] See, e.g., Delagoa Bay Railway (U.S. & U.K. vs. Port.) (Lyon-Caen, Renault & Meili arbs., 1893), summarized in II J.B. Moore, International Arbitrations to Which the United States has been a Party 1891, 1896 (1898); Upton Case (U.S. vs. Ven.), IX Rep. Int'l Arb. Awards 234, 236 (Bainbridge arb., 1903) ("The right of the State, under the stress of necessity, to appropriate private property for public use is unquestioned, but always with the corresponding obligation to make just compensation to the owner thereof"); Affaire Goldenberg (Ger. vs. Romania), II Rep. Int'l Arb. Awards 905, 909 (Fazy arb., Judgment of 27 Sep. 1928) (partial payment of market value is confiscation of the remaining value); Spanish Zones of Morocco (Spain vs. Morocco), II Rep. Int'l Arb. Awards 615, 647 (Huber arb., Judgment of 1 May 1925) ("il peut être considere comme acquis qu'en droit international un etranger ne peut être prive de sa propriete sans juste indemnite" where such

(Footnote Continued)

The Respondents argue nonetheless that customary international law has evolved substantially since 1955 and in this regard point to resolutions and declarations of the U.N. General Assembly as elucidated by writings of learned publicists. Respondents refer in particular to the 1973 Resolution on Permanent Sovereignty over Natural

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compensation equalled the value of property at the date of taking plus interest); De Sabla (U.S. vs. Panama), VI Rep. Int'l Arb. Awards 358, 356-67 (Award of 29 June 1933) ("It is axiomatic that acts of a government in depriving an alien of his property without compensation impose international responsibility" and consequently "the proper measure of damages" is "to award to the claimant the full value . . . of her property"). See also Herz, "Expropriation of Foreign Property," 35 Am. J. Int'l L. 243, 265-55 (1941) ("only full and immediate compensation in cash fulfills the conditions of international law") and Wetter & Schwebel, "Some Little-Known Cases on Concessions," 40 Brit. Y. B. Int'l L. 183 (1964).

I agree with recent commentators that although these cases did not per se adopt the exact phrase "prompt, adequate and effective" they did substantively award such full compensation. Robinson, "Expropriation in the Restatement (Revised)," 78 Am. J. Int'l L. 176 (1984); Gann, "Compensation Standard for Expropriation," 23 Col. J. Transnat'l L. 615, 616 (1985); Mendelson, "Compensation for Expropriation: The Case Law," 79 Am. J. Int'l L. 414, 415 (1985). I also agree that these "cases stand on their own feet" and do not dictate expressly an "absolute general rule of full compensation in every case." Schacter, "Compensation Cases - Leading and Misleading," 79 Am. J. Int'l L. 420, 422 (1985). Given, however, that the Tribunal's immediate task is to decide the legal question of the standard of compensation existing as of 1955, it is not sufficient merely to state that in a practical sense the cases demonstrate "that foreign investors may get a fair award without asserting an absolute and inflexible rule." Id. Nor can the Tribunal state that the rule is uncertain. See Lauterpacht, "Some Observations on the Prohibition of 'Non-Liquet' and the Completeness of Law," reprinted in 2 H. Lauterpacht, Collected Papers 213 (1975). It is the duty of the Tribunal to decide the question using, inter alia, the above cases as evidence of customary law.

Resources[14], the Declaration on the Establishment of a New Economic Order[15], and the Charter of Economic Rights and Duties of States[16] ("Resolution 3281" or "Charter"). The latter states, inter alia, in Article 2(2)(c) that every State has the right to:

> nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals. . . .

This line of argumentation has been a key aspect of the recent challenge to the international law of expropriation: it has forced an intensive fundamental examination of the sources of international law, and it has been rejected by international arbitral panels.

Legal significance is attributable to U.N. General Assembly resolutions only to the extent that they are regarded as evidence of the practice of States generally accepted as law, that is, customary international law.[17] In

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[14]G.A. Res. 3171, 28 U.N. GAOR Supp. (No. 30) at 52, U.N. Doc. A/9030 (1973), reprinted in 13 Int'l Legal Mat'ls 238 (1974).

[15]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).

[16]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 252 (1975).

[17]See generally Schwebel, "The Legal Effect of (Footnote Continued)

ascertaining state practice, what States do is more important than what they say. Schwebel, "Confrontation, Consensus and Codification in International Law," Proceed., Am. Br., Int'l L. Assoc. 1979-80 14 (1980). Although "expectations may rest not only on actual conduct, but also on other forms of communication, including the verbal"[18], special care must be taken not to base norms merely on the statements of States in circumstances where it is difficult, if not impossible, to distinguish between belief and rhetoric. See generally Arangio-Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations," 137 Recueil des Cours 418 (1972).

Recognizing such difficulties, the International Court of Justice and scholars have suggested various factors to consider in weighing the evidentiary value of a particular resolution: whether the pattern of voting shows consensus generally and amongst the groups of most interested states; whether the language is of a norm-generating character; concurrent statements made; citation to the resolution in subsequent resolutions; and the subsequent conduct of States.[19] The value of resolutions "depends upon the extent to which they can be regarded as expressions of the 'judicial conscience' of humanity as a whole rather than of

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(Footnote Continued)
Resolutions and Codes of Conduct of The United Nations," 7 Forum Internationale (1985).

[18] O. Lissitzyn, International Law Today and Tomorrow 34-36 (1965).

[19] 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, 6-7 (1974-75); Bleicher, "The Legal Significance of Re-Citation of General Assembly Resolutions," 63 Am. J. Int'l L. 444 (1969).

an incongruous or ephemeral political majority." Johnson, "The Effect of Resolutions of the General Assembly of the United Nations," 32 Brit. Y.B. Int'l L. 97, 122 (1955-1956).

Before applying such analysis to the resolutions at hand, I note that the three resolutions particularly cited by Respondents were preceded by Resolution 1803, entitled "Permanent Sovereignty over Natural Resources," adopted by the General Assembly on 14 December 1962. The relevant portion 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.[20] (Emphasis added.)

René-Jean Dupuy, sole arbitrator in Texaco Overseas Petroleum vs. Libya (Award of 19 January 1977), reprinted in 17 Int'l Legal Mat'ls 1 (1978) ("TOPCO"), considered in detail the legal significance of General Assembly Resolution 1803 and its successors, including the Charter. Resolution 1803 had been adopted by a nearly unanimous vote "representing not only all geographical areas but also all economic systems." TOPCO, para. 40, 17 Int'l Legal Mat'ls at 28. In addition, statements of States concurrent with the adoption of Resolution 1803 indicate that they believed "appropriate compensation . . . in accordance with international law" to equal the full compensation

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[20] 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).

traditionally required by international law.[21] In contrast, Resolution 3281, the Charter, "was supported by a majority of States but not by any of the developed countries with market economies which carry on the largest part of international trade." TOPCO, para. 86, 17 Int'l Legal Mat'ls at 30. Originally the Group of 77 had drafted the Charter "as a first measure of codification and progessive development."[22] Significantly, however, this description was purposefully deleted from the final text voted upon by the General Assembly. See Virally, "La Charte de Droits et Devoirs Economiques des Etats," 20 A.F.D.I. 57, 59 (1974) ("It is therefore clear that the Charter is not a first step to codification and progressive development . . . . "). Dupuy thus concluded that while Resolution 1803 expresses opinio juris communis and reflects "the state of customary law existing in this field"[23], the Charter "must be analyzed as a political rather than as a legal declaration concerned with the ideological strategy of development and, as such, supported only by non-industrialized States." TOPCO, paras. 87-88, 17 Int'l Legal Mat'ls at 30.[24]

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[21]Schwebel, "The Story of the U.N.'s Declaration on Permanent Sovereignty Over Natural Resources", 49 Am.B.A.J. 463, 465-66 (1963).

[22]See U.N. Doc. A/C.2/L. 1386 (1979) at 2.

[23]Accord, Chilean Copper Case (L.G. Hamburg 1973), reprinted in 12 Int'l Legal Mat'ls 251, 276 (1973).

[24]Particularly significant in this regard, too, is the statement of the Iranian delegate in voting for Resolution 3281. The Iranian delegate noted the benefits of protecting foreign investment and stated that his vote in favor of the resolution was without prejudice to the international obligations Iran had assumed in that field, including those respecting compensation in the event of nationalization of foreign property. See Legal Problems of Multinational Corporations 148 (Simmonds ed. 1977) (citing AIC. 2/SR.1650 at 10-11). This statement is evidence that the Iranian

(Footnote Continued)

Many arbitration awards since 1955 also have supported a standard of compensation that fully restores the financial position of the aggrieved party. The award in the Sapphire arbitration states:

> According to the generally held view, the object of damages is to place the party to whom they are awarded in the same pecuniary position that they would have been in if the Contract had been performed in the manner provided for by the parties at the time of its conclusion. . . . It is therefore natural that the creditor should thereby be given full compensation. . . . .[25]

The former President of this Tribunal, Gunnar Lagergren, sitting as sole arbitrator in the BP Exploration arbitration, stated that the "case analysis . . . demonstrates that the responsibility incurred by the defaulting party for breach of an obligation to perform a contractual undertaking is a duty to pay damages, and that the concept of restitutio in integrum has been employed . . . as a vehicle for establishing the amount of damages."[26] Judge Lagergren then cited with approval Sir Hersch Lauterpacht's statement that restitutio in integrum "means that the injured person is placed in the position he occupied before the occurrence of the injurious act or

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Government did not view Resolution 3281 as affecting the meaning to be attributed to its obligations under the Treaty of Amity.

[25] Sapphire International Petroleum Ltd. v. NIOC (Cavin arb., Award of 15 Mar. 1963), reprinted in 35 Int'l L. Rep. 136, 185-86.

[26] BP Exploration Co. (Libya Ltd.) v. Government of the Libyan Arab Republic (Lagergren arb., Award of 1 Aug. 1974), reprinted in 53 Int'l L. Rep. 297, 347.

omission . . ."[27] Likewise Dupuy in the TOPCO arbitration stated:

> Even more important restitutio in integrum being in spite of everything the basic principle, it is this principle which (in conformity with the rule laid down by the Permanent Court of International Justice in the Chorzow Factory case . . .) will serve as the reference for calculating the amount of a possible pecuniary indemnity. . . .[28]

The most recent arbitral awards,[29] including the awards of the Tribunal,[30] also support a standard of full compensation.

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[27] H. Lauterpacht, Private Law Sources and Analogies of International Law 147 (1929).

[28] TOPCO, supra, para. 105, 17 Int'l Leg. Mat'ls at 35.

[29] See, e.g., AGIP Co. v. Popular Republic of Congo, paras. 88, 98 (Trolle, Dupuy & Rouhani arbs., ICSID Award of 30 Nov. 1979), reprinted in 21 Int'l Leg. Mat'ls 726, 737-38 (1982); Benvenuti et Bonfant v. People's Republic of the Congo, paras. 4.63-4.82 (Trolle, Bystricky & Razafindralambo arbs., ICSID Award of 8 Aug. 1980) (damages ex aequo et bono include lost profits), reprinted in 21 Int'l Leg. Mat'ls 740, 759-60 (1982); Amco Asia Corp. v. Republic of Indonesia, paras. 265-68 (Goldman, Foighel & Rubin arbs., ICSID Award of 20 Nov. 1984), reprinted in 24 Int'l Legal Mat'ls 1022, 1036-37 (1985). But see Libyan American Oil Co. and Libyan Arab Republic (Mahmassani sole arb., Award of 12 Apr. 1977), reprinted in 20 Int'l Legal Mat'ls 1 (1981).

[30] See 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 at 105 and 109 ("it is a general principle of public international law that even in a case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value of the property taken."); Tippets, Abbett, McCarthy, Stratton and Islamic Republic of Iran, Award No. 141-7-2 at 10 (29 June 1984) (Claimant is entitled under international law and general principles of law to compensation for full value of the property of which it is deprived"). See also Concurring Opinion of George H. Aldrich (26 May 1983) to ITT

(Footnote Continued)

I also take note of the growing consistent investment treaty practice of States. I concur, as stated in the Interlocutory Award, that as a source of custom such treaties carry with them some of the limitations previously described with regard to lump sum settlement agreements. It is significant, however, that while in the cases of lump sum settlement agreements a creditor nation may as a compromise accept less than the full compensation to which it believes itself entitled, in the case of investment protection treaties one finds socialist and third world states insisting on a standard of compensation greater than one might have thought they would demand, given, for example, their voting record in the U.N. General Assembly. Of the ten investment treaties concluded between developing countries inter se during the period 1974 to 1982, "3 treaties . . . demand an 'adequate' compensation . . . 2 treaties . . . demand the 'equivalent of the market value' . . . one treaty of the same period demands the 'equivalent of the genuine value' [and] 4 treaties . . . demand the

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Industries and Islamic Republic of Iran, Award No. 47-156-2 (26 May 1983).

The reference to "normally" in American International Group presumably was intended to acknowledge that certain exceptional circumstances, e.g., war or similar exigency, might dictate a different result. As expressly noted, however, in the Restatement of the Law, Foreign Relations Law of the United States (Revised) (Council Draft No. 8, 7 Feb. 1986) §712, Comment d:

> A departure from the general rule on the ground of "exceptional circumstances" is unwarranted if (a) the property taken had been used in a business enterprise that was specifically authorized or encouraged by the state; or (b) the property was an enterprise taken for operation as a going concern by the state; or (c) the taking program did not apply equally to nationals of the taking state; or (d) the taking itself was otherwise wrongful [because not for a public purpose or because discriminatory].

'equivalent of the value' of the investment." Verwey & Schrijver, "The Taking of Foreign Property Under International Law: A New Legal Perspective?," 15 Neth. Y.B. Int'l L. 3, 73 (1984). See generally, International Chamber of Commerce, Bilateral Treaties for International Investment (1977) (listing 170 bilateral investment protection treaties concluded since 1945).

For all of the foregoing reasons, I conclude that even in the case of a lawful taking full compensation was required by customary international law in 1955 and has remained so required to date and therefore that Article IV(2) of the Treaty of Amity grants to the nationals of either State Party the substantive right to compensation equalling the "full equivalent of the property taken."[31]

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[31] I perceive no exception to this rule, whether under the Treaty of Amity or pursuant to customary international law, in the case of a programmatic nationalization, e.g., of an entire field of business. The Interlocutory Award addresses facts which Claimants assert constituted part of such a nationalization de facto, citing a meeting of the Iranian Board of Directors of SEDIRAN in the fall of 1979 in which it was stated, regarding Iran's intention to form the National Iranian Drilling Company, that "all drilling activities in Iran will be taken over" and "there will be no job in Iran for Sediran." Given Chairman Mangård's participation 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, which granted "going concern" value as "compensation for the value of the property taken" in what was described in the identical circumstances of INA Corporation, Award No. 184-161-1 (15 Sep. 1985) at 8, as "a classic example of a formal and systematic nationalisation by decree of an entire category of commercial enterprises considered of fundamental importance to the nation's economy," and which the present Interlocutory Award cites with approval, no "nationalization exception" can be read into the Interlocutory Award. Any encouragement in that direction that might be drawn from the Separate Opinion of Judge Lagergren in INA Corporation and Islamic Republic of Iran, Award No. 184-161-1 (15 Sep. 1985), is, in my view,

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III. THE REMEDIES AVAILABLE

Claimant has argued further that the taking in the instant case was unlawful. Although full compensation would appear to be the maximum compensation available in such case, I believe it is important to note that Claimant's remedies, in contrast to its rights, are not limited by Article IV(2) of the Treaty of Amity.

A taking is unlawful under customary international law when it occurs in a discriminatory context,[32] is not for a public purpose,[33] or constitutes a breach of a specific

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unjustified in light of the Award itself in that case and the thoughtful Separate Opinion of Judge Holtzmann. Likewise the fact that Claimant here, like the Claimant in INA Corporation, has elected to measure the "full compensation" to which it is entitled by a method other than determining "going concern" value is of no consequence to the validity of the compensation standard itself.

I perhaps should note, as is implicit in the Interlocutory Award's reference, at note 20, to interest and the "relevant principles of international law," that full compensation, whether under the Treaty of Amity or customary international law, means not just an amount equivalent to the value of the property taken, but also the prompt payment of such amount, i.e., either at the time of taking or within a reasonable time thereafter with interest from the date of taking, in a form economically usable by the expropriated party (ordinarily convertible currency without restriction or repatriation).

[32] See, e.g., Chilean Copper Case (L.G. Hamburg 1973), reprinted in 12 Int'l Legal Mat'ls 251, 276-77 (1973) (de facto discrimination found where the nationalization included only U.S.-owned mines and the nationalization consequently held to be illegal under international law); Seidl-Hohenveldern, "Chilean Copper Nationalization Cases Before German Courts," 69 Am. J. Int'l L. 110, 113 (1975).

[33] See U.N. General Assembly Resolution 1803, supra; also Article IV(2) of the Treaty of Amity expressly prohibits such a taking.

obligation undertaken by the nationalizing State in relation to the property in question, e.g., violates the terms of an agreement between that State and an alien.[34]

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[34]Two additional grounds for unlawfulness occasionally cited are (1) denial of justice (see, e.g., Draft U.N. Code of Conduct for Transnational Corporations, Art. 52, reprinted in 1 Legal Problems of Codes of Conduct for Multinational Enterprises 502-503 (Horn ed., 1980)) and (2) failure promptly to pay the required compensation.

I consider it unlikely that denial of justice in the customary sense constitutes a basis separate from those recognized above. For example, when the alleged denial of justice is lack of notice of the taking or the lack of an opportunity to challenge judicially the propriety of the taking, the taking itself is not a damage resulting from the denial of justice. To the degree that the alien has a customary right to due process, the denial of justice does not render the previous taking unlawful, but rather is a wrong itself for which proximately caused damages may be sought. Although judicial review might have revealed discrimination or the lack of a public purpose, it is those aspects and not the lack of opportunity for municipal judicial review that render the taking unlawful.

In some instances, the property protection provision of a bilateral investment treaty expressly requires, for example, prior notice of the proposed taking. In such situations, depending upon the wording of the provision, the lack of notice may render the taking itself unlawful or it may, as a breach of the treaty, constitute a separate unlawful act.

Likewise I must express doubt as to whether, under customary international law, a State's mere failure, in the end, actually to have compensated in accordance with the international law standard set forth herein necessarily renders the underlying taking ipso facto wrongful. If, for example, contemporaneously with the taking the expropriating State provides a means for the determination of compensation which on its face appears calculated to result in the required compensation, but which ultimately does not, or if compensation is immediately paid which, though later found by a tribunal to fall short of the standard, was not on its face unreasonable, it would appear appropriate not to find that the taking itself was unlawful but rather only to conclude that the independent obligation to compensate has

(Footnote Continued)

The practical consequence of unlawfulness is in the remedies available. The remedy for a lawful taking is full compensation; the remedy for an unlawful taking is restitution or, where restitution is not practical, full compensation. Even in cases of unlawful takings, particularly where restitution is not possible, a difference in remedies potentially still could remain insofar as punitive or exemplary damages might be sought.[35]

(Footnote Continued)
not been satisfied. If, on the other hand, no provision for compensation is made contemporaneously with the taking, or one is made which clearly cannot produce the required compensation, or unreasonably insufficient compensation is paid at the time of taking, it would seem appropriate to deem the taking itself wrongful. It is in such cases that restitutio in integrum may be appropriate as a remedy and that, in addition to that, or to a monetary award of damages, should that alternative be selected, a tribunal might consider an award of punitive damages. See note 35, infra.

[35] See The Lusitania Cases, 7 Rep. Int'l Arb. Awards 32 (Parker umpire, Anderson & Kiesselbach comm., Opinion of 1 Nov. 1923); J. Ralston, International Arbitral Law and Procedure §369 (1910) ("While there is little doubt that in many cases the idea of punishment has influenced the amount of the award, yet we are not prepared to state that any commission has accepted the view that it possessed the power to grant anything save compensation.")

There are strong reasons in logic why it would be appropriate for an international tribunal to award punitive or exemplary damages against a State in such circumstances. In the absence of such damages being awarded against an unlawfully expropriating State, where restitution is impracticable or otherwise inadvisable, that State is required to furnish only the same full compensation as it would need to provide had it acted entirely lawfully. Thus, the injured party would receive nothing additional for the enhanced wrong done it and the offending State would experience no disincentive to repetition of unlawful conduct. If it is not deemed unseemly for the national courts of one State to "punish" at least certain entities of a foreign State, see U.S. Foreign Sovereign Immunities Act, 28 U.S.C. §1606 (court award of punitive damages prohibited
(Footnote Continued)

Claimant in the instant case argues that the taking of SEDIRAN was unlawful (1) under Iranian law because when Clause C of the Law for the Protection and Development Industries ("Clause C") was applied commencing eight months after the date of expropriation it was applied incorrectly and (2) under international law (a) because no compensation has been paid and (b) because the taking was a breach of the Treaty of Amity, e.g., no "adequate provision [was] made at or prior to the time of taking for the determination and payment" of the required compensation.[36] This position is taken by Claimant because, as it argues, "unlawful takings are subject to the strictest compensation requirements . . . ." While there is much force in Claimant's arguments,[37]

(Footnote Continued)
against a foreign state "except for an agency or instrumentality thereof," defined in §1603(b) to include "a separate legal person . . . which is an organ of a foreign state"), it is questionable whether an international tribunal, particularly one formed by agreement of the only States Parties as to which it can adjudicate, need be so reticent.

[36]Claimant has not argued strongly, however, either that the taking was not for a public purpose or that it was discriminatory.

[37]It appears from the record before the Tribunal that Clause C was applied incorrectly to SEDIRAN. The regulations implementing the Law for the Protection and Development Industries inter alia provide that Clause C shall be applied to factories and companies with substantial loans.

> By "substantial loan" is meant the sum total of two ratios:
> 1. Long term loan divided by fixed assets before deducting amortization.
> 2. Two times of the current debts divided by current assets in the balance sheet of the year 1356 (1977).
>
> Should the total of these two ratios be more than 2.5 such company shall be recognized as having a

(Footnote Continued)

they need not be considered, however, given (a) the Tribunal's holding that full compensation is required regardless of whether or not the taking here was lawful and (b) the fact that the Claimant has not sought restitution or punitive damages, the remedies to be considered in cases of unlawful taking.

IV. CONCLUSION

For all of the reasons stated above, and in the Interlocutory Award, I believe the Tribunal correctly has found Claimant entitled to full compensation for the taking of its shareholder interest in SEDIRAN.

Dated, The Hague,
27 March 1986

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(Footnote Continued)
substantial loan.

Only the second ratio is disputed by the Parties. I agree with Claimant that the sum of the two ratios equals 1.7255 and that Clause C was therefore applied incorrectly. Such clear misapplication potentially opens to question the alleged public purpose underlying the taking.

The lack of any provision for compensation having been made by Iran at any time also strongly implicates its responsibilities under both the Treaty of Amity and customary international law.

By definition it is difficult to envision a de facto or "creeping" expropriation ever being lawful, for the absence of a declared intention to expropriate almost certainly implies that no contemporaneous provision for compensation has been made. Indeed, research reveals no international precedent finding such an expropriation to have been lawful.