IRAN-UNITED STATES CLAIMS TRIBUNAL

ایالات متحده - ایران

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Case No. 129 Date of filing: 1 APR 86

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

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** SEPARATE OPINION of Correction to opinion of Mr Brower

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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.

CORRECTION TO THE SEPARATE OPINION OF JUDGE BROWER

The following corrections should be made in the English version of my Separate Opinion filed in this Case on 27 March 1986:

1. Page 1, line 11, the word "fulsomely" should be replaced with the word "abundantly."

2. Page 5, line 3, the word "Agreement" should be replaced with the word "Declaration".

3. Page 21, line 22, insert after "(26 May 1983)" the phrase ", reprinted in 2 Iran-U.S. C.T.R. 348".

4. Page 23, line 20, the number "20" should be replaced with the number "22".

5. Page 23, line 29, the word "or" should be replaced with word "on."

Copies of the corrected pages are attached.

Charles N. Brower
CHARLES N. BROWER

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 abundantly 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

As to the second objection, the Respondents have misconstrued the effect of the Claims Settlement Declaration. Article V of the Claims Settlement Declaration 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

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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(Footnote Continued)
Industries and Islamic Republic of Iran, Award No. 47-156-2 (26 May 1983), reprinted in 2 Iran-U.S. C.T.R. 348.

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].

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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(Footnote Continued)
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 22, 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 on 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.