IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایالات متحده

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** AWARD - Type of Award _____
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** OTHER; Nature of document: Correction to Separate Opinion of C. Brower
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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.

CORRECTION TO THE SEPARATE OPINION OF JUDGE BROWER

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

1. Page 4, line 33 (in footnote number 6), the word "Conevnetion," should be "Convention."

2. Page 5, line 13, the word "right" should be changed to "rights."

3. Page 7, line 3, a comma should be inserted after the word "continues."

4. Page 10, line 25, in the continuation of footnote 10, the word "Iranian's" should be changed to "Iranians'."

5. Page 11, line 30, the words "and arbitral" should be inserted after the word "judicial."

6. Page 12, line 34 in footnote 11, the "," after "note)," should be changed to ";".

7. Page 13, lines 36, 37 and 38, should read:

Judgement of 1 May 1925) ("il peut être considéré comme acquis qu'en droit international un étranger ne peut être privé de sa propriété sans juste indemnité" where such

8. Page 20, line 37, opening quotation marks should be inserted before the word "Claimant."

Page 20, line 40, the words "George H." should be changed to "Judge."

9. Page 22, line 31, "(15 Sep. 1985)" should be changed to "(13 Aug. 1985)".

Page 22, line 40, the word "Sep." should be changed to "Aug."

Copies of the corrected pages are attached.

Charles N. Brower

CHARLES N. BROWER

> 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 Convention, 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 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 rights 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 rights 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

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.

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 Iranians' 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 and arbitral 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 considéré comme acquis qu'en droit international un étranger ne peut être privé de sa propriété sans juste indemnité" where such

(Footnote Continued)

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 Judge Aldrich (26 May 1983) to ITT

(Footnote Continued)

'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 (13 Aug. 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 Aug. 1985), is, in my view,

(Footnote Continued)