IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE No. 131
CHAMBER TWO
AWARD NO. 518-131-2

PETROLANE, INC.,
EASTMAN WHIPSTOCK MANUFACTURING, INC.,
and SEAHORSE FLEET, INC.,
Claimants,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
IRANIAN PAN AMERICAN OIL COMPANY,
NATIONAL IRANIAN OIL COMPANY, and
OIL SERVICES COMPANY OF IRAN,
Respondents.

DISSENTING AND CONCURRING OPINION OF
SEYED KHALIL KHALILIAN[1]

1. The expropriation issue is the most crucial point addressed in the present Award, and I shall therefore discuss it first. Apart from the fact that a finding of expropriation is highly questionable in the circumstances of the present Case, the more regrettable aspect of the majority's decision is its endorsement of the Claimants' demand for compensation

[1] This opinion is belated to reasons both personal and medical.

based on the purchase price of certain used equipment, without taking into account any depreciation. As to the first point, the Case file lacks sufficient corroborative evidence to warrant a finding of expropriation. As to the second, there is no legal basis, nor could the majority cite any precedents in the case-law history of international tribunals, to justify the position that the used equipment could be valuated as new for the purpose of compensation, even assuming in the present Case that it had been taken by the Respondents.

2. In finding for expropriation,[2] in the Award the majority predicates its reasoning on the assumption that Eastman had properly, and strictly in accordance with OSCO's General Conditions, tendered OSCO two forms, known as the Request To Export ("RTE"), at the relevant times —i.e., in April and June 1979[3]— but that the Respondents failed to extend

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[2] The Claimants developed a story of expropriation intended to establish that the Foundation for the Oppressed had seized Eastman's equipment. Upon hearing the Claimants' version of the relevant events, which they supported by affidavits, the Tribunal was not persuaded to believe the story and therefore rejected their allegation. Para. 82 of the Award.

[3] Clause 16:

> On completion of the Services or on early termination of the Contract as provided for under these General Conditions the Contractor [Eastman] shall export the Service Plant in accordance with the Company's [OSCO's] Materials Procedure in Schedule II hereto or use the Service Plant on another contract with [OSCO] or, with the permission of [OSCO], pay the appropriate customs duties and charges on the Service Plant and obtain a release from the customs authorities which will permit the use thereof for third parties or their sale in Iran ..."

Eastman the necessary cooperation to export the equipment. See paras. 84-102 of the Award under the heading The Failure to Re-Export. However, in order to comply with Clause 16 of OSCO's General Conditions and consequently to establish liability on the part of the Respondents, it was imperative for Eastman: a) to establish to the Tribunal's satisfaction that it had submitted a formal RTE at the relevant time and that its request was denied by NIOC or OSCO, thereby establishing default by the other party to the contract; b) to prove, further, that it had no other alternative available than to export the Service Plant; and c) to have exhausted all possible means of mitigating its damage. Thus, only if all three of these requirements were met could one possibly infer a case of State responsibility.

3. The issue of the evidentiary materials: The question whether or not the Claimants were correct in their allegation that the April RTE was submitted to NIOC or OSCO properly and in due course could be decided after an examination of the degree of coherence and materiality of the evidence presented. The most significant material submitted to the Tribunal in this connection is a list of equipment dated April 1979. The evidentiary value of this material, however, is highly debatable.[4] First, it is no more than a mere photocopy and does not bear the signatures of the persons who would have had to sign it either routinely or by virtue of the contract. Second, nothing has been presented in the record to substantiate this list as constituting a formal request. Rather, it is quite conceivable that after the supervention of the revolutionary events in Iran, Eastman made up that list but put it on hold; i.e., it did not really indicate thereby

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[4] Cf. the probative value of invoices, see Lockheed Corporation v. Iran, Award No.367-829-2 [Khalilian, Dissenting and Concurring Opinion], 18 IRAN-U.S. C.T.R 292, at 345 (para. 43).

any resolute intention to export the equipment. The evidence is very clear that Eastman re-rented some of the items; i.e., it picked out a number of items presently reflected on the alleged April RTE and used them again on a rental basis. Objectively, this indicates that in view of the uncertain course of the events of that time, Eastman had not firmly decided to abandon its market in Iran and export the equipment. Rather, it was apparently wavering between a decision to interrupt its activities in Iran and a policy of clinging to the hope of reactivating at least a part of its business there. Under those circumstances, it could not have been altogether serious about exporting the equipment, inasmuch as it was mindful of certain prospective areas in which to resume selling its services to Iranian customers.[5]

4. However, Eastman contended that a formal RTE was actually presented to NIOC in April 1979. In addition to the above-mentioned unsigned copy, it submitted in evidence an affidavit deposed by a corporate man, Mr. McMillan, a memorandum sent by the same person to one of Eastman's managers on 21 October 1979, and oral testimony (also rendered by McMillan) at the hearing conference. The April RTE is not corroborative evidence; rather, it is a controversial list of rental items whose receipt the Respondents flatly deny. Therefore, to examine the veracity of the allegation, the Tribunal must resort to the contemporaneous independent evidence.

5. a) McMillan's affidavit: This piece of evidence should not be taken as contemporaneous independent evidence, because

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[5] Cf. Seismograph Services Corporation v. NIOC, Award No. 420-443-3 (22 December 1988), 22 Iran-U.S. C.T.R. 3, para. 303: "It is therefore very improbable that the Claimant would have decided to export the totality of this Property, including the items which would not be worth the freight and insurance costs should it have been allowed to proceed to the export of Property related to Crews One and Two."

the affiant was a corporate officer (clearly an interested party in these proceedings)[6] who undeniably submitted his affidavit in order to support his employer's case. Moreover, in preparing his affidavit he was telling of events that had taken place many years before, so that his account can hardly be characterized as contemporaneous. What is more, McMillan had a servant-master relationship with the Claimant. His affidavit therefore carries little weight as evidence on the issue, and it remains no more than a secondary evidence.[7] According to the practice of international tribunals, affidavits need to be supported by corroborating, independent evidence. See, e.g. Schott, Award No. 474-268-1, paras. 56-57. There, Schott's testimony was also backed up by the testimony of two witnesses, yet he failed to persuade the Tribunal.[8] Also, in the Stewart case the Claimant filed six affidavits to substantiate the allegation that his possessions

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[6] In Sedco Inc. v. National Iranian Oil Company, the Tribunal showed its reluctance to accept a valuation based exclusively on the estimate of one of the company's officers. It therefore added that the claimant had submitted certain objective, independently verifiable information that supported the officer's valuation. Interlocutory Award No. ITL 59-129-3, 15 Iran-U.S. C.T.R. 23, para. 37. The Tribunal repeated the same viewpoint in para. 76, ibid at 49. It also stated: "Mr. Thorn is a leading officer of the Claimant company and the President of SISA ... Mr. Thorn's close affiliation to Claimant and SISA could quite naturally have caused a certain subjectivity (which must be distinguished from bad faith) to taint his assessment." Ibid para. 75.

[7] See Sandifer, Evidence Before International Tribunals, 1975, pp. 351-54.

[8] See also Morgan Equipment Company v. Iran, Award No. 100-280-2, 4 IRAN-U.S. C.T.R., at 276; Morrison-Knudsen Pacific v. The Ministry of Roads and Transportation, Award No. 143-127-3, 7 IRAN-U.S. C.T.R., at 79; Schering Corporation v. Iran, Award No. 122-38-3, 5 IRAN-U.S. C.T.R., at 367.

packed into a sea container were confiscated by the Revolutionary Council of Iran. Yet, holding that "[T]he evidence is inadequate to find that the Claimant suffered a property loss through acts attributable to the Respondent,"[9] Chamber Two dismissed the claim.

6. Besides, if the majority believed that McMillan told the Tribunal nothing but the truth, why did it not assume that the Respondents' affiants were equally credible? On NIOC's side , Mr. Sadri and others rebutted the statements of Mr. McMillan. We also heard oral testimony that the alleged April RTE had not been submitted to NIOC or OSCO. See para. 79 of the Award. Their rebuttal fell on deaf ears, however. By virtue of Art. 15(1) of the Tribunal Rules,[10] the principle of equal treatment of both parties requires, in similar circumstances, that the Tribunal either disregard both sides' affidavits insofar as they contradict one another, or else give equal weight to the Respondents' affidavits. In either case the result would be the same. In Telecommunications Co. of Iran v. United States, the respondent denied in rebuttal having received the letter invoked by the claimant, which could excuse it from nonperformance of its contractual obligations. The Tribunal gave weight to this rebuttal despite the testimony given by a Mr. Hughes.[11] In the

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[9] Charles P. Stewart v. Iran, Award No. 468-12458-2 (9 February 1990), 24 IRAN-U.S. C.T.R. 116, at 119. See also note 1, ibid at 116.

[10] "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any state of the proceedings each party is given a full opportunity of presenting his case." (emphasis added)

[11] Award No. 457-B55-1 (19 December 1989), 23 Iran-U.S. C.T.R. 320, at 335.

present case, however, the majority ignored the affidavits and oral testimonies given by the Respondents' witnesses in rebuttal to Mr. McMillan.[12]

7. b) McMillan's memorandum: As the second piece of evidence, the majority has relied upon the terms of a memorandum sent by McMillan on 21 October 1979 to Keith Bengston, Eastman's Middle East and West Africa Division Operations Manager. However, the memorandum does not support the position that the April RTE was submitted in a timely manner to NIOC or OSCO. In para. 87 of the Award, the majority quotes what I believe to be the most significative part of the memorandum. For, if the memorandum contained other passages more relevant to the Case, they should have been quoted instead. The quoted passage is as follows:

> The original prerequisite for tool export was to follow instructions contained in the "Materials Procedure" clauses in our contract. It required copies of import forms and an inventory to accompany the permission to export forms. We complied fully with this requirement... (emphasis added)

With the above quotation in mind, one wonders how the majority could possibly have determined, based on this evidence, that a formal RTE had definitely been presented in April 1979. The memorandum makes no mention of the April RTE, nor does it complain that NIOC had denied permission to export. Furthermore, how can one infer the exact items of equipment

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[12] Cf. Opal H. Sether v. Tavana Insurance Co., Award No. 363-11377-2 [Khalilian, Separate Opinion], 18 IRAN-U.S. C.T.R, at 283-84; Lockheed Corporation v. Iran, Award No.367-829-2 [Khalilian, Dissenting and Concurring Opinion], ibid at 325 (para. 4).

at issue from the quoted passage, which speaks in very vague and nonspecific terms? Besides its ambiguity as to the items of tools involved, the memorandum is dated October 1979, which gives rise to the impression that it might have related only to the June RTE. In addition, the major flaw in the memorandum is that it generates an ambiguity by using the general term "excess equipment". This term per se does not refer to any particular items. Furthermore, in the light of Eastman's admission that some of the items listed on the April RTE were later taken out and re-rented, one wonders how the majority could have concluded that all the items mentioned on the list are compensable.

8. c) McMillan's oral testimony: The third and last piece of evidence which persuaded the majority to find for expropriation was the testimony given by McMillan at the hearing. As a matter of course, that testimony was no more than a verbal version of what he had already put into his affidavit. The remarks made above in regard to the validity of affidavits. See supra para. 5. apply equally here, too. Also, the principle of equal treatment of claimant and respondent requires the Tribunal either to disregard the oral testimony, in that the Respondents' witnesses also gave oral testimony rebutting McMillan's, or else to give the same weight and credibility to both sides. See supra para. 6. In either case, the outcome would have been the same.

9. These were all the evidentiary materials adduced by Eastman and relied upon by the majority, which then concluded, in a highly facile manner, that:

> After reviewing all the evidence before it, the Tribunal is persuaded that the April RTE was presented by Eastman to NIOC and OSCO. para. 90.

It is rather astonishing that the majority has reached such an unequivocal conclusion based only upon the meager, conflicting evidence discussed above, which it has surveyed in just two short paragraphs in the Award (paras 87-88). Indeed, the above-cited paragraph effectively served as the majority's basic premise upon which to build the whole notion of State responsibility against NIOC and the Government of the Islamic Republic of Iran, in the instant Case. I believe, however, that its premise falls far short of serving that purpose.

10. The issue of other alternatives: In order to defend its proprietary rights over the Service Plant, it was necessary for Eastman to establish that there was no alternative available to it other than to export the equipment. Yet, the following paragraph will demonstrate that Eastman has failed to prove this crucial assertion.

11. Under the contract, and in order to prevail in its claim here, Eastman was required to show that it had exhausted all possible avenues for protecting its properties, with a view to mitigating its damage.[13] Therefore, apart from exporting the equipment, Eastman had to try all other alternatives and to take all reasonable actions that could help it to lessen its property losses. However, it has not been established, or even alleged, that Eastman took any measure other than

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[13] It will be a case of an irrevocable damage if the injured party does not acted to mitigate his damage. See H.L.A. Hart and T. Honoré, Causation In The Law, Oxford: Clarendon Press, 1985, p. 312. "As an almost inflexible preposition," states also Calamari, "a party who has been wronged by a breach of contract may not unreasonably sit idly by and allow damages to accumulate. The law does not permit him to recover from the wrongdoer those damages ..." J. D. Calamari and J. M. Perillo, CONTRACTS, 3rd. Ed., West Publishing Co., 1987, at 610 (§14-15).

allegedly insisting, to the exclusion of all other avenues, on exporting the equipment. Yet, that was not its only option. Pursuant to the contract in force between the parties, Eastman had three possibilities by which it could attempt to exercise its rights over the Service Plant. It could export the equipment, rent it to a third party, or even dispose of it through sale. In the latter two cases, Eastman should have paid the relevant customs duties and obtained a release from the authorities. See OSCO's General Conditions, Clause 16, quoted in note 3, supra. Contractually, Eastman was only permitted —and not required— to choose the first of these alternatives. Although this point has a significant bearing on the issue of expropriation, it has been totally ignored in the Award. See, contra, Seismograph Services Corporation v. NIOC, Award No. 420-443-3 (22 December 1988), para 274.[14] There, since the Claimant, CEPS, did not attempt to use its option of selling the equipment as allowed it under Clause 16, the Tribunal refused to reach the conclusion that it was deprived of "the effective use, benefit and control of

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[14] 22 Iran-U.S. C.T.R. 3, where the Tribunal states:

> The Tribunal, however, also must consider that, pursuant to its contracts, CEPS had a second option available regarding the disposal of the Property. This option was to sell the Property locally after payment of the appropriate customs duties and charges. This would only have been profitable insofar as the value of the Property was higher than the cost of the customs duties and charges at the time of sale. The Claimant has not alleged that it was precluded from using this option at any time relevant here. Ibid at 72.

its Property so as to constitute an expropriation." Ibid, para. 301.[15]

12. June RTE: Although the above observations were made mainly in relation to the April RTE, they apply equally to the June RTE, with just one exception. Here, it is not disputed between the parties that the June RTE was presented to the Respondents in accordance with the contractual requirements, and that the Respondents approved the export since the form bears a signature in the box for indicating approval. What

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[15] In the Seismograph case, see supra note 14, the Tribunal held Iran liable not for a taking, but for an interference with the claimant's rights by not allowing the latter to export its property. See paras. 302-304 of that Award. Therefore, it limited the compensation to the loss of the profit that CEPS would have earned during the working life of the equipment:

> On the basis of these allegations the Tribunal finds that the actual damage suffered by the Claimant as a result of the deprivation of its right to export and, therefore, of the use of the Property outside Iran is limited to the loss of the profit that it would have earned with this Property during the working life of the Property. para. 305.

Here, I must digress by pointing out that the lost profit envisioned in the Award is not the kind normally sought as lucrum cessans in expropriation cases —a profit which is calculated quite speculatively, projected into future. The lost profit granted in the above cited Award is, rather, a specific profit which could certainly have been realized, but which had been interrupted due to an interference by the respondent. It, therefore, constitutes a profit similar to that relating to a tenant's use of property during the remainder of a tenancy period. Interference with such a right is to be objectively considered as an instance of damnum emergens.

is at issue, however, is whether Eastman was later prevented from exporting the equipment listed in the June RTE. The burden of proof falls on Eastman to demonstrate that after obtaining the approval for export, it took all reasonable steps to export the equipment but was unsuccessful in those efforts due to illegal acts directed against it by NIOC or the Government of Iran. By approving the export, NIOC did all that it was contractually required to do; it was then incumbent upon Eastman to take the necessary steps actually to export the equipment. In the Houston case, the Tribunal dismissed a similar demand by the claimant therein, stating that "HCC is still required to show that it took all reasonable steps to export the equipment, so as to satisfy the burden of proof that the losses suffered by it were incurred as a result of the acts or omissions of IRAN and not by HCC's own failure to act."[16] Surely, in the present Case the Claimant's evidentiary materials were sufficiently flawed for the Tribunal to invoke the same argument. Nonetheless, the majority chose to deviate from the generally accepted rules of evidence, and instead reproached the Respondents on two counts: First: In paragraph 96 of the Award the majority remarks that the "[c]ertificates from Iranian Customs showing that this equipment had been cleared for export should have

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[16] Houston Contracting Company v. NIOC, Award No. 378-173-3 (22 July 1988), 20 Iran-U.S. C.T.R. 3, at 124 (para. 467). The statement preceding the passage quoted above is also relevant. Here is a full quotation:

> HCC was required under the Gach Saran Contract to take steps to re-export or sell equipment imported thereunder. Even if such action was not required by the other contracts, HCC is still required to show that it took all reasonable steps to export the equipment, so as to satisfy the burden of proof that the losses suffered by it were incurred as a result of the acts or omissions of IRAN and not by HCC's own failure to act.

been accessible to the Respondents and could have been produced by them." This statement which is in effect an objection to the Respondents' argument had never been raised by the Claimants. Yet, the majority initiated it proprio motu as if it was so necessary to excuse the Claimants' failure to produce the relevant evidence. Similarly, it turns a blind eye to the massive, indeed catastrophic destruction which took place in southern Iran during the war with Iraq, owing to which not a single document of the official records there survived. Second: In order to buttress its position, the majority further states in the same paragraph: "The Respondents neither proved or even alleged that OSCO provided Eastman with any directions." It is true, as the Award points out, that OSCO's Materials Procedure contains guidelines instructing Eastman to effect shipment in accordance with OSCO's directions. However, direction is normally given only when applied for. There is nothing in the record to prove that Eastman ever solicited any directions for exporting the equipment; nor is there the slightest indication that it raised objections, at any relevant time, to OSCO's failure to provide such directions. The Tribunal could more appropriately have questioned Eastman's failure to establish that it really needed the directions in order to proceed, as well as why, if it really believed it needed the directions and was maintaining that OSCO withheld them, Eastman never raised any objections to OSCO for this failure to comply with its obligation under the Contract.

13. Failure to take into account the accurate itemization of the equipment: Having unpacked the export shipment reflected (as alleged by the Claimant but denied by the Respondent) in the April RTE, Eastman picked out a number of items and re-rented them. See supra para. 7. Nonetheless, the Claimant brought a claim for full compensation for all the items under both the April and June RTEs. The majority has awarded on the basis of this claim, even though Eastman states that it did

not exclude therefrom the items whose exportation it effectively renounced by subsequently choosing to re-rent them. For this portion of the equipment, Eastman never did submit a third RTE, in addition to the April and June RTEs. Obviously, then, both the claim and the Award involved an erroneous itemization of the Service Plant for the purpose of compensation. Absent any RTE for the reactivated equipment, it could have not been considered as expropriated.

14. In effect, the majority appears to have based this inaccurate decision on the premise that Eastman was unlikely to have been so careless as to abandon the Service Plant in Iran. This idea, however, is plagued by factual and legal flaws. Although any sensible businessman should be anxious about his property and would therefore take all the steps necessary to maintain his rights, this is true only when all things are running normally. By contrast, in the circumstances then prevailing in Iran, a wide range of unpredictable factors, doubts and uncertainties affected the judgment of many foreign contractors. At the same time, despite the many serious problems discouraging contractors, there were also some prospects in certain areas which gave them cause for hope. Today, in the restful atmosphere of The Hague, it is quite easy for us to rely on hindsight and think of how given situations in revolutionary Iran might reasonably have been expected to turn out. However, if we are more objective and place everything in its actual context, we realize that some other events, however unlikely, could also have occurred. The assumption of unlikelihood underlying the majority's decision does not relieve Eastman of its burden of proof, for otherwise certain other claimants such as Houston and Seismography, which failed to prove a case of expropriation before this Tribunal, should also have been relieved of that burden. The legal flaw found in the present finding of expropriation, as in certain other analogous cases adjudicated by the Tribunal, is a complete disregard of the

principle that a State can not be held internationally responsible for deprivation of aliens' property unless it has directed particular concrete actions against the property of specific aliens. Then, it is incumbent upon such aliens to carry the burden of proof to substantiate their cases before an international court. However, the Claimant in the Case under study has submitted not even one single piece of contemporaneous evidence to prove that Iran or NIOC took control of Eastman's equipment despite Eastman's efforts and reasonable steps to safeguard its properties. See supra, "The issue of the evidentiary materials."

15. Part of the equipment rented to OSCO by Eastman belonged to third parties: Daily, OPI, and Cougar tools. They did not appear before the Tribunal as claimants, however. Eastman had argued that it was also entitled to compensation for this portion of the equipment, based on the theory of a bailee's rights in respect of items in his custody. The Tribunal dismissed this claim in paras. 103-104, though its reasoning appears not to be very plausible. Eastman, the bailee in the present Case, was acting as an agent for Daily and OPI, and as an agent it was not liable for loss or destruction of the equipment by a third party, except to the extent provided for in the relevant contracts. Even in the latter case, a loss suffered by the bailee is considered to be consequential, indirect damage being generally not compensable by the third party to the bailee.

16. Failure to reflect Depreciation in calculating the Replacement Value: As regards the measure of compensation, the Tribunal followed the practice established in its rulings in similar cases of expropriation, and awarded the full equivalent of the Eastman-owned[17] equipment listed on the

[17] Part of the equipment rented to OSCO by Eastman belonged to third parties. See para. 15.

April and June RTEs. See the Award, para. 105. To determine the full equivalent value, the majority endorsed the Claimant's position by asserting that this was equal to the fair market value. See the Award, para. 106. This finding is also supported by the previous practice of the Tribunal, whereby the market value is viewed as the price a reasonable, willing buyer would pay a willing seller in a free market transaction[18] —a concept which includes the element of depreciation. Yet, in the present Case, while the majority cast doubt on the Claimant's proposition that used drilling equipment, even when maintained as good as new, would normally have the same fair market value as new drilling equipment, it finally declined to include depreciation as an element of valuation, justifying its decision merely by invoking the lack of evidence on the Respondents' side. See the Award, para. 108. I too agree that the defense was woefully lacking in evidence on the matter of valuation,[19] but the majority's view as reflected in the Award is equally wanting in adequate legal argumentation. Its approach is not logical, for the following reasons.

17. Just as the Eastman's expert, Mr. Jones, asserted in respect of the Eastman equipment, in another case, Sedco Inc. v. National Iranian Oil Company, the claimant's expert argued

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[18] See Starrett Housing Corp. v. Iran, Final Award No. 314-24-1, 16 Iran-U.S. C.T.R. 112, at 122 (para. 18); Amoco International Finance Corporation v. Iran, Partial Award No. 310-56-3 (14 July 1987), 15 Iran-U.S. C.T.R. 189, at 255 (para. 217).

[19] "In respect of the expropriation claim, as we have expressed in our memorials, NIOC does not accept the claim for expropriation and, thus, rejects it and, since they believe that there was no expropriation taking place, therefore, they did not see it necessary to evaluate the property or calculate the compensation." Respondent's presentation, quoted from the Transcript of the Hearing, p. 358.

also that the value of a rig depended more upon its condition than upon its age: "He stated that if a rig is properly maintained, as various components wear out they are replaced by new parts so that after several years nearly all major components would be significantly newer than the originally assembled rig." Interlocutory Award No. ITL 59-129-3,[20] para. 34. Chamber Three decided to the contrary, however, and held that the age of a rig is a relevant factor in its valuation. Ibid. Reproving the claimant in that case for minimizing the role of the age of the property in its valuation, the Tribunal further states: "Furthermore, it is arguable that he [the claimant's affiant] somewhat underestimated the relevance of the age factor to a prospective buyer." Ibid para. 75.

18. Fair market value means a price which a willing buyer would pay for the equipment to a willing seller in a free market transaction. It is common-sense that no sensible buyer ignores the age of the equipment —however carefully it has been refurbished— or declares himself prepared to pay as high a price for used goods as for brand-new ones. Reviewing both the written submissions and the transcript of the hearing, I noticed that even the Claimant's counsel and the expert affiant, Mr. Jones, did not run the risk of absurdity in asserting this claim. In their presentation, they carefully pointed out that the rental of the equipment would be the same, whether used or new.[21] They very cautiously

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[20] See supra, note 6.

[21] In his oral testimony, Mr. Jones told the Tribunal: "... so if you are in the rental business it really doesn't make any difference whether the product is a brand new motor or a used one..." Case No. 131, Doc. No. 183, the Transcript of the Hearing, at p. 75. Jones further testified: "If it is used in the rental business, then it is exactly the same value (continued...)

advanced the notion of "rental" rates, avoiding to assert outright that the purchase price for aged equipment was the same as for new. Dodging this issue, they then requested the Tribunal to award compensation based on the replacement value of identical new equipment. The majority erroneously endorsed this position, even though it should have been well aware that it is not the Tribunal's function to assess the rental of the equipment allegedly taken; rather, it should determine the purchase price that a reasonable buyer would pay to the seller.

19. The Award fails to cite any judicial precedents in support of the majority's position. The Claimant, however, invoked in its submissions Chamber One's Award in Oil Field of Texas, Inc. v. Iran, in which "[t]he Tribunal finds that the replacement value, in the circumstances of this Case, is an appropriate measure of the value of the equipment."[22] The

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[21](...continued)
as a new piece of equipment because, again, the rental rates are the same." (Emphasis added), ibid p. 77. Replying to my question, the Claimant's counsel, Mr. Rovine, also avoided the central issue by using exactly the same expressions: "Something perhaps like a car that you rent, and whether it has a hundred miles or a thousand miles, the rental rate is the same." (Emphasis added), ibid at p. 315. These remarks speak eloquently for themselves. It is to be noted that they all spoke of a "rental rate," as if Chamber Two's arbitrators were sitting there for the purpose of renting the equipment to NIOC or Iran. However, expropriation was being addressed, and so it is the market or purchase value that was at issue. They never discussed what would be the price if a reasonable, willing buyer sat down to negotiate a price for purchasing the used, refurbished equipment. So, even from their viewpoint would the buyer really pay the same price for it as for brand-new equipment? Surely, no one would seriously believe so!

[22] Award No. 258-43-1 (8 October 1986), 12 Iran-U.S. C.T.R. 308, para. 43, at 319.

Tribunal then adds: "The question whether the equipment at issue was used or new is not as such determinative as to its value."[23] From my standpoint, one can make a distinction between Oil Field and the Eastman Case; the element distinguishing these two cases could easily be found by examining why it was immaterial, in the former case, to resolve the issue of whether the equipment was aged or new. Chamber One gives the reason in the subsequent paragraph, stating that:

> The appraisal submitted by NIOC was based on the assumption that the equipment was defective —an assumption not borne out by the evidence. If this assumption is discounted, NIOC's appraisal is not significantly different from the value submitted by the Claimant.

In other words, since the valuations of both claimant and respondent were so close, the issue of whether the equipment was new or used was immaterial.

20. The majority's reliance on the argument that the Respondents failed to provide evidence on valuation, see supra para. 16, is subject to criticism in that international tribunals have an inherent power to decide certain issues quite independently and on their own initiative, no matter how deficient or insufficient the evidence submitted. I am pointing here to what has consistently been recognized in the case-law of this very Tribunal, namely, the equitable discretion to take decisions proprio motu on certain matters in certain circumstances. An equitable adjustment as to the valuation involved in this Case is indeed one of those instances. For, speaking of common sense, in the eyes of a reasonable buyer there is an unquestionable difference between

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[23] Ibid para. 44.

the price he would pay for new equipment and that for used, no matter how regularly refurbished. In view of the notion of "equitable discretion" endorsed by the Tribunal itself, the majority cannot be relieved of its responsibility in the instant Case by saying, essentially, that in view of the total absence of any rebuttal evidence regarding the valuation issue, it finds it difficult to choose arbitrarily a depreciation factor to be applied to the value of the assets taken. This approach by the majority leads, of course, to a miscarriage of justice and a negation of accepted concepts such as equitable discretion, equitable adjustment, and reasonable approximation, which were hitherto developed in the course of the Tribunal's history and have helped it to adjudicate valuation issues on various occasions even where the evidence was lacking or insufficient. A passage from the Final Award in the Starrett case is significant in this connection:

> In this respect, the practice of the Tribunal supports the principle that when the circumstances militate against calculation of a precise figure, the Tribunal is obliged to exercise its discretion to determine equitably the amount involved. Economy Forms Corp. v. Islamic Republic of Iran, Award No. 55-165-1, p. 21 (14 June 1983) reprinted in 3 Iran-U.S. C.T.R. 42,52. See also Sola Tiles, Inc. v. Government of the Islamic Republic of Iran, Award No. 297-209-1, para. 48 (22 April 1987); Thomas Earl Payne v. Government of the Islamic Republic of Iran, Award No. 245-335-2, para. 37 (8 August 1986). It is generally recognized that international tribunals have a wide margin of

appreciation to make reasonable approximations in such circumstances.[24] (Emphasis added)

21. Specifically on the subject of depreciation where the evidence was absent, the Pereira case provides an example of the exercise by the Tribunal of its inherent power. It found in favor of that approach in the following terms:

> The only evidence of value presented with regard to the confiscated property is an inventory of property items noting with the original purchase price of each item, which when totalled, equals 5,455,990 rials. Taking account of the likely depreciation of major items and the nominal re-sale value of small items, the Tribunal concludes that value of the confiscated property on 5 October 1980 equalled 1,000,000 rials. ...[25]

Also by the exercise of its equitable discretion, the Tribunal reduced the claimant's recovery in another case. International School Services, Inc. v. NICIC, 9 Iran-U.S. C.T.R. 187, at 199: "As an exercise of its equitable discretion, the Tribunal finds that the Claimant's recovery should be reduced by this amount." This approach was further illustrated in the Phelps Dodge case, adjudicated by the same Chamber Two that has taken an opposite position in the present

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[24] Final Award No. 314-24-1, 16 Iran-U.S. C.T.R. 112, at 221-222. See also ibid p. 221: "These matters are not capable of precise quantification because they depend on the exercise of judgmental factors that are better expressed in approximations or ranges. In these circumstances, the Tribunal must make an overall determination of a global amount..."

[25] William L. Pereira Associates, Iran v. Iran, Award No. 116-1-3, 5 Iran-U.S. C.T.R. 198, at 227.

Case. There, in making an adjustment to the costs incurred in favor of the respondent, it relied on the concept of equitable discretion.[26] It also made a reference to an earlier decision by the Tribunal in Queens Office Tower Associates, where the loss was apportioned and the claimant's recovery thereby reduced, once again as a result of the Tribunal's own initiative in availing itself of its equitable discretion.

22. Given the facts and precedents cited above, it would not have been arbitrary of the Tribunal to make an equitable adjustment to Eastman's recovery in the present Case as well. The majority should have simply taken into account that (a) used equipment is not salable at the same price as new equipment; and (b) in awarding the Claimant compensation based on new equipment value, the Tribunal undeniably took the risk of unjustly enriching Eastman to the detriment of the Respondent. It should after all be recalled that in the Payne case, the Chamber Two itself made an approximation in order to reduce the claimant's recovery, and awarded it what the Tribunal called a "fair market value." Award No. 245-335-2, cited as precedent in the above-quoted passage from Starrett (supra, para. 20), was rendered by Chamber Two, which adjudicated the present Case as well. In para. 37 of that Award, it was found that an ex officio approximation of the value of the claimant's interests was warranted, in order to

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[26] Phelps Dodge International Corporation v. Iran, Award No. 218-135-2 (19 March 1986), 10 Iran-U.S. C.T.R. 157, at 173 (para. 52).

determine their fair market value.[27] Was that earlier approach, then, merely an arbitrary decision?

23. Lost profits: The claim for loss of profits based on the alleged deprivation of the use of directional drilling equipment during the 12-month lead time required to obtain new equipment has been dismissed in para. 110 of the Award. As a concept in terms of international ajdudication, "lost profit" —lucrum cessans— is generally viewed as consequential, indirect, and even remote damage, which is not compensable in lawful expropriations.[28] This is the principle upon which to base the argument for rejecting the claim for lost profits. However, the lost profit sought by Eastman could not be viewed from this angle; it was, rather, certain profits anticipated quite reasonably during a short definite period of time. See also my digressive remarks supra, note 15. Certainly, as the Award points out, the Claimants' failure to provide evidence as to the lead time required, or proof of invitations or

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[27] Thomas Earl Payne v. Government of the Islamic Republic of Iran, Award No. 245-335-2 (8 August 1986), 12 Iran-U.S. C.T.R. 3, at 15, 16. The value thus determined by the Tribunal was $900,000.00, rather than the $8,827,000.00 sought by the claimant. Cf. ibid, at 13.

[28] Despite its adjudicating numerous cases of expropriation, the Tribunal has not established any precedent of awarding lost profits during its ten-year judicial activities. The core of the problem in the compensations based on the method known as 'discounted cash flow' is also the fact that lost profits have to be taken into account as the main and essential element in the computation thereof. See AMOCO, supra note 18, at 259 (para. 229); S. Kh. Khalilian, "The Place of Discounted Cash Flow in International Commercial Arbitration: Awards By Iran-United States Claims Tribunal," Journal of International Arbitration, Vol. 8, No. 1 (March 1991), pp. 41-43.

inquiries by potential customers, would appear to constitute grounds for dismissing the claim.

24. Jurisdictional flaws: A major flaw impairing the majority's decision on jurisdiction can be seen in its finding in para. 17 of the Award. There, the majority holds that the substitution of Seahorse Fleet, Inc. for Seahorse, Inc. is permissible, as representing "the name of the proper Claimant, and not an amendment whereby a new Claimant is added," reasoning that "Seahorse Fleet, Inc. is the actual successor corporation to the claim-holder, Offshore Boats." The fact is, however, as stated in a letter dated 14 January 1978 and submitted in evidence, that Offshore Boats —a juridical entity created by Petrolane, Inc. and the party that signed the underlying contract in the claim— was merged with Seahorse, Inc. Thus, it was Seahorse, Inc. that initially brought the present action before the Tribunal, and it was only in subsequent stages of the proceedings that it described the Claimants as "Seahorse, Inc. and/or Seahorse Fleet, Inc." Seahorse Fleet, Inc. is an entirely separate entity and not a true party to this Case; therefore, adding its name to the caption of the Claimants' written submissions constituted the addition of a new claimant and not, contrary to the majority's view, merely a clarification of the name of the proper claimant. In support of this position, it must also be pointed out that the lawsuit filed with a New York court for the same claims and against the same respondent as in the present Case, was pursued by "Seahorse, Inc." as late as 10 July 1980.

25. So far as the subject-matter of the present claims is concerned, in this Case the Tribunal has jurisdiction over only the invoices relating to services after August/September 1977. This is because the evidence submitted by the Claimants does not establish their ownership of the shares of the subsidiary companies prior to that time; nor has any proof

been provided to establish the Claimants' nationality prior to September 1977. NIOC raised objections to the lack of evidence on these points, but the Claimants' only reaction was to deny the need for any evidence in proof of its ownership and nationality during the times in question (Case No. 131, Doc. No. 157, at 44). Instead of treating this reply as a mere circumvention clearly undermining the credibility of the claim, the majority found it a persuasive argument in favor of relieving the Claimants of their burden of proof in this connection.[29] Given that the Case is thus impaired by serious lacuna in the evidence, certain of the claims should have been dismissed on grounds of non-jurisdiction.

26. The Fallacy of Subrogation: The majority's argument in para. 119 of the Award is highly confused. Eastman owed one of its employees, Mrs. Karimi, certain amounts in severance pay, unpaid salary and other benefits. An order issued in February 1981 by the Ahwaz court directed NIOC to earmark a certain sum, for this purpose, out of the amounts it owed to Eastman. NIOC complied with the court's order and paid Mrs. Karimi the judgment sum. Relying on this fact, NIOC brought a counterclaim against Eastman for the amount it had paid Karimi, and the majority decided in NIOC's favor on this point by skirting the jurisdictional issue. Who, however, was the true owner of this claim? The owner was either Karimi, who as a private person would not be eligible under the Algiers Declarations to bring an action against a United States

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[29] Peat Marwick, the accountant hired by the Claimants to verify and pronounce its views on the documentary evidence relating to Claimants' nationality and ownership of stock, has made the following remarks: "At your [the Claimants'] request, we have performed certain procedures with respect to the matters delineated below. Such procedures, which are the basis of this letter, did not constitute an examination made in accordance with generally accepted auditing standards." (emphasis added)

private national, or else it was NIOC, which was also ineligible to bring this claim since it belonged to a third party until February 1981. The subrogation discussed in the Award[30] took place only in February 1981, when NIOC effected payment, in lieu of Eastman, to Karimi. To put the matter more simply, NIOC stepped into Karimi's shoes and became the owner of the claim against Eastman only after it had satisfied the court's order. Therefore, this counterclaim cannot be regarded as having been outstanding on 19 January 1981, as required by the Declarations. In fact, the Award explicitly states that the counterclaim was not outstanding as of that date, "[i]f NIOC's counterclaim arose from that court order." On the other hand, it holds that Karimi's claim itself gave rise to the counterclaim, and therefore finds that NIOC's counterclaim was outstanding after all. One feels a certain bewilderment in the face of this reasoning, for it is by no means clear how Karimi's claim could, by itself and without generating any process of succession, possibly have given rise to NIOC's counterclaim.

27. Seahorse's Retention Claim: The key issue in this claim is whether, given the circumstances confronting the Parties in 1979, it was outstanding on 19 January 1981. No matter whether or not the Respondents had ever raised this plea of non-jurisdiction, jurisdictional issues must, ipso facto, be taken up ex officio by the Tribunal even if not raised by a party. As noted in the Award, a message telexed by Seahorse on 30 November 1979 gives rise to the question whether its retention claim was outstanding as of the date required by the Algiers Declaration. The Award reaches the conclusion that the claim was indeed outstanding, because while in the said

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[30] "In the Tribunal's view, the court order by its nature implied that, to the extent NIOC complied with it by paying Karimi, NIOC succeeded to Karimi's rights against Eastman." Para. 119.

telex Seahorse refused to accept the payment offered by IPAC in satisfaction of the former's retention claim, this refusal cannot be interpreted as constituting a waiver or suspension of its claim. See para. 143 of the Award. I do not fully concur with this conclusion. The majority states in the Award that "the currency exchange restrictions in effect in Iran and the measures taken by the United States to freeze Iranian assets in response to the seizure of its embassy in Tehran meant that Seahorse would have had great difficulty in late November 1979 in repatriating the retention money that IPAC was offering to it." However, even when viewing the issue from this same perspective, one wonders why this refusal on Seahorse's part should not amount at least to a suspension of its claim. Being not outstanding means that a debt is not due, as the result of either a contractual arrangement or a consent by the creditor to defer collection of the debt until a later date than that on which it was initially due. What Seahorse did in respect of its claim is tantamount to an extension of the date of maturity of the obligation.[31] Admittedly, Seahorse did not indicate that it was waiving its claim, but it did, nevertheless, suspend sine die payment on its demand. It would thus have been quite appropriate to find that this claim was not outstanding on 19 January 1981, given that the inconveniences that lead Seahorse to decline, even temporarily, to accept IPAC's offer of payment were still in place, and given moreover that the Claimants have not established that Eastman ever requested, at any time prior to 19 January 1981, that IPAC effect payment on the retention claim.

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[31] Cf. Schering Corporation v. Iran, Award No. 122-38-2, 5 IRAN-U.S. C.T.R. 361, at 373.