161-110
161-11.

ES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

110

Case No. 161

Date of filing: 26Nov86

** AWARD - Type of Award _____

- Date of Award _____

_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____

_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of Mr Amelí

- Date 26Nov86

68 pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

_____

- Date _____

_____ pages in English _____ pages in Farsi

R/12

In His Exalted Name

110

CASE NO. 161
CHAMBER ONE
AWARD NO. 184-161-1

INA CORPORATION,
Claimant,
and
THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN,
Respondent.

DISSENTING OPINION OF JUDGE AMELI

I. Introduction

On 15 August 1985 I issued a declaration indicating my inability to join in the Award in this Case filed on 13 August 1985 because of the form in which it was finally issued. In the said declaration, I also intimated that I joined in the Separate Opinion of Judge Lagergren, containing statements on the current status of international law on nationalization and compensation in which I largely share but that I would, in due course, issue my dissenting opinion to the Award.

My dissent stems from the fact that this Tribunal should have decided this Case on the basis of the present status of international law on nationalization and compensation. If the Tribunal had so decided, and awarded "appropriate" compensation to INA, taking into account "the rules in force" in Iran "and international law", it would have arrived at a figure which approximates more to the realities of the situation.

In the contrary circumstances, the Tribunal awarded to INA the amount it paid for its shares at the time of the purchase. This position, apart from everything else, ignores the fact that INA, as a venture capitalist took up shares in a corporation whose value was subject to market risks. Indeed, at the time it was nationalized this value was in the negative. Nor can this negative value be attributed to the act of nationalization itself, for as the evidence shows, the corporation had incurred heavy losses prior to nationalization and its net worth as at the date of nationalization was a negative value of over 69 million rials. Thus, as a shareholder, INA was entitled to no more than what its investment was worth at the time it was nationalized.

The Tribunal bases its decision on Article IV(2) of the Treaty of Amity between the Imperial Government of Iran and the United States of America[1], claiming that for the purposes of this Case it is a lex specialis between the United States and the Islamic Republic of Iran, and that its provisions in the present circumstances require compensation representing the full equivalent of the property taken. It

---

[1] Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, signed on 15 August 1955, entered into force on 16 June 1957, 28 U.N.T.S. 93; 1336 Iranian Law Digest 78; T.I.A.S. No. 3853; 8 U.S.T.899.

then interpreted this "full equivalent" as being equal to the fair market value of the Claimant's shares in the Iranian company, assessed as at the date of nationalization.

In the first place, I do not believe that, having regard to the history of the Treaty of "Amity", the alleged breaches of obligations thereunder by the United States, and changed circumstances, the Treaty provisions, including those pertaining to compensation for nationalized property, can be invoked even before the International Court of Justice (the "ICJ"), the forum selected by the High Contracting Parties under that Treaty, let alone before this Tribunal.

Secondly, this Tribunal lacks jurisdiction to make any pronouncement as to the interpretation or application of the Treaty of Amity. The High Contracting Parties pursuant to Article XXI of the Treaty undertook to submit any such dispute to the ICJ. They did so with particular regard for the Court's 15-member composition and their method of election by the General Assembly of the United Nations from among well-known jurists of the world including from Communist and Third World countries. Although, as Judge Lachs of the ICJ put it, an ICJ Judge does not carry with him any particular political alliance to the Court from his country of nationality,[2] the United States nevertheless would be forced to abide by the rulings of the Judges with whose countries it has been in ideological war. Determination of such issues by the ICJ would make it possible for the Islamic Republic to be heard by eminent Judges of divergent views.

---

[2] Separate Opinion of Judge Lachs, pp. 1-3 in Military and ParaMilitary Activities in an against Nicaragua (Nicaragua v. United States of America) Merits, ICJ Judgment of 27 June 1986.

~~Article XXI(2) of the Treaty provides:~~

> 2. Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

Certainly the Algerian Declarations and this Tribunal were not intended by the two Governments to be the other pacific means for settlement of disputes arising from the interpretation or application of the Treaty of Amity. Modification of such particular provision by a successive treaty requires special treatment.

The jurisdiction of the ICJ on these issues is exclusive of the jurisdiction of any forum including that of this Tribunal. An agreement giving a tribunal exclusive jurisdiction is not required to state that "the tribunal has exclusive jurisdiction." Any obligatory provision is sufficient for that purpose. In fact the Full Tribunal's own established criterion in nine test cases involving forum selection clauses attests to this conclusion. The last phrase of Paragraph 1 of Article II of the Claims Settlement Declaration excludes from the jurisdiction of this Tribunal "claims arising under a binding contract between the parties specifically providing that any dispute thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position."

In determining whether or not such phrase excluded its jurisdiction the Full Tribunal held that "the plain wording" of the term in six of the forum selection clauses, "fulfil[led] the requirements in Article II of the Claims Settlement Declaration that a claim falls outside the jurisdiction of the Tribunal if it arises under a contract between the parties specifically providing that any dispute

thereunder shall be within the sole jurisdiction of the competent Iranian courts," although only one of the clauses contained the word "exclusively". Those forum selection clauses were as follows:

1. "All disputes arising in connection with this Purchase Agreement not otherwise amicably settled between the parties shall be settled by submission to the Courts of Iran." Halliburton Co. and Doreen/Imco, et al. Award No. ITL 2-51-FT, Part III, p. 4, reprinted in 1 Iran-U.S. C.T.R. 242, 245.

2 and 3 "Any disputes arising from the execution of this agreement, if not settled amicably, shall be resolved through the Iranian legal authorities."

or a different translation of same clause:

"Any dispute arising from the performance of their contract, not settled amicably, shall be settled by reference to the legal authorities of Iran." George W. Drucker, Jr. and Foreign Transaction Co. et al, Award No. ITL 4-121-FT, Parts II and III(1), pp. 2-3 and 7, reprinted in 1 Iran-U.S. C.T.R. 252, 253 and 257.

4. "Eventual disputes must be finally and exclusively settled in Iranian courts." Ibid. Part III(2), p. 8, reprinted in 1 Iran-U.S. C.T.R. 252, 257.

5. "All disputes arising out of this Subcontract, or the interpretation and understanding of its provisions between the parties, which cannot be settled through amicable negotiations or correspondence, shall first be referred to a committee composed of a representative of each of the Employer, Housing Organization, and Subcontractor. In case no agreement can be reached or if one of the parties does not agree with the judgement of the majority of the committee, the dispute will be settled according to the laws of Iran by reference of it to competent courts of Iran." (Emphasis added.) T.C.S.B. Inc. and Iran, Award No. ITL 5-140-FT, Part III, p. 4, reprinted in 1 Iran-U.S. C.T.R. 261, 264.

6. "All disputes arising out of or in connection with this Agreement, any performance or non-performance thereof, or the consequences of any of the foregoing shall be settled by a competent Court of Law of Iran." Stone & Webster Overseas Group, Inc. and National Petrochemical Co. et al, Award No. ITL 8-293-FT, Part II, p. 3, reprinted in 1 Iran-U.S. C.T.R. 274, 275.

Most of these quoted provisions do not use terms such as "exclusive" or "sole", as neither does the forum selection clause of the Treaty of Amity. And the Full Tribunal did not find it necessary that such terms should be present in order to meet the requirement of exclusive jurisdiction. Consequently this Tribunal is bound to refrain from any pronouncement on any dispute as to the interpretation or application of the Treaty of Amity. The Tribunal's pronouncement on these issues of the Treaty of Amity will unduly relieve the United States, the real party to disputes relating to interpretation of the Treaty, from pursuing the matter in its proper forum where the Islamic Republic will also be able to prosecute any United States violations of the Treaty of Amity, as to which this Tribunal lacks jurisdiction.

Furthermore, assuming arguendo that the Treaty can so be invoked here, the rules of treaty interpretation require that the relevant provisions on compensation should be modified to the extent required by international law at the time of interpretation. Moreover, the concept of "fair market value" that was applied, --assuming arguendo that it was applicable --should have involved a systematic evaluation of what the Claimant's shares were actually worth on the Iranian market.

II. The Current Status of International Law on Nationalization and Compensation

The international law on nationalization and compensation has undoubtedly undergone major transformations. In its present formulation, the traditional concept of "prompt, adequate and effective" compensation -- which is even doubted as ever having been fully established -- has been jettisoned and replaced by the concept of "appropriate" compensation. This is the conclusion one comes to upon a qualitative examination of the sources of international law as defined by the Statute of the ICJ, and of developments within the international community since the assertion of the so-called Hull formula in the 1930s.

Article 38 (c) of the Statute of the ICJ lists the sources of international law as international conventions, whether general or particular, international custom as evidence of a general practice accepted as law, and the general principles of law recognized by civilized nations. In addition, Article 38 (d) of the Statute, after entering a caveat against the application of stare decisis to decisions of the ICJ, mentions judicial decisions and then the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.

Judicial decisions are therefore of limited value in determining the rules of international law. Decisions of arbitral tribunals are of even less value in this regard. Similarly, it is not every piece of writing that qualifies as a subsidiary means of determining rules of international law. It is only the teachings of the most highly qualified publicists of the nations of the world and not the speculations of polemicists nor the numerous untested opinions in the proliferation of academic writings -- many of which tend to contradict each other. To be regarded as reliable subsidiary sources of international law, even the most authoritative writings of publicists must reflect the true

nature of international law, as the law so recognized by the plurality of the subjects of international law, namely, the sovereign states. Consequently, resolutions of the General Assembly of the United Nations, where they evince the practice of the member states, must be regarded as valuable sources of international law. Certainly the collective views of member states expressed in such resolutions cannot be less authoritative than the opinions of individual publicists, scholars, or arbitrators.

I am aware of the formalistic argument that General Assembly resolutions do not create law in a formal sense, since they are not among the sources of international law mentioned in Article 38(c) of the Statute of the ICJ. However, such resolutions may nevertheless authoritatively prove the existence of international law --as noted by Castaneda in his seminal essay on the subject. Castaneda writes:[3]

> The basic foundation for the binding force of rules or principles that are "declared", 'recognized' or 'confirmed' by a resolution rests, in the final analysis, on the fact that they are customary rules or general principles of law. But the declaratory resolution that incorporates and formulates them has a fully probative legal value. As [Judge] Jessup states concerning the Nuremberg principles and the crime of genocide, the declarations in which the principles 'are embodied are persuasive evidence of the existence of the rules of law which they enunciate.' (Emphasis added.)

Judge Jiménez de Aréchaga of the ICJ (and former President of the Court), also writes on this issue:

> [I]n the exercise of its powers under the [United Nations] Charter the General Assembly may not legislate for the world.... But, as the "town meeting of the world" it is a centre where States

---

[3] J. Castaneda, Legal Effects of United Nations Resolutions (New York, 1969), 172 quoting Ph. Jessup, A Modern Law of Nations, 46 (New York, 1948).

> may express their consensus on an existing or emerging rule of international law or provide the basis and the starting point for a progressive development of that law through the uniform conduct of states.[4]

1. The Statement of the Law

What is the "general practice accepted as law" (opinio juris communis) on the question of compensation for nationalization in modern times? Is it the "prompt, adequate and effective" standard asserted mainly by the United States, or is it some other standard? I maintain that the starting point for a statement of the law in modern times is the United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962, entitled "Permanent Sovereignty over Natural Resources," as Judge Lagergren also does in his Separate Opinion in this Case. Paragraph 4 of the said Resolution reads:

> 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 . . . . (Emphasis added.)

---

[4] Jiménez de Aréchaga, International Law in the Past Third of a Century, 159 Recueil des Cours 34 (1978). See also, Ian Brownlie, Principles of Public International Law 14 (3d. ed., Oxford, 1979). But on the question of "consensus" or universal acceptance, see the North Sea Continental Shelf Case, 1969 I.C.J. 229: "To become binding, a rule or principle of international law need not pass the test of universal acceptance... The evidence should be sought in the behaviour of the great number of States, possibly the majority of States, in any case the great majority of the interested States".

In subsequent years this concept has been elaborated upon. In October 1972, the Trade and Development Board of the United Nations Conference on Trade and Development ("UNCTAD") by Resolution 88 (XII) declared that, the Board:

> Reaffirms the sovereign right of all countries freely to dispose of their natural resources for the benefit of their national development in the spirit and in accordance with the principles of the United Nations . . . .
>
> Reiterates that, in the application of this principle, such measures of nationalization as States may adopt in order to recover their natural resources are the expression of a sovereign power in virtue of which it is for each State to fix the amount of compensation and the procedure for these measures, and any dispute which may arise in that connexion falls within the sole jurisdiction of its courts, without prejudice to what is set forth in General Assembly Resolution 1803 (XVII) . . . .

On 5 February 1974, the United Nations General Assembly again adopted Resolution 3171 (XXVIII) on Permanent Sovereignty over Natural Resources, paragraph 3 of which reads, in terms similar to UNCTAD Resolution 88:

> [E]ach state is entitled to determine the amount of possible compensation and the mode of payment, and . . . any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures.

The vote on Resolution 3171 (XXVIII) was 109 in favor, one against and 17 abstentions, including the United States. The major difference between Resolution 3171 (XXVIII) and Resolution 1803 (XVII) is that the former reserves exclusively for the laws of the nationalizing state the subject of compensation and any disputes thereof. Subsequent resolutions of the General Assembly have maintained this distinction between them and Resolution 1803 (XVII). These resolutions are Resolution 3201 (S-VI) of 1 May 1974, titled the Declaration on the Establishment of a New International Economic Order and Resolution 3281 (XXIX), the Charter of

Economic Rights and Duties of States, adopted on 12 December 1974.

There has not been a dearth of commentators anxious to throw light on the true content of the law. Most of them, with characteristic common law bias, have turned to judicial and arbitral decisions on the point, at the expense of the primary sources of international law. However, in this regard, they have not always been true to their craft. They blur important common law distinctions between obiter dictum and ratio decidendi. The sources used are highly selective and not representative of the views of the international community as a whole. In the end, they conclude that even though the cases do not use the magical words of "prompt, adequate and effective" compensation, they nonetheless all provide for "full" compensation.[5]

Some of these writers rely for instance on the TOPCO/-CALASIATIC arbitral award, 17 I.L.M. 3 (1978) and conclude in a somewhat curious way that:

> Since the arbitrator stated that Resolution 1803 (XVII) expressed an opinio juris communis, in the context of awarding the remedy of restitutio in integrum, it is fair to conclude that he viewed the compensation standard under international law to be fair market value or full value compensation, which is equivalent to the [United States] Department of State's interpretation of 'adequate' compensation.[6]

The flaw in this conclusion is that TOPCO involved an unlawful expropriation -- as to which a different remedy

---

[5] See, e.g., Gann, Compensation Standard for Expropriation 23 Colum. J. Transnat'l L. 615, 616 (1985). See also Mendelson, Compensation for Expropriation: The Case Law 79 Am. J. Int'l L. 414, 415 (1985).

[6] Gann, n. 5, supra, at 628.

applies -- rather than a lawful expropriation or nationalization; thus the measure of compensation used is not helpful to a debate on compensation for nationalization. The same can be said about references to the arbitral Award in Sapphire International Petroleum Ltd. v. N.I.O.C., 35 Int'l L. Rep. 136 (1963), in the context of lawful nationalizations, as erroneously made in the Separate Opinion of Judge Holtzmann.[7] It would be more accurate to seek support for this proposition in the BP Exploration Co. (Libya Ltd.) v. Government of the Libyan Arab Republic, reprinted in 53 Int'l L. Rep. 297. Also, in the BP Exploration Arbitration Judge Lagergren as the sole arbitrator, first found the respondent in clear breach of its international obligations. In such situations, where the conduct of a party is held to be unlawful, in terms of its contractual obligations, then the concept of restitutio in integrum may perhaps properly be invoked.[8]

But restutio in integrum has no place in discussions of lawful expropriation. Judge Jiménez de Aréchaga notes, for instance, that "once the measures of nationalization are not per se unlawful, but, on the contrary, constitute the exercise of a sovereign right, the general rules of state responsibility that govern unlawful acts can no longer be applied."[9] In those instances of lawful nationalization, the modern international law standard is that of "appropriate" compensation, which may allow for less than the full value of the property taken, rather than the alleged

---

[7] Separate Opinion of Judge Holtzmann in this Case, at 6.

[8] See, Chorzow Factory Case (Merits), 1928 P.C.I.J. Ser. A No. 17.

[9] Jiménez de Aréchaga, State Responsibility for the Nationalization of Foreign Owned Property, 11 N.Y.U. J. Int'l L. & Pol. 179 at 181 (1978).

traditional standard of "prompt, adequate and effective", or "full" compensation. Professor Murphy puts this point more succinctly when he states:

> If adequate compensation is taken to mean an amount equivalent to the full value of the property, it does not reflect the position or practice of a sufficient number of states to constitute a norm of customary international law. The standard of appropriate compensation referred to in General Assembly Resolution 1803 (XVII), understood as an amount that is reasonable under all the circumstances, is probably the governing principle. Such a standard would permit a developing state which undertakes a general nationalization program to pay aliens something less than the full value of their property or investment. There are several considerations that lead to this conclusion . . . .[10]

Professor Murphy lists these considerations as including the fact that "a considerable majority of member states have repudiated the full-value standard", and secondly, "the fact that many competent writers support a more flexible standard". Finally, he states that, "a standard of appropriate compensation in nationalization cases is particularly suitable when the general subject matter of current nationalization programs is taken into account."[11]

Professor Oscar Schachter, in another discussion, offers an even more compelling consideration. Basing his thesis on a comprehensive review of state practice, judicial decisions, and other authoritative sources, he convincingly writes:

---

[10] Murphy, Limitations Upon the Power of a State to Determine the Amount of Compensation Payable to an Alien upon Nationalization, in 3 The Valuation of Nationalized Property in International Law, (R. Lillich, ed. 1975) at 49, 52.

[11] Id. at 53.

> The argument that the 'prompt, adequate and effective' formula is traditional international law finds little support in state practice, or authoritative treatises and monographs.[12]

Professor Detlev F. Vagts of Harvard Law School also maintains that

> The case for the survival of the classical prompt, adequate and effective compensation rule on expropriation of foreign property has been eroded to a degree.[13]

In the same article he adds that

> Few States have asserted that they are not obliged to justify their compensation programmes as in keeping with international law, even though they have sought to broaden the list of factors to be taken into account in assessing the adequacy of that compensation.[14]

These views are supported in an earlier writing of Mr. Castaneda, as follows:

> [A General] Assembly resolution can be proof that a customary rule is no longer one. If the majority of members of the international community express, through a resolution, their rejection of a customary rule, it is evident that that rule lacks the element of opinio juris.[15]

Thus, the effort of Mr. Holtzmann to interpret Resolution 1803 as being in conformity with the United States standard

---

12 Schachter, Editorial Comment: Compensation for Expropriation, 78 Am. J. Int'l L. 121 at 123 (1985).

13 Vagts, Minimum Standard, 8 Encyclopedia of Public International Law 382, 384 (1985).

14 Id.

15 Castaneda, n. 3, supra, at 171.

of "prompt, adequate and effective" compensation is erroneous. This is particularly so since an attempt by the United States delegation to amend the Resolution to include that particular formula was unsuccessful. A similar effort failed again at the time of the adoption of General Assembly Resolution 3281.[16]

Subsequent comments by other writers, in obviously partisan vein, do little to shake Professor Schachter's well researched and reasoned thesis that current international law has rejected the alleged traditional standard of "prompt, adequate and effective" or "full compensation" in the sense advocated by Secretary Hull.

One of the sources that Professor Schachter cites is the arbitral award in the Government of the State of Kuwait and The American Independent Oil Co., ("AMINOIL"). That award clearly stated that the standard of appropriate compensation as set forth in Resolution 1803 (XVII) "codifies positive principles."[17] However, it has been erroneously stated elsewhere that, that award "rejected a purported customary rule of international law that prescribed 'incomplete' compensation."[18] The truth of the matter is that the Aminoil Tribunal's remarks were in answer to a specific argument raised by Kuwait that Resolution 1803 (XVII) was not an ordinary rule of international law, but a jus cogens or peremptory norm which would invalidate any provision in an agreement, such as their agreement with Aminoil, which ran counter to the norm. The Aminoil Tribunal was therefore not "rejecting" that rule of customary

---

16 General Assembly, Official Records, 17th Session, Agenda Item 39, p. 42 (A/C.2/L.668) (1962); see also, Jiménez de Aréchaga, n.9 supra, at 184.

17 AMINOIL, 21 I.L.M. 976, 1023.

18 Holtzmann, n.7, supra at 8.

~~international law but was saying that it has not ripened to~~ the status of jus cogens in the sense argued by Kuwait.

Furthermore, the Aminoil Tribunal placed a lot of emphasis on the fact that Kuwait, like the United States, was an important capital exporting country.[19] This would tend to limit the probative value of the decision, if at all, to controversies involving two capital exporting countries.

Another significant departure from the so-called traditional standard is represented by the Libyan American Oil Company (LIAMCO) and the Government of the Libyan Arab Republic (12 April 1977), reprinted in 20 I.L.M. 1 (1981), and 62 Int'l L. Rep. 140 (1982) decided by Dr. Sobhi Mahmassani, as sole arbitrator. In that case, LIAMCO sought compensation for its 1955 oil concessions terminated by Libya's 1971 Nationalization decrees. The LIAMCO Award is interesting for the present discussion, because, first of all, it clearly makes a distinction between cases of wrongful taking and lawful nationalizations and secondly, it acknowledges the "confused state of international law" regarding the standard of compensation for nationalization, and in particular whether or not a claim for lost profits is sustainable and to what extent. In the circumstances, the sole arbitrator falls on what he terms "equitable compensation" as the basis of his award to LIAMCO, --a standard which by no stretch of imagination will qualify as "full compensation".

In support of the principle of "appropriate compensation" as the standard for nationalization and expropriation, Judge Lagergren quotes the Full Tribunal's Interlocutory Award in the Oil Field of Texas Case, in which the

---

19 AMINOIL, n. 17, supra, 1033, para. 146.

Tribunal "adopted the formulation that the successor must be held liable to pay 'appropriate compensation taking into account all the circumstances of the case.'"[20] (Emphasis added by Judge Lagergren.) Judge Holtzmann in his Separate Opinion in INA argues that the term "appropriate compensation" in Oil Field of Texas was used in answer to the argument that no compensation was payable rather than what level of compensation was due.

On this point, I also share Judge Lagergren's view rather than that of Judge Holtzmann whose view is after all ex post facto. Judge Holtzmann, who has been quick to file separate opinions in awards he indicates to do so, never filed his Concurring Opinion in the Oil Field of Texas Case. He also later withdrew from participating in the decision in that Case on the compensation issue. Judge Mosk, who at the time had filed his Concurring Opinion in Oil Field of Texas, later resigned but was subsequently appointed as ad hoc Member when that Case came to be decided by Chamber One on the compensation issue. Judge Mosk's Concurring Opinion in the Interlocutory Award does not address the issues Judge Holtzmann discusses. The final Award in the Case clearly indicates that a major part of the awarded compensation was for the "taking" of three blowout preventers.[21] The final Award in that Case under the chairmanship of Judge Böckstiegel states:

> The Tribunal finds that the replacement value, in the circumstances of this Case, is an appropriate

---

[20] Oil Field of Texas, Inc. and The Government of the Islamic Republic of Iran, et al, Interlocutory Award No. ITL 10-43-FT (9 December 1982) p. 22 reprinted in 1 Iran-U.S. C.T.R. 347, 356 and 362.

[21] Oil Field of Texas, Inc. and The Government of the Islamic Republic of Irna, et al., Award No. 258-43-1 (8 October 1986), paras. 41-45 and 56(a).

measure of the value of the equipment."[22] (Emphasis added.)

The issue of what the appropriate compensation is under the Treaty of Amity is of course an issue on which Judges Lagergren and Holtzmann join, and as to which I dissent.

But I would agree with the Separate Opinion of Judge Lagergren in this Case in holding that current international law requires "appropriate compensation", as opposed to "prompt, adequate and effective" which is interpreted by western industrialized countries and their advocates as "full compensation", for lawful nationalizations.[23]

2. The Law of the Nationalizing State on the Measure of Compensation

Resolution 1803 (XVII), as observed above reads in part that:

> 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. (Emphasis added.)

If indeed Resolution 1803 (XVII) is opinio juris communis, then international law defers to the laws of the nationalizing state on the rules of valuation for compensation. However, Resolution 1803 (XVII) adds that those rules

---

[22] Id. para. 43.

[23] It is helpful to recall that the Libyan nationalizations were essentially political. Libya was reacting to the inaction of the United Kingdom Government when Iran occupied the three strategically located islands of Abu Musa, The Greater and Lesser Thumbs in the Persian Gulf. At the time of the Iranian occupation on November 19th and 30th, 1971, the islands were nominally under British Protection.

must also reflect international law. This however does not imply that international law has any superiority over municipal law. It is this latter requirement that distinguishes Resolution 1803 (XVII) from its successor Resolutions, such as 3201 (S-VI) and 3171 (XXVIII), which omitted the reference to international law. What Resolution 1803 implies therefore is that the valuation standards adopted by the nationalizing state must also meet standards recognized by international law. But here one should note the opinion of Dr. Mahmassani, in the LIAMCO case that, in the area of valuation standards for compensation, we find little help in either state practice or arbitral decisions.[24] There is hardly any consistency or uniformity of practice either by the various states or by arbitral tribunals. Each tribunal that has undertaken such analysis, after confessing helplessness, has proceeded to call on either the principle of "acquired rights", "unjust enrichment", "equity" or other variations and then fashioned its own ad hoc methods of valuation. This attitude invariably leads to widespread discontent with these awards. It is little wonder therefore that even after these awards, enforcement has almost always depended on subsequent negotiated settlement between the parties.[25]

What is required is to start with the compensation methods put forward in the nationalizing state's legislation and subject these to the current requirements of international law that can be proven as being generally accepted. These international law requirements, according to Professor Murphy, would subject the discretion of the nationalizing state to some "ideals of fundamental fairness". In this connection, he explains that:

---

[24] LIAMCO, 20 I.L.M. 1, 76.

[25] See, M. Sornarajah, Pursuit of Nationalized Property (1986) at 56 et seq.

> The fairness of a compensation award depends upon a proper regard being paid to all relevant considerations that, in varying degrees, touch upon the history of a given investment and its potential after acquisition by the nationalizing state. There is here an emphasis upon specific context, a preference for detailed analysis over the invocation of broad generalizations."[26]

Judge Jiménez de Aréchaga puts this even more precisely when he writes that the factors to be taken into account in determining what is appropriate compensation in any given instance include: whether the initial investment has been recovered, whether there has been undue enrichment as a result of a colonial situation, whether the profits obtained have been excessive, the contribution of the enterprise to the economic and social development of the country, its respect for labour laws and its reinvestment policies.[27]

With this type of approach, each situation would dictate the valuation methods to be used. Generally, three basic types of valuation methods are brought into play in nationalization claims, namely, the net book value method, the going concern method and the replacement value method. It may be noted here that the last two methods are associated with the old notions of "prompt, adequate and effective", or "full" compensation --which have been replaced by the standard of "appropriate" compensation, as demonstrated above. The advantage of this approach is that it would encourage the development of compensation laws in capital-importing States that are in line with current international standards. Moreover, it is in tune with Resolution 1803 (XVII) and its flexible standard of compensation.

---

26 Murphy, n.10, supra, at 61-62.

27 Jiménez de Aréchaga, n.9, supra, at 185.

3. INA's Claim under the Current Status of International Law

If the Tribunal had decided this Case on the basis of the current position of international law, it would have come to the conclusion that it is to the law of Iran, first and foremost, that one should look for the rules on compensation.

The evidence before the Tribunal was that a mechanism for the assessment and payment of compensation was established under the Law of Nationalization of Insurance and Credit Enterprises of 25 June 1979. This mechanism required the Central Insurance of Iran ("CII") to commission a formal valuation to be carried out by an independent firm of accountants. Based on this valuation, CII was further required to make a composite report to a Joint General Assembly, comprising five Government Ministers, who were to make their recommendation on the appropriate level of compensation to be paid. The Respondent produced evidence that pursuant to this mechanism, CII commissioned an independent firm of accountants to evaluate Shargh's worth. The said firm, Amin & Co., reported a net loss of 4,289,915 rials and a net worth (negative value) of 69,201,871 rials and 95,008,871 rials, based on alternative valuation methods, for Shargh as of 25 June 1979, the date of nationalization.

The Tribunal, however, decided to ignore the Amin Report because, in its view, it was based on company records that the Respondents did not produce. The Tribunal did not find convincing the Respondent's reason for non-production of these documents as being too "voluminous". I think that the Tribunal's decision and the reason given to ignore the Amin Report are even less convincing. It is an ex post facto rationalization of their decision to give compensation to INA. For certainly, if the Tribunal merely thought that

the Amin Report needed further amplification and support that were not forthcoming for the reasons adduced, then nothing prevented the Tribunal from appointing an expert, as it has done in other cases, to go to Iran and look at these "voluminous" documents. In the circumstances, the Tribunal ruled out the Amin Report and was left with those figures contained in the balance sheet provided by INA and chose to rely on those figures even though it knew the figures were in dispute.

If the Tribunal had been guided as it claimed to be by international law, it would not have held that INA was entitled to the "full equivalent of the property taken", and therefore would not have been anxious to consign the Amin Report and its figures to the gallows.

Moreover, in its interpretation of the "full equivalent" to mean "fair market value", the Tribunal failed to ascertain in a systematic way what this "fair market value" actually was, i.e. by reference to the actual state of the insurance business in Iran at the material time, and having regard to the portfolio of the company. Thus, if it had followed the logic of its own valuation formula, the Tribunal would have held that the Iranian legislation was not "arbitrary" in its treatment of compensation. In that event, and having regard to the history of INA's investment and the proven rather than the alleged value of that investment prior to its nationalization, the Tribunal would have ruled that INA was entitled to substantially less than it claimed and was awarded --the exact figure of course depending on the recommendations of their expert's assessment of the Amin Report, or on the Tribunal's own assessment of the "fair market value" of the company.

The experience of other countries would also have been relevant if the Tribunal had undertaken a systematic evaluation of the propriety of the compensation mechanisms adopted

by Iran. For instance, a number of decisions of the European Court of Human Rights --which, whether or not they were grounded on general international law, must certainly be regarded as embodying general principles of law recognized by civilized nations-- provide important insights into the law and practice of European countries on the question of compensation for nationalization. Thus, in both the Case of James and others,[28] and the Case of Lithgow and others,[29] the European Court, as well as the European Commission on Human Rights in its prior consideration of both cases, utilized the approach of balancing the demands of the general interests of the community and the private property interests of the individual in evaluating the propriety or fairness of the respective compensation mechanisms. This is no different from the balancing approach entailed in the determination of appropriate compensation under international law, as discussed above.

Thus, while it had been argued by the parties in both the James and Lithgow cases that international law required the payment of "prompt, adequate and effective" compensation, neither the Commission nor the Court made a specific holding to that effect. Judge Holtzmann's reference to the proceedings before the Commission in the Lithgow Case, in his Separate Opinion in the present case, is thus not helpful if it was intended to support the "prompt, adequate and effective" argument. In the final analysis, both the Commission and the Court, in both the James and Lithgow cases, concluded that an appropriate balance had in fact been achieved in the compensation formulae at issue, neither of which applied the "prompt, adequate and effective"

---

[28] Case No. 3/1984/75/119, Judgment of 21 February 1986.

[29] Case No. 2/1984/74/112-118, Judgment of 8 July 1986.

concept. No further compensation was awarded in either case. Moreover, both cases conformed with previous and current practice in a number of western industrialized countries, in which legislation requisitioning or nationalizing private property interests were nevertheless upheld although they had not provided for "prompt, adequate and effective" compensation.[30]

4. Currency of the awarded sum

As to the awarding of $285,000 in principal to the Claimant, the Majority argues that no other amount was mentioned as being equivalent to the invested 20 million rials, that no discussion took place concerning the subtle question of the date of conversion and as to who was to bear the risk of changes in monetary value if a day other than the nationalization date was chosen. But this did not relieve the Tribunal of its duty to apply the relevant law on the issue, as it has done in other cases.[31]

The Respondent in both its Statement of Defence (page 34), and written summary of its oral argument at the Hearing (pages 4 and 15), objected to the expression in United States dollars of the Claimant's "relief sought" arguing that the investment was in rials, that the price in the

---

[30] For a discussion of these instances, see the James and Lithgow cases generally, and also, Higgins, The Taking of Property by the State: Recent Developments in International Law, 176 Recueil des Cours (1982), passim; and the Dissenting Opinion of Judge Kashani in Starret Housing Corporation et al., and The Government of the Islamic Republic of Iran, et al., (Interlocutory Award No. ITL 32-24-1), 64 et seq.

[31] McCollough & Company, Inc. and The Ministry of Post, Telegraph and Telephone, et al., Award No. 225-89-3 (22 April 1986), paras. 105-112; T.C.S.B., Inc. and Iran, Award No. 114-140-2 (16 March 1984), pp. 15-16, reprinted in 5 Iran-U.S. C.T.R. 160, 168-69.

Share Purchase Agreement was stated in rials and that the Claimant had paid in rials. However, the Claimant neither explained nor substantiated its claim for dollars in respect of its rial investment, nor indicated on what basis its 20 million rials investment amounted to $285,000. Where a claimant does not clearly state or substantiate its claim and the respondent denies it, dismissal of the claim is a rule of principle. In certain cases the Tribunal has recognized this rule of specificity and dismissed the claims in question.[32] By nationalizing a company in which the Claimant held shares, the Government was found by the Tribunal to have incurred an obligation to compensate the Claimant, but that obligation should have been expressed in the currency of the investment, and if to be converted it should have been payable on the basis of the exchange rate prevailing at the date of payment.

But in this Case the Tribunal not only awarded dollars against the Respondent, but also placed the risk of change in monetary value on the Respondent, only due to lack of argument by the Parties. It did so as if the principle is that the Award must be in dollars and the unclaimed, unproven depreciation damages must also be awarded against the Respondent, and yet no justification is provided for such an innovation.

Apart from certain unexplained actions of the Tribunal, other authorities recognize nominalism as an age-old principle governing the payment of monetary obligations. For instance, Professor Francis Mann writes on this issue as follows:

---

32 See, e.g., Foremost Tehran, Inc., et al. and The Government of the Islamic Republic of Iran, et al., Award No. 220-37/231-1 (10 April 1986) p. 36: "The Tribunal finds that the amounts claimed... have not been sufficiently explained or substantiated, and they are therefore denied."

> The extent of monetary obligations cannot be determined otherwise than by the adoption of nominalism. [Emphasis in original.] The nominalistic principle means that a monetary obligation involves the payment of so many chattels, being legal tender at the time of payment, as, if added together according to the nominal value indicated thereon, produce a sum equal to the amount of the debt. In other words, the obligation to pay £10 is discharged if the creditor receives what at the time of performance are £10, regardless of both their intrinsic and their functional value. [Emphasis added.] It follows that a monetary obligation has no other 'value' than that which it expresses. In the vast majority of cases the possibility of changes in monetary value does not enter the parties' minds, though they may have a definite idea of the exchange value, or purchasing power, of the stipulated amount of money. If they have regard to that possibility, they may safeguard themselves by protective clauses; if they fail to do so, although they anticipate disarrangements of monetary value, they must be taken to have accepted the risks involved. The law does not allow the implication of terms which either do not exist at all or to which the parties failed to give adequate expression.[33]

Similarly the principle of nominalism has been adhered to in international arbitrations. In a valuable treatise on the subject the authors state:

> Arbitrators presume that international businessmen negotiate contracts in awareness of the potential impact of price fluctuations and foreign exchange regulations. Unless the parties explicitly reallocate these risks, arbitrators hesitate to imply terms that alleviate a party's obligation to perform.
>
> Fluctuations of the currency in which a contract price is denominated changes the real value of contractual obligations. Parties may avoid this risk by using a currency stabilization clause, for example by indexing the currency to its gold value at the time of contracting.

---

[33] F. Mann, The Legal Aspects of Money, 84-85 (4th ed., 1982).

> Arbitrators will generally enforce such a clause despite inconsistent provisions of national law. In the absence of such a clause, however, arbitrators have generally concluded that the parties have assumed the risks of currency fluctuation.
>
> A party to an international contract generally must render payment in the designated currency even though its value has changed.[34]

Another author expresses the same views on an international arbitral award which dealt with currency fluctuations in a terminated contract, rather than an ongoing contractual relationship in respect of which the same rule would apply. He states:

> [I]nternational commercial arbitrators have the tendency to consider that any prudent businessman must protect himself against currency risks, attributing a speculative character to operating in which such protection is lacking. Already in 1932, in [ICC] Case no. 519, an arbitrator emphasized: 'Here it could generally be said that it is regrettable that in many instances, businessmen dealing in currencies other than the national one are not sufficiently concerned with the question of exchange rates. A good businessman must always take precautions in this sense, because his activity is to do business and not to speculate.' [Emphasis in original.] It is understandable then that the validity of exchange guarantees are admitted by arbitrators as a principle answering the needs of international commerce and that they not be concerned with solutions the applicable law of the contract may have in this respect. This equally explains their harshness when the contract contains no guarantee clause.[35]

Also, as Professor Mann notes, in 1976 by its Miliangos Case the United Kingdom House of Lords in conformity with

---

[34] W. Craig, W. Park & J. Paulsson, International Chamber of Commerce Arbitration, § 35.04 (1984).

[35] ICC Case No. 1717/72 in 101 Journal du Droit International, 890, 892 (1974).

~~the contemporary law of other European countries changed its~~ previous rule precluding the awarding of damages in foreign currency to allow such damages if this was indicated by the facts of the case, such as by contract designating such currency or by non-contractual liabilities incurred in such currency in a foreign country. According to the new ruling it was

> only at the stage of payment or enforcement that conversion into Sterling at the rate of exchange then prevailing takes place. This is so whether the claim is for payment of a specific sum contractually due as for damages for breach of contract or tort or for a just sum due in respect of unjustified enrichment or for restitution. Nor does it matter whether the contract sued upon is governed by English or by foreign law. Nor is it necessary to ask for specific performance rather than payment: in either case the defendant will be ordered to pay foreign money. Moreover an award in an English arbitration may be expressed and enforced in foreign currency and a foreign award or judgment so expressed may be enforced like the English award or judgement.[36] (Emphasis added, footnotes omitted.)

The next question is whether the mere reduction in the purchasing power of money is an item of damage which, notwithstanding the principle of nominalism, the law recognizes as recoverable. Or whether it is at least possible to recover loss suffered by reason of the fact proved by the creditor that, had there been no default, he could and would have bought some property (or foreign currency) more cheaply than at the time of payment.

---

[36] Mann, supra n.33 pp. 347-48, citing Miliangos v. George Frank (Textiles) Ltd., [1976] A.C. 443, 463, 68 and 69 per Lord Wilberforce; The Despina R., [1979]A.C. 685; B. P. Exploration Co. (Libya) Ltd. v. Hunt, [1979]1 W.L.R. 783, per Robert Goff, J. aff'd [1981]1 W.L.R. 232, 245; and Re Dawson, [1966]2 N.S.W.R. 211.

As to this question, the basic principle is non-responsibility rather than responsibility, as also recognized by Principle 37 of the Islamic Republic Constitution. I am even more astonished on this point in a case such as this, where not only the very significant issue of the status of the Treaty of Amity and interpretation of its terms are dealt with against the Islamic Republic, but also the issue of conversion, in both instances the Tribunal arguing that the issue was not discussed by the Parties. Despite considerable deliberation on the conversion issue the Majority felt that the opposite view might jeopardize the position of United States claimants before this Tribunal while it did not feel the same as to the Iranian respondents on the issue of the Treaty of Amity. In fact the Tribunal's recognition of the issue as a "subtle question as of which date the conversion... legally ought to take place — on the date of the nationalization or the date of the award (in this case approximately the same as the date of payment) or some other date?" is a reflection of that extensive deliberation. Although I appreciate the need for the Tribunal to conclude cases in a timely manner, I do not understand why in instances such as this the Tribunal must sacrifice necessary discussion of pertinent issues in the Award and proceed to decide against the Respondent by mere assumption of responsibility.

There was no allegation or proof that the rial had depreciated. It may well be that it was the dollar that had depreciated or even appreciated. One should not blame everything on the Islamic Republic of Iran. Both Iranian and United States currencies had been "floating" with no fixed value in the relevant period. It should also be noted that no allegation of devaluation had been made either with respect to the dollar or the rial.

Where the currency is "floating", its value is determined by market forces, i.e., supply and demand. This value

is not controlled by the monetary authorities or the government so as to make it liable for such changes. It is true that in periods of extreme instability a State may pursue policies of supporting or depreciating its currency, such as by buying or selling it for foreign currency or for gold or other assets, or by devaluation. But a currency which is "floating" can neither be devalued nor revalued by the government, because its international value depends on market forces that are independent of governmental action. Thus likewise the government cannot be held liable for any depreciation of the monetary value occasioned by such changes. Furthermore in a "floating" exchange rate system there is no clear causal relationship between policy measures by the government and any changes in monetary value complained of.

Assuming that the Claimant's concern in this Case was not which of the currencies had depreciated but that the delay in payment had resulted in an additional damage equivalent to the difference in monetary value, it is arguable if such damage is recoverable in international law at all. With regard to liquidated sums in commercial papers whose place of payment is the beneficiary's domicile, such a damage may be recoverable in certain Western European countries but only under certain conditions. For example the 1967 European Convention on Foreign Money Liabilities, Annex, Article 4(2), provides that such damage "shall not be payable to the extent that the inability of the debtor is due to default of the creditor, or to force majeure, or the creditor has not suffered loss resulting from the depreciation." This Convention that recognizes the recoverability of such damages however has not entered into force due to lack of ratification by even a single member state of the Council of Europe, although under the Convention a variety of reservations is allowed including the exclusion of non-contractual liabilities.

In certain Western European countries where in appropriate circumstances such a damage is recoverable, it is still limited to instances of actual loss suffered as a result of the claimant's inability to deal with the money in the manner in which he would have used it. But the claimant must prove that he would have benefited from such higher value, e.g. by selling the goods the respondent did not deliver. On the other hand, if the value since the time of breach or wrong has increased and is higher at the time of judgment, the same rule demands that the claimant be limited to an amount that at the time of judgment would enable him to make good his loss.

Furthermore, under English law, damages for actual loss suffered through the depreciation of sterling have, in the absence of an agreement between the parties, never been awarded. In case of non-payment of a debt the measure of damages is interest on the money only.[37] Therefore, on the basis of the foregoing, where the parties have themselves not provided for a currency adjustment in their transaction, there is no justification for the payment of damages occasioned by any changes in monetary value except for the payment of interest on the principal amount. In this connection the granting of 8.5% interest to INA — if interest was payable at all — should have been based on the principal amount of the rial obligation rather than on the dollar amount.

If we accept the principle that the debtor is only liable for foreseeable damages in particular with regard to compensation for nationalization, which is lawful per se, then recovery for unintended depreciation in international law for a case such as the one at hand must be rejected.

---

[37] Mann, supra, n. 33, pp. 109-110.

It is clear that principally the award of compensation must be in the currency of obligation. Since the investment was in rials the Government of the Islamic Republic at most must be required only to pay the compensation in no currency other than the rial to make good the loss at the place of dispossession. The Declarations of the Government of Algeria, paragraph 7, establishing a Security Account for the payment of awards rendered in favour of United States claimants also does not modify this principle. At most, the Security Account makes it possible for the claimant to satisfy the rial obligation from the fund in case the Iranian respondent does not comply with the Tribunal's award. But this is not a substitute for the primary obligation and does not change it into a dollar obligation. As stated elsewhere:

> The true equity and the real reason should be that it is not the function of legal proceedings to interfere with substantive rights. It is their function to enforce rights. The idea that default or breach creates entitlement to a currency which previously was not the money of account, whether actual or potential, lacks both justification and attraction.[38]

In case the security is needed to satisfy the obligations then the dollar security must be converted into the rial, or a third currency if it be the currency of obligation, rather than vice versa.

Even if the Tribunal wrongly believes that just because the Security Account contains US dollars its awards in favour of United States claimants must be payable only in US dollars, still such a view, as recognized by the Tribunal in the McCollough Case, does not require that the rial obligation "established by the awards" "should necessarily be

---

[38] Mann, supra, n.33, pp. 346-47.

expressed in US dollars. The Algiers Accords contain no provision supporting such a conclusion."[39] And in that situation the rial amount awarded "would be converted to US dollars at the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account, at the conversion rate then prevailing."[40]

Of course, there are cases before the Tribunal in which the currency of obligation is the dollar, in which situation where the need arises for using the Security Account no conversion would be necessary. But in such instances if the Tribunal considers that the law or the Declaration requires it to make adjustments for variations in monetary value (which I deny), then it must make sure not to award in excess of the obligation if the dollar has appreciated in the intervening period, that is, it must reduce the dollar compensation to the extent it had appreciated. This in my view is also subject to proper allegation and proof of the extent of the appreciation of the dollar in the relevant period. But if nominalism is the rule, then such variations in monetary value must be disregarded. However, the Tribunal's practice is very conspicuously one-sided and inconsistent on this issue, that is, maintaining nominalism in awarding dollar obligations against Iran without deducting any appreciated difference, but disregarding nominalism in the instance of rial obligations by converting and awarding it in dollars at the rate of the default date. This amounts to awarding unalleged and unproven depreciation, in both instances against the Iranian respondents. This was done to

---

39 McCollough Case, supra, n. 31, paras. 107-108.

40 Id., para. 109.

avoid the problem of awarding an unjustifiable depreciation adjustment, which was granted in the McCollough Case.[41]

Even if the Tribunal considers that it is required by its mandate to award in dollars and thus to convert the rial obligation into dollars, it must do so according to the rate of exchange prevailing at the time of judgment, if not at the time of payment or enforcement. I am aware of the view advocating application of the conversion rate at the date of default in contractual obligations. But even in those instances "the better rule" is the conversion rate of the date of judgment, as was held by Chamber Two of this Tribunal in the TCSB Case, where the obligation was in rials. In that Case the Tribunal stated that

> Normally with a debt of this kind, where there has not been a devaluation and where it is not clear that the claimant would have promptly converted the rials into dollars if they had been paid when due, the Tribunal believes the better rule is that conversion should be made as of the date of the award. The Claimant assumed under the contract the risk of exchange rate variations. The fact that by virtue of the Algiers Declarations payment of the present award is to be made in U.S. dollars, should not, by itself, relieve him of that risk. This rule was followed by Chamber 3 in its award in the Rexnord Case, Award No. 21-132-3, dated 10 January 1983.... The Tribunal concludes that, on the record before it, conversion in this case should be made as of the date of the award.[42]

A fortiori, in non-contractual obligations the rule is that the conversion, if any, must be made at the rate prevailing at the date of payment. This was recognized in

---

[41] Supra n. 31 paras. 110-111. The Tribunal in that Case awarded 12.5% of the principal rial obligation as "depreciation adjustment" plus 10% interest on the principal amount, in addition to payment of the Award on the basis of the exchange rate prevailing at the date of payment.

[42] T.C.S.B., supra n. 31.

the Diverted Cargoes[43] arbitral award by René Cassin, Vice President of the French Conseil d'Etat in 1955. The point at issue was the dollar/sterling conversion rates applicable to a credit in sterling to be given by the United Kingdom to Greece in respect of certain cargoes bound for Greece which in April 1941 were diverted and taken over by the British forces for use in the war against the common enemy. Some of the cargoes having been shipped from the United States, their original f.o.b. cost was expressed in dollars. The question was whether the credit owed to the Greek Government for those cargoes should be converted into sterling at the exchange rate at the date of payment, as Greece contended, or at the rate prevailing up to the devaluation of sterling on 18 September 1949, as the United Kingdom contended. After having failed in protracted negotiations to resolve the issue, the two governments submitted it to arbitration, pursuant to a compromis signed in 1953. Having considered the matter, the arbitrator, René Cassin, expressed the view that the payment-date rule was supported by "so decisive a monument of international case law" that it constituted a general principle of law. Although Professor Mann considers this statement as an exaggeration of the status of the law at the time it was made, he states that

> Nevertheless it anticipated the welcome development which has since then occurred and which renders it possible to suggest that international law should adopt the payment date rule.[44]

As demonstrated above this "welcome development" has indeed been accepted by international tribunals, and international law requires application of the payment date rule. The Tribunal was therefore mistaken in awarding the dollar

---

[43] The Matter of the Diverted Cargoes (Greece v. Great Britain (1955) 22 Int'l L. Rep. 820.

[44] Mann, supra n. 33, pp. 556-57.

amount sought by the Claimant without applying this international law rule.

III. The Treaty of Amity

At the heart of my disagreement with the present Award is the fact that it treats the Treaty of "Amity", which it considers as a lex specialis between the Government of the Islamic Republic of Iran and the United States of America, as dispositive of the controversy between INA and the Islamic Republic.

The Tribunal justifies its position by stating that "the continued validity and effect of the Treaty have not been contested by the Respondent in any of the written pleadings in this Case" and further that the Treaty "does however, impose certain standards of compensation in the event of a taking of property."[45]

As to the alleged lack of contestation the Award ignores a number of facts and/or their implications in this case. The Claimant had filed its claim against both CII and the Government. The details of its complaints pertained to actions that CII had taken, since the nationalization of Shargh had not been disputed by the Iranian side. The defence in this case is also entirely dependent on the actions and intimate knowledge of CII with regard to the business performance of Shargh prior to nationalization, and CII's treatment of Shargh after nationalization. Consequently the entire pleadings in this case had been made by CII rather than the Government. It was only at the final hearing that the Tribunal dismissed CII as not being a proper Respondent in the Case and thus struck it from the

---

45 The Award in this Case at 9.

record, while maintaining CII's counterclaim as that of the Government "insofar as it was asserted by" it.

The Agent of the Government had also protested against an unauthorized legal brief filed by the Claimant on the measure of compensation under international law in response to Respondent's Rejoinder unless a reply was also permitted from the Respondent. Under Article 19 of the Tribunal Rules and the Tribunal's guidelines on this matter in its Order of 14 September 1983 in Cases No. 37 and 231, the Respondent's Rejoinder is the last memorial in the case unless otherwise provided by the Tribunal.[46] The Tribunal admitted the brief at the Hearing, stating that it would inform the parties if it would permit further replies to be filed. However the Tribunal allowed no reply by the Government and issued its Award in the Case.

It seems to me that in the circumstances where, in the view of the Tribunal, the lex specialis does impose "certain standards of compensation" impliedly higher than that required under customary international law, it ought to have requested the two Governments to submit briefs on the issue of validity and effect of the Treaty of "Amity". The Tribunal has done so on other issues of less significance in other cases[47] and, in my view, should have done so in this

---

46 Foremost Tehran, Inc., et al. and The Government of the Islamic Republic of Iran, et al., (Cases No. 37 and 231), reprinted in 3 Iran-U.S. C.T.R. 361.

47 See, e. g., International Schools Services, Inc. (ISS) and National Iranian Copper Industries Company (NICIC), Case 111, Chamber One, Order of 14 March 1983 relinquishing jurisdiction to the Full Tribunal, Full Tribunal Order of 18 March 1983 inviting both Governments in addition to the parties to the Case to comment on the Tribunal's jurisdiction over an American non-stock corporation as a claimant, and Full Tribunal decision on the matter as Interlocutory Award No. ITL 37-111-FT (6 April

(Footnote Continued)

~~instance. This is all the more so since, at the Pre-hearing~~ Conference, CII whose entire pleadings had subsequently been adopted by the Agent of the Government of the Islamic Republic of Iran had canvassed the point of the invalidity of the Treaty. (Minutes of the oral proceedings of 18 January 1983, page 4.)

Although the Agent of the Government of the Islamic Republic was not prepared to argue the invalidity of the Treaty of Amity in a pre-hearing conference on 18 January 1983, he was able to present his government's elaborate arguments in less than two weeks in the Hearing of the major expropriation case of Starrett Housing Corporation, et al. and The Government of the Islamic Republic of Iran, et al. before the same Chamber and Judges dealing also with this Case. Moreover the fact that in the Hearing of 31 August 1983 in this Case the Government adopted as its own the entire pleadings of CII, which canvassed the point of the invalidity of the Treaty, must ameliorate any shortcoming in contesting the validity of the Treaty and raising the need

---

(Footnote Continued)
1984); E-Systems, Inc., and The Government of the Islamic Republic of Iran, et al, Case 388, Chamber One, Order of 22 September 1982 inviting the United States Government in addition to the Parties to the Case to comment on whether or not the Tribunal has exclusive jurisdiction over compulsory counterclaims of the Iranian party who had initiated legal proceedings against the American party before an Iranian court; by the same Order the Chamber relinquished jurisdiction to the Full Tribunal for deciding the issue and the latter dealt with the matter in Interim Award No. ITM 13-388-FT (4 February 1983); Housing and Urban Services, International, Inc. and The Government of the Islamic Republic of Iran, Tehran Redevelopment Corporation, Case No. 174, Chamber One Order of 13 January 1984 inviting the parties' comments on the Tribunal's jurisdiction over claims of the American partner in the absence of its other partner against the Iranian company, based on a contract the partners had jointly entered into with the Iranian company, Chamber Order of 4 May 1984 accepting the Memorial of the Government of the United States on the issue and the Chamber's decision on the matter in Award No. 201-174-1 (22 November 1985).

for briefing of the issue by the two Governments. Even if the Tribunal was not satisfied that the Respondent had sufficiently raised the issue, so long as the Case itself raised an important issue[48] the Tribunal had the authority and must have exercised that authority to relinquish jurisdiction over the matter in favour of the Full Tribunal pursuant to Presidential Order No.1. Paragraph 6(a) of that Order provides:

---

[48] To indicate the significance of the issue, it suffices to quote the United States Congressman Mr. Percy and the then Legal Adviser of the United States Department of State, Mr. Davis Robinson, from the United States Congressional Record, vol. 129, No. 157 (14 November 1983), p. S 16055, reprinted in 22 I.L.M. 1406 (1983):

> CLAIMS AGAINST IRAN
>
> Mr. PERCY. Mr. President, the work of the Iran-United States Claims Tribunal at the Hague in the Netherlands is continuing in an effort to provide compensation to the many American citizens and corporations who lost money and property as a result of actions by the Government and officials of Iran. One of the key issues in the Tribunal's deliberations is the question of appropriate standards for determining the level of compensation required for such losses. Iran has sought to argue that it is no longer bound by the 1955 treaty which established the general standard of prompt, adequate and effective compensation, which has become an important term of art in international law.
>
> In view of the importance of this issue to many American businesses, I asked the Legal Adviser of the Department of State, Davis Robinson, to provide me with a memorandum discussing this issue. I ask that a copy of this memorandum be included in the Record at this point.

Mr. Robinson begins his Memorandum with these sentences:

> The Iran-United States Claims Tribunal in the Hague has heard or scheduled for hearing numerous claims seeking compensation for the expropriation of property of U.S. nationals by Iran. In each of these cases, as in numerous others which will follow, the Tribunal must ascertain the applicable

(Footnote Continued)

> Where a case pending before a Chamber raises an important issue the Chamber may, at any time prior to the final award relinquish jurisdiction in favor of the plenary Tribunal,....

Furthermore, some of the issues involved in the question of the Treaty's validity and enforceability are so notorious and compelling that the Tribunal should have examined them on its own initiative[49] instead of "assum[ing] that for the purpose of the present Case the Treaty remains binding as it is drafted."

If the Tribunal had either requested the eventual Respondent to submit a brief on the issue of validity of the Treaty or had exercised its inherent power to consider and raise relevant issues on its own, it would have confirmed that there existed "changed circumstances or principles of international law capable of invalidating, suspending or modifying the Treaty of Amity". As the Agent of the Government of the Islamic Republic of Iran stated in the case of Starrett before this Chamber these principles are, first, the principle of reciprocity; second, the principle of rebus sic stantibus; third, the principle of ex malo jus non oritur and fourth, the principle of odious debts and state succession. As discussed below, the first two of these principles have the effect of suspending the operation of the Treaty while the last two would invalidate the Treaty.

(Footnote Continued)
> standard of compensation for expropriated property....

[49] See e.g. Dallal and Islamic Republic of Iran and Bank Mellat, Award No. 53-149-1 (10 June 1983) reprinted in 3 Iran-U.S. C.T.R. 10, 12-14 and Judge Holtzmann's Dissenting Opinion, p. 28 where the Tribunal ex officio considered and decided the relationship between Iran's currency regulations and the IMF Agreement and their effect on the parties' transaction.

Alternatively, if the Tribunal were still to consider the Treaty as valid and enforceable, then on the basis of the general principles of treaty interpretation, it ought to have interpreted its provisions in the light of changes in customary international law, specifically, on standards of compensation for nationalized property.

1. The Validity of the Treaty of Amity

Before dealing with the various grounds upon which I consider the Treaty of Amity as inoperative, let me explain that, contrary to what has been stated elsewhere, the issue has not been conclusively decided by a court of competent jurisdiction as to constitute res judicata between the Government of the United States and the Government of the Islamic Republic of Iran. It has been argued that the ex parte decision of the ICJ in the Case Concerning United States "Diplomatic" and "Consular Staff" in Tehran (U.S.A. v. I.R.I.) 1980 I.C.J. 3, decided the issue of the validity of the Treaty of Amity.[50] It must be borne in mind that the World Court's ruling in that case dealt with the validity of the forum selection clause, i.e. Article 22 of the Treaty of "Amity", in order to assert jurisdiction over a relatively small portion of the controversy, an approach proper under the principle of severability of such clauses from invalid agreements. Consequently the self-serving statements contained in the United States Department of State Memorandum[51] and the Separate Opinions of United States appointed

---

[50] See e.g. Separate Opinion of Judge Brower, p. 3 in Sedco, Inc. and National Iranian Oil Company and the Islamic Republic of Iran, Interlocutory Award No. ITL 59-129-3.

[51] United States Department of State Memorandum on the Application of the Treaty of Amity to Expropriations in Iran (13 October 1983), reprinted in U.S. Congressional Record, Vol. 129 No. 157, Nov. 14, 1983. at S 16055-60 and 22 I.L.M. 1406-11 (1983).

Arbitrators[52] before this Tribunal as to the res judicata effect of the judgment of the World Court regarding the terms of the Treaty of Amity are not correct. Moreover, pursuant to the Declaration of the Government of Algeria, paragraph 11, the United States undertook to

> promptly withdraw all claims now [then] pending before the International Court of Justice and thereafter [to] bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this Declaration....

The effect of this provision must be, at least, that the judgment cannot be invoked against Iran before this Tribunal by the United States or its claimants.[53]

a) The Principle of Reciprocity

The principle of reciprocity is considered as the "scaffolding" on which relations between peoples developed.[54] It is also said to be a perennial idea whose influence, although muted in municipal law, remains strong in international law up till now. Lenhoff explains its role in international law as follows:

---

[52] See e.g., Judge Brower, supra, n. 50; Judge Mosk in American International Corporation, Inc., et al. and The Islamic Republic of Iran, et al., Award No. 93-2-3 (19 December 1983), reprinted in 4 Iran-U.S. C.T.R. 96, 111.

[53] Also as regards the so-called reliance by Iran in the "Attachment Cases" in United States courts on the continued validity of the Treaty, the local American Counsel who raised the point, did so without formal instruction and did not represent the views of the Government of Iran on this matter.

[54] Schneeberger, Reciprocity as Maxim of International Law, 37 Georgetown L. J. 29 (1948-49).

> The role played by reciprocity in the domain of international law can hardly be overrated. Speaking of the process by which diplomatic customs have grown into rules of international law, Professor Schwarzenberger states that 'such rules were based on the firmest foundation of all law, the principle of reciprocity, and thus not much in danger of being violated.[55]

The principle is an autonomous legal concept[56], and may be expressed in positive or negative terms. It is indeed to be contrasted with retaliation, reprisal and retorsion.[57] Expressed as negative reciprocity, what it entails is that an injured party is entitled to withhold the performance of an obligation identical or equivalent to the obligation violated by the other party. For those who might view this proposition as startling, Professor Schneeberger has these words:

> It has been asserted that negative reciprocity as an answer to a violation deals a vital blow to confidence which is of paramount importance in relations between states . . . .
>
> In contradiction of this, former Secretary of State Cordell Hull denounced it as effrontery and cynicism if a state demands, while [it] itself scoffs at and disregards every principle of law and order, that other states adhere rigidly to all such principles . . . .
>
> Denial of the right to resort to reciprocity in answer to a wrong would constitute a grotesque encouragement to enter treaties with the mental reservation to disregard obligations to self and to bind merely the other party.[58]

---

55 Lenhoff, Reciprocity: The Legal Aspects of a Perennial Idea, 49 Northwestern Univ. L. Rev. 619 (1954-55). See also, E. Zoller, Peacetime Unilateral Remedies: An Analysis of Counter Measures, 14-27, (1984).

56 Zoller, supra, n. 55 at 15.

57 Schneeberger, supra, n. 54, passim.

58 Id., at 35.

Further support for the doctrine and its application is provided by Bruno Simma. He notes:

> The possibility of a State reciprocating in kind a breach of international obligation provides a powerful argument for its observance. The idea of reciprocity therefore lies at the root of various methods of self-help by which States may enforce their rights.[59]

Paul Reuter also writes:

> In fact one of the fundamental principles of the law of treaties is reciprocity; a Party who does not fulfill his obligations should not expect the other to fulfill theirs (execution trait pour trait; inadimplendum).[60]

In its practical workings, the principle operates to bar an offending state from relying on the terms of an agreement that he has himself violated, to extract obligations from the victim state. It goes without saying that what obligations the victim state may withhold is entirely within its sovereign right. Attempts to place limitations on the invocation of the principle of reciprocity in cases involving certain types of treaties have been severely criticized as resting on "dual confusion".[61]

---

59 Simma, Reciprocity, in 7 Encyclopaedia of Public International Law 400, 402, (1984).

60 P. Reuter, Droit International Public, 152 (6th ed. 1983). Reuter wrote as follows:

> En effet un des principes fondamentaux du droit des traités est celui de la reciprocité; une partie qui ne respecte pas ses obligations ne saurait exiger d'une autre qu'elle respecte les siennes (execution trait pour trait; inadimplendum).

61 See, Zoller, supra, n. 55 at 25 on her critique of the decision in Star Industries Inc. v. U.S. 60 Int'l L. Rep. 644 (1972), 461 F. 2d 557 (1977).

The only acceptable limitation on the principle is that "obligations erga omnes" are not covered by the principle.[62] The rationale here is that otherwise it would destroy its underlying notions of equivalence and identity or undermine its unstated attempt to redress the imbalance between parties.

The ICJ did not have any difficulty in applying the principle without limitation in the Case concerning Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970). In its answer to South Africa's objection to the vires of the United Nations General Assembly in adopting Resolution 2145 (XXI) which terminated South Africa's Mandate for South West Africa, the World Court opined that:

> One of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfill its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship.[63]

It is significant that in that same case, the World Court concluded, although with additional grounds, that the revocation of the Mandate did not require "cooperation" with the mandatory Power.

As a general rule, the principle of reciprocity applies by operation of general public international law, irrespective of whether or not it is a term of the relevant treaty or other agreement. There is, however, an additional reason for invoking the doctrine in the context of the Treaty of

---

62 Zoller, supra, n. 55 at 26.

63 1971 I.C.J. 16, 46.

"Amity". This is because that Treaty was predicated and "conclude[d] on the basis of reciprocal equality of treatment."[64] Significantly, that criterion was inserted at the request of Iran and was the subject of certain debate.[65]

---

[64] The preambular section of the Treaty states:

> The United States of America and Iran, desirous of emphasizing the friendly relations which have long prevailed between their peoples, of reaffirming the high principles in the regulation of human affairs to which they are committed, of encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and of regulating consular relations, have resolved to conclude, on the basis of reciprocal equality of treatment, a Treaty of Amity, Economic Relations, and Consular Rights, and have appointed as their Plenipotentiaries:.... (Emphasis added.)

[65] See, the declassified Telegram No. 212 of 16 October 1954 from the United States Embassy in Tehran to the United States Department of State in Washington reporting on the work of the two negotiating teams on the Draft Treaty of Amity and the recommendations of the United States team, cited in Mr. Robinson's Memorandum, n. 49; See also same telegram filed before this Tribunal by Claimants in Baker International Corp., et al and The Government of the Islamic Republic of Iran, et al, Case No. 369 Doc. No. 281, vol. I, p. 164 (2 April 1985). The telegram states:

> 1. Preamble
>
> Dr. Abdoh stated that the Government of Iran would like to have a statement in the draft treaty that the agreement was to be applied on a basis of reciprocity, and explained that this was for its effect upon third countries. The Government of Iran wanted, if possible, to avoid the extension of the terms of this treaty to third countries, notably to the Soviet Union, with which the Government of Iran had or might enter into treaties containing most-favored-nation clauses. (The Iranian representatives explained that many of the suggested changes in the draft treaty were motivated by the concern of the Iranian Government over the most-favored-nation clause in treaties which Iran had with other countries.) Dr. Abdoh indicated that the Government of Iran would be satisfied on this point if a phrase were inserted in line 6 of the preamble, so that clause would read: "The United States and Iran, . . . have resolved to conclude on the basis of the principle of reciprocity a Treaty of Amity and Economic Relations, . . .".

(Footnote Continued)

Iran's position, which eventually prevailed at the negotiations on this point, was that it did not want to be forced to extend the special privileges under this treaty to other states, in particular the Soviet Union, with whom it had or might enter into treaties containing a most-favored-nation clause. Dr. Abdoh, head of the Iranian delegation, explained to the satisfaction of the American delegation, that with the insertion of that clause, they could shield the terms of this treaty from any other state unless that state could prove reciprocity even where it had a most-favored-nation status.[66] Iran therefore has the right to challenge the applicability of the Treaty against the United States.

Thus, the principle is applicable on grounds of either general law or the terms of the Treaty itself. The only question left is whether from the history of dealings between Iran and the United States, Iran has a basis for invoking the doctrine of reciprocity and thereby barring the United States and its nationals from relying on the Treaty of "Amity" to extract obligations from Iran. The answer is yes. According to the Islamic Republic the United States has by its conduct so disowned its obligations under the Treaty of "Amity" that it cannot be recognized as retaining the rights which it claims to derive from the relationship.

(Footnote Continued)

> The Embassy perceives no objection to this addition and recommends that the Department accept the suggestion of the Iranian representatives.

[66] Id. p.1. For the rationale involved in this, see E. Zoller, Enforcing International Law Through U.S. Legislation 14 (1985) where she explains that:

> The essence of the special treaties of reciprocity was that the equivalence given for the privileges secured was exceptional -- the like of which no other state could offer. As a result the favors extended by these treaties could not be enjoyed under the most-favored-nation clause.

Despite the provision of Article I of the Treaty stating that "[t]here shall be firm and enduring peace and sincere friendship between the United States of America and Iran", the course of conduct of the United States before and after the Algerian Accords offends against the friendly relations, economic relations and the consular rights of Iran. Examples are legion.

Among the alleged violations that occurred before the Algerian Declarations are the singling out of Iranian nationals for visa investigations, in particular about 100,000 Iranian students in the United States;[67] the unlawful detention of Iranian nationals in the United States;[68] the deportation of at least 5,000 Iranian nationals from the United States without just cause and the ordering of several thousand students to present academic credentials in 30 days or face deportation;[69] the maltreatment of Iranian nationals incarcerated in United States prisons.[70] Among the few cases filed before the Tribunal in respect of such maltreatment is the case of Haddadi and the United States of America, Award No. 162-763-3 (31 January 1985), which illustrates both the United States treatment of Iranian students in that country --violation of the Treaty of Amity-- and the Tribunal's treatment of it. In that case the Claimant's son, Sassan Haddadi, an Iranian student had gone to the United States for further education in 1978 and thereafter in May

---

67 See, e.g. Reports in New York Times of 11 November 1979, pp. 1 & 14; 15 November 1979 p. 18 Col. 1; 20 November 1979, pp. A1 & A12.

68 See, e.g. Reports in New York Times of 15 November 1979 p. 20, col. 1.

69 See, e.g. Reports in New York Times of 17 November 1979, p. 1, col. 5; 27 November 1979, p. 9, col. 5; 30 November 1979.

70 See, e.g. Report in New York Times of 20 April 1980, p. 45, col. 6.

~~1980 had been arrested and subjected to described tortures,~~ resulting in his permanent insanity and finally had been sent to Iran on 15 July 1980. The Award in that case does not indicate if the United States contested these allegations at all, but that it requested dismissal of the Case for lack of jurisdiction over claims other than thoses "arising out of a debt, contract, expropriation or other measures affecting property rights" under Article II, paragraph 1 of the Claims Settlement Declaration, and for lack of locus standi of the father to bring the claim of the son.

The Award dismissed that Case on three grounds. First, for lack of jurisdiction over claims based on personal injuries as required by the Tribunal's jurisdictional mandate. Second, insofar as the Claimant, as guardian, was acting as the legal representative of a son lacking capacity to sue, the claims were for personal injuries to the son, and for losses and expenses resulting from such injuries, and such claims were not embraced by the Tribunal's jurisdictional mandate. Third, to the extent the Claimant asserted his own damages resulting from the loss of a son, such losses also fell outside the jurisdictional mandate of the Tribunal. No basis was pleaded in the Case for supporting the assertion that the Claimant father enjoyed a property interest in his son's welfare which was diminished by the latter's incapacitation, or that the material and moral losses were the consequences of any other event than the personal injuries to the son.

Another is the Case of Karimpanahi and The United States of America, Case No. 182 before the Tribunal. The Claimant in that case, a civil engineer of Iranian nationality residing in the United States alleges among other things that in 1971 the New York City police entered into his apartment, destroyed a number of his documents and took with them a number of his other documents, and also jailed

~~him on the false charge of trespassing in his own apartment.~~ He further alleges that on his re-entry into the United States in May 1980, the United States Immigration officials confiscated his Iranian passport and his United States permanent residency card and that he was detained by them while legally and lawfully entering the United States at the Kennedy Airport in New York; that from that time for more than 14 months, during which he was pursuing his case against the decisions of the Immigration officials and Immigration courts, he was constantly subjected to savage harassment by the United States authorities, until he was able to obtain a favourable order from a United States federal district court against the deportation orders of the Immigration authorities; that however the Immigration authorities refused to return his passport and residency card until a second Order had been issued by the Federal district court; that in addition to considerable loss of earnings in this period, when he obtained employment with the civil engineering firm of Gruen Associates the United States authorities caused them to dismiss him after a while and since then he has been subject to further harassment by them, resulting in his further unemployment; and that these acts of harassment were not limited to him only but extended also to his relatives who happened to visit him from other parts of the United States. He also alleges that the correspondence between him and the Tribunal has been tampered with by the United States authorities and that in certain instances he did not receive the Tribunal's communications, whereupon the Tribunal instructed its Registry to use registered mail for further correspondence with him. This Case has remained unresolved to date, while the claim of Gruen Associates, Inc. and Iran Housing Company, et al Award No. 61-188-2 (17 July 1983), reprinted in 3 Iran-U.S. C.T.R. 97, was awarded more than three years ago even in the absence of the Iranian judge of the Tribunal, See Dr. Shafeiei's Reasons for Not Signing the Award of 9 August 1983 in that case, reprinted in 3 Iran-U.S. C.T.R. 124.

~~Moreover, there is the Case of~~ The ~~Islamic~~ Republic of Iran Ministry of Defence and The Government of the United States of America, Case No. 936, before Chamber 3 of the Tribunal, in which the Ministry seeks more than $600,000 in damages for the loss of personal effects resulting from the abrupt expulsion of 107 Iranian Navy and Army cadet students pursuant to the Executive Order of the President of the United States on 10 April 1980. The Ministry contends that the 36 hours alloted for the students' departure was so short that they were unable to collect their belongings and personal effects under the police surveillance and had to leave them behind, particularly where they had to get a number of connecting flights from long distances within the United States to reach the specified international airport in order to leave the country in time. The Ministry asserts that these "hostile and inhuman actions" by the United States violated both international law and the agreements between the respective military authorities of both governments, pursuant to which the Iranian cadets and officers were sent to the United States for further training. This, like the other case described above, has not yet been decided by the Tribunal, although similar to all other cases before the Tribunal it was filed in a three-month period ending on 19 January 1982.

Further, there is the Executive Order of 14 November 1979 of the President of the United States declared an "emergency" and ordered "blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United

States."[71] The value of affected financial assets according to United States sources was at least $8 billion[72] and according to the Islamic Republic (Case No. A15) another $8 billion including unliquidated non-military assets and $12 billion worth of pre-paid military goods (Case No. B1), which the United States has still not returned. There is also the United States Executive Order prohibiting exports to and imports from Iran[73], and finally, the armed invasion of the Islamic Republic of Iran or what is also described by the United States as the abortive "rescue" mission.[74]

These actions by the United States appear to be violative of the letter and spirit of the Treaty of Amity, in particular, the following: Article II(4) requiring "most constant protection and security" of treaty nationals, and guaranteeing reasonable and humane treatment in every respect to such nationals when in custody as well as access to all facilities necessary to their defence, and prompt and impartial disposition of the case; Article III(2) requiring freedom of access by treaty nationals to the courts and administrative agencies upon terms no less favourable than those applicable to nationals of any third country, and "prompt and impartial justice" by those courts and administrative agencies; Article IV requiring fair and equitable treatment to treaty nationals in conformity with

---

71 Executive Order No. 12170 of 14 November 1979, 44 Fed. Reg. 65729 (1979).

72 See Report of New York Times of 20 November 1979 at p. 13, column 2.

73 Executive Order No. 12205 of 7 April 1980, 4 Fed. Reg. 24099 (1980).

74 Haji-Bagherpour and The Government of the United States of America, Award No. 23-428-2 (2 January 1983) 2 Iran-U.S. C.T.R. 38; Stein, Contempt, Crisis and the Court: The World Court and the Hostage Rescue Attempt, 76 Am. J. Int'l. 499 (1982).

applicable laws (para. 1), and freedom from searches and from molestation without just cause (para. 3).

It is particularly significant to note that paragraph 2 of Article IV, which United States claimants rely upon to extract compensation from Iran, reads in full as follows:

> 2. Property of nationals and companies of either High Contracting Party, including interest 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. (Emphasis added.)

I disagree with the view that Article IV(2) of the Treaty provides for the "full equivalent of the property taken" as the compensation standard. For the same Article also provides that "the most constant protection" that the foreign property is to be accorded is limited to the one that is "no ... less than that required by international law", and that there must be a "just compensation." The Award does not argue why it picks on the "full equivalent of the property taken" as the compensation standard, while it is more convincing to consider that term to have been limited to the requirement of general international law by the term "in no case less than that required by international law." Otherwise this provision has been rendered meaningless. The formulation of Article IV(2) as a whole makes it clear that the intent of the High Contracting Parties was not to prescribe a standard of compensation higher than that provided by international law, but to affirm that in cases of expropriation a compensation is due.

Moreover in the thirty years after conclusion of the Treaty (1955-1985), the considerable evolution of international law regarding compensation for expropriation has demonstrated that "appropriate compensation" is the rule today and according to the general rules of interpretation of customary international law, also recognized by Article 31 of the Vienna Convention, the terms of the Treaty must be interpreted in accordance with their ordinary meaning "in their context and in the light of its object and purpose".

By the particular interpretation that it gives to Article IV(2) of the Treaty of Amity, the Tribunal ignores the reciprocal basis of that provision and all other provisions of the Treaty, which provide corresponding protections and guarantees for Iranian nationals that have been apparently violated by the actions referred to above. In so violating its reciprocal obligations, the United States and its nationals are not entitled to extract compliance with the treaty from the Government of the Islamic Republic of Iran.

The alleged violations by the Government of the United States occurring subsequent to the Algerian Declarations include its failure to unblock the property and interests in property of the Government of Iran and its instrumentalities and controlled entities. These assets, financial as well as non-financial, include, inter alia, proceeds from oil sales, Iranian banking deposits, Embassy and Consular bank accounts and the balance of the fund paid to the fiscal agent of the United States (Federal Reserve Bank) for repayment of

syndicated bank loans,[75] assets totalling well over 8 billion dollars.[76]

Other such violations involve the failure of the United States governmental agencies to honour military sales and service contracts entered into with Iran[77], auctioning of irreplaceable items of property of the Government of Iran in the United States[78] and restriction of entry of Iranians into the United States.[79]

In case these violations were examined and found to be true, it would be clear that the reciprocity upon which the Treaty is predicated has not been in existence in the relevant period, Iran has not been treated as the most favoured nation and its nationals have not been accorded the most constant protection by the United States in the relevant period, and therefore that the United States and its nationals cannot be allowed to extract any obligations from the Islamic Republic of Iran on the basis of that Treaty.

---

75 See, The Islamic Republic of Iran and The United States of America, Award No. ITL 63-A15(I:G)-FT (20 August 1986) which, by requiring the United States to transfer to Iran the balance of the fund that is about $500 million, in effect ruled that the United States had violated the Algerian Accords by not transferring those funds in 1981.

76 See, supra n. 70. For a fuller account of the claims of the Government of Iran regarding violations by U.S. agencies in respect of sales and service contracts, see the Statement of Claim of the Islamic Republic of Iran in Case A-15.

77 See, e.g. The Islamic Republic of Iran and The United States of America, Interlocutory Award N. ITL 60-B1-FT (4 April 1986).

78 See, e.g. The Government of the Islamic Republic of Iran and The Government of the United States (Cases A4 & A15), 5 Iran-U.S. C.T.R. 131.

79 See, the Statement of Claim of the Islamic Republic of Iran in Case A15.

b) Changed Circumstances

Another ground for considering the Treaty of Amity as unenforceable is the principle of changed circumstances. By Article V of the Claims Settlement Declaration,

> 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, taking into account usages of the trade, contract provisions and changed circumstances. (Emphasis added.)

In its classical formulation, changed circumstances is known as the doctrine of rebus sic stantibus, by which every treaty is stated to be based on the assumption that the circumstances shall remain unchanged as between the parties. The principle is also codified in Article 62 of the Vienna Convention on the Law of Treaties, which speaks of fundamental change of circumstances. However, by virtue of Article V of the Claims Settlement Declaration, which is the primary authority so far as this Tribunal is concerned, the doctrine of rebus sic stantibus and the Vienna Convention only become subsidiary grounds for a finding on the suspension or termination of the Treaty of Amity.

There is hardly any doubt that circumstances have changed in the relations between the United States and Iran to an extent which cannot but have some effect on the Treaty of Amity between the two countries. The spirit of Amity upon which that Treaty was concluded and which predicated its subsistence did not prevail at the time this Claim arose, and the obligations under the Treaty were not being performed by either party. Thus the termination of the Treaty, or, at the minimum, its suspension, can be implied from the conduct of the parties.

Although the Tribunal is unaware of any specific steps taken by either Government to suspend[80] or terminate the Treaty, this does not remove the Tribunal's obligation to apply Article V of the Claims Settlement Declaration, which does not admit of any conditions. The Tribunal recognizes that it is bound to take into account or apply in all cases the "changed circumstances" under Article V for invalidating, suspending or modifying the Treaty, but its reason for not doing so in this Case is that neither Parties invoked that provision. (Award, p. 9). In my view Article V, by its mandatory formulation that the Tribunal "shall decide all cases on the basis of ... changed circumstances," removes any necessity for invocation of that provision by either of the Parties. Thus, to refrain from addressing the issue, for whatever reason, would be to renege on the Tribunal's duty to take account of changed circumstances in its determination of cases before it.

In the Case of Questech, the respondent had invoked the Islamic Revolution to terminate a contract which provided for no such termination. In the proceedings the respondent had not invoked the changed circumstances provision of Article V of the Claims Settlement Declaration. However, Chamber One of the Tribunal, under the chairmanship of President Böckstiegel applied the provision to the Case and stated as follows:

---

80 It is interesting to know the status of a similar Treaty of Amity between the United States and Vietnam of 1961, 579 U.N.T.S. 99; 17 U.S.T. 44; T.I.A.S. 5954 that the United States publication, Treaties in Force, as of 1984 consider it as "remain[ing] under review," (p. 189) pursuant to the takeover of the Vietnam government by the communist regime. See also the Opinion of the United States Acting Attorney General and Proclamation of President Roosevelt, respectively, of July and August 1941 on suspension of the multilateral International Load Line Convention of 1930 in G. Hackworth, V Digenst of International Law 353-56.

> [The] concept of changed circumstances, also referred to as clausula rebus sic stantibus, has in its basic form been incorporated into so many legal systems that it may be regarded as a general principle of law; it has also found a widely recognized expression in Article 67 of the Vienna Convention on the Law of Treaties of 1969.... [T]he consideration of changed circumstances in the present context is warranted by the express wording of Article V of the Claims Settlement Declaration. That provision not only lays down the law to be applied by the Tribunal, but it also mandates the Tribunal to 'tak[e] into account relevant usages of the trade, contract provisions and changed circumstances' when deciding 'all cases,' thereby mentioning 'changed circumstances' on the same level as 'contract provisions' (emphasis added). In the context of the Algiers Declarations the inclusion of the term 'changed circumstances' means that changes which are inherent parts and consequences of the Iranian Revolution must be taken into account.[81] (Footnotes omitted.)

I would therefore conclude that, by virtue of the changed circumstances that have ensued between the two Governments since the Islamic Revolution in Iran, the Treaty of Amity between the two countries was, at the very least, suspended by operation of law at the relevant period.

Beyond Article V of the Claims Settlement Declaration, which I consider conclusive of the issue, the Vienna Convention also affords additional grounds for establishing the suspension or termination of the Treaty. Although neither the Islamic Republic nor the United States have signed that Convention, and moreover Article 4 of the Convention makes it applicable only to treaties concluded after the entry into force of the Convention with regard to the States in question (which thus precludes its application to the Treaty of Amity), the provisions of the Convention may be relied

---

81 Questech, Inc. and The Ministry of the National Defence of the Islamic Republic of Iran, Award No. 191-59-1 (25 September 1985) pp. 20-22.

upon here insofar as they reflect customary international law.[82] Article 62 (1) of the Vienna convention states:

> A fundamental change of circumstances...
> may not be invoked as a ground for terminating or withdrawing from the treaty unless:
> a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
> b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

Article 62(2) further states that such changed circumstances may not be invoked as a ground for terminating or withdrawing from the Treaty:

> (a) if the treaty establishes a boundary; or
> (b) if the fundamental change is the result of a breach by the party invoking it . . . .

The Treaty of Amity not falling under the exceptions provided under Article 62(2) of the Convention, the principle stated in Article 62(1) of the Convention clearly applies.

It may be argued that even if a fundamental change of circumstance has occurred, it merely allows the Islamic Republic of Iran to terminate the treaty either under the terms of the treaty or the Vienna Convention, by providing notification of its intention not to be bound. The answer to the argument is provided in Article 65(5) of the Vienna Convention which states that:

> Without prejudice to article 45, the fact that a state has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

---

82 Fisheries Jurisdiction Case, 1973 I.C.J. 18.

In any case, these are merely subsidiary grounds in view of the specific jurisdictional mandate of the Tribunal to take account of changed circumstances in deciding all cases before it, which, in my estimation, leads to an inescapable conclusion that the Treaty of Amity was no longer operative in the relevant period.

c) The Principle of Ex Malo Jus Non Oritur

The principle of ex malo jus non oritur is a general principle of law that bars a party from profiting from his own wrongful conduct. The principle arises in the present context because of the circumstances surrounding the overthrow of the Mossadeq regime in 1953, the return to power of Mohammad Reza Pahlavi as the Shah of Iran and the consequent signing of the Treaty of Amity.[83]

It is public knowledge that, in 1953, the United States Central Intelligence Agency, acting in collaboration with the Secret Service of the British Government, organized the coup d'état in Iran which ousted the government of Mossadeq and replaced it by a government disposed to continue the special privileges accorded to the United States and Western Powers.[84] In fact, it appears that as recognition of its prior involvement in the internal affairs of Iran, the

---

[83] For a detailed account of the Anglo-American involvement in the overthrow of the Mossadeq regime in 1953, see, Brian Lapping, End of Empire (1985), at 218 et seq; Richard W. Cottam, Nationalism in Iran (1979); Kermit Roosevelt, Countercoup: The Struggle for the Control of Iran (1979), passim; Homa Katouzian, The Political Economy of Modern Iran (1981); C.M. Woodhouse, Something Ventured (1982).

[84] Id., passim. In fact Sheibani et al., and The Government of the United States of America, Case No. 941 before Chamber one of the Tribunal, gives an elaborate account of the coup in seeking damages for the injury and

(Footnote Continued)

United States undertook as follows in the first paragraph of the Declaration of the Government of Algeria:

> The United States pledges that it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs.

The organization of this coup d'état constituted an international delict, a violation of the duty of non-intervention in the internal affairs of another State. This age-old concept of non-intervention has been given contemporary expression in both the 1965 Declaration on Inadmissibility of Intervention into Domestic Affairs of States[85] and the 1970 Declaration on Principles of Friendly Relations.[86]

Resolution 2625 (XXV) provides a formulation of the legal duty not to intervene in these terms:

> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign

---

(Footnote Continued)
loss of life and property it caused the Claimants and their constituents. For unstated reasons however the Tribunal has left this case inactive.

Moreover, if the reports are true, it appears that the United States involvement in Iran has continued in the post-19 January 1981 period, despite the United States undertaking not to do so under paragraph 1 of the Declaration of the Government of Algeria. See, CIA Courted Iran, Exiles for 7 Years, International Herald Tribune, 20 November 1986, p. 1. col. 1.

85 United Nations General Assembly Resolution 2131 (XXVIII).

86 United Nations General Assembly Resolution 2625 (XXV).

rights and to secure from it advantages of any kind.

This principle was again reiterated in the 1973 General Assembly Resolution 3171 (XXVIII) on Permanent Sovereignty over Natural Resources, which:

> deplores acts of State which involve force, armed aggression, economic coercion or other illegal or improper means in resolving disputes . . . .[87]

Further support for the formulation is found in the Charter of Economic Rights and Duties of States,[88] Article 32 of which states:

> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.

A direct consequence of this delict by the United States is that it was able to persuade the new government of Iran, which it had itself helped to install, after the coup, to negotiate the 1955 Treaty of Amity. To allow the United States, or its nationals, to profit from their wrongful conduct of intervention in the internal affairs of another State, will be offensive to this legal principle of fundamental importance and general application. The Treaty of Amity, therefore, cannot be invoked by reason of this principle.

---

87 United Nations General Assembly Resolution 3171 (XXVIII).

88 United Nations General Assembly Resolution 3281 (XXIX).

d) The Principle of Odious Debts

Yet another basis on which the Treaty of Amity is considered as inapplicable in the present Case is the principle of "odious debt".[89] In its most basic formulation, this principle states that "if a despot enters into a debt, not for the benefit nor in the interest of the State but to prop up his despotic regime, in order to suppress the populace who oppose him, the debt is odious in relation to the entire populace."

The rationale for this principle is that: the debt is not a state obligation; it is a debt of the regime and personal to the power who contracted it. Therefore, it falls with such power. History is replete with examples of repudiation of odious debts.

Mexico's repudiation in 1860 of the debts of the usurping regime is one example. Likewise, immediately after the Spanish-American war the United States repudiated the "subjugation-debts" incurred by Spain in suppressing the insurrectionary movements in Cuba in 1868 and 1895, also on the basis of this same principle. The Soviet Union's repudiation of the Tsarist debts after the 1917 revolution, Indonesia's rejection of debts incurred by the Netherlands in military operations against its national liberation movement, even after accepting to bear part of these debts at The Hague Round Table Conference of 1949, and Algeria's rejection of debts incurred by France in the Algerian war of independence are further illustrations of this same principle.

---

89 For a thorough treatment of the concept of odious debt, see the Report of the Special Rapporteur on Succession of States in respect of State debts, in Yearbook of the (Footnote Continued)

Although the principle has been invoked more regularly in relation to financial debts, its basis is the rejection of an odious obligation; it should therefore apply by parity of reasoning to any odious obligation, financial or otherwise. The Treaty of Amity is in all respects akin to an odious debt, personal to the regime of the despotic Shah and must perforce be deemed to have fallen with him. Consequently, neither the United States nor its nationals can purport to rely on the Treaty to derive any benefits.

2. Interpretation of the Treaty of Amity in the Light of Current International Law

Finally, I maintain that even if one were to assume arguendo that the Treaty of Amity was still operative, INA would still not be entitled to compensation greater than that provided under international law. This is because the provisions of the Treaty must still be interpreted by the Tribunal in the light of changes in international law. This is a basic rule of treaty interpretation that is well-established, as reflected in the work of the Institut de Droit International, in the provisions of the Vienna Convention on the Law of Treaties, in decisions of the International Court of Justice and other important judicial institutions, as well as in the writings of publicists.

In 1975, the Institut de Droit International, after several years of study, adopted a resolution which states in part as follows:

> 4. Any interpretation of a treaty must take into account all relevant rules of international law

---

(Footnote Continued)
International Law Commission, 1977 Vol. II (Part One), at 45 et seq.

which apply between the parties at the time of application.[90]

Similarly, Article 31(3)(c) of the Vienna Convention provides that in interpreting a treaty, account should be taken of "any relevant rules of international law applicable in the relations between the parties." This provision is significant and material because its wording differs from

that proposed by Sir Humphrey Waldock in his draft presented to the International Law Commission in 1964[91], which had stated that the meaning to be given to a term of a treaty should be determined "in the light of the general rules of international law in force at the time of its conclusion." The International Law Commission decided by 14 votes to 2 to delete the underlined words. The 14 members of the International Law Commission who voted to delete those words did so in expression of their belief that it was appropriate to take into account the rules of international law in force at the date of interpretation.[92]

This rule of treaty interpretation has been the subject of extensive commentary. It is often referred to as the doctrine of intertemporal law. Judge Elias, for instance, in his treatise on The Modern Law of Treaties, writes:

> It is necessary to take into account as well the so-called intertemporal law in its application to treaties; that is to say, to have regard to the effect of the evolution of the law on the

---

90 Resolution adopted by the Institut de Droit International at its Wiesbaden Session [1975] Annuaire de l'Institut de Droit International, 537.

91 See, United Nations Document No. A/CN. 4L107.

92 See, Yearbook of the International Law Commission, 1966, Vol. I (Part Three), at 190 et seq.

interpretation of the legal terms used in the treaty.[93]

This rule of Treaty interpretation was articulated in the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970). In its advisory opinion, the International Court of Justice stated categorically:

> Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into
>
> account the fact that the concepts embodied in Article 22 of the Covenant . . . were not static, but were by definition evolutionary, as also, therefore was the concept of sacred trust. The parties to the Covenant must consequently be deemed to have accepted them as such.[94] (Emphasis added.)

The Court further explained:

> That is why, viewing the institution of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law.[95]

The Court then concluded:

> Moreover, an international instrument has to be interpreted and applied within the framework of

---

93 T. Elias, The Modern Law of Treaties 77 (1974).

94 Supra, n. 63, at 31.

95 Id.

> the entire legal system at the time of interpretation.[96]

In a subsequent case, the Aegean Sea Continental Shelf Case (Greece v. Turkey), the ICJ adopted the same approach. Faced with the issue of interpreting a reservation clause relied upon by the Government of Greece, the Court ruled as follows:

> The Court is of the opinion that the expression in reservation (b) 'disputes relating to the territorial status of Greece' must be interpreted in accordance with the rules of international law as they exist today, and not as they existed in 1931.[97]

This is a rule of treaty interpretation of vintage origin. The Permanent Court of International Justice ruled similarly in the Case Concerning the Nationality Decrees issued in Tunis and Morocco (France v. Great Britain)[98] Also, in the Spanish Zones of Morocco Claim, Judge Huber, in interpreting a provision in a 1783 Treaty concluded:

> Ces droits ne visent que l'usufruit d'une residence 'convenable'; sans doute, cette dernière expression doit être interprétée au point de vue des exigences de nos jours.[99]

The jurisprudence of the European Court of Human Rights confirms a similar judicial attitude. In the Tyrer Case[100], the Court had to decide whether the judicial corporal punishment imposed on the applicant under operative rules in the Isle of Man constituted a breach of Article 3 of the

---

96 Id.

97 Aegean See Continental Shelf Case (Greece v. Turkey), 1978 I.C.J. 3 at 33.

98 1923 P.C.I.J. Ser. B, No. 4, at 24.

99 Spanish Zones of Morocco Claim 51, 2 U.N.R.I.A.A. (1925), at 725.

100 Tyrer Case, European Court of Human Rights, Judgment of 25 April 1978, Ser. A, No. 26.

European Convention on Human Rights proscribing torture and inhuman punishment. In concluding that the said punishment was a breach of Article 3 of the Convention, the Court stated:

> The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it, the Court cannot be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe in this field. Indeed, the Attorney-General For the Isle of Man mentioned that, for many years, the provisions of Manx legislation concerning judicial corporal punishment had been under review.

Similarly, in the Affaire Dudgeon[101], the Court in majority stated:

> [T]he Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member states."

By parity of reasoning, the Treaty of Amity, even if it is accepted as a lex specialis between the Governments of the United States and the Islamic Republic should be read and interpreted in the light of the current status of international law, which I have already discussed in Part II above.

Dated, The Hague
5 Azar 1365/26 November 1986

Koorosh-Hossein Ameli

---

101 Affaire Dudgeon, European Court of Human Rights, Judgment of 22 October 1981, Ser. A. No. 45.