161-114
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CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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ORIGINAL DOCUMENTS IN SAFE

Case No. 161 Date of filing: 3 Feb 87

** 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 Correction of Mr Ameli

- Date 3 Feb 87

2 pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

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- Date _____

_____ pages in English _____ pages in Farsi

R/12

In His Exalted Name

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

INA CORPORATION,
Claimant,

and

THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN,
Respondent.

CORRECTION TO DISSENTING OPINION OF JUDGE AMELI

The following corrections should be made in the English version of my Dissenting Opinion in this Case, dated 5 Azar 1365/ 26 November 1986:

1. Page 12, line 18, second word should read "restitutio", rather than restutio.

2. Page 25, footnote 32, line 3, reference page number should read "39", rather than 36. And last line should follow by: "See also, id., p. 37."

3. Page 38, line 15, after the first world add an "*", and at the bottom of the page add the following:

   * See, Transcript of the Hearing in that Case, pp. 1068-83.

4. Page 58, line 6, change "Article 67" to "Article 62"; line 15, delete the underlining of the word "and" and underline the word "all" in the same line.

5. Page 68, line 9, after the word "cannot", add the word "but".

A copy of the corrected pages is attached.

Dated, The Hague,
14 Bahman 1365/ 3 February 1987

Koorosh-Hossein Ameli

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 restitutio 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

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[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).

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:

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[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. 39: "The Tribunal finds that the amounts claimed... have not been sufficiently explained or substantiated, and they are therefore denied." See also, id., p. 37.

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

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(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).

* See, Transcript of the Hearing in that Case, pp. 1068-83.

> [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 62 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

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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.

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 but 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

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