CAMBRIDGE

Cambridge University Press
978-0-521-46338-6 - Iran-United States Claims Tribunal Reports, Volume 28
Edited by Ruth Pogany
Excerpt
More information

DECISIONS, AWARDS AND INTERLOCUTORY AWARDS

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-46338-6 - Iran-United States Claims Tribunal Reports, Volume 28
Edited by Ruth Pogany
Excerpt
More information

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

v.

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

(Case No. 131)

AWARD NO. 518-131-2[1]

DISSENTING AND CONCURRING OPINION OF SEYED KHALIL KHALILIAN[2]

1. The expropriation issue is the most crucial point addressed in the present Award, and I shall therefore discuss it first. Apart from the fact that a finding of expropriation is highly questionable in the circumstances of the present Case, the more regrettable aspect of the majority's decision is its endorsement of the Claimants' demand for compensation based on the purchase price of certain used equipment, without taking into account any depreciation. As to the first points, the Case file lacks sufficient corroborative evidence to warrant a finding of expropriation. As to the second, there is no legal basis, nor could the majority cite any precedents in the case-law history of international tribunals, to justify the position that the used equipment could be valuated as new for the purpose of compensation, even assuming in the present Case that it had been taken by the Respondents.

2. In finding for expropriation,[3] in the Award the majority predicates its reasoning on the assumption that Eastman had properly, and strictly in accordance with OSCO's General Conditions, tendered OSCO two forms, known as the Request To Export ("RTE"), at the relevant

[1 Award reprinted in 27 IRAN-U.S. C.T.R. 64.]
[2 Filed 18 March 1992. This Opinion is belated to reasons both personal and medical.]
3 The Claimants developed a story of expropriation intended to establish that the Foundation for the Oppressed had seized Eastman's equipment. Upon hearing the Claimants' version of the relevant events, which they supported by affidavits, the Tribunal was not persuaded to believe the story and therefore rejected their allegation. Para. 82 of the Award.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-46338-6 - Iran-United States Claims Tribunal Reports, Volume 28
Edited by Ruth Pogany
Excerpt
More information

times—i.e., in April and June 1979[4]—but that the Respondents failed to extend Eastman the necessary cooperation to export the equipment. *See* paras. 84-102 of the Award under the heading *The Failure to Re-Export*. However, in order to comply with Clause 16 of OSCO's General Conditions and consequently to establish liability on the Part of the Respondents, it was imperative for Eastman: a) to establish to the Tribunal's satisfaction that it had submitted a formal RTE at the relevant time and that its request was denied by NIOC or OSCO, thereby establishing default by the other party to the contract; b) to prove, further, that it had no other alternative available than to export the Service Plant; and c) to have exhausted all possible means of mitigating its damage. Thus, only if all three of these requirements were met could one possibly infer a case of State responsibility.

3. *The issue of the evidentiary materials*: The question whether or not the Claimants were correct in their allegation that the April RTE was submitted to NIOC or OSCO properly and in due course could be decided after an examination of the degree of coherence and materiality of the evidence presented. The most significant material submitted to the Tribunal in this connection is a list of equipment dated April 1979. The evidentiary value of this material, however, is highly debatable.[5] First, it is not more than a mere photocopy and does not bear the signatures of the persons who would have had to sign it either routinely or by virtue of the contract. Second, nothing has been presented in the record to substantiate this list as constituting a formal request. Rather, it is quite conceivable that after the supervention of the revolutionary events in Iran, Eastman made up that list but put it on hold; i.e., it did not really indicate thereby any resolute intention to export the equipment. The evidence is very clear that Eastman re-rented some of the items; i.e., it picked out a number of items presently reflected on the alleged April RTE and used them again on a rental basis. Objectively, this indicates that in view of the uncertain course of the events of that time, Eastman had not firmly decided to abandon its market

[4] Clause 16:
On completion of the Services or on early termination of the Contract as provided for under these General Conditions the Contractor [Eastman] shall export the Service Plant in accordance with the Company's [OSCO's] Materials Procedure in Schedule II hereto or use the Service Plant on another contract with [OSCO] or, with the permission of [OSCO], pay the appropriate customs duties and charges on the Service Plant and obtain a release from the customs authorities which will permit the use thereof for third parties or their sale in Iran . . .

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

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-46338-6 - Iran-United States Claims Tribunal Reports, Volume 28
Edited by Ruth Pogany
Excerpt
More information

in Iran and export the equipment. Rather, it was apparently wavering between a decision to interrupt its activities in Iran and a policy of clinging to the hope of reactivating at least part of its business there. Under those circumstances, it could not have been altogether serious about exporting the equipment, inasmuch as it was mindful of certain prospective areas in which to resume selling its services to Iranian customers.[6]

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

5. a) *McMillan's affidavit*: This piece of evidence should not be taken as contemporaneous independent evidence, because the affiant was a corporate officer (clearly an interested party in these proceedings)[7] who undeniably submitted his affidavit in order to support his employer's case. Moreover, in preparing his affidavit he was telling of events that had taken place many years before, so that his account can hardly be characterized as contemporaneous. What is more, McMillan had a servant-master relationship with the Claimant. His affidavit therefore carries little weight as evidence on the issue, and it remains no more than a secondary evidence.[8] According to the practice of international tribunals, affidavits need to be supported by corroborating, independent evidence. *See, e.g. Schott*, Award No. 474-368-1, paras. 56-57.[9] There,

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

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

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

[9] 24 IRAN-U.S. C.T.R., at 223.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-46338-6 - Iran-United States Claims Tribunal Reports, Volume 28
Edited by Ruth Pogany
Excerpt
More information

Schott's testimony was also backed up by the testimony of two witnesses, yet he failed to persuade the Tribunal.[10] Also, in the *Stewart* case the Claimant filed six affidavits to substantiate the allegation that his possessions packed into a sea container were confiscated by the Revolutionary Council of Iran. Yet, holding that "[T]he evidence is inadequate to find that the Claimant suffered a property loss through acts attributable to the Respondent,"[11] Chamber Two dismissed the Claim.

6. Besides, if the majority believed that McMillan told the Tribunal nothing but the truth, why did it not assume that the Respondents' affiants were equally credible? On NIOC's side, Mr. Sadri and others rebutted the statements of Mr. McMillan. We also heard oral testimony that the alleged April RTE had not been submitted to NIOC or OSCO. *See* para. 79 of the Award. Their rebuttal fell on deaf ears, however. By virtue of Art. 15(1) of the Tribunal Rules,[12] the principle of equal treatment of both parties requires, in similar circumstances, that the Tribunal either disregard both sides' affidavits insofar as they contradict one another, or else give equal weight to the Respondents' affidavits. In either case the result would be the same. In *Telecommunications Co. of Iran* v. *United States*, the respondent denied in rebuttal having received the letter invoked by the claimant, which could excuse it from nonperformance of its contractual obligations. The Tribunal gave weight to this rebuttal despite the testimony given by a Mr. Hughes.[13] In the present case, however, the majority ignored the affidavits and oral testimonies given by the Respondents' witnesses in rebuttal to Mr. McMillan.[14]

7. b) *McMillan's memorandum*: As the second piece of evidence, the majority has relied upon the terms of a memorandum sent by McMillan on 21 October 1979 to Keith Bengston, Eastman's Middle East and West Africa Division Operations Manager. However, the memorandum does not support the position that the April RTE was submitted in a

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

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

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

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

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

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-46338-6 - Iran-United States Claims Tribunal Reports, Volume 28
Edited by Ruth Pogany
Excerpt
More information

timely manner to NIOC or OSCO. In para. 87 of the Award, the majority quotes what I believe to be the most significative part of the memorandum. For, if the memorandum contained other passages more relevant to the Case, they should have been quoted instead. The quoted passage is as follows:

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

With the above quotation in mind, one wonders how the majority could possibly have determined, based on this evidence, that a formal RTE had definitely been presented in April 1979. The memorandum makes no mention of the April RTE, nor does it complain that NIOC had denied permission to export. Furthermore, how can one infer the exact items of equipment at issue from the quoted passage, which speaks in very vague and nonspecific terms? Besides its ambiguity as to the items of tools involved, the memorandum is dated October 1979, which gives rise to the impression that it might have related only to the June RTE. In addition, the major flaw in the memorandum is that it generates an ambiguity by using the general term "excess equipment". This term *per se* does not refer to any particular items. Furthermore, in the light of Eastman's admission that some of the items listed on the April RTE were later taken out and re-rented, one wonders how the majority could have concluded that all the items mentioned on the list are compensable.

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

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

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-46338-6 - Iran-United States Claims Tribunal Reports, Volume 28
Edited by Ruth Pogany
Excerpt
More information

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

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

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

11. Under the contract, and in order to prevail in its claim here, Eastman was required to show that it had exhausted all possible avenues for protecting its properties, with a view to mitigating its damage.[15] Therefore, apart from exporting the equipment, Eastman had to try all other alternatives and to take all reasonable actions that could help it to lessen its property losses. However, it has not been established, or even alleged, that Eastman took any measure other than allegedly insisting, to the exclusion of all other avenues, on exporting the equipment. Yet, that was not its only option. Pursuant to the contract in force between the parties, Eastman had three possibilities by which it could attempt to exercise its right over the Service Plant. It could export the equipment, rent it to a third party, or even dispose of it through sale. In the latter two cases, Eastman should have paid the relevant customs duties and obtained a release from the authorities. *See OSCO's General Conditions*, Clause 16, quoted in note 3, *supra*. Contractually, Eastman was only *permitted*—and not *required*—to choose the first of these alternatives. Although this point has a significant bearing on the issue of expropriation, it has been totally ignored in the Award. *See, contra*, *Seismograph Services Corporation* v. *NIOC*, Award No. 420-443-3

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

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-46338-6 - Iran-United States Claims Tribunal Reports, Volume 28
Edited by Ruth Pogany
Excerpt
More information

(22 December 1988), para 274.[16] There, since the Claimant, CEPS, did not attempt to use its option of selling the equipment as allowed it under Clause 16, the Tribunal refused to reach the conclusion that it was deprived of "the effective use, benefit and control of its Property so as to constitute an expropriation." *Ibid*, para. 301.[17]

12. *June RTE*: Although the above observations were made mainly in relation to the April RTE, they apply equally to the June RTE, with just one exception. Here, it is not disputed between the parties that the June RTE was presented to the Respondents in accordance with the contractual requirements, and that the Respondents approved the export since the form bears a signature in the box for indicating approval. What is at issue, however, is whether Eastman was later prevented from exporting the equipment listed in the June RTE. The burden of proof falls on Eastman to demonstrate that after obtaining the approval for export, it took all reasonable steps to export the equipment but was unsuccessful in those efforts due to illegal acts directed against it by NIOC or the Government of Iran. By approving the export, NIOC did all that it was contractually required to do; it was then incumbent upon Eastman to take the necessary steps actually to export the equipment. In the *Houston* case, the Tribunal dismissed a similar demand by the claimant therein, stating that "HCC is still

[16] 22 IRAN-U.S. C.T.R. 3, where the Tribunal states:

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

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

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

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

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-46338-6 - Iran-United States Claims Tribunal Reports, Volume 28
Edited by Ruth Pogany
Excerpt
More information

required to show that it took all reasonable steps to export the equipment, so as to satisfy the burden of proof that the losses suffered by it were incurred as a result of the acts or omissions of IRAN and not by HCC's own failure to act."[18] Surely, in the present Case the Claimant's evidentiary materials were sufficiently flawed for the Tribunal to invoke the same argument. Nonetheless, the majority chose to deviate from the generally accepted rules of evidence, and instead reproached the Respondents on two counts: *First*: In paragraph 96 of the Award the majority remarks that the "[c]ertificates from Iranian Customs showing that this equipment had been cleared for export should have been accessible to the Respondents and could have been produced by them." This statement which is in effect an objection to the Respondents' argument had never been raised by the Claimants. Yet, the majority initiated it *proprio motu* as if it was so necessary to excuse the Claimants' failure to produce the relevant evidence. Similarly, it turns a blind eye to the massive, indeed catastrophic destruction which took place in southern Iran during the war with Iraq, owing to which not a single document of the official records there survived. *Second*: In order to buttress its position, the majority further states in the same paragraph: "The Respondents neither proved or even alleged that OSCO provided Eastman with any directions." It is true, as the Award points out, that OSCO's Materials Procedure contains guidelines instructing Eastman to effect shipment in accordance with OSCO's directions. However, direction is normally given only when applied for. There is nothing in the record to prove that Eastman ever solicited any directions for exporting the equipment; nor is there the slightest indication that it raised objections, at any relevant time, to OSCO's failure to provide such directions. The Tribunal could more appropriately have questioned Eastman's failure to establish that it really needed the directions in order to proceed, as well as why, if it really believed it needed the directions and was maintaining that OSCO withheld them, Eastman never raised any objections to OSCO for this failure to comply with its obligation under the Contract.

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

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

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-46338-6 - Iran-United States Claims Tribunal Reports, Volume 28
Edited by Ruth Pogany
Excerpt
More information

13. *Failure to take into account the accurate itemization of the equipment*: Having unpacked the export shipment reflected (as alleged by the Claimant but denied by the Respondent) in the April RTE, Eastman picked out a number of items and re-rented them. *See supra* para. 7. Nonetheless, the Claimant brought a claim for full compensation for all the items under both the April and June RTEs. The majority has awarded on the basis of this claim, even though Eastman states that it did not exclude therefrom the items whose exportation it effectively renounced by subsequently choosing to re-rent them. For this portion of the equipment, Eastman never did submit a third RTE, in addition to the April and June RTEs. Obviously, then, both the claim and the Award involved an erroneous itemization of the Service Plant for the purpose of compensation. Absent any RTE for the reactivated equipment, it could have not been considered as expropriated.

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

© Cambridge University Press www.cambridge.org