Shahin Shaine Ebrahimi,
Cecilia Radene Ebrahimi,
Christina Tandis Ebrahimi, *Claimants*

v.

The Government of the Republic of Iran, *Respondent*

(Cases No. 44, 46, and 47)

Award No. 560-44/46/47-3

Separate Opinion of Mohsen Aghahosseini[1]

In its Final Award in the within Cases, this Chamber, having been presented with a number of legal and factual issues, made certain findings, with some, but not all of which I agreed. I now write, as promised in there, *first* to specify my points with respect to some of the more important of those findings; and *secondly* to state a word where I think this is called for. Lest it should be differently understood, it must be reiterated that this is not therefore intended as an exhaustive list of my reactions to all the issues discussed in the Award.

i. the standard of compensation

The Award holds, correctly and justly, I suggest:

(a) That while customary international law recognizes an obligation to provide compensation for a taken property, the standard of compensation it sanctions is not "prompt, adequate and effective", but "appropriate". The latter, unlike the former, "aims at ensuring that the amount of compensation is determined in a flexible manner, that is, taking into account the specific circumstances of each case".[2]

(b) That it is this "flexible standard" – the one with inherent elasticity – that has been upheld in the Tribunal precedents, according to which "once the full value of the property has been properly evaluated, the compensation to be awarded must be appropriate to reflect the pertinent facts and circumstances of each case".[3]

(c) That all this, despite the existence of a "Treaty of Amity" between the Parties, wherein reference is made to "prompt payment of just

[1] [Filed 9 February 1995. The Award is reprinted at 30 IRAN-U.S. C.T.R. 170.]
[2] Award at para. 88.
[3] Award at para. 95.

compensation", representing "the full equivalent of the property taken".[4]

Legally warranted and equitable[5] as these conclusions are, a great hue and cry has been raised against them. The flexible standard, we are told, is "ill-defined", "essentially meaningless", "unjustified", "out of step with the times", "counter productive", "backward-looking", "wrong in theory" and "wrong in practice"; a standard which leaves the result to "caprice" perception. Its adoption by this Tribunal despite the existence of the Treaty of Amity is, on top of all those, a neglect of "the fundamental law governing the subject".[6]

It is not my intention here to revisit the wealth of evidence which demonstrates, conclusively, the almost universal and deeply-rooted support in all the primary sources of international law for a flexible approach. That is a task which rested with, and was sufficiently performed by, the Majority in the text of the Award. Instead, I venture to suggest that a flexible approach – one which calls for the determination of the standard of compensation to be made on the basis of all relevant circumstances – is not only a rule of the law of nations, but the law of nature and reason, the dictate of civil behavior. This should be elementary enough. A rule which would require the trier of fact to turn a blind eye to the circumstances of a case, to order, automatically, the payment of full compensation whenever it found a taking – the *damnum corpore corpori datum* – belongs not to the present day of refined juridical conception, but to a primitive time: to Rome before the laws of the Twelve Tables and to England when trespass took its early shape. In fact, the Twelve Tables – those remaining fragments of them which were later reconstructed – specifically relate the remedies for violation of property rights to the specific circumstances surrounding a violation.[7] This is hardly surprising. "[E]ven a dog", says Oliver Wendell Holmes, "distinguishes between being stumbled over and being kicked".[8]

What, then, is so special about the requirement to pay compensation to the alien owner of a nationalized property that would justify a singular exception to this elementary and sound rule? The rule that the law's sanctions – penalty or compensation – must fit the nature of the wrong, must relate to the

[4] Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, *signed* 15 August 1955, *entered into force* 16 June 1957, 284 U.N.T.S. 93, T.I.A.S. No. 3853, 8 U.S.T. 900, Article IV, paragraph 2.

[5] Equity, says one of the law's greatest teachers, is essentially the application of the general decrees of the law to the particular circumstances of each individual case. 1 William Blackstone, *Commentaries on the Laws of England* 61 (1st ed. 1765-1769).

[6] Separate Opinion of Judge Richard C. Allison in the present Cases (12 October 1994).

[7] 1 Sir James Fitzjames Stephen, *A History of the Criminal Law of England* 9-10 (1883).

[8] Oliver Wendell Holmes, Jr., *The Common Law* 3 (1881).

circumstances under which the wrong is committed? What, in short, justifies a return to a rigid rule of primeval simplicity?

The answer, the inquirer is invariably told by the advocates of a rigid rule, is the sanctity of the right of property. Yet this is not an answer at all. The right of property is recognized and respected by almost all societies and systems of law. There is nothing, however, peculiar about that. So is the right, to give an extreme instance, of life. Yet no one has ever suggested that when this latter – the right of life – is violated, sanctions should be imposed irrespective of the circumstances, irrespective of other considerations involved. And yet "the law cannot be less careful of the persons than of the property of its subjects".[9]

What, then, the advocates of never-less-than-full-compensation must justify is not their simple respect for, or even their fascination with, property – with capital – but the developing of this into an obsession of such magnitude as to deny the possible effects of all other principles, of all other considerations, however pertinent, on this exalted and canonized right of property.

After many years of ceaseless efforts exerted by very many States, it has now been long established, for instance, that nations are sovereign over their natural resources and have the right to dispose of them in accordance with their interest. It has long been demonstrated, again, that the international community is in need of new principles governing international economic relations; that nationalizations, at times, are absolutely necessary for social purposes. Now, what must be justified by the opponents of the flexible approach is not that the ownership of property should be respected, but why these considerations should have no place in the determination of compensation for a taken property. And on this, of course, no justification is provided.

The assertion with regard to the Treaty of Amity, that its provisions as *lex specialis* in the relations between the parties require full compensation whatever the dictate of customary international law, is equally misplaced. Assuming, for the sake of argument only, that the Treaty does apply to claimants of dual Iran-United States nationality, and assuming, further, that the relevant terms of the Treaty required at the time of conclusion the payment of full compensation in cases of taking, its present application to the parties at hand mandates the observance of a flexible standard only. This is because of the necessity to take note, when interpreting the Treaty, of the emergence of the flexible rule in customary international law, for the following reasons:

First, the Treaty expressly links, in Article IV, paragraph 2, the standard of required property protection – of which the prompt payment of just compensation, representing the full equivalent of the property taken, is only a consequence – to the standard upheld by the international law. In the words

[9] *Id.* at 83.

of the Treaty itself, the property of nationals of each contracting Party must be protected "in no case less than that required by international law". The evolution of a rule of customary international law in this field – putting an end to the Western powers' domination of international relations on the subject – is therefore of direct relevance to the correct interpretation of what the Parties really intended by those qualifying words. Any other interpretation, it goes without saying, would render the quoted phrase in the Treaty wholly redundant.

Second, and even in the absence of such express linkage, the terms used in the Treaty in this respect (*e.g.* constant protection, just compensation) are obviously not static, but by definition of "evolutionary" nature. That being the case, it is the requirement of a general and well-settled rule of international law that such terms be interpreted in the light of any evolved principle of law in the field.[10]

Third, Article V of the Claims Settlement Declarations, which refers to the law governing the resolution of all disputes before this Tribunal, specifically directs this forum to decide all cases on the basis of respect for law, applying, *inter alia*, international law, taking into account, amongst others, changed circumstances. Such changed circumstances since the conclusion of the Treaty some forty years ago include, to give a single instance, the recognition by the international law of the right of States taking control of their natural resources or otherwise nationalizing foreign enterprises, the legality of which was once disputed. They include, to provide yet another instance, the wide acceptance of the need for a new international economic order. They include, again, the recognition of the right of the nation-states to determine their own economic and social future. These, then, are relevant rules of international law, which being applicable at the time of interpreting the Treaty, must, as suggested by a resolution of the Institute of International Law, be taken into account.[11]

One final comment on this. Realizing that the evidence in support of the existence of a flexible – or "appropriate" – rule is too extensive to allow a general denial, the rule's emergence during "the middle years of this century" is sometimes conceded. But it is contended that this development – the result,

[10] *See*, for example, *Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, where the International Court of Justice concluded, in its advisory opinion, that in such circumstances " . . . an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation" (1971 I.C.J. 16, 31). *See also* Taslim Elias, *The Modern Law of Treaties* 77 (1974): "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 interpretation of the legal terms used in the treaty."

[11] "Any interpretation of a treaty must take into account all relevant rules of international law which apply between the parties *at the time of application*." Annuaire de l'Institut de Droit International 537 (1975) (emphasis added).

we are told, of sustained attack in the postwar period by forces on Colonel Ghadaffi's side against those on Secretary Hull's – has once again in the past few years reversed itself in favor of the traditional rule of full compensation. The evidence adduced in support of this consists, principally, of a network of bilateral investment treaties containing such requirement.[12]

Whether the genuine aspirations and hard-fought struggles of many States to assume control of their natural resources, to determine their own future economic order, and to exercise some minimum degree of right vis-à-vis their dealings with capital investors can be tastefully likened to the attack by forces of this or that ruler, one does not know. One does know, however, that the rules of international law, including the requirement of a flexible approach, do not fluctuate like a yo-yo, moving up and down in a second. Such fluctuations, at any rate, cannot be caused by the conclusion of a few investment treaties, which have their own purposes, and which do not even constitute any serious source of international law.

2. LACK OF FAULT ON THE PART OF THE RESPONDENT

The above discussion on the flexible rule – the rule requiring the taking into account of all the pertinent circumstances – brings me to one such circumstance, the presence or absence of fault on the part of a respondent.

In his capacity as the International Law Commission's Special Rapporteur on State Responsibility, the Chairman of this Chamber has told us of the importance, in the Commission's Provisional Draft Articles, of fault as a necessary condition of State liability:

> According to our understanding, particularly in view of the presence of Article 31 . . . and of the commentary thereto, the Commission seemed rather to believe that fault was a *sine qua non* condition of wrongfulness and responsibility.[13]

Next, he has told us of his own view of the importance at any rate of fault or lack of it as a factor in determining the *consequences* of an international wrong – the degree of required compensation, for instance.

[12] Hopes to achieve the task of undermining the international law rule of flexible standard had been originally pinned on the Iran-United States Claims Tribunal. Professor Oscar Schachter, for instance, referring to the establishment of this Tribunal "to deal with unusually large claims", states that this had attracted "the attention of an influential group of U.S. lawyers on the issue", and the "political climate in Washington ensured that those views would find support in the government". (*The Question of Expropriation/Compensation in the United Nations Code in the Light of Recent State Policy and Practice*, pp. 34-35, delivered at the Symposium on the United Nations Code of Conduct on Transnational Corporations, held at The Hague, 15-16 September 1989.)

[13] Gaetano Arangio-Ruiz, Special Rapporteur, Second Report on State Responsibility, Addendum, U.N. Doc. A/CN.4/425/Add.1, par. 163, p. 3 (22 June 1989).

> Whether or not there are cases in which responsibility is attributed regardless of the absence of any degree of fault, there is no doubt, in our opinion, about the relevance of fault with regard to the specific determination of the *consequences* of an internationally wrongful act. One thing would be to say that the presence of fault is not essential for an act to cross the threshold separating the lawful from the unlawful. Another thing is to say that the legal consequences of an act which has passed that threshold are the same whether or not any fault (*dolus* included) is present in any degree.[14]

Let us see how this view, so unequivocally stated, is applied in a concrete case. The facts of the present dispute are adequately reflected in the Award and need not be repeated here. Those pertinent to our inquiry demonstrate, unquestionably, that there has been no fault, of any nature or degree, on the part of the Respondent.

The international wrongful act for which the Respondent State is here sued is "the taking of property belonging to foreign nationals without compensation." Yet the evidence shows that the Respondent State had at no time any intention to take the property in question and, further, that it had no knowledge that the property belonged to foreign nationals. Indeed, it believed, quite reasonably, that the property was owned by its own nationals. On the other hand, the Claimants, who are at any rate of Iranian nationality, deliberately acted to keep the Respondent in the dark with respect to their second, United States, nationality.

The taking in the present Cases is said to have resulted from the appointing by the Respondent of certain directors to the Claimants' company (Gostaresh Maskan, hereinafter sometimes "GM"). This was authorized by "The Act Concerning the Appointment of Temporary Manager(s) to Supervise Manufacturing, Industrial, Commercial, and Services Entities of Either Public or Private Sector" (hereinafter, the Act). Yet this was an urgent measure necessitated by the unforeseen and uncontrollable – *Force Majeure* – conditions brought about in Iran by the Revolution. It was a measure, in the express words of the Act, to "prevent the closure of certain entities whose managers or principal shareholders had either abandoned their entities or were, for any other reason, unable to manage the entities." Interestingly enough, Mr. Ali

[14] *Id.* at 3-4. Others, including the current President of the International Court of Justice, have come to the same conclusion:

> . . . [T]he element of fault should play an important part in any examination of the consequences (reparation, satisfaction, or sanctions) of the wrongful act, once that act is established and ascribed. It is indeed the almost automatic practice of the tribunals, once a breach of obligation has . . . been established and attributed to a State, to pass on to a second stage at which they ascertain whether and to what extent the relevant conduct by the State concerned was malicious or wilfully harmful. Mohammed Bedjaoui, *Responsibility of States: Fault and Strict Liability*, 10 Encyclopedia of Public International Law 359 (1987).

Ebrahimi, the principal shareholder of GM and the Claimants' father, has himself vividly described the circumstances under which the Respondent State had been forced to interfere in the affairs of this abandoned entity. He has testified, both orally and in writing, on how at those extraordinary times he had found it impossible to run the company's affairs:

> I personally had problems, not with the government, but in the early stages of the revolution, although the government was trying to get control of all the elements, there were some elements (especially in Khuzestan, which were really not under government control) and these people gave me quite a bit of hard time. . . .

Indeed, he has explained that due to those conditions it had become impossible for him to even visit the company's work sites, and that, but for effective intervention by officials of the Respondent Government, his very association with the company would have had serious personal consequences for him:

> I really did not have any problem with the government or the revolutionary committees. My trouble was in Khuzestan. Every time I went there – especially, we had laid off a lot of workers the year before during the revolution and a lot of these people were armed, and they had various committees – committees of fired workers of Gostaresh Maskan . . . – there was one committee that I did not know who they were. They took me one time. They were not related to the revolutionary government; they were not related to the committees; they were not related to the clergy. It was called the "Committee of the Execution of Ali Ebrahimi." . . . . It was that kind of problem. . . .

It was under such circumstances that the main shareholder of the entity turned away from it and, assisted by the Government, for which he now acknowledges his gratitude, he left the country. And it was under such circumstances, and in order only to prevent the total disintegration of the company and the disappearance of its assets, that the Respondent State perforce appointed managers to run the abandoned entity.

Next, the Respondent State has had no knowledge – and has not been negligent in not having any knowledge – of the foreign nationality of the Claimants, another constituent element of the international wrong in question. This, as far as the Respondent State was aware, was an entity registered in Iran and owned by exclusively Iranian nationals. There has, of course, been no dispute that the Claimants were, and still are, Iranian nationals. But while the laws of Iran do not recognize dual nationality, and while Iran had no occasion or means to become aware of the fact that the Claimants happened to possess a second nationality, the Claimants declined to provide Iran with notice of such fact, exclusively within their knowledge. They thereby deprived the Respondent State of any knowledge of the possible presence of a constituent element of this wrong; namely, that what was being taken belonged to foreign nationals.

The evidence shows, indeed, that the Claimants went further, that they not only concealed their United States nationality but positively deceived the Respondent State in that respect. This, too, requires a word of explanation.

In their Statements of Claim filed some two years after the alleged taking, the Claimants submitted that the legislative measure under which their property had been expropriated by the Respondent State was "The Law for the Managing and Taking of Ownership of the Stocks in Contracting and Consultant Engineering Entities" (hereinafter, the Law). This was a measure taken pursuant to the Act referred to above; the Act, it will be recalled, that authorized the appointment of temporary manager(s). There, the Government of Iran had been given two months by the legislature to decide upon the status of ownership of large industrial and agricultural units to which the Act applied. Here is what the Claimants have themselves submitted on this point:

> On March 9, 1980, Iran enacted "The Legal Act of the Holding and Management of Stocks in Contracting and Consultant Engineering Firms and Entities," which declared that all the shares and assets of certain engineering companies would be taken into Iran's possession. *Gostaresh is one of the companies covered by the act.* (Statement of Claim, para. 11, emphasis added.)

Now, a proviso to Article II(B) of the Law specifically provides:

> [t]he value of the shares of foreign shareholders in the entities taken by the Government shall, upon the auditing and evaluation of each entity, be paid by the Government.

This is a Proviso of which the Claimants were fully aware. Under the title of "Points at Issue", they pose the following question in their Statements of Claim:

> Did Iran breach its obligation under the Iranian law entitled "The Legal Act of the Holding and Management of Stocks in Contracting and Consultant Engineering Firms and Institutes," which provided at Article II(B) note that: "*The value of the foreign partners/stockholders of the companies expropriated by the government shall be paid by the government* . . .," by failing to compensate Claimant[s] for the taking of [their] interests in Gostaresh? (Statement of Claim, para. 18.)

This, then, is the Law on which the Claimants in their Statements of Claim rely in support of their expropriation Claim; this, indeed, is the only Law relevant to the expropriation of stocks in consultant engineering companies; and this is the Law the breach of which has been asserted before the Tribunal.

And yet, while the Law by clear implication makes a distinction between foreign and Iranian shareholders, providing for the payment of compensation not to Iranians but to foreign shareholders, and while the Claimants expressly admit their knowledge of the existence of a Proviso in the Law which envisages the payment of compensation only to foreign shareholders, they simply refrain from as much as informing the Respondent State that besides being Iranians, they are also of a foreign nationality. They deliberately conceal their United States nationality where they are under a duty to do otherwise, and thereby positively deceive the Respondent in this respect.[15]

Such, then, have been the undisputed facts of the present Cases. On the one hand, an interference by the Respondent State not to secure any gains, but to prevent chaos and total disintegration of the entity interfered with; an interference with no knowledge, and no means of knowing, that it constituted an internationally wrongful act. There existed, on the other hand, the Claimants' deliberate act of not disclosing their second nationality, not even when they believed that the Respondent Government had provided for compensation to be paid to foreign nationals whose property had been taken.

Nevertheless, there is in the body of the Award not a word about these facts. Not a word about the effects of the Respondent's lack of fault on the *consequences* of its internationally wrongful act; on the degree of compensation. And all this despite the fact that the distinguished Rapporteur is one of the two-member Majority in the present Cases. Regrettably, convictions academically averred are not necessarily adhered to in practice.

3. THE EFFECTS OF PREVAILING SOCIAL AND POLITICAL CONDITIONS ON THE VALUE OF THE ENTITY IN QUESTION

An Expert was appointed by the Tribunal to assist it in determining the value of the Claimants' entity. In the Terms of Reference, he was directed by the Tribunal to take into account all "prior changes in the general political, social, and economic conditions which might have affected [the entity's] business prospects as of the date it was taken". That being his instruction, he stated in his oral testimony that although in his valuation of the Claimants' entity he had taken note of the conditions, mainly economic, in Iran *as they affected the entity's business prospects*, he had not similarly considered the effects of

[15] It must be noted that the point here is not what has, or has not, in fact happened to the Claimants' entity, but the Claimants' conduct as compared with that of the Respondent. As far as the Claimants were concerned, there can be no doubt that they, in fact, believed that the Law for the Managing and Taking of Ownership of the Stocks in Contracting and Consultant Engineering Entities directly applied to their company, and that they would have been entitled to compensation, had they not concealed their United States nationality.

the country's political and social conditions on the value of the entity in the market in which it existed.

This was based on a legal error which had to be rectified by the Tribunal. Once it is admitted, as it must, that the value of an entity cannot be determined in abstract but with close reference to its locale and to the social, political, and economic environment under which it operates; once it is admitted, as it must, that the objective of valuation is to find out the actual value of the entity in the actual market, then the limiting of the inquiry into one set of effects to the exclusion of others makes no sense at all.

Here was a case in which the Tribunal, having found the Respondent State liable for the taking of the Claimants' shares in an entity, was required to determine the amount of damages sustained by the Claimants, as represented by the actual value of their shares. This was to be done by first determining the value of the entity (GM) in the Iranian market at the time; by determining the real value of GM as a corporation offered for sale in Iran under the political and social conditions which obtained in there in 1979.[16] Yet the Expert had determined the value of the entity in abstract. He had limited his inquiries into the effects of special circumstances in Iran on the entity's business prospects, but not on the possible demand for its acquisition.

Now the evidence, including Mr. Ebrahimi's testimony at the Hearing, shows that the atmosphere in Iran after the victory of the Revolution flatly rejected the class of wealthy proprietors as a whole. The effects of the society's intolerance towards those who had amassed wealth under the old regime on possible demands for the purchase of a giant corporation like GM, and hence its devastating effects on the entity's market value, should be self-evident. Those with the slightest familiarity with the then political and social conditions in Iran will not require to be told that then and there, no one was remotely likely to consider the acquisition of GM or any like corporation as a worthy investment.

Indeed, as it is clearly revealed by the testimony of Mr. Ebrahimi, GM at the time was not an asset but a liability for its owners. That is the conclusion one must inevitably draw from the description of circumstances offered by Mr.

[16] The Tribunal precedent is to the same effect:

Although the method of analysis employed by the Claimants' two experts is undoubtedly consistent with modern techniques of valuation . . . their valuation does not in the Tribunal's view reflect the market value of Iran America at the relevant date. Without here examining in detail the various assumptions on which the experts have based their valuation, the Tribunal indicates some of the main reasons for its having taken that view. First, *the appraisals do not sufficiently consider the changes in general social and economic conditions in Iran which had taken place between the autumn of 1978 and June 1979*, or their likely duration. In this connection, it should be noted that *during that period many Iranian nationals belonging to the wealthier part of the population left their country.* *American International Group, et al.* v. *Islamic Republic of Iran, et al.*, Award No. 93-2-3, p. 19 (19 Dec. 1983) (emphases added).