

Principles of Expropriation in Verdicts issued by Iran–United States Claims Tribunal

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Abstract: Nowadays claims arising from foreigners' expropriation constitute a major part of actions raised in the international courts which has created a valuable judicial precedent. Expropriation is the legitimate right of governments who have tried to reduce foreigners' penetration into different economic, social, and political arenas by legislation of various rules; nationalization, dispossession, and confiscation of properties are among its examples. Expropriation occurs when it is align with public interest and is not discriminatory, and governments are bound to pay compensation; yet foundation of governments' responsibility varies in terms of legal description of expropriation. If expropriation is legitimate, this responsibility is justified based on two theories namely "unjustified enrichment" and "vested right", and the related government is merely bound to pay a compensation equal to the value of the expropriated properties (actual damages). But in illegitimate expropriation, as it is regarded an illegal act, the government is liable to compensate for the losses caused by its illegal act. Finally, there is no significant difference in international votes and judicial precedents between expropriated movable and immovable properties. This paper investigates principles governing expropriation in the verdicts issued by Iran–United States Claims Tribunal.

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Introduction

Since international laws rely mainly upon international customs as well as international treaties and contracts, the importance of the decisions taken by the Claims tribunal will be strengthened. Obviously there are many scientific and legal debates in this regard due to diversity of issues raised in Iran-United States Claims Tribunal and the legal importance and effect of its verdicts. Besides lawyers, statements and verdicts issued by the Claims Tribunal draw the attention of other researchers and scholars particularly in political, economic, historical, etc. fields.

According to the international law principles of any government, it owns the right of expropriation due to possessing sovereignty within its territory and essentially sovereignty implies such a matter. The claims of American petitioners in the performance of Iran government regarding expropriation comprise two matters indeed. First, in the expropriation of the properties, international principles including compensation have not been implemented as per their claims.

Second, some of the behaviors of Iran government are regarded as expropriation and petitioners claimed that these acts are deemed as expropriation though Iran government had denied this matter (Hejazi, 2005, pp. 84-85). Multiple cases in the Tribunal were obviously allocated to the recognition of whether the performance of Iran government is regarded as expropriation or not, and

of course these claims were prosecutable in the tribunal when they were raised according to the conditions and criteria mentioned in the statement. In the other words the Tribunal has been recognized competent.

1. A glance at Iran–United States Claims Tribunal located in Hague

Once the students following Imam took over the America's embassy in Tehran, relationships of Iran- United States got strained and then were completely severed which were extensive before victory of Islamic Republic of Iran.

After near one year, two countries agreed to release staff of America's embassy in Tehran; so negotiations led to the conclusion of "Algiers Declaration" and finally establishment of Iran-United States Claims Tribunal in Hague.

Following the hostage of the staff of America's embassy in Tehran, The United States firstly closed Iran embassy in America and then seized Iran assets in the banks of America as per Carter's order, then President of America.

After a while, the parties agreed to release Iran assets and properties in exchange for freedom of America's embassy staff. To carry out this agreement, rather than direct negotiation, they decided to undertake negotiations through a third government (Algeria); ultimately these negotiations resulted in formulation of several documents that are called "Algiers Declarations". These declarations consist of

three declarations namely general, disputes settlement, and trust.

General declaration is about rights and obligations of the parties. In disputes settlement declaration, the parties have agreed to establish an ad hoc court to settle their disputes (Khorasani, 2000, p. 60).

Ad hoc is indeed an international arbitration in which the parties select the arbitration tribunal and the governing rule. In the declaration of trust, it was provided that Iran is obliged to deposit one billion Dollars in an escrow account from which the object of judgment will be paid after issuance of the verdict by the Tribunal (Jimenez, 1978, p. 79).

1.1 Unilateral Obligation

The first obligation was related to Iran according to which it must exit hostages from Iran healthily. Preceding implementation of this obligation, the United States were obliged to exit all seized assets and properties of Iran from America. The value of these assets was near 8 billion dollars and they must be transmitted to England and deposited in an account in the name of the Algerian Central Bank. The United States did that and Iran set free hostages after notice of Algeria government. Then half of this money was returned to Iran; and from the other half, three billion dollars were paid to the banks of America for Iran debts, and one billion dollars were transmitted into an escrow account aligned with declaration of trust (Algiers third declaration) to guarantee payment of the object of judgment of Iran- United States Claims Tribunal; albeit this money was deposited in an account in Netherlands (place of arbitration) (Moghadam, 2004, p. 28).

At that time it was argued that first Iran received all of its seized assets and consequently it must consider an amount for compensation to the U.S. nationals.

Second, most cases were related to the U.S. nationals who had incurred losses from measures of Iran government; yet neither of these two arguments seemed rational. Also as mentioned earlier, the parties agreed to settle all disputes through an arbitration tribunal (Moghtader, 2008, p. 157).

However, this tribunal heard only financial disputes and thus despite the U.S. government had been committed not to interfere in Iran affairs, such matters as natural events or other cases of the U.S. interference were not prosecutable in the tribunal. In exchange for advantages given by Iran, the United States pledged that hostages would not litigate against Iran.

In the Algiers Declaration, it had been provided that the king assets would be returned to

Iran since Iran claimed that all assets of the king belong to the Iranians and the king has attained them illicitly. Yet Americans did not accept this claim and told that if they raise an action in the courts of the United States and a verdict is issued against the king family, the U.S. government will not impede the verdict implementation and will pay the object of judgment from the assets of the king family (Mohammadi, 1996, p. 53).

Also the U.S. was obliged to exit all the assets of Iran government from America and return them to Iran, but it violated its obligation again. The tribunal convicted the U.S. in a general verdict that it has violated its obligation and must pay compensation; yet this general verdict must be raised in the tribunal and be proved item by item. Among them, there are many military items and items from IAEA. Among the most important remained cases, the case 15-a can be mentioned that is related to Iran state organizations which had some assets in the U.S.

Iran- United States Claims Tribunal is composed of nine arbitrators: three appointed by Iran, three appointed by the United States, and a further three (neither Iranian nor United States nationals) that form three-member chambers. The seat of the Tribunal is The Hague (Netherlands); albeit this place can be changed by mutual agreement (the same).

The jurisdiction of the Tribunal has been provided in Articles 2 and 6 of the disputes settlement declaration and Articles 16 and 17 of the general declaration and in the document of the parties' obligations. In the jurisdiction of the Tribunal, actions of governments against nationals of each other have not been regarded as the main action; whereas many actions raised by Iran were against nationals of the United States, they were not prosecutable in the Tribunal and Iran incurred great losses. Iran filled many claims against American companies that were not within the jurisdiction of the Tribunal and had no result, yet the United States had essentially no claim against Iranians and this was one of the major problems of the Iranian delegation concluding Algiers Declaration led by Behzad Nabavi.

To raise an action in the Tribunal, it must be arising from debt or contract or confiscation or any other act effective on the ownership. Also the origin of the action must be created before the conclusion of the Algiers Declaration and not be settled until the date of declarations. The Tribunal jurisdiction is determined by its adjudicators. Its verdicts are enforceable directly and no one can prevent their enforcement.

One of the principles governing Iran- United States actions is Rebus principle by virtue of which "whenever circumstances of the time of a contract

conclusion which is for the time being the evidence of the action have been changed, the court considers the changes in the circumstances" (LAN, 1992, p. 63).

This principle has been enforced in some cases; for example, Iran purchased a number of F14 fighter aircrafts before the Revolution and the United States did not intend to deliver these aircrafts. It raised an action against Iran and claimed that Iran has not paid for the contract. In defense, Iran claimed that it has not intended to be gendarme of the region at that time; but at the present juncture it does not need these facilities any more as circumstances have changed and thus it has essentially no obligation. Adjudicators of the Tribunal accepted Iran argument by virtue of Rebus principle (Ibid). Enforcement of Hague Tribunal decisions has been provided in paragraphs 1 and 3 of the Article 4 of disputes settlement declaration and clauses 16 and 17 of the general declaration. According to these articles, for the payment of the object of judgment pertaining to the verdicts issued against Iran and to the benefit of the United States, an account was opened in the Settlement Bank of the Netherlands into which one billion dollars were deposited and the object of judgment would be paid as per instruction of the Tribunal president. Hence the tribunal president orders the payment to the Central Bank of Algeria. Algeria that is the escrow representative of both parties orders the payment to the Settlement Bank of Netherlands and the object of judgment is paid to the Federal Reserve Bank of America so as to be paid to the winning parties. However no specific rules have been provided for enforcement of the verdicts issued to the benefit of Iran and in each case the winning party is obliged to take verdict to the residence of losing party and enforce that. But in rare cases where the verdict has been issued to the benefit of Iran, the Americans have enforced that and there have been no particular problem. This matter does not eliminate the main problem that is discriminatory implementation and a policy of double standards in verdicts enforcement and this problem remains (Mohseni, 2010, pp. 31 and 32).

2. Principles of expropriation in the verdicts of Iran- United States Claims Tribunal

Here, principles governing expropriation in the verdicts of Iran – United States Claims Tribunal will be presented.

2.1 Foreigner Expropriator Principle

If the government that undertakes expropriation is not foreign, the issue of expropriation is confined to the relation of person with his government which is an internal matter not

international (UN International Law Commission, 2008, p. 277).

If owners of dual nationality (based on one of their nationalities) are considered citizens of the expropriator government, according to the principle of no international liability of government towards its citizens, the expropriator government is not liable in the international arena and it is merely prosecutable through internal laws (the same).

Iran – United States Claims Tribunal rejected claims of citizens whose effective nationality was Iranian. For example in *Homa Diba Benedix V. The Islamic Government of Iran*, Mrs. Benedix claim was rejected due to dominance of her Iranian nationality. The verdict issued in *Daniel pour(M)- V. Iran* is considered among the verdicts of the Tribunal in this regard. First it can be said that lack of Tribunal jurisdiction over these claims is due to a condition stipulated in the settlement declaration which indicates that only Iranians against the United States government and the U.S. nationals against Iran government may raise actions. However, even if such a condition has not been stipulated, Iranians may not raise action against their own government (Iran) in an international forum (Foyuzi, 1986, p. 49).

2.2 Territorial Sovereignty Principle

The properties must be located within the territorial sovereignty of the government.

Expropriation right is one of the rights arising from the government sovereignty right and is confined to its territorial sovereignty. This question may be raised that if assets of a company in Iran are nationalized, do other countries courts recognize it or not? Apparently the answer is that if nationalization is legitimate, internal courts of other countries will recognize it (Safaei, 2005, p. 139).

2.3 Existence of an official government as the expropriator

A government must exist and be recognized by the foreigner government.

As per this principle, the act of rebels and revolutionaries, before coming to power and be recognized as a government, in confiscating foreigners' properties is not considered legal. International law has recognized expropriation right for the government, because the government is a defined international organ that can bear the burden of responsibility. The exception of this principle has been taken into account by the Tribunal. If the revolutionaries became successful and came to the power, the government will be liable for their acts. In *Alfred w. shoet V. The Islamic Republic of Iran*, the president of the Tribunal third branch provided in the clause 33 by virtue of The Draft Convention on State

Responsibility that "if revolutionaries succeeded in establishment of the successor government (to the overthrown government), that government will be liable for the revolutionaries acts though those acts have been committed before the government establishment...". In clause 35 of the verdict issued in *K.P.Yea v. The Islamic Republic of Iran*, the Tribunal first branch declared that the acts of the revolutionary movement that (later) establish the government are imputable to the government in particular circumstances. By virtue of the Article 15 of The Draft Convention on State Responsibility of International Law Commission, the Tribunal continues that it has been convinced that statements and measures of Imam Khomeini are imputable to the government, as he has been the leader of a movement that established the new government. In clause 25 of the verdict issued in *J. Rankin v. The Islamic Republic of Iran*, while referring to the above mentioned convention and approving the stance adopted in the above verdicts, the Tribunal second branch differentiates between cases that financial losses are caused for the foreign nationals coincidentally and cases in which foreign assets are targeted by the revolutionaries' invasion (Safaei, 1995, p. 261).

2.4 Lack of discrepancy with the provisions of the Treaty of Amity

Confiscation of foreign properties must not be in contrast with the provisions of bilateral or multilateral treaties between the nationalizing government and the foreign national government.

In most cases raised in the Tribunal, American petitioners tried to portray Iran measure as illegitimate by virtue of the Treaty of Amity or use at least the compensation standard stipulated in the Treaty.

Yet even by such a specific law, the Tribunal did not exempt itself from investigation of general laws of the customary international law on compensation. Anyway, the Tribunal conclusions indicate that Iran measures have not been in contrast with the provisions of the Treaty despite applicability of the Treaty. Hence it is seen that from Tribunal point of view there is no doubt that violation of the Treaty leads to the illegitimacy of the expropriation and it has only discussed about applicability of the Treaty or violation occurrence. In general, mere violation of the Treaty without any other conditions suffices for the illegitimacy of the expropriation (the same).

2.5 Imputation to the government

To prove "expropriation", the petitioner must prove that first he has been the beneficiary of the financial assets or rights, second these financial

assets or rights have been expropriated or have been targeted by similar acts. Therefore he has incurred losses and finally expropriation or interference is imputable to the foreign government (Rah Peik, 2009, p. 184).

Petrol case is among cases in which the Tribunal has investigated "imputation" to the government while assessing "the government interference".

In this case, the American petitioner cannot prove that the act is imputable to the government and the mere evidence of the petitioner is the testimony of one of the witnesses implying that Poor Foundation and Oil Company took the petitioner building key. Despite accepting the petitioner evidence of expropriation in the spring of 1980, the Tribunal did not consider his evidence sufficient for proving its imputation to Iran government and rejected the petitioner claim. So imputation to the government is one of the main conditions of the government liability for compensation in the practice established in the Tribunal.

In *computer Sciences corporation V. The Government of Islamic Republic of Iran et al.*, it is claimed that guards of the revolutionary ordered the corporate staff to leave the building without taking anything, and then did not permit the petitioner to enter into the building. The Tribunal recognized Iran government liable for the acts of the Corps staff.

In *Edgar Protiva et al. V. Islamic Republic of Iran*, it is stated that the Poor Foundation gives a group the permission of the occupation of the petitioner building and the tribunal considered the government liable for compensation. Also in *Jalal Moein V. the Islamic Republic of Iran*, the tribunal rejected the claim of petitioner regarding confiscation of properties as well as imputation of this act to Iran government due to lack of evidence.

2.6 Compensation Principle

From legal perspective, compensation is regarded as the most essential condition of expropriation legitimacy. Compensation is an integral part of expropriation issue. If expropriation is combined with violation of international law principles is essentially illegitimate. Expropriation is the right of government. Yet it is not unconditional and one of its conditions is compensation. Compensation does not have a punitive aspect and it is not in fact a punishment, so we cannot state that the government must pay compensation for expropriation of the properties belonging to the nationals of other countries. Some have regarded unjustified enrichment as its basis and some have referred to the principle of respect for private ownership or vested right and have ultimately

deemed this act of government inconsistent with human rights except for the cases of nationalization.

Necessity of compensation for expropriation has been approved in the verdicts of Iran- United States Claims Tribunal as well. The verdict issued by this Tribunal in Amoko case can be mentioned as an example. Sometimes the issue of legitimacy has been also raised.

2.7 Non-Discrimination Principle

Expropriation must not be discriminatory.

The principle indicates that the government cannot separate national(s) of a country discriminatorily and confiscate their properties.

In Amoko case, the petitioner had claimed that the act of Iran government in expropriation of Amoko contractual rights in Khamco Company has been discriminatory because the government has not nationalized profits of Japan in a similar project relating to Iran –Japan Petrochemical Company while it is related to the Oil industry. Approving the fact that non- discrimination is among vital conditions of expropriation legitimacy and with reference to the fact that defendant confesses to the existence of this principle and denies just discrimination practically, the Tribunal stated that in absence of other reasons, this conclusion that confiscation of Amoko resources is illegitimate merely due to the fact that another project has not been confiscated is difficult. It referred to the vote of adjudicators in Amin Evil case indicating that nationalization policy may be implemented gradually and step and step. So it did not regard the act of Iran government in nationalizing Khamco discriminatory (Morandiere, 1960, p. 34).

2.8 Public Interest Principle

In Amoko case, the petitioner stated that been the motivation of expropriation or nationalization of Iran government has been not paying the Amoko share from Khamco incomes and argued that in most projects that have been nationalized in Iran, foreign investment has been finished. Declaring that such an act is not regarded discriminatory, the Tribunal considered it a kind of distinct in expropriation and added that such a distinct in motivation may make expropriation illegitimate. The Tribunal declared that no comprehensive definition has been offered for social cause in the field of expropriation in the arbitration verdicts by present; even there is no consensus on such a definition. However, if the motivation of expropriation is to not pay the legitimate rights of the contractual party rather than social interests, such an act will be contrary to the principle of good faith, and considering it legitimate is inconsistent with an established practice based on which the government

must be faithful to its contractual obligations against private foreign companies. In clause 146 of Amoko verdict, the Tribunal states that there is no need to solve this delicate legal matter in the present case because there is no doubt that enactment of the single article (voiding oil contract in Iran) based on which Khamco has been nationalized, has been consistent with nationalization of oil industry in 1951 so as to close Iran to one of its social and political causes. Thus the claim of petitioner implying that illegitimacy of the government act due to lack of social cause is rejected (Emam, 1994, pp. 242-243).

3. Articles related to the expropriation in settlement declaration

Expropriation right stems from the government sovereignty. What occurs if an independent state organization that possesses a separate legal personality has expropriated a foreigner property? Whether the act of the state organization is imputable to the government or not? Besides customary international law reflected in the Draft Convention on State Responsibility, clauses 2 and 3 of the Article 7 of settlement declaration have defined Iran and the United States. As per clause 3, Iran comprises Iran government, any sub-state political organization, and any representative, entity or organization controlled by the government. Through this broad definition, the matter of imputation to the government has been solved to a high extent because the act of the controlled entities and organizations may be regarded as the acts of government easily.

The second matter is the governing law. Article 5 of the settlement declaration provides regarding the rules governing actions including expropriation actions that:

"The Tribunal will decide about all matters based on law and apply legal law and Commercial Code principles and international laws, and consider commercial customs, contract provisions and circumstances changes" (Ansari, 2008, p. 148).

According to this article, the Tribunal is free to select the governing law and is not confined merely to the international law. So sometimes American petitioners based their claims on two or three foundations, for example a claim has been raised based on expropriation and alternatively based on breach of contract or unjustified enrichment. In these cases, the Tribunal was free to accept the petitioner claim based on breach of contract if issuance of the verdict based on expropriation was not possible, and to issue the verdict to his benefit. The third matter is the subject matter jurisdiction of the Tribunal that has been mentioned broadly in Article 2 of the settlement declaration. Regardless of

claims based on contract, "expropriation and any other act effective on the ownership rights" are among bases for claims that are regarded within the jurisdiction of the Tribunal. Expropriation covers claims arising from nationalization and confiscation, and any other act effective on the ownership rights embraces assumptions against indirect expropriation. By virtue of clause 1 of Article 2 of the settlement declaration, those actions are prosecutable in the arbitral tribunal that stem from debts, contracts, expropriation or any other act effective on the ownership rights.

a. Expropriation

The above term has been translated in the Persian copy of the declaration as the equivalent of confiscation of properties; while confiscation is not appropriate. It seems that the intent of stipulating the above mentioned word in clause 1 of article 2 of the settlement declaration has been the broad meaning of expropriation ranging from nationalization to dispossession and confiscation (Almasi, 1989, p. 112).

b. Any act effective on the ownership rights

The concept of any act is broad and multiple examples are perceivable for a broad concept. Apparently stipulation of the above phrase in clause 1 has been because of the fact that sometimes acts do not necessarily result in expropriation yet they are effective somehow on the ownership rights of the beneficiary; so they are considered within the jurisdiction of the tribunal (the same, p. 127).

4. Indirect expropriation and Iran- United States Claims Tribunal

Among different types of expropriation, indirect expropriation is investigated by studying the procedure of Iran- United States Claims Tribunal. Many uncertainties regarding this type of expropriation are removed by studying Iran- United States Claims Tribunal.

Among criteria related to the definition of indirect expropriation, permanent deprivation of the investor from its proprietary rights can be pointed out. The procedure of the arbitral tribunal indicates various examples of this type of expropriation among which assignment of temporary managers, objective possession, entailing the property, not paying the dividends, etc. can be mentioned. Indirect expropriation occurs sometimes gradually (like assignment of managers) and sometimes once and immediately.

As regards objective possession of properties, no transparency is seen in the acts of government; that is, no official and legal declaration

is undertaken by the host government. International law has not recognized legitimacy for the act of governments in this regard. This matter may bring about different legal effects which relate to the amount of payable compensation. In the other words, the government responsibility in indirect expropriation is heavier than its legal cases like nationalization and consequently the host government incurs more losses because based on international law, nationalization is considered a legitimate act while the act of governments in indirect expropriation is regarded illegitimate (Zaidel Huhnen Feldern, 2006, pp. 47-48).

In the international law, as regards illegal expropriations, the victim does not only deserve to receive compensation (cash equivalent of the seized property) but he will also deserve receiving interest damages from the date of seizure up to the date of verdict issuance; while in nationalization, only compensation of actual damages may be received.

5. Iran – United States Claims Tribunal Procedure

This procedure has been the greatest international arbitration as regards hearing expropriation actions particularly indirect expropriation. Through past international procedures, this tribunal has only regarded actual damages payable in nationalizations (including objective damages, contractual rights, patent, key-money, and future prospects of the property) and excluded potential damages i.e. interest damages from the range of payable losses (the same, p. 242).

However in indirect expropriations, the tribunal considered interest damages as certain or actual interests payable from the date of seizure up to the date of verdict issuance. Yet regarding interest damages after the date of verdict issuance, the tribunal regarded it as a "hypothetical interest" and did not consider it payable even in indirect expropriations.

Conclusions

From international law perspective, expropriation is a legal act. However, the expropriator government is bound to pay compensation to the dispossessed owner. Yet the foundation of government responsibility varies based on legal description of expropriation. If expropriation is legitimate, with regard to the nature of expropriation that is a kind of ownership transmission, it is justified based on two theories namely "unjustified enrichment" and "vested rights". So by virtue of such a commitment, the related government is only bound to pay a compensation equivalent to the value of the expropriated properties

(actual damage). Yet as regards illegitimate expropriation, since this is an illegal act and an international fault from international law perspective, that government is liable for compensation of losses caused by its illegal act. As regards legal principles and criteria of determining the value of confiscated properties, if there is an active market for those properties it is determined based on the market price; otherwise it is evaluated based on a price that a wise merchant considers for transaction of those properties. But value of the properties is not considered identical to its future interest. In actions related to expropriation in Iran – United States Claims Tribunal, the things that is highly important is criterion and the amount of compensation that must be paid by the tribunal. The tribunal has enforced customary international law and Iran – United States Treaty of Amity, and in fact there is no case in which the tribunal has not referred to the internal law of one party in the expropriation actions. The tribunal considered the proper compensation with regard to the international law and Iran – United States Treaty of Amity.

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Verdicts

1. Alfred w.shoet V. The Islamic Republic of Iran
2. Daniel pour(M)- V. Iran
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