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Who Pays for the Iran-United States Claims Tribunal?

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Who pays for the Iran-United States Claims Tribunal?

by Michael Peter Waxman

United States of America
v.
Sperry Corporation and Sperry World Trade, Inc.
(Docket No. 88-952)

Argument Date: Oct. 10, 1989

ISSUE

Is Section 502 of the Foreign Relations Authorization Act, which directs the Federal Reserve Bank to deduct a fixed percentage from any award in favor of U.S. claimants issued by the Iran-United States Claims Tribunal, unconstitutional on the ground that it effects a taking of property without payment of just compensation?

FACTS

Sperry Corporation and Sperry World Trade Inc. (collectively referred to as "Sperry") did business with the Iranian government throughout the 1970s. This business, consisting of computer systems leases and data processing services, was conducted from the United States as well as from an office in Tehran.

In response to the seizure of the American Embassy in Tehran, the capture and hostage-taking of our diplomatic personnel, and Iran's threat to withdraw its assets from the United States, the president of the United States declared a national emergency pursuant to the International Emergency Economic Powers Act, and issued an Executive Order blocking removal or transfer of "all property and interests in property of the Government of Iran."

In the ensuing weeks, the U.S. secretary of the treasury granted a general license authorizing judicial proceedings (specifically, "pre-judgment attachments") against Iran.

Sperry subsequently withdrew all of its non-Iranian personnel from Iran and brought suit against Iran seeking $18 million in damages for past-due computer rentals, conversion of assets that Iran allegedly prevented Sperry from removing, and interference with advantageous business relationships. On Oct. 24, 1980, Sperry obtained a pre-judgment attachment of certain Iranian assets located in the United States.

On Jan. 19, 1981, both the United States and Iran agreed to adhere to the "Algiers Accords." The Algiers Accords provided for the release of the American hostages, the unfreezing of Iranian assets in the United States, and the resolution of claims by the nationals of each party against the government of the other.

The United States, pursuant to the Accords, undertook to terminate all legal proceedings in U.S. courts involving claims of U.S. persons and institutions against Iran, and "to nullify all attachments and judgments obtained therein." The president's actions to revoke the pre-judgment attachments pursuant to this understanding were upheld by the Supreme Court in *Dames & Moore v. Regan,* 453 U.S. 654 (1981).

The Accords further provided for the establishment of an international arbitral tribunal, known as the Iran-United States Claims Tribunal, to hear and render "final and binding" decisions that would be enforceable in the courts of any nation under its laws. In addition, the United States agreed to perform various functions and to assign personnel to carry out the filing of claims and disbursements. The Accords provided that "the expenses of the Tribunal shall be borne equally by the two governments."

Sperry filed a claim against Iran with the Tribunal, seeking payment for the past-due computer rentals, and reimbursement for the assets Iran allegedly would not permit Sperry to remove. Prior to the payment of any of the Tribunal's awards to U.S. claimants, but after the filing deadline for claims, the U.S. Department of the Treasury issued a "directive license" requiring the Federal Reserve Bank to deduct 2 percent from each award certified by the Tribunal.

This amount was to be paid into the Treasury "to reimburse the United States Government for costs it incurred for the benefit of U.S. nationals who have claims against Iran."

Although Sperry and Iran had reached a settlement agreement before the issuance of the "directive license," it was not submitted for acceptance and recording with the Tribunal until after the directive. When the Federal Reserve Bank of New York received payment of the Tribunal's award, it deducted the 2 percent charge.

Sperry brought this suit in U.S. Claims Court to challenge the deduction as a violation of both the Independent Offices Appropriations Act (IOAA) and the Fifth Amend-

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ment to the U.S. Constitution. On May 1, 1985, the claims court rendered an oral decision concluding that the Treasury Department's directive license violated the IOAA.

Congress immediately enacted legislation (Section 502) that specifically authorized the assessment of a fee (1.5 percent and 1 percent) against successful U.S. claimants before the Tribunal. The basis for this fee was to reimburse the U.S. government for the expenses it incurred. The statutory requirement was made retroactive to June 7, 1982 (the same date on which the Treasury Department had issued the directive license).

Sperry once again challenged the fee as a violation of the Fifth Amendment's guarantee that private property will not be taken for public use "without just compensation." The claims court agreed with the government that Sperry's case was moot. In addition, the court rejected Sperry's argument on the ground that virtually every tax or fee diminishes the affected property to some extent and that this diminution does not render Congress' act unconstitutional.

Factors in the claims court's decision included its findings that: (1) the economic impact of the fee was far less substantial than in many "taking cases"; (2) Congress has historically authorized fees to reimburse the United States for the costs of adjudicating and settling claims against foreign governments; (3) U.S. nationals doing business abroad necessarily assume the risk that the president may be required to exercise his established power to resolve their claims against a foreign government; and (4) Sperry had benefited directly from the Tribunal.

The claims court further held that Section 502 did not contravene the Fifth Amendment's due process clause even though it was retroactive and imposed a fee on successful claimants only. Finally, the court found that the fee was a reimbursement for specific services rendered by the government rather than a raising of revenue to support the government generally.

Conversely, the Federal Circuit Court of Appeals concluded that Section 502 was an unconstitutional taking of private property without payment of just compensation. The court of appeals eschewed the traditional multi-factor test and instead applied a "per se" approach.

It found that Section 502 provides for "seizing a percentage of the awards of the Tribunal" to pay "for the resolution of the hostage crisis." Therefore, the government should pay compensation when it uses private claims as "bargaining chips" to further the nation's foreign policy goals.

The court of appeals concentrated on the pre-judgment attachment awarded to Sperry between the time the Secretary of the Treasury permitted action and the United States undertook "to terminate all legal proceedings in United States courts. . . [and] to nullify all attachments and judgments obtained therein" as set forth in the Algiers Accords.

The court reasoned that since Sperry already had obtained a pre-judgment attachment, it had had a sufficient forum and remedy in the district court, and that there were sufficient assets to cover an eventual award.

Therefore, Sperry neither needed the Tribunal nor received any benefit from the Algiers Accords. Significantly, the court of appeals distinguished between this case and those in which the parties had no other effective recourse against the foreign government concerned.

BACKGROUND AND SIGNIFICANCE

Sperry is not the typical government "taking of property without just compensation" case. Unlike the cases in which the government has inappropriately underpaid or failed to pay a party for the use or abuse of its property, *Sperry* requires the Supreme Court to determine whether the government properly classified the amount of money it withheld as a "user fee."

Sperry argues that in this case the government's "user fee" is in reality an appropriation of Sperry's award. Therefore, since Sperry has not been fully paid, it has a cause of action against the government under the takings clause of the Fifth Amendment to the U.S. Constitution.

Traditionally, when governmental activities must be assessed to see if they so impair private property rights as to amount to a taking, a court's inquiry is guided by three factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.

Sperry argued successfully in the court of appeals that this multi-factor analysis should not be followed when there is a physical occupation or appropriation of private property. Instead, a "per se" approach must be followed that analyzes the occurrence alone with no consideration of mitigating factors.

The court of appeals regarded the "user fee" deduction mandated by Section 502 as a permanent "appropriation," thereby triggering the per se approach. The court concluded that the government should pay compensation when it uses private claims as "bargaining chips" to further the nation's foreign policy goals. Within this conclusion lies the heart of the issue in the *Sperry* case.

The unique facts of the Iranian government's hostage-taking, and the diplomatic netherworld of the United States-Iran relationship that followed it, form a unique backdrop for this case.

Unless the Supreme Court wishes to dispose of *Sperry* on the technical ground that the Senate's passage of Section 502 was an unconstitutional act, either because it was the improper origination of a "tax" provision (as against a "user fee") that must originate in the House of Representatives, or because it denied due process by improperly directing the retroactive application of a defective administrative scheme, the Court must wrestle with the nature of the situation for which the "user fee" was created.

Did the United States permit parties with claims against the Iranian government to bring their actions in U.S. court, and to obtain pre-judgment attachments, as part of a

government plan to use the successful private actions as "bargaining chips" with which to obtain an overall settlement of the hostage crisis?

If so, did the Senate through Section 502 then create the "user fee" in order to obtain recompense for the United States' expenses for the overall crisis (a "taking" in the eyes of the court of appeals) by taxing the successful American claimants before the Iran-United States Claims Tribunal? Or was the deduction required by Section 502 a "user fee" for the expenses incurred by the United States for the maintenance of Claims Tribunal related procedures? Even if it was exacted solely for the Claims Tribunal costs, does that remove it from being a "taking"?

Not surprisingly, there are few precedents to assist the analysis of this situation. Sperry asserts that the government's power to suspend or settle claims does not give it the right to take property without compensation. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

Further, it reasons that its case is markedly unlike *Shanghai Power Co. v. United States*, 4 Cl.Ct. 237 (1983), aff'd mem. 765 F.2d 159 (Fed. Cir.), which found no "just compensation clause" violation in the president's settlement of claims against the People's Republic of China (PRC) on the ground that the American claimant there had no other recourse against the PRC. (See also the International Claims Settlement Act of 1949, 22 U.S.C. § 1626(b)).

Sperry points out that in the case now before the Court, the United States first permitted Sperry and the other Iran-United States Tribunal claimants to sue Iran on their own. But after their lawsuits met with initial success, the United States signed the Algiers Accords, which stripped them of their victories. Thereafter, Sperry and the other claimants could only use the Iran-United States Claims Tribunal to resolve their disputes.

Then, six months after the final date for filing with the Tribunal, the U.S. Department of the Treasury established the "directive license" that would become the forerunner to Section 502's "user fee."

The impact of the *Sperry* decision may be far greater than the vast sums (plus interest) the government withheld under the Treasury Department's "directive license." This case may affect the ability of the government to enter into international dispute resolution mechanisms.

A decision against the government may require it to carefully assess the costs involved in the creation and maintenance of any such mechanism that is proposed in the future. Further, assuming the government has the power to deny access to other domestic dispute resolution mechanisms, affected parties might have grounds for claiming that the assessment of costs is a "taking" even with advance notice.

While on the one hand it might seem that the government could be unfairly charging successful applicants such as Sperry, the Court may well have to consider whether, in the heat of a world crisis, it is appropriate to leave the ability to effect an equitable resolution of claims, much less their payment, to domestic courts.

ARGUMENTS

For the United States of America *(Counsel of Record, John R. Bolton, Assistant Attorney General, Department of Justice, Washington, DC 20530; telephone (202) 633-2217):*

1. In order to reimburse the U.S. government for its costs in connection with the arbitration and payment of claims against Iran, Congress had the constitutional authority to impose a fee on U.S. claimants who receive an award from the Iran-United States Claims Tribunal.

For Sperry Corporation and Sperry World Trade, Inc. *(Counsel of Record, John D. Seiver, 1919 Pennsylvania Ave. N.W., Suite 200, Washington, DC 20006; telephone (202) 659-9750):*

1. The Iran Claims Settlement Act violates the takings clause of the Fifth Amendment because it legislatively imposes the costs of settling the hostage crisis on those American nationals whose commercial claims against Iran were suspended in exchange for the release of the hostages.
2. The Iran Claims Settlement Act is void under the due process and origination clauses as well.

AMICUS BRIEFS

In Support of Sperry Corporation

The Chevron Corporation and the Pacific Legal Foundation.