8. AWARD MADE IN CASE No. 2139 IN 1974 (ORIGINAL IN FRENCH)

Parties:
Claimant: Foreign company X
Defendant: a State enterprise of a developing country

Subject matters:
Dissolution of responding party during proceedings - force majeure [not included in the Trans-Lex] - calculation of damages (customs) [not included in the Trans-Lex]

Award

In reply to their expropriation by the government of a developing country, the foreign companies which until then had been exploiting the raw materials sources in that country announced that they would effect the seizure of the nationalized raw materials in the event that those materials were sold on the international market. Some time after the nationalization measures, the state enterprise responsible for exploiting and commercializing the nationalized raw materials concluded sales contracts with purchasers from various countries. Some of them refused to carry out their obligation to take delivery of the raw materials sold, on grounds that the threats of seizure made by the expropriated companies constituted a case of force majeure freeing them from that obligation.

In accordance with the arbitration clauses contained in the sales contracts, the state enterprise concerned laid the case before an ICC arbitration tribunal in order to obtain compensation for the injury caused. The ICC arbitrators were therefore led to make several awards, in all of which the state enterprise won its case and the plea of force majeure, invoked by the defaulting buyers, was rejected.²

It was deemed advisable to give here, as being characteristic of all the awards made in this contract, extracts from this award, given the accuracy and conciseness of its wording, both concerning the rejection of the plea of force majeure (ii) and the compensation for the damages suffered by the state enterprise (iii). Moreover, in this particular instance, before the arbitrators could rule on the merits of the case, they had to resolve a procedural difficulty (i) which is not without interest.

i. After the arbitral proceedings were introduced but prior to the arbitrators’ deliberations, the defendant X was dissolved and then struck from the trade register. Thus the arbitrators had to determine whether under those circumstances said party could still be considered a party to the arbitration. The arbitrators gave an affirmative decision on this point, as follows:

³Whereas the present proceedings were initiated prior to the dissolution and alleged removal from the trade register of X . . . , its present status is of little importance and in fact has no effect on the validity of the proceedings pending before the
arbitral tribunal; they are in fact perfectly in order as to their form.

'Whereas, moreover X . . . deposited its plea in defence . . . prior to its definitive removal from the trade register . . . that plea should be considered valid and should be taken under consideration, particularly as the terms of reference were signed by the liquidator dissolving the company . . . after the alleged removal took place . . . .'

[...]

Another of these awards (Award no. 2142 of 1974) has been reported in Yearbook, Vol. I (1976), p. 132.

Referring Principles:

- XIII.3.7 - No suspension in case of bankruptcy of a party