Part One - Liability Issues

Statement of Facts

This proceeding In an arbitration under the Commercial Arbitration Rules of the American Arbitration Association between Revere Copper and Brame Incorporated, a Maryland corporation, (Revere) and Overseas Private Investment Corporation (OPIC) arising out of Contract of Guaranty No. 7230 between the U. S. Government’s Agency for International Development (AID) and Revere, dated September 15, 1970. OPIC has succeeded AID as Party to this Contract.

The OPIC Contract relates to an investment made by Revere in its wholly-owned subsidiary, Revere Jamaica Alumina, Limited, a Maryland Corporation, (RJA) for the purpose of financing RJA’s construction and operation of “a bauxite mining operation, a plant to convert the bauxite to alumina and related facilities ... ” in Jamaica, West Indies.

Revere's Claim in for compensation under Coverage B of the OPIC Contract (“Expropriation”) and reimbursement of expense. The basic issue for determination to whether Revere or Its subsidiary RJA sustained losses which resulted from “Expropriatory Action” as that term is defined in relevant provisions of Section 1.15 of the General Terms and Conditions of the OPIC Contract, an follows:
1.15. Expropriatory Action. The term ‘Expropriatory Action’ means any action which is taken, authorized, ratified or condoned by the Government of the Project Country, commencing during the Guaranty Period, with or without compensation therefor, and which for a period of one year directly results in preventing:

"(b) the Investor from effectively exercising its fundamental rights with respect to the Foreign Enterprise either as shareholder or as creditor, as the case may be, acquired as a result of the Investment provided, however, that rights acquired solely as a result of any undertaking or agreement with the Government of the Project Country shall not be considered fundamental rights merely because they are acquired from such undertaking or agreement; or

"(c) the Investor from disposing of the Securities or any rights accruing therefrom; or

"(d) the Foreign Enterprise from exercising effective control over the use or disposition of a substantial portion of its property or from constructing the Project or operating the same;"

Excluded is any action resulting from:

"(1) any law, decree, regulation, or administrative action of the Government of the Project Country which is not by its express terms for the purpose of nationalization, confiscation, or expropriation (including but not limited to intervention, condemnation, or, other taking) is reasonably related to constitutionally sanctioned governmental objectives, is not arbitrary, is based upon a reasonable classification of entities to which it applies and does not violate generally accepted International law principles;"

Section 1.15 concludes:

"The abrogation, impairment, repudiation or breach by the Government of the Project Country of any undertaking, agreement or contract relating to the Project shall be considered an Expropriatory Action only if it constitutes Expropriatory Action in accordance with the criteria set forth in this section."

Having thus concluded that the Agreement of March 10, 1967 was an internationalized contract and, therefore, that international law principles are applicable, we consider next what principles govern the question of abrogation.

(b) Applicable Principles of International Law

In 1962 the United Nations General Assembly adopted Resolution 1803 (XVII) relating to “Permanent Sovereignty Over Natural Resources” which provided

"Foreign investment agreement freely entered into by, or between, States shall be observed in good faith." (57 Am. J. Int’l. L. 710, 712 (1963)).

This is a basic principle of international law notwithstanding subsequent efforts in the United Nations to limit its applicability. The TOPCO/Libya Award deals with these efforts at some length. At page 71 of the Award, Professor Dupuy says:

"While Resolution 1803 (XVII) appears to a large extent as the expression of a real general will, this is not at all the case with respect to the other Resolutions mentioned above...In particular, as regards the Charter of Economic Rights and Duties of States, several factors contribute to denying legal value to those provisions of the document which are of interest in the instant case."
After reviewing distinguishing features, the award concludes that the later concepts cannot be regarded as more than a *de lege ferenda* formulation, which even appears *contra legem* in the eyes of many developed countries:

"One should conclude that a sovereign State which nationalizes cannot disregard the commitments undertaken by the contracting State: to decide otherwise would in fact recognize that all contractual commitments undertaken by a State have been undertaken under a purely permissive condition on its part and are,

therefore, lacking of any legal force and any binding effect...such a solution would gravely harm the credibility of States since it would mean that contracts signed by them did not bind them; it would introduce in such contracts fundamental imbalance because in these contracts only one party... would be bound. In law, such an outcome would go directly against the most elementary principle of good faith and for this reason it cannot be accepted.”

*(TOPCO/Libya Award*, at 73, 74)

These observations are relevant in this case. The argument is made by OPIC that Revere knew or should have known that the Government undertakings in Clause 12 were not binding on the Government of Jamaica and could not have been binding under the law governing the Agreement. Chief Justice Smith said in his Judgment:

"I have not the slightest doubt that... the view of the government’s representatives regarding Clause 12 was made clear to, at least, the plaintiff company's Jamaican lawyers. It is extremely unlikely that the lawyers did not communicate this view to their clients."

But even if Revere was aware of the Government ‘s position with respect to Clause 1a, does this mean that the provision of that Clause was not binding as matter of international law? The answer to this: important question requires an examination of the history of the Government's Position an the matter of limiting its taxing powers with respect to the aluminum companies.

As early as 1957, or ten years before Revere entered Jamaica, the Government negotiated a "package deal" with Reynolds

and Kaiser on the matter of tax stability. This arrangement was to last for 25 years and included s formula for determining the rate of profit assessable for income tax purposes, a ceiling for all taxes of 45% of profits, rates of royalty, and a provision that

"No further taxes will be imposed on bauxite, bauxite reserves, or bauxite operations, or any assets used in bauxite operations or dividends on bauxite operations."

The emphasis was in increasing the Governments's share of profits by way of income tax. It was then recognized that "it was not in Jamaica's interest to create a situation in which it could be said that we have broken an agreement about income tax by imposing a royalty ....out of line with the royalties that prevail throughout the world". The new 25 year arrangement accordingly focussed on increased income taxation for Jamaica. One of the predominant considerations was "to enlarge their operations in Jamaica and would look to Jamaica as the principal source of supply".

Both Reynolds and Kasier were told, however, that "the Government did not consider a 25-year income tax arrangement as a sensible arrangement". Circumstances might change to make this unrealistic, In that event "it would be natural to expect that Government would approach the companies with a view to reopening the matter". Indeed, the companies were told
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that "...it would be the duty of Government to denounce any long-term agreement of this character which had become unrealistic and which was having the result of depriving the country of a share in the profits to which it was entitled".

The report of the 1957 negotiations records that, in response to the companies' insistence that the Government enter into "a binding agreement that no other taxes would be imposed on their mining operations", they were told that "no Government could bind a future Government not to exercise its legislative powers and that legislation itself could put an end to any agreement of that sort". The companies, it was reported, "quite naturally insisted that they would derive protection from an agreement which the Government would be expected to observe". Although "the Chief Minister pointed out over and over that he could make no agreement which would propose to bind the future legislative action of the Government", it was acknowledged that the provisions in question would "have to be regarded as a matter of good faith and a civilised government would not be likely to repudiate this undertaking". The conclusion of this part of the Report says:

"The assurances in the Agreement, therefore, are to be regarded as binding in good faith on the Government but not in any way an unrealistic promise to the company, namely, that no future legislation can be passed affecting them."

When asked by Kaiser to incorporate the agreement in legislation, the Minister said "he saw no virtue in.....(this) request...because this gave the Company no greater protection inasmuch as such a law could subsequently be repealed by the Government, present of future". Thus, the companies were told that the agreement was "binding in good faith" but the legislature was free to change it at will.

Counsel for Reynolds said that he would "not agree that it is impossible for a Government to contract in respect of the future exercise of executive authority" or that it was "impossible to make any contract which the legislature of Jamaica could not nullify by a Statute". Counsel went on to say:

"...what we are aiming at is a contract; so that if the Legislature did propose to pass a Statute nullifying the contract, they would have to do so in the face of the fact that by so doing, they were acting in bad faith and breaking a bargain."

It seems to us that both parties understood the situations. Chief Justice Smith in finding Clause 12 "invalid" and conferring "no valid contractual right" nevertheless said:

"On the available evidence, the parties to the 1967 Agreement regarded it as a legally binding contract up to the enactment of the Acts of 1974. It is inconsistent with that conduct to plead now a lack of intention to create legal relations in order to upset the Agreement."

The international law rule that a government is bound by is contracts with foreign parties notwithstanding the power of its legislature under municipal to alter the contract has been repeatedly asserted in important international arbitrations and elsewhere. Thus, in the Shufeldt case (United States vs.

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Guatemala, II U.N.R.I.A.A. 1079, Sir Herbert Sisnett 1930) the Sole Arbitrator said with reference to a decree of the Legislative Assembly of Guatemala directing the Executive to take possession of lands covered by a chicle concession:

"... it is perfectly competent for the government of Guatemala to enact any decree they like and for any reasons they see fit, and such reasons are of no concern to this Tribunal. But this Tribunal is only concerned where such a decree based even on the best of grounds works injustice to an alien subject, in which case the Government
ought to make compensation for the injury inflicted and cannot invoke any municipal law to justify their refusal to do so.” (id., at 1095)

There is a close parallel between the Shufeldt case and the one involved here. Guatemala claimed that the contract was ultra vires, null and void, and vested no rights in the claimant because the power to approve or disapprove government contracts was assigned to the Legislature by the Constitution. While the Arbitrator found that the contract had been laid before the legislature in a Memorial of the Minister of Agriculture and not disapproved, the Government of Guatemala insisted that the Memorial contained no mention of the contract and that it had never been approved as required by the Constitution. Six years after Shufeldt claimed to have acquired his rights, the Assembly disapproved the contract and the Government argued that this established nullity ab initio. It also took the position that any claim of breach should be decided by arbitration in Guatemala and under no circumstances referred to the courts or to diplomatic channels. The subsequent arbitration before the Chief Justice of Honduras was established by agreement between the two governments concerned.

In the case before Swiss arbitrator Judge Cavin in Sapphire International Petroleum Ltd. V. National Iranian Oil Company, 35 Int'l Law Rep'ts. 136 (1967), as in the Revere case, the contract did not provide for the applicable law, but only that the parties undertook to carry out its provisions "in accordance with the principles of good faith and good will". In the present case the Jamaican Government's statements relating to the tax arrangements with the aluminum companies were that they were "to be regarded as binding in good faith on the Government".

The Arbitrator in Sapphire concluded that the contract before him had "a quasi-international character" and was not subject to the law of any country or any particular legal system. In his view "general principles of law based upon the practice common to civilized countries" were applicable. Having found that the National Iranian Oil Company in this case had deliberately refused to carry out certain of its obligations" and that this failure was a breach of contract, he said

"... It is a fundamental principle of law, which is constantly being proclaimed by international courts, that contractual undertakings must be respected. The rule pacta sunt servanda is the basis of every contractual relationship." (35 Int'l Law Rep'ts., at 181)

In the TOPCO/Libya Award, Professor Dupuy also dealt with the relationship between nationalization measures under municipal law and State obligations under contracts subject to international law. With reference to the latter, he says:

"...the State has placed itself within the international legal order in order to guarantee vis-a-vis its foreign contracting party a certain legal and economic status over a certain period of time. In consideration for this commitment, the partner is under an obligation to make a certain amount of investments in the country concerned and to explore and exploit at its own risks the petroleum resources which have been conceded to it.

"Thus, the decision of a State to take nationalizing measures constitutes the exercise of an internal legal jurisdiction but carries international consequences when such measures affect international legal relationships in which the nationalizing State is involved" (TOPCO/Libya Award, at 50).
The position was clearly stated in the Third Report of State Responsibility submitted by the International Law Commission to the General Assembly of the United Nations in 1973, as follows:

"...the fact that some particular conduct conforms to the provisions of national law or is even expressly prescribed by those provisions does not make it possible to deny its internationally wrongful character when it constitutes a breach of an obligation established by international law. As has been clearly stated,

'The principle that a State cannot plead the provisions (or deficiencies) of its constitution, as a ground for the non-observance of its international obligations ... is indeed one of the great principles of international law, informing the whole system and applying to every branch of it..." (II Yr. Bk. Int'l L. Comm. 1971, at 193, 277; See also 1973 Report to the General Assembly, A/9010/Rev.1, II Yr. Bk. 1973, at 163, 188)

The situation is Jamaica with respect to the aluminum companies in 1957, 1966 and 1967, was the almost classic one of a government seeking to obtain substantial long term commitments from foreign investors for the economic development of its natural resources and for that purpose providing substantial inducements in the way of tax and other assurances for limited periods of time. If the sovereign power of a State cannot be fettered in this manner by entering into binding contracts, the State would be deprived of the power by such contracts to meet essential needs. Inevitably, in order to meet the aspirations of its people, the Government may for certain periods of time impose limits of the sovereign powers of the State, just as it does when it embarks on international financing by issuing long term government bonds on foreign markets. Under international law the commitments made in favor of foreign nationals are binding notwithstanding the power of Parliament and other governmental organs under the domestic Constitution to override or nullify such commitments. Any other position would mean in this case that Jamaica could not in the exercise of its sovereign powers obtain foreign private capital to develop its resources or attract foreign industries. To suggest that for the purposes of obtaining foreign private capital the Government could only issue contracts that were non-binding would be meaningless. As the contracts were made in the sense that the commitments were set out in unqualified legal form, international law will give effect to them. For the purposes of this proceeding they must be regarded as binding.

Parenthetically, we repeat what we pointed out earlier as to the stated policy of the Foreign Assistance Act of 1961 that authorizes AID-OPIC insurance contracts, namely to support the principles of increased economic cooperation and trade among countries. Our view as to the meaning of the insurance contracts fosters such policy.

On this phase of the case we have concluded that, so far as international law is concerned, the Government of Jamaica was bound by its commitments under the provisions of the 1967 Agreement, including its commitments under Clause 12.

* This Contract will be hereinafter referred to as "the OPIC Contract or simply "the Contract". It takes the form of Special Terms and Conditions signed by the parties and designated "221 KST 11-65 Revised (Combined)" and General Terms and Conditions, designated "221 KGT 11-65 Revised (Combined)"

**Referring Principles:**

| IV.2.3 - No repudiation of contractual consent by state party |