REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Continental Insurance Company Case—Decision No. 3

20 July 1960

VOLUME XIV pp. 474-480

NATIONS UNIES - UNITED NATIONS

CONTINENTAL INSURANCE COMPANY CASE—DECISION No. 3 OF 20 JULY 1960

The United States-Japanese Property Commission, established pursuant to the "Agreement for the Settlement of Disputes Arising Under Article 15 (*a*) of the Treaty of Peace with Japan" and composed of Mr. Lionel M. Summers, Counsellor of Embassy and Consul-General, Member of the Commission appointed by the Government of the United States of America; Mr. Kumao Nishimura, Member of the Permanent Court of Arbitration and former Ambassador of Japan to France, Member of the Commission appointed by the Government of Japan; and Judge Torsten Salén, President of the Supreme Restitution Court for Berlin, Third Member of the Commission chosen by mutual agreement of the Governments of the United States of America and of Japan,

Having considered the Petition and Reply filed with the Secretariat by the Agent of the United States, Mr. Arnold Fraleigh, on March 10, 1959, and October 5, 1959, respectively, and the Answer and Counter Reply filed with the Secretariat by the Agent of the Government of Japan, Mr. Tatsuo Sekine, on July 27, 1959, and March 8, 1960, respectively, in the case of *The United States of America* ex rel. *the Continental Insurance Company* vs. *Japan*, and

Having determined that the Commission has jurisdiction over the dispute, has reached the following conclusions:

THE FACTS:

The Continental Insurance Company (hereinafter referred to as the "claimant") is an Allied national within the meaning of the Treaty of Peace and the Draft Allied Powers Property Compensation Law (hereinafter referred to as the "Compensation Law"), by virtue of being a corporation organized and existing under the laws of the State of New York, one of the States of the United States of America.

In the year 1906 the Imperial Government of Japan authorized, by virtue of Law 6 and Decree 19 of the Ministry of Finance, the issuance of the Imperial Japanese Government Four Percent Loan of 1910 in the amount of 450,000,000 French francs. Each one of the bonds of that issue was signed by S. Kurino, the Japanese Ambassador in Paris, and contained *inter alia* the following provisions:

. . .

3. The payment of semi-annual coupons and the reimbursement of the capital of the present certificate which shall be effected in Paris, at Messrs. Rothschild Bros., in France for the amount indicated respectively on the certificate and the coupons; in London at the office of the Yokohama Specie Bank, Ltd. at the rate of exchange of the day on Paris; in Brussels at the exchange of the day on Paris at the office of the firm which Messrs. Rothschild will designate; in Japan at the same dates as in Paris on the basis of 100 yen gold for 258 francs payable.

4. Except in cases of anticipated reimbursement provided for below the capital of the present certificate will be reimbursed the 15 May 1970.

5. The interest shall be paid against the return of the coupons falling due on the capital and return of the present certificate accompanied by all its coupons not falling due. The amounts of the missing coupons not falling due shall be deducted from the capital to be reimbursed to bearer.

. . .

12. The certificates and coupons of the present loan belonging to persons not residing in Japan are exempt forever of any Japanese tax present or future.

On three occasions between 1923 and 1934 the claimant purchased bonds of the above-mentioned issue. Specifically, the claimant purchased bonds in

the amount of 180,000 francs on July 2, 1923, through the branch office of the National City Bank in Tokyo; bonds in the amount of 354,000 francs on May 2, 1934 through the Guaranty Trust Company of Paris; and bonds in the amount of 173,500 francs on April 3, 1934 through the National City Bank in Paris.

Prior to December 7, 1941, all of the foregoing bonds purchased by the claimant were on deposit with the Tokyo Kyotakukyoku (Tokyo Deposit Bureau). The deposits had been made to comply with the regulations of the Government of Japan which required insurance companies doing business in Japan to make deposits of securities to guarantee their financial capacity and as a reserve against unearned premiums.

On or about February 10, 1942, the property of the claimant located in Japan, including the above-mentioned bonds and the coupons appertaining thereto, was sequestered and placed under the administration of a custodian of enemy property appointed by the Government of Japan.

On March 23, 1951, bonds and coupons of the above-mentioned loan similar in value to those sequestered from the claimant were restored to the claimant with the exception of the coupons covering the period from May 15, 1942 through November 15, 1950. The latter coupons were not restored, and form the subject matter of this claim.

On July 27, 1956, the Government of Japan and the Association Nationale des Porteurs Français de Valeurs Mobilières, representing a group of French bondholders holding bonds of the same issue as those owned by the claimant, reached an agreement for the payment and redemption of the bonds and coupons held by the members of the Association at the rate of twelve times the face value in francs of the bonds and coupons. (For convenience, that agreement will hereinafter be referred to as the "Bondholders Agreement".) The Bondholders Agreement was made as a result of recommendations rendered by Mr. Nils Von Steyern to whom the question of providing equitable relief to the bondholders had been submitted for consideration by the Government of Japan and the Bondholders Association. Article X of the Bondholders Agreement stipulated that:

> Both the payments and the repurchase of bonds by the Government, described in this agreement, are applicable only to bonds and coupons meeting the following three conditions:
>
> (1) They must not be owned by Japanese nationals on the date on which this agreement becomes effective.
>
> (2) They must not be circulating in Japan on the aforesaid date.
>
> (3) They must be submitted by the bondholders to the agents, for the purpose of receiving the payments described in this agreement or for the purpose of repurchase, the bondholders thus confirming their acceptance of the Government's offers.

Originally the Government of the United States of America claimed compensation on behalf of the claimant in the amount of 99,634,381.63 yen based on the supposition that the bond instruments contained a gold clause. Later, however, that position was abandoned. Instead, claim was made in the amount of 3,056,400 French francs which represented the face amount of the francs payable under the coupons multiplied by twelve, the multiplier used in the Bondholders Agreement. The Government of the United States of America predicates the right to demand payment on the basis of twelve times the face amount of the coupons expressed in francs on the argument that the Government of Japan cannot under international law differentiate between various

types of bondholders; and that having agreed to pay certain bondholders twelve times the amount of the face value of the coupons expressed in francs it must extend the same treatment to all foreign bondholders. The treatment that it affords its own nationals is, of course, a matter of municipal law.

THE ISSUES:

In essence, therefore, the Commission is faced with three possible solutions. In effect, it may order the Japanese Government to pay to the claimant:

(1) the face amount of missing coupons payable in yen; or

(2) the face amount of the missing coupons payable in francs; or

(3) the face amount of the missing coupons payable in francs multiplied by twelve.

In any event, however, a sum of 10,968.98 yen withdrawn by the claimant from the Special Property Account must be deducted from the amount payable.

DISCUSSION:

The Commission turns first to the discussion of the first two alternatives. The bonds in question are of a type that has been widely used in international finance as a means of guaranteeing the investor against currency depreciation. The provisions of such a bond guaranteeing payment in two or more currencies at the option of the bondholder have been held valid by numerous international and domestic courts. [See for example *Charles R. Crane (United States)* vs. *Austria and City of Vienna*, decided by the Tripartite Claims Commission (United States, Austria and Hungary) constituted under the Agreement of November 26, 1924, and reported in *Reports of International Arbitral Awards (Recueil des Sentences Arbitrales)* vol. VI, United Nations (Nations Unies), page 244; *Compagnie Electrique de la Loire et du Centre* c. *Rondeleux et autres*, Cour de cassation (France), *61 Journal du droit international* (1934), page 939- at 940-941; *McAdoo* vs. *Southern Pacific Co.* (1935), District Court, N.D. California, S.D. (United States), 10 Federal Supplement 953 at 954.]

In at least one case it has been held that payment may be made in a local currency provided that payment is equivalent in value, at the then rate of exchange, to the value that would have been received by the bondholder if he had obtained payment in the foreign currency stipulated in the bond (See Loan of the *Crédit Foncier franco-canadien*, Judgement of June 3, 1930 of the Cour de cassation, *Journal du droit international*, 1931 at page 102).

In the present case, the Government of Japan alleges that since the coupons are being presented for payment in Japan, this payment, under the terms of the contract itself, should be made in yen. It appears to be clear, however, from the pleadings and from the statements made at the oral hearings, that the claimant was prohibited from exporting the coupons from Japan so that in effect the Government of Japan, through its own unilateral action, prevented the bondholder from obtaining the benefit of the option it was entitled to exercise under the terms of the bond instrument.

It seems probable that the Government of Japan, in the exercise of its sovereign power to control foreign exchange, could insist that a bondholder holding the bonds in Japan receive payment in yen. In such a case, however, the bondholder would appear to be entitled to receive yen in an amount equivalent in value to the francs the bondholder would have received had it not been prevented from exercising the option of presenting the bonds for payment in French francs in Paris. The Commission does not, however, have to decide this par-

ticular question as the liability of the Government of Japan is determined in this case by the terms of the Treaty of Peace and the Compensation Law rather than by the general provisions of international law.

The pertinent provisions of the Treaty and of the Compensation Law read respectively as follows:

TREATY OF PEACE WITH JAPAN

Article 15

(*a*) In cases where such property (the property of each Allied Power and its nationals) was within Japan on December 7, 1941, and cannot be returned or has suffered injury or damage as a result of the war, compensation will be made on terms not less favorable than the terms provided in the draft Allied Powers Property Compensation Law approved by the Japanese Cabinet on July 13, 1951.

. . .

DRAFT ALLIED POWERS PROPERTY COMPENSATION LAW

Article 8

The amount of damage to those public loans, debentures, bonds issued under special laws by juridical persons, or public loans or debentures issued by foreign states or juridical persons (hereinafter referred to as "the public loans, etc.") which have been subjected to the wartime special measures and have not been restituted and for which the time of their redemption has arrived before the time of compensation shall be the total of the amount of the principal and the amount of the interest coupons which accompanied such public loans, etc.

2. The amount of damage to those public loans, etc. whose time of redemption has not arrived by the time of compensation and which are incapable of restitution shall be the total of their current price as of the time of compensation and the amount of the interest coupons up to the time of compensation.

. . .

Article 17

. . .

2. In cases where the amount of money of the debts, loans, etc. or patent working fee stipulated in Articles 7, 8 and 9, has been designated in terms of currencies other than the Yen and should have been paid in foreign currency or, although designated in the Yen, should have been paid in foreign currency at the fixed exchange rate in accordance with the term of contract, the Japanese Government shall recognize its liability to make compensation in foreign currency and make it available to the claimant at the earliest date permitted by the Japanese foreign exchange position and in accordance with the laws and regulations concerning the foreign exchange.

As may be seen, Articles 8 and 17 of the Compensation Law, which by the terms of Article 15 (*a*) of the Treaty of Peace, are for all intents and purposes made a part of the Treaty, provide that where an amount of money payable under public loans, bonds and debentures has been designated as payable in a currency other than yen, payment shall be made in such currency. In this case, payment is specified both in francs and yen, but the option to determine which currency shall be received lies wholly with the bondholder so that if the bondholder demands payment in francs the situation is the same as if payment were stipulated in francs alone. The Compensation Law is clear and specific and, therefore, the Government of Japan is obligated to make the francs avail-

able to the claimant at the earliest date permitted by the Japanese foreign exchange position; that is, to pay the claimant 254,700 francs, less the value in francs at the date of payment of 10,968.98 yen.

The question whether the claimant is entitled to twelve times the amount of francs stipulated on the face of the coupons is more difficult to resolve. It will be noted that Article 8 of the Compensation Law quoted above refers specifically to the *amount* of principal and the *amount* of interest as the measure of compensation. That law is the law controlling upon the Commission and it is bound by its terms in rendering a decision. Hence, the only manner by which it could hold that the claimant is entitled to twelve times the amount of francs stipulated in the coupons would be to find that the face amount of the coupons was automatically changed from the value set forth therein to twelve times that value by virtue of the Bondholders Agreement. The Commission is in grave doubt whether it could make such a finding in view of the specific provisions of the law even if under international law it were convincingly established that the benefits of an agreement such as the Bondholders Agreement applied equally and automatically to all bondholders not withstanding the provisions of Article X of that Agreement.

In any event, in the present instance, it has not been convincingly established that the claimant may under applicable principles of international law invoke the Bondholders Agreement and its benefits, the Agent of the United States of America not having been able to produce any precedent that would shed light on the problem. In view of the foregoing, the Commission does not believe that it is justified in interpreting the word "amount" as used in the Compensation Law, as meaning anything other than the face amount stipulated in the bonds and coupons.

The Government of the United States also invokes the benefit of the Bondholders Agreement on grounds of equity.

Article 22 of the Treaty of Peace provides, *inter alia*, that a special claims tribunal may be established to settle disputes concerning the interpretation or execution of the Treaty.

The "Agreement for the Settlement of Disputes Arising Under Article 15 (*a*) of the Treaty of Peace with Japan" was entered into in accordance with that Article. Pursuant to the request made to the Government of Japan, in conformity with Article II of that Agreement, the present Commission was established to pass upon the disputes referred to it by the Government of the United States of America under Article I.

Neither the Treaty of Peace nor the Agreement for Settlement of Disputes referred to above contains any authorization which would permit the Commission to act as an *amiable compositeur*. Instead, Article 15 (*a*) of the Treaty of Peace provides that compensation will be made in terms not less favourable than the terms provided in the Compensation Law. In the Compensation Law, special rules have been given for the calculation of the amount of damage to specific properties, including damage to public loans, etc. (See Article 8 quoted *supra*.)

Failing a specific provision authorizing the Commission to decide a case *ex aequo et bono*, the Commission cannot base its decisions on purely equitable grounds. It is bound to apply the rules laid down in the Treaty of Peace and the Compensation Law.

DETERMINATION OF THE COMMISSION:

In view of the foregoing the United States-Japanese Property Commission determines that the Continental Insurance Company is entitled to an award in the amount of 254,700 francs, the face amount of the missing coupons,

minus the value in francs of 10,968.98 yen, the amount of the sum withdrawn by the claimant from the Special Property Account. Needless to say the francs to which reference is made are the ones that were in circulation prior to January 1, 1960, when the new so-called "heavy franc", worth one hundred of the old francs, went into circulation.

This decision shall be definitive and binding and its execution incumbent upon the Government of Japan.

SIGNED in the City of Tokyo on this 20th day of July, 1960.

Torsten SALÉN
Third Member

Lionel M. SUMMERS
United States Member

Kamao NISHIMURA
Japanese Member