TIDEWATER OIL COMPANY CASE AND OTHERS— DECISION No. 4 OF 20 JULY 1960

Compensation for losses and damages sustained as the result of the war by American shareholders in Japanese Companies—State responsibility—Excessive depreciation and cancellation of contracts.

Indemnisation pour pertes et dommages subis du fait de la guerre par des actionnaires américains de Compagnies japonaises — Responsabilité de l'Etat — Dépréciation excessive et résiliation des contrats.

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 Japan.

Having considered the pleadings filed in the above entitled cases by the Agent of the Government of Japan and the Agent of the Government of the United States and having heard the oral arguments presented by such Agents, and;

Having deemed it desirable to consider all of the cases together since the same issues of law are presented in most cases and those issues were considered together in the General Reply and General Counter Reply and at the oral hearings;

The Commission has reached the following conclusions:

The Commission is satisfied that it properly has jurisdiction over all of the above entitled claims. They are based on losses and damages sustained as the result of the war by Japanese companies in which the claimants, both corporations and individuals, held shares of stock.

The nationality and qualifications of the claimants are not seriously contested in a single case. The Commission has also satisfied itself as to the nationality and qualifications of the claimants so there is little to be served by dwelling on the subject further.

The responsibility of the Government of Japan is predicated upon Article 15 (*a*) of the Treaty of Peace and more particularly upon the Draft Allied Powers Compensation Law (hereinafter referred to as the "Compensation Law") which is incorporated by reference into Article 15 (*a*).

The cases vary somewhat and some present issues that are not found in others. Generally speaking, the claims are brought under four headings, namely bomb damage to inventory, bomb damage to fixed assets, including construction in process, damage owing to excessive war time deprecation and damage owing to the cancellation of war time contracts on the termination of hostilities.

The amount of the damages allowed is subject in each case to the deductions specified in Article 12 item 3 of the Compensation Law.

There has been disagreement between the two Governments as to the liability of the Government of Japan for inventory losses. Inventory was constantly changing and little, if any, of the original inventory on hand in 1941 was still on hand at the time of the bombings that led to the loss. Hence the Government of Japan asserts that the property was not in Japan at the commencement of the war which is specified in the Compensation Law as condition for claiming compensation with respect to such property. On the other hand, the Government of the United States maintains that inventory, which is a commercial concept, must be looked upon as a continuing, although shifting, entity.

There is agreement on the whole as to responsibility for losses to fixed assets although the Agent of the Government of Japan has objected to the inclusion of construction in process in the calculation of fixed assets, and the application of the depreciation rate used by the Agent of the Government of the United States of America. There are also a few other minor issues related to the basic problem of responsibility for war damage to fixed assets.

There has been disagreement as to the liability of the Government of Japan for excessive war time depreciation and for cancellation of war time contracts. The latter two issues are complicated by the fact that in the largest case before the Commission from a monetary standpoint (Case No. 6) claims for excessive depreciation and cancellation of contracts were not filed within the time limit for the filing of claims.

There has also been disagreement as to the interpretation of Article 12 item 3, such disagreement revolving around a variety of issues. Among them are whether replacement properties constitute new acquisitions, whether property acquired since the time of the coming into effect of the Treaty of Peace should be taken into account, what are the proper methods of calculating acquisition costs and current market values and whether inventory as well as fixed assets should be used in calculating deductions. Moreover the question of the property of making a global comparison of existing properties and total acquisitions as a means of determining the deductions, when it becomes manifest that an

individual property survey is impossible for practical reasons, has been discussed at length.

The Commission has given careful study to the various issues as expounded in the volumious pleadings filed by both parties. It also profited from the arguments advanced during eight days of oral hearings at which time certain additional material was made a matter of record.

As a result of its deliberations the Commission concluded that the commercial concept of inventory as a separate, albeit continually changing entity, should be recognized and that the Government of Japan was responsible for damage to inventory not exceeding in value the inventory on hand at the commencement of the war even though the items constituting the inventory at the time of its destruction were not the precise items as those that were in existence at the beginning of the war. As has been stated there is generally agreement as to the liability of the Government of Japan for damages to fixed assets. On the minor issues relating to fixed assets, such as the inclusion of construction in process, the Commission concurs with the position of the Agent of the United States of America.

On the other hand the Commission believes that it has to disallow claims for excessive depreciation and cancellation of contracts for a variety of reasons. In at least one case (Case No. 6) those items of claim had not been submitted to the Government of Japan within the requisite period for the filing of claims. Moreover there is insufficient evidence to establish that all of the damages under these two items could be considered as having occurred as the result of the war. Moreover some of the excessive depreciation may have been compensated for at the time it occurred by increased sales with concomitant profits.

After having reached the foregoing conclusions and having considered the deductions provided for by Article 12 item 3 the Commission entered into discussions with the parties, including the representatives of the claimants, to determine the proper award in each case. As a result of such discussions and the Commission's own estimate of the various losses, it has arrived at the conclusion that payment to the claimants of record should be made as listed below:

To Tidewater Oil Company in Case No. 5, the sum of . .	295,000,000
To General Electric Company—doing business as International General Electric Co. in Case No. 6 the sum of. .	3,820,000,000
To International Standard Electric Corporation in Case No. 8 and No. 9 the sum of.	2,270,000,000
To American Trading Company of Japan, Ltd., in Case No. 10 the sum of.	614,000
To Burnham S. Colburn, Myra Colburn Perry and William B. Colburn, heirs at law and residual legatees of the estate of May E. C. Keane, deceased, successors to Fiduciary Trust Co. of New York, executor of the estate of May E. C. Keane in Case No. 10 the sum of. .	39,805,000
To Myra Colburn Perry, Burnham S. Colburn, Jr., Evelyn Colburn Thorn, Mary Louise Colburn Glenn and First Union National Bank of North Carolina as trustee for Jean Wrayford Willmer and Derek Franklin Wilmer, residual legatees of the estate of William L. Keane, deceased and successors to William L. Keane in Case No. 10 the sum of.	36,792,000
To William White, Jr. and Sanford D. Beecher, executors of the estate of John R. Geary, deceased and successors	

to Henry L. Geary and Sandford D. Beecher as executors of the estate of John R. Geary in Case No. 10 the sum of.	149,463,000
To Henry R. Geary, executor of the estate of Emma R. Geary, deceased, successor to Emma R. Geary in Case No. 10 the sum of.	2,577,000
To Henry R. Geary as executor of the estate of Henry L. Geary, deceased and successor to Henry L. Geary in Case No. 10 the sum of.	52,319,000
To Henry R. Geary in Case No. 10 the sum of	2,577,000
To John V. Geary in Case No. 10 the sum of	2,577,000
To Veronica M. Geary and Lillian Geary, sole heirs at law of Catherine F. Geary in Case No. 10 the sum of .	2,577,000
To E. Gerli and Company, Inc. in Case No. 10 the sum of	6,136,000
To Georgina T. Goff in Case No. 10 the sum of.	21,400,000
To Agnes R. Grimmesy in Case No. 10 the sum of . . .	59,640,000
To Anne Frazar Hawkins in Case No. 10 the sum of . . .	1,718,000
To Noel E. Macksey in Case No. 10 the sum of	5,197,000
To Carlisle Chandler McIvor and Frederick Winant, executors of the last will of Elizabeth G. McIvor in Case No. 10 the sum of.	9,862,000
To Abby F. Warner in Case No. 10 the sum of	9,954,000
To Rosemary G. Eitzen in Case No. 11 the sum of. . . .	415,000
To William White, Jr. and Sanford D. Beecher, as co-executors of the estate of John R. Geary in Case No. 11 the sum of.	197,000
To Wheeler Sammons in Case No. 12 the sum of.	125,000
To Maria Laffin in Case No. 12 the sum of	1,200,000
To William White, Jr. and Sanford D. Beecher as executors of the estate of John R. Geary in Case No. 12 the sum of.	3,775,000
To E. Gerli & Company, Inc. in Case No. 13 the sum of	4,500,000
To American Trading Company of Japan, Ltd. in Case No. 15 the sum of.	140,000
To William White, Jr. and Sanford D. Beecher as executors of the estate of John R. Geary in Case No. 16 the sum of.	1,440,000

In arriving at the foregoing sums the deductions provided for under Article 14 of the Compensation Law have been taken into consideration so that such sums are free and clear of such deductions.

The Commission has been given to understand that the amount provided in the national budget of Japan for the payment of claims during the present Japanese fiscal year is not sufficient. The claimants are cognizant of the situation and are not insisting upon immediate payment. If, however, full payment is not made within one year from the date of this Decision, interest at the rate of 5%, which is the rate provided as the usual rate in Article 404 of the Civil Code of Japan, should be payable on the unpaid balance.

In view of the foregoing the Commission, acting in accordance with the authority vested in it by the Treaty of Peace, and the Agreement for the Settlement of Disputes arising under Article 15 (*a*) of the Treaty of Peace with Japan, and in pursuance of Article 20 of the Rules of Procedure does hereby make the following determinations:

1. The Government of Japan shall pay to each claimant as compensation

the amount previously set forth in the prior part of this Decision not later than one year from the date of this Decision.

2. If after the expiration of that period, all or a part of an award remains unpaid, interest shall be paid at the rate of five per cent per annum on the unpaid balance commencing from the day marking the expiration of that period until payment has been made in full.

3. The present Decision settles all claims or demands incidental or related to the present claims of the Government of Japan against the respective claimants on whose behalf this Decision is rendered as well as all similar claims and demands of the claimants against the Government of Japan.

This Decision is definitive and binding and its execution is incumbent upon all of the parties hereto.

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

Torsten SALÉN
Third Member

Lionel M. SUMMERS
United States Member

Kumao NISHIMURA
Japanese Member