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IRAN-US CLAIMS TRIBUNAL CASES

INA Corporation v. The Government of the Islamic Republic of Iran
(Case No. 161)

Chamber One: Lagergren (Chairman); Ameli; Holtzmann

I. Facts

I(i) The investment

INA International Insurance Company, a wholly owned subsidiary of the Claimant, acquired a 20% shareholding in Bimeh Shargh Public Joint Stock Company) ("**Shargh**") from Arya National shipping Lines ("**Arya**"). INA International paid Arya 20 million Rials for Arya's 20% shareholding in Shargh.

I(ii) The taking

Claimant's claim arose out of the nationalization of Shargh, by the Government of Iran on 25 June 1979. On 25 June 1979, all insurance companies operating in Iran, including Shargh, were proclaimed nationalized by the Law of Nationalization of Insurance Corporations.

II. Relevant findings

II(i) Applicable law

The Tribunal held that for the purpose of this case it was "in the presence of a *lex specialis*, in the form of the Treaty of Amity, which in principle prevails over general rules" (8 Iran-U.S. C.T.R 378). The Tribunal pointed out that the continued validity and effect of the Treaty had not been contested by the Respondent in any of the written pleadings and that no argument in subsequent pleadings or at the hearing disturbed the view that "for the purpose of the present case the Treaty remains binding as it [was] drafted" (8 Iran-U.S. C.T.R 379).

The Tribunal also noted, however, that in a case like the one before it, "involving an investment of a rather small amount shortly before the nationalisation, international law [admitted] compensation in an amount equal to the fair market value of the investment", suggesting that the outcome would have been the same had the case been decided on the basis of general principles of public international law, rather than on the basis of the Treaty of Amity (8 Iran-U.S. C.T.R 378).

Judge Amelie, dissenting (but concurring in Judge Lagergren's Separate Opinion), concluded that the Treaty of Amity was inoperative for a number of reasons (which are not relevant for present purposes) (8 Iran-U.S. C.T.R 431-447). Amelie also held that, even if the Treaty of Amity were in force, disputes regarding the interpretation or application of the Treaty of Amity could only be heard by the International Court of Justice and the Tribunal accordingly "lacked jurisdiction to make any pronouncements as to the interpretation or application of the Treaty of Amity" (8 Iran-U.S. C.T.R 405). The case, in Judge Amelie's view, should have been decided "on the basis of the present status of international law on nationalization and compensation" (8 Iran-U.S. C.T.R 404).

II(ii) Discrete expropriation or nationalization scheme

All insurance companies operating in Iran, including Shargh, were proclaimed nationalized by the Law of Nationalization of Insurance Corporations. The claim therefore arose out of the nationalisation of an entire industry.

II(iii) Lawful or unlawful taking

The Tribunal pointed out that "it has long been acknowledged that expropriations for a public purpose and subject to conditions provided for by law - notably that category which can be characterised as 'nationalisations' - are not per se unlawful". The Tribunal noted that the case before it presented "a classic example of a formal and systematic nationalisation by decree of an entire category of commercial enterprises considered of

fundamental importance to the nation's economy" (8 Iran-U.S. C.T.R 378). The Tribunal therefore appeared to regard the taking as lawful.

II(iv) Description of the assets

The assets comprised the Claimant's 20% shareholding in Shargh.

II(v) Date of taking and date for calculating compensation

The date of the taking and the date for calculating compensation were both held to be 25 June 1979, the date on which all insurance companies operating in Iran, including Shargh, were proclaimed nationalized by the Law of Nationalization of Insurance Corporations.

II(vi) Choice of remedy (restitution/compensation)

The Tribunal held that the Claimant was entitled to compensation for the nationalisation of its property (8 Iran-U.S. C.T.R 379).

II(vii) Standard of compensation

Treaty of Amity

The Tribunal held that, "in view of the circumstances in [the] case", "the words 'the full equivalent of the property taken'" used in Article IV of the Treaty entitled the Claimant "to be granted compensation equal to the fair market value of its shares in Shargh, assessed as of the date of nationalization" (8 Iran-U.S. C.T.R 379). The tribunal cited with approval the Permanent Court of International Justice's definition of compensation for a lawful taking "as the value of the undertaking *at the moment of dispossession* plus interest to the day of payment" (emphasis added by the Tribunal), in the Chorzow Factory case (Merits), which it described as the "locus classicus" in situations such as the INA case (8 Iran-U.S. C.T.R 379 fn 10).

As noted above, Judge Amelie (dissenting) regarded the Treaty of Amity as "inoperative". Judge Amelie stated that, even assuming *arguendo* that the Treaty of Amity was applicable, "it should be interpreted in the light of the current status of international law" (8 Iran-U.S. C.T.R 450). Judge Amelie then referred to his analysis (earlier in his Dissenting Opinion) of the state of international law, in which he had concluded *inter alia* that "the modern international law standard is that of 'appropriate' compensation, which may allow for less than the full value of the property taken, rather than the alleged traditional standard of 'prompt, adequate and effective' or 'full' compensation". Judge Amelie's position on the standard of compensation for nationalizations under international law is discussed below.

International law

<u>International law: the Award</u>

Although the Tribunal's award was based on the provisions of the Treaty of Amity, the Majority made interesting remarks about the standard of compensation for expropriation

under international law. The Tribunal stated that "in the event of …large-scale nationalisations of a lawful character, international law has undergone a gradual reappraisal, the effect of which may be to undermine the doctrinal value of any 'full' or 'adequate' (when used as identical to 'full') compensation standard as proposed in this case)" (8 Iran-U.S. C.T.R 378). The footnote accompanying that statement refers to the Separate Opinions of the Tribunal members. All three members of the Tribunal considered this question in their Separate Opinions (in the case of Judge Amelie's Dissenting Opinion, he dissented from the finding of the Majority but concurred in Judge Lagergren's Separate Opinion).

The Tribunal held, however, "that in a case such as the present, involving an investment of a rather small amount shortly before the nationalisation, international law admits compensation in an amount equal to the fair market value of the investment" (8 Iran-U.S. C.T.R 378).

Judge Holtzmann, in his Separate Opinion, regarded the Tribunal's statement regarding the applicable compensation standard for large-scale lawful nationalisations to be "*obiter dictum* because it [was] extraneous to the present case". This was because the case was "expressly decided on the basis of the Treaty of Amity, not under customary international law". In Holtzmann's view, the paragraph "[said] little". He noted that "its observation that the standards for compensation are undergoing gradual re-appraisal [was] a truism", as "all aspects of the law [were], and deserve[d] to be, regularly re-examined." He pointed out that "the paragraph merely says that such re-appraisal 'may' perhaps 'undermine' these standards". "It [stopped] far short", Holtzmann concluded, "of affirming that any such undermining – let alone any change – [had] actually occurred" (8 Iran-U.S. C.T.R 391-392).

International law: The Separate Opinions

Appropriate compensation

Judge Lagergren stated in his Separate Opinion that "an application of current principles of international law, as encapsulated in the 'appropriate compensation' formula, would in a case of lawful large-scale nationalisations in a state undergoing a process of radical economic restructuring normally require the 'fair market value' standard to be discounted in taking account of 'all circumstances'". He qualified this by saying that such discounting could "never be such as to bring the compensation below a point which would lead to 'unjust enrichment' of the expropriating state". He added that "the discounting often [would] be greater in a situation where the investor [had] enjoyed the profits of his capital outlay over a long period of time, but less, or none, in the case of a recent investor, such as INA" (8 Iran-U.S. C.T.R 390).

Judge Lagergren cited Sir Hersch Lauterpacht's statement in the eighth edition of Oppenheim's International Law as an early example of a movement towards modifying the rules of compensation for large-scale lawful nationalizations. Lauterpacht stated that the traditional rules of compensation must be subject to:

> "modification....in cases in which fundamental changes in the political system and economic structure of the State or far-reaching social reforms entail interference, on a large scale, with private property. In such cases, neither the principle of absolute respect for alien private property nor rigid equality with the dispossessed nationals offer a satisfactory solution to the difficulty. It is probable that, consistently with legal principle, such solution must be sought in the granting of partial compensation" (8 Iran-U.S. C.T.R 385-6).

In his Separate Opinion, Judge Holtzmann noted that Lauterpacht's "statement appear[ed] to be the expression of a search for a future rule, not the description of an established principle of law". Holtzmann found it significant that the statement had *not* been accompanied any footnotes citing authority for the proposition (whereas statements purporting to express a rule of international law were accompanied in the text by numerous references to supporting authority). In Holtzmann's view, Lauterpacht was simply suggesting an approach, "one, moreover, that international tribunals [had] not followed" (8 Iran-U.S. C.T.R 400).

Judge Amelie, although dissenting from the finding of the Majority, concurred in Judge Lagergren's Separate Opinion. Judge Amelie was of the view that "in its present formulation, the traditional concept of 'prompt, adequate and effective' compensation – which [was] even doubted as ever having been fully established – [had] been jettisoned and replaced by the concept of 'appropriate' compensation" (8 Iran-U.S. C.T.R 407). Amelie criticized those academic writers who argued in favour of 'full' compensation for expropriations for basing their arguments on cases of *unlawful* expropriation (such as *TOPCO* and *Saphire*). Amelie noted that a different remedy applied to unlawful takings. In the case of *lawful expropriations,* Amelie held, "the modern international law standard is that of 'appropriate' compensation, which may allow for less than the full value of the property taken, rather than the alleged traditional standard of 'prompt, adequate and effective' or 'full' compensation". He cited *inter alia* the award in *LIAMCO* in support of his view. This arbitrator in *LIAMCO* had referred to the 'confused state of international law' on this point, and had ultimately adopted a standard of 'equitable compensation' as the basis for the award (8 Iran-U.S. C.T.R 411).

Resolution 1803

Judge Lagergren also discussed Resolution 1803 (XVII) of the UN General Assembly of 1962 in his Separate Opinion, which he said supported a flexible approach that sought to "accommodate the legitimate expectations of the foreign investor together with the needs of a state undergoing a process of radical economic restructuring". He pointed out that Paragraph 4 of Resolution 1803 recognised that considerations of public utility, security or the national interest override purely individual or private interests, both domestic and foreign and provides for the payment of *appropriate compensation* for nationalisation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. Lagergren noted that "modern arbitral practice [lent] considerable weight to the acceptance of the standard enunciated in that Resolution, citing the decisions in *Texas Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic (Topco-Libya)*, *The Government of*

the State of Kuwait and The American Independent Oil Company (Kuwait-Aminoil), *OSCO v NIOC* and, in a different, commercial context *Banco Nacional de Cuba v Chase Manhattan Bank* (8 Iran-U.S. C.T.R 386-387).

Judge Holtzmann, in response, argued that Lagergren had incorrectly found the notion of *discounted* compensation to be "encapsulated in the 'appropriate compensation' formula" mentioned in various decisions and in academic works. According to Holtzmann, Lagergran had cited a number of sources apparently only because they had used the words 'appropriate compensation'. Holtzmann stated that "in attaching talismanic significance to these words", Lagergren had "confused substance with semantics". Holtzmann argued that, "in fact, the term 'appropriate compensation' was used in many of the cited sources to mean 'full compensation', as opposed to 'no compensation', not to mean 'partial compensation' as compared with 'full compensation'" (8 Iran-U.S. C.T.R 393). Holtzmann therefore argued that the cases Judge Lagergren had cited *did not* support his conclusion that compensation at a discount to full market value could be payable in certain circumstances. Holtzmann pointed out that none of the awards or judgments cited by Judge Lagergren actually awarded less than full compensation. (8 Iran-U.S. C.T.R 395). Holtzmann argued that, in fact, there was a "vast trend in decisions in cases on takings that provide for full compensation" (8 Iran-U.S. C.T.R 396).

Judge Amelie also discussed the relevance of Resolution 1803 in his Dissenting Opinion. He asked what "the 'general practice accepted as law' (*opinio juris communis*) on the question of compensation for nationalization" was in modern times. Amelie maintained "that the starting point for a statement of the law in modern times is Resolution 1803" (8 Iran-U.S. C.T.R 409). Further on in his Dissenting Opinion, Judge Amelie made the following remarks:

> "If indeed Resolution 1803 (XVII) is *opinio juris communis*, then international law defers to the laws of the nationalizing state on the rules of valuation for compensation. However, Resolution 1803 (XVII) adds that those rules must also reflect international law. This however does not imply that international law has any superiority over municipal law. … What Resolution 1803 implies therefore is that the valuation standards adopted by the nationalizing state must also meet standards recognized by international law. But here one should note the opinion of Dr. Mahmassani, in the LIAMCO case that, in the area of valuation standards for compensation, we find little help in either state practice or arbitral decisions. There is hardly any consistency or uniformity of practice either by the various states or by arbitral tribunals. Each tribunal that has undertaken such analysis, after confessing helplessness, has proceeded to call on either the principle of 'acquired rights', 'unjust enrichment', 'equity' or other variations and then fashioned its own ad hoc methods of valuation." (8 Iran-U.S. C.T.R 416)

Judge Amelie went on to add that "what is required is to start with the compensation methods put forward in the nationalizing state's legislation and subject these to the current requirements of international law that can be proven as being generally accepted" (8 Iran-U.S. C.T.R 416).

Academic writers

Judge Lagergren also relied on the views of a number of leading academics to support the conclusion reached in his Separate Opinion. He cites writings by Professor Oscar Schacter, Judge Rosalyn Higgins, Professor Burns Weston and Rudolf Dolzer to support his view that, owing to disagreements in international law over the standard of compensation, tribunals are "forced to undertake the task of carefully identifying what factors should be placed on the scale in any given case in arriving at an 'appropriate' level of compensation" (8 Iran-U.S. C.T.R 390).

Judge Holtzmann challenged Lagergren's reliance on these academic writers, arguing that their views are based on an almost exclusive reliance on lump-sum or other settlements of international disputes. Holtzmann notes that "such settlements are, at best, of limited use as sources of international law since they are not motivated by *opinio juris*, but rather are generally products of the particular prevailing social, economic, and political constraints bearing on the parties" (8 Iran-U.S. C.T.R 399).

II(ix) Elements of compensation

The Claimant requested only the amount it paid for its shares, as a fair measure of the value of the shares on the date of nationalisation. It argued that the position of Shargh was at least as good at the date of nationalisation (25 June 1979) as it was on the date that Claimant acquired its shares (3 May 1978). The Claimant contended that it would have been entitled to greater compensation had it made a valuation of the present value of its future profits, but the small amount involved in the case did not warrant the expense of such a valuation (8 Iran-U.S. C.T.R 380).

II(x) Principles of valuation

The Tribunal held that Claimant was entitled to the fair market value of its 20% share in Shargh. The Tribunal defined "fair market value" as "the amount which a willing buyer would have paid a willing seller for the shares of a going concern, disregarding any diminution of value due to the nationalisation itself or the anticipation thereof, and excluding consideration of events thereafter that might have increased or decreased the value of the shares" (8 Iran-U.S. C.T.R 380).

As noted above, Judge Amelie, dissenting, had disagreed that the Treaty of Amity was applicable to this case and had said that any compensation should be based on "the current position under international law" (8 Iran-U.S. C.T.R 417). As noted above, Judge Amelie stated that appropriate compensation might allow for less than full value compensation. He referred with approval to Judge Jimenez de Arechaga's enunciation of the factors that should be taken into account when determining the level of 'appropriate compensation'. These included: (i) whether the initial investment had been recovered, (ii) whether there had been undue enrichment as a result of a colonial situation, (iii) whether the profits obtained had been excessive, (iv) the contribution of the enterprise to the economic and social development of the country, its respect for labour laws and its reinvestment policies (8 Iran-U.S. C.T.R 417; Jimenez de Arechaga, *State Responsibility for the Nationalisation of Foreign Owned Property,* 11 N.Y.U.J.Int'l L. & Pol. 179 at 181

(1978)). Amelie stated that "with this type of approach, each situation would dictate the valuation methods to be used" (8 Iran-U.S. C.T.R 417).

II(xi) Method of valuation

The Tribunal considered whether the financial condition of Shargh on the date of nationalisation (25 June 1979) was substantially the same as it was on the date of purchase (3 May 1978). After considering Shargh's publicly audited accounts, the Tribunal concluded that Shargh's value had, if anything, increased following Claimant's investment (8 Iran-U.S. C.T.R 382).

The Tribunal rejected a report prepared by Amin & Co (a firm of accountants), which the Respondent had relied on to assert that no compensation was due to the Claimant. This report had concluded that Shargh had a negative net value. The Tribunal noted that the report had been prepared pursuant to a contract with Central Insurance Iran, the government body responsible for the regulation of insurance activities in Iran, and noted that the contract prescribed various non-standard accounting techniques which Amin & Co had been required to follow. Many of these accounting techniques were not explained in the report. The Tribunal accordingly held that it was impossible to evaluate the report's findings (particularly as the Respondent had failed to furnish either the text of the rules and directives Amin & Co were required to follow, or the underlying documents on which the report was based, despite being ordered by the Tribunal to do so; the Government of Iran had claimed that they were too voluminous) (8 Iran-U.S. C.T.R 382).

Judge Amelie, dissenting, said that the Tribunal had erred in rejecting the Amin report and stated that the Tribunal could have appointed an expert to travel to Iran to examine these documents (8 Iran-U.S. C.T.R 418). He accordingly found that the Claimants shares had a negative net value and no compensation should be granted.

Judge Amelie stated that "generally, three basic types of valuation methods are brought into play in nationalization claims, namely, the net book value method, the going concern method and the replacement value method". He then expressed the view that the *going concern* valuation and *replacement value* methods were "associated with the old notions of 'prompt, adequate and effective' compensation - which [had] been
replaced by the standard of 'appropriate' compensation". Amelie therefore seemed to reject these methods, but without expressly endorsing *net book value*, the third "basic type of valuation method".

II(xii) Approximation of compensation

The Tribunal accepted that the US dollar value of Claimant's 20 million Rial investment in Shargh was US$ 285000 plus interest at the date of nationalisation, despite hearing no evidence about the appropriate date for conversion of the Rial amount to US dollars. The Tribunal remarked that no discussion had taken place "concerning the subtle question as of which date the conversion of this Rial amount into dollars legally ought to take place - on the date of the nationalisation or the date of the award (in this case approximately the same as the date of payment) or some other date?" It also remarked that it had not "heard

any arguments on the question of "who bears the risk of changes in monetary value if a day other than the day of nationalisation is chosen" (8 Iran-U.S. C.T.R 383).

Judge Holtzmann pointed out that the Tribunals in *TAMS-AFFA* and *AIG* had also found that the date of nationalization should be used for the purpose of determining the rate of exchange to US dollars, but without limiting their holdings to the facts of the specific case (8 Iran-U.S. C.T.R 403).

Judge Amelie, in his Dissenting Opinion, stated that the obligation to pay compensation "should have been expressed in the currency of the investment, and if to be converted it should have been payable on the basis of the exchange rate prevailing at the date of payment" (8 Iran-U.S. C.T.R 420). Judge Amelie criticized the Tribunal for placing the risk of a change in the exchange rate on the Respondent, simply on the basis that the point had not been argued by the parties. Judge Amelie regarded the principle of nominalism as applicable to the denomination of the award: that the "obligation to pay £10 is discharged if the creditor receives what at the time of performance is £10, regardless of both their intrinsic and functional value" (quoting F. Mann, *The Legal Aspects of Money,* 84-85 (4th ed., 1982)). As the Claimants had paid for their shares in Rials, Judge Amelie argued that compensation (assuming any compensation was due to the Claimants, a finding Judge Amelie disagreed with) should be paid in Rials. Amelie quoted the following passage with approval:

> "Fluctuations of the currency in which a contract price is denominated changes the real value of contractual obligations. Parties may avoid this risk by using a currency stabilization clause, for example by indexing the currency to its gold value at the time of contracting. Arbitrators will generally enforce such a clause despite inconsistent provisions of national law. In the absence of such a clause, however, arbitrators have generally concluded that the parties have assumed the risks of currency fluctuation. A party to an international contract generally must render payment in the designated currency even though its value has changed." (8 Iran-U.S. C.T.R 421; W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration,* para 35.04 (1984)).

Judge Amelie added that there was also no other justification "for the payment of damages occasioned by any changes in monetary value except for the payment of interest on the principal amount" (8 Iran-U.S. C.T.R 425). In other words, the mere reduction of in the purchasing power of money was not an "item of damage which, notwithstanding the principle of nominalism, the law [recognized] as recoverable" (8 Iran- U.S. C.T.R 423). Amelie held that, even if the Tribunal was required to make its award in dollars, it was obliged to do so in accordance with "the rate of exchange prevailing at the time of the judgment, if not at the time of payment or enforcement" (rather than at the date of the expropriation) (8 Iran- U.S. C.T.R 426).

II(xiii) The impact of equitable considerations

The impact of equitable considerations, on the standard of compensation under international law, is discussed in detail under the headings "Standard of Compensation", "Principles of valuation" and "Method of valuation" above.

II(xiv) Amount of award

The Tribunal awarded Claimant US$285 000.

II(xv) Interest

The Tribunal awarded simple interest at a rate of 8.5% from the date of nationalisation (25 June 1979) to the date of the award (13 August 1985).

III Conclusion

This award has attracted a great deal of attention owing to the Tribunal's statement that "in the event of …large-scale nationalisations of a lawful character, international law has undergone a gradual reappraisal, the effect of which may be to undermine the doctrinal value of any 'full' or 'adequate' (when used as identical to 'full') compensation standard as proposed in this case)". Each of the members of the Tribunal wrote separate opinions expressing in depth views on the correctness and impact of that statement.

In the specific circumstances of the case, however, the Treaty of Amity was held to be a *lex specialis* that governed the standard of compensation and required the payment of compensation amounting to the full equivalent of the property taken. The Tribunal held that even in the absence of the Treaty of Amity, "in a case such as the present, involving an investment of a rather small amount shortly before the nationalisation, international law admits compensation in an amount equal to the fair market value of the investment." Issues of determining fair market value were simplified by the fact that the claimant had asked simply for the amount it had paid for the investment a year prior to the taking. The Tribunal concluded that, if anything, the value of the property taken had increased since the claimant had made its investment. The Tribunal accordingly awarded the amount claimed by the claimant.