IRAN 161-101 171-101 RIBUNAL دیوان داوری دعاوی ایران - ایالات متحده

RIGINAL DOCUMENTS IN SAFE

Case No. 161 Date of filing: 15 AUG 85

** AWARD - Type of Award _____
- Date of Award _____
_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of Judge Holtzmann
- Date 15 AUG 85
19 pages in English _____ pages in Farsi

** DISSENTING OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____
_____
- Date _____
_____ pages in English _____ pages in Farsi

R/12

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE No. 161
CHAMBER ONE
AWARD NO. 184-161-1

INA CORPORATION,
Claimant,

and

THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN,
Respondent.

SEPARATE OPINION OF JUDGE HOLTZMANN

I. Introduction

The Award in this case properly holds that the Claimant is entitled to receive full compensation for its 20% of the shares of an Iranian insurance Company, Bimeh Shargh, which was nationalized by the Islamic Republic of Iran. The Award correctly finds that this obligation flows from the Treaty of Amity between Iran and the United States of America, which provides that compensation "shall represent the full equivalent of the property taken."[1] I fully agree with the holding that these words of the Treaty of Amity "entitle the Claimant to be granted compensation equal to the fair market value of its shares in Bimeh Shargh, assessed as of the date

---

[1] Treaty of Amity, Economic Relations and Consular Rights, 15 August 1955, Art. IV, para. 2 (entered into force 16 June 1957) (hereinafter "Treaty of Amity").

of nationalization." Moreover, the Award rightly finds that this is the same amount to which the Claimant would be entitled in this case if principles of customary international law were to be applied rather than the lex specialis of the Treaty of Amity.[2]

I write this Separate Opinion because, in addition to its clear holdings, the Award also includes the following quite unnecessary -- and perhaps confusing -- obiter dictum:

> In the event of such large-scale nationalisation 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.

That statement is obiter dictum because it is extraneous to the present case. For this case is expressly decided on the basis of the Treaty of Amity, not under customary international law. And as stated in the Award, even if it were decided under principles of international law the same full compensation would be granted.[3]

---

[2]This accords with other opinions in this Tribunal. As my colleague Judge Aldrich has written, "the applicable rules of international law [governing compensation for a taking] are not significantly different whether the Treaty applies or not." Concurring Opinion of George H. Aldrich in ITT Industries, Inc. and The Islamic Republic of Iran, et al., Award No. 47-156-2, at 10 (filed 26 May 1983), reprinted in 2 Iran-U.S. C.T.R. 348, 354. See also Concurring Opinion of Richard M. Mosk in American International Group, Inc. and Islamic Republic of Iran, Award No. 93-2-3, at 9 (filed 30 Dec. 1983) reprinted in 4 Iran-U.S. C.T.R. 111, 116.

[3]The Award expressly states that the nationalization in this case was not the type of "large-scale" nationalization to which the quoted paragraph refers. Award at 8.

I would have preferred that the Award in this case -- as any other Award -- be confined to its actual decision and an explanation of the reasons for it, and that it not include obiter dictum. The paragraph in itself, however, says little. Its observation that the standards for compensation in some nationalizations are undergoing gradual reappraisal is a truism; for, surely, all aspects of law are, and deserve to be, regularly re-examined. And the paragraph merely says that such reappraisal "may" perhaps "undermine" these standards. It stops far short of affirming that any such undermining -- let alone any change -- has actually occurred.

What difficulties there may be with the paragraph stem from the footnote to it: "See Separate Opinions." For the paragraph is a "hook" upon which Judge Lagergren has hung a further obiter dictum in the form of a Separate Opinion arguing his view that international law no longer favors full compensation for all nationalizations but, rather, tends in some cases toward "discounting" the amount that a government must pay for private property that it chooses to take. That is, of course, his personal view to which he is entitled, although it might perhaps be more appropriately put forward in some other context; it is not an opinion of this Tribunal. Nor is it the view that international courts and arbitral tribunals take of the law, although it has been favored by some commentators and opposed by others.

Normally, one would hesitate to comment at length on an obiter dictum piled on an obiter dictum. However, Judge Lagergren's eminence commands our attention and impels careful analysis of his views, even when they do not constitute judicial precedent. Therefore, I find it necessary to explain why I believe that the Separate Opinion is incorrect, unsupported by the bulk of the sources it cites and contrary to a significant body of case law that it ignores.

I also write separately to comment on a few other points, notably the unreasonably low rate of interest provided in the Award and the refusal to grant the Claimant any of the costs of arbitration to which it is entitled under the Tribunal Rules.

II. The Standards of Compensation Under Customary International Law in Cases of Takings

The thesis of Judge Lagergren's Separate Opinion is that in some cases of "large-scale" nationalizations current principles of international law no longer require payment of full compensation equivalent to the fair market value of the property at the time of taking, and that, instead, the value should be "discounted" by some amount so that only partial compensation is paid.[4]

That theory and the discussion of it in the Separate Opinion are fundamentally flawed. Simply put, the sources the Separate Opinion cites do not support its thesis. While some commentators have put forth theories of partial compensation in certain circumstances, and while some negotiated settlements embody compromises that provide for less than full compensation, the fact is that courts and international tribunals when faced with the responsibility of deciding actual cases overwhelmingly follow the rule of awarding full compensation for governmental takings.[5]

---

[4]The Separate Opinion appears to use the word "discounted" in the general sense of "reduced" or "lessened." That would result in what is often called "partial" compensation. This use of the word "discounted" does not relate to the so-called "discounted cash flow" method of determining fair market value, which is a commonly used valuation technique.

[5]The difference between propounding theories and acting upon them has long been recognized in life and recorded in

(Footnote Continued)

The first error of the Separate Opinion is that it incorrectly finds the notion of discounted compensation to be "encapsulated in the 'appropriate compensation' formula" mentioned in various decisions and in other contexts. Accordingly, it cites a number of sources apparently only because they use the words "appropriate compensation." In attaching talismanic significance to these words, the Separate Opinion confuses substance with semantics. In fact, the term "appropriate compensation" is 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." Thus, for example, the Separate Opinion seeks to find support for its thesis in the use of the term "appropriate compensation" in U.N. General Assembly Resolution 1803 (XVII). When that Resolution was adopted in 1962, the delegates from the United States and from Madagascar noted that "appropriate" meant at least "adequate," i.e., "full," compensation.[6] See 17 U.N. GAOR C.2 (846th mtg.), para. 3, UN Doc. A/C2/SR.846 (1962); 17 U.N. GAOR C.2 (850th mtg.), para. 16, UN Doc. A/C.2/SR.850 (1962); Schwebel, The Story of the U.N.'s Declaration on Permanent Sovereignty Over Natural Resources, 49 A.B.A.J. 463, 465-66 (1963). The United States withdrew an amendment that would have made the point explicit on the understanding that the term would be so interpreted. Id. at 466. A Soviet amendment that would have provided for no duty to compensate was then defeated by a recorded vote. Id.

(Footnote Continued)
literature: "'And it is so comfortable to have theories that one is not bound to carry out' said Phineas." A. Trollope, Phineas Finn 404 (Penguin ed. 1980).

[6]The Award in the present case confirms that the term "adequate" compensation is often used as being "identical" to "full" compensation. See Award at 8.

This meaning--full compensation--is one commonly given to the term "appropriate compensation" by commentators[7] and by arbitral tribunals, including those that are cited in the Separate Opinion. For example, Professor Dupuy as sole arbitrator in the TOPCO-Libya case stated that the test of "appropriate compensation" contained in Resolution 1803 expressed an opinio juris communis. The context of his statement was not, however, a discussion of full versus partial compensation, but rather one of compensation versus no compensation. Libya in that case argued in a memorandum objecting to the arbitration that certain United Nations resolutions were evidence of a rule of international law exempting nationalizations from international legal standards such as the requirement that compensation be paid. Professor Dupuy rejected this view, noting that the only U.N. resolution that had achieved general acceptance was Resolution 1803, which provided that nationalization and compensation were subject not only to the laws of the nationalizing state, but also to international law. Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic, 17 I.L.M. 3, 30 (1978) (Para. 87).

Moreover, when Professor Dupuy proceeded to discuss the standard of compensation -- the question relevant here -- it is clear that he understood "appropriate compensation" to mean full compensation. His award quotes, and explicitly relies on as precedent, the well-known principle of the Chorzów Factory case that there must be restitution to re-establish the situation that would have existed had the nationalization not occurred: "[r]estitution in kind, or,

---

[7] See, e.g., Olmstead, Krauland & Orentlicher, Expropriation in the Energy Industry: Canada's Crown Share Provision as a Violation of International Law, 29 McGill L.J. 439, 458 (1984) (Resolution 1803 "recognized and reinforced the strict duty to compensate").

if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear." [1928] P.C.I.J., Ser. A, No. 17, at 47, quoted in 17 I.L.M. at 32 (Para. 97). While the TOPCO award directs restitutio in integrum, it emphasizes, as did the Chorzòw Factory case, that awards of damages are intended to place the claimant in the same position as would restitutio in integrum. 17 I.L.M. at 34 (Para. 102).[8]

Similarly, the thesis of the Separate Opinion finds no support in its citation of this Tribunal's decision in Oil Field of Texas, Inc. and The Government of the Islamic Republic of Iran et al., Interlocutory Award No. ITL 10-43-FT (1982), reprinted in 1 Iran-U.S. C.T.R. 347. That Award used the term "appropriate compensation" not to suggest that less than full compensation might be paid, but rather to emphasize that international law requires compensation. The Tribunal was rejecting Iran's contention that in a de facto take-over by a State of a joint venture, the State had no obligation to pay the joint venture's debts:

> From the point of view of general principles of law it would be difficult to accept that the de facto succession which took place would have as a consequence that [the National Iranian Oil Company] could totally escape its previous obligation to provide the funds necessary to meet the contractual liabilities arising out of contracts entered into by [the joint venture] for the provision of services and goods regarding operations relating to exploration, development

---

[8] "'[M]onetary compensation must, as far as possible, resemble restitution . . . .'" 17 I.L.M. at 34 (para. 102), quoting E. Jiménez de Aréchaga, in Manual of Public International Law 531, 567 (M. Sorenson ed. 1968). The nationalization at issue in the TOPCO arbitration was deemed to be part of a policy of industry-wide nationalization. See 17 I.L.M. at 25 (para. 74). The arbitrator found that since Libya had bound itself not to nationalize for the period of the concession, restitution, rather than compensation, should be ordered.

> and production of crude oil and natural gas . . . . If a de facto succession of rights and obligations in a certain field has taken place without the observance of . . . rules under the applicable national law [for the protection of creditors during mergers], it is even more important to establish a rule under international law that such succession must have as a consequence that the surviving company is under an obligation to pay appropriate compensation taking into account all the circumstances of the case.

Oil Field of Texas at 22. Thus, the Tribunal was simply using the term "appropriate compensation" in answer to the argument that no compensation was payable, not to signify that in some circumstances only partial compensation might be due.

Quite apart from the semantical confusion of the discussion in the Separate Opinion is the more fundamental point that none of the awards or judgments that it cites awarded less than full compensation. Thus, in the Aminoil arbitration, the arbitral tribunal rejected a purported customary rule of international law that prescribed "incomplete" compensation. That tribunal found that the precedents cited to support partial compensation were settlement agreements with ambiguous terms concluded under circumstances that excluded any expression of opinio juris. The Government of the State of Kuwait and The American Independent Oil Co. (Aminoil), 21 I.L.M. 976, 1035-37 (1982) (para. 155-157). The Aminoil tribunal awarded what it found to be the full, going-concern value of the expropriated rights. Id. at 1041 (para. 178(1)). Similarly, as noted, the sole arbitrator in the TOPCO case awarded restitutio in integrum, which is no less than full compensation.

The Separate Opinion also cites Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981). That case involved the nationalization of virtually all the private banks in Cuba. See id. at 878. In these circumstances, the United States Circuit Court of Appeals

found that "appropriate compensation" meant full compensation. Id. at 892-93.

In addition to the TOPCO, Aminoil and Banco Nacional de Cuba cases cited in the Separate Opinion and discussed above, there is a vast trend of decisions in cases of takings that provide for full compensation.[9] Professor M.H. Mendelson recently summarized this extensive body of international law as follows:

---

[9]See the following recent examples: AGIP Co. v. Popular Republic of the Congo, 21 Int'l Legal Mat'ls 726 (ICSID 1982) (full compensation in nationalization of oil products distribution industry); Benvenuti et al. v. People's Republic of the Congo, 21 Int'l Legal Mat'ls 740 (ICSID 1982) (full compensation in expropriation of plastic-bottle factory); Libyan American Oil Co. v. Government of the Libyan Arab Republic, 62 Int'l L. Rep. 140, 217-218 (1977) (Mahmassani, sole arbitrator) (general oil industry nationalization: full market value of physical plant and equipment, "equitable compensation" for lost profits using "prior [sic], adequate and effective" standard as "a maximum and a practical guide"). The recent cases rely on a long line of earlier decisions both before and after the Chorzów Factory case. See, e.g., Norwegian Shipowners' Claims (Norway v. U.S.A.), 1 Rep. Int'l Arb. Awards 308, 334, 338, 339 (Perm. Ct. Arb. 1922) (compensation for requisitioned ships at fair actual value of the property taken); Delagoa Bay Claim (U.S.A., U.K. v. Portugal) (1900), quoted in III M. Whiteman, Damages in International Law 1694, 1698 (1943) ("full reparation" for taking of railway concession, even if regarded as legal expropriation); Shufeldt Claim (U.S.A. v. Guatemala), 2 Rep. Int'l Arb. Awards 1080, 1099 (1930) (Sisnett, sole arb.) (full compensation for confiscation of chicle concession); Anglo-Iranian Oil Co. Ltd. v. Jaffrate, [1953] 1 W.L.R. 246, 253 (Sup. Ct. Aden 1953) (compensation for nationalization of oil company must be "adequate, effective and prompt"). See also Sapphire International Petroleums Ltd. v. NIOC, 35 Int'l L. Rep. 136, 185-86 (1963) (Cavin, sole arb.) (full compensation for breach by State party of oil exploration concession agreement); Lighthouses Arbitration (France v. Greece), 23 Int'l L. Rep. 299, 300-01 (Perm. Ct. Arb. 1956) (full compensation for taking of concession, under terms of concession agreement); Amco Asia Corp. et al. v. Republic of Indonesia (Merits), paras. 265-68 (ICSID 20 November 1984) (full compensation for failure to protect aliens, but no expropriation found.)

> Whilst the cases do not espouse the [prompt, adequate and effective] formula in so many words, they do require payment of full compensation and provide no support for a flexible standard in this regard.

Compensation for Expropriation: The Case Law, 79 Am. J. Int'l L. 414, 415 (1985).[10] The case law thus underlines -- not undermines -- the continuing doctrinal value of the full compensation standard.

The support in the Separate Opinion for its thesis of discounted compensation therefore boils down to the writings of a handful of commentators. I do not deny that writings of highly qualified commentators can be a subsidiary source

---

[10] Professor Mendelson's article is a critique of the article by Professor Oscar Schachter, Editorial Comment: Compensation for Expropriation, 78 Am. J. Int'l L. 121 (1984), which is cited in the Separate Opinion.

The Separate Opinion also finds no support in its quotation from the Report of the European Commission of Human Rights in the case of Sir William Lithgow and Others against United Kingdom (adopted 7 March 1984). First, the Commission is absolutely explicit that its remarks were directed to compensation required to be paid to nationals of the expropriating state under the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol signed 20 March 1952), not the compensation required by customary international law in cases of expropriations of the property of aliens. In the latter category of cases, the Commission recognized that general principles of international law conferred "an additional concrete guarantee of compensation." Lithgow, para. 377. Moreover, the individual applicants and the Government of the United Kingdom all agreed that if general international law were applicable to the case (by virtue of a provision in the Protocol incorporating "the general principles of international law"), it would require "prompt, adequate and effective compensation" to be paid in the large-scale, industry-wide nationalizations at issue there. Id. paras. 237, 254. (The Commission declined to find that under the Convention the general principles of international law of takings applied to nationals and therefore decided the case under other of the Convention's provisions.)

of international law, but the writings cited in the Separate Opinion relies are not persuasive in this context.

For example,the Separate Opinion refers to an editorial comment by Professor Oscar Schachter[11] on a quite early draft of the Restatement of Foreign Relations Law of the United States (Revised) (hereinafter called "the Restatement").[12] The painstaking process that produces the Restatement involves dialogue among many experts in the field. Professor Schachter's comment, and the opposing views of Professor Mendelson, are but part of that dialogue. The important thing now is the consensus that emerges from the dialogue. Thus, on the subject of compensation for a governmental taking the Restatement's Tentative Final Draft of 15 July 1985 provides:

---

[11] Supra n.9.

[12] The Restatement is the work of the American Law Institute ("ALI"), a private organization consisting of leading American judges, lawyers and professors. The Restatement is prepared by Reporters expert in the field. The Chief Reporter for the current revision of the Restatement is Professor Louis Henkin of Columbia Law School, and the Associate Reporters are Professors Andreas F. Lowenfeld of New York University Law School, Louis B. Sohn of University of Georgia Law School, and Detlev F. Vagts of Harvard Law School. The Tentative Final Draft referred to herein reflects, inter alia, the comments on earlier drafts by a group of Advisors who are Americans and of a distinguished International Advisory Panel, as well as by the ALI Council. It will be further reviewed by the Council of the ALI and a final vote by the Council and the ALI membership is expected to take place in 1986.

The function of the Restatement is described in the Introduction to the Final Tentative Draft as follows:

> The positions or outlooks of particular states, including the United States, should not be confused with what a consensus of states would accept or support. Thus, the Restatement of this subject, in stating rules of international law, represents the opinion of the American Law Institute as to the rules

(Footnote Continued)

> for compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and must be paid at the time of the taking, or within a reasonable time thereafter with interest from that date, and in a form economically usable by the foreign national.

Id. sec. 712(1). The Comments and Reporters' Notes to this section make clear that the use of the qualification "in the absence of exceptional circumstances" is intended to allow for the possibility of what the Reporters call "[t]he agricultural land reform exception." Id., Reporters' Note 3. The Comments emphasize that the exception is very narrow:

> An exceptional circumstance that has been specifically suggested and extensively debated, but never authoritatively passed upon by an international tribunal, involves national programs of agricultural land reform. See Reporters' Note 3. Takings of agricultural land, unlike takings of mineral resources or of a going business concern, typically do not generate funds from which the government could make compensation . . . .

Id., Comment d. The Restatement's explicit exclusion of nationalizations of mineral-resource investments and going business concerns makes clear that any such exception would not extend to all large-scale nationalizations, as the Separate Opinion proposes. Even as so limited, the Restatement recognizes that no international tribunal has accepted the exception.

Professor Schachter shares with other writers cited in the Separate Opinion[13] an almost exclusive reliance on

---

(Footnote Continued)
> that an international tribunal would apply if charged with deciding a controversy in accordance with international law.

[13] I.e., Dolzer, Higgins and Weston but with the notable exception of Sir Hersch Lauterpacht, whose views I
(Footnote Continued)

lump-sum or other settlements of international disputes in deriving contemporary dispute-resolution practice.[14] 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. This has been the conclusion of arbitral and judicial tribunals that have considered such evidence. Thus, for example, the International Court of Justice indicated in the Barcelona Traction case that such settlement agreements establish no norms and therefore do not provide generally applicable legal guidance. [1970] I.C.J. Rep. 3, 40 (para. 61). Likewise, the international arbitral tribunal in the Aminoil case held with respect to compensation agreements in oil nationalization cases that "opinio juris seems a stranger to consents of that type . . . . [T]he economic pressures that lay at the root of them had nothing to do with law, and do not enable them to be regarded as components of the formation of a general legal rule." 21 I.L.M. at 1036-37 (para. 157). Similarly, the United States Circuit Court of Appeals in the Banco Nacional de Cuba case rejected the evidence relied upon by the writers cited in the Separate Opinion:

> The notion that, merely because a negotiated settlement will not result in full payment, a victim of expropriation has no right to more than partial compensation simply confuses adjudication with compromise. Partial compensation inheres in

---

(Footnote Continued)
discuss infra.

[14] Schachter, supra n.9, at 124 & n.18; Higgins, The Taking of Property by the State: Recent Developments in International Law, 176 Recueil des Cours 259, 293-94 (1982); Weston, The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth, 75 Am. J. Int'l L. 437, 454 (1981); Dolzer, New Foundations of the Law of Expropriation of Alien Property, 75 Am. J. Int'l L. 553, 559-560 (1981).

> the process of negotiation and compromise; we should no more look to the outcome of such a process to determine the rights and duties of the parties in expropriation matters than we would look to the results of settlements in ordinary tort or contract cases to determine the rules of damages to be applied. Were we to adopt the view pressed by Banco Nacional, either there would be no incentive for an expropriating state to negotiate a settlement, or, more likely, the prospect of a partial compensation award in a court would lead to the negotiation of a settlement at an even lower level. Carrying the process to its logical conclusion, the courts would then be asked to take into account these lower settlements in making the next adjudicated awards. We are concerned with the parties' rights and duties, and we do not believe that international law as to compensation is merely descriptive of their conciliatory actions.

658 F.2d at 892.

The Separate Opinion also relies upon a single sentence in a commentary by Sir Hersch Lauterpacht in 1955 in which he stated that partial compensation might be appropriate in connection with large-scale governmental interference with private property. That statement appears to be the expression of a search for a future rule, not the description of an established principle of law. Thus, although the learned work in which this statement appears contains extensive citations whenever it reports on the existing state of the law, this sentence is supported by no citation of authority. Moreover, on the following page Lauterpacht reports that the Chorzòw Factory case is "[a]n authoritative exposition of and decision on the measure of damages" for takings. L. Oppenheim, International Law 353 n.1 (8th ed. H. Lauterpacht 1955). As noted above, the Chorzòw case is the classic exposition of the requirement of full compensation for expropriation. Lauterpacht's statement does not, therefore, purport to be lex lata; it is rather a suggested approach, one, moreover, that international tribunals have not followed.

This Tribunal has followed the mass of case authority in its two earlier nationalization cases and has awarded full compensation in American International Group, Inc. et al. and Islamic Republic of Iran et al., Award No. 93-2-3 (1983), reprinted in 4 Iran-U.S. C.T.R. 96 ("AIG"), and Tippetts, Abbett, McCarthy, Stratton and Tams-Affa Consulting Engineers of Iran et al., Award No. 141-7-2 (1984) ("TAMS").

AIG was the claim of the shareholders of another Iranian insurance company nationalized by the same Law of Nationalization of Insurance and Credit Enterprises of 25 June 1979 as is involved in the present case. The Respondents argued, inter alia, that only "partial compensation" should be paid, citing United Nations resolutions using the term "appropriate compensation." In addition, they argued that if full compensation was to be paid, the company should be valued on the basis of its "net book" value rather than its "going concern" value. Chamber Three of the Tribunal rejected these arguments and held that the company should be valued "as a going concern, taking into account not only the net book value of its assets but also such elements as good will and likely future profitability, had the company been allowed to continue its business under its former management." Id. at 21. This was the "fair market value" of the nationalized company's shares. Id. at 17. The Award did not specify whether it was made under the Treaty of Amity or customary international law, apparently because it considered that the standard of compensation would be the same under either rule. The Tribunal stated, "[I]t is a general principle of public international law that even in a case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value

of the property taken," and it awarded an amount it considered equivalent to full value. Id. at 14-15.[15]

Similarly, Chamber Two flatly held in TAMS, in which Claimant's interest in an engineering partnership was expropriated, that "[t]he Claimant is entitled under international law and general principles of law to compensation for the full value of the property of which it was deprived." TAMS at 10. In a footnote, the Tribunal cited the Chorzòw Factory and Norwegian Shipowners cases, and noted that the parties had not argued the question of the relevance of the Treaty of Amity. Id. at 10 n.2. Judge Shafeiei dissented, arguing inter alia, that international law provided only for partial compensation and that the two cited decisions were "age-old cases [that] should be confined to their special facts." Supplementary Comments by Judge Shafie Shafeiei on his Non-signature of the Award in Case No. 7, at 18 (filed 27 July 1984).[16]

Thus it can be seen that whatever "reappraisal" of customary international law may have occurred in recent years, it has not led courts or arbitral tribunals to adopt a standard of partial compensation. There are sound reasons

---

[15] Judge Mosk in a concurring opinion stated that it appeared that the award was based upon customary international law, and noted that "there are no meaningful differences between the obligations for compensation set forth in the Treaty of Amity and those provided by customary international law." Concurring Opinion of Richard M. Mosk at 9 (filed 30 Dec. 1983).

[16] See also Concurring Opinion of George H. Aldrich in ITT Industries, Inc. and The Islamic Republic of Iran, et al., Award No. 47-156-2, at 10 (filed 26 May 1983), reprinted in 2 Iran-U.S. C.T.R. 348, 354 (international law would provide full compensation for expropriation of interest in Iranian company); Dames & Moore and The Islamic Republic of Iran et al., Award No. 97-54-3, at 22 (1983) reprinted in 4 Iran-U.S. C.T.R. 212, 223 (full compensation for expropriation of equipment).

of law and policy why this should be so. For justice demands, as it always has, that a party who has been deprived of his property should be made whole; and in an economically interdependent world the law should encourage investment, not discourage it by increasing its risks.

III. Interest

The Award grants the Claimant interest at the rate of only 8.5% on the unpaid compensation due to it. That rate is unreasonably low and ignores the policy of this Chamber stated in our Award in Sylvania Technical Systems and the Government of the Islamic Republic of Iran, Award No. 180-64-1, at 30-34. In that case this Chamber stated:

> This Chamber finds it in the interest of justice and fairness to develop and apply a consistent approach to the awarding of interest in cases before it. . . . In the absence of a contractually stipulated rate of interest, the Tribunal will derive a rate of interest based approximately on the amount that the successful Claimant would have been in a position to have earned if it had been paid in time and thus had the funds available to invest in a form of commercial investment in common use in its own country. Six-month certificates of deposit in the United States are such a form of interest for which average interest rates are available from an authoritative official source.

Id. at 31-32. On that basis, interest of 12% was awarded in Sylvania; approximately the same amount should in my view have been awarded here.

Instead, the Award "adopts the rate used by Chamber Three in a claim concerning a parallel case of nationalization of an insurance company pursuant to the same law, the American International Group case." Award at 16 n.9. In AIG, however, there was no particular reason for the choice of 8.5%. Judge Mosk in his Concurring Opinion in that case objected that "interest awarded should be based on prevailing interest rates" and noted that he saw "no reason why the rate of interest in this case [8.5%] should be less

than awarded by the Tribunal at about the same time in another expropriation claim. Dames & Moore and The Islamic Republic of Iran, Award No. 97-54-3 (19 December 1983)." Concurring Opinion of Richard M. Mosk in AIG, supra, at 18-19. It was just this lack of "uniformity" that Chamber One noted in the Sylvania case and attempted to establish a precedent to correct.

I would have preferred to respect the reasoned approach of this Chamber in the Sylvania case, but I join in the Award in order to form a majority.

IV. Costs

This is a case in which the Respondent admitted that there had been a taking and in which the Claimant was forced to sue in order to receive any compensation. Yet the Award refuses to grant the Claimant any of its costs of the arbitration, despite the provisions of the Tribunal Rules. See Articles 38 and 40. Those Rules mandate that the Tribunal shall fix the costs of the arbitration in its award and require that they be borne by the unsuccessful party, subject to certain conditions. This is a subject that I have analyzed in some detail in my Separate Opinion on Awarding Costs of Arbitration in the Sylvania case, and I need not repeat that analysis here. For the reasons previously expressed, I would have awarded costs in this case.

V. Other Points

There are two other points in the Award as to which brief explanations may be warranted:

1. The Award observes that nationalizations such as occurred in this case are "among the risks which investors must be prepared to encounter." Award at 8. While it is,

of course, true that investors risk losing the opportunity to continue their businesses, they do not risk not being paid full compensation for their loss because that is guaranteed to them by law.

2. The Tribunal utilizes the rate of exchange from dollars to rials on the date of nationalization in computing damages in this case. The Award suggests that this holding is limited to the particular procedural facts of this case. Nevertheless, it is to be noted that both of the other Chambers of the Tribunal have dealt with the same issue in nationalization cases and have likewise used the date of nationalization for this purpose, but without limiting their holdings in any way. See AIG, supra, at 13 n.5; TAMS, supra, at 17.[17]

Howard M. Holtzmann

The Hague
15 August 1985

[17] See also F.A. Mann, The Legal Aspects of Money 546 (4th ed. 1982).