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...ES CLAIMS TRIBUNAL

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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.

AWARD

Appearances:

For the Claimant: Mr. Terence F. Gilheany,
Mr. Leonard van Sandick,
Attorneys,
Mr. Ernest Auerbach,
Representative of INA
Corporation,

For the Respondent: Mr. Mohammad K. Eshragh,
Agent of the Government of the
Islamic Republic of Iran,
Mr. Assadollah Nouri,
Mr. Gholam Hossein Jabari,
Miss Tayebah Rejaie,
Legal Advisers to the Agent,
Mr. Mehrdad Bagheri,

~~Vice-President, Central~~
Insurance of Iran.

Also present: Ms. Jamison M. Selby,
Deputy Agent of the Government
of the United States of America.

I. (i) Factual background

On 17 December 1981 INA Corporation ("INA"), a United States corporation incorporated under the laws of Pennsylvania, filed with the Tribunal a claim for compensation for the expropriation of its 20% shareholding in Bimeh Shargh (Public Joint Stock Company) ("Shargh"), an Iranian insurance company. INA claims US $285,000 representing what it alleges to be the going concern value of its shares, together with interest at 17% and legal costs.[1]

INA acquired its shares under an Agreement entered into on 3 May 1978 between INA International Insurance Company Ltd. ("INA International"), a wholly-owned subsidiary of INA, incorporated in Bermuda; Shargh; and Arya National Shipping Lines ("Arya"). By this Agreement INA International purchased Arya's 20% shareholding in Shargh, amounting to 4,000 of the 20,000 issued shares. Under Shargh's Articles of Association, 20% was the maximum holding permitted to any one shareholder. The proposed investment by INA International was approved by Central Insurance of Iran ("CII"), the Government body responsible for the regulation of insurance activities in Iran, by a letter to Shargh of 27 December 1977. Pursuant to the Agreement, INA

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[1] The Statement of Claim also included an element of approximately $15,000 representing INA's share of the profits of Shargh during its brief period of ownership, but this was not pursued by the Claimant.

International paid Arya 20 million Rials for Arya's 4,000 shares of Shargh.

Shargh was incorporated under the laws of Iran in 1949 with an initial share capital of 100 million Rials. When in 1974 its capital value was increased to 200 million Rials, the increased capitalisation was not paid up either by Arya or the other shareholders at the time, but they were obligated to do so at a later date. This was reflected in the Purchase Agreement, Article 1 of which provided that INA International would pay 20,000,000 Rials "for the purchase of 20%, or 4000 shares of the 20,000 shares of Shargh at par value (Rials 10,000) (50% are paid up and 50% are to be paid up)." Article 2 of the Agreement provided that INA International was to pay up the additional capital contribution of 20 million Rials no later than 17 June 1979.

It is alleged by INA that shortly before this payment fell due, it was postponed with the approval of CII, to 17 June 1981. This is not accepted by the Respondent, who argued in its Statement of Defence that Article 188 of the Commercial Code of Iran requires that any increase in capitalisation must be paid for in full at the time of subscription, and that this provision cannot be waived.

The shares purchased from Arya were registered in the books of Shargh on 3 May 1978 in the name of "INA Corporation", and not "INA International Insurance Company Ltd." INA sought to clarify this discrepancy in response to an Order of the Tribunal of 21 January 1983 by explaining that the registration in the name of INA itself was erroneous. When the error was discovered, the shares were transferred into the name of INA International in October 1979, though there is no evidence that this was ever formally recorded in the share registration books of Shargh itself.

The Tribunal decided to resolve the resultant ambiguity as to the identity of the Claimant by concluding, in its Order of 19 August 1983, that for the purposes of this case only, INA Corporation is deemed to be the direct owner of the 20% equity interest in Shargh and thus is the proper Claimant. At the Tribunal's request, following an agreement of the Parties, INA International submitted during the course of the hearing of the case a release of the two Respondents originally named, the Government and CII, "from all claims by INA International Insurance Company against the said Respondents arising out of the subject of this case".

On 25 June 1979 the Law of Nationalisation of Insurance and Credit Enterprises was enacted in Iran. Article 1 provides as follows:

> "To protect the rights of the insured, to expand the insurance industry and the entire State and to place it at the service of the people, from the date of this law, all insurance enterprises in Iran are proclaimed nationalised with acceptance of the principle of legitimate conditional ownership."

By operation of this law, Shargh, in common with other Iranian insurance companies, was brought under the control of a joint Board of Directors comprising the President of CII, the Executive Director of Iran Insurance Company and representatives from certain Government ministries.

(ii) Points in issue

The essence of the dispute between the Parties lies not in the fact of nationalisation having taken place, which is agreed, but in the determination of the level of compensation, if any, which should be paid to the shareholders of Shargh as a consequence. No compensation has been paid to date. INA argues for compensation that is "prompt, adequate and effective", on the basis both of

general principles of international law and the Treaty of Amity, Economic Relations and Consular Rights of 15 August 1955. INA asks the Tribunal to accept the amount of its initial investment in Shargh as the best available indicator of the value of the company as a going concern at the time of nationalisation just over one year later.

INA relies in support of its position on the last annual audit carried out by Shargh's accountants, Daghigh & Co., which shows a net profit of 1,913,475 Rials for the year ending 20 March 1979 (i.e., for the year 1357).

The respondent Government concedes that, in principle, the wording of Article 1 of the nationalisation law does, in appropriate cases, envisage the payment of compensation to private shareholders of nationalised insurance companies, but that this must be based on the "net book value" of the company. The Respondent explained that a mechanism for the assessment and payment of compensation exists pursuant to which CII commissioned an official valuation to be carried out by an independent firm of accountants to assess the value of each of the twelve nationalised companies at the date of nationalisation. It was further explained that a composite report was to be made by CII to the Joint General Assembly consisting of five Government Ministers, established pursuant to the nationalisation law, who would in due course make their recommendation to the Government as to the appropriate level of compensation, if any, to be paid.

In the case of Shargh, the audit was undertaken by Amin & Co., a firm of accountants practising in Iran, pursuant to an agreement entered into with CII on 14 August 1979 which set out the terms of reference of the valuation.

The Amin report shows losses as at 25 June 1979 of 4,289,915 Rials. Two alternative methods used to arrive at a net

value of Shargh produced, respectively, negative figures of 69,206,871 and 95,008,871 Rials.

At the date of the hearing, 31 August 1983, the composite report was in the process of compilation. On the basis of the findings of Amin & Co., the Respondent contends that Shargh had "a negative value" and that no compensation is payable. Far from being profitable, it is argued, the company had operated consistently at a loss. The price paid by INA for its shareholding was in excess of the true market value of the shares and was not now recoverable.

INA argues that the Tribunal has been furnished with insufficient information as to the basis of the Amin valuation, the principles on which it was undertaken and the documents and data on which it was based, for it to be accorded any evidential value. The Tribunal's Order of 21 January 1983 required production, inter alia, of the material which had been made available to Amin & Co., but no such material was filed and the Respondent contended at the hearing that it was too voluminous to be conveniently assembled. The Tribunal decided to admit the Amin Report as evidence but to take account of the lack of supporting documentation in assessing the evidential weight to be accorded to it.

The Respondent filed a counterclaim seeking to hold INA liable for an unspecified amount representing the "negative" value of Shargh to the extent of its shareholding. INA denies any such liability, relying on the principle of the limited liability of shareholders as embodied in Article 1 of the Commercial Code of Iran.

The Respondent further claims the amount of 20 million Rials from INA, being the unpaid value of 50% of its shares in Shargh outstanding since the increase in capitalisation. INA contends that this was a debt owed to Shargh which

~~either vested in the Government of Iran or became~~ extinguished upon nationalisation. INA alleges that the extension of the due date for payment until 17 June 1981 removes this claim from the ambit of the Tribunal's jurisdiction.

The claim as originally filed named CII as a respondent in addition to the Islamic Republic of Iran. During the course of the hearing the Tribunal decided, in accordance with CII's plea, that it was not a proper or necessary respondent to a claim based on expropriation. Accordingly the claim against CII and CII's counterclaim were dismissed; the counterclaim remained insofar as it was asserted by the Government.[2]

II. The general and particular international law applicable

The Claimant has characterised as unlawful the failure of the Government of Iran to determine and pay compensation to it as shareholder of Shargh upon that company's nationalisation. It has further argued that the standard of "full" or "adequate" compensation, which it describes as the value of its share of the company as a going concern, should be brought to bear in the present situation. The Respondent does not contest that compensation is in principle payable to INA, but asserts that it should be calculated on the basis of the net book value of the nationalised shares.

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

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[2] On 17 January 1983 CII filed a Supplemental Counterclaim against INA's Belgian subsidiary for 17,920,491 Rials allegedly due under a reinsurance contract, but this was disallowed by the Tribunal in its Order of 26 January 1983.

"nationalisations" - are not per se unlawful. A lawful nationalisation will, however, impose on the government concerned the obligation to pay compensation.

This case presents, in addition, 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. During the course of the post-Revolutionary economic restructuring in Iran, the banks were nationalised on 7 June 1979. The insurance companies, including Bimeh Shargh, were nationalised by decree on 25 June 1979, and then on 5 July 1979 there followed the nationalisation of heavy industries. Such measures number among the risks which investors must be prepared to encounter.

In the event of such 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.[3]

However, the Tribunal is of the opinion 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.

Moreover, for the purpose of this case we are in the presence of a lex specialis, in the form of the Treaty of Amity, which in principle prevails over general rules.

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[3] See Separate Opinions.

The continued validity and effect of the Treaty have not been contested by the Respondent in any of the written pleadings in this case. During the pre-hearing Conference held on 18 January 1983, the Agent of the Government of Iran indicated that his Government was not at that stage prepared to present its definitive views as to the validity of the Treaty. No argument on this issue was submitted in subsequent pleadings or at the hearing. Nor did the Parties invoke any "changed circumstances", or principles of international law, capable of invalidating, suspending or modifying the Treaty, which the Tribunal is bound to take into account or apply in all cases according to the provisions of Article V of the Claims Settlement Declaration.[4] The Tribunal must therefore assume that for the purpose of the present case the Treaty remains binding as it is drafted.

The Tribunal has previously observed that "there is nothing in either Article II or Article IV of the Treaty which extends the scope of either State's international responsibility beyond those categories of acts already recognised by international law as giving rise to liability for a taking".[5] It does, however, impose certain standards of compensation in the event of a taking of property. Article IV, paragraph 2, provides as follows:

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[4] Article V of the Claims Settlement Declaration reads as follows:

> "The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."

[5] Sea-Land Service, Inc.and The Government of the Islamic Republic of Iran, Ports and Shipping Organisation, Award No. 135-33-1, at p. 26 (Chamber One, 22 June 1984).

> "Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof."

In view of the circumstances in this case the Tribunal holds that the words "the full equivalent of the property taken" entitles the Claimant to be granted compensation equal to the fair market value of its shares in Bimeh Shargh, assessed as of the date of nationalisation.[6]

III. Valuation

As stated above the Claimant is entitled to the fair market value of its 20% share in Bimeh Shargh. "Fair market value" may be stated 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.[7] In this

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[6] The locus classicus in situations such as the present is 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", Chorzow Factory case (Merits), PCIJ Ser. A No. 17 (1928) pp. 46-47 (emphasis added).

[7] See American International Group, Inc. and Islamic

(Footnote Continued)

case, the evidence shows that INA, a willing buyer, purchased the shares from a willing seller in a transaction approximately one year before the nationalisation. There is not sufficient evidence to show that the transaction was anything but at arm's-length. INA contends that the price it paid is a fair measure of the value of the shares on the date of nationalisation because the financial condition of Shargh was at least as good at that time as it had been on the date of INA's purchase. INA asserts that its compensation would have been greater if a valuation had been made to project future profits and discount them to present value as of the date of nationalisation. INA considers, however, that the expense of such a valuation was not warranted in view of the relatively small amount involved in this case. INA therefore claims only an amount equal to its purchase price for the shares.

If, as INA asserts, the value of Shargh remained stable between the date of its purchase and the date of nationalisation, this approach to valuation is reasonable. Thus, the Tribunal must consider the evidence before it to determine if 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.

In order to show that nothing had occurred to lessen the value of its investment prior to nationalisation, INA has submitted balance sheets for the three years ending 20 March 1979. These were based in part on regular annual audits conducted by an Iranian firm of public accountants, Daghigh & Co. The statements show that Shargh was financially sound and was gradually increasing its profitability. INA relies

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(Footnote Continued)
Republic of Iran, Award No. 93-2-3, at pp. 16-17 (Chamber Three, 19 December 1983).

~~on these to support its contention that the value of the~~ shares at the time of nationalisation was at least as great, if not greater, as at the time of the initial investment.

The Respondent bases its contention that Shargh had a negative net worth primarily on an audit conducted after nationalisation by another Iranian firm of public accountants, Amin & Co. At the hearing INA and the Respondent reached agreement on the basic figures shown in the financial statements submitted by INA. However, the Respondent contends that the new audit by Amin (which covers only the 3 months between the last Daghigh audit and the nationalisation) reveals that the figures submitted by INA have to be qualified and supplemented, and that this results in a negative net worth. The Respondent also contends that the last Daghigh report itself contains footnotes indicating that Shargh was not profitable. The Daghigh and Amin reports are discussed below.

The Daghigh audit report, dated 16 June 1979 (9 days before the nationalisation of Shargh), contains a balance sheet which confirms the basic figures shown in the balance sheets submitted by INA. However, the Respondent contends that certain notes contained in the Daghigh report negate the profitable image shown by Shargh's balance sheets.

A careful study of the Daghigh notes reveals mainly only two categories of commentary that might be construed as negative:

1. Notes concerning matters (such as the valuation of lands held by Shargh) that predated INA's investment; and

2. Notes concerning non-receipt of certain confirmations.

Concerning the first category, in the absence of contrary evidence, it must be assumed that these matters, which were of long standing, were reflected in the financial reports and business data which INA reviewed prior to its investment. Thus, it must be assumed that the value determined in 1978 for INA's share in Shargh took into account these matters. Concerning the second category, most of the notes at issue concern the failure of governmental agencies or private companies to provide certain notifications or confirmations either to Shargh or to Daghigh. Neither Shargh nor INA can be held accountable for the failure by organizations over which they had no control to provide the requested information. No negative inferences are possible from these circumstances. The Daghigh report, read as a whole, does not negate INA's showing that Shargh was increasingly profitable in the years prior to nationalisation.

The Amin report was prepared after the nationalisation, pursuant to a contract with CII which prescribed various accounting techniques which Amin was required to follow. The Amin report is accompanied by various notes, which qualify the report to such a degree that it is impossible, without examination of the underlying documents and various special accounting procedures (referred to but not explained or quoted) to evaluate the results of the audit. For example, one of the notes states that

> "[T]he attached financial statements have not been prepared on the basis of acceptable accounting principles used by other operating insurance companies which in return is based on their going concern principles."

Since the compensation for the Claimant's stock should be based on the value of the company as a going concern, this qualification alone destroys the usefulness of the Amin report for the purpose of valuing the nationalised shares. Another example of the difficulty in relying on the Amin

report is a note stating that certain adjustments have been made because "the company is no longer continuing its operations as it used to do" (i.e., before nationalisation).

The report's numerous references to special rules and directives of CII also make it impossible for the Tribunal to judge the validity of the valuation techniques used. The Respondent has furnished neither the texts of such rules and directives nor the underlying documents, although it was ordered to do so. The Respondent's attempt to excuse its non-compliance with the Tribunal's Order by merely stating that the documents were "voluminous" is not convincing. The Respondent did not raise this asserted excuse until the hearing, long after the date for submission of these materials had passed; even then, the Respondent gave no indication of the actual amounts of material involved or any description of the alleged problems involved which prevented submission of the materials by the Respondent or their inspection by INA. In assessing the evidentiary weight of the Amin report, the Tribunal must draw negative inferences from the Respondent's failure to submit the documents which it was ordered to produce.[8] In sum, the Amin report is so qualified and limited, and so influenced by unexplained, specially adopted (and not generally accepted) accounting techniques, that it cannot be considered to reflect the value of Shargh at the time of nationalisation.

The balance sheets and testimony submitted by INA constitute convincing evidence that Shargh's value had, if anything, increased in the year following INA's investment.

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[8] D. Sandifer, Evidence Before International Tribunals (rev. ed. 1975) 108, 115-18, 150-53, 172-74; Witenberg, La Théorie des Preuves Devant les Juridictions Internationales, Vol. 56 Recueil des Cours (II-1936), p.5, at pp. 47-48.

Neither the footnotes to the Daghigh report nor the Amin report negate this conclusion. Thus, INA's proposal to value Shargh (and hence INA's 20% interest in Shargh) at its 1978 level appears not only reasonable but, in fact, conservative.

In this case $285,000 plus interest thereon have been the only amounts ever mentioned as being equivalent to the invested 20 million Rials. No discussion has 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? Nor has the Tribunal 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. The Tribunal is therefore prepared to accept in this case that the figure of $285,000 represents the value of INA's interest in Shargh as at the date of nationalisation.

IV. The counterclaim

The Respondent has argued that INA's share of the unpaid 50% of Shargh's capital stands as a continuing debt of 20 million Rials on the part of INA to the company. It accepts that the Share Purchase Agreement provided for payment of the balance by 17 June 1979, but it rejects the contention that this date was postponed to 17 June 1981; and seeks to recover the 20 million Rials by way of counterclaim.

In the view of the Tribunal, such a counterclaim is untenable whether or not the payment date was extended. INA never derived any benefit from the additional capital represented by this amount and no rights of ownership were or could have been exercised in respect of it; nor could this ever have happened once the company had been

nationalised. The imminence of this measure must have been known by 17 June 1979, just eight days before the decree was promulgated. Thus the situation must be viewed as one of frustration of the purpose of that part of the contract. Since the consideration had failed, the debt must be regarded as having been extinguished. This counterclaim must therefore be dismissed.

In addition, the Respondent has reserved the right to request that INA be held liable for an unspecified amount representing the alleged "negative" value of Shargh to the extent of its shareholding. Any such request must be denied in view of the principle of limited shareholders' liability and the Tribunal's finding that Shargh's value is not negative.

The question has been raised whether the counterclaims are properly within the Tribunal's jurisdiction as they are based on the Share Purchase Agreement and shareholders' liability, whereas the claim is one for compensation for expropriation. However, in the light of its conclusions, the Tribunal does not find it necessary to address this issue.

V Interest

The Tribunal finds that the Claimant is entitled to interest on the amount of compensation at a reasonable annual rate of 8.5 per cent as from the date of nationalisation, 25 June 1979.[9]

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[9] In this respect the Chamber adopts the rate used by Chamber Three in a claim concerning a parallel case of nationalisation of an insurance company pursuant to the same law, the American International Group case (see footnote 7 above).

VI Costs

The Tribunal determines that each Party shall bear its own costs of arbitration.

For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

1) THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN is obligated to pay INA CORPORATION the amount of Two Hundred and Eighty Five Thousand United States Dollars (US $285,000.00) together with simple interest thereon at 8.5 per cent per annum from 25 June 1979 up to and including the date of this Award.

   The above obligation shall be satisfied by payment out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

2) The counterclaims of THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN are dismissed.

3) Each Party shall bear its own costs of arbitration.

The Award is submitted to the President of the Tribunal for

notification to the Escrow Agent.

Dated, The Hague
12 August 1985

Gunnar Lagergren
Chairman
Chamber One
(Separate Opinion)

In the name of God

Koorosh-Hossein Ameli
(Dissenting Opinion)

Howard M. Holtzmann
(Separate Opinion)