161 – 99

171 – 99

ATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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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.

Separate Opinion of Judge Lagergren

I believe a few observations are appropriate in the context of this case concerning the level of compensation in the field of nationalisation.

It is generally accepted that some types of expropriation are inherently unlawful - among these one can cite cases in which foreign assets are taken on a discriminatory basis or for something other than a public purpose. Here, it is well settled that the measure of compensation ought to be such as to approximate as closely as possible in monetary terms to the principle of restitutio in integrum - a remedy which is itself for practical reasons usually impossible of achievement. It is in such cases that the concept of "full compensation" finds its clearest modern application. The notion of "full" compensation has also been widely used in bilateral treaties, for lawful as well as unlawful takings. Another formula often found in such treaties is what has become known since 1938 as the "Hull doctrine", that is the rule that compensation must be "prompt, adequate and effective". However, it can hardly be argued that

the standard of "adequate" compensation necessarily involves a requirement of "full" compensation.

The Hull standard, though built on relatively little express arbitral practice, long enjoyed widespread support in legal writings. However, as long ago as 1955, in the eighth edition of Oppenheim's International Law, Sir Hersch Lauterpacht suggested that 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" (emphasis added) (at p. 352).

This flexibility of approach, which seeks to accommodate the legitimate expectations of the foreign investor together with the needs of a state undergoing a process of radical economic restructuring, found its most concrete and widely accepted expression in Resolution 1803 (XVII) of the United Nations General Assembly of 1962 (the Declaration on Permanent Sovereignty over Natural Resources), paragraph 4 of which states that,

> "Nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation (emphasis added), 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."

Modern arbitral practice lends considerable weight to the acceptance of the standard enunciated in that Resolution.

Professor Dupuy, in the TOPCO - Libya award of 1977[1], was able to pronounce that the test of "appropriate compensation" had come to represent the "opinio juris communis" that reflected "the state of customary law existing in the field".[2]

The most recent arbitral decision to adopt and give substance to the concept of "appropriate compensation" is the Award rendered on 24 March 1982 in the arbitration between The Government of the State of Kuwait and The American Independent Oil Company ("Aminoil")[3]. That distinguished Tribunal (Reuter, Sultan, Fitzmaurice) saw its task in the following terms,

> "The Tribunal considers that the determination of the amount of an award of 'appropriate' compensation is better carried out by means of an enquiry into all the circumstances relevant to the particular concrete case, than through abstract theoretical discussion. Moreover the Charter of the Economic Rights and Duties of States, even in its most disputed clause (Article 2, paragraph 2c) - and the one that occasioned reservations on the part of the industrialized States - recommended taking account of "all circumstances" in order to determine the amount of compensation - which does not in any way exclude a substantial indemnity" (at paragraph 144).

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[1] Texas Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic, 17 ILM 3, 29 (1978); 53 ILR 389 (1979).

[2] See also Judge Eduardo Jiménez de Aréchaga, International Law in the past third of a century, in Vol. 159 (Recueil des Cours 1978, at p. 301:

> "... one of the facts evidenced by the process of elaboration of [the Charter of Economic Rights and Duties of States, General Assembly Res. 3281 (XXIX) of 12 December, 1974] is that the classical doctrine does not represent the general consensus of States and consequently cannot be considered as a rule of customary law."

[3] 21 ILM 976 (1982).

Clearly, regard must be had to the fact that these two pronouncements have been made in the special and limited context of the rights and duties of states with respect to their natural resources. Oil concessions, in particular, present special problems and care must be taken in attempting to extrapolate the holdings in such cases into general principles which might be capable of a wider application.

The basic thesis of "appropriate compensation", however, is one of inherent elasticity, and has been upheld in a different, commercial context by the United States Court of Appeals for the Second Circuit in Banco Nacional de Cuba vs. Chase Manhattan Bank[4] in 1981, who preferred it to the traditional formulation:

> "It may well be the consensus of nations that full compensation need not be paid 'in all circumstances' ... and that requiring an expropriating state to pay 'appropriate compensation' - even considering the lack of precise definition of that term, - would come closest to reflecting what international law requires..... But the adoption of an 'appropriate compensation' requirement would not exclude the possibility that in some cases, full compensation would be appropriate."

Whether this standard is more correctly characterised as an exception to a still subsisting - though admittedly shrinking - Hull doctrine, or as evidence of a more general tendency towards the wholesale displacement of that doctrine as the repository of the opinio juris, is still the subject of debate. But the latter view appears by now to have achieved a rather solid basis in arbitral decisions and in writings. Our Tribunal, in plenary session, in its decision on the effects of a "de facto succession", by which contractual rights and obligations were transferred from one company, OSCO, to another company, NIOC, the latter being "totally controlled by the Government of Iran", has itself adopted the formulation that the successor must be held liable to pay "appropriate compensation taking into account

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[4] 658 F 2d 875 (2d Cir. 1981) at 892.

all the circumstances of the case" (emphasis added) in respect of the debts and obligations of its predecessor.[5]

The principle of "appropriate compensation" taking account of all relevant circumstances has certainly found considerable support in recent commentaries,[6] and would now appear to be regarded as the correct legal standard at least in cases arising out of large-scale nationalisations of commercial enterprises of fundamental importance to the nation's economy, where the Hull standard seems to be inadequate.

Without taking any position as to its merits it is interesting to note the case of Sir William Lithgow and Others against United Kingdom, now pending before the European Court of Human Rights. This case is related to compensation for the large-scale nationalisation of the aircraft and shipbuilding industries in the United Kingdom, under the Aircraft and Shipbuilding Industries Act 1977. The European Commission of Human Rights stated in its Report of 7 March 1984 in the case, paragraph 376:

> "Accordingly in the Commission's opinion a right to compensation for the taking of property is inherent in Art. 1[7] in so far as the payment of compensation may be necessary to preserve the appropriate relationship of

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[5] Interlocutory Award No. ITL 10-43-FT filed on 9 December 1982 in the case of Oil Field of Texas, Inc. and The Government of the Islamic Republic of Iran, et al., reprinted in Volume 1 of Iran-U.S. Claims Tribunal Reports, 1982, p. 347, at pp. 356 and 362.

[6] Judge Manfred Lachs, in The Development and General Trends of International Law in Our Time, Nijhoff, 1984 (reprinted for private circulation from Recueil des Cours, Vol. 169), concludes that the legality of a taking "does not release the local sovereign from the obligation to pay 'appropriate compensation'." (at p. 100).

[7] Article 1 of Protocol No. 1 to the European Convention on Human Rights.

> proportionality between the interference with the individual's rights and the 'public interest'."

Professor Oscar Schachter, in a comment[8] on the controversy occasioned by the recent draft articles on compensation in the American Law Institute's Restatement of the Foreign Relations Law of the United States (Revised)[9], contemplates several possible perceptions of the current state of the law given the gradually accepted assumption that the Hull doctrine is no longer acceptable as a rule of general application "in all circumstances":

> "One possibility is to retain the formula as the preferred (or "correct") interpretation of "just compensation" but allow for exceptions in certain broad categories of cases. The most obvious candidate for such exceptional treatment would be the large-scale nationalizations, land reform and "indigenization" programs that have been adopted by many countries." (at p. 124).

The alternative preferred by Schachter is the one retained in the draft Restatement, "just compensation", for the very reason that it

> "leaves room for considerable flexibility in application. It should enable tribunals to consider such factors as the financial burden of the expropriating state and whether deferred payments and payments in local currency are reasonable in the circumstances." (id. at p. 129).

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[8] A.J.I.L. Vol. 78, Jan. 1984, pp. 121-130. But see Professor M. H. Mendelson in A.J.I.L. Vol. 79, April 1985, pp. 414-420, with answer by Schachter in same Vol. 79, pp. 420-422.

[9] Article 712 of Tentative Draft No. 3, of 1982, provides that "[a] state is responsible under international law for injury resulting from (1) a taking by the state of the property of a national of another state .... when provision is not made for just compensation."

His rejection, on balance, of the "appropriate compensation" formulation would thus seem to be reducible to largely semantic, rather than substantive, considerations.

I am also inclined to the view that "appropriate", "equitable", "fair" and "just" are virtually interchangeable notions so far as standards of compensation are concerned. Nor is there any single method of valuation to be used in all situations of compensation. Instead, there is a wide choice of well-established methods of valuation applicable and appropriate under different circumstances. Even the notions "full" and "adequate" compensation contain, inevitably and with the best of intentions, a margin of uncertainty and discretion.

Professor Rosalyn Higgins referring in her recent Hague Academy lectures to the "battle of the rhetoric on compensation standards",[10] agrees with Professor Burns Weston's comment on the conclusions to be drawn from actual practice:

> ".... one finds in the great majority of cases the depriving countries ultimately have granted compensation in an amount and form not inconsistent with the 'partial' compensation and valuation standards prevalent since World War II, and often with express reference to international law ...." [11]

Rudolf Dolzer[12], who views both the Hull and the Calvo doctrines as embodying extreme negotiating positions neither of which is either tenable in principle or representative of the state of

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[10] The Taking of Property by the State: Recent Developments in International Law, in Vol. 176 Recueil des Cours 1982, p. 267, at p. 294.

[11] The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth, in A.J.I.L. July 1981, Vol. 75, p. 437, at pp. 453-4.

[12] New Foundations of the Law of Expropriation of Alien Property, in A.J.I.L. July 1981, Vol. 75, p.553, at pp.557 et seq.

the law, admits that this very polarisation of opinion militates against a strictly consensual view of international law. The inescapable consequence is, as he points out,

> "that this perspective will entail a certain creative function for the decision-making body involved .... the alternative under current circumstances would be an abdication of the role of law in all areas where no precise, overreaching common opinion still exists in the international community."[13]

A tribunal is thus 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.

Dolzer suggests that the general economic context, "the impact of the compensatory obligations on the economy of the expropriating state", and the "developmental" nature of the investment, should be considered alongside the original expectations of the investor at the time of importing his capital and the "legitimate reliance" he is entitled to place on the host state's decision to allow such investment and assume the attendant obligations.

I conclude from the foregoing 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". However, such discounting may, of course, never be such as to bring the compensation below a point which would lead to "unjust enrichment" of the expropriating state. It

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[13] Id. at p. 578

might also be added that the discounting often will be greater in a situation where the investor has 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.

Dated, The Hague
14 August 1985

Gunnar Lagergren