IRAN—UNITED STATES CLAIMS TRIBUNAL: CASE CONCERNING THE AMERICAN INTERNATIONAL GROUP, INC. /AMERICAN LIFE INSURANCE COMPANY AND THE ISLAMIC REPUBLIC OF IRAN/CENTRAL INSURANCE OF IRAN (Nationalization of Iranian Insurance Company; Compensation for Equity Interest Held by American Corporation and Wholly—Owned Subsidiaries of American Corporation)

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(Nationalization of Iranian Insurance Company; Compensation for Equity Interest Held by American Corporation and Wholly-Owned Subsidiaries of American Corporation)

[December 19, 1983]

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CERTIFIED COPY

فتوکپی گواهی شده

CASE NO. 2
CHAMBER THREE
AWARD NO. 93-2-3

AMERICAN INTERNATIONAL GROUP, INC. and AMERICAN LIFE INSURANCE COMPANY,

Claimants,

- and -

ISLAMIC REPUBLIC OF IRAN and CENTRAL INSURANCE OF IRAN (BIMEH MARKAZI IRAN),

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL — دادگاه دعاوی ایران - ایالات متحده

FILED - ثبت شد

Date تاریخ 1363/9/28
19 DEC 1983

No. 2 - 2 شعبه

AWARD

APPEARANCES:

For Claimants:
Mr. David R. Hyde,
Mr. Howard G. Sloane,
Attornies
Mr. Randall Drain
Ms. S. Elaine Shaw
Mr. R. Kendall Nottingham

For Respondents:
Mr. Mohammad K. Eshragh,
Deputy Agent of the
Islamic Republic of Iran
Mr. Abousaid Rahbari,
Mr. Seyed Hossein Tabaie,
Legal Advisers to the
Agent
Dr. Gholam Hossein Jabbari,
Mr. Kayvan Khashayar,
Representatives of the
Islamic Republic of Iran
Mr. Mehrdad Bagheri,
Representative of Central
Insurance of Iran

Also present:
Mr. Arthur Rovine,
Agent of the United States
of America

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*[Reproduced from the text provided by the U.S. Department of State. The Concurring Opinion of Richard M. Mosk appears at I.L.M. page 14.

[The General Declaration and the Claims Settlement Declaration of the Democratic and Popular Republic of Algeria, dated January 19, 1981, appear respectively at 20 I.L.M 224 (1981) and 20 I.L.M. 230 (1981).

[The U.S. Department of State memorandum on the application of the Treaty of Amity to expropriations in Iran appears at 20 I.L.M. 1406 (1983).]

I. THE PROCEEDINGS

On 20 October 1981, Claimant, AMERICAN INTERNATIONAL GROUP, INC. ("AIG"), filed its Statement of Claim against Respondents, the ISLAMIC REPUBLIC OF IRAN and CENTRAL INSURANCE OF IRAN ("Bimeh Markazi"), seeking compensation for the alleged nationalization of an Iranian insurance company in which AIG allegedly had an equity interest. Respondents filed their Statement of Defence on 5 April 1982.

On 19 April 1982, the Tribunal fixed dates for the submission of written evidence and memorials and scheduled a Hearing for 4 October 1982.

On 5 August 1982, Bimeh Markazi requested that the Hearing be converted into a Pre-Hearing Conference. On 15 September 1982, the Tribunal denied the request, but ruled that at the Hearing it would consider whether to permit further written submissions or a subsequent hearing. On 20 September 1982, the Agent of Iran again objected to the holding of a hearing without a Pre-Hearing Conference. On 1 October 1982, the Tribunal declared that its Order of 15 September 1982 would remain in effect.

On 20 September 1982, Claimant AIG filed its legal memorandum and evidence. Respondents filed no evidence or legal memoranda or designation of witnesses prior to the 4 October Hearing.

On 4 October 1982, the Hearing was held. Claimant AIG submitted evidence, testimony and legal arguments and Respondents submitted testimony and legal arguments. At the Hearing, Respondents filed a supplement to their Statement of Defence in which they raised the issue of whether AIG was the proper party to the dispute and other jurisdictional objections.

On 25 October 1982, the Tribunal fixed dates for the further submission of evidence and scheduled a Hearing for 13 January 1983 for the purposes of hearing rebuttal testimony and argument from the parties.

On 6 December 1982, Claimant filed a Supplemental Memorandum including evidence, and an amended Statement of Claim naming as an additional Claimant AMERICAN LIFE INSURANCE COMPANY ("ALICO"), a corporation organized under the laws of the State of Delaware, U.S.A. On 10 December 1982, Respondents filed a Memorial, together with written evidence.

A second Hearing was held on 13 January 1983. On the same day, Respondents filed a Reply to Claimant's Supplemental Memorandum and Claimant filed additional affidavits.

Following the Hearing, the member of the Tribunal appointed by the Islamic Republic of Iran resigned. A new member was appointed. The Tribunal has hereby determined not to repeat the prior hearings (see Article 14 of the Tribunal Rules).

II. FACTUAL BACKGROUND

AIG's claim arises out of the nationalization of the Iran America International Insurance Company ("Iran America"), by the Government of Iran on 25 June 1979.[1]

Iran America, which began operations on 22 December 1974, was organized as an Iranian public joint stock company with 10% of the shares issued each in the names of American

[1] In its Statement of Claim, AIG also claimed entitlement to unspecified amounts allegedly due under re-insurance contracts with Bimeh Markazi, but has not in subsequent pleadings or set forth the factual allegations upon which it based this claim or offered any evidence or argument on its behalf. The Tribunal deems this claim to have been withdrawn.

Life Insurance Company ("ALICO"), a corporation organized under the laws of the State of Delaware, U.S.A.; American International Reinsurance Company, Limited ("AIRCO"), a corporation organized under the laws of Bermuda; and American International Underwriters Overseas Limited ("AIUO"), a corporation organized under the laws of Bermuda; and with 5% of the shares issued in the name of The Underwriters Bank Incorporated ("UBANK"), a corporation organized under the laws of the State of Connecticut, U.S.A. Each of these corporations was a wholly-owned subsidiary of AIG.

On 25 June 1979, all insurance companies operating in Iran, including Iran America, were proclaimed nationalized by the Law of Nationalization of Insurance Corporations.[2]

Claimant AIG brought an action in a United States court seeking compensation for the alleged taking of the above mentioned 35% interest, and on 10 July 1980, the court issued an Order adjudicating the Government of Iran liable for such compensation. That case was subsequently suspended pursuant to United States Government regulations implementing the Algiers Declarations.[3]

[2] In its 20 September 1982 Memorial, the Claimant AIG alleges that certain actions which preceded that Law amounted in themselves to an expropriation of Iran America. However, Claimants do not state the date of this alleged expropriation; nor do they rely upon this contention in advancing their claim. Rather, Claimants continue to seek compensation from the date of the nationalization.

[3] The Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981 ("General Declaration") and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran dated 19 January 1981 ("Claims Settlement Declaration").

Subsequent to the nationalization, Iran America was renamed the Tavana Insurance Company and was operated by a managing director selected by a governmental board established by the aforesaid Law of Nationalization. In September 1982, all of the assets of the company were transferred to the Asia Iran Insurance Company.

III. JURISDICTION OVER THE CLAIM

1. Contentions of the Parties

AIG contends that it has been a United States national, as defined by Article VII, paragraph 1, of the Claims Settlement Declaration, from the time the claim arose to 19 January 1981, the date of the Algiers Declarations, and has remained as such to the present.

AIG also contends that the claim is a claim of a national of the United States as defined in Article VII, paragraph 2, of the Claims Settlement Declaration on the alleged ground that it was, during the relevant period and until the present time, the beneficial owner of the Iran America shares issued in the names of ALICO, AIRCO, AIOU and UBANK and thus is the direct owner of the entire claim. In addition, AIG alleges that UBANK has been dissolved as of 19 July 1979, that its assets have vested with AIG as the sole shareholder in UBANK and that AIG is therefore the direct owner of the claim with regard to the Iran America shares issued in the name of UBANK.

In the alternative, AIG contends that it is the indirect owner of the claim with regard to the shares in the names of AIRCO and AIOU because these companies are not United States nationals, and are thus unable to bring claims, and because its 100% ownership interest in these companies is sufficient to control them.

With regard to the shares issued in the name of ALICO, AIG, in the alternative, seeks to amend its Statement of Claim to name ALICO as a claimant.

AIG also contends that the claim arises out of an "expropriation or other measures affecting property rights", within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration and that both Respondents come within the definition of "Iran" found in Article VII, paragraph 3, of the Declaration.

The Respondents challenge the adequacy of the proof offered to demonstrate the Claimant AIG's United States nationality and argue that AIG may not present the claim directly as beneficial owner of the 35% interest held in the names of ALICO, AIRCO, AIOU and UBANK. Further, the Respondents challenge the Claimant AIG's proof that it controls AIRCO and AIOU within the meaning of Article VII, paragraph 2, of the Declaration. They also argue that no sufficient evidence to prove that UBANK has been dissolved and that its assets have vested in AIG has been presented and maintain that, as United States nationals, both UBANK and ALICO could have presented claims for the shares held in their names, thus precluding AIG from asserting a claim with regard to these shares. The Respondents oppose AIG's proffered amendment on the ground that it states a new claim and is thus barred by the deadline for presenting claims found in Article III, paragraph 4, of the Claims Settlement Declaration.

The Respondents also object to subject matter jurisdiction over the claim on various grounds. They argue that an act of nationalization does not constitute an expropriation under international law and, thus, does not come within the jurisdictional requirements of Article II, paragraph 2, of the Claims Settlement Declaration. They further argue that the claim is barred for the reasons that the Commercial Code of Iran gives to Iranian courts exclusive jurisdiction over Iranian corporations, that the Claimant has failed to exhaust local remedies provided in the Iranian law and that the national- ization of insurance companies was an Act of State which is not subject to review by an international tribunal.

2. The Tribunal's findings with regard to jurisdiction

AIG has submitted a certificate dated 7 September 1982 from the Secretary of State of the State of Delaware, U.S.A., attesting to the fact that AIG was organized under the laws of that State on 9 June 1967 and has maintained this status to the date of the certificate.

AIG has also submitted affidavits of Maurice R. Greenburg, who is AIG's president and chief executive officer, which state that AIG is a widely-held corporation whose shares are publicly traded in the United States. They further state that well over 75% of the outstanding shares of AIG are held by persons with United States addresses and that, to Mr. Greenburg's personal knowledge, aggregate foreign ownership of AIG does not exceed 25% of AIG's outstanding shares. No contrary evidence has been introduced.

The Tribunal finds that, based upon the above evidence, and in light of the absence of anything which would cast doubt upon AIG's allegations, a reasonable inference may be made that over 50% of the shares of AIG are owned by United States citizens, and the Tribunal so concludes.

The Greenburg affidavits state that AIG has continuously owned all of the shares of ALICO, AIOU and AIRCO since the claim arose and that it owned all of the shares of UBANK until that corporation was dissolved on 19 July 1979, upon which event AIG succeeded to its assets. Reference is also made to an attached copy of AIG's 1981 annual report describing ALICO, AIOU and AIRCO as subsidiaries of AIG.

The Greenburg affidavits attest to the fact that the Iran America shares held of record by ALICO are reflected in disclosure statements required by United States law as assets of AIG, not ALICO; that dividends paid on the shares were included in AIG's earnings, and not ALICO's; and that, while AIG officers have served on Iran America's board of directors, ALICO's officers have not.

Finally, AIG cites materials published by Iran America itself which describes the company as "joint venture with 65% ownership by Iranians and 35% ownership by American International Group".

The Respondents have submitted no evidence with regard to the ownership of ALICO, AIRCO, AIOU and UBANK. With regard to the alleged beneficial ownership of the Iran America shares held of record by ALICO and UBANK, the Respondents have submitted powers of attorney granted by these companies authorizing two individuals to exercise their shareholder powers at stockholder and directors meetings of Iran America.

The Tribunal concludes on the basis of this evidence that ALICO, AIRCO and AIOU are wholly-owned subsidiaries of AIG and that UBANK has been dissolved and ceases to have an independent legal existence. It is clear that AIG's ownership interests in AIRCO and AIOU are sufficient to control these companies, and that, as non-United States corporations, they are themselves ineligible to present claims before the Tribunal. To the extent that the claim relates to the Iran America shares held of record by these two companies, it has been owned indirectly by AIG during the relevant period. AIG is entitled to maintain the claims of its whollyowned non-United States subsidiaries, i.e. AIRCO and AIOU. Article VII, paragraph 2 of the Claims Settlement Declaration.

With regard to the claim related to the UBANK shares the Tribunal is satisfied that, as the sole shareholder in that company, AIG has succeeded to all of UBANK's interest in the Iran America shares as a consequence of UBANK's dissolution in July 1979. As UBANK's successor in this respect, AIG is entitled to bring the claim to the extent that it relates to the Iran America shares held in the name of UBANK.

There is a question as to whether AIG can bring the claims related to the shares of ALICO. See Article VII, paragraph 2, of the Claims Settlement Declaration. The Tribunal does not need to reach this issue since it finds that the amendment whereby ALICO is introduced as additional Claimant besides AIG, should be allowed. The Tribunal hereby decides accordingly. Such amendment does not change the amount sought or the factual or legal basis of the claim and cannot be said to prejudice the Respondent. Article 20 of the Tribunal Rules, even if not directly applicable, gives guidance in deciding this issue. Not to allow the amendment would, in the circumstances of the present case, amount to a degree of formalism which is hard to justify.

The Tribunal finds that its jurisdiction over "expropriations" by virtue of Article II, paragraph 1, of the Claims Settlement Declaration applies equally to "nationalizations" and other forms of takings. In any event, the Tribunal's jurisdiction over "other measures affecting property rights" is, by itself, sufficiently broad to encompass the subject matter of the claim in this case.

That the Commercial Code of Iran give Iranian courts jurisdiction over Iranian corporations such as Iran America, cannot exclude the claim from the Tribunal's jurisdiction. In Article II, paragraph 1 of the Claims Settlement Declaration, the two Governments delimited the grounds for excluding claims from the Tribunal's jurisdiction, and a general reservation for cases within the domestic jurisdiction of one of the countries was not among those grounds.

The Algiers Declarations grant jurisdiction to this Tribunal notwithstanding that exhaustion of local remedies or Act of State doctrines might otherwise be applicable.

In conclusion, the Tribunal has before it a claim by AIG with regard to 25 per cent of the Iran America shares and a claim by ALICO with regard to 10 per cent of those shares. The Tribunal has jurisdiction over both claims.

IV. MERITS OF THE CLAIM

1. Contentions of the Parties

The Claimants contend that the nationalization of Iran America was a violation of international law in that it was not accompanied by "prompt, adequate and effective" compensation as required by the principles of customary international law and because it failed to comply with obligations set forth in the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran dated 15 August 1955, ("Treaty of Amity") which entered into force on 16 June 1957. The Claimants cite a number of decisions of international tribunals and municipal courts to support its claim under customary international law and rely upon Article IV, paragraph 2, of the Treaty of Amity to establish the alleged non-compliance with treaty obligations. The Claimants also rely upon the above-mentioned Order [4] issued by the United States District Court for the District of Columbia on 10 July 1980 (see at II above), in which the Court held the process by which Iran America was nationalized to be in violation of the Treaty of Amity and of customary international law. The Claimants assert that this "should be recognized and accorded full faith and credit in this arbitration" on the issue of liability.

For this alleged violation of international law, the Claimants maintain that, under both the Treaty of Amity and customary international law, they are now entitled to the payment of "just" compensation equal to the "full value" of their interest as of the date of nationalization, plus interest from 25 June 1979, the date of the nationalization.

The Claimants argue that for purposes of determining the just amount of compensation the company's value must be measured as a going concern, including such elements as future business prospects and good will. The Claimants also contend that the valuation of their own interest in the company must disregard any action of the Government of Iran prior to nationalization which may have had the effect of artificially depressing the value of the company and any event which followed the nationalization which may have negatively affected the company's future business prospects.

Finally, the Claimants allege that the full value of Iran America as a going concern on the date of nationalization was US $111,470,000. In accordance with their 35% interest in Iran America, the Claimants therefore request compensation in the amount of US $39,010,000.

The Respondents deny that they have violated principles of customary international law by nationalizing Iran America, either by acting to nationalize the insurance industry or by failing as yet to pay any compensation. They argue that the right of nationalization is universally recognized as an expression of the permanent sovereignty which every nation enjoys over natural resources and economic activities within its territory. Moreover, while they concede that there is a duty eventually to compensate the former owners of nationalized property, the Respondents deny that the standard of "prompt" compensation is a norm of customary international law. Instead, they contend that the international legal duty to pay compensation requires only an early indication of an intention to compensate and actual

[4] American International Group, Inc. et al. v. Islamic Republic of Iran and Central Insurance of Iran (Bimeh Markazi Iran), No. 79-3298 (D.D.C. 10 July 1980).

payment within a reasonable time. The Respondents claim that they have not violated international standards because compensation paid even during forthcoming years would still come within the reasonable time permitted by the standard.

The Respondents also deny that they violated the terms of the Treaty of Amity. First, they argue that, on various grounds, the Treaty of Amity is no longer in force. Second, they maintain that, even if the Treaty of Amity remains in force, the nationalization of the Iranian insurance industry does not constitute a "taking" within the meaning of the Treaty of Amity and, as such, the treaty's protections and standards are inapplicable to this case.

The Respondents also contend as follows: Even assuming, arguendo, that Iran violated principles of customary international law in the course of nationalizing the insurance industry, there is no international legal entitlement to compensation equal to the "full value" of the property nationalized. The suggestion of full compensation derives from the traditionally asserted standard of "prompt, adequate and effective" compensation which has been repudiated by modern developments in international law; instead, a standard of "partial compensation" should be applied, based on references contained in resolutions of United Nations organs and from post-war settlement practice. Thus, whatever method of valuation is used, the compensation payable may be less than the value arrived at in order to account for such factors as the costs of administering the mechanism for payment, other independent liabilities of the owners of the nationalized property and considerations of justice.

The Respondents do not address the effect of the Treaty of Amity on the appropriate standard of compensation in the event that that treaty should be held applicable to the instant case.

The Respondents further contend that, even if the standard of compensation were held to be "just" compensation for "full value", it would be inappropriate and unreasonable to value the property as a going concern. Instead, they argue that the method of valuation required by modern international law is merely an assessment of the "actual worth of assets owned on the date of nationalization" without consideration of such elements as good will or loss of future profits. Thus the Respondents offer as the appropriate measure of compensation the "net book value", which they define as "assets minus liability without consequential damages".

As to the actual value to be assigned to Iran America, the Respondents do not accept the methodology employed in the "going concern" valuations offered by the Claimants, thereby rejecting various of the assumptions made by Claimants' experts. In the course of this critique, Respondents propose a method of valuation under which the net assets of Iran America are valued at 61,000,000 rials, or US $865,617,[5] which would leave Claimants' 35% interest with a value of US $302,966. Respondents further assert, however, that 111,461,250 rials, or US $1,581,571, should be deducted from the value of the Claimants' interest, representing an amount due from the Claimants to the Respondents under various, unspecified re-insurance contracts. Thus the Respondents contend that no compensation is owing to the Claimants, but rather that the Claimants are indebted to the Respondents.[6]

[5] This and other currency conversions herein are based upon the official rate of exchange in effect on the date of nationalization, being 70.475 rials per US dollar.

[6] The Respondents make no claim for this alleged indebtedness.

Respondents also submitted a valuation of the company's net assets prepared by professional accountants employed by Bimeh Markazi which assigns a range of values to the company from 327,250,000 rials to 377,250,000 rials, or from US $4,643,491 to US $5,352,962. Under this valuation, prior to any allegedly legitimate deductions, the value of the Claimants' interest would range from US $1,625,222 to US $1,873,537.

Finally, although the Respondents have presented their defence jointly on all of the above issues, they both maintain that, if there is any liability under the claim, it is attributable only to the Government of Iran and not to Bimeh Markazi, which, they contend, is neither responsible for the nationalization nor the owner of the nationalized Iran America.

2. Compensation for the Nationalization of Iran America

a. Obligation to pay Compensation

As previously stated, all insurance companies operating in Iran, including Iran America, were proclaimed nationalized effective June 25 1979 by the Law of Nationalization of Insurance Corporations.

In the opinion of the Tribunal it cannot be held that the nationalization of Iran America was by itself unlawful, either under customary international law or under the Treaty of Amity (if relevant to the solution of the present dispute, see below), as there is not sufficient evidence before the Tribunal to show that the nationalization was not carried out for a public purpose as part of a larger reform program, or was discriminatory. On the other hand, it 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. The Respondents have conceded that there is a duty eventually to compensate for the nationalization of Iran America.

The main issues in dispute between the Parties are therefore - apart from the value of Iran America's shares on the date of nationalization - the standard of compensation to be applied and the point in time when payment of compensation becomes due (see above under IV.1).

Since compensation was not made within any period after the date of nationalization (i.e. the date of the action giving rise to the claim), that would be considered legally required, the Tribunal holds that the nationalizing State - the Islamic Republic of Iran - is obligated to compensate the Claimants for damages for the taking of their shares in Iran America. The amount of compensation due will be dealt with in the following parts of the Award.

No valid ground has been invoked for holding Bimeh Markazi responsible under the claim. The claim against that Respondent should therefore be dismissed.

b. Amount of Compensation

The Claimants advance their claims both under the Treaty of Amity and under customary international law. They maintain that in either case they are now entitled to the payment of "just" compensation equal to the "full" value of their interest in Iran America as of the date of nationalization.

The Respondents, who contend that the Treaty of Amity is no longer in force, argue that there is no legal entitlement to compensation equal to the "full" value of the property nationalized. They maintain that the traditionally accepted standard of "prompt, adequate and effective" compensation has been repudiated by modern developments in international law. They refer, inter alia, to the United Nations Charter of Economic Rights and Duties of States, Resolution 3281 (XXIX) of 1974 which uses the expression "appropriate" compensation. They also cite the practice of States in arriving at settlements of nationalization claims. These developments, they argue, require that only "partial" compensation be paid.

As previously stated, the parties disagree as to the method of valuation to be used. The Claimants maintain that Iran America should be valued as a going concern, including such elements as good will and prospects of future profit. The Respondents contend that the assessment should be made exclusively on the basis of the "net book" or "break up" value of the company.

(i) Iran America's Value as a Going Concern

The Tribunal will first deal with the question which conclusions may be drawn regarding the value of Iran America as a going concern in the light of the evidence submitted.

The relevant date for valuation is that of the nationalization, 25 June 1979. There is not sufficient evidence of any Government actions prior to that date directly or indirectly intended to diminish the value of Iran America and therefore no consideration is given to that aspect when determining the company's value. On the other hand, as pointed out by the Claimants, neither the effects of the very act of nationalization should be taken into account nor the effects of events that occurred subsequent to the nationalization. Evidence regarding the actual development of the company's business in the years following the nationalization should thus be disregarded. Rather, the valuation should be made on the basis of the fair market value of the shares in Iran America at the date of nationalization.

The evidence in this case indicates that there has not been an active market for Iran America's shares. In the absence of such a market, Claimants have relied on appraisals concerning the value of the company by two independant actuaries. One appraisal, made by a Swedish insurance actuary Mr. Robert Themptander, gave as result a total estimated worth of the company as at 21 March 1979 [the end of the last fiscal year prior to the nationalization] of approximately US $147 million. In a second appraisal, made by Mr. Norman D. Freethy of Hymans, Robertson & Co., Consulting Actuaries, London, the value to be placed on the company was calculated as at 21 March 1978 and adjusted up to 25 June 1979. Mr. Freethy, who also gave oral tesmimony at the two Hearings, in his original report arrived at a total value ranging between approximately US $74 million and US $111 million, depending on the allowance made for future real increases in the level of certain businesses.

Mr. Freethy, Claimants' principal expert, asserted that he did not use financial information contained in the 20 March 1979 financial report because it reflected abnormal economic conditions related to the Revolution itself, which took place in the fiscal year included within that report.

In ascertaining the going concern value of an enterprise at a previous point in time for purposes of establishing the appropriate quantum of compensation for

nationalization, it is - as already stated above - necessary to exclude the effects of actions taken by the nationalizing State in relation to the enterprise which actions may have depressed its value. As also stated above, there is not sufficient evidence in this case that Iran had taken any such actions.

On the other hand, prior changes in the general political, social and economic conditions which might have affected the enterprise's business prospects as of the date the enterprise was taken should be considered. Whether such changes are ephemeral or long-term will determine their overall impact upon the value of the enterprise's future prospects. Thus, financial data available for the period 21 March 1978 - 25 June 1979 should not be ignored.

At the Hearing on 13 January 1982, Mr. Freethy re-examined his assumptions on the basis of data for the fiscal year ending 21 March 1979. As a result, the expert lowered to about US $80 million the upper limit of the range of values originally determined, by eliminating the assumption of historical growth rates for future life insurance business and by reducing by 30% the projected profitability of existing life insurance, presumably to reflect the unusually high rate of uncollectable premiums.

The most important element of the compensation claimed by the Claimants for the taking of their shares in Iran America is the loss of prospective earnings. When making its own assessment of the market value to be given to these shares, the Tribunal will therefore have to conclude, inter alia, which assumptions could reasonably be made, with a sufficient degree of certainty, in June 1979 regarding the future life and profitability of the company in view of the relevant conditions then existing in Iran.[7]

Although the method of analysis employed by the Claimants' two experts is undoubtedly consistent with modern techniques of valuation of insurance companies, their valuation does not in the Tribunal's view reflect the market value of Iran America at the relevant date. Without here examining in detail the various assumptions on which the experts have based their valuation, the Tribunal indicates some of the main reasons for its having taken that view. First, the appraisals do not sufficiently consider the changes in general social and economic conditions in Iran which had taken place between the autumn of 1978 and June 1979, or their likely duration. In this connection, it should be noted that during that period many Iranian nationals belonging to the wealthier part of the population left their country. Second, the appraisals do not account for the effects of certain Iranian taxes upon net profitability. Third, changes in the company's financial position between 21 March 1979 and the date of nationalization are not reflected in Mr. Freethy's revised valuation. Fourth, the company had been conducting its business only for little more than 4½ years, and such a short period must be deemed to provide an insufficient basis for projecting future profits.[8]

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7 See Jimenez de Aréchaga, Recueil des Cours (1978 I), p 286 and note 533: "The basic test is the certainty of the damage".

8 See G. Andreasson, Methods for Evaluation of Insurance Companies and Insurance Portfolios, 1980 (a paper submitted to and published by the International Congress of Actuaries), p 16: "In many markets, particularly the big ones, insurance companies' profits vary in a cyclical pattern ... To buy a company in a period just following a peak year can be very expensive, as there might follow only one or two more acceptable years and then a several years' period of loss ... The selection of time is very important as we have these cyclical patterns ..."

As stated above, there is no evidence of an active market for the company's shares. It appears, however, from the reports of an accountant firm (see below) that some shares were traded prior to the nationalization; that the last trading took place in July/August 1978 at a price of 5,760 rials each; and that the highest price at which company shares were traded during the fiscal year ending 20 March 1979 was 6,260 rials per share. As there is no evidence as to the number of shares traded and the circumstances in which those sales took place, it is not possible to say whether or not the prices mentioned represented the fair market value of the company's shares, neither at the date of the sales nor at the date of nationalization.

Based on the foregoing, the Tribunal believes that the fair market value (or going concern value) of Iran America at the date of nationalization is significantly less than even the lowest figure arrived at by the experts of the Claimants.

(ii) Iran America's Net Book Value

In order to establish the value of the company the Respondents relied primarily on a critique of Mr. Freethy's appraisal; on the testimony of Dr. G. Jabbari, a legal and insurance expert and Vice President of Bimeh Markazi; and on a share valuation report dated 7 September 1982, made by the firm of Agahan & Co., Public Accountants, Tehran. As previously stated, the Respondents - not accepting the "going concern" method of valuation - arrived at an estimated value of the net assets of the company amounting to 61,000,000 rials or US $ 865,617. This figure is based mainly on Dr. Jabbari's testimony. Agahan & Co. in their report valuated the shares at the date of nationalization at 3,772.5 rials each or, alternatively, after an adjustment made according to later issued instructions by the relevant Government authority, at 3,272.5 rials each, giving a total value of the company of US $5,352,962 or US $4,643,490. The accountants state in their report, however, that in their final balance sheet the company has neither been fully considered a going concern nor has it been regarded as a breaking-up business; the adopted basis has been a combination of both. The report further shows that on certain issues the accountants, in accordance with instructions received, have taken into consideration the actual result of the company's business during the years following the nationalization.

A close examination of the audit report, with particular attention paid to the data contained in the notes to it, makes it clear that the results arrived at by the accountants are too low due to the instructions received. It is evident that had they employed standard accounting principles for the valuation of the company's shares as at 25 June 1979, they would have come to a considerably higher amount than the alternative figures indicated in the report.

(iii) Conclusions

The first point in issue is which method should be used for the valuation of Iran America's shares. The Tribunal holds that the appropriate method is to value the company 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. The book value method is used mainly for liquidation purposes.

The next issue to be considered is therefore what conclusions can be drawn from the evidence before the Tribunal concerning the going concern or fair market value of Claimants' interest in Iran America.

From what has been stated above, it might be possible to draw some conclusions regarding the higher and the lower limits of the range within which the value of the company could reasonably be assumed to lie. But the limits are widely apart. In order to determine the value within those limits, to which value the compensation should be related, the Tribunal will therefore have to make an approximation of that value, taking into account all relevant circumstances in the case. In so doing, the Tribunal fixes the value of the shares, for which amount the Claimants should now be compensated, at US $10,000,000. Out of this amount US $7,142,857 shall be paid to AIG and US $2,857,143 shall be paid to ALICO.

In view of the conclusions in this case, the Tribunal need not here deal with the issues concerning the validity of the Treaty of Amity and its relevance with regard to the present dispute.

The Respondents have alleged that an amount of 111,461,250 rials or US $1,581,571 is due from the Claimants under various reinsurance contracts. There is, however, no evidence before The Tribunal of that amount being owed to Respondents, and therefore such set off cannot be granted.

c. Interest

The Tribunal finds that the Claimants are entitled to interest on the amounts of compensation at a reasonable annual rate of 8.5 per cent as from the date of nationalization, 25 June 1979.

V. COSTS

The Tribunal determines that all parties shall bear their own costs of arbitration.

VI. AWARD

THE TRIBUNAL HEREBY AWARDS AS FOLLOWS:

The Claim against the Respondent BIMEH MARKAZI is dismissed.

The Respondent GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN is obligated to pay and shall pay to the Claimant AMERICAN INTERNATIONAL GROUP, INC. the sum of Seven Million One Hundred and Forty Two Thousand Eight Hundred and Fifty Seven United States Dollars (US $7,142,857) plus simple interest at the annual rate of eight and a half (8.5) per cent as from 25 June 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment of the Award.

The Respondent GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN is obligated to pay and shall pay to the Claimant AMERICAN LIFE INSURANCE COMPANY the sum of Two Million Eight Hundred and Fifty Seven Thousand One Hundred and Fifty Three United States Dollars (US $2,857,153) plus simple interest at the annual rate of eight and a half (8.5) per cent as from 25 June 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment of the Award. [*]

Such payment shall be made 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.

*[See correction at I.L.M. page 13.]

Each of the parties shall bear its costs of arbitration.

This Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Dated, The Hague
١٩ December 1983

Nils Mangård
Chairman
Chamber Three

In the Name of God

Richard M. Mosk
Concurring Opinion

Parviz Ansari Moin

The arbitrators in Chamber Three of the Tribunal having been invited to sign the Award on 19 December 1983 at 12 noon, Judge Ansari Moin appeared and stated that he would not sign the Award.

Nils Mangård

Richard M. Mosk

AMERICAN INTERNATIONAL GROUP, INC. and AMERICAN LIFE INSURANCE COMPANY,

Claimants,

- and -

ISLAMIC REPUBLIC OF IRAN and CENTRAL INSURANCE OF IRAN (BIMEH MARKAZI IRAN),

Respondents.

CASE NO. 2
CHAMBER THREE
AWARD NO. 93-2-3

IRAN UNITED STATES CLAIMS TRIBUNAL — FILED - ثبت شد
Date ١٣٦٢/٩/٢٨ — 19 DEC 1983
No. 2 — ٢

CORRECTION OF AWARD

Pursuant to Article 36 of the Tribunal Rules, the Tribunal hereby corrects Award No.93-2-3 as follows:

> The terms "Two Million Eight Hundred and Fifty Seven Thousand One Hundred and Fifty Three United States Dollars (US $2,857,153)" appearing on page 23 of the Award are corrected to read "Two Million Eight Hundred and Eifty Seven Thousand One Hundred and Forty Three United States Dollars (US $2,857,143)".

CERTIFIED COPY
فتوکپی گواهی شده

Dated, The Hague
19 December 1983

Nils Mangård
Chairman
Chamber Three

In the Name of God

Richard M. Mosk
Concurring Opinion

Parviz Ansari Moin

The arbitrators in Chamber Three of the Tribunal having been invited to sign the Correction of Award on 19 December 1983, Judge Ansari Moin stated that he would not sign the Correction of Award.

Nils Mangård

Richard M. Mosk

CASE NO. 2

CHAMBER THREE

AWARD NO. 93-2-3

AMERICAN INTERNATIONAL GROUP, INC. and AMERICAN LIFE INSURANCE COMPANY,
Claimants,

and

ISLAMIC REPUBLIC OF IRAN and CENTRAL INSURANCE OF IRAN (BIMEH MARKAZI IRAN),
Respondents.

CONCURRING OPINION OF RICHARD M. MOSK

I concur in the Tribunal's Award in order that a majority can be formed. As one authority has written, if there is no majority, the "arbitrators are therefore forced to continue their deliberations until a majority, and probably a compromise solution, has been reached." Sanders, Commentary on UNCITRAL Arbitration Rules, II Yearbook, Commercial Arbitration 172, 208 (1977). This Award represents a "compromise solution" in which I have joined so that some award could be issued. Otherwise, this case, heard almost a year ago, would remain undecided.

I recognize that the value of Claimants' nationalized interest in Iran America cannot be established with precision. I believe, however, that there are justifications for an award of damages higher than that provided by the Tribunal in this case. Moreover, the Tribunal should have discussed more fully in its Award certain issues such as the applicability of the U.S.-Iran Treaty of Amity,[1] the time at which the payment of compensation was required and the standard of compensation utilized.[2]

Treaty of Amity

The Tribunal should have held explicitly that the terms of the Treaty of Amity are controlling as to the requirements for compensation in cases of nationalization or expropriation by Iran of the property of United States nationals.

Article IV, paragraph 2, of the Treaty of Amity provides as follows:

> 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.

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[1] Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, signed 15 August 1955, entered into force, 16 June 1957, T.I.A.S. No. 3853, 8 U.S.T. 900 ("Treaty of Amity").

[2] For a criticism of summary determinations of the value of nationalized property, see Lillich, "The Valuation of Nationalized Property by the Foreign Claims Settlement Commission", in I The Valuation of Nationalized Property in International Law 95, 97-99 (R. Lillich ed. 1972).

The Treaty of Amity has never been terminated, either under its terms or otherwise. There is no evidence that Iran gave the formal written notice required by Article XXIII of the Treaty of Amity or any other notice effective under international law. See Vienna Convention on the Law of Treaties, Arts. 54(a), 65 and 67, U.N. Doc A/Conf. 39/27, 23 May 1969, entered into force 27 January 1980, reprinted in 8 I.L.M. 679 (1969) ("Vienna Convention");[3] 14 M. Whiteman, Digest of International Law 442-44 (1970).

It is doubtful that even a material breach of the Treaty of Amity would permit termination without the notice required by that treaty and by international law. In any event, I cannot agree with Iran's contention that the United States breached the Treaty. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) 1980 I.C.J. 3, 18-20, 28, 38 (Judgment of 24 May 1980). Moreover, during 1980 and 1981, Iran itself relied upon and argued the continued applicability of the Treaty of Amity in cases before United States courts.[4] Iran asserted in one of these cases:

> The Treaty of Amity, moreover, remains in effect. American courts have uniformly refused to declare a treaty to be terminated or ineffective, in the absence of executive action, under circumstances at least as compelling as those in the Iranian cases.... In the present situation, where there has been no declaration of war, this Court should be even less willing to derogate any existing treaty with a foreign power. Article XXIII, [para.] 2 of the Treaty of Amity provides that it "shall remain in force for ten years and shall continue in force thereafter until terminated as provided herein," and paragraph 3 of Article XXIII requires one year's written notice to effect termination. No such notice has been given.

Memorandum of the Government of Iran in Opposition to Confirmation of Attachments, 74-6, Iranian Attachment Cases (S.D.N.Y.)(filed April 21, 1980). Thus, Iran cannot now contend that the Treaty was abrogated by events that were known to it at the time of its own invocation of the Treaty. See Vienna Convention, Art. 45; Bowett, Estoppel Before International Tribunals and Its Relation to Acquiescence, 1957 Brit.Y.B. Int'l.L. 176, (1958); B. Cheng, General Principles of Law As Applied by International Courts and Tribunals 141-42 (1953); MacGibbon, Estoppel in International Law, 7 Int'l & Comp.L.Q. 468, 479 (1958).

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[3] The effect of paragraph 5 of Article 65 of the Vienna Convention is unclear. A plea of termination in defense to a claim for breach of a treaty does not appear to constitute the instrument of notice required under Articles 65, paragraph 2, and 67, paragraph 2, of the Vienna Convention, to make the termination effective. Similarly, a fundamental change of circumstances, Art. 62 of the Vienna Convention, would seemingly not obviate notice requirements. In any case, Iran has not invoked, and under the circumstances cannot invoke, such a ground. See, e.g., Article 62, paragraph 2(b), of the Vienna Convention. Moreover, Iran should be precluded by virtue of Article 45 of the Vienna Convention and general principles of estoppel from asserting that the Treaty was terminated. See infra at n.4.

[4] See, e.g., Brief for Intervenor-Respondent The Islamic Republic of Iran 13, 29, 45, Dames & Moore v. Regan (U.S. Sup. Ct.) (Filed June, 1981); Memorandum of the Government of Iran in Opposition to Confirmation of Attachments 16-17, 74-75, Iranian Attachment Cases (S.D.N.Y.) (filed April 21, 1980); Memorandum of Davis Robinson, Legal Adviser of the U.S. Department of State, Application of the Treaty of Amity to Expropriations in Iran, 129 Cong. Rec. S 16055, n.6 (daily ed. Nov. 14, 1983). The United States Government continues to issue "treaty trader" and "treaty investor" visas to Iranian nationals pursuant to the Treaty of Amity. Id. at S 16058 n. 7.

In United States Diplomatic and Consular Staff, the International Court of Justice stated that:

> [A]lthough the machinery for the effective operation of the 1955 Treaty has, no doubt, now been impaired by reason of diplomatic relations between the two countries having been broken off by the United States, its provisions remain part of the corpus of law applicable between the United States and Iran.

1980 I.C.J. at 28. The Court also observed:

> The very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory. It is precisely when difficulties arise that the treaty assumes its greatest importance....

Id.

Even if the Treaty of Amity were not considered to be operative today, it was in force on the date this claim arose -- the date of the nationalization -- and thus is applicable to this claim. Id.; Vienna Convention, Art. 70, paragraph 1 (b) ("[T]ermination of a treaty ... does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.").[5]

The Treaty of Amity constitutes the law applicable to this case, and Claimants, as nationals of the United States, may rely upon that Treaty. Article V of the Claims Settlement Declaration[6] provides that the Tribunal shall apply "such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable." As noted supra, the International Court of Justice has held that the provisions of the Treaty "remain part of the corpus of law applicable between the United States and

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[5] The property protection provisions of the Treaty of Amity have not been superseded by the adoption of such United Nations resolutions as the United Nations Declaration on Permanent Sovereignty over National Resources, G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962), reprinted in 57 Am.J.Int'l L. 710(1963), or the 1974 United Nations Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974), reprinted in 69 Am.J. Int'l L. 484 (1975), as contended by Iran. If Iran wished to have Article IV, paragraph 2, of the Treaty of Amity amended in the light of those resolutions, it could have sought to negotiate such amendment; but it did not do so. Indeed, with respect to Resolution 3281, the Iranian delegate to the United Nations noted that approval thereof was "without prejudice to any arrangements or agreements reached between States concerning investments and modalities of compensation in the event of nationalization or expropriation of foreign property." Legal Problems of Multinational Corporations 148 (K. Simmonds ed. 1977) (quoting U.N. Doc. A/C.2/SR. 1650, pp. 10-11).

[6] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, dated 19 January 1981.

Iran." United States Diplomatic and Consular Staff, 1980 I.C.J. at 28. Thus, in the instant case, the Treaty of Amity is the source of international law. It also appears that the Treaty of Amity is part of the municipal law of both the United States and Iran. United States Constitution, Art. VI, cl.2; Civil Code of Iran, Art. 9. Accordingly, in cases such as this case, which involve matters that are the subject of the Treaty of Amity, that Treaty is the most, if not the only, appropriate law to apply.

The entire framework of the Algiers Declarations[7] leads to the same conclusion. Article II, paragraph 1, of the Claims Settlement Declaration, gives this Tribunal jurisdiction over, inter alia, claims of United States nationals which "arise out of ... expropriations or other measures affecting property rights." The Algiers Declarations specifically give the nationals of the United States and Iran the right to bring such claims on their own behalf. Claims Settlement Declaration, Art. III, paragraph 3. Thus, the Governments gave to their nationals the right to bring before this Tribunal claims which would normally be governed by international law. As the Treaty of Amity is the pertinent international law, it should be applied to these claims.

There is no reason to decline to apply the applicable law or to accord claimants fewer substantive rights just because the two Governments have agreed that claimants may present their own claims before this international Tribunal rather than providing for government espousal of such claims.

Moreover, both Iran and United States claimants relied on the Treaty of Amity in United States courts. It does not seem logical that by shifting such disputes to arbitration before this Tribunal[8] the parties to the Algiers Declarations intended to eliminate the substantive rights of the parties to base a claim on a Treaty of Amity violation or otherwise to invoke that Treaty as applicable law.

Even without regard to the Algiers Declarations, it is arguable that, in providing for rights of their nationals in the Treaty of Amity, the Governments intended that those rights be enforceable by their nationals. See Jurisdiction of the Courts of Danzig Case, 1928 P.C.I.J., ser. B. No. 15 (Advisory Opinion of 3 March). In addition, in the words of Judge Jiménez de Aréchaga:

> Precisely, one of the most important future uses of the stipulation "pour autrui" in international law may consist in its being

[7] Claims Settlement Declaration and Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981("General Declaration").

[8] See General Principle B of the General Declaration. A United States Court held in favor of Claimants against Iran on the basis of the Treaty of Amity. It should be noted that a claimant before the Tribunal does not have to exhaust local remedies and is not faced with such defenses as sovereign immunity and the act of state doctrine (see the Tribunal discussion of jurisdiction in this case).

> used in order to raise the individual to the status of a subject of the law of nations, granting him certain rights based on agreement between states, and giving him remedies before international organs for protection of those rights.

Jiménez de Aréchaga, Treaty Stipulations in Favor of Third States, 50 Am.J.Int'l Law 338, 357 (1956); see Draft Convention on the International Responsibility of States for Injuries to Aliens, Art. 3, paragraph 1(d) and Art. 22, paragraph 2, reprinted in 55 Am.J. Int'l L. 548, 549, 578 (1961).

Thus, in determining the Claimants' rights with respect to the nationalization of their ownership interest in Iran America, the Tribunal should have relied upon the provisions of the Treaty of Amity.

It appears that the Tribunal, in awarding Claimants as damages what it determined to be the full value of the property nationalized, has relied upon customary international law. As I discuss infra, there are no meaningful differences between the obligations for compensation set forth in the Treaty of Amity and those provided for by customary international law.

Prompt Compensation

Under the Treaty of Amity, Iran is obliged to pay compensation promptly for its taking of the property of a United States national. Treaty of Amity, Art. IV,paragraph 2 ("Such property [shall not] be taken ... without the prompt payment of just compensation ... [A]dequate provision shall have been made at or prior to the time of taking for the determination and payment thereof."). Such prompt compensation is also compelled by customary international law. See Norwegian Shipowners' Claims (Nor. v. U.S.), 1 R. Int'l Arb. Awards 307, 342 (1922); Goldenberg Case (Ger. v. Rum.), 2 R. Int'l Arb. Awards 901, 909 (1928); 2 D. O'Connell, International Law 781 (1970).[9]

Standard of Compensation

Under the Treaty of Amity, Iran is obligated to pay "just compensation," which is defined as that which "shall represent the full equivalent of the property taken." Treaty of Amity, Art. IV, paragraph 2 (emphasis added). Here again, there is no difference between the standard of compensation provided for by the Treaty of Amity and that provided for by customary international law. See ITT Industries, Inc. and The Islamic Republic of Iran, Award No. 47-156-2, (Concurring Opinion of George H. Aldrich)(26 May 1983).[10] Although there has been controversy over the standard of compensation required by customary international law, see Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 888-91 (2d Cir. 1981), I believe such law requires

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[9] Post World War II settlement practice has not modified international custom regarding promptness of compensation. Such settlements do not reflect legal determinations, but rather are negotiated resolutions of claims that obligations were breached. Each settlement agreement should be deemed sui generis. See Barcelona Traction Case, 1970 I.C.J. 3, 40 (Judgment of 5 February). Certainly the lengthy negotiation process leading to lump sum settlements has no bearing on the appropriate time for the payment of compensation.

[10] See also the negotiating history of the Treaty of Amity in Robinson Memorandum, 129 Cong. Rec. at S 16056-57.

full compensation.[11] The notion that property can be taken without full compensation is incompatible with fundamental fairness and other public and international interests. The risk of inadequate compensation for takings may discourage much-needed international investments in the developing countries or at least will raise the cost of those investments to such countries. In addition, developing countries will have an increasing interest in protecting the foreign investments of their own nationals. See generally 2 D. O'Connell, International Law 784 (1970)[12]

There are some who suggest that less than full compensation may constitute appropriate compensation. Although I do not agree with this suggestion, various factors cited with regard to a determination of whether less than full compensation should be awarded support full compensation in the instant case. Claimant American International Group, Inc. and its subsidiaries (collectively "AIG") made their investment with the encouragement of the Iranian government. Presumably, both were interested in the development of an Iranian insurance industry. AIG devoted time and money to supply expertise, train Iranian personnel in the business of insurance, and otherwise assist the Iranian insurance industry. The investment was not made in a "colonial" or "quasi-colonial" country and did not have any adverse effect on Iran. AIG did not commit any improper acts, and there is no indication that AIG derived excess or unwarranted profits. Indeed, it appears that AIG encouraged Iran America to take measures favoring long-term stability over short-term profits. Thus, although the investment was not a relatively old one, it was intended to be one of long duration. It may be assumed that AIG made its investment in reliance, not only on Iranian government cooperation, but also on the explicit provisions of the Treaty of Amity. Thereafter, Iran took over the assets of the company as part of its program "to expand the insurance industry over the entire State" and to nullify and "liquidate" all activities of "representatives of foreign insurance companies." The Law of Nationalization of Insurance Corporations, paragraphs 1 and 2 (25 June 1979). Thus, Iran, by its taking, became the beneficiary of all of the efforts of AIG, as well as of the business of Iran America. I do not suggest that any of these factors is relevant to the determination of what is adequate compensation under customary international law; as noted above, they are relevant only to theories that I do not accept. I mention them, however, to point out that even under these theories, the Claimants are entitled to full compensation.

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[11] Full compensation clearly contemplates effective compensation.

[12] Various United Nations resolutions are not determinative of the customary international law standard. See discussion in Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d at 889-91; Amerasinghe, "The Quantum of Compensation for Nationalized Property" in III The Valuation of Nationalized Property in International Law 91, 111-14 (R. Lillich ed. 1975); Texaco Overseas Petroleum Co. v. Libyan Arab Republic (Merits) 53 I.L.R. 422,484-95 (Dupuy, sole arb.)(Award of 19 January 1977); Higgins, "The Taking of Property by the State: Recent Developments in International Law," 176 Rec. des Cours 259, 292-3 (1983); Schwebel, The Effect of Resolutions of the U.N. General Assembly on Customary International Law 73 Am. Soc. Int'l L. Proc. 301 (1979).

The Tribunal correctly concludes that, having failed to pay any compensation, Iran is now liable for damages equal to the compensation which AIG was entitled to receive, plus interest from the date of the taking. The Tribunal also correctly determines that the compensation due was AIG's share of the fair market value of the property nationalized. These decisions are in accordance with customary international law. See Chorzów Factory Case (Merits)(Ger. v. Pol.), 1928 P.C.I.J., ser. A, No. 17, at 47 (Judgment of 13 September); Norwegian Shipowners' Claims (Nor. v. U.S.), 1.R. Int'l Arb. Awards 307 (1922).

The Valuation

The Tribunal properly holds that Iran America, which was an operating entity, must be valued as a going concern, considering all of the elements which contribute to the company's worth, including prospective income.[13] The term "going concern" connotes "the undertaking itself considered as an organic totality ... the value of which is greater than that of its component parts, and which must also take account of the legitimate expectations of the owners." Kuwait and American Independent Oil Company, 21 I.L.M. 976, 1041 (Reuter, Sultan, Fitzmaurice, arbs.)(Award of 24 March 1982). The Tribunal applies the well-recognized principle that, in determining the value of the company, it must disregard the negative effects of certain actions of the Government of Iran, as well as developments subsequent to the taking.[14]

Since there has never been an active market in the shares of Iran America, the Tribunal must resort to other means to determine the fair market value of that company and the Claimants' shares therein. In this connection, Claimants submitted appraisals by qualified actuaries.

Although conceding the competence of the Claimants' principal expert, Respondents relied primarily on the

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13 The value of lost prospective business has been recognized as compensable by international tribunals. R.N. Pomeroy et al. and Government of the Islamic Republic of Iran, Award No. 50-40-3 (8 June 1983); Chorzów Factory Case (Merits) (Ger. v. Pol.), 1928 P.C.I.J., ser. A, No. 17 (Judgment of 13 September); Shufeldt Claim (U.S. v. Guat.), 2 R. Int'l Arb. Awards 1079, 1099 (1930); Lena Goldfields Arbitration (1930), reprinted in 36 Corn. L.Q. 42 (1950); Lighthouses Arbitration, Claim No. 27 (Fr. v. Gr.), 23 I.L.R. 299 (1956). The United States Foreign Claims Settlement Commission has valued business enterprises as going concerns. See Lillich, "The Valuation of Nationalized Property by the Foreign Claims Settlement Commission" in I The Valuation of Nationalized Property in International Law 95, 113-16 (R. Lillich, ed. 1972).

14 See ITT Industries, Inc. and The Islamic Republic of Iran, Award No. 47-156-2 (Concurring Opinion of George H. Aldrich)(26 May 1983); Restatement (Second) of Foreign Relations Law of the United States §188, comment b, at 565 (1965); Organization for Economic Cooperation and Development, Draft Convention on the Protection of Foreign Property, Art. 3, comment 9(a) at 27 (1967), reprinted in 7 I.L.M. 126 (1968); Draft Convention on the International Responsibility of States for Injuries to Aliens, Art. 10, paragraph 2(b), reprinted in 55 Am.J. Int'l L. 548, 553 (1961); Lillich, supra, at n. 13 p. 97; Lighthouses Arbitration, Claim No. 27 (Fr. v. Gr.), 23 I.L.R. 299, 301(1956).

statements of one of their own representatives and a critique of the appraisal of Claimants' principal expert, an English actuary. Respondents based their estimate of the value of the company on its alleged book value without giving any consideration to the company as a going concern. Moreover, Respondents' audit figures are unreliable for purposes of an evaluation because they are based upon the assumption that the company ceased to operate on the date of nationalization and other arbitrary assumptions, upon government instructions to take into account post-nationalization events and upon non-standard accounting practices. Respondents basically left unrebutted much of the evidence provided by Claimants' experts.

The Tribunal has not, in my view, accorded sufficient weight to the material supplied by the Claimants' experts. The Tribunal has made certain unjustified assumptions and has reached questionable conclusions in discounting the opinions of those experts.

Contrary to the Tribunal's view, I believe that Claimants' experts were justified in asserting that Iran America's performance from 21 March 1978 - the end of its 1978 fiscal year - to the date of nationalization, should be disregarded. Because of events surrounding the Revolution, that period appears to have been an abnormal one. It should be noted, however, that Claimants' principal expert, at the hearing, took into account 1979 figures.

The Tribunal points to the supposed impact of Iranian taxes as a deficiency in the report of Claimants' principal expert. Although the expert acknowledged that he did not take into account certain taxes, he stated that such taxes would not have had a significant effect on his evaluation. The Tribunal lacked sufficient evidence of the effect of taxes to draw any conclusions concerning them. There were suggestions that taxes on insurance companies in Iran were less than those on other companies. Apparently, taxes on AIG's dividends had not yet been assessed. Even if they had been and even if they are relevant, presumably AIG would receive a credit for such taxes against United States tax obligations.

The Tribunal states that the appraisals of Claimants' experts "do not sufficiently consider the changes in general social and economic conditions in Iran...." There is no evidence, however, that such changes would have affected the Iranian insurance market except in the short term. The Tribunal's assertion that many wealthy Iranians left Iran assumes, without any evidentiary foundation, that such wealthy Iranians constituted a significant proportion of the likely market for the insurance offered.

The Tribunal, in noting that the company had only been doing business for 4½ years, ignores the fact that Claimants' expert took into account a "pessimistic" view of the company's future. Moreover, the company had established certain business and growth patterns.

AIG has done business in countries throughout the world, including many in which there have been revolutions, social turmoil and economic disruption. The evidence demonstrates that when AIG invested in Iran America, there was not a highly developed insurance industry in Iran. Thus, Iran America had significant untapped business prospects. Indeed, in the Law of Nationalization of Insurance Corporations, Iran justified its action on the ground that it was necessary in order "to expand the insurance industry over the entire State." Paragraph 1. This was also the purpose of Iran America and was among the opportunities upon which its future prospects rested. The principal reason for the nationalization appears to have been to prevent participation in these opportunities by "representatives of foreign insurance companies." Paragraph 2. Whatever the reason for the nationalization, the nationalization law supports the Claimants' position that Iran America had substantial business prospects in Iran.

Iran America began business in late 1974. Each year its business increased. Its profits increased almost 50% from 1977 to 1978. There is no significant evidence before the Tribunal that, but for the nationalization and actions attributable to the Government of Iran after the Revolution, Iran American could not have continued to operate successfully. Indeed, the evidence shows that, during 1979, economic and social dislocations that might affect the company had begun to wane.

In short, the assumptions which caused the Tribunal to discount in part the opinions of Claimants' experts are based on inadequate evidence.

The fact that Claimants' own experts came to different conclusions suggests the inexactness of valuations of insurance companies. Undoubtedly, uncertainties resulting from events in Iran can and should be considered and might lead one reasonably to reduce the values estimated by the Claimants' experts. Based on the factors set forth above, however, I believe that a higher valuation of the nationalized property than that arrived at by the Tribunal would have been justified. I also continue to believe that the interest awarded should be based on prevailing interest rates and that costs, including reasonable attorneys' fees, should be awarded. See Granite State Machine Co., Inc. and The Islamic Republic of Iran, Award No. 18-30-3 (Concurring Opinion of Richard M. Mosk)(25 January 1983), 1 Iran-U.S. C.T.R. 442, 449, 450-51. I see no reason why the rate of

interest in this case should be less than that 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).

Nevertheless, for the reasons stated at the outset of this opinion, I concur in the Tribunal's Award.

Dated, The Hague
30 December 1983

Richard M. Mosk

AMERICAN INTERNATIONAL GROUP, INC. and AMERICAN LIFE INSURANCE COMPANY,

Claimants,

- and -

ISLAMIC REPUBLIC OF IRAN and CENTRAL INSURANCE OF IRAN (BIMEH MARKAZI IRAN),

Respondents.

CASE NO. 2
CHAMBER THREE
AWARD NO. 93-2-3

CORRECTION OF AWARD

Pursuant to Article 36 of the Tribunal Rules, the Tribunal hereby corrects Award No.93-2-3 as follows:

> The terms "Two Million Eight Hundred and Fifty Seven Thousand One Hundred and Fifty Three United States Dollars (US $2,857,153)" appearing on page 23 of the Award are corrected to read "Two Million Eight Hundred and Fifty Seven Thousand One Hundred and Forty Three United States Dollars (US $2,857,143)".

Dated, The Hague
19 December 1983

Nils Mangård
Chairman
Chamber Three

Richard M. Mosk
Concurring Opinion

In the Name of God

Parviz Ansari Moin

The arbitrators in Chamber Three of the Tribunal having been invited to sign the Correction of Award on 19 December 1983, Judge Ansari Moin stated that he would not sign the Correction of Award.

Nils Mangård

Richard M. Mosk