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ORIGINAL DOCUMENTS IN SAFE

Case No. 481

Date of filing: 20/10/88

** AWARD - Type of Award Final
- Date of Award 28/10/88
30 pages in English _____ pages in Farsi

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

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

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

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IRAN-UNITED STATES CLAIMS TRIBUNAL

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IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعاوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date	28 JUN 1988 تاریخ
	۱۳۶۷ / ۴ / ۷
No.	481 شماره

CASE NO. 481

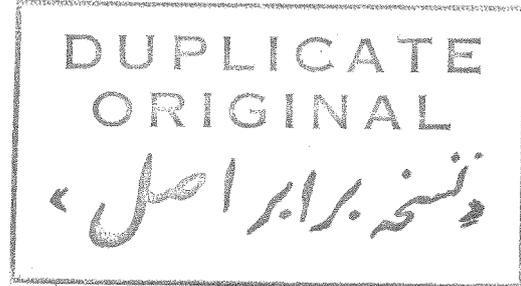
CHAMBER THREE

AWARD NO. 373-481-3

MOTOROLA, INC.,
Claimant,

and

IRAN NATIONAL AIRLINES CORPORATION,
THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
Respondents.

AWARDAppearances:For the Claimant:

Mr. Markham Ball,
Mr. Joseph P. Griffin,
Mr. William T. Holden,
Attorneys for the
Claimant;
Dr. William D. Connor,
Mr. Edward Dervishian,
Representatives of the
Claimant.

For the Respondents:

Mr. Mohammad K. Eshragh,
Agent the Government of
the Islamic Republic of
Iran;

Mr. Mohammad Taghi Naderi,
Legal Advisor to the
Agent of the Islamic
Republic of Iran;
Mr. Mohammad Mansour,
Commercial advisor to the
Government of the Islamic
Republic of Iran;
Mr. Mohsen Azadeh,
Mr. Hossein Karimi,
Mr. Ahmad Hejazi,
Assistants to the Agent
of the Islamic Republic
of Iran;
Mr. Ali Raouf,
Mr. Bahram Khosravi Yazdi,
Mr. Ahmad Shafiee,
Mr. Mohammad Reza Askari,
Mr. Jalal Ali Hosseini,
Mr. Gara Mansouria,
Representatives of Iran
National Airlines
Corporation.

Also Present:

Mr. John D. Crook,
Agent of the Government
of the United States of
America.

I. PROCEEDINGS

1. The Claimant, MOTOROLA, INC. ("Motorola" or "Claimant"), is the manufacturer of communications and electronic equipment, including portable and two-way radio systems, radio paging products and closed circuit television systems. Motorola sold products in Iran through an independent distributor as early as the late 1950s. A branch of its subsidiary Milcom Communication and Electronics Ltd. ("Milcom") was established in Iran in 1972. Milcom assisted in selling and installing Motorola products and worked in concert with its immediate corporate parent, Motorola Israel Ltd. ("MIL").

2. On 18 January 1982 Motorola filed a Statement of Claim against the Respondents IRAN NATIONAL AIRLINES CORPORATION ("Iran Air"), IRAN ELECTRONICS INDUSTRIES ("IEI") and the PROVISIONAL GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN COUNCIL OF MINISTERS ("Iran"), claiming, as finally pleaded, (1) the amount of \$36,716.35 for goods allegedly sold by Motorola to Iran Air ("Debt Claim"), and (2) \$910,000 as compensation for the alleged expropriation of the Iranian branch of Milcom ("Expropriation Claim").

3. The Parties have submitted memorials and evidence on all issues in this Case.

4. On 16 May 1986 the Respondents filed a "Supplement to the Statement of Counterclaim Filed on 5 May 1985" in which a counterclaim for allegedly unpaid social security premia was raised. On 26 May 1986 the Respondents further submitted the "Memorial of the Government of the Islamic Republic of Iran in Support of the Tribunal's Jurisdiction over Claims arising out of Non-Payment of Social Security Premia." By Order dated 16 June 1986, the Tribunal decided to reject both these filings, as well as the counterclaim, on grounds of untimeliness.

5. Three days before the Hearing the Claimant submitted a statement by its attorney concerning arbitration costs allegedly incurred. Given that a document of this nature can only be submitted at a late stage of the proceedings, the Tribunal admits this document as part of the record in this Case.

6. A Hearing was held on 23 June 1986. The Claimant, Iran and Iran Air appeared and presented oral argument.

7. At the Hearing both Parties submitted complete copies of "Milcom Communications and Electronics Limited, Iran Branch, Financial Statements at 31st December 1978" which thus were accepted for filing.

8. Subsequent to the Hearing, on 7 July 1986, the Claimant submitted copies of two publications entitled "The Valuation of Unlisted Shares" by Christopher G. Glover and "Valuing a Business" by Shannon P. Pratt, respectively. Although these documents are publicly available documents, the Tribunal declines to accept them as evidence in this Case because their submission was untimely. In any event, the findings in this Case render them unnecessary.

9. Further, on 21 July 1986, the Claimant submitted an affidavit by the Vice President/Director of Treasury of Motorola, Garth A. Milne, updating an earlier affidavit regarding the average interest rates Motorola would have paid for borrowing funds. The Tribunal admits this submission on the same basis as it admitted the document concerning arbitration costs. (See para. 5, supra).

10. By documents filed on 8, 16 and 23 September 1986, the Agent of the Islamic Republic of Iran raised a new counterclaim for allegedly unpaid taxes. The Claimant objected to the admission of this counterclaim as well as the late filed pleadings. On grounds of untimeliness the Tribunal declines

to admit this counterclaim as well as the documents filed with it.

II. PRELIMINARY ISSUES

a. Generally

11. Motorola is alleged to own both parts of the Claim raised in this Case as the ultimate corporate parent of Motorola International Development Corporation ("MIDC") and Motorola International Capital Corporation ("MICC"), both United States corporations, and Motorola Israel, Limited ("MIL"), an Israeli corporation, and Milcom Communications & Electronics, Limited ("Milcom"), a British corporation.

12. Based on the evidence submitted, the Tribunal is satisfied that Motorola, MIDC and MICC are United States corporations, that Motorola is the owner of MIL and Milcom and that more than 50% of the outstanding shares of Motorola are owned by citizens of the United States, so as to satisfy the requirements of United States nationality in the Claims Settlement Declaration ("CSD"). The Claimant thus satisfies the jurisdictional requirements of the CSD.

b. The Debt Claim

13. This Claim is for payment of alleged debts arising out of an agreement for the sale of goods and services related to the installation of a closed circuit television ("CCTV") system at the Mehrabad Airport in Iran. Pursuant to this agreement Iran Air purchased electronic components and installation services for the CCTV system. The parties to the CCTV agreement were allegedly Motorola and Iran Air, but the actual installation work was assigned to Milcom.

14. It is undisputed that all the required components were delivered to Iran Air. With the exception of \$36,716.35, which the Claimant now asserts is due, Iran Air paid for the components. The charges for the installation work - \$140,811.25 - allegedly remain unpaid. These charges, however, are not part of Motorola's Debt Claim because they are directly owed to Milcom, Motorola's subcontractor, and because the value of this receivable is taken into account in Motorola's Expropriation Claim. (See paras. 38-79, infra).

15. At the Hearing -- for the first time -- Iran Air contended that the Debt Claim should be rejected on the ground that it was not formulated in the Statement of Claim with the specificity required by Article 18, paragraph 1, of the Tribunal Rules, and therefore it does not constitute a proper claim.

16. Although the Statement of Claim lists Motorola as the creditor for receivables, including the \$36,716.35 here claimed, the Tribunal agrees with Iran Air that the Statement of Claim is not completely clear in its description of this Debt Claim. Iran Air, however, did not raise this lack of specificity as a ground for dismissal of the Debt Claim in any of its pleadings in response to the Statement of Claim. More important, the Statement of Claim was sufficiently clear and detailed for Iran Air to prepare a response to all parts of the Claim in this Case in its Statement of Defense filed 14 February 1983. Furthermore, by the same submission, Iran Air raised a counterclaim seeking \$175,298.51 for the allegedly defective and incomplete installation of the CCTV system. This counterclaim is based explicitly on the same agreement as the Debt Claim, i.e., the CCTV agreement. In view of the foregoing, the Tribunal finds that Iran Air may not now invoke the Statement of Claim's lack of complete clarity as a basis for dismissing the claim.

17. It is beyond dispute that the Respondent to this Debt Claim is Iran Air. The record is not as clear in determining the proper Claimant. According to the Statement of Claim, Motorola is the direct owner of a debt owed by Iran Air,¹ which, according to evidence and subsequent pleadings, arose out of the CCTV system agreement. The evidence invoked, however, raises some doubts regarding the contracting parties to this agreement.

18. In claiming that it is the proper Claimant, Motorola relies, inter alia, on a purchase order numbered 45000, change orders made thereto and related correspondence from and to Iran Air. According to these documents, however, the selling party appears not to have been Motorola, but another corporate entity named Motorola Communications & Electronics Inc. ("MCE") under address 375 No. Broadway, Jericho, New York 11753.² As is established by letters to Iran Air on MCE letterhead, MCE is clearly a duly incorporated entity separate from Motorola.

19. In its pleadings Iran Air has not objected to Motorola's status as the proper Claimant. In the majority of its pleadings, however, Iran Air captioned the Claimant as "MCE." This also is true with respect to the pleading in which Iran Air recognized the debt here alleged.

¹Motorola mentions, however, that although Motorola had its branch Milcom in Iran, "some larger orders and systems were sold directly by Motorola (through its wholly owned international sales subsidiary, Motorola Communications International Inc., MCII)." The record contains no further reference to MCII's involvement in the here relevant transaction and there is no evidence of MCII's nationality. The Tribunal concludes that MCII is not involved in the transactions here at issue.

²In one of these documents, however, the addressee is "Motorola Communications Corporation."

20. The evidence on record -- relevant shipping documents, invoices, checks for payment of the required down payment under the CCTV agreement, unhonored sight drafts for the amounts here at issue, as well as related correspondence -- establishes that Motorola (or a division thereof³) effected shipment of the goods and delivered them and thus was entitled to receive payments due, pursuant to the CCTV agreement. Based on the foregoing, and the finding that Motorola is a United States national, the Tribunal holds that Motorola's claim for payment of the debt satisfies the jurisdictional requirements of the CSD.

21. It also is clear that Iran Air's counterclaim arises out of the CCTV agreement and is directed against Motorola Inc. As a consequence it arises out of the same transaction as the subject matter of the claim. The Tribunal therefore has jurisdiction over the counterclaim as well.

c) Remaining Preliminary Issue

22. At the Hearing the Claimant conceded that it has not alleged any facts implicating IEI as a respondent, and orally withdrew its claim against IEI. Consequently, the remaining Respondents are Iran Air and Iran.

³The record evidences references to "Motorola Inc. Communications International Div," "Motorola Inc. I.D.C.," and "Motorola Inc."

III. THE DEBT CLAIM AND COUNTERCLAIM

a) The Claim

23. The CCTV agreement was entered into on or about 7 April 1977. It subsequently was modified at least three times, i.e., in October 1977, in June 1978 and in September 1978. The Claimant contends, and the Respondent Iran Air does not dispute, that these modifications were not caused by any acts or omissions of the Claimant. It also is not disputed that the Claimant shipped and delivered all of the CCTV system components that Iran Air ordered.

24. Payment, however, has not been made on all items. The Claimant has provided invoices and unpaid sight drafts establishing that Iran Air never paid for three shipments totalling \$36,716.35. These sight drafts were due for payment sixty days after the date they were presented, i.e., 6 August 1978 (on the invoice for \$23,189.10) and 25 November 1978 (on the invoice for \$13,527.25).

25. In its Memorial Iran Air concedes that this amount was not paid and that it is due and owing. Based on the foregoing, the Tribunal holds that Iran Air is obligated to pay Motorola \$36,716.35.

b) The Counterclaim

26. An analysis of the Respondent's counterclaim for the allegedly defective and incomplete installation of the CCTV system requires an inquiry into the sequence of events associated with the installation of the CCTV system.

27. The installation of the CCTV system began during the first part of 1978 after the first revision of the agreement. By April 1978 the work was allegedly "well under way." By the summer of 1978 installation work had pro-

gressed to the point where Milcom requested the assistance of a senior field technician of Motorola to supervise the final stages of installation. Motorola sent a Mr. Dervishian to advise Milcom on these technical matters.

28. By the end of 1978, according to the Claimant, the CCTV system was ready for optimization, the final procedure necessary for delivery of the systems, but Milcom was unable to complete the procedure due to force majeure conditions. Indeed strikes and civil disorder eventually caused Milcom temporarily to shut down its operations. When Milcom was able to resume operations, shortly after February 1979, however, it allegedly was placed under the control of managers appointed by Iran.

29. On 10 August 1979 Iran Air's headquarters in New York forwarded to the Claimant a telex requesting Motorola to send a technician to Iran for delivery and final acceptance of the CCTV system. Motorola determined, however, that it could not assure the security of any of its technicians that it would have had to send to Iran. Instead, it offered to train one of Iran Air's qualified communications technicians in the United States to perform the procedure in Iran. Iran Air never responded to this proposal. Consequently, the optimization procedure was not carried out and the system was never formally "delivered" as defined in the agreement.

30. Iran Air now claims that the installation was defective, causing damages in an amount equal to or exceeding \$175,298.51, the total sum paid to date for the equipment and installation. In defense, the Claimant alleges that the Respondent is delinquent in paying for the installation, in a total amount of \$140,811.25.⁴ However, Motorola does not

⁴This figure is the sum of (1) the invoiced price for the 10 October 1977 work order (\$103,935) plus (2) the additional invoice of September 1978 for "extra work" (\$62,860) less (3) the 25% down payment on (1) received on 1 April 1978 (\$25,983.75).

directly seek to recover this amount, since it has computed this amount outstanding as part of its valuation of the allegedly expropriated subsidiary.

31. As evidence of the defective installation, Iran Air makes two submissions. First, it argues that Milcom undertook in a letter of 31 January 1978 to complete performance within two months of receipt of the down payment, which occurred on 5 April 1978. The delay in completing and delivering the system is said to be evidence that it was defectively and negligently installed.

32. Second, Iran Air has submitted an Expert's Report dated 8 October 1983, which outlines several alleged deficiencies in the system as of that date. This report indicates that while portions of the system were functioning, other aspects, including the cable pathways, were generally in disarray and the system could not be fully utilized.

33. In response to these contentions the Claimant relies on affidavits stating that the system was in the final stages of completion when it was forced to leave Iran, and that any defects in the system must be attributable to lack of proper maintenance or conditions of civil unrest in the intervening period.

34. Upon reviewing the evidence the Tribunal finds that the Respondent has not substantiated its contentions. First, although the non-contemporaneous Expert Report may be evidence of present defects in the CCTV systems, there is no evidence that these defects are attributable to the Claimant. Second, no contemporaneous complaint was ever lodged by Iran Air. To the contrary, the fact that Iran Air was seeking to have final optimization of the system in 1979 suggests that it was properly installed. To the extent defects are attributable to the layout design, the Respondent has provided no evidence as to the respective

responsibilities of the Parties for designing the system around existing airport structures.

35. The Respondent also alleges that the Claimant was in delay. The Tribunal finds that the Respondent has not established that the delays incurred were caused by any negligence attributable to the Claimant. The evidence shows that on several occasions the Parties encountered the need for additional work or components, commencing as early as October 1977, then later in June 1978, and finally in September 1978. In any event, even if the Claimant would be responsible for delays, this does not, as the Respondent appears to contend, prove that the installation was defective.

36. The Tribunal finally considers that, under the circumstances, the failure to "optimize" the system, or make final delivery, was not a breach. Motorola was initially clearly prevented from completing performance due to the force majeure conditions in Iran. Subsequently, and to the extent reasonably possible under the prevailing circumstances, Motorola attempted to discharge its obligations by offering to train Iran Air's representatives to make the final optimization. Iran Air had a duty either to accept that offer or give justifiable reasons for rejecting it. Iran Air did neither. Consequently, the Tribunal finds that the Claimant adequately discharged its responsibility to deliver the system to the Respondent.

37. In conclusion, the Respondent's counterclaim for damages for defective installation is denied. Motorola is entitled to payment in full for those parts for which payment has not yet been made. (See para. 25, supra).

IV. THE EXPROPRIATION CLAIM

38. The Claimant contends that its Iranian branch of Milcom was expropriated through a series of acts attributable to Iran. For this expropriation it seeks compensation in the amount of \$910,000 allegedly constituting the fair market value of the Milcom branch. In addition, the Claimant seeks interest and costs.

a) Expropriation

1. Facts and Contentions

39. Milcom was managed locally by an Iranian national, Mr. Gh. Dowlatshahi, who was authorized under the terms of a power of attorney to exercise a comprehensive range of powers on behalf of Milcom. He was assisted by a handful of expatriate assistant managers, the majority of which were Israeli nationals, as well as approximately 30 Iranian nationals serving as technicians, salespersons and accounting and clerical staff.

40. Milcom performed its ordinary operations and business affairs in Iran through the fall of 1978. Increasing interruptions attributable to the Iranian Revolution allegedly created conditions of force majeure which eventually caused Motorola to withdraw its expatriate personnel in December 1978. Milcom apparently continued to operate, but it was forced to close down completely for approximately two weeks during the height of the Revolution. On 26 February 1979 Mr. Dowlatshahi sent a telex to Motorola informing it that Milcom personnel and property were intact and that the company was ready to resume operations.

41. In March 1979, however, a group of Revolutionary Guards, armed with guns, broke into Milcom's premises in Tehran, and ordered all employees to depart. When officials

of MIL tried to establish telephone contact with Milcom, they were allegedly informed by unknown persons in that office that Milcom was closed. At the same time Mr. Dowlatshahi was imprisoned on charges unknown to the Claimant and to the Tribunal.

42. On 25 April 1979 the "Revolutionary Attorney General - Islamic Republic of Iran" appointed Mr. M. K. Tahanha to "supervise" Milcom "until further notice." Motorola was notified of this by telex dated 29 April 1979 and signed by a Mr. Giglou under the title of "assistant general manager."

43. On 6 May 1979, Mr. Tahanha notified the Claimant that the "revolutionary [sic] government" had authorized him to sign all checks in the name of Milcom. Mr. Tahanha hoped this would be "O.K. from your side," and requested Motorola to "take necessary actions in order to give me legal authority for doing so." Additionally he requested a cash infusion of \$200,000 since Milcom had been closed for approximately 40 days.

44. In an exchange of telexes Motorola subsequently requested confirmation of the legal authority of Mr. Tahanha to act as general manager. Mr. Tahanha explained that his appointment was made in conformity with legal Act No. 6738, "Act Concerning the Appointment of Temporary Directors for the Supervision and Management of Firms and Companies." Mr. Tahanha stated that he had been validly appointed pursuant to the terms of this law, quoting the official appointment issued by the Revolutionary Attorney General, which stated that "the directors of Milcom . . . have abandoned their positions, and have left the country since the conquest of the Revolution; and . . . the continuance of the operations of the said company is required for the Government Agencies."

45. In a telexed response Motorola disputed the authority quoted by Mr. Tahanha and stated that Milcom was "open and operating at the time the Revolutionary Council took control

of Milcom," and thus that Motorola "clearly had not abandoned the firm . . . [and that] Milcom's directors have always been non-resident while the company was being actively run by a general manager."

46. In May and June 1979 Mr. Tahanha and other Milcom employees sent numerous telexes requesting money, spare parts and other support for Milcom, which Motorola, according to its Vice-President and Director of Corporate Multinational operation Mr. William D. Connor, was unwilling to supply on the ground that "Motorola could do nothing for Milcom unless and until the Company was returned to Motorola and our General Manager was reinstated."

47. During the same period, Mr. Tahanha sought and finally obtained a meeting with Motorola in London on 14 and 15 July 1979. Among the matters discussed was a Motorola proposal for sale of Milcom to Iran Electronics Industries ("IEI"). A formal proposal to that effect was transmitted to the Managing Director of IEI in August 1979.⁵

48. Motorola introduced this sale proposal stating, inter alia, the following:

[. . .]

Unfortunately, as professional managers for the shareholders of Motorola, Inc., we were unable and remain unable to accept any responsibility for the actions being taken by Milcom during the period of external management of its activities. We have no authority to do so regardless of desire to find a solution to the needs of our customers and our employees.

Due to the current situation existing in Iran while new order is being established in the country, we are unable as well to send in a management team from other parts of Motorola. As a result, we find a dilemma in which, first, we cannot accept responsibilities for the company's operation today because we have no legal right to do so, and second, we are unable to provide external management support.

[. . .]

⁵The copy of the proposal on record is undated.

49. Pursuant to the ensuing terms of the proposal Motorola suggested that IEI purchase Milcom whereby IEI would assume the responsibility for servicing Milcom's customers and would act as the distributor of Motorola equipment in Iran. The proposed purchase price was Milcom's net book value pursuant to the "most recent financial data available to Motorola on Milcom," i.e., a balance sheet of 31 December 1978. According to this balance sheet, the "Surplus of Assets over Curr. Lia." was \$86,000. In addition, a provision for taxes in the amount of \$272,000 was stated to be the result of a five year old disputed tax assessment from the Iranian Income Tax authorities. In the proposal Motorola expressed that "[w]e hope that this dispute would now be resolved and that provision would no longer be required. That being the case, the total equity of the company would then be \$358,000."

50. On 15 September 1979 Motorola received the following telex from Mr. Tahanha:

Re yr Tlx No. 7793 dd 12 Sept 79⁶

During April 79 Revoloutionary [sic] concil [sic] appointed me as temporary supervisor for Milcom in order to keep Milcom in operating condition [.] [N]ow Government has taken full charge of these matters, and so directed Ministry of Commerce to nominate a qualified person to supervise Milcom. Ministry of Commerce found me qualified to fill this position. By letter 15272 Ministry of Commerce appointed me as general manager of Milcom.

I will have meeting with IEI and also Ministry of Commerce this week. Most probably final decision will be made by the said authorities by the end of this week.

I will telex you as soon as the result is known.
[. . .]

⁶This telex is not in evidence.

51. On 19 September 1979, the Director General of the Ministry of Commerce responded to Motorola's sale proposal in the following way:

1. Your assets, fund, and etc. are not sufficient for liabilities, taxes as well as vage [sic] salary and allowances of your staff members.

2. Iranian Govt as well as Ministry of Commerce are not interested to [sic] transfer of owner ship [sic] of Milcom Co.

3. We suggest to appoint your own manager to supper-vise [sic] - Milcomco either from IEI or from other parts of Motorola branches.

4. Further more according to the decision of the revolutioneary [sic] council of the Islamic Republic of Iran, the Ministry of Commerce authorized to supervise, till the owners deside [sic] to come bak [sic] to their jobs.

5. The best alternative would be a face to face discussion about the future of your activities in Iran.

Hope to see you or one of your representatives in Iran to continue our discussions.

52. Motorola has not alleged, and nothing in the record indicates, that it responded to this telex from the Ministry of Commerce.

53. It appears that a new head of IEI was appointed on or about the end of September. On 4 October 1979 Motorola contends it re-proposed the sale to IEI on the same terms as in August. On 5 November 1979 Motorola was informed that this proposal also had been rejected. After this date there is no evidence of any further contact between the Parties.

54. On the basis of this evidence the Claimant argues that Iran effectively expropriated Milcom on 29 April 1979 by ousting Milcom's duly appointed management and by appointing a temporary general manager. According to the Claimant this expropriation was subsequently confirmed by a permanent

appointment of Mr. Tahanha, Iran's subsequent refusal to purchase Milcom, and the continuing refusal or omission to submit to the Claimant current information regarding the affairs of Milcom.

55. The Respondent does not dispute the essential facts in this Case, but rather contends that different legal consequences follow from them. It bases its defense on the argument that the appointment of managers was necessary to protect Milcom and its employees since Milcom's regularly constituted management had abandoned Milcom.

2. The Tribunal's Findings

56. As an initial matter the facts in this Case do not warrant a conclusion that Milcom was abandoned by its management. It is well established that the conditions in Iran in December 1978 constituted force majeure conditions. To the extent that Milcom was managed by expatriates, their departure from Iran in December 1978 was thus justified. In any event, the expatriate personnel left the management of the branch in the hands of the duly appointed General Manager, Mr. Dowlatshahi, an Iranian national. Nothing in the record suggests that Mr. Dowlatshahi did not perform his functions until he was imprisoned.

57. The issue thus becomes whether the appointment by Iran of Mr. Tahanha on 25 April 1979 permits the conclusion that Iran thereby asserted such control over Milcom that a taking occurred and that Milcom was expropriated as of that date.

58. It is true that in previous practice of the Tribunal, the appointment of managers often has been regarded as a "highly significant indication" of a taking and thus of expropriation. (See Sedco Inc. and National Iranian Oil Company, Award No. ITL 55-129-3 at 40 (28 Oct. 1985), reprinted in 9 Iran-U.S. C.T.R. 248, 277-78). It is also

true that the temporary nature of an appointment of managers has not precluded a finding of a taking. "[T]he form of the measures of control or interference is less important than the reality of their impact." (Tippets, Abbett, McCarthy, Stratton, and TAMS-AFFA Consulting Engineers of Iran, Award No. 141-7-2 at 11 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 225.)

59. Although the Tribunal thus considers that the appointment of Mr. Tahanha is a significant event, the Tribunal finds that, in the circumstances of this Case, this appointment does not amount to an expropriation. In this Case, the Tribunal must take into consideration that the temporary nature of Mr. Tahanha's appointment is supported by the subsequent events. Both Mr. Tahanha and the Ministry of Commerce urged Motorola to appoint a new external manager to replace Mr. Dowlatshahi. Motorola initially insisted that Mr. Dowlatshahi be reinstated. While his imprisonment clearly precluded such reinstatement, Motorola has not alleged, and nothing in the record warrants the conclusion, that Mr. Dowlatshahi's imprisonment was related to the fact that he acted as Milcom's General Manager.

60. Immediately upon his appointment Mr. Tahanha and Motorola took up negotiations regarding the future of Milcom. Exchanges of telexes and other written communications were followed by a meeting in London 14-15 July. This evidences the interest both Parties had in reaching an agreement. Iran had an interest to secure direct and immediate access to spare parts and Motorola had an interest to ensure that Milcom retained its customers. In fact, Milcom had no business future if it could not benefit from a close cooperation with Motorola, on which Milcom completely depended for the supply of spare parts necessary for the maintenance of equipment already sold and for the sale of new equipment. Such considerations undoubtedly greatly influenced these negotiations.

61. The negotiations appear to have taken a new direction at the meeting in London. Now Motorola was offering Milcom for sale to IEI (through the Ministry of Commerce). The Claimant states that the reason for this change was that it had become clear that it "would not be permitted to install an experienced and knowledgeable General Manager who would be dedicated to Motorola's interests." There is no evidence, however, that Motorola took any action to have new management of its choice installed. In the written sale proposal submitted in August, Motorola further explains that it would not appoint a new external management to replace Mr. Dowlatshahi because "[d]ue to the current situation existing in Iran [it was] unable . . . to send in a management team from other parts of Motorola." This may be an explanation of at least two situations. It can be interpreted as an implied reference to force majeure conditions in Iran in August 1979. However, it has not been established for certain that force majeure conditions still prevailed in Iran at that time. Another possible interpretation, however, is that Motorola did not have suitable personnel available. It is relevant here to recall that Milcom's immediate parent was an Israeli company and that the expatriate members of Milcom management in Iran prior to the Revolution were Israeli nationals.

62. Motorola's offer to sell Milcom was turned down, however, on 19 September 1979 by the Director General of the Ministry of Commerce. (See para. 51, supra). A few days before, on 15 September 1979, Motorola was informed by Mr. Tahanha that he had been confirmed as "general manager" of Milcom. (See para. 50, supra). The Claimant contends that this telex is clear evidence that at least by that time the Ministry of Commerce had asserted full control over Milcom by rendering Mr. Tahanha's appointment permanent. The Tribunal disagrees. The Tribunal finds that this telex rather evidences an intent on the part of the Ministry of Commerce to ratify the decision taken by the Revolutionary

Council than to change the terms of the appointment from temporary to permanent. This conclusion is strengthened by the terms of the response of the Ministry of Commerce to Motorola's sale proposal. In this response the Ministry states that it "was authorized to supervise till the owners de[c]ide to come ba[c]k to their jobs." (Emphasis added).

63. It should also be noted that although the Ministry by this response clearly stated that it had no interest in purchasing Milcom, it expressly invited Motorola to appoint a new external management and expressed its wish that negotiations on "the future" of Motorola's activities in Iran would resume by "a face to face discussion." Although it is clear, in view of the fact that Milcom's clients mostly were governmental agencies (see para. 76, infra), that any prospects of future commercial activities of Milcom depended on its good relations with the Iranian government, nothing in the record evidences that Motorola displayed any interest for either one of these suggestions. Motorola's only response to this letter was to re-propose the sale (on the same terms and conditions as in August) to IEI in early October 1979, which proposal was again rejected.

64. In view of the foregoing the Tribunal finds that neither the events in April 1979 nor, prima facie, the events in September 1979 warrant the conclusion that Iran had assumed such control over Milcom that a taking had occurred. On the contrary, they imply that both parties assumed that Motorola was still the owner of Milcom, that it had the right to appoint its own manager and to dispose of it by selling it to IEI.

65. The remaining issue is the merits of the Claimant's contention that Iran's refusal in September 1979 to accept Motorola's sale proposal, taken together with the confirmation of Mr. Tahanha as general manager, should be construed as constituting a definite taking of Milcom, if this taking

did not take place previously and was only confirmed by these two decisions. However, in view of the findings below regarding the value of Milcom in September 1979 the Tribunal finds that it need not reach this issue.

b) Valuation

66. Since the Claimant alleged that an expropriation took place on 25 April 1979, its valuation of Milcom is based on the situation at that time. Originally, the Claimant pleaded that Milcom should be valued on the basis of alleged net receivables. This valuation is in harmony with the valuation on which the proposed sale price was based. As finally pleaded, however, the Claimant contends that it is entitled to \$910,000, allegedly the "full equivalent of the property taken," which is the fair market value of Milcom, valued as a going concern.

67. Although the Respondent disputes that any taking has occurred, it contends that the Claimant in any event is only entitled to the net book value of Milcom which, it submits, is negative.

68. The Tribunal agrees with the Claimant that net book value is not an appropriate standard of compensation. This is in conformity with earlier Tribunal practice. See Amoco International Finance Corporation and Government of the Islamic Republic of Iran, Partial Award No. 310-56-3 at paras. 90-100 (14 July 1987). Rather, in cases of expropriation like the present one, the compensation to which the Claimant is entitled is the equivalent of the going concern value Milcom had at the time of the expropriation. (See id. at para. 263). Excluding the short period of time at the height of the Revolution in which force majeure conditions in Iran prevented Milcom from doing business, Milcom

admittedly was a going concern at the time of any taking. Consequently Milcom should be valued as a going concern.

69. In this Case the Tribunal has one contemporaneous indication of Milcom's market value. In September 1979 the Claimant valued and was prepared to sell Milcom for \$358,000 together with "full and active support" from Motorola. The price was based on Milcom's net book value as of 31 December 1978. It constituted the sum of the net surplus over the liabilities amounting to \$86,000 and a liability provision for taxes amounting to \$272,000 that the Claimant considered no longer to be a liability at the time. Except for the inference that could be drawn from the absence of any counterclaim for this amount there is no further indication in the record regarding the outcome of Milcom's tax dispute. The Tribunal notes that in this evaluation the Claimant has made no provision for any possible liabilities incurred by Milcom after 1 January 1979. It should be recalled that Mr. Tahanha requested a cash infusion of \$200,000 after Milcom had been closed for 40 days. (See para. 43, infra). Furthermore, the Ministry of Commerce disagreed with this valuation of Milcom. In its reply to the sales proposal the Ministry of Commerce contended that Milcom's liabilities exceeded its assets. In such circumstances it is difficult to conclude that Milcom had a positive market value in September 1979.

70. The Claimant contends that the going concern value of Milcom as of 25 April 1979 was \$910,000. It relies on an evaluation made by a financial consultant and also the affidavit testimony of Mr. Connor regarding Milcom's business prospects, as well as the audited financial statements of Milcom as of 31 December 1978.

71. Based on a Report prepared in July 1978 entitled "Motorola Iran 1978-83 Plan Highlights," the Claimant submits that at the time of the claimed expropriation Milcom was working on several new large projects which would have involved approximately 30 million dollars in bookings,⁷ and expected other projects to generate approximately 15 million dollars in bookings in 1979.

72. The Claimant's financial consultant introduced its study under the heading of "Approaches to the Valuation" stating that:

The concept of fair market value on which our study is predicated assumes a relatively stable long term economic climate in Iran [. . .]. Implicit in [this] assumption [. . .] is the expectation of a short disruption in the economy, and a resultant delay in achieving the forecast earnings of the company due to the Islamic Revolution in 1979. We discounted for this short term disruption.

73. The expert then reviewed the history and the nature of Milcom's business, analyzed Milcom's finances, future prospects, as well as "The Economic, Investment and Industry Environment in Iran." Under this latter heading the expert concluded that:

Thus there was a large market for non-broadcast radio equipment around the valuation date, and with the government's commitment to modernization and growth, further expansion in these and other services and industries that require such equipment was anticipated.

⁷These projects included a 20 million dollar project to establish a nationwide car telephone system for Telecommunications Company of Iran; a 7 million dollar project to extend the communications system of both the Iranian National Police and the Highway Patrol; a 3 million dollar project to establish a secured two-way radio system in the Prime Minister's Office; and a 2 million dollar project for IEI to establish a civil defense siren system.

Based on these considerations regarding Milcom's future prospects, the consultant determined that Milcom would have earned at least \$130,000 in post-tax income in 1979 and the years immediately following. Using the "comparative method" to establish "an investor appraisal ratio," and the forecasted earnings for 1979, the expert concluded that the purchase price one could expect to be paid for Milcom would have been approximately seven times the anticipated one-year earnings for 1979, or \$910,000.

74. The Respondents object to this valuation. They argue that it is based on an overly optimistic appraisal of future income, especially in light of the Revolution, which radically diminished Milcom's business prospects. They note that Motorola was owned by an Israeli parent corporation with which it had a distribution agreement, and that many of its technical employees were Israelis or other expatriates who would under post-Revolutionary governmental policies likely have been excluded from active participation in business with the Iranian Government. Moreover, they note that in the year immediately preceding the Revolution, 1978, Milcom registered a post-tax loss of \$23,000. They claim it is impossible that Milcom could have gone from a \$23,000 loss in 1978, prior to the Revolution, to a \$130,000 profit in 1979, during and after the Revolution. The Respondent has not offered any alternative value of Milcom specified as a going concern value, but contends generally, with reference to Milcom's financial statements and expert evidence, that Milcom had a negative value.

75. Upon analysis, the Tribunal finds that it cannot rely on the valuation proposed by the Claimant. Almost all the factors that could negatively have influenced the value of Milcom have been disregarded as insignificant. The consultant's estimation of Milcom's annual net income is based on marketing plans prepared by the Claimant as of July 1978, i.e., well before the establishment of the Islamic

Revolutionary Government in February 1979. The earthquake that the whole economy of Iran underwent as a consequence of the Revolution was completely ignored. In particular, the consultant completely disregarded the detrimental effects the change of government and of government policy and priorities necessarily would have on pre-revolutionary governmental projects and thus on Milcom's future business prospects. Further all factors that could positively have influenced Milcom's value have been treated as certain or at least as financially relevant to the value. The Tribunal concludes that this valuation is conjectural and yields a grossly exaggerated value of Milcom.

76. The Tribunal must therefore assess Milcom's value on the basis of the available evidence otherwise in the record. It must be underscored that Milcom's main function was to act as a distributor of Motorola's products. This rendered Milcom totally dependent on full support and cooperation from Motorola. On the other hand, Milcom's clients were almost exclusively government agencies.⁸ Consequently, the situation which developed in September 1979 when the Ministry of Commerce declined to purchase Milcom, irrespective of the reasons for this decision, must have had an inescapably detrimental effect on Milcom's future business prospects. It should be noted that although an acceptance of Motorola's sale offer - at approximately one third of Milcom's presently claimed value - would have limited the problems that Iran and its agencies otherwise would have encountered in finding spare parts and expertise in servicing its equipment, the decision evidences that the Ministry of Commerce had strong incentives for not doing so. These may have been of a financial or political nature. In either event the result would be the same.

⁸Including, inter alia, Iranian Armed forces, Iranian
(Footnote Continued)

77. The Claimant argues that as Milcom also was responsible for the service and repair of Motorola products sold in Iran and as there was a significant demand for such services after the events of the Revolution, the prospects for Milcom's future profitability were excellent. The Tribunal agrees with the Claimant that it would have been reasonable to expect an upsurge in the demand for Milcom's services after the Revolution. The extent of this upsurge is unspecified, however, and, even if it had been significant, such a demand would typically have been of a temporary nature. Furthermore, an evaluation of Milcom's future prospects cannot be based only on service generated incomes.

78. Against this background, the Tribunal finds that the Claimant's assertions of excellent future business prospects for Milcom and its allegedly consequential high going concern value lacks credibility. The Tribunal is not satisfied that irrespective of any expropriatory action on the part of Iran, Motorola would have been able to maintain any significant part of the market in two-way radio telecommunications it allegedly held before the Revolution, or that the post-Revolutionary government would have made use of Milcom's otherwise established and well-developed facilities for servicing, repairing and replacing two-way radio and similar telecommunications products for any length of time. Under such conditions, and at the times here relevant, Milcom cannot be considered to have had any going concern value.

(Footnote Continued)

Air Force, Iranian Navy, Iranian National Police, Iranian Gendarmerie, Prime Minister's Office, Highway Patrol, Imperial Court and Tehran Traffic Police.

V. OTHER CLAIMS

79. The Claimant identified a number of other potential claims in its Statement of Claim, none of which has been further pursued in these proceedings. The Tribunal finds that the Claimant has abandoned these claims.

VI. INTEREST

80. Pursuant to its earlier practice, the Tribunal considers that the Claimant is entitled to interest on the awarded amount in this Case and that 10% is a fair rate of interest. (See McCullough & Co., Inc. and The Ministry of Post, Telegraph and Telephone, Award No. 255-59-3 (22 April 1986), reprinted in 11 Iran-U.S. C.T.R. 3. The Tribunal further finds that interest shall be calculated as of the respective dates the amounts fell due.

VII. COSTS

81. The Tribunal finds that each party shall bear its costs of arbitration.

VIII.AWARD

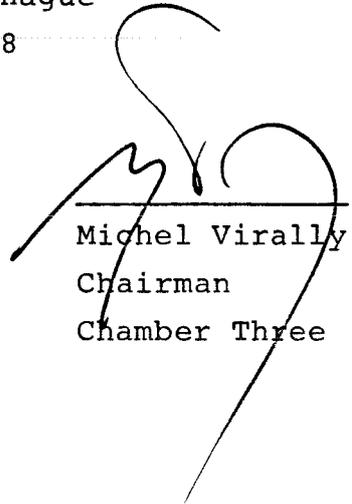
82. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

- a. IRAN NATIONAL AIRLINES CORPORATION is obligated to pay to MOTOROLA, INC. the sum of Thirty-six thousand seven hundred sixteen United States Dollars and thirty-five Cents (U.S.\$36,716.35), plus simple interest at the rate of ten (10) percent per annum (365-day basis) from 6 August 1978 on the amount of Twenty-three thousand one hundred eighty-nine United States Dollars and 10 Cents (U.S.\$23,189.10), and from 25 November 1978 on the amount of Thirteen thousand five hundred twenty-seven United States Dollars and twenty-five Cents (U.S.13,527.25), in both cases up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;
- b. This 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;
- c. All other claims and counterclaims are dismissed;
- d. Each party shall bear its own costs of arbitration.

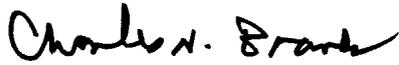
This award is submitted to the President of the Tribunal for the purpose of notification to the Escrow Agent.

Dated, The Hague
28 June 1988



Michel Virally
Chairman
Chamber Three

In the Name of God



Charles N. Brower
Concurring and
Dissenting opinion



Parviz Ansari Moin
Concurring (except as to the
dismissal of the counter-
claims). As to the interest,
see my Separate Opinion in
McCullough and Company, Inc.
and Ministry of Post,
Telegraph and Telephone,
Award No. 225-89-3 (22 April
1986), reprinted in 11
Iran-U.S. C.T.R. 45.