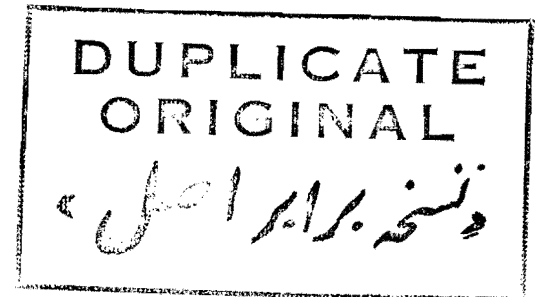


IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دآوری دعاوی ایران-ایالات متحدہ
ثبت شد - FILED	
Date 11 APR 1986	تاریخ
۱۳۶۵ / ۱۱ / ۲۲	
No. 37	شماره



CASE NOS. 37 and 231

CHAMBER ONE

AWARD NO. 220-37/231-1

Case No. 37

FOREMOST TEHRAN, INC., FOREMOST  
SHIR, INC., FOREMOST IRAN CORP.,  
FOREMOST FOODS, INC., FOREMOST-  
McKESSON, INC., OVERSEAS PRIVATE  
INVESTMENT CORPORATION,

Claimants,

and

THE GOVERNMENT OF THE ISLAMIC  
REPUBLIC OF IRAN, THE MINISTRY OF  
ECONOMIC AFFAIRS AND FINANCE,  
FINANCIAL ORGANISATION FOR THE EXPANSION  
OF OWNERSHIP OF INDUSTRIAL UNITS,  
NATIONAL INVESTMENT COMPANY OF IRAN,  
INDUSTRIES AND MINES BANK (as successor  
to INDUSTRIAL AND MINING DEVELOPMENT  
BANK OF IRAN), FOUNDATION FOR THE  
OPPRESSED, SHERKAT SAHAMI LABANIAT  
PASTEURIZE PAK,

Respondents.

Case No. 231

FOREMOST TEHRAN, INC., FOREMOST SHIR, INC.,  
FOREMOST IRAN CORP., FOREMOST FOODS, INC.,

FOREMOST-McKESSON, INC.,  
Claimants,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC  
OF IRAN, THE MINISTRY OF ECONOMIC AFFAIRS  
AND FINANCE, FINANCIAL ORGANISATION FOR THE  
EXPANSION OF OWNERSHIP OF INDUSTRIAL UNITS,  
NATIONAL INVESTMENT COMPANY OF IRAN,  
INDUSTRIES AND MINES BANK (as successor to  
INDUSTRIAL AND MINING DEVELOPMENT BANK OF IRAN),  
FOUNDATION FOR THE OPPRESSED,  
BANK MARKAZI IRAN, SHERKAT SAHAMI LABANIAT  
PASTEURIZE PAK,

Respondents.

---

AWARD

Appearances:

For the Claimants: Mr. Mark R. Joelson  
Ms. Sydney Kase  
Mr. Leonard van Sandick  
Attorneys  
Mr. Richard Stern  
Attorney for OPIC  
Mr. Sabin Phelps  
Mr. Leonard M. Patterson  
Representatives of  
Foremost-McKesson, Inc.,

For the Respondents:

Mr. Mohammad K. Eshragh  
Agent of the Government of the  
Islamic Republic of Iran  
Mr. Ali Akbar Riazi

Legal Adviser to the Agent  
Mr. Mohsen Karbasi  
Representative of Pak Dairy  
Mr. Yahya Alizadeh  
Mr. Ali Akbar Salehi  
Legal Advisers to Pak Dairy  
Mr. Reza Aghilabadi  
Assistant to Representative of  
Pak Dairy

Also present: Mr. John Reynolds  
Legal Adviser to the Agent of  
the Government of the United  
States of America

---

I. Facts and contentions

a) The procedural history

This Award decides two separate Cases. The major element of the claims in both Cases relates to alleged expropriation of shares held by affiliated United States corporations in a dairy company in Iran. A portion of these investments was insured against the risk of expropriation. One of the Cases, No. 37, relates to the insured portion of the claims, and the insurer is included as a party. The other Case, No. 231, involves uninsured portions of the expropriation claim, and the insurer is not a party. The second Case also includes claims for certain alleged breaches of contract, as to which there was no insurance.

In view of the similarity of the underlying facts and issues, and the circumstance that most of the Parties

appear in both Cases, the hearing of the two Cases was co-ordinated. See Internal Guidelines of the Tribunal, para. 1, reprinted in 1 Iran-U.S. C.T.R. 98. The hearing of both Cases took place on 14 and 15 December 1983, and they are now made the subject of a single Award.

(i) Case No. 37

On 16 November 1981 the Statement of Claim in Case No. 37 was filed with the Tribunal by Foremost Tehran, Inc., Foremost Shir, Inc., Foremost Iran Corporation, Foremost Foods, Inc., Foremost-McKesson, Inc. (hereinafter collectively referred to as "Foremost"), and Overseas Private Investment Corporation ("OPIC"). The Claimants allege expropriation of the 31% equity interest held by certain of the Foremost companies in Sherkat Sahami Labaniat Pasteurize Pak ("Pak Dairy"), an Iranian joint stock company. This claim seeks damages of \$7,040,000, as compensation for the insured portion, 64%, of that 31% shareholding. There is also a claim for the expropriation of two cash dividends that were declared in 1979 and 1980 and paid to other shareholders, but not to Foremost. The Claimants seek \$577,814 as compensation for the insured 64% portion of the unpaid dividends. The Claimants seek interest on these claims.

OPIC is an agency of the United States Government engaged in the business of insuring the overseas investments of United States nationals. It was named as a Claimant in Case No. 37 in exercise of its rights under assignment clauses, described below, contained in two settlement agreements, dated 29 July 1980 and 3 August 1981, whereby it had paid compensation to Foremost under insurance contracts relating to Foremost's investment in Pak Dairy.

The Respondents to the claim are the Government of the Islamic Republic of Iran, the Ministry of Economic Affairs

and Finance, the Financial Organisation for the Expansion of Ownership of Industrial Units ("Financial Organisation"), National Investment Company of Iran ("NICI"), Industries and Mines Bank ("IMB")<sup>1</sup>, the Foundation for the Oppressed, and Pak Dairy, which entities the Claimants seek to hold jointly and severally liable.

ii) Case No. 231

The second Case, No. 231, was filed on 12 January 1982. The Claimants are the same Foremost companies as in Case No. 37, but here OPIC is not a party. The Respondents are identical to those in Case No. 37, with the addition of Bank Markazi Iran. The claim consists of three parts. Part I, the major element, relies on the same factual allegations which form the basis of the claims in Case No. 37. Foremost seeks compensation amounting to \$3,960,000 for the uninsured 36% of its allegedly expropriated 31% interest in Pak Dairy. Compensation of \$325,021 is sought for the uninsured 36% portion of the two unpaid dividends. Foremost seeks to hold the Respondents jointly and severally liable. Foremost seeks interest on these claims.

Part II of the claim alleges breaches of four contracts under which Pak Dairy leased milk carton filling machines. Two of the machines were leased by Foremost Foods, formerly known as International Dairy Engineering Company, and two by Foremost-McKesson. These two corporations are the only Claimants with respect to this part of the Case. Under alternative calculations of damages, the Claimants seek unpaid monthly rentals and the value of the machines, which Pak Dairy has retained. First, they suggest awarding unpaid

---

<sup>1</sup> Successor to Industrial and Mining Development Bank of Iran ("IMDBI") and certain other banks.

rentals to the date the machines are paid for, as well as the value of the machines. Alternatively, they suggest applying the rule of Raygo Wagner Equipment Co. and Star Line Iran Co., Award No. 20-17-3 (15 December 1982), reprinted in 1 Iran-U.S. C.T.R. 411, by awarding unpaid rentals to the date, 5 December 1980, on which Pak Dairy, in response to Foremost's demand, should have returned the machines, as well as their value. The Claimants seek interest on the amounts awarded under either calculation.

Part III of the claim alleges breach of a Technical Assistance Agreement ("TAA") between Pak Dairy and Foremost-McKesson, which is the sole Claimant in this respect. It seeks a total of \$157,013.70, together with interest, in respect of unpaid invoices, trademark licenses, fees and other amounts allegedly due under the TAA.

Parts II and III are directed against both Pak Dairy and the other Respondents, whom Foremost alleges interfered with its contractual rights to receive payment from the company.

b) Contentions of the Parties

i) Jurisdiction

The Respondents raise a number of jurisdictional objections. As to both Case Nos. 37 and 231, they first argue that Foremost-McKesson held no shares in Pak Dairy, and thus cannot be a Claimant in its own right in the claim based on expropriation. The Respondents point out that, as to the same claim, Foremost Foods is named as a Claimant only in respect of 1% of shares which are entered in the registration book of the company in the name of Frank Fisher, a Foremost representative who served on the Pak Dairy board of directors. Moreover, they dispute that Foremost Foods can claim with respect to shares so

registered in the name of Mr. Fisher. In this connection, they argue that Article 40 of the Commercial Code of Iran makes registration of ownership conclusive, so that even were there an agreement between Mr. Fisher and Foremost Foods, it could not be enforced against the company or a third party.

Next, as to Case No. 37, the Respondents argue that legal title to the claim is now vested in OPIC, and thus the Foremost companies have no locus standi. They argue as well that OPIC only acquired its rights to a portion of its claim in August 1981, when the second of the two settlement agreements was signed, and thus was not the owner of that portion of the claim on 19 January 1981.<sup>2</sup> Moreover, they contend that OPIC, a government agency, is not a national of the United States within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration. Thus, it could only bring a claim "arising out of contractual arrangements between [Iran and the United States] for the purchase and sale of goods and services" as provided in Article II, paragraph 2, which this claim, for expropriation, clearly is not.

In addition, the Respondents contend that since Foremost has received full compensation from OPIC, it no longer has a claim. They also object, as an evidentiary matter, to the deletion of the figures showing the amounts paid by OPIC from the copies of the two settlement agreements filed with the Tribunal.

Describing itself as a private corporation, Pak Dairy argues that it cannot be an "entity controlled by the Government of

---

<sup>2</sup> A claim must have been "outstanding" on 19 January 1981 to fall within the jurisdiction of the Tribunal. See Claims Settlement Declaration, Article II, paragraph 1.

Iran ..." within the meaning of Article VII, paragraph 3 of the Claims Settlement Declaration. Thus, in its view, it does not fall within the Tribunal's jurisdiction. NICI and the Foundation for the Oppressed likewise deny that they are controlled entities over which the Tribunal may assert jurisdiction.

Finally, the Respondents argue that the Law Concerning the Attraction and Protection of Foreign Investment, pursuant to which a certificate of approval was issued for Foremost's investment in Iran, provides a dispute settlement procedure which excludes the Tribunal's jurisdiction pursuant to Article II, paragraph 1 of the Claims Settlement Declaration.

The Claimants suggest that neither Foremost-McKesson nor OPIC is a necessary party to the claim in Case No. 37. They acknowledge that Foremost-McKesson itself held no shares in Pak Dairy, but explain that it was included as a Claimant because it is the 100% owner of the other Foremost companies and the named party to the two settlement agreements with OPIC. In the Claimants' view, because OPIC has only a limited beneficial interest, it could have permitted Foremost to pursue the claim as its continuous legal owner, and to recover from Foremost later. Accordingly, they are prepared to dispense with OPIC as a Claimant. In any event, the Claimants assert that the amounts paid by OPIC in settlement of Foremost's insurance claim are irrelevant to any issues in this proceeding.

The Claimants contend that Pak Dairy is a controlled entity within the meaning of Article VII, paragraph 3, by virtue of the ownership by other controlled entities of a majority of the company's shares and the representation of controlled entities through a majority of the members of the board of directors. Specifically, the Claimants allege that the Financial Organisation, NICI, IMB, National Iranian Banks



Investment Company ("NIBIC") and the Foundation for the Oppressed are government-controlled and that they hold shares in Pak Dairy collectively amounting to 52% and hence constituting a controlling interest.

Finally, the Claimants point out that the dispute settlement procedure of the Law Concerning the Attraction and Protection of Foreign Investment is not a "binding contract" which would bring the exclusionary provision of Article II, paragraph 1, into play, and that their expropriation claim is not based on any "special legislation" as contemplated by that law.

ii) The merits

In 1959 the Foremost group of companies participated in the establishment of Pak Dairy in Iran, initially owning a 50% equity interest. By separate agreements, they provided technical assistance and trademark licensing. The equity interest held by Foremost varied subsequently, rising at one point to 86%, but later becoming considerably less as the result of a number of sales. It is uncontested that, at the end of the fiscal year 1979, Foremost held 30%, while, as noted above, there is a dispute whether Foremost owned an additional 1% registered in the name of Frank Fisher. Of the shares on which Foremost bases its claims, 10% were registered in the name of Foremost Tehran, 10% in the name of Foremost Shir, 10% in the name of Foremost Iran, and 1% in the name of Mr. Fisher. Foremost Foods is the 100% owner of each of these Foremost companies. Foremost Foods is, in turn, a wholly-owned subsidiary of the remaining Claimant, Foremost-McKesson.

Foremost claims to have played a major role in the management of Pak Dairy, having provided management skills and personnel, including participation on the board of directors.

Foremost alleges that starting in late 1978 and acting in concert, the Iranian governmental entities with shares in Pak Dairy implemented a series of decisions which effectively deprived it of the use and benefit of its 31% interest in the company. Specifically, Foremost alleges first that the climate of hostility toward United States nationals forced its expatriate personnel in Iran, including Mr. Fisher, Pak Dairy's managing director until November 1979, and Mr. Loichinger, the chief engineer, to leave the country at the end of 1978. According to Foremost, the prevailing circumstances prevented Mr. Loichinger's return altogether, while Mr. Fisher, who visited Iran three times during 1979, found it impossible safely to return there after his final departure on 1 November 1979. The forced absence of Foremost personnel severely hampered its ability to preserve the value of its investment. Second, Foremost alleges that although Pak Dairy declared cash dividends in 1979, 1980 and 1981, in each case based on profits earned in the prior year, and paid those dividends to Iranian stockholders, it refused to pay them to Foremost pursuant to a decision by the Pak Dairy board of directors not to pay any money for any reason to foreign shareholders. Similarly, Pak Dairy declared stock dividends in 1979 and 1980 which were distributed to all Iranian shareholders, but Foremost received only the 1979 stock dividend, not the one declared in 1980. Third, Foremost alleges that in November 1980 government representatives ousted Mr. Fisher, one of Foremost's two representatives, from the Pak Dairy board of directors. At the same time, by improperly rejecting the two shareholder proxies held by Mr. Vahdati, Foremost's remaining representative, government representatives also managed to prevent Foremost from electing a replacement to Mr. Fisher, thus depriving Foremost of the representation to which the cumulative voting provision of the Iranian Commercial Code entitled it. Fourth, Foremost alleges that Dr. Mohsen Ameli, the government-employed chairman of Pak Dairy's board, instructed Mr. Asghari, Mr. Fisher's

replacement as managing director, to cease sending accounts, financial statements or other information to United States citizens or translating such material into English as had been the practice. Finally, Foremost cites as contributing to expropriation Pak Dairy's failure to pay rentals and other sums due under the agreements which underlie Parts II and III of Case No. 231.

According to Foremost, the cumulative effect of these actions rose to the level of expropriation on 27 May 1980, the date on which Mr. Asghari sent a telex to Foremost informing it of the decision of the board of directors to make no payments to foreign shareholders. Foremost claims that on that date the going-concern value of its 31% equity holding was \$11 million. It relies on a valuation report prepared by Standard Research Consultants ("SRC"). At the hearing, SRC's representative, Mr. Kenneth McGraw, gave evidence concerning comparative company analysis, the method of valuation SRC had employed, and discussed the factors he had taken into account.

The Respondents deny that Pak Dairy was government-controlled, or that the Respondent entities which held shares used their rights as shareholders as a means to implement government policy. Pak Dairy contends that at least one-half of the shares which the Claimants count as the Financial Organisation's are in fact registered in the names of individual farmers and workers, to whom it is the Organisation's objective to transfer ownership. According to Pak Dairy, while the Financial Organisation votes these shares, it does so only pursuant to a purchase/agency agreement which places ownership in the hands of the individuals, but leaves voting rights in the hands of the Financial Organisation while the purchase price of the shares remains unpaid. Pak Dairy states that, in the years ending December 1979 and December 1980, Iranian firms, banks and companies held 41%, foreign companies held 30% and

natural persons, including the farmers and workers, held 29%.

The Respondents further deny that there has been any interference with the rights of Foremost as a shareholder, or any expropriation of its interest. A finding of expropriation, the Respondents contend, would require a specific decree or legislative act, neither of which is present in this Case. The Respondents emphasize the distinction between majority share ownership by individual government entities - which, they contend, does not essentially alter the private character of the company - and expropriation. They allege that Pak Dairy remains an independent private corporation, and they characterize the dispute as one arising from minority shareholders' dissatisfaction with the majority shareholders' exercise of their legitimate management rights. In the Respondents' view, such grievances should be brought before the courts of Iran.

Turning to Foremost's specific allegations of interference, Pak Dairy denies that any of Foremost's personnel were expelled from management. In the case of Mr. Fisher, he remained in contact with Pak Dairy after his departure in November 1979. Pak Dairy contends that there were no irregularities in the conduct of board meetings, and that the form of proxy which was ruled unacceptable for the shareholders' meeting of 16 November 1980 was correctly ruled invalid, as it had not been properly certified and had been given only in relation to a meeting scheduled for 11 October 1980. Foremost's participation on the Board ended only when it withdrew its representatives by telex on 23 October 1981 and declined to replace them.

Pak Dairy argues that all shareholders were treated alike in the dissemination of corporate reports and notices, and that Foremost was not entitled to any special privileges in this

regard. Information was, it contends, being made available to Foremost as late as September 1981. With regard to the payment of dividends, Pak Dairy acknowledges that it was obliged to pay in Rials, but contends that there was no requirement to convert the dividend payments into Dollars. The telex sent by Mr. Asghari on 27 May 1980, stating that no further payments could be made to foreign shareholders, was unauthorised and had been superseded by statements by Pak Dairy of its willingness to make any rental and dividend payments it owed.

Pak Dairy disputes Foremost's proposed valuation of its holding, contending that SRC's method was chosen as the one likely to yield the highest, though not the most accurate, results. Pak Dairy complains that it takes no account of subsidy levels and uses auditing reports which do not include necessary reserves. Pak Dairy submitted, in the form of a post-hearing memorial, a report by Mr. Khatami of Separ Auditing and Management Services which proposes alternative methods of valuation.

As to the machine rental claims, Pak Dairy contends that the underlying contracts were "imposed" and "one-sided", and that, to the extent that rental is claimed for the period after 19 January 1981, it is excluded from the Tribunal's jurisdiction. It has expressed its willingness to pay, in Rials, rentals for a five-year period on the basis of the company's books. It agrees to pay a fair price for the machines, but does not accept Foremost's estimation of their current value, which it contends should be assessed by an expert. As to the amounts due under the TAA, Pak Dairy does not dispute that it has to pay amounts reflected on its own books.

The Ministry of Economic Affairs and Finance, NICI, the Foundation for the Oppressed, the Financial Organisation,

IMB and Bank Markazi Iran each deny that the claims are attributable to them.

All Parties have asked for costs.

## II. Reasons for Award

### a) Procedure

The Respondents have requested that certain documents included in the Claimants' submissions of documentary evidence be excluded. Since no valid grounds for such exclusion have been presented, the Tribunal admits all such documents.

Having regard to the Tribunal's holding, set forth below, on the claim for expropriation, the Tribunal finds no need to rule on the Respondents' objection to the deletion of the amounts paid by OPIC from the copies of the two settlement agreements filed.

### b) Jurisdiction

#### i) The Claimants

It is no longer disputed by the Respondents that the Foremost companies are nationals of the United States of America as defined by Article VII, paragraph 1 of the Claims Settlement Declaration.

As has been seen above, the Claimants have expressed the view that OPIC is not a necessary party to Case No. 37 and can be dismissed as Claimant, as the claim is legally vested in Foremost and can properly be brought by it alone. The Respondents argue that, because Foremost was compensated by OPIC for its alleged losses pursuant to the two settlement agreements of 29 July 1980 and 3 August 1981, it no longer

has a claim for expropriation to bring before the Tribunal. They contend that, insofar as a claim exists, it is vested in OPIC.

An examination of the terms of the settlement agreements leads the Tribunal to a different conclusion. The first settlement agreement, dated 29 July 1980, relates to Foremost's share of the dividend declared by Pak Dairy in 1979. It provides for the transfer by Foremost of its "entire beneficial interest" in the insured dividend. At the same time, however, Foremost retained the legal title to the claim, and with it, the right and duty to institute proceedings for recovery in its own name. The second agreement, dated 3 August 1981, relates to the dividend declared in 1980 as well as to Foremost's entire equity interest in Pak Dairy. It, too, contains an assignment to OPIC of "a beneficial interest" in, inter alia, "any claims, causes of action or other rights of Foremost" existing in connection with the assets allegedly expropriated. It goes on to provide,

"Foremost shall retain and use its best efforts to maintain the legal title in and to all of the aforesaid items for the benefit of and in trust for OPIC, except as otherwise provided below."

It follows that Foremost is legally entitled to pursue a claim for recovery of the insured portion of its losses as well as the uninsured portion. Legal title to the entire claim was vested continuously in Foremost from the date the claim arose to 19 January 1981 and remained so thereafter, notwithstanding the intervening settlements with OPIC. This being so, the recovery by Foremost of a measure of compensation from its insurers cannot affect its title to claim against the present Respondents.

This result appears to be entirely consistent with the governing law of the settlement agreements, that of the

District of Columbia, which, like other common law systems, provides that an insured party who assigns a limited beneficial interest to its insurer is the proper party to bring a claim for compensation for the entire loss.<sup>3</sup>

In view of the foregoing, and having regard to the Claimants' statement that OPIC is not a necessary party and can be dismissed, OPIC is stricken as a Claimant in Case No. 37. Likewise, Foremost-McKesson, which was not itself a shareholder in Pak Dairy, but which was named as a party to the settlement agreements with OPIC, is also stricken as a Claimant in Case No. 37.

Another preliminary issue is whether Foremost held only 30% of the shares of Pak Dairy, or whether it held 31%. The latter figure includes not only the holdings entered in Pak Dairy's registration book in the names of three Foremost companies, but also a block of 910 shares registered in the name of Frank Fisher. The Respondents argue that the entry in Pak Dairy's registration book of the disputed block of 910 shares, constituting 1% of Pak Dairy's outstanding stock, in Frank Fisher's name, precludes Foremost from asserting ownership of them. They rely on Article 40 of the Iranian Commercial Code, which they read to make nominal registration conclusive.

In the present Cases, however, there is abundant evidence that Pak Dairy knew -- and acted in accordance with its knowledge -- that apart from the 161 shares that Mr. Fisher held in his own right, he held the disputed block of 910 shares as nominee of Foremost Foods. First, Pak Dairy's own

---

<sup>3</sup> See, e.g., American Law Institute, Restatement (Second) of Trusts §280 (1959); Stanley v. Colt, 72 U.S. (5 Wall.) 119, 168 (1867); Mobile and Montgomery Railway Co. v. Jurey and Gillis, 111 U.S. 584 (1883).



list of shareholders separately records the two blocks of shares held by Mr. Fisher. Second, a letter written by Mr. Fisher on 3 July 1979 in his capacity as managing director of Pak Dairy to the Ministry of Economic Affairs and Finance requests that permission be granted Pak Dairy to transfer to Foremost the dollar equivalent of 31% of the dividend declared in 1979. Third, an auditor's report reflecting Pak Dairy's 1979 income taxes appears to show that the proposed dividends on Mr. Fisher's blocks of shares were taxed at different rates -- treatment consistent with different ownership. Fourth, Foremost stated at the hearing that the usual practice was that Foremost receive a single dividend check for the entire 31%.

Moreover, the particular circumstances of this Case would make a contrary result both inequitable and illogical. First, in an affidavit submitted in support of Foremost's claim here, Mr. Fisher, the only other possible owner of the disputed block, states that Foremost owned 31% of the shares in Pak Dairy. Second, Foremost stated at the hearing that Mr. Fisher had signed and delivered to Foremost an undated "stock power" that authorized Foremost to transfer ownership of the 910 shares into its own name at any time. Third, in Case No. 10755, to which Pak Dairy refers, and which arises from the same nucleus of facts as the present Cases, Mr. Fisher has submitted a Statement of Claim, in which he asserts ownership only of the block of 161 shares which both he and Foremost have consistently stated was the extent of his personal holding in the company. Taking account of all these considerations, the Tribunal concludes that, as a matter of equity and for the purposes of the present Cases, Foremost Foods must be regarded as the true owner of the 1% of Pak Dairy's shares registered in the name of Mr. Fisher. Foremost is therefore entitled to make its claim in respect of all 31%.

ii) The Respondents

As to the Tribunal's jurisdiction over the respondent entities, it is not disputed that Bank Markazi Iran falls within the definition of "Iran" in Article VII, paragraph 3 of the Claims Settlement Declaration. The Tribunal has previously held that the Foundation for the Oppressed, likewise, is an instrumentality controlled by the Government of the Islamic Republic of Iran and is thus within the Tribunal's jurisdiction. See Award No. ITL 54-134-1 of 17 September 1985 in Hyatt International Corporation et al. and The Government of the Islamic Republic of Iran et al. at pp. 23-31.

As to the remaining Respondents, the Financial Organisation has not denied that it falls within the prescribed definition, and the record contains compelling evidence that it is a governmental entity. Its Charter, enacted by the Iranian Parliament, indicates that it is affiliated to the Ministry of Economic Affairs and Finance, and the Minister serves as Chairman of its General Assembly. Further, the correspondence filed as exhibits to Pak Dairy's post-hearing memorial indicates that a distinction was drawn for tax purposes between shares in Pak Dairy held by the Financial Organisation as nominee for various farmers and workers, and shares owned directly by the Financial Organisation itself, which was "government-owned". The Tribunal therefore finds that it has jurisdiction over the Financial Organisation.

NICI has denied that it falls within the definition of "Iran" in Article VII, paragraph 3, of the Claims Settlement Declaration. However, it has not adduced any evidence to support this position, while there is considerable evidence to the contrary. NICI was established as a joint stock company in 1975, apparently pursuant to legislation designed to encourage investment in productive units. Its founding shareholders were four banks and two insurance companies.

All banks in Iran were nationalised by the Law of Nationalization of Banks of 7 June 1979, and all insurance companies by the Law of Nationalization of Insurance Companies of 25 June 1979. A list of the members of NICI's board of nine directors shows the same four banks and two insurance companies, together with three private individuals. The Tribunal therefore concludes that it has jurisdiction over this Respondent.

IMB is likewise under government control by virtue of the nationalisation of all banks in June 1979.

A list of the shareholders of Pak Dairy at the end of 1979 shows that 10% of the shares were held in the name of NIBIC. It is not disputed that IMB, NIBIC's largest shareholder, took control of its affairs in about June 1979. Therefore NIBIC must be held to have been under the ultimate control of the Government.

Pak Dairy is itself named as a Respondent in these Cases. The question whether a corporation is controlled by the Government of Iran for jurisdictional purposes is distinct from that of whether the corporation or any of its shares have been expropriated. Although the relevant evidence may be largely coextensive, different considerations apply to its evaluation.

The two main indicators of government control of a corporation are the identity of its shareholders and the composition and behaviour of its board of directors, which must be examined together. A list of Pak Dairy's shareholders as of December 1979 and December 1980, extracted by Pak Dairy from the annual reports of its auditors, indicates that IMB held 3.6% of Pak Dairy's shares, NIBIC 10%, NICI 8.3%, the Foundation for the Oppressed 9.5%, and the Financial Organisation 9.6% in its

own name. Thus, controlled entities directly owned 41% of Pak Dairy's shares.

A further 11% of the shares were held in the name of workers and farmers who had purchased them from the Financial Organisation. It is therefore necessary to determine whether the rights in respect of these shares were, for practical purposes, exercised by the Financial Organisation. The shares were registered in the names of the workers and farmers to whom they had been transferred during the period 1974 to 1978 pursuant to the Wider Share Ownership Law. However, the Financial Organisation, which had loaned the purchase price in each case, retained the right under the individual purchase agreements to vote the shares as "undismissible attorney" and to apply the dividends accruing to them, for as long as it took to amortize the purchaser's debt. Only those purchasers who had paid cash retained the right to vote their shares, but it appears that only an insignificant number had so paid. The Tribunal therefore concludes that this 11% block of Pak Dairy's shares was, in effect, under the control of the Financial Organisation, thus bringing the total holding in the hands of governmental organisations to approximately 52%.

Even were majority shareholding not conclusive as to control, it is clear that by some time in 1980, controlled entities occupied a majority of the seven seats on the board of directors and dominated its affairs. For example, the minutes of an "Ordinary General Meeting in Extra-Ordinary Manner" held on 16 November 1980 record a decision that from that time the board would consist of Dr. Ameli and Mr. Karbasi, both of the Financial Organisation; Mr. Vahdati of Foremost Shir; two representatives of NIBIC; and one representative each from IMB and the Foundation for the Oppressed. Thus, six of the seven seats were government-controlled. In conjunction, majority share ownership and control of the board establish that Pak Dairy

is an "entity controlled by the Government of Iran" within the meaning of Article VII, paragraph 3, of the Claims Settlement Declaration. It is thus a proper Respondent to the claims of Foremost presently before the Tribunal.

iii) The forum selection clause

A further jurisdictional issue is whether the dispute settlement procedure laid down by the Law Concerning the Attraction and Protection of Foreign Investments in Iran ("LAPFI"), enacted in 1955, operates, as the Respondents argue, to exclude the jurisdiction of the Tribunal pursuant to Article II, paragraph 1 of the Claims Settlement Declaration, which excludes

"claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position".

Article III of LAPFI, in turn, provides that capital imported into Iran in accordance with its provisions "shall be subject to the legal protection of the Government". The same Article guarantees "fair compensation" where the owner is deprived of his capital by "special legislation". It also provides that "[i]n case of disputes, investigation of claims for fair compensation guaranteed by the Government shall be undertaken by competent Iranian courts".

In the Tribunal's view, the Respondents' contention must fail. The claim before the Tribunal is one for expropriation, but it is based on allegations of a series of governmental measures rising eventually to the level of a taking. There is no allegation of any "special legislation" which deprived Foremost of its property rights. Further, the expropriation claims before the Tribunal are brought by all four Foremost companies holding shares in Pak Dairy.

The Ministry of Commerce approval granted pursuant to LAPFI for the initial investment was granted in the sole name of International Dairy Engineering Company, which subsequently changed its name to Foremost Foods. The portions of the claim belonging to the other three companies would thus be outside the scope of the LAPFI dispute settlement provision in any event.

c) The merits

i) The expropriation claim

Foremost claims that its 31% holding in Pak Dairy was expropriated by the actions of the Government and its agencies. It argues that the taking was accomplished by 27 May 1980, the date of the telex from Mr. Asghari stating that no payments could be made to foreign shareholders.

It is well settled, in this Tribunal's practice as elsewhere, that property may be taken under international law through interference by a state in the use of that property or with the enjoyment of its benefits. This remains true in the absence of a formal expropriatory decree, even where the formal legal title to the property is not affected. In its Award in Starrett Housing Corporation et al. and The Government of the Islamic Republic of Iran et al. the Tribunal observed that

"it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner."<sup>4</sup>

---

<sup>4</sup> Award No. ITL 32-24-1 of 19 December 1983, reprinted in 4 Iran-U.S. C.T.R. 122, 154.

Foremost claims that the expropriation of its interest was the cumulative result of a number of instances of interference with the exercise of its rights as shareholder. It identifies these, specifically, as the expulsion of Foremost's expatriate personnel from Iran, the refusal to pay dividends to Foremost since 1979, the ouster of Mr. Fisher from the board of directors and the interference with the provision of basic information to Foremost. Thus the question for the Tribunal is whether the combined effect of these alleged acts or omissions, or, indeed, the impact of any one of them, was sufficient to deprive Foremost of its fundamental rights as owner of 31% of Pak Dairy's shares.

Foremost's claim must be examined in the light of the history of its investment in Pak Dairy and its participation in the management of that company as well as of the subsequent developments which took place. The original investment was made in 1959, and the level of Foremost's shareholding subsequently fluctuated, as has previously been seen. Mr. Fisher related in his affidavit that Foremost's holding had already been reduced in 1976 from 51% to a minority interest of 31%. It thereby lost the right to nominate the managing director, although Mr. Fisher continued to hold this office until his departure from Iran in November 1979. His successor, Mr. Asghari, who held office until September 1980, was a board member who had previously represented a private shareholder, Technisaz Company.

A comparison of the shareholders in 1976 with those listed at the end of 1979 reveals that even in 1976, government participation was prominent, with 30% of the shares in Pak Dairy already owned by government entities. The Financial Organisation held 21%, and NICI held 9%. A significant change in the balance of ownership took place after June 1979, however, when various private shareholdings came into

the hands of government-controlled entities, bringing the level of holdings by such entities to approximately 52%.

It was not until October 1979 that the Financial Organisation began to exercise a leading role in Pak Dairy's affairs. Its two representatives, Dr. Ameli and Mr. Karbasi, were elected to the board of directors on 14 October 1979, and from that point on, a strong and inexorable shift can be traced in the attitudes of the board of directors, which inclined more and more towards the implementation of the policies of the new Government. Up to that point Foremost had continued to enjoy a position of significant influence in the company's affairs, even after it ceased to have a majority shareholding, by virtue of its contribution of technical and management expertise over several years as well as the influence of Mr. Fisher in his role as managing director. However, Foremost's influence began to erode from that date.

Foremost's holding did not at that time entitle it to appoint the managing director. After Mr. Fisher resigned from that office in November 1979, Mr. Asghari, a colleague of long standing, was appointed to succeed him as managing director at a board meeting held on 15 November 1979, when the board accepted Mr. Fisher's resignation "after thanking him for his efforts during several years in office". Foremost maintained its two places on the board in the person of Mr. Fisher, who appointed a proxy, and Mr. Neil Dinaut, who represented Foremost Shir. The minutes of that meeting record that Dr. Ameli appended a note urging that all "foreign contracts" entered into by Pak Dairy should be "reconsidered" and that no further payments should be made in respect of them.

There followed a board meeting on 17 February 1980, held at the offices of the Financial Organisation and chaired by Mr. Haghshenas of IMDBI. The object of the meeting was to



discuss the year's accounts and decide on the distribution of the company's profits. On behalf of the Financial Organisation, Dr. Ameli proposed that "the minimum amount of the legal dividend be paid to the shareholders and the balance be appropriated for the purpose of creating a reserve fund for severance pay" for the company's workers. The proposal as to severance pay was based on the recommendation of Pak Dairy's auditor, and it was extensively debated at the meeting. Mr. Vahdati, who by now was serving as proxy for both Foremost directors, was absent from the meeting. He was, however, present when the discussion was resumed at the next meeting, held at Dr. Ameli's office on 10 March 1980, again under the chairmanship of Mr. Haghshenas. A decision was taken at that meeting to set up the severance pay reserve fund. In the ensuing discussion about dividends, the minutes state that

"the representatives of the Financial Organization ... expressed their opinion that the minimum dividend should be divided among the shareholders; that the balance [of the profit] be credited to the company's reserve fund and that no stock dividend be issued. Their reason for this action was the presence of foreign shareholders in the company. By this action, they wanted to hold the amount paid to the foreigners to the minimum."

One of the factors taken into consideration in arriving at the dividend was that

"the profits made by the company under current laws and regulations belong to the company and, the shareholders have a right thereto in proportion to their capital investment, therefore, whether there is a distribution in cash, or a stock dividend, or a reservation of a portion as undivided profit, it will not in principle change the rights of the shareholders to the profits earned; especially because due to the existing dispute between the governments of Iran and the United States, the payment of profits to the foreign shareholders has been suspended for the time being" (emphasis added).

A dividend of eighteen percent of the profit in cash and ten percent in stock was declared on 15 April 1980.

The next development of significance occurred when Foremost wrote a letter to Mr. Asghari on 21 May 1980 requesting that the amount of the dividend payable to the Foremost companies, 29,864,280 Rials, be placed in a separate bank account to be opened in the name of Foremost-McKesson. Mr. Asghari replied by telex dated 27 May 1980 in the following terms:

"I have to inform you that due to decision and instruction of the board of directors, Pak Dairy can not pay any sums of money for any reason to foreign share holders. So I cannot take any action regarding your request."

Foremost's request for written confirmation of this decision met with no response. Despite Pak Dairy's assertion in its pleadings that the telex was unauthorised, it was in fact never specifically retracted. However, in telexes dated 28 September 1981 and 11 November 1981 Pak Dairy stated its readiness to pay, in Rials, the dividends which it said had been credited to Foremost in Pak Dairy's books.

An appraisal of the situation prevailing at 27 May 1980, the date on which Foremost asserts that the actions of Pak Dairy's governmental shareholders crystallised into a taking, reveals that two years' dividend, one of which had been declared only one month previously, had not been paid. However, Foremost still owned 31% of the shares; it still held two seats on the board of directors; and it continued to exercise its rights in this respect through the participation of Mr. Vahdati. It could not, as a minority shareholder, have expected successfully to oppose the trend on the part of the majority towards the adoption of policies in line with those of the new revolutionary Government. The only action of the majority which was demonstrably directed against Foremost's interest, and which must be considered to engage the responsibility of the Government, was the withholding of the dividend payments. However, while constituting an undoubted interference with Foremost's

rights, this in itself could not be interpreted as amounting to an expropriation of Foremost's interest when set against the background of Foremost's continued, albeit circumscribed, participation in the affairs of the company.

As at May 1980, Foremost still had two seats on the board of directors and was continuing to exercise its rights in that respect without apparently encountering any interference.

Certain critical changes occurred at a later date, however, notably at the general meeting of shareholders on 16 November 1980, discussed above in the context of governmental control over Pak Dairy. The two proxies held by Mr. Vahdati were found not to be formally valid for the purpose of that meeting. More significantly, at the suggestion of the representative of the Foundation for the Oppressed, Mr. Fisher was voted off the board of directors by "the majority vote of the shareholders present at the meeting", and both Mr. Haghshenas and Mr. Asghari resigned. The general meeting then expressed its gratitude for the services of Mr. Fisher. The three were replaced by directors representing the Foundation for the Oppressed, IMB and NICI. The election was "by the unanimous vote of the shareholders present at the meeting". The minutes of the meeting confirm that Foremost Shir still held one seat on the board, occupied by Mr. Vahdati. At that meeting Dr. Ameli stated that

"the main objective [of the company] is ... to protect the interests of the country as well as to preserve the industry and the interests of all shareholders including the minor ones within the framework of the general interests of the country; and the Board of Directors has done all in its power to achieve this end."

The record shows that Mr. Vahdati continued to participate in the decisions of the board, on one occasion submitting reports as to the selection of personnel. The last occasion

on which his signature appears is a meeting held in March 1981. His resignation evidently took effect at some point between March and June 1981. But the minutes of a general meeting held on 7 June 1981 show that two new Foremost representatives, Mr. Yahyazadeh and Mr. Sohrabi, were on that date elected to the board. They remained until their resignation in October 1981, and one of them, Mr. Yahyazadeh, participated in the preparation of the minutes of meetings in the capacity of secretary.<sup>5</sup>

The task now before the Tribunal is to evaluate the rights Foremost had in Pak Dairy in the period prior to the alleged expropriation; the extent to which these rights were diminished or interfered with prior to 19 January 1981; and, finally, whether such interference amounts in law to an expropriation giving rise to a right to compensation.

Such a holding would involve a determination by the Tribunal that measures were adopted which were not only detrimental in their effect on Foremost, but which went beyond the legitimate exercise by the majority of the shareholders of Pak Dairy, or by its duly elected board of directors, of their right to manage the company's affairs in what they perceived to be its best interests.

Since 1976 Foremost had been a minority shareholder with two out of seven seats on the board of directors of Pak Dairy. For a period of some seven months between November 1980 and June 1981 this representation was reduced to one, though after that, two new Foremost directors were elected. There is evidence that these directors were not mere "token" appointments, but played an active part in the company's

---

<sup>5</sup> Pak Dairy has argued that Foremost's continued exercise of its shareholders' rights until October 1981 gives rise to an estoppel as to the pursuit of any expropriation claim.

affairs until Foremost chose to withdraw them by a telex of 23 October 1981. It is significant that to this day Foremost retains the title to its 31% shareholding. There is no record of any attempt formally to confiscate its actual shares.

The only significant act on the part of Pak Dairy's controlling organs which appears to have been done with the object of discriminating against Foremost was the withholding of declared cash dividends for two successive years. This constituted a serious infringement of Foremost's right to enjoy the fruits of its holding in Pak Dairy. This is also the only act which can be attributed beyond doubt to the State.

The evidence, in the Tribunal's view, is finely balanced. In order to succeed before the Tribunal in a claim for expropriation, Foremost must show that it already had an outstanding claim by 19 January 1981.<sup>6</sup>

In the context of the time factor in expropriation cases, the Tribunal has previously stated,

"A claim for a taking is outstanding on the day of the taking of property. Where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of the property, the breach forming the cause of action is deemed to take place on the day when the interference has ripened into more or less irreversible deprivation of the property rather than on the beginning date of the events. The point at which interference ripens into a taking depends on the circumstances of the case and does not require that legal title has been transferred."<sup>7</sup>

---

<sup>6</sup> See note 2 above.

<sup>7</sup> Award No. 196-302-3 of 28 October 1985 in International Technical Products Corporation et al. and The Government of the Islamic Republic of Iran et al. at 49.

As to what might be considered "more or less irreversible deprivation", it is instructive to examine the provisions of the General Terms and Conditions of the standard OPIC insurance contract, as produced by the Claimants, Article 1.13 of which defines "Expropriatory Action", as a general rule, as "any action which is taken, authorized, ratified or condoned by the Government of the Project Country, commencing during the Insurance Period, with or without compensation therefor, and which for a period of one year directly results in preventing: ... (b) the Investor from effectively exercising its fundamental rights with respect to the Foreign Enterprise either as shareholder or as creditor..." (emphasis added).

The way in which the law treats cases of alleged expropriation of foreign investment has been discussed extensively by Professor G. C. Christie, who observes:

"The right which seems, from an examination of the cases and of the underlying realities, to be least subject to successful interference, is the right of the owner to manage his enterprise. And yet, even here one cannot be dogmatic. The fact that an alien employer is suddenly forced to take nationals of the local State on to his board of directors would not seem, by itself, to amount to expropriation. Nor would it seem to be expropriation if the alien owner were forced to take representatives of his labour force on to his board. There might even be circumstances where operating control over the enterprise might be completely taken from the alien owner without rendering the State liable even for 'damages' for use. Suppose a State took over certain foreign enterprises and operated them prudently, paying a fair return, perhaps the actual profits of the enterprise, to the owners. Presumably after a sufficient passage of time such action would amount to an expropriation, but how long this period might be one would not wish to hazard a guess. If the State announced in advance that the taking would be for the duration of the 'present economic emergency' but 'in no event' longer than, say, 'five years' it would seem doubtful whether an alien could complain that his property had been expropriated. Under somewhat analogous circumstances there are strong indications that, in the United States at least, such property would not be considered to have been expropriated. In

such circumstances one might be tempted to ask whether the foreigner could alienate his property during the stated period and try to resolve the controversy on this ground. The editors of the Harvard Draft suggest this as a possible test. But if the enterprise were sufficiently large this criterion would add nothing because of the lack of possible buyers other than the State itself."

Christie, What Constitutes a Taking of Property Under International Law?, 38 Brit. Y.B. Int'l L. 307, 333-34 (1962) (footnotes omitted).

Having examined the totality of the evidence in the present Cases, the Tribunal reaches the conclusion, on balance, that the interference with the substance of Foremost's rights did not, by 19 January 1981, and still less by 27 May 1980, amount to an expropriation.

The above conclusion is not altered by consideration of the effect of the departure of Foremost's personnel from Iran. While this contributed to the diminution of the enjoyment of Foremost's rights, it did not affect their fundamental nature. In this context, it is significant that after Foremost withdrew its two directors in October 1981, Pak Dairy replied with a telex of 11 November 1981 suggesting that the resignation be withdrawn and new directors designated. It should also be noted that Foremost has not proved the existence of any statutory restriction on its right to sell or otherwise dispose of its shares, and the report of Standard Research Consultants does not indicate any such restrictions. The report instead concludes that "the going-concern fair market value" of Foremost's 31% interest in Pak Dairy was \$11 million on 27 May 1980.

The legal characterisation of the interference suffered by Foremost appears rather to be on the same footing as that suffered by the Claimants in the Case of Sporrong and Lönnroth, European Court of Human Rights, Judgment of 23

September 1982, Series A no. 52.<sup>8</sup> There, the grant of long-term expropriation permits (twenty-three and eight years respectively), accompanied by prohibitions on construction (twenty-five and twelve years respectively), over two pieces of real property in Stockholm, resulted in a serious impairment of the enjoyment and disposition of the Claimants' property which, however, fell short of affecting the legal title. The measures were held not to be expropriatory.

The Court in Sporrong held:

"In the Court's opinion, all the effects complained of . . . stemmed from the reduction of the possibility of disposing of the properties concerned. Those effects were occasioned by limitations imposed on the right of property, which right had become precarious, and from the consequences of those limitations on the value of the premises. However, although the right in question lost some of its substance, it did not disappear. The effects of the measures involved are not such that they can be assimilated to a deprivation of possessions. The Court observes in this connection that the applicants could continue to utilise their possessions and that, although it became more difficult to sell properties in Stockholm affected by expropriation permits and prohibitions on construction, the possibility of selling subsisted...." (paragraph 63).

It is open to the Tribunal to make a similar finding in the present Cases to the extent that the level of interference established here constitutes "other measures affecting property rights" as contemplated by Article II, paragraph 1, of the Claims Settlement Declaration, though it may not have risen to the level of an actual taking.

---

<sup>8</sup> Cf. the case of Ellerman v. The State of Poland, Decision of 29 July 1924 of Mixed German-Polish Arbitral Tribunal, Recueil des décisions des Tribunaux Arbitraux Mixtes, Vol. V, p. 457, in which the Tribunal found itself competent to render a provisional order for payment of compensation by the Polish

(Footnote Continued)



Such interference, attributable to the Iranian Government or other state organs of Iran, while not amounting to an expropriation, gives rise to a right to compensation for the loss of enjoyment of the property in question.

The Tribunal is also satisfied that Foremost's claim for expropriation must be taken to include a claim for a lesser degree of interference with its rights.

Pak Dairy was, and is, obliged to pay declared dividends to all its shareholders. Faced with a clear breach of this duty in the form of the withholding by Pak Dairy of the cash dividends declared in 1979 and 1980 and due to Foremost, the Tribunal determines that an interference of the type described above exists, and that the amount of these dividends represents the correct level of compensation payable by the Government.

Foremost is therefore entitled to recover \$423,758 representing the cash dividend declared in 1979 and \$479,077 representing the cash dividend declared in 1980. It appears from the record that these figures are net of taxes.

The claim has been expressed by Foremost in U.S. Dollars in its pleadings before the Tribunal. No discussion has taken place, either in the written pleadings or at the hearing, concerning the accuracy of these figures. The Tribunal therefore accepts the Claimants' suggested computation in these Cases.

The dividends were declared, respectively, on 15 April 1979 and 15 April 1980. According to Article 57 of Pak Dairy's

---

(Footnote Continued)

Government to a claimant deprived of the possession and usufruct of a property in respect of which no formal instrument of expropriation had yet been issued.

Articles of Association, dividends were to be paid "within four months after resolution of general meeting". Thus the two dividends became due, respectively, on 15 August 1979 and 15 August 1980. Foremost is entitled to interest on the first dividend from 15 August 1979, and on the second dividend from 1 October 1980, the date from which interest is claimed.

The Tribunal considers it reasonable to award interest at the rate of 10% per annum on the amounts found to be due in these Cases.

An allocation of the two dividends between the four Foremost companies in proportion to their respective holdings gives the following figures:

(a) the dividend declared in 1979

Foremost Tehran (10%)	- \$136,696.13
Foremost Shir (10%)	- \$136,696.13
Foremost Iran (10%)	- \$136,696.13
Foremost Foods (1%)	- \$ 13,669.61

(b) the dividend declared in 1980

Foremost Tehran (10%)	- \$154,540.97
Foremost Shir (10%)	- \$154,540.97
Foremost Iran (10%)	- \$154,540.97
Foremost Foods (1%)	- \$ 15,454.09

No award in respect of these dividends is made against any Respondent other than the Government.

Foremost's enjoyment of its shareholding was further infringed by Pak Dairy's failure to deliver the certificate representing the stock dividend declared in 1980. The certificate representing the stock dividend declared in 1979

had been collected by Mr. Fisher in person. In the light of Pak Dairy's repeated assurances that Foremost's rights of ownership subsist, the Tribunal assumes that Pak Dairy will promptly deliver to Foremost the stock certificates for the stock dividend declared in 1980.

ii) The contract claims

Part II of Case No. 231 relates to four contracts for the lease of milk carton filling machines to Pak Dairy. Two of the lease agreements were entered into by Foremost Foods (then named International Dairy Engineering Company) and two by Foremost-McKesson. The agreements were dated 4 May 1974, 14 July 1975, 8 June 1976 and 19 November 1977, respectively. Each provided for the payment of a "base rental" in sixty consecutive monthly instalments commencing on the 10th day of the month after installation of the machine. In addition, a monthly production rental was payable, calculated in accordance with a formula based on the quantity and capacity of containers manufactured and sold, for the life of the machines. A report showing details of the number of containers filled and sold, less returns, during the preceding calendar month, together with a remittance of the amount due, was to be furnished by Pak Dairy to Foremost no later than the 10th day of the next month. Each agreement provided for a minimum production rental, and contained a clause entitling Foremost as lessor to terminate for breach and repossess the machine upon thirty days' written notice.

Foremost alleges that no monthly payments were made in respect of the machines for the period after 31 May 1979. After the filing of the claim, base rentals continued to accrue under the last of the four agreements, while production rentals continued to accrue in respect of all four machines.

On 5 November 1980, Foremost Foods and Foremost-McKesson each wrote letters to Pak Dairy giving notice of default and demanding, in accordance with the contracts, either that full payment be made or that the machines be returned within thirty days. Pak Dairy did not reply, nor did it return the machines.

Foremost has filed an affidavit of Suzan McCloskey of Ex-Cell-O Corporation, the manufacturer of the machines, who estimated the useful life of each of them as twelve years from installation, and valued the machines accordingly. Pak Dairy, on the other hand, denies that the machines would last longer than five years, though there is evidence that they continued to be used thereafter. It has disputed Foremost's evidence of valuation, and requests that an expert be appointed. It admits that five years base rental was payable in respect of the machines insofar as this was due by 19 January 1981.

Pak Dairy has not satisfied the Tribunal either by argument or evidence that the contracts were "imposed" or "one-sided". Pak Dairy's failure to pay the rental payments due or to return the machines upon demand constitutes breaches for which Foremost is entitled to compensation. First, Foremost is entitled to both base and production rental payments which were due for the use of the machines until 5 December 1980, when Pak Dairy had an obligation to return the machines. For practical purposes, the Tribunal decides that rentals are due through December 1980, and that compensation for the value of the machines (see below) was due on 1 January 1981. According to the chart produced in evidence by Foremost and based on information received from Pak Dairy, the unpaid rentals through December 1980 amounted to \$112,932.90. Foremost is also entitled to interest on the rental payments from the respective dates on which they became due. However, the Tribunal declines to award the additional rental amount of \$31,807 "based on alleged

production figures," as Foremost has neither adequately explained nor sufficiently substantiated this figure. Thus, Foremost Foods is entitled to recover the amount of \$45,263.78 representing rental on machines QP 50886 and RPCF 3772, and Foremost-McKesson is entitled to recover the amount of \$67,669.12 representing rental on machines LQP 51026 and QM 51253. In addition, the Tribunal awards Foremost Foods interest on the rental payments due it in two parts: first, the sum of \$3,985.69 representing 10% interest on the unpaid rentals from the respective dates on which they were due to 10 January 1981; and second, 10% on the sum of \$45,263.78, the total amount of unpaid rentals owed Foremost Foods from 10 January 1981. In the same manner, the Tribunal awards Foremost-McKesson interest on the rental payments due it in the amount, first, of \$5,902.24, representing 10% interest on the unpaid rentals from the respective dates on which they were due to 10 January 1981, and second, 10% on the sum of \$67,669.12, the total amount of unpaid rentals owed Foremost-McKesson, from 10 January 1981.

Second, the Tribunal considers that in the circumstances of this Case, Foremost is entitled to recover the value of the machines. Foremost's expert, an official of the company which manufactured the machines, estimated the value of the four leased machines at \$331,595.00. This figure is, if anything, conservative, as the affidavit states the "current" value of the machines, presumably referring to the date of submission of the affidavit in 1983. In addition, Mr. Fisher states in his affidavit that the machines were in good working order at the time of his departure from Iran. Even though Pak Dairy was in possession of the machines and therefore in a better position to assess their condition than Foremost, Pak Dairy has not adduced any countervailing evidence as to the value of the machines. Accepting Foremost's effectively uncontroverted evidence of valuation,

the Tribunal awards \$331,595.00, together with 10% interest thereon from 1 January 1981, to compensate for Pak Dairy's failure to return the machines. Of the principal sum, \$132,055.00 is due to Foremost Foods in respect of machines QP 50886 and RPCF 3772, and \$199,540.00 is due to Foremost McKesson in respect of machines LQP 51026 and QM 51253.

Part III of Case No. 231 is a claim in respect of the TAA entered into between Foremost-McKesson and Pak Dairy on 21 December 1970. Foremost claims a total of \$157,013.70, with interest, representing various invoiced amounts and trade-mark licence fees. The claim is broken down into four separate items, which the Tribunal will examine in turn.

- (a) invoices for supplies, ingredients and spare machinery parts - \$12,981.92

Foremost-McKesson has provided invoices to substantiate this element of its claim, which has not been specifically disputed by Pak Dairy. It is therefore accepted in its entirety.

- (b) trademark fees for the years 1979 and 1980 at U.S.\$7,500 per year - \$15,000.00

Though Pak Dairy denies that it continued to use Foremost's trade marks, the TAA, whereby a fee of \$7,500 per year was payable to Foremost-McKesson for the license to do so, remained in force until 20 December 1980. The Tribunal thus finds that the fees for 1979 and 1980 are payable.

- (c) salaries and allowances for personnel employed by Pak Dairy - \$84,196.87

Under the TAA, Pak Dairy reimbursed Foremost for

services performed for it by Foremost employees. The present claim relates to three employees -- Mr. Fisher, Mr. Loichinger, and Mr. Carlsson, the plant superintendent.

The invoices submitted in respect of Mr. Fisher relate mostly to periods during 1979 when he was absent from Iran, but according to the invoices, "performing Management Services for Pak Dairy". While there is no evidence as to what those services were, or what type of benefit Pak Dairy derived from them, it is not disputed that Mr. Fisher made three trips to Iran in 1979. He was still serving as managing director and on the board of directors at the time he made these trips, which totalled several months in duration. In the absence of more precise evidence, the Tribunal considers it reasonable to award salary and expenses amounting to \$10,000.00, as well as airfare totalling \$3,103.

The Tribunal finds that the amounts claimed in respect of Mr. Carlsson and Mr. Loichinger have not been sufficiently explained or substantiated, and they are therefore denied.

- (d) moving expenses of Mr. Fisher and Mr. Loichinger -  
\$44,834.91

Foremost-McKesson has submitted invoices to substantiate this element of its claim, and it has not been disputed by Pak Dairy. The Tribunal considers it reasonable to grant it.

The total amount thus payable to Foremost McKesson under the Technical Assistance Agreement is \$85,919.83. The Tribunal considers it reasonable that the Part III items should attract interest at the rate of 10% from 1 January 1981.

The Award in respect of Parts II and III of Case No. 231 is based on contractual obligations for which Pak Dairy alone is liable. No award is made against any other named Respondent in respect of those claims.

d) Costs

Each Party shall bear its own costs.

III. Award

For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

1. The claim of FOREMOST TEHRAN, INC., FOREMOST SHIR, INC., FOREMOST IRAN CORP., and FOREMOST FOODS, INC., for expropriation of their respective holdings of shares in Pak Dairy is dismissed.

2. In respect of the two unpaid cash dividends, the Respondent THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN is obligated to pay:

(a) to the Claimant FOREMOST TEHRAN, INC. the amount of Two Hundred Ninety-One Thousand Two Hundred Thirty-Seven United States Dollars and Ten Cents (U.S. \$291,237.10) together with simple interest at the rate of 10 percent per annum (365-day basis) on \$136,696.13 from 15 August 1979 and on \$154,540.97 from 1 October 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

(b) to the Claimant FOREMOST SHIR, INC. the same amount shown in subparagraph (a) above together with the same amount of interest as shown in that subparagraph;



(c) to the Claimant FOREMOST IRAN CORP. the same amount shown in subparagraph (a) above together with the same amount of interest as shown in that subparagraph;

(d) to the Claimant FOREMOST FOODS, INC. the amount of Twenty-Nine Thousand One Hundred Twenty-Three United States Dollars and Seventy Cents (U.S. \$29,123.70) together with simple interest at the rate of 10 percent per annum (365-day basis) on \$13,669.61 from 15 August 1979 and on \$15,454.09 from 1 October 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

3. In respect of contractual claims, the Respondent SHERKAT SAHAMI LABANIAT PASTEURIZE PAK is obligated to pay to the Claimant FOREMOST FOODS, INC. the amount of One Hundred Eighty-One Thousand Three Hundred Four United States Dollars and Forty-Seven Cents (U.S. \$181,304.47) together with simple interest at the rate of 10 percent per annum (365-day basis) on \$132,055.00 from 1 January 1981 and on \$45,263.78 from 10 January 1981 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

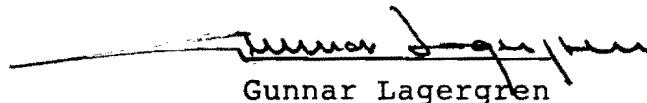
4. In respect of contractual claims, the Respondent SHERKAT SAHAMI LABANIAT PASTEURIZE PAK is obligated to pay to the Claimant FOREMOST-McKESSON, INC. the amount of Three Hundred Fifty-Nine Thousand Thirty-One United States Dollars and Nineteen Cents (U.S. \$359,031.19) together with simple interest at the rate of 10 percent per annum (365-day basis) on \$285,459.83 from 1 January 1981 and on \$67,669.12 from 10 January 1981 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

5. Each Party shall bear its own costs.

These obligations 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.

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

Dated, The Hague  
10 April 1986

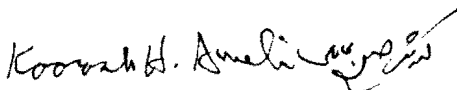


Gunnar Lagergren

Chairman

Chamber One

In the name of God

  
Koorosh-Hossein Ameli

1. Joining as to denial  
of expropriation claims.

2. Concurring as to granting  
of claims for two unpaid

  
Howard M. Holtzmann

1. Dissenting as to denial  
of expropriation claims.

2. Joining as to granting  
of claims for two unpaid

dividends, except dissenting as to subparagraph 2(d) of the dispositif.

dividends.

3. Dissenting as to granting of contractual claims.

3. Joining as to granting of contractual claims.

4. Joining as to costs.

4. Dissenting as to denial of costs to the Claimants.

5. Dissenting as to award of interest.

5. Joining as to award of only 10% interest solely in order to form a majority. See my Separate Opinion in International Schools Services, Inc. and National Iranian Copper Industries Company, Award No. 194-111-1, pp. 3-4 (10 October 1985).

6. Dissenting as to the existence of jurisdiction over certain of the claims and Parties. The majority having concluded that such jurisdiction exists, I have in some instances participated and voted on the merits.

See separate opinion.

See separate opinion.