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\*\* AWARD - Type of Award \_\_\_\_\_  
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\*\* DECISION - Date of Decision \_\_\_\_\_  
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\*\* CONCURRING OPINION of \_\_\_\_\_  
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\*\* SEPARATE OPINION of MR. Mohsen Akhahossini  
- Date 9 Feb. 95  
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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحدہ

IN THE NAME OF GOD



CASES NOS. 44, 46, and 47

CHAMBER THREE

AWARD NO. 560-44/46/47/-3

SHAHIN SHAINÉ EBRAHIMI,  
 CECILIA RADENE EBRAHIMI,  
 CHRISTINA TANDIS EBRAHIMI,  
 Claimants,

and

THE GOVERNMENT OF THE ISLAMIC  
 REPUBLIC OF IRAN,  
 Respondent.

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان داوری دعاوی ایران - ایالات متحدہ
FILED	ثبت شد
DATE	9 FEB 1995
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	تاریخ

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SEPARATE OPINION OF MOHSEN AGHAHOSSEINI

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In its Final Award in the within Cases, this Chamber, having been presented with a number of legal and factual issues, made certain findings, with some, but not all of which I agreed. I now write, as promised in there, first to specify my positions with respect to some of the more important of those findings; and secondly to state a word where I think this is called for. Lest it should be differently understood, it must be reiterated that

this is not therefore intended as an exhaustive list of my reactions to all the issues discussed in the Award.

1. THE STANDARD OF COMPENSATION

The Award holds, correctly and justly, I suggest:

- (a) That while customary international law recognizes an obligation to provide compensation for a taken property, the standard of compensation it sanctions is not "prompt, adequate and effective", but "appropriate". The latter, unlike the former, "aims at ensuring that the amount of compensation is determined in a flexible manner, that is, taking into account the specific circumstances of each case".<sup>1</sup>
- (b) That it is this "flexible standard" --the one with inherent elasticity-- that has been upheld in the Tribunal precedents, according to which "once the full value of the property has been properly evaluated, the compensation to be awarded must be appropriate to reflect the pertinent facts and circumstances of each case."<sup>2</sup>
- (c) That all this, despite the existence of a "Treaty of Amity" between the Parties, wherein reference is made to "prompt payment of just compensation", representing "the full equivalent of the property taken".<sup>3</sup>

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<sup>1</sup> Award at para. 88.

<sup>2</sup> Award at para. 95.

<sup>3</sup> Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, signed 15 August 1955, entered into force 16 June 1957, 284 U.N.T.S. 93, T.I.A.S. No. 3853, 8 U.S.T. 900, Article IV, paragraph 2.

Legally warranted and equitable<sup>4</sup> as these conclusions are, a great hue and cry has been raised against them. The flexible standard, we are told, is "ill-defined", "essentially meaningless", "unjustified", "out of steps with the times", "counter productive", "backward-looking", "wrong in theory" and "wrong in practice"; a standard which leaves the result to "caprice" perception. Its adoption by this Tribunal despite the existence of the Treaty of Amity is, on top of all those, a neglect of "the fundamental law governing the subject".<sup>5</sup>

It is not my intention here to revisit the wealth of evidence which demonstrates, conclusively, the almost universal and deeply-rooted support in all the primary sources of international law for a flexible approach. That is a task which rested with, and was sufficiently performed by the Majority in the text of the Award. Instead, I venture to suggest that a flexible approach-- one which calls for the determination of the standard of compensation to be made on the basis of all relevant circumstances-- is not only a rule of the law of nations, but the law of nature and reason, the dictate of civil behavior. This should be elementary enough. A rule which would require the trier of fact to turn a blind eye to the circumstances of a case, to order, automatically, the payment of full compensation whenever it found a taking-- the damnum corpore corpori datum-- belongs not to the present day of refined juridical conception, but to a primitive time: to Rome before the laws of the Twelve Tables

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<sup>4</sup> Equity, says one of the law's greatest teachers, is essentially the application of the general decrees of the law to the particular circumstances of each individual case. 1 William Blackstone, Commentaries on the Laws of England 61 (1st ed. 1765-1769).

<sup>5</sup> Separate Opinion of Judge Richard C. Allison in the present Cases (12 October 1994).

and to England when trespass took its early shape. In fact, the Twelve Tables-- those remaining fragments of them which were later reconstructed-- expressly relate the remedies for violation of property rights to the specific circumstances surrounding a violation.<sup>6</sup> This is hardly surprising. "[E]ven a dog", says Oliver Wendell Holmes, "distinguishes between being stumbled over and being kicked".<sup>7</sup>

What, then, is so special about the requirement to pay compensation to the alien owner of a nationalized property that would justify a singular exception to this elementary and sound rule? The rule that the law's sanctions-- penalty or compensation-- must fit the nature of the wrong, must relate to the circumstances under which the wrong is committed? What, in short, justifies a return to a rigid rule of primeval simplicity?

The answer, the inquirer is invariably told by the advocates of a rigid rule, is the sanctity of the right of property. Yet this is not an answer at all. The right of property is recognized and respected by almost all societies and systems of law. There is nothing, however, peculiar about that. So is the right, to give an extreme instance, of life. Yet no one has ever suggested that when this latter-- the right of life-- is violated, sanctions should be imposed irrespective of the circumstances, irrespective of other considerations involved. And yet "the law cannot be less careful of the persons than of the property of its subjects".<sup>8</sup>

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<sup>6</sup> 1 Sir James Fitzjames Stephen, A History of the Criminal Law of England 9-10 (1883).

<sup>7</sup> Oliver Wendell Holmes, Jr., The Common Law 3 (1881).

<sup>8</sup> Id. at 83.

What, then, the advocates of never-less-than-full-compensation must justify is not their simple respect for, or even their fascination with, property-- with capital-- but the developing of this into an obsession of such magnitude as to deny the possible effects of all other principles, of all other considerations, however pertinent, on this exulted and canonized right of property.

After many years of ceaseless efforts exerted by very many States, it has now been long established, for instance, that nations are sovereign over their natural resources and have the right to dispose of them in accordance with their interest. It has long been demonstrated, again, that international community is in need of new principles governing international economic relations; that nationalizations, at times, are absolutely necessary for social purposes. Now, what must be justified by the opponents of the flexible approach is not that the ownership of property should be respected, but why these considerations should have no place in the determination of compensation for a taken property. And on this, of course, no justification is provided.

The assertion with regard to the Treaty of Amity, that its provisions as lex specialis in the relations between the parties require full compensation whatever the dictate of customary international law, is equally misplaced. Assuming, for the sake of argument only, that the Treaty does apply to claimants of dual Iran- United States nationality, and assuming, further, that the relevant terms of the Treaty required at the time of conclusion the payment of full compensation in cases of taking, its present application to the parties at hand mandates the observance of a flexible standard only. This is because of the necessity to take note, when interpreting the Treaty, of the emergence of the

flexible rule in customary international law, for the following reasons:

First, the Treaty expressly links, in Article IV, paragraph 2, the standard of required property protection-- of which the prompt payment of just compensation, representing the full equivalent of the property taken, is only a consequence-- to the standard upheld by the international law. In the words of the Treaty itself, the property of nationals of each contracting Party must be protected "in no case less than that required by international law". The evolution of a rule of customary international law in this field --putting an end to the Western powers' domination of international relations on the subject-- is therefore of direct relevance to the correct interpretation of what the Parties really intended by those qualifying words. Any other interpretation, it goes without saying, would render the quoted phrase in the Treaty wholly redundant.

Second, and even in the absence of such express linkage, the terms used in the Treaty in this respect (e.g. constant protection, just compensation) are obviously not static, but by definition of "evolutionary" nature. That being the case, it is the requirement of a general and well-settled rule of international law that such terms be interpreted in the light of any evolved principle of law in the field.<sup>9</sup>

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<sup>9</sup> See, for example, Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), where the International Court of Justice concluded, in its advisory opinion, that in such circumstances "... an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation." (1971 I.C.J. 16, 31). See also Taslim Elias, The Modern Law of Treaties 77 (1974): "It is necessary to take into account as well the so-called intertemporal law in its application to treaties; that is to say, to have regard to the

Third, Article V of the Claims Settlement Declarations, which refers to the law governing the resolution of all disputes before this Tribunal, specifically directs this forum to decide all cases on the basis of respect for law, applying, inter alia, international law, taking into account, amongst others, changed circumstances. Such changed circumstances since the conclusion of the Treaty some forty years ago include, to give a single instance, the recognition by the international law of the right of States taking control of their natural resources or otherwise nationalizing foreign enterprises, the legality of which was once disputed. They include, to provide yet another instance, the wide acceptance of the need for a new international economic order. They include, again, the recognition of the right of the nation-states to determine their own economic and social future. These, then, are relevant rules of international law, which being applicable at the time of interpreting the Treaty, must, as suggested by a resolution of the Institute of International Law, be taken into account.<sup>10</sup>

One final comment on this. Realizing that the evidence in support of the existence of a flexible-- or "appropriate"-- rule is too extensive to allow a general denial, the rule's emergence during "the middle years of this century" is sometimes conceded. But it is contended that this development-- the result, we are told, of sustained attack in the postwar period by forces on Colonel Ghadaffi's side against those on Secretary Hull's-- has once again in the past few years reversed itself in favor of the

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effect of the evolution of the law on the interpretation of the legal terms used in the treaty."

<sup>10</sup> "Any interpretation of a treaty must take into account all relevant rules of international law which apply between the parties at the time of application." *Annuaire de l'Institut de Droit International* 537 (1975) (emphasis added).



traditional rule of full compensation. The evidence adduced in support of this consists, principally, of a network of bilateral investment treaties containing such requirement.<sup>11</sup>

Whether the genuine aspirations and hard-fought struggles of many States to assume control of their natural resources, to determine their own future economic order, and to exercise some minimum degree of right vis-à-vis their dealings with capital investors can be tastefully likened to the attack by forces of this or that ruler, one does not know. One does know, however, that the rules of international law, including the requirement of a flexible approach, do not fluctuate like a yo-yo, moving up and down in a second. Such fluctuations, at any rate, cannot be caused by the conclusion of a few investment treaties, which have their own purposes, and which do not even constitute any serious source of international law.

## 2. LACK OF FAULT ON THE PART OF THE RESPONDENT

The above discussion on the flexible rule --the rule requiring the taking into account of all the pertinent

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<sup>11</sup> Hopes to achieve the task of undermining the international law rule of flexible standard had been originally pinned on the Iran-United States Claims Tribunal. Professor Oscar Schachter, for instance, referring to the establishment of this Tribunal "to deal with unusually large claims", states that this had attracted "the attention of an influential group of U.S. lawyers on the issue", and the "political climate in Washington ensured that those views would find support in the government". (The Question of Expropriation/Compensation in the United Nations Code in the Light of Recent State Policy and Practice, pp. 34-35, delivered at the Symposium on the United Nations Code of Conduct on Transnational Corporations, held at The Hague, 15-16 September 1989.)

circumstances-- brings me to one such circumstance, the presence or absence of fault on the part of a respondent.

In his capacity as the International Law Commission's Special Rapporteur on State Responsibility, the Chairman of this Chamber has told us of the importance, in the Commission's Provisional Draft Articles, of fault as a necessary condition of State liability:

According to our understanding, particularly in view of the presence of Article 31... and of the commentary thereto, the Commission seemed rather to believe that fault was a sine qua non condition of wrongfulness and responsibility.<sup>12</sup>

Next, he has told us of his own view of the importance at any rate of fault or lack of it as a factor in determining the consequences of an international wrong --the degree of required compensation, for instance.

Whether or not there are cases in which responsibility is attributed regardless of the absence of any degree of fault, there is no doubt, in our opinion, about the relevance of fault with regard to the specific determination of the consequences of an internationally wrongful act. One thing would be to say that the presence of fault is not essential for an act to cross the threshold separating the lawful from the unlawful. Another thing is to say that the legal consequences of an act which has passed that threshold are the same whether or not any fault (dolus included) is present in any degree.<sup>13</sup>

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<sup>12</sup> Gaetano Arangio-Ruiz, Special Rapporteur, Second Report on State Responsibility, Addendum, U.N. Doc. A/CN.4/425/Add.1, par. 163, p. 3 (22 June 1989).

<sup>13</sup> Id. at 3-4. Others, including the current President of the International Court of Justice, have come to the same conclusion:

...[T]he element of fault should play an important part in any examination of the consequences (reparation, satisfaction, or sanctions) of the

Let us see how this view, so unequivocally stated, is applied in a concrete case. The facts of the present dispute are adequately reflected in the Award and need not be repeated here. Those pertinent to our inquiry demonstrate, unquestionably, that there has been no fault, of any nature or degree, on the part of the Respondent.

The international wrongful act for which the Respondent State is here sued is "the taking of property belonging to foreign nationals without compensation." Yet the evidence shows that the Respondent State had at no time any intention to take the property in question and, further, that it had no knowledge that the property belonged to foreign nationals. Indeed, it believed, quite reasonably, that the property was owned by its own nationals. On the other hand, the Claimants, who are at any rate of Iranian nationality, deliberately acted to keep the Respondent in the dark with respect to their second, United States', nationality.

The taking in the present Cases is said to have resulted from the appointing by the Respondent of certain directors to the Claimants' company (Gostaresh Maskan, hereinafter sometimes "GM"). This was authorized by "The Act Concerning the Appointment of Temporary Manager(s) to Supervise Manufacturing, Industrial, Commercial, and Services Entities of Either Public or Private Sector" (hereinafter, the Act). Yet this was an urgent measure necessitated by the unforeseen and uncontrollable-- Force Majeure-- conditions brought about in Iran by the Revolution. It was a measure, in the express words of the Act, to "prevent the

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wrongful act, once that act is established and ascribed. It is indeed the almost automatic practice of the tribunals, once a breach of obligation has... been established and attributed to a State, to pass on to a second stage at which they ascertain whether and to what extent the relevant conduct by the State concerned was malicious or wilfully harmful." Mohammed Bedjaoui, Responsibility of States: Fault and Strict Liability, 10 Encyclopedia of Public International Law 359 (1987).

closure of certain entities whose managers or principal shareholders had either abandoned their entities or were, for any other reason, unable to manage the entities." Interestingly enough, Mr. Ali Ebrahimi, the principal shareholder of GM and the Claimants' father, has himself vividly described the circumstances under which the Respondent State had been forced to interfere in the affairs of this abandoned entity. He has testified, both orally and in writing, on how at those extraordinary times he had found it impossible to run the company's affairs:

I personally had problems, not with the government, but in the early stages of the revolution, although the government was trying to get control of all the elements, there were some elements (especially in Khuzestan, which were really not under government control) and these people gave me quite a bit of hard time....

Indeed, he has explained that due to those conditions it had become impossible for him to even visit the company's work sites, and that, but for effective intervention by officials of the Respondent Government, his very association with the company would have had serious personal consequences for him:

I really did not have any problem with the government or the revolutionary committees. My trouble was in Khuzestan. Every time I went there --especially, we had laid off a lot of workers the year before during the revolution and a lot of these people were armed, and they had various committees-- committees of fired workers of Gostaresh Maskan ... --there was one committee that I did not know who they were. They took me one time. They were not related to the revolutionary government; they were not related to the committees; they were not related to the clergy. It was called the "Committee of the Execution of Ali Ebrahimi." .... It was that kind of problem....

It was under such circumstances that the main shareholder of the entity turned away from it and, assisted by the Government, for which he now acknowledges his gratitude, he left the country. And it was under such circumstances, and in order

only to prevent the total disintegration of the company and the disappearance of its assets, that the Respondent State perforce appointed managers to run the abandoned entity.

Next, the Respondent State has had no knowledge-- and has not been negligent in not having any knowledge-- of the foreign nationality of the Claimants, another constituent element of the international wrong in question. This, as far as the Respondent State was aware, was an entity registered in Iran and owned by exclusively Iranian nationals. There has, of course, been no dispute that the Claimants were, and still are, Iranian nationals. But while the laws of Iran do not recognize dual nationality, and while Iran had no occasion or means to become aware of the fact that the Claimants happened to possess a second nationality, the Claimants declined to provide Iran with notice of such fact, exclusively within their knowledge. They thereby deprived the Respondent State of any knowledge of the possible presence of a constituent element of this wrong; namely, that what was being taken belonged to foreign nationals.

The evidence shows, indeed, that the Claimants went further, that they not only concealed their United States nationality but positively deceived the Respondent State in that respect. This, too, requires a word of explanation.

In their Statements of Claim filed some two years after the alleged taking, the Claimants submitted that the legislative measure under which their property had been expropriated by the Respondent State was "The Law for the Managing and Taking of Ownership of the Stocks in Contracting and Consultant Engineering Entities" (hereinafter, the Law). This was a measure taken pursuant to the Act referred to above; the Act, it will be recalled, that authorized the appointment of temporary manager(s). There, the Government of Iran had been given two months by the legislature to decide upon the status of ownership of large industrial and agricultural units to which the Act

applied. Here is what the Claimants have themselves submitted on this point:

On March 9, 1980, Iran enacted "The Legal Act of the Holding and Management of Stocks in Contracting and Consultant Engineering Firms and Entities," which declared that all the shares and assets of certain engineering companies would be taken into Iran's possession. Gostaresh is one of the companies covered by the act. (Statement of Claim, para. 11, emphasis added.)

Now, a proviso to Article II(B) of the Law specifically provides:

[t]he value of the shares of foreign shareholders in the entities taken by the Government shall, upon the auditing and evaluation of each entity, be paid by the Government.

This is a Proviso of which the Claimants were fully aware. Under the title of "Points at Issue", they pose the following question in their Statements of Claim:

Did Iran breach its obligation under the Iranian law entitled "The Legal Act of the Holding and Management of Stocks in Contracting and Consultant Engineering Firms and Institutes," which provided at Article II(B) note that: "The value of the foreign partners/stockholders of the companies expropriated by the government shall be paid by the government...", by failing to compensate Claimant[s] for the taking of [their] interests in Gostaresh?" (Statement of Claim, para. 18.)

This, then, is the Law on which the Claimants in their Statements of Claim rely in support of their expropriation Claim; this, indeed, is the only Law relevant to the expropriation of stocks in consultant engineering companies; and this is the Law the breach of which has been asserted before the Tribunal. And yet, while the Law by clear implication makes a distinction between foreign and Iranian shareholders, providing for the payment of compensation not to Iranians but to foreign shareholders, and while the Claimants expressly admit their

knowledge of the existence of a Proviso in the Law which envisages the payment of compensation only to foreign shareholders, they simply refrain from as much as informing the Respondent State that besides being Iranians, they are also of a foreign nationality. They deliberately conceal their United States' nationality where they are under a duty to do otherwise, and thereby positively deceive the Respondent in this respect.<sup>14</sup>

Such, then, have been the undisputed facts of the present Cases. On the one hand, an interference by the Respondent State not to secure any gains, but to prevent chaos and total disintegration of the entity interfered with; an interference with no knowledge, and no means of knowing, that it constituted an internationally wrongful act. There existed, on the other hand, the Claimants' deliberate act of not disclosing their second nationality, not even when they believed that the Respondent Government had provided for compensation to be paid to foreign nationals whose property had been taken.

Nevertheless, there is in the body of the Award not a word about these facts. Not a word about the effects of the Respondent's lack of fault on the consequences of its internationally wrongful act; on the degree of compensation. And all this despite the fact that the distinguished Rapporteur is one of the two-member Majority in the present Cases. Regrettably, convictions academically averred are not evidently adhered to in practice.

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<sup>14</sup> It must be noted that the point here is not what has, or has not, in fact happened to the Claimants' entity, but the Claimants' conduct as compared with that of the Respondent. As far as the Claimants were concerned, there can be no doubt that they, in fact, believed that the Law for the Managing and Taking of Ownership of the Stocks in Contracting and Consultant Engineering Entities directly applied to their company, and that they would have been entitled to compensation, had they not concealed their United States' nationality.

3. THE EFFECTS OF PREVAILING SOCIAL AND POLITICAL CONDITIONS ON THE VALUE OF THE ENTITY IN QUESTION

An Expert was appointed by the Tribunal to assist it in determining the value of the Claimants' entity. In the Terms of Reference, he was directed by the Tribunal to take into account all "prior changes in the general political, social, and economic conditions which might have affected [the entity's] business prospects as of the date it was taken". That being his instruction, he stated in his oral testimony that although in his valuation of the Claimants' entity he had taken note of the conditions, mainly economic, in Iran as they affected the entity's business prospects, he had not similarly considered the effects of the country's political and social conditions on the value of the entity in the market in which it existed.

This was based on a legal error which had to be rectified by the Tribunal. Once it is admitted, as it must, that the value of an entity cannot be determined in abstract but with close reference to its locale and to the social, political, and economic environment under which it operates; once it is admitted, as it must, that the objective of valuation is to find out the actual value of the entity in the actual market, then the limiting of the inquiry into one set of effects to the exclusion of others makes no sense at all.

Here was a case in which the Tribunal, having found the Respondent State liable for the taking of the Claimants' shares in an entity, was required to determine the amount of damages sustained by the Claimants, as represented by the actual value of their shares. This was to be done by first determining the value of the entity (GM) in the Iranian market at the time; by determining the real value of GM as a corporation offered for sale in Iran under the political and social conditions which



obtained in there in 1979.<sup>15</sup> Yet the Expert had determined the value of the entity in abstract. He had limited his inquiries into the effects of special circumstances in Iran on the entity's business prospects, but not on the possible demand for its acquisition.

Now the evidence, including Mr. Ebrahimi's testimony at the Hearing, shows that the atmosphere in Iran after the victory of the Revolution flatly rejected the class of wealthy proprietors as a whole. The effects of the society's intolerance towards those who had amassed wealth under the old regime on possible demands for the purchase of a giant corporation like GM, and hence its devastating effects on the entity's market value, should be self-evident. Those with the slightest familiarity with the then political and social conditions in Iran will not require to be told that then and there, no one was remotely likely to consider the acquisition of GM or any like corporation as a worthy investment.

Indeed, as it is clearly revealed by the testimony of Mr. Ebrahimi, GM at the time was not an asset but a liability for its owners. That is the conclusion one must inevitably draw from the description of circumstances offered by Mr. Ebrahimi; and that

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<sup>15</sup> The Tribunal precedent is to the same effect:

Although the method of analysis employed by the Claimants' two experts is undoubtedly consistent with modern techniques of valuation... their valuation does not in the Tribunal's view reflect the market value of Iran America at the relevant date. Without here examining in detail the various assumptions on which the experts have based their valuation, the Tribunal indicates some of the main reasons for its having taken that view. First, the appraisals do not sufficiently consider the changes in general social and economic conditions in Iran which had taken place between the autumn of 1978 and June 1979, or their likely duration. In this connection, it should be noted that during that period many Iranian nationals belonging to the wealthier part of the population left their country. American International Group, et al. and Islamic Republic of Iran, et al., Award No. 93-2-3, p. 19 (19 Dec. 1983) (emphases added).

is why Mr. Ebrahimi himself decided to disassociate himself from the corporation and leave the country. The point made here is an extremely simple one. If GM could have been of any great value to any prospective purchaser --if it could have been run by anyone for large profits, or otherwise disposed of against any substantial consideration-- it would not have been abandoned by Mr. Ebrahimi in the first place. The fact that Mr. Ebrahimi, a typical private owner, had come to realize that under the prevailing circumstances the only course open to him was to relinquish the corporation is a clear proof of how other would-be investors would have regarded the prospect, and of the fact that there could therefore be no remotely attractive market for the corporation.<sup>16</sup>

All this may now be summarized. Once, in valuating GM, the socio-politico-economic conditions prevailing in Iran in 1979 are taken into account --as they must, by law-- it becomes evident that, there being no enthusiasm for private ownership of such an entity, there being no possibility for the continuation of its operation as a private enterprise, it could not have attracted many sensible purchasers. Prospective purchasers are not normally prepared to invest in a company where the forces both within and outside the entity would not allow them to assert its ownership, let alone to effectively control its operations and activities. They do not invest in a company where they would not be allowed access to its assets. And this was bound to lead to a dropped demand for the acquisition of the GM type of companies in exactly the same way as the departure for social reasons of the wealthier stratum of the population had affected the value of an insurance company in the Case just cited.

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<sup>16</sup> One need not be reminded of the fact that the presence of such conditions in the country had absolutely nothing to do with the Respondent Government. Indeed, as stated before, the Tribunal has before it the testimony of Mr. Ebrahimi, describing in detail how in all these he had been unfailingly assisted by the highest authorities in the Government.

Yet the Award declines to take note of this very unusual political and social conditions which prevailed in Iran in 1979, and which adversely affected the market value of the Claimants' entity. The three reasons given in the Award in justification of this refusal reveal a most astonishing failure to understand the law and the Respondent's argument.

First, it is said that:

Fair market analysis is a valuation method incorporating well-established principles of accounting and corporate finance. Its usefulness rests on the premise that like companies will be valued alike. That is, in any number of comparable cases the interaction between a hypothetical willing seller and a hypothetical willing buyer will yield a comparable result. Fair market valuation thus carries with it an inherent degree of abstract analysis.<sup>17</sup>

This is quite wrong. As stated before, the objective --the only objective-- is to determine the amount of damages suffered by the Claimants when they lost their shares in an entity. That determination can only be made by assessing the value of the entity, and from there the value of the Claimants' shares. Now, the Award, having admitted that the value of the Claimants' entity must be determined by reference to the relevant market, in this case the Iranian market, fails to realize that the market is just bound to be affected by political and social conditions leading to a dropped demand, as it is bound to be affected by economic conditions influencing the entity's business prospects. Instead, it simply assumes that the demand --the market-- for an entity operating under the revolutionary atmosphere of Iran in 1979 is the same as that for an entity with similar attributes operating in London or New York. "[L]ike companies", says the Award unequivocally, "will be valued alike", irrespective, evidently, of the socio-political conditions governing their markets; irrespective of the place and time.

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<sup>17</sup> Award at para. 107.

And all this in flat violation of the Tribunal precedent. In a recent decision, for instance, this Tribunal has specifically dealt with the effects of the Revolution on the market value of the Claimants' shares in a private company, very much the issue under discussion here.<sup>18</sup>

The Award in that Case first notes that the company (Alborz) maintained a very healthy financial status throughout the revolutionary period. It continued to produce its basic products, it consistently increased its sales, it retained its core business, and it managed to meet its payrolls "right up to the time of taking". Yet, says that Award, it is the Tribunal's task to determine the full equivalent of the taken property by relying on a hypothetical seller/buyer scenario, and "[a] potential investor in Alborz shares at the time of taking would certainly have noted the events of the Revolution and weighed the resulting political and economic risks."<sup>19</sup> Having dealt with the economic effects of the Revolution, the Award goes on to refer to "the prevailing unforeseeability and instability of the market", on which a potential willing buyer would have focused.<sup>20</sup> For its valuation purposes, the Award then relies on the last-traded stock price for the Claimants' shares and, to take account of the stated risks, proposes a %25 discount to that price. The same approach is adopted by the said Award with regard to the valuation of the Claimants' shares in a bank. Indeed, here a larger discount of %30 is thought to have been mandated by the relevant events.

Lest the point should be missed, it must be emphasized that the discounts in question are made to reflect not the changed economic conditions affecting the company's business prospects

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<sup>18</sup> Faith Lita Khosrowshahi, et al. and Government of the Islamic Republic of Iran, et al., Award No. 558-178-2 (30 June 1994).

<sup>19</sup> Id. at para. 50 (emphasis added).

<sup>20</sup> Id. at para. 51.

--which economic conditions, according to the Award, had made no real impact on the company's sound financial status-- but the "political risks" which would have been noted and weighed by any potential purchaser.

Second, says the present Award, "fair market valuation does not require the valuer to identify any concrete candidate buyer to substantiate his conclusions on the company's market value." The passage most vividly indicates that what has been so clearly argued by the Respondent has not been understood. The market value of the Claimants' entity, submits the Respondent, had been affected by a sharp drop in the demand for large stock transactions; and there had been a sharp drop in the demand because, under the prevailing social and political environment of the time, such investment was regarded as utterly hazardous. What has this factual submission got to do with the Award's allusion to the identification of a "concrete candidate buyer" remains a mystery. There has been no suggestion, on the part of the Respondent, that the valuer should identify "a concrete buyer". Nor that it was the absence of "a concrete buyer" that had affected the GM's market value. What had affected the market value, according to the submission, was the absence of "any buyer" under those conditions.

A mystery must also remain the Award's third reasoning:

[I]t is clear that a government cannot justify non-payment (or inadequate payment) for valuable property on the ground that prospective buyers would have been lacking because of the expropriation itself or the threat thereof.<sup>21</sup>

What is the relevance of this rule to the point at issue? Can it be the case, hard as it is to imagine, that general

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<sup>21</sup> Award at para. 107.

revolutionary conditions are confused with expropriation or threat of it?<sup>22</sup>

#### 4. DISCOUNT FOR MINORITY SHARES

The Claimants were the minority shareholders in GM, the holders of %19. In his valuation Report, the Expert opined that when the question is "how much would a buyer have needed to pay to induce the minority shareholders to sell", then it would be appropriate to make some deduction for the fact that minority shareholders are in a relatively weak position. He suggested a discount of 5%.

This is not only a sound valuation principle but the dictates of common sense. If the total value of interests in an entity, divided into 80% majority interest and 20% minority interest, is \$1000, no one would be willing to pay \$200 for the 20% minority interest. This is because he who pays the remaining \$800 would acquire not only the remaining 80% of the shares but the additional, and vitally important, right to control the company.

This much was admitted by all concerned. Attempts, however, were made at the Hearing to confuse the Expert by directing his attention to utterly irrelevant points. He was pressed, for instance, to consider the effect of the assertion that in practice, the Government of Iran acquired all the shares in GM. That, he said, was a different issue:

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<sup>22</sup> In a footnote in the Award (Fn. 21), one additional argument is advanced, namely, that market considerations "might have made it more difficult for the shareholders in Gostareh Maskan to sell their shares... thereby affecting their net worth. Such difficulties for the hypothetical seller are not determinative for the value of the company itself, however." Once again a complete failure to understand that the value of a company cannot be determined in abstract, and that what the Tribunal is expected to determine is the value of the Claimants' net worth --affected by the market-- and not the value of the company in vacuo.

I think I can say no more than that it becomes then a legal issue of what one is trying to value. If one says that Gostaresh Maskan was acquired in its entirety and therefore the problem is to value GM... the way that that's split up becomes irrelevant, that gives you different answer from if you say that it was only the minority holding that we are concerned with and it's only the minority that was acquired and we should ask what price would induce a buyer of that holding to acquire it.

The Award, on the other hand, rejects the suggested discount on the ground that:

The Terms of Reference clearly instructed the Expert to determine the net asset value of Gostaresh Maskan as a company. They did not instruct him to inquire into the value of the Claimants' 19% interest in Gostaresh Maskan on the free market. The Tribunal therefore agrees with the views of the Expert on this issue.<sup>23</sup>

Before turning to the main issue, a word must be said about this last sentence: "The Tribunal therefore agrees with the views of the Expert on this issue". Now this is amazing. What are the views of the Expert with which the Award proposes to agree? The Expert has simply stated that if the objective is to determine the fair market value of the Claimants' 19% shares, a valuation rule requires a discount. If, on the other hand, the objective is to determine the value of the entire entity, then no question of minority interests would arise in the first place. He has deferred to the Tribunal a legal point; a legal point which, according to how it is resolved, will have clearly different consequences in valuation terms. How can one "agree" with a view, the expression of which is withheld until a prior point is first resolved?

The legal point referred to the Tribunal by the Expert is, indeed, a simple one to answer. What has been the Tribunal's objective in the present proceedings? To determine the fair

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<sup>23</sup> Award at para. 167.

market value of the Claimants' 19% shares and compensate them accordingly, or to stop short of that, namely, by the determination of the value of GM as a whole? To determine the amount of damages suffered by the Claimants as the result of the asserted taking of their 19% interest in the entity, or to inquire into what the Respondent has, or has not done with the rest of the entity?

The Award holds that the discount suggested by the Expert should be rejected because the Terms of Reference clearly instruct the Expert to determine not the value of the Claimants' 19% shares, but the value of GM as a whole. This must be rejected summarily. First, if the Expert was instructed to determine the value of GM as a whole, this was not an aim in itself, but a step only towards the realization of an aim. The aim, in other words, was not, one hopes, to compensate the Claimants with the figure put by the Expert on the value of the entity as a whole, but to use the figure as a basis for the Tribunal's only aim of determining the market value of the Claimants' shares. Secondly, in that very Terms of Reference in which the Expert was invited to determine the fair market value of GM as a whole, he was further specifically instructed to also consider the effect of the fact that the Claimants had only a minority share in the company. He accordingly told the Tribunal what the effect in that case would be. Why was he so instructed if the only thing the Tribunal wanted to know was the value of the entire company?

The second, and the last, reason relied upon by the Award in support of its rejection of a discount for minority share is a decision by another Chamber in Birnbaum<sup>24</sup>. This reliance, too, is wholly out of place.

First, this Chamber is not bound by the decisions of other Chambers. Secondly, Birnbaum is a case of partnership and, as

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<sup>24</sup> Harold Birnbaum and Islamic Republic of Iran, Award No. 549-967-2 (6 July 1993).



such, is clearly distinguishable from the present Cases.<sup>25</sup> Finally, the two grounds invoked by the Chamber in Birnbaum in support of its decision are both unwarranted. It is said there that this Tribunal does not discount the value of a minority interest, just as it has never awarded surplus value for a controlling interest. This is wrong. This Tribunal has always awarded surplus value for the controlling interests because, in such cases, it has always determined the value of the whole entity and then proceeded to award the sum proportionate to the whole value; and the whole value always includes the surplus for the right of control.

It is also said there that a minority discount should not be made in a case in which the taking party obtains, not only the minority interest but the whole entity. This, too, directly violates a rule which this Tribunal has, in order to protect the American claimants' maximum rights, invariably applied in tens of cases. In determining the amounts of due compensation in expropriation cases, this Tribunal has never concerned itself with what an expropriating party has gained by its action --which often would have come to nothing or very little-- but with what the owner has lost. It has been on that basis that hundreds of millions of dollars have been readily awarded to American claimants as compensation for the taking of entities that have been of no use to the Government of Iran; entities which have been interfered with simply to prevent chaos and lay-offs.

The present Cases should not be treated differently. Indeed, they have not been treated differently up to a point favorable to the Claimants. The Expert has not been asked to determine how

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<sup>25</sup> The difference, as explained by an experienced expert at the Hearing, is significant. In a partnership, the partners have direct rights to the assets. The possibility therefore that, as minority partners, they may be disadvantageously affected by the majority's decisions is not great. In here, on the other hand, the shareholders have no direct right to the assets. The value of their shares is the value in money terms of the rights in the company. It is here that the issue of control assumes significance.

much the Respondent has gained by its action --by its taking of a company which has failed to secure a single contract ever since--but to determine the value of the Claimants' shares in the market at the time. If that is the objective, says the Expert, then there must be a discount to reflect the fact that minority shares are sold with a discount in the market.

Now, if a majority of two of our colleagues in another case have, by reference to what the expropriating party has gained rather than the market value of what has been taken, determined the amount of due compensation, this is only because they have, with due respect, misunderstood the point and misapplied the law. One such isolated instance in violation of a host of decisions in the life of this Tribunal should not be followed as a "precedent".

#### 5. DISCOUNT FOR UNAUDITED ACCOUNTS

Yet another item on which the Award declines to uphold the Expert's finding and thereby substantially adds, once more, to the value of GM is with respect to the discount applied to the company's net asset value to reflect the fact that the company's financial statements had not been audited. The suggested discounting is based on a universally recognized valuation principle. As the Expert says: "any purchaser would have been likely to require that accounts should be audited and would have had some qualms buying a firm whose accounts had not been audited". He warns that "it would be totally wrong not to apply any discount."

The Award, however, sets to do precisely what the Expert has warned the Tribunal against: not to apply a discount. And it does so for two reasons. First, "in as much as the discount is argued to accommodate the concerns of a prospective purchaser (or of the valuer for that matter)," that rationale is lacking in an expropriation context. Second, the Respondent, despite ample

opportunities, has "clearly failed" to produce "adequate evidence" that any alleged errors had "in fact" been committed. The first is legally misconceived, the second is a misrepresentation of evidence.

First, what is the difference between the valuation of an entity in an expropriation context and its valuation in the context of a prospective purchaser, so as to justify the application of a discount for unaudited accounts in one context but not in the other? On this point, basic to the Award's argument, the Award is dead silent. The prospective purchaser wants to pay for the real value, no more and no less, of the entity he intends to buy. Because it is a fact, as the Expert has told us, that liabilities greater than those reflected in the entity's unaudited books are usually detected, the purchaser demands a discount to reflect the real value of the entity.

Here, too, it is the Tribunal's intention, I trust, not to pay the Claimants more than the real value of their shares. In the absence of any other method by which the value of the Claimants' shares can be determined, the Tribunal, and the Expert, have of necessity relied on the value of the shares as reflected in the entity's books; books which have not been audited and which commonly do not fully reflect the entity's liabilities. Should there be no similar discount to protect the Respondent against "hidden liabilities"? Against overcompensating the Claimants?

Besides, this Tribunal has always evaluated expropriated shares on the basis of their fair market value, i.e., a value that a willing buyer would have paid a willing seller in the market. Based on this, a valuation in the context of expropriation cannot possibly exceed the value that a prospective purchaser would have paid for these shares. If a willing buyer would have requested a discount for lack of audit-- and the Expert has told us that a willing buyer invariably would-- then the rejection of this discount by the Tribunal will, inevitably,

result in providing the Claimants with compensation in excess of the value that they could receive in an open market. And this, of course, is clearly unlawful.

In fact, the Tribunal precedent was at first followed in the present proceedings where, after much deliberations and having found that GM had been expropriated, the Expert was specifically instructed by the Terms of Reference to determine the "fair market value" of the Claimants' shares. That "fair market value" was then determined for the Tribunal. It should not have been upgraded, substantially, on the arbitrary and totally unsupported ground, invoked by the Award whenever it is short of reasoning, that one is here concerned with a different context. If expropriation is a context in which principles of fair market valuation may be set aside, the Expert should not have been directed, in a carefully worded Terms of Reference, to determine the fair market value of the entity.

It is a clear violation of the Terms of Reference, of recognized principles of arbitration, and of the Arbitrators' mandate to first determine the entity's "fair market value", and then to try to adjust it upwards by asserting that expropriation is a context different from a normal transaction. What the Tribunal is here concerned with is not the context, but the value of the shares in question, and the awarding of a penny in addition to the market value of those shares will constitute, as it has done in the present Cases, a clear act of ultra vires.

Secondly, the assertion in the Award that the Respondent has in fact failed to substantiate any errors in the unaudited books of the company is factually unfounded. It must be borne in mind, first, that the discount is applied not to cover "substantiated errors", but to reflect the probability at the time of valuation that errors may be subsequently discovered. Any developments, therefore, after the date of valuation is entirely irrelevant. This very Award, interestingly enough, flatly declines to take note of the entity's dire financial status after the asserted

taking, including, for instance, of the cancellation of all GM's contracts by its employers. And it does so by arguing that these cancellations took place after the date of valuation. How is it that here, in contrast, it readily allows itself to take note of whether or not the Respondent has substantiated any error after the date of valuation?

More importantly, the assertion is, as stated above, factually incorrect. Here is what the Expert, having carefully examined the evidence, says in this respect:

...if the purchaser... had the evidence available to me-- then he would indeed have had some concerns, and it is primarily for that reason that I felt that a discount should be applied.

He is, therefore, proposing a discount not only because a valuation principle so requires, but additionally because the evidence available to him so dictates. Further:

There are a couple of other issues I ought to refer to there, and that is that there may have been indeed other errors that a proper audit would have uncovered.

And again:

It is possible that, on the evidence available to me, this deduction was unduly large, but I think the new evidence reported by the Respondent on some of these issues makes me rather more comfortable with the original deduction.

Evidence, not of the uncertainty of the unaudited accounts, but of actual errors in them leads an Expert valuer to feel more comfortable with his original deduction. The Award tells us that there has been no such evidence before the Expert!

## 6. CAPITAL GAINS TAX

The Expert was instructed in the Terms of Reference to consider the effects, if any, of "taxes applicable under Iranian law to GM's income." This includes a tax liability for all the revalued assets, tangible or otherwise.

In his valuation, the Expert did not take this liability into account. This was because, he said, the tax in question was payable only when a revaluation was reflected in the company's accounts, while his revaluation of the GM's assets was not reflected in the GM's accounts.

This was all legally wrong; the result, in fact, of a misapprehension of the correct role and place of "valuation" in the Tribunal's process of resolving a dispute such as the present one. This Tribunal-- or indeed any other forum, for that matter-- is not a valuation firm. It does not undertake to determine, in appropriate cases, the value of given assets for the sake of valuation. Where it does so in such cases, it is to achieve an entirely different objective, namely, the determination of the amount of damages, if any, suffered by the dispossessed owner. In short, valuation is not, as stated in the previous section, an aim in itself, but a step towards the realization of an aim. Once that is realized-- that the Tribunal's only objective here is the determination of the amount of damages suffered by the Claimants as the result of a wrong-- it becomes evident that whether or not a liability, attached to the valuated assets, is recorded somewhere is of no relevance whatsoever.

This may be further explained. Assume that the value of the assets of a given entity, as initially reflected in its accounts, is \$100, for which all tax liabilities have been met. Assume, further, that the entity is taken without compensation and that, when assessed at the time of the taking, its initial value is found to have increased to \$1000. Assume, finally, that under the laws of the State in which the entity operates, this \$900

increase in the entity's value creates a liability to the State for tax in the amount of \$100. It is a tax, further, that will not be collected until that \$900 increase is actually recorded in the entity's accounts, or the entity is in fact sold, etc.

Now, if the case is pleaded, what would be the task of the forum in charge? If it is the determination of the value of the entity at the time of taking, and nothing more, then the value of the entity is of course \$1000. That is the value put on its assets and, in the absence of any recorded, and hence collectible, liability, the figure must stand. But if that is not the real, or the final, task-- if valuation is undertaken not for its sake but for the further objective of determining the amount of damages inflicted on the wronged party by the taking State-- then that objective cannot of course be properly realized without taking the \$100 tax liability into account. That is because in the entity's \$1000 value, the injured party has only a \$900 interest. The rest does not belong to him, but to the taking State. And an injured party cannot be compensated for what he does not own in the first place.

The Award declines to correct the Expert on this purely legal issue:

The assessment of a capital gains tax on Gostaresh Maskan's appreciated properties as of the valuation date assumes that one could equate the hypothetical sale of the Company with an actual transaction....<sup>26</sup>

Such an assumption, says the Award, is wrong, for expropriation is not a transaction. And, to add insult to injury:

Absent any taxable event within the meaning of Iranian tax law, the assessment of a capital gains tax would constitute a violation of fundamental principles of Iranian tax law.<sup>27</sup>

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<sup>26</sup> Award at para. 164.

<sup>27</sup> Id.

This is frankly nothing but a hypocritical argument. Here is a case in which certain Claimants assert that, their shares in an entity having been taken by the Respondent State, they have suffered damages equivalent to the value of their shares. In order to determine the amount of damages assertedly suffered by the Claimants, the fair market value of the entity on the valuation date must first be ascertained. In order to ascertain this fair market value, a sale of the entity on the date of taking is assumed. The parties to this assumed sale are a reasonable purchaser and a reasonable seller, two reasonable businessmen who are rational, and well informed of all the relevant facts.

Those reasonable businessmen, being aware of all the relevant facts, would know, for example, that the company has certain unfinished contracts which, if completed, would generate certain revenues. Not revenues already accrued at the time of the hypothetical sale, but revenues which the reasonable businessmen assume would be generated in future if the company is allowed to complete its part of the contracts. So, they put a value on these assumed revenues. The reasonable businessmen would further note, again, for instance, that the actual fair market value of the company's capital is more than what is reflected in the company's books. So, they put a price on this additional value. Not an additional value actually reflected on the company's books, but a value based on the realization that a capital gain has in fact been made, even though not reflected anywhere. And so goes on the process with regard to all other assets of the entity, actual or assumed.

But the reasonable businessmen would not naturally stop there. Having evaluated the company's actual and assumed assets, including those which are not reflected in the company's books, they sensibly turn to examine the company's actual and assumed liabilities. Being informed of all the pertinent facts, they would know, for instance, that the company, registered and operating under the laws of Iran, is subject to certain tax



liabilities. They would know, again, that under the tax laws of Iran, the revenues from the assumed completion of remaining contracts are taxable. Not an actual tax on an actual revenue, but an assumed tax on an assumed revenue. They would know, too, that by the specific provisions of the corporate tax laws of Iran, any gain made on corporate capital is taxable. True, such taxes are imposed only when the gain is reflected in the company's books, or, at the latest, when the company is sold or otherwise disposed of. But that is the very hypothesis on the basis of which the reasonable businessmen were prepared to put a price on the additional value of the capital in the first place. Hence, not a tax actually imposed on, or prior to the date of valuation, but a tax which is by law attached to any reflected revaluation or transaction, and which must therefore be assumed whenever a revaluation or transaction is assumed.

So the reasonable businessmen, having subjected the actual and assumed assets and revenues of the company to actual and assumed liabilities, arrive at the fair market value of the company on the date of the assumed sale.<sup>28</sup>

Interestingly enough, the Claimants in the present Cases, too, readily submit to the logic and soundness of the rule requiring the taking into account of all taxes imposed on an assumed transaction:

The calculation of tax liability... is based on provisions of the tax law of Iran. But, since for the purpose of evaluation of the net worth of the company, all receivables are taken into account, and accordingly, it is assumed all the profit realized in

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<sup>28</sup> The reasonable businessmen would take into account not only the assets but also the liabilities of the intended entity in order to determine its value as at a given time. The time in future when an item of liability would actually become payable is irrelevant, if the liability itself relates to pre-assessment period. Otherwise, the reasonable purchaser would be paying for the gross value of the pre-valuation assets, making himself exposed to the liabilities which are attached thereto. Hardly a reasonable man!

this regard is going to be distributed to the shareholders, the following tax computation shall be made to reflect the real tax liability of the company....

This, then, is the rule which the Claimants themselves propose to apply: tax computation to be made with respect to "all receivables", based on an assumption that "all the profits realized in this regard is going to be distributed to the shareholders". In other words, since, for the purpose of assessing the net worth of the company on the valuation date, all receivables are taken into account, and since it is assumed that all the profits are going to be realized and distributed to the shareholders on that date, tax computations must also be made to reflect the real tax liabilities of the company on the said date. That is no more than an affirmation by the Claimants of the principle that in determining the fair market value of an entity, not only its assets, but also its liabilities must be taken into account.

But the Award is not prepared to accept as sound and fair what the Claimants are willing to regard as such. Instead, it seeks to adopt a most untenable position. It readily agrees that the amount of possible damages suffered by the Claimants must be determined by reference to the fair market value of their shares on the date of the taking. It agrees, further, that this fair market value is equivalent to the price which two reasonable businessmen (buyer and purchaser) would be prepared to put on the Claimants' shares in a hypothetical sale on the valuation date. Only, the Award's reasonable businessmen, and particularly its purchaser, are a bit different.

The purchaser there is a person who is prepared to pay, not only for the value of the assets of the Claimants' company as of the valuation date, but also for any future revenue which the company may generate for its remaining contracts. That is because he assumes that the company will complete its remaining contracts in future and will receive the expected revenues. But then he is

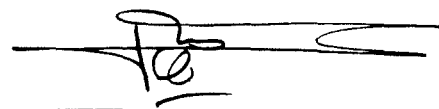
"reasonable" enough not to bring into his calculations any taxes which by law is imposed on the expected revenues. His reason for doing so? Those taxes will only be imposed on future revenues and, by definition, do not accrue prior to the valuation date!

The Award's reasonable purchaser is prepared, again, to fully pay for the asserted gains in the company's capital, but he would not be bothered by the fact that, under the provisions of Iranian tax laws, capital gains are subject to taxation. His reason? There is no actual event of selling capital assets! In other words, the Award's reasonable purchaser would be prepared to pay the taxes levied against the capital gains made and collected free of tax by the present owners of the assessed entity. He must be a very reasonable businessman indeed!

The issue is really too simple to tolerate the introducing into it of any attempted confusion. The only proper, indeed the only conceivable, means by which the fair market value of the Claimants' shares in GM at the time of valuation may be ascertained is to subject all the company's actual and assumed assets to all its actual and assumed liabilities. That requires, inter alia, the taking into account of all the liabilities incurred under the relevant provisions of the tax laws of Iran, including taxes levied against capital gains.

The Award, on the other hand, accepts the taking into account of all the company's assumed revenues and future incomes; but for taking note of the liabilities thereto, it requires actual materialization of such liabilities! It is a wholly illogical position, a position decidedly biased against the Respondent.

Dated, The Hague  
9 February 1995



Mohsen Aghahosseini