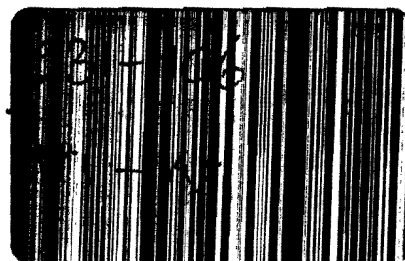


196

ایالات متحدہ



ORIGINAL DOCUMENTS IN SAFE

Case No. _____

Date of filing: _____

** AWARD - Type of Award _____
 - Date of Award _____
 _____ pages in English _____ pages in Farsi

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

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

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

** DISSENTING OPINION of Mr. Holtzman to Award 220-37/231-1
 - Date 15 April '86
16 pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

- Date _____
 _____ pages in English _____ pages in Farsi

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 ORGANIZATION FOR THE
EXPANSION OF OWNERSHIP OF INDUSTRIAL
UNITS, NATIONAL INVESTMENT COMPANY
OF IRAN, INDUSTRIES AND MINES BANK,
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 ORGANIZATION FOR THE
EXPANSION OF OWNERSHIP OF INDUSTRIAL
UNITS, NATIONAL INVESTMENT COMPANY
OF IRAN, INDUSTRIES AND MINES BANK,
FOUNDATION FOR THE OPPRESSED, BANK
MARKAZI IRAN, SHERKAT SAHAMI
LABANIAT PASTEURIZE PAK,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دآوری دعاوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date 15 APR 1986	تاریخ
1365 / 11 / 26	
No. 231	شماره

<p>DUPLICATE ORIGINAL</p> <p>نسخه برابر اصل</p>

DISSENTING OPINION OF JUDGE HOLTZMANN
ON EXPROPRIATION

The Award in these Cases includes a number of significant holdings in which I join. For example, it concludes that a claimant is not barred from coming before this Tribunal because it has received payment under a contract insuring it against the risk of expropriation and has assigned a beneficial interest in its claim to the insurance company. Further, finding various breaches of contract, the Award establishes methods for computing damages and interest upon failure to pay rentals and to return leased machinery. Importantly, the Award holds the Government of the Islamic Republic of Iran responsible for measures taken by a private company because its affairs were dominated by directors who were representatives of governmental entities and government-owned banks that owned a majority of its stock. In consequence, the Award holds that the Government of Iran must fully compensate Foremost¹ for Pak Dairy's² refusal to pay Foremost dividends declared in 1979 and 1980 and paid to other shareholders. In reaching these conclusions, the Tribunal accurately chronicles the takeover of Pak by Government representatives and the discriminatory treatment of Foremost that ensued.

The Tribunal errs, however, by failing to recognize that Pak's actions, continuing and uncorrected, so deprived Foremost of its rights as a holder of 31% of Pak's stock as to have constituted an expropriation of those rights and created an obligation to compensate Foremost not only for two unpaid dividends but also for the value of its shares. In this way, the Tribunal ignores the full consequences of the events it describes.

¹As used herein, "Foremost" refers collectively to Foremost-McKesson, Inc. and various of its subsidiaries.

²Sherkat Sahami Labaniat Pasteurize Pak, herein called "Pak Dairy" or "Pak."

The Award acknowledges, as it must to remain faithful to the unquestioned view of both this Tribunal and international law authorities in general, that the absence of a formal expropriation decree or legislative act presents no bar to Foremost's claim here:

[M]easures 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.

Starrett Housing Corp. and Islamic Republic of Iran, Award No. ITL 32-24-1 (19 December 1983), reprinted in 4 Iran-U.S. C.T.R. 122, 154.³ It is equally well settled that "[a] deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits" Tippetts, Abbott, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, Award No. 141-7-2, pp. 10-11 (29 June 1984).⁴

There can hardly be a greater interference with the use and enjoyment of a shareholder's rights than for a

³See Harza Engineering Co. and Islamic Republic of Iran, Award No. 19-98-2 (3 December 1982), reprinted in 1 Iran-U.S. C.T.R. 499, 504; Dames and Moore and Islamic Republic of Iran, Award No. 97-54-3 (20 December 1983), reprinted in 4 Iran-U.S. C.T.R. 212, 223; Christie, What Constitutes a Taking of Property Under International Law?, 1963 Brit. Y.B. Int'l L. 307, 311.

⁴See Draft Convention on the International Responsibility of States for Injuries to Aliens, Art. 10(3)(a) ("taking of property" occurs when there is "unreasonable interference with the use, enjoyment, or disposal of property"), reprinted in Sohn and Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, 55 Am. J. Int'l L. 545, 553 (1961).

corporation to refuse repeatedly to pay dividends to that shareholder while it makes such payments to all others. That is exactly what happened to Foremost. Pak Dairy's Articles of Association require that at least 10% of its annual profits be distributed to the shareholders in the form of dividends. Pak earned profits in 1978 and, accordingly, a cash dividend and a stock dividend were declared at a board meeting in April 1979. Foremost did not receive its cash dividend, although all other shareholders were paid theirs. Pak Dairy again earned profits in 1979, and a cash and a stock dividend were declared at a meeting in March 1980. Again the cash and stock dividends were distributed to the Iranian shareholders, while Foremost received neither.

The minutes of the meeting of the board of directors at which the later dividends were declared frankly describe the decision not to pay Foremost. The meeting was dominated by the chairman of the board, Dr. Mohsen Ameli, who was also chairman of the Financial Organization for the Expansion of Ownership of Industrial Units, a governmental agency that was a major shareholder in Pak. The corporate minutes record that Dr. Ameli and another director representing the Financial Organization initially "expressed their opinion that the minimum dividend should be divided among the shareholders." The minutes explain that "[t]heir reason for this action was the presence of foreign shareholders in the company," and that "[b]y this action, they wanted to hold the amount paid to the foreigners to the minimum." Foremost was the only significant foreign owner.

The minutes also describe the "extensive discussion" that followed. The directors acknowledged that "[t]he 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" Accordingly, the board decided that "[i]n order to

preserve the rights of the Iranian shareholders, it seems essential that a reasonable percentage of the company's profits be divided in the form of a cash or a stock dividend" The board was faced, however, with a dilemma -- how might it distribute profits in the form of dividends without paying Foremost? It devised a simple solution. Asserting that "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," the board concluded that "[c]onsequently a decision . . . in this regard will have no effect on the rights of the foreign shareholders or the enforcement thereof." The board cited no law or regulation imposing such a suspension, and there is no indication that any existed. Having determined not to pay Foremost, the board thereupon voted in favor of a cash dividend equal to 18% of the prior year's profit and a 10% stock dividend.

Foremost vigorously sought its dividends. By telex and confirming letter dated 21 May 1980, Foremost made a "request and demand" that its cash dividends "be immediately deposited" to its account in either Bank of Tehran or Bank Melli, both located in Tehran. Foremost noted that any difficulty in transferring the dividends to it in United States dollars would provide "n[o] justification for Pak to continue to hold these funds in its own name." Therefore, it "insist[ed] that these funds be separated from the funds of Pak Dairy and placed in a bank account under the exclusive control of Foremost-McKesson, Inc." Pak Dairy's answer came swiftly. In a telex of 27 May 1980, the then managing director of Pak said flatly, "I have to inform you that due to decision and instruction of the board of directors, Pak Dairy cannot pay any sums of money for any reason to foreign shareholders." Unwilling to accept this rebuff from Pak's managing director, Foremost sent another telex on 5 June 1980, requesting

that the board of directors communicate to us directly their decision in this matter and express to us the legal basis for this denial. We are not aware of any Iranian regulation or decree which permits the unequal treatment of the shareholders of an Iranian company.

There was no reply.

On 28 September 1981, fifteen months after the flat refusal to pay dividends and eight months after the Algiers Accords had been signed, Pak Dairy's board of directors sent a telex to Foremost in connection with arranging a proposed settlement meeting. In that telex, Pak stated for the first time that the dividends had been credited on Pak's books to Foremost's account. Pak's Articles of Association contain no provision authorizing the company to credit dividends to a shareholder's account on the company's books instead of paying them, nor have the Respondents cited any Iranian law authorizing such action.

As the Tribunal correctly concludes, the denial to Foremost of its shares of the company's profits "appears to have been done with the object of discriminating against Foremost," and this treatment constituted a "serious infringement of Foremost's right to enjoy the fruits of its holding in Pak Dairy." Moreover, as the Tribunal also correctly concludes, this action "can be attributed beyond doubt to the State." These circumstances are classic hallmarks of expropriation. Foremost retains the physical possession of its share certificates in Pak Dairy, but it is an owner in name only.⁵ Its shares have become mere pieces

⁵ See The Measures Taken by the Indonesian Government Against Netherlands Enterprises, 5 Neth. Int'l L. Rev. 227, 236 (1958) (When there is a "refusal in advance to grant permission for the transmission of operating profits to the owners, the latter have been deprived of all enjoyment of their property [and] remain the owners in name only.").

of paper, of interest only to scripophilists -- the hobbyists who collect financially worthless share certificates for their historical or decorative value.

Subsequent events confirm that Foremost's shares were expropriated no later than 27 May 1980, when Mr. Asghari advised Foremost of the board decision to deny it any share in Pak's profits. The dividends declared in 1979 and 1980 still have not been paid to Foremost, or even deposited in an Iranian bank account in its name. Moreover, it is uncontested that a dividend was declared in 1981 based on profits earned in 1980, and that Foremost did not receive this dividend. In addition, Foremost has received no dividends since, although there is good reason to believe that they have been declared. In a telex to Foremost dated 11 November 1981, Pak Dairy informed Foremost that the "company ha[d] in no way been in a worse condition in the two or three recent fiscal periods" than during the period when Foremost had participated in management. If this is true -- and there is no evidence to the contrary -- Pak Dairy presumably has continued to earn profits, giving rise, pursuant to its Articles of Association, to an obligation to distribute a percentage of those profits as dividends. Foremost has received no dividends, a circumstance consistent only with a finding that an expropriation has occurred. Nor is there any reason to believe that Foremost will ever receive its share of Pak's past or future profits. Rather, "subsequent events and the passage of time have made . . . unavoidable" the conclusion that the Respondents' actions have "rendered [Foremost's] rights of ownership so meaningless as to be the equivalent of an expropriation of those rights." Concurring Opinion of George H. Aldrich, ITT Industries Inc. and Islamic Republic of Iran, Award No. 47-156-2 (26 May 1983), reprinted in 2 Iran-U.S. C.T.R. 349,

352.⁶ Clearly, "this deprivation is not merely ephemeral." Tippetts, Abbott, McCarthy, Stratton, supra, p. 11.⁷

While the bare refusal to permit Foremost to share in Pak Dairy's profits suffices to establish expropriation, the circumstances leading to and surrounding the refusal provide colorful insights into the state of affairs. For example, shortly after taking a place on the board, Dr. Ameli observed that the Financial Organization did not "regard the Pak Pasteurized Company as really being a [private] company." An affidavit before the Tribunal recounts how Dr. Ameli walked out of a discussion of Foremost's representation on Pak's board of directors, declaring that he would not stay at a meeting with "American sympathizers." Later, at Dr. Ameli's instigation, Foremost's managing

⁶See Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2 (19 March 1986) (events in five years after 19 January 1981 relied upon as evidence to confirm expropriatory action before that date and to support conclusion that deprivation was "likely to continue indefinitely").

⁷Again in this Award, the Tribunal gives effect to the teaching of Phelps Dodge, supra, and the ITT Industries concurrence, supra, that events occurring after 19 January 1981 cast light on events which a Claimant asserts have given rise to a claim before that date, the deadline by which a claim must have been "outstanding" in order to fall within this Tribunal's jurisdiction. Claims Settlement Declaration, Article II, paragraph 1. Indeed, the Tribunal's holding that no expropriation occurred relies almost entirely on Foremost's participation until October 1981 on the Pak Dairy board of directors, and the Tribunal finds it "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." Moreover, the Tribunal discusses changes in the composition of Pak Dairy's Board of Directors which occurred earlier, in June 1981. Inexplicably, however, the Tribunal declines to consider what the continuing refusal of Pak Dairy to pay Foremost its rightful dividends has to say about the situation that existed before 19 January 1981, by which time the decision not to pay Foremost had been made.

director was ousted from the board, and its remaining representative was prevented from using proxies to vote for a replacement on the pretext that the proxies were technically defective, even though proxies in the same form had been accepted at earlier meetings. The board minutes record that even one of the directors representing an Iranian bank protested against questions being "dictatorially solved" in accordance with Dr. Ameli's views. That director was replaced a few months later. The denial of any financial benefits to Foremost extended to amounts due under its machine rental and technical assistance agreements with Pak. Referring to those contracts, Dr. Ameli declared in handwriting on the minutes of a November 1979 board meeting:

As stated in previous meetings, all foreign contracts of the company must be reconsidered, and are not valid in my opinion, as any payment in this connection shall be illegal.

The other director representing the Financial Organization penned his concurrence on the same minutes, stating "I agree with the view of Dr. Ameli and that actions should be taken accordingly." Neither Dr. Ameli nor his colleague cited any law that would render "illegal" Pak's honoring of its contractual obligations -- as, indeed, no legal authority has ever been cited for the refusal to pay dividends to Foremost. Taken together, these circumstances reveal a systematic and blatant pattern of conduct by Pak's directors to deny Foremost all financial benefits from its relationships with Pak.

Further confirmation of the occurrence of an expropriation here is provided by OPIC's determination, under an

insurance contract whose relevant terms⁸ are consistent with the definition of expropriation under customary international law, to pay Foremost compensation not only for the insured portions of the unpaid dividends, but also for the insured portion of its share in the value of Pak Dairy as a whole. The action of Foremost's insurer does not, of course, bind this Tribunal. It is nonetheless instructive that an experienced insurance company, evaluating the same actions as this Tribunal, concluded, against its own financial interest, that there had been an expropriation. The credibility of that determination is bolstered by OPIC's willingness to deny claims when it considered that no expropriation had occurred. See Revere Copper & Brass, Inc. v. OPIC, 628 F.2d 81 (D.C. Cir.), cert. denied, 446 U.S. 839

⁸The contract provides in pertinent part:

1.13. Expropriatory Action. The term "Expropriatory Action" means 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:

(a) the Investor from receiving payment when due in the currency specified of amounts which the Foreign Enterprise owes the Investor on or in respect of the Securities; or

. . . .

(e) the Investor from repatriating, and from exercising effective control in the Project Country over, amounts received in respect of the Securities as Investment Earnings or Return of Capital, which action commences within the eighteen (18) months immediately succeeding such receipt

Overseas Private Investment Corporation, General Terms and Conditions of Contract of Insurance.

(1980); OPIC v. Anaconda Co., 418 F. Supp. 107 (D.D.C. 1976).⁹

To reach the contrary conclusion that there was no expropriation, the Tribunal conducts a "balanc[ing]." On the one hand, it states unequivocally that "Pak Dairy was, and is, obliged to pay declared dividends to all its shareholders," and it finds no justification for the refusal to pay them to Foremost. On the other, however, it reasons that this "undoubted interference with Foremost's rights [cannot] be interpreted as amounting to an expropriation of Foremost's interests when set against the background of Foremost's continued, albeit circumscribed, participation in the affairs of the company."¹⁰

⁹In connection with the jurisdictional requirement that claims before this Tribunal have been "outstanding" by 19 January 1981, the Tribunal finds it "instructive" that the General Terms and Conditions of the standard OPIC insurance contract include a requirement that allegedly expropriatory action prevent the exercise of ownership rights "for a period of one year." See note 8, supra. The Tribunal misconstrues this provision. The insurance contract provides that the insurance company will pay for expropriations occurring within the policy period, but will wait for one year to be sure that the expropriation was not transitory. Thus, events that occur after the expropriation are taken into account to determine whether the expropriation was rescinded. The one-year waiting period does not mean that the expropriation is deemed to have occurred one year after its initial manifestation; it reflects simply a prudent practice to test whether an expropriation has taken place in the light of events following it. In any event, here the expropriation arises from Pak Dairy's refusal to pay Foremost its dividends. The first was due, as the Tribunal finds, on 15 August 1979. Thus, taken as a whole, the events in these Cases establish an expropriation satisfying the one-year requirement before the jurisdictional deadline of 19 January 1981.

¹⁰Even on its own terms, however, the Tribunal does not fully compensate Foremost. Holding that Foremost's claim of expropriation encompasses the claim of unlawful interference on which it bases its decision, the Tribunal awards the value of the cash dividends withheld from Foremost in 1979
(Footnote Continued)

The weight the Tribunal accords to Foremost's "continued, albeit circumscribed, participation" on Pak's board produces a curious "balance." At all times relevant to these cases, Foremost was a minority shareholder. The events here recounted amply illustrate that, as such, it did not have the power to direct the affairs of the company. A minority shareholder participates on the board in order to express its views and to observe the company's performance from an informed vantage point. Its participation, therefore, is but a means to its principal objective -- a proportionate share in the profits and growth of the enterprise. And the right to participate is meaningless where, as here, the entitlement to share in profits is denied.¹¹

The Tribunal, however, erroneously assumes that Foremost's participation on the Pak Dairy board of directors, in what proved a futile attempt to protect its interests, is somehow inconsistent with the claim of expropriation. To the contrary, Foremost acted in the exercise of reasonable business judgment. After

(Footnote Continued)

and 1980. But as to the 1980 stock dividend, the Tribunal merely "assumes" that Pak Dairy will deliver to Foremost the stock certificates to which it is entitled. The same principles which lead the Tribunal to hold that Foremost was wrongfully deprived of its cash dividend apply equally to the stock dividend, and there is no reason why the Tribunal should not order effective relief in this regard.

¹¹For these reasons, it is hard to understand the Tribunal's reliance on Christie, What Constitutes a Taking of Property Under International Law?, 38 Brit. Y.B. Int'l L. 307, 333-34 (1962). The Tribunal recites a long passage from Professor Christie's article, but does not explain its application to these cases. The passage is plainly irrelevant. It deals entirely with the "right of the owner to manage his enterprise." As a minority shareholder, Foremost had no such right. And the explicit assumption of the passage the Tribunal quotes is that the State continues to pay the owner a fair return, a circumstance indisputably absent here.

revolutionary events forced all expatriate executives to leave Iran, Foremost participated in Pak's management only by exercising its right to elect two of the seven members of Pak Dairy's board of directors, as it was entitled by the cumulative voting provisions of Iranian law. As conditions in Iran prevented Foremost from sending United States nationals to attend Pak Dairy board meetings, it designated various Iranian individuals to serve from time to time as its representatives on the board. Even though generally ineffective, this presence at board meetings was the best means Foremost had to keep contact with a company in which it had made a substantial investment and in which it hoped that its ownership rights might one day be restored.¹²

Indeed, the Tribunal's reliance on Foremost's continued participation could discourage minority shareholders which find themselves in a similar situation from pursuing the

¹²Foremost described its motivation in an October 1981 telex to the Pak board:

Since the expropriation, notwithstanding Pak's arbitrary refusal to grant Foremost its most fundamental rights with regard to Pak (which refusal forms the basis of the expropriation) and even though Foremost was prevented by the Government of Iran from obtaining its lawful share of the profits of the company, Foremost felt it had no other recourse than to continue to attempt to influence the management and operation of Pak by attendance at meetings of shareholders and of the board of directors of Pak. This was done in the hope Foremost's continued physical presence at company meetings might have the effect of deterring the inexperienced Government directors from wasting the company's assets

Having finally concluded that the presence of its representatives at meetings was a "futility," Foremost informed Pak by this telex that it "no longer sees a reason to continue its presence at board of directors and shareholder meetings of Pak." Accordingly, Foremost's two representatives on the board resigned.

course of action which would serve the best interests of the putatively expropriated company. The record makes clear that Foremost permitted its representatives on the board to serve as long as they did in the hope of preserving the value of the company and thereby mitigating the effects of the expropriation. To the extent that they succeeded, of course, the benefit would inure to all parties.

It is also curious that the Tribunal finds it significant that "to this day Foremost retains the title to its 31% shareholding," that "[t]here is no record of any attempt formally to confiscate its actual shares," and that "Foremost has not proved the existence of any statutory restriction on its right to sell or otherwise dispose of its shares." As Starrett, supra, teaches, and as the Tribunal reiterates in this Award, the absence of formal measures is irrelevant to a claim of expropriation in circumstances such as those here.

Finally, the Tribunal gains no support from the Case of Sporrong and Lönnroth, European Court of Human Rights, decision of 24 September 1981, Series A, no. 52. First, Sporrong was brought by Swedish citizens against their own government, and the distinguished European Court of Human Rights has expressly stated that its decisions concerning takings by a State of the property of its own nationals are not governed by general principles of international law. See Case of James and Others, European Court of Human Rights, judgment of 21 February 1986, Series A, Vol. 98, paras. 58-60. More importantly, the interference with property rights proven in Sporrong was of a fundamentally different character than that at issue here. There, as the passage quoted by the Tribunal indicates, "all the effects complained of . . . stemmed from the reduction of the possibility of disposing of the properties concerned." Id., para. 63 (emphasis added). Notwithstanding the State-imposed restrictions on real property in Sporrong, the

owners "could continue to utilize their possessions," and "the possibility of selling [them] subsisted." Id. Here, in contrast, the impairment or elimination of Foremost's ability to sell its shares¹³ is only one aspect of the State interference with its property rights. Unlike the applicants in Sporrong, Foremost has additionally, and crucially, lost the "use" of its property in the only sense meaningful in this context -- the right of a minority shareholder to share in the profits of the enterprise.

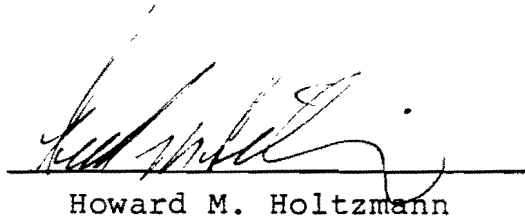
It is settled in this Tribunal, as a matter both of customary international law and of the Treaty of Amity between the United States and Iran,¹⁴ that an owner is entitled to compensation for the full value of expropriated property. See American International Group Inc. and Islamic Republic of Iran, Award No. 93-2-3 (19 December 1983)

¹³ Surely no foreign buyer would purchase Foremost's shares after Pak Dairy announced that it would not "pay any sums of money for any reason to foreign shareholders," and then refused even to explain that decision, let alone rescind it. Nor is it reasonable to expect that there would be an Iranian buyer for Foremost's shares. In view of current circumstances and governmental policies, the most likely Iranian buyer would be a governmental entity. Having eliminated Foremost without paying it, however, the Government has no need to purchase Foremost's shares. While Pak's shares had been traded in small amounts on the Tehran Stock Exchange, it appears that that market ceased to operate after the Islamic Revolution. Even were it available, record evidence shows that it could not have absorbed a large block of shares at a fair price. Iranian individuals, who could receive governmental assistance by purchasing Pak shares from the Financial Organization for the Expansion of Ownership of Industrial Units, would hardly choose to purchase instead from Foremost. Thus, for all practical purposes, after May 1980 Foremost was unable to sell its shares.

¹⁴ 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. 899.

(customary international law), reprinted in 4 Iran-U.S. C.T.R. 96, 105-09; Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2, pp. 14-18 (19 March 1986) (Treaty of Amity); Sedco, Inc. and National Iranian Oil Co., Award No. ITL 59-129-3, pp. 6-7, 13 (27 March 1986) (Treaty of Amity). Normally, a business enterprise is valued as a going concern at the date of expropriation, taking into account its future profitability. See American International, supra. See also Sedco, supra. Applying those principles to this case, Foremost is entitled to receive compensation equal to 31% of the going concern value of Pak Dairy in May 1980. For the purposes of this opinion, it is unnecessary precisely to calculate that amount. Foremost has offered in evidence a report of a valuation expert which concluded that the going concern value of the 31% holding in Pak on 27 May 1980 was \$11 million. Foremost also points out that in 1975 the Financial Organization purchased a large block of Pak shares from Foremost as part of a program for broadening public ownership in companies such as Pak. Applying the valuation formula established by the Central Bank of Iran in that prior transaction, it appears that the value of Pak in May 1980 was approximately \$10 million. Accordingly, I would have awarded compensation of at least \$10 million, plus 11.5% interest from the date of expropriation, and Foremost's costs of this arbitration.

In sum, the Tribunal here acknowledges only the tip of the iceberg; it ignores the greater mass that lies beneath. For that reason, I respectfully dissent.



Howard M. Holtzmann

The Hague
14 April 1986