[redacted]

CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

84

ORIGINAL DOCUMENTS IN SAFE

Case No. 317 Date of filing: 22-4-87

** AWARD - Type of Award Final
- Date of Award 22-4-87
27 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 _____
- Date _____
_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____
_____
- Date _____
_____ pages in English _____ pages in Farsi

R/12

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران ـ ایالات متحده
FILED - ثبت شد
Date 22 APR 1987 تاریخ
۱۳۶۶ /۲/ ۲
No. 317 شماره

CASE NO. 317
CHAMBER ONE
AWARD NO. 298-317-1

SOLA TILES, INC.,
Claimant,
and
THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN,
Respondent.

DUPLICATE ORIGINAL
«نسخه برابر اصل»

AWARD

Appearances:

For the Claimant:
Mr. M. Belli,
Mr. D. Sabih,
Mr. R. Waechter,
Mr. C. Belli,
Attorneys for Claimant,
Ms. J. Bednar,
Assistant to the Attorneys,
Mr. Y. Hachamoff,
Representative of Claimant.

For the Respondent:
Mr. A. Shirazi,
Acting Agent for the Government of the Islamic Republic of Iran,
Mr. A. A. Ryazi,
Legal Adviser to the Agent,
Mr. F. Momen,
Attorney,

Mr. H. Gholami,
Assistant to the Agent.

Also present: Mr. J. R. Crook,
Agent of the United
States of America,
Mr. M. Glanz,
Adviser to the Agent.

I. INTRODUCTION

A. The Proceedings

1. On 15 January 1982 the Claimant, SOLA TILES, INC., ("Sola") filed a claim with the Tribunal against the Respondent THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN ("GOI"), seeking damages for the alleged expropriation of the assets of an Iranian corporation, Simat Middle East (Iran) Ltd. ("Simat"), which Sola claims to have owned. As of the hearing, Sola sought U.S.$3,207,782 in compensation as well as interest and costs. GOI filed a Statement of Defence on 7 January 1983, Sola a Reply on 14 March 1983, and GOI a Rejoinder on 17 April 1984. Both Parties filed evidence and further memorials pursuant to orders of the Tribunal. A hearing took place on 17 October 1985, at which both Parties presented oral argument and witnesses.

B. Facts and contentions of the Parties

2. On 11 October 1975, Simat Middle East (Iran) Ltd. was incorporated in Iran. Ninety percent of its shares were owned by Mr. Yitzhak Hachamoff, an Israeli national, and the remaining 10% by Mr. Parviz Nazarian, a national of Iran. Under the Articles of Association of the corporation, Mr. Hachamoff was appointed managing director "with full and absolute authority" over Simat's affairs. Simat's business activities consisted of the import and resale of high quality ceramic tiles, mainly from

two suppliers in Italy for whom Simat was the sole distributor in Iran. The Claimant states that Simat's business became increasingly profitable between 1975 and 1979, by which time it had 18 showrooms throughout Iran.

3. The Claimant alleges that in January 1979 it became unsafe for Mr. Hachamoff to remain in Iran, and he left, giving a power of attorney to his assistant, Ms. Shahnaz Eliassi, so that she could continue to conduct Simat's business in his absence. Subsequently, from June 1979, the Claimant alleges that various steps were taken by the local Provisional Revolutionary Committee to interfere with the business of Simat. According to the Claimant, the interference eventually amounted to a taking of control and an expropriation of the company's assets. The compensation now sought, U.S.$3,207,782, includes elements of $1,750,000 for lost profits and $750,000 for goodwill and equity.

4. In 1978, Mr. Hachamoff began negotiations with two United States nationals, the brothers Robert and Samuel Solomon, with a view to forming a company in the United States which would distribute the products of the two Italian tile manufacturers, one of which was at that time actively considering making a substantial investment in Simat in Iran. As a result of these discussions, Sola Tiles, Inc., the present Claimant, was incorporated in California and registered on 23 May 1979. Mr. Hachamoff owned 49% of the shares, Mr. Robert Solomon 26% and Mr. Samuel Solomon 25%. Stock certificates were issued on 6 September 1979.

5. On 25 May 1979, a "Conveyance and Assignment by Simat Middle-East (Iran) Ltd. to Sola Tiles Inc." was executed by Mr. Hachamoff as managing director of Simat. It purported immediately to transfer all of the assets and liabilities of Simat to Sola.

6. The Respondent has denied liability both on grounds of jurisdiction and on the merits of the claim. First, it disputes the United States nationality of Sola. It also questions Sola's continuous ownership of the claim from the earliest date it allegedly arose, 14 June 1979, until 19 January 1981, the period prescribed by Article VII, paragraph 2, of the Claims Settlement Declaration. Principally, it argues that the transfer of Simat's assets and liabilities to Sola was neither genuine in intention nor valid in execution, as it was not properly notarized as required by Iranian law.

7. On the merits, the Respondent denies that any expropriation of Simat's assets took place. It further disputes the valuation placed by Sola on Simat's assets at the date of the alleged expropriation.

II. REASONS FOR AWARD

A. Procedure

8. The Tribunal's Order of 29 August 1985 contained a clear statement that, in view of the hearing date, no extension would be granted for the submission of rebuttal evidence after 1 October 1985. On 4 October 1985, the Respondent filed a submission pursuant to that Order. When the Claimant objected, the Respondent explained that the three-day delay was due to unexpected problems with an Iran Air flight. The Tribunal notes that the document in question contains various legal arguments and no documentary evidence. Given the character of the submission, and the relatively slight delay in filing, the Tribunal does not consider the Claimant's right to respond at the hearing to have been prejudiced, and the submission is therefore admitted.

9. However, the Respondent filed a further submission on 30 October 1985, which it stated contained documents supporting the testimony given by one of the witnesses at the hearing. Such a

filing of evidence, made without authorization almost two weeks after the hearing had taken place, cannot be accepted.

B. Jurisdiction

10. In order to satisfy the requirements of Article VII, paragraph 2, of the Claims Settlement Declaration, Sola must establish that it presents a claim "owned continuously, from the date on which the claim arose to the date on which this agreement enters into force," by a national of the United States. See Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2, paras. 12, 14 (19 Mar. 1986). In turn, in order to establish its nationality during the relevant period pursuant to Article VII, paragraph 1, Sola must prove, for present purposes, that it is "a corporation . . . organized under the laws of [California]" in which, "collectively, natural persons who are [United States] citizens . . . hold, directly or indirectly, an interest . . . equivalent to fifty percent or more of its capital stock."

(i) the Claimant's nationality

11. Under the law of the State of California, a corporation comes into existence upon the filing of the Articles of Incorporation with the appropriate governmental authority, in this case the Secretary of State. A copy of a Certificate of the Secretary of the State of California has been filed with the Tribunal which states that the Articles of Incorporation of Sola Tiles, Inc. were filed on 23 May 1979. The Articles of Incorporation were signed by Mr. Hachamoff as the incorporator of Sola.

12. It remains for the Tribunal to satisfy itself that fifty per cent or more of the capital stock of Sola was owned by United States nationals between the two relevant dates: the first date on which the claim can be said to have arisen and 19 January 1981, the date of the Algiers Declarations.

13. It is clear from documents filed by the Claimant that a Special Meeting of the Board of Directors of Sola was held on 6 September 1979, and the Minutes record the presence of all three shareholders: Yitzhak Hachamoff, the owner of 980 shares, Robert Solomon, the owner of 520, and Samuel S. Solomon, the owner of 500. At that meeting all three were elected as Directors. Mr. Hachamoff was elected President, Secretary and Chief Financial Officer, and Mr. Samuel Solomon, Vice-President. All three signed the Minutes. On the same date, share certificates were issued to each of the three. The Tribunal has examined copies of the United States passports of the Solomon brothers, and is satisfied of their United States nationality. The ownership of 51% of Sola's shares by United States nationals is thus established as at 6 September 1979.

14. According to Sola, the earliest date on which a finding of expropriation might be based is 14 June 1979, the date on which an impoundment notice was served by the Provisional Revolutionary Committee on Simat in Tehran. The Tribunal must therefore examine the position prior to 6 September 1979.

15. Under California law, the issuance of share certificates evidences ownership; it does not create it. In the absence of any indication to the contrary, the Tribunal infers that the numbers of shares issued to the three owners of Sola on 6 September 1979 reflected the division of ownership between them at the date of incorporation some three months earlier. No evidence has been adduced by the Respondent which suggests otherwise.

16. The record supports this inference. A letter dated 1 March 1983 from the Vice-President of City National Bank of Los Angeles confirms that on 21 May 1979 a joint bank account was opened in the names of all three owners. Deposits by the Solomon brothers made initially and during the next four days totalled $13,335. Mr. Hachamoff deposited $10,000. On 21 June 1979, the bank received the corporate documents of Sola, the

first account was closed and a new account opened in the name of Sola Tiles, Inc., with both the Solomon brothers and Mr. Hachamoff named as signatories. The Claimant has filed a copy of the signature card with the Tribunal.

17. In addition, there is evidence of an existing business collaboration between the Solomon brothers and Mr. Hachamoff before the formation of Sola. Two customs invoices from the same two Italian manufacturers who supplied Simat, dated respectively 12 April and 19 April 1979, and addressed to "Hachamoff Solomon" as buyer at the same Los Angeles address as the one given by Mr. Hachamoff in the Articles of Incorporation of Sola one month later, establish that they had placed preliminary orders for tile samples from these suppliers.

18. The Tribunal concludes from this evidence that United States nationals owned "an interest" in Sola "equivalent to fifty per cent or more of its capital stock" at the earliest date on which the claim could have arisen.

19. Further, it appears from the affidavit of Mr. Hachamoff that the Claimant corporation continued to trade after November 1980, the approximate date of attempts to repatriate funds in Simat's Iranian bank accounts into Sola's account. The City National Bank letter of 1 March 1983 states that Sola's bank account was still active at that date. There is thus no reason to doubt that Sola continued in existence under the same ownership at 19 January 1981. In sum, Sola was a United States national during the relevant period.

(ii) continuous ownership of the claim

20. The next issue is that of continuous ownership by Sola of the claim itself - for present purposes, of its interest in Simat. Sola's entitlement to bring a claim depends upon the validity of the assignment to it of Simat's assets and

liabilities by the instrument signed by Mr. Hachamoff on 25 May 1979.

21. The first question is whether, as a matter of Simat's corporate governance, Mr. Hachamoff had the authority to execute an assignment of Simat's assets and liabilities. Under Article 8 of Simat's Articles of Association, Mr. Hachamoff was "elected and appointed as the Managing Director with full and absolute authority" and the other shareholder, Mr. Nazarian, was chairman of the board of directors. Mr. Nazarian's shares were, according to Article 7, "placed at the disposal of the Managing Director". Article 9 provided:

> "All financial obligating documents and instruments, contracts and likewise ordinary papers and documents will be valid if signed solely by the Managing Director under the seal of the Company."

Finally, Article 10 provided:

> "The Managing Director is the legal representative of the Company and holds full authority in all the operations of the Company . . . ."

Article 10 also gave examples of the Managing Director's authority, such as the purchase and sale of movable and immovable property. A transfer of the type made in May 1979 was thus within the ambit of Mr. Hachamoff's authority, and fulfilled the formal requirements of the corporation's governing instrument.

22. It remains to determine which law governed the assignment and whether the instrument in question complied with the requirements thereof.

23. Sola has maintained that the law of California governs the validity of an assignment which was executed and delivered in that jurisdiction. The GOI has argued to the contrary, that the Commercial Code of Iran governs the transfer of the assets and liabilities of an Iranian corporation. It contends that the

assignment fails to comply with the formal requirements of the laws of Iran as to notarization, and is thus invalid.

24. The law of California imposes minimal formal requirements for the validity of such an assignment, both as between the parties to it and vis-à-vis third parties. Section 955 of the California Civil Code provides:

> "a sale of accounts, contract right or chattel paper as part of a sale of the business out of which they arose . . . shall be deemed protected against third persons when such property rights have been endorsed or assigned in writing and in the case of such instruments or chattel paper delivered to the transferee, whether or not notice of such transfer or sale has been given to the obligor . . . ."

Since it is undisputed that the assignment was committed to writing and delivered to Sola, the transferee, there would appear to be no obstacle to its validity under California law.

25. The relevant Iranian law is a different matter, however. Under Article 103 of the Commercial Code of Iran, (trans. Musa Sabi, 2nd ed., 1976), which governs limited liability companies such as Simat, transfer of shares may only be effected by a "notarial deed" - in other words, an instrument notarized by a notary public or certain categories of government officials.

26. Mr. Hachamoff told the Tribunal that at the end of January 1979 he himself had been advised to leave Iran because of prevailing conditions and had returned to Israel. While in Israel, he executed a power of attorney in favour of his assistant at Simat, Ms. Shahnaz Eliassi, empowering her to conduct the affairs of Simat on his behalf and in his absence. Ms. Eliassi had been employed as executive secretary since 1975, managing Simat's sub-distributors, stock and inventory, and sales. On her return to Iran, however, the Ministry of Foreign Affairs confiscated the power of attorney on the ground that it was unacceptable because it was issued abroad. Thus, at the time the assignment took place, it was not possible to have the document notarized in Iran. Mr. Hachamoff was nonetheless

mindful of the advisability of complying as far as possible with the requirements of Iranian law, and at least of serving notice on the Iranian authorities that the assignment had taken place. Mr. Hachamoff told how he took the assignment document, in Farsi, to the Iranian Consul in San Francisco and signed the document in the presence of the Consul, who then affixed a rubber stamp and added his own signature. The Consul kept the original and, after initial reluctance, provided a photocopy for Mr. Hachamoff to retain.

27. The Respondent asserts that such a procedure was not sufficient to confer formal validity on the assignment. Indeed, Mr. Hachamoff himself told how the Consul had expressed the view that he lacked the power to notarize the document. Thus there is no dispute that the correct form of notarization was not obtained. However, the Government of Iran cannot be permitted to rely on such a defect vis-à-vis Sola, given that it was itself responsible for the circumstances which made strict compliance with legal formalities impossible. Mr. Hachamoff could not return to Iran, and the power of attorney which he had granted to Ms. Eliassi to enable her to conduct Simat's affairs in his absence had been declared invalid. The Tribunal is satisfied that Mr. Hachamoff, on Sola's part, made every effort possible in the circumstance to comply with any formal legal requirements and to ensure that the Iranian authorities had notice of the assignment. Whatever the result with respect to a third party, it would be inequitable to find the assignment invalid vis-à-vis the Government of Iran on the sole ground that the steps taken by Mr. Hachamoff fell short of the formal requirements of Iranian law.

28. Thus, without having to decide whether Iranian or California law governs, the Tribunal concludes that for the purposes of the present Case the assignment of 25 May 1979 must be deemed valid as to decide otherwise would in the circumstances be inequitable. It follows that Sola has owned the claim continuously for the relevant period.

C. The Merits

(i) the issue of expropriation

29. It is well settled in the practice of the Tribunal, as elsewhere, that property may be taken under international law through interference by a State in the use of that property or the enjoyment of its benefits amounting to a deprivation of the fundamental rights of ownership. See, e.g., Foremost Tehran, Inc. and Islamic Republic of Iran, Award No. 220-37/231-1, p. 22 (11 Apr. 1986); Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, Award No. 141-7-2, pp. 10-11 (29 June 1984); Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2, pp. 12-14 (19 Mar. 1986); Thomas Earl Payne and Islamic Republic of Iran, Award No. 245-335-2, pp. 10-13 (8 Aug. 1986).

30. The Claimant alleges that the expropriation of Simat took place over a period between June and November 1979. It claims to have been deprived of the company's assets and goodwill, and of the control and management of the business. Evidence was presented to the Tribunal in the form of affidavits and oral clarifications from Mr. Hachamoff; affidavits from two Simat employees, Ms. Shanaz Eliassi and Mr. Manuchehr Pour-Ebrahimi; and certain contemporaneous documents.

31. According to the Claimant, after Mr. Hachamoff's departure from Iran and the invalidation of the power of attorney executed in favour of Ms. Eliassi, she continued to collect outstanding debts from Simat's customers and deposit them with the bank, and to pay wages to the other employees and miscellaneous operating expenses of the company, until approximately June 1979. In her affidavit Ms. Eliassi relates that on 26 June 1979, she was asked to go to the office of the Revolutionary Committee. There she was informed that the Committee had decided to impound and take over control of Simat's warehouse. Ms. Eliassi further states that some 738,500 Rials, part of the proceeds of a recent

sale of tiles, was taken from her on that occasion. She reported these events to Mr. Hachamoff, who was in regular contact by telephone with Simat's office.

32. Two documents support Ms. Eliassi's recollection of events. The first is a notice of impoundment issued by the "Provisional Committee of the Islamic Revolution of the Imam Khomeyni", dated 14 June 1979, which states, in translation, that in compliance with an order of the Committee of 13 June, "the warehouses of the Cement Company (ceramics), containing the Italita tiles, has no right whatsoever to take any tiles out, and it is strictly forbidden unless a written order issued by the Imam Committee of the Third District is obtained, and Mr. Manouchehr and Ms. Shahnaz [Eliassi], the sellers of the tiles, must report themselves as soon as possible to the District." The notice of impoundment then lists the Committee's representatives and their addresses.

33. The second document is a receipt for the sum of 738,500 Rials in cash, stated to have been received from Ms. Eliassi by the Committee on 26 June 1979.

34. Simat's warehouse manager, Mr. Manuchehr Pour-Ebrahimi, relates in his affidavit that he and Ms. Eliassi continued to manage Simat after Mr. Hachamoff's departure until April or May 1979, keeping in daily contact with him on the telephone. Thereafter he was subjected to numerous approaches by the same Committee, who eventually entered his home and arrested him in late June that year. He states that he was detained until a sum of 470,000 Rials belonging to Simat was handed over, and that officials of the Committee interrogated him as to the contents of Simat's warehouses, which they said were to be confiscated.

35. Mr. Pour-Ebrahimi further relates that he worked under the supervision of the Committee until about February 1980, gathering Simat's tile inventory so that the Committee could sell the tiles to Simat's existing buyers and confiscate the proceeds for

the benefit of the Foundation for the Oppressed. Mr. Pour-Ebrahimi states, in particular, that in November 1979 he was ordered to remove all stock from Simat's warehouse and transfer it to a new location, a task which involved some twenty-five container loads of Italian tiles and took him and ten other workers between seven and ten days to complete.

36. While the Claimant has not produced any receipts or other documents emanating from the Committee relating to the warehouse inventory itself, it has offered evidence of the Committee's activities in the form of a detailed inventory of household effects taken from Mr. Hachamoff's apartment some time during 1979 on the Committee's orders. It has also produced evidence of the sale by the Police Department Traffic Bureau of a motor car registered in Mr. Hachamoff's name.

37. The Respondent denies that any expropriation took place, arguing that any assumption of control over Simat's affairs was intended to safeguard the company's business in the absence of its managing director, who, it claims, left the country of his own volition. The Respondent denies that any restrictions had been imposed on Simat's conduct of its affairs.

38. At the hearing of the claim, evidence was given by Mr. Nureddin Fekrati, an attorney who had been instructed by the landlord of the premises rented by Simat in Tehran to commence proceedings for the recovery of rent arrears. Having obtained a judgment in his client's favour, he proceeded to obtain a writ of attachment and visited the property to ascertain the value of goods available for seizure in execution of the debt. Mr. Fekrati stated that he was able to seize the telephone line at the showroom, but that there was little else of value. In the event that the company's assets had been expropriated, Mr. Fekrati said, there would have been no possibility that the attachment would be allowed to proceed. Mr. Fekrati claimed only to have seen the exterior of the warehouse premises; he stated that he did not enter. In answer to questions, he also

stated that he had no knowledge of any bank account held in Simat's name and had not attempted any attachment of a bank account. The date of the legal proceedings and subsequent attempts at attachment did not emerge clearly from Mr. Fekrati's testimony, but it is most unlikely that they occurred before 1980.

39. Mr. Fekrati's statement that there was nothing other than a telephone at Simat's premises is entirely consistent with a finding that the assets of the company had been expropriated at some earlier date. In the view of the Tribunal, the weight of evidence does not support the Respondent's argument that Simat had been abandoned by its owners. Instead, it strongly suggests that the Revolutionary Committee took active and specific steps from June 1979 to assume control over the assets, inventory and business of Simat, and that, by the end of 1979, the committee had effectively taken over the inventory and management of the company, and deprived the owners of all control. Ms. Eliassi left the company in July 1979; Mr. Pour-Ebrahimi continued to work for the Revolutionary Committee until about February 1980, by which time his task of assembling and relocating the inventory of tiles was complete.

40. Although there was never any specific expropriatory decree or similar instrument, the Tribunal finds that the impoundment notice issued as an official document by the Committee on 14 June 1979 stands as a clear statement of that body's intentions with regard to the property of Simat - intentions which it proceeded to implement during the course of the next five months. Further, it is well settled that the Revolutionary Committees are among those organs whose acts are attributable to the Government of Iran, which is responsible for them as a matter of law.[1] Basing its conclusion on the available

---

[1] See, e.g. William L. Pereira Associates, Iran and Islamic Republic of Iran, Award No. 116-1-3, p. 43 (19 Mar. 1984).

documents and the evidence of two of Simat's former employees, the Tribunal therefore finds that there was a progressive taking of Simat's business operations which was completed, at the latest, by November 1979.

ii) the measure of compensation

41. The Claimant bases its claim for compensation on general principles of law, and cites in particular the dictum of the Permanent Court of International Justice in the Chorzow Factory Case[2] to the effect that the level of compensation should be based on "the value of the undertaking at the moment of dispossession plus interest to the date of payment". It does not rely on the Treaty of Amity[3] or any other source of lex specialis. Consequently the Respondent has not addressed the applicability and effect of that Treaty.

42. The Treaty, which provides that compensation "shall represent the full equivalent of the property taken," cannot be ignored, however; it must in some way form part of the legal background against which the Tribunal decides the case. The Tribunal's conclusion, that the same standard would be required

---

[2] P.C.I.J., Series A, No. 17 (1928).

[3] 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. Article IV, paragraph 2, provides as follows:

> "Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof."

in this case by customary law as by the direct application of the Treaty itself, obviates the need to decide whether and on what footing it applies here.[4]

43. Turning to the standard currently prescribed by customary law, much of the debate that has divided the respective protagonists of terms such as "prompt, adequate and effective", "fair", "just" or "appropriate" compensation has been conducted at a theoretical level. An examination of the attempts of various tribunals to invest these terms with a concrete meaning reveals, however, that the distance between rhetoric and reality is narrower than might at first appear.

44. As an initial matter, the Tribunal notes the widespread use in recent years of the term "appropriate" applied to the standard of compensation. That term necessarily contemplates that all relevant circumstances will be assessed in any given case. Both the term itself and the elasticity it implies have by now achieved a solid basis in arbitral practice and writings. Its modern use is generally traced back to the Declaration on Permanent Sovereignty over National Resources of the United Nations General Assembly, Resolution 1803 of 1962,[5] paragraph 4 of which defines conditions for a lawful expropriation and requires that:

> "In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State

---

[4]The Tribunal has held in previous awards that the Treaty was applicable, either as being "clearly applicable to the investment at issue . . . at the time the claim arose", and thus "a relevant source of law on which the Tribunal is justified in drawing," Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2, pp. 15-16 (19 Mar. 1986); or as lex specialis, assumed to govern in the absence of agreement to the contrary, INA Corporation and Islamic Republic of Iran, Award No. 184-161-1, pp. 8-9 (13 Aug. 1985).

[5]17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5344 (1962).

> taking such measures in the exercise of its sovereignty and in accordance with international law" [emphasis added].

45. The reference to "international law" suggests that the delegates who adopted the Resolution intended no break with prevailing customary law. Also, the travaux préparatoires confirm that the drafters used the word "appropriate" in the sense of "adequate".[6]

46. A recent formulation employing the term "appropriate" emanates from the International Law Association. On 30 August 1986, it adopted the Seoul Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order. Article 5.5 states:

> "A state may nationalise, expropriate exercise eminent domain or otherwise transfer property within its territory and subject to its jurisdiction, subject to the principle of international law requiring a public purpose and non-discrimination, and subject to appropriate compensation as required by international law and to any applicable treaty and without prejudice to legal effects flowing from any contractual undertaking" [emphasis added].

The Declaration thus recognizes that the term "appropriate" finds its content in international law and any applicable treaty.

47. While recent arbitral and judicial tribunals have also employed the standard of "appropriate" compensation, they have at the same time regularly awarded compensation equalling the full value of the property in the circumstances.[7] For example,

---

[6] See 17 U.N. GAOR C.2 (846th Mtg.), para. 3, UN Doc. A/C.2/SR.846 (1962); 17 U.N. GAOR C.2 (850th Mtg.), para. 16, UN Doc. A/C.2SR.850 (1962).

[7] See, e.g., Mendelson, Compensation for Expropriation: The Case Law 1979 Am. J. Int'l L. 414, 415 (1985) ("Whilst the cases do not espouse the [prompt, adequate and effective] formula in so many words, they do require the payment of full compensation

(Footnote Continued)

in the TOPCO-Libya arbitral award rendered in 1977, Professor René-Jean Dupuy identified the standard of "appropriate compensation" as the repository of the "opinio juris communis" representing "the state of customary law existing in the field".[8] Professor Dupuy proceeded to award full compensation in the form of restitutio in integrum. Similarly, but in the different context of a commercial dispute before a municipal court, the United States Court of Appeals for the Second Circuit observed in 1981,

> "It may well be the consensus of nations that full compensation need not be paid 'in all circumstances' . . . and that requiring an expropriating state to pay 'appropriate compensation' - even considering the lack of precise definition of that term, - would come closest to reflecting what international law requires. But the adoption of an 'appropriate compensation' requirement would not exclude the possibility that in some cases, full compensation would be appropriate."[9]

Applying that analysis, the Court approved an award of "full compensation for Chase's loss . . . neither more nor less than is appropriate in the circumstances." Id. at 893.

48. Equally significant, and more recent, is the AMINOIL award of 24 March 1982, in which that tribunal adopted the test of "appropriate compensation" and elaborated on its application:

> "The Tribunal considers that the determination of the amount of an award of 'appropriate' compensation is better

---

(Footnote Continued)
. . . .."). For an assessment of whether the application of differently-characterised compensation standards has resulted in any reduction in the level of protection afforded by tribunals to foreign investors, see Gann, Compensation Standard for Expropriation, 23 Colum. J. Transnat'l L. 615, 616 (1985).

[8] Texas Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic, 17 International Legal Materials 3, 29 (1978); 53 ILR 389 (1979).

[9] Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 892 (2d Cir. 1981).

> carried out by means of an enquiry into all the circumstances relevant to the particular concrete case, than through abstract theoretical discussion. Moreover the Charter of the Economic Rights and Duties of States, even in its most disputed clause (Article 2, paragraph 2c) - and the one that occasioned reservations on the part of the industrialized States - recommended taking account of "all circumstances" in order to determine the amount of compensation - which does not in any way exclude a substantial indemnity."[10]

The Aminoil tribunal's evaluation of the relevant circumstances prompted it to render an award of compensation based on the "going concern" value of the company in question, including an element in respect of lost future profits.

49. For the purposes of the present Case this short selection of relevant sources can be considered as sufficient. Sola interprets the applicable standard of customary law as requiring the Tribunal to award it the market value of Simat as a "going concern" at the date of expropriation, including compensation not only for physical assets, accounts receivable and expropriated cash, but also for goodwill and lost future profits. As has been seen both in theory and in practice, "appropriate" compensation encompasses such elements, so long, of course, as they are justified by the facts of the particular case. Conversely, arbitral tribunals, including this one, have declined to value expropriated property as a going concern when concrete factors relative to the property itself have made the use of that method impossible or inappropriate.

50. This Tribunal, in applying the standard prescribed by the Treaty of Amity - the "full equivalent" of the property taken - recently concluded:

---

[10] Arbitration between The Government of the State of Kuwait and The American Independent Oil Company (Reuter, Sultan, Fitzmaurice, arbitrators), 21 International Legal Materials 976, para. 144 (1982).

> "SICAB had [not] become a 'going concern' prior to November 1980 so that such elements of value as future profits and goodwill could confidently be valued. In the case of SICAB, any conclusions on these matters would be highly speculative . . . ."[11]

ii) valuation

51. Sola claims damages totalling $3,207,782 representing the value of Simat's tangible and intangible assets, including goodwill and equity, and lost profits, using an exchange rate of 70.6 Rials to the Dollar. Of this figure, the lost profit element accounts for $1,750,000 and goodwill and equity $750,000. Of the value placed on the tangible assets, the major element, $590,415, relates to inventory, showrooms and equipment described by Mr. Hachamoff in an affidavit but only partially supported by documentary evidence. The remainder consists of accounts receivable, cash expropriated from employees and bank accounts, which are also only partially documented.

52. The Tribunal has determined that Simat was expropriated; that the company clearly had some market value; and that Sola is entitled to compensation based on that value. The Tribunal examines first the physical assets, accounts receivable and expropriated cash. These elements of value do not depend on going-concern analysis, but in this Case they raise evidentiary problems. While the Claimant must shoulder the burden of proving the value of the expropriated concern by the best available evidence, the Tribunal must be prepared to take some

---

[11] Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2, p. 17 (19 Mar. 1986). The United States Department of State has recognised that there might be situations where the application of the "going-concern" approach is impracticable or might operate unfairly, "-for example, where an investment has a limited history of operating results, or where expropriation occurs after significant costs are incurred but before a revenue-generating stage is reached", Smith, The United States Government Perspective on Expropriation and Investment in Developing Countries, 9 Vand. J. Transnat'l L. 519-20 (1976) (quoted in Gann, supra n.7, at 619 n.14).

account of the disadvantages suffered by the Claimant, namely its lack of access to detailed documentation, as an inevitable consequence of the circumstances in which the expropriation took place.

53. In the circumstances of this Case, a valuation based on a piecemeal approach, item by item, is unsatisfactory if used on its own. Fortunately, the record contains an independent, contemporaneous report on Simat's business that provides the Tribunal with an additional source on which to base the valuation of Simat at the date of the taking.

54. During the course of 1978, one of the two Italian manufacturers with whom Simat had distributorship agreements, Ceramiche Grazia ("Grazia"), was considering the possibility of making an investment in Simat in order to strengthen its own position in the Iranian market. In June 1978, Mr. Andrea Barilli, an attorney engaged by Grazia, and Mr. Mimmo Muratori, Grazia's area manager responsible for exports to the Middle East, visited Tehran in order to examine Simat's business structure, its legal and financial situation and its prospects generally, in order to report back to Grazia on the feasibility of such an investment. The visit took place on 17-18 June 1978, and on 28 June 1978 Mr. Barilli submitted a twelve-page report on his findings. He concluded that, although instability in Iran indicated a cautious approach, a limited investment would be reasonable in view of the efficiency of Mr. Hachamoff's management of the company.

55. Mr. Barilli did not include in his report any monetary estimate of the value of Simat's business. However, he subsequently confirmed in a letter addressed to Mr. Hachamoff and transmitted via Grazia on 18 July 1983, that at the time of his visit,

> "[Y]ou attributed to your assets a value of US$ 750,000 and estimated in a similar amount the value of the good-will of your company. Grazia was interested in buying 50% of your company.

> Also you estimated in 2.5 x 1 the value of any item imported, when in Teheran.
>
> We found your company seriously run and reliable, your figures realistic and judged the business opportunities favorable; but I personally advised against making large investments in Iran, because I judged the general situation unsound."

Mr. Barilli's contemporaneous report confirms his positive appraisal of the business, its management and its prospects.

56. Though Mr. Barilli was not present at the hearing, Mr. Muratori attended and gave evidence about the visit they had made and the impressions he had formed. He said that he had interfered as little as possible in Mr. Barilli's investigation of Simat's books and records in order to allow him to form his own opinions of the company's prospects as a basis on which to advise Grazia. Mr. Muratori told the Tribunal that on the way back to Italy from Tehran, he had exchanged views with Mr. Barilli, and the latter had confirmed that he considered the estimate of $750,000, representing half the company's value, to be a valid "starting point" for Grazia's 50% participation - that is, Mr. Barilli thought Sola worth $1,500,000 of which $750,000 was attributable to physical assets and accounts receivable, and $750,000 to goodwill.

57. A value contemplated by a serious potential investor on the basis of professional advice offers a well-founded starting point for the Tribunal's own assessment of Simat's value during the latter part of 1979. The figure of $750,000 put forward by Mr. Hachamoff, and adopted by Mr. Barilli at the time of his visit in 1978, was a global valuation of Simat's physical assets and accounts receivable. Mr. Barilli's report contains no breakdown of the value of these assets and no reference to the value of specific items, such as inventories of tiles. Whether that figure reflects the value of these assets in late 1979 can to some extent be tested by reference to individual items of evidence forming part of the present record, given that the total now claimed in respect of assets is $707,782, of which

$590,415 is attributed to physical assets and $117,367 to accounts receivable and expropriated cash.

58. Taking the value of Simat's physical assets first, the Tribunal finds nothing to suggest that Simat's warehouse, showrooms and equipment had diminished in value during the course of the year after Mr. Barilli's visit. On the contrary, Mr. Muratori told the Tribunal how Grazia had itself financed the construction and equipment of a showroom to enhance the presentation of Simat's product. Sola values the showrooms at $112,000, and various items of fittings and equipment on the basis of Mr. Hachamoff's "best recollections".

59. Variations might be expected to have occurred, however, in the level of the inventory of tiles held by Simat at any time. Mr. Hachamoff's own assessment was that the inventory at 30 September 1978, taken together with three further months' average deliveries up to the end of the year, amounted to approximately $411,000 worth of tiles. That the inventory was considerable is confirmed by Mr. Pour-Ebrahimi, who states that it took "from seven to ten days . . . using five large semi-trailers and about ten workers under my supervision" to transfer "approximately the equivalent of twenty-five overseas containers of inventory" to the Revolutionary Committee's warehouse.

60. The value placed by Sola on its showrooms and inventory thus totals $523,000. Allowing a further $2,000 for the miscellaneous items of equipment, and bearing in mind that this is within the global figures contemplated by Mr. Barilli in 1978, the Tribunal considers it reasonable in the circumstances to award a total of $525,000, as the actual value of the physical assets, including inventory. The Tribunal must make a reasonable estimate of the total amount of accounts receivable, including a commission due, and cash expropriated from bank accounts because there is little documentation of these items, the only records of which appear to have been left in Iran.

Making such an estimate, the Tribunal awards $100,000 of the $117,367 claimed. The total thus awarded in respect of Simat's physical assets, accounts receivable and expropriated cash is $625,000.

61. Sola also seeks compensation for Simat's goodwill and for its lost future profits. The Tribunal must therefore determine whether Simat qualifies as a "going concern."

62. The considerations on which the "goodwill" of Simat rests are at best speculative. Goodwill can best be defined, at least for the purposes of the present case, as that part of a company's value attributable to its business reputation and the relationship it has established with its suppliers and customers. In 1978, when Mr. Barilli made his report, the prospects for Simat's business were clearly favourable. Construction was on the increase, opening up a large, untapped market both within and outside Tehran, and Simat enjoyed the confidence of its suppliers, who were prepared to grant it favourable credit terms and, in the case of Grazia, to build a showroom at its own expense.

63. Different elements had come into play by the time of the expropriation, however. Simat's trade consisted largely of selling specialised luxury tiles, the market for which depended in large measure on the continued construction of luxury houses and apartments. The question presents itself - though neither party offered evidence on this point - whether Simat could have expected to continue importing large quantities of tiles without experiencing problems in obtaining the renewal of licences, a crucial factor bearing in mind that Simat depended exclusively on the import of its product to do business. What is even more certain is that the market for items such as those imported by Simat would have suffered a severe diminution as a result of the sweeping social changes brought about by the Islamic Revolution. Even in June 1978, Mr. Barilli was clearly mindful of the

vulnerability of Simat's operation to such factors, and his caution was borne out by subsequent events.[12]

64. The impact of such developments on the value of the goodwill element of Simat's business by the time of the expropriation in 1979 must have been dramatic. Given the picture that emerges, Simat's prospects of continuing active trading after the Revolution were not, in the view of the Tribunal, such as to justify treating Simat as a going concern so as to assign any value to goodwill. The decision to assign no value to Simat's goodwill suggests a similar result as to future lost profits, which also depend upon the business prospects of a going concern. In addition, Simat had the briefest past record of profitability, having shown a loss in 1976, its first year of trading, and a small profit the next year. Accordingly, the Tribunal assigns no value to future lost profits and therefore does not decide the question whether and to what extent lost profit can be claimed in exproriation cases in addition to the going concern value.

65. The Tribunal therefore awards the Claimant $625,000 as a global assessment of the compensation due, representing the value of Simat's business in late 1979.

---

[12] See American International Group, Inc. and Islamic Republic of Iran, Award No. 93-2-3, p. 18 (19 Dec. 1983):

> "prior changes in the general political, social and economic conditions which might have affected the enterprise's business prospects as of the date the enterprise was taken should be considered. Whether such changes are ephemeral or long-term will determine their overall impact upon the value of the enterprise's future prospects."

See also Thomas Earl Payne and Islamic Republic of Iran, Award No. 245-335-2, p. 17 (8 Aug. 1986).

Interest

66. The Claimant has requested interest on the amount claimed at the rate of 12%. In accordance with the approach developed and applied by this Chamber since its award in Sylvania Technical Systems, Inc. and Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985), the Claimant is entitled to interest on the amount awarded, at a rate based approximately on the amount that it would have been able to earn had it had the funds available to invest in a form of commercial investment in common use in its own country. Six-month certificates of deposit in the United States are such a form of investment for which average interest rates are available from an authoritative official source, the Federal Reserve Bulletin. In view of the Tribunal's finding that the expropriation of Simat's business was complete by a date in November 1979, the Tribunal determines that interest shall run from 1 January 1980, the date on which compensation might reasonably have been paid to Simat's owners. The average rate of interest paid on six-month certificates of deposit for the relevant period was approximately 10.75 percent, and the Tribunal applies that rate in this Case.

Costs

67. The Claimant seeks an award of costs of legal representation in connection with the arbitration of its claim amounting to $2,206,954, based on a contingency agreement with its attorneys; it also seeks reimbursement of expenses incurred of $17,574. Having regard to criteria of the kind outlined in Sylvania, supra, pp. 35-38, and taking into account the outcome of this Case, the Tribunal determines that the Claimant should be awarded costs in the amount of $20,000.

III. AWARD

For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

The Respondent THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN is obligated to pay the Claimant SOLA TILES, INC. the sum of Six Hundred and Twenty-Five Thousand United States Dollars (U.S. $625,000) plus simple interest at the rate of 10.75 percent per annum (365-day basis) from 1 January 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account, plus costs of $20,000.

These obligations shall be satisfied by payment out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

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

Dated, The Hague
22 April 1987

Karl-Heinz Böckstiegel
Chairman
Chamber One

In the Name of God

Mohsen Mostafavi
Dissenting Opinion

Howard M. Holtzmann