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UNITED STATES CLAIMS TRIBUNAL

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** CONCURRING OPINION of _____

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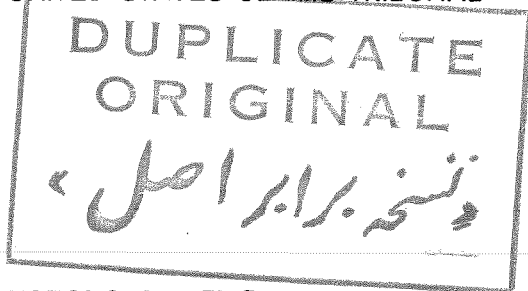
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of Judge Beawer. to Award
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IRAN-UNITED STATES CLAIMS TRIBUNAL



دیوان داوری دعاوی ایران - ایالات متحدہ

CASE NO. 481

CHAMBER THREE

AWARD NO. 373-481-3

MOTOROLA, INC.,
Claimant,

and

IRAN NATIONAL AIRLINES CORPORATION,
IRAN ELECTRONICS INDUSTRIES, THE
GOVERNMENT OF THE ISLAMIC REPUBLIC
OF IRAN,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL		دادگاه داوری دعاوی ایران - ایالات متحدہ
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CONCURRING AND DISSENTING OPINION OF JUDGE BROWER

1. I concur generally in the Award's findings regarding jurisdiction, in its dismissal of the Respondents' counterclaim for defective installation of a CCTV system and in its conclusion that the Claimant is entitled to \$36,716.35 in unpaid invoices and sight drafts for electrical components delivered to Iran Air. For these reasons, and in order to form a majority necessary to an award, I concur in the present Award.

2. I utterly disagree, however, with the Award's conclusions regarding Motorola's claim for the expropriation of the Iranian branch of its subsidiary Milcom. In particular, I believe that the Award's failure to find a taking to have occurred as a result of the appointment of Mr. Tahanha in April of 1979 as temporary manager of the branch, as confirmed by the subsequent "ratification" of this appointment in September of 1979 by the Ministry of Commerce, completely misreads the documentary evidence in the record and ignores the reality of Iran's involvement with the branch at that time. In my view the proper, and

indeed the only logical, reading of the facts in this Case, applying well-established Tribunal precedent defining an expropriatory taking, results in a determination that such a taking occurred on 25 April 1979, the date of Mr. Tahanha's appointment.

3. In addition, while concurring in the Award's refusal to base an award on the valuation analysis proposed by the Claimant, I believe that the evidence in the record establishes an appropriate value for the branch based on actual historical earnings. The Award's conclusion that the branch was devoid of any going concern value due to the Revolution and the changes in government policy in Iran at that time ignores the actions of Iran in relation to Milcom and simply is the result of the same type of unsupportable speculation and conjecture which the Award itself decries in the Claimant's own analysis of valuation.¹

I.

4. The Award finds that neither the appointment of Mr. Tahanha as temporary manager of Milcom in April of 1979 nor the subsequent refusal of the Ministry of Commerce in September of 1979 to purchase its branch prima facie warrants "the conclusion that Iran had assumed such control over Milcom that a taking had occurred." (Para. 64.) In reaching this conclusion, the Award emphasizes that the appointment was temporary in nature, as evidenced by the Ministry of Commerce's and Mr. Tahanha's requests for Motorola to appoint a new management team and the negotiations between the Parties over the possible sale of the branch to the Ministry. Rather than finding the 15

¹I note that the Award, strictly speaking, discusses valuation only as of September, and not as of April, but the facts did not materially change over the intervening period of 4-5 months.

September 1979 telex from Mr. Tahanha to Motorola to be proof of an intent on the part of the Respondents to make his appointment permanent, the Award finds that it simply evidenced an intent on the part of the Ministry to "ratify" the earlier "temporary" appointment of Mr. Tahanha by the Revolutionary prosecutor.

5. In this vein the Award finds no evidence to suggest that Motorola "took any action to have new management of its choice installed." (Para. 61.) While it notes Motorola's statement in its sale proposal that it was unable to install a new management team "[d]ue to the current situation existing in Iran," the Award supposes that this was a reference either to force majeure conditions, which have not been proven to have existed at that time, or to Motorola's lack of suitable personnel for the job, a reference to Milcom's Israeli connection. In sum, the Award concludes that the Respondents' invitations for Motorola to appoint a new management team, the ability of Motorola at least to offer its branch for sale to the Ministry and Motorola's failure to act to install new management "imply that both parties assumed that Motorola was still the owner of Milcom, that it had the right to appoint its own manager and to dispose of it by selling it to IEI." (Para. 64.)

6. The Brothers Grimm could not have constructed a purer fairy tale out of plain facts than does the instant Award in regard to the expropriation claim. What the Award appears to suggest is that even when a company such as Motorola (1) has its local branch management removed and jailed by Iran, (2) suffers access to its Iranian bank account to be given to a government appointed manager who by statute is deemed the "legal successor" to the displaced manager, and (3) for years loses all access to the decision making process for the branch it is not deprived of the benefit of its property because of several gratuitous statements made by the Respondents about the future management of the branch and

Motorola's attempt to settle and salvage some value for its property by offering it for sale. Indeed, rather than being the victim of this interference, Motorola is cast as the catalyst of its own problems in failing to appoint a new management team for the branch, something the Award apparently believes could have been done. Such an analysis is wholly unreasonable.

7. To sort through the events in this Case and their relevance to the issue of an expropriatory taking, it is best to start with an understanding of what constitutes such a taking. As eloquently defined long ago by Chamber Two, a taking occurs "through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected." Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, Award No. 141-7-2 at 10-11 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 225. While the assumption of control through the appointment of a provisional manager does not automatically imply a taking, "such conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral." Id. at 11, reprinted in 6 Iran-U.S. C.T.R. at 225.

8. It is with this understanding that the Tribunal previously has deemed the appointment of a provisional manager to be an "important factor" and a "highly significant indication" in finding whether such a taking has occurred. Sedco, Inc. and National Iranian Oil Company, Award No. ITL 55-129-3 at 40-41 (28 October 1985), reprinted in 9 Iran-U.S. C.T.R. 248, 277-78; see Starrett Housing Corporation and Islamic Republic of Iran, Award No. ITL 32-24-1 at 52 (21 December 1983), reprinted in 4 Iran-U.S. C.T.R. 122, 154. Indeed, in reality, absent one unfortunate Award in this Chamber, see Dissenting Opinion of Judge

Brower in Eastman Kodak Company and Islamic Republic of Iran, Award No. 329-227/12834-3 (11 November 1987), the Tribunal invariably has found an expropriatory taking to have occurred when Iran has appointed a provisional manager and displaced the claimant's own management team. E.g., Thomas Earl Payne and Islamic Republic of Iran, Award No. 245-335-2 (8 August 1986), reprinted in 12 Iran-U.S. C.T.R. 3; Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2 (18 March 1986), reprinted in 10 Iran-U.S. C.T.R. 157; TAMS-AFFA, supra; Sedco, Inc., supra; Starrett Housing Corporation, supra.

9. This nearly unbroken line of past awards has been compelled by the character of authority under which such appointments, and the appointment of Mr. Tahanha in this Case, were made. Such appointments were made by virtue of "An Act Concerning the Appointment of a Temporary Director or Directors for the Custody of Production and Industrial and Commercial and Agricultural and Service Units Whether in the Public or the Private Sector." This law, enacted pursuant to a government decree in April 1979, provided that once a government appointed manager was installed "[t]he competency of the former directors or persons in charge to manage the affairs of the said unit shall be terminated," and the new manager "shall remain in [his] post[] and the shareholders shall have no right whatever to elect directors in their place" until Iran so permitted. The law further provided that the government representative would be "in every respect the legal successor[]" of the former managers. Consequently, once such a drastic and far-reaching step was taken by Iran, it certainly should not, and consistently has not, taken much further Iranian involvement for the Tribunal to determine that a claimant has been deprived of his fundamental rights of ownership in its property. In my view, a contrary finding would require Iran to have exhibited at the very least a clear and convincing intent in both

words and actions to return control of the entity to the claimant.

10. Here Iran evidenced no such intent. From the date of Mr. Tahanha's appointment Motorola was effectively excluded from the management of its branch in every way. During the months subsequent to his appointment Mr. Tahanha never once requested Motorola to participate in the management of the branch, only requesting it, as attested to by William D. Connor, the Assistant General Manager of Motorola's Information Systems Group, and verified in Mr. Tahanha's telex to Motorola on 6 May 1979, to send money and spare parts to the branch in order to keep it operational. Motorola rightfully refused those requests, informing Mr. Tahanha that it "could do nothing for Milcom unless and until the company was returned to Motorola and our Manager reinstated."

11. Iran's failure to heed Motorola's demands for the return of its management then caused Motorola to forward to IEI an offer for the sale of its branch. The language of the proposal's introduction, however, reflects the true nature of this offer. That introduction clearly states that, due to the appointment of Mr. Tahanha, Motorola was "unable . . . to accept any responsibility for the actions being taken by Milcom during the period of external management of its activities" and that it had "no authority to do so regardless of our desire to find a solution to the needs of our customers and our employees." Motorola thus found itself in "a dilemma in which, first, we cannot accept responsibilities for the company's operation today because we have no legal right to do so, and second, we are unable to provide external management support." In short, it sought a settlement.

12. The reality of the situation was made even clearer by the 15 September 1979 telex from Mr. Tahanha to Motorola

informing it that the Ministry of Commerce had changed his initial appointment as "temporary supervisor" to "general manager" of Milcom since Iran had then "taken full charge" of the business of the branch. Not surprisingly, four days later the Ministry by telex rejected Motorola's offer for the sale of its branch for various reasons, including the fact that Mr. Tahanha already had been appointed to operate Milcom.

13. In my view, at this point Iran had interfered with the operation of Milcom to such an extent that Motorola was deprived of its fundamental rights of ownership to the branch and had no reasonable expectation that such rights would be returned to it in the future. Following the precedent this Chamber set in Sedco, Inc. and National Iranian Oil Company, Award No. ITL 55-129-3 (28 October 1985), reprinted in 9 Iran-U.S. C.T.R 248, the Award then should have regarded the date of the taking as 25 April 1979, the date of Iran's first definitive interference with the rights of the Claimant.²

14. The Award's reliance on the "temporary" nature of Mr. Tahanha's appointment has no basis in the record and grossly misconstrues the actions of Iran. Contrary to the assertion in the Award, no evidence suggests that Mr. Tahanha ever

²Sedco established that "[w]hen . . . the seizure of control ripens into an outright taking of title, the date of appointment presumptively should be regarded as the date of taking." Sedco, Inc. and National Iranian Oil Company, Award No. ITL 55-129-3 at 41 (28 October 1985), reprinted in 9 Iran-U.S. C.T.R. 248, 278; accord Concurring Opinion of Judge Brower, Amoco International Finance Corp. and Islamic Republic of Iran, Award No. 310-56-3 at 2-3 (14 July 1987). Sedco further concluded that "[w]hen . . . it also is found that on the date of the government appointment of 'temporary' managers there is no reasonable prospect of return of control, a taking should conclusively be found to have occurred as of that date." Sedco, supra, at 42, reprinted in 9 Iran-U.S. C.T.R. at 278-79.

encouraged or requested Motorola to appoint a new management team for Milcom. The only evidence of any requests made by Mr. Tahanha are those for Motorola to send money and spare parts and a request in a telex of 28 May 1979 for Motorola to send an authorized representative to Iran in order to "understand the situation which prevails." These requests were refused by Motorola for the very reason that its management team was not in charge of its Iranian operations and Iran would not relinquish its control of Milcom. In any event they form no basis to suggest that Mr. Tahanha was offering to step down from his position or even to give Motorola a voice in the management of Milcom.

15. While the telex from the Ministry of Commerce to Motorola on 19 September 1979 rejecting the sale offer includes a suggestion for Motorola to appoint a new general manager "either from IEI [an Iranian state entity] or from other parts of Motorola branches" and further includes an invitation for "face to face discussion" between the parties in Iran, to interpret this "offer" as a legitimate request for Motorola to appoint a new manager or to retake control of Milcom would be to rewrite completely what the evidence in the record has established. Not one act on the part of the Ministry throughout the period of Iran's interference with Milcom suggests that it was willing to allow Motorola to regain management control of its branch. The statute under which Mr. Tahanha was appointed expressly provided that the government appointed manager was to remain in control "until such time as the government Ministry . . . has not cancelled the commission." For Motorola to have appointed a new general manager therefore the Ministry would have had to have acted affirmatively in cancelling Mr. Tahanha's appointment, an act the Ministry did not even suggest. Rather, as evidenced by Mr. Tahanha's telex of 15 September 1979, just days prior to this invitation the Ministry altered his status from "temporary supervisor" to "general manager" because by then Iran had "taken full

charge" of the business. The nature of this act was made clear by the Ministry's subsequent termination of communication with Motorola regarding Milcom's business in Iran.

16. The Award's interpretation of the 15 September 1979 telex from Mr. Tahanha as merely reflecting ratification of his earlier "temporary" appointment rather than making his appointment permanent ignores the language of the telex itself. The telex clearly states that the Revolutionary Council in April 1978 appointed Mr. Tahanha as "temporary supervisor" of Milcom but that "now Government has taken full charge of these matters and so directed Ministry of Commerce to nominate a qualified person to supervise Milcom." (Emphasis added). It then states that the Ministry thus appointed him "as general manager of Milcom." A mere reading of this language leads one to the inevitable conclusion that as of the date of the Ministry's appointment Mr. Tahanha's status with Milcom had changed and become more permanent. No language in this telex suggests that it was a mere "ratification" of the former "temporary" appointment. Indeed, under the statute governing Mr. Tahanha's initial appointment no such subsequent ratification was necessary for his continued presence.

17. Finally, the Award's assertion that Motorola took no action to have a new general manager appointed is unfounded. As the Award concedes, throughout the summer of 1979 Motorola requested Iran to furnish it information on the status of Mr. Dowlatshahi, its former general manager.³ It

³The Award finds some significance in the fact that the record does not indicate "that Mr. Dowlatshahi's imprisonment was related to the fact that he acted as Milcom's General Manager." (Para. 59.) It is clear, however, from the record that Milcom was never informed, though it inquired on various occasions, of the charges
(Footnote Continued)

further is amply evidenced that Motorola continually refused to involve itself with the branch in any way until its general manager was returned to his position and Iran relinquished control of the branch.

18. I thus believe that a taking of the branch occurred on 25 April 1979.⁴

II.

19. Equally flawed is the Award's conclusion that Milcom had no going concern value at the time of the alleged taking. The Award bases its conclusion on two grounds: first, that any increase in demand due to the Revolution for service and repair of Motorola products previously sold in Iran would be short-lived; and second, that Milcom, given that its customers were almost entirely government agencies, would have lost all of its former customers because of the Revolution and changes in government policy. The Award thus concludes that Motorola would not "have been able to maintain any significant part of the market in two-way radio telecommunications it allegedly held before the Revolution" and that the Government would not have "made use of Milcom's otherwise established and well-developed facilities for

(Footnote Continued)

levied against Mr. Dowlatshahi. Indeed, in the sales offer presented to IEI Motorola made reference to this lack of knowledge. The Respondents, however, deemed it unnecessary ever to inform Motorola of the reasons for Mr. Dowlatshahi's imprisonment before or thereafter and to this day have deemed it unnecessary to inform the Tribunal of these charges. Any inference drawn from this lack of information in the record thus must be against the Respondents since they are the only Parties with knowledge of the charges.

⁴At a minimum the Tribunal should have found, following Eastman Kodak Company and Islamic Republic of Iran, Award No. 329-227/12834-3) at para. 60 (11 November 1987), that the "significant event" of Mr. Tahanha's appointment as a temporary manager constituted a potentially compensable "interference with [Claimant's] property rights."

servicing, repairing and replacing two-way radio and similar telecommunications products for any length of time." (Para. 78).

20. The evidence in the record establishes that a significant business role existed for Milcom in April 1979, with a definite probability for expansion and increased earnings. Chief among such indications is the very fact that Iran chose to assert control over Milcom. Although the business was shut down in March 1979 by Revolutionary Guards, the Government itself decided to reopen it. The telex appointing the interim manager noted that the "continuance of the operations of [Milcom was] required for the Government Agencies." The critical nature of Milcom's work also was highlighted in the telex: Milcom "performs repair and service work of all telecommunication equipment of Government Agencies." Continued provision of those vital services was thus deemed essential, and business opportunities for Milcom remained assured.

21. Moreover, at the Hearing, Mr. Connor testified that Motorola contemporaneously anticipated an upsurge in business immediately after the success of the Revolution. It was known at the time that much of the radio and telecommunications equipment previously sold or installed by Motorola and Milcom would need repair or servicing as a result of use, or abuse, during the revolutionary period. Motorola previously held about 60% of the market in two-way radio and similar telecommunications products. Given Iran's geographical conditions and the continued exigencies of maintaining public order and governmental communication after the Revolution, it was assured that there would be continued, or even heightened, demand for Milcom's expertise. Immediately after the success of the Revolution, as early as 26 February 1978, Milcom telexed Motorola that it was preparing to begin these activities: "Company personnel and property in good shape. . . . Need to re-shape

company policy and structure and channel of business soonest." Milcom also noted that it was already engaged in "some service activities" although "other activity on sales and projects" had not yet resumed.

22. This demand is corroborated by other evidence. At the Hearing Respondents themselves offered testimony that Iranian purchasers have continued to seek Motorola parts and equipment, although this has been done through independent foreign suppliers since Motorola ceased doing business with Milcom after the uncompensated expropriation.

23. After the management takeover, the contemporaneous exchanges between the Parties confirmed the ongoing nature of Milcom's business prospects. Claimant stressed to Respondents that "Milcom's products and technology can be useful assets to your economy" and that there was a significant base of customers to be served. Respondents, on their part, indicated, at least initially, a desire to secure Motorola's continued cooperation so that the business would be as profitable as possible.

24. The Award's conclusion that Milcom would have lost all of its customers due to the Revolution and changes in government policy is completely unsubstantiated. The evidence in the record gives no contemporaneous indication that the governmental policy of purchasing products had changed in April or September of 1979, or that it was likely to change in the future. Indeed, the Award's conclusion is undermined by the very fact that Iran chose to assert control over Milcom to assure it would be available to do business with the Government. It is not likely that the Government would act quickly to assume permanent control over a moribund operation, or one which was not integral to the existing economy. The Respondents tendered no evidence to rebut the Claimant's assertion as to the continued profitability of Milcom over the days and weeks immediately

after the expropriation, although they were certainly able to do so, having possession of the records of the company for that period.

25. The Award's further use of Iran's rejection of the sales proposal in September of 1979 as proof that government policy had changed also is somewhat misleading. At the same time the Award theorizes that Iran's policy toward Motorola had changed, it inferentially also finds that at the time of the refusal Iran took control of Milcom by appointing its own general manager in order to keep the branch operational. In my view, as previously expressed, this interference constituted an expropriatory taking of the branch as of 25 April 1979. Consequently, there was no need for Iran to accept a purchase offer for the company.

26. In sum, I believe sufficient unrebutted evidence exists in the record to find that Milcom had a going concern value and prospects for future business in Iran at the time of the taking. Unfortunately, the Award foregoes analysis of the evidence in the record and simply takes judicial notice of an unsubstantiated allegation.

III.

27. Once determining that Milcom had a going concern value at the time of the taking, and also assuming that the taking occurred on 25 April 1979, the issue becomes one of valuing the branch as a going concern. While I concur in the Award's conclusion that the Claimant's proposed valuation, based on future income projections, is too conjectural, rejection of Motorola's analysis does not mean that the ultimate valuation asserted by the Claimant is not reasonable or fully supportable under proper economic analysis based on evidence in the record. On the contrary, even if the most conservative possible valuation data are

used, grounded only upon actual historical earnings, I believe that a comparable valuation figure results.

28. In arriving at a proper valuation, one starts with the established proposition that, given Milcom's health at the time of the taking, the primary determinant of its value is the level of income it could reasonably anticipate at the time of the expropriation. In ascertaining the level of future income, past income patterns can -- at least in the circumstances of this Case where there is no adequately supported evidence as to future projections -- be a suitable and reliable basis upon which to ground the valuation. Once the projected income is identified, those income streams must be capitalized by a factor to determine the fair market value.⁵

⁵The Award finds it "difficult to conclude that Milcom had a positive market value in September of 1979" (Para. 69) on the grounds that Motorola's sales proposal listed a tax liability, alleged no longer to be outstanding, of \$272,000 and Mr. Tahanha previously had requested a \$200,000 cash infusion to keep the branch operational. In addition, the Award points out that the Ministry of Commerce rejected the sale proposal, specifically mentioning that Milcom's liabilities exceeded its assets. These facts, however, form no basis to question the existence of a positive market value for Milcom at the time.

Initially, nothing in the record disputes Motorola's assertion that the tax liability had been resolved (see, infra, n. 6). The telex in which Mr. Tahanha requests the cash lists several areas where the money allegedly was needed, only one of which was taxes. Thus, the inferential relationship between a \$200,000 request and an alleged \$272,000 tax liability, which the Award apparently creates, is mere speculation.

In addition, the mere fact that the Ministry of Commerce in conclusory fashion stated in its rejection of the sale proposal that Milcom's liabilities exceeded its assets in no way disputes the specific figures given by Motorola and its historical data. The Ministry listed a variety of reasons for rejecting this proposal. Indeed, the Award finds that its rejection signaled a shift in policy of

(Footnote Continued)

29. Excluding the two years in which Milcom's business was interrupted due to extraordinary factors of a non-recurring nature,⁶ between 1974 and 1977 Milcom earned a pre-tax average annual profit of \$102,000. Although post-tax income was lower (\$35,000), this reflected inclusion of reserves (in the amount of \$230,816)⁷ made by Milcom pending resolution of an ongoing dispute over Milcom's income tax liability. Since the date of the last financial statements the tax dispute appears to have been resolved in favor of Milcom.⁸ Including this amount in the income over the four year period results in average annual income of \$92,704.

30. The second principal step is the determination of a capitalization factor. The Claimant has submitted expert evidence that such a valuation can be done properly through

(Footnote Continued)

the Government, thus disputing the theory that Milcom's financial status was a factor in the Ministry's decision.

⁶Milcom suffered a loss in its initial months of operation in 1973; such financial results generally are viewed as part of the cost of establishing a new business and are not predictive of future income streams. Similarly, although ordinary business operations during the first half of 1978 were sufficiently favorable for Motorola to predict, as of July 1978, substantial year-end post-tax profits, subsequent operations in 1978 increasingly were hampered by the violence and unrest of the Revolution, resulting in income substantially below projected levels.

⁷As is noted at Exhibit D to the Statement of Claim, total reserves for taxation at 31 December 1977 were 16,157,178 rials, or \$230,816 (converted at the prevailing rate -- accepted on the financial statements -- of 70 rials/dollar).

⁸At the Hearing, Claimant's counsel noted that no counterclaim for the potential tax liability represented by these reserves had been asserted by Respondents at any stage of the proceedings. Respondents did not argue that the tax dispute had been resolved in favor of the Government, or that it was still outstanding. Nor did they submit financial evidence of payment, or allege that payment had been made. The only conclusion warranted is that the liability has been resolved in favor of Milcom.

a method often adopted by professional valuation experts: the selection of an appropriate price-earnings ratio, i.e., the multiple of past, or projected, earnings at which businesses, or interests therein, are sold between willing buyers and sellers. Claimant has submitted expert evidence that the appropriate capitalization factor would be 7, which represents the price-earnings ratio at which the stock of Milcom hypothetically would have been traded.

31. This figure appears to be reasonable and is supported by the record. It is well within the price earnings ratios of stocks publicly traded on the Tehran stock market as compared with these figures up to the end of 1978. Moreover, it is also comparable with price-earnings ratios of United States companies engaged in similar business during the same period. Consequently, I would have determined that a price-earnings figure of 7 is justified. Applying it to the annual past income results in a preliminary value of \$648,928.

32. This figure, does not, however, fully reflect the total value of Milcom as of April 1979. For instance, expert testimony establishes that a significant premium -- often as much as 40% or 50% of the trading price of a minority interest -- is often paid for a controlling interest in an ongoing enterprise. In this case, of course, 100% of the business was transferred. Moreover, while the Revolution may have disrupted business during the latter part of 1978, it is probable that the need for continued parts and servicing, as well as the need for maintenance of public order, would have increased demand for Milcom's products. Applying the most conservative factor to this result, a factor of 25% should be added on to the initial valuation.

This results in a final valuation of \$811,161, as the going concern value of Milcom as of 25 April 1979.⁹

33. This figure, derived from the conservative application of Milcom's proven earnings to well-known economic valuation models, represents the fair, full value of Milcom at the time it was expropriated. It is not, of course, evidence that an actual buyer tendered such an offer at that date. As a matter of law, however, it must be presumed that a willing buyer, legally authorized to complete such a transaction, would have been present with sufficient capital to consummate a sale. That there may have been no potential buyers -- a fact not demonstrated on the record -- evidences only the clear intent of the Government to exclude all others from ownership, not lower value. To say that no foreign buyers were investing in Iran at the time, or that any company with dealings with foreign suppliers had no future value, is merely to admit facts engaging Iran's state responsibility for a seizure of foreign property. The fact remains that effective ownership of Milcom was transferred from Motorola to Iran as of 25 April 1979. This exchange, by itself, satisfactorily demonstrates that a "buyer" existed; actual determination of value is accomplished by the application of valuation principles intended to simulate the action of willing buyers and sellers. Iran is liable to pay the real value of that which it obtained through the seizure, unreduced by the events associated with the expropriation, whether those events consist of broad changes of governmental policies prompting the nationalization of a business or industry, or specific actions taken to seize an

⁹This figure is roughly comparable to the initial valuation figure of \$748,133 assigned by Claimant in its Statement of Claim, which figure was not based on the going concern value but on an analysis of its outstanding receivables.

individual enterprise. I thus would have concluded that the Claimant is entitled for the expropriation of its subsidiary to the amount of \$811,161.¹⁰

Dated, The Hague

28 June 1988



Charles N. Brower

¹⁰At a minimum the Tribunal should have awarded the book value of the expropriated property. See n. 5, supra. Even the complete denial of any claim based on expropriation or any other measure affecting property should have caused the Tribunal to consider awarding the \$140,811.25 indisputably owed by Iran Air to Milcom (as an indirect claim under Article VII(2) of the Claims Settlement Declaration). (See Award para. 14.)