

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON, D.C. 20579

IN THE MATTER OF THE CLAIM OF

AMERICAN INTERNATIONAL GROUP, INC.

Claim No. V-0330

Decision No. V-0404

Oral Hearing held on November 19, 1985

Counsel for Claimant:

Gibson, Dunn & Crutcher

FINAL DECISION

This claim was filed by AMERICAN INTERNATIONAL GROUP, INC. in the amount of \$3,290,084.80 based upon losses suffered by American International Underwriters Vietnam Company, Inc. (AIU, Vietnam). By Proposed Decision issued June 26, 1985, the Commission made an award to claimant in the amount of \$183,348. Objection was filed and an oral hearing requested. This claim, along with Claim No. V-0331, filed for losses of New Hampshire Insurance Company, were briefed and argued together. Oral argument was held on this claim on November 19, 1985, Lynn Williams, Esquire, appearing on behalf of claimants. Oral testimony was presented by Mr. R. Kendall Nottingham, an employee of AMERICAN INTERNATIONAL GROUP, INC.; Mr. Richard Stern; and Mr. Norman D. Freethy.

Prior to the oral hearing, written briefs and certain documentary evidence were submitted, and subsequent to oral hearing, additional written documentation was submitted, along with an additional report by Robertson & Co., and a brief by the assistant General Counsel of Overseas Private Investment Corporation. The Commission has fully considered the entire record presented.

The basis of claimant's objection is that the Commission limited compensation to "net book value" and failed to recognize and award "going concern value", which claimant equates with the discounted value of future profits.¹

Before proceeding with the merits of claimant's objection, the Commission would like to clarify any misleading implications drawn from the wording of its Proposed Decision. Counsel for claimant points out that a reading of the Proposed Decision might lead to the conclusion that the Commission accepts as a standard for compensation for the expropriation of property, a standard of only partial compensation rather than full and adequate compensation. To clarify any doubt which could arise in interpreting the Commission's Proposed Decision, the Commission states that it adheres to the standard of adequate compensation which it equates with full compensation. In an appropriate factual situation, such compensation would be predicated upon the "going concern value" or fair market value of an expropriated enterprise.

A determination of what constitutes adequate compensation for a given loss must be determined by the Commission based upon the record presented to it. In this regard, pursuant to Commission regulation 531.6, claimant has the burden of proof of all issues involved in the determination of a claim, including the amount of damages. The issue before the Commission in this claim, therefore, is to determine under all the facts and circumstances as shown by an examination of the record, whether

¹ The award in the Proposed Decision was not, in fact, predicated upon net book value as no balance sheets had been presented to the Commission. Records subsequently produced by claimant show the actual net worth of AIU, Vietnam, to have been \$10,835 as of the date of the fall of South Vietnam. Net worth for the preceeding years were: 1970-\$25,622; 1971-\$20,248; 1972-\$43,260; 1973-\$59,836; 1974-\$53,532. Distribution of earned surplus was made to stockholders during 1972, 1973, and 1974, in the amounts of \$6,881, \$21,818, \$25,109, respectively.

the Commission's proposed award constitutes adequate compensation, and if not, what amount would constitute adequate compensation.

AIU, Vietnam, was incorporated in 1948 under the laws of then, French Indo-China, and apparently had continuously operated as a general insurance agency until the fall of South Vietnam at the end of April 1975. In the years immediately before the fall of South Vietnam, claimant principally, although not exclusively, wrote insurance for New Hampshire Insurance Company and operated a claims office for that insurance company. As of January 1975, claimant employed some 63 Vietnamese employees of whom 17 appear to have exercised some form of management or supervisory function, 7 whom were accountants and 4 appear to have been claim adjustors. The rest of the staff appears to have provided clerical and general services support.

Immediately prior to the fall of Vietnam, claimant evacuated its two American managers and an undisclosed number of Vietnamese employees. Exhibit B to the original submission of these claims states as a reason for the failure to submit original documentation: "The hurried departure of AIU, Vietnam, personnel from the very real physical danger in Saigon, ...". While it would appear from this statement that all employees had been evacuated, other evidence in reference to two employees who had held assistant management positions, is to the effect that although they were offered evacuation, they declined the opportunity for personal reasons. The affidavits quoted in their entirety hereinafter indicate that some employees of AIU, Vietnam, remained and subsequently were employed by the Government of Vietnam. Claimant has not submitted more precise information as to who was evacuated from Vietnam. In light of claimant's failure to submit evidence to the contrary, it seems reasonable to the Commission to conclude that those personnel evacuated would have been the longer termed and more valuable employees.

The record indicates that claimants operated in leased premises and, except for approximately \$12,000 worth of leasehold improvements, furniture and equipment, together with two automobiles, owned no other physical assets used in the insurance business. According to an affidavit subsequently submitted by claimant, the office equipment and supplies were taken away by communist authorities and sent to Hanoi.

With the fall of South Vietnam, AIU, Vietnam, ceased operation as an insurance agency writing insurance on New Hampshire Insurance Company. Claimant states they are informed that on May 2, 1975, a North Vietnamese Finance Ministry representative ordered the combination of the largest insurance companies into one state owned South Vietnamese insurance company, however, no evidence has been submitted in support of this assertion. On October 27, 1975, the Ministry of Economics and Finance of the Provisional Revolutionary Government issued a proclamation ordering all private insurance companies to stop all operations in South Vietnam. It appears that the Ministry of Finance of the Government of Vietnam conducted all insurance business throughout Vietnam after the fall of South Vietnam.

A government is entitled under its police powers without violating international law to change its economic policy and have certain industries conducted by the government. In reference to the banking industry in Cuba the Court of Appeals for the Second Circuit held that had Cuba simply exercised its police power to order private banks to cease their banking business, there would be no justification for awarding the going concern value of its branches. Banco Nacional De Cuba v. Chase Manhattan Bank 658 F. 2nd 875, 1981.²

² Although claimant disagrees with a further holding of the court of appeals which denied a claim for future profits on the ground that it was speculative, the same conclusion on this issue was reached by the District Court which awarded future profits and with which decision, presumably, claimant agrees.

In an amicus brief submitted by the Deputy General Counsel of the Overseas Private Investment Corporation, the view is expressed that:

"(W)here a private foreign investor loses his business as a result of government regulation which generally prohibits private persons from engaging in such a business, compensation equivalent to going concern value is not due, absent other factors. Some compensation will be due if specific assets are taken in connection with such regulation."

Claimant, however, asserts that where an enterprise is taken over by a foreign government as a going concern, the owner is entitled to an award for going concern value, despite the fact that the government may subsequently ban all private parties from conducting the particular business in which the enterprise was engaged. This proposition was set forth in the brief submitted by the Deputy General Counsel of Overseas Private Investment Corporation as follows:

"On the other hand, where a government prohibits private persons from engaging in a particular type of business and takes such businesses from private persons and continues to operate them in substantially the same form, compensation at going concern value is required under international law. In that case, the government has done more than exercise its regulatory powers. It has also directly gained the benefit of the going concern value of the businesses by taking them and operating them."

As a general proposition, the Commission agrees with this statement of law. Its application, however, depends upon a factual determination of whether a business was taken over as a going concern.

The sole evidence submitted in support of claimant's contention that the government in Vietnam took over claimant's business as a going concern consists of two affidavits dated October 19, 1985 and November 1, 1985 from a former employee. Although one of the affidavits contains the name of the former employee, claimant has requested that his identity remain anonymous. The affidavits state as follows:

"I do depose and swear the following:

1. That my name is (), born April 25, 1923 currently residing and working in Agana, Guam.
2. That I am a former employee of American International Underwriters/New Hampshire Insurance Company (AIU/NHIC), having been employed there from February, 1955 to April 1975.
3. That around the third or fourth week of April, 1975, I informed Mr. Pat O'Rourke that I was unable to leave Saigon with other employees of AIU/NHIC because of concern for my sons who were serving in the South Vietnamese armed forces on the front line. I planned to leave Saigon later, if possible, on my own.
4. That the communists poured into Saigon from April 30, 1975.
5. That after April 30, 1975, the remaining AIU/NHIC employees came to the AIU/NHIC Office daily to protect the Office and wait for developments.
6. That about after one month, the communist cadres and security agents came and seized our Office. They controlled our property and convened all AIU/NHIC employees for a meeting, They announced that they will continue to operate the insurance office under their nationalized business organization. If anyone wanted to not cooperate with them, these elements were told they must leave Saigon and go to the so-called "New Economic Zone". These individuals would not receive "Rice Ration". Fearing the above, all of us were compelled to work for them.
7. That the communist used our offices for both production and claims operations. I worked in the Claims Department.
8. That all usable office equipment and supplies in our office were taken away by the communist for sending to Hanoi.
9. That I worked with them until July, 1977. I resigned for "health reasons" and started looking for ways to escape and eventually go to the United States.
10. That until May, 1980, before I was able to escape from Saigon, I observed our Office still open for business conducting insurance activity under the control of the communists.

I understand the statement above. It is true and correct to the best of my knowledge, memory and belief.

() October 19, 1985

I do further depose and swear the following subsequent to my affidavit of October 19th, 1985:

1. That the communist seized the offices of American International Underwriters (AIU) and the offices of New Hampshire Insurance Company (NHIC) and continued to operate an insurance business using our resources. This activity was under the management and supervision of communist personnel coming from the Ministry of Finance in Hanoi. All lines of insurance were engaged in such as Marine, Fire, Automobile, Casualty, Workers Comp and etc. The various lines were divided into "cells" such as the Automobile Production Cell, Workers Compensation Claims Cell, Marine underwriting Cell, etc.

2. A number of former AIU and NHIC employees were appointed as Chiefs of each cell to teach the communists about the insurance profession.

3. The communists used the AIU and NHIC insurance policy forms for their basic activities. Some conditions and terms in the policy forms were modified. The name "Vietnamese Insurance Company - Ho Chi Minh City Branch" was superimposed over AIU and NHIC. Forms were used in two languages:

(a) Vietnamese language policy for local customers.

(b) An English language version for foreign customers.

4. Expiring policies were not renewed in AIU/NHIC as before. However, our files and claim experience records were used by the communists to write insurance coverages in their Company, the Vietnamese Insurance Company - Ho Chi Minh City Branch which was newly established in what had been South Vietnam.

5. The customers for the Vietnamese Insurance Company - Ho Chi Minh City Branch were the newly nationalized organizations and a number of companies from certain socialist and neutral countries.

The foregoing comments are true and correct to the best of my knowledge, memory and belief.

() November 1, 1985"

The issue before the Commission is whether the evidence supports a determination that AIU, Vietnam, as an operating unit, was taken over as a going concern so that it is entitled to an award greater than that previously made by the Commission. It appears that prior to the fall of South Vietnam, AIU, Vietnam, had been operating as a self-contained unit selling insurance through its own employees and sub-agents for New Hampshire Insurance Company. It had been operating a claims office on behalf of New Hampshire Insurance Company. It received income from commissions on policies it wrote and maintained its own

accounting for income and expenses and periodically distributed earned surplus to its stockholders. Although its principal function had been to write insurance for New Hampshire Insurance Company, and although New Hampshire Insurance Company no longer did business in Vietnam after the fall of South Vietnam, an insurance agency could continue writing insurance for other underwriters, including even the Government of Vietnam. Before the fall of South Vietnam the agency had certain intangible assets arising from the cost of training its key personnel and in the competitive economy in which it had functioned, its portfolio would be of value due to anticipated renewals. There is no evidence presented as to the value of the former intangible asset,³ and the latter would have markedly decreased value in the non-competitive economy existing after the Government of Vietnam took over the underwriting of insurance. The Government of Vietnam presumably obtained the value of various procedures and forms which had been established to carry out both the sales and claims adjusting functions.

The only evidence in support of claimant's contention that AIU, Vietnam, was taken over as a going concern is that contained in the affidavits above referred to. From these, it appears that apparently nothing happened for some period of time after the fall of South Vietnam, but at some time after the end of May 1975, those former employees of AIU, Vietnam, who remained in Vietnam were employed by the government in the conduct of its insurance business.

Claimant in its argument has not specifically addressed the question of what constitutes the takeover of a going concern as that concept would apply to the facts of this claim. Due to the exodus of what appear to have been key personnel, particularly in

³ In Claim of Pan-American Life Insurance Company, Claim No. CU-3651, Decision No. CU-4212, claimant established its actual investment in training its agents and sought the amortized value of such costs which was granted by the Commission.

light of the importance of the training and experience of the people who operated the agency, the Government of Vietnam did not receive the benefit of the full resources of AIU, Vietnam, as they existed in Vietnam before the fall of South Vietnam nor the resources which backed that agency which were located outside of Vietnam. Despite this, the Commission concludes that the Government of Vietnam did takeover that which could function as an operating unit and received a value in excess of the net book value of AIU, Vietnam.

Subsequent to the oral hearing on this claim, claimant submitted various records pertaining to the operation of AIU, Vietnam, from 1970 through the end of April 1975. The records indicate that the agency produced net income for each of the years in the following rounded amounts: 1970-\$1,100; 1971-\$3,100; 1972-\$32,300; 1973-\$45,000; 1974-\$30,400. During the first four months in 1975, the agency suffered a loss of \$39,000 which, even after adjustment for one time payments to terminating employees, still resulted in a loss in excess of \$11,000 during this period.⁴

The records, therefore, reveal greatly expanded net income for the period of 1972 through 1974, although such income dropped by one-third from 1973 to 1974.

Testimony presented at the oral hearing was to the effect that high profits in part had been due to the writing of Marine insurance which allowed a high premium for war risk insurance. The records submitted demonstrate that the percentage of premiums

⁴ Pre-tax income for 1972, 1973 and 1974 are shown as \$55,000, \$77,000, and \$48,700. Although the assertion is made in a report filed by an actuary that he was informed that certain credits may have been received on United States income taxes for taxes paid in Vietnam, no evidence nor information on this point has been submitted to the Commission, and as AIU, Vietnam, was indirectly owned by AMERICAN INTERNATIONAL GROUP, INC. through a series of trusts and foreign corporations, the Commission is in no position to determine what, if any, benefit was indirectly received by such other corporations. Earned surplus of AIU, Vietnam, upon which dividends were paid was based upon after tax income.

from Marine insurance, as compared to total premiums showed a similar sharp increase in 1972 and 1973 but again declined in 1974 and 1975.

As previously set forth, earned surplus distributed to shareholders totalled \$53,808 for the five year period from 1970 through 1974.

Claimant has submitted an actuary's report providing the actuary's opinion as to the discounted value of future profits of AIU, Vietnam. The Commission finds this of little assistance in determining the value of the loss for a number of reasons. The Commission notes that arbitral tribunals have not necessarily equated going concern value with the discounted value of future profits. See Claim of Wells Fargo & Company, American Mexican Claims Commission, Decision No. 22-B, report to the Secretary of State, page 150. The United States-Iran Claims Tribunal in a claim cited by claimant determined the going concern value of an Iranian insurance company, after considering testimony from the same actuary, at but a fraction of the asserted value of future profits even after the actuary had substantially reduced his original estimates at the request of the tribunal to account for business conditions immediately preceding the expropriation of the property.

A review of the records of AIU, Vietnam, draw into question a number of the assumptions made by the actuary in producing his estimate of future profits. The actuary was apparently presented with, and based his findings upon, information only as to the years 1972 through 1974, although the figures for 1970 and 1971 when income was minimal, as well as the figures for 1975 when a net loss was sustained were available.⁵ The actuary estimated

⁵ A supplemental report submitted by the actuary supposedly to consider the effect of the 1975 losses suffered by AIU, Vietnam, discusses only conclusions pertaining to New Hampshire Insurance Company based upon further information concerning the claims experience of New Hampshire Insurance Company, which information has not been supplied to the Commission.

future income by ignoring the history of actual income but assuming that income would be 6.5% of gross premiums, which assumption proves highly questionable from a review of the records.⁶ Although income dropped by one-third from 1973 to 1974, the actuary projected continuing increases in income. Unfortunately, for reasons not clear to the Commission, the records of AIU, Vietnam, the existence of which was at one time denied on the record, were submitted to the Commission only after the oral hearing and only at the request of the Commission. This prevented any opportunity to seek an explanation from the actuary, who testified, as to the apparent inconsistencies between the information contained in the records and the actuary's assumptions.

Finally, the actuary's estimates were predicated upon the continued operation of AIU, Vietnam, as it existed and operated with its previous complement of personnel before the fall of South Vietnam.

Claimant has argued that balance sheets for AIU, Vietnam, have little, if any, relevancy. While this would be true as it might relate to the branch office of New Hampshire Insurance Company, AIU, Vietnam, was a self-contained business which produced income from commissions and had expenses from its operation which determined its income as a operating unit and at any given time had assets and liabilities which determined its net worth. Based upon these figures, distribution of earned surplus was made to the owners of AIU, Vietnam. The Commission, therefore, is of the opinion that the records of income and net worth as it relates to AIU, Vietnam, as an insurance agency are relevant.

⁶ For the period of 1970-1974 net income approximated 3% of premiums.

As previously noted, the actual net worth of AIU, Vietnam, at the time of the fall of South Vietnam was but slightly in excess of \$10,000. This net worth was clearly deflated, however, due to a number of factors present during the final months before the fall of South Vietnam.

The Commission does consider the evidence concerning average net income to be of relevance. The capitalization of such net income would normally be a factor which an investor would take into consideration in fixing a purchase price for such a business. The net income of AIU, Vietnam, even discounting the losses suffered in 1975, averaged approximately \$22,000 in the five year period before the fall of South Vietnam. Income levels demonstrated great fluctuation. The record before the Commission is insufficient to allow a valid determination as to whether net income in 1970 and 1971 were, on a historical basis, abnormally low or whether that income in 1973 was due to temporary factors causing it to be abnormally high.

From the record before it, the Commission has taken into consideration the evidence pertaining to the period of 1970 through 1974, including the average net worth, \$40,000; the average net income, \$22,000; the average earned surplus distributed to stockholders for the five year period, \$10,760; the average distribution during the three years in which earned surplus was distributed, \$17,900. The Commission has considered the discounted value in 1975 of 20 years continued net earnings at the level averaged between 1970 and 1975 as well as the capitalized value of such net earnings.

The Commission concludes based upon the entire record that claimant has suffered a loss in the amount of \$260,000 and is entitled to an award in that amount. The Commission notes that this award approximates the value of the average net worth plus the discounted value of 20 years continued net income; approximates average net income capitalized at 8.5% and constitutes a

figure 25 times the average distribution of earned surplus to stockholders for the five year period and 15 times the average distribution for the three years that profits were, in fact, distributed. The Commission, therefore, considers that this award, based upon the record presented to the Commission by claimant constitutes full and adequate compensation as a going concern as it was taken by the Socialist Republic of Vietnam.

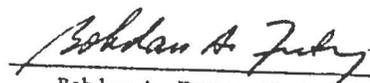
The Commission, therefore, withdraws its previous award and makes the following award as its final determination of this claim.

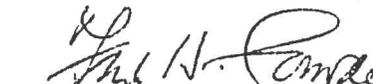
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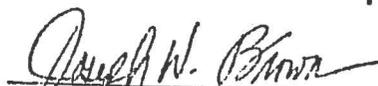
Claimant, AMERICAN INTERNATIONAL GROUP, INC., is therefore entitled to an award in the principal amount of Two Hundred Sixty Thousand Dollars (\$260,000.00), plus interest at the rate of 6% simple interest per annum from May 1, 1975 until the date of settlement.

Dated at Washington, D.C.
and entered as the Final
Decision of the Commission.

JAN 22 1986


Bohdan A. Futey, Chairman


Frank H. Conway, Commissioner


Joseph W. Brown, Commissioner

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON, D.C. 20579

IN THE MATTER OF THE CLAIM OF

AMERICAN INTERNATIONAL GROUP, INC.

Claim No. V-0330

Decision No. V-0404

Counsel for Claimant:

Joann Miles

PROPOSED DECISION

This claim in the amount of \$3,290,084.80 against the Government of the Socialist Republic of Vietnam under Title VII of the International Claims Settlement Act of 1949, as amended by Public Law 96-606 (94 Stat. 3534), is based upon losses suffered by American International Underwriters Vietnam Company, Inc. (AIU, Vietnam). All shares of stock in AIU Vietnam were beneficially held for the benefit of American International Underwriters Overseas, Limited, a corporation originally organized as Leeton Limited under the laws of the Island of Bermuda. This latter company is a wholly owned subsidiary of claimant, which was organized under the laws of the State of Delaware and over 50% of whose stock is held by United States nationals.

Under section 703 of Title VII of the International Claims Settlement Act of 1949, as amended, the Commission is given the following jurisdiction:

"The Commission shall receive and determine in accordance with applicable substantive law, including international law, the validity and amounts of claims by nationals of the United States against Vietnam arising on or after April 29, 1975, for losses incurred as a result of the nationalization, expropriation, or other taking of (or special measures directed against) property which, at the time of such nationalization, expropriation, or other taking, was owned wholly or partially, directly or indirectly, by nationals of the United States to whom no restoration or adequate compensation for such property has been made."

AIU Vietnam was engaged in the business of writing insurance on behalf of New Hampshire Insurance Company, a claimant before the Commission in claim V-0331. Although claimant does not have evidence as to what happened to the assets of AIU Vietnam after the fall of Saigon, the Commission is willing to presume that its assets were taken by the Socialist Republic of Vietnam and lacking further evidence will assume this occurred on May 1, 1975 (See Claim of BETTY MITCHELL, Claim No. V-0358, Decision No. V-0259).

Claimant asserts the loss of the assets of AIU Vietnam and the value of its projected profits as of May 1, 1975.

Claimant states that due to the chaos occasioned with the fall of Vietnam, they were unable to transfer the records of its Vietnamese subsidiary but has submitted reconstructions based upon partial records and claimant asserts that the value of the assets of AIU Vietnam was in the amount of \$204,806.77.

The Commission has reviewed the reconstructed records submitted by claimant. The Commission finds that certain accounts receivable totalling \$19,350.53 involving accounts with New Hampshire Company, AIU Corporation, New York, AIU Chicago, AIU San Francisco and Vietnam Adjusters and Surveyors Company are inter-company accounts which in the Commission's view does not constitute a compensable loss. The Commission further finds that the asserted value of \$3,108.17 for a 1969 Mazda 1500 automobile overstates the value of said vehicle as of 1975. Based upon such evidence as the NADA official Used Car Guide for May 1975, the Commission finds that said vehicle had a value of \$1,000.00 on the date of loss. A number of items including insurance balance receivables find little support in the record, the Commission has taken into consideration the difficulty presented to the claimant due to the chaotic situation of the fall of Saigon and based upon

the entire record, claimant did suffer a compensable loss in the amount of \$183,348.00 and will make an award to claimant in that principal sum.

Claimant asserts further claim for the value of future profits which it asserts would have been accumulated by AIU Vietnam, Inc. For the reasons set forth in the Claim of NEW HAMPSHIRE INSURANCE COMPANY, Claim No. V-0331, Decision No. V-0426 this part of claimant's claim is denied.

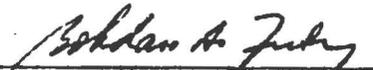
The Commission has concluded that awards granted under Public Law 96-606 for the nationalization or other taking of property, or interests therein, shall include interest at the rate of 6% simple interest per annum from the date of loss to the date of settlement.

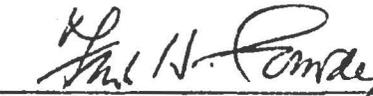
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Claimant, AMERICAN INTERNATIONAL GROUP, INC., is therefore entitled to an award in the principal amount of One Hundred Eighty-Three Thousand Three Hundred Forty-Eight Dollars (\$183,348.00), plus interest at the rate of 6% simple interest per annum from May 1, 1975, to the date of settlement.

Dated at Washington, D.C.
and entered as the Proposed
Decision of the Commission.

JUN 26 1985


Bohdan A. Futey, Chairman


Frank H. Conway, Commissioner


Joseph W. Brown, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, if no objections are filed within 15 days after service or receipt of notice of this Proposed Decision, the decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. (FCSC Reg., 45 C.F.R. 531.5 (e) and (g), as amended.)