

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

IN THE MATTER OF THE CLAIM OF

AMERICAN INTERNATIONAL GROUP, INC.
NEW HAMPSHIRE INSURANCE COMPANY

Claim No. V-0331

Decision No. V-0426

Oral Hearing held on November 19, 1985

Counsel for Claimant:

Gibson, Dunn & Crutcher

FINAL DECISION

This claim was originally filed by AMERICAN INTERNATIONAL GROUP, INC. in the amount of \$3,442,961.35 based upon losses suffered by NEW HAMPSHIRE INSURANCE COMPANY (NHIC). By Proposed Decision issued June 26, 1985, the Commission, after substituting NHIC as the proper claimant, made an award in the amount of \$289,443.21. Objection was filed and an oral hearing was requested. This claim, along with the claim of AIU, Vietnam, V-0330 were briefed and argued together. Oral argument was held 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.

Before proceeding to 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 in this claim 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 may constitute the "going concern value" of an expropriated enterprise.

The statement of a general rule, however, does little to assist in a determination of what constitutes "adequate" compensation in a given claim.

In its Proposed Decision, the Commission made an award based upon a reconstituted list of assets including the value of accounts and securities owned by NHIC which were lost in Vietnam. Originally, certain objections were filed based on certain reductions made by the Commission in the value of these asserted assets, however, these objections have not been pursued by claimant. 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 a discounted value of future profits.

The record before the Commission concerning the operation of the branch office of NHIC is exceedingly limited.¹ For almost 30 years prior to the fall of South Vietnam, NHIC had been licensed as a general insurer in Indo-China, and for some years had written casualty, marine, and fire insurance in South Vietnam. The office in Vietnam constituted a branch office of NHIC. It operated in leased premises and its total physical assets consisted of \$257 worth of furniture. The record does not reveal the number of employees, if any, which staffed the branch office. A list of some 63 personnel employed by AIU, Vietnam, has been submitted and, undoubtedly, some of these employees supported the branch office operation. As far as the record reveals, it appears that the branch office acted as a conduit, forwarding premiums and underwriting information to the home

¹ The only document submitted in support of gross premiums of NHIC appears to be a statement of such premiums for 1974 and indicates that claimant's assertion of gross premiums is substantially overstated.

office of NHIC in the United States which, in turn, secured reinsurance for exposures in excess of \$250,000 and presumably accounted for premiums, expenses and loss ratios as part of their world-wide business. As testified by Mr. Nottingham, when the operation in Vietnam is viewed "...it does not include the control office in Hong Kong, the AIU operation in New York, its reinsurance structure nor the overall result of the New Hampshire Insurance Company which is putting its assets and capital behind the Vietnam branch." He testified that the whole principal of a branch operation is that the essential capital of the writing insurance company stays at the home office. Insurance was written on behalf of NHIC by a general agent, AIU, Vietnam, whose losses are subject to claim V-0330.

Prior to the fall of Vietnam, claimant evacuated a number of its employees from Vietnam. According to Exhibit B submitted with the claim, reference is made to "The hurried departure of New Hampshire personnel from the very real physical danger in Saigon,..." which precluded the gathering and transmission of detailed documentary evidence. After the fall of South Vietnam, NHIC wrote no further insurance in Vietnam nor did it pay any losses on policies previously written. NHIC was one of a number of foreign insurance companies operating in South Vietnam. The record does not disclose how many domestic insurance companies may also have been operating in South Vietnam, although other claims before the Commission have been based upon the loss of stockholder interests in local Vietnamese insurance companies, so presumably there were also such companies in operation.

Claimant states that it is 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 from the evidence submitted that the Ministry of Finance of the Government of Vietnam conducted all insurance business throughout South Vietnam after the fall of South Vietnam.

From the record, it appears that the elimination of the private sector from writing insurance was nondiscriminatory in that it did not single out just NHIC or even all foreign insurance companies, but eliminated all private sector insurance companies from underwriting insurance.

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

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."

Mr. R. Kendall Nottingham testified before the Commission concerning claimant's experience in China after the communist takeover. There, claimants were allowed to continue writing

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.

insurance for two or three years, following which the business of writing insurance was taken over exclusively by the government and the market was lost to claimant. No contention appears to be made by claimant that such action in China constituted the basis of a compensable loss, and the Commission notes that no claim for any such loss was filed with the Commission under Title V of the International Claims Settlement Act of 1949, as amended.

Claimant, however, asserts that where an enterprise is taken over and continued in operation 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.

Although claimant has submitted two affidavits from a former employee of AIU, Vietnam, the text of which are set forth in full in the Commission's Final Decision in claim V-0330, the affidavits at most indicate that those employees of AIU, Vietnam, who remained in Vietnam were subsequently employed by the government in the conduct of its insurance business. The relevancy of that evidence as it reflects upon the issue of whether AIU, Vietnam, as a general insurance agent was taken over as a going concern is

considered by the Commission in its decision relating to AIU, Vietnam. The Commission, however, fails to see how such affidavits relate to the question of whether NHIC was taken over as a going concern.

The capital, assets, and resources of NHIC outside of Vietnam were not taken by the Government of Vietnam nor did they in any way inure to the benefit of that government. The Government of Vietnam wrote no policies on the NHIC, nor did that company pay any losses after the fall of South Vietnam. The capital and resources of NHIC remained available to it in support of their world-wide insurance underwriting business. The branch office in Vietnam, in and of itself, had no resources which would have allowed it to conduct an insurance underwriting business. The Commission fails to see how the closing of such a branch office can constitute the expropriation of a "going concern." The Commission is of the view that at a minimum for the expropriation to be of a going concern, the local concern which is expropriated must have sufficient resources to at some level continue its previous operation. Therefore, as to the branch office of NHIC, the Commission finds the record before it does not support a finding of the takeover of a going concern, and, therefore, claimant has not made out a case for an increase in its award based upon a going concern value of NHIC.

The factual situation presented is in contrast to that involved in the arbitration of the claim of American International Group, Inc. and the Islamic Republic of Iran before the U.S.-Iran Claims Tribunal which involved a 35% ownership interest in an Iranian Insurance Company, capitalized and operating in Iran, which, as far as the record shows, was able to continue its former operation in all regards as it had existed before the Islamic revolution.

In its Proposed Decision, the Commission made an award to claimant in the amount of \$289,443.21. This was not, strictly speaking, a determination of the "net worth" of NHIC branch office in Vietnam as no balance sheet evidence was submitted to determine a "net worth." The Commission also agrees with the contention of claimant that the concept of "net worth" of such a branch office has little meaning as it only operated as a conduit and, after setting up certain statutory reserves, channeled all funds as rapidly as possible to the home office of NHIC.

In considering its original determination of the loss of NHIC, the Commission considered the reconstituted list of "assets" submitted. It deducted from the value asserted an account receivable from AIU, Vietnam, in the amount of 160,378,313 piasters, or the equivalent of \$212,421.60 at the exchange rate in effect at the time of the fall of South Vietnam. On the record before it at the time of the Proposed Decision, it appeared to the Commission that AIU, Vietnam, did not have sufficient assets to cover this loss and, therefore, the Commission did not include the amount in its award. Subsequent to the oral hearing, and at the request of the Commission, AIU, Vietnam, submitted records of its financial condition, including balance sheets as of the date of the fall of South Vietnam. The account under consideration appears to be for insurance balances due from premiums collected from the issuance of New Hampshire Insurance policies which had not at that time been remitted to NHIC. Although originally claimant objected to this deduction, as set forth here and above, the objection was not pursued. The Commission, however, has again considered whether, in an attempt to provide adequate compensation, the deduction was warranted. The Commission agrees with the statement of counsel at oral argument that this claim does present an unusual case perhaps of first and last impression. In an attempt to determine adequate compensation for NHIC, the Commission has reviewed the record

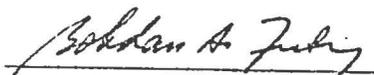
submitted by AIU, Vietnam, which indicate that its balance sheet shows a positive net worth and assets sufficient to cover the account payable which is listed in the books of AIU, Vietnam. But for the action of the communist government of Vietnam and the takeover of all insurance underwriting, these premiums in due course would have been transferred to NHIC. Although the issue is not free from doubt, the Commission decides that this account receivable should be added to the award to NHIC. The Commission, therefore, determines that claimant, NEW HAMPSHIRE INSURANCE COMPANY is entitled to an award in an amount, rounded to the nearest dollar, of \$501,865, and considers the effective date of loss to be May 1, 1975. The Commission therefore withdraws its previous award and makes the following award as its final determination of this claim.

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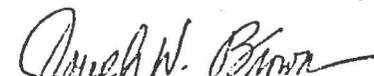
Claimant, NEW HAMPSHIRE INSURANCE COMPANY, is therefore entitled to an award in the principal amount of Five Hundred One Thousand Eight Hundred Sixty-Five Dollars (\$501,865.00), plus interest at the rate of 6% simple interest per annum from May 1, 1975 until the date of settlement.

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
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IN THE MATTER OF THE CLAIM OF

AMERICAN INTERNATIONAL GROUP, INC.
NEW HAMPSHIRE INSURANCE COMPANY

Claim No. V-0331

Decision No. V-0426

PROPOSED DECISION

This is a claim in the asserted amount of \$3,442,961.35 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 the loss of assets and future profits suffered by the NEW HAMPSHIRE INSURANCE COMPANY when its branch office in Vietnam was taken over and liquidated by the Socialist Republic of Vietnam.

Claimant, American International Group Inc., qualifies as a United States national as it was incorporated in 1967 in the State of Delaware and in excess of 90% of its shares are held by persons having addresses in the United States and therefore the Commission finds that natural persons who are citizens of the United States owned directly or indirectly 50% per centum of the outstanding capital stock.

NEW HAMPSHIRE INSURANCE COMPANY, however, also qualifies as a United States national having been incorporated in the State of New Hampshire in 1869 and all of its stock is owned directly or indirectly by American International Group, Inc. Section 705(a) of Public Law 96-606 in relevant part states:

"A claim under section 703 of this Act based upon an ownership interest in any corporation, association, or other entity which is a national of the United States may not be considered. . ."

The Commission, therefore, denies the claim of American International Group, Inc. As all the evidence is before the Commission, however, under the circumstances of this claim, the

Commission finds that the filing of the claim in the name of American International Group, Inc. is merely a technical error lacking in substance and, therefore, the Commission will substitute the NEW HAMPSHIRE INSURANCE COMPANY, hereinafter referred to as claimant, as the proper party.

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."

Claimant was originally licenced as a general insurer in then French Indo China in 1948. In December of 1973, the Republic of Vietnam authorized claimant, along with certain other foreign insurance companies to continue to operate for a period of two years, effective January 1, 1974. With the fall of Saigon, claimant withdrew certain of their personnel from Vietnam and effectively lost control of their branch office in that country. Claimant operates a general insurance business in all 50 States of the United States and in numerous jurisdictions overseas.

According to the information available to the Commission, 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. They further ordered all private insurance companies to liquidate and dissolve themselves.

Pursuant to the proclamation of October 27, 1975, on November 11, 1975, the Ministry of Economics and Finance issued a decision to establish a committee to supervise the liquidation of the old insurance companies and the deadline for the completion of liquidation and in settling of all accounts was established as of December 31, 1975. Absent specific evidence concerning claimant's branch operation in Vietnam, the Commission finds that claimant's assets in Vietnam were taken as of December 31, 1975.

Due to the circumstances of the fall of Saigon and the chaos caused thereby, claimant was unable to transfer all of the branch records out of Vietnam. Claimant has, therefore, submitted reconstructions of its various balance sheets and accounts from partial records available outside of Vietnam. Under the circumstances, the Commission is willing to accept this as having sufficient probative value upon which to make an award. The evidence submitted lists the assets of claimant's Vietnam branch in the amount of \$513,785.35. One problem, however, is presented. Among claimant's assets were \$40,000.00 worth of certain United States treasury notes which had been deposited with the Director General of the Treasury of the Republic of Vietnam. The notes matured in 1979. Claimant has a receipt for the deposit of the treasury notes which were registered in the name of claimant. Claimant continued to receive interest payments until the notes matured in 1979.

Claimant has sought payment of these notes by the United States Treasury. It appears that the United States Treasury has informed claimant that should any of these securities be presented for any transaction, claimant will be immediately notified, presumably for the purpose of contesting rightful ownership. The Department of the Treasury is unwilling at this time to make payment on these notes without a license necessary for the release of any United States treasury notes which are located in South Vietnam. Claimant recognizes that it may not

receive both payment from the United States Treasury for these notes and an award from the Commission and has indicated they will amend their claim and withdraw that portion of the claim relating to the United States treasury notes in the event payment is received. This presents a problem for the Commission, however, in that time constraints placed upon the Commission by Public Law 96-606 require a determination of the issue. The Commission, therefore, will make a contingent award as to the value of these United States treasury notes. The distribution of funds to award holders under this program will be carried out by an appropriate branch of the Department of the Treasury. In the award section of this decision, the Commission will direct the Department of the Treasury at the time of such future payment to ascertain claimant's rights under these United States treasury notes and if such notes have been paid to or on behalf of claimant by the United States Treasury or if such payment is anticipated within a reasonable time thereafter that the Commission's award should be reduced in the amount of \$40,000.00. The treasury notes involved are U.S. treasury notes 170 and 171, both of which are in the face value of \$5,000, and treasury notes 363, 364, and 365, each in the face amount of \$10,000.00, all notes dated November 15, 1973 and due November 15, 1979.

The Commission further notes that claimant's list of assets includes an item in the amount of \$224,342.14 as the balance of an account held by AIU Vietnam, Inc. American International Group, Inc., has filed a companion claim V-0330 for losses suffered by AIU Vietnam, Inc. The records in claim V-0330, as submitted by American International Group, Inc. do not reflect a corresponding obligation to pay \$224,342.14. In fact the assets of AIU Vietnam, Inc. appear, from the evidence submitted in Claim V-0330, to be insufficient to meet such an obligation. While the

Commission in Claim V-0330 will not consider this account as an obligation of AIU Vietnam, Inc., likewise it cannot include it as a compensable asset of NEW HAMPSHIRE INSURANCE COMPANY.

The Commission, therefore, finds that claimant suffered a loss in the principal amount of \$289,443.21, payment on \$40,000.00 of which is contingent as set forth above.

In addition, claimant claims for the discounted value as of 1975 of what it asserts would have been future profits earned by claimant's Vietnam Branch. Claimant has submitted its own calculations based upon its assumptions of increased sales and anticipated profits for a period of 20 years after 1975 and asserts discounted value in the amount of \$3,085,278.00. Claimant has also submitted a similar independent appraisal by Hyman's Robertson & Company of London which, based upon their assumptions, estimates the discounted value of future profits as of December 31, 1974 in the amount of \$2,252,000.00.

The Commission holds that under the circumstances of this claim, this part of claimant's claim is not allowable. The Commission reaches this conclusion on two independent grounds.

It appears to the Commission from the facts available to it that the present claim does not represent a situation where a foreign government has nationalized and continued the operation of an ongoing concern. Rather, the Provisional Revolutionary Government prohibited the further operation of private insurance companies and caused their liquidation. The Commission notes that claimant was operating in Vietnam under permission granted by the previous government to allow foreign insurance companies to operate in Vietnam. This permission had been given through the end of 1975. The Commission concludes that a sovereign government is entitled to determine whether or not foreign insurance companies will be allowed to operate within the sovereign's borders. The fact that permission was denied by the new government does not constitute a nationalization of an

ongoing concern, as distinguished from the forced liquidation of the assets of the company which does constitute a taking of property and for which the Commission has found that claimant is entitled to an award.

Independently the Commission considers the claim for future profits under the circumstances of this claim to be a matter of speculation and conjecture. Although claimant states that the techniques for placing a value on the worth of an insurance business have been developed in recent years, the Commission notes that estimate of future profits as computed by claimant varies by some 30% from the same figures as computed by Hyman's Robertson & Company. On its face the discrepancy in these results indicates that the process is far from an exact science. More importantly, the wartime conditions prevalent in Vietnam both before and continuing after the fall of Saigon created an atmosphere which, in the Commission's view, defies any reasonable prediction concerning the future profitability of insurance, sales and profits. On page 8 of report from Hyman's Robertson & Company the agency states:

"Whilst, with hindsight, one would take a more pessimistic view of the future profitability of the business, we would not consider such an approach to be reasonable. Clearly the events immediately preceding the fall of Saigon would have depressed the value of any business and served to destroy any market previously existing."
(emphasis added)

In this regard, the Commission notes that in the Claim of CHASE MANHATTAN BANK determined by the Commission under Title V of the International Claims Settlement Act of 1949, as amended, the Commission included within its award an amount based upon future profits as part of the "going concern value." This was pursuant to a directive in that statute that the Commission should base its valuation by taking into account the market value, book value, going concern value, or cost of replacement which was most appropriate to the property and equitable to the claimant. Public Law 96-606 contains no such directive to the

Commission, but rather directs the Commission to determine awards under international law. In BANCO NACIONAL DE CUBA v. CHASE MANHATTAN BANK, 658 Fed. 2d 875 (1981) the United States Court of Appeals held that such inclusion of an amount based upon future profits under circumstances similar to those in this claim was inappropriate and speculative and thus not allowed under international law. The court so held despite the fact that the bank branches in Cuba had been taken over by the Government and operated as an ongoing business. For the above reasons, the Commission denies claimant's claim for future profits.

Claimant is therefore entitled to an award in the principal sum of \$289,443.21 subject to the contingency as to \$40,000.00 of this award as set forth hereinabove.

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. Such interest would run on \$249,443.21 worth of claimant's award from December 31, 1975. As to the remaining amount of \$40,000.00, representing the claim for the loss of United States treasury notes on which claimant states that interest was paid by the United States Treasury until maturity on November 15, 1979, interest would run from November 15, 1979 in the event that payment is made of this part of claimant's award.

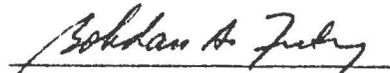
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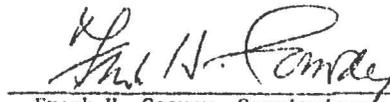
Claimant, NEW HAMPSHIRE INSURANCE COMPANY, is therefore entitled to an award in the principal amount of Two Hundred Eighty-Nine Thousand Four Hundred Forty-Three Dollars and Twenty-One Cents (\$289,443.21), provided that on the date of distribution of any claims fund no payment has been made by the United States Government to or on behalf of claimant by or on behalf of the United States of America on treasury notes 170,

171, 363, 364, or 365, all dated November 15, 1973 and due November 15, 1979. If payment of any or all of these notes has been made or is reasonably to be anticipated at the time of distribution of any claims fund to claimants, this award is to be reduced by the face amount, and interest thereon, of any such treasury notes. In addition to the foregoing principal amount, claimant is entitled to interest at the rate of 6% simple interest per annum on Two Hundred Forty-Nine Thousand Four Hundred Forty-Three Dollars and Twenty-One Cents (\$249,443.21) from December 31, 1975 until the date of settlement and on Forty Thousand Dollars (\$40,000.00) from November 15, 1979 until 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.)