IRAN-UNITED STATES CLAIMS TRIBUNAL

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99-151
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** CONCURRING OPINION of _____

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In the Name

CASE NO. 99
CHAMBER TWO
AWARD NO. 217-99-2

PHELPS DODGE CORP. and
OVERSEAS PRIVATE INVESTMENT CORP.;
Claimants,

and

THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

DISSENTING OPINION OF HAMID BAHRAMI

For the reasons set forth in this Opinion, I was unable to join in the majority decision on Case No. 99. Those reasons were set forth in the deliberative sessions in this case, but my colleagues unfortunately did not accept them. My purpose in disseminating the present Dissenting Opinion is not simply to add yet another commentary on the corpus of Tribunal Awards. Rather, I believe that even though the said Award is not inequitable from the point of view of the amount awarded, it was rendered precipitously and in disregard of certain legal rules and principles, and thus can not be invoked as valid precedent by the other Chambers (even though some of the Chambers of the Tribunal have invoked this Award, whose issuance they were seemingly awaiting for some time, immediately after it was rendered, as justification for their

own positions). For this reason, I have proceeded to set forth the present Opinion and, in discussing the legal defects in the Award, to caution my colleagues on this Tribunal against relying on it as a judicial precedent.

1. DEFECTS IN THE DISCUSSION OF THE CLAIM

On principle, it is unnecessary for me to preface my Opinion with a reiteration of the meritorious issues in the claim. Nevertheless, because in discussing the meritorious issues the majority has also set forth certain points which I believe to be in the nature of opinions, and has based its decision thereon, I therefore deem myself obliged to mention several points in connection with the meritorious issues in the claim as well:

First, in Paragraph 3 of "The Facts", the majority sums up the titles of the agreements as follows: pursuant to separate agreements, consisting of four agreements between the shareholders restricting any transfer of shares to third parties, an engineering and design agreement between SICAB and Phelps Dodge Industries (a wholly-owned subsidiary of Phelps Dodge), a technical assistance and training agreement between SICAB and Phelps Dodge International Corp. (another wholly-owned subsidiary of Phelps Dodge), and a technical management agreement, also between SICAB and Phelps Dodge, the Claimant (Phelps Dodge) undertook to carry out the basic plant designs, select the equipment, appoint the technical director [of SICAB], train SICAB personnel and transfer technical knowledge to SICAB, and supervise manufacturing operations. The majority then opines that the evidence

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(1) Namely, the Dissenting Opinion of Judge Holtzmann in the claim of Foremost v. The Government of Iran (Award No. 220-37/231-1); and in particular, the majority Decision in the claim of Sedco v. the National Iranian Oil Company (Award No. 59-129-3), rendered by Chamber Three.

indicates that Phelps Dodge controlled SICAB through these means and that such control was a condition for its capitalizing SICAB for this project, and also that Phelps Dodge's rights to control SICAB were expanded significantly through the agreement dated 9 July, 1977.

In my opinion, the majority has confused the issue of technical responsibility for the project, which was the main concern of the Iranian shareholders, with legal control over the company. The issue of technical responsibility for the project was so important to the Iranian shareholders that when SICAB's capitalization was increased, in which Phelps Dodge was unwilling to participate, they made their increased investment without Phelps Dodge's participation conditional on Phelps Dodge's undertaking to accept responsibility for technical control over the project. However, legal and juridical control over the company rested, as before, with the majority shareholders. A perusal of SICAB's Articles of Association and the various decisions of its General Meetings and Board of Directors clearly reveals that the majority [shareholders], relying completely on Phelps Dodge's technical expertise, had assigned to it the responsibility for technical management of the project's daily affairs, whereas in accordance with the Iranian Commercial Code, basic financial decisions, legal changes in the company and signing of binding agreements--which constitute specific attributes of legal control-- had also remained vested in the majority.(1)

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(1) See: Articles 4, 10, 11, 13 and 14, which show that the majority shareholders had effective control over the company. Furthermore, it was provided in Paragraph 1 of the Minutes of 9 July, 1977, that although Phelps Dodge was not participating in the capital expansion, in exchange it undertook to provide SICAB with the necessary administrative executive staff, the managing director and the other senior staff. This also confirms the fact that Phelps Dodge's acceptance of technical responsibility constituted a condition, not of capital investment by Phelps Dodge, but of capital investment by the Industrial and Mining Development Bank and the other Iranian shareholders.

In my opinion, Phelps Dodge was entrusted with technical authority in order to extend its liability as an expert partner; and this merely extended Phelps Dodge's fiduciary liability vis-à-vis the company and other shareholders. The majority has failed to note that Phelps Dodge's authority to appoint the managing director was also intended to extend Phelps Dodge's technical liability as well, because at that time the SICAB project was not in the operational stage. Rather, the managing director's program was made up of the issue of constructing the factory, purchasing the equipment, and other technical matters preliminary to the operational stage; and the Iranian shareholders, particularly the Industrial and Mining Development Bank, which were desirous that the project become profitable, intended by this expedient to prevent Phelps Dodge from advancing any excuses in justification of any possible failure of the Project. This aim of the Industrial and Mining Development Bank was not unknown to the foreign investor; that Bank even made its undertaking to provide credit towards completion of the project conditional upon Phelps Dodge's accepting technical liability and its projecting that a reasonable profit (over a five-year period) would be realized. Therefore, the SICAB project was based upon the principle of assignment of technical responsibility to Phelps Dodge, not upon the granting of any special privilege to Phelps Dodge by the Iranian shareholders in order to encourage it to invest in Iran; and as has already been said, legal control of the company rested with the majority shareholders.

Second, as is stated in "The Facts," Phelps Dodge was itself responsible for making a projection of the project's profitability; and in view of the fact that the Respondent provided all of the facilities, the said project should have been making a reasonable profit within five years, in addition to repaying the loan. Since the Industrial and Mining Development Bank and Iranian shareholders had made their

investments in reliance on Phelps Dodge's prognosis, and since the project failed, contrary to Phelps Dodge's projections, to become profitable, the prognosis prepared by Phelps Dodge has no bearing upon the calculation of indemnification; rather, it is Phelps Dodge, on principle, that is liable for damages incurred by the Bank and shareholders. Moreover, the Bank's action in calling its matured loans was, as shall be set forth below, based on Phelps Dodge's failure to carry out the project in the manner envisaged; and in this respect too, the Claimant can have no right of action whatsoever against the Respondent.

Third, it is stated in Paragraph 6 of "The Facts" that had the Iranian Revolution not occurred, the SICAB project would have been completed by late 1979. The evidence in the case confirms quite the opposite. Of course, Phelps Dodge's report on the possibility of completing the project appears to indicate that the project would be finished by mid-1979; and for this reason, the greater part of the project ought to have been completed prior to the beginning of the Iranian Revolution (ie, prior to 1978). It is not clear just how Phelps Dodge could possibly have completed the project within the six months remaining in 1979 since at the end of 1978 it was lagging far behind in completing the works as provided for in the project and had far exceeded the anticipated costs for completing the project -- so much so that Phelps Dodge itself was unwilling to participate in increasing SICAB's capitalization.

Of course, certain management problems and deficiencies had delayed completion of numerous construction projects in Iran, but Phelps Dodge was availing itself of all the financial and administrative facilities of the Industrial and Mining Development Bank of Iran; nor can Phelps Dodge's failure to complete the project be attributed to the unrest prevailing during the Iranian Revolution. Phelps Dodge has

not alleged that it encountered even the slightest problem in importing machinery and putting it into operation. Thus, the failure of the project, like the failure to complete it in accordance with the schedule provided for by Phelps Dodge, is attributable more to Phelps Dodge's errors in its prognosis of the project's completion than to Revolutionary events.

Fourth, in Paragraph 9 of "The Facts," the majority has described the Council for the Protection of Industries as a "governmental body," and based on this description, it has reached its intended conclusion, namely that the Iranian Government controlled the SICAB project. In view of the provisions of the Law for the Protection of Industries of Iran, I believe that exception must be taken to this description, because although the majority of the members of the Council for the Protection of Industries are Government officials, and serve thereon as ex officio members, the Council is nonetheless not a Government agency vested with executive governmental functions. Rather, it is a quasi-judicial authority which takes judicial decisions for the purpose of preventing the closure of bankrupt factories; and if it determines that a firm is insolvent, it appoints over it a manager, who serves as a receiver, in order to ensure that the said firm does not come within the purview of the Office for Liquidation of Bankruptcy. Therefore, as stated above, the Council for the Protection of Industries is a quasi-judicial organization having special judicial functions and powers similar to those of a receiver in other countries. To describe the Council as a "governmental body", without any other evidence than that the majority of its members hold government positions, is analogous to characterizing courts of law as "governmental bodies" by virtue of the fact that their judges are employed by the Ministry of Justice, a characterization which would certainly not accord with the facts of the matter. The meaning of "government control" as intended in the Claims Settlement Declaration is, that

executive agencies of the government, invoking the relevant laws, assume the management of a private going concern in the interests of the state, and dispossess its shareholders of ownership thereof; it does not apply to a case where a council of trustees in bankruptcy appoint a receiver and temporary manager to run a bankrupt firm, in order to protect the rights of its creditors and to prevent it from being dissolved.

II. JURISDICTION AND LIABILITY

In determining that it has jurisdiction, and in finding the Government of the Islamic Republic of Iran liable, the majority has ignored two basic legal issues. Firstly, it has permitted OPIC to bring claim before this Tribunal on the strength of a strained interpretation of the provisions of the Claims Settlement Declaration. Secondly, in assuming that the Council for the Protection of Industries is a governmental body, it has declared that SICAB has come under Government control, and holds that the Government of the Islamic Republic of Iran assumed ownership of Phelps Dodge's shares in SICAB as of the date on which the said Council appointed a manager for the factory.

A. The Bringing of Claim by OPIC before the Tribunal

In light of the principle of respect for the sovereignty of the two Governments which are signatories to the Declarations, and in accordance with established principles of

international law, the Tribunal cannot extended its jurisdiction beyond that limit intended by the two Governments.[1] The jurisdiction of the Tribunal over disputes between the two Governments has been explicitly delimited and defined in the Claims Settlement Declaration. Pursuant to Article II, paragraph 2 of the Claims Settlement Declaration, the Governments of Iran and the United States may bring before the Tribunal only those kinds of claims set forth in the Declaration; and in analogous instances, the Tribunal has ruled that claims not explicitly provided for in paragraph 2 lie outside its jurisdiction.[2] Therefore, the bringing of a claim of expropriation against the Government of Iran by OPIC, which is certainly not a private national of the United States but is, rather, tantamount to the United States Government, is contrary to the intention of the High Contracting Parties and outside the inherent jurisdiction of this Tribunal. The majority itself was aware of this point; for this reason, it has invoked the contra-positive of Article VII, paragraph 2 of the Claims Settlement Declaration, opining that since Phelps Dodge's rights were transferred to OPIC after the signing of the Declaration, the Tribunal need not decide whether OPIC is a national of the

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(1) In Case No. A/2, although it could have made a finding that it was intended by the provisions of the Declarations that all claims shall be settled before this Tribunal, the Tribunal nonetheless interpreted its jurisdiction very narrowly.

(2) In Case No. B/16, a claim by Iran against the United States, the Tribunal held that Iran's claim, which according to the Tribunal's interpretation did not arise solely out of purchase and sale agreements, was outside its jurisdiction. (Award No. 105 in Case No. B/16, Chamber One) In Case Nos. B/24 and B/3, Iran's claims were also determined, for the same reason, to lie outside the Tribunal's jurisdiction.

United States; and it has thereby permitted OPIC to bring claim. It is a recognized principle of interpretation that a conclusion in conflict with the express language of the text cannot be reached through its contra-positive. There is room for considerable doubt as to whether the contra-positive of Article VII, paragraph 2 permits the Tribunal to regard the assignment of a claim after signing of the Declaration to persons who are not entitled to bring claim and whose claim is in any event not within the scope of the Tribunal's jurisdiction (inter alia, the United States Government, or non-US nationals), as authorizing OPIC to bring claim; because such an interpretation enables the Claimants and their assigns to violate the provisions of the Declaration with respect to the Tribunal's inherent jurisdiction. From the legal point of view, and in reliance on the contra-positive of paragraph 2, I can accept assignment of the claim, after its filing, to other United States nationals who are themselves entitled to bring claim before the Tribunal, but assignment of the claim in such a way as to enable persons to bring claim whose claims are inherently outside the Tribunal's jurisdiction, would convert this arbitral Tribunal into a public court enjoying broad jurisdiction over claims brought against Iran, and this is certainly contrary to the intention of the two Governments.

The issue of a claimant's continuity of nationality has been brought up even before the mixed commissions and the US Foreign Claims Settlement Commission. The latter Commission has ruled that assignment of a claim to third parties is valid only where the relevant laws permit such an interpretation on the basis of certain considerations.

In facing the issue of claims which had apparently been assigned to non-United States nationals after conclusion of the 1948 Agreement (to settle the claims against Yugoslavia), the United States Foreign Claims Settlement Commission

accepted the principle that based on standards of international law, a claim must belong to United States nationals from the time it arises to the time it is settled. (1) This same Commission stated in its Interlocutory Decision in the Factor claim, that:

> "Under well established principles of international law, unless otherwise provided by treaty, in order for a claim espoused by the United States to be compensable, the property upon which it is based must have been owned by a national or nationals of the United States at the time of loss, and the claims which arose from such loss must have been owned by a United States national or nationals continuously thereafter." (2) [emphasis added]

Therefore, the rule of continuous nationality can be disregarded only pursuant to a special agreement by the two Governments; and the contra-positive of Article VII, paragraph 2 cannot be regarded as constituting a special agreement by the two Governments enabling the bringing of claims before the Tribunal which lie outside its jurisdiction.

A further deleterious consequence of this Award is, that the Tribunal has in effect disregarded the bipartite Agreement for the encouragement of private United States capital investment in Iran, ratified by the two Governments in 1957 pursuant to an exchange of Notes. According to Part III, paragraph 2 of the said Note, any possible disputes between the United States and Iran regarding compensation paid by the United States to its private investors in Iran shall be referred to special arbitration, as provided for in

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(1) See: The Foreign Claims Settlement Commission of the United States, Decision and Annotation, US Government Printing Office, 1968, page 19.

(2) Ibid, page 168. Of course, in its final decision in this case, the Commission departed from this position, by invoking United States municipal law and by conforming to Congress' order that the Commission expedite settlement of the matter. However, because the Commission's decision was founded upon US municipal law rather than on a treaty, it does not alter the relevant principle of international law.

the same Agreement. The Algiers Declaration has neither explicitly nor implicitly abrogated this Agreement, which thus remains a part of the corpus of international agreements between Iran and the United States.

Pursuant to that Agreement, the United States Government may guarantee private United States investments made in Iran, with the permission of the Iranian Government,[1] against political risks through AID or OPIC. Once it has paid compensation, the United States Government shall be regarded as the successor to the private investor, and it can recover from Iran the rial equivalent of the monies paid by it. If the two Governments fail to come to an agreement concerning the amount of the compensation, the matter shall be referred to special international arbitration, as provided for in that same Agreement, and the dispute shall be settled by an arbitrator appointed by the President of the International Court of Justice.

Now, however, in accepting OPIC as a claimant, the majority in this case has without reason brought within the Tribunal's jurisdiction a dispute for whose settlement the Iranian and United States Governments had made express provision for a different forum and which, pursuant to Article II, paragraph 2 of the Claims Settlement Declaration, they have also removed from the jurisdiction of this Tribunal (since such disputes are within the jurisdiction of another international arbitral forum). Although an arbitral forum ordinarily has the right to determine whether it has

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(1) It is necessary to note that the Iranian Government has guaranteed only those investments covered by the Law for the Attraction and Protection of Foreign Investments, and that Phelps Dodge's investment in Iran is covered by this Law.

jurisdiction in international commercial arbitrations, this rule cannot be applied in any interpretation of the jurisdiction of this Tribunal, which was established pursuant to an agreement between the two Governments.

B. Attribution of the Claim to the Government of the Islamic Republic of Iran

This Tribunal has so far not properly defined "government control," which is, pursuant to the Claims Settlement Declaration, taken as constituting a prerequisite for bringing claims against the Government of the Islamic Republic of Iran. The several Chambers of the Tribunal have held in various cases, without delimiting the meaning and scope of "control," that any manner of intervention by the Government in the affairs of private firms, and in particular its appointment of managers, constitutes evidence of control. In the Raygo Wagner case (Award No. 20-17-3), Chamber Three stated that Starline Company was under the control of the Government of the Islamic Republic of Iran, because it was being managed by persons who were apparently Government officials. Chamber Two has rendered a similar ruling in the Kimberly-Clark case (Award No. 46-57-2). Chambers One and Three have even regarded the Foundation for the Oppressed, which pursuant to the express language of the laws under which it was established is a public pious foundation, as the locum tenens of the Iranian Government, and have held that the firms being managed by the said Foundation are therefore under the control of the Government. In the Cal-Maine Foods case (Award No. 133-340-3), Chamber Three held that since the Procès-verbal dated 19 August, 1981 was written on paper bearing the official Government emblem, Seamourgh Company is under the control of the Government of the Islamic Republic of Iran. And now, in Case No. 99, the majority in Chamber Two has held that the intervention of the Council for the

Protection of Industries constitutes government control, solely by reason of the fact that the members of the said Council are government officials; whereas the Law establishing the Council was passed in 1966, and the Council is an appointing authority for receivers for firms which are in effect insolvent.

If we are to accept the logic of the majority, we shall have to conclude that all bankrupt Iranian firms and companies being managed by receivers in bankruptcy should be regarded as under the Government's control, and that the Government must pay compensation to those United States claimants who set up companies in Iran but were unsuccessful in their investment, even if they were culpably bankrupt owing to mismanagement or to their having engaged in aleatory transactions. In my opinion, Article V of the Claims Settlement Declaration does not empower the Tribunal to attribute a claim to the Government of the Islamic Republic of Iran without reason and without relying on the legal premises endorsed in Article V of that Declaration. What the Declaration intended by the term "government control" was not, general and nondiscriminatory application of Iranian law to persons covered thereunder; for in this event one could regard every person who has, according to prevailing laws, performed some act coming under the provisions of some particular law, as being under Government control. Furthermore, in developing countries whose governments necessarily pursue the policy of a guided economy, "control" has a meaning differing from that which applies in Western capitalist societies. If, in interpreting the Declaration, the Tribunal wishes to apply concepts which in principle arise out of municipal law, then it should take note of the approach taken by the International Court of Justice in The Hague in the Barcelona Traction claim (5 February 1970), as to accepted principles of municipal law. Subsequent to the Revolution, in enforcing a series of nondiscriminatory

domestic economic policies, the Government of the Islamic Republic of Iran has passed certain special laws and regulations for nationalizing and controlling commercial firms; and the two Governments took those municipal laws into account when signing the Declarations. If the Government intended to control a firm, it would have the legal apparatus for doing so at its disposal and would act on that basis. According to Brownlie's interpretation, from the viewpoint of international law government control over a private firm must constitute effective control, such that the firm is converted thereby into a part of the Government, rather than merely falling, in some way or other, under the provisions of governmental laws and regulations. In my opinion:

-- Firstly, by attributing popular revolutionary actions to the Government of the Islamic Republic of Iran, this Tribunal's Chambers have disregarded the express provisions of Part D of Paragraph II of the General Declaration, wherein such claims were nullified. The intervention of such persons [viz Government officials appointed as ex officio members of boards managing] the affairs of firms and companies can never be construed as constituting "government control."

-- Secondly, management of an insolvent firm by quasi-judicial authorities, in enforcing the Law for the Protection of Industries and Prevention of Closure of Factories (a law enforced on numerous occasions prior to the Revolution with respect to bankrupt industrial concerns incapable of meeting their debt obligations), is not subsumed under the definition of "control" as intended in the Algiers Declaration. In other words, management of an insolvent firm is a prominent example of receivership, a legal institution recognized under most legal systems. The aim of this kind of management is, to enable the creditors to recover a greater percentage of the monies owed them. Naturally, the Law for the Protection of Industries thereby also forestalls the closure of

factories and prevents creation of unemployment, and these steps are among the economic objectives of all countries. On the other hand, enforcement of the Law for the Protection of Industries with respect to an insolvent firm by means of the facilities which the Government grants the firm in question through the banking system, will also ultimately redound to the benefit of its shareholders as well, because once a productive unit has been commercially revitalized, pursuant to the said Law, the factory is transferred back to its owners. Thus, the primary aim of the Law for the Protection of Industries in providing for management of the concerns covered thereunder, is to recover those loans and credits extended to such private firms by banks from Government resources. And for this same reason, the Law for the Protection of Industries is applied most particularly with respect to firms which have availed themselves of Government credits.

-- Thirdly, "control" as intended in the Algiers Declaration leads to a determination by the Tribunal that it has jurisdiction. Moreover, the Tribunal's aim in finding in favor of its jurisdiction is, ultimately, to accept the claim brought against the Government of Iran and bring about repayment of that Government's debt to the American Claimant. In a case where a productive unit is insolvent and incapable of repaying its debts to the Iranian banks (and on the basis of the case file, the foreign investor himself was responsible for this situation; moreover, it was he who lured the Iranian banks into investing monies, based on his unrealistic calculations and his faulty projections as to the project's profitability), I do not see what avenue the Iranian Government has barred to the foreign investor, or what opportunity it has deprived him of, by enforcing the Law for the Protection of Industries, such that the Tribunal might, by holding that the Government controlled [SICAB], agree on principle that the Government is thereby liable.

The proceedings in this Case reveal that any loss suffered thereby by the foreign investor was due to errors by the investor in the course of accepting ordinary commercial risks, and not to administration by the Council for the Protection of Industries. Furthermore, it is clear that such a claim is not attributable to the Council for the Protection of Industries either, because it relates to the manner in which the project was carried out prior to intervention by the said Council.

-- Fourthly, in the section under "The Facts," reference has been made to the issue of nationalization of the Industrial and Mining Development Bank of Iran as an indication that the Government has exercised a policy of controlling the project through the said bank. The fact is, however, that years before its nationalization, the Industrial and Mining Development Bank of Iran was already pursuing the same policy which it applied in the case of SICAB. That is, if an investor were to envisage that a project was going to make a profit, but the project failed, contrary to his projections, to do so by the maturation date of the loan, and if the bank also determined that the company was incapable of repaying its obligations owing to mismanagement, then it would issue an enforcement order in accordance with the loan agreement (cf. the model contract filed in the present Case); and it would assume direct management of the factory upon seeking recourse to the Council for the Protection of Industries. This procedure is not the result of the Bank's nationalization, and it is independent of the exercise of any special policy which the Government might possibly have in this connection.

-- Fifthly, in holding the Government liable in connection with administration of a private firm, a fundamental point must be noted-- that is, whether such administration is permanent, or temporary and limited, because the Council for the Protection of Industries continues to administer such a

firm [only] until it succeeds in recovering those monies owed the banks. Citing its authorities on international law, the majority acknowledges that management of a private firm by the Government must not be merely temporary and limited, since in this case the notion of government control and enjoyment of property by the Government will not apply (Paragraph 22 of the Award). However, in Paragraph 21 of the said Award, it states that although the Law for the Protection of Industries provides for "provisional" administration by the manager appointed by the Council and describes him as a "trustee," it also expressly provides that a factory shall not be returned to its owners until all of its debts are paid. Then, in Paragraph 22, the majority opines that this administration will likely continue "indefinitely." In my opinion, Paragraphs 21 and 22 of the Award are not supported by reasons, because since the Law has made provision for return of the factory to its shareholders, sufficient evidence exists that the administration by the Council for the Protection of Industries is of a temporary nature. That Law specifies the objective of such management of the factory, namely to repay the company's debts. Naturally, the legislative authority could not have specified the period of time within which such an objective shall be achieved. The duration of administration by the Council depends upon various conditions and upon the profitability of each industrial concern. This being the case, how could the Law possibly envisage any specific period of time within which to realize this objective? Therefore, the legal arguments adduced indicate that the administration by the Council for the Protection of Industries is of a temporary nature. Furthermore, just as the Respondent has stated, factories have in numerous instances been returned to their shareholders once the loans to the relevant industrial concern have been repaid. Based on the foregoing, the majority has failed to adduce any evidence in support of its statement that as of 15 November, 1980, the Government took

over control of the factory for an indefinite period; and on principle, no such evidence exists. In addition, it is superfluous and misleading to point out that no dividends have been paid to the shareholders. The Claimant itself has not asserted that the insolvent SICAB Company distributed any dividends or was legally capable of doing so, such that the nonpayment of dividends or deprivation of shareholders' access to their property might be of any significance.

In short, in its Award the majority has set out to justify its objective, namely to prove the compulsory assignment of Phelps Dodge's shares to the Government (the worth of which shares the majority has itself valuated without applying any standard whatsoever); and in the process it has posited certain rules of law which, although valid in themselves, are inapplicable to this claim; and it then interprets the facts in the case in accordance with its own conclusions. On this basis, the majority has held that the Government of the Islamic Republic of Iran assumed control over the financial rights of an insolvent company whose assets apparently had a net negative worth at the time the Council took it over and was moreover incapable of meeting its debt obligations; and that the Government is liable for the "losses" incurred by the shareholders in question.

According to elementary principles of law, although a share represents a demand by the shareholder upon the company, that demand (ie., the value of the share) is payable only after the company has paid off all its other obligations to its secured and ordinary creditors. In view of this fact, the majority has failed to give any explanation of just what losses the Government has caused SICAB's foreign shareholders to incur, assuming <u>in arguendo</u> that it has divested them of SICAB. If Phelps Dodge's shares have become worthless and SICAB's shares have lost all value owing to its heavy debts, then the losses borne relate to ordinary commercial losses,

and thus have no bearing upon the Council's assumption of control over SICAB.

III. VALUATION OF PHELPS DODGE'S SHARES

In seeking to valuate Phelps Dodge's shares, the majority refers to the Iran-United States Treaty of Amity and to international law. In Paragraph 27 of the Award, it states that "whether or not the Treaty is still in force today," it is a source of international law, and in view of Article V of the Algiers Declaration, the Tribunal [must] take its provisions into account. Then, in trying to valuate SICAB's shares, instead of resorting to other international legal precedents, it refers to judgments made by this Tribunal itself (Awards Nos. 93-2-3, and 141-7-2). In making the Award, it then adopts the procedure of valuating the company as a "going concern". Yet, what is astonishing is that the majority itself admits that SICAB was not a "going concern" prior to November, 1980 (the date of the take-over by the Government, in the opinion of the majority). Then, disregarding the fact that according to international legal precedent, the relevant point is that a firm be a "going concern" at the time of "take-over," (1) and that if at that date it is not a going concern, then only its "book value" (2) shall be taken into consideration, the majority does not bother to calculate the book value of the shares; it simply assigns a value of $2,437,860 to Phelps Dodge's shares themselves, without stating the basis for its computation.

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(1) See: The valuation of Nationalized Property in International Law, by Professor Lillich, vol.II, pages 108 ff.

(2) See in particular: Lillich, op cit, p. 40.

In my opinion:

First, it is only the Government of the United States, and not the Claimant, that may invoke the Treaty of Amity (quite aside from the issue of whether or not it remains in force) in connection with the claim for compensation;

Second, the Tribunal cannot invoke the Treaty of Amity, particularly Article IV thereof, in isolation and without regard to the Exchange of Notes between Iran and the United States in connection with the [Guaranty of Private] Investments, wherein specific provisions are set forth with respect to expropriation and nationalization of private United States investments in Iran;

Third, assuming, in arguendo, that the Tribunal grants OPIC locus standi to appear as a claimant, it is not at all clear how and on the basis of what criterion, the Tribunal, having awarded in favor of OPIC and Phelps Dodge, apparently leaves it to the Claimants to divide the judgment amount between themselves, without its having ascertained the amount of the compensation paid Phelps Dodge by OPIC. Yet, according to OPIC's rules and regulations, that agency pays up to 90% of an investor's losses, and pursuant to the Iran-United States Exchange of Notes on investments, OPIC shall be deemed to be the successor in interest to the investor, with respect to the amount to which the latter was insured;

Fourth, the issue of the valuation of nationalized holdings according to international law has not been clearly resolved, even by applying those criteria set forth in the treaties of amity into which the United States has entered with other nations. The criteria set forth in United Nations declarations, in the international practice of states, and in the provisions of the Treaty of Amity and the Restatement of United States Foreign Relations, all fail to provide rules

for a precise calculation. In actual fact, a prescription for valuating nationalized properties should be derived from a study of the sizable body of jurisprudence and precedent on the subject;

Fifth, even if the majority does wish to enforce the provisions of the Treaty of Amity as a source of international law, it cannot disregard the fact that agencies such as OPIC and the United States Foreign Claims Settlement Commission must enforce principles of international law as interpreted by the United States. (1) Nor may the Tribunal seek to valuate nationalized properties arbitrarily and without giving reasons, or without taking into account the amount of the compensation calculated and paid by OPIC. In my opinion, even if the Tribunal did not deem it necessary for the Claimant to state how much compensation it was paid by OPIC, in view of the observations made above it ought at least to have taken note, in valuating the property of the United States investor, of OPIC's accounting standards to the greatest degree possible, as these represent the de facto enforcement of United States rules of international law. (2)

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(1) As stated in the text of the Award, it was provided in the insurance contract with OPIC that if OPIC and the investor failed to reach agreement as to the amount of the compensation, the dispute was to be referred to arbitration, and the arbitrator would apply the principles of international law (namely, the principles relating to payment of full equivalent compensation, which the United States incorporates in its treaties of amity with other nations).

(2) See: the article by Koven, entitled "Expropriation and the Jurisprudence of OPIC," published in the Harvard International Law Journal No. 22 (1981), pages 289 ff.

Sixth, International practice and decisions by arbitral tribunals show that where a firm is not a "going concern" at the time of taking, the "full equivalent" of compensation demanded by the Claimant should be calculated solely on the basis of the firm's book value.

A. A Discussion of Problems Relating to How the Shares Were Valuated

1. United States Claimants May Not Invoke the Treaty of Amity before the Tribunal:

Neither the Iranian Government nor the United States Government has requested the Tribunal for an interpretive opinion as to whether the Treaty of Amity, Economic Relations, and Consular Rights remains in effect or has de facto been terminated; nor has the Algiers Declaration vested the Tribunal with jurisdiction in this respect. Therefore, enforcement of that Treaty's provisions by the Tribunal -- and at that solely with the guidance of the American claimants-- is outside the Tribunal's jurisdiction and gives rise to precedents which are manifestly in conflict with the standards of international law and, as shown in the present Opinion, supra, inconsistent with those principles to which Iran and the United States adhered in their relations even prior to the Revolution.

Although a treaty is tantamount to law from the standpoint of municipal law, it is nonetheless the states signatory thereto that are responsible for enforcing its provisions. Moreover, after entering into a treaty, a state passes the appropriate regulations relating to the privileges conferred upon private persons by that treaty, within its own municipal law. Until the states which have entered into the treaty give effect to the standards therein provided for within the

ambit of their municipal law, individual persons may not invoke the broad language of the treaty. In private law, the rule of privity of contracts sets forth this same principle, and the said rule is also applied where the treaty is enforced under international law. For this reason, the municipal courts give immediate effect only to those portions of international treaties which are "self-executing." From the viewpoint of classical international law, the duty of international courts in enforcing treaties is very clear, because private persons do not have the right to bring claim before international fora; and if a state seeks to enforce privileges accorded to its nationals by treaty, it must extend its diplomatic protection and itself bring claim against the state which is a party to the contract in question. Therefore, assuming that a party to the claim (the American claimant) does invoke a bilateral treaty, the Tribunal may not interpret it. Nor may the Tribunal regard the provisions of a bilateral Iran-United States treaty as constituting a general source of international law even though, as the majority states in its Award, it simultaneously refrains from addressing the issue of whether the Treaty remains in force at present (whereas, assuming that it does remain in force, enforcement of the provisions of Article IV thereof is subject to the separate Agreement entered into by the two Governments relating to the encouragement of private United States investment in Iran).

The sources of international law are enumerated in Article 38 of the Statute of the International Court of Justice in The Hague. The Iran-United States Treaty of Amity (assuming in arguendo that it does remain in force at present) should be taken note of in the light of the entire body of the existing reciprocal international obligations between Iran and the United States. And, as shall be discussed below, in view of the bilateral Iran-United States Agreement of 1957, the full equivalent compensation payable under

Article IV of the Treaty of Amity is that amount paid by OPIC to the private United States investor. This being the case, the United States Government should demand compensation of this amount only; and the private United States investor should not be permitted to abuse the provisions of the Declarations as an ostensible claimant or to refuse to divulge the amount of compensation already paid it. Nor should it be allowed, though not entitled to do so, to invoke the Treaty of Amity on the one hand, while failing on the other hand to make the slightest reference to the bilateral Agreement concerning encouragement of investment, entered into between Iran and the United States.

In Paragraphs 27 and 28 of the Award, the majority refers to the Treaty of Amity as a source of international law. Yet, the provisions of the Treaty of Amity may be deemed to constitute a source of general international law only if they have come, at the very least, to constitute a rule of customary international practice in international relations. Yet, this very Tribunal has held in the claim of INA Corporation (Award No. 184-161-1, dated 13 August, 1985) that the standard of "appropriate compensation," rather than full compensation, has come to prevail in current international law. At the same time, however, it is my opinion that by enforcing the provisions of the Treaty of Amity, Chamber One of the Tribunal has applied a rule in this case which finds no precedent in international law; this "rule" can be referred to as enforcing a bilateral agreement in the interest of persons who are neither directly nor indirectly parties thereto, a practice which in my opinion has no basis in law. If the majority intended to apply the provisions of Article IV of the Treaty of Amity with respect to Phelps Dodge's investment in Iran, then OPIC should first of all have divulged the amount of compensation paid by it and then brought claim before the Tribunal for recovery of the rial equivalent of the said amount, since that investment was covered by the Law for the Attraction of Foreign Invest-

ment in Iran and since the United States Government has also insured it through OPIC on the basis of the Exchange of Notes by Iran and the United States relating to the encouragement of investment. In this event, if the Tribunal supposes itself in arguendo to be the locum tenens of the arbitral forum provided for in Article III, paragraph (B) of the said Agreement,(1) it can only, at most, issue an award for payment of compensation of the above amount. In my opinion, because the term "full compensation" has not been precisely defined in the Treaty of Amity, its meaning must be interpreted solely in light of the bilateral Agreement, which prescribes the manner in which Article IV of the Treaty of Amity shall be enforced.

B. An Examination of Standards on Payment of Compensation

A fundamental defect in the majority Award is that in referring to certain previous Awards by the Tribunal (which posit no standard whatsoever for a determination of the level of compensation), it states that the Iranian Government is liable to Phelps Dodge for payment of full compensation. Then, without defining the meaning of "full compensation" or explaining the basis for its calculations, it represents Phelps Dodge's ownership interest as of 15 November, 1980 as being equal to $2,437,860. In this way, the majority Award (like certain other precedential decisions by the Tribunal cited in the text of the present Award) is manifestly unjustified and it fails to give any reasons in support thereof.

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(1) See: Guaranty of Private Investments, an Agreement between the United States of America and Iran, effected by Exchange of Notes by the Iranian and United States Governments, dated 24 September 1957, published in Treaties and other International Acts Series, page 234.

Article 32, paragraph 3 of the Tribunal Rules expressly provides that

> "The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given..."

On the issue of calculation of compensation, the statement that in the opinion of the Tribunal, the compensation payable is equal to the amount of the Claimant's original investment, is tantamount to its having rendered the award without stating the reasons on which it is based, because the amount of the investment made by the investor has no bearing on the value of his holdings in the four years thereafter. "Full compensation" does not mean that a foreign investor's assumption of commercial risks shall be disregarded, and that those shares which have become worthless owing to the investor's mismanagement are to be imposed on the Government at their original price.

The fact is, that although it is possible to suppose that there are subjective differences between the terms "full compensation" and "appropriate compensation", which represent divergent lines of legal thought, the Tribunal should nonetheless have taken note, in calculating the amount of compensation due, of how compensation has been calculated in the judicial precedent before it. In actual fact, those terms are legally meaningless, unless there is some means of applying them in practice. Because the earlier decisions by the Tribunal vis-à-vis the issue of calculation of compensation fail on the whole to provide justifications or to cite authorities, I have by and large made reference in this study to other international legal precedentiary material. The conclusion reached by Professor Lillich [1] with respect to calculation of compensation is, that although payment of

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(1) See: The Valuation of Nationalized Property in International Law, by Lillich, vol.III, pages 114 ff.

compensation based on the value of a going concern is taken as constituting "full compensation," nonetheless compensation for nationalization to the full value of the property taken has not, in practice, been paid in any instance. It must be noted that this method has been applied with respect to investments which are actually considered to be going concerns; yet, there exists no precedent providing that compensation equal to the initial investment shall be paid to a bankrupt firm. Sufficient evidence has been presented in this case in demonstration of the fact that SICAB had become insolvent prior to the Revolution in Iran. Nor do legal scholars of investor nations, who generally justify payment of compensation on the grounds of unjust enrichment, hold that payment of compensation equal to a company's initial investment is justified, without taking into account its liabilities as well. Naturally, if unjust enrichment is taken in this case as grounds for awarding payment of compensation, then here too, how can the conclusion be reached that the Government of the Islamic Republic of Iran has become unjustly enriched by having taken SICAB, whose proven debts to the Iranian state banks are approximately equal to its assets? In its Award, the majority has admitted that SICAB had not yet become a going concern as of November 1980, but then, it is stated several sentences later that "SICAB, although laden with a considerable burden of debt, could reasonably have been expected to become profitable in the long term." However, the basis for valuating shares is, the date a firm was taken over by the Government. If the Tribunal concedes that SICAB was not a going concern at the date of the claimed taking by the Government, then it should have determined the book value of the property as at

the date of taking and made its Award on this basis.[1] This is the procedure followed by the United States Foreign Claims Settlement Commission in all instances where the issue of valuating expropriated firms was involved.[2]

The supposition that the Tribunal must in any event assess compensation where there has been an expropriation or taking of property by the Government, lacks any legal justificaion. In the case of Bank Zwiazku Spolek Zarobkouych v. Pozanianu, wherein the Polish Government took over the said Bank and dissolved it in 1950, the United States Foreign Claims Settlement Commission dismissed the shareholders' claim of ownership rights in the Bank on the grounds that the Bank's liabilities exceeded its assets and the expropriated shares were worthless. In the Moniak claim (Claim No. Po-3107, Dec. No. Po-3174), the Commission held that the losses incurred by the Claimant resulted from economic disturbances due to the War and refused to pay compensation on the Claimant's worthless shares.[3]

If the rule that full compensation must be paid were accepted as a principle of international law by investing nations, inter alia the United States, then the practice of the United States Foreign Claims Settlement Commission, which is an agency of the United States Government, would reflect the practical application of this principle. Moreover, this Tribunal cannot first agree to payment of full compensation (which is at any rate not a customary rule of international law) as a principle of international law and then apply it in a more extreme manner than is the practice of the states which have invented this principle.

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(1) See: Lillich, op cit, vol.II, page 40.

(2) See: Foreign Claims Settlement Commission of the United States, Decision and Annotation, ed. Sutton, 1968, pages 77, 93, 185 and 217.

(3) Ibid, page 559.

C. In this Claim, the Tribunal has also left OPIC and the Claimant free to connive over obtaining monies from Iran to which they have no entitlement whatsoever. Even supposing that the Tribunal makes a determination in favor of its jurisdiction, and supposing further that it seeks sua sponte to enforce Article IV of the Treaty of Amity, the majority has nonetheless forgotten that OPIC is a United States Government agency. And since the United States is one of the two Parties to the invoked Treaty, Article IV of the Treaty of Amity cannot under any circumstance signify anything more, in connection with assessment and calculation of the United States investor's compensation, than do the standards which are accepted by the United States Government-- viz, the rules for payment of compensation by OPIC.

The United States Government extends its facilities for guaranteeing private US investments to those investments made in countries which have already accepted conditions similar to those of the Treaty of Amity in connection with payment of compensation. Therefore, the rules prescribed by OPIC for payment of compensation and the means of calculating the amount thereof, cannot be dissimilar to the concept of "full compensation" under United States international law. In fact, just as Professor Lillich has stated,

> "... the valuation mechanics of the insurance compensation formulas have been tested under fire through the administration of claims in a situation in which parties with adverse financial interests (OPIC and the insured investor) had access to binding adjudication in arbitration should they fail to reach agreement on the interpretation and application of these contractual provisions. We should be encouraged to look at this insurance, not for a complete theory of valuation [of compensation] or a principle of legal responsibility, but rather for pragmatic instruction in valuation techniques..."

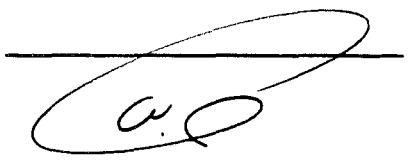
Professor Lillich is of the opinion that the phrase "net investment" constitutes the basis on which OPIC assesses compensation; this consists of the original investment, less

return of capital and adjustment for net retained earnings and losses.(1)

Pursuant to Article VI(2) of OPIC's model contract, in the event that a dispute arises between OPIC and the United States investor, the dispute shall be referred to arbitration. Moreover, the arbitrator shall adhere, in calculating the compensation, to the principles of international law (whereby is definitely meant, those principles of international law accepted by the United States-- ie. payment of full compensation). It can therefore not be disputed that the rules for payment of compensation by OPIC are the same as the principles of United States international law.

Now, in the present claim, in awarding an amount equal to that of the United States investor's original investment (that is, without deducting business losses incurred), the Tribunal has, firstly, applied the theory of payment of full compensation out of place; and secondly, in applying it, the Tribunal has invented a standard which is far in excess of the principle of "net investment" (namely, "full compensation" according to United States international law), without mentioning any legal reasons whatsoever.

In view of the foregoing, I dissent to the Award issued in Case No. 99.



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(1) See: Lillich, op cit, vol. III, pages 71-76.