IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

24-209
۲۴-۲۰۹

ORIGINAL DOCUMENTS IN SAFE

Case No. 24 Date of filing: 13 SEP 84

** AWARD - Type of Award _____
- Date of Award _____
_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of Mr. Kashani

- Date 16 July 84
82 pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

- Date _____
_____ pages in English _____ pages in Farsi

R/12

FARSI VERSION FILED 17 JULY 1984

DUPLICATE ORIGINAL
«نسخه برابر اصل»

CASE NO. 24
CHAMBER ONE
INTERLOCUTORY AWARD
NO. ITL 32-24-1

STARRETT HOUSING CORPORATION,
STARRETT SYSTEMS; INC.,
STARRETT HOUSING INTERNATIONAL, INC.,

Claimants,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, BANK MARKAZI IRAN, BANK OMRAN, BANK MELLAT,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده
FILED - ثبت شد
Date ۱۳۶۳/۶/۲۲ تاریخ
13 SEP 1984
No. 24 شعبه

DISSENTING OPINION OF MAHMOUD KASHANI

The Interlocutory Award issued by Chamber One in the present case has not accorded due regard to matters of procedure and important substantive issues, and I therefore issue this Dissenting Opinion in connection with it.

In this Dissenting Opinion I shall first take up the procedural issues, i.e., the Claimants' standing, the mutual incompatibility of their claims, their nationality, and consequently the Tribunal's jurisdiction. Following thereupon, I shall state my views on the substantive issues.

THE PROCEDURAL ISSUES

I. The Claimants' Locus Standi

In their Statement of Claim and in all subsequent memorials, the Claimants have listed as claimants three companies organized and incorporated in the United States. Despite the objections of the Respondents, the cause of action of each of these companies remains unclear, and the nature of the legal relationship giving rise to the claim of each of these three companies has not been specified. In particular, no contractual relationship whatsoever exists between any of the three claimant companies and the Respondents, such as might entitle them to bring claim. Under the legal systems of Iran and the United States, as well as under international law, it is an accepted legal principle that a commercial corporation possesses a juridical personality which is independent of, and distinct from, that of its shareholders, and further that the rights of the corporation are completely separate from those of its shareholders. Furthermore, none of the three claimant companies has asserted that it had held property or proprietary rights in Iran which were expropriated by the Government of the Islamic Republic of Iran. Their sole relationship, which was between one of the three said American companies (Starrett Housing Corporation) and one of the Iranian banks

conciled with their other assertion, namely that Shah Goli has been expropriated by the Government of Iran, and in fact it blatantly contradicts that assertion. As such, it constitutes grounds for summarily dismissing the claim of expropriation, because if Shah Goli is under the Claimants' control, no claim can be brought asserting that Shah Goli has been expropriated by the Government of Iran. In other words, if the Claimants hold that Shah Goli is under their control within the meaning of Article VII, paragraph 1 of the Claims Settlement Declaration, then it necessarily follows that Shah Goli cannot possibly be held to have come under the control of the Government of Iran.

At each stage of this proceeding, the Respondents have objected to the existing obscurities and at the non-identification of the Claimants; they have particularly objected that Shah Goli is an Iranian national and therefore lacks locus standi to bring claim against the Government of Iran and the other Respondents. The fact that Shah Goli is an Iranian national constitutes the major reason why the Basic Project Agreement was assigned on October 18, 1975 from the Swiss company to Shah Goli. Moreover, the Claim Settlement Declaration regards as cognizable the claims of nationals of either of the two Governments against the other Government -- and not the claims of nationals of one Government against that same Government. In addition, the Claimants do not own all the shares in Shah Goli; 20% of its shares belong to Iranian nationals. Shah Goli also has numerous sales contracts with apartment purchasers, and it has heavy debts and obligations to Iranian banks and to other Iranian and non-Iranian companies. Therefore, as a juridical person, Shah Goli holds Iranian nationality and comes under the jurisdictional authority of the Islamic Republic of Iran. States have no interna-

tional responsibility whatsoever before international fora with respect to their own nationals; a state's relations with its own nationals are subject to such state's municipal laws.

In its Interlocutory Award, the Chamber also has taken note of this fact and affirmed the Respondents' position that Shah Goli lacks locus standi to bring claim (Interlocutory Award, p. 34). The valid conclusion to be drawn from this fact is that, for this reason as well, the Claimants' claims are to be declared as outside the jurisdiction of the Tribunal and dismissed. Instead, however, the Interlocutory Award goes on to state that the Basic Project Agreement, which was concluded between Shah Goli and Bank Omran -- and which contains an arbitration clause providing for adjudication of disputes -- does not contain the type of clause which would exclude it from the jurisdiction of this Tribunal. Not only is there no relationship whatsoever between these two conclusions arrived at in the Interlocutory Award, but Shah Goli also has, on principle, no locus standi to bring claim before this Tribunal whereby the issue of the said arbitration clause might be capable of being entertained. At any event, this important and fundamental issue remains open, and the Interlocutory Award has taken no decision with respect to the Tribunal's jurisdiction.

This situation is the direct consequence of the fact that the true claimant in this case has not been identified. It is obvious that under such conditions the Respondents have been deprived of the opportunity to present an effective and rational defence. For this reason, it is essential that the Claimants be requested to eliminate this fundamental defect before continuing any further with the proceedings in this case, so that it may be possible to proceed with a just adjudication.

II. The Contradiction between the Claimants' Various Causes of Action

Not only are the claimants in this case unknown, but the causes of action as asserted in the Statement of Claim are also mutually contradictory. One of their allegations is that Shah Goli has been expropriated. In that event, only the Government can be considered a respondent, because only the Government has the authority to expropriate and nationalize. This being the case, the present claim cannot, on principle, be brought against Bank Markazi and Bank Mellat. In their Statement of Claim, the Claimants have asserted a second claim which they base upon the Basic Project Agreement. Because that claim is a contractual claim, the Government of the Islamic Republic of Iran and Bank Markazi cannot be deemed to be the proper respondents. The Claimants' third claim, namely the alleged bank guarantee attributed to Bank Omran, is also contractual in nature.(1) If the Claimants' true claim is for expropriation, then the contractual claim automatically becomes moot. Likewise, if they wished to demand Shah Goli's contractural entitlements, then the presumption of expropriation would automatically become moot. Therefore, the numerous grounds of action set forth in the Statement of Claim blatant-

---

(1) From the outset, the Respondents have denied the authenticity of this bank guarantee and considered it as having been forged, and they have requested presentation of its original. The Claimants remained silent in the course of the exchange of memorials, but finally admitted at the Hearing that there exists no original copy of the said guarantee. It is a cause for regret that in the Interlocutory Award, page 10, the Claimants are quoted as having stated that the Respondents have never raised any objection to the said guarantee prior to this claim. Not only have the Claimants never made such a statement, but how, on principle, could the Respondents conceivably have objected before the allegation was made and prior to the presentation of a document of whose existence they were unaware?

ly contradict each other, and this contradiction has deprived the Respondents of their right to present a real and effective defence.

One of the established principles of adjudication is that claimant's plaint must be unequivocal and definite. Article 72, paragraph 4 of the Iranian Civil Procedure Code includes the following among the information to be provided in a statement of claim:

> "The obligations, or other grounds, on the basis of which the claimant deems himself to be entitled to bring claim, in such a way that what is intended is clear and explicit."

In their various memorials, the Respondents objected to the ambiguous and unspecified cause of action. By its Order dated 9 December 1982, the Chamber requested the Claimants to specify their cause of action. In their memorial filed on 17 January 1983, the Claimants ranked their various claims and presented the claim of expropriation as constituting their principal claim. Counsel for the Claimants affirmed the above in the Hearing as well. But even though counsel for the Claimants adds that upon holding of the principal claim, namely that of expropriation, the remaining causes of action (i.e. force majeure and the guarantee) will drop, this does not suffice to safeguard the right of the Respondents to present an effective defence. Under such conditions, the Chamber should request the Claimants to specify the grounds and contentions supporting their ultimate claim and to identify the actual respondent in connection with the expropriation, so as to provide the true and proper respondents with adequate opportunity and scope to defend themselves. By continuing with these proceedings under circumstances where the Claimants have selected three distinct and contradictory grounds of action, the Chamber has placed the Respondents in a position where they are incapable of responding to the Claimants'

principal and ultimate claim with sufficient care. This fact in actuality places the Claimants in a more advantageous position than that of the Respondents and deprives the latter of their right to a true defence. In this respect it violates Article 15 of the UNCITRAL Rules, which require that the arbitral tribunal treat the parties with equality, and that at each stage of the proceedings, each party be given an equal opportunity to present its positions and defences.(1) For this reason, as soon as the Claimants selected the claim of expropriation as their principal and ultimate claim, the Chamber should have excused all of the Respondents from further proceedings except the Government of the Islamic Republic of Iran -- against which such claim has been brought. It also should have granted the latter a renewed and sufficient opportunity to defend itself against that claim. No such opportunity has been afforded the Government of the Islamic Republic of Iran, and the Claimants have succeeded in diverting the course of the proceedings to their own advantage by exploiting the technique of asserting their numerous and contradictory causes of action. Moreover, the Respondents have been unable to argue their counterclaims with precision, because the multiplicity of causes of action has prevented any exact identification of the true counter-respondent to the counterclaims. It is manifest that such fundamental violations of the principles of adjudication, having taken away the right to a true defence, may provide a basis for overturning the Interlocutory Award and all other stages of the present arbitral proceeding.

---

(1) "Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

III. The Failure to Prove the United States Nationality of the Claimants

Article VII, paragraph 1 of the Claims Settlement Declaration has provided the following two conditions with respect to claims by corporations:

(1) that the corporation or other legal entity have been organized and incorporated within the jurisdiction of the United States of America; and

(2) 50% or more of the stock of such corporation belong to natural persons who are American citizens.

The basic condition for American corporations to bring claims before this arbitral Tribunal is, first and foremost, that said American corporation have some contractual rights in connection with the Government of the Islamic Republic of Iran or its agencies, or that it have had ownership rights in Iran which were subjected to expropriation. As was stated above, none of the three American companies named in the Statement of Claim possesses any such rights, and therefore all discussion of whether natural persons who are citizens of the United States own 50% or more of their capital stock is on principle irrelevant and nugatory. By virtue of the express language of Article VII, paragraph 1 of the Claims Settlement Declaration, the claims by the company incorporated in West Germany are outside the jurisdiction of this Tribunal, because the West German company was not organized and incorporated within the jurisdiction of the United States of America. The claim of expropriation of Shah Goli's property is also, a fortiori, outside this Tribunal's jurisdiction, because Shah Goli was not only not organized in the United States, but it was instead organized and registered in Iran and any possible claims by Shah Goli are thus inherently subject to the jurisdiction of the Iranian courts.

Aside from the abovementioned points, even for the very companies which have been baselessly named as claimants, the Claimants have been unable to present adequate evidence in proof that natural persons who are citizens of the United States own 50% of their capital stock. Starrett Housing Corporation has a capital stock of $9 million, which is divided into 9 million shares. Pursuant to Article VII, paragraph 1 of the Claims Settlement Declaration, in order for the said company to be regarded as a U.S. national, it must have been incorporated within United States jurisdiction and citizens of that country must own 50% or more of its stock. The Claimants had the obligation of presenting valid and precise ownership documentation for the company's shareholders, demonstrating that natural persons who are citizens of the United States own at least 4,500,000 of Starrett Housing Corporation's shares. The sole document submitted to the Chamber by the Claimants is a certificate prepared by the corporate secretary, which merely lists the shareholders together with the number of their shares; no document has been presented as evidence that U.S. citizens are the holders (i.e. through ownership and possession) of those shares. The certificate by the said corporate secretary cannot have any credibility before this arbitral Tribunal, because that person is in the employ of the corporation and is in fact on the payroll of the Claimants and acts according to their instructions. No evidence has been presented as to the number of the issued and outstanding shares of the company, by means of which it might be established that the figures cited by the said person in connection with the number of shares and the relevant percentages of the years 1979 through 1982, are correct. Furthermore, in accordance with Article VII, paragraph 1 of the Claims Settlement Declaration, the total capital stock of the corporation must be the criterion for determining its shareholders' nationality.

A second company, by the name of Starrett System Inc,. has also brought claim as a claimant. The capital of record

of this corporation amounts to 100,000 dollars, divided into one million ten-cent shares of common stock. The Claimants have submitted one Share Certificate in their Exhibit No. 42, indicating that Starrett Housing Corporation has only 100 shares of Starrett Systems, Inc.'s stock (Document No. 3 of the said Report). Moreover, according to its Articles of Association the value of each share is one cent, whereas it has been listed as one dollar on the Share Certificate, a fact which is inconsistent with the Articles of Association. In order to rebut the Respondents' objections, at the Hearing the Claimants presented the Chamber with a certificate signed by a Mr. Jeffrey Mishkin, but as that individual's standing in submitting the said certificate is unknown, the certificate is unacceptable and, as a result, this company's control by the first Claimant is unproved.

A third company, named Starrett Housing International, Inc., is another of the Claimants, though its legal relationship to the first two corporations is unknown. The Claimants have not specified what portion of the relief sought in the case each of them is demanding; nor have they specified what share each of the Claimants is demanding out of the damages from the numerous respondents against whom they have brought suit.

The shareholders list includes a large number of persons mentioned as being "trustees", but the Claimants have not provided any document establishing in what trusteeship relation they stand, thus it is not known who are the actual owners of the shares in question. Because of these clear deficiencies the Claimants have been unable to prove, as required by Article VII, paragraph 1 of the Claims Settlement Declaration, that any of the three claimant companies is more than 50% owned by shareholders having United States citizenship, and this fact is cause for this Tribunal's lack of jurisdiction over adjudication of the Claimants' claims.

IV. The Tribunal's Lack of Jurisdiction

The Claimants have regarded the claim of expropriation of Shah Goli's properties as constituting their principal claim. Shah Goli is a construction company, and it had a single project and purpose. This company was able to purchase two parcels of land (lots nos. 809 and 1175) in the Farahzad area from the former Pahlavi Foundation by virtue of the fact that it was an Iranian national. Furthermore, because it paid only a small part of the purchase price of the land, Shah Goli mortgaged both of the said tracts of land, together with all the buildings and facilities under construction thereon, to the seller as security for the balance of the purchase price. Shah Goli sold in advance the 1539 apartments which were to be constructed on these two tracts over a two year period, receiving approximately $88.5 million from the purchasers in advance payments. This company also borrowed millions of dollars from Bank Omran, and as security for these loans it mortgaged a number of the apartments to Bank Omran. Shah Goli has been involved solely in construction activities at these two tracts of land, and has not been active in any other field. If the Claimants allege that Shah Goli has been expropriated by the Government of the Islamic Republic of Iran, such claim is ipso facto cause for rejection of every other claim, and for the same reason all other claims automatically fail.

But however that may be, none of the three American companies which have brought suit as claimants, nor even the West German company, has the right to bring a claim of expropriation in connection with Shah Goli, an Iranian company.

Shah Goli was organized and registered on 10-4-1354 (1 July 1975) with the Corporate Registration Bureau in Tehran, under No. 22199. This company's total undertaken capital amounts to one million rials (equalling approximately

$12,000), divided into one thousand shares of stock of record, each worth one thousand rials. Of Shah Goli's shares, 797 belong to a company registered in West Germany, 200 shares belong to natural persons who are nationals of Iran, and the remaining 3 shares are in the name of three of the company's directors. According to Article 5.1 of Shah Goli's Articles of Association, only 35% of its capital is paid up in cash (350,000 rials, equal to approximately $4,500), and payment of the remainder of the capitalization has been subscribed by the shareholders.

Because Shah Goli was registered in Iran, it is subject to the Amended Joint-Stock Companies Act. Moreover, pursuant to Article 590 and 591 of the Commercial Code of Iran, it has Iranian nationality. In this regard, Article 94 of the Amended Joint-Stock Companies Act provides that:

> "No general assembly may alter the nationality of the company; nor may it, by any majority, add to the obligations of its shareholders."

Shah Goli was able to take ownership of the two parcels of land in question only by virtue of the fact that it was organized and registered in Iran and had acquired Iranian nationality, and thereby, only to commence with its project, which was to construct and sell apartments. The Shareholders in Shah Goli may not now consign the fundamental issue of this company's Iranian nationality to oblivion. In the course of its operations, Shah Goli has concluded hundreds of sales contracts for its apartments, and it has established wide-spread relationships with Iranian banks and contractors. Under such circumstances, it is entirely consistent with justice and legal principles, that all of this company's relationships and claims should fall subject to Iranian law and come within the jurisdiction of Iranian judicial fora.

The principle of the independence of a corporate personality from the personality of its shareholders is respected

and formally recognized under both municipal and international law. Apart from the fact that none of the three claimant companies has any shares in Shah Goli, and that the fact of the West German company's ownership of some of the shares does not enable it to bring claim before this arbitral Tribunal, the relationship between a company and its shareholders is, in principle, of such a nature that there exists a complete separation between the personality of each. The significant and decisive result of this separation is that the company's property, rights and liabilities belong to its juridical personality and the shareholders possess no proprietary right to the company's property. The independence of a company's juridical personality from that of its shareholders is set forth in Article 1 of the Amended Joint-Stock Companies Act, as follows:

> "A joint-stock company is a company whose capital is divided into shares and the liability of whose shareholder is limited to the par value of the shares respectively held by them."

This same principle has further legal concomitants in connection with the regulations relating to bankruptcy of a company and to claims with respect to its existence; as provided by Articles 35 and 36 of the Iranian Civil Procedure Code:

> Article 35
> "Actions relating to bankruptcy of commercial companies whose principal office is in Iran, shall be brought [before the court within whose jurisdiction] the principal office of the company is located."

> Article 36
> "Actions relating to the existence of a company, actions between the company and its shareholders, disputes between the shareholders, and actions against the company by third persons, shall be brought [before the court within whose jurisdiction] the principal office [of the company] is located, so long as the company is in existence or, in the event of its dissolution, so long as liquidation proceedings relating to the company are still underway."

A further special factor requiring that Shah Goli's claims be adjudicated exclusively in the Iranian courts, is that all of the company's property and assets are in the form of immovable property, namely land and apartments; in accordance with a general rule of law, all claims in connection with a contractual relationship arising out of the ownership of land and the purchase or sale of apartments, shall be brought in the jurisdiction where the property is located. The reasoning and logic behind this legal principle is extremely simple and obvious. In this respect, Article 23 of the Iranian Civil Procedure Code provides that:

> "Actions involving immovable property -- whether actions over ownership or actions over all other rights relating to such property -- shall be brought before the courts within whose jurisdiction the immovable property is located, even if the claimant and/or the respondent do not reside within said jurisdiction."

It is here important to take note of the fact that Shah Goli, by virtue of being an independent juridical person, has certain rights and obligations, and whatever claims it may have against the Government of Iran or Iranian nationals, are subject exclusively to the jurisdiction of the Iranian courts. This company cannot assert greater rights than those enjoyed by all other Iranian nationals; nor, in particular, may it drag its claims against the Government to which it owes allegiance before an international forum. The Claims Settlement Declaration has not permitted claims between Iranian nationals to be referred to this arbitral Tribunal; this Tribunal is no referee in bankruptcy, nor may it confer special rights and privileges upon one group of shareholders in an Iranian company while disregarding the other group. Attempting to discriminate between the Iranian group of shareholders in this company and its non-Iranian group is also automatically an illogical and unjustifiable result of the above. If Shah Goli's shareholders possess certain rights, such rights must be examined before a forum capable of

effecting a decision on the rights and claims of all the shareholders. Moreover, so long as Shah Goli exists and continues to have a legal existence as a juridical person under Iranian law, no judicial forum, not even the courts of Iran, may distribute any of the company's property among its shareholders without giving respect to the claims and demands of the company's creditors -- and this, only after dissolution and liquidation of the company. Shah Goli has complicated legal relationships with more than 1500 purchasers of its apartments, as well as very large debts to Iranian banks; and pursuant to Article 35 of the Iranian Civil Procedure Code and to the bankruptcy provisions under the Commercial Code, all of the relevant procedures must be carried out exclusively by the Iranian courts in order for there to be an appraisal of the company's assets, its liquidation, and distribution of same.

The above observations find confirmation from another direction as well. Article II, paragraph 1 of the Claims Settlement Declaration has carefully enumerated the claims of nationals of the United States, whether these relate to natural or juridical persons. It has been expressly provided in this Article that the subject matter of any claim of expropriation must be a property right, and this is entirely logical, for expropriation, from both the conventional and the legal point of view, signifies the divestment of property, which in turn requires that there exist a property right. I shall discuss the fact that no expropriation has taken place at further parts of this Opinion, but at this point it will suffice to note that the Government of the Islamic Republic of Iran has denied all allegations of expropriation; nor is there, on principle, any logical or legal possibility of expropriation in this case. However, the critical point is that the shareholders of a company have no right of ownership over the company's property. The company's independent juridical personality also makes it impossible for a company's shareholders to represent themselves as being the owners of

the company's property in parallel to the company itself. For example, Georges Ripert states in this regard:

> "As a juridical person, a company is the owner of those properties which its shareholders have brought into its possession, or which the company has acquired after its formation. The shareholders have no rights over the company's property..."(1)

In its Judgment in Barcelona Traction case, the International Court of Justice has also stated this matter even more decisively and explicitly:

> "41. Municipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them. Separated from the company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction. So long as the company is in existence the shareholder has no right to the corporate assets." [1970] I.C.J. §41.

The above results in numerous legal consequences, most of which concern the privileges of forming a company, and the most important of which is the separation of the company's property from that of its shareholders. The liability of the shareholders in joint-stock companies is restricted to the company's capital of record, and the company's creditors may not satisfy the company's debts out of the personal resources of its shareholders. It was indubitably these very

---

(1) Traité Elémentaire de DROIT COMMERCIAL, Georges Ripert, Dixième édition par René Roblot, p. 693:

> "La société personne morale est propriétaire des biens qui lui ont été apportés par les associés ou qu'elle a acquis après sa constitution. Les associés n'ont aucun droit sur les biens qui figurent dans ce patrimoine..."

considerations which caused Shah Goli's shareholders to make use of the technique of forming and registering this company in Iran and to assign a majority of its shares to another company, registered in West Germany. And if in turn the company registered in West Germany belongs to yet other companies, in such an event the actual shareholders shall have concealed themselves behind firm barriers, across which their creditors and other persons having rights over Shah Goli cannot possibly reach them; furthermore, they have also availed themselves of numerous tax privileges. Arising also from the fact that there exists a double taxation treaty between the United States and West Germany and also one between West Germany and Iran, while there is none between the United States and Iran. This being the case, it is not at all inequitable, if this company has come to enjoy a special status, for the claims relating to said company's property to be available solely to that company itself and not to its shareholders, who have concealed themselves behind the labyrinthine ramparts of the juridical personalities of numerous companies having various nationalities.

For this reason, the Claimants will not have the right to bring claim asserting expropriation of Shah Goli's property on the basis of Article II, paragraph 1 and Article VII, paragraph 1 of the Claims Settlement Declaration, which constitutes their principal cause of action and the framework for the bringing of a claim on their part. It is also obvious that Article VII, paragraph 2 of the Claims Settlement Declaration can be of no assistance to the Claimants' position.(1) For not only does Article VII, paragraph 2 not constitute a basis which is independent of the rest of the provisions of the Claims Settlement Declaration, but the obvious condition for invoking it is that a company be controlled by an American company. In the instant case, not only are the West German and Iranian companies precluded for separate reasons from

(1) Claimants' Reply filed 30 June 1982, page 96.

seeking such recourse to this arbitral Tribunal, but what is more important, the claim that Shah Goli has been expropriated by the Government of the Islamic Republic of Iran prevents the Claimants from reasserting that the said company is under their control. A company cannot be under the control of an American company and at the same time under the control of the Government of the Islamic Republic of Iran. This is a clear case of estoppel, which international fora have always borne in mind in their adjudications.(1) That is, the Claimants cannot select the claim of Shah Goli's expropriation as their principal claim in suing against the Government of the Islamic Republic of Iran, and then change their position to assert that they control Shah Goli, once they encounter exclusions from the jurisdiction of this Tribunal. The terms and provisions of the Algiers Declarations, which govern this Tribunal's jurisdiction, are always subject to the principle of restrictive interpretation, in accordance with this recognized general international principle and the policy of the Tribunal itself.(2)

---

(1) The Temple Case, (1962) I.C.J. 6 at 32, Arbitral Award by the King of Spain, (1960) I.C.J. 192 at 213.

(2) Award No. 25-71-1 in Case No. 71 (Mrs. Grimm and the Government of the Islamic Republic of Iran), Chamber One. See also the quotations relating to the following cases:

- "every Special Agreement, like every clause conferring jurisdiction upon the court, must be interpreted strictly" (Free Zones case, Series A/B, n° 46, pp. 138-139.)

- "in case of doubt a limitation of sovereignty must be construed restrictively" (P.C.J.I., Free Zones, December 6, 1930, Series A, n° 24, p. 12; see also Wimbledon case, Series A, n° 1, p. 24.)

- "no State can, without its consent, be compelled to submit its disputes with other States either to mediation, or to arbitration or to any other kind of pacific settlement" (P.C.I.J., The Eastern Carelia case, Series B, n° 5, p.27.)

- "It is true that the Court's jurisdiction is always a limited one, existing only in so far as States have

(continued)

In the Interlocutory Award, the majority has been content to deny Shah Goli's standing to bring claim before this Tribunal, but states, in an ambiguous and incomprehensible manner, that Shah Goli -- through the Claimants -- has locus standi in this case. I fail to comprehend just how, if Shah Goli has no legal standing, its lack of standing can be changed, "through the Claimants," to possession of standing, or just how this would result in bringing about the Tribunal's jurisdiction. This is some sort of acrobatics, and the Chamber must consider the issue of its nonjurisdiction as a preliminary issue in accordance with Article 21, paragraph 4 of the UNCITRAL Rules as soon as possible, so as to take a decision as to its lack of jurisdiction before burdening the Parties with any further trouble and expense.

(continued)

accepted it; consequently, the Court will, in the event of an objection - or when it has automatically to consider the question - only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant" (The Chorzow Factory case, jurisdiction, Series A, n° 9, p. 32.)

- "Considering the natural state of liberty and independence which is inherent in sovereign States, they are not to be presumed to have abandoned any part thereof, the consequence being that the high contracting Parties to a Treaty are to be considered as bound only within the limits of what can be clearly and unequivocally found in the provisions agreed to and ... those provisions, in case of doubt, are to be interpreted in favour of the natural liberty and independence of the Party concerned" (P.C.A., 18th July 1932, R.I.A.A., vol. II, p. 1254.)

- "in all cases where there could be a doubt as to the jurisdiction, especially in the hypotheses... where the credit and the good faith of one of th contracting parties are directly involved, the Commission must refrain from judgment and must interpret its powers in a restrictive and not an extensive manner. To adopt another method of interpretation would be to incur the criticism of assuming powers which are jealously guarded for exercise by governments themselves". (Mixed United States/Colombia Commission, 18th May 1866, La Pradelle et Politis, Recueil des arbitrages internationaux, vol. II, p. 488.

It is manifestly obvious that, inasmuch as the Claimants have no proprietary rights and instead of all of the proprietary rights and all the rights and obligations arising out of the Agreement belong to Shah Goli, an Iranian company, this arbitral Tribunal cannot intervene in this matter in the capacity of the company's liquidator and carry out actions which should be taken in the presence of all Shah Goli's creditors and purchasers of its apartments -- in short, of all interested persons -- in their absence and before a non-competent forum. In carrying out its mandate, the Tribunal should accord respect to all the laws and regulations of the Government of the Islamic Republic of Iran, which govern Shah Goli as an Iranian company, for this signifies respect for the sovereign authority of the Government of the Islamic Republic of Iran, one expression of whose will was the establishing of this arbitral Tribunal.

SUBSTANTIVE ISSUES:

1. The Claim of Shah Goli's Expropriation is Baseless

In the preceding sections, we demonstrated that several companies incorporated in the United States, which have baselessly presented themselves as claimants in the instant case, have no contractual relationship with the Respondents, and that by virtue of the Claims Settlement Declaration this Tribunal is not the competent forum to adjudicate the Claimant's claims on the basis of any other legal relationship

either, whether contractual or noncontractual. Recognizing the Tribunal with jurisdiction over this claim has the direct consequence of giving the Claimants the opportunity to mislead this arbitral Tribunal by bringing complicated and ambiguous, intentionally contradictory claims, to cause the Respondents to be deprived of the opportunity to present a proper defence, to place severe difficulties in the way of any attempt to file for and follow-up repayment of the huge amounts which Shah Goli owes to Iranian banks and, finally, to jeopardize the claims of over 1500 purchasers of apartments, who have been unable to take delivery of their apartments even after years of delay and payment of millions of rials. Moreover the facts that the project concerned is located in Iran, the actual interested parties and witnesses in the case are not available, and 20% of Shah Goli's shares belong to Iranian nationals, constitute further important reasons demonstrating this Tribunal as forum non conveniens and seriously calling into doubt the fairness of its proceedings.

If Shah Goli, the other party to the Agreement with Bank Omran, had at its disposal valid and legitimate claims, it could easily have brought and pursued them before the Iranian judicial fora; yet, the Claimants are endeavoring with an amazing insistence to pursue their claims before this arbitral Tribunal in a complicated and obscure form. In addition, the claim of expropriation, which has been selected as their principal and ultimate claim, has itself not been presented in a clear manner, and the Respondents have been given no opportunity to present an effective defence. I am obliged once more to reiterate certain of the important facts in this case which have been changed, so that it may be possible to reach valid legal conclusions in connection with the claim of expropriation:

A. Shah Goli Has Lacked Financial Resources from the Outset

Shah Goli's paid-in capital amounts to 350,000 rials (approximately $4,500). This company is an Iranian national, and it is the sole second party to the Basic Project Agreement. In actuality, after the Basic Project Agreement was assigned to this company, none of the companies which have instituted claims were parties to the Agreement with Bank Omran or have standing in this case, whereas Shah Goli, as the seller of the apartments, assumed obligations towards the purchasers and yet had neither land nor the necessary capital at its disposal. Two parcels of land were sold to Shah Goli by the former Pahlavi Foundation, for which only a small part of the price Shah Goli was able to pay. For this reason both parcels of land, together with the facilities constructed thereon, were mortgaged to the Foundation as security against payment of the purchase price for the land. It would have been impossible to carry out this huge project, involving construction of 1539 apartment units, without the use of Bank Omran's name and good standing. The people of Iran were acquainted with neither Shah Goli nor its foreign directors; instead, the widespread need for housing, and the name and good standing of Bank Omran, led to the sale of all of the apartments within a very short time, and to the deposit into Shah Goli's account with Bank Omran, amounts totalling 6 billion rials in advance payments (equivalent to $88.5 million). The major capitalization for the Project was obtained from these same funds.

Pursuant to Article 9, paragraphs (c) and (e) of the Basic Project Agreement, Shah Goli undertook to supply all the materials and capital for this Project:

Article 9, paragraph (c) provides:

"That Starrett [i.e., Shah Goli] will supply the building materials, finished and semi-finished

products, equipment, machinery, etc., necessary for the construction..."

Paragraph (e) of the same Article provides:

"That Starrett [i.e., Shah Goli] will pay supplies, contractors' bills, consultants' fees and all the expenses concerned with the Project and shall import or cause to be imported all the necessary funds, to pay for local materials and for labor. Starrett will import the foreign currency needed for the Project into Iran through the Bank."

Therefore, it was Shah Goli's responsibility to provide the capital, all considerations aside as to the manner and source thereof, because Shah Goli had accepted obligations as the seller of the apartments, and Bank Omran would not have been prepared to conclude the Agreement with it without that undertaking. The above-cited Article stipulates that Shah Goli import the currency needed for the Project into Iran through Bank Omran so that Shah Goli will carry out its responsibility properly and legally. As we shall note, infra, neither Shah Goli nor its shareholders were able to provide any proper and legal capital investment for this Project; yet at any rate, it was Shah Goli's obligation to provide the capital, an obligation which Starrett Housing guaranteed.

Article 9, paragraph (a) adds:

"That Starrett [i.e., Shah Goli] shall fulfill all the terms of this Agreement promptly and in good faith to the end that the Project be efficiently completed as contemplated herein."

B. Starrett Housing Corporation's Guarantee of Shah Goli's Obligations

Because Shah Goli lacked the resources and capital necessary for such a huge project, Starrett Housing, an American corporation, undertook to guarantee Shah Goli's

obligations, and on a variety of dates it guaranteed those obligations as follows:

> "IN ORDER to assure Bank Omran (the 'Bank') to enter into an Agreement, in the form attached hereto (the 'Agreement'), with the 7 Iranian companies listed in Exhibit I thereto, each a private joint stock company organized under the laws of Iran (1) (the 'Starrett Companies'), Starrett Housing Corporation, a New York, U.S.A. corporation, with its chief office at 909 Third Avenue, New York, New York, hereby jointly and severally with the Starrett Companies guarantees to the Bank the performance by the Starrett Companies of all of their obligations to the Bank under the Agreement so long as and fully to the extent that the same are and shall be binding on the Starrett Companies. In the event that any of the Starrett Companies fails to perform its obligations under the Agreement Starrett Housing Corporation agrees to perform such obligations.
>
> "IN WITNESS WHEREOF; Starrett Housing Corporation has duly executed and delivered this Instrument of Guarantee on October 16, 1975." (Emphasis in the original)

This Guarantee led to the conclusion of the Agreement with Shah Goli, because Bank Omran would not possibly have placed any reliance upon Shah Goli, a company without any capital, nor placed at its disposal millions of dollars in advance payments by the purchasers, without obtaining such guarantees. In order that there not remain the slightest doubt as to completion of the Project and completion of the apartments and their delivery to the purchasers, Bank Omran acquired a further right in the Basic Project Agreement.

Article 10, paragraph (c) of the Basic Project Agreement states that:

> "Either party not in default, even after notice of default to the defaulting party, may elect to proceed to complete the Project without waiving said default or its claims for provable damages consequent thereon."

---

(1) Of these 7 companies, Shah Goli was the principal company; the others are only nominal and inactive companies.

Article 12 adds:

> "... the work may be continued and completed even without the participation and cooperation of the defaulting party."

On the basis of these undertakings, not only the sum of 6 billion rials ($88.5 million) in advance payments by the purchasers, but also a further sum of 1,340,000,000 rials (equivalent to $19,124,875) constituting a loan by Bank Omran, were placed at the disposal of Shah Goli.

However, despite these vast resources placed at Shah Goli's disposal, the passage of time demonstrates that Shah Goli's American directors were guilty of abuse of the trust and immense assistance provided them by Bank Omran. At the time they abandoned the Project and left Iran, years after the Agreement was concluded, they had completed less than 56% of the works, whereas 90% of the costs and expenses borne in the Project had also been provided by the purchasers and by Bank Omran as well. In other words, Shah Goli's obligation to provide the capital has been forgotten and Starrett Housing, an American corporation, has given no indication that it is bound by its repeated guarantees and warrantees.

C. Shah Goli's Delay Past the Contracted Period

While it had undertaken to make delivery of the apartments within a two-year period, Shah Goli had no specific schedule for this huge project and failed to carry out adequate supervision of the stage-by-stage progress of the works.

According to its sales contracts with its customers, it undertook to make delivery of the apartments to the purchasers within two years of the date of conclusion of the contracts. Construction work began in January 1976 on parcel no. 809, and in September 1977 on parcel no. 1175. Shah Goli was therefore obligated to hand over the 800 apartment units of parcel no. 809 to its customers by the end of 1977. As for parcel no. 1175, it undertook to deliver the remainder of the apartments by September 1979. Despite the above, based on the 29 September 1978 progress report which it sent its customers, Shah Goli admitted that construction work had fallen behind the schedule provided for. That is, in a situation where only four months were remaining to Shah Goli until the period contracted for making delivery of the apartments in the first section was to lapse, it had completed only 30% of the construction work. In this connection, the formal Declaration dated 6 December 1978 by a shareholder and Iranian member of Shah Goli's board of directors, who regarded this delay as constituting a major breach of Shah Goli's duties, is worthy of notice. In this document, the American directors were warned and notified that delivery of the apartments would be delayed by one or two years due to Shah Goli's inattention to its financial and technical responsibilities.

Due to a lack of financial resources, Shah Goli was faced with acute crises in late 1978. Because it had despaired of completing the apartments by the contracted time, in December 1978 it decided to deliver apartments with numerous defects, for which there was no certificate of completion, no architect's confirmation and no assignment document, to a number of customers who were willing to pay Shah Goli the balance of the price in cash in exchange for a certain reduction in price. This act was in violation of housing safety rules, as well as contractual standards.

On 7 December 1978, Mr. D. Scannavino, the company's chief of internal affairs, submitted a 45-page report on the

apartments which were to be delivered in the future, wherein 1437 major and minor defects requiring correction prior to delivery were listed in connection with a limited number of apartments intended for such delivery. In order to obtain financial resources for the sake of continuing their work, Shah Goli's American directors invited a number of customers, by phone and in person, to accept delivery of their apartments as they were, in exchange for a reduction. This is the background which the Claimants are now representing as acts by the Revolutionary Guards and as entry into the Project site by armed men seeking to prevent Shah Goli from raising its prices.

D. Cessation of the Company's Operations

Owing to the drying up of Shah Goli's financial resources and failure of its foreign shareholders to comply with their obligations to provide capital for the Project, work on the Project slowed and came to a halt in late 1978, that is, several months before the victory of the Islamic Revolution in Iran. A large number of its American and non-American personnel engaged on the Project left the country, for the sole reason that Shah Goli was unable to pay their salaries. With respect to the company's weak financial condition, Mr. M. M. Taheri (Engineer), who was President of Shah Goli's General Assembly and Mr. Henry Benach's representative on the Board of Directors, states in his written Affidavit that:

> "...from early 1357 (middle of 1978), the company's weak financial situation had become apparent. The semi-control exercised by the company over the workshop gradually deteriorated as well.... Owing to its weak financial condition, the company was faced with a fresh crisis daily.... Following the victorious outcome of the Revolution, over-all the company's financial health had deteriorated to the extent that it was unable even to meet its payroll..."*

---

* [Retranslated from the Farsi original]

At the same time -- i.e., on 20 December 1978 and indeed two months prior to the victory of the Revolution -- Shah Goli's Iranian shareholder also advised its directors of the company's weak financial situation and of the halt of its operations, by means of a telex in which he stated in part that:

> I would like to remind you of my telexes nos. 352, 629/SM and 705/SM dated 13.10.1976, 17.10.1977 and 2.2.1978 respectively, telling the board of directors of the expected situation created by mismanagement of the company, a situation where we are presently facing. The facts are that you have an obligation towards the buyers of the units and you have failed to so under your sales agreements with the buyers, and now by taking advantage of the present socio-economic situation of Iran, blaming the recent events as an excuse for late delivery....
>
> * * *
>
> It is a fact that Shah Goli cannot continue this project due to financial problems, a commitment which is made by Starrett Housing Corporation of New York guaranteeing complete financial support of the project, as per Article 9 (E) of the Basic Agreement, which reads as follows....
>
> * * *
>
> We hereby request and demand your immediate clarification of your financial position regarding the project, as we will not tolerate any setbacks due to your financial inability to carry out and complete the project. We, representing over 1,500 buyers, and the sales organization responsible for marketing of the same apartments, will take any and all legal action in order to assure the completion of the project and to secure the rights and interests of the buyers.

Two of Shah Goli's American directors, i.e. Henry Benach and Richard Bassuk, left Iran and the company's activities wound down toward a complete halt owing to a lack of financial resources. Nonetheless, because of their obligations to the apartment purchasers, and in particular to Bank Omran, the company's directors continually represented that its work and operations were proceeding. In an interview with The New York Post magazine after the victory of the Revolution, Mr. Henry Benach stated that:

> "... 'Everything is still there,' he said. 'We have one building 26 floor high, nearly completed ... and throughout the uprising not a single window was broken. In fact, since the strikes and all, we've only missed two or three days of construction...'"

In his letter dated 7 April 1979 to Bank Omran, Mr. Arthur Radice, another of the company's directors, stated that work had halted for only a week, and asked Bank Omran for financial assistance:

> "...Shah Goli up to-date has continuously been working on the project only stopping for a one-week period during the 'Revolution'. Because of an existing cash flow problem, the project is presently working on a much reduced scale...'"

The important point is: at that very time, the Claimants represented that work on the Project was continuing and that they were carrying out their obligations. Yet they changed their position thereafter and always refer in their claim to conditions preceding and following the Islamic Revolution in Iran as obstacles in the way of continuing the work, and sometimes as "force majeure." This shifting of positions is also deemed to constitute a further estoppel.

Under pressure from its creditors, who were demanding payment on its debts, Shah Goli began selling contraband foreign exchange and conducting transactions with the Project contractors and creditors in the following manner: by availing itself of Shah Goli's foreign exchange account with the Chase Manhattan Bank in New York, it would give them dollar checks or foreign currency drafts in exchange for discounted rials, or for settlement of its debts at a reduced amount. In these circumstances, the Provisional Government decided for a temporary freeze of the accounts of natural and juridical persons who had large debts to the banks, pending a complete investigation. At that time, Shah Goli's account showed a

negative balance of over one billion rials owing to Bank Omran and yet Shah Goli had only 10,000 rials in funds in its account (i.e.,approximately $150): these are the very funds to which the Claimants refer in their Statement of Claim as Shah Goli's blocked monies in Bank Omran, whereas that same account owed Bank Omran $15 million.

Following these events, Shah Goli's American director, Arthur Radice, was summoned by the Tehran Public Prosecutor's office for issuing bad checks. In this incident, too, Bank Omran hurried to his assistance and succeeded in having him released from detainment upon its issuance of two bonds for a total of 42 million rials, following which he immediately left the country. It is worth noting that despite all this solicitude shown Shah Goli's director by officials of Bank Omran and the Tehran Public Prosecutor's office, in their Statement of Claim to this Tribunal, the Claimants portray Arthur Radice's infractions and issuance of bad checks (which would have entailed his prosecution by creditors and the holders of those checks) as a case of harassment and detainment of Starrett's senior director on the Project.

Thus Shah Goli was faced with financial problems and its operations had come to a halt as well. At this same time, and considerably before the incident at the American "Embassy," the company's American directors had departed Iran and left the company without management. The document best illustrating the company's situation is the telex dated 15 July 1979 by Mr. Azarnia, Shah Goli's Iranian director and shareholder, to the company's other directors. The Claimants have attempted to impugn the value of this decisive and incontrovertible evidence by alleging, inter alia, that there was enmity between the Iranian director and shareholder, and the foreign directors. These allegations, however, cannot negate the value of documents relating to both the company itself and its

shareholders. Indeed, these documents well demonstrate the Claimants' actual operations in Iran. In a part of the said telex it is stated that:

> "... Your negligence and default in failing to exert the necessary diligence and effort in connection with the Project... has not only resulted in considerable financial losses and expenses to the purchasers... but has caused injury to the shareholders as well.... Over the past years since the Project has been underway, Azgara Co. has repeatedly notified you of the lack of the necessary financial resources, which is one of the two basic causes of the Project's total paralysis.
>
> "The other basic reason for your (the project's) failure ... is your continuous mismanagement of the executive and technical affairs of the Project, as well as your breach of your obligations under the Basic Project Agreement in this respect.... Your deviation from principles and from your obligations towards completion of the Project, has created a cost over-run ... and has turned the Project into an economic disaster for Starrett and everyone involved....
>
> "...Besides all the above-cited acts, in order to meet a part of your costs you have set out, without any authorization whatsoever, to sell off construction equipment necessary for the Project, such as generators, automobiles and cranes, and you have sold appliances purchased for the Project, such as carpeting, windows, tinted glass, and refrigerators and other kitchen appliances, at less than their actual value as well. Is this the way to carry out and complete a $220 million Project?.... You ... have used the recent social events in Iran as an excuse.
>
> "However, I should like to remind you that accusing a Revolution -- i.e. the events of February 1979 -- as being at fault, cannot justify your defaults and mistakes in the years 1976-1979. The fact that you take such a position demonstrates that your intentions are opportunistic and financially fraudulent."*

---

* [Retranslated by the Tribunal's Language Services.]

On the basis of evidence to be discussed hereinbelow, the American directors were motivated to take such steps as these because they had despaired of successfully continuing with the Project, the completion of which they had made the purchasers of their apartments hopeful, based on their abundant propaganda and on the basis of Bank Omran's reputation.

E. Shah Goli's Bankruptcy; Assistance by the Alavi Foundation and Bank Omran

There is abundant evidence in the case to demonstrate clearly the fact that Shah Goli was bankrupt even prior to the Revolution. Even Shah Goli's American directors themselves repeatedly confessed their inability to pay off the company's debts. In his letter of 7 April 1979 to Bank Omran, for example, Arthur Radice, Shah Goli's Managing Director, states that:

> "... our only [final] requirement to allow us to immediately continue and turn apartments over to the buyers is the financial help we need from the Bank to pay past due debt.... We estimate we will require approximately 700 million rials to meet our past due obligation..."

This letter was written under conditions where, according to the available evidence in the case, only a small percentage of the overall works had been completed; and in view of the inflation rate, which increased in the following years, the above sum would not have been sufficient for the company's needs. In their Statement of Claim and their subsequent submissions, the Claimants speak continually of the expropriation of the former Pahlavi Foundation by the Government of the Islamic Republic of Iran and of the nationalization of Bank Omran.

The Foundation has continued on as a charitable institution, and its ownership has not been vested in the new Government. As for Bank Omran, even though it has been nationalized and has joined Bank Mellat, this change has had no effect whatsoever upon Shah Goli and its operations. On principle, the banks in many countries, for example Norway and France, have been nationalized, but this change in the bank's ownership has never entailed nationalization of the said banks' projects and contracts. What is most important of all, is that Shah Goli and its American directors formally recognized these changes after the victory of the Revolution and repeatedly asked the Alavi Foundation and Bank Omran for loans and assistance, an instance of which is the deposit of a $600,000 bond in order to secure the release of Mr. Radice from detention.

In addition, the Alavi Foundation, desiring to set the Project in motion as it was under pressure from purchasers of the apartments, made a $3 million loan to Shah Goli three months after the victory of the Revolution. This loan was extended under conditions where the company's American directors were continuing to manage it as before. In this way, the picture of conditions in Iran provided by the Claimants in their Statement of Claim is in total disagreement with the actual facts. Throughout this whole time, Shah Goli's account with Bank Omran was functioning properly, and Bank Mellat has placed at the disposal of the Tribunal as evidence the balance sheet of this account's activities from November 1978 through April 1979.

After the departure of the American directors in the summer of 1978, Mr. Louis Johnson, the then managing director of the company, requested the Alavi Foundation for a further loan of 14 million dollars. Alarmed over the company's financial situation, the Alavi Foundation and Bank Omran requested a thorough study of the financial and technical status of the Project. The study was carried out by Mr.

Farrokh Neghabat, as well as by Mr. Stanley Davis, the Project's Executive Manager, who was appointed by the American directors themselves. The study, which was made on 7 September 1979, ascertained that even if all the necessary facilities and funds were placed at Shah Goli's disposal, 26 months were needed as from 23 August 1979, to bring the Project to completion, in which case the company would nevertheless face financial losses amounting to 669 million rials.

On 1 September 1979, the Alavi Foundation, Bank Omran and Shah Goli entered into an agreement whereby the sum of one billion rials ($14 million) would be paid to Shah Goli on a gradual basis in accordance with a schedule prepared by the West Tehran Development Organization and approved by Shah Goli. Even though this loan had been agreed to, Shah Goli's director sought to obtain a further loan, from Bank Melli Iran. In his letter of 22 October 1979 to Bank Melli Iran, Mr. Johnson stated that according to estimates by his specialists, the sum of 1.5 billion rials, and a period of 36 months, were needed to complete the Project. In other words, he increased Mr. Neghabat's calculations, which were highly conservative. The latter calculations revealed the truth to Shah Goli's directors for the first time, showing that under the most conservative estimates, after completion of the Project and delivery of the apartments they would face definite losses of at least $50 million, and for this reason they refused to accept the loans agreed to and approved by the Alavi Foundation.

In his Affidavit submitted to the Tribunal, Mr. M. M. Taheri, an engineer and a member of Shah Goli's Board of Directors, has provided valuable information concerning Shah Goli's situation; in particular, he explains the refusal of its American directors to accept these loans as follows:

> "... At any event, Bank Omran agreed to defer payment on the company's current indebtedness, which consisted of loans and outstanding debts on the sale

of the land, until completion of the works; it also agreed not to take interest in this connection, and to make the necessary working capital available to the company, on condition that the apartments be sold under the Bank's supervision, so that the Bank could be assured that the monies generated by sale of the apartments would be spent in the workshop. However, I felt that although the company's management ostensibly welcomed these solutions, it did not evince much interest on this occasion and avoided signing an agreement with the Bank. I suppose that the figures and calculations in the prepared table had revealed to the company's directors and to Mr. Henry Benach the bitter fact that for Starrett, the future of the company would be dark and gloomy. The figures and data were so eloquent and clear that there was no room for doubt or misapprehension in this regard. Mr. Davis, who had replaced Mr. Radice after the Islamic Revolution, considered Mr. Radice responsible for this bleak track record and had stated as much in his reports to New York. One day, after we had been studying the data for nearly two hours, Mr. Davis placed his elbows on the table and his hands under his chin, and said very sadly and regretfully that only a miracle could save Henry (referring to Mr. Benach). He then continued that Mr. Benach's management had been under question in New York for some time now, and that a reputable newspaper had described Starrett's operations in Iran as a failure. However, discussions and negotiations continued with officials of the Alavi Foundation in connection with how the loan was to be made, how much it would cost, etc. The Alavi Foundation, having declared that it was prepared to grant the loan, asserted that the company's past performance had not corresponded to proper planning and procedures and that now that it had agreed to make a large loan available to [the company], [the Foundation] wished to supervise the manner in which the loan monies were spent. The company's directors, however, were unwilling to agree to this condition. In this way, days and weeks passed, until Americans were recalled by the President of the United States and all the American officials left Iran, leaving the company in a very weak condition financially and the works far behind schedule. Apparently the miracle of which Mr. Davis spoke had come about." *

---

* [Retranslated from the Farsi by the Tribunal's Language Services]

F. Abandonment of Shah Goli and the Project by its American Management

After Shah Goli had halted its operations owing to a lack of capital, the management of its affairs completely unravelling and the company's American directors leaving Iran as well, the incident at the American "Embassy" in Tehran served as a convenient pretext: the person nominally serving as the company's manager left Iran, and as a result the company and this huge project were completely abandoned.

Earlier, on 22 August 1979, Mr. Salour, Managing Director of the Alavi Foundation, had reminded the directors of Starrett Housing Corporation, who had underwritten Shah Goli's obligations by means of the October 16, 1975 Guarantee, to take the necessary steps to complete the Project. In this letter, he stated:

> "Mr. Henry Benach:
>
> "In response to your letter of 10 August 1979, unfortunately the negotiations conducted towards a resumption of Shah Goli's works were without result, and you are therefore unequivocally notified that all these efforts were for the sake of setting the works in motion. If the company lacks the requisite financial resources, the Provisional Government of the Islamic Republic will be obliged to take action in this matter, in accordance with the prevailing laws. Therefore, for the sake of establishing better relations and in order to respond to the 1600 customers who have paid you their money and yet have thus far obtained no results, it is imperative to take the necessary steps as quickly as possible to complete the said project." *

---

* [Retranslated from the Farsi by the Tribunal's Language Services]

In its telex of 11 December 1979 repeating its proposal of new financial resources (the company's basic problem), Bank Omran also renewed its invitation to Shah Goli's American directors to come to Iran in order to resume work, or else to introduce a representative for the sake of negotiations on completing the work. In this telex it stated that:

> "3) Though there has not been any obligation for providing financial resources for completion of construction of apartments and it has been your obligation to provide such financing however as we have been informed your representatives in Iran have been informed that sufficient financings are available to be made to you awaiting for Shahgoli's representative in this respect. This is the best proof showing that there is no obstacle for continuation of your work in Iran.
>
> "4) In case you need further discussions you may come or send a fully authorized representative to Iran.
>
> "5) Should the completion of the work be stopped or postponed you will be responsible for the consequences to."

Because the said formal invitation by Bank Omran was without result, by a further telex to Shah Goli's directors dated 6 January 1980, Bank Omran reiterated its request that they assume the task of supervising their company. It emphasizes its own position as follows:

> "As we are informed managers of Shahgoli without any reason have left the work and do not attend the site. They may have left Iran already. Therefore we are afraid that the work be stopped as a result of that. There is no one in here in represent you and to take care of the buyers calling and coming to Shahgoli for delivery of apartments as well as for payment of wages and salary to the workers and the employees of Shahgoli.
>
> "Below is a translation of Article 1 of the Decree regarding those companies whose managers have left their companies and have fled the country. In case managers of Shahgoli do not attend the site by

January 15, a manager of a supervisor shall be assigned by the Government for Shahgoli and such action by the Government should not be constructed by you as confiscation or interference having direct effect on the project."

II. The Nonresponsibility of the Government of the Islamic Republic of Iran for Events Before and After the Victory of the Revolution

Aside from the procedural and jurisdictional objections discussed in Part I of the present Opinion, the claim of Shah Goli's expropriation by the Government of the Islamic Republic of Iran is, legally speaking, vague as well, and the evidence invoked by the Claimants is ambiguous. The Claimants have attempted to construe the events related to the Islamic Revolution in Iran and even events preceding the Victory of the Revolution, as constituting expropriation of Shah Goli, and they have made great efforts to distort and misinterpret these events in order to be able to distort the face of a glorious Islamic Revolution, a revolution unique in the entire history of mankind. The Claimants have misappropriated millions of dollars in advance payments by purchasers and loans by Bank Omran and turned their backs on a bankrupt project.

Shah Goli and Starrett Housing have shirked their obligations to the apartment purchasers and Bank Omran, and left the country. Now, in order to justify their evasion of their obligations and to perpetrate perhaps further instances of misfeasance and to acquire other ill-gotten resources as well, they have set out in their Statement of Claim and their memorials to circulate misleading and nonfactual statements and assertions. But the Revolution, which took place in order to put an end to an oppressive regime and establish freedom and independence, and which attained victory at the cost of the sacrifices and bloodshed of thousands of innocent com-

patriots, is far too exalted for the Claimants to distort through their narrow-minded standards and self-serving motives. Furthermore, the important facts set forth above reveal the actual realities so clearly as to leave no room for the Claimants' fanciful allegations. The evidence submitted shows that not only were the events preceding and following the victory of the Islamic Revolution in Iran unrelated to Shah Goli, but Shah Goli enjoyed the utmost of kindness and consideration from the institutions concerned, i.e. the Alavi Foundation and Bank Omran, to the extent that even several months after the victory of the Revolution the Alavi Foundation paid a $3 million loan to the company, and Thereafter as well, the company's directors constantly had their hands out to Bank Omran and the Foundation for further loans. Instead of honoring their legal and moral obligations to their customers, and considering the millions of dollars in debts they owe to Bank Omran, in that period the company's American directors either went back to their own country one way or another, or else engaged in activities such as transferring foreign currency or issuing bad checks. As a whole, they had no honorable solution to pose against the grave crisis which had arisen for the company as a result of their mismanagement and financial misfeasance. They left Bank Omran and the company burdened by heavy debts and obligations, and then, from that same time, they set out to bring actions, draft statements of claim and concoct allegations contrary to fact, such as the "armed attack" upon the Project site, and the like. In late 1979 they even commenced vexatious proceedings in the American courts.

At any rate, the Interlocutory Award did not accept that part of the Claimants' contentions wherein they attempted to exploit the events associated with the Islamic Revolution in Iran. In one part of the Interlocutory Award, it is stated in this respect:

> "...But investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of the economic and political system and even revolution. That any of these risks materialized does not necessarily mean that property rights affected by such events can be deemed to have been taken. A revolution as such does not entitle investors to compensation under international law. Therefore, when considering the events prior to January 1980 to which the Claimants have referred, the Tribunal does not find that any of these events individually or taken together can be said to amount to a taking of the Claimants' contractual rights and shares..." (Emphasis added.)

Shah Goli lacked capital from the very beginning -- never did the Claimants make any proper capital investment in the Project. However, even if they had made a valid and legal capital investment and suffered losses as a result of the revolutionary events in Iran, they could not have treated these circumstances and conditions as giving rise to responsibility on the part of the Government of Iran.

Germane to this issue, inter alia, Bayard, a former United States Secretary of State, wrote to the Spanish Government in 1888 in connection with the claim of an individual named D.G. Negrete against the Government of Spain, stating that his intention at that stage was not to espouse Negrete's claim, but to inquire as to the position of the Spanish Government; for, the United States Government was aware that a host government is not an insurer, and "this insurrection is one of those calamities against which no prudent government could guard except by measures more detrimental than the evil they are intended to remedy."(1) This is the law as it remains today(2) and no state has accepted such a standard of liability as guarantor in this regard.(3)

---

(1) Moore, VI Digest of International Law, 961-4 (1906).

(2) I. Brownlie, System of the Law of Nations, State Responsibility Part I, (1983) 170, following a full quotation of Mr. Bayard's letter.

(3) Id. at 171 .

The International Court of Justice has also affirmed this fact in the Barcelona Traction Case, even for instances where revolutionary conditions do not exist in a country. In one portion of that Judgement it states that:

> "... When a state admits into its territory foreign investments or foreign nationals it is, as indicated in paragraph 33, bound to extend to them the protection of the law. However, it does not thereby become an insurer of that part of another state's wealth which these investments represent. Every investment of this kind carries certain risks..." [1970] I.C.J. §87.

In this way, none of the events preceding or following the Islamic Revolution in Iran can be interpreted as constituting expropriation, and any hypothetical loss or diminution in value of the investment occurring in such circumstances relates to the investor alone and not to the Government of the Islamic Republic of Iran. This rule was applied by Chamber One not only in the instant case, but it was thereafter affirmed in other cases as an established rule as well. In a different Award (Case No.33, Sea-land Service, Inc. and Ports and Shipping Organization of the Islamic Republic of Iran), issued as Award No. 135-33-1, Chamber One declared as follows:

> "...The second [factor] is that it is generally acknowledged that the state of administrative chaos which prevailed in Iran throughout the first few months of 1979 makes it unsafe to attribute any such ostensibly governmental acts to the revolutionary Government that subsequently came to power. Mr. Bos relates in his Affidavit that it was at about this that time the head of the Labour Office at Bandar Abbas was replaced. Against a back-ground of continued uncertainty and changes in control, it strikes the Tribunal as virtually impossible to use such acts as the basis of a finding of expropriation. The Tribunal is mindful of the fact that the events of which Sea-Land complains all took place before 1 August 1979, during the very period of foment and disorder which preceded and accompanied the Revolution, and not as a result of the implementation of post-revolutionary policies. (See, also, Gould Marketing, Inc. and Ministry of National

Defence of Iran (Award No. 24-49-2) at pages 11-14; Starrett Housing Corporation et al. and The Government of the Islamic Republic of Iran et al. (Award No. ITL 32-24-1) at page 54.)

A finding of expropriation would require, at the very least, that the Tribunal be satisfied that there was deliberate governmental interference with the conduct of Sea-Land's operation, the effect of which was to deprive Sea-Land of the use and benefit of its investment.[8] Nothing has been demonstrated here which might have amounted to an international course of conduct directed against Sea-Land. A claim founded substantially on omissions and inaction in a situation where the evidence suggests a widespread and indiscriminate deterioration in management, disrupting the functioning of the port of Bandar Abbas, can hardly justify a finding of expropriation.

Thus the claim against the Government of Iran based on expropriation must be dismissed.

8 See, for example, the Oscar Chinn case, P.C.I.J. Ser. A/B No. 63 (1934) at page 86; G.C. Christie, What Constitutes a Taking of Property Under International Law? [1962] B.Y.I.L., at page 311.

This is not only a rule which is established under international law and applied by this arbitral Tribunal, but it is also on principle a rule recognized by the Governments of the Islamic Republic of Iran and the United States in the Algiers Declaration. The Act passed by the Majlis on 25 Dey-mah 1350 (15 January 1981) authorizing recourse to arbitration with respect to disputes between the Governments of the Islamic Republic of Iran and the United States, has expressly excluded "claims arising out of the Islamic Revolution in Iran." Moreover, pursuant to the said Act, paragraph 11 (D) of the Algiers Declaration has barred all claims arising out of events occurring and relating to injuries to United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran.

Based on these points, the Claimant's allegations in connection with the events preceding and following the victory of the Islamic Revolution in Iran, are in toto irrelevant and rejected; and insofar as this has been explicitly stated in the Interlocutory Award, the Claimants have no further recourse in this regard.

III. Appointment of a Temporary Manager to Proceed with the Project Does not Constitute Expropriation of Shah Goli

Pursuant to Article 10 (c) and Article 12 of the Basic Project Agreement, it was provided that in the event of Shah Goli's default, Bank Omran may elect to proceed to complete the project. By its telex of 11 December 1979, and especially by the telex of 6 January 1980, Bank Omran gave notice to the Claimants to return to Iran and carry out their obligations for completing the Project. It is also stated that in the event of refusal, steps will be taken to appoint a manager for Shah Goli in order to complete the construction works, and it notes as a precaution that the said action shall not be construed as expropriation. In their telex of 11 January 1980, Shah Goli's American directors resorted to the travel advisory by the United States Department of State to U.S. nationals as a pretext for not returning to Iran and for shirking performance of their obligations. Despite the fact that Shah Goli's American directors had received all manner of financial assistance from Bank Omran and the Alavi Foundation and could easily have enjoyed still further moral and material assistance if they had decided to continue working, instead they used the prevailing conditions in Iran as a further pretext and refused to accept Bank Omran's invitation. It is worthy of note that at that date, Shah Goli's American directors did not register the slightest objection to Bank Omran's proposal to continue work on the basis of their contractual obligations, or to appointment of a manager; they were solely

attempting to justify their refusal to return. The reason is obvious, for they were aware, under those conditions, of the company's financial situation and the total bankruptcy of the Project and they would not have considered it in their interest to continue working on the Project under any circumstances. However, now that the Iranian and United States Governments have sought to settle their disputes and the Security Account has come into existence along with this arbitration, it is most amazing to observe that Shah Goli's directors have created a complicated claim on their part and have attempted to make improper use of this arbitral Tribunal and the funds of the Iranian Government by invoking a claim of expropriation.

At any rate, the Ministry of Housing of the Government of the Islamic Republic of Iran appointed Mr. Erfan as Temporary Manager of Shah Goli, which had been left without management, at the request of Bank Omran and solely in order to fulfill the obligations under the Basic Project Agreement. Furthermore, as a result, the Government of the Islamic Republic of Iran was compelled, in order to put the affairs of this undirected project in order, to incur millions of dollars in material losses and costs, as well as to face other serious, nonmaterial difficulties in order to respond to the incessant requests from purchasers of the apartments.

Although the Interlocutory Award has not held found that the events related to the Revolution have given rise to any responsibility on the part of the Government of Iran, the final part of the Award has regarded the appointment of a manager for completion of the Project as constituting control of Shah Goli by the Government of Iran. In one part of the Interlocutory Award, it has been admitted that assumption of control over a property by a government does not automatically and immediately lead to the conclusion, under international law, that such property has been taken by that government and thus entailing payment of compensation. The fact has also

been confirmed that the Claimants were repeatedly invited to continue working and assume direction of Shah Goli's affairs. Nonetheless, in another part of the Interlocutory Award, it has been concluded that, as of 31 January 1980, the Government of Iran had interfered with the Claimants' property rights in the Project and that these rights had become so useless that they must be deemed to have been taken. We stated above that the Claimants possessed no property rights whatever in Iran, with respect to which an assumption of taking might apply. And even if it be assumed, in arguendo, that such property rights did exist, in the light of the facts which led to appointment of a manager and to assumption of control over work on the Project, such a conclusion is totally unjust and -- for numerous reasons which will be discussed below -- is incompatible with the terms of the Basic Project Agreement, the subsequent acts of the Claimants, legal principles, and the provisions of the Algiers Declarations.

A. Appointment of the Manager to Complete the Project Was a Contractual Right and Obligation

Article 9, paragraph (a) of the Basic Project Agreement obligates Shah Goli to "fulfill all the terms of this Agreement promptly and in good faith to the end that the Project be efficiently completed as contemplated herein."

Vast sums of money had been paid by apartment purchasers to Shah Goli, solely on the strength of Bank Omran's good standing. Apart from the explicit obligations and guarantees which it had exacted from Shah Goli and the American company, Starrett Housing, respectively, Bank Omran deemed it necessary to have at its disposal further guarantees in the event of a default by Shah Goli and non-observance of its guarantees by Starrett Housing. Therefore, Article 10 (c) and Article 12 of the Basic Project Agreement were clearly included therein in

the interest of Bank Omran. Pursuant to these Articles, any default by Shah Goli must not bring about a halt to the Project, and Bank Omran was authorized to take the necessary steps to continue and complete the Project, even without the participation of the company.

The facts in the instant case demonstrate that because of their mismanagement and inexperience, and most important of all because of their misallocation of the company's assets, the company's directors were incapable of managing this Project in a self-sufficient manner despite having received $88.5 million in advance payments from their customers and $20 million in loans from Bank Omran, as well as having had the land (which constitutes the basic and major asset of such a project) placed at the disposal of the company without prior payment of the purchase price.

The Respondents state that 20% of the company's monies (which were in reality advance payments by the purchasers) were, through manipulation of accounts, deposited to the accounts of companies affiliated with the directors of Shah Goli (such as Azgara and Starrett Construction) as "sales services" and "management" costs, instead of being spent for progress on the works. That is, the payment of 8¼% to Azgara's account for "sales services" costs was an unreasonable payment, because this cost is conventionally less than 3% of the transaction price, and the severe need for housing in Tehran, as well as the reputation of Bank Omran, resulted in the sale of all of the apartments anyway. Furthermore, payment of 11¾% of the company's monies to Starrett Construction as "management" costs, was in consideration of unknown and fabricated "services." As a result of these unreasonable payments, in all, 20% of the company's income was embezzled and the company was unable to pay its expenses and burdened itself with millions of dollars in debts as well. Letters by the company's directors, such as that dated 7 April 1979 by Arthur Radice, the report on the company's liquid assets situation signed by Stanley Davis

on 7 September 1979, and Louis Johnson's letter dated 22 October 1979 to the manager of the Credit Department of Bank Melli Iran, are the most decisive evidence in proof of Shah Goli's bankrupt status. Therefore, contrary to the Claimants' statements, construction activities had in effect halted well before the departure of the last-remaining company director. The witnesses who appeared at the Hearing Conference, all of whom were involved in the Project and had first-hand knowledge of the facts involved, testified to this fact before the Tribunal.

It was under such circumstances that Shah Goli's American directors resorted to the pretext of the directives by the United States Department of State to abandon the company, along with its obligations towards the apartment purchasers, since a minimum of 1.5 billion rials and a further period of 36 months would be required, on the basis of the assessment dated 22 October 1979 by its American director, before the Project could be brought underway. In this manner, they confronted Bank Omran and the apartment purchasers with a half-completed project, of which, according to the statement by the Respondents' expert witness, less than 56% of the total works had been completed. If Shah Goli's directors had acted in good faith and the company had enjoyed sufficient financial resources, the crisis in the relations between Iran and the United States could not have created any obstacle to the completion of the works. The Project did not require any ultra-modern, complicated expertise, and Iranian engineers and technicians could easily have managed the company and made the Project a success far better than its inexperienced American directors could have.

What ought Bank Omran to have done, in a situation where the company had no management and its directors were not even willing to accept loans from the Alavi Foundation and Bank Melli Iran, and where the Bank had risked its prestige, its good standing, and millions in dollars of its own capital, on

the performance of this Project? The apartment purchasers, who had been promised delivery of their apartments within two years, were putting Bank Omran under pressure. Can any fair and intelligent person accept the idea that Bank Omran should have failed to react, and should not have taken steps to supervise the company in the face of this large project resulting from millions of dollars in investments by customers and in assets of the Alavi Foundation and the Bank itself? If Bank Omran had not acted to take charge over the company and prevent the embezzlement and dissipation of its assets, it would have had tortious liability towards the apartment purchasers. Moreover, on the strength of the provisions of Articles 10 and 12 of the Basic Project Agreement, Bank Omran had retained for itself the right to prevent the works from coming to a halt. It is thus Bank Omran who is the true claimant in the present actions, and it is the company's directors who ought to be answerable for their own contractual obligations. No one can take Bank Omran to task for exercising its contractual rights under such circumstances. In exercising its rights, Bank Omran has been guilty of no default; it has carried out all the necessary formalities and precautions in inviting the company's directors to continue taking charge of the Project. Therefore, the appointment of a manager to complete the Project constitutes its exercise of a contractual right, and Bank Omran has not incurred any liability as a result of having exercised and availed itself of the said right. The exercise of this right, and the appointment of a manager, were totally in the interest of Shah Goli, because as a result the company's assets were protected and the construction activities, which the company was obligated to the purchasers to carry out, continued, and because as a result the company's property was not only <u>not</u> put to no use, but construction activities progressed and Shah Goli and its shareholders are the principal and ultimate beneficiaries from Bank Omran's action in appointing a manager. Whereas Bank Omran has availed itself of its contractual right, it has also always been prepared to turn the Project over to the

company directors in the event that they returned, a fact which has been proved to the Tribunal. Under such conditions, even if the exercise of the said contractual right occasioned injury to Shah Goli -- and in the present case any presumption of injury is moot -- said injury cannot be compensated. It is an accepted principle under all legal systems, that the use and exercise of a right is not a fault and does not cause the person possessing that right to incur liability, even if the other party incurred damages as a result of the exercise of said right.

B. The Respondents' Primary Counterclaim demands that Goli's Original Directors take control over the Company and complete the Project

Prior to taking action to ensure continuation of construction works, Bank Omran and the Alavi Foundation requested the company's directors to assume charge of the company, and after they were compelled to take charge of the semi-completed Project themselves, they requested the company directors on various occasions to fulfill their obligations by taking charge of the company. This request arose from Shah Goli's contractual obligations pursuant to the Basic Project Agreement; moreover, from the practical point of view it was feasible, provided that there was good faith on the part of the company's American directors. Many projects which were incomplete at the time of the victory of the Islamic Revolution in Iran came to a successful conclusion through the help of the relevant Governmental organizations and agencies. On no occasion did Shah Goli's directors go in person to Iran or select any persons for this purpose. This request was repeated by officials of Bank Omran even in the negotiations which were held in London. The Respondents also utilized the opportunity afforded them before this arbitral Tribunal, and they reiterated this invitation in their Statement of Defence

dated 22 April 1982, in their subsequent memorials, and in the Prehearing and Hearing conferences. For this reason, it cannot possibly be said that the company's directors were prepared to assume charge over the Project and pay its expenses, and that Bank Omran, or the Government of Iran, prevented them from doing so.

Their compulsory and unsought assumption of control over the incomplete Project brought about numerous difficulties for Bank Omran and the Government of the Islamic Republic of Iran, and it caused them to incur millions of dollars more in costs. And this was in a situation where Shah Goli was responsible for providing the capital. Assuming, in arguendo, that the Tribunal determined that it had jurisdiction, Bank Omran and the Government of the Islamic Republic of Iran requested that the American company, Starrett Housing, be compelled to fulfill the terms of its 16 October 1975 Guarantee whereby it undertake to carry out Shah Goli's obligations and complete the Project, and they have regarded this issue as constituting their principal counterclaim, because on the basis of a subsequent assessment by the American directors the Project which was supposed to be completed within a two-year period, would require at least seven years. As a result it has been established that the company was in default on its obligations.

Neither the Claimants nor this Chamber can escape the obvious fact that the claim of expropriation automatically fails, in view of the Respondents' counterclaim demanding that the Claimant be obliged to complete the Project, and this constitutes the best evidence of the Claimants' lack of good faith. There has never, up to the present, been an instance where expropriation was forced upon a government. Although the Interlocutory Award admits these successive invitations, it poses the question of what facilities were provided Shah Goli's directors to enable them to take charge of the Project. This is not a justifiable question, because the Government of

the Islamic Republic of Iran is not required to establish facilities for Shah Goli, which is an Iranian national. Even in the case of foreign nationals, the rules of international law have not required provision of the greatest possible degree of protection by governments; rather, what is at issue is the minimum degree of protection. Therefore, so long as the government of the place where a company is registered and formed observes the minimum standards necessary under international law, foreign nationals are obliged, in accordance with established principles of customary international law, to seek the solution to their problem within the framework of the administrative regulations and judicial system of the host country, and governments will not be confronted by any manner of international responsibility before the local remedies for redress have been exhausted. Moreover, Shah Goli is an Iranian national and was obligated to take the necessary steps to vindicate its hypothetical rights itself. There has been no evidence submitted in the present case that the company, or its foreign directors, were actually prepared to assume charge over the company, which they have left without management, or that they were prepared to pay the huge expenses for completing the Project and its current liabilities.

With all this, perhaps the present case has also as a distinguishing feature, the fact that the Alavi Foundation paid a $3 million loan to the company and approved a further loan of $14 million as well. Neither the Alavi Foundation nor Bank Omran had any such obligations to do so; however, no document can provide more decisive proof of the fact that the greatest possible degree of protection was extended to this company, than the telex dated 11 December 1979, which it will perhaps be prudent for the Chamber to restudy. It is stated in the said telex that:

> "3) Though there has not been any obligation for providing financial resources for completion of construction of apartments and it has been your obligation to provide such financing however as

> we have been informed your representatives in Iran have been informed that sufficient financings are available to be made to you awaiting for Shahgoli's representative in this respect. This is the best proof showing that there is no obstacle for continuation of your work in Iran.
>
> "4) In case you need further discussions you may come or send a fully authorized representative to Iran.
>
> "5) Should the completion of the work be stopped or postponed you will be responsible for the consequences thereto."

The fact is that the claim of expropriation made by Shah Goli's American directors is a means for evading performance on their contractual obligations. This allegation is also a pretext for emasculating and rendering nugatory Starrett Housing Corporation's Guarantee dated 16 October 1975. This Chamber must not permit the company's directors to shirk their contractual obligations, which they should have carried out in good faith. If these obligations and guarantees are so readily trod underfoot, then what guarantee remains at the international level? Under municipal law, such actions entail decisive and established performance bonds, and companies are not permitted to trod such weighty obligations underfoot with impunity. In some instances where there was flagrant bad faith on the part of construction companies, the criminal authorities have prosecuted such companies for fraud by their directors. And in fact, what Shah Goli's directors have done bears comparison with the criminal standards of the General Public Code of Iran. Even if this arbitral Tribunal, which is carrying out its duties as an international forum, lacks the powers of municipal criminal fora, it should nonetheless not permit Shah Goli's American directors and Starrett Housing to use conditions which in no way prevented their continuation of work and the completion of the Project, as a pretext for evading performance of their obligations so easily. Indeed, it was because of these very obligations that Bank Omran

placed its good standing, reputation, and millions of dollars in its own capital and in advance payments by customers in jeopardy, and it is now high time that this arbitral Tribunal restore to these obligations their true sense and meaning.

C. The Claimants' Subsequent Acts

The Interlocutory Award failed to take note of the fact that, whereas Shah Goli's directors did not appoint a manager for the company, they continued to involve themselves personally in the company's property, not regarding the appointment of a manager as an obstacle to their actions. The Claimants allege that Shah Goli was taken as from September, 1978; the Chamber did not accept this allegation, and it instead considered 31 January 1980 as the basic date at which control by the Government of Iran took form. However, important information is available in this case indicating that Shah Goli's directors made use of the Company's bank accounts even well after that date, and that they conducted these transactions as, and in the name of, the company's directors. According to page 2 of Claimants' Exhibit No. IV-A-1 to their Statement of Claim, payments were made to the New York bank account of Shah Goli Apartment Construction Company. These payments relate to the months of January, February, March, May, and even June 1980. Withdrawals were also effected from this company's account by Henry Benach, as the chairman of the board of directors or the Managing Director and a delegate of the latter approved by the Board of Shah Goli under Article 14.9 of the Articles of Association. See note 2, supra, at 29. These withdrawals took place throughout 1979 and in the months of February, March, April, and June 1980 as well (Exhibit No. IV-A-3, page 4). On page 8 of Exhibit No. IV-D, the Claimants even admit that payments were made by Shah Goli as late as

September 1981. Apart from the fact of these payments and withdrawals, which were totally within the Claimants' prerogatives and of which neither Bank Omran nor the Government of the Islamic Republic of Iran could, naturally, have had any knowledge, an important legal fact poses itself at this point: how can the Claimants treat the appointment of a manager at Bank Omran's request as constituting expropriation whereas, as late as 9 months after the signing of the Algiers Declarations, and 20 months after January 1980, they in practice treated Shah Goli as a company under their own control and withdrew its monies or made payments on its behalf? Unfortunately, because of the large number of cases and the excessive pressure by the Claimants, this Chamber on principle failed to consider these issues, a fact which provides serious grounds for objecting to the validity of the instant Decision and which militate in favor of its review.

In addition, the above is to be regarded as an overt admission by the Claimants that no expropriation occurred, because the fact that Henry Benach and other company officials signed checks as company directors and delegates is a bar to acceptance of their allegation of expropriation. This is an obvious instance of estoppel and is cause for rejecting the allegation of expropriation. (See supra, note 1 at 22.)

D. The July 14, 1979 Law Concerning the Appointment of Temporary Managers, is not an Expropriatory Law

Following a protracted halt to the company's operations, Shah Goli's directors abandoned the company and its employees and left Iran. Under such circumstances, not only did Bank Omran's contractual rights entitle it to request appointment of a manager to complete the Project, but the overall interests of the Government of the Islamic Republic of Iran, and its duty to establish order and to put the rights of the

apartment purchasers in order, dictated that it not remain indifferent when faced with such a critical situation. In its telex dated January 6, 1980, wherein it protested the fact that the company's American directors had abandoned the company and left its employees without direction, Bank Omran stated that pursuant to Article 1 of the Bill for Appointing Temporary Managers concerning companies whose managers have abandoned them and left the country, a manager or supervisor would be appointed for Shah Goli by the Government unless Shah Goli's directors presented themselves at the work site by January 15, and further, that such action by the Government shall not be construed as confiscation or interference having a direct bearing upon the Project. Mr. Erfan was appointed Temporary Manager by the Ministry of Housing in accordance with the said Law. The Interlocutory Award has considered the appointment of a Temporary Manager, and indeed this Law itself, as depriving the shareholders in Shah Goli of their management over the company and as resulting in a deprivation of the Claimants' possibilities of effective use and control of the company.

The Interlocutory Award has ignored the obvious fact that the above Law was ratified on July 14, i.e. six and a half months before the Temporary Manager was appointed. Throughout that period, so long as Shah Goli was, even if only formally, under the management of its directors, no action was taken to appoint a manager and in addition, during this entire period, agreement was reached on making loan payments to the company and officials of the Bank and the Foundation extended a great deal of assistance to the company. The said Law was not motivated by anti-Americanism; it was passed solely in order to safeguard the public interest. In addition, the utmost of accommodation and moderation was exercised towards Shah Goli in the enforcement of this Law. That is, prior notice was given the company's directors asking them to assume charge over the company in one way or another, and no action was even taken to appoint a manager until two and a half months after

the directors had left. If, therefore, the company's directors or shareholders have been deprived of the right to manage the company, this deprivation is the result of their own violation. In actuality, the company's financial situation was such that its directors considered it in their best interest to abandon it; the appointment of a Temporary Manager was preceded by background events wholly attributable to Shah Goli's shareholders and American directors, and not to the Government of Iran.

The action by the Ministry of Housing in appointing a Temporary Manager not only arose out of the said Law, but it was also based upon generally recognized legal principles. Article 306 of the Iranian Civil Code permits the management of other persons' property in their interest, in the event that the owner dies or is absent.(1) This is a principle which is recognized under most legal systems (gestion d'affaire).(2)

Furthermore, preventing the closing down of industrial units is currently among the principles of concern to all governments. For example, the Law for the Protection of Industry and Prevention of Shutdowns at the Nation's Factories, ratified in 1964 (that is, years before the victory

---

(1) According to the said Article:

> "If someone manages the property of an absent or a [legally] incompetent person or the like without the permission of the owner or of that person entitled to give permission, he must give an accounting of his period of management. If it would have been possible to obtain permission in a timely manner, or if delay in intervening would not have caused any loss, he will not be entitled to make claim for his [management] expenses. However, if a failure to intervene or a delay in intervention would have entailed losses to the owner of the property, then the intervenor will be entitled to receive those expenses which were necessary for managing [the property]."

(2) Articles 1372 through 1375 of the French Civil Code.

of the Islamic Revolution in Iran) was passed for this purpose.

For this reason, enforcement of the Law dated 14 July, 1979 with respect of Shah Goli, which is an Iranian national, cannot of itself be regarded as constituting expropriation or even control by the Iranian Government, nor can it give rise to responsibility on the part of the Government of the Islamic Republic of Iran.

Expropriation signified divestment of ownership rights, and entails that the government has taken action to divest another party of its ownership rights in property belonging to the latter and has also taken possession of the said property. The Interlocutory Award has also conceded that no law has been passed for the expropriation of Shah Goli, but it should also be added that this company is not, on principle, susceptible to expropriation, because all of the apartments were sold in advance from the very outset, and all of the customers paid the company large sums of money as advance payments. The land on which these apartments were to be constructed belongs, ultimately, to the purchasers; moreover, as for registration they were registered with the Office for Registration of Properties in the name of Shah Goli, and pursuant to Article 22 of the Iranian Code for the Registration of Properties, only that company can be regarded as the legal owner of the said properties.(1)

Moreover, pursuant to an official instrument, the two parcels of land nos. 809 and 1175 are both held in mortgage by the Alavi Foundation, for the reason that the Foundation has not been paid the purchase price therefor. Therefore, this company has nothing which could be expropriated and taken

---

(1) In accordance with Article 665, paragraph 3 of the Iranian Civil Procedure Code, this constitutes one of the grounds for overturning an arbitral award.

possession of by the Government. On principle, there exists solid evidence that Shah Goli was, financially, in a state of certain bankruptcy. As of the date when the company was abandoned, less than 56% of the construction works had been completed, and the company was encumbered by huge debts as well. To these facts should be added the expenses of completing the Project which had undergone inflation owing to its unusual delay. It is reasonable, under such circumstances, for us to hold that the Government of Iran has expropriated a company which had nothing at all except large debts and heavy obligations?

While it is true that the Claims Settlement Declaration has endowed this arbitral Tribunal with jurisdiction over expropriation, expropriation or nationalization is attributable to the Government only if it has passed a special law divesting ownership rights, or if it has officially recognized such expropriation. This Chamber cannot interpret its jurisdiction so broadly that it is able to find liable the Government of the Islamic Republic of Iran of expropriation in an instance such as this, where the appointment of a manager was temporary and solely for the purpose of managing the company's affairs. Moreover, the Government of the Islamic Republic of Iran and Bank Omran have declared their preparedness to place the company at the disposal of its directors. Obviously, there is no compensation greater than the return of a property itself to its owner.

The Law dated July 14, 1979 contains no provisions for expropriation or nationalization. The purport of the said Law is clear and explicit, and it does not mention expropriation. Moreover, its economic and social objectives are totally distinct from those of expropriation and nationalization. This Law was ratified in order to bring about economic and social stability, to give proper direction to the nation's affairs, and to assure the public welfare. Upon the departure

of the American directors and their abandonment of more than 1500 apartment purchasers, the Government of the Islamic Republic of Iran had no other remedy than to consider the legitimate interests of the apartment purchasers and the preservation of public order, and thus to agree to Bank Omran's request for the appointment of a manager to complete the Project. If the Government of Iran had not so acted, the company's property would have been exposed to wastage and dissipation. It is also necessary to note that the said Law was passed while Iranian society was in the throes of a great revolution. Under revolutionary conditions, the powers which governments possess for their self preservation and for protecting the rights of their population, are broader than normal. In an Award which it recently rendered, Chamber One of the Tribunal accepted this very fact, invoking a decision by the Mexican-U.S. General Claims Commission, a portion of which it seems beneficial to cite. In this Award, it is stated that:

> "...It is well recognised that in comparable situations of crisis governmental authorities are entitled to have recourse to very broad power without incurring international responsibility. As the Mexican-U.S. General Claims Commission said in the case of Dickson Car Wheel Co. v. United Mexican States:
>
> > 'States have always resorted to extraordinary measures to save themselves from imminent dangers and the injuries to foreigners resulting from these measures do not generally afford a basis for claims..... The foreigner, residing in a country which, by reasons of natural, social or international calamities is obliged to adopt these measures, must suffer the natural detriment to his affairs without any remedy.....'"
>
> (Award in Case No. 33, cited supra.)

Certainly, what the above-mentioned Commission accepted in 1931 can also be affirmed in 1980, in connection with the conditions following the Islamic Revolution in Iran.

E. International Jurisprudence Has Not Regarded Such Acts As Constituting Expropriation

There exist numerous precedents relating to instances where this sort of action by governments has been recognized as justified and those governments have not incurred responsibility:

During the Second World War, conditions arose in France which were similar to those in Iran following the Islamic Revolution. Pursuant to an Act passed on September 10, 1940, the Government of France was empowered to appoint temporary managers for industrial and commercial establishments whose managers were incapable of managing them. It was provided in Article 1 of the said Act (which resembled Article 1 of the Iranian Act dated July 14, 1979) that:

> "An order by the State Minister for Industrial Production and Labor can appoint a temporary manager to any industrial or commercial enterprise of which the qualified managers are not, for whatever reason, in a position to exercise their functions."(1)

Article 6 of the said Act forbade the institution of any claim which would result in a shutdown or interruption of the operations of such establishments. Obviously, the underlying rationalization behind this Article was that it was necessary that these establishments continue operating. Another Act,

---

(1) Journal Officiel de la Republique Francaise (26 October 1940), p. 5430. "Loi prévoyant la nomination d'administrateurs provisoires des entreprises privées de leurs dirigeants." Translated from the original French:

> "Art. ler. -- Un arrêté du ministre secrétaire d'Etat à la production industrielle et au travail peut nommer un administrateur provisoire de toute entreprise industrielle ou commerciale dont les dirigeants qualifiés sont, pour quelque motif que ce soit, placés dans l'impossibilité d'exercer leurs fonctions."

dated February 2, 1941, provided that if the capital of these establishments were assigned, or their assets were sold, the owners of the said establishments would be paid the proceeds from any such transfer. By virtue of rulings by the French courts, a temporary manager appointed by the Government operated on the basis of private law and was not deemed to be an agent of the Government.(1)

In Canada, the Federal Government proposed its new national energy program in 1980. The basic new policy, which was to be implemented by two pieces of legislation, contained elements which effectively infringed upon the interests of foreign firms that had already invested in the area of exploration and development of Canadian energy resources. In particular, the Government proposed that a 25% interest in any right existing on lands belonging to the Canadian Government, be transferred to the Crown of Canada ("Crown share"). Section 61 of Bill C-48 (First Session, 32d Parliament, 1980) precluded payment of compensation:

> "61 (1) The interests and rights provided by this Act replace all oil and gas interests and rights or prospects thereof acquired or vested in relation to Canada Lands prior to the coming into force of this Act.
>
> (2) No person shall have any right to claim or receive any compensation, damages, indemnity or other form of relief from the Majesty in right of Canada or from any servant or agent thereof for any acquired, vested or future interest or right or any prospect thereof which is replaced or otherwise affected by this Act or for any duty or liability imposed by this Act."

In the Federal Republic of Germany, the Parliament passed legislation which implemented a system of joint management ("Co-determination") for most large industrial firms. In

---

(1) Jean Derrupe, Professeur à la Faculté de Droit de l'Université de Bordeaux - 1 Repértoire de Droit Commercial Dalloz, 1972, Administrateur Provisoire.

actuality, this complex legislation fundamentally altered the decision-making structure in these firms. For all joint stock companies having a work-force of over 2000 employees, one-half of the members of the supervisory board were thenceforth to be appointed by the workers. When discussion was taken up over whether this major change in the law, which infringed upon one of the principal organs of a company, ultimately involved expropriation of the company and made payment of compensation necessary, the Constitutional Court of the Federal Republic of Germany rejected this plaint on the merits (Decisions of the Constitutional Court, Vol. 50, 1979, page 290). The Decision by the Constitutional Court was founded on the view that the social obligations constituting an inseparable part of ownership rights required that such a law be considered as having a bearing upon the essence and concept of ownership rights and could not be regarded as constituting expropriation; and as a result, no compensation whatever was paid to the shareholders of such companies.

In 1975, the Government of the United Kingdom passed legislation for reviewing existing oil concessions (the 1975 Oil and Undersea Pipeline Act). This reconstruction took place as follows: parts of this Act were to be automatically incorporated in the existing contracts. The effect of the new situation was that the concessions already acquired were in a less favorable position than that envisaged under the terms of the original contracts. For instance, the new Act clearly changed the rules regarding the circumstances under which a license could be revoked. In sum, the Act shifted the benefits and the burdens provided for in the original contracts in favor of the public interest and thus weakened the legal position of the licensees. This change and worsening of position did not come about with respect to a single issue only; rather, a number of contractual points were changed. When it was argued that the Act amounted to an indirect taking of the property of the licensees, the British Government answered flatly:

> "...the change in the legal framework that is available to governments and is regularly used by a whole host of environmental, health, tax and other measures, does not include the provision to compensate as a result." (Debates of the House of Commons, Standing Committee D, col.1146-1172 (July 3, 1975).

In another message, addressed to the British Confederation of Industry, the British Secretary of State for Energy stated:

> "new taxation, exchange control, safety or other requirements also modify government profits but it is everywhere accepted that these measures do not necessitate the payment of compensation".
> (See: Ms. R. Higgins, "The Taking of Property by the State: Recent Developments in International Law," Academy of International Law, The Hague, Recueil des Cours, Vol. 176 (1982), page 350).

At any rate, no compensation was paid as a consequence of the said legislation and conduct by the British Government.

Even the Restatement of the Law (Second), Foreign Relations Law of the United States, devotes a chapter to circumstances where damage caused to an alien as a result of the conduct of a State does not depart from the international standard of justice, require compensation, or constitute an exception to the rule, such instances comprising, rather, a different group of acts by a State which do not depart from the international standard of justice. The said instances, as set forth in Chapter 4 of the "Restatement of the Law," include security measures and police power, currency control, emergencies, and retaliatory measures. Section 197, entitled "Police Power and Law Enforcement," states that:

> "(1) Conduct attributable to a state and causing damage to an alien does not depart from the international standard of justice... if it is reasonably necessary for
> (a) the maintenance of public order, safety, or health, or
> (b) the enforcement of any law of the state (including any revenue law) that does not itself depart from the international standard..."

And Section 199, entitled "Emergencies," states that:

> "Conduct attributable to a state and causing damage to an alien does not depart from the international standard of justice... if it is reasonably necessary to conserve life or property in the case of disaster or other serious emergency."

The preceding examples and laws demonstrate that even in industrialized nations operating under a market-oriented economy, individual ownership rights have been subjected to limitations and subordinated to the general public interest, without any resultant payment of compensation.

What is to be concluded from these precedents is that even Western states have been obliged, and under ordinary conditions at that, to pass restrictive legislation for the purpose of governing their nation and protecting the general public interest, and that this legislation has not been regarded as violating the minimum standard of protection required under international law for aliens. It must now be asked, how could the Government of the Islamic Republic of Iran, which came to power through a great Revolution by means of which the despotic former system was overthrown, possibly have safeguarded its own existence and its national sovereignty, and the interests of Iranian society, without passing such legislation? Appointing temporary managers for factories and companies whose managers had, for various reasons, left Iran and left the units under their supervision without management, was the least that the Government of the Islamic Republic of Iran was obligated to do in order to prevent the wheels of industry from coming to a halt and thus causing a great number of employees and workers at the units involved from being thrown out of work. These regulations were not discriminatory, their principal and immediate objective being to protect the public interest. Any interpretation of this Act overlooking that social objective and the exceptional nature of the post-revolutionary situation, constitutes nothing less than misinterpretation of, and extortion from, a revolution. In

other words, it may be said that within the framework of this Act, the abandonment of Shah Goli and the Project created such an emergency for Bank Omran and the Government of the Islamic Republic of Iran, that the appointment of a manager to safeguard and complete the semi-completed Project, and to protect the rights of the apartment purchasers, was made unavoidable.

Most significant of all, and confirming what has been stated above, is the Charter of Economic Rights and Duties of States, ratified by the United Nations General Assembly on 12 December 1974. The Charter officially recognizes the indisputable right of States to choose their economic system, as follows:

> "Article 1
>
> "Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.
>
> "Article 2
>
> "1. Every State has and shall freely exercise full permanent sovereignty, including possession use and disposal, over all its wealth, natural resources and economic activities.
>
> "2. Each State has the right:
>
> (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment..."

This Charter, which was ratified in the United Nations General Assembly by an immense majority of 120 states, is currently recognized as a source of legislation for modern international law and is actually considered as having worldwide authority in international law. An international forum with the duty to implement international law cannot, in

today's world, ignore the will of a decisive majority of states as embodied in this Charter and attempt to concoct an imaginary international law for itself.

IV. Valuation of Shah Goli

By reason of being an Iranian national, Shah Goli is not entitled to institute a claim before this arbitral Tribunal. For reasons which have been set forth in the present Opinion, the reciprocal structure of the Algiers Declarations does not permit the Tribunal to adjudicate claims by nationals of the Government of the Islamic Republic of Iran against their own Government. The principle of international nonresponsibility of States towards their own nationals before international fora is a further important reason barring cognizance of such a claim. Even if the appointment of a temporary manager were to be construed as signifying a taking, such an act nonetheless concerns an Iranian company; the fact that its shareholders were German or, in arguendo, American, has no bearing whatever on the matter. This company's juridical personality has been retained, and the appointed manager is running the company as before, in accordance with the law and in conformity to all of the provisions of commercial law. Because this company has retained its juridical personality, as an Iranian national it remains in every respect subject to the laws and courts of Iran and no international forum may examine this company's financial situation or adjudicate its claims. International law respects municipal legal institutions. The laws of Iran govern this company. In particular, in connection with dissolution and liquidation, Articles 199 through 231 of the Amended Joint-Stock Companies Act and the further provisions of the Commercial Code, govern this company as imperative laws; and they shall continue to so govern, in accordance with Article 36 of the Iranian Civil Procedure Code, "so long as the company exists or, in the event of its

dissolution, so long as liquidation of the company's affairs is underway." This arbitral Tribunal, which has the duty of implementing international law, cannot disregard this fact (in this connection, see Part III of my Opinion in Case No. 165, filed on 8 February 1984).

For this reason, whatever the outcome of this valuation, the Tribunal cannot make itself the locum tenens of the Iranian courts, and any action it may take in this respect will disarray the company's affairs and cause injury to all interested parties.

The Respondents have objected to the jurisdiction of this Tribunal. Still, they have agreed to a valuation of Shah Goli's assets, which are limited to the Project at issue, for the sole purpose of demonstrating the company's net negative worth. Moreover, the Chamber has referred the issue of Shah Goli's valuation to an expert within a framework specified by it, and without assuming any responsibility on the part of the Government of the Islamic Republic of Iran. Only paragraph 1 of the expert's terms of reference relates to valuation of the company and to the reason for referring the matter to an expert opinion. Paragraphs 2, 3, 4 and 5 have no connection to valuation of Shah Goli -- if it be assumed that it has been taken. Paragraphs 2 through 5 comprise a series of points of information which the Chamber has asked the expert to provide.

A. The main purpose in referring the matter to an expert, is to determine the value of Shah Goli, as has been expressly set forth in paragraph 1 of the expert's terms of reference. It has been expressly provided in the Interlocutory Award that its value shall be determined as of 31 January 1980. The events subsequent to that date must not be taken into account. In valuating Shah Goli's worth, the critical factor is to determine the percentage of physical progress of the works as of 31 January 1980. According to the sales contracts, the apartments were supposed to be delivered over

to the purchasers within two years. The apartments in Phase I were to be delivered by the end of 1977, and those in Phase II by September 1979. If Shah Goli had been working on its obligations, not only would one-half of the apartments have been delivered one year prior to the Revolution and the other half in September 1979, but the increase in costs and inflation, which are an inevitable phenomenon worldwide, would not have attended the outlays needed to complete the works -- particularly inasmuch as a revolution is normally attended by an increase in the inflation rate. The available evidence in the case demonstrates that the rate of progress was far behind the contracted schedule. What this fact signifies, is that the company had no time-table or proper calculation of the period of time needed to complete such a project. And for this very reason, despite the fact that four years had elapsed since the works commenced, in his letter the company's manager predicted that an additional 36 months would be required to complete the works, a prediction which was, moreover, doubtless the minimal time required, and one predicated upon the assumption that all other factors and facilities would be ready for the company. Therefore, the company still had a long way to go before completing the Project and turning it over to the purchasers, and this fact constitutes the basic factor in any determination of the company's value.

B. In the valuation of Shah Goli, its debts owed to third persons, such as Bank Omran or contractors, as well as the demands submitted as counterclaims, play a decisive and critical role. Under the Basic Project Agreement, Shah Goli was obligated as the builder and seller of the apartments, and therefore any liabilities which it had to third persons, banks or Iranian governmental agencies, are to be treated as Shah Goli's liabilities and must necessarily be taken into account in its valuation. This point has been explicitly provided for in the description of the expert's terms of reference.

C. The company's American directors have admitted that the events and circumstances preceding and following the victory of the Islamic Revolution in Iran had no effect on performance of the works. The Interlocutory Award also expressly denies any responsibility on the part of the Government of the Islamic Republic of Iran in connection with that period. Even if those circumstances may have reduced the value of the company, there is no rule of international law which requires the Government to make compensation therefor. In Case No. 33, as shown above, the Chamber has not found the events relating to the period of the Revolution and subsequent to it to be attributable to the Government; and in the instant Interlocutory Award it is expressly stated that none of the events asserted by the Claimants to have occurred, either individually or taken together, can be considered as amounting to a taking of Shah Goli. In fact, the Interlocutory Award has based its finding of governmental control over the company solely upon the appointment of a manager, and for that reason it has specified the date upon which the manager was appointed as the date as of which Shah Goli is to be valuated. In other words, even according to the Interlocutory Award itself, if the Government of Iran had not appointed a temporary manager on 30 January 1980 to direct and complete the Project, there would have materialized no expropriation, or even control. The Revolution and its concomitants ought to be regarded as a social transformation which should have been foreseen as a capital investment risk in the conditions prevailing in Iran during the 1970's.

D. The factor of the halt to payments has been candidly conceded by all the company's directors. Despite the fact that it was obligated to provide the capital investment, Shah Goli encountered difficulties in making payments from late 1978 on, and it was unable to cover many of its checks and promissory notes. The letter of 7 April 1979 by Shah Goli's director, Arthur Radice, explicitly admits as much. Even if Shah Goli's former management had continued in charge, its

financial difficulties and lack of liquidity would absolutely have compelled it to dissolve and liquidate the company. This fact is to be taken into account in the valuation of this company: the value of a company in a state of insolvency and bankruptcy can never be compared to that of a going concern which is effectively maintaining its operations.

E. On principle, Starrett Construction has not instituted any claim in the instant case. In the Hearing conference, the Claimants described it as a dormant company. Moreover, owing to its possession of Iranian nationality, this company is not entitled to bring claim before this arbitral Tribunal. Its actual shareholders have not been specified in the case, nor has its alleged contract with Shah Goli for so-called "management fees" been submitted to the Chamber. Under such circumstances, it is extremely difficult for the expert to render an opinion in this respect. The important point in this connection is that according to the circumstances attending the instant case, the said company has not had a financial, technical or engineering existence in any way independent of Shah Goli's. It is not known how many employees it had, or what were their skills. How much capital did it have, and practically speaking, what services did it render Shah Goli? What evidence and documentation is there that it actually rendered the said services? It would appear that Starrett Construction was in reality a dummy corporation for the purpose of illegally siphoning off Shah Goli's revenues, in view of the fact that its directors and shareholders were the very Americans involved in Shah Goli, who should have shown a total loyalty to Shah Goli and were duty-bound to manage the latter full-time. Since Shah Goli, with all its domestic and foreign personnel, was incapable of managing the Project properly, what personnel, and with what skills, could Starrett Construction have brought to bear in assisting it? In light of these circumstances, the 11¾% charge on Shah Goli's revenues constitutes an improper and illegal exaction. For this reason, the Interlocutory Award has not accepted the

management fees and the amounts paid therefor (paragraph 2 of the expert's terms of reference. If, in making his valuation, the expert demands the necessary documents in this connection and determines how much of Shah Goli's money was spent in this way, it will be useful in the Chamber's further proceedings.

F. On principle, the heavy duty equipment used for carrying out the Project belongs to Shah Goli. It has been expressly provided by Article 9, paragraph (c) of the Basic Project Agreement that Shah Goli would supply the equipment and machinery necessary for the construction of the Project. Therefore, so far as it relates to the ownership of this machinery, this matter is to be regarded as resolved in accordance with the Basic Project Agreement; nor have any of the Claimants alleged that they owned this equipment. With respect to valuation, this machinery is an intrinsic part of the Project, and in reality, just as the Zomorod Project is an immovable construction project, so too has this equipment and machinery been allocated to carrying out the said Project and is to be regarded as immovable property, because this equipment has been allocated for constructing these apartments and completing this Project.(1) Therefore, in valuating this equipment, the expert should take into account the fact that the heavy duty machinery is to remain in the service of the Project until the end and completion of the said Project, for it would be infeasible to continue construction activities without this machinery. This equipment would have been totally depreciated through use over the period of time needed to complete the Project; upon completion of the Project, its value is to be determined in the light of the circumstances

---

(1) Article 18 of the Iranian Civil Code considers this kind of property as immovable, by virtue of the fact that it has been allocated to immovable property. See also Article 524 of the French Civil Code; also see Lecon de Droit Civil by Mazeaud, Introduction au Droit Civil, No. 191, "Les immeubles par destination."

involved in construction projects in Iran, and since it belongs to Shah Goli, this value must be deducted from the Project costs. Moreover, this sort of machinery will ordinarily have no commercial value after completion of a project.

G. It has been requested in paragraph 4 of the expert's terms of reference that the expert identify the amount of principal and accrued interest of loans, and the extent to which these loans were expended on the Project; the expert is also to specify the proper method for taking into account what loans were made to Shah Goli in accordance with the Basic Project Agreement. Insofar as the expert's opinion concerns the amount of these loans and the proper method for expending them on the Project, this material comprises information which is supplementary and tangential to the valuation of Shah Goli. As for the method for taking loans into account, the Basic Project Agreement contains specific and explicit provisions which the expert ought to take into account.

Article 9, paragraph (e) of the Agreement provides:

> "That Starrett will pay supplies, contractors' bills, consultants fees and all the expenses concerned with the Project and shall import or cause to be imported all the necessary funds, to pay for local materials and for labor. Starrett will import the foreign currency needed for the Project into Iran through the Bank."

Shah Goli was organized with a paid-in capital of 350,000 rials (approximately $4,500), the minimum figure countenanced for private joint-stock companies by law. This amount of capital was obviously unable to satisfy the requirements of this huge project, and one of Shah Goli's obligations under the terms of the aforementioned Article, was to provide the capital funds, all considerations as to their source and method of acquisition to one side. It can be said, rather, that this was its principal obligation and the reason for concluding the Agreement, because the extensive privileges

which Bank Omran granted Shah Goli were in exchange for this company's obligation to make the capital investment; otherwise, this company had no other distinction which would have led to the conclusion of an agreement with it. Furthermore, as the seller of the apartments, Shah Goli undertook obligations towards the purchasers, and it was therefore responsible for importing the necessary capital for fulfilling its obligations, and at that, in the form of foreign currency imported through Bank Omran. Therefore, if the company's shareholders placed monies at its disposal, they did so in response to this very obligation to provide the capital investment, and it is misleading to describe this as a loan, nor does such a description conform to Shah Goli's obligations under the Basic Project Agreement.

In this same connection, it should be noted that under the terms of the October 16, 1975 Guarantee, not only Shah Goli, but also Starrett Housing -- in the event of Shah Goli's default on its responsibilities -- was obligated to fulfill its obligations. One of these obligations was that of providing the capital investment. Therefore, while the Claimants may perhaps regard something in their internal relations as a loan, it cannot be described as a loan in connection with Bank Omran or the Basic Project Agreement; it constitutes nothing other than its obligation to make the capital investment.

The crucial conclusion to be reached from the above, is that the expert cannot first valuate Shah Goli and its assets, and then enter into his valuation the capital which was utilized in generating the company's assets. This would obviously be double valuation for a single asset, something that does not conform to the expert's mandate, which is to determine the value of the company's assets, assuming, in arguendo, that it has been taken.

It also seems necessary to mention in this place the point that in their Statements of Defence and in the Hearing

conference, the Respondents have objected in detail to the legality and validity of these loans, and that the Chamber has not yet taken any decision in this respect. Of course, once the Claimants have chosen expropriation as the basis of their claim, there no longer exists any need to examine the validity or invalidity of these loans, because whatever may have been properly expended on the Project will come under the company's obligation to provide the capital investment pursuant to Article 9, paragraph (e) and will necessarily be reflected in the valuation of the Project, while whatever has not been expended does not merit examination.

However, the secondary evidence and circumstances of this case suggest that these so-called "loans" were of a sham nature and were not true loans. As an example, mention may be made of the monies which were allegedly placed at Shah Goli's disposal by Starrett Construction. Starrett Construction had no independent financial, technical or engineering existence whatsoever, and it is not known just what services it rendered, in consideration for which it extracted millions of dollars of Shah Goli's monies; it is also peculiar indeed for it to have made a part of those same monies available to Shah Goli as a loan. This point is among the critical issues in the expert's terms of reference, and for this reason, in accordance with the provisions of paragraph 3, the expert shall make a careful study, in order to discover the relations between these two companies and the true nature of their interactions.

V. The Invitation to Engage in Negotiation for Completing the Project

In Part VI of the Interlocutory Award, the Chamber invited the Parties to engage in settlement negotiations and to discuss and agree upon new and constructive solutions in order to bring the Project to a successful conclusion. This

The Hague in order to meet with the Claimants; and further, that they specifically proposed to the Claimants that they either return to Iran or else assume charge of managing and completing the Project themselves in any manner they saw fit, whether by making use of eminently qualified Iranians or by availing themselves of specialists from any other countries, adding that an accounting would be provided to Shah Goli's directors for the period in which the temporary manager was in charge. In his letter dated 26 March 1984, counsel for the Claimants has confirmed that fact that the Respondents' representatives have proposed that the Claimants take charge of the Project. In his report, the Agent of the Government of Iran adds that:

> "Respondents' proposal for the return of Shahgoli's directors to Iran was also the only proposal that could spare the parties from detailed discussions concerning Claimant's claims and Respondents' counterclaims, and would in principle resolve the case completely. Furthermore this was the proposal which consistently had been repeated by Respondents during the proceedings, and had attracted Tribunal's attention.
>
> "The basis of this proposal was that inasmuch as Starrett believes, and as it asserted in its briefs, that the Zomorod Project is a successful and profitable project, it would be better if it came to Iran itself to collect the large profits generated as a result of its activity, to complete in return the project according to its obligations and undertakings, to pay the outstanding liabilities owed by Shahgoli, and that in this way Respondents would extend to it the necessary aid and assistance..."

The report by the Agent of the Government of the Islamic Republic of Iran reveals that the Claimants did not agree to this proposal. In his report of this meeting submitted to the Tribunal on 12 June 1984, counsel for the Claimants also stated that the Claimants were unwilling to return to Iran.

The Claimants cannot ignore the formal invitation of the Chamber, which is attempting to bring about a settlement of

the disputes between the Parties. I would hope that the Parties accord greater attention to this worthy and constructive invitation by the Chamber, and that further delay be avoided so that the Project shall be completed as quickly as possible. This is surely the most natural solution to the instant dispute, and the Chamber will naturally take its outcome into consideration in its future proceedings.(1)

The Hague,

Dated 16 July 1984

Dr. Mahmoud Kashani

(1) From the outset, Mr. Holtzmann, the United States appointed arbitrator, dissented to Part VI of the Interlocutory Award. Now, in his Opinion dated 20 December 1983, he has criticized the Chamber's invitation, holding that it constitutes an exertion of pressure upon the Claimants and a particular form of settlement which corresponds to the demands of only one of the Parties; in another part of the said Opinion, he characterizes the repeated invitations by Bank Omran and the Government of Iran as a sham and feigned desire. The said objections are unjustified. In actuality, the Chamber's invitation to the Parties to complete the Project cannot correspond to the demands of only one of the Parties, because the Claimants have alleged that Shah Goli has been expropriated and that they have been deprived of control over an management of the Project. If they are being truthful in this assertion, the Chamber's invitation to have the Project placed at the disposal of the company's directors so that they can complete it, is on the side of their assertion, and there is therefore no way that it can be construed as constituting an exertion of pressure by the Chamber -- unless the Claimants' assertion of expropriation is a device for them to evade performance of their contractual obligations. And if this is the case, the formal invitation by the Chamber will also fully deter-

mine whether the invitations by Bank Omran and the Government of Iran are of a sham and posturing nature, or whether the Claimants have been unwilling form the beginning to assume supervision of Shah Goli and complete the Project.

It is regrettable that Mr. Holtzmann regards this worthy invitation by the Chamber, which is really a valid application of the rules of procedure and is prompted by a desire for justice and equity, as being contrary to the American Code of Ethics for Arbitrators in Commercial Disputes. He has also held that the said Code is instructive for this Tribunal.

It would perhaps have been better, since he states that arbitrators must be bound by this Code, for him to have complied with it himself. Many of the claims raised by the Claimants in their Statement of Claim and briefs, such as the armed attack on Shah Goli's office by the Revolutionary Guards, the blocking of the company's accounts, the forced departure of Arthur Radice, the divestiture of the Alavi Foundation's ownership rights, the $22 million reduction, etc., were subsequently refuted by the Respondents through unequivocal documentation. The Respondents demonstrated that Shah Goli's account had a balance of only $150. The detention of Radice, Shah Goli's director, occurred in connection with his issuance of bad checks, and he was released thanks to the fact that Bank Omran posted a $600,000 bond for him. No apartments were ready for delivery, for there to have been a $22 million reduction given; and if a reduction was given, it came at the initiative and will of the American directors. The Alavi Foundation is a charitable institution and cannot be expropriated; moreover, the Claimants have obtained loans from it and had dealings with it. Now, is it not a violation of the Code of Ethics for Mr. Holtzmann to restate the Claimants' false allegations in his so-called "Concurring" Opinion which he has filed in the instant case, and at that against a sovereign Government, after it has been proved that these improper accusations are untrue?