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** DISSENTING OPINION of Mr Bahrami

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In His Exalted Name

CASE NO. 335
CHAMBER TWO
AWARD NO. 245-335-2

THOMAS EARL PAYNE,
Claimant,

and

THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN,
Respondent.

DISSENTING OPINION OF HAMID BAHRAMI

As set forth in the majority's Award, the Claimant has maintained that the Government of the Islamic Republic of Iran expropriated his ownership interests in two Iranian limited liability companies, viz. "Irantronics" and "Berkeh". Initially, the Claimant submitted a Statement of Claim seeking damages amounting to $ 2,889,101; but then, on 5 May 1983 (that is, long after the final date for accepting claims brought before the Tribunal) he increased his claim to $ 7,261,640 by changing his basis of valuation. The case record also reveals that the principal work of both companies from 1977 on was the importation and sale of electronic spare parts, and that they had also established a "Standards and Metrology Laboratory" in Iran, which provided Iranian customers with services during and after sales. In view of

the Claimant's own statements, this installation's most important customer was, the Iranian Government agencies. Owing to the drastic decrease in orders from the United States by instrumentalities of the Iranian Government, and to the disappearance of demand for sales of US films (which constituted another part of his activities), the Claimant cut back the number of his employees in Iran, and left Iran himself in December 1978, turning over the management of the company to the other shareholders. As the Claimant himself has confirmed, the level of activities of this installation decreased steadily until the summer of 1980; and it was at that time, when the other two firms had no noteworthy activities or income in Iran, that the Iranian Ministry of Commerce appointed someone to run the two companies temporarily. Nor has any evidence been produced to show that the said establishment's income following that date sufficed even to cover its current expenses. The fact is that by virtue of the appointment of a Government-appointed manager, this inactive establishment which should have been dissolved in the summer of 1980 owing to cessation of its subject of activities, has prolonged its legal life. Now, despite this fact, on paragraph 37 of its Award the majority concludes

> "... that it must make an approximation of the value of the Claimant's interest in the two companies, taking into account all the circumstances of the Case. Accordingly, the Tribunal determines that the sum of U.S. $900,000 represents the fair value of the Claimant's interests in the two companies at the time of the taking." (emphasis added)

As I stated in the deliberative sessions I am unable, for the reasons set forth below, to concur in an Award issued on the basis of conjectures and surmises and vague "circumstances", in an attempt to effect a hasty determination of a claim brought against one Government. I shall elaborate below on certain of my views in connection with the present Award.

I. ACCEPTANCE OF THE NEW CLAIM AS AN AMENDMENT TO THE STATEMENT OF CLAIM

On 18 January 1982, the Claimant brought claim for $2,889,101, which valuation was made on the basis of a demand for all of his entitlements and assets allegedly remaining in Iran. Naturally, the Claimant himself did not expect, in drawing inferences from the provisions of the Algiers Declarations and precedential decisions by international courts and other fora, that the Tribunal would regard business activities which for all practical purposes had no future in Iran-- and a firm whose principal subject of operations had come to an end-- as constituting a going concern; or that it would issue an award for the hypothetical future profits of such a firm, in disregard of the fundamental changes in Iran's economy following the Revolution. For this reason, the Claimant had not, in his calculations, made any claim for the value of his shares in the company had the Iranian Revolution not occurred. However, because the American claimants for the most part have brought claims for loss of future profits as well, on 5 May 1983 (that is, after the final date for submission of statements of claim), the Claimant also increased the remedy sought in his claim to $7,261,640, plus interest and costs, on the basis of his presumptive future revenues.

I believe that this change in the amount sought does not constitute an amendment to the Statement of Claim in the sense intended in Article 20 of the Tribunal Rules and should thus be rejected, because:

1. Although the Claimant submitted his new demand as an "Amendment to the Statement of Claim," the majority ought to have taken note of the fact that the terms "amend" and "supplement" referred to in Article 20 of the Tribunal Rules can authorize an increase in the remedy sought, only where

the basis of valuation or the cause of action has been set forth in the original statement of claim, but the figure thus provided has been incorrectly calculated, in which event the claimant can be permitted to amend his statement of claim. In other words, an amendment is always corollary to a finding that an error has been made, (1) and the Claimant cannot amend that statement of claim without asserting that an error has been made in the preparation of his initial statement of claim. Of course, just as Judge Mosk (quoting Judge Manfred Lachs) has stated in his Dissenting Opinion in Harnischfeger Corporation and the Ministry of Roads and Transportation (Award No. 175-180-3), "exaggerated formalism may... in some circumstances deny the administration of justice." It should, however, be observed that respect for this same principle dictates that the Tribunal always take the facts into account, and not that resorting to the procedures provided for in the Tribunal Rules shall permit the Claimant to exceed the limits of the Algiers Declarations and thereby cause injury to the Respondent. By the same logic, the Tribunal in a Decision dated 8 December 1982 rejected a requested Amendment of the Statement of Claim in Raymond International which would have entailed the entry of another claimant in that case.

In the same way, in Cal-Maine and Iran (Award No. 133-340-3) the Tribunal made a finding that at the time the

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(1) See the meaning given to Amendment of claim in Black's Law Dictionary. In explaining the difference between a supplemental complaint and an amendment to the statement of claim, that same Dictionary states that an "amended complaint" is one that merely corrects faults and errors in the claim.

Claimant submitted its Statement of Claim, it demanded only the amount of its investment, two years' interest and costs of adjudication; and it therefore denied the claim for accounts receivable because this claim had been submitted late and prior permission had not been obtained to amend the statement of claim. It is thus the Tribunal's policy to agree to an amendment to statements of claim only where such amendments are not outside the Tribunal's jurisdiction and where they relate to correction of errors which will in any event not be prejudicial to the respondent's position.

2. The rule of the limited and expressly-defined jurisdiction of this Tribunal, which the Tribunal itself has time and again recognized, requires that only those amendments shall be accepted that are not expedients for bringing new claims after the period allowed for the filing of statements of claim with the Tribunal has expired. Therefore, the Tribunal can agree to an increase in the remedy sought-- in other words, to the bringing of a new claim-- only prior to the expiration of the time limit for filing of statements of claim, because it is outside the Tribunal's jurisdiction to accept such claims after expiration of the said time period. The final sentence of Article 20 of the Tribunal Rules provides that

> "However, a claim may not be amended in such a manner that it falls outside the jurisdiction of the arbitral tribunal." (emphasis added)

3. The issue of the acceptance of an amendment to a statement of claim at the Tribunal's discretion (where it would be rejected if filed late or prejudicial to the other party) is something that has been left to the Tribunal's own authority once it has ascertained that it has jurisdiction thereover. Thus, the majority's argument that

> "The Respondent had ample opportunity to respond, and did respond, to the revised valuation made by the Claimant. Accordingly, the Tribunal decides that the Amendment is admissible in accordance with Article 20 of the Tribunal Rules,"

is insufficient ground for accepting the Claimant's new claim (on the pretext of revision of his basis of valuation) after the expiration of the time period for submitting statements of claim, because the Respondent's response to the Amendment relates to the merits of the claim, whose effect is contingent upon an assertion of jurisdiction by the Tribunal. This is particularly the case here where the Tribunal joined consideration of the request to reject the Amendment to the merits, so that it cannot now bind the Respondent to its response, in taking up the said request.

II. FAILURE TO SPECIFY THE BASIS OF CALCULATION OF DAMAGES

In this Opinion, I shall refrain from reiterating those matters set forth in my Dissenting Opinion in Phelps Dodge. The inference that I draw from Article V of the Claims Settlement Declaration and from Article 32, paragraph 3 of the Tribunal Rules, in view of the need to rely upon law in rendering an award against a Government, is that the Tribunal cannot rely upon approximate and unspecified criteria in determining the amount of damages to be awarded. The following points in particular cast the majority's rough calculation in doubt:

1. On principle, the term "going concern" is not a clearly defined legal concept because, from the legal point of view, a company is a "going" concern so long as it has not been wound up, and this has nothing to do with the value of the company's shares. Even a company which is continuing with its operations despite having financial difficulties and a net negative worth comes under the heading of a "going

concern." In this way, if the majority has come to the conclusion that the companies at issue in this case were going concerns at the time of their taking, the most that it could have done was to consider the market value of the Claimant's share in those companies, something which has in fact been accepted in paragraphs 30 and 35 of the majority's Award. The majority itself has noted that these firms have been valuated on the basis of propositions put forth by the Claimant and without taking account of the circumstances of the case prior to the date of their taking, a method which is thus entirely unreliable. For this very reason, in paragraph 36 of the Award the majority concludes that

> "... the effects of the Revolution seriously discounted the reliability of past performance as an indicator of likely future profitability for the two companies and the value of their goodwill, particularly since they are service companies."

As discussed below, the factors pointed out by the majority in its Award indicate that any method of valuation of the Claimant's firms other than on the basis of their net book value, would be inappropriate.

2. In December 1978 the Claimant left Iran, and the shareholders who remained in Iran were solely in charge of running the companies' administrative affairs. The Claimant's proffered reason for leaving Iran--ie, the allegation that Americans were being expelled or their work conditions had become difficult-- was not applicable to that time; rather, the Claimant abandoned his firms, which he is now claiming as profitable, because he had given up hope on his future prospects for operating in Iran. For this reason, in 1979 Hewlett- Packard, which according to the Claimant was its principal competitor, ceased operations as well. There can be no doubt that the Claimant would have assigned his shares to purchasers or to his fellow shareholders, if at that time those firms had had a fair market value greater

than their net book value. Even if a customer had been found as late as the summer of 1980 (when a temporary manager was apparently appointed for those companies) the Claimant, who no longer intended to return to Iran, would have proceeded to transfer his own shares. Therefore, at the time of the alleged "taking" of the said companies, those shares had no fair market value at all, and it is for this reason that the Claimant has been unable to adduce any market value in Iran in order to justify his method of valuating his shares.

3. On principle, the Claimant's alleged companies are service companies; and in valuating the shares of such firms, the use made by the company of the expert services of its shareholders should be taken into account as the main criterion. In reality, if the company's Laboratory has any greater value than the book value of its equipment, this is due to the expertise of its shareholders, who use the equipment. For this reason, in Iran such professional firms are ordinarily established as limited liability companies; and pursuant to the provisions of the Iranian Commercial Code, transfer of the shares of limited liability companies depends upon the agreement of a numerical majority of its shareholders. These procedures make it difficult to sell the shares of professional companies in the open market, or to nonspecialized persons. In this way, if these service companies were even conceivably profitable after the Claimant's voluntary departure from Iran, this claim belongs to the other two shareholders, who are Iranian; and the Claimant's entitlement on this ground is limited to the net book value of his shares. In my opinion, this case differs from American International Group and the Islamic Republic of Iran (Award No. 93-3-3, dated 19 December 1983), although that Decision by the Tribunal was not founded upon valid legal grounds, either. In the latter case, what was involved was the issue of the nationalization of an insurance

company, for whose shares a fair market value could at any rate be taken into account; whereas in the present case, the Claimant alleges that two service firms were taken, whose managing shareholder for all purposes abandoned his work approximately two years prior to appointment of a Government-appointed manager, owing to those companies' gradual decline in activity. That precedent which may bear a greater similarity to the method of valuating damages in the present claim, is Computer Sciences Corporation and the Government of Iran (Award NO. 221-65-1, dated 16 April 1986). In that case, the Tribunal held that the claimant was entitled to recover the value of his furnishings and equipment left in his Tehran office. The United States Foreign Claims Settlement Commission has expressly rejected claims relating to commercial good-will and lost profits in United Shoe Machinery Corporation and in John Medio Proach,[1] in confirmation of its own prior policy and in invocation of international law. In the view of the said Commission, its reasons for rejecting such claims were, the indirect nature of the damages, the uncertainty of future profits, and the impossibility of guaranteeing them. The Commission also held that such claims are not admissible under international law.

4. In paragraph 34 the majority has furthermore determined that "it must value the Claimant's interests on the basis of the fair market value of his shares taking into account the debts of the companies including tax liabilities." However, it is entirely unclear to me, if in valuating the Claimant's interest in the two companies at issue in the case we take

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(1) Foreign Claims Settlement Commission of the United States Decisions and Annotations (1968), pp. 375 and 558.

into account their tax and social security liabilities, upon the basis of what approximate calculation the Claimant can be found to be entitled to $900,000. Of course I take note of the fact that the majority has rejected the tax and social security counterclaims, (1) but at any rate it could not avoid taking such debts into account in stating the basis of its valuation of the shares; and it has also promised in the Award to deduct the companies' debts in valuating those shares. However, since the amount of damages awarded was stated without explanation of the means by which it was arrived at, and since the Respondent asserts that these companies' tax debts exceed $3 million, it can be presumed that the majority disregarded the companies' debts in estimating the amount of damages to be awarded.

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(1) In paragraph 12 of its Award, the majority dismisses the Respondent's tax and social security counterclaims since, it argues,

> "neither Irantronics nor Berkeh are parties to this action, since the Counterclaim for taxes and social security premiums cannot be said to arise out of the Claim which is for the taking of property without compensation, and since the Claimant is not personally liable as a shareholder for the tax debts of these Iranian limited liability companies..."

This position does not appear to be very tenable, for the reasons set forth in detail in my Opinion in connection with the Award in Case No. 68. In particular, the first sentence of that argument is on principle predicated upon an error, because the claim has been attributed to the Government in this case for the reason that the Tribunal has recognized these companies as being under the control of the Iranian Government; thus, how can be majority <u>not</u> regard the Government as a party to the claim?

5. Aside from the fact that the awarding of interest depends upon a decision by the Full Tribunal in Case No. A/19, in my opinion the awarding of interest on the judgement amount in effect constitutes payment of damages on top of damages and is not authorized, since Article 713 of the Iranian Civil Procedure Code expressly bars the payment of damages on damages-- as well as in view of the fact that the judgement amount in the present claim has been estimated for the purpose of indemnifying the Claimant.

For the reasons set forth above, I dissent to the Award issued in the present case, with respect to those matters discussed in this Opinion.

The Hague, 5 Aban 1365/27 October 1986

Hamid Bahrami-Ahmadi