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# 1984 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

## JUDGES' BENCH MEMORANDUM

**NOT TO BE BEEN BY PARTICIPANTS**

JUDGES' BENCH MEMORANDUM

I.

Does Industria's exercise of jurisdiction, by accepting the suit by Minex and Lencot in its domestic courts, violate an international right of Naturalia to sovereign immunity?

Some authorities believe sovereign immunity is purely a matter of domestic law, or comity at most, and not an international-law right at all. E.g., Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," 28 Brit. Y.B. Int'l L. 220, 228 (1951); New England Merchants National Bank v. Iran Power Generation & Transmission Co., 502 F. Supp. 120, 129, 19 I.L.M. 1298, 1315 (S.D.N.Y. 1980). At the other extreme, the USSR and China assert that any state (though not state instrumentalities such as Natmin) has an absolute right under international law to sovereign immunity in all cases whatsoever. The prevailing view is probably that some irreducible minimum of sovereign immunity is an international-law right, though no international tribunal is believed to have ruled on the question. However, the exercise of jurisdiction under the "restrictive" theory -- which permits jurisdiction at least of "commercial" matters and of torts committed on the territory of the state exercising jurisdiction -- is acceptable to the vast majority of states today. Naturalia's best, if not only, argument for absolute immunity would be that there formerly existed a

consensus -- and hence a rule of international law -- in favor of absolute immunity, and that such a rule, once established, cannot be abrogated without the consent of all states, and in particular the state which seeks to invoke the old consensus.

Assuming that international law both requires some measure of sovereign immunity and permits the restrictive theory, no one contends that the precise contours of that theory have been established in international law; there is clearly at least some room for innovation and variation in municipal legal systems. For recent codifications which could be argued to be illustrative of the mainstream approach, see U.S. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, 15 I.L.M. 1388 (1976); U.K. State Immunity Act, 17 I.L.M. 1123 (1978); Canada State Immunity Act, 21 I.L.M. 798 (1982); Draft Convention, Jurisdictional Immunity of States, Adopted by Inter-American Juridical Committee, 22 I.L.M. 292 (1983); European Convention on State Immunity, Council of Europe, No. 74 (1972), reprinted in UN Legislative Series, Materials on Jurisdictional Immunity of States and Their Property, Doc. ST/LEG/SER. B/20, pp. 158-68 (1982); "The International Law Association Draft Convention on Foreign Sovereign Immunity: A Comparative Approach," 23 Va. J. Int'l L. 635 (1983).

The scholarly literature is vast; a few good recent examples are: "Foreign Sovereign Immunity and Com-

mercial Activity: A Conflicts Approach," 83 Col. L. Rev. 1440 (1983); Australian Law Reform Commission, Reference on Foreign State Immunity, Research Papers 1 through 4 (1983); "Current Developments: The 34th Session of the International Law Commission," 77 A.J.I.L. 323, 328-30 (1983), and reports of the ILC there mentioned; Eskridge, "The Iranian Nationalization Cases: Toward a General Theory of Jurisdiction over Foreign States," 22 Harvard Int'l L.J. 525 (1981).

A principal question arising under the restrictive theory would be whether Naturalia's termination of the project agreement and expropriation of the property thereunder are "commercial" acts. U.S. authorities are fairly uniform that expropriation is a sovereign, not a commercial, act. See, e.g., Victory Transport Inc. v. Comisaria General, 336 F.2d 354, 3 I.L.M. 1030 (2d Cir. 1964) (dictum), cert. denied, 381 U.S. 934 (1965); cf. Associacion de Reclamantes v. United Mexican States, 561 F. Supp. 1190, 22 I.L.M. 625 (D.D.C. 1983). Industria should argue that international law does not obligate states to take this view. Industria should also argue that, even if jurisdiction over the expropriation were deemed in violation of international law because expropriation is a sovereign act, Naturalia's simultaneous breach and termination of a commercial agreement is a commercial act and therefore not subject to sovereign immunity. Naturalia should reply that this exalts form over

substance and that what occurred was essentially an expropriation, and therefore non-commercial.

Naturalia should also argue that (except as to the project properly located within Industria) Industria has insufficient contacts with the expropriation to permit its courts to take jurisdiction even if the defendants were private parties, let alone sovereigns. That is, Naturalia should argue that international law contains a doctrine similar to that applied to jurisdictional conflicts among states of the United States in International Shoe Co. v. Washington, 326 U.S. 310 (1945) (constitutional due process requires certain "minimum contacts" between subject matter of a case and the foreign state to enable the forum to exercise jurisdiction). Query whether the contacts in the present case would be sufficient to satisfy the "direct effect" test of 28 U.S.C. § 1605(a)(2). See Note, "Effects Jurisdiction under the Foreign Sovereign Immunities Act and the Due Process Clause," 55 N.Y.U.L. Rev. 474 (1980). For an imaginative recent discussion of international-law limitations on national jurisdiction, see ALI, Restatement (Revised), Foreign Relations Law of the United States, Tentative Draft No. 2 (1981), though many doubt whether this bears much relation to established existing law.

Industria should point out that, since Natmin bank accounts in Industria were attached, Natmin is apparently doing business in Industria. If it is, that fact alone

would be enough under, for example, U.S. law for jurisdiction over the entire suit so far as it is against Natmin, even if the business is unrelated to the project. Last clause of 28 U.S.C. § 1605(a)(3); see Sanchez v. Banco Central de Nicaragua, 515 F. Supp. 900 (E.D. La. 1981). Industria should argue that, in the absence of any international authority to the contrary, U.S. law is evidence of what is internationally acceptable. Naturalia might try to show that other codifications of sovereign-immunity law contain no provision comparable to the clause in question and that the Court should draw conclusions from this.

The situation is entirely different with respect to the project property located in Industria at the time of the expropriation. In the U.S., jurisdiction would clearly lie under 28 U.S.C. § 1605(a)(3) (first clause) to determine title to that property. Under international law, of course, territorial sovereignty is the most usual and powerful basis for the exercise of jurisdiction. Hence, Naturalia will probably have difficulty arguing that the exercise of jurisdiction over such property violates international law or that the state exercising jurisdiction is precluded from applying its own law or policy in deciding whether to give effect to a foreign expropriation in that context. Thus, Naturalia may virtually have to concede that Industria could adjudicate the merits of Naturalia's conduct in order to render a judgment determining the title to the property

located in Industria. Any arguments to the contrary by Naturalia will be either frivolous or ingenious.

Naturalia could argue that, under most current theories, an expropriation is effective to pass title even though the expropriator may be under a duty to pay compensation, so that even if the first clause of 28 U.S.C. § 1605(a)(3) is consistent with international law there is no genuine dispute as to "rights in property" but merely over the adequacy of compensation. This would be a strong argument, which has won successes in the courts, if the property had been in Naturalia at the time of the expropriation and had been exported only later. But as to the property which was in Industria at that time, U.S. law has been clear since the 1920s that U.S. courts are not obliged to recognize extraterritorial effects of foreign expropriations that contravene U.S. law or policy, and it will be very difficult for Naturalia to show that international law requires such recognition.

As to the property on the high seas at the time of expropriation but now in Industria, in the U.S. jurisdiction would lie under the first clause of 28 U.S.C. § 1605(a)(3), and Naturalia would find it difficult to argue that the exercise of jurisdiction to determine title to such property violated international law. Naturalia might make a somewhat stronger argument that international law should not permit Industria to apply its own law or policy in determining

title to property that was on the high seas (especially in ships registered in Naturalia) when the expropriation took place. Industria should reply that there is no established principle of international law forbidding a state to apply its own laws or policy once jurisdiction exists. This precise question does not appear to have arisen in U.S. courts under the act-of-state doctrine, but it is generally agreed in the U.S. both that the doctrine applies only to acts committed within one's own territory and that the doctrine is a matter of comity at most, not a requirement of international law. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 15 I.L.M. 735 (1976); United Bank, Ltd. v. Cosmic International, Inc., 542 F.2d 868 (2d Cir. 1976); Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir.), cert. denied, 409 U.S. 1060 (1972); Crockett, "Choice of Law Aspects of the Foreign Sovereign Immunities Act of 1976," 14 Law and Policy in Int'l Business 1041 (1983).

Naturalia could argue that Natmin should not be held liable for acts of Naturalia because they are different entities. See First National City Bank v. Banco Para el Comercio Exterior de Cuba, ____ U.S. ____, 22 I.L.M. 840 (1983). Industria should reply that the international law in this area is limited to, at most, questions of sovereign immunity, and that a country having jurisdiction is free to

apply whatever doctrines of joint liability, alter ego, agency, etc., it wishes.

Another issue raised by Naturalia's claim is whether, even assuming Industria's courts could properly take jurisdiction, international law prohibits the attachment of funds of the Central Bank of Naturalia, which are presumably used for sovereign purposes, although the problem does not so state. U.S. law would prohibit such an attachment even for purposes of execution after judgment. 28 U.S.C. § 1611(b)(1). Query whether international law places any limitations on prejudgment attachment (except of diplomatic premises), assuming the national court properly has jurisdiction over the main action.

II.

Should Industria prevail on its claim that Naturalia's termination of the project agreement, and expropriation of property thereunder, violated international law?

1. May Industria properly present an international claim on the ground that the majority owners are its nationals, even though the direct injury was to Minex, a corporation of Naturalia? The principal authority is the Barcelona Traction case, [1970] I.C.J. Rep. 3 (Belgium held without standing to bring claim against Spain for injuries to a Canadian corporation in which Belgian citizens were

shareholders); but note Judge Riphagen's strong dissenting opinion. The key difference is that in Barcelona Traction the corporation was a national of a third country, so that there remained the possibility of diplomatic protection for it; no such possibility exists in the present case if Industria lacks standing. Naturalia should argue that, even if Industria has standing to bring the expropriation claim, the breach-of-contract claim should fail since Lencot has no contractual relationship with Naturalia.

2. Does customary international law require the payment of prompt, adequate and effective compensation, as determined by an international court having jurisdiction, when a state expropriates alien property? Or does international law establish some different standard of compensation? Or does international law allow a state to pay whatever compensation it chooses pursuant to its own laws and as decided by its own courts? If there is an international-law standard of compensation, has Naturalia complied with that standard? And does Naturalia's repudiation of its contract give rise to international liablity?

Naturalia will argue that any former consensus on the subject has disappeared; that no consensus exists as to the right of private property and hence as to the right to compensation for property; that if any international-law rule exists today it is a highly permissive one expressed in General Assembly resolutions (see, e.g., "Charter of Economic

Rights and Duties of States," U.N. Doc. A/9631 (1974), 69 A.J.I.L. 484 (1975), 14 I.L.M. 251 (1975); "Permanent Sovereignty over Natural Resources," U.N. Doc. 9030 (1973), 68 A.J.I.L. 381 (1974), 13 I.L.M. 238 (1974)); that contemporary state practice is best illustrated by lump-sum settlements where only a fraction of value is paid; that the old rule was imposed by colonialist and capital-exporting powers in their own narrow self-interest, and at no time enjoyed a real consensus (i.e., Latin America dissented); that even the U.S. Supreme Court has recognized that the status of the law is highly uncertain. Sabbatino, supra. Industria's contractual claim should fail because breach of a contract between a state and a private company does not implicate international law at all.

Industria should argue that General Assembly resolutions have no force of law, but are only recommendations (UN Charter, Art. 10); that an existing rule of international law cannot be destroyed or changed so long as a major group of concerned states -- the capital-exporting countries -- continue to adhere to it; that positions taken on the subject by Third World countries are mostly political rhetoric, not representing serious views about the state of the law, and are belied by the willingness of many of these states to adhere in practice to the old rule through treaties, contracts, domestic-law provisions, etc.; that there is no possible justification for a less-than-full compensation

rule, either morally or in view of the need for international economic stability and security of investment; that if anything the traditional rule should be deemed strengthened by the increasing emphasis on human rights in international law; that the notion of "permanent sovereignty over natural resources" can hardly warrant promiscuous abrogation of property rights previously granted or contracts previously concluded, since a state's very sovereignty over its resources would be incomplete were it not able to make such grants and binding commitments in its own interests; and that, even if some departures from the full-compensation rule might be justified in cases involving colonialism or coercion, no such circumstances have been shown here.

Industria should argue that Naturalia's conduct was in breach of contract as well as expropriatory, and that international law recognizes that the principle pacta sunt servanda applies not only to treaties but also, as a general principle recognized by civilized nations, to economic-development agreements between states and private investors. The contract in question bears all the indicia of contracts that have been held to be "internationalized" or "stabilized" in this sense.

As to the measure of compensation, Industria should contend that the value of an ongoing business or income-producing property must be determined (absent an established market for identical property, which rarely

exists) with reference to the earning power of the business or property. Such a calculation is properly made by a "discounted cash flow" study, which is a well-recognized technique which economic and valuation experts can carry out with adequate precision. (Such a study attempts to predict the future earnings of an enterprise and to determine the present value of the prospect of receiving those earnings, with appropriate adjustments to take account of the risk factors involved. See, e.g., Solomon, The Theory of Financial Management (1963).) Book value, which the Naturalia tribunal awarded, is irrelevant since a company's books reflect (at most) past investment and not future prospects. The contractual measure of damages is similar if not identical to the expropriation measure; the aggrieved party is entitled to a monetary award that will put it in as good a position as if the contract had been duly performed.

Sources generally favorable to Industria's position include, in addition to a host of pre-World War II arbitral decisions, Chorzow Factory Case, [1928] P.C.I.J. Ser. A. No. 17, 4, 1 Hudson, World Court Reports 646; Norwegian Shipowners' Claims, 1 R.I.A.A. 307 (1922); TOPCO arbitration, 53 I.L.R. 420 (1977); LIAMCO arbitration, 20 I.L.M. 1 (1977); Sapphire arbitration, 35 I.L.R. 136 (1963); Aminoil arbitration, 21 I.L.M. 976 (1982); AGIP arbitration, 21 I.L.M. 726 (1979); Benvenuti & Bonfant arbitration, 21 I.L.M. 740 (1980); Revere arbitration, 56 I.L.R. 258 (1978);

S.P.P. arbitration, 22 I.L.M. 752 (1983); American International Group (AIG) v. Iran,* Award No. 93-2-3, Iran-United States Claims Tribunal, Dec. 19, 1983 (unpublished); 8 Whiteman, Digest of International Law 1087-89 (1967); Wehberg, "Pacta Sunt Servanda," 53 A.J.I.L. 775 (1959); Nwogugu, The Legal Problems of Foreign Investments in Developing Countries (1965); "The Compensation Requirement in the Taking of Alien Property," 22 Rec. A.B. City N.Y. 195 (1967); International Chamber of Commerce, Bilateral Treaties for International Investment (Pub. No. 303) (1977); ALI, Restatement (2d), Foreign Relations Law of the United States §§ 185-195 (1965); White, Nationalization of Foreign Property (1961); Weil, "Problems relatifs aux contrats passes entre un Etat et un particulier," 128 Recueil des Cours 95 (1969 III); Weil, "Les clauses de stabilisation ou d'intangibilite inserees dans les accords de developpement economique," in Melanges offerts a Charles Rousseau 301 (1974).

Sources generally favorable to Naturalia's position include the various UN General Assembly resolutions on the subject since 1962 and favorable comments on them; Dolzer, "New Foundations of the Law of Expropriation of Alien Property," 75 A.J.I.L. 553 (1981); Katzarov, The Theory of Nationalization (1965); Amerasinghe, State Responsibility for Injuries to Aliens 121-68 (1967); De Visscher, Theory and Reality in Public International Law

* Copy of Award attached, Appendix A.

153-63, 198-204 (Corbett trans. 1968); Fatouros, Government Guarantees to Foreign Investors 51-53, 222-31 (1962); Bring, "The Impact of Developing States on International Customary Law Concerning Protection of Foreign Property," 24 Scandinavian Stud. L. 97, 131 (1980); Akinsanya, "Permanent Sovereignty over Natural Resources and the Future of Private Foreign Investment in the Third World," 18 Indian J. Int'l L. 175 (1978); Asante, "Stability of Contractual Relations in the Transnational Investment Process," 28 Int'l & Comp. L.Q. 401, 408 (1979); Kuhn, "Nationalization of Foreign-Owned Property in Its Impact on International Law," 45 A.J.I.L. 709 (1951); Girvan, "Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint," in III Lillich (ed.), The Valuation of Nationalized Property in International Law 149 (1975); Gainer, "Nationalization: the Dichotomy Between Western and Third World Perspectives in International Law," 26 Howard L.J. 1547 (1983).

For a collection of various views, see Lillich (ed.), International Law of State Responsibility for Injuries to Aliens (1983).

Naturalia should attempt to distinguish the post-World War II arbitrations cited above (except for the Iran-United States Claims Tribunal's recent decision in the AIG case, supra) on the ground that these were all arbitrations under specific contractual provisions, with various choice-of-law clauses; none of them relied entirely on interna-

tional law, and, since all the tribunals had jurisdiction to make awards for breach of contract, none of them had to confront directly the questions whether international law requires full compensation or whether a breach of contract is itself a violation of international law. Naturalia should also point out that the Aminoil decision, supra, expressly held that expropriation is not a breach of contract unless the contract very expressly so provides, as the project contract here involved does not; that the arbitral decisions have generally awarded claimants far less than they sought, and have not been particularly impressed with discounted-cash-flow studies; and that at least one of the awards (LIAMCO) seems to accept the view that international law on this subject has changed in the last 20 years.

Subsidiary questions presented by Industria's claim are the following.

Calvo Clause. A "Calvo Clause" is a provision either of municipal law or of a contract which purports to deprive foreign investors of international rights and/or remedies and to relegate them entirely to the rights and remedies which nationals of the host country possess under that country's municipal law. On this subject see generally 8 Whiteman, Digest of International Law 916-33 (1967). Naturalia will argue that its constitutional Calvo Clause, accepted along with existing Naturalia law generally by Minex in the Project Agreement, prevents Industria from

claiming any rights on behalf of Minex/Lencot that Naturalia's citizens could not claim.

We do not know, because the statement of the problem does not tell us, what rights Naturalia's citizens have in cases of expropriation or breaches of state contracts. But clearly Naturalia's citizens have no right to adjudication by an international court. Industria should argue that that is a question of remedy, not of substantive right, and that the Calvo Clause (unlike most such clauses) is not nearly explicit enough to waive international remedies as well as substantive rights; that the clause should be read narrowly, because in derogation of or at least in tension with international law, and that the reference to international law in the Project Agreement itself confirms these arguments. As to substantive rights, Industria should argue that Naturalia has failed to prove (the statement of the problem being silent) that its citizens do not enjoy all the rights conferred on foreigners by international law, and likewise has failed to prove that Minex/Lencot in fact received treatment as favorable as did nationals similarly situated.

Industria should further argue that the Calvo Clause is ineffective generally, since rights under international law belong to Industria, not Minex/Lencot, and Industria never waived them. Industria should further argue that, even if the contract claim were held affected by the

Calvo Clause, the expropriation claim, being distinct from the contract even through the property was acquired by contract, should be unaffected. Naturalia would reply that the property derives entirely from the contract and that any distinction would be artificial. Industria might argue that a Calvo Clause in a constitution is less effective than one inserted in the contract itself. See 8 Whiteman, supra, at 919.

Procedural denial of justice. Industria may argue that Naturalia's compensation tribunal, being subject to political control and with no appeal to the courts, could not satisfy international standards for procedural justice. See Restatement (2d), supra, §§ 180-182. Industria would probably be ill advised to spend much time on this, since it is a relatively murky area and, even if Industria prevailed, the proper remedy would be unclear. The one factor that might lead Industria to emphasize a denial-of-justice claim is that substantial authority holds that such a claim is not affected by a Calvo Clause. See 8 Whiteman, supra, at 918-19, 924, 932. However, the same may be true of an expropriation claim, and as we have already seen the Calvo Clause in question is arguably so vague as unlikely to be held of much benefit to Naturalia. Naturalia will argue that the nature, composition and proceedings of the tribunal complied fully with international standards.

Restitution. Industria seeks an order that Naturalia "honor and perform" the Project Agreement -- i.e., it apparently seeks not only damages but restitution. The authorities are sharply divided as to whether such a remedy should be ordered. Contrast Chorzow Factory, supra, and TOPCO, supra, (pro-restitution) with BP, supra (anti). Industria's best argument is that it is a general rule of international law that the proper remedy is, to the extent practicable, that which will undo the consequences of the wrongful act. Naturalia's best argument is that, even if its actions are held wrongful and full reparation is held owing, to require Naturalia to restore a foreign investor to control of Naturalia's principal natural resource is both impractical and a serious infringement of its sovereignty; a state must be able to expropriate contract rights as well as property, and to control its territory, incurring at most an obligation to pay compensation.

Manner and currency of payment. Industria will claim that Minex/Lencot is entitled to payment in hard currency and that any bonds it receives must be credited against the compensation obligation not at their face value but at their market value in hard currency on the date of receipt. This is really a corollary of whether Industria prevails on its claim that international law requires prompt, adequate and effective compensation for expropriation and/or a similar measure of damages for breach of contract.

APPENDIX A

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CERTIFIED COPY

فتوکپی گواهی شده

CASE NO. 2
CHAMBER THREE
AWARD NO. 93-2-3

AMERICAN INTERNATIONAL GROUP, INC. and AMERICAN LIFE INSURANCE COMPANY,

Claimants,

- and -

ISLAMIC REPUBLIC OF IRAN and CENTRAL INSURANCE OF IRAN (BIMEH MARKAZI IRAN),

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران و ایالات متحده

FILED - ثبت شد

Date ۱۳۶۲/۹/۲۸ تاریخ
19 DEC 1983

No. 2 - ۲ شماره

AWARD

APPEARANCES:

For Claimants:

Mr. David R. Hyde,
Mr. Howard G. Sloane,
Attornies
Mr. Randall Drain
Ms. S. Elaine Shaw
Mr. R. Kendall Nottingham

For Respondents:

Mr. Mohammad K. Eshragh,
Deputy Agent of the
Islamic Republic of Iran
Mr. Abousaid Rahbari,
Mr. Seyed Hossein Tabaie,
Legal Advisers to the
Agent
Dr. Gholam Hossein Jabbari,
Mr. Kayvan Khashayar,
Representatives of the
Islamic Republic of Iran
Mr. Mehrdad Bagheri,
Representative of Central
Insurance of Iran

Also present:

Mr. Arthur Rovine,
Agent of the United States
of America

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20 DEC. 1983

OFFICE U.S. AGENT

## I. THE PROCEEDINGS

On 20 October 1981, Claimant, AMERICAN INTERNATIONAL GROUP, INC. ("AIG"), filed its Statement of Claim against Respondents, the ISLAMIC REPUBLIC OF IRAN and CENTRAL INSURANCE OF IRAN ("Bimeh Markazi"), seeking compensation for the alleged nationalization of an Iranian insurance company in which AIG allegedly had an equity interest. Respondents filed their Statement of Defence on 5 April 1982.

On 19 April 1982, the Tribunal fixed dates for the submission of written evidence and memorials and scheduled a Hearing for 4 October 1982.

On 5 August 1982, Bimeh Markazi requested that the Hearing be converted into a Pre-Hearing Conference. On 15 September 1982, the Tribunal denied the request, but ruled that at the Hearing it would consider whether to permit further written submissions or a subsequent hearing. On 20 September 1982, the Agent of Iran again objected to the holding of a hearing without a Pre-Hearing Conference. On 1 October 1982, the Tribunal declared that its Order of 15 September 1982 would remain in effect.

On 20 September 1982, Claimant AIG filed its legal memorandum and evidence. Respondents filed no evidence or legal memoranda or designation of witnesses prior to the 4 October Hearing.

On 4 October 1982, the Hearing was held. Claimant AIG submitted evidence, testimony and legal arguments and Respondents submitted testimony and legal arguments. At the Hearing, Respondents filed a supplement to their Statement of Defence in which they raised the issue of whether AIG was the proper party to the dispute and other jurisdictional objections.

On 25 October 1982, the Tribunal fixed dates for the further submission of evidence and scheduled a Hearing for 13 January 1983 for the purposes of hearing rebuttal testimony and argument from the parties.

On 6 December 1982, Claimant filed a Supplemental Memorandum including evidence, and an amended Statement of Claim naming as an additional Claimant AMERICAN LIFE INSURANCE COMPANY ("ALICO"), a corporation organized under the laws of the State of Delaware, U.S.A. On 10 December 1982, Respondents filed a Memorial, together with written evidence.

A second Hearing was held on 13 January 1983. On the same day, Respondents filed a Reply to Claimant's Supplemental Memorandum and Claimant filed additional affidavits.

Following the Hearing, the member of the Tribunal appointed by the Islamic Republic of Iran resigned. A new member was appointed. The Tribunal has hereby determined not to repeat the prior hearings (see Article 14 of the Tribunal Rules).

## II. FACTUAL BACKGROUND

AIG's claim arises out of the nationalization of the Iran America International Insurance Company ("Iran America"), by the Government of Iran on 25 June 1979.[1]

Iran America, which began operations on 22 December 1974, was organized as an Iranian public joint stock company with 10% of the shares issued each in the names of American

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[1] In its Statement of Claim, AIG also claimed entitlement to unspecified amounts allegedly due under re-insurance contracts with Bimeh Markazi, but has not in subsequent pleadings or set forth the factual allegations upon which it based this claim or offered any evidence or argument on its behalf. The Tribunal deems this claim to have been withdrawn.

Life Insurance Company ("ALICO"), a corporation organized under the laws of the State of Delaware, U.S.A.; American International Reinsurance Company, Limited ("AIRCO"), a corporation organized under the laws of Bermuda; and American International Underwriters Overseas Limited ("AIUO"), a corporation organized under the laws of Bermuda; and with 5% of the shares issued in the name of The Underwriters Bank Incorporated ("UBANK"), a corporation organized under the laws of the State of Connecticut, U.S.A. Each of these corporations was a wholly-owned subsidiary of AIG.

On 25 June 1979, all insurance companies operating in Iran, including Iran America, were proclaimed nationalized by the Law of Nationalization of Insurance Corporations.[2]

Claimant AIG brought an action in a United States court seeking compensation for the alleged taking of the above mentioned 35% interest, and on 10 July 1980, the court issued an Order adjudicating the Government of Iran liable for such compensation. That case was subsequently suspended pursuant to United States Government regulations implementing the Algiers Declarations.[3]

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[2] In its 20 September 1982 Memorial, the Claimant AIG alleges that certain actions which preceded that Law amounted in themselves to an expropriation of Iran America. However, Claimants do not state the date of this alleged expropriation; nor do they rely upon this contention in advancing their claim. Rather, Claimants continue to seek compensation from the date of the nationalization.

[3] The Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981 ("General Declaration") and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran dated 19 January 1981 ("Claims Settlement Declaration").

Subsequent to the nationalization, Iran America was renamed the Tavana Insurance Company and was operated by a managing director selected by a governmental board established by the aforesaid Law of Nationalization. In September 1982, all of the assets of the company were transferred to the Asia Iran Insurance Company.

## III. JURISDICTION OVER THE CLAIM

### 1. Contentions of the Parties

AIG contends that it has been a United States national, as defined by Article VII, paragraph 1, of the Claims Settlement Declaration, from the time the claim arose to 19 January 1981, the date of the Algiers Declarations, and has remained as such to the present.

AIG also contends that the claim is a claim of a national of the United States as defined in Article VII, paragraph 2, of the Claims Settlement Declaration on the alleged ground that it was, during the relevant period and until the present time, the beneficial owner of the Iran America shares issued in the names of ALICO, AIRCO, AIOU and UBANK and thus is the direct owner of the entire claim. In addition, AIG alleges that UBANK has been dissolved as of 19 July 1979, that its assets have vested with AIG as the sole shareholder in UBANK and that AIG is therefore the direct owner of the claim with regard to the Iran America shares issued in the name of UBANK.

In the alternative, AIG contends that it is the indirect owner of the claim with regard to the shares in the names of AIRCO and AIOU because these companies are not United States nationals, and are thus unable to bring claims, and because its 100% ownership interest in these companies is sufficient to control them.

With regard to the shares issued in the name of ALICO, AIG, in the alternative, seeks to amend its Statement of Claim to name ALICO as a claimant.

AIG also contends that the claim arises out of an "expropriation or other measures affecting property rights", within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration and that both Respondents come within the definition of "Iran" found in Article VII, paragraph 3, of the Declaration.

The Respondents challenge the adequacy of the proof offered to demonstrate the Claimant AIG's United States nationality and argue that AIG may not present the claim directly as beneficial owner of the 35% interest held in the names of ALICO, AIRCO, AIOU and UBANK. Further, the Respondents challenge the Claimant AIG's proof that it controls AIRCO and AIOU within the meaning of Article VII, paragraph 2, of the Declaration. They also argue that no sufficient evidence to prove that UBANK has been dissolved and that its assets have vested in AIG has been presented and maintain that, as United States nationals, both UBANK and ALICO could have presented claims for the shares held in their names, thus precluding AIG from asserting a claim with regard to these shares. The Respondents oppose AIG's proffered amendment on the ground that it states a new claim and is thus barred by the deadline for presenting claims found in Article III, paragraph 4, of the Claims Settlement Declaration.

The Respondents also object to subject matter jurisdiction over the claim on various grounds. They argue that an act of nationalization does not constitute an expropriation under international law and, thus, does not come within the jurisdictional requirements of Article II, paragraph 2, of the Claims Settlement Declaration. They further argue that the claim is barred for the reasons that the Commercial Code of Iran gives to Iranian courts exclusive jurisdiction over Iranian corporations, that the Claimant has failed to exhaust local remedies provided in the Iranian law and that the national- ization of insurance companies was an Act of State which is not subject to review by an international tribunal.

2. The Tribunal's findings with regard to jurisdiction

AIG has submitted a certificate dated 7 September 1982 from the Secretary of State of the State of Delaware, U.S.A., attesting to the fact that AIG was organized under the laws of that State on 9 June 1967 and has maintained this status to the date of the certificate.

AIG has also submitted affidavits of Maurice R. Greenburg, who is AIG's president and chief executive officer, which state that AIG is a widely-held corporation whose shares are publicly traded in the United States. They further state that well over 75% of the outstanding shares of AIG are held by persons with United States addresses and that, to Mr. Greenburg's personal knowledge, aggregate foreign ownership of AIG does not exceed 25% of AIG's outstanding shares. No contrary evidence has been introduced.

The Tribunal finds that, based upon the above evidence, and in light of the absence of anything which would cast doubt upon AIG's allegations, a reasonable inference may be made that over 50% of the shares of AIG are owned by United States citizens, and the Tribunal so concludes.

The Greenburg affidavits state that AIG has continuously owned all of the shares of ALICO, AIOU and AIRCO since the claim arose and that it owned all of the shares of UBANK until that corporation was dissolved on 19 July 1979, upon which event AIG succeeded to its assets. Reference is also made to an attached copy of AIG's 1981 annual report describing ALICO, AIOU and AIRCO as subsidiaries of AIG.

The Greenburg affidavits attest to the fact that the Iran America shares held of record by ALICO are reflected in disclosure statements required by United States law as assets of AIG, not ALICO; that dividends paid on the shares were included in AIG's earnings, and not ALICO's; and that, while AIG officers have served on Iran America's board of directors, ALICO's officers have not.

Finally, AIG cites materials published by Iran America itself which describes the company as "joint venture with 65% ownership by Iranians and 35% ownership by American International Group"

The Respondents have submitted no evidence with regard to the ownership of ALICO, AIRCO, AIOU and UBANK. With regard to the alleged beneficial ownership of the Iran America shares held of record by ALICO and UBANK, the Respondents have submitted powers of attorney granted by these companies authorizing two individuals to exercise their shareholder powers at stockholder and directors meetings of Iran America.

The Tribunal concludes on the basis of this evidence that ALICO, AIRCO and AIOU are wholly-owned subsidiaries of AIG and that UBANK has been dissolved and ceases to have an independent legal existence. It is clear that AIG's ownership interests in AIRCO and AIOU are sufficient to control these companies, and that, as non-United States corporations, they are themselves ineligible to present claims before the Tribunal. To the extent that the claim relates to the Iran America shares held of record by these two companies, it has been owned indirectly by AIG during the relevant period. AIG is entitled to maintain the claims of its whollyowned non-United States subsidiaries, i.e. AIRCO and AIOU. Article VII, paragraph 2 of the Claims Settlement Declaration.

With regard to the claim related to the UBANK shares the Tribunal is satisfied that, as the sole shareholder in that company, AIG has succeeded to all of UBANK's interest in the Iran America shares as a consequence of UBANK's dissolution in July 1979. As UBANK's successor in this respect, AIG is entitled to bring the claim to the extent that it relates to the Iran America shares held in the name of UBANK.

There is a question as to whether AIG can bring the claims related to the shares of ALICO. See Article VII, paragraph 2, of the Claims Settlement Declaration. The Tribunal does not need to reach this issue since it finds that the amendment whereby ALICO is introduced as additional Claimant besides AIG, should be allowed. The Tribunal hereby decides accordingly. Such amendment does not change the amount sought or the factual or legal basis of the claim and cannot be said to prejudice the Respondent. Article 20 of the Tribunal Rules, even if not directly applicable, gives guidance in deciding this issue. Not to allow the amendment would, in the circumstances of the present case, amount to a degree of formalism which is hard to justify.

The Tribunal finds that its jurisdiction over "expropriations" by virtue of Article II, paragraph 1, of the Claims Settlement Declaration applies equally to "nationalizations" and other forms of takings. In any event, the Tribunal's jurisdiction over "other measures affecting property rights" is, by itself, sufficiently broad to encompass the subject matter of the claim in this case.

That the Commercial Code of Iran give Iranian courts jurisdiction over Iranian corporations such as Iran America, cannot exclude the claim from the Tribunal's jurisdiction. In Article II, paragraph 1 of the Claims Settlement Declaration, the two Governments delimited the grounds for excluding claims from the Tribunal's jurisdiction, and a general reservation for cases within the domestic jurisdiction of one of the countries was not among those grounds.

The Algiers Declarations grant jurisdiction to this Tribunal notwithstanding that exhaustion of local remedies or Act of State doctrines might otherwise be applicable.

In conclusion, the Tribunal has before it a claim by AIG with regard to 25 per cent of the Iran America shares and a claim by ALICO with regard to 10 per cent of those shares. The Tribunal has jurisdiction over both claims.

## IV. MERITS OF THE CLAIM

### 1. Contentions of the Parties

The Claimants contend that the nationalization of Iran America was a violation of international law in that it was not accompanied by "prompt, adequate and effective" compensation as required by the principles of customary international law and because it failed to comply with obligations set forth in the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran dated 15 August 1955, ("Treaty of Amity") which entered into force on 16 June 1957. The Claimants cite a number of decisions of international tribunals and municipal courts to support its claim under customary international law and rely upon Article IV, paragraph 2, of the Treaty of Amity to establish the alleged non-compliance with treaty obligations. The Claimants also rely upon the above-mentioned Order [4] issued by the United States District Court for the District of Columbia on 10 July 1980 (see at II above), in which the Court held the process by which Iran America was nationalized to be in violation of the Treaty of Amity and of customary international law. The Claimants assert that this "should be recognized and accorded full faith and credit in this arbitration" on the issue of liability.

For this alleged violation of international law, the Claimants maintain that, under both the Treaty of Amity and customary international law, they are now entitled to the

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[4] American International Group, Inc. et al. v. Islamic Republic of Iran and Central Insurance of Iran (Bimeh Markazi Iran), No. 79-3298 (D.D.C. 10 July 1980).

payment of "just" compensation equal to the "full value" of their interest as of the date of nationalization, plus interest from 25 June 1979, the date of the nationalization.

The Claimants argue that for purposes of determining the just amount of compensation the company's value must be measured as a going concern, including such elements as future business prospects and good will. The Claimants also contend that the valuation of their own interest in the company must disregard any action of the Government of Iran prior to nationalization which may have had the effect of artificially depressing the value of the company and any event which followed the nationalization which may have negatively affected the company's future business prospects.

Finally, the Claimants allege that the full value of Iran America as a going concern on the date of nationalization was US $111,470,000. In accordance with their 35% interest in Iran America, the Claimants therefore request compensation in the amount of US $39,010,000.

The Respondents deny that they have violated principles of customary international law by nationalizing Iran America, either by acting to nationalize the insurance industry or by failing as yet to pay any compensation. They argue that the right of nationalization is universally recognized as an expression of the permanent sovereignty which every nation enjoys over natural resources and economic activities within its territory. Moreover, while they concede that there is a duty eventually to compensate the former owners of nationalized property, the Respondents deny that the standard of "prompt" compensation is a norm of customary international law. Instead, they contend that the international legal duty to pay compensation requires only an early indication of an intention to compensate and actual

payment within a reasonable time. The Respondents claim that they have not violated international standards because compensation paid even during forthcoming years would still come within the reasonable time permitted by the standard.

The Respondents also deny that they violated the terms of the Treaty of Amity. First, they argue that, on various grounds, the Treaty of Amity is no longer in force. Second, they maintain that, even if the Treaty of Amity remains in force, the nationalization of the Iranian insurance industry does not constitute a "taking" within the meaning of the Treaty of Amity and, as such, the treaty's protections and standards are inapplicable to this case.

The Respondents also contend as follows: Even assuming, arguendo, that Iran violated principles of customary international law in the course of nationalizing the insurance industry, there is no international legal entitlement to compensation equal to the "full value" of the property nationalized. The suggestion of full compensation derives from the traditionally asserted standard of "prompt, adequate and effective" compensation which has been repudiated by modern developments in international law; instead, a standard of "partial compensation" should be applied, based on references contained in resolutions of United Nations organs and from post-war settlement practice. Thus, whatever method of valuation is used, the compensation payable may be less than the value arrived at in order to account for such factors as the costs of administering the mechanism for payment, other independent liabilities of the owners of the nationalized property and considerations of justice.

The Respondents do not address the effect of the Treaty of Amity on the appropriate standard of compensation in the event that that treaty should be held applicable to the instant case.

The Respondents further contend that, even if the standard of compensation were held to be "just" compensation for "full value", it would be inappropriate and unreasonable to value the property as a going concern. Instead, they argue that the method of valuation required by modern international law is merely an assessment of the "actual worth of assets owned on the date of nationalization" without consideration of such elements as good will or loss of future profits. Thus the Respondents offer as the appropriate measure of compensation the "net book value", which they define as "assets minus liability without consequential damages".

As to the actual value to be assigned to Iran America, the Respondents do not accept the methodology employed in the "going concern" valuations offered by the Claimants, thereby rejecting various of the assumptions made by Claimants' experts. In the course of this critique, Respondents propose a method of valuation under which the net assets of Iran America are valued at 61,000,000 rials, or US $865,617,[5] which would leave Claimants' 35% interest with a value of US $302,966. Respondents further assert, however, that 111,461,250 rials, or US $1,581,571, should be deducted from the value of the Claimants' interest, representing an amount due from the Claimants to the Respondents under various, unspecified re-insurance contracts. Thus the Respondents contend that no compensation is owing to the Claimants, but rather that the Claimants are indebted to the Respondents.[6]

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[5] This and other currency conversions herein are based upon the official rate of exchange in effect on the date of nationalization, being 70.475 rials per US dollar.

[6] The Respondents make no claim for this alleged indebtedness.

Respondents also submitted a valuation of the company's net assets prepared by professional accountants employed by Bimeh Markazi which assigns a range of values to the company from 327,250,000 rials to 377,250,000 rials, or from US $4,643,491 to US $5,352,962. Under this valuation, prior to any allegedly legitimate deductions, the value of the Claimants' interest would range from US $1,625,222 to US $1,873,537.

Finally, although the Respondents have presented their defence jointly on all of the above issues, they both maintain that, if there is any liability under the claim, it is attributable only to the Government of Iran and not to Bimeh Markazi, which, they contend, is neither responsible for the nationalization nor the owner of the nationalized Iran America.

## 2. Compensation for the Nationalization of Iran America

### a. Obligation to pay Compensation

As previously stated, all insurance companies operating in Iran, including Iran America, were proclaimed nationalized effective June 25 1979 by the Law of Nationalization of Insurance Corporations.

In the opinion of the Tribunal it cannot be held that the nationalization of Iran America was by itself unlawful, either under customary international law or under the Treaty of Amity (if relevant to the solution of the present dispute, see below), as there is not sufficient evidence before the Tribunal to show that the nationalization was not carried out for a public purpose as part of a larger reform program, or was discriminatory. On the other hand, it is a general principle of public international law that even in a

case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value of the property taken. The Respondents have conceded that there is a duty eventually to compensate for the nationalization of Iran America.

The main issues in dispute between the Parties are therefore - apart from the value of Iran America's shares on the date of nationalization - the standard of compensation to be applied and the point in time when payment of compensation becomes due (see above under IV.1).

Since compensation was not made within any period after the date of nationalization (i.e. the date of the action giving rise to the claim), that would be considered legally required, the Tribunal holds that the nationalizing State - the Islamic Republic of Iran - is obligated to compensate the Claimants for damages for the taking of their shares in Iran America. The amount of compensation due will be dealt with in the following parts of the Award.

No valid ground has been invoked for holding Bimeh Markazi responsible under the claim. The claim against that Respondent should therefore be dismissed.

b. Amount of Compensation

The Claimants advance their claims both under the Treaty of Amity and under customary international law. They maintain that in either case they are now entitled to the payment of "just" compensation equal to the "full" value of their interest in Iran America as of the date of nationalization.

The Respondents, who contend that the Treaty of Amity is no longer in force, argue that there is no legal entitlement to compensation equal to the "full" value of the property nationalized. They maintain that the traditionally accepted standard of "prompt, adequate and effective" compensation has been repudiated by modern developments in international law. They refer, inter alia, to the United Nations Charter of Economic Rights and Duties of States, Resolution 3281 (XXIX) of 1974 which uses the expression "appropriate" compensation. They also cite the practice of States in arriving at settlements of nationalization claims. These developments, they argue, require that only "partial" compensation be paid.

As previously stated, the parties disagree as to the method of valuation to be used. The Claimants maintain that Iran America should be valued as a going concern, including such elements as good will and prospects of future profit. The Respondents contend that the assessment should be made exclusively on the basis of the "net book" or "break up" value of the company.

(i) Iran America's Value as a Going Concern

The Tribunal will first deal with the question which conclusions may be drawn regarding the value of Iran America as a going concern in the light of the evidence submitted.

The relevant date for valuation is that of the nationalization, 25 June 1979. There is not sufficient evidence of any Government actions prior to that date directly or indirectly intended to diminish the value of Iran America and therefore no consideration is given to that aspect when determining the company's value. On the other hand, as pointed out by the Claimants, neither the effects of the very act of nationalization should be taken into account nor the effects of events that occurred subsequent to the

nationalization. Evidence regarding the actual development of the company's business in the years following the nationalization should thus be disregarded. Rather, the valuation should be made on the basis of the fair market value of the shares in Iran America at the date of nationalization.

The evidence in this case indicates that there has not been an active market for Iran America's shares. In the absence of such a market, Claimants have relied on appraisals concerning the value of the company by two independant actuaries. One appraisal, made by a Swedish insurance actuary Mr. Robert Themptander, gave as result a total estimated worth of the company as at 21 March 1979 [the end of the last fiscal year prior to the nationalization] of approximately US $147 million. In a second appraisal, made by Mr. Norman D. Freethy of Hymans, Robertson & Co., Consulting Actuaries, London, the value to be placed on the company was calculated as at 21 March 1978 and adjusted up to 25 June 1979. Mr. Freethy, who also gave oral tesmimony at the two Hearings, in his original report arrived at a total value ranging between approximately US $74 million and US $111 million, depending on the allowance made for future real increases in the level of certain businesses.

Mr. Freethy, Claimants' principal expert, asserted that he did not use financial information contained in the 20 March 1979 financial report because it reflected abnormal economic conditions related to the Revolution itself, which took place in the fiscal year included within that report.

In ascertaining the going concern value of an enterprise at a previous point in time for purposes of establishing the appropriate quantum of compensation for

nationalization, it is - as already stated above - necessary to exclude the effects of actions taken by the nationalizing State in relation to the enterprise which actions may have depressed its value. As also stated above, there is not sufficient evidence in this case that Iran had taken any such actions.

On the other hand, prior changes in the general political, social and economic conditions which might have affected the enterprise's business prospects as of the date the enterprise was taken should be considered. Whether such changes are ephemeral or long-term will determine their overall impact upon the value of the enterprise's future prospects. Thus, financial data available for the period 21 March 1978 - 25 June 1979 should not be ignored.

At the Hearing on 13 January 1982, Mr. Freethy re-examined his assumptions on the basis of data for the fiscal year ending 21 March 1979. As a result, the expert lowered to about US $80 million the upper limit of the range of values originally determined, by eliminating the assumption of historical growth rates for future life insurance business and by reducing by 30% the projected profitability of existing life insurance, presumably to reflect the unusually high rate of uncollectable premiums.

The most important element of the compensation claimed by the Claimants for the taking of their shares in Iran America is the loss of prospective earnings. When making its own assessment of the market value to be given to these shares, the Tribunal will therefore have to conclude, inter alia, which assumptions could reasonably be made, with a sufficient degree of certainty, in June 1979 regarding the

future life and profitability of the company in view of the relevant conditions then existing in Iran.[7]

Although the method of analysis employed by the Claimants' two experts is undoubtedly consistent with modern techniques of valuation of insurance companies, their valuation does not in the Tribunal's view reflect the market value of Iran America at the relevant date. Without here examining in detail the various assumptions on which the experts have based their valuation, the Tribunal indicates some of the main reasons for its having taken that view. First, the appraisals do not sufficiently consider the changes in general social and economic conditions in Iran which had taken place between the autumn of 1978 and June 1979, or their likely duration. In this connection, it should be noted that during that period many Iranian nationals belonging to the wealthier part of the population left their country. Second, the appraisals do not account for the effects of certain Iranian taxes upon net profitability. Third, changes in the company's financial position between 21 March 1979 and the date of nationalization are not reflected in Mr. Freethy's revised valuation. Fourth, the company had been conducting its business only for little more than 4½ years, and such a short period must be deemed to provide an insufficient basis for projecting future profits.[8]

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[7] See Jimenez de Aréchaga, Recueil des Cours (1978 I), p 286 and note 533: "The basic test is the certainty of the damage".

[8] See G. Andreasson, Methods for Evaluation of Insurance Companies and Insurance Portfolios, 1980 (a paper submitted to and published by the International Congress of Actuaries), p 16: "In many markets, particularly the big ones, insurance companies' profits vary in a cyclical pattern ... To buy a company in a period just following a peak year can be very expensive, as there might follow only one or two more acceptable years and then a several years' period of loss ... The selection of time is very important as we have these cyclical patterns ..."

As stated above, there is no evidence of an active market for the company's shares. It appears, however, from the reports of an accountant firm (see below) that some shares were traded prior to the nationalization; that the last trading took place in July/August 1978 at a price of 5,760 rials each; and that the highest price at which company shares were traded during the fiscal year ending 20 March 1979 was 6,260 rials per share. As there is no evidence as to the number of shares traded and the circumstances in which those sales took place, it is not possible to say whether or not the prices mentioned represented the fair market value of the company's shares, neither at the date of the sales nor at the date of nationalization.

Based on the foregoing, the Tribunal believes that the fair market value (or going concern value) of Iran America at the date of nationalization is significantly less than even the lowest figure arrived at by the experts of the Claimants.

(ii) Iran America's Net Book Value

In order to establish the value of the company the Respondents relied primarily on a critique of Mr. Freethy's appraisal; on the testimony of Dr. G. Jabbari, a legal and insurance expert and Vice President of Bimeh Markazi; and on a share valuation report dated 7 September 1982, made by the firm of Agahan & Co., Public Accountants, Tehran. As previously stated, the Respondents - not accepting the "going concern" method of valuation - arrived at an estimated value of the net assets of the company amounting to 61,000,000 rials or US $ 865,617. This figure is based mainly on Dr. Jabbari's testimony. Agahan & Co. in their

report valuated the shares at the date of nationalization at 3,772.5 rials each or, alternatively, after an adjustment made according to later issued instructions by the relevant Government authority, at 3,272.5 rials each, giving a total value of the company of US $5,352,962 or US $4,643,490. The accountants state in their report, however, that in their final balance sheet the company has neither been fully considered a going concern nor has it been regarded as a breaking-up business; the adopted basis has been a combination of both. The report further shows that on certain issues the accountants, in accordance with instructions received, have taken into consideration the actual result of the company's business during the years following the nationalization.

A close examination of the audit report, with particular attention paid to the data contained in the notes to it, makes it clear that the results arrived at by the accountants are too low due to the instructions received. It is evident that had they employed standard accounting principles for the valuation of the company's shares as at 25 June 1979, they would have come to a considerably higher amount than the alternative figures indicated in the report.

(iii) Conclusions

The first point in issue is which method should be used for the valuation of Iran America's shares. The Tribunal holds that the appropriate method is to value the company as a going concern, taking into account not only the net book value of its assets but also such elements as good will and likely future profitability, had the company been allowed to continue its business under its former management. The book value method is used mainly for liquidation purposes.

The next issue to be considered is therefore what conclusions can be drawn from the evidence before the Tribunal concerning the going concern or fair market value of Claimants' interest in Iran America.

From what has been stated above, it might be possible to draw some conclusions regarding the higher and the lower limits of the range within which the value of the company could reasonably be assumed to lie. But the limits are widely apart. In order to determine the value within those limits, to which value the compensation should be related, the Tribunal will therefore have to make an approximation of that value, taking into account all relevant circumstances in the case. In so doing, the Tribunal fixes the value of the shares, for which amount the Claimants should now be compensated, at US $10,000,000. Out of this amount US $7,142,857 shall be paid to AIG and US $2,857,143 shall be paid to ALICO.

In view of the conclusions in this case, the Tribunal need not here deal with the issues concerning the validity of the Treaty of Amity and its relevance with regard to the present dispute.

The Respondents have alleged that an amount of 111,461,250 rials or US $1,581,571 is due from the Claimants under various reinsurance contracts. There is, however, no evidence before The Tribunal of that amount being owed to Respondents, and therefore such set off cannot be granted.

c. Interest

The Tribunal finds that the Claimants are entitled to interest on the amounts of compensation at a reasonable annual rate of 8.5 per cent as from the date of nationalization, 25 June 1979.

## V. COSTS

The Tribunal determines that all parties shall bear their own costs of arbitration.

## VI. AWARD

THE TRIBUNAL HEREBY AWARDS AS FOLLOWS:

The Claim against the Respondent BIMEH MARKAZI is dismissed.

The Respondent GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN is obligated to pay and shall pay to the Claimant AMERICAN INTERNATIONAL GROUP, INC. the sum of Seven Million One Hundred and Forty Two Thousand Eight Hundred and Fifty Seven United States Dollars (US $7,142,857) plus simple interest at the annual rate of eight and a half (8.5) per cent as from 25 June 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment of the Award.

The Respondent GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN is obligated to pay and shall pay to the Claimant AMERICAN LIFE INSURANCE COMPANY the sum of Two Million Eight Hundred and Fifty Seven Thousand One Hundred and Fifty Three United States Dollars (US $2,857,153) plus simple interest at the annual rate of eight and a half (8.5) per cent as from 25 June 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment of the Award.

Such payment shall be made out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

Each of the parties shall bear its costs of arbitration.

This Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Dated, The Hague
19 December 1983

Nils Mangård
Chairman
Chamber Three

In the Name of God

Richard M. Mosk
Concurring Opinion

Parviz Ansari Moin

The arbitrators in Chamber Three of the Tribunal having been invited to sign the Award on 19 December 1983 at 12 noon, Judge Ansari Moin appeared and stated that he would not sign the Award.

Nils Mangård

Richard M. Mosk

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

AMERICAN INTERNATIONAL GROUP, INC. and AMERICAN LIFE INSURANCE COMPANY,

Claimants,

- and -

ISLAMIC REPUBLIC OF IRAN and CENTRAL INSURANCE OF IRAN (BIMEH MARKAZI IRAN),

Respondents.

CASE NO. 2
CHAMBER THREE
AWARD NO. 93-2-3

IRAN UNITED STATES CLAIMS TRIBUNAL
FILED - ثبت شد
Date ۱۳۶۲/۹/۲۸ تاریخ
19 DEC 1983
No. 2 — ۲ شماره

## CORRECTION OF AWARD

Pursuant to Article 36 of the Tribunal Rules, the Tribunal hereby corrects Award No.93-2-3 as follows:

> The terms "Two Million Eight Hundred and Fifty Seven Thousand One Hundred and Fifty Three United States Dollars (US $2,857,153)" appearing on page 23 of the Award are corrected to read "Two Million Eight Hundred and Eifty Seven Thousand One Hundred and Forty Three United States Dollars (US $2,857,143)".

CERTIFIED COPY
فتوکپی گواهی شده

Dated, The Hague
19 December 1983

Nils Mangård
Chairman
Chamber Three

IRAN-UNITED STATES CLAIMS TRIBUNAL
THE HAGUE

In the Name of God

Richard M. Mosk
Concurring Opinion

Parviz Ansari Moin

The arbitrators in Chamber Three of the Tribunal having been invited to sign the Correction of Award on 19 December 1983, Judge Ansari Moin stated that he would not sign the Correction of Award.

Nils Mangård

Richard M. Mosk

RECEIVED
20 DEC. 1983