

MEMORANDUM OF DETERMINATIONS

Expropriation Claim of Citibank N.A.
Sudan -- Contract of Insurance No. X002 and Annex XC796

I. CLAIM

On June 8, 1999, Citibank, N.A. ("Citibank" or the "Investor") filed an Application for Compensation, accompanied by two volumes of exhibits and supplemented by letters and additional exhibits on July 30 and December 20, 1999, and March 15, 2000 (the "Claim"), seeking US\$1,055,607 in compensation under the expropriation coverage (Coverage B) of OPIC Country Annex XC796 to Contract of Insurance (Master Branch Bank - Citibank N.A.) No. X002, as amended on June 23, 1992 (collectively, the "Contract").¹ The Investment covered under the Contract represents 100 percent of the \$10,000,000 contributed by the Investor as branch capital to support the operations of its branch bank in Khartoum, Sudan (the "Branch"). For the period of September through December 1998, during which time the alleged expropriatory acts occurred, the Current Insured Amount with respect to Coverage B under the Contract was \$7,700,000.

OPIC finds that the Claim is valid under the Contract and that compensation is payable in the amount of \$1,055,607.²

II. BACKGROUND

Citibank opened the Branch in 1978. The Claim arises out of actions taken by Sudan's Central Bank (the "SCB") against the Branch in late 1997 and 1998.

Since 1984, banking activity in Sudan has been subject to Islamic law, which prohibits the earning of interest on loans and deposits. Banks operating in Sudan therefore provide financing to clients using certain SCB-approved Islamic credit procedures. Since 1984, the Branch has provided its clients financing principally through the use of an approved Islamic financial instrument known as a *murabaha*.

Pursuant to a *murabaha*, a bank, upon the request of a customer, purchases goods from a seller, and then re-sells the goods to the customer (the "buyer"). In consideration for the goods, the buyer pays the bank, in installments, a price equal to the purchase price paid by the bank to the seller plus an additional amount that is considered profit on the sale.

The SCB is the governmental entity that regulates banking activity in Sudan. According to the Claim, "although the local laws and regulations specify the [financing]

¹ A copy of the Investor's "Application for Compensation," not including exhibits, is attached as Appendix A.

² The Investor also seeks a refund of a portion of the premium it has paid, a matter which is governed by Section 3.01 and 3.02 of the Contract. OPIC will determine the amount of refund due, and notify the Investor of its determination, promptly after compensation is paid for this Claim, pursuant to the Contract.

mechanisms to be used, they do not provide the full details of the requirements or the methodology to be adopted in implementing such mechanisms.” The legal requirements applicable to the use of *murabahas* during the period related to the Claim are set forth principally in a single, one-page SCB regulation (“SCB Circular No. 18”).⁴

The SCB’s practice in regulating the Branch has been to conduct annual comprehensive inspections of the Branch’s activities, and from time to time additional limited inspections relating to specific banking activities, products or customers. Typically, four or five SCB inspectors would conduct the annual inspection over a period of approximately four weeks, supplemented from time to time by SCB specialists with expertise in certain product areas (e.g., *murabahas*). During these annual inspections, the SCB inspection team would conduct an exhaustive review of the Branch’s transaction documents. Unless the SCB found a violation, in the Branch’s experience, it did not issue an inspection report to the Branch.

Throughout the 13 years prior to 1997 that it operated the Branch in Sudan under Islamic law, the SCB never alleged that any of the Branch’s *murabaha* transactions violated local law. From at least 1991 until 1997, the SCB conducted both annual and episodic inspections of the Branch’s activities (including the Branch’s *murabaha* transactions), without identifying any violations to the Branch, and without issuing any inspection reports to the Branch. In short, according to the Investor, prior to the imposition of U.S. sanctions on Sudan, as described below, the Branch’s relations with the SCB had been “excellent.”

Foreign banks are required to obtain SCB approval in order to remit banking profits abroad. On May 28, 1997, the Branch filed with the SCB an application to repatriate its 1996 profits in the amount of Sudanese Pounds (“LS”) 4,476,324,859. Prior to submitting this application, the SCB had completed its annual inspection of the Branch’s 1996 activities, including the Branch’s 1996 *murabaha* transactions. As in the case of previous inspections of the Branch, the SCB gave no indication that any problems existed with respect to the Branch’s *murabaha* transactions, and no inspection report was issued.

While the Branch’s application to repatriate its 1996 profits was pending, in November of 1997, the United States imposed economic sanctions on Sudan.⁵ Pursuant to these sanctions, the Branch was required to seize assets of and restrict activities involving the Government of Sudan (“GOS”) and its controlled entities.

In early December 1997, contrary to prior practice, the SCB sent a second inspection team to conduct a comprehensive review of the Branch’s 1996 activities, although such a review had already been performed. Again, the SCB inspection team in connection with

⁴ A translation of SCB Circular No. 18, furnished by the Investor as Exhibit 17 to the Claim, is attached as Appendix B.

⁵ On November 4, 1997, the United States imposed sanctions on Sudan, including the freezing of Sudan’s assets in the U.S. and the banning of all U.S.-Sudanese trade, due to Sudan’s sponsorship of international terrorism, efforts to destabilize neighboring countries and poor human rights record.

this second audit did not indicate that any violations existed with respect to the Branch's *murabaha* transactions, nor did it issue an inspection report.

On March 10, 1998, the SCB finally responded to the Branch's May 1997 request to remit its 1996 profits. Although the SCB approved the repatriation of LS 1.8 billion, it required the Branch to pay to the SCB LS 2.7 billion, which amount the SCB alleged represented illegal profits earned on eleven "phoney" *murabaha* transactions. At the time the SCB demanded that the Branch disgorge these "illegal" profits, the SCB provided no reasons for its determination.

The Branch disputed the SCB's demand for payment, noting among other points that despite two comprehensive SCB inspections of its 1996 *murabaha* activities, the SCB had not issued to the Branch any inspection report indicating violations. Subsequently, in April of 1998, the SCB provided the Branch a copy of an inspection report dated January 15, 1998 regarding the Branch's 1996 activities (the "January 1998 Report"). The January 1998 Report identifies the specific *murabaha* transactions conducted by the Branch in 1996 that the SCB determined to be "phoney," grouping them into three categories as follows: (1) "murabahas where the customer played the role of the conductor and beneficiary," consisting of transactions in which the seller of the goods and the bank customer that was the buyer were affiliates or had common shareholders; (2) "murabahas where issued checks were endorsed to the client who conducted the *murabaha*," consisting of transactions in which the seller endorsed to the buyer the check issued by the Branch to the seller to pay the purchase price of the goods that are the subject of the *murabaha*; and (3) "murabahas where the value was transferred or checks issued in favor of the conductor of the *Murabaha*," consisting of transactions in which, subsequent to payment of the seller by the Branch, the seller transferred to the account of the buyer (including by check) an amount equal to the amount of the purchase price paid by the Branch.⁶ Of these three categories, a substantial majority of the allegedly "illegal" profits involved transactions in the first category, between related parties.

The Branch challenged the SCB's payment demand in writing and in meetings with SCB officials, arguing among other points that: (1) pursuant to advice of its local counsel, Islamic law permits *murabaha* transactions that involve as the seller and buyer parties that belong to the same commercial group, as long as they are independent legal entities and, moreover, it is "normal" for entities within the same commercial group to trade with one another; (2) although the Branch carefully screens the parties to all of its *murabaha* transactions, for purposes including the confirmation of the good reputation and legal independence of the buyer and seller, the Branch cannot control or monitor how the seller uses the proceeds of the sale to the Branch, and should not be held accountable for actions beyond its control; and (3) the buyers in the specific *murabahas* identified in the inspection report, as part of their core businesses, made annual purchases far in excess of

⁶ A translation of the January 1998 Report, furnished by the Investor as Exhibit 4 to the Claim, is attached as Appendix C.

the amount represented by the disputed *murabahas*, and therefore have no reason to engage in sham *murabahas*.⁷

Subsequent to the Branch's protest of its decision, the SCB issued to the Branch a revised determination dated August 16, 1998, which reduced the amount of Branch profits deemed illegal by more than 70 percent, from LS 2.7 billion to LS 797 million. The revised determination attached an opinion of the "Shariat Committee" on the Branch's 1996 *murabaha* transactions.⁸ According to the Claim, the Shariat Committee is a governmental body with expertise in Islamic law that was established in 1996 to resolve disputes between the SCB and regulated banks.

The Shariat Committee opinion attached to the revised SCB determination states that the SCB's January 1998 Report was reviewed by a "Shariat researcher," who confirmed the "possibility of usury" in the identified *murabaha* transactions due to the reasons specified in the report (i.e. transactions involved related parties, or transfer of funds from the seller to the ultimate buyer, including by endorsement of the Branch's check). Noting the conclusions of the Shariat researcher, the Shariat Committee determined that only six out of the eleven *murabaha* transactions identified in the SCB inspection report violated Islamic law. Of these, the transactions deemed illegal consisted of: (1) three of the seven transactions identified in the January 1998 Report as involving related parties, (2) both of transactions identified in the January 1998 Report as involving endorsement by the seller of the Branch's check to the buyer, and (3) one of the two transactions identified in the January 1998 Report as involving the transfer from the seller to buyer of amounts equal to the purchase price paid by the Branch. The Shariat Committee opinion, the January 1998 Report, and the documentation relating to the specific transactions do not reveal the distinction, with respect to the transactions identified in the first and third categories, between transactions deemed legitimate and those deemed illegal.

On August 20, 1998, the United States bombed a pharmaceutical factory in Khartoum identified by U.S. intelligence sources as a producer of chemical weapons linked to a terrorist organization responsible for the bombing of two U.S. embassies in Africa. The GOS quickly expressed its outrage, and relations between the two countries deteriorated further.

On September 8, 1998, the SCB, without prior notice, deducted the LS 797 million from the Branch's account with the SCB. The Branch's subsequent request to the SCB for a meeting with the Shariat Committee to discuss the basis for such seizure elicited no response.

In the meantime, on June 22, 1998, the Branch filed with the SCB an application to repatriate its 1997 profits. Prior to this date, the SCB had conducted its annual inspection

⁷ Copies of the Branch's written protests to the SCB, furnished by the Investor as Exhibits 3 and 5 to the Claim, are attached as Appendix D.

⁸ A translation of the SCB's revised determination with attached Shariat opinion, furnished by the Investor as Exhibit 6 of the Claim, is attached as Appendix E.

of the Branch's 1997 activities. As in the case of previous inspections, the SCB audit team did not indicate that any violations existed with respect to the Branch's 1997 *murabaha* transactions, nor did it provide the Branch an inspection report.

Subsequent to the U.S. bombing of the pharmaceutical plant in Khartoum, in August of 1998, the SCB conducted a second comprehensive inspection of the Branch's 1997 activities. Other than the second comprehensive inspection conducted with respect to the Branch's 1996 activities, immediately after the imposition of U.S. sanctions on Sudan, the SCB had never performed two comprehensive inspections of the Branch in a single year. No violations were noted by the SCB audit team in connection with this second inspection, nor did the SCB issue to the Branch any inspection report.

On September 30, 1998, the SCB informed the Branch that it had debited LS 1,508,825,331 from the Branch's account with the SCB. Without providing any other explanation or detail, the SCB alleged this amount represented profits made from "phoney" 1997 *murabaha* transactions.

The Branch protested the seizure of funds and the finding that it had engaged in illegal transactions, and requested an explanation of the reasons for the determination. In response, the SCB provided the Branch a copy of an SCB inspection report regarding the Branch's 1997 operations (the "October 1998 Report"). Similar to the January 1998 Report, the October 1998 Report identifies the specific *murabaha* transactions deemed "phoney," grouping the transactions into the same three categories (i.e. transactions involving related parties, endorsed purchase price checks, and transfers of the purchase price amount). In addition, the October 1998 Report states that most of the *murabaha* transactions involved transportation services, "whereas *murabahas* can't be used for services but for goods."⁹

The Branch delivered to the SCB a written protest of the October 1998 Report, raising many of the same points made in its protest of the SCB's determination with respect to its 1996 activities. In addition, Branch officers met with officials of the SCB to discuss its position.

As it did with respect to its initial determination in connection with the Branch's 1996 activities, the SCB substantially revised its determination with respect to the Branch's 1997 *murabahas*. By letter dated November 24, 1998, the SCB notified the Branch that "after the decision of the Shariat committee," more than a third of the 1997 profits that had been seized would be restored to the Branch's account, and only LS 974,562,332 retained by the SCB as illegal profits on "phoney" *murabahas*. Although the SCB provided no explanation for its revised decision, and did not attach any opinion of the Shariat Committee, it appears from a comparison of the amount of profits declared illegal in the initial and revised decisions, that the SCB upon further review determined that only

⁹ A translation of the October 1998 Report, furnished by the Investor as Exhibit 10 to the Claim, is attached as Appendix F.

two out of the six *murabaha* transactions identified in the October 1998 Report violated Islamic law. Of these, the transactions deemed illegal consisted of: (1) two of the three transactions identified in the October 1998 Report as involving related parties, (2) but not the transaction identified in the October 1998 Report as involving endorsement by the seller of the Branch's check to the ultimate buyer, and (3) not the two transactions identified in the October 1998 Report as involving the transfer from the seller to buyer of amounts equal to the purchase price paid by the Branch.

The Branch again protested the decision in writing and, as it had done in connection with the SCB determination regarding its 1996 activities, repeatedly requested a meeting with the Shariat Committee. The SCB responded only by informing the Branch in writing that it declined to accept the Branch's "appeal."

In a letter dated November 29, 1998, the SCB notified the Branch that, in addition to the illegal profits, it was deducting from the Branch's account with the SCB a fine in connection with the 1997 *murabahas* equal to LS 1,225,980,000. The SCB justified the amount of the fine, which represented twice the rate of the standard fine imposed for illegal *murabahas*, on the basis that the Branch had "previously committed the same violations in 1996." On December 10, 1998, however, the SCB deducted from the Branch's account only LS 795,920,000, presumably reflecting the reduction in 1997 *murabahas* deemed illegal. The penalty was the subject of an immediate Branch protest, and on December 21, 1998, the SCB, without explanation, refunded a portion of the penalty, so that the amount finally deducted was LS 500,000,000.

The total amount of 1997 profits deducted by the SCB from the Branch's account was thus LS 1,474,562,332, and the sum of the 1996 and 1997 profits seized, LS 2,271,707,313. The table below shows these categories of deductions and the US dollar equivalents of the amounts given in Sudanese Pounds. The amount sought as compensation under the Claim, \$1,055,607, represents the US Dollar value of the total amount deducted by the SCB from Branch profits, as shown in the table below.

By December 10, 1998, the Branch ceased banking operations in Khartoum, and its accounting books were closed as of that date pursuant to a liquidation process overseen by SCB. A final balance sheet was prepared for the Branch as part of that process and submitted to the SCB.¹⁰ The GOS Tax Department had required that the amounts deducted for 1996 and 1997 profits (i.e., 1996 profits of LS 797,144,981, and 1997 profits of LS 974,562,332) be included in the final balance sheet as "unremitted profits carried forward," a taxable category. Thus, although the Investor disputes the tax implications of this accounting decision, there appears to be no disagreement between the Branch and the SCB that the amounts deducted constituted unremitted profits of the Branch.

¹⁰ On December 1, 1999, Citibank submitted to OPIC a second Application for Compensation involving the Branch, seeking compensation for \$3.5 million of branch capital that has not been returned by SCB and other amounts

Table 1: Branch Profits Seized by the SCB

	Profits Originally Seized	Profits Restored	Net Profits Seized
1996 Profits	March 10, 1998	September 8, 1998	
	LS 2,700,000,000*	LS 1,985,479,810	LS 797,144,981**
			\$370,000**
1997 Profits	September 30, 1998	November 28, 1998	
	LS 1,508,825,331	LS 534,262,999	LS 974,562,332
	\$700,331	\$229,589	\$470,742
Penalty	December 10, 1998	December 21, 1998	
	LS 795,920,000	LS 295,920,000	LS 500,000,000
	\$342,031	\$127,166	\$214,865
Total Deducted			LS 2,271,707,31
			\$1,055,607

*SCB ordered the Branch to pay this amount, but did not deduct it from the Branch's account.
 **SCB deducted this amount from the Branch's account as of September 8, 1998.

("Claim II"). The financial statements referred to herein are included in the materials submitted by Citibank in support of Claim II.

III. DETERMINATIONS UNDER THE CONTRACT

The Claim of Expropriation under Section 1.19(d) is Valid.

Pursuant to Section 18.01 of the Contract, and subject to the other terms and conditions thereof, OPIC is obligated to pay compensation to the Investor, in the amount provided in Article 20 of the Contract, for any "Expropriatory Action" with respect to which the "Date of Expropriation" occurs during the "Insurance Period." The "Date of Expropriation" is the first day of the period in which an action through the duration of time became "Expropriatory Action", as defined in Section 1.19. As the actions of the SCB that gave rise to the Claim took place in 1998, and the Insurance Period extends from at least June 1, 1990 until at least April 21, 2000,¹¹ the key issue upon which the Investor's right to compensation turns is whether or not an "Expropriatory Action" took place. That term is defined in Section 1.19 of the Contract.

The Investor asserts that the actions of the SCB against its 1996 and 1997 profits constituted "Expropriatory Actions" pursuant to subsections (a), (b), and (d) of Section 1.19. Because OPIC finds that the Claim demonstrates that the actions of the SCB constituted "Expropriatory Actions" within the meaning of subsection (d), no determination is made with respect to subsections 1.19(a) and (b).

Definition of Expropriatory Action

Section 1.19(d) of the Contract states:

Expropriatory Action. The term "Expropriatory Action" means any action which is taken, authorized, ratified or condoned by the Government of a Project Country, commencing during the Insurance Period, with or without compensation therefor, and which for a period of one year directly results in preventing:

...

- (d) the Investor from repatriating, and from exercising effective control in the Project Country over, amounts received as Investment Earnings or Return of Capital, which action commences within eighteen months immediately succeeding such receipt[.]

The term "Government of a Project Country" is defined in the Contract in Section 1.22 to mean the governing authority or agents thereof that are in effective control of all or any part of a Project Country. OPIC finds that the SCB falls within this definition. As

¹¹ The Insurance Period for the initial \$5,000,000 branch capital contribution made by the Investor extends from April 22, 1980 to April 21, 2000; the Insurance Period for the Investor's second infusion of \$5,000,000 in branch capital extends from June 1, 1990 to May 31, 2010.

discussed above, it further finds that the one-year duration requirement of Section 1.19 has been satisfied, and that the actions taken by the SCB against the profits of the Branch commenced during the Insurance Period.

The term "Investment Earnings" used in subsection 1.19(d) is defined in Section 1.25 of the Contract as "accumulated earnings ... reflected on the balance sheet of a Branch as Unremitted Profits." "Unremitted Profits" in turn is defined in Section 1.40 to mean "accumulated earnings not remitted to the Investor's head office or transferred to another account, for both current and prior years."

The facts alleged and demonstrated by the Investor in its Claim establish that the Branch was prevented by actions of the SCB from repatriating, and from exercising effective control in the Project Country over, amounts received as Investment Earnings on its 1996 and 1997 activities equal to \$1,055,607. These actions commenced within 18 months immediately succeeding the Branch's receipt of such Investment Earnings.

Actions that fulfill the requirements of subsections (a), (b), (c) or (d) of Section 1.19 are nonetheless excluded from the definition of an "Expropriatory Action" if they fall within any of several exceptions set forth in subsections 1.19(1) through (7). Thus, an action is not an "Expropriatory Action" if it occurs or continues in effect as a result of, to paraphrase Section 1.19:

- (1) a legal act that is not expressly for the purpose of expropriation, serves a legitimate government objective, is not arbitrary, and does not violate generally accepted principles of international law;
- (2) failure of the Investor or Branch to take all available and reasonable administrative and judicial steps to prevent the action;
- (3) action in accordance with an agreement voluntarily made by the Investor or Foreign Enterprise;
- (4) provocation by the Investor or Branch, unless the provocation is an action taken pursuant to a request of the Government of the United States or an act in good faith in an administrative, arbitral or judicial proceeding;
- (5) insolvency or creditors' proceeding not resulting from actions of the Government of the Project Country;
- (6) bona fide exchange control actions of the Government of the Project Country; or

- (7) a lawful action by the Government of the Project Country taken in its capacity as shareholder, director or manager of the Branch.

OPIC finds that the Branch and the Investor were reasonably diligent in challenging the SCB's actions, sufficient to preclude the application of subsection (2) of Section 1.19. With respect to subsection (4), OPIC notes that the written determinations of the SCB and the Shariat Committee indicate that the SCB seized the Branch's funds based solely on the findings that such funds represented illegal profits of, or penalties due in connection with, "phoney murabahas;" no other actions of the Branch are cited as the basis for the seizures. Moreover, to the extent that the SCB seized the Branch's funds in retaliation for the Investor's implementation of United States Government sanctions against Sudan, OPIC finds that such actions, taken pursuant to a request of the United States Government, would not give rise to the application of subsection (4). OPIC also finds that the exceptions set forth in subsections (3) and (5) through (7) are not raised by the facts of the Claim. At issue therefore is whether or not the actions of the SCB occurred or continued in effect as a result of, to quote in full subsection (1) of Section 1.19:

- (1) any law, decree, regulation or administrative action of the Government of a Project Country which is not by its express terms for the purpose of nationalization, confiscation or expropriation (including but not limited to intervention, condemnation or other taking), is reasonably related to constitutionally sanctioned governmental objectives, is not arbitrary, is based upon a reasonable classification of entities to which it applies and does not violate generally accepted principles of international law[.]

OPIC finds that the actions of the SCB against the Branch's 1996 and 1997 profits were arbitrary, unreasonable and violative of generally accepted principles of international law, and that therefore the exception set forth in Section 1.19(1) does not apply. Because OPIC finds that the actions of the SCB prevented the Investor from repatriating and controlling Investment Earnings for a period of more than one year, and that none of the exceptions set forth in Section 1.19 apply, it finds that such actions constitute "Expropriatory Actions."

SCB Actions Arbitrary, Unreasonable and Contrary to International Law

The actions taken by the SCB with respect to the Branch's profits were extraordinary, internally inconsistent, contrary to its prior course of dealings, and without apparent basis in any written law of Sudan. For these reasons, although OPIC does not lightly find that actions taken by a foreign regulatory authority purportedly to implement local law are arbitrary, unreasonable and violative of generally accepted principles of international law, OPIC makes such a finding here with respect to the actions of the SCB against the Branch's 1996 and 1997 profits.

Among the specific facts that lead OPIC to its conclusion are:

- In neither of the initial comprehensive inspections performed on the Branch's 1996 and 1997 activities did the SCB give any indication that any problems existed with respect to the Branch's *murabaha* transactions. Moreover, in none of the SCB's inspections in previous years of the Branch's *murabaha* transactions, which the Investor alleges were substantially similar to the transactions entered into in 1996 and 1997, did the SCB indicate that the Branch's *murabahas* violated local law. Rather, despite all of these prior, exhaustive inspections, it was only after the United States imposed sanctions on Sudan, which Citibank as a bank subject to United States law was required to implement, and then again after the United States Government took military action against a target located in Sudan, that the SCB ordered unprecedented additional comprehensive inspections of the Branch's 1996 and 1997 activities and declared violations to have taken place. Thus, the SCB's actions with respect to the Branch's 1996 and 1997 *murabaha* transactions appear to be both arbitrary and politically motivated in light of the absence of any SCB challenge to those same transactions and similar transactions prior to the deterioration of U.S. - Sudanese relations.
- The magnitude and inconsistency of the SCB's revisions of its initial decisions with respect to both the 1996 and the 1997 transactions are further evidence of the arbitrary nature of the SCB's actions. When the Branch challenged the SCB's initial decision with respect to its 1996 activities, the SCB responded by reducing the amount of profits deemed illegal by more than 70 percent. Similarly, the SCB reduced by more than a third its initial determination as regards the Branch's 1997 *murabaha* transactions, and as regards the size of the fine to be imposed. But in each case neither the SCB nor the underlying Shariat Committee opinions upon which its decisions were supposedly based advanced any coherent rationale as to why certain transactions were subsequently found to be legitimate. Nor does any discernible pattern emerge from the SCB decisions and the Shariat Committee opinions. In the revised decisions, which are purportedly based on the Shariat Committee opinions, the SCB appears to maintain its original position regarding the illegality of each of the categories of transactions identified in its initial decision, but then without explanation excludes from the transactions deemed illegal certain *murabahas* that appear to fall squarely within these categories. The SCB actions treat like transactions differently: transactions found to be legitimate after further review are very similar in their structures to the transactions deemed illegal.¹² The SCB actions were thus internally inconsistent, as well as contrary to SCB's practice in prior years, and therefore arbitrary.

¹² Moreover, in the case of the transactions deemed illegal in part because they involved contracts for transportation services instead of the sale of goods, the Investor has provided direct evidence, in the form of *murabaha* contracts for services entered into by [REDACTED] and the [REDACTED] b(4) that local GOS-owned Islamic banks have entered into similar transactions. In addition, a legal opinion provided by the Investor (see footnote 13) states that the SCB has issued a circular indirectly approving the use of the *murabaha* financing structures for service transactions.

- As confirmed by legal opinions provided by the Investor,¹² none of the bases upon which the SCB deemed the Branch's 1996 and 1997 *murabaha* transactions illegal, or even close analogues thereto, appear in any of the decrees, regulations, instructions or other guidance of the SCB, or other local law.
- The SCB declined to respond to any of the arguments advanced by the Branch as to why, both as a matter of local law and banking practicality, the subject *murabahas* were not and should not be proscribed by the SCB, despite the fact that the Branch's arguments are supported by legal opinions of a local lawyer and appear persuasive on their face.
- Despite its repeated requests, the Branch was denied access to the Shariat Committee, which acted as the appellate body with respect to the Branch's challenge of the SCB's decisions.

A government may be liable under international law for arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state. See Restatement (Third) of Foreign Relations Law of the United States §712(3) (1987). In applying this standard to the Claim, OPIC is guided by Comment (i) to Section 712 of the Restatement, which states in relevant part:

An alien enterprise that has been lawfully established is protected by international law against changes in the rules governing its operations that are discriminatory ... or are so completely without basis as to be arbitrary in the international sense, i.e., unfair.

Based on the facts alleged and demonstrated in the Claim, including those discussed above, OPIC finds that the actions of the SCB were arbitrary, unreasonable and violative of generally accepted principles of international law.

IV. AMOUNT OF COMPENSATION

Pursuant to Section 20.03 of the Contract, the amount of compensation shall be the sum computed by taking the portion attributable to the Investment of the receipts or proceeds which were the object of the Expropriatory Action, less the portion attributable to the Investment of any assets received by the Investor from non-OPIC sources in compensation for the loss resulting from the Expropriatory Action. Section 1.24 of the Contract defines "Investment" as that portion of "the Investor's actual contribution of Branch Capital to a Branch that is insured hereunder and listed in paragraph 1 of the respective Country Annex in the column captioned 'Insured Investment'." The Investment, as specified in the Contract, is \$9,000,000, or ninety percent of the Investor's actual contribution of \$10,000,000 in Branch Capital to its branch in Sudan. The Contract also provides, however, that its provisions are subject to the Risk Retention

¹² Copies of the legal opinions of [REDACTED] dated February 17, 1999 and February 20, 2000, are attached as Appendix G. b(4)

Agreement between OPIC and Citicorp Insurance (Bermuda) Ltd., dated as of January 1, 1988, the successor agreement to which is the Risk Retention Agreement between OPIC and a Citibank affiliate, Citicorp Insurance USA, Inc., dated as of July 1, 1996 (the "Risk Retention Agreement"). The Risk Retention Agreement, under which the 10% self insurance requirement is the Contract with respect to Annex X-C76 is fulfilled by the reinsurance arrangements provided for therein, effectively increases the portion of the Investor's actual contribution of branch capital that is insured under the Contract to one hundred percent. As a result, the amount of compensation payable under the Contract, subject to the provisions of the Risk Retention Agreement, is 100% of the expropriated losses.

OPIC finds that the amount of the Investor's loss is, as alleged, \$1,055,607. (See Table 1 above). Pursuant to Section 20.03 of the Contract, with respect to each amount of Sudanese Pounds seized by the SCB, OPIC calculated the corresponding amount of the loss in U.S. dollars using the effective legal exchange rate in Sudan as of the date such amount of Sudanese Pounds was seized (i.e. the dates of occurrence of the SCB actions that became "Expropriatory Actions" through the duration of the required time, as provided by Section 1.14 of the Contract). As no compensation has been received from sources other than OPIC, within the meaning of Section 20.03 of the Contract, the amount of compensation due to the Investor under the Contract is one hundred percent of the total amount of the Investor's loss due to the Expropriatory Action, or \$1,055,607.

V. ASSIGNMENT TO OPIC

Pursuant to Section 19.03 of the Contract, compensation will be paid under this Claim to the Investor upon completion of the required assignments to OPIC.

VI. CONCLUSION

For the foregoing reasons, OPIC concludes that the Claim of the Investor is valid and that the Investor is entitled to compensation in the amount of \$1,055,607.

OVERSEAS PRIVATE INVESTMENT CORPORATION

By:



Kirk K. Robertson

Its:

Executive Vice President

Dated:

September 22, 2000