

COMPENSATION FOR EXPROPRIATION AND NATIONALIZATION
OF FOREIGN INVESTMENT

The Contribution of the
Iran-U.S. Claims Tribunal

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The Contribution of the Iran-U.S. Claims Tribunal

by

Mohammad Shamsaei

This study encompasses an examination of the awards of the Iran-U.S. Claims Tribunal in cases of expropriation and nationalization of Foreign Investment.

The question of compensation for expropriation and nationalization of alien property has always been a controversial issue in the relationship between the foreign investors and investees particularly in the third world countries. This question has been a major point of discussion in international law as well.

The Iran-U.S. Claims Tribunal is the most recent body to deal with the question of expropriation; nationalization and compensation. In this study I have attempted to see what the awards of the Tribunal have contributed to the resolution of the controversial question of compensation for expropriation and nationalization. In 1982 when the Tribunal began work, the International law standard to be applied in determining compensation in cases of expropriation and nationalization was a controversial issue. The period from 1982 onwards might be considered as a new era in international law. Thus to explore the present status of the international law of compensation the awards of the Tribunal have been examined. I have attempted to find out what standard of compensation has been applied in the awards of the Tribunal; what has been the governing law; what has been the context of that law; and finally what have been the justifications for the application of that law. These issues are discussed within eight chapters. The ninth chapter, however, reviews the findings of the study and contains some general conclusions. The final assessment of this study is that, the decisions of the Tribunal have been given against a background of the increasing recognition of the need for foreign investment in the developing countries and have made an important contribution to the law in this field.

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ABBREVIATIONS

Am. J. Int'l Law	American Journal of International Law
Arb. Journal	Arbitration Journal
B.Y.B. Int'l Law	British Year Book of International Law
Cal. W. Int'l L. Journal	California Western International Law Journal
Can. Y. Int'l Law	Canadian Year Book of International Law
Case W. Res. J. Int'l Law	Case Western Reserve Journal of International Law
Col. J. Trans'l Law	Columbia Journal of Transnational Law
Hague Recueil	Recueil des Cours d' l'Academie de droit International
J.W.T. Law	Journal of World Trade Law
I.C.J.	International Court of Justice
I.C.L.Q.	International and Comparative Law Quarterly
I.C.L.	International Law Commission
Ind. J. Int'l Law	Indian Journal of International Law
I.L.R.	International Law Reports
I.L.M.	International Legal Materials
Int'l Law.	International Lawyer
N.Y.B. Int'l Law	The Netherland Year Book of International Law
N.Y.U.J. Int' L. and Policy	New York University Journal of International Law and Politics
Proc. A.S.I.L.	Proceedings of the American Society of International Law
R.I.A.A.	United Nations Reports of International Arbitral Awards
U.N.T.S.	United Nations Treaty Series
Virg. J. Int'l Law	Virginia Journal of International Law
Y.B. Int'l L.C.	Year Book of the International Law Commission
Y.B.C. Arb.	Year Book of Commercial Arbitration

Y.B.W. Aff.

Year Book of World Affairs

J. Int'l
Arbitration

Journal of International Arbitration

INTRODUCTION

This thesis is a review of those awards of the Iran-U.S. Claims Tribunal which relate to the expropriation of foreign owned property. The Tribunal has made many such awards and, as we shall see, they are highly significant. However, the question of compensation for expropriation or nationalization⁽¹⁾ of alien property has been a major point of discussion in international law for decades. Numerous international institutions, including the United Nations, have tried to enhance and structure economic and industrial co-operation throughout the world. Several efforts have been made to create general rules that would be universally acceptable to foreign investors and their governments. However, due to the contradictory views of countries at different levels of industrial development and varying econo-political systems the results have remained incomplete.⁽²⁾

Despite the widespread recognition of an urgent need for foreign capital and expertise in the less developed (or developing) countries of Asia, Africa, Middle East and Latin America, many of these countries show mixed feelings towards foreign investment.⁽³⁾ An increasing amount of foreign investment during past decades has been in accordance with economic development programmes of such countries. Nevertheless, many developing countries still view foreign investment particularly the activities of multinational enterprises (MNEs) as remnants of old colonialism.⁽⁴⁾ This is especially the case in countries where foreign investment pervades vital industries and influences the economic and political life.

Foreign companies naturally and generally follow a policy of profit maximising.⁽⁵⁾ However, this policy may not always conform with governmental plans for the development of national economy. Moreover, foreign investments may be perceived as maintaining the dependence of the capital-importing countries on the capital-exporting state.

Nevertheless, the desirability of foreign capital; advanced technology; know-how; and the increased willingness of the industrialized countries to contribute to the infrastructures of developing countries has made most governments respond to the wishes of investors. Such responses include bilateral arrangements, and unilateral enactment of investment laws which ensures favourable treatment and various incentives such as tax exemptions etc to foreign investors.⁽⁶⁾

In spite of this, during recent years a substantial amount of investment in capital importing countries were expropriated. Actually the post-war period was characterized by massive waves of expropriation, first in Eastern Europe and then in some of the newly independent states.⁽⁷⁾ From 1960 onwards in each decade the world community witnessed an increase of such expropriation cases. For instance the number of expropriations of foreign property in 1975 was four times higher than in 1970 and fifty times higher than in 1961. In the 1960s, fifty nine non-Communist countries of the third world nationalized American assets in their country. Most notably, forty nine percent of all expropriations in that period took place in the Latin American countries.⁽⁸⁾

In the 1970s the Arab countries; North Africa and the Middle East including Israel, were responsible for twenty seven per cent of all nationalizations, the black African countries for thirteen percent and Asia for eleven percent.⁽⁹⁾

Kolvenback points out American practice during the two World Wars:

"induced many ... countries, notably in the third world to expropriate foreign investments some times without compensation. Former colonies in Africa and Asia, and also Latin American countries regarded foreign investments in certain industries as an undue limitation of their sovereignty and, therefore, confiscated such assets."⁽⁹⁾

To the above mentioned nationalization and expropriation cases must now be added the expropriation of American assets in Iran which took place in early 1980, following the Islamic revolution. American investment was both extensive and massive in Iran during the time the Shah's government was in power. Most if not all of the property so acquired was expropriated by the Islamic revolutionary regime.⁽¹⁰⁾

Certainly these takings have contributed mightily to the intensity of the confrontation between the third world and the developed countries. As Neville points out:

"As a result of these confrontations the line has been clearly drawn between the industrialized nations and those developing countries of the world that subscribe to the precepts of the New International Economic Order (NIEO), as emotional appeal for redistribution of the world's wealth".⁽¹¹⁾

Both groups of nations advance well-defined and contrasting arguments in support of their positions in expropriation of property, the law governing such expropriations, and the terms and conditions of compensation.

The conflicting attitudes towards alien property are reflected in the discussion on the state of customary international principles of expropriation and nationalization. Despite numerous articles and various efforts to establish a uniform international standard on the conditions of an compensation for expropriation, the classic controversy between the two main and extreme views has remained unsolved. To see what the awards of the Iran-U.S. Claims Tribunal have contributed to the resolution of this controversy we must begin by considering the legal background.

CHAPTER ONE

EXPROPRIATION IN INTERNATIONAL LAW

1.1 NATIONALIZATION OF FOREIGN OWNED PROPERTY

Nationalization of foreign property is legal in itself in international law, unless it is in breach of the provisions of a treaty, or it constitutes violation of a specific principle of customary international law. In the absence of a specific treaty not to do so, a country is free in its discretion to nationalize for public purposes the properties located in its territory of foreign nationals as well as that of its own citizens.⁽¹²⁾

This right to nationalize is recognised as an aspect of the sovereignty of nations, their freedom to govern territories as they see fit unless restricted by an international rule to which they have explicitly or tacitly assented.

Aréchaga goes so far as to state that:

"Contemporary international law recognises the right of every state to nationalize foreign-owned property, even if a predecessor state or a previous government engaged itself, by treaty or by a Contract, not to do so. This is a corollary of the principle of permanent sovereignty of a state over all its wealth, natural resources and economic activities as proclaimed in successive General Assembly resolutions and particularly in Article 2, Paragraph 1, of Chapter II of the Charter of Economic Rights and Duties of States. The description of this sovereignty as permanent signifies that the territorial state can never lose its legal capacity to change the destination or the method of exploitation of those resources, whatever arrangements have been made for their exploitation and administration."⁽¹³⁾

Traditional international law considered any interference by a state with foreign-owned property a violation of acquired rights, which were internationally protected and thus an international unlawful act.⁽¹⁴⁾ But today it seems that an act of nationalization or

expropriation constitutes the exercise of a sovereign right of a state and is consequently lawful.⁽¹⁵⁾

Nationalization, however, raises the question whether a nationalization that is lawful in itself involves a liability in international law for the nationalizing state to pay compensation to the foreigner who is affected by it, and if so, what the standard is for determining the amount of compensation.

To examine these questions this chapter will discuss the international legal rules of compensation in the period before the Iran-U.S. Claims Tribunal was set up in 1980. As it is our aim in this study to show the present state of these rules, the awards of that important Tribunal will then be examined in the subsequent chapters.

The reason for adopting this approach is that we would like to examine whether the awards of the Tribunal have clarified these old rules or have made new law in this regard.

1.2 CUSTOMARY INTERNATIONAL LAW OF COMPENSATION

The legal rules concerning compensation for the taking of foreign-owned property have been the subject of on-going controversy at least since the end of World War II. In the pre-World War II period the "overwhelming practice and the prevailing legal opinion" supported the view that customary international law requires full ("prompt, adequate and effective") compensation for the property taken.⁽¹⁶⁾ In recent years the relative unanimity in both the practice and scholarly views has been subjected to considerable erosion. Dolzer,

when summarising the current situation of international law (as distinct from 'traditional') has stated that:

"the opinions expressed by industrialized states and developing states with respect to the rules of international law are widely divergent, and the conduct of states in actual practice coincides with none of these expressed views".⁽¹⁷⁾

It is interesting to point out that less than twenty years ago, a large majority of the United Nations General Assembly declared the customary international law of expropriation dead.⁽¹⁸⁾ Eighty six governments supported the Resolution 3171 which stated that a state expropriating foreign property,

"is entitled to determine the amount of possible compensations and the mode of payment, and ... any dispute which might arise should be settled in accordance with the national legislation of [that] state."⁽¹⁹⁾

Scholars cited this and other General Assembly resolutions as evidence that international law no longer required full compensation for the expropriation of foreign property.

1.2.1 THE LAW GOVERNING DISPUTES ARISING FROM A TAKING

One of the most complex questions posed by expropriation cases is the threshold inquiry: which law governs the propriety of taking and determines the measures of compensation to be paid. Normally there are two possible sources of legal standards predictable: municipal law and international law. These two sources often dictate widely different results.

Prior to World War 1, a number of Latin American governments had taken the position that expropriated aliens were entitled only to 'national treatment' (as opposed to 'an international minimum

standard') that is, they treat the property of aliens in the same manner in which they treat the property of their own nationals. (20)

Some Latin American states also resisted the proposition that a state has any right to present an international claim on behalf of its national who has been expropriated. These countries have frequently insisted on the insertion of clauses in concession and other investment agreements (known as Calvo Clauses, after their originator) by which the investing Company submits to the Jurisdiction of the local Courts and authorities and surrenders any right to the diplomatic protection of its state of incorporation. (21)

Many such clauses are still in effect. However Latin American states in practice have usually been willing at least to negotiate with states of expropriated owners, and subsequently to reach settlements with them or with the owners themselves. These states are generally averse to international adjudication or arbitration but have some times agreed to the resolution of claims by mixed-claims commissions.

The U.S.S.R. also following the Bolshevik revolution in the 1920s and Mexico following the upheavals in that state in the 1930s argued that all states possess full authority over all property within their borders and no international law rule existed that diminished this fundamental principle of sovereignty. They contended, that all such property, whether owned by nationals of the state or foreigners, was wholly subject to the national law of the state within which it was located and was not a proper subject of international law. However, this view has never been recognised by international tribunals and it seems settled now that international law is to be applied in claims of expropriation or nationalization.

However, in 1929 a decision supporting the position that a state's municipal law was to be applied to disputes arising from contracts between foreign investors and their host states was rendered by the Permanent Court of International Justice (PCIJ) in the *Serbian Loan Case*. The Court held that:

"any Contract which is not a Contract between states in their capacity as subjects of international law, is based on the municipal law of some country".⁽²²⁾

Neville has pointed out:

"Despite the general applicability of a municipal body of law implied by this language an exception has been created for long-term economic development agreements which allows private concessionaires to contract for the right to develop or extract a state's natural resources without subjecting the agreement to the dangers of subsequent re-interpretation under municipal law."⁽²³⁾

However, the developing countries have taken the position that even with regard to long-term economic development agreements, the governing law must be the municipal law of the host state. As we mentioned earlier, they claim that termination of a long-term contract for public purpose is an aspect of their sovereignty. They add that international law gives priority to state sovereignty rights over contractual rights to natural resources. To support their claim they rely mainly on U.N. General Assembly Resolution Number 3281. In this resolution the General Assembly proclaimed:

"1. , Every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

2. Each state has the right ...

(c) To nationalize, expropriate or transfer of foreign property, in which case appropriate compensation should be paid by the state adapting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of

the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means."⁽²⁴⁾

To strengthen their position developing countries also point to a decision which was rendered by the International Court of Justice (ICJ) in the *Anglo-Iranian Oil* case. In this case, the Court rejected by the view that a concessionary Contract between a government and a foreign private corporation would be considered an international treaty.⁽²⁵⁾ In keeping with this view, a former president of the ICJ dismissed the idea that there is an international law of Contracts, and argued that, even if there were, the principle of a state's permanent sovereignty over its wealth and natural resources would be recognised as a controlling principle of international law.⁽²⁴⁾

However, the Charter of Economic Rights and Duties of States has been dismissed by many commentators as a mere declaration of principles. They have noted that the U.S. and five other industrialized countries (Belgium, Denmark, Federal Republic of Germany, Luxembourg and the U.K.) voted against it. Ten other industrialized nations (Austria, Canada, France, Ireland, Israel, Japan, Netherlands, Norway, Spain and Sweden) abstained from voting. Since the Charter of Economic Rights and Duties of States was not supported by such a number of industrialized countries with significant international trade engagements, it has been argued that the charter cannot be considered to be an expression of a consensus among nations equivalent to a new norm of customary law.⁽²⁷⁾

Dupuy also in TOPCO arbitral award, analysing the Charter of Economic Rights and Duties of States concluded that:

"International law may operate as a factor limiting the freedom of the state should foreign interests be affected, even though Article 2 [of the Charter] does not state this explicitly".⁽²⁸⁾

However, applicability of such view with regard to short-term agreements, may not be feasible.

In these agreements, for reasons of national prestige and pride as well as a more rational desire not to be dependent on an unfamiliar and uncontrollable foreign law, host states are rarely permitted to subject themselves to the laws of a foreign country, and often require that the Contract be governed in all its aspects by the law of their sovereign.⁽³⁰⁾ Distinguishing between ordinary and extra ordinary Contracts Westberg points out that:

"In ordinary Contracts with state parties ... the applicable law clause is usually not negotiable. If the foreigner wants the Contract, he must accept the applicable law clause prescribed by the state party ...".⁽³¹⁾

Nevertheless, with regard to long-term Contracts the law of the sovereign generally will not be accepted as the law applicable to all aspects of the Contract including disputes. The most compelling reasons for this are the power of the sovereign to change the law to its own advantage and the fact that this power has been exercised from time to time, as shown by the international arbitrations. Other reasons might be the rudimentary state of the sovereign's legal system and uncertainty as to what the law is.⁽³²⁾ Concession agreements of international oil companies are probably the best examples of such long-term agreements with state parties. The creative drafting techniques used by oil company lawyers to avoid the

law of host states are evident in the awards of a number of international arbitrators involving such agreements. (33)

Turning to expropriation claims not involving contractual rights, the applicable legal issue requires a somewhat different analysis. Since there is no Contract, normally there will be no applicable law clause to construe. The problem in the expropriation context involves, rather the broader issue as to what law governs the claim of expropriation in all its aspects, particularly, the fundamental questions as to whether an expropriation has taken place and, if so, what the remedy should be. The broader issue refers to the on-going controversy over the law of expropriation between the industrialized-developed countries of the world on the one hand and the third world-developing and socialist states on the other. The applicable law issue is central to the controversy because the latter involves the question whether the legal rights of aliens within the territory of a sovereign state derive from, and therefore must necessarily be subject to, the law of the sovereign, or whether there are certain international law rules governing the treatment of aliens that exist apart from traditional prerogatives. The practical significance of the question exist primarily in the fact that the answer in a given case of expropriation may determine whether the expropriating state will be free to fix the compensation at whatever level it deems appropriate including zero.

However, within the sphere of international tribunals, the complex question of applicable law is a less serious problem.

While the Calvo Doctrine and other extreme legal positions have not been universally rejected, the many reported international tribunal

awards that have dealt with the issue all accept that expropriation claims are the subject of customary international law or that such law prevails over any contradictory national law of either the state or foreign party involved. As we shall see in Chapter Five of this study with regard to expropriation cases, the Iran-U.S. Claims Tribunal, notwithstanding the contention of the Iranian parties before the Tribunal in one way or another, has applied international law as the proper law governing the expropriation cases. Therefore, in expropriation claims the lawyer's task is to identify and argue the compensation rules to be followed under international law. However, the international law standard has remained an embattled issue. While, for instance, Clagett,⁽³⁴⁾ argues that Hall Doctrine remains the rule of customary international law, Dolzer⁽³⁵⁾ on the other hand argues that neither Calvo Doctrine, nor Hall rule represents existing customary law.

1.2.2 THE TRADITIONAL LAW

The traditional standard as it has been stated in text books⁽³⁶⁾ and other writings,⁽³⁷⁾ and in statements⁽³⁸⁾ issued by capital-exporting states is that where property belonging to a foreign national is expropriated or nationalized by a state, that state should pay "prompt, adequate and effective compensation". In a case where an expropriation in breach of contractual obligations is involved, it was stated that "*restitutio in integrum* is ... under the principles of international law, the normal sanction for non-performance of contractual obligations and that it is inapplicable only to the extent that restoration of the *status quo ante* is impossible".⁽³⁹⁾ The principles of *restitutio in integrum* and of equity have been used

to suggest that adequate compensation means at least the payment of the market value of the expropriated property.⁽⁴⁰⁾

The traditional standard is often described by reference to the famous 1938 note of the U.S. Secretary of State (Cordell Hull) to the Mexican Government on the expropriation by Mexico of foreign oil interests. Responding to the refusal of the Mexican governments to compensate Americans for properties that it had expropriated the Secretary's note declared that the American claimants were entitled under international law to prompt, adequate and effective compensation.⁽⁴¹⁾

The most central element in the above triple-standard formulated by Hull concerns the adequacy of the compensation. To meet this requirement the compensation must reflect the full, fair market value of the property as of the date of the taking.⁽⁴²⁾ The requirement that the compensation be 'prompt' was generally held to mean that the compensation must be paid at or near the time of the taking, or that some provision at least will have been made at that time. Failing which, interest from the date of the taking would be payable.⁽⁴³⁾ The third point of the standard that the compensation be 'effective' means that the payment must be made in realizable exportable form.⁽⁴⁴⁾ Of course, payment in non convertible currency, that is, unmarketable bonds is not effective. In other words payments must be provided in a freely convertible currency or some other form that has measurable value and is useable by the foreign party.

In the case of property for which a market existed; adequate or full compensation standard was held to mean the fair market value of the property.⁽⁴⁵⁾ That is, the amount a willing buyer would pay a

willing seller. Where no market existed (as often is the case), the standard has been found to require valuation on the basis of various methods such as replacement cost and book value.⁽⁴⁶⁾ In the case of on-going businesses or property complexes with future profit expectations, the going concern approach has been regarded as suitable in most cases. This method not only considers the value of the physical assets but also "takes into account the loss of future profits, and often such intangible assets as good will as well."⁽⁴⁷⁾ The replacement cost less actual depreciation, in some circumstances, notably in case of certain tangible things, has been accepted as an alternative to the going concern approach.

The replacement value and particularly the going concern approach are often contrasted with the net book value of the property.⁽⁴⁸⁾ Book value method is as carried on the owner's books; their value as fixed in insurance policies; and their valuation for tax purposes in the records of the respondent state. Therefore this method is only seldom acceptable as reflecting the fair market value.⁽⁴⁹⁾

However, the requirement that market value must be paid as compensation is not accepted by the developing countries, which have been responsible for most of the expropriation in recent times.

As it will be discussed later, in the U.N. fora as well as within the related international tribunals, these countries have challenged the requirement of market value for a nationalized property.

Surprisingly, in a number of situations, capital exporting countries have accepted or permitted their own nationals to accept amounts less

than the market value of the property taken.⁽⁵⁰⁾ Sornarajah points out that:

"The conflict between the views on compensation, ... reflects the unwillingness on the part of newly independent nations to accept the norms of law developed in the period of European hegemony. Adequate compensation reflects, free market notions of property which are alien to non-European people."⁽⁵¹⁾

Merillat also states:

"In developing countries state regulation and intervention in private property rights in order to accelerate developments is well-entrenched and compensation on the basis of market value would be seen as a deterrence to such development."⁽⁵²⁾

Much of the debate concerning the proper standard of compensation for the expropriation of foreign owned property by a state, as distinct from that of its own nationals, has been carried out in the light of policy considerations. Before proceeding any further we must examine these policy considerations.

1.2.3 POLICY CONSIDERATIONS

Proponents of the traditional law claim that adequate compensation must be paid in case of expropriation of an investment made by an alien. They believe that the flow of capital and technology that foreign investments generates is beneficial to developing countries. Since expropriation without compensation would hinder such investment taking place, it has been argued that international law must maintain a rule requiring payment of adequate compensation.⁽⁵³⁾

By stressing the benefits that foreign private investments brings in, Weston has said that:

"... world-wide economic growth cannot do without private investment"

and added that:

"host country deprivation regulations that counteract the flow of private wealth and other important values across national boundaries, may be seen to work against global well-being."⁽⁵⁴⁾

These assumptions which support the traditional norm of full compensation are based on the economic premise, that foreign investment flows have been uniformly beneficial in their effect on development.

There is little doubt that foreign investment does have beneficial effects on the host economy. Otherwise, governments of developing countries would not have invited foreign investors into their countries. However benefits are not one sided. Foreign investors do not invest for benevolent purposes. Thus they are naturally more concerned with profit maximizing than the development of the host country. In many situations, benefits of investment flow substantially to the foreign investor. Disproportionate benefits secured and repatriated by foreign investors could deter development. Such obstacles to development would be particularly significant in cases where the foreign investors are multinational corporations which had acquired a stranglehold on the domestic economy.⁽⁵⁵⁾ In such cases it has been suggested that the host economy could become integrated into the multinational system, making it dependent upon the economies of the home countries of foreign investors.⁽⁵⁶⁾ Therefore the notion that foreign investment is entirely beneficial to the host economy seems to be unacceptable. Besides the free flow of investment and technology, the world community has expressed other

goals which bear relation to this subject. One of these goals is the elimination of the growing disparity between the rich and the poor. Realizing that goal has given rise to a new international law of development.⁽⁵⁷⁾ It is believed that the acceleration of the development of the countries of the third world will be in the mutual interest of both developing and developed countries.⁽⁵⁸⁾ Since a norm which requires the payment of full or market value of an expropriated property, in pursuance of development programmes, could be regarded as inconsistent with the universally accepted goals of development of the third world, it could be argued that such a norm should not be regarded as obligatory. Since development objectives have been accepted by the international community, rules which facilitate development must be preferred. Therefore it is necessary to make a distinction between investments which are beneficial and those which are not beneficial to the host economy. While higher standards of compensation would be appropriate in the case of expropriation of investments having beneficial results, other considerations may apply in the case of expropriations which have a harmful effect on the host economy.⁽⁵⁹⁾ Payment of full compensation in any case of expropriation irrespective that the investment has been beneficial or detrimental would hinder the pursuit of socio-economic objectives by governments of developing countries.⁽⁶⁰⁾

However, capital-exporting states claim that in any case of expropriation full compensation is due. Judge Carneiro in his dissenting judgement in the *Anglo-Iranian Oil* case argued that full compensation for expropriated property must be paid, as such a rule is "a pre-requisite of international co-operation in the economic and financial fields".⁽⁶¹⁾

Similarly in the *Barcelona Traction Case*, (Belgium v. Spain) Judge Gros, in a separate opinion made the statement that:

"... any nationalization of a regular kind would have been accompanied by compensation."⁽⁶²⁾

Clagett points out: "customary international law has long recognised the obligation of a state to pay compensation upon the expropriation of property of foreign nations, including contract rights and other intangibles ..."

He adds that: "This obligation derives from elementary principles of fairness and justice. In addition, the obligation encourages transnational investment, thereby promoting development of national resources and providing economic benefits throughout the world by ensuring foreign investors the value of their legitimate expectations".⁽⁶³⁾ Below we shall examine the authoritative pronouncements that have been made in this area.

1.3 JUDICIAL AND ARBITRAL DECISIONS IN PRE-WORLD WAR II PERIOD

(a) The decision of Permanent Court of International Justice in *Chorzow Factory Case* (Germany v Poland) 1928

In the *Chorzow Factory case*⁽⁶⁴⁾ the Permanent Court of International Justice (PCIJ) ruled in 1928 that Poland's seizure of a nitrate factory owned by German nationals was in violation of a convention concluded between Germany and Poland. The judgements of the court in this case are often cited as the origin of the traditional international law rules applicable to the compensation issues in expropriation cases. The PICJ declared in that case that reparation must, as far as possible, wipe out all the consequences of the

expropriation and re-establish the situation which would in all probability have existed if the act had not been committed.⁽⁶⁵⁾ In doing this the Court had appointed experts to assist with the calculation of the compensation owing and instructed them to include in their calculation of damages the value of the factory and its future prospects at the time of the taking. Although the case was ultimately settled by agreement of the parties, this instruction has since been cited for the principle that lost profits should be included in the compensation payable by a state when it expropriates a foreign-owned business property.

Some authorities, however, maintain that the inclusion of lost future profits is required only when the taking has been unlawful.⁽⁶⁶⁾ Accordingly, they point out that a distinction must be made between lawful and unlawful takings. As a result, they believe that a different standard of compensation is required for lawful takings from that required for unlawful takings.

Nevertheless, the judgement as a whole indicates that the minimum monetary obligation in all cases was the payment of full value of the property taken. What distinguished unlawful from lawful takings was the additional obligation in the former cases, if *restitutio in integrum* was impossible, to compensate for consequential loss. Strictly speaking, what the Court said about the standard of compensation for lawful taking supported the standard of full compensation.

(b) - Arbitral tribunals

Another often cited case with regard to the question of compensation is the *Norwegian Shipowners* (Norway v U.S.) case which was decided in 1922 by Permanent Court of Arbitration (PCA). In that case involving rights under a shipbuilding contract, the Tribunal described the applicable standard as just compensation.⁽⁶⁷⁾ It maintained that:

"Just compensation implies a complete restitution of the status quo ante, based, not upon future gains of the United States or other powers, but upon the loss of profits of the Norwegian owners as compared with other owners of similar property."⁽⁶⁸⁾

In assessing the compensation due to the Norwegian shipowners from the U.S. for the confiscation by the latter of their ships and contracts for the construction of the ships during the First-World War, the Tribunal held that the shipowners were entitled to the fair market value of their property. Because of the special war time situations, the Tribunal decided that the actual market value was a distortion of the real market value. Therefore, it ruled that the value must be assessed *ex aequo et bono*.⁽⁶⁹⁾ Consequently, the claimants were awarded compensation for profits they would have realized if they had sold the contracts just before the expropriation.

In the *Goldenberg* case (Germany v Romania) (1928), also the same formula was applied. The Tribunal decided that, even in the case of lawful requisition, the property had to be "equitablement pay le plus rapidement possible" and that the payment of one-sixth of the market value of the property taken amounted to a wrongful confiscation of the other five-sixths.⁽⁷⁰⁾

In addition, in 1956 the PCA added a further element to the traditional standard of full or adequate compensation. In the arbitration between France and Greece known as the *Lighthouses* arbitration the Tribunal held that the French owner of a concession for the operation of lighthouses seized by the Greek government during World-War II was entitled to compensation based on the future nett profits that the owner would have realized were it not for the expropriation.⁽⁷¹⁾

In calculating these profits, the arbitrators refused to consider Greece's contention that the subsequent upheaval of World-War II would have reduced the profitability of the lighthouses in the hands of the French owner. The Tribunal declared:

"To assess the compensation, reference must be made to the date on which took place the wrongful act ... of the Greek Government which gave rise to the right of compensation and the damage suffered by the firm can only be assessed by reference to data existing at the time when the concession was taken over. Subsequent events, which were unforeseen at that time both by the firm which was dispossessed of it, cannot be taken into consideration in a case of a grant of compensation which ought to have been not only determined but also put at the disposal of a concessionaire before the latter's removal."⁽⁷²⁾

Thus full compensation was determined according to the anticipated profits as of the time of seizure without consideration being given to the conduct of Greece and subsequent wartime events. Accordingly it became a principle in international law that the events after a taking should not be taken into account in the calculation of the due compensation.

1.4 THE RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE U.S. (73)

In 1960 the Restatement articulated the full compensation standard as follows:

187: Just compensation as required by Section 186 must be:

- (a) adequate in amount as indicated in Section 188
- (b) paid with reasonable promptness ... and,
- (c) paid in form that is effectively realizable by the aliens to the fullest extent that circumstances permit, as indicated in Section 190.

188: Adequacy of Compensation

(1) Compensation, to be adequate in amount within the meaning of Section 187, must be in an amount that is reasonable under the circumstances, as measured by the international standard of justice indicated in Section 165. Under ordinary conditions, including the following, the amount must be equivalent to the full value of the property taken, together with interest to the date of payment.

(a) If the property was acquired or brought into the jurisdiction of the state by the alien for use in a business enterprise that the alien was specifically authorized to establish or acquire by a concession, contract, licence, or other authorization of the state, or that the alien established or acquired in reasonable reliance on the conduct of the state designed to encourage investment by aliens in the economy of the state;

(b) If the property is an operating enterprise that is taken for operation by the state as a going concern;

(c) If the taking is pursuant to a program under which property held under similar circumstances by nationals of the state is not taken, or;

(d) If the taken is wrongful under international law as stated in Section 185.

(2) In the absence of the conditions specified in sub-section (1), compensation must be nevertheless be equivalent of full value unless special circumstances make such requirement unreasonable.

Claims for adequacy of compensation continued to be made by capital-exporting developed countries in the late 1960s. In this regard, more sophisticated theoretical bases have been presented by international lawyers in justifying such claims. These theories will be examined below.

1.5 LEGAL THEORIES

1.5.1 THE THEORY OF ACQUIRED RIGHTS

The concept of acquired rights according to the developed countries as applied to nationalization of foreign property, means that respect must be had for rights which, being lawfully acquired under the relevant municipal law and international law, were recognized by the municipal law of the nationalizing state.

The effect of this concept of respect for acquired rights is that rights of foreigners which are created under or recognized by the host state may not be abrogated unless in virtue of a permissible rule of international law. (74)

O'Connell defines acquired rights as "any rights ... properly vested under municipal law", stated that "such rights cannot be cancelled without full satisfaction of the equities attaching to them."⁽⁷⁶⁾

In the context of international law of compensation the theory of acquired rights is used to support the norm of adequate compensation. However, the extent to which the theory of acquired rights forms part of international law is uncertain.

Sornarajah points out that:

"resort must be had to a weak source of international law to argue that acquired rights are recognized by civilized nations. Even if the hoary fallacy that only the legal systems of civilized nations should be taken into account be accepted, it would still be difficult to show that there is such respect for property within the legal systems of developed states to justify the elevation of acquired rights as a general principle of law."⁽⁷⁷⁾

Pellonpää examining arbitral practice in the last two decades has also concluded that "the arbitral practice ... cannot be said to support any rigid 'acquired rights' theory as the doctrinal foundation of the duty to pay compensation. Rather the practice while it recognizes the foreign owner's right to full compensation, at the same time also recognizes the state's economic sovereignty and its power to formulate its policies without having to pay compensation for any such diminution of the market value of the property as is brought about by changes in the general socio-economic orientation of the state."⁽⁷⁸⁾

1.5.2 THE DOCTRINE OF UNJUST ENRICHMENT

It has been argued that, in a case of expropriation or nationalization when the host government takes property which does

not belong to it, it has enriched itself to the value of the taken property, "if not also to the extent of future profits that would arise from the property."⁽⁷⁹⁾ Therefore, it has been suggested that the expropriating state is obliged to pay full compensation for the expropriated property.

The application of the principle of unjust enrichment is justified on the grounds that it is a general principle of law recognised by civilized nations within the terms of Article 38 (1)(c) of the Statute of the International Court of Justice (ICJ).⁽⁸⁰⁾

In awards of international tribunals, occasional references to the principle of unjust enrichment may be found. The award issued with regard to *Lena Goldfields* case (1930)⁽⁸¹⁾ is an example. In this case the Soviet government granted a concession to Lena Goldfields in 1925 during the time of the New Economic Policy. Five years later the Soviet government changing her policy, annulled all its obligations under the concession agreement. Thereupon the government was sued by the company for compensation in the amount of approximately £13 million. The arbitrators awarded the amount claimed, but only the amount of £3 million in non-interest-bearing rates was paid over twenty years.⁽⁸²⁾ As a basis of the claim the arbitrator considered both breach of contract and unjust enrichment. For reasons not stated, they preferred unjust enrichment and added that the result was the same anyway - damages including loss of profits.⁽⁸³⁾

In the *Libyan American Oil Company (LIAM CO.) v Libyan Arab Republic* (1977) case, the sole arbitrator awarded, as he put it, equitable compensation for a claim based on the breach of a concession

agreement.⁽⁸⁴⁾ The awarded amount of \$66 million exceeded the amount allegedly due under unjust enrichment principles by \$9 million. But it remained \$120 million short of the amount that the company had claimed to represent the value of its concession as calculated in view of future profits. The arbitrator refrained from giving any reasons for his own assessment.⁽⁸⁵⁾

With regard to the application of unjust enrichment principle in matters of nationalization, authors have presented different views. Francioni has pointed out that the view maintained by the large majority of authors who advocated the adoption of the principle of unjust enrichment with regard to nationalization cases, rests on "an ill-conceived interpretation of the principle and on an explicit or implicit intent to preserve or restore, under this different label, the theory of prompt, adequate and effective compensation, including interests and future profits".⁽⁸⁶⁾

Furthermore, Lord McNair believed that international law does not import private law rules and institutions but regards them "as an indication of policy and principles".⁽⁸⁷⁾

What makes the principle of unjust enrichment highly relevant in the field of nationalizations is its equitable foundation. Accordingly, it requires that account must be taken of the entire past relationship between the parties, the profits made by the investor and the harm, if any, suffered by the host economy as a result of the investment. It also requires that the undue enrichment acquired by foreign companies during a period of monopoly or of highly privileged economic position, as, for instance, during a period of colonial domination should be taken into account.⁽⁸⁸⁾ If this view is

accepted, the principle of unjust enrichment cannot be used uniformly to support the requirement of full compensation. Rather, it may even provide the view that excess profits which accrued to the investor must be taken into account in assessing the compensation. With regard to application of this principle in the context of the Iran U.S. claims Tribunal, some more discussion has been given in Chapter 7 of this study.

To preserve adequate compensation and to avoid compensation conflicts at an early stage, developed capital-exporting countries have negotiated bilateral investment protection treaties with developing capital-importing countries.

1.6 BILATERAL TREATIES

Bilateral investment treaties (BITs) between states have been a feature of recent international business relations. Most of the developed countries of Europe as well as the United States of America, have concluded such treaties with developing countries throughout the world. Many Latin American states, which have traditionally challenged for national control over foreign investment, very recently have also entered into such treaties.⁽⁹⁰⁾ Some socialist countries have also taken part in such treaties.⁽⁹¹⁾ The U.S. bilateral treaties concluded with other nations, are known as treaties of Friendship, Commerce and Navigation (F.C.N.). Since the end of World-War II, the U.S. government has negotiated a total of 44 of these treaties.⁽⁹²⁾ While both F.C.N. and bilateral investment treaties are planned for the same identical purposes, provisions included in these treaties might contain some

differences.⁽⁹³⁾ However, for the purpose of our study we treat both types of treaties equally as devices for preserving the traditional norms of customary international law.

1.6.1 REASONS FOR BILATERAL TREATIES

Bilateral treaties came into fashion after several multilateral efforts on the protection of foreign investment failed. Issues in foreign investment particularly those made by multinational companies (MNEs) involve sensitive factors such as national sovereignty, exploitation of national resources and national economic policies.⁽⁹⁴⁾ As we mentioned earlier, there is unlikely to be an international consensus, particularly in view of the claims made by developing countries to a New International Economic Order (NIEO).

As we discussed earlier, the traditional norm of state responsibility has been the subject of an on-going controversy. Because of the uncertainty in the law on investment protection, bilateral treaties have been negotiated between developed and developing countries. These treaties have included provisions for the protection and treatment of direct foreign investment. Both BITs and F.C.N.S. treaties contain clauses concerning expropriation and compensation. The majority of the treaties protect foreign investment from a wide range of takings by the state including creeping expropriation.

1.6.2 COMPENSATION CLAUSES

Compensation clauses in these treaties require the payment of full compensation.⁽⁹⁵⁾ The Hull formula of 'prompt, adequate and effective' compensation is found in some of these treaties. Article

6 of the Sri Lanka-Switzerland Agreement for the Reciprocal Promotion and Protection of Investments, describes the compensation payable upon the nationalization of property of Swiss nationals as follows:

"Investments of nationals of either contracting party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization ... except for a public purpose and against prompt, adequate and effective compensation. Such compensation shall amount to the value of the investment expropriated immediately before the expropriation, or the impending expropriation became public knowledge and shall include interest at a normal commercial rate until the date of payment. Payments of compensation should be made without delay and shall be freely transferable at the official rate of exchange prevailing on the date used for the determination of value. The national or company effected shall have a right, under the law of the contracting party making the expropriation to prompt determination of the amount of compensation either by law or by agreement between the parties and to prompt review, by a Judicial or other authority of that Contracting Party, of its case and of the valuation of his or its investment in accordance with the principles set out in this article".⁽⁹⁶⁾

In treaties with some other developing countries also such references to the payment of prompt, adequate and effective compensation may be found. Another formula used in these agreements is referred to as "just compensation" and to define just compensation as the full value of the nationalized property. Article IV, paragraph 2 of the Treaty of Amity, Economic Relations and Consumer Rights concluded between the United States and Iran provides that:

"Property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof."⁽⁹⁷⁾

Relying on bilateral treaties particularly, on clauses in these treaties referring to the "prompt, adequate, effective" compensation,

the Legal Adviser to the U.S. Department of State has recently argued that the Hull standard continues to be accepted. He stated that:

"States have shown their legal practice by establishing a network of international treaties - provisions controlling compensation in expropriation are often contained in bilateral Friendship, Commerce and Navigation (FCN) treaties. In the case of the United States, many of these are with developing nations. They contain provisions calling for compensation in terms equivalent to the traditional standard, although there are slight drafting variations. The history of these agreements indicates that the parties recognized that they were thereby making the customary rule of international law explicit in the treaty language and re-affirming its effect."⁽⁹⁸⁾

Mann has also asserted that these treaties establish, strengthen and enlarge the force of traditional conceptions.⁽⁹⁹⁾

Obviously, bilateral treaties create obligations between parties and give protection to investors who are nationals of the state parties to the treaty, in that compensation must be paid them in accordance with the standards specified in the treaty in the event of nationalization. Where a nationalization is effected without payment of compensation in accordance with the standard specified in the treaty an international wrong is committed. As it is discussed in the Chapter 6 of this study, with regard to many expropriation cases and the compensation due for these cases, the U.S. claimants before the Iran-U.S. Claims Tribunal, have relied heavily on the Treaty of Amity. To the surprise of some, the Tribunal has also applied the Treaty's provisions in some of its decisions in such cases.

However, the existence of bilateral treaties referring to the norm of full compensation cannot be regarded as evidence of a customary principle that full compensation must be paid upon nationalization or expropriation of foreign property. There is little uniformity in the

principles employed in the bilateral treaties. Metzger pointed out that in the U.S. practice, "just compensation in local currency which need not be converted if exchange controls are maintained and the exchange is needed for the local population"⁽¹⁰⁰⁾ is sufficient. It has been maintained that the specific purpose of these treaties was not the formulation of a rule on compensation for nationalization. The treaties are concluded to secure mutual interests of value to both parties. The availability of raw materials and markets, the economic development of the host country and the resulting political friendship and the host country's perception of the role of foreign investment in development are the governing points in the conclusion of such treaties.⁽¹⁰¹⁾ Many of Latin American states have refused to participate in such treaties. Some developing states which are members of the non-aligned movement, such as India, Mexico and Nigeria have not participated in these treaties.⁽¹⁰³⁾ It is true that a large majority of third-world socialist and non-socialist countries have entered into such treaties. But these countries have asserted different norms on the international plane. From the 1960s onwards, particularly in the 1970s, developing countries have been challenging customary international law. They have voted for resolutions of the General Assembly which reject the standard of "prompt, adequate and effective" compensation and assert the exclusive competence of the national courts to assess the compensation for nationalization property. Therefore it can be concluded that it is unlikely that these treaties will have a role in settling the dispute as to compensation for expropriation in international law.

So far we have been dealing with customary international law as a source of law supported by developed countries. We have also examined some other possible sources which according to developed states support and strengthen the customary international law of compensation. The case law in pre-World War II supported the traditional law of compensation. However, the principles of acquired rights, unjust enrichment and also bilateral investment agreements did not bear out this rule.

However, the decisions of arbitrations in post-World War II, arguably in principle, support the traditional full compensation standard although decisions do not refer to the specific formula of prompt, adequate and effective compensation.

1.7 POST-WAR CASES

Between the early 1950s and the early 1970s, a series of arbitrations discussed the international law of expropriation. The first series of these arbitrations were Abu Dhabi (1951);⁽¹⁰⁴⁾ Qatar (1953);⁽¹⁰⁵⁾ ARAMCO (1958);⁽¹⁰⁶⁾ and Sapphire (1963).⁽¹⁰⁷⁾ These arbitrations arose out of termination or renegotiation of long term petroleum concessions by the governments of the Middle East countries. Since none of these concession agreements had a clear choice-of-law clause, consequently, each tribunal applied, in one manner or another, "general principles of law".⁽¹⁰⁸⁾ In ascertaining the content of that law the arbitrators frequently cited as precedents the decisions of earlier international arbitral tribunals that had applied similar general principles or public international law.⁽¹⁰⁹⁾ Moreover, "in every instance the tribunal held the concessionary state to the terms

of its concession, or to damages for its breach, largely on the basis of the body of international precedents."⁽¹¹⁰⁾ The decision of the Tribunal in *Sapphire* case is a clear example. The arbitrator referring to international precedents, recognised that the full compensation standard applied to claims based on the abrogation of concession rights by a state instrumentality, and held this meant the compensation must include both the loss suffered (*damnum emergens*) and the profit lost (*lucrum cessans*):

"According to the generally held view, the object of damages is to place the party to whom they are awarded in the same pecuniary position that they would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion The creditor should thereby be given full compensation. This compensation includes the loss suffered ..., and the profit lost The award of compensation for the lost profit for the loss of possible benefits has been frequently allowed by international arbitral tribunals"⁽¹¹¹⁾

Therefore it can be concluded that these decisions continued a precedent-based jurisprudence of expropriation and can reasonably be argued to support a continued requirement under international law as of the mid 1960s for the payment of full compensation for expropriated property.

However, in the late 1950s and early 1960s, dozens of new states obtained their independence and challenged customary international law. Many of these governments found themselves saddled with foreign ownership of large sectors of their economies which they believed to have been imposed on them during colonial rule on unfair terms.⁽¹¹²⁾ They desired to expropriate on a large scale, and they resisted the notion that they were subject to international standards in doing so, particularly with regard to compensation. Many of these states refused to consider themselves bound by a law in whose formation they

had not participated. They maintained that that law did not reflect their own cultural and legal traditions.⁽¹¹³⁾ The law of expropriation and nationalization attracted their special animus as it purported to place strict limitations on how they could deal with foreign investors in control, of many of the new states' natural resources at the time of independence.⁽¹¹⁴⁾ As far as the compensation issue is concerned, they contended that, if the traditional requirement of full compensation were applied to extensive expropriation, it would give the developed countries a veto over attempts to undertake fundamental reform of their economic and social structures. Accordingly, they adhered to the principle of partial compensation. Further, they pointed out that state practice in the post-World War II period has substantiated such requirement.

1.8. PARTIAL COMPENSATION

Adherents of partial compensation contend that modern international claims settlement practice has modified the traditional standard of full compensation, at least in the context of the modern extensive expropriation in pursuance of major reform of a country's social and economic structure.⁽¹¹⁵⁾ Supporters of partial compensation, including Iran, argue that their view is more consistent than the traditional position with contemporary international practice. To substantiate their arguments, adherents of partial compensation rely on the predominant post-World War II practice of settling international claims controversies involving extensive expropriations through the use of the lump sum settlement device rather than through international adjudication.

1.8.1 LUMP SUM SETTLEMENTS

The post-war lump sum settlements between capital exporting states negotiating on behalf of their deprived nationals and the nationalizing states demonstrate that even the western market states have settled for less than full value of the expropriated property in a substantial number of cases.⁽¹¹⁶⁾ Such settlements were then cited, in turn as evidence of state practice demonstrating that international law no longer required full compensation. Nevertheless, the partial compensation view is merely a generalization of past state practice rather than a statement of an accepted legal standard that is capable of reconciling post-war settlement agreements, which have ranged from minimal compensation in some cases to almost full compensation in others.⁽¹¹⁷⁾ As a result controversy over the compensation standard remained to be resolved.

In 1962, the United Nations General Assembly debated these different standards of compensation in connection with Resolution 1803.

1.9 THE GENERAL ASSEMBLY RESOLUTION OF 1803 ON PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

1.9.1 BACKGROUND

In 1955 the Third Committee of the General Assembly approved a draft article, as a part of the Human Rights Covenants, on the right of self determination. The second paragraph of that article stated: "The peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of

mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."⁽¹¹⁸⁾ The concept of economic self-determination derived from a General Assembly resolution of 21 December 1952. Approximately 10 years later, work in the UN Commission on Permanent Sovereignty over Natural Resources and the Economic and Social Council culminated in the adoption of Resolution 1803 (XVII) by the General Assembly on December 1962.

1.9.2 THE U.N. GENERAL ASSEMBLY RESOLUTION OF 1962⁽¹¹⁹⁾

This resolution was in the form of a Declaration on Permanent Sovereignty Over Natural Resources. The resulting compromise resolution created a new requirement of appropriate compensation. Paragraph 4 of Resolution provides that:

"Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as over-riding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted. However, upon agreements by sovereign states and other parties concerned, settlement of the dispute should be made through arbitrators or international adjudication."⁽¹²⁰⁾

Approval was overwhelming, only France and South Africa voted against the resolution, with most Communist countries abstaining. Paradoxically, the compromise resolution purported to state a new requirement of appropriate compensation for expropriated property, while simultaneously reaffirming adherence to international law. However some western states, notably the United States, argued that the reference to international law reaffirmed the requirement of

traditional law of compensation and that appropriate compensation meant prompt, adequate and effective compensation. (121)

1.10 MODERN CHALLENGES TO THE TRADITIONAL LAW OF COMPENSATION

1.10.1 BANCO NATIONAL DE CUBA v SABBATINO (1963)

There were doubts as to the general acceptance of the traditional rule prior to, and contemporaneous with the passing of Resolution 1803. The U.S. Supreme Court with regard to the above case stated that:

"There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens" (122)

"The disagreement as to relevant international law standards reflects a ... basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favour state control of a considerable portion of the means of production and those that adhere to a free enterprise system. (123)

This division of opinions stems from the fact that many developing countries believe that the traditional rules of international law formulated in the nineteenth century were inapplicable to them. (124) These countries did not take part in the formulation of the rules and they did not consent to them either. Further, they believe that the traditional rules were not only formulated in their absence but were in fact formulated against their interests. (125) This challenge to the validity of the traditional rule was accompanied by pressure from developing countries for the formulation of a new set of rules which would reflect the current state of the world and serve the interests of all nations. The challenge to the traditional rule was maintained

in the period between 1962 and 1973. In this period, the U.N. had extended its membership to approximately thirty new nations, the majority of which were developing nations in Africa and Asia. With the strength of the developing countries this enhanced in the General Assembly, a new resolution concerning permanent sovereignty over natural resources was passed.

1.10.2 GENERAL ASSEMBLY RESOLUTION 3171 (1973)

Resolution 3171⁽¹²⁶⁾ clearly manifested a rejection of the traditional rule. As we saw earlier, Resolution 1803 was essentially a restatement of the traditional rule. It provided that in the case of nationalization, "the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures ... and in accordance with international law."⁽¹²⁷⁾ In contrast, Resolution 3171 provided that "each state is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each state carrying out such measures."⁽¹²⁸⁾ Clearly, the requirements that the owner "shall be paid compensation" and that "disputes be settled in accordance with international law" are absent.

Six months after passing Resolution 3171, the U.N. General Assembly passed the Declaration⁽¹²⁹⁾ and Program of Action⁽¹³⁰⁾ on the Establishment of a New International Economic Order. That Resolution called for the adoption of the Charter of Economic Rights and Duties of States ('Charter').⁽¹³¹⁾

The call was met and the Charter was adopted in 1974 as General Assembly Resolution 3281 (120 votes in favour, 6 against, 10 abstentions).

1.10.3 THE PRINCIPLE OF COMPENSATION IN THE 'CHARTER'

The relevant principles of the Charter are to be found in Article 2 as follows:

1. Every state has and shall freely exercise full permanent sovereignty including possession, use and disposal, overall its wealth, natural resources and economic activities.
2. Each state has the right:
 - ... (c) to nationalize, expropriate or transfer ownership of private property, in which case appropriate compensation should be paid by the state adopting such measures, taking into accounts its relevant laws and regulations and all circumstances that the state considers pertinent. In any case where the question of compensation give rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means."⁽¹³²⁾

Recall that the traditional rule called for compensation as one element of a legal expropriation. In contrast, the Charter seems to make compensation optional (at the option of the expropriating state). Therefore whereas the traditional rule inserted in Resolution 1803 provides that compensation "shall" be paid, the Charter provides that compensation "should" be paid. By providing only that appropriate compensation should, but not necessarily must, be paid and that any controversy regarding compensation "shall be settled under the domestic law of the nationalizing state and by its tribunals" the Charter reflected the traditional standard by simply ignoring it.

1.10.4 LEGAL EFFECT OF GENERAL ASSEMBLY RESOLUTIONS AND THE CHARTER CONTROVERSY

General Assembly Resolutions are generally considered to be recommendations only and therefore are not legally binding.⁽¹³³⁾

Under Article 10 of the U.N. Charter, the General Assembly only issues "recommendations" and its resolutions have no binding force as obligations for member nations. Clagett believes, "resolutions ... should be regarded as having a political rather than a legal significance". He adds "voting for resolution became in the early 1970s in effect a means for a state to establish "anti-imperialist" credentials at little cost in discouraging foreign investment, since many if not most of the states in question maintain investment codes or enter into bilateral treaties or agreements with foreign investors which give foreign investment far greater protection than the recent General Assembly resolutions would suggest."⁽¹³⁴⁾

Brownlie, however, points out that "such resolutions are vehicles for the evaluation of state practice and each must be weighed in evidential terms according to its merits."⁽¹³⁵⁾ Pellonpää also has stated that:

"This is far from saying that resolutions *per se* could create binding law, and none of the cases under review has so held. It is rather that such resolutions in certain specified circumstances may be regarded as evidence of customary international law or can contribute - among other factors - to the creation of such law"⁽¹³⁶⁾

It should be pointed out that much of the difficulties in the assessment of the state of customary law is attributable to the debatable evidentiary value of certain sources on which arguments concerning this law are commonly based. Among these sources U.N.

Resolutions have attracted the most arguments. Therefore, as a preliminary question arbitral tribunals have had to decide what value U.N. resolutions have from the point of view customary international law.

However, from 1963 to 1974 no international tribunal rules on an expropriation dispute. As a result, the evidentiary value of resolutions; and also the state of customary international law of compensation remained unclear. However, arbitrations concerning post-charter cases of expropriation have discussed both the evidentiary value of U.N. resolutions as well as the state of customary law of compensation.

1.11 POST-CHARTER CASES

The main post-charter cases are mainly *BP v Libya* (137); the *Texaco*(138); *Liamco*(139); and the *Aminoil*(140) cases, and all concerned nationalization of oil concessions belonging to the companies in question.

With regard to the question of evidentiary value of the U.N. resolutions, the decision issued in relation to the *Texaco* case seems an authoritative one. In that case, sole Arbitrator Dupuy, made the legal value of a particular resolution dependent on the circumstances surrounding its adoption, particularly the voting conditions and on an analysis of its contents, i.e., whether the provision purports to state "the existence of a right on which the generality of the states has expressed agreement" or put forward propositions *de lege ferenda*.(141)

Examining these factors, Dupuy made a contrast between the Charter and the Resolution 1803. The Charter, Article 2 of which appears to leave the amount of compensation to the unfettered discretion of the state as well as certain other resolutions with similar contents, "were supported by a majority of states but not by any of the developed countries with market economies which carry on the largest part of international trade."⁽¹⁴²⁾ The arbitrator concluded that "Article 2 of this Charter must be analyzed as a political rather than as a legal declaration."⁽¹⁴³⁾

By contrast the Resolution 1803 "was supported by a majority of Member States representing all of the various groups", Dupuy stated that "on the basis of the circumstances of the adoption ... and by expressing an *opinio juris communis*, Resolution 1803 ... seems to this Tribunal to reflect the state of customary international law existing in this field."⁽¹⁴⁴⁾ The decision in the *Texaco* case has been shared by those rendered in *Aminoil* and the U.S. Court case *Banco Nacional de Cuba*.⁽¹⁴⁵⁾ As we will see in Chapter 6 of this study the decision of the Iran-U.S.-claims Tribunal in *Sedco* case also follows the same approach.

Therefore according to the "post-charter arbitral practice" it is still Resolution 1803 that expresses the requirements of international law concerning, compensation for the taking of alien-owned property.

However, the requirement of "appropriate compensation ... in accordance with international law" as it was inserted in paragraph 4 of the Resolution 1803, and the acceptance of this provision as the definition of customary international law, is only a step towards the

clarification of the legal situation. As Pellonpää points out "By requiring "appropriate compensation ... in accordance with international law" Resolution 1803 only confirms the existence of an international law standard concerning compensation".⁽¹⁴⁶⁾ Therefore, in order really to understand the state of customary international law of compensation, we must go beyond such general linguistic formulations as "appropriate compensation". We should examine whether a more concrete definition of the standard of compensation can be derived from the relevant court case.

1.11.1 LIBYAN CASES - (THE POST-CHARTER JURISPRUDENCE)

Between 1971 and 1974 the Libyan Arab Republic nationalized the interest and properties in Libya of B.P.⁽¹⁴⁷⁾; *TOPCO* and *CALASIATIC*⁽¹⁴⁸⁾; and *LIAMCO*⁽¹⁴⁹⁾; all foreign oil companies. These nationalizations created the disputes that set the stage for three major international arbitrations.⁽¹⁵⁰⁾ Three separate arbitral tribunals adjudicated the lawfulness of these nationalizations and the remedies of the companies.

- *The B.P. Arbitration*

On December 7, 1971, all of the interest and properties of B.P. Exploration Company (Libya) Limited, (B.P.), a subsidiary of British Petroleum Company Limited, were expropriated and the case went to arbitration. Firstly, sole arbitration, Lagergren, found that Libya's taking of B.P.'s interests and properties "violated public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character ...". He

added that "the fact that no offer of compensation has been made indicates that the taking was also confiscatory."⁽¹⁵¹⁾

To identify principles of international law common to Libyan law, as required by the choice-of-law provision in the concession agreement, the Arbitrator mainly relied on "the case law of international tribunals".⁽¹⁵²⁾ After examining that case law and after an attempt to distinguish *Chorzow Factory*⁽¹⁵³⁾ as dictum, he concluded that:

"*restitutio in integrum* is available as a remedy under public international law for a state in breach of a concession agreement but only as a vehicle for establishing damages".⁽¹⁵⁴⁾

Lagergren had not been required to calculate damages. However, his reference to reparation "as a vehicle for establishing damages" appears that he endorsed damages in full, at least in cases of unlawful expropriations.⁽¹⁵⁵⁾

- *TOPCO/CALASIATIC Arbitration*

The claims of the Texas Overseas Petroleum Company (TOPCO) and the California Asiatic Oil Company (CALASIATIC)⁽¹⁵⁶⁾ were heard jointly by Dupuy, as Sole Arbitrator. With regard to the law governing the arbitration, Dupuy determined that the arbitration was directly governed by international law.⁽¹⁵⁷⁾ While theoretically, municipal law of Libya could be applicable, the arbitrator stated that "all the elements of this case support ..., the adoption of a ... solution which is to consider this arbitration as being directly governed by international law".⁽¹⁵⁸⁾ Like Lagergren, Dupuy relied heavily on the case law of international tribunals and held that *restitutio in integrum* was the appropriate remedy in international law for a wrongful expropriation. As we saw earlier, the arbitrator did state

in dicta that the 1962 U.N. Resolution 1803, unlike the Charter, reflected the state of customary international law on compensation.⁽¹⁵⁹⁾ Again, we saw that this resolution referred to the payment of "appropriate compensation in accordance with international law".⁽¹⁶⁰⁾ Since the arbitrator stated that Resolution 1803 expressed an *opinio juris communis*, in the context of awarding the remedy of *restitutio in integrum*, it is fair to conclude that he viewed the compensation standard under international law to be full value compensation.

- *LIAMCO Arbitration*

The Libyan American Oil Company (LIAMCO)⁽¹⁶¹⁾ owned 25.5% of a concession, and it was expropriated by the Libyan government in two stages in September 1973 and February 1974.

The concession agreement contained a choice of law clause. That clause provided that the agreement would be governed by and interpreted in accordance with the laws of Libya common to the principles of international law, and, in the absence of commonality, in accordance with general principles applied by international tribunals. Analyzing this provision, the arbitrator declared that initially the proper law to apply in dispute was Libyan law when consistent with international law and then general principles of law.⁽¹⁶²⁾

Determining the standard of compensation required in international law, the arbitrator analyzed opinions and U.N. Resolutions. Firstly, the arbitrator concluded that under both Libyan and international law, the nationalizing state had a duty to pay compensation and that

at a minimum the state should include the actual damage, the value of nationalized property. Secondly, he concluded that there was diversity of views with respect to the obligation to compensate for incorporeal property, such as the rights under the concession and whether that determination should include *cessans*, meaning lost profit.⁽¹⁶³⁾

The arbitrator found that Libya law required good faith observation of the concession agreement and therefore entitled *Liamco* to both *damnum emergens* and *Lucrum cessans*.⁽¹⁶⁴⁾ However, he pointed out that international law was less clear with this regard. He added international arbitral precedents were too dated to be relied on and the General Assembly resolutions, although not binding were represented "the recent dominant trend of international opinion".⁽¹⁶⁵⁾ Also he explained that post lump sum settlements contradicted a full compensation standard; and *restitutio in integrum* as opposed to damages would infringe on the authority of a sovereign within its own territory.⁽¹⁶⁶⁾ Accordingly, he stated that although "the classical formula of prompt, adequate and effective compensation remains as a maximum and a practical guide for assessment", it was not the only compensation standard applicable under international law.⁽¹⁶⁷⁾ After a general review of various sources of law, the arbitrator concluded that the right to compensation for all loss of future profits for the unexpired term of a concession still is unsettled. He stated:

"In such confused state of international law, ... it appears clearly that there is no conclusive evidence of the existence of community or uniformity in principles between the domestic law of Libya and international law concerning the determination of compensation for nationalization in lieu of specific performance and in particular concerning the problem whether or not all or part of the loss of

profits (*lucrum cessans*) should be included in that compensation, in addition to the damage incurred (*damnum emergens*).⁽¹⁶⁸⁾

Therefore, since under the choice of law clause he could find no commonality between Libyan law and international law on the compensation standard, the arbitrator resorted to equity, a general principle recognized as a supplementary source of law in both Libyan and international law to adopt a standard of equitable compensation.

- *AMINOIL Arbitration*

The AMINOIL Arbitration grew out of the nationalization of the American Independent Oil Company's (AMINOIL) Oil concession, by Kuwait in 1977. Kuwait agreed that it owed monetary compensation, but the parties disagreed over the method of valuation. As a result, the parties agreed to submit the dispute to arbitration.⁽¹⁶⁹⁾

The tribunal noted that the applicable law to the dispute was international law which is also an integral part of the law of Kuwait.⁽¹⁷⁰⁾ Applying this choice of law AMINOIL was entitled only to appropriate compensation for a lawful taking of its property interests. The Tribunal referred to this standard as the most general formulation of the rules applicable to lawful nationalization, a standard which codified positive principles and was not contested by the parties in this proceeding.

The tribunal then held that the determination of "appropriate compensation" required an inquiry into all the circumstances relevant to the particular case.⁽¹⁷¹⁾ And that compensation "must be calculated on a basis such as to warrant the upkeep of a flow of investment in the future"; and that, for such an important, long-term

contract, "there must necessarily be economic calculations, and the weighing up of rights and obligations, of chances and risks, constituting the contractual equilibrium".⁽¹⁷²⁾ As far as the method of valuing the expropriated interests is concerned, the tribunal accepted in principle, the proffered discounted cash flow method of valuing.⁽¹⁷³⁾ However if it held that the parties had agreed that AMINOIL would only receive a "reasonable rate of return" from its investment.⁽¹⁷⁴⁾

The tribunal's valuation analysis is an important international precedent because of its extensive discussion of valuation methods. As Gann also points out, although the tribunal adopted the standard of appropriate "compensation, the specific content given by the tribunal to that standard is totally consistent with the content given by the Department of State to the standard of "adequate" and "prompt" compensation".⁽¹⁷⁵⁾ In the valuation process the Tribunal rejected the nett book value method to the expropriation of an operational enterprise. Instead the tribunal held that fixed assets should be valued at their replacement value at the date of the taking, thereby taking into account not only the effects of depreciation and other market factors.⁽¹⁷⁶⁾ Second, it decided that an operational enterprise should be valued as a going concern which included compensation for future lost profits and takes inflation into account.⁽¹⁷⁷⁾ However, the method of going concern value has not uniformly been used in all nationalization cases. As we will see below, the American Federal Court in *Cuba v Chase Manhattan Bank Case* (1981) rejected application of such standard. With regard to valuation methods in general and the application of going concern

value in particular, some more consideration will be given in Chapter 8 of this study.

1.12 JUDICIAL DECISIONS

As a result of the 1959 Cuban Revolution all branches of Chase Manhattan Bank were nationalized. In the *Cuba v Chase Manhattan Bank* case which arose out of that Revolution, the Second Circuit Court of Appeals decided an appeal involving claims for compensation for nationalized bank branches that had operated in Cuba from 1925 until 1959.⁽¹⁷⁹⁾ This decision is the only recent judicial decision to consider the international standard of compensation for expropriation. The decision included a concise exposition of the history of the debate over the compensation standard and then rejected going concern value as at the date of the taking as the measure of compensation payable by Cuba on the facts of this case. It applied instead a standard which it described as providing both full and appropriate compensation.⁽¹⁸⁰⁾ The Court asserted that such a standard in some cases might require full compensation. However, on the facts of the Chase Manhattan Case the Court awarded nett asset or book value of the nationalized bank branches.⁽¹⁸¹⁾ Rejecting the going concern value method with regard to this case, the court concluded that the revolution and its economic consequences, such as the emigration of wealthier nationals and the nationalization of other sectors of the Cuban economy made it unlikely that Chase could operate profitably after revolution.⁽¹⁸²⁾ Some more explanations about the effect of events or circumstances subsequent to the taking, in fixing the compensation due, will be given in Chapter 8 of this study.

Finally, a decision similar to the above was made by the European Court of Human Rights in the case of *James and Others*, concerning the application of Article 1 of Protocol No. 1 to the European Convention on Human Rights, which provides *inter alia* that every natural or legal person is entitled to the "peaceful enjoyment of his possessions".⁽¹⁸³⁾ In its judgement the Court made it clear that in the event of taking of property Article 1 does not "guarantee a right to full compensation in all circumstances".⁽¹⁸⁴⁾ The Court continued "Legitimate objectives of public interest, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value".⁽¹⁸⁵⁾

The relevance of this decision to the INA case in the context of Iran-U.S. Claims Tribunal has also been discussed in Chapter 8 of this study.

Examining the post-charter case law (1971-82) it could be concluded that: (I) no tribunal has expressly adopted traditional standard of prompt, adequate and effective standard of compensation; (II) *TOPCO/CALASIATIC* and *AMINOIL* Arbitrations concluded that the "appropriate compensation" standard as inserted in 1803 Resolution is the international law standard. This standard was also supported in the Second Circuit's opinion in the *Chase Manhattan Bank*, although the Court asserted that such a standard in some cases might require full compensation. The *LIAMCO* arbitration concluded that equitable compensation is an acceptable formulation under general principles of law which are incorporated into international law. In *LIAMCO*, the award recited and then rejected the arguments for an established full

compensation standard that included lost profits. Nevertheless, as Norton points out it "based the largest part of the award of equitable compensation on a calculation of the claimant's lost profits." (186)

1.13 CONCLUSION

It can be concluded that up to the year 1982, the international law standard to be applied in determining compensation in cases of expropriation and nationalization remained a controversial issue. The traditional standard of prompt, adequate and effective, meaning full compensation, including lost future profits in the case of ongoing business enterprises, was being challenged by proponents of a new, contemporary standard. The impact of this challenge was subsequently to be seen in the United States in the Section 712 of the Restatement (Third) which restated the standard as requiring "appropriate" or just compensation or an amount equivalent to the value of the property taken. (187)

However, with regard to the issue of international law of compensation, the period from 1982 onwards could be considered as a new era in international law. In this period, as we mentioned earlier, the Iran-U.S. Claims Tribunal was established. With a broad jurisdiction, for about a decade this Tribunal has been handling many expropriation and nationalization cases under international law. According to many international lawyers, this Tribunal is likely to have considerable influence on articulating and shaping principles of international law. Thus there must be examined:

(I) What standard of compensation has been applied in the awards of the Tribunal; and;

(II) What has been the governing law i.e. public international law or the law of expropriating state in application of that standard; and

(III) in application of any of these two laws what have been the contents of that law; and finally

(IV) what have been the justifications in the application of any of these laws.

Analyzing the awards of the Tribunal, requires some general explanation of the origins and the legal framework of the Tribunal. This will be presented in the next Chapter.

NOTES TO INTRODUCTION AND CHAPTER 1

1. I shall use throughout the study the terms of expropriation and nationalization interchangeably. In general, these terms refer to any state action against private alien wealth over which states claim jurisdictional competence, totally or partially depriving alien owners of title or control. A discussion of the possible terminology and its nuances may be found in S-Hohenveldern, "Semantics of Wealth Deprivation and their Legal Significance", in 2, *Foreign Investment in the Present and a New International Economic Order*, D. Dick ed, 1987, p.218. The literature on the law of expropriation is vast. Useful bibliographies appear in 2, *F. v Garcia-Amador, The Changing Law of International Claims*, 1983, pp.895-932; and R. Higgins, "The Taking of Property by the State", 176, *Recueil Des Cours*, 1982, II, p.259.
2. In this context, projects of general interest are the Draft U.N. Code on the Transfer of Technology and the Draft U.N. Code of Conduct of Transnational Corporations, both of which have faced serious difficulties caused by the differing stand points of developed and developing countries. See, *Transnational Corporation in World Development*, U.N. - Centre on Transnational Corporations, 3rd ed; 1983; see also, Sanders, "Implementing International Codes of Conduct for Multinational Enterprises", 30, *AM.J. Comp. Law*. 1982. p.241. In addition to the U.N. efforts, in 1976 the OECD Council approved a Declaration on International Investment and Multinational Enterprises which includes a recommendation for the member governments concerning national treatment of foreign investment. On the basis of this document, the OECD Committee on International Investment and Multinational Enterprises list exceptions to national treatment in the member countries and arguably aims at reducing obstacles to the free flow of direct investment among the members.
3. See, e.g., H.J. Steiner and D.F. Vagts, *Transnational Legal Problems*, 1986, pp.84-88, A. Akinsanya, "Host Governments' Responses to Foreign Economic Control: The Experiences of Selected African Countries". 30, *I.C.L.Q.* 1981, pp.769-784; and S.K.B. Asante, "Restructuring Transnational Mineral Agreements", 73, *AM.J. International Law*, 1979. p.335.
4. Ibid see also, A. Akinsanya, *The Expropriation of Multinational Property in the Third World*, 1980, pp.14-48; and S. Raman, "Transnational Corporations, International Law and the New International Economic Order", 6 *SYR. J. International Law and Com.*, 1978.
5. See, e.g., M. Sornarajah, *The Pursuit of Nationalized Property*, 1986, pp.41-46. See also, Sornarajah, "Compensation for Expropriation: The Emergence of New Standards", 13, *J.W.T. Law*, 1979, p.110-11.
6. See, D. Gordon, "The Polish Foreign Investment Law of 1990", 24, *International Lawyer*, 1990, p.335, A.B. Sherr, "Joint Ventures in the USSR: Soviet and Western Interests with Considerations for Negotiations", Vol. XXIII, Col. J.W.

- Business, 1988, p.25; P. Gawith, "South African's Investment Incentives Set to Stimulate Capital Projects", *Financial Times*, September 9, 1991, p.5.
7. See, B.M. Clagett, "Present State of the International Law of Compensation for Expropriated Property and Repudiated State Contracts", Vol. 12. *Private Investment Abroad*, 1988, p.8; and Clagett, op cit, "Protection of Foreign Investment Under the Revised Restatement", 25, *Var. J. International Law*, 1984, p.73.
 8. See, J. Bradly, "Managing Against Expropriation", 75, *Harvard Business Review*, 1977, p.275; M. Leigh, "Expropriation of Foreign-owned Investment - Recent Trends", 6, *Private Investment Abroad*, 1972, p.197.
 9. See, W. Kolvenbach, *Protection of Foreign Investments; A Private Law Study of Safeguarding Devices in International Crisis Situations*, 1989, p.3.
 10. See, B. Rubin, *Paved with Good Intentions - The American Experience and Iran*, 1981; see also, C.N. Brower and M.D. Davis, "The Iran-U.S. Claims Tribunal After 7 Years; A Retrospective View From the Inside", 43, *Arbitration Journal*, 1988, p.18-19.
 11. See, M.K. Neville, "The Present Status of Compensation by Foreign States for the Taking of Alien Owned Property", 13, *Vand. J. Trans-Law*, 1980, p.51.
 12. See, e.g., M. Sornarajah, *The Pursuit of Nationalized Property*, op cit. He argues that "there is overwhelming support for the view that nationalization of foreign property, even those terminating foreign investment agreements are legal in modern international law", p.168.
 13. See, J. de Arechaga, "State Responsibility for the Nationalization of Foreign Owned Property", 11, *N.Y.U.J.I.L. & Policy*, 1978, p.184.
 14. Sornarajah, op cit, p.168. See also in, D.P. O'Connell, *International Law*, 11, 1970.
 15. See, Sornarajah, op cit, J. de Arechaga, op cit.
 16. See, R. Dolzer, "New Foundations of the Law of Expropriation of Alien Property", 75, *AM.J. International Law*, 1981, p.553; see also, R. Lillich, the "Current Status of the Law of State Responsibility for Injuries to Aliens" in *International Law of State Responsibility for Injuries to Aliens*, (R. Lillich ed.), 1983, pp.5-6.
 17. R. Dolzer, "Expropriation and Nationalization", 8, *Encyclopedia of Public International Law*, 1985, p.214.
 18. See, B.M. Clagett, "The Expropriation Issue Before the Iran-U.S. Claims Tribunal: Is Just Compensation Required by

- International Law or Not?", 16, L. & P. in International Business, p.831.
19. See, G.A. Res. 3171, 28, U.N. GAOR Supp. (No.30) at 52, U.N. Doc. A/9030, 1973, reprinted in 68. AM. J. International Law, 1974, p.381; 13, I.L.M. 1974, 238.
 20. The notion of national treatment was based upon the Calvo Doctrine. Carlos Calvo, an Argentine jurist, argued that national law and jurisdiction should be recognised in expropriation claims on grounds of sovereignty. See, D. Shea, the Calvo Clause 19 (1955) as cited in R. Lillich, "The Valuation of Nationalized Property in International Law: Towards a Concensus or More Rich Chaos", 1972, p.192. See also; A. Fatouros, "International Law and the Third World", 50, Vir. L. Rev., 1964, pp.807-11, also see T.W. Lee, "The Iran-U.S. Claims Tribunal and the question of the Nationality of the Claims and Compensation for Expropriation", 4, Chinese, Y.B. International L. & Affairs, 1984, p.133.
 21. See, B.M. Clagett, "Present State of the International Law of Compensation for Expropriated Property and Repudiated State Contracts", op cit, p.5.
 22. Ibid.
 23. Payment of Certain Serbian Loans Issued in France, 1929, P.C.I.J., Ser A., No.20.
 24. Neville, op cit, p.55.
 25. G.A. Res. 3281, 29 U.N. GAOR Supp. (No.31) 50, 52 U.N., Doc. A/9631, 1974.
 26. Anglo-Iranian Oil Case (1952), I.C.J., 93.
 27. See, Arechago op cit, pp.190-91. See also, Revere Copper and Brass v O.P.I.C., 17, I.L.M., 1978, 1321.
 28. Most international lawyers agree that the resolutions of the General Assembly of the U.N. are not law and do not have binding effect. See, e.g., Haight, "The New International Economic Order and the Charter of Economic Rights and Duties of State", 9, International Law., 1975, p.591.
 29. See, Texaco Overseas Petroleum Company (TOPCO) v Libya, 53, ILR, 1977, p.389, 17, I.L.M., 1978, p.1.
 30. In this regard Iranian practice is an example. This country insists on having Iranian substantive law as the applicable law of government contracts. "Iran adheres strictly to the notions of territoriality, sovereignty and territorial exclusivity and, perhaps understandably, is unwilling to give up its privileged rights emanating from its position as a sovereign independent nation state". Thus Iran, in principle, applies its national rules to international relations. See, S.H. Amin, *Commercial Arbitration in Islamic and Iranian Law*, 1989.

31. See, J.A. Westberg, "The Applicable Law Issue in International Business Transactions with Government Parties - Rulings of the Iran-U.S. Claims Tribunal". 2, ICSID. Rev. F. Invest. L. Journal, 1987, p.475.
32. Ibid.
33. For a recent comment on the applicable law issue in relation to oil concession agreements, see El-Kosheru and Riad, "The Law Governing a New General of Petroleum Agreements - Changes in the Arbitration Process", 1, ICSID, Rev. F. Invest. L. Journal, 1987, p.34; see also Aminoil; Texaco, Liamco Arbitrations in the subsequent pages.
34. See Clagett, "The Expropriation Issue Before Iran-U.S. Claims Tribunal", op cit, p.831.
35. See, Dolzer, "New Foundations of the Law of Expropriation", op cit, p.553.
36. See, e.g., D.P. O'Connell, *International Law*, Vol. 2, 1970, pp.780-791; and D.W. Greig, *International Law*, 1976, p.579.
37. P.B. Gann, "Compensation Standard for Expropriation", 23, *Columb. J. Transnational Law*, 1985, p.619-20; B.M. Clagett and D.B. Poneman, "The Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law", 22, *International Law*; 1988, pp.40-41; R. Houck, "Restatement of the Foreign Relations Law of the United States (Revised); Issues and Resolutions, 20, *International Law*;, 1986, pp.1375-76.
38. See, U.S. Department of State Statement on Foreign Investment and Nationalization, 30 Dec 1975, reprinted in 15, *I.L.M.*, 1976, p.186; see also the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, reprinted in, Sohn and Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens", 55, *AM. J. International Law*, 1961, pp.545-553.
39. See, the award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic, op cit., note 29.
40. See, M. Sornarajah, op cit, p.109.
41. See the correspondence in 3, G. Hackworth, *Digest of International Law*, 1942, pp.655-65; see also, Hudson, "The Expropriation of Oil Properties by Mexico", 32, *AM. J. International Law*, 1938, p.519.
42. See, Restatement (Second) of Foreign Relations Law of the United States, reporters note 3, 1965, p.185.
43. Ibid, p.187, in 1963 the United States codified the Hall rule in the Hickenlooper Amendment, which requires the President to suspend foreign aid to any country nationalizing property of the U.S. Citizens without provision for "speedy compensation

for such property in convertible foreign exchange, equivalent to the full value thereof". See, Foreign Assistance Act of 1963, Pub. L.N. 88-205, 301 (e)(2), 77 Stat. 379, 387 (Codified at 22 U.S.C., 2370 (e)(1), 1976.

44. Ibid, see also Section 712 of the Restatement (Third) of the Law Foreign Relations Law of the U.S., (1987); comment to Section 712 of the Restatement (Third) States:

"Compensation should be in convertible current without restrictions on repatriation, but payment in bonds may satisfy the requirement of just compensation if they bear interest at an economically reasonable rate and if there is a market for them through which their equivalent in convertible currency can be realized.

Various forms of payment have been provided in the negotiated settlements which would not be held to satisfy the requirements of just compensation, e.g. payment in non-convertible currency that can be used for investment in productive assets in the taking state, or even payment in kind, as in the case of expropriation of investment in natural resources". See also, Expropriation in the Restatement (Revised), 78, AM. J. International Law, 1984, 176; M.H. Mendelson, "What Price Expropriation? Compensation for Expropriation: The Case Law", 80, AM. J. International Law, 1985, p.415.

45. See the "U.S. Department of State Statements on Foreign Investment and Nationalization" op cit, see also Gann, op cit, 616-617.
46. Ibid also see, McCosker, "Book Values in Nationalization Settlements", in R. Lillich, *The Valuation of Nationalized Property in International Law*, 1972, p.36.
47. See, Muller, "Compensation for Nationalization - A North-South Dialogue", 19, *Columb. J. Transnational Law*, 1981, p.40. Going concern valuation is further discussed in the Chapter 8 of this study.
48. Muller op cit, pp.40-41.
49. Ibid.
50. See, Sornarajah, "Compensation for Expropriation", op cit, p.109. See also D.A. Lapres, "Principles of Compensation for Nationalized Property", 26, *ICLQ*, 1977, p.98-100.
51. Ibid, see also, G. Roy, "Is the Law of State Responsibility a Part of Universal International Law", 55 *AM. J. International Law*, 1961, p.863; R.P. Anand, *Asian States and International Law*, 1973.
52. H.C.L. Merillat, *Land and Constitution*, 1967, p.40.
53. See, e.g., E. Snyder, "Protection of Private Foreign Investment: Examination and Appraisal", Vol. 10, *I.C.L.Q.* 1961,

- p.469; B.M. Clagett, "Present State of the International Law of Compensation", *op cit*, pp-1-27; J.H. Dunning, *International Investment*, 1977, pp.44-7.
54. See, B.H. Weston, "Constructive Takings under International Law: A Modest Foray into the Problem of Creeping Expropriation", 16 *Va. J. International Law*, 1975, p.103.
 55. See, Sornarajah, *op cit*, p.111.
 56. *Ibid*.
 57. See, O. Schachter, "The Evolving International Law of Development", 15, *Columb. J. Transnational Law*, 1976, p.1; S.R. Chowdhury, "Reasonable Expectations of the Foreign Investor and the Host State", in *Foreign Investment in the Present and a New International Economic Order*, (Ed. by D.C. Dicke), 1987, p.259.
 58. See Snyder, *op cit*, pp.470-471.
 59. See, Dolzer, "New Foundations of the Law of Expropriation of Alien Property", *op cit*. He views a tribunal in making a decision with regard to a compensation due, it should consider different factors. Among them is "the developmental nature of the investment". He adds this factor "should be considered alongside the original expectations of the investor at the time of importing his capital and the legitimate 'reliance' he is entitled to place on the host state's decisions to allow such investment and assume the attendant obligations". See in p.553.
 60. *Ibid*. Dolzer points out in case of large scale nationalizations where a state undergoing a process of radical economic restructuring the requirement of fair market value should be discounted in taking account of all relevant circumstances.
 61. See, 93, *I.C.J. Rep.* 1952, p.151.
 62. See, *I.C.J. Rep.* 1979, p.3.
 63. See, Clagett, "The Expropriation Issue Before the Iran-United States Claims Tribunal" in *L. Pol. in International Business*, *op cit*, p.875.
 64. See, *P.C.I.J., Ser. A, No.17*, 1928, p.47.
 65. *Ibid*.
 66. See, e.g., *Pollonpää and Fitzmaurice, "Taking of Property in the Practice of the Iran-U.S. Claims Tribunal", *N.Y. International Law*, Vol. XIX, 1988, pp.60-72, 123-127; see D.W. Bowett, "State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach", *B.Y.B. International Law*, 1989, pp.59-64; see also, *Asia Corporation v Indonesia Case (1984)*, ICSID award of 20 November 1984, reprinted in 24, *I.L.M.*, 1985, p.1022 at para.202.

67. See, Norwegian Shipowners' Claims, 1 Rep. International Arb. Awards, 1922, p.307.
68. Ibid. p.338.
69. Ibid. p.339.
70. See, Germany v Rumania, 2 Rep. International Arb. Awards, 1928, p.901-909.
71. See, Lighthouse Arbitration, 23, International L. Rep. (P.C.A.), 1956, p.299.
72. Ibid. p.300.
73. The Restatement (Second) Foreign Relations Law of the U.S. was in fact the first restatement on the subject. There has been a Revised Restatement which has been known as "The Revised Restatement of Foreign Relations Law". See, B.M. Clagett and D.G. Poneman, the Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law, op cit, p.35.
74. See, C.F. Amerasinghe, State Responsibility for Injuries to Aliens, 1967, p.148.
75. See, I.C.J. Pleadings, (1952), p.81.
76. See, D. O'Connell, *International Law*, op cit, p.305.
77. See, Sornarajah, *The Pursuit of Nationalized Property*; op cit.
78. See. M. Pellonpää, Valuation of Expropriated or Nationalized Property in International Arbitral Practice of Recent Years, 4, *Kansainoikeus-IUS Gentium*, 1988, p.163.
79. See, Sornarajah, "Compensation for Expropriation", op cit, p.119.
80. Ibid.
81. See, *Lena Goldfields, Ltd. v U.S.S.R.*, reprinted in 36, *Cornell L.Q.*, 1950, p.42.
82. Ibid.
83. Ibid.
84. See, *LIAMCO Case*, 62, *I.L.R.*, 1982, p.140.
85. Ibid. See also, K.M. Messen, "Domestic Law Concepts in International Law", in R.B. Lillich, *The Valuation of Nationalized Property in International Law*, Vol. IV, 1987, p.165.
86. See, F. Francioni, "Compensation for Nationalization of Foreign Property: The Borderland Between Law and Equity", 24, *I.C.L.Q.*, 1975, p.277.

87. See, Lord McNair, "Opinion on the Seizure of Property and Enterprises in Indonesia", 6, *Netherlands International Law Review*, 1959, p.218; see also, "International Status of South West Africa", Advisory Opinion, *I.C.J. Reports*, 1950, p.148.
88. See, J. de Arechaga, "The International Law in the Past Third of a Century", 159, *Recuell Des Cours*, 1978-1, p.286.
89. There are presently over 175 of such treaties, linking eighty developed and developing countries. For a compilation of investment treaty texts through 1984, see International Center for the Settlement of Investment Disputes (ICSID); Certain later treaties may be found in *International Legal Materials (I.L.M.)*. See also, International Chamber of Commerce (I.C.C.), *Bilateral Treaties for International Investment*, 1977, a periodically updated pamphlet which lists many treaties with commentary and illustrative texts.
90. See, e.g., Columbia-Federal Republic of Germany (1965); Ecuador-Federal Republic of Germany (1965); Panama-U.S. (1981), U.K.-Costa Rica (1981).
91. See, e.g., Yugoslavia-Egypt (1977); The Peoples' Republic of China-Sweden (1980).
92. See, S. Asken, "The Case for Bilateral Investment Treaties", in *Private Investors Abroad - Problems and Solutions in International Business*, (M. Landwehr, ed. 1981, pp.357-58,59.
93. See, K.S. Gadgeon, "Valuation of Nationalized Property Under United States and Other Bilateral Investment Treaties", in R.B. Lillich, *Valuation of Nationalized Property in International Aliens*, Vol. IV, op.cit., p.101; see also, S. Aronson, "An Examination of Compensation Terms in the United States-Egypt Bilateral Investment Treaty", 16, *Case W. Res. J. International Law*, 1984, p.287; and P.M. Robin, "The Bit Won't Bite: The American Bilateral Investment Treaty Program", 33, *AM. Univ. L. Rev.*, 1984, p.931.
94. For an examination of MNEs; their features; and their impact on the economy of developed/developing countries see, M. Shamsaei, *Legal Control of Multinational Enterprises Operating in the Third World*, LL.M., Dissertation (unpublished), 1988, p.2-12.
95. See, e.g., the Compensation Clauses in BITS concluded between U.S.-Egypt, 1982, 21, *I.L.M.*, 1982, 927; U.S.-Haiti, 1983, Unpublished, U.S. Department State File; U.S. Senegal, 1983, Unpublished, U.S. Department State file.
96. See, Switzerland-Sri-Lanka, 1981, 21, *I.L.M.*, 1981, p.399.
97. See, Treaty of Amity, Economic Relations and Consular Rights, 15 August 1955, 8 *U.S.T.*, 899, T.I.A.S. No. 3853.
98. See, D.R. Robinson, "Expropriation in the Restatement (Revised)", 78, *AM.J. International Law*, 1984, p.176.

99. See, F.A. Mann, "British Treaties for the Promotion and Protection of Investment", 52, B.Y. International Law, 1984, p.176.
100. See, S. Metzger, Law of International Trade, Vol. 1., 1966, p.127.
101. See, R. Voss, 31, I.C.L.Q., 1979, p.686. See also R. Dolzer, "New Foundations", 75, AM.J. International Law, op cit, p.506.
102. See, e.g., O. Schachter, "Compensation for Expropriation", 78, AM. J. International Law, 1984, p.128.
103. See, M. Sornarajah, State Responsibility and Bilateral Investment Treaties, 29, J.W.T. Law, 1987, p.92. See also, A. Akinsanya, "International Protection of Direct Foreign Investments in the Third World", 36, I.C.L.Q., 1987, p.58.
104. See, *Petroleum Dev. Ltd v Sheikh of Abu Dhabi*, 18, I.L.R., 1951, p.144.
105. See, *Ruler of Qatar v International Marine Oil Company*, 20, I.L.R., 1953, p.534.
106. See, *Saudi Arabia v Arabian American Oil Company*, 27, I.L.R., 1958, p.117.
107. See, *Sapphire International Petroleum Ltd v National Iranian Oil Company*, 35, I.L.R., 1963, p.136.
108. See, ARAMCO, op cit, at 167-69; Sapphire, op cit, at 170-175; Qatar, op cit, at 545; and Abu Dhabi, op cit, at 149.
109. See, ARAMCO, op cit, at 172; Sapphire, op cit at 175.
110. See, P.M. Norton, "A Law of the Future or a Law of the Past?: Modern Tribunals and the International Law of Expropriation", 85, AM. J. International Law, 1991, p.477.
111. Sapphire case, op cit, pp.185-186.
112. See, B.M. Clagett, "Present State of the International Law of Compensation", op cit, p.6.
113. Norton, op cit, p.478.
114. Ibid.
115. See, note, "International Law: An "Appropriate" Compensation Standard for Nationalized Property: Banco Nacional de Cuba v Chase Manhattan Bank", MIN. L. Rev. Vol.66, 1982, p.936. See also, Muller, op cit, p.46-49.
116. See, R. Lillich and B. Weston, *International Claims: Their Settlement by Lumpsum Agreements*, 1975, P.A.; see also U.S.-Rumanian Settlement which netted the U.S. \$24,526, 370 of which \$22,020,370 came from Rumanian assets frozen in the U.S. to satisfy claims adjudicated by the Foreign Claims Settlement

- Commission at \$84,729,291. See, in Dawson and Weston, "Prompt, adequate and effective: A Universal Standard of Compensation?", 30 *Fordham L. Rev.* 1962, p.743; The largest percentage recovered by post-war French Lumpsum settlements was 60.6 percent of "recognized claims". See, in B. Weston, *International Claims in Post-War French Practice*, 1971, p.179.
117. See, B.M. Clagett, "Present State of the International Law of Compensation", *op cit*, pp.15-16. See also, K.M. Siegel, "The International Law of Compensation for Expropriation and International Debt: A Dangerous Uncertainty", 8, *Hast. International Comp. L. Review*, 1985, p.236.
118. See, Res. 626 (VII). See also Rest. 1314 (XIII), 12 December 1958, and 1515 (XV), 15 December 1960. See in I. Brownlie, *Principles of International Law*, 1989, p.539.
119. See, G.A. Res. 1803 (XVII), 17, U.N. GAOR Supp., (No.17), at 15, U.N. Doc. A/5217, 1962.
120. *Ibid.*
121. See, Schwebel, "The Story of the U.N.'s Declaration on Permanent Sovereignty Over Natural Resources", 49, *AM. B. Asso., J.*, 1963, p.463-465.
122. See, *Banco Nacional de Cuba v Sabbatino*, 376, U.S. 398, 1963, p.428-29.
123. *Ibid*, p.430.
124. *Ibid.*
125. See, R. Lillich, "The Current Status of the Law of State Responsibility for Injuries to Aliens", in *International Law of State Responsibility for Injuries to Aliens 2* (R. Lillich ed.), 1983, p.2.
126. G.A. Res. 3171 (XXVIII), 28, U.N. GAOR Supp. (No.30A), at 52, U.N. Doc. A/9030, (1973), reprinted in 68 *AM. J. International Law*, 1974, p.381.
127. See, Resolution 1803, *op cit*.
128. See, Resolution 3171, *op cit*.
129. G.A. Res., 3201, U.N. GAOR Supp., (No.1) at 3, U.N. Doc. A/9559, 1974.
130. G.A. Res. 3202, U.N. GAOR Supp., (No.1) at 3, U.N. Doc. A/9559, 1974.
131. *Ibid.*
132. *Ibid.*
133. See, Brower and Tepe, "The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International

- Law?" 9 International Law., 1979, pp.295,301; Haigh, "The New International Economic Order and the Charter of Economic Rights and Duties of States", 9, International Law., 1975, p.591.
134. See, B.M. Clagett, "Present State of the International Law of Compensation", op cit, p.7.
 135. See, Brownlie, op cit, p.542.
 136. See, Pellonpää, "International Law and Compensation for the Taking of Alien Owned Property: Recent Trends in Arbitral Practice", op cit, p.339.
 137. See, *British Petroleum Exploration Company v Libyan Arab Republic*, 53, I.L.R., 1973, p.297.
 138. *Texaco Overseas Petroleum Company/California Asiatic Oil Company v Libya*, 17, I.L.M., 1978, p.29.
 139. *Libyan American Oil Company v Libyan Arab Republic*, 20, I.L.M., 1981, p.1.
 140. See, *American Independent Oil Company v Kuwait*, 66, I.L.R., 1982, 519; see also in 21, I.L.M., 1982, p.976.
 141. See *Texaco*, op cit, paras 83, 86-87 (the quotation is from para 87).
 142. Ibid.
 143. Ibid.
 144. Ibid, para 86.
 145. U.S. Court of Appeal, Second Circuit, 4 August 1981, 658 Federal Reporter, 2nd Series, 1981, p.875.
 146. See, Pellonpää, "International Law and Compensation for the Taking of Alien Owned Property", op cit, p.342.
 147. B.P. op cit, note 137.
 148. TOPCO, op cit, note 138.
 149. LIAMCO, op cit, note 139.
 150. For a detailed examination of Libyan cases see, V. Mehren and P. Kourides, "International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases", 75, AM. J. International Law, 1981, pp.476-550.
 151. See B.P. op cit, note 147, p.329.
 152. Ibid, p.332.
 153. Chorzow Factory Case, op cit.
 154. B.P. Case, op cit, p.347.

155. Judge Lagergren was also a member of the Iran-U.S. Claims Tribunal and has also ruled on many of the same issues in that capacity.
156. TOPCO Case, op cit.
157. Ibid, 17, I.L.M., p.8.
158. Ibid.
159. Ibid.
160. Ibid.
161. LIAMCO op cit, 20, I.L.M., 1981, p.1.
162. Ibid, p.64.
163. Ibid, p.54-56.
164. Ibid.
165. Ibid, p.53.
166. Ibid.
167. Ibid, p.86.
168. Ibid.
169. See, AMINOIL op cit, 66, I.L.R., 519.
170. Ibid.
171. Ibid.
172. Ibid, p.602-603.
173. Ibid, p.605-607.
174. Ibid, p.611-613.
175. See, Gann, "Compensation Standard for Expropriation", op cit, p.638.
176. Ibid.
177. Ibid.
178. See, Banco Nacional de Cuba v Chase Manhattan Bank, op cit. See also, H. Rafat, "Legal Aspects of the Cuban Expropriation of American-owned Property", 11, St. Louis U.L.J., 1966, p.45.
179. Ibid.
180. See, Banco Nacional de Cuba Case, op cit, p.892-93.
181. Ibid.

182. Ibid, p.894.
183. See Article 1 of Protocol No.1 to the European Convention on Human Rights; see also the American Convention on Human Rights, Article 21; and the African Charter on Human and Peoples' Rights, Article 14.
184. See, Judgement of 21 February 1986; E.C.H.R., Ser. A. No.98, para 54.
185. Ibid. See also *Sporrong and Lonroth*, Judgement of 1982, Ser. A. No.52, para 69; *Lithgow and Others*, Judgement of July 1986, Series A No.102, para 120-121.
186. Norton, op cit, p.478.
187. See, Restatement of the Foreign Relations Law of the United States (Revised) (Tent. Draft No.3 1982). See also, Schachter, "Compensation for Expropriation", op cit, p.121; C.P. Banman, "An International Standard of Partial Compensation upon the Expropriation of an Alien's Property", Vol. 19, Case W. Res. J. International Law, 1987, p.103.

CHAPTER TWO

THE LEGAL FRAMEWORK
OF THE TRIBUNAL

THE LEGAL FRAMEWORK OF THE TRIBUNAL

As we mentioned in the previous Chapter, the main purpose of this study is exploring the present status of the law of compensation in the awards of the Iran-U.S. Claims Tribunal. However, we are not examining the Tribunal itself in detail. Therefore, the material in this chapter is limited to a general description of the Tribunal and certain key provisions of the international agreements under which it was established. Accordingly, this chapter will serve as a background for the chapters that follow.

2.1 THE ORIGINS OF THE TRIBUNAL

2.1.1 THE IRANIAN REVOLUTION

In the 1960s and the 1970s the Shah's Iran was adopted as the protector of the U.S. interest in the Persian Gulf region.⁽¹⁾ There was a special state to state relationship between Iran and the U.S. This relationship led to a wide range of economic and financial ties between Iran as an oil-rich developing state and the U.S. Private Sector as an industrialized market. Hundreds of American Corporations were involved in Iran in projects worth many billions of dollars. As a result, by the end of the 1970s, more than 40,000 Americans were living in Iran.⁽²⁾ However, the presence of many Americans involved in different areas of governmental machineries, as well as in private sectors, resulted in Iranian politicians in the early 1978, claiming that the Shah was under the control of Americans and served mainly their interests.⁽³⁾ This attitude towards the Shah's regime provoked strikes in the oil and other industries, which were signs of protests against the Shah's relationship with the U.S.

Politicians and revolutionary groups supported these strikes and claimed for self-reliance in the economy. In the autumn of 1978, strikes and anti-American incidents became more and more frequent in Iran. Thousands of Iranians were killed during that period of the Revolution. Foreigners also suffered in the process; American nationals, perhaps, more than the others.⁽⁴⁾

There were many groups with different political ideals involved in revolutionary activities. Their ideals were ultimately channelled by the late Ayatollah Khomeini and other religious leaders into an all out attempt to oust the Shah and, also, the American economic and military influence, which was claimed by the revolutionaries as the source of the Shah's power and the root of their difficulties. On the 16 January, 1979, the Shah left Iran never to return. The Islamic Revolution which forced the Shah to give up his power claimed complete victory on 11 February, 1979.

During the Islamic Revolution in 1978 and early 1979, most projects involving American businesses in Iran were disrupted. As the Revolution advanced, contacts with various U.S. business interests were abrogated and their assets were expropriated or abandoned.⁽⁵⁾

2.1.2 THE HOSTAGE CRISIS

At the end of October 1979 the deposed Shah arrived in the U.S. for medical treatment. The Shah's reception by the U.S. provoked Iranian students to occupy the U.S. Embassy in Tehran in November 1979.⁽⁶⁾ As a result, the students took the staff of the Embassy as hostages. In exchange for the release of the hostages, the students demanded that the Shah and his assets be returned to Iran. After that the

Central Bank of Iran (Bank Markazi) proposed a plan to withdraw all its funds from U.S. banks.⁽⁷⁾

2.1.3 THE U.S. RESPONSES

In response to the above plan and the hostage-taking the U.S. banned oil imports from Iran and froze Iranian assets on 14 November, 1979. These were valued at some 12 billion dollars.⁽⁸⁾ Other Western countries and Japan also imposed sanctions against Iran. This basically amounted to a prohibition against the export of military supplies to Iran and an agreement not to extend new credit to Iran. Notably, some states and particularly Japan, which had been the largest purchaser of Iranian oil, at first refused to pay premium prices for Iranian oil and eventually stopped buying oil from Iran.⁽⁹⁾

Concurrently, many American nationals and companies which had suffered losses in Iran in 1978 and early 1979, rushed to the Courts to obtain judicial attachments of Iranian property in the U.S. However, these law suits did not progress to any judgement or any decree. This was because a presidential order was made forbidding "entry to any judgement or of any decree or order of similar or analogous effect" against Iranian property. The U.S. Justice Department also requested that "no action be taken pending resolution of the hostage crisis".

In December 1979, following to the efforts for release of the hostages the U.S. made an application against Iran before the I.C.J.⁽¹¹⁾ Ruling on the application in 15 December, the Court indicated interim measures which called for the immediate termination

of the detention of the Embassy's personnel; return of premises; and for reparation to be made to the U.S. for injury caused to it by hostage-taking. Iran did not take part in the proceedings.

Nevertheless, the efforts for release were continued. These efforts were military as well as diplomatic. However, the military rescue attempt which took place in April 1980 and therefore preceded the I.C.J. final judgement was unsuccessful.⁽¹²⁾

Coincidentally on 27 July 1980 the Shah died and two months later the Iran-Iraq broke out. The situation was very complicated. Following intense diplomatic activity and the abortive military episode, the mediation of a friendly power, to end the captivity of the hostages began.⁽¹³⁾ Negotiations to end the crisis were conducted through good offices of the Algerian Government. For political reasons no Iranian official met with any American official. The process of negotiations was an extremely complex one and as Judge Lagergren has pointed out "it was unique in legal history."⁽¹⁴⁾

Iran was under great pressure to negotiate the release of the hostages.⁽¹⁵⁾ As a result, at last on 19 January 1981, Iran and the U.S. reached agreement on their release.

2.2 THE ALGIERS ACCORDS

The Iran-U.S. accord of 19 January 1981 could be said to be the biggest financial deal in history.⁽¹⁶⁾ In simple terms, Iran agreed to release the hostages, and the U.S. agreed to effect the return of Iranian assets and the dismissal of litigation against Iran in U.S.

Courts. The agreement compromised two declarations of commitment and various technical arrangements.⁽¹⁷⁾

2.2.1 THE DECLARATION OF ALGIERS

This Declaration which is also called 'General Declaration',⁽¹⁸⁾ records the Central Commitments of the Parties.

In fact, in this Declaration the U.S. and Iran made Commitments regarding their future political relations, the release of the U.S. nationals held in Tehran and the freeing of Iranian assets frozen by the U.S. That Declaration also contained a pledge of non-intervention in Iranian affairs by the U.S. and several agreements concerning the return of Iranian assets and the settlement of U.S. claims. The Second Declaration, the Claims Settlement Agreement, provided for the establishment of the Iran-U.S. Claims Settlement Tribunal.⁽¹⁹⁾

Following the Revolution, hundreds of claims had been filed in the United States Courts against Iran and a substantial portion of Iran's frozen assets had been attached in these judicial proceedings. Restoration of the financial status of Iran required that these judicial attachments be nullified. Therefore as a substitute for the U.S. Courts proceedings, the two governments agreed to establish an arbitral body (the Iran-U.S. Claims Tribunal) to hear and adjudicate claims by U.S. nationals against Iran and, additionally, certain claims by Iranian nationals against the U.S. government and between the two governments. The U.S. also waived its right to proceed further before the I.C. J. ⁽²⁰⁾ Accordingly, the General Declaration provided that the U.S.:

"agrees to terminate all legal proceedings in the United States Courts involving claims of United States persons and institutions against Iran and its State enterprises, to nullify all attachments and judgements obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration".⁽²¹⁾

The Claims Settlement Declaration (Agreement) established the Iran-U.S. Claims Tribunal as the mechanism for settling the related claims of Iran and the U.S. through binding Third-party arbitration.⁽²²⁾ It declared that:

Claims referred to the arbitration Tribunal shall, as of the date filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the Courts of Iran, or of the United States, or of any other Court".⁽²³⁾

2.2.2 FINANCIAL ARRANGEMENTS

Following the above agreements, on 20 January 1981 \$8 billion held by the New York Federal Reserve Bank and by overseas branches of U.S. banks was transferred to an escrow account agreed to by Iran, and the hostages were released.⁽²⁴⁾ Other Iranian assets subsequently were released. Actually most of that unfrozen money went to pay off bank loans owed by Iran. Accordingly, the U.S. banks were repaid and were thus excluded from the jurisdiction of the Claims Tribunal. The non-bank U.S. claimants and all Iranian claimants, including Iranian banks, were obliged to seek remedies through the Claims Tribunal. Out of the total sum released to Iran by the U.S., some \$3.667 billion had to be transferred to American banks on account for their claims against Iran.⁽²⁵⁾ The remainder of this amount was allocated to a third party escrow account to meet Iran's claims. It is out of this source that Iran has been awarded \$514 million, most of which was frozen Iranian assets.⁽²⁶⁾

On the other hand, following its agreement with the U.S. in 1981, Iran deposited \$1 billion in a third escrow account. This special security account was held in escrow by the Central Bank of Algeria, with a subsidiary of the Central Bank of the Netherlands and intended for the payment of the awards to U.S. claimants made by the Iran-U.S. Claims Tribunal.⁽²⁷⁾ Iran agreed to replenish this when occasion demanded in order to maintain a minimum of \$500 million in the Security Account. Judge Lagergren believes that that "Security Account was established as compensation for the annulled attachments in the United States".⁽²⁸⁾

Soon after the accords were ratified by the U.S. government, the latter suspended all lawsuits in U.S. Courts against Iran that were within the Tribunal jurisdiction. There were several hundred lawsuits pending by United States firms seeking some billions of dollars from Iran in payment of contracts or commercial agreements. These disputes concerned hundreds of incomplete construction projects, expropriation or nationalization of oil, gas and mineral properties as well as uncompleted contracts for both military and civilian goods. Claimants of lawsuits objected to the Algiers Declaration requiring the release and transfer of attached assets and the suspension of litigation in U.S. Courts in favour of Tribunal arbitration.⁽²⁹⁾ Nevertheless, the Algiers Declaration was eventually ratified by President Reagan and on 4 February 1981 he signed an executive order to implement the Declaration.⁽³⁰⁾

Following this order, the U.S. Justice Department took action on 26 February 1981, to suspend most private lawsuits against Iran and to free attached Iranian assets for their transfer by 19 July 1981.⁽³¹⁾

In the *Dames and Moore* case, the Supreme Court also affirmed the President's power to accomplish this objective. The Court decided that the claim by Dames and Moore that suspension of its claims constituted a taking was not ripe and upheld the President's constitutional power to implement the Claims Settlement Declaration, resulting suspensions of lawsuits and transfers of the Iranian frozen assets. (32)

Claimants with lawsuits felt that they might not be given the quality of justice or quantity of recovery that they might have obtained through a U.S. Court. However, as Brower and Davis point out, "those claimants who have recovered benefited greatly by access to the Security Account for payment and by the fact that Iran could not assert state or sovereign immunity defenses in proceedings before the Tribunal". (33)

2.3 THE COMPOSITION AND CHARACTER OF THE TRIBUNAL

The Tribunal consists of nine members, three appointed by Iran, three appointed by the United States and three others from third countries who are either selected by agreement of the six Iranian and the United States arbitrators, or appointed by an independent appointing authority. The nine members sit in three separate chambers, each consisting of an American, Iranian and third-country member, to hear and decide the claims. They also sit together as a full Tribunal to decide questions of interpretation of the Accords and basic legal issues common to a number of claims.

The Tribunal has been described as "a unique international institution" (34) and its awards as "a gold-mine of information for

perceptive lawyers".⁽³⁵⁾ However, in a recent international commercial arbitration an arbitrator stated that "the decisions of the Tribunal,, were not persuasive because the Tribunal after all involves a special type of arbitration".⁽³⁶⁾

The status of the Tribunal has aroused the curiosity of many academic lawyers since its formation. Is the Tribunal a private arbitral Tribunal created to resolve private law disputes arising under different systems of law, and to hear private law claims against Iran and the U.S.; or is the Tribunal an interstate Tribunal charged with ruling on the responsibility of the respondent state under public international law; or is it, as a further possibility, performing both functions?

Academics have tried to answer the above questions by reference to various aspects of the Tribunal's jurisprudence.⁽³⁷⁾ Thus, while Lake and Dana have argued that the arbitrations of the Tribunal are "a-national",⁽³⁸⁾ another American lawyer, the late Ted Stein, stated that "the *lex fori* of the Tribunal is public international law".⁽³⁹⁾ Finally, a British scholar, Lady Hazel Fox, states that the Tribunal "is the latest example of how a private party may have its private claims taken up by the state and presented through an interstate arbitration."⁽⁴⁰⁾

The Tribunal's statement in *Esphahan v. Bank Tejarat*, indicated that in its view, it is performing a dual function.⁽⁴¹⁾

In that case which involved a dual nationality issue, the full Tribunal stated that while it was clearly an international tribunal established by treaty, and while some of its cases involved disputes

between two governments and involved interpretation and application of public international law, most disputes (including all those brought by dual nationals) involved a private party on one side and a government or government-controlled entity on the other, and many involved primarily issues of municipal law and general principles of law. It stated that in such cases it was the rights of the claimant, not of his nation, which were to be determined by the Tribunal and that this should be contrasted with the situation of espousal of claims in international law.⁽⁴²⁾ Furthermore, the Tribunal described itself in this context as "a substitute forum" for the national courts of both countries and concluded that although the Tribunal was not an organ of a third state, it was not a tribunal where claims were espoused by a state at its discretion and decided solely by reference to public international law.⁽⁴³⁾ Thus the Tribunal not only has to decide issues of responsibility in public international law, it is also an arbiter of the private law duties of the respondent state.⁽⁴⁴⁾ On this view the Tribunal is a hybrid which rule on both the responsibility of the respondent state in international law and on its liability in private law.⁽⁴⁵⁾

Westberg points out that "the Tribunal was organized and operates on the pattern of earlier mixed international arbitral Tribunals".⁽⁴⁶⁾ In the post-World War I period, mixed arbitral tribunals came into fashion as a consequence of the peace treaties, which established them to settle disputes arising out of claims of individuals affected by the war.⁽⁴⁷⁾ One of the features of mixed arbitral tribunals was that individuals were permitted to present their cases themselves. These tribunals enjoyed jurisdiction over claims of individuals against the foreign state as well as claims of individuals against

each other. The mixed arbitral tribunals, were usually composed of three members: one member named by each of the treaty parties and the third 'neutral' chairman, chosen by mutual agreement. If the parties failed to reach agreement on the chairman, a variety of alternatives were provided, including appointment by the Council of the League of Nations.⁽⁴⁸⁾

The mixed arbitral tribunals applied the law contained in the Peace Treaties and in some cases the national law of the parties, according to conflict of law rules.⁽⁴⁹⁾ The Peace Treaties provided a variety of procedures for the enforcement of the judgements of these tribunals, including payments to a clearing office. The workload of these tribunals was enormous. The Franco-German Arbitral Tribunal, for example, alone dealt with more than 20,000 cases.⁽⁵⁰⁾

Norbert Wuhler points out that,

"For the development of international courts and tribunals the most important contribution rendered by the mixed arbitral tribunals was the granting to individuals of direct access to the Tribunals".⁽⁵¹⁾

Considering the above descriptions of the mixed arbitral tribunals, it seems that the Iran-U.S. Claims Tribunal is very similar. However, as Fox also points out, the Tribunal has its own novel features which distinguishes it from those Tribunals.⁽⁵²⁾ This Tribunal was intended to be a court, to proceed like a court and to give decisions like a court. The machinery for execution of the Tribunals' awards was provided under the Constitutive instruments that created it. i.e. a billion U.S. dollars escrow fund, with a promise by one treaty party to replenish that fund whenever it fell below U.S. \$500 million.⁽⁵³⁾ Through this account private parties'

claims, as well as state parties claims, can be paid. As Khan points out, this enforcement machinery greatly strengthens the judicial character of the Tribunal.⁽⁵⁴⁾ The General Principles in the General Declaration also emphasised the intention to achieve a settlement of outstanding private law claims, as well as public international law claims against either state.⁽⁵⁵⁾ Thus Principle B of the General Declaration stated that "it was the purpose both parties ... to terminate all litigation as between the government of each party and the nationals of the other and to bring about the settlement and determination of all such claims through binding arbitration".⁽⁵⁶⁾

Article II(1) of the Claims Settlement Agreement provides that:

"An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counter-claim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims or counter-claims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration... and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specially providing that any disputes there under shall be within the sole jurisdiction of the competent Iranian Courts in response to the Majlis position."⁽⁵⁷⁾

Taking the Principle B of the General Declaration and the above Article together not only shows the international character of the Tribunal, but also clearly indicates the fusion of state and private party claims in one procedure.⁽⁵⁸⁾

Article V of the Claims Settlement Agreement states the basis on which claims before the Tribunal are to be decided and "is of fundamental importance to any understanding of the nature and function of the Tribunal."⁽⁵⁹⁾ It declares that "the Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, Contract provision and changed circumstances."⁽⁶⁰⁾

The requirement that the Tribunal's awards be made on the basis of law "evokes a particular conception of international arbitration".⁽⁶¹⁾ This has been the conception since the 1899 Hague Convention for the Pacific Settlement of International Disputes.⁽⁶²⁾ For Article 15 of that Convention states: "International arbitration has for its object the settlement of differences between states by judges of their own choice *and on the basis of respect for law.*"⁽⁶³⁾ This conception, of course, is not restricted to public international law arbitrations. The UNCITRAL rules apply it in the area of private arbitration as well. However, the Tribunal's applicable law clause differs from that specified for similar claims tribunals in the past, as the Tribunal is not limited to a single body of law or legal principles but "must consider that seemingly broader concept of respect for law".⁽⁶⁴⁾ This, as Judge Mosk has pointed out:

"The Tribunal involves an amalgam of public and private international law."⁽⁶⁵⁾

All these special features of the Tribunal have led Stewart and Sherman to conclude that:

"The Tribunal is a unique institution, representing of the most ambitious and complex international claims adjudication programmes ever undertaken." (66)

2.4 THE TRIBUNAL'S RULES OF PROCEDURE

2.4.1. UNCITRAL RULES

Article III, Section 2 of the Claims Settlement Declaration prescribed the procedural rules to be followed in conducting the business of the Tribunal. These are the arbitration rules of the United Nations Commission on International Trade Law or UNCITRAL. (67) UNCITRAL's main objective is to harmonize and unify the law of international trade as well as to co-ordinate the work of organizations active in this field. (68) In order to assist with the resolution of international trade disputes, UNCITRAL adopted Arbitration Rules in 1976, Conciliation Rules in 1980, Guidelines for Administering Arbitration Under the UNCITRAL Arbitration Rules in 1982 and the Model Law on International Commercial Arbitration in 1985. (69)

With regard to application of the UNCITRAL Rules by the Tribunal, Judge Bellet states that:

"One particularly beneficial opportunity proved by the Algiers negotiators was in fact, the occasion to apply the UNCITRAL Rules - which only date from 1976 - on a large scale to a multi-case arbitral Tribunal. By enacting the UNCITRAL Rules, the United Nations had sought to establish a body of procedural rules embodying a compromise between common and civil law systems. It was to this compromise that the Iranian jurist... and the American jurist agreed, and the Tribunal benefited considerably thereby." (70)

2.4.2 MODIFICATION OF THE UNCITRAL RULES

The Claims Settlement Declaration permits parties to modify UNCITRAL arbitration rules as considered necessary by the two Governments.⁽⁷¹⁾ Also the Tribunal is allowed modification of the UNCITRAL arbitration rules with respect to arbitral proceedings to ensure the efficient, just and equitable management of a substantial case load through a bilingual judicial process.⁽⁷²⁾

The UNCITRAL arbitration rules, as modified by the Tribunal and adopted as 'Tribunal's Rules' apply to all proceedings before the Tribunal. In accordance with these Rules the Tribunal, for each case, generally receives four written submissions as well as documentary evidence. These are a statement of claims, a statement of defence which may contain a counter-claim, a reply and a rejoinder.⁽⁷³⁾ If the Tribunal cannot reach a conclusion on the basis of written submissions, it will proceed to hold a hearing. In most complex cases the Tribunal may invite the parties to a pre-hearing conference with a view to clarifying issues and perhaps settling points of order to be observed at the hearing.

The rules, in general, have provided the Tribunal and its constituent chambers with a large degree of flexibility in determining the procedures suitable for the handling of individual arbitrations and various types of cases.⁽⁷⁴⁾ The Tribunal however, has been criticized by some Americans for being too flexible in certain respects, particularly in granting time extensions to Iranian respondents that have delayed proceedings and increased the claimant's cost.⁽⁷⁵⁾

Nevertheless, it should be pointed out that the Tribunal has not only demonstrated the usefulness of international arbitration in general, but its procedural decisions also provide useful interpretations of the UNCITRAL Rules and demonstrates their usefulness.

With reference to the modified UNCITRAL Rules (Tribunal Rules), Judge Bellet has accurately summarised the position in his statement that:

"... modification has had at least three beneficial effects. First it permits the parties to evaluate their likelihood of success before the Tribunal; second, it assists the arbitrators by assuring consistency in their jurisprudence; and third, the modification encourages commentators critical analysis of the evolving jurisprudence."⁽⁷⁶⁾

2.5 THE SCOPE OF THE TRIBUNAL'S JURISDICTION

The Tribunals' Jurisdiction is dealt with in three separate sections of Article II of the Claims Settlement Declaration. Section 2 grants jurisdiction over certain "official claims of the United States and Iran against each other."⁽⁷⁷⁾ Section 3 confers the Tribunal's jurisdiction in deciding "any dispute as to the interpretation of performance of any provision of" the General Declaration.⁽⁷⁸⁾ For our purposes however, the Tribunal's most important jurisdiction is included in Section 1 of Article II. That section empowers the Tribunal, on the basis of respect for law, claims of U.S. nationals against Iran, and of Iranian nationals against the United States arising "out of debts, contracts... expropriation or other measures affecting property rights ..."⁽⁷⁹⁾

Other jurisdictional requirements, affecting claims under Article II(1) are that the claims and counter-claims have been outstanding on 19 January 1981, the date of the Algerian accords, and that the

claims have been filed with the Tribunal no later than 19 January 1982.⁽⁸⁰⁾

Certain types of claims were expressly excluded from the Tribunal's jurisdiction and should be mentioned.

2.5.1 DIRECT IRAN CLAIMS AGAINST U.S. NATIONALS

The Tribunal in interpretive case Number A/2 determined that it had no jurisdiction to hear claims by Iranian government entities against U.S. nationals.⁽⁸¹⁾ So while Iran could make a counter-claim against any U.S. national which made a claim against Iran at The Hague. Iran could not make a direct claim against those U.S. nationals who did not submit their claims to the Tribunal. There were many cases in which the U.S. party chose not to go to the Tribunal. Consequently, following this decision, Iran withdrew 1330 claims from the Tribunal.⁽⁸²⁾

2.5.2 THE EXCLUSION CLAUSE

Article II of the Claims Settlement Declarations excludes from the jurisdiction of the Tribunal claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the component Iranian courts. This was in response to the Majlis position.⁽⁸³⁾

The Majlis (Iranian Parliament) position was expressed in a single article Act of Parliament, which authorized the Iranian government to proceed with the settlement through arbitration. The Act states:

"The (Iranian) government is authorised with regard to financial and legal disputes between the Government of the

Islamic Republic of Iran and the American Government not stemming from the Islamic Revolution of Iran or the occupation of the American Centre of Conspiracy, to take action through mutually agreed arbitration, taking into account the provisions approved by the Islamic Consultative Assembly, and to resolve and settle the said disputes. Note: Regarding the disputes the handling of which by Competent Iranian Courts has been envisaged in the relevant agreement, such disputes will not be covered by the provisions of the single article."⁽⁸⁴⁾

Accordingly, in the Iranian view, any contract which included a clause suggesting Iran as a possible forum was excluded from the jurisdiction of the Tribunal. However the U.S. parties argued that a claim could be excluded only where (1) the claim arose under a contract between the arbitrating parties, (2) the contract specifically provided that any dispute thereunder was to be within the sole jurisdiction of the Competent Iranian Courts and (3) the contractual selection of Iranian Courts was binding on the parties.⁽⁸⁵⁾ In a series of interlocutory awards the full Tribunal decided that it had no jurisdiction to determine if the choice-of-forum clauses were binding because the Claims Settlement Agreement did not expressly grant such power.⁽⁸⁶⁾ As a result in *World Farmers Trading Inc. v Government Trading Corp.*, for example, Chamber one of the Tribunal dismissed a claim against one of the respondents because it was based on a Contract which states that "eventual disputes must be finally and exclusively settled in Iranian Courts".⁽⁸⁷⁾ However, the Tribunal in other cases has construed such clauses strictly, upholding only those that "unambiguously restrict jurisdiction to the Court of Iran".⁽⁸⁸⁾ The decision of the Tribunal in the *TCSB Inc. v Iran* is an example. The related clause of the Contract in this case provided for referral of disputes to a joint committee and then settlement "according to the laws of Iran and if necessary by

arbitration or by reference to Competent Courts".⁽⁸⁹⁾ Nevertheless, the Tribunal found that it did not confer sole jurisdiction on the Iranian Courts, and so the Tribunal was found to have jurisdiction.⁽⁹⁰⁾

In addition, claims of either the United States Government or former hostages arising out of the hostage taking in the American Embassy in Tehran were excluded from the Tribunal's jurisdiction.

Furthermore claims arising out of injury to the United States nationals on their property as a result of popular movements in the Course of the Islamic Revolution in Iran which were not an act of the Government of Iran were excluded.⁽⁹¹⁾

2.6 THE WORK OF THE TRIBUNAL

The Tribunal has addressed an enormous caseload. As Lillich has stated, "In recent history no arbitral tribunal has faced the enormous task now before the Tribunal".⁽⁹²⁾

As we mentioned earlier, all claims, other than interpretive disputes had to be filed with the Tribunal by 19 January 1982. A total of 3,816 claims were filed before the deadline. These included 965 cases of more than \$250,000, or in other words, "large claims", 2782 "small claims" (claims of less than \$250,000), and 69 "B" cases (disputes directly between the two governments). In addition, 24 "A" cases, that is disputes about the interpretation or compliance with the accords, have been filed. Of the cases filed as originally classified, the U.S. or U.S. nationals filed 3 "A" cases, 18 "B" cases, 558 large claims and all of the small claims. Iran, or

Iranian nationals, filed 21 "A" cases, 51 "B" cases, 407 large claims and no small claims.⁽⁹³⁾ By contrast, the Court of Arbitration of the International Chamber of Commerce (ICC) in Paris, between 1977 and 1981, averaged 243 requests for arbitration annually and constituted approximately two hundred panels each year. These ICC cases involved less than \$250,000 and would be small claims in the Tribunal.⁽⁹⁴⁾

The cases filed by American claimants generally involved alleged breaches of contract and expropriations and nationalizations. In this study however, we will focus on the expropriation and nationalization cases. Claimants in the cases included many of the largest American companies. Claims under \$250,000 (the small claims), unlike the other claims are presented by the government on behalf of the claimants. The precise total of the claims brought before the Tribunal has never been tallied. However, estimates have ranged as high as \$60 billion.⁽⁹⁵⁾

The majority of American claimants in large cases conforms to the following pattern:

(a) The claimant is a national of the U.S. as defined in Article VII, paragraph 1(b) of the Claims Settlement Declaration;

(b) each respondent named is a party against which the claimant is entitled to file a claim before the Tribunal pursuant to the Claims Agreement;

(c) the claim concerned was outstanding on 19 January 1981, the date of the Claims Agreement; and

(d) the claims in question arises out of a contract, an expropriation, or other measures, affecting property rights and is not a claim excluded from jurisdiction pursuant to Article II, paragraph 1, of the Claims Settlement Declaration.

2.7 THE SIGNIFICANCE OF THE TRIBUNAL'S JURISPRUDENCE

The Tribunal has made awards on a wide range of issues of a substantive nature, many concerning nationalization and breaches of contract. Up to September 1990, the Tribunal had issued 489 awards, 76 interlocutory and interim awards and 838 case terminations.⁽⁹⁶⁾

Over the ten years the Tribunal has been dealing with claims, it has completed 10198 case depositions or an average of roughly 458 cases per year, or 38 per month. As Westberg states, this is "a record that must compare favourably around the world".⁽⁹⁷⁾ In addition, the Tribunal's awards are being published in both English and Farsi. Significantly separate and dissenting opinions of arbitrators with regard to different cases and concerning many of the fundamental issues of law are also being published. These, together with the Tribunal's judgements, provide a rich deposit of legal authority on international business transactions. As Judge Mosk had declared:

"These opinions should be of value to practitioners who advice on international transactions, to those who are involved in international Commercial litigation, and to whose who will be involved in establishing dispute resolution mechanisms in the future".⁽⁹⁸⁾

Examining the awards of the Tribunal, Swanson has commented that:

"In terms of the sheer number of decisions, it will be difficult for international legal scholars to ignore the jurisprudence of the Tribunal".⁽⁹⁹⁾

As we saw in Chapter 1, the international law of state responsibility for injury to foreign investors presents a number of unresolved problems. Because so many measures, both formal and informal, taken by the Iranian government affected the business of the U.S. investors, the Tribunal is in an unusually good position to affect development of the law in this area. (100)

As we saw earlier, the Islamic Revolution was characterized by strong anti-American rhetoric. This was increasingly accompanied by mass demonstrations, political disturbances and also strikes and riots. Key industries, including oil production and processing, and banking, were from time to time disrupted by strikes. Naturally, it was difficult for U.S. Companies to operate normally and to carry out routine business transactions. As a result, many American businesses evacuated the dependents of their expatriate employees. They hoped that conditions would improve shortly. However, when the situation continued to deteriorate, the bulk of American businesses withdrew all or most of their employees between December 1978 and January 1979.

After the Revolution, during March-June 1979, some businesses made tentative contact with the new government in an attempt to return to Iran and resume work. The new government also contacted others with invitations to return. However, some companies took the position that *force majeure* conditions had totally interrupted their contractual obligations. (101) Others which had subsidiary or affiliate operations, attempted to continue to manage their business through their local staff and directors by exercising their shareholders' rights.

The new government initiated several steps to bring the Iranian economy more under its control. Beginning in June 1979 the new government embarked on a systematic programme of nationalization.⁽¹⁰²⁾ Banks were nationalized on 7 June 1979, and insurance companies on 25 June 1979.⁽¹⁰³⁾ In addition, Iran nationalized all metal production, ship building, automotive and aircraft industries.⁽¹⁰⁴⁾ As far as the objective of these nationalizations are concerned they were intended (1) to re-order Iranian industry, which was in turmoil after the departure of the Shah; (2) to redistribute wealth and ameliorate the harsher aspects of the capitalistic system; and (3) to remove Iran's dependence upon foreign capital.⁽¹⁰⁵⁾

In addition, to consolidate the political and financial objectives of the Revolution, the Iranian government introduced laws for the replacement of business management under a variety of circumstances. As a result many of the remaining U.S. companies operations in Iran were informed that their designated managers had been "provisionally" replaced with managers or directors appointed by the government.⁽¹⁰⁶⁾ These measures resulted in many claims before the Tribunal. While American claimants in these cases have argued that such designations have deprived them of their properties, the Iranian respondents have generally maintained that the appointment of Provisional Managers took place to keep the companies in a good order and productive.⁽¹⁰⁷⁾

The Tribunal's decisions have thus had to deal with many different issues. Accordingly, while some authors⁽¹⁰⁸⁾ have seen the significance of the Tribunal's decisions in their discussion of what level of host state interference amounts to a taking, others put the

emphasis on its treatment of the amount of compensation required.⁽¹⁰⁹⁾ It is certainly clear that, as Lee points out there has been "a tremendous opportunity for the Tribunal to make contributions to the law of international claims covering such complex areas as diplomatic protection of aliens abroad, state responsibility for injuries to aliens, expropriation of aliens' property, compensation for expropriation, as well as valuation, etc".⁽¹¹⁰⁾

In this study, Chapter 3 will examine the concept of a "taking" in the context of the Tribunal. Since proof of the date of the taking is a necessary element in a successful claim and at the same time has a great impact on the valuation of the dispossessed property Chapter 4 will discuss the issue of timing in the decisions of the Tribunal. Chapter 5 then deals with the general issue of the standard of compensation, while Chapter 6 discusses the compensation standard under the Treaty of Amity between Iran and the U.S.

A crucial area of the Tribunal's awards which has close links to the standard of compensation is the issue of how to actually calculate damages (or compensation) based on the designated compensation standard. Accordingly, Chapter 7 discusses the quantification of damages in the awards of the Tribunal.

Having examined the view points of both parties before the Tribunal with regard to the full compensation standard in the Chapter 7, Chapter 8 examines the Tribunal's own interpretations of the concept of full compensation. Some general conclusions will round off this survey of the Tribunal's jurisprudence in Chapter 9.

NOTES TO CHAPTER 2

1. See e.g. W. Forbis, *Fall of the Peacock Throne: The Story of Iran*, 1980, p.6-14; and E. Abrahamian, *Iran Between Two Revolutions*, 1982.
2. See Abrahamian, *Ibid.*
3. See Kayhan (Iranian Newspaper) in Farsi, 1978, No. 268. Also see Etelaat (Iranian Paper) in Farsi, 1978, No. 289 and 290.
4. See C.N. Brower and M.D. David, "The Iran-U.S. Claims Tribunal After Seven Years: A Retrospective View From Inside", *The Arb. Journal*, Vol. 93, No. 4, 1988, p.19.
5. *Ibid.*
6. See G. Lagergren, "Iran-United States Claims Tribunal", Report 4, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 1987, p.112.
7. *Ibid.*
8. See S.H. Amin, "Iran-United States Claims Settlement", *I.C.L.Q.*, Vol. 32, 1983, p.751.
9. *Ibid.*
10. See in Brower and David, *op cit*, p.19.
11. See A. Jeffery, "The American Hostages in Tehran: The I.C.J. and the Legality of Rescue Missions", *I.C.L.Q.*, Vol. 30, 1981, p.717.
12. *Ibid.* See also, *United States Diplomatic and Consular Staff in Tehran (U.S. v Iran)*, *I.C.J. Rep.* (Judgement of 24 May 1980), p.3.
13. See Lagergren, Report 4, *op cit*, p.114.
14. *Ibid.*
15. *Ibid.*
16. *Ibid.*
17. See in *1-Iran-U.S. Claims Trib. Reports; 1981-82*, p.3, 20, *I.L.M.*, 1981, p.223. These documents are; *The Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments made by Iran and the United States*, *ibid*, at 5, 20 *I.L.M.*, at 224; *Undertakings of the Government of Iran and the United States*, *ibid*, at 7, 20 *I.L.M.*, at 229; *the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by Iran and the U.S.*, *ibid*, at 9, 20,

I.L.M., at 230; and the Escrow Agreement, *ibid*, at 12, 20 I.L.M., at 234.

18. The term "General Declaration" in this study refers to The Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments Made by Iran and the U.S. See in 1-Iran-U.S. Claims Trib. Reports, *op cit*.
19. The phrase "Claims Settlement Agreement or Declaration" refers to the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by Iran and the U.S. See in 1-Iran-U.S. Claims Trib. Reports, *op cit*, p.3.
20. See Brower and David, *op cit*.
21. See, "General Declaration" in 1-Iran-U.S. Claims Trib. Reports, *op cit*.
22. *Ibid*.
23. *Ibid*.
24. See Lagergren, Report 4, *op cit*.
25. *Ibid*.
26. *Ibid*.
27. See in 1-Iran-U.S. Claims Trib. Reports, *op cit*, p.5. See also P.D. Trooboff, "Implementation of the Iranian Settlement Agreements - Status, Issues and Lessons: View from the Private Sector's Perspective", in *Private Invest. Abroad - Problems and Solutions in International Business*, M. Landwehr ed., 1981, p.103.
28. See G. Lagergren, "Iran-U.S. Claims Tribunal" in *Realism in Law-Making: Essays on International Law*, ed, in Honour of Willem Riphagen, (A.Bos and H. Sibiliszi), 1986, p.115.
29. *Ibid*.
30. See Executive Order No. 12, 294 (24 February 1981), reprinted in 46 Fed. Reg. 14, 113, 1981. Implementing regulations were published at 46 Fed. Reg. 14, 330-14, 337 (26 February 1981), reprinted in 31 C.F.R., Part 535.
31. See *Dames and Moore v Regan*, 453, U.S. 654, 1981. See also in 20, I.L.M., 1981, 897; and C. Christine, "The Foreign Affairs Power of the U.S. President and the Iranian Hostages Agreement: *Dames and Moore v Regan*", 32, I.C.L.Q., 1983, p.600.
32. *Ibid*.
33. Brower and David, *op cit*, p.21.

34. See R. Lillich in preface to *The Iran-United States Claims Tribunal*, (R. Lillich ed.), 1984, p.vii.
35. See H.M. Holtzmann, "Some Lessons of the Iran-United States Claims Tribunal" in *Private Investment Abroad - Problems and Solutions in International Business*, (J. Moss ed.), 1988, p.16.
36. See D.D. Caron, "The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution", in *Am. J. International Law*, Vol. 84, 1990, p.106.
37. See e.g. H. Hardenberg, the Awards of the Iran-U.S. Claims Tribunal seen in Connection with the Law of the Netherlands, *International Bus. Lawyer*, 1984, p.337 translated from *De Vitspraken Van het Iran-United States Claims Tribunal naar Nederlands recht bezian*, *Nederlands Juristenblad*, 1984, p.167; V. den Berg, "Proposed Dutch Law on the Iran-U.S. Claims Settlement Declaration". A reaction to Mr. Hardenberg's Article, *International Bus. Lawyer*, 1984, p.341; E. Lauterpacht, "The Iran-U.S. Claims Tribunal - An assessment", in *Private Invest. Abroad - Problems and Solutions in International Business*, (M. Landwehr ed.), 1982, p.213; and J. Lewis, "What Goes Around Comes Around: Can Iran Enforce Awards of the Iran-U.S. Claims Tribunal in the United States?", *26 Colum. J. Transnational Law*, 1988, 515.
38. See W. Lake and J. Dana, "Judicial Review of Awards of the Iran-U.S. Claims Tribunal: Are the Tribunal's Awards Dutch?", *16 L. & Pol'y Int'l Business*, 1984, p.755.
39. I. Stein, *Jurisprudence and Jurists' Prudence*, "The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal", *78, Am. J. International Law*, 1984, p.18.
40. See H. Fox, "States and the Undertaking to Arbitrate", *37, I.C.L.Q.*, 1988, pp.1,3.
41. See Case No. 157, *Nasser Esphahanian v Bank Tejarat*, in *2, Iran-U.S. Claims Tribunal Reports*, 1983 (II), p.165.
42. Ibid.
43. Ibid.
44. Ibid.
45. See R. Khan, *The Iran-United States Claims Tribunal, Controversies, Cases and Contribution*, 1990, p.79.
46. See J.A. Westberg, *International Transactions and Claims Involving Government Parties - Case Law of the Iran-United States Claims Tribunal*, 1991, p.5.
47. See N. Wuhler, "Mixed Arbitral Tribunals" in Bernhardt (ed), *Encyclopedia of Public International Law*, Vol. 1, 1981, pp.142-146.

48. Ibid.
49. Ibid.
50. Ibid.
51. Ibid, p.145-146.
52. See Fox, "States and the Undertaking to Arbitrate", op cit.
53. Ibid, see also "General Declaration", Para. 7, op cit.
54. See Khan, op cit, p.79.
55. See in 1-Iran-U.S. Claims Trib. Reports, op cit.
56. Ibid.
57. Ibid.
58. See Fox, op cit, p.21.
59. See D.L. Jones, "The Iran-United States Claims Tribunal: Private Rights and State Responsibility", in 24, Virg. J. International Law, 1984, p.259.
60. See "Claims Settlement Agreement", in 1, Iran-U.S. Claims Tribunal, op cit.
Crooks points out the phrase that "the Tribunal shall decide all cases on the basis of respect for law" was intended "to curb the perceived supposition of 19th Century arbitrators to decide interstate disputes on non legal grounds". See J.R. Crook, "Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience", in 83, Am. J. International Law, 1989, p.280.
61. See T.L. Stein, "Decisions of the Iran-United States Claims Tribunal", 24, Virg. J. International Law, 1984, p.227.
62. See 32, Stat. 1779, IS No. 392, Gr.Britain, 1899.
63. Ibid.
64. Ibid.
65. See R.M. Mosk, "Lessons From the Hague - An Update on the Iran-U.S. Claims Tribunal", 14, Pepperdine L. Review, 1987, p.825.
66. See in D. Stewart and L. Sherman, "Developments at the Iran-United States Claims Tribunal: 1981-1983", 24. Va. J. International Law, 1983, p.6, reprinted in the *Iran-United States Claims Tribunal, 1981-1983*, (R. Lillich ed.), 1984, 1.

67. See United Nations Committee on International Trade Law Rules (UNCITRAL Rules), 31, U.M. GAOR Suppl. (No. 17), U.N. Doc. A/31/17, 1976, reprinted in 15 I.L.M., 1976, p.701.
68. Ibid.
69. Ibid. For an account of UNCITRAL activities, see H. Merrmann, "The Contribution of UNCITRAL to the Development of International Trade Law" in 2, Transnational L. International Commercial Transactions, 1982, p.35.
70. See. P. Bellet, "Symposium on the Iran-United States Claims Tribunal", (Foreword), 16, L & Pol'y Int'l Business, 1984, p.670.
71. See in 1, Iran-U.S. Claims Tribunal Reports, op cit.
72. Ibid.
73. See Westberg, International Transactions and Claims, op cit, p.345.
74. In the Tribunal, there are nine arbitrators and sit in three separate chambers, each consisting of an American, Iranian and third-country arbitrator, to hear and decide the claims.
75. See in Westberg, op cit, p.10.
76. See Bellet, op cit.
77. See Claims Settlement Declaration in 1, Iran-U.S. Claims Tribunal Reports, op cit.
78. Ibid.
79. Ibid.
80. Ibid.
81. See Decision of 19 December 1981, reprinted in 21, I.L.M., 1982, p.78.
82. See Lagergren, Iran-United States Claims Tribunal in, Realism in Law-Making, op cit, p.114.
83. See 1, Iran-U.S. Claims Tribunal Reports, op cit.
84. See Iranian Official Gazette No. 103460, dated 11.5.59.
85. See Stewart and Sherman, op cit, p.19.
86. See Award No. ITL-2-51-FT (November 1982) in 1, Iran-U.S. Claims Tribunal Reports, 1981-82, p.242, also it is reprinted in Iranian Assets Litigation Report, 7, 136, 1983.

87. See Case No. 764, Award No. 66-764-1 in 3, Iran-U.S. Claims Tribunal Reports, p.197. See also the Case No. 121, George W. Drucker, Jr. v Foreign Transactions Co. et al, Interlocutory Award No. ITL-4-121-FT, Part III(2), "The Cement Offer", in 1, Iran-U.S. Claims Tribunal Reports, op cit, p.257.
88. See Case No. 188, Gruen Associates, Inc. v Iran Housing Co. Award No. 61-188-2 in 3, Iran-U.S. Claims Tribunal Reports, p.97.
89. See Case No. 140, Award No. ITL-5-140-FT in 1, Iran-U.S. Claims Tribunal Reports, p.262.
90. Ibid.
91. See, 'Claims Settlement Agreement', Article 11(1), together with paragraph 11 of the "General Declaration", in 1, Iran-U.S. Claims Tribunal Reports, op cit.
92. See Lillich, op cit.
93. See 1983-1984 Tribunal Annual Report, reprinted in Mealey's Litigation Reports: Iranian Claims, 1984, p.1860.
94. See. T. Paulsson, "Arbitration Under the Rules of the International Chamber of Commerce", in Resolving Transnational Disputes through International Arbitration, (T. Carbonneau ed.), 1984, pp.237-38.
95. See Westberg, op cit.
96. See Tribunal Communique No.94/5 dated 15 October 1990, reprinted in 5, Mealey's Litigation Reports, op cit, 1990, p.19.
97. See Westberg, op cit, p.13.
98. See Judge Mosk, "Lessons from the Hague", op cit, p.826.
99. See S.R. Swanson, "Iran-U.S. Claims Tribunal: A Policy Analysis for the Expropriation Cases", 18, Case W. Res. J. Int'l Law, 1986, p.309.
100. For a general study about the development of International law, see e.g. H. Lauterpacht, *The Development of International Law by the International Court of Justice*, 1958, reprinted 1982.
101. See Am. Bell Int'l In. v Iran, Award No. 255-48-3 (19 September 1986), in 6, Iran-U.S. Claims Tribunal Reports, p.255. See also W.N. Eskridge, "The Iranian Nationalization Cases: Toward a General Theory of Jurisdiction over Foreign States", Har. Int'l L. Journal, Vol.22, 1988, p.525.
102. See "Law of Nationalization of Banks", (Law of 7 June 1979), reprinted in G.H. Vafai, *Commercial Laws of Middle East*, (Booklet 6), 1984, p.3.

103. See, "Legal Bill on Nationalization of the Insurance Organisations and Credit Institutions". (Iranian Official Gazette No. 10264 dated 1.3.1359 - 22 May 1980), reprinted in G.H. Vafai, op cit. (Booklet 3), p.42.
104. See, "The Law on Protection and Development of Iranian Industries", (No. 71226 dated 25.4.58), issued by Prime Minister, reprinted in G.H. Vafai, (Booklet 3), p.16. See also, "The By-Laws of the Iranian National Industries Organization", (No. 57230, 26.7.1360), op cit.
105. Ibid. See also E. Vicker, Iran's Plan for Reconstructing its Industry Under Islamic Rule Begins to Take Shape, in Wall St. Journal, 26 December 1979, at 10, Col. 1.
106. See the Law on Protection and Development of the Iranian Industries and the By-Laws of the Iranian National Industries Organizations, op cit.
107. See e.g. *Schering Corp. v Iran*, Award No. 122-38-3 in 5, Iran-U.S. Claims Tribunal Reports, 1984, p.361.
108. See Swanson, op cit.
109. See Clagett, "The Expropriation Issue Before the Iran-United States Claims Tribunals: Is "Just Compensation" Required by International Law or Not?", 16, L. & Pol. Int'l Business, 1984, p.813.
110. See T.W. Lee, "The Iran-United States Claims Tribunal and The Questions of the Nationality of the Claimants and Compensation for Expropriation", 4, Chinese Y.B. Int'l. L. Affairs, 1984, p.129.

CHAPTER THREE

TAKING OF FOREIGN OWNED PROPERTY
IN THE IRAN-U.S. CLAIMS TRIBUNAL

In the previous Chapter it was briefly mentioned that the Tribunal has issued significant decisions relating to the taking of foreign investment. Here we will examine selected decisions of the Tribunal concerning interferences by the host state which amount to expropriation under contemporary standards of international law. However, before examining the Tribunal's decisions with that regard, we shall analyse some general legal issues with regard to taking in international law.

3.1 TAKING IN GENERAL

As Verwey and Schrijver have also pointed out it is almost a truism to say that "few subjects are as controversial in international law today as the taking of foreign property".⁽¹⁾

As we mentioned in Chapter One since the Soviet Revolution and the extension of the public sector in many economies, both socialist and non-socialist, the conflict of interest between foreign investors and host states, seeking to obtain control over their own economies, has become more acute. However, it must not be forgotten that even in *laissez-faire* economies, the taking of private property for certain public purposes and the establishment of state monopolies have long been familiar.⁽²⁾

Takings are difficult to define under international law. Traditional scholars have attempted to define and distinguish different types of taking such as nationalization, expropriation, and confiscation. An expropriation has been defined as the state's taking "possession of personal, individually held assets and rights of foreigners and usually making prompt and fair payment for them".⁽³⁾ In contrast in

nationalizations the host state takes property in the larger interests of society to advance a program of economic and social reforms "in order to have the ownership of wealth and natural resources, as well as the means of production perform a social function".⁽⁴⁾ A confiscation has been defined as "the deliberate seizure of property by a state without provision for adequate compensation; it usually implies the denial of any right to restitution or damages".⁽⁵⁾

However, as it has been pointed out by Brownlie, the relevant terminology remains unsettled. He states that:

"The terminology of the subject is by no means settled, and in any case form should not take precedence over substance. The essence of the matter is the deprivation by state organs of a right of property either as such, or by permanent transfer of the power of the management and control".⁽⁶⁾

Brownlie has also provided us with a brief explanation of the meanings of the related terms, "Confiscation", "nationalization", and "socialization":

"If the compensation is not provided, or the taking is regarded as unlawful, then the taking is sometimes described as confiscation. Expropriation of one or more major national resources as a part of a general new programme of social and economic reform is now generally referred to as nationalization or socialization".⁽⁷⁾

The U.S. position embraces a broader definition of expropriation including within its scope certain economic interests in addition to the traditional concept of property rights. This position has most recently been articulated in the 1986 Revision of the Restatement of the Foreign Relations Law of the United States:

"712... A state is responsible under international law for injury resulting from:

(1) a taking by the state of the property of a national of another state that is (a) not for a public purpose, or (b)

discriminatory, or (c) not accompanied by provision for just compensation....

(3) other arbitrary or discriminatory acts or omissions by the state that impair *property or other economic interests of a national or another state*".⁽⁸⁾

However, the word 'taking' in this study is used as a general concept of deprivation by the state of alien-owned property, and as such it encompasses both 'expropriation' and 'nationalization'. By the former expression we mean single, more or less isolated cases of deprivation, while the term nationalization indicates large scale takings, especially those which affect a whole industry or natural resource.

As we saw in the previous Chapter, by applying Article II(1) of the Claims Settlement Declaration, the Tribunal can resort to a wide range of legal rules for the wide variety of claims arising in an economic context. However, the scope of the present Chapter is limited to the Tribunal's contribution concerning one category of such rules and one area of subject matter, i.e., international law as applied to the taking of foreign property. Considering the controversiality of the concept of 'taking' in international law and taking into account the relatively low number of judicial and arbitral precedents, it seems this subject is a topic in which the Tribunal has the potential role of clarifying the law in a manner that is important. The legal position of the U.S. and its nationals (which it can be said to be a representation of the western legal position) is confronted by the legal position of Iran (which could be said to be a representation of the third world position) in cases involving the various circumstances of alleged takings. When applying international law to the various factual settings the Tribunal is in a position to give rulings which will be treated as

authoritative statements of law by other tribunals and decision-makers. Remembering this we will attempt to present the Tribunal's practice and thereby to highlight its possible contributions. However, in a discussion on the "taking of property" the first issue which however should be addressed is the basic question of what is property in the meaning of the relevant legal rules. Accordingly first we will examine that basic issue.

3.2 THE CONCEPT OF PROPERTY

Property has been defined by municipal legal systems including land as well as various kinds of tangible objects. However, the notion of property is not restricted to mere physical or tangible objects. Sometimes rights that fall under the category of contracts rights are treated as property too. Lawson and Rudden in their monograph on the law of property explain that:

"If the right created by contract can be transferred from one person to another, the law regards them as a species of property. Indeed English law call them things through it uses the old French jargon choses in action".⁽⁹⁾

Therefore alongside physical objects the law treat certain "abstract things" as property including for example, debts, and shares in Companies; contractual rights; and intellectual property such as patents and copyrights. However, in international law the question of non-material rights, particularly contractual rights such as property susceptible to a taking has been rather more controversial. Therefore, it is necessary for tribunals involving in international petroleum agreements, for example, to analyse the legal nature of petroleum concessions. Whether they are property rights or mere contract rights is a critical issue affecting the right of the state to interfere with such rights. In the LIAMCO arbitration, the Sole

Arbitrator considered property as covering both corporeal and incorporeal property, with the latter being "those rights that have a money value".⁽¹⁰⁾ He found concession rights to be included under the category of incorporeal property. He explained that:

"This assertion is recognized by international precedents, as was held for instance by the Permanent Court of Arbitration in its Award delivered on 13 October 1922 in the dispute between the United States of America and the Kingdom of Norway".⁽¹¹⁾

He further explained that that view was in harmony with the municipal law of most legal systems, including that of Libya and with Islamic Jurisprudence.⁽¹²⁾

In clarifying the concept of concession rights, Higgins points out:

"... the attack on the inviolability of concession rights comes not from a rejection of concessions as property rights, but from changing views about permitted interferences with property rights.

For the moment, it should be noted that there are today certain jurists who seek to enlarge the matters covered as property... . The so called New Property Theorists have argued that the conception of property should be broadened to include non-proprietary rights that fulfil the same economic and social functions as rights of property".⁽¹³⁾

In addition, international law and practice has generally adopted a wide property concept⁽¹⁴⁾ and, as we shall see below, the practice of the Iran-U.S. Claims Tribunal also has followed such approach. This Tribunal in several cases has accepted that elements such as goodwill and future profitability, as well as the question of contractual rights can be the object of expropriation.

3.2.1 THE TRIBUNAL'S CASE LAW

- *Starrett v Iran*⁽¹⁵⁾

In this case concerning the expropriation of Shah Goli housing Company, the claimants argued that the expropriation was not limited to items such as buildings, but also included contractual rights to complete the project as well as the earned reasonable profits.

Accepting this the Tribunal declared that:

"There is nothing unique in the Claimant's position in this regard. They rely on precedents in international law in which cases... of expropriation or taking, [are] primarily aimed at physical property. In this case it appears from the very nature of the measures taken by the Government of Iran in January 1980 that these measures were aimed at the taking of Shah Goli. The Tribunal holds that the property interest taken by the Government of Iran must be deemed to comprise the physical property as well as the right to manage the project and to complete the construction in accordance with the Basic Project Agreement and related agreements, and to deliver the apartments and collect the proceeds of the sale as provided in the Apartment Purchase Agreements".⁽¹⁶⁾

This case could be construed as a confirmation of the susceptibility of contractual rights to a taking only to the extent that such rights are related to expropriation or nationalized physical property. However the decision of the Tribunal in *Mobil Oil Iran et al* confirms that "there is no inherent qualification of that kind".⁽¹⁷⁾

Generally speaking, in cases concerning the alleged taking of concession rights affecting Iran's natural resources, the Tribunal has held that such rights may constitute objects of a taking under international law, and this notwithstanding the fact that the law chosen by the parties to be applicable in their contractual relations is other than international law.⁽¹⁸⁾ Therefore, in the *Mobil Oil* case, which concerned the alleged taking of the Sales Purchase

Agreement (SPA)⁽¹⁹⁾ concluded between Iran and a consortium of major oil companies, the Tribunal stated that:

73. "In these cases... the lawfulness of an expropriation must be judged by reference to international law. This holds true even when the expropriation is of contractual rights. A concession, for instance, may be the object of a nationalization regardless of the law the parties chose as the law of the contract".⁽²⁰⁾

Yet in the *Amoco International Finance Corporation Case*⁽²¹⁾ the Tribunal pointed that:

108. "... expropriation which can be defined as a compulsory transfer of property rights, may extend to any rights which can be the object of a commercial transaction, i.e., freely sold and bought, and this has a monetary value".⁽²²⁾

Accordingly, as we mentioned earlier, the Tribunal's practice also confirms the idea that any challenge against the inviolability of concessions or other contractual rights "comes not from a rejection of concessions as property rights, but from changing views about permitted interferences with property rights".⁽²³⁾ In addition, in the *Amoco* case, the Tribunal confirmed that the property rights may be extended to any rights and is not limited, for instance, to contractual rights. However, in the *Starrett* case the Tribunal held that the property rights in the agreement was limited only to contract rights which are closely related to physical property which has also been expropriated.

3.3 FUNDAMENTAL CONDITIONS OF A TAKING

As we mentioned in the first chapter, a state's right to expropriate or nationalize foreign property is not as such in dispute. However, Verwey and Schrijver, while confirming such a right, also point out

circumstances that may render a taking illegal under international law. They say:

There is no doubt, in any case, that in the course of our century multilateral negotiations, international reactions to "nationalizations" and treaty practice have proven the correctness - at least with respect to the taking of foreign property which (a) is not explicitly prohibited by treaty or contract (as in the case of "stabilization clauses" or "unassailability clauses", and which (b) serves a public purpose- of the thesis that "in legal doctrine the right to nationalize as such is no longer the subject of debate".⁽²⁴⁾

Thus in the absence of specific treaty obligations to the contrary, a taking does not *per se* mean an illegal act in international law. However factors or circumstances which render a taking illegal under international law and the consequences of such an illegality as compared to the consequences of a legal taking are less clear.

Western industrializing countries declare that expropriation may occur but it must be in accordance with an "international minimum standard". Accordingly while "a state possesses the right to nationalize a property belonging to foreign nationals in its territory, ... it is entitled to do so only subject to conditions laid down by that law".⁽²⁵⁾

These conditions, the real essence of the "international minimum standard", have been reaffirmed on numerous occasions particularly by the U.S. Government as follows:

"Under international law, the United States has a right to expect:

That any taking of American private property will be non-discriminatory;

That it will be for a public purpose; and

That its citizens will receive prompt, adequate and effective compensation from the expropriating country".⁽²⁶⁾

The Fifth Amendment to the U.S. Constitution also provides:

"nor shall private property be taken for public use, without just compensation".⁽²⁷⁾

'Public purpose' as a requirement for a legal taking has also been included in some important U.N. Resolutions. For instance, paragraph 4 of Resolution 1803 provides that:

"Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility... or the national interest, both domestic and foreign".⁽²⁸⁾

Accordingly, we may note that international law has always required that a taking be for a public purpose. A public purpose may indeed be for reasons of public utility, but it may readily be appreciated that not all public purposes necessarily entail the transfer of property to a public utility. Reference to the national interest is obviously much wider than public purpose, but perhaps it covers those public purpose reasons that do not lead to public utility.

It is remarkable that even developing countries in one form or another have maintained that nationalization or expropriation must be based on consideration of public utility. Examining the constitutions of capital importing countries Weinstein states that almost all constitutions of Asian or African countries which contain expropriation provision specify the intent of, or reason for expropriation. He further points out that, "Generally, the constitutional provisions speak in terms of 'public utility', while the more recent constitutions also refer to the element of "social interest".⁽²⁹⁾

Thus it could be concluded that there is considerable unanimity that a taking, to be legal, should be for a public purpose. Now we will examine the Tribunal's approach to the basic legal conditions of a taking. We shall start with two inter-related conditions of 'public

purpose' and non-discrimination as conditions which are seldom denied.

3.3.1 THE PRACTICE OF THE TRIBUNAL

The Tribunal, relying on customary international law and the Treaty of Amity, has in several cases confirmed the requirement of the 'public purpose' for a taking. The decision of the Tribunal in the *American International Group v Iran*⁽³⁰⁾, is one such case. This case, was concerned the alleged taking of 35 percent of the shares of an insurance company by virtue of the Law of Nationalization of Insurance Companies⁽³¹⁾ the Tribunal stated that:

Examining the facts the Tribunal could not be held that the nationalization of the insurance company was by itself unlawful, as there was 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.⁽³²⁾

In addition, in the *INA* case, which concerned a taking of 20 percent shareholding in an Iranian Insurance Company (Bimeh Shargh), the Tribunal pointed out that not only nationalizations, but also expropriations, are subject to the fundamental condition in question. The Tribunal stated that:

"It has long been acknowledged that expropriations for a public purpose and subject to conditions provided for by law - notably that category which can be characterised as "nationalizations" - are not *per se* unlawful. A lawful nationalization will, however, impose on the government concerned the obligation to pay compensation".⁽³⁴⁾

In neither case was the Tribunal called upon to discuss the contents of the requirement of public purpose. This perhaps indicates that the limits imposed on the expropriating state by the public purpose

condition are relatively modest.⁽³⁵⁾ This was confirmed by the Tribunal in the *Amoco International Finance Corporation*. This case arose out of the taking of the "Khemco Agreement" which had been executed on 12 July 1966 between the claimant's Swiss subsidiary, Amoco International S.A. on the one hand, and the Iranian National Petrochemical Company (N.P.C.), on the other hand. The Khemco Agreement was established between the parties on a fifty-fifty basis as a joint stock company under the laws of Iran. Its purpose was to install and operate a plant with a view to the extraction and sale of natural gas and related products by virtue of contractual arrangements.

In this case the Tribunal in a partial award stated:

145. "A precise definition of the public purpose for which an expropriation may be lawfully decided has neither been agreed upon in international law nor even, suggested. It is clear that as a result of the modern acceptance of the right to nationalize, this term is broadly interpreted, and that states, in practice, are granted extensive discretion".⁽³⁶⁾

However, the Tribunal did accept that in principle there are certain limitations on the discretion referred to. For instance "an expropriation, the only purpose of which would have been to avoid contractual obligations of the state or of an entity controlled by it, could not be considered as lawful under international law".⁽³⁷⁾ It was also mentioned that "a state has no right to expropriate a foreign concern only for financial purposes". Nationalization with a view to obtaining the revenues "from the exploitation of national resources [for] the development of the country" however, would not as such be illegitimate "under this condition".⁽³⁸⁾

Nevertheless, in that case the Tribunal accepted that the Single Article Act which authorized the nationalization of the oil industry in Iran, was sufficient for the nationalization in question to be for a clear public purpose. The Tribunal stated:

146. "It could not be doubted that the Single Article Act was adopted for a clear public purpose, namely to complete the nationalization of the oil industry in Iran initiated by the 1951 nationalization of the Iranian Oil Industry Act, with a view to implementing one of the main economic and political objectives of the new Islamic Government".⁽³⁹⁾

This suggests that if legislation in respect of nationalization or expropriation indicates that it has been enacted for the public purpose this is *prima facie* sufficient proof of such a purpose. Accordingly, as Pellonpää and Fitzmaurice have pointed out:

"In present day international law is up to the state itself to determine what is public good requires, and such a determination is likely to be over-ruled by an international tribunal only in very exceptional circumstances".⁽⁴⁰⁾

An example of such exceptional circumstances could be the case where the expropriating state clearly and openly admits that the taking was resorted to for political considerations unrelated to any public purpose in a socio-economic sense. Another example could be where a dictator resorts to a taking for his private benefit. The illegality of takings which are arbitrary or which are motivated by considerations of a political nature, unrelated to the internal well-being of the taking state, was clarified by the Sole Arbitrator in *B.P.* case. The arbitrator in that case held "the taking by the respondent of the property, rights and interests of the claimant clearly violates... international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character".⁽⁴¹⁾

The existence of the requirement of non-discrimination was also confirmed by the Iran-U.S. Claims Tribunal in the *Amoco* case. In that case both the parties held widely different views on the contents of the prohibition of discrimination. Claimant alleged that the taking of "Khemco Company" was discriminatory on the grounds that while all comparable American interests were expropriated, in another of NPC's joint ventures, the Japanese share of a consortium, the Iran-Japan Petrochemical Company (IJPC) was not expropriated. The respondents denied discrimination. They asserted that the Single Article Act applied to the entire oil industry and the exclusion of the IJPC contract was an exception due to the specific circumstances. Furthermore they mentioned that the operation of the IJPC joint venture was not closely linked with other contracts relating to the exploitation of oil fields, whereas the operation of the Khemco plant was linked to the supply of gas from the oil fields operated jointly by Amoco and NIOC.⁽⁴²⁾ In addition, the respondents emphasized that "IJPC was not yet an operational concern at the relevant time, a point that was confirmed by the claimant".⁽⁴³⁾

The Tribunal pointed out that discrimination is widely held as prohibited by customary international law in the field of expropriation. Nevertheless it found it difficult, "in the absence of any other evidence, to draw the conclusion that the expropriation of a concern was discriminatory only from the fact that another concern in the same economic branch was expropriated".⁽⁴⁴⁾ In explaining this conclusion the Tribunal stated:

142. "... reasons specific to the non-expropriation enterprise or to the expropriated one, or to both, may justify such a difference of treatment. Furthermore, as observed by the arbitral tribunal in *Kuwait and American Independent Oil Company (Amin Oil)*... a coherent policy of nationalization can reasonably be operated gradually in successive stages. In the present case, the

peculiarities discussed by the parties can explain why IJPC was not treated in the same manner as Khemco. The Tribunal declines to find that Khemco's expropriation was discriminatory".⁽⁴⁵⁾

Thus the *Amoco* case suggests that while non-discrimination is a condition of lawful expropriation at the same time, however, it recognises that it is not an absolute requirement. Accordingly, as Professor Harris has correctly concluded "discrimination that is reasonably related to the public purpose that underlies the expropriation is not illegal".⁽⁴⁶⁾

In addition as the *Amoco* case itself indicates different treatment of various persons or classes of owners of property does not automatically amount to prohibited discrimination. Such differentiation is wrongful only if it is unreasonable, or it is without some objective justification. While distinction between foreigners on the one hand and nationals of the host country itself on the other is clearly justifiable, specific reasons may also justify differential treatment of various classes of foreigners. Accordingly, it could be concluded that "while the requirements of 'public purpose' and 'non-discrimination' in takings are well established, a certain shift in favour of the state's economic sovereignty appears to be discernible in the way they are interpreted today".⁽⁴⁷⁾

In addition to "public purpose" and "non-discrimination", "provision of compensation" is the third aspect concerned in the legality of a taking. Since this condition is a core issue in foreign investment disputes and raises special questions, and this study is focussed on the compensation issue in the awards of the Iran-U.S. Claims Tribunal, this requirement is discussed extensively in other

chapters. Here therefore we shall only examine the requirement of the "due process of law" that is occasionally suggested as a further requirement, but not unanimously accepted as international law.

3.4 THE REQUIREMENT OF DUE PROCESS OF LAW

The notion of "due process of law" has been described as stipulating that:

"The measures must be based upon (domestic) law, taking in accordance with procedures prescribed in the Constitution or (relevant) laws, subject to the possibility of appeal, and not applied in an arbitrary manner".⁽⁴⁸⁾

The meaning of this requirement is sometimes described in much simpler terms like "the property must be amenable to the jurisdiction of the expropriating state". In whatever terms the definition of due process of law encompasses not only the requirement of compatibility with domestic law safeguards, but also including certain minimum standards existing apart from the domestic law.⁽⁴⁹⁾

3.4.1 THE PRACTICE OF THE TRIBUNAL

Generally speaking the Tribunal's case law suggests that the lack of due process of law is not an independent ground for arguing the legality of taking. For instance, in the *Sedco* case, which concerned the taking of the Claimant's share in SEDIRAN Drilling Company as well as the taking of oil drilling and related equipment belonging to the claimant's Panamanian subsidiary, Judge Brower, examining this issue, stated that it is unlikely that denial of justice in customary sense constitutes a basis separate from those recognized above (i.e. non-discrimination, public purpose, violation of a specific obligation". Further he explained:

"For example, when the alleged denial of justice is lack of notice of the taking or the lack of an opportunity to challenge judicially the propriety of the taking, that taking itself is not a damage resulting from the denial of justice. To the degree that alien has a customary right to due process, the denial of justice does not render the previous taking unlawful, but rather is a wrong itself for which proximately caused damages may be sought. Although judicial review might have revealed discrimination or the lack of public purpose, it is those aspects and not the lack of opportunity for municipal Judicial review that renders the taking unlawful".⁽⁵⁰⁾

The issue of due process also arose in *Amoco* which the claimant based its argument concerning the wrongfulness of the taking on the alleged violation of Iranian law, both substantive and procedural.⁽⁵¹⁾ The claimant contended that the expropriation of its rights in the *Khemco* Agreement was unlawful. It stated that:

119. "... expropriation of its right in the *Khemco* Agreement was a violation of the 1965 Act concerning Development of Petrochemical Industries, which was in force at this time and which provided for the enforcement of such an agreement, once entered into and approved by the government and the competent parliamentary committees".

The Claimant alleged furthermore that "no statute or decree authorized the expropriation, which is therefore devoid of any legal basis".⁽⁵²⁾

The Tribunal stated that:

120. "Conformity with domestic law is not usually cited as a condition for an internationally lawful nationalization and the Treaty [of Amity] specifies no such condition".⁽⁵³⁾

But it should be stated that in the *Amoco* case, the Tribunal did not have to adopt a definite position, as it found that in any event the taking was in accordance with Iranian law, i.e. the Single Article Act and the procedures established by it.⁽⁵⁴⁾ Yet the Tribunal expressed doubts as to whether compatibility with domestic law could

be regarded as a requisite of international law, given the lack of case law supporting such a proposition. (55)

The Tribunal (as did Judge Brower) referred to the fact that "violation of domestic law, when invoked, is most often analyzed as evidence of the lack of fulfilment of one of the conditions imposed by international law, such as the existence of public purpose... or of the payment of compensation". (56) Therefore the Tribunal's limited case law suggests that the lack of due process or incompatibility with domestic law are not independent grounds for challenging the legality of a taking. While violation of domestic law may indirectly reveal breaches of the requirements of public purpose and non-discrimination, this cannot *per se* be characterized as a basic legal condition of expropriation or nationalization.

3.5 THE RELEVANCE OF THE STATE CONTRACTS

Another controversial issue in the taking context might be the requirement that a taking should not be in conflict with a "state contract" i.e. a contract or agreement between the state and the foreign investor.

3.5.1 GENERAL REMARKS

State contracts or investment agreements are transnational contracts between a state, its agencies or state-owned companies acting on its behalf and a foreign investor, usually a multinational company, relating to an investment in an oil, mining, or other industrial venture within the territorial jurisdiction of that state. (57) These agreements are in the form of a concession, an equity or contractual joint venture, or a service contract. Agreements which are involved

in the exploitation of natural resources are sometimes described as Concession agreements. The Contracting state may act in breach of Contract, use its powers under domestic law to annul the Contract, or repudiate the Contract by means illegal in terms of domestic law. Now the question might be what is the position of international law in respect of repudiation of such Contracts.

In principle, the position is regulated by the general principles governing the treatment of aliens. Therefore the act of the host or contracting state will incur state responsibility if it constitutes a denial of justice or an expropriation contrary to international law. The general view is that a breach of a contract, provided of course it is not a confiscatory annulment, does not create state responsibility on the international plane.⁽⁵⁸⁾ Accordingly, a situation in which the host state exercises its executive or legislative authority to destroy contractual rights, comes within the law relating to expropriation. Such action will therefore lead to state responsibility under the same conditions as expropriation.

As a result, it is often stated that the repudiation of the Contract is illegal if it is arbitrary and, discriminatory. For instance action directed against persons of a particular nationality or race is discriminatory, and action which lacks a normal public purpose is arbitrary. A government acting in good faith may enact exchange control legislation or impose trade restrictions which incidentally lead to the annulment or non-enforceability of contractual rights. It is difficult to treat such action as illegal in international law. However, there are some international lawyers who argue that the breach of a state Contract by the Contracting government of itself creates international responsibility. For instance, Jennings has

argued that there are no basic objections to the existence of an international law of Contract.⁽⁵⁹⁾ He points out that in the field of nationality, for instance, rights created in municipal law may be evaluated according to international law standards. Exponents of the international law character of state Contracts also use arguments based upon the doctrine of acquired rights and the principle of *pacta sunt servanda*.⁽⁶⁰⁾ However, there are some other lawyers who on the other hand, contend that state contracts are not concluded between states and do not have an international status, because private companies are not subjects of international law.⁽⁶¹⁾

This latter view receives some support from the decision of the International Court in *Anglo-Iranian Oil Company*⁽⁶²⁾ case.

The Court in that case could not accept the view that a concessionary Contract signed between a government and a foreign private corporation could be considered to be an international treaty.⁽⁶³⁾

Consequently, the cancellation of a concession of this nature, before the expiry of its term, as a consequence of a measure of nationalization, cannot be considered as breach of an international treaty. Instead, such a measure would constitute the expropriation of the contractual rights of a foreign company which means, of course, that such a measure would require the payment of appropriate compensation. In other words, in a taking involving a concession agreement or a state contract the mere existence of the agreement or contract does not render the taking unlawful under international law. This is confirmed by the practice of the Tribunal where, as will now be explained, is noticeable that the mere existence of a state contract does not render a taking unlawful.

3.5.2 THE TRIBUNAL'S PRACTICE

In the *Amoco* case, which involved a state contract, the Tribunal in its partial award stated that:

179. "In international practice, and notably in the cases submitted to international arbitration, the dispute has focussed on the question of the so called 'stabilization clauses'. For the reasons set forth in the [case] it is not seriously questioned that, in the absence of such a stabilization clause, a contract does not constitute a bar to nationalization. That is an aspect of the evolution of international law in this area and of the general recognition of the right of states to nationalize".⁽⁶⁴⁾

Accordingly the state contract *per se* does not prohibit a taking, but a "stabilization clause" in a state contract could possibly have such an effect.

3.5.3 STABILIZATION CLAUSES

The term 'stabilization clause' has been defined as a clause contained in an agreement between a government and a foreign company by which the government party undertakes neither to repudiate nor to cancel the agreement nor to modify its terms, either by legislation or by administrative measures.⁽⁶⁶⁾

The Stabilization Clause concept was characterized by the Tribunal as:

166. "... contract language which freezes the provisions of a national system of law chosen as the law of the contract as the date of the Contract, in order to prevent the application to the Contract of any future alterations of this system".⁽⁶⁶⁾

The legal significance of such clauses is controversial because the clause involves a tension between the legislative sovereignty and public interest of the state party and the long term viability of

contractual relationships. If we take the position that state Contracts are valid on the plane of international law then a breach of such a Contract is unlawful and to be compensated as a form of expropriation. Another view is that that stabilization clauses as such are invalid in terms of public international law. Arechaga supporting this view states:

"We do not believe that there is an international law of contract, but even if it were so, international law contains the fundamental and overriding principle of the permanent sovereignty of the state over all its wealth and natural resources".⁽⁶⁷⁾

Furthermore, he points out that stipulation of a stabilization clause in a contract "does not achieve the purpose of a real stabilization clause because international law does not forbid a nationalization, nor the resulting cancellation of the Contract, provided appropriate compensation is paid".⁽⁶⁸⁾

In the *Amoco* case the Tribunal stated that the right to nationalize, a fundamental attribute of state sovereignty... cannot easily be considered surrendered and that it would be advantageous to construe any provision of a contract as forbidding nationalization.⁽⁶⁹⁾ As a result the Tribunal did not take a definite standpoint on the legal relevance of the stabilization clause in the agreement in question. However the Tribunal's reasoning in its partial award in the *Amoco* case is not without interest. It suggests that the language of a contract provision, in order to make that provision a "stabilization clause", should be quite explicit in obliging the state not to use its legislative power to terminate the contractual relationship. This perhaps can be seen as another "aspect of the evolution of international law in the area and of the general recognition of the right of states to nationalize".⁽⁷⁰⁾

The second Tribunal award involving stabilization clause issues was that in *Mobil Oil*. As we saw earlier, *Mobil Oil*⁽⁷¹⁾ involved a long term agreement for the purchase of oil between Iran's NIOC and several American oil companies known as the Consortium. Article 29 of the agreement provided that it was to be interpreted in accordance with the laws of Iran but that:

"The termination before expiry date or any alteration of this agreement shall be subject to the mutual agreement of the parties".⁽⁷²⁾

Article 30B of the agreement also provided that the agreement would be "duly enacted as a part of the law of Iran".⁽⁷³⁾ The claimant argued that the agreement was subject to the international rule of *pacta sunt servanda* which governs contracts between states and private persons as well as interstate agreements.⁽⁷⁴⁾ Iran argued that *pacta sunt servanda* is simply inapplicable in that it is a rule of international law specifically framed to govern treaties, i.e. interstate agreements, and thus it cannot be interpreted to limit the right of a sovereign state to legislate, even if such legislation varies contractual rights.⁽⁷⁵⁾

The Tribunal found that the original agreement had not been breached by either party but had been ended by mutual agreement as required by the stabilization clause quoted above, and that this agreement was evidenced by the conduct of the parties over an extended period of time.⁽⁷⁶⁾ Thus the majority award avoided a direct ruling on the stabilization cause. However, Judge Brower in a concurring opinion, relying on the above mentioned Articles of the Agreement and contemporary international precedents concluded that Iran's expropriation of the claimant's property interests in the agreement constituted a breach of the stabilization clause in this case.⁽⁷⁷⁾

In summary, the majority awards in *Amoco International Finance* and *Mobil Oil* avoided holdings on the question of stabilization clauses by ruling in the former that Iran was not a party to the agreement and therefore not bound by the Stabilization Clause and in the latter by holding the parties had ended the agreement by mutual agreement so that there was no breach of the clause in that case. In *Amoco International Finance*, however, it was noted that the general principle of law known as *pacta sunt servanta* is not applicable to contracts between states and foreign private parties.⁽⁷⁸⁾

3.6 THE OBLIGATION TO PROVIDE SOME MEASURES OF COMPENSATION

It is generally recognised that a taking should not only be for a public purpose and non-discriminatory, but that it should also be accompanied by some measure of compensation, at least as a matter of principle.⁽⁷⁹⁾ A detailed discussion of the standard and calculation of compensation will be presented in the following chapters. In this section we examine whether the duty to pay compensation promptly is a condition similar to those related to public purpose and non-discrimination, and whether non-payment of compensation renders the taking *ipso facto* wrongful, or could be considered an independent consequence of taking. The latter is suggested by the *INA* and *American International Group* cases.

As stated in the passage quoted earlier,⁽⁸⁰⁾ in the *INA* case the Tribunal seemed to make a distinction between factors relating to 'per se unlawfulness', on the one hand, and the obligation to pay compensation on the other. Similarly in *American International Group*, after characterizing the nationalization as lawful with reference to the requirements of public purposes and non-

discrimination, the Tribunal went on to state that it is a 'general principle of public international law that even in a case of lawful nationalization the former owner is normally entitled to compensation⁽⁸¹⁾. Therefore in both cases the Tribunal has clearly distinguished such basic conditions of lawfulness as the 'public purpose' requirement from the duty to pay compensation. Although both are connected with the legality of a taking, they do this in a different way. Public purpose and non-discrimination are basic conditions the non-fulfilment of which makes the taking *ipso facto* wrongful or 'per se unlawful', i.e. a wrongful act under international law. Non-payment of compensation as such is not a ground of wrongfulness; rather the duty to pay compensation appears to be the legal consequence even of a taking which can be characterized as lawful.⁽⁸²⁾

However the Tribunal in the *Amoco* case seemed to contradict the above analysis by stating:

116. "The other condition to a lawful expropriation provided for in the Treaty of Amity is the 'prompt payment of just compensation', an obligation which is also accepted as a general rule of customary international law as well".⁽⁸³⁾

This statement might suggest that failure to pay compensation more or less immediately renders the taking a wrongful act under international law. However, a closer reading of the partial award in *Amoco* does not support such a conclusion. This is shown by the fact that despite the lack of prompt (or any other) payment by the time of the Tribunal proceedings, the Tribunal explicitly found the taking in question to be lawful. Hence, prompt payment is not (literally) a condition of the legality of a taking. As Pellonpää and Fitzmaurice have pointed out, 'promptness' rather has to be understood as

referring to the requirement, that the compensation be accompanied by interest from the date of taking'.⁽⁸⁴⁾

Although actual non payment does not of itself render a taking illegal, the Tribunal's practice does suggest that some indication of, or provision for, the payment should be made at the time of the taking. In *Amoco* the Tribunal referred to Article IV(2) of the Treaty of Amity, according to which 'adequate provision shall have been made at or prior to the time of taking for the determination and payment of compensation, and stated that such provisions must provide the owner of the expropriated assets with a sufficient guarantee that the compensation will be actually determined and paid in conformity with the requisites of international law'.⁽⁸⁵⁾ That customary international law also contains the kind of requirement is further supported by the fact that Iranian parties before the Tribunal have accepted that 'the international legal duty to pay compensation requires... an early indication of an intention to compensate...'.⁽⁸⁶⁾ Also American arbitrators, who are usually tempted to impose the strictest requirements on expropriating states, do not, as a matter of general principle, seem to require essentially more than this.⁽⁸⁷⁾

The opinion of Judge Brower in *Sedco* (second interlocutory award), can probably be taken as both the lowest common denominator of the Tribunal practice, and also as a succinct description of the general principles. The Judge stated:

"I must express doubt as to whether, under customary international law, a state's mere failure, in the end, actually to have compensated in accordance with the international law standard set forth herein necessarily renders the underlying taking *ipso facto* wrongful. If, for example, contemporaneously with the taking the expropriating state provides a means for the determination of compensation which on its face appears calculated to result in the

required compensation but which ultimately does not, or if compensation is immediately paid which, though later found by a tribunal to fall short of the standard, was not on its face unreasonable, it would appear appropriate not to find that the taking itself was unlawful but rather only to conclude that the independent obligation to compensate has not been satisfied. If, on the other hand, no provision for compensation is made contemporaneously with the taking, or one is made which clearly cannot produce the required compensation, or unreasonably insufficient compensation is paid at the time of taking, it would seem appropriate to deem the taking itself wrongful".⁽⁸⁸⁾

Considering the practice surveyed above, it is possible to conclude that there are three basic conditions of legality; (i) the taking has to be for the public purpose; (ii) the taking should be carried out in a non-discriminatory fashion; and (iii) it should be followed and accompanied by some provision, or indication that such compensation as is required by international law will be forthcoming.

3.7 THE TRIBUNAL AND THE QUESTION OF THE ACTIONS ENGAGING STATE RESPONSIBILITY FOR A TAKING

For a company or an individual alleging expropriation of its property two issues are crucial: (i) the liability of the state, for the conduct said to constitute expropriation; and (ii) the date at which the expropriation occurred. The former is a necessary element for a claim to be successful. The latter, which will be discussed in Chapter 4, may have a great impact on the valuation of the dispossessed property.

3.7.1 DETERMINING WHETHER AN EXPROPRIATION HAS OCCURRED

INA, *American International Group* and *Amoco*, which were examined in previous sections, are cases which exemplify taking as explicitly having been found lawful by the Tribunal. The three cases share the

factor that they concerned deprivations of property based on special nationalization laws (Iranian public laws expressly nationalizing industries or particular entities). In this category of cases there can be no doubt that a taking attributable to the state has occurred and as a matter of fact, the Tribunal also has had no difficulty in recognizing the expropriatory effect of the above Iranian laws.⁽⁸⁹⁾ However, in international law it is accepted that legal consequences can also follow from acts that are not formal expropriations, yet constitute an equivalent interference with the property. Firstly, in such cases, it must be determined whether such acts or events constitute a taking; only then the question of compensation can be addressed.

Most cases brought before the Tribunal belong to the category involving the 'gray area' of expropriation in which no formal taking is announced by the host government, but the alien argues that the property has been seized *de facto*.⁽⁹⁰⁾

Determining whether and how an indirect taking is attributable to the host state's government, requires a two-state inquiry in to the nature of the relevant acts and employs the conceptual framework developed to determine state responsibility for wrongful acts. As stated in *Otis Elevator company*:

29. "The Tribunal must... examine the acts of interference *Otis* complains of and determine whether any or all are attributable to the Government of Iran and whether any or all, by themselves or collectively, constitute a sufficient degree of interference to warrant a finding that a deprivation of property has occurred".⁽⁹¹⁾

Accordingly, in the first stage, it has to be established that the act is attributable to the state which can be called the subjective element of state responsibility. The second stage concerns with the

objective element of the state responsibility. Here, the priority is to determine whether the encroachment, attributable to the state, on the property rights of the owner, actually constitutes a taking. While the subjective and objective elements are inextricably linked and may thus be difficult to examine separately, distinguishing between them will provide a useful point of departure for the discussion later in this chapter of what kind of interferences by a host state will justify a decision that there has been a taking.

3.7.2 THE QUESTION OF ATTRIBUTABILITY TO THE HOST GOVERNMENT

A basic condition for state responsibility in international law is conduct consisting of an action or omission which is attributable to the state.⁽⁹²⁾ Attributability, however, assumes that a distinction exists between public and private acts. Consequently, means are needed to differentiate between these two areas. Chapter II (The "Act of State" Under International Law) of the ILC Draft Articles on State responsibility for wrongful acts can provide authoritative guidance in the search for such means.

The Tribunal has in cases concerned with the taking of property had to concern itself with many of the problems addressed in the ILC Draft. Although the Tribunal has jurisdiction under the Claims Settlement Declaration over government owned and government controlled entities for whose actions Iran would not necessarily be responsible under general international law,⁽⁹³⁾ it has from the beginning made it clear that where there is a taking the general rules of responsibility under international law apply.⁽⁹⁴⁾ Therefore, while in many situations it is not necessary for the Tribunal to decide whether the actions of a particular Iranian

respondent are attributable to Iran under general principles of international law, in expropriation cases the Tribunal does have to decide this issue.⁽⁹⁵⁾

In most cases of expropriation or nationalization the question of attributability to the host government has not been difficult. Usually the alleged deprivatory acts can be attributed to the legislative and/or executive organs of the state acting in those capacities. Since it is accepted that the conduct of an organ of the state shall be considered as an act of that state, the acts of these organs can therefore be characterized as acts of state under international law.

3.7.3 JUDICIAL ORGANS

Actions by a judicial organ of the state may also be regarded as an act of that state and amount to a taking. This was confirmed in the *Oil Field of Texas* case, where the Tribunal said that:

'it is well established in international law that the decision of a court in fact depriving an owner of the use and benefit of his property may amount to an expropriation of such property that is attributable to the state of that court'.⁽⁹⁶⁾

3.7.4 REVOLUTIONARY ORGANS

In *Sola Tiles*⁽⁹⁷⁾ the Tribunal held that it is also well settled that the so-called Revolutionary Committees are among those organs whose acts are attributable to the Government of Iran and consequently the government is responsible for them as a matter of law. The same applies to the Revolutionary Guards. The seizure of property by such organs has consequently been attributable to Iran as a taking. In

fact in international law these entities are regarded as a group of persons acting on behalf of the State and thus in the view of the Tribunal are regarded as organs of the Iranian state.

3.7.5 EXCEPTIONAL CASES

Exceptionally there may be groups of persons for whose acts the state is not responsible although they have had a role in seizing property. The Workers' Council of the Schering Company of Iran is an example of this.⁽⁹⁸⁾ In 1980, the assets of the above company was seized by the Workers' Council. To examine whether such a Council could be characterized as a state organ, the Tribunal, after reviewing the purpose and origins of the relevant legislation, concluded that;

'The Constitutional and regulatory framework for the creation of Workers' Councils do not indicate that the Councils were to have other duties than basically representing the workers' interests vis-a-vis the management of companies and institutions and to co-operate with the management. That the formation of the Councils was initiated by the State does not itself imply that the Councils were to function as part of the State machinery'.⁽⁹⁹⁾

Here, the Tribunal could not find that the acts of the Council were presumptively attributable to the State. Thus in order to make Iran responsible it had to be specifically established that the Council in fact acted on behalf of the government, or that there was direct government involvement. However, the Tribunal found no evidence that the Council was in fact acting on behalf of the government of Iran, or any of its agencies or entities. Also it noted that there was no evidence of any governmental interference or control over the election of the various members of the Council. Moreover, there was no evidence of any orders, directives, or recommendations by the

Government to the Council, and no proof that it acted upon any instructions of the Government.

In cases in which a taking is allegedly carried out by a private commercial entity, the Tribunal appears to follow the same basic analysis, except that it assumes that in the ordinary case there is no *dejure* link, since, the separate juridical status of the corporation is normally respected.⁽¹⁰⁰⁾ Actions taken by such commercial entities that may have an adverse impact on the economic affairs of those doing business with the entities are not, by virtue of the governmental ownership of such entities, thereby transformed into expropriations.

The most recent case supporting this point is *Flexi-van leasing Inc. v Iran*⁽¹⁰¹⁾ where the claimant alleged that the Government acquired ownership and control of two private commercial corporations with which the claimant had been doing business. It charged that the failure of the corporations to honour their contracts with the claimant constituted an expropriation of those contract rights by the government. The Tribunal, however, held that the mere assumption of ownership and control over the two corporations did not constitute expropriation of the rights associated with the contracts entered into by those corporations. It held that in order to establish liability of the Government the claimant was required to show direct governmental interference with the Contracts, such as 'orders, directives, recommendations or instructions issues to the corporations by the governmental agency controlling the corporations'.⁽¹⁰²⁾ However, the Tribunal has not provided any explanation or analysis of the source of this reasoning. This lack of explanation as Brower has pointed out: 'appears to be analogous to

the traditional piercing-the-veil standard for disregarding corporate entities'.⁽¹⁰³⁾

A similar approach to attributability was applied in *International Technical Products Corp. v Iran*⁽¹⁰⁴⁾ In that case the claimant alleged that a Government-owned bank, (Bank Tejarat), had expropriated a building belonging to the claimant. The bank initially argued that it had acquired the claimant's building through an authorized sale, then later claimed to have succeeded to title through a formal mortgage foreclosure. The Tribunal noted that to hold the Iranian government responsible for the alleged taking would require one of two findings; (a) that the bank was acting in its capacity as a state organ (rather than as a commercial entity); or (b) that the Government or one of its organs was an accessory to the transfer.

Emphasizing the separate legal personality of Bank Tejarat the Tribunal noted that, although in certain respects the bank 'may be said to perform governmental functions',⁽¹⁰⁵⁾ when acquiring real property the bank presumably acted in its ordinary commercial role. Thus the Tribunal held that even if the bank had acted lawfully in acquiring the real estate, governmental responsibility under international law for an expropriation would not be established.

In these exceptional cases, the claims were dismissed because the evidence which was presented did not show that the omissions referred to were due to the instructions of the Government.

3.7.6 HOW AN ACT OF AN ORGAN MAKES THE HOST STATE RESPONSIBLE

The next question which arises is what the sort of positive evidence of government interference with the actions of a separate legal entity is needed to make such actions attributable to the state. Among the cases brought before the Tribunal, the *Foremost* case⁽¹⁰⁶⁾ appears to provide the best answer to this question. This case concerned the alleged expropriation, through various acts and omissions, of the claimant's 31 per cent equity interest in an Iranian joint-stock company called Pak Dairy, most of which (52 per cent) was owned by the Government. The Claimant alleged that its interest had been expropriated due to: (1) the expulsion of its expatriate personnel from Iran during the course of the Revolution; (2) the corporation's refusal, from 1979 through to the day of the award, to pay the claimant any dividends; (3) the forced departure of the company's two representatives from the seven-person board of directors in late 1981; and (4) interference with the provision to the claimant of basic financial information about the corporation thereafter. The Tribunal dismissed the claim of alleged expropriation.⁽¹⁰⁷⁾ But it concluded that, through Pak Dairy's refusal to pay certain cash dividends to *Foremost*, the Government became guilty of 'other measures affecting property rights'.⁽¹⁰⁸⁾ That this non-payment could 'be attributed beyond doubt to the state' was obviously due to the fact that it was the Government representatives on Pak Dairy's board of directors who, with explicit reference to government policy, pressed through the decision not to pay the dividends to the American shareholders.⁽¹⁰⁹⁾

The above examination of the Tribunal's case law shows that, before attribution can take place, it is vital to ascertain the nature of

the organ whose direct acts may be responsible for deprivatory events. Sometimes, as we saw in *Schering* case, it is a kind of functional analysis rather than any formal criterion that determines whether an entity is regarded as an organ of the state; at other times, conclusions in this regard are based on the formal judicial status of the organ and so it is concluded that actions of corporations entrusted with a separate legal personality, although owned or indirectly controlled by the government, cannot be attributed to the state.

3.8 THE TRIBUNAL FINDINGS ON WHAT CONSTITUTES EXPROPRIATION

In the previous section we examined the question of governmental intention as an element of expropriation. However, a positive intention to expropriate foreign property is not always required to constitute a taking under international law. As the Tribunal in the *Tippets* case declared, the 'form of the measures of control or interference is less important than the reality of their impact'.⁽¹¹⁰⁾ A taking may occur under international law 'through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected'.⁽¹¹¹⁾ However, there is no clear-cut formula for determining what is necessary for a taking in international law. When deciding cases which have been brought before it the Tribunal has consistently ruled that interference by the government with the alien's enjoyment of the concomitants of ownership, such as the use or control of property, or the income and economic benefits derived therefrom, constitutes a compensable taking.⁽¹¹²⁾ The Tribunal's pronouncements on the question of the degree of interference necessary to a finding of taking has been slightly different,

however. In certain cases the Tribunal has used the formula of unreasonable interference in the use of the property right; in others it has described the standard as requiring an "interference... to such an extent that these [property] rights are rendered so useless that they must be deemed to have been expropriated".⁽¹¹³⁾ In still further cases it has declared that a taking occurs whenever an owner is "deprived of fundamental rights of ownership" and the deprivation "is not merely ephemeral".⁽¹¹⁴⁾ However, as Tribunal-Member Brower pointed out, "the most common bench mark of the Tribunal's discussion in this regard, has been reasonableness".⁽¹¹⁵⁾ In one of the earliest cases⁽¹¹⁶⁾ the Tribunal suggested in a dictum that an unreasonable interference "with the use of property is sufficient to find taking".⁽¹¹⁷⁾ This standard was followed shortly thereafter in *Golpira v Iran*,⁽¹¹⁸⁾ and more recently in *International Technical Products Corp. v Iran*⁽¹¹⁹⁾ Nonetheless, the Tribunal's discussions of the degree of interference necessary to constitute an expropriation, have not focused on semantics, but rather on the reality of the impact of the alleged taking.⁽¹²⁰⁾ As a result, 'the standard both explicitly and implicitly adopted by the Tribunal requires an unreasonable interference with property rights caused by actions attributable to the Government'.⁽¹²¹⁾

However, the 'unreasonable interference' formula is a wide and general standard. It varies under different circumstances. The parameters of attribution of a taking to the Government also may vary. Since, in previous sections, the question of attributability was discussed, here we examine only the question of unreasonable interference. This question will be discussed in connection with the three major types of property on which expropriation cases have been brought before the Tribunal: (1) Personal property, such as office

equipment or other tangible objects; (2) Funds held in bank accounts; and (3) entire businesses or major operating assets.

3.8.1 UNREASONABLE INTERFERENCE

3.8.1.1 TANGIBLE PROPERTY

The cases involving expropriation of tangible property by Iran have involved the physical seizure of these properties.

In these cases, the Tribunal has had no difficulties in finding a taking. Such a finding was made in *Dames & Moore v Iran*.⁽¹²²⁾ The claimant charged that Government representatives physically occupied a rented warehouse in which the claimant stored its vehicles, office equipment, instruments and other equipment.⁽¹²³⁾ It was declared that the warehouse was to be used to house refugees of the war with Iraq and that any claimant's private property stored in it was to be turned over to the Iranian Army. The Tribunal considered the claimant's affidavits and allegations as sufficient proof of this occurrence, especially since the Government of Iran did not contest claimants' evidence.⁽¹²⁴⁾

The Tribunal held that:

'the unilateral taking of possession of property and the denial of its use to the rightful owners may amount to an expropriation even without a formal decree regarding title to the property'.⁽¹²⁵⁾

The Tribunal also rejected the respondent's alternative assertion that the custodian named by the claimant to safeguard the property in its absence had previously transferred the property to himself to satisfy certain unsubstantiated debts of a vague origin. Having found that the property had been taken by the Government of Iran, the

Tribunal held that claimant was entitled to compensation for the value of its property.⁽¹²⁶⁾ The same result was reached in *William L. Pereira Assocs., Iran v Iran* as well as in *Computer Sciences Corp. v Iran* in which the claimant's affidavit evidence testifying to the events was sufficient to establish a taking of its office equipment by Iran.⁽¹²⁷⁾ In this last case the Tribunal pointed out: 'this evidence has not been rebutted and the Tribunal is satisfied that CSCSI was thus denied the use of its office equipment and that it was therefore denied access to the equipment'.⁽¹²⁸⁾

Similarly in *General Dynamics Telephone*,⁽¹²⁹⁾ the Claimant's evidence established that it had left test equipment and installation spares in locked rooms at Iranian Air Force bases and in Iranian customs offices. Because the property was left in the custody of Iranian government organizations, the Tribunal held that Iran could be deemed to be responsible and awarded \$72,606, representing the value of the equipment claimed.⁽¹³⁰⁾

In the above mentioned claims, the claimants presented evidence both as to the taking and the government's involvement that was convincing enough to create at least a presumption in favour of the claim. In other cases in which the claimant's evidence was not so convincing, the Tribunal denied the claims. The decision of the Tribunal in *Morrison Knudson Pacific*⁽¹³¹⁾ is an example of the denied cases. In that case, the claimant alleged that Iran had confiscated certain minor-equipment used in its operations, but presented no evidence except for the affidavit of its business manager whose statements were speculative and vague. Since the evidence was not convincing, the claim was dismissed for lack of proof.

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A similar result on the same reasoning was reached in the *AHFI Planning*⁽¹³²⁾ case. In that case the claimant alleged that its office in Tehran was taken over in November 1979 by a revolutionary Committee acting on behalf of the government of Iran, following which furniture and equipment were expropriated. The only evidence presented by the claimant in support of this claim was an affidavit by the international sales manager of the claimant that he had received a phone call from the Iranian landlord relating that unidentified persons styled as "representatives of a revolutionary Committee" had occupied the leased offices and taken possession of the AHFI property. The Tribunal held that that was an inadequate basis on which to find that the Iranian government was responsible and as a result the claim was dismissed for lack of proof.

Accordingly, in expropriation claims involving the taking of tangible assets, the Tribunal awards may be cited for the principle that the evidence of a taking by some persons or organizations for whom the government is responsible must be clear and convincing. Simply showing that property was left behind and alleging expropriation of it has consistently been found by the Tribunal to be an insufficient basis for holding Iran liable. However, where the evidence has shown that the property was in the possession of Iranian government organizations, or there was convincing evidence of government action of some kind, a finding of expropriation has been made.

3.8.1.2 BANK ACCOUNTS

During, and especially after any revolution, there are usually restrictions on foreign investors. Although these depend on the political circumstances of the revolutionary state, they may include

restrictions on withdrawing and repatriating money from the revolutionary state.

This happened to American investors in Iran; many of them were unable to withdraw their dollar and rial funds, held in their Iranian bank accounts, at the time they departed from Iran. Consequently, they claimed before the Tribunal to recover such losses. Their claims were based on different theories of liability, for example, breach of contract, unjust enrichment; expropriation and so on. However, as far as this part of the study is concerned, we examine only those claims which were based on expropriation. In resolving these cases the Tribunal appears to have applied the same basic standard of unreasonable interference with the use of property, but has demanded proof of a high degree of interference by Iran before a taking is considered to have occurred. This can be seen in the *Harza*⁽¹³³⁾ case, where the claimant because of administrative problems in relation to Bank Melli Iran, was prevented from withdrawing from his account on several occasions, but the Tribunal held that the claim must be dismissed for want of proof. Reviewing the evidence the Tribunal concluded that it did not support a finding that the bank had intended to deprive the claimant of its rights to use its bank account, nor that the requirements that had been imposed by the bank were unreasonable or even inconsistent with normal Iranian banking practice. As a result the claim was dismissed.

Similarly, the Tribunal dismissed the claim in *American Housing International*.⁽¹³⁴⁾ In that case an Iranian bank had refused to honour cheques drawn by the claimant on his account, but there was conflicting evidence as to the reasons for the refusal. Claimant's evidence consisted of an affidavit by a Company officer that a

substantial deposit had been made to the account and that the bank had subsequently refused to honour cheques drawn on it. In response the bank filed an affidavit by one of its managers asserting that the account was without funds. Declaring the only issue was whether there were any funds in the claimant's account, the Tribunal held that the claimant had not discharged its burden of proving that there remained a balance and the claim was dismissed.⁽¹³⁵⁾

In *American Bell International Inc. v Iran*,⁽¹³⁶⁾ on the other hand, the Tribunal clearly found a taking of a bank account. In this case the claimant, which in early 1979 left Iran, along with a large telecommunications project it had there, left money in an Iranian bank account for the settlement of its outstanding obligations. This money could be disbursed only upon the joint signatures of the claimant's designated agent and the representative of an Iranian governmental entity with which the claimant had been doing business prior to the Revolution. After having cleared from the account, first a 'substantial amount' and then all of its obligation, the Claimant several times requested the release of the balance of the funds. These requests were denied. Instead, an agent of the Iranian governmental entity demanded that the claimant's agent accede to its order to transfer the funds into an account under the sole control of the Iranian Government. The agent of the Government threatened that these demands must be complied with and non-compliance would, in any case, 'not prevent' the Government from obtaining access to the funds.

The claimant argued that this constituted expropriation under international law.⁽¹³⁷⁾ The respondent denied liability, alleging that the events did not amount to expropriation under Iranian law

which was the governing law of the contracts under which the claimant had been performing in Iran.⁽¹³⁸⁾ The Tribunal had no difficulty concluding that the funds had been taken. It stated:

150. "... In the circumstances of the present case there is no need to discuss the applicable law at length. Where, as here, both the purpose and effect of the acts are totally to deprive one of funds without one's voluntarily given consent, the finding of a compensable taking under any applicable law, international or domestic, is inevitable, unless there is clear justification for the seizure".⁽¹³⁹⁾

Since the respondent did not provide any evidence to justify its continuing access to those funds, the Tribunal awarded the value of the funds so taken.

When the funds have not actually been transferred and remain subject to the control of the owner, the Tribunal has been much more reluctant to find that an expropriation has occurred. A question which might arise here is whether nationalization of a bank establishes the expropriation of the funds which are in it. In *William L. Periera Associates v Iran*, the claimant (along with other claims), alleged that the money which it held in two accounts maintained in an Iranian bank, had been expropriated by virtue of the subsequent nationalization of that bank and by virtue of the fact that it had allegedly been unable to withdraw its funds.⁽¹⁴⁰⁾ The Tribunal denied the claim on the following grounds: (a) the claimant had not submitted evidence that it had been prevented from withdrawing funds from the accounts; (b) it had failed to show that nationalization of the Iranian banks amounted to a taking of the funds it held in the accounts in question.

Normally, then, nationalization of a bank does not establish the expropriation of the funds because, as Brower has pointed out,

"Nationalization of a bank only affects the ownership of that bank but not the bank's account liabilities".⁽¹⁴¹⁾

In addition to the above mentioned awards, another group of awards involving banks arose out of Iran's blocking of foreigners' funds on the authority of its foreign exchange control regulations and must now be considered.

3.8.1.3 FOREIGN EXCHANGE CONTROLS

From the view point of the foreign investor, the ultimate objective of its undertaking is to realize profits in the currency of its home state or some other currency that has a stable value in the international market place. Thus most contracts with foreign state parties contains provisions for the payment in some hard currency.⁽¹⁴²⁾ Yet the risk of currency exchange blockage in developing countries grew to such proportions in the 1950s that insurance against this risk was made available by the U.S. government in its foreign investment guarantee programme and is generally available today from a wide assortment of national and international insurance programs.⁽¹⁴³⁾

As in most countries of the world, the use of foreign exchange in Iran was and is regulated by the government by means of foreign exchange control regulations operated by its Central bank known as Bank Markazi. Before the revolution in February 1979, many foreign companies and individuals opened foreign exchange accounts in Iranian banks and relied on the routine transfer abroad of the foreign exchange funds in these accounts, as well as the conversion of the Iranian rial funds into foreign exchange for the payment abroad of foreign currency obligations pursuant to these regulations. After

the revolution, all account holders, including Iranians and Americans, who required foreign currencies found that what had formerly been routine was now stopped. Some of the Americans concluded after several attempts to gain access to their funds proved unsuccessful, that such access had been permanently blocked.⁽¹⁴⁴⁾ Claims for compensation were therefore brought before the Tribunal relying on a variety of legal theories including contract breach and expropriation.

In these cases, Iran generally defended itself on the ground that whatever actions had been taken were legal and proper, in accordance with its foreign exchange control regulations, and in keeping with its international obligation.

Since July 1944 Iran has been a member of the International Monetary Fund (IMF) agreement.⁽¹⁴⁵⁾ The Agreement contains provisions *inter alia* that foreign exchange contracts are unenforceable if they are entered contrary to the valid exchange control regulations of the member state involved.⁽¹⁴⁶⁾ Article VIII, Section 2(b) of the IMF Agreement declares that:

"Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistent with this (Fund) Agreement shall be unenforceable".⁽¹⁴⁷⁾

However, Article VI Section 3 of the Agreement limits the extent to which exchange controls may be exercised under the IMF Agreement. It provides for:

"Exercise [of] such controls as are necessary to regulate international capital movements... [but not] in a manner which will restrict payment for current transactions or which will unduly delay transfer to funds in settlement or commitments".⁽¹⁴⁸⁾

Accordingly, it would appear that only controls applied to capital transfers, as distinguished from current exchange transactions, could be found to be consistent with Iran's obligations under the IMF Agreement and only then when it was clear that controls would not unduly delay the payment of foreign commitments.

In many cases before the Tribunal American Claimants argued that foreign exchange control violated the Articles of IMF Agreement. Further they argued that the government of Iran was liable for unlawfully taking the funds or, alternatively, that the Iranian banks were liable for unlawfully withholding them.

In *Mark Dallal*,⁽¹⁴⁹⁾ the claimant was the holder of two U.S. dollar cheques drawn by an Iranian bank on Chase Manhattan in New York. When the claimant had presented the cheque in New York for payment, they were dishonoured by Chase Manhattan because of insufficient funds. Iran's defence was that cheques were null and void because they had been issued by the Iranian bank in violation of a foreign control regulation. Dallal argued that a bank that issued a cheque could not subsequently deny liability on the grounds it had violated internal regulations in issuing a cheque in the first place. Noting that both Iran and the U.S. were parties to the IMF Agreement, the award of the Tribunal supported the right of Iran and its banks to refuse payment on U.S. dollar cheques where this would involve a violation of Iran's foreign exchange control regulations. The award referred to the IMF Agreement and a provision on the Monetary and Banking Law of Iran which provided that the Central Bank shall control and formulate regulations regarding foreign exchange transactions. The award looked to Article VI, Section 3 of the IMF Agreement applying to capital transfers and concluded:

"These regulations at least in so far as they apply to mere capital transfers under Article VI, Section 3 of the IMF Agreement are valid currency regulations within Article VIII, Section 2(b)".⁽¹⁵⁰⁾

Thus it seems that the Tribunal was persuaded that it was dealing with a capital transfer transaction which Iran could validly regulate under the IMF Agreement.

In contrast to the above case, in the *Nasser-Esphahanian*⁽¹⁵¹⁾ case, which involved similar facts, the Tribunal reached a different result. In this case the claimant had purchased a U.S. dollar cheque from an Iranian bank drawn on the Iranian bank's account with Citibank in New York city. When the cheque was presented in Citibank, it was dishonoured for insufficient funds. Iran maintained that the Iranian bank could not be responsible for the dishonour by Citibank, but no argument or evidence as to who was responsible was presented. The Tribunal upheld the claimant's right and declared that a bank that draws a cheque is responsible to ensure that sufficient funds are available in the bank on which the cheque is written to cover the cheque, also noting that this was text book law in New York where payment was to have been made. Judge Shafeiei filed a dissenting opinion⁽¹⁵²⁾ in the case, pointing out that the award had ignored the question of the legality of Iran's foreign exchange control regulations. The dissent discussed the IMF Agreement provisions and concluded that the Tribunal was duty bound to refuse enforcement of foreign exchange controls which violated Iran's currency regulations,⁽¹⁵³⁾ as had been the case in *Mark Dallal*.

However, in the *Hood Corporation*⁽¹⁵⁴⁾ award which was issued by the Tribunal a year later, it upheld Iran's position. In that case the

claimant had made a thirty-one day time deposit with an Iranian bank on 14 October 1979. By telex on 30 November, Hood had requested that the funds in the time deposit which had expired be transferred to a bank account which it maintained in West Germany, to be converted there into Deutchmarks. The Iranian bank had telexed back on 1 December that permission of the Central Bank would have to be obtained for the requested transfer. Subsequently, the claimants received information from the Iranian bank that the Central Bank would not authorize such a transfer. Before the Tribunal, Hood argued that Iran was liable because the Central Bank refused to permit the repatriation of its fund and this act was a violation by Iran in respect of its obligations under both Iranian law and international law.

Hood specifically argued that the exchange controls imposed by Iran constituted a violation of Article VIII of the IMF Agreement. Iran responded that it had never joined Article VIII and was therefore not bound by that provision and that, in any event, it had informed the IMF of its regulations in accordance with Article XIV. The award agreed with Iran that the restrictions imposed were within Section 3 of Article VI, pertaining to capital movements, and were therefore not in violation.

Judge Mosk filed a dissenting opinion,⁽¹⁵⁵⁾ arguing that Iran had violated international law in several ways, by failing to make provision for the repatriation of the claimant's fund, by failing to fix time limits on the exchange controls it had imposed, and by failing to articulate any reasons for the restrictions. Further, Judge Mosk argued that in order for foreign exchange control regulations to be found valid by the Tribunal they must be based on

plausible reasons, and must be subject to reasonable time limits. (156)

The above mentioned awards of the Tribunal involving foreign exchange controls reveal an inconsistency in the approach to the issues involved and in the results for the parties. However some general observations regarding the approach of future international tribunals to such issues may be made. The awards in favour of Iran in *Mark Dellal and Hood Corporation* suggests that international tribunals may support a strong presumption in favour of the validity of foreign exchange controls exercised by a state, while the awards in favour of the claimant in the *Nasser Esphahianian* case indicate that this presumption may be overcome where the relevant facts and legal arguments are carefully identified and presented.

3.8.1.4 BUSINESS

In this part we examine how the Tribunal has applied the standard of 'unreasonable interference' to interests such as the loss of a business entity or commercial operation. (157) In doing so, the Tribunal has used a broad approach. It has focused on the entire panoply of ownership rights: the right to appoint directors and participate in management; the receipt in the ordinary course of business of financial and commercial information from the business; receipt of income or other distributions; and other aspects of ownership.

In determining the occurrence of an expropriation of business enterprises, the Tribunal has never used any fixed and mechanical standard. However, in a few cases (in which an expropriation has been found) it has concluded that the total ousting of the foreign

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owner from control and management of the property, has amounted to a taking of the property in question. This conclusion can be seen in the decisions of the Tribunal in the *Sedco*,⁽¹⁵⁸⁾ *Starret*,⁽¹⁵⁹⁾ *Phelps Dodge*,⁽¹⁶⁰⁾ and *Tippett*⁽¹⁶¹⁾ cases. In these cases, the Tribunal held that the replacement of the owner's management or directors with representatives appointed by the Government in a company or enterprise has been a negative factor, and has resulted in expropriation of that property, since the former managers or directors are no longer able to participate in the management. Also, the Tribunal found the appointment of temporary managers by the Government to be a taking, as long as the facts show the managers have assumed a functionally permanent role.⁽¹⁶²⁾ For instance, in the *Tippetts* case, although the appointed managers for the Iranian subsidiary were temporary, the owner had been cut off from ordinary dissemination of financial information and so the Tribunal considered the expropriation confirmed.⁽¹⁶³⁾ After considering the facts, the Tribunal concluded that the claimant had been deprived of its property interests in its Iranian subsidiary and that the government of Iran was liable in the sense of its acts and omissions, for that deprivation.

In the *Starret* case, however, other facts confirmed the permanency of supposedly temporary managers. In this case the Tribunal held that for a number of reasons, that the appointment of government managers to take over a massive housing construction project previously managed by the Claimant was the point at which an expropriation effectively occurred, despite the Government's subsequent invitations to the Claimant to return and finish the project.⁽¹⁶⁴⁾

The appointment of temporary managers in this case was made pursuant to the decree of the Revolutionary Council, adopted on 14 July 1979, called the Bill for Appointing Temporary Manager or Managers for the Supervision of Manufacturing, Industrial, Commercial, Agricultural and Service Companies, either private or public.⁽¹⁶⁵⁾ Considering this act, the Tribunal pointed out that the appointment of temporary managers in accordance with the provision of the act, had deprived the shareholders of their right to manage the Company.⁽¹⁶⁶⁾ As a result of these measures, the claimants could no longer exercise their rights to manage the Company, and 'were deprived of their possibilities of effect, use and control of it'.⁽¹⁶⁷⁾ The government of Iran argued that *Starret* had been requested to resume the project.⁽¹⁶⁸⁾ Since, however, there was no evidence that the claimant, if it had returned to the project, would have been offered compensation for any reduction in the value of its ownership rights and contract rights caused by the temporary managers, the Tribunal concluded that the expropriation was complete.⁽¹⁶⁹⁾

The scope of management functions under the above Bill was another factor which influenced the Tribunal. Article 3 of the Bill defines the powers of the managers appointed by the Ministry concerned as follows:

"The Manager of Board of Directors.... have every necessary authority for running the day-to-day business of the Company. They do not require special permission from the original managers of owners of said company".⁽¹⁷⁰⁾

Because the Government appointed managers, under the above Bill, had complete authority to run the business, displaced the former management and precluding the owner from selecting any

representative, the Tribunal found an expropriation of the Company. (171)

The Iranian government had argued that the temporary managers were appointed to look after the best interests of the Corporation. (172) They were appointed to prevent a shut-down of economic and industrial units and any laying off of workers. It further contended that under Article 4 of the Bill a temporary manager has the status and obligations of an attorney to his client with regard to the company and is considered as a trustee and that accordingly his acts should not be considered to have any expropriatory effect. (173) However, the Tribunal has been of the view that the governmental purpose in appointing such managers has little or no bearing on whether the substitution of managers amounts to an expropriation. As we saw earlier, the Tribunal in *Tippetts* case pointed out that:

'The intent of the Government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact'. (174)

Consequently, in *Starret*, notwithstanding the argument that the managers were appointed to look after the interests of the Company, the Tribunal did not hold this to be a mitigating factor. (175)

The irrelevance of the Government's intention was given particular attention in *Phelps Dodge Corp. v Iran*. In this case, the claimant company owned 19.36 percent of an Iranian company (SICAB) which had been established for the purpose of manufacturing and selling various wire and cable products. (176) After the revolution, on 27 October 1980, the Iranian Council for the Protection of Industries a governmental body, transferred the SICABs management to two designated organizations: The Bank of Industry and Mines and The

Organization of National Industries, both of which were agencies of the Government. As a result of the transfer, no meetings of SICABs Board of Directors or shareholders were held; and the claimant received no information on its business activities. Similarly, the claimant received no information as to the financial affairs of SICAB. (177)

The Tribunal recognized that the legal authorization pursuant to which the Government Council had appointed new managers, a 'Law of Protection of Industries and Prevention of Stoppage of Factories in the Country', described the managers as 'trustees' and the administration of the factory as 'provisional'. However, the law nowhere declared that the managers were trustees for the shareholders. The Tribunal pointed out that "it fully understood the reasons why the respondent felt compelled to protect its interests through this transfer of management and also understood the economic, financial and social concerns that inspired the law pursuant to which it acted". (178) Nevertheless, the Tribunal held that "those reasons and concerns cannot relieve the Respondent of the obligation to compensate *Phelps Dodge* for its loss". (179) Since the Respondent had taken control of SICABs factory; was running it for its own benefit; and seemed likely to continue to do so indefinitely, the Government was liable to the claimant for the value of that property. (180)

The Tribunal has thus been consistent in finding an expropriation has taken place in cases where the appointment of a "temporary" or "provisional Manager" by the government was accompanied by facts or circumstances indicating that the essential rights of share ownership, including particularly the right to participate in the management of the company, had been permanently interfered with.

NOTES TO CHAPTER 3

1. See, W.D. Verwey & N.J. Schrijver, "The taking of Foreign Property Under International Law: A New Legal Perspective", 15-N.Y.B. Int'l Law, 1984. See also, U.N. Doc. A/9716, Annex 1, Para 2, and n.b. with respect to the Western hemisphere. The document shows that between 1960 and mid 1974 alone, 875 cases of nationalization took place in 62 countries. Rogers also points out that "investment disputes have been at the very heart of our official relations with the other nations of the Americas for half a century". See in W.D. Rogers, "Of missionaries, fanatics and lawyers: some thoughts on investment disputes in the Americas", 72 A.J. Int'l Law, 1978, p.1.
2. See I. Brownlie, *Principles of Public International Law*, 1990, p.531.
3. See R. Ribiero, *Nationalization of Foreign Property in International Law*, 1977, 1.
4. Ibid.
5. See B. Wortley, *Expropriation in Public International Law*, 1959, p.39.
6. Brownlie, op cit, p.531
7. Ibid.
8. See Restatement (Third) of the Foreign Relations Law of the United States. See also B.M. Claggett and D.B. Poneman, "The Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law", 22, *The Int'l Lawyer*, 1988, p.35; R. Houk, "Restatement of the Foreign Relations Law of the United States (Revised): Issues and Resolutions", 20 *Int'l Lawyer*, 1986, p.1361; and D.R. Robin, "Expropriation in the Restatement (Revised)", 78 A.J. Int'l Law, 1984, p.176.
9. See F.H. Lawson and B. Rudden, *The Law of Property*, 1982, p.4.
10. See *Liamco v Libya*, 62 *Int'l L. Reports*, p.140. See also in 20 *I.L.M.*, 1981, p.1.
11. See in 20 *I.L.M.*, *ibid*, at 53.
12. Ibid.
13. See R. Higgins, "The Taking of Property by the State: Recent Developments in International Law", 176 *Hague Recueil*, 1982, no.3. p.270.
14. Ibid.
15. Starret Housing Corporation is the parent company of a group of subsidiary corporations engaged in construction and development projects. The claimants involvement in Iran began in 1974, when Starret Housing agreed to participate in a project for the construction of a residential community on an unimproved land

- adjacent to North-West Tehran. The claimant undertook to construct a total of 6000 apartment units in three phases. See Starret, interlocutory award, 4 Iran-U.S. C. Trib. Rep., p.123.
16. See Starret, Interlocutory award in 4 Iran-U.S. C. Trib. Reports, p.156.
 17. See *Mobil Oil Iran Inc., et al. v Iran*, 16 Iran-U.S. C. Trib. Reports, p.3, 44.
 18. Ibid, p.25, Para 73.
 19. This agreement from 1973, which entitled the consortium members to purchase crude oil from a defined area in Iran, was prematurely nullified in 1981 by virtue of the 1980 Single Article Act concerning the nationalization of Iran's oil resources. The principle contents of the above act of 8 January 1980 were as follows: 'All oil agreements considered by a special commission appointed by the ministry of oil to be contrary to the nationalization of the Iran oil industry act shall be annulled and claims arising from conclusion and execution of such agreements shall be settled by the decision of the said commission. The Tribunal found that the SPA had been terminated by a mutual agreement of the parties prior to the alleged taking, and therefore did not extend to the issue of whether there was a taking in the particular circumstances of the case.
 20. *Mobil Oil Iran et al*, partial award, Para 73.
 21. This case arose out of the 'Khemco Agreement' executed on 12 July 1966 between the claimant's Swiss subsidiary, Amco International S.A., on the one hand, and the Iranian National Petrochemical Company (NPC), on the other. Pursuant to this agreement a company called 'Khemco' was established between the parties on a fifty-fifty basis as a joint stock company under the laws of Iran. Its purpose was to install and operate a plant with a view to the extraction and sale of natural gas and related products by virtue of rather complicated contractual arrangements. The Khemco Agreement had been concluded to remain in force until 1997, but it was declared null and void on 24 December 1980 as a culmination of a series of events characterized by the Tribunal as the taking of the Khemco Company. Damages claimed before the Tribunal consisted essentially of profits allegedly lost due to the premature termination of the Khemco Agreement for the facts and the relevant contractual setting. See *Amoco Partial Award*, Paras. 28-76. See in 15 Iran-U.S. C. Trib. Reports, 1987, p.193.
 22. Ibid, see Para. 108. The respondents had argued that rights based on a contract did not constitute property. Ibid, Para 105.
 23. See *Higgins*, op cit, n.6, p.272.
 24. *Verwey and Schrijver*, op cit.
 25. Ibid.

26. See Clagett and Poneman, *op cit*, p.40.
27. See B. Akerman, "Private property and the Constitution", Yale, U.P., 1977, p.3.
28. See G.A. Res. 1803, 17 U.N. GAOR Supp. No.17, 15 U.N. Doc., A/5217, 1962, reprinted in 57 A.J. Int'l Law., 710, 1963; 2, I.L.M., 1963, p.223.
29. See P.D. Weinstein, "The Attitude of the Capital Importing Nations Towards the Taking of Foreign-owned Private Property", 5, Ind. J. Int'l Law, 1969, p.118.
30. *American International Group and American Life Insurance Company v The Islamic Republic of Iran and Central Insurance of Iran (BIMEH MARKAZI IRAN)*, 4 Iran-U.S., C. Trib. Reports, p.96, 1983.
31. For the content of the Act see, Iranian Gazette, (Published by the Ministry of Justice), series 10264, 1980. See also in J. Vafai, *Commercial Laws of the Middle East, Iran*, Booklet 3, 1985, p.15.
32. See 4 Iran-U.S. C. Trib. Reports, p.105.
33. See *INA Corp v Iran*, in 8 Iran-U.S. C. Trib. Reports, 1985, p.373.
34. Ibid, p.378.
35. See M. Pellonpää and M. Fitzmaurice, 'Taking of Property', 19, N.Y.B. Int'l Law, 1988, p.62.
36. See in 15 Iran-U.S. C. Trib. Reports, 1987, p.233.
37. Ibid.
38. Ibid.
39. Ibid, pp.233-234. The principle contents of the Single Article Act of 8 January 1980 were as follows: "All oil agreements considered by a special commission appointed by the Ministry of Oil to be contrary to the nationalization of the Iran Oil Industry Act shall be annulled and claims arising from conclusion and execution of such agreements shall be settled by the decision of the said commission". See in G. Vafai, *op cit*, Booklet 3, p.11.
40. *Pellonpää and Fitzmaurice, *op cit*, p.63.
41. *B.P. Exploration Company (Libya) Limited v Government of the Libyan Arab Republic*, 53 I.L.R., p.297, 1973.
42. See in *Amoco Int'l Finance Corp. v Iran*, 15 Iran-U.S. C. Trib. Reports, *op cit*, para.141, p.232.
43. Ibid.

44. Ibid, para.142.
45. Ibid.
46. See D.J. Harris, *Cases and Materials on International Law*, 1991, p.542.
47. See Pellonpää and Fitzmaurice, op cit, p.65..
48. See Verwey and Schrijver, op cit, p.9.
49. Ibid.
50. See *Sedco Inc. Case v The Islamic Republic of Iran and NIOC*, Case No. 129, Award No. ITL 59-129-3, (Interlocutory Award) in, 10 Iran-U.S. C. Trib. Reports, 1986, p.204, (separate opinion of Judge Brower).
51. See Amoco, Partial Award, op cit, para.119.
52. Ibid, para.119.
53. Ibid. Para 120.
54. Ibid.
55. Ibid, para.120.
56. Ibid.
57. See G. Jaenicke, "Consequences of a breach of an investment agreement governed by international law, by general principles of law, or by domestic law of the host state", in *Foreign Investment in the present and a New International Economic Order*, edit by D.C. Dike, 1987, p.177.
58. See Brownlie, op cit, p.548.
59. See R.Y. Jennings, "State Contracts in International Law", 37 B.Y.B. Int'l Law, 1961, 158-82. See also Clagett and Poneman, "The Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law", op cit, p.50.
60. See Brownlie, op cit, p.549.
61. See e.g., E.J. de Arechaga, "International Law in the Past Third of a Century", 159, *Recueil Des Cours*, 1978, I, p.305.
62. See I.C.J. Reports, 1952, p.112.
63. Ibid.
64. See Amoco case, op cit, para.179, p.243.
65. See Jaenicke, op cit.
66. See Amoco Partial Award, op cit, p.239.

67. See Arechaga, op cit.
68. Ibid.
69. See Amoco Partial Award, op cit, para.179, p.243.
70. Ibid.
71. See *Mobil Oil Iran, Inc. and Mobil Sales and Supply Corporation v Government of the Islamic Republic of Iran and National Oil Company*, 16 Iran-U.S. C. Trib. Reports, 1987, p.3.
72. Ibid.
73. Ibid, p.20.
74. Ibid, p.22.
75. Ibid.
76. Ibid.
77. Ibid, p.24.
78. Ibid, pp.64-7.
79. See e.g. A. Akinsanya, 'International Protection of Direct Foreign Investments in the Third World Countries', 36 I.C.L.Q., p.58, 1987, *The Expropriation of Multinational Property in the Third World*, 1980, S.R. Swanson, Iran-U.S. Claims Tribunal: 'A Policy Analysis of the Expropriation Cases', Case W. Res. J. Int'l Law, 18, p.321, 1986, C.N. Brower, 'Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-U.S. Claims Tribunal', 21 The Int'l Lawyer, p.693.
80. See n.9 (in the section of the basic legal condition of a taking).
81. See in 4 Iran-U.S. C. Trib. Reports, p.105.
82. Pellonpää & Fitzmaurice, 'Taking of Foreign Property', 19, N.Y.B. Int'l Law, p.69, 1988.
83. See Amoco, Partial Award, Para 116, p.223.
84. Pellonpää & Fitzmaurice, op cit, p.70.
85. The Treaty of Amity concluded between Iran-U.S. (1955).
86. See Iranian Pleading in American International Group, as quoted in the Award, 4 Iran-U.S. C. Trib. Reports, p.103.
87. Pellonpää & Fitzmaurice, op cit, p.70.
88. See Sedco, ITL 59-129-3, separate opinion of Judge Brower in 10 Iran-U.S. C. Trib. Reports, op cit, p.204.

89. See C.N. Brower, "Current Developments in the Law of Expropriation and Compensation: A preliminary survey of awards of the Iran-U.S. Claims Tribunal", *Int'l Lawyer*, Vol. 21., No.3, p.643, 1987.
90. *Ibid.*
91. In *Otis Elevator Company Case*, the claimant sought compensation for its 40 percent equity share in the Iran Elevator Company Ltd., a private corporation incorporated to establish an elevator manufacturing company in Iran, which was allegedly expropriated by the respondents, The Islamic Republic of Iran, specifically the Ministers of Labour and Commerce and also Bank Mellat. See in 14 Iran-U.S. C. Trib. Reports, p.293, 9 - See Article 3 of the ILC Draft Articles on State Responsibility, part 1.
92. Article VII(3) of the Claims Settlement Declaration: 'Iran means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality or entity controlled by the Government of Iran or any political subdivision thereof'.
93. Pellonpää & Fitzmaurice, *op cit*, p.74.
94. *Ibid.* However in some cases, it has been possible to circumvent the attributability issue by finding an 'appropriation' or 'usurpation' in the meaning of commercial law or general principles of law to have taken place - For more detail see *Sedco Case, Sedco, Inc. v National Iranian Oil Co.*, Award No. ITL-55-129-3 at 31-33 October 29, 1985.
95. Oil field of Texas, Para 42 on the case 1 No. 1, Iran-U.S. C. Trib. Reports. See also Article 6 of the I.L.C. Draft, ('The conduct of an organ of the state shall be considered as an act of that state under international law whether that organ belongs to the constituent, legislative, executive, judicial or other power....'). The claim in this case was based on a contract concluded between the claimant and oil service company of Iran (OSCO) for the lease of certain equipment to OSCO to be used in petroleum exploitation. In addition to contract-related claims, the claimant sought compensation on the theory of unjust enrichment from NIOC, and on the theory of expropriation from the Government of Iran which was alleged to have been expropriated oil field's property leased to OSCO. For more detail see *Oil Field of Texas Inc. v Iran (OSCO)* in 1-Iran-U.S. C. Trib. Reports, p.348.
96. See *Solatiles*, Para 40, in 4 Iran-U.S. C. Trib. Reports, p.398.
97. See 5 Iran-U.S. C. Trib. Reports, p.346. The claimant business in Iran consisted of selling pharmaceuticals through Schering Company of Iran. The claimant alleged that acts of the Worker's Council prevented it from recovering certain loan payments due from Schering Iran as well as amounting to expropriation of certain assets held in bank accounts, see *ibid*, pp.363-364.

98. Ibid, p.370. However Judge Mosk American Arbitrator in the Tribunal was of the view that the Worker's Council's acts created state responsibility for Iran. For more detail see S.R. Swanson, 'Iran-U.S. Claims Tribunal: A Policy Analysis of the Expropriation Cases', Case W. Res. J. Int'l Law, Vol. 18, 1987, pp.353-356.
99. See *Schering Corporation v Iran*, in 5 Iran-U.S. C. Trib. Reports, 1984, p.361, 370. See also C.N. Brower, Current Developments in the Law of Expropriation and Compensation, op cit, p.655.
100. See in 5 Iran-U.S. C. Trib. Reports at 379-380.
101. See in 12 Iran-U.S. C. Trib. Reports, 1986, p.335.
102. Ibid, p.348.
103. See, Brower, op cit, p.655.
104. See *International Technical Products Corp. v Iran*, in 9 Iran-U.S. C. Trib. Reports, 1985, p.10.
105. Ibid, Brower, however, dissented on the grounds that the bank had not carried its burden to show that the property was acquired lawfully. See in p.655, op cit.
106. Foremost case; (*Foremost Tehran Inc. v Iran*) Case, No.37. See in 10 Iran-U.S. C. Trib. Reports, p.228.
107. Ibid. See pp.244-257
108. Ibid, p.251
109. Ibid, p.252.
110. See Tippetts Case, op cit, p.226.
111. Ibid.
112. See e.g., *Payne v The Islamic Republic of Iran*, in 12 Iran-U.S. C. Trib. Reports, 1986, p.3 (citing inter alia, *Foremost*, *Starrett*, *Tippetts*, and *Phelps Dodge* for the well settled principle that property may be taken "through interference by a state in the use of that property or with enjoyment of its benefits").
113. See *Starrett*, op cit, p.156.
114. See *Tippetts*, op cit, p.225.
115. See Brower, "Current Developments in the Law of Expropriation and Compensation", op cit, p.644.
116. See *Harza Engineering Co v The Islamic Republic of Iran*, 1 Iran-U.S. C. Trib. Reports, 1981-81, pp.499,504.
117. Ibid.

118. See *Golpira v The Islamic Republic of Iran*, 2 Iran-U.S. C. Trib. Reports, 1983, p.177.
119. See *International Technical Products*, op cit, p.42.
120. See *Brower*, op cit, p.644.
121. Ibid.
122. See *Dames & Moore v The Islamic Republic of Iran*, in 4 Iran-U.S. C. Trib. Reports, p.212, 1983.
123. Ibid.
124. Ibid.
125. Ibid, p.223.
126. Ibid.
127. See *Computer Sciences Corporation v The Islamic Republic of Iran*, in 10 Iran-U.S. C. Trib. Reports, p.269, 1986. See also *William L. Pereira Assocs., Iran v Iran* in 5 Iran-U.S. C. Trib. Reports, 1984, p.198.
128. See *Computer Sciences Corporation*, op cit, p.303.
129. See *General Dynamics Telephone Systems Centre Inc. v The Government of the Islamic Republic of Iran*, in 9 Iran-U.S. C. Trib. Reports, p.153.
130. Ibid, pp.165-166.
131. See *Morrison-Knudsen Pacific Limited v The Ministry of Roads and Transportation*, in 7 Iran-U.S. C. Trib. Reports, p.54.
132. See *AHFI Planning Associates Inc. v The Government of Iran, Iran Housing Company*, in 11-Iran-U.S. C. Trib. Reports, p.168.
133. See *Harza Engineering Co. v Iran*, Case No. 98, in 1 Iran-U.S. C. Trib. Reports, 1982, pp.499, 507.
134. See *American Housing International v The Government of the Islamic Republic of Iran*, in 5 Iran-U.S. C. Trib. Reports, 1984, p.235.
135. Ibid.
136. See Award No. 255-48-3, 1986 in 12 Iran-U.S. C. Trib. Reports, p.170.
137. Ibid.
138. Ibid.
139. Ibid, p.214.

140. See *William L. Pereira Associates*, op cit, p.206.
141. See *Brower*, op cit, p.646.
142. See International Monetary Fund (IMF), 1984 Annual Report on Exchange Arrangements and Exchange Restrictions, 1984, p.3.
143. See, in, IFI.Shihata, *MIGA and Foreign Investment*, 1988.
144. See e.g., *Schering Corporation v The Islamic Republic of Iran*, 5 Iran-U.S. C. Trib. Reports, p.361.
145. Articles of Agreement of the IMF, adopted 22 July 1944, 60 Stat. 1401, 1411, T.I.A.S. No. 1501, 2 U.N.T.S., 39 (1947), as amended 28 July 1969, 20 U.S.T. 2775, T.I.A.S., No. 6748, 726, U.N.T.S., 266, (1976), and 1 April 1978, 29 U.S.T., 2203, T.I.A.S., No.8937.
146. For a discussion on the Articles of the Agreement of the IMF and their role in the Tribunal see, J. Gold, "The Iran-U.S. Claims Tribunal and the Articles of Agreement of the International Monetary Fund, 18, Geo. Wash. J. Int'l Law, 1985, p.537, Sir Joseph Gold's writings in the area of international monetary law are noteworthy. There are too many articles to list. These include J. Gold, *Exchange Rates in International Law and Organization*, 1988; J. Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 A.J. Int'l Law, 1983, p.443; and J. Gold, *The Fund Agreements in the Court*, 1962.
147. See in Articles of Agreement of the IMF, op cit, Art. VIII, S2(b).
148. Ibid, Art. VI, S.3.
149. See *Mark Dallal v The Islamic Republic of Iran*, in 3 Iran-U.S. C. Trib. Reports, p.10.
150. Ibid, p.13.
151. See *Nasser Esphahamian v Bank Tejarat*, in 2 Iran-U.S. C. Trib. Reports, p.212.
152. See The Dissenting Opinion of Dr. Shafeia on the Issue of Dual Nationality in 2 Iran-U.S. C. Trib. REports, p.178.
153. Ibid, p.221.
154. See *Hood Corporation v The Islamic Republic of Iran*, in 7 Iran-U.S. C. Trib. Reports, p.36.
155. See Dissenting Opinion of M. Mosk, ibid, p.48.
156. Ibid, p.50.
157. As we saw in Chapter 2 of this study, the revolutionary government of Iran enacted a series of laws beginning in April 1979 in its attempt to deal with the problem of failing

businesses. The initial law authorizing the displacement of owner-appointed directors and managers of companies by government appointed directors was approved by the Revolutionary Council on 16 April 1979 in the Bill of Law for Appointment of Directors for Supervision of the Companies and Firms. This law was superseded two months later by a new law entitled "An act concerning the Appointment of a Temporary Director of Directors for the Custody of Production and Industrial and Commercial and Agricultural and Service Units Whether in Public or the Private Sectors. Under the authority of this legislation, government-appointed managers replaced the directors or managers that had been designated by the owners of many businesses in which Americans had invested and participated.

158. See *Sedco Inc., for itself and on behalf of Sedco International S.A., and Sediran Drilling Company v The Islamic Republic of Iran*, in 9 Iran-U.S. C. Trib. Reports, 1985, p.248.
159. See *Starrett Housing Corporation v The Islamic Republic of Iran*, in 4 Iran-U.S. C. Trib. Reports, op cit, p.122.
160. See *Phelps Dodge v The Government of Islamic Republic of Iran*, in 10 Iran-U.S. C. Trib. Reports, 1986, p.157.
161. See *Tippetts v TAMAS-AFFA Consulting Engineers of Iran*, in 6 Iran-U.S. C. Trib. Reports, 1984, p.219.
162. See *Starrett Housing Corporation*, op cit.
163. See *Tippetts case*, op cit, p.219.
164. See *Starrett case*, op cit, p.122.
165. See the Bill in J. Vafai *The Commercial Laws of the Middle East (Iran)*, Booklet 3, p.15.
166. See *Starrett case*, op cit, p.154.
167. Ibid.
168. Ibid, p.155.
169. Ibid, p.156.
170. Ibid, p.147.
171. Ibid.
172. Ibid, p.148.
173. See the Bill in Vafai, op cit, p.15.
174. See *Tippetts case*, op cit, p.226, p.40. See also *Phillips Petroleum Co. Iran v Iran*, in 21 Iran-U.S. C. Trib. Reports, 1989, p.115.
175. See *Starrett case*, op cit.

176. See *Phelps Dodge*, op cit, p.121.

177. Ibid.

178. Ibid, p.130.

179. Ibid.

180. Ibid.

CHAPTER FOUR

THE DATE OF THE TAKING

In the first part of this study we examined the liability of the State for the conduct said to constitute expropriation. This second part of the study addresses mainly, the issues of the standard of compensation which is to be applied in determining any compensable damages resulting from an expropriation and the methods of valuation of the expropriated property. However, applying any standard of compensation to a taking requires first and foremost, determination of the date of that taking. As we will see shortly the date of the taking has had a great impact on determining the compensation, as well as on the valuation of the dispossessed property.

4.1 DATE OF THE TAKING

Under normal conditions when an expropriation occurs, i.e. the exact date of taking, may not be critical, because political and economic conditions which usually affect the value of the expropriated property are constant throughout. In a revolutionary situation however, the property value may fluctuate with the volatile political, social and economic milieu.⁽¹⁾ So, in a revolutionary condition, the fixing of the exact date of expropriation is an important issue.

Whether an expropriation of property occurs by virtue of a formal decree or in a type of *de facto*⁽²⁾ taking, in either case the determination of the date of taking is a delicate task. Moreover, for the purposes of the Tribunal's jurisdiction, the date of the taking can be crucial as well. First, we shall examine the effect of the date of taking on the Tribunal's jurisdiction, then we will discuss separately the date of taking in cases which are affected by

a formal decree and in cases in which there is no formal expropriatory decree.

4.1.1 THE DATE OF THE TAKING AND THE TRIBUNAL'S JURISDICTION

As we explained in the second chapter the Tribunal has no jurisdiction over disputes not outstanding on 19 January 1981⁽³⁾. Article II(1) of the Claims Settlement Agreement excludes from the Tribunal's jurisdiction "claims described in Paragraph 11 of the Declaration of the Government of Algeria on 19 January 1981, and claims arising out of actions of the United States in response to the conduct described in such paragraphs..."⁽⁴⁾, Paragraph II of the Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration) removes from the Tribunal's jurisdiction "any depending or future claims of the United States or a United States national arising out of events occurring before the date of this Declaration related to (A) the seizure of the 52 United States nationals on 14 November 1979, or (B) their subsequent detention....."⁽⁵⁾ Accordingly, the Tribunal cannot consider a claim for an expropriation or compensation occurring after the date 19 January 1981.

Considering the above date, the Tribunal dismissed the case *International Technical Products Corp. v Iran*⁽⁶⁾.

In this case, the claimants among other claims, alleged that their real property had been expropriated. The claimants purported to have been either the beneficial owners or legal owners, at all relevant times, of a building containing eight apartments located in Tehran.⁽⁷⁾ The claimants initially based their claim on the alleged failure of the previous Government of Iran and its successors, the

present Iranian Government, to protect the building, thereby depriving claimants of the use and benefit of the building even prior to claimants' departure from Iran in December 1978.⁽⁸⁾ Later, claimants contended that the building was expropriated through actions of Bank Tejarat (an Iranian Commercial Bank) with "the formal approval and active participation of the Government of Iran in the form of both its Revolutionary prosecutor and the State Deeds and Property Registration Organization".⁽⁹⁾

Bank Tejarat, appearing as mortgagee of the property, and for the purposes of this claim, apparently as the representative of Iran as well, challenged the jurisdiction of the Tribunal to hear the claim. It accepted that the control of the building had been passed to it after claimants' departure from Iran in December 1978. Nevertheless, it asserted that it had taken the title to the building by foreclosing for non-payment by claimants of their mortgage obligations.⁽¹⁰⁾ It alleged that it had obtained legal title on September 1983 in compliance with the foreclosure procedures set forth in Article 34 of the Law for Registration of Deeds and Property.⁽¹¹⁾ Examining the facts, the Tribunal was not convinced that acts or omissions on the part of the Iranian government arguably engaging its international responsibility occurred within the period necessary to its jurisdiction and for this reason dismissed the claim.

The time of an alleged taking has also been relevant in some other cases in which the Tribunal's jurisdiction has been contested.⁽¹²⁾ However, these decisions, like that in the *International Technical Products* case, they turned entirely on the facts and so do not require further discussion here.

4.2 THE DATE OF THE TAKING AND THE EXISTENCE OF A FORMAL DECREE

4.2.1 THE INSURANCE COMPANY NATIONALIZATION CASES

When an expropriation is affected by a formal decree, the inquiry about the date of that expropriation is relatively simple.⁽¹³⁾ Normally the date of the decree itself will be considered as the date of the expropriation. Accordingly, in the insurance company nationalization cases before the Tribunal, the date of expropriation was found to be the date on which the pertinent legislation proclaimed all insurance companies operating in Iran to be nationalized which was 23 June 1979. However, adjustments may need to be made because of changes in value that may have been caused by an earlier announcement of the nationalization.⁽¹⁴⁾ Such adjustments were made, for example, in valuation of the assets of American International Group, (AIG) when the case was brought before the Tribunal.⁽¹⁵⁾

On 23 June 1979, all insurance companies operating in Iran, including American International Group, were proclaimed nationalized by the Law of Nationalization of Insurance Companies.⁽¹⁶⁾ On 21 October 1981, claimants filed a claim against respondent (the Islamic Republic of Iran) before the Tribunal, seeking compensation for the taking of their assets. Despite the objections were raised which by the respondent in connection with the case,⁽¹⁷⁾ the claimants argued that under the Treaty of Amity and customary international law they were "entitled to the payment of just compensation equal to the full value of their interest as of the date of nationalization."⁽¹⁸⁾ AIG argued 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 goodwill.⁽¹⁹⁾

The claimant also contended 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".(20)

The Tribunal never clearly stated what standard of valuation was applicable.(21) It focussed mainly on the amount of compensation. It held that no Iranian actions prior to the nationalization should be considered in determining AIG's value. However, the Tribunal went on to state that the effect of both the nationalization and subsequent events on the company's value should not be taken into account either. Thus the valuation was made on the basis of the fair market value of the company at the date of nationalization.(22)

The valuation decision was complicated by the fact that there was no active market for AIG's shares, therefore both parties relied on expert testimony. Both parties experts relying on different financial facts, presented their own testimonies.(23) However, the Tribunal rejected both sets of valuations, adopting neither AIG's or Iran's estimate. It is interesting to note that AIG's valuations which were based on 1978 data, were rejected on the general principle that:

"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... necessary to exclude the effects of actions taken by the nationalizing state in relation to the enterprise which actions may have depressed its value. Moreover, 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.... Thus, financial data for the period 21 March 1978 - 25 June 1979 should not be ignored".⁽²⁴⁾

While the Tribunal found that the method of analysis which had been employed by the claimant's two experts was consistent with modern techniques of valuation of insurance companies, nevertheless it disagreed with their final valuation. It found that: "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 appraisal does not account for the effects of certain Iranian taxes upon net profitability. Thirdly, changes in the company's financial position between 21 March 1979 and the date of nationalization are not reflected in claimant's expert valuation".⁽²⁵⁾ Based on the foregoing, the Tribunal considered that fair market value of AIG at the date of nationalization was significantly less than even the lowest figure arrived at by the experts of the claimants. As we illustrated above, although the date of nationalization of AIG was fixed, 23 June 1979 i.e. the date of the nationalization act, the valuation of its assets and shares became subject to some adjustments.

4.2.2 THE PETROLEUM INDUSTRY CASES

While with respect to the insurance company nationalization cases the date of expropriation was found to be the date of pertinent legislation,⁽²⁶⁾ in petroleum industry cases in which the takings were carried out pursuant to the Single Article Act, the date of

taking was found to be different. In *Mobil Oil*⁽²⁷⁾ the sequence of governmental acts and relevant events commenced on 10 March 1979, the date of an NIOC letter to the oil companies declaring the agreements had become "inoperative".⁽²⁸⁾ Meetings followed at which attempts were made to reach agreement on the termination of the agreements.

The Single Article Act was issued 10 months later on 8 January 1980 authorizing nullification of certain contracts in the oil industry, and on 5 September 1981, claimants were sent a letter informing them that their agreements had been nullified. The oil companies contended that the date of expropriation was 10 March 1979, the date of the NIOC letter that had first informed them of the Iranian position that the agreements were inoperative.⁽²⁹⁾ Iran argued for the later date of 5 September 1981, the date of the formal nullification letters. The award avoided a finding on the issue by ruling no expropriation had occurred because the parties had agreed to termination of the agreements.

However, in a concurring opinion, Judge Brower agreed with the claimants on the date issue. He reasoned that 10 March 1979 should be taken as the effective date of expropriation even if the NIOC's letter of that date was ambiguous. This was because the date of the initial act "presumptively" should be regarded as the date of the taking when subsequent events confirm an expropriation has taken place.⁽³⁰⁾

In *Amoco International Finance*,⁽³¹⁾ the parties agreed that expropriation had taken place but disagreed on the date. Amoco argued for the early date of 1 August 1979 on the reasoning that the various communications and meetings between the parties prior to that date had made it clear that Amoco's right had been nationalized,

pointing particularly to the unilateral takeover in June and July 1979 of Khemco's marketing activities, against its objections.⁽³²⁾ As it had in *Mobil Oil*, Iran argued for a much later date at the end of December 1980 when Amoco had been notified that the Special Commission established pursuant to the Single Article Act had declared the contract null and void.⁽³³⁾ The award by Chamber Three agreed with Iran, fixing the date at 24 December 1980 on the reasoning that this was the date on which "the process which led to expropriation of Amoco's rights and interests in Khemco was complete....".⁽³⁴⁾

From the foregoing observations it could be concluded that in those expropriations affected by a formal decree (i) as regards nationalization of the insurance companies the date of the pertinent legislation was found to be the date of the expropriation, although with regard to the valuation of the properties some adjustments seemed to be necessary; (ii) in nationalization of the petroleum industries, however, the above formula was acceptable neither to the parties of the cases nor to the Tribunal. Accordingly, while the Tribunal in the *Mobil Oil* case did not fix any date, in the *Amoco* case the Tribunal fixed a date which was different to the date of the decree, i.e. the Single Article Act.

4.3 THE DATE OF THE TAKING IN DE FACTO EXPROPRIATION CASES

In the previous chapter we examined different types of *de facto* expropriation cases. It will be recalled that in these cases there is no formal expropriatory decree, but expropriation instead takes place by successive encroachments upon management and ownership rights. Accordingly, in these cases fixing the date of expropriation

is a difficult task. Differences of character among cases also cause the determination of the date of the expropriation to vary. Due to these differences the Tribunal in each individual case has adopted criteria consistent with the character of that case. For instance, as we shall now explain, in cases of expropriation of office equipment or a bank account, the method which has been used by the Tribunal differs from the method which has been used in cases of expropriation of a business entity.

4.3.1 THE DATE OF THE TAKING IN AN EXPROPRIATION OF A BANK ACCOUNT

In the case of expropriation of assets such as bank accounts or office equipment the Tribunal "generally has selected the date as of which the owner's access to the goods has been blocked".⁽³⁵⁾

The decisions of the Tribunal in *American Bell International Inc (ABII) v Iran*⁽³⁶⁾, (part of which is concerned with the expropriation of a bank account); and in *Dames & Moore v Iran*⁽³⁷⁾, illustrate the above statement. In the former case, the claimant (ABII) along with other claims, alleged its funds held in a bank account in Iran were expropriated by the Iranian Government.⁽³⁸⁾ The ABII funds in question were held in a joint ABII and Telecommunication Company of Iran (TCI) account established at Bank Melli by virtue of an agreement of 19 March to which ABII was party.⁽³⁹⁾ The funds in this account were used to satisfy ABII's outstanding affairs with creditors subsequent to its departure. Transactions on the account were to be made subject to the joint signature of TCI and ABII representatives at Price Waterhouse.⁽⁴⁰⁾ The claimant contended that although a substantial amount of his outstanding obligations had been settled, the ministry of Post, Telephone and Telegraph had delayed

the release of its funds which was about 20,000,000 Rials.⁽⁴¹⁾ It further stated that it had many times requested the release, when almost all of the obligations had been satisfied.⁽⁴²⁾ These requests were not complied with. Instead on 10 August 1980 the Ministry in a letter personally forwarded by a TCI representative to ABII's Iranian representative at Price Waterhouse with the authority to sign on behalf of ABII, had requested that Price Waterhouse transfer the funds to a TCI account at Bank Melli.⁽⁴³⁾ In a letter dated 19 August 1980 to ABII the representative reported that he was informed that "non compliance with the payment request would have serious personal consequences for [him] and would in any case not stop TCI obtaining access to ABII's funds".⁽⁴⁴⁾ The representative then had authorized the transfer of the funds which was effected on 11 August 1980.⁽⁴⁵⁾ Since then ABII had not had any access to the funds.

The Tribunal concluded in the light of these facts that claimant had been wrongfully deprived of its bank account of 19,976,850 Rials and therefore it was entitled to an award of U.S. \$283,964, i.e. the value of the property as of the date of the taking which was 11 August 1980.⁽⁴⁶⁾

4.3.2 THE DATE OF THE TAKING IN AN EXPROPRIATION OF OFFICE EQUIPMENT

An example of this type of case before the Tribunal is *Dames & Moore v Iran* (1983)⁽⁴⁷⁾ In this case claimants along with other claims, alleged that in the course of his work in Iran his property, which included vehicles and office equipment kept at a rented privately owned warehouse near Tehran, had been expropriated.⁽⁴⁸⁾ The claimant, relying on sworn statements of the Managing Director and General Manager of his company in Iran during the relevant period,

stated that in the autumn of 1980, representatives of the Government of Iran had occupied the warehouse and informed representatives of claimants that the warehouse was to be used to house refugees of the war and that any useful equipment stored therein would be turned over to the Iranian army.⁽⁴⁹⁾ The claimant further stated from that date his representatives were denied access to the equipment. Although Iran's liability was disputed,⁽⁵⁰⁾ the Tribunal, was of the opinion that unreasonable interference of the respondent with the use of the stored equipment had occurred.⁽⁵¹⁾

As far as the date of the expropriation of the equipment is concerned different dates might be considered as the date of the expropriation.⁽⁵²⁾ However, as we noted in Chapter 3, in the view of the Tribunal the date at which the owners' access to the goods has been blocked is the day of expropriation. Accordingly in the present case the Tribunal concluded that "a taking of the property occurred no later than 1 January 1981".⁽⁵³⁾

In the awards involving the taking of tangible properties such as vehicles, furnishings and equipments, the date issue has seldom been raised, perhaps because in this type of cases the answer did not affect the valuation of the properties taken. On the other hand, in expropriation cases involving ongoing business the date question has often been contested.

4.4 THE DATE OF THE TAKING IN EXPROPRIATION OF AN ONGOING BUSINESS

In expropriation cases involving ongoing businesses, a multiplicity of dates for the taking is conceivable. Consequently, in such cases the task of fixing a date is more complex. The taking of an ongoing business might occur through a chain of events. For example, it

might begin with minor management interferences and culminate in the transfer of title. The taking however, will not necessarily be found to have occurred at the time of either the first or the last such event. The Tribunal has been of the view that expropriation of an ongoing business occurs when the interference becomes an "irreversible deprivation".⁽⁵⁴⁾

Thus, in *International Technical Products Corp. v Iran* the Tribunal stated:

A claim for a taking is outstanding on the day of the taking of property. Where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of the property, the breach forming the cause of action is deemed to take place on the day when the interference has ripened into more or less irreversible deprivation of the property rather than on the beginning date of the events. The point at which interference ripens into a taking depends on the circumstances of the case and does not require that legal title has been transferred".⁽⁵⁵⁾

The question of 'the date of taking' was further addressed in the context of the appointment of provisional managers in *Sediran Drilling Company (Sedco) v National Iranian Oil Company*.⁽⁵⁶⁾ In that case the Tribunal was faced with two possible expropriation dates:

1 - 2 August 1980, when an order was issued by the National Industries Organization of Iran causing the formal transfer of claimant's shares;

2 - 22 November 1979 when claimant was stripped of its management rights by the appointment of three Iranians as provisional directors of the company.⁽⁵⁷⁾

The appointment of conservators or managers has often been regarded as a significant indication of expropriation because of the attendant denial of the owner's right to manager the enterprise.⁽⁵⁸⁾ Accepting

the appointment of the Government managers as an indication of expropriation of Sediran, the Tribunal however, laid out a two part standard holding that: (i) a taking is presumptively found to occur upon the appointment of managers and (ii) such presumption becomes conclusive if at the time of the appointment there was no reasonable prospect of the return of control to the owner. In this regard the Tribunal said:

When, as in the instant case, the seizure of control by appointment of "temporary" managers clearly ripens into an outright taking of title, the date of appointment presumptively should be regarded as the date of taking....

When... it is also found that on the date of the Government appointment of "temporary" managers there is no reasonable prospect of return of control, a taking should conclusively be found to have occurred as if that date.⁽⁵⁹⁾

Finally, the Tribunal accepted that the earlier date was the appropriate date of the expropriation. The Tribunal reasoned that the earlier date was more "equitable" because (i) the company's value to the claimants should not be affected by the Government's in fact operating the Company and having sole control over the generation of income; (ii) valuation of an expropriated entity 'must discount the effect of expropriatory acts.⁽⁶⁰⁾

However, in most cases of this type, it was not clear at the time of the appointment of the temporary managers whether the company would ultimately be liquidated, permanently taken over by the government, or returned to its shareholders. Therefore in contrast to Sedco, in the Starrett case⁽⁶¹⁾, the Tribunal expressly declared that the appointment of a temporary manager in mid January 1980 could not by itself be considered an expropriation because the control of the government through such an appointment was temporary and incomplete.⁽⁶²⁾

However, the award went on to find that the taking had occurred "at least by the end of January 1980"⁽⁶³⁾ which was only two weeks after the appointment of the temporary manager in the case. In this regard the Tribunal stated:

"There can be little doubt that at least at the end of January 1980 the Claimant had been deprived of the effective use, control and benefits of their property rights in Shah Goli.

It has therefore been proven that at least by the end of January 1980 the government of Iran had interfered with the Claimant's property rights in the Project to an extent that rendered these rights so useless that they must be deemed to have been taken".⁽⁶⁴⁾

Starrett had argued for a much earlier date on the grounds that the anti-American policies of the Iranian government amounted to an unlawful expropriation, presumably at the time of the revolution in late 1978 and early 1979. The Tribunal rejecting that argument stated that investors assume the risk of revolutions which do not by themselves constitute a taking giving rise to a claim for compensation under international law.⁽⁶⁵⁾ While the award did not articulate the criteria which it followed in fixing the date of expropriation, the Tribunal's rejection of the earlier date as it was claimed by Starrett and the date on which the temporary manager was appointed, denotes that it settled on the date by which it considered the expropriation process to have become irreversible.

In *Tippetts, Abbett, McCarthy, Stratton*⁽⁶⁶⁾ the claimant alleged expropriation of its interest in a partnership for which a temporary manager had been appointed by Iran on 24 July 1979. In determining the date of expropriation at a later date, the Tribunal stated that: "...assumption of control over property does not automatically and immediately justify a conclusion that the property has been taken by the government,.... such a conclusion is warranted whenever events

demonstrate that the owner has been deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral".⁽⁶⁷⁾

Thus according to the Tribunal, in that case such taking does occur when it appears that the deprivation involved is not merely short lived. However, in *Thomas Earl Payne*⁽⁶⁸⁾ the Tribunal found that the date of the taking was the date that the provisional or temporary manager was appointed. Examining the facts in that case, the Tribunal was persuaded of the governments intention to expropriate the claimant's interest at the time of appointment of the provisional manager by evidence that the business involved was high technical and critical to Iran's defence operations thus making it a particular target for takeover.⁽⁶⁹⁾

To sum up it could be concluded that in addressing the date issue the Tribunal has produced different results and articulated different criteria for fixing the date of expropriation in different fact situations. In *Sedco* and *Thomas Early Payne*, the date of the first formal government act was accepted as the date of expropriation. However, the approach in *Starrett* and *International Technical Product Corporation* was to find the point at which the process had become "more or less irreversible", while in *Tippetts, Abbett, McCarthy, Stratton*, the course followed was to find the date on which it appeared the deprivation was not merely ephemeral.

Taking all cases together, the Tribunal's awards on the date issue have clearly declined to accept automatically the date of the first act; instead it has examined the facts of each case to determine the point in time when the interference or deprivation or taking became permanent or "irreversible".

NOTES TO CHAPTER FOUR

1. C.N. Brower, "Current Developments in the Law of Expropriation and Compensation: A preliminary survey of awards of the Iran-U.S. Claims Tribunal", *Int'l Lawyer*, Vol. 21, No.3, 1987, p.656.
2. For a detailed discussion about *de facto* expropriation cases see, R. Dolzer, "Indirect expropriation of Alien Property". *ICSID Review - Foreign Investment L. Journal*, 1987, pp.41-63, see also Weston, "Constructive takings under International Law: A modest foray into the problem of 'creeping expropriation'", *16 Va. J. Int'l Law*, 1975, p.103. Christie, "What Constitutes a Taking Under Constitutional Law?", *38, B.Y. Int'l Law*, 1962, p.307.
3. See Article II of the Claims Settlement Declaration, in *1 Iran-U.S. C. Trib. Reports*, p.9. For a discussion of the Jurisdiction issue in the Tribunal see D.L. Jones, "The Iran United States Claims Tribunal: Private Rights and State Responsibility", *Virg. J. Int'l Law*, Vol. 24,2, 1984, pp.259-276. See also D.P. Stewart and L.B. Sherman, "Developments at the Iran-U.S. Claims Tribunal", 1981-83, *I.Virg J. Int'l Law*, Vol. 24,1, 1983, p.1.
4. *1 Iran-U.S. C. Trib. Reports*, op cit.
5. *Ibid.*
6. Case No. 302, see in *9 Iran-U.S. C. Trib. Reports*, p.10.
7. *Ibid*, p.42.
8. *Ibid.*
9. *Ibid*, p.230.
10. *Ibid*, p.43.
11. *Ibid.*
12. See eg. *Schering Corporation v Iran*, *5 Iran-U.S. C. Trib. Reports*, p.361. In that case the claimant along with other claims, claimed for the payment of debts allegedly owed by Firooz to Searching Iran. The case was dismissed because it was not 'an outstanding claim as of 9 January 1981 as required by the Claims Settlement Agreement.
13. See C.N. Brower, op cit, p.656.
14. See *William L. Pereira Assocs. Iran v Iran*, Award No. 116-1-1 at 43 (19 March 1984), *5 Iran-U.S. C. Trib. Reports*, pp.198, 226-27.
15. See *American International Group v Iran*, in *4 Iran-U.S. C. Trib. Reports*, 4, 1983, p.96.

16. AIG's claim arose out of the nationalization of the Iran America International Insurance Company (Iran America) by the Government of Iran on 25 June 1979. Iran America, which had begun operations on 22 December 1974, was organized as an Iranian public joint stock company with ten per cent of the shares issued each in the names of American Life Insurance Company ('ALICO'), 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 five per cent 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.
17. The Respondents' objections were about (i) the adequacy of the proof offered to demonstrate the claimant AIG's United States nationality; (ii) subject matter jurisdiction of the Tribunal over the claim on various grounds. See in 4 Iran-U.S. C. Trib. Reports, 4, op cit, pp.99-100.
18. Ibid, p.105.
19. Ibid, p.107.
20. Ibid, p.106
21. See "Nationalizations - Standard of Compensation", in 24 Virg. J. Int'l Law, 1984, p.1004. See also, D.V. Jones, op cit, p.277.
22. See in 4 Iran-U.S. C. Trib. Reports, op cit, p.107.
23. Ibid.
24. Ibid. See also in "Nationalizations", Virg. J. Int'l Law, op cit, p.1007.
25. See in 4 Iran-U.S. C. Trib. Reports, op cit, p.119. Also in this regard, see concurring opinion of Richard M. Mosk, in the same report, op cit, p.111.
26. It should be noted that Iran did not contest the date in these cases. See American Group International (AGI) in 4 Iran-U.S. C. Trib. Reports.
27. See Mobil Oil case in 16 Iran-U.S. C. Trib. Reports, p.3.
28. Ibid, p.10.
29. Ibid, p.44.
30. Ibid, p.67.
31. See Amoco International Finance case in 15 Iran-U.S. C. Trib. Reports, p.189.
32. Ibid, pp.208-209.

33. Ibid, p.213.
34. Ibid, p.220.
35. C.N. Brower, op cit, p.657.
36. See Case No. 48 in 12 Iran-U.S. C. Trib. Reports, p.170.
37. See Case No. 54 in 4 Iran-U.S. C. Trib. Reports, p.212.
38. See in 12 Iran-U.S. C. Trib. Reports, op cit, p.213.
39. Ibid.
40. Ibid, p.214.
41. Ibid.
42. Ibid.
43. Ibid.
44. Ibid.
45. Ibid.
46. Ibid, p.231.
47. See Case No. 54 in 4 Iran-U.S. C. Trib. Reports, op cit, p.212.
48. Ibid, p.222.
49. Ibid.
50. Iranian representatives before the Tribunal asserted a general denial of liability. They alleged that authorized representatives of claimant had conveyed all of the equipment concerned to various Iranian individuals and companies before the time of the alleged taking. For a more detailed discussion, see 4 Iran-U.S. C. Trib. Reports, op cit, p.222.
51. Ibid, p.223.
52. For example the date 30 March 1979 which claimant was forced to leave Iran because of the atmosphere of anti-Americanism, or September which an 'executive writ' in respect of the property was issued by the State Deeds and Property Registration Organization of the Iranian Ministry of Justice.
53. Iran-U.S. C. Trib. Reports, 4, op cit, p.223.
54. See *International Technical Products Corp. v Iran* in 9 Iran-U.S. C. Trib. Reports, p.240.
55. Ibid. See also *Tippetts, Abbett, McCarthy, Stratton v Tams-Affa Consulting Engineers of Iran*, Award No. 141-7-2, (29 June 1984), 6 Iran-U.S. C. Trib. Reports, p.219 ("taking of property

ythrough various acts of interference deemed to have occurred not when first interferences occurred, but later, with consequence that interest was calculated from the later date of the taking or deprivation").

56. The taking in the *Sedco* case had not been affected under laws aimed at nationalization of a designated industry, but under the legislation enacted shortly after the revolution authorizing the appointment of temporary directors for the protection of certain businesses. However, the expropriated investment in this case was in the oil drilling business and the evidence showed that the government had decided to take over the business as a part of the petroleum industry as a whole. See Case No. 129, *SEDCO Inc.*, for itself and on behalf of *SEDCO International, S.A.*, and *Sediran* in 9 Iran-U.S. C. Trib. Reports, p.248.
57. *Ibid*, pp.276-277.
58. See e.g. Sohn & Baxter, "Responsibility of States for Injuries to Aliens", 55 A.J. Int'l Law, 1961, pp.548, 558-59. Christie, *op cit* at 337, ("the most fundamental right that an owner of property has is the right to participate in its control and management").
59. See in 9 Iran-U.S. C. Trib. Reports, *op cit*, p.278.
60. *Ibid*, p.279. See also *American International Group v Iran*, Award No. 93-2-3 at 17-18 in 4 Iran-U.S. C. Trib. Reports, *op cit*, at p.107.
61. See in 4 Iran-U.S. C. Trib. Reports, p.154.
62. *Ibid*.
63. *Ibid*.
64. *Ibid*.
65. *Ibid*, p.156.
66. See *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineering of Iran, The Government of the Islamic Republic of Iran*, in 6 Iran-U.S. C. Trib. Reports, *op cit*, p.219.
67. *Ibid*, p.225.
68. See *Thomas Earl Payne v The Government of Islamic Republic of Iran* in 12 Iran-U.S. C. Trib. Reports, p.3.
69. *Ibid*.

CHAPTER FIVE

REMEDIES

REMEDIES

In the last two chapters we examined the controversial issues of 'the taking' as well as 'the date of the taking'. Determining how a claimant should be compensated for his lost property interest is, of course, also an area of controversy in expropriation cases. These determinations necessarily involve an inquiry into what type of remedy should be employed, as well as the scope of that remedy.

5.1 RANGE OF REMEDIES

In international law, as the decisions of the International Courts and international arbitrations show, there is a broad range of remedies available to investors whose property interests have been expropriated⁽¹⁾ These include restitution or specific performance, substitution of the value of the property taken, award of punitive damages, or other measures intended to indemnify the claimant for the wrong done, or the property lost.⁽²⁾ However, it should be pointed out that reparation is still the primary and most frequently sought form of relief.⁽³⁾ After almost sixty years, the definition of its legal nature remains to be found in the often quoted statement issued by the Permanent Court of International Justice in the *Chorzow Factory* case (1928).⁽⁴⁾ The case was related to the expropriation by Poland of a factory at Chorzow, contrary, as the Court had held, to the Geneva Convention of 1922 between Germany and Poland on Upper Silesia.⁽⁵⁾ In this judgement the Court ruled upon a claim by Germany for reparation for the damage caused by an illegal expropriation. In this case the Court stated:

The essential principle contained in the notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act

and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind or, if to the value which a restitution in kind would bear the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁽⁶⁾

Accordingly, reparation may take two different forms, restitution in kind or the payment of damages.

5.2 RESTITUTION IN KIND

While restitution in kind is the primary remedy, as the Court said elsewhere in the same judgement, monetary compensation 'is even the most usual form of reparation' and was in fact selected by Germany in that case.⁽⁷⁾ However, it seems fairly clear that as a rule international law has for long recognised restitution in kind as a right, against the wrong-doing state.⁽⁸⁾ An example of legal restitution in kind could be the decision which was made with regard to the *Martini* case.⁽⁹⁾ In that case, the Tribunal held that proceedings in a case in the Venezuelan courts that was lost by the claimant company had been "manifestly unjust" and decided that "the Venezuelan Government is bound to recognize, by way of reparation, the annulment of the financial obligation imposed" by the Venezuelan courts on the claimant company.⁽¹⁰⁾ In the *Temple* case also, it was ordered that Thailand should return to Cambodia the artefacts which had been taken unlawfully from a temple by Thai authorities.⁽¹¹⁾

Brownlie points out that "it would seem that territorial disputes may be settled by specific restitution, although the declaratory forms of the Judgements of the International Court masks the element of restitution".⁽¹²⁾ However as Schwarzenberger has stated

"international judicial institutions have slowly groped their way towards the articulate formulation of the rule that the Commission of an international tort entails the duty to make reparation. For a considerable period, they tended to limit redress for breaches of international law to monetary compensation for actual injury, or damage suffered".⁽¹³⁾

It is obvious that neither 'restitution in kind' or 'monetary compensation' is an exclusive principle. One author has subdivided the wrongdoer's duty into a duty to restore where a situation has been illegally created and a duty to pay compensation where the wrongdoer has wrongfully failed to create a situation.⁽¹⁴⁾ The Harvard Draft Convention recognizes the principle by providing in Article 27 that the reparation which a state is required to make for a wrongful act or omission may take the form of 'measures designed to re-establish the situation which would have existed if the wrongful act or omission... had not occurred', damages or a combination thereof.⁽¹⁵⁾ In our opinion, determining the reparation primarily depends on the circumstances of the case and on the claimant state's choice whether the wrongdoer state can or should make restitution in kind or pay damages. For example, in a nationalization case, if the nationalized assets have already passed into the hands of bonafide third party purchasers, restitution is indeed impossible. National Courts may have jurisdiction over such persons, but international tribunals have no jurisdiction to require them to return to the nationalized party the assets which they now hold. Again, the nationalized property may no longer exist in the same form to be restituted.

Sometimes restitution is impossible, depending on the circumstances of the case. Such circumstances are what the Permanent Court had in mind in its *obiter dictum* in the *Chorzow* case, when it spoke of restitution being required, unless "this is not possible".⁽¹⁶⁾ Certain writers interpret impossibility of restitution as meaning that if a state is unwilling to return what it has taken by nationalization, and cannot be compelled to do so, then restitution is impossible' and should not be ordered against a state.⁽¹⁷⁾ This seems to be accepted, particularly, in situations where the taking is of the business of exploitation of natural resources, within a state's territory, or indeed any other commercial enterprise which has to operate within the state's territory.⁽¹⁸⁾ Accordingly, in recent arbitral awards the application of restitution rarely can be seen.

5.2.1 RESTITUTION IN RECENT ARBITRAL AWARDS

In recent arbitral awards, as we shall see below, the arbitrators have hesitated to apply "restitution in kind" in making their decisions. While they have recognised the principle as a principle of international law, nevertheless, they have tended to treat it as a purely theoretical possibility.

In the recent arbitration between the *Libyan American oil Company (Liamco)* and the Government of the Libyan Arab Republic, the Sole Arbitrator, Dr. Mahmassani spoke of restitution as being a general principle of the Islamic Sharia and of international law, but said that it was 'hindered' by the impossibility of performance.⁽¹⁹⁾

Although in the *Texaco v Libya* case,⁽²⁰⁾ a different arbitrator, Dupuy, relied on the principle of restitution and equated specific performance with restitution, this course was rejected by Judge Lagergren in *B.P. v Libya*.⁽²¹⁾ As it is well known, specific performance did not take place in *Texaco v Libya*. Instead compensation was eventually agreed between the parties. Similar hesitation about the application of restitution can be seen in the award in *Amco Asia Corp. v Indonesia*.⁽²²⁾ The Tribunal was concerned with the claim that the Indonesian government had unlawfully revoked an investment licence, granted to the alien corporation. It said:

It is obvious that this Tribunal cannot substitute itself for the Indonesian Government, in order to cancel the revocation and restore the licence. Such actions are not claimed, and it is more than doubtful that this kind of restitution *integrum* could be ordered against a sovereign state.⁽²³⁾

For restitution to be carried out, it is necessary for the Arbitration tribunal to order a specific performance against a state. However, these tribunals feel that once states have given their consent (whether *ad hoc*, or in an arbitration clause) they can pronounce upon the law as it affects a dispute before them; but they cannot order specific performance.⁽²⁴⁾

It is also a reality that within a state's territory specific performance usually is impractical.⁽²⁵⁾ Impracticability and virtual impossibility of restitution have led to the emergence of a request from private parties seeking redress for nationalization, that the award be in the form of a declaration of the invalidity of the act in question. In *B.P. v Libya* case the claimants argued in favour of restitution, but requested a declaration rather than an order that it should be restored to the full enjoyment of its rights under the B.P.

concession.⁽²⁶⁾ The Tribunal found this to be a purely theoretical distinction. It stated:

It may be argued that the claimant does not in fact ask for an order of restitutio integrum, but merely for a declaratory statement as to its legal position under the B.P. concession and with respect to certain property and that issue of whether restitution in kind is an available remedy therefore is not presented... The Tribunal holds, however, that no such distinction should be made. If it is found that the claimant is entitled to be restored to the full enjoyment of its rights under the B.P. concession, and is the owner of the Oil and assets referred to, then the claimant is entitled to an order for specific performance or, alternatively, a declaratory award of entitlement to specific performance".⁽²⁷⁾

In the *Liamco-Libya* case also, Mahmassani, like Judge Lagergren, answered the request for a Declaratory Award negatively but on rather different grounds.⁽²⁸⁾ In that case, the claimant requested the issue of a declaratory award that Libya's acts were unlawful and not entitled to international recognition and that Libya did not have title to oil extracted from Liamco's concessions. Dr. Mahmassani, referring to and relying on the sovereignty of states and the act of state doctrine and the inability to enforce a Declaration, rejected the request in question.⁽²⁹⁾

Bowett also is of the opinion that in cases where the nationalization is of the business of exploitation of natural resources, within a state's territory "restitution is remote, and specific performance will usually be impractical, so that a claim to compensation will become, realistically, the primary remedy. Similar arguments would tend to relegate the remedy of a declaratory judgement to a secondary role in such cases".⁽³⁰⁾

Considering the above arguments, a fundamental question must be whether international law does indeed recognize in principle the remedy of restitution. In the *B.P.-Libya* case, Arbitrator Lagergren

suggested that the dictum in the *Chorzow Factory case* was obiter, because in that case the German government did not claim restitution.⁽³¹⁾ He further explained that "such comments as the court made were in reality to identify the principles by which to determine the amount due in compensation for an unlawful taking".⁽³²⁾ However, Dupuy, Sole Arbitrator in *Texaco-Libya case* stated: "the principle was expressed in such general terms that it is difficult not to view it as a principle of reasoning having the value of a precedent".⁽³³⁾ Higgins points out that for Professor Dupuy "the very numerous quotations of this part of the opinion in doctoral writings confirm....., that all authors see in it a declaration of principle."⁽³⁴⁾ Nonetheless, Judge Lagergren was of the belief the writers merely repeat the quotation of the *Chorzow case* and fail "to appreciate its limited significance".⁽³⁵⁾

It is a reality that in none of nationalization of concessionaries has restitution alone been claimed. The U.K., for example, in its protest note to Libya relating to the *B.P. v Libya* nationalization spoke of restitution and compensation as alternatives, either of which would serve to make an otherwise unlawful act lawful.

So far as the practice of the U.S. were concerned, the Hickenlooper Amendment to the *Sabbatino* judgement of the U.S. Supreme Court referred to compensation but not restitution.⁽³⁶⁾ Thus it could be concluded that although restitution is in general terms a recognized remedy, it has not in practice been an established remedy. Lack of such status, in our opinion, is because of the impracticability of restitution as a means of settlement of cases, particularly in cases of nationalization of businesses based on state contracts. There may be a role for restitution of the actual property expropriated, in

cases where there has been an unlawful detention of a ship or aircraft, or where there has been an unlawful occupation of a territory. Yet in situations where the taking is of a business exploiting natural resources, within the state's territory, the likelihood of restitution seems remote.⁽³⁷⁾ As we will see, restitution or specific performance has not been seriously contemplated in the awards of the Iran-U.S. Claims Tribunal which are the most recent case law in respect of expropriation.

5.2.2 RESTITUTION IN THE IRAN-U.S. TRIBUNAL

Judge Brower (the U.S. Member of the Tribunal) has pointed out that 'virtually all of the Tribunal's decisions focus solely on the return of the claimant of the value of the property interest lost. Restitution or specific performance has not been discussed... in any of the Tribunal's awards'.⁽³⁸⁾ The primary reason for this has been the nature of the cases that makes restitution almost impossible. Claims which have been brought before the Tribunal, characteristically have either been because of "breach of a contract or an expropriation of a business entity or commercial operation". The nationalized property may no longer exist or may have been passed into the hands of a third party. Thus as a practical matter restitution is impossible. Furthermore, the Tribunal does not have adequate enforcement mechanisms for such restitution, although it does have available to it the Security Account established in the Algiers Accords out of which monetary awards can be satisfied.⁽³⁹⁾ Moreover, claimants have seldom, if ever, requested punitive damages. In the *Sedco* case, the Claimant argued that the expropriation of its interest was unlawful and that the remedy for an unlawful taking is

restitution, or where restitution is not practical, full compensation. The Tribunal held that the "Claimant must receive compensation for the full value of its expropriated interest in Sediran,..... regardless of whether or not the expropriation was otherwise lawful".⁽⁴⁰⁾

It is notable that in the *Starrett* case⁽⁴¹⁾ Iran formally offered restitution as the appropriate remedy. for settling the case, nevertheless the Tribunal refused this. This attitude of the Tribunal has resulted in that Khan to conclude that:

"...the Tribunal has never considered *restitution in integrum* as the appropriate remedy in expropriation cases, even in a case where it was formally offered by that expropriating state".⁽⁴²⁾

5.3 DETERMINING OF THE SCOPE OF COMPENSATION

The question of the scope of compensation concerns whether the expropriating state must pay the genuine economic value of the property, full, or only partial compensation. However, in the context of the Tribunal the issue has related to only two standards: full and partial compensation. Iran as the respondent in the cases before the Tribunal has not denied the very principle of compensation although it has in almost all cases contended the scope of it.

5.3.1 THE OBLIGATION TO COMPENSATE

As it was discussed in Chapter 1, customary international law has long recognized such elementary principles as respect for lawfully acquired property rights and respect for lawfully concluded agreements between states and foreign investors. As Clagett points out:

"...state liability for breach of these obligations has never been seriously questioned by any twentieth century arbitral Tribunal or other international adjudicatory authority".⁽⁴³⁾

To the contrary, international Tribunals have repeatedly held that under customary international law a state must compensate an alien investor if the state expropriates the investor's interest.⁽⁴⁴⁾ As was also pointed out earlier, Iran itself recognized this rule by admitting in legal opinions, filed in the Tribunal that its unilateral termination of a state contract "is subject to the payment of appropriate compensation".⁽⁴⁵⁾

In the *Chorzow Factory* case, which is the leading decision in public international law concerning the obligation to pay compensation for expropriation, the Permanent Court described compensation as a necessary element of any lawful expropriation.⁽⁴⁶⁾

Recent international arbitrations have also uniformly held that when states expropriate property, whether by repudiating contractual obligations to foreign investors or otherwise, an obligation to pay compensation arises. As we saw in the first Chapter, in the recent oil expropriation arbitrations arising out of Libya's expropriation of foreign petroleum interests, three different international arbitrators each held Libya to be liable for payment of compensation.

In a more recent international arbitration concerning the *Benvenuti et Bonfont v People's Republic of the Congo* (1980)⁽⁴⁷⁾ the state party defendant was held liable to a foreign company for breach of its contractual undertakings. In summary, customary international law, as interpreted by international courts and tribunals, has consistently recognized that the expropriation of foreign investors' property, including contract rights, must be accompanied by

compensation. However, the scope of compensation and its determination have remained controversial.

As we mentioned earlier, debate as to the scope of compensation before the Tribunal has centred on two standards of compensation, viz. full and partial compensation. The two parties in the cases have naturally continued to insist on their own principles. While the American side, relying on the traditional standard of the Hull formula, insists on the principle of full compensation, the Iranian side, relying on the U.N. Resolutions, have been insisting on a partial compensation standard.⁽⁴⁸⁾ This issue has been at the centre of a vortex of scholarly articles and speculation; and the Tribunal's decisions and awards on this point have received very close attention. We shall examine these awards to determine which one of the above mentioned principles has been employed by the Tribunal.

In determination of the scope of compensation, the principal issue is determination of the applicable law, as by application of that law, the scope of compensation can be determined.

Accordingly, the Tribunal in expropriation cases had had to deal with two issues: first the question of which law is applicable, Iran's domestic law, the Treaty of Amity, between the United States and Iran, or customary international law; and secondly the question of the precise context of that law. The Tribunal has, however, hesitated to discuss these issues comprehensively and in depth, but on the contrary has tended to discuss them sparingly.

It has confronted these questions only when it was unavoidable. The reason perhaps, has been the great number of expropriation cases, and "possible impact as a precedent of a case relying on - or rejecting -

a particular standard of compensation".⁽⁴⁹⁾ Because of this reluctance, the Tribunal's treatment of the issues has depended on the importance of the individual case. In cases in which the amount of property in dispute was relatively small or the expropriation dispute was incidental to the main claims, the controversy over the applicable law and legal standard has taken second place to the disposition of the case. Consequently, in many of the cases involving seizure of tangible business assets, such as office equipment, the Tribunal has simply awarded the value of the property at the time of seizure, without discussion of any of the issues.⁽⁵⁰⁾ In cases in which the expropriated property formed the principle aspect of the claim, on the other hand, the issues of applicable law and compensation standards have been discussed more directly. We may now examine these awards of the Tribunal to explore just how the Tribunal has determined this applicable law, then its treatment of the standard of compensation.

5.4 THE APPLICATION OF IRANIAN DOMESTIC LAW

As we mentioned in the second Chapter, the Charter of the Tribunal, the 'Claims Settlement Declaration',⁽⁵¹⁾ permits the Tribunal to look at a wide range of sources to determine the law it will apply.⁽⁵²⁾ Accordingly, claims under contracts for the purchase of goods or services have been decided entirely, or at least substantially, on the basis of the parties' contracts. Where there is no contract, or where it does not provide significant rules, the Tribunal regularly has identified and applied general principles of law.⁽⁵³⁾ In cases which are relevant to public international law, such as expropriation, treaty interpretation and expulsion, the Tribunal has applied that body of law. The Tribunal has rarely applied national

rules, "even in cases where the parties might arguably have agreed on them as the rule of decision". (54)

As far as the applicability of the Iranian domestic law in determination of compensation in expropriation cases is concerned, the Tribunal decisions to date have not upheld Iran's contentions that its own domestic law governs the standard of compensation payable for nationalized or expropriated property. In the two cases dealing with expropriations made under formal government decree (the law of Nationalization of Insurance Corporations), the Tribunal applied principles of customary international law or treaty law to determine the standard of compensation, without relying on or applying Iranian Law. These cases are as follows.

American International Group (AIG) v Iran (1983)

In this case, the claimant (AIG) claimed 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 had an equity interest. (55) AIG's claim arose out of nationalization of the Iran America International Insurance Company ('Iran America') by the Government of Iran in June 1979.

Iran America, which began its activities in 1974, was organized as an Iranian public joint stock company with 10% of the shares issued each in the names of American Life Insurance Company ('ALICO'), a corporation organized under the laws of the state of Delaware, American International Reinsurance Company, Limited (AIRCO), a corporation organized under the laws of Bermuda; and American International Underwriters Overseas Limited (AIUO), a corporation

also 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. Each of these corporations was a wholly owned subsidiary of AIG. The Respondents, along with other objections,⁽⁵⁷⁾ objected to subject matter jurisdiction over the claim on various grounds.

As regards the issue we are presently concerned with, they argued that the claim was barred for the reasons that "the Commercial Code of Iran gives its Iranian Courts exclusive jurisdiction over Iranian corporations, that the claimant had failed to exhaust local remedies provided in the Iranian law and that nationalization of insurance companies is an Act of State which is not subject to review by an international Tribunal".⁽⁵⁸⁾

However, the Tribunal found that the commercial code of Iran, although giving jurisdiction to Iranian courts over Iranian corporations such as Iran America, could not exclude the claims from its jurisdiction.⁽⁵⁹⁾ Relying on Article II, Paragraph 1 of the Claims Settlement Declaration, the Tribunal further stated "the two Government 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".⁽⁶⁰⁾

Furthermore, the Algiers Declaration has granted jurisdiction to the Tribunal notwithstanding that exhaustion of local remedies or Acts of State doctrines might otherwise be applicable.⁽⁶¹⁾ In conclusion, the Tribunal found that it had jurisdiction over both claims i.e. a claim by AIG with regard to 25 percent of the Iran America shares and a claim by ALICO with regard to 10 percent of those shares.

INA Corporation v Iran (1985)

In this case, the claimant (INA Corporation), a United States corporation incorporated under the laws of Pennsylvania, filed a statement of claim with the Tribunal for compensation for alleged expropriation of its 20 percent shareholding in Bimeh Sharagh (an Iranian Public Joint Stock Insurance Company⁽⁶²⁾). INA claimed U.S. \$285,000 representing what it alleged was the value of its shares, together with interest and legal costs. As far as the determination of the level of compensation is concerned, the claimant argued that compensation should be 'prompt, adequate and effective on the basis both of general principles of international law and the Treaty of Amity'.⁽⁶³⁾

The respondents conceded that, "in principle, the wording of Article 1 of the nationalization law does, in appropriate cases, envisage the payment of compensation to private shareholders of nationalized insurance companies".⁽⁶⁴⁾ The Respondent explained that a mechanism for the assessment and payment of compensation exists pursuant to which Central Iranian Insurance (CII) commissioned an official evaluation to be carried out by an independent firm of accountants to assess the value of each of the twelve nationalized companies at the date of nationalization.⁽⁶⁵⁾ The Respondent further explained that "a composite report was to be made by CII to the Joint General Assembly consisting of five Government ministers, established pursuant to the nationalization law, who would in due course make their recommendation to the Government as to the appropriate level of compensation, if any, to be paid".⁽⁶⁶⁾

However, the Tribunal, ignoring the pertinent Iranian laws and regulations, found the fair market value principle as the proper

international law rule in determination of the value of the shares.⁽⁶⁷⁾ We will have more discussion about this decisions of the Tribunal later in this chapter, as this decision concerning the valuation standard of compensation is rather different from other decisions which have been made in this area.

American Bell International Inc. (ABII) v Iran⁽⁶⁸⁾

This case also is another in which the Respondents relied on the Iranian Law. In this case the claimant, along with other claims, argued that the funds held in his bank account in Iran had allegedly been expropriated by the Government of Iran.⁽⁶⁹⁾ The claimant's funds in question were held in an account jointly with Telecommunication of Iran. The funds in this account were used to satisfy ABII's outstanding affairs with creditors subsequent to its departure. The claimant, relying on international law, sought compensation for his funds. Respondent did not dispute the appropriation of the funds, but contended that the acts in question did "not amount to 'expropriation or usurpation' under Iranian Law, the law governing the contracts".⁽⁷⁰⁾ However, the Tribunal noted that in the circumstances of this case there was "no need to discuss the applicable law at length".⁽⁷¹⁾ The Tribunal further stated:

Where, as here, both the purpose and effect of the acts are totally to deprive one of funds without one's voluntarily given consent, the finding of a compensable taking or appropriation under any applicable law (International or domestic), is inevitable unless there is clear justification for the seizure.⁽⁴¹⁾

Since there was no outstanding obligation of ABII, to justify the taking of its funds, the Tribunal found that the claimant was wrongfully deprived of its bank account funds and without reliance on

any Iranian or international law, simply awarded the value of the funds as of the date of the taking.⁽⁷³⁾

To sum up, in the three above cases, the Tribunal did not rely on the Iranian law. On the contrary, in the first and second cases, it applied the principles of customary international law and in the third case simply awarded the value of the property without reliance of any of the above mentioned laws.

Although the Tribunal did not discuss its reasons for disregarding Iranian law in its decisions concerning the determination of compensation, its decisions in this regard are consistent with the opinion of some commentators, as well as the decisions of international tribunals. Among commentators, Carlston, for example, states:

'While confiscatory legislation must be given application by the Courts of a state in which judicial review on the bases of opposition to international law is impossible, both international courts and courts of other states, may refuse to give application to such legislative action as it impinges upon international society and if it is violat^e of international law'.⁽⁷⁴⁾

In the settlement of *Shufeldt's claim* more than fifty years ago, this principle was also applied. In that case the Guatemalan legislature had enacted a decree depriving Shufeldt of all his rights under a ten year economic development agreement.⁽⁷⁵⁾ The Guatemalan government contended that this decree rendered the contract null and void *ab initio*. The Arbitrator held:

"It is perfectly competent for the Government of Guatemala to enact any decree they like and for any reason they see fit... But this Tribunal is only concerned where such a decree passed even on the best of grounds works injustice to an alien subject, in which case the Government ought to make compensation for the injury inflicted and cannot invoke any municipal law to justify their refusal to do so".⁽⁷⁶⁾

In response to the argument of the Guatemalan government, that the legislative decree was the constitutional act of a sovereign state that was not subject to review by any judicial authority, the arbitrator declared:

"This may be quite true from a national point of view but not from an international point of view for 'it is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject'" (77)

Subsequently, in the TOPCO arbitration the arbitrator noted the irrelevance to an international claim of the legal character of nationalization measures under municipal law. Dupuy in this regard summarised the relevant principle with his observation that:

"It is, indeed, a well known principle that, with regard to international law, municipal law is a mere fact and that the act of a state which is irregular internationally cannot be affected by its legal character under municipal law within which the state acted". (78)

5.5 THE APPLICATION OF CUSTOMARY INTERNATIONAL LAW

In the previous section we examined the question of the applicability of domestic law as a source for determination of compensation. We saw that these laws have not been employed in settling international claims. Also we saw that the Tribunal has hesitated to apply the national rules of either of the participating states in any case before it "even in cases where the parties might arguably have agreed on them as the rule of decision". (79) As a result, the Tribunal, when determining the standards of compensation in expropriation cases, has mainly relied on customary international law. While in some cases it has relied exclusively on customary international law, in others it has relied on both customary international law and the

Treaty of Amity, and in a few cases exclusively on the Treaty of Amity, which will be examined in the next Chapter.

However, the content of customary international law with respect to the compensation standard is not clear cut. As we discussed in the first Chapter, the customary rules in the area of nationalization of foreign property, particularly with respect to compensation, have always been controversial and remain as a point of controversy in the relationship between foreign investors and host states, especially Third World ones.⁽⁸⁰⁾

While Western developed states, mainly the U.S., along with many legal writers, claim that the traditional rule of customary international law (i.e. the standard of full compensation), still exists, the Third World states, along with some jurists in these countries, argue that the customary law in this regard has changed at least to a principle of less than full compensation.⁽⁸¹⁾ Since in this study we are dealing primarily with the decisions of the Iran-U.S. Claims Tribunal we must examine changes supposedly affecting customary international law in the light of the arguments of the parties before the Tribunal. First the position of Iran before the Tribunal with respect to the customary international law standard of compensation will be examined. Then the position of the U.S. in this regard will be discussed.

Since Iran in its arguments against the principle of full compensation as a rule of customary international law has tried to rely decisively on U.N. Resolutions and settlement practice, the Tribunal has been faced with the necessity of deciding the basis on which to draw conclusions concerning the contents of such law. This

question along with the question of the position of both parties will be discussed as preliminary matters.

Finally, in the decisions of the Tribunal in application of compensation standard issued from different chambers, certain differences can be discerned. Therefore the fourth part of the Chapter will assess the Tribunal's contribution to the question of the standard of compensation.

5.5.1 THE POSITION OF IRANIAN PARTIES

Iranian parties have repeatedly challenged the traditional requirement of full compensation. While in some cases they have implicitly denied this standard, in other cases they have explicitly challenged this standard. For instance, in the *Thomas Earl Payne* case Iran used the implied argument:

'Present day international law lays down a standard of partial compensation, the amount determined "with a view to the laws and regulations of the states concerned"'.⁽⁸²⁾

In the *American International Group* case, on the other hand, Iran straightforwardly stated:

'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 practices".⁽⁸³⁾

Iranian parties, when relying on the partial compensation standard, maintain that lump sum agreements between States have affected traditional customary international law.⁽⁸⁴⁾ Also they argue that the various resolutions adopted by the U.N. General Assembly in the 1970s: the "Charter of Economic Rights and Duties of States" and the 'Declaration on the "Establishment of a New Economic Order' both

adopted in 1974, and "Permanent Sovereignty over Natural Resources", adopted in 1962,⁽⁸⁶⁾ have changed the content of the international law.

It is well known that in lump sum and other settlements the compensation has usually amounted to less than the full value of the property in the sense of the traditional international law standard.⁽⁸⁷⁾ A study of the wording of consecutive U.N. Resolutions from the 1960s and 1970s also shows a trend of departing from the requirement of full compensation as the standard of international law.⁽⁸⁸⁾ Since World-War II, the U.S., the U.K., France and some other countries have attempted to settle the international claims of their nationals by negotiating lump sum settlement agreements.⁽⁸⁹⁾ Under these agreements, the respondent state pays a fixed sum to the claimant state and the latter distributes it, generally through a national claims commission established pursuant to domestic legislation. Examples of such commissions are the U.S. Foreign Claims Settlement Commission, the British Foreign Compensation Commission and the French Commission which, adjudicate the separate claims and allocate a share of the fund to each successful claimant.⁽⁹⁰⁾ Lillich, in examining lump sum agreements in the last 40 years, has concluded "this procedural device has become, without doubt, the paramount vehicle for settling international claims".⁽⁹¹⁾ Between the end of World-War II and 1975, 139 lump sum agreements were concluded.⁽⁹²⁾ Moreover, an additional 29 lump sum agreements were concluded in the period from 1975 to 1982.⁽⁹³⁾ However, their jurisprudential significance has been the subject of intense controversy. In 1970, the I.C.J. in the *Barcelona Traction case*⁽⁹⁴⁾ declared lump sum agreements as *sui generis*, describing them as no

more than a *lex specialis*; having no legal effect beyond the unique circumstances giving rise to them, and consequently not to be regarded as sources of general international law.⁽⁹⁵⁾ Nevertheless, Lillich and Weston argues that the I.C.J. was incorrect in its approach to these agreements. They state:

First, that lump sum agreements fall squarely within the ambit of sub-paragraphs 1(a) and (b) of Article 38 of the statute of the I.C.J.; second, that as "sources" of international custom "they can and must be treated in the same manner as any other international prescription; third, that this treatment should be both contextual and policy-oriented in character; and finally, that as a result of such treatment (but only after such treatment) they can be accorded binding, analogical, or no effect whatsoever. Continued adherence to a theory that would deny the validity of these conclusions by relegating the whole phenomenon of lump sum agreement-making to an inferior status within the pantheon of international [legal] prescription is... to deny a growing edge of international law. Worse, it is to misconceive the nature of law and legal process."⁽⁹⁶⁾

Returning to the position held by Iranian parties, they not only relied on the lump sum agreements and argued for a partial compensation standard, but in some cases also argued in favour of "appropriate compensation". For instance, in the *Sedco case*⁽⁹⁷⁾ the Iranian parties argued that: 'customary international law requires appropriate compensation to be measured in the light of all circumstances of the case, and assessed with "unjust enrichment" as the guiding principle'.⁽⁹⁸⁾ They further argued, should any enrichment or their part entitling the claimant compensation such compensation should be calculated according to the net book value as the appropriate valuation method".⁽⁹⁹⁾

Since the *Sedco case* related partly to an oil nationalization agreement, the Iranians employed unjust enrichment as a basis for the appropriate compensation principle which has been recognized as part of the issue of the permanent sovereignty of states over their

natural resources. While the concept of unjust enrichment in international law has been used uniformly in favour of full compensation standard,⁽¹⁰⁰⁾ relating this issue to that of permanent sovereignty indicates a claim to pay less than full compensation. The principle of unjust enrichment works in two ways: while the plaintiff in a case may claim his own rights on the basis of unjust enrichment, the respondent, on the other hand, may argue this principle in his own favour, as the Iranian parties in the *Sedco* case did. Thus, the Iranians argued that undue enrichment acquired by Sedco during a period of monopoly, or of a highly privileged economic position, should be taken into account.

The Iranian position is supported by some writers who contend that the principle of unjust enrichment favours less than full compensation. For instance Sornarajah points out that:

"If in fact, the principle of unjust enrichment forms a part of international law, it cannot support the blanket proposition that full compensation must be paid upon the expropriation of foreign property. Since it is an equitable principle, it requires that account must be taken of the entire past relationship between the parties, the profits made by the investor and the harm, if any, suffered by the host economy as a result of the investment".⁽¹⁰¹⁾

Friedman also made this point in the following terms:

"A decision whether a state enriches itself at the expense of another state or of private foreign interests is often a highly complex question involving an examination of not only the formal legal titles but of the history of economic-political relations between the parties... If, for example, a concession for growing and merchandising tobacco for the exploitation of mineral resources has been granted under conditions of political... domination and under financial conditions starkly different from this prevailing in an open market, it would be neither realistic nor equitable not to take into account the unjust enrichment that has accrued to the foreign interest as a result of their privileged position...."⁽¹⁰²⁾

He further explained that:

"when a foreign company has acquired a long lease over agricultural territories or mines, at a rent that by comparison with prevailing commercial rates is purely nominal and when it has for a number of years made profits considerably in excess of those that would have been possible under normal commercial arrangements, it is entirely proper to bring these factors into account against the benefits that will accrue to the country as a result of the nationalization of the assets developed by the skill of the foreign enterprise and by the capital invested in it".⁽¹⁰³⁾

Similar to the position held by the Iranian Government in the *Sedco* case, was the position adopted by the Chilean government with regard to the expropriation of the properties of the Copper Mining Corporations, Kennecott and Anaconda in 1972.⁽¹⁰⁴⁾ In this case, the Chilean Government had put forward the view that excess profit which had accrued to the investor must be taken into account in assessing the compensation. With regard to this case further explanation will be given in Chapter 7 of this study.

Arguing against the principle of full compensation, Iranian parties in many cases, have also disputed this principle on the basis of the concept of "Permanent Sovereignty over Natural Resources" enshrined in Resolution 1803 and 3281 of the United Nations General Assembly. The concept of permanent sovereignty has been vigorously asserted by developing countries as a *sine qua non* of national independence and economic self-sufficiency. It has been invoked as a fundamental premise of the right of states to nationalize foreign property or regulate the operations of foreign investors, particularly in the national resource sector.⁽¹⁰⁵⁾ As far as the compensation standard in cases of nationalization is concerned, Resolution 1803 in its Paragraph 4 states that in cases of:

"Nationalization expropriation or requisitioning the owner shall be paid *appropriate compensation*, in accordance with the rules in force in the state taking such measures in the

exercise of its sovereignty and in accordance with international law".⁽¹⁰⁶⁾

Approval for this resolution was overwhelming; only France and South Africa voted against the resolution, with most communist countries, including Cuba, abstaining.⁽¹⁰⁷⁾ Paradoxically, the compromise resolution purported to state a new requirement of "appropriate" compensation for expropriating property, while simultaneously reaffirming adherence to international law. This ambiguity allowed some western diplomats to argue that the reference to international law reaffirmed the orthodox position and that appropriate compensation meant 'prompt, adequate and effective' compensation.⁽¹⁰⁸⁾ Schwebel has argued that the absence of opposition to the American Ambassador's statement during the debate on the Resolution that "appropriate compensation" referred to in the Article meant "prompt, adequate and effective compensation", together with the rejection of the Soviet amendment that compensation must be assessed in accordance with standards specified in the national laws only, and the acceptance in the Resolution that international standards are relevant, indicate that the traditional norm that full compensation must be paid remained unaffected by the Resolution.⁽¹⁰⁹⁾

But this has not been the understanding of other lawyers. Writing a year after the Resolution, Professor Friedman observed that the requirement of "appropriate compensation" in the Resolution, "while capable of the most diverse interpretations and probably deliberately imprecise, may indicate an evolution from the formerly predominant Western sponsored principle of "full, prompt and adequate compensation to a more flexible principle that takes into account the circumstances under which the interests in question were acquired and

is more likely to achieve a balance of equities in the various situations". (110)

Asante, the Director of the U.N. Centre on the Transnational Corporations, after a close examination of the arguments of the Western European and the U.S. governments in favour of the traditional rule of full compensation in a case of nationalization, points out that:

"Notwithstanding the formal affirmation of the traditional rules by the governments of Western European states in international forums and bilateral investment agreements, a realistic assessment of the evidence and sources within the past forty years, namely state practice in all regions, diplomatic exchanges, multilateral and regional endeavours towards in international regime for investments, *opinio juris* on a global basis, the relevant resolution of the United States and other declarations of the preponderant majority of the members of the international community, cannot sustain the Hull formula, a valid principle of contemporary international law". (111)

Schachter maintains that the "prompt, adequate and effective compensation" formula was never a rule of traditional international law and certainly has no validity in contemporary international law in all cases of nationalization. (112) He further maintains that a study of state practice in cases of post-war nationalization shows that compensation fell short of the full value and that payments were often made in non-convertible currency. (113) Bring argues that no generally recognized international standard can be inferred from state practice with regard to the quantum of compensation; what can be inferred is a duty to pay compensation which is to be discharged *bona fide* considering all the relevant circumstances. (114)

From a philosophical understanding, some western writers such as Wieghel and Weston have argued that a more equitable re-distribution of the world's resources would be precluded by the requirement of

fair market value as a basis of compensation.⁽¹¹⁵⁾ Such a concept is equally subversive of the legitimate attempts of the poorer countries to achieve fundamental economic and social reforms. In such cases, the traditional compensation standard must yield to a formula that considers the country's political instability, or its capacity to pay.

In the view of third-world developing countries the imposition of the traditional formula of 'prompt, adequate and effective compensation' in a case of nationalization is "unduly onerous and tantamount to the imposition of a virtual embargo on their abilities to take appropriate measures to restructure their economies".⁽¹¹⁶⁾ As far as the computation of compensation is concerned, in the view of these countries, the concept of fair market value implicit in the requirement of adequate or full compensation is particularly inappropriate in major economic restructuring involving large-scale land reform or nationalization of strategic sectors such as natural resources. The concept is inadmissible because "it purports to apply traditional commercial and property concepts in a situation which is not a normal commercial purchase but more properly characterised as the intervention of state power to restructure the capital and economic system".⁽¹¹⁷⁾ Insisting on this attitude, Iran in the *Amoco case*⁽¹¹⁸⁾ put forward the principle of the net book value as a measure of compensation. The Iranian parties contended that this principle "accords with state practice and case authorities and is supported by the theory of unjust enrichment".⁽¹¹⁹⁾ In addition the Iranians argued that recovery of future profits in the case of a lawful expropriation (since the *Amoco* expropriation was considered to be lawful) should be excluded.⁽¹²⁰⁾

Arguing against the idea of compensation for lost profits as it was put forward by the claimant, the Iranian parties argued against application of any other standard instead of net book value, because "the result of the award of lost profits would be absurd, since the claimant would be able to invest the amounts including lost profit, received as compensation, and therefore obtain a real return for such an investment, which would be tantamount to double recovery and such an award would also produce an unreasonable rate of return".⁽¹²¹⁾ Amoco made an investment of \$6 million (in 1968), for a half share of the capital. By the end of 1978 the net book value of the joint venture project had increased to \$29.3 million, of which \$14.65 million was Amoco's share. Moreover, the joint venture had earned after taxes \$82.5 million by the end of 1978, that is \$41.25 million in profit for Amoco.⁽¹²²⁾ This means a return in excess of \$50 million on an investment of \$6 million. The Iranian parties argued that compensation "on top of that for loss of future profits would be the opposite of fairness and equity".⁽¹²³⁾

However, the Iranian arguments, though deriving some support from practice and scholarly writing, contrasts sharply with the position of the U.S. government and the American claimants before the Tribunal which must now be considered.

5.2.2 THE POSITION OF U.S. PARTIES

The U.S. Government and the American claimants generally have been claiming "compensation equal to the "full" value of their interest... as the date of nationalization (or other taking) meaning the fair market value of expropriated property, a value which includes lost profits".⁽¹²⁴⁾

Accordingly, to them partial compensation for the expropriated property does not suffice under international law. Alternatively, in some cases they have claimed full ("prompt, adequate and effective") compensation by virtue of customary international law.⁽¹²⁵⁾ Furthermore they contend that in the case of an ongoing business enterprise, full market value means going concern value, including not only net assets, but also goodwill and anticipated future earnings. However, it should be noted that the claimants in the American International Group case contended that "the valuation of their own interest... must disregard any action of the government of Iran prior to nationalization which may have had the effect of artificially depressing the value" of their own interest, and any event which followed the nationalization which may have negatively affected their future prospects of their interest in the business.⁽¹²⁵⁾

For expropriation involving a state contract, i.e. an agreement between a state and a foreign investor, they claim that the foreign investor is entitled to receive just compensation, that is the full equivalent of the property or rights expropriated or repudiated. This means compensation that will place the foreign investor in as good an economic position as he was in before the expropriation or repudiation occurred.⁽¹²⁷⁾ In addition, they claim, "the foreign investor's rights must be valued without regard to any reduction in value that would have resulted from apprehension that the rights must be expropriated without full compensation or that the state party might otherwise breach this agreement".⁽¹²⁸⁾

In the *Amoco International Finance Corporation* case, the Iranian Respondents when discussing the compensation issue emphasised a

distinction between a lawful and unlawful expropriation. They argued that when the nationalization is lawful "the measure of compensation must be substantially less than the measure of damages for breach and in any event, no compensation should be paid for loss of future profits".⁽¹²⁹⁾ They further contended that in such cases "the duty to compensate would be limited to the unjust enrichment of the nationalizing state". This means that the compensation should be equivalent to the net book value of the residual nationalized assets of the foreign company. The claimant however, insisted that "international law requires compensation for expropriation whether the expropriation is lawful or unlawful, but asserted that an illegal seizure of property requires a standard of compensation higher than the standard of lawful expropriation".

As we can see, there is a big difference between the attitude of the Iranian and American parties towards the compensation standard in expropriation or nationalization cases. As Pellonpää and Fitzmaurice have pointed out: "Even where the difference between the Iranian and American parties might not be so manifest as regards the general formulation of the standard of compensation, the gap is apparent at least when it comes to the valuation methods suggested".⁽¹³⁰⁾

However, in cases concerning expropriation of tangible assets, the American parties, while arguing in favour of full compensation standard in calculation of the value of the expropriating assets have exceptionally been satisfied with the application of the net book value standard. For instance in the *Computer Sciences Corporation* case where Iran was liable for the expropriation of furniture and office equipment which had been in the Tehran offices of a subsidiary of the claimant, the claimant had calculated the compensation due on

the basis of the net book value which, not surprisingly, was accepted by the Respondent.⁽¹³¹⁾ The claimant did not mention why he only sought the net book value of the equipment. It seems that this was because the relevant portion of the claim was only a tiny fraction of the whole case, and therefore in the claimant's view perhaps did not deserve the effort of more complicated calculations. Apart from these exceptional cases, the American position as presented before the Tribunal reflects the standard of full compensation (i.e. the Hull standard of 'prompt, adequate and effective' compensation) as the customary rules of international law. Below, we shall first examine the standpoint of the Tribunal regarding the customary international law of compensation and then we shall analyse the work of the Tribunal in applying the compensation standard.

5.6 THE POSITION OF THE TRIBUNAL CONCERNING CUSTOMARY INTERNATIONAL LAW OF COMPENSATION

As we said earlier, the Tribunal in small claims involving tangible business assets such as office equipment or furnishings has not discussed any applicable rule and simply has awarded the value of the taken property, upholding *sub silentio* the principle of full compensation.⁽¹³²⁾ In big claims of expropriations or in large scale nationalizations, however, both parties have discussed the applicable source of law and the Tribunal inevitably has been forced to examine these sources. Thus the standpoint of the Tribunal concerning customary law can only be found in the latter cases. In these cases the Tribunal in its search for customary international law has examined settlement practice, and the relevance of the U.N. Resolutions, as well as international and arbitral awards. However, as will be seen, it has rejected the former two, and has mainly

emphasized the international and arbitral awards. We will examine these below:

5.6.1 CLAIMS SETTLEMENT AGREEMENTS

Regarding the settlement principle in the post-1945 in the *Amoco International Finance Corp*⁽¹³³⁾ the Tribunal said that:

"As a rule, state practice as reflected in settlement agreements cannot be considered as giving birth to customary rules of international law, unless it presents specific features which demonstrate the conviction of the state parties that they were acting in application of what they considered to be settled law, the provisions of such agreement, indeed are the outcome of negotiations in which motivations other than legal ones may have prevailed. This is specially true here, where certain commercial advantages given to companies (even if they were not expressly detailed in the agreements) produced the concessions that they accepted on the standard of compensation".

While the discussion in the above case was limited to settlements between states and foreign companies, the Tribunal's discussion in the *Sedco*⁽¹³⁴⁾ case was extended to both settlement agreements and lump sum agreements between states. The Tribunal in the *Sedco* case stated that:

"both types of agreements can be so greatly inspired by non-judicial considerations - e.g. resumption of diplomatic or trading relations - that it is extremely difficult to draw from them conclusions as to *opinio juris*, i.e. the determination that the content of such settlements was thought by the states involved to be required by international law"⁽¹³⁵⁾

In the *Sedco* case it added that:

"The International Court of Justice and international arbitral tribunals have cast serious doubts on the value of such settlements as evidence of custom".⁽¹³⁶⁾

In another context it stated that "considerations underlying settlements often include factors other than elements of law".⁽¹³⁷⁾

This means, of course, that the bulk of relevant state practice is dismissed.⁽¹³⁸⁾ While it is true that many treaties or other examples of state practice, are in fact based on factors other than 'elements of law' there are many agreed settlements in the oil industry in which states increased their participation in concessions licenses, joint ventures and so on, enjoyed by foreign companies operating in their territory.⁽¹³⁹⁾ As Bowett points out: "if all state practice had to be isolated from factors other than elements of law, there would be little evidence of state practice - in this or in any other field - which could be used as evidence of custom".⁽¹⁴⁰⁾ In effect therefore, the Tribunal was rejecting virtually all evidence save judicial or arbitral discussions.⁽¹⁴¹⁾ For this reason, Lillich and Weston, two American writers, have recently argued for more status to be given to lump sum agreements as evidence of the standards of compensation commonly adopted in state practice.⁽¹⁴²⁾ They have criticized the attitude of the U.S. members of the Tribunal who have been instrumental in persuading the Tribunal to reject the evidence of 'a new consensus' on compensation provided by these agreements.⁽¹⁴³⁾

The Tribunal in the *Sedco* case applied the same reasoning (as it did to settlement agreements) to bilateral investment practices. It stated that:

"The bilateral investment Treaty practice of states which more often than not reflects the traditional international law standard of compensation for expropriation, more nearly constitutes an accurate measure of the High Contracting Parties' views as to customary international law, but also it carries with it some of the same evidentiary limitation as lump sum agreements. Both kinds of agreements involve in some degree bargaining in a context to which *opinio juris* seems a stranger".⁽¹⁴⁴⁾

Discussions in the *Sedco* case also extended to the next question to be considered: whether in the light of the U.N. Resolution there has been an erosion of the traditional standard of full compensation.

5.6.2 THE LEGAL IMPACT OF U.N. RESOLUTIONS

As we mentioned earlier, Iranian parties relying on U.N. Resolutions, argued in the *Sedco* case and elsewhere that there has been an erosion of the traditional international law standard of full compensation. The Tribunal in this case declared that:

'United Nations General Assembly Resolutions are not directly binding upon states and generally are not evidence of customary law. Nevertheless, it is generally accepted that such resolutions in certain specified circumstances may be regarded as evidence of customary international law or can contribute - among other factors - to the creation of such laws'.⁽¹⁴⁵⁾

In examining the Resolutions 1803, 3201 and 3281, the Tribunal concluded that among these three Resolutions, only Resolution 1803 has obtained considerable unanimity in international arbitral practice and scholarly opinion and reflects, if it does not evidence, current international law.⁽¹⁴⁶⁾

In the *Amoco* case also the Tribunal recognized this Resolution as a better reflection of legal standards than the 1974 'Economic Charter'.⁽¹⁴⁷⁾ When discussing whether "just" compensation (meaning full compensation) is a condition of lawfulness of an expropriation in international law, the Tribunal noted that the Charter had cast some doubt on this. Other less controversial resolutions such as Resolution 1803 confirm the existence of the rule. However, in the *Sedco* case the Tribunal admitted that the Resolution (with its requirement of "appropriate compensation... in accordance with international law") is itself ambiguous and does not give an answer

to any of the existing questions concerning the amount of compensation.⁽¹⁴⁸⁾ The Resolution, as the Tribunal pointed out, "has been argued, on the one hand, to express the traditional standard with different words and on the other hand to signify an erosion of this standard".⁽¹⁴⁹⁾ Accordingly, the formula of appropriate compensation as used in the Resolution 1803 is of an elusive nature. Nonetheless, the Tribunal admitted that the reference to "international law" suggested that the delegates who had adopted the Resolution intended no break with prevailing customary international law.⁽¹⁵⁰⁾ Moreover, to the Tribunal the *travaux preparatoires* were a confirmation that the drafters had used the word 'appropriate' in the sense of adequate.⁽¹⁵¹⁾

A recent application of the term 'appropriate' emanates from the International Law Association. On 30 August 1986, it adopted the Seoul Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order. Article 5.5 of this Declaration states:

'A state may nationalize, expropriate, exercise eminent domain or otherwise transfer property within its territory and subject to its jurisdiction, subject to the principle of international law requiring a public purpose and non-discrimination, and subject to appropriate compensation as required by international law... and without prejudice to legal effects flowing from any contractual undertaking (emphasis added)⁽¹⁵²⁾

According to the Tribunal the Seoul Declaration recognizes that the term "appropriate" finds its content in international law.⁽¹⁵³⁾ In other words, the "appropriate compensation standard", as inserted in the Declaration, is equivalent to the traditional standard of full compensation. In supporting this statement the Tribunal in the *Sola Tiles* case stated:

While recent arbitral and judicial tribunals have employed the standard of 'appropriate' compensation, they have at the same time regularly awarded compensation equalling the full value of the property in the circumstances".⁽¹⁵⁴⁾

Nonetheless, for the Tribunal the relevance of U.N. Resolutions to customary law is regarded as rather limited. For this reason, the awards of the Tribunal need to be backed up by other authorities. Thus in reaching decisions of compensation, the Tribunal has relied on legal writings; and judicial and arbitral precedents, as well as its own earlier awards.

5.6.3 RELIANCE ON INTERNATIONAL AND ARBITRAL AWARDS

References in the awards of the Tribunal can be found to classical cases, and newer arbitral awards, as well as to some ICSID and ICC arbitration awards.⁽¹⁵⁵⁾

The Judgement of the P.C.I.J. concerning the Factory at Chorzow (*Chorzow Factory case Germany v Poland (1928)*),⁽¹⁵⁶⁾ in spite of the fact that it is sixty years old, has been the most authoritative for the Tribunal in making decisions about the compensation due in expropriation and nationalization cases. In the *Amoco* case, both parties before the Tribunal referred to this judgement when discussing the effects of the lawfulness or unlawfulness of expropriation on the standard of compensation, but each of them gave contrary interpretations of it.⁽¹⁵⁸⁾

Undoubtedly, the first principle which was established by the Court was that a clear distinction must be made between lawful and unlawful expropriations, since the rules applicable to the compensation to be paid by the expropriating state differ according to the legal characterization of the taking.⁽¹⁵⁹⁾

In examining the judgement of the Court the Tribunal found that in an unlawful expropriation there is an obligation of reparation of all the damages sustained by the owner of the expropriated property.(160) It further explained that in a case of unlawful expropriation the rules of international law relating to international responsibility of states will be applied.(161) To the Tribunal these rules provide for *restitutio in integrum*, i.e. restitution in kind, or if impossible, its monetary equivalent. It continued by stating that "a lawful expropriation must give rise to the payment of fair compensation(162) or of the just price of what was expropriated. Such an obligation is imposed by a specific rule of international law of expropriation".(163)

A similar view was taken by the Tribunal when examining the decision of the Permanent Court of Arbitration in *Norwegian Shipowners Claims (Nor v U.S. 1922)*.(164)

In this case the Norwegian owners of ships expropriated by the U.S. during World War 1 were found to be entitled to just compensation under international law. The Tribunal held that "such compensation equalled the 'fair actual value of the property.... at the time and place it was taken".(165)

The Tribunal further stated that numerous other arbitral decisions confirm these statements as the customary international law.(166)

As a result, generally speaking, in expropriation and nationalization cases, the Tribunal has concluded that under customary international law the claimant must receive full compensation for its expropriated or nationalized interest. Nevertheless, it must be pointed out that while in respect of expropriation cases (unlawful and single

expropriation ones) the Tribunal has required full compensation, with regard to lawful nationalizations it has indicated that less than full compensation in some circumstances might be appropriate. In the following sections we shall examine the Tribunal's view in both expropriations and nationalizations.

5.6.4 CUSTOMARY LAW IN EXPROPRIATION CASES

In the cases of involving simple individual expropriation the Tribunal has held consistently that full compensation is payable. It should be pointed out that the takings of property in these cases has not been referred to as 'nationalizations' and they do not seem to have been regarded as such. They seem to have been treated as simple expropriations of an individual nature which were justified because they were for a public purpose. Full compensation in these cases was generally understood to mean the full value of the property taken, which could include in appropriate circumstances an elements for profitability.

Similarly, in regard to the expropriation of land (which was also not apparently treated as nationalization proper), including tangible assets, in the one relevant case the Tribunal has held that full compensation was payable in the sense that it regarded the issue as one of establishing the fair market value of the property. In those cases in which claims were related to tangible assets only, the Tribunal awarded full compensation.

In the *Sedco* case, in relation to the taking of the claimants' share in an Iranian drilling company called "Sediran", the Tribunal was of the opinion that international tribunals and legal writers overwhelmingly support the conclusion that under customary

international law full compensation should be awarded for the property taken. It added that "this is true whether or not the expropriation itself was otherwise lawful".(167)

Supporting its decision, the Tribunal examined recent arbitral decisions and made references to its own earlier awards. It declared that the standard of full compensation as the customary rule in lawful or unlawful expropriation cases, is illustrated by the award rendered in *Libyan American Oil Company v Libyan Arab Republic* (LIAMCO).

The arbitrator in *Liamco* found that the concessionaire had been lawfully deprived of its property and went on to state that "there is no difficulty in concluding that the indemnity shall include as a minimum the *damnum emergens*, e.g. the value of the nationalized corporal property, including all assets, installations and various expenses incurred".(169) The Tribunal concluded that "compensation at full value for *damnum emergens* thus was held as an undisputed minimum standard even in what the arbitrator regarded as a lawful nationalization".(170)

Emphasising that international law requires full compensation, the Tribunal also took into account its own past practice.(171) It stated that in *Tippets, Abbett, McCarthy, Stratton v Iran* (1984), (172) which concerned expropriation of the claimant's 50 per cent share in an Iranian entity created for the purpose of performing certain engineering and architectural services, the Tribunal had stated that the claimant was entitled under international law and general principles of law to compensation for the full value of the property of which it had been deprived.

Finally, in supporting full compensation as the standard of international law, it relied on the view of some scholars, especially those who otherwise appear to view with sympathy the desire of developing nations for a standard requiring less than full compensation. It stated that Brownlie had concluded that 'expropriation of particular items of property (as distinct from nationalization) is unlawful unless there is provision for the payment of prompt adequate, and effective compensation'.⁽¹⁷³⁾ Another reference was to Amerasinghe who had held that "the argument that the law has changed has been made, not in regard to what may be called an 'individual expropriation'... but in regard to the case of nationalization."⁽¹⁷⁴⁾

Thus as far as the awards of the Tribunal in respect of the above cases indicate, international law requires full compensation in single cases of expropriation. Although the Tribunal's pronouncement in the above cases are the most unequivocal statements of principle, other awards rendered by the Tribunal can also be cited as support for this conclusion. Examples of the latter awards are the awards of the Tribunal in the *Dames & Moore* case.⁽¹⁷⁵⁾ Where one of the claims concerned expropriation of "vehicles, office equipment, instruments and other equipment". The Tribunal held that the claimant was entitled to compensation for the value of the equipment as of the date of the taking, quite clearly meaning full (rather than just partial) value of the property.

The conclusion of the Tribunal is also consistent with the practice of other tribunals. For instance, a reference can be made to the above mentioned ICSID award in *Amco v Indonesia*.⁽¹⁷⁶⁾ The damages were eventually awarded on the basis of a breach of a kind of

contract which was found to have existed between the parties, rather than on the basis of expropriation (an alternative theory put forward by the claimant), but it was made clear that in case of a taking the result "would have been the same as that of the unjustified breach of contract alleged by the claimants".⁽¹⁷⁷⁾ As damages for such a breach the Tribunal in turn felt bound to "grant the investor full... compensation of th prejudice it suffered, as international law requires..."⁽¹⁷⁸⁾ In principle such compensation was considered to comprise both *damnum emergens*, i.e. the immediate loss suffered, and the lost profits (*lucrum cessans*).

Therefore, not only the jurisprudence of the Iran-U.S. Tribunals, but also arbitral practice generally supports the conclusion that at least in cases of single, individual expropriation, as distinct from nationalization, customary international law requires the payment of full compensation. This means the full value of the property taken, which can include in appropriate circumstances an element for profitability.

5.6.4 CUSTOMARY LAW IN NATIONALIZATION CASES

Nationalization cases, as we mentioned earlier, were cases in which the takings resulted from, or were part of, the take over by Iran of entire industries in the course of implementing state control over areas of the economy. With regard to such cases the Tribunal made a distinction in the *Phillips Petroleum Company of Iran* case (1989)⁽¹⁷⁹⁾ between the standard of compensation inserted in the Treaty of Amity and that of customary international law, holding in effect that the former was strict, whatever the latter was, and required "just compensation representing the full equivalent of the

property taken". The Treaty standard was also held to be applicable in the case.

In the INA case the Tribunal assumed that the Treaty of Amity, as the *lex specialis*, was similar to customary international law, the *lex generalis*, on the subject of nationalization.⁽¹⁸⁰⁾ Under either of the laws, in the case in hand what was payable was "compensation equal to the fair market value of the investment" which, by implication, in the opinion of the Tribunal was full compensation. However, considering that the taking of the INA was one case among others of systematic takings in Iran, the Tribunal pointed out that:

"This case presents, in addition, a classic example of a formal and systematic nationalization by decree of an entire category of commercial enterprises considered of fundamental importance to the nation's economy...

In the event of such large-scale nationalizations of a lawful character, international law has undergone a gradual re-appraisal, the effect of which may be to undermine the doctrinal value of any 'full' or 'adequate' (when used as identical to 'full') compensation standard as proposed in this case".⁽¹⁸¹⁾

Nevertheless, this obiter statement does not go further than confirming that the traditional standard may have been undermined. Immediately after the above quotation the Tribunal addressing the instant case, stated that:

"In a case such as the present, involving an investment of a rather small amount shortly before the nationalization, international law admits compensation in an amount equal to the fair market value of the investment".⁽¹⁸²⁾

While the INA case indicates that less than full compensation might be appropriate in cases of nationalization of a more substantial investment with a longer profit history, the Tribunal's decision in *American International Group*⁽¹⁸³⁾ fails to confirm this. In the latter case Chamber Three of the Tribunal was faced with a case

concerning a larger and somewhat older investment in the Iranian insurance business, nationalization of which was based on the very same enactment as that involved in *INA*.⁽¹⁸⁴⁾ Instead of indicating any profound erosion of the full compensation standard, the Tribunal in this case rather put forward the main rule "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".⁽¹⁸⁵⁾ That the Tribunal did not find justification to depart from what it thus considered the "normal" rule of full compensation (which is quite obviously meant by compensation for the "value" of the property), is shown by the fact that the compensation was based on the "fair market value" of the claimant's shares in the nationalized Iranian insurance company at the date of the taking.⁽¹⁸⁶⁾ This value in turn was assessed as a going concern in which the future profitability was included as one element.

Thus although in the practice of the Tribunal the possibility of less than full compensation being appropriate in some cases of nationalization has not been totally excluded, at least so far no concrete decision can be interpreted as an application of such a lesser standard.

However, it should be pointed out that in the case of a lawful nationalization the Tribunal has acknowledged that the elements of full compensation are limited to *damnum emergens*, *lucrum cessans* being excluded from the calculations. The Tribunal with regard to the nationalization of the *Amoco's*⁽¹⁸⁷⁾ interest in *Khemco*, found that damage which would fully cover *lucrum cessans* were property only in the case of an unlawful taking, and not in lawful takings to which category the Tribunal considered the present case to belong. Still,

even in this case of a lawful taking the compensation, pursuant to Article IV(2) of the Treaty of Amity, should reflect the full value of the property. Such value of the enterprise (Khemco) as a going concern should also encompass, in addition to its physical and financial assets, various immaterial rights as well as "goodwill and commercial prospects". These various intangible assets, including commercial prospects, the Tribunal distinguished from *lucrum cessans* (full lost profits) for which there was no entitlement in a lawful taking. Therefore the Tribunal's finding in the *Amoco* case may turn out to prove the correctness of the *obiter* statement in *INA* that insofar as concerns large-scale nationalizations, the value of "full" or "adequate"... compensation standard' may have been undermined by recent developments.

To sum up, the practice of the Tribunal emerges as follows:

(I) In so far as *per se* wrongful takings are concerned (both expropriation and nationalization) full compensation is due and no exceptions appear possible, and this means that whether the damages incurred consist of *damnum emergens* or *lucrum cessans*, or both, they should be fully compensated.

(II) In the case of lawful takings, whether the taking is a discrete expropriation or part of a larger nationalization programme, there is no doubt about the applicability of the standard of full compensation as cases in which the loss of property or property rights is to be characterized as falling under *damnum emergens*.

(III) In the case of lawful nationalization, while again here there is no doubt of about the applicability of the full compensation standard, the Tribunal's practice suggests that departure from the full compensation standard, if it is going to happen, should be limited and affect only compensation for *lucrum cessans*.

However, so far, none of the cases decided by the Tribunal, suggests that the Tribunal has applied a standard lower than full compensation. Nevertheless, the Tribunal in *INA* did hint at the appropriateness of such a lesser standard in large scale

nationalizations of a lawful character. The partial award in *Amoco*, although it operates with the standard of full compensation, further suggests that there may be an adjustment of damages for *lucrum cessans* where a case can be characterized as a part of a nationalization programme, and concerns a lawful taking of property rights pertaining to Iran's natural resources. Accordingly, while the standard of full compensation in the Tribunal's view is clearly the main rule in international law, some exceptions to it do not appear totally excluded.

So far we have been dealing with the standard of compensation under customary international law. In addition, the Treaty of Amity between Iran and the U.S. is also a relevant source. Application of that Treaty in the practice of the Tribunal will be examined in the next chapter.

NOTES FOR CHAPTER FIVE

1. See C.N. Brower, "Current Developments in the Law of Expropriation and Compensation: A preliminary survey of awards of the Iran-U.S. Claims Tribunal", Vol.21, No.3, *Int'l Lawyer*, 1987, p.656.
2. Ibid, see also F.A. Mann, "The Consequences of an International Wrong in International and National Law," XLIX, *B.Y.B. Int' Law*, 1976, p.2.
3. Ibid.
4. Ibid.
5. See P.C.I.J., Series A, No.17, 1928, p.47.
6. Ibid.
7. Ibid.
8. See Mann, op cit, p.3. See also Jimeneg de Arechaga, *Manual of Public International Law* (1968) pp.565, 566., who regards restitution in kind as the normal remedy, I. Brownlie, *Principles of Public International Law 4th ed.* 1990, p.458., who regards restitution in kind as exceptional; Verdross and Simma, *Universells Volkerrecht*, 1976, pp.630, 631, who state particularly clearly that restitution in kind is the primary right and damages (compensation) are only subsidiary in the sense that they can only be claimed if restitution in kind is impossible.
9. Italy v. Venezuela, (1930). See in 2, U.N. Rep. Int'l Arb. Awards, p.975.
10. Ibid, p.1002.
11. See in I.C.J. Rep. 1962, p.6. See also C.D. Gray, *Judicial Remedies in International Law*, 1987, p.198.
12. I. Brownlie, *Principles of International Law*, op cit, 1990. p.383.
13. G. Schwarzenberger, *International Law*, Vol.1, 3rd ed., 1957 p.653.
14. See Wengler, *Volkerrecht*, 1964, p.503, p.10. See also in Mann, op cit, p.4.
15. See Sohn and Baxter, *A.J. Int'l Law*, 55, 1961, p.580.
16. P.C.I.J. Series A, op cit.
17. See e.g. S. Friedmann, *Expropriation in International Law*, 1953.

18. See R. Higgins, "The taking of property by the state: Recent Developments in International Law", 176, Hague, *Recueil des Cours*, 1982, pp.316-17.
19. *Liamco case* (1977). See in 62 I.L.R., 140.
20. *Texaco case* (1974). See in I.L.R., 389 at 497-508. Dupuy relied, in addition, on the *Mavrommatis Jerusalem Concessions Case* (1925), P.C.I.J., Series A, No.5 at p.51; the *Temple of Preah Vihear case*, I.C.J. Reports, 1962, p.6 at pp.36-37 The *Judgement of Central American Court of Justice in El Salvador v Nicaragua*, A.J. Int'l Law, 11 (1917), p.674 at p.730; the *Martini case*, *Ibid*, 25 (1931), p.554 at p.585; and the writings of publicists.
21. See B.P. case, in 53 I.L.R., 297.
22. ICSID Tribunal, award of 20 November 1984, reprinted in I.L.M., 24, 1985, p.1022 at Para. 202. See also the *Letco case*, another ICSID award: *Ibid*, 26, 1987, at p.668. In this case the Tribunal excluded the possibility of specific performance of a concession contract with Liberia, or even the value of an injunction, and so confined itself to money damages. For more detail of the cases see Gray, *Judicial Remedies in International Law*, 1987, p.12-16, *op cit*.
23. ICSID Tribunal award of 20 November 1984, *op cit*.
24. See Higgins, *op cit*, p.316.
25. See D.W. Bowett, "State Contracts with Aliens: Contemporary Developments on Compensation for Termination of Breach" LVIX, B.Y.B. Int'l Law, 1988, p.60.
26. 53, I.L.R., 297, at p.330.
27. *Ibid*.
28. 62, I.L.R., p.199.
29. *Ibid*.
30. Bowett, *op cit*, p.60.
31. 53, I.L.R., 296.
32. *Ibid*.
33. 53, I.L.R., 389 at p.507.
34. Higgins, *op cit*, p.319.
35. See in the *B.P. v Libya*, *op cit*, p.296.
36. Higgins, *op cit*, p.319.
37. See Bowett, *op cit*, p.60.

38. Brower, *op cit*, p.658.
39. See Declaration of the Government of the Democratic and Popular Republic of Algeria (it is called General Declaration) in 1. Iran-U.S. Claims Trib. Rep. (1981) also see in 20 I.L.M. 224, 1981.
40. See *Sedco Inc. case*, Vol. 15, Iran-U.S. C. Trib. Reports, 1987, p.23.
41. See *Starrett Housing Corp. v Iran* in 4 Iran-U.S. C. Trib. Reports, 1983, p.149.
42. See R. Khan, *The Iran-United States Claims Tribunal, Controversies, Cases and Contribution*, 1990, p.248.
43. See B. Claggett, "The Expropriation Issue Before the Iran-United States Claims Tribunal: Is "Just Compensation" Required by International Law or Not?", 16, L. & Pol. Int'l Business, 1984, p.823.
44. *Ibid.*
45. See e.g. *Amoco Iran Oil Co v Iran*, in 3, Iran-U.S. C. Trib Reports, p.297, opinion of D.J. Abdoh, Appendix to Memorandum of National Iranian Oil Company (NIOC) (15 November 1982), p.3. (arguing that Iran had the right to terminate a state contract with a foreign investor "on the grounds of its sovereignty subject to the payment of appropriate compensation; see also the dissenting opinion of Judge Ameli, in the INA case who argued that "current international law requires "appropriate compensation", as opposed to "prompt, adequate and effective...." which is interpreted by western industrialized countries.... as full compensation, for lawful nationalizations... See in 8, Iran-U.S. C. Trib. Reports, p.403.
46. See *Chorzow case*, 1928, P.C.I.J., Series A, No.17, p.46.
47. See *Ltd. Benvenuti et Bonfant v People's Republic of the Congo*, in 21, I.L.M., 1980, p.740.
48. In nearly all expropriation cases before the Tribunal Americans have argued the principle of full compensation and Iranians have contended the principle of partial compensation. See e.g. *SEDCO Inc. v Iran*, Case No. 129, in 10, Iran-U.S. C. Trib. Reports, pp.3 and 180, *INA Corporation v Iran*, Case No. 161, 8, Iran-U.S. C. Trib. Reports, p.373, *Schering Corporation v Iran*, Case No. 38, 5, Iran-U.S. C. Trib. Reports, p.361.
49. See C.N. Brower, "Current Development in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-U.S. Claims Tribunal", *Int'l Lawyer*, Vol. 21, 1987, p.659.
50. See e.g. *Dames & Moore v Iran*, Award No. 97-54-3 at 23, 4, Iran-U.S. C. Trib. Reports, 212, 223-24, 1983; William L.

Pereira Association v Iran, Award No. 116-1-3, p.43, 5, Iran-U.S. C. Trib. Reports, 198, 226-27, 1984.

51. Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the U.S. and the Government of the Islamic Republic of Iran, 19 January 1981. See 1, Iran-U.S. C. Trib. Reports, 1981-81, p.3.
52. 20-Article v of the Claims Settlement Declaration provides: "The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking in to account relevant usages of the trade, contract provisions and changed circumstances". Ibid, p.11.
53. See J.R. Crook, 'Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience', Am. J. Int'l Law, Vol. 83, p.280, 1989.
54. Ibid.
55. American International Group, Inc. v Iran, Case No. 2, 4, Iran-U.S. C. Trib. Reports, 1983, p.97.
56. Ibid.
57. The respondents challenged the adequacy of the proof which had offered to demonstrate the claimant AIG's U.S. nationality and argued that AIG may not present the claim directly as beneficial owner of the 35% interest held in the name of ALICO, AIRCO, AIVO and UBANK. See, 4, Iran-U.S. C. Trib. Reports, p.99.
58. Ibid, p.100. Article 2 of Iranian Commercial Code, 1979. See J. Vafai, *Commercial Law of the Middle East (Iran)*, 1984, Booklet 7, p.15.
59. See 4, Iran-U.S. C. Trib. Reports, op cit.
60. Ibid. See Article II of the Claims Settlement Declaration 1, Iran, U.S. C. Trib. Reports, op cit, p.9. According to this Article 'The Tribunal is established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counter claim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national claim, if such claims and counter claims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transaction which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph II of the Declaration of the Government of Algeria of 19 January 1981 and claims arising out of the actions of the United States in response to the conduct described in such paragraph and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder

shall be within the sole jurisdiction of the Competent Iranian Courts, in response to the Majlis position".

61. See General Declaration, 1, Iran-U.S. C. Trib. Reports, op cit, p.8.
62. I.N.A. Corporation v Iran, Case 161, op cit, p.374.
63. Ibid, p.376.
64. Ibid.
65. Ibid.
66. Ibid.
67. Ibid, p.378.
68. See *Am. Bell Int'l, Inc. v Iran*, Award No. 184-161-1 (13 August 1985), 11, Iran-U.S. C. Trib. Reports, pp.213-214.
69. Ibid, p.214.
70. Ibid.
71. Ibid.
72. Ibid.
73. Ibid, p.215.
74. Cited from B.M. Clagett, "Just Compensation in International Law: The issues before the Iran-U.S. Claims Tribunal". See R. Lillich, *Valuation of Nationalized Property*, (ed), 1987, p.43.
75. See Shufeldt claim, op cit, p.1095.
76. Ibid.
77. Ibid, p.1098.
78. See *Topco* arbitration, op cit, 53 I.L. Rep., p.480. See also *LIAMCO* arbitration, 20 I.L.M., p.87-88, 1977. In this case, the arbitrator referred to the general principle of non-retroactivity of laws, which denies retrospective effect to new legislation and requires respect for acquired rights under previous legislation.
79. See J.R. Crook, "Applicable Law in International Arbitrations: the Iran-U.S. Claims Tribunal Experience", 83, *Am. J. Int'l Law*, 1989, p.280.
80. 2, See e.g. N. Girvan, "The Question of Compensation: A third world perspective, 5, *Vand. J. Trans'l Law*, 1972, p.340, D.A. Lapers, "Principles of Compensation for Nationalized Property", 26 *I.C.L.Q.*, 1977, p.97, R. Dolzer, 'New Foundations of the Law of Expropriation of Alien Property', 75, *Am. J. Int'l Law*, 1981, p.553, Comments, 'The New International Economic Order

- and General Assembly Resolutions: The Debate over the Legal Effects of General Assembly Resolutions Revisited', 15, Calif. West. Int'l L. Journal, 1985, p.647, D.C. Dicke, *Foreign Investment in the Present and a New International Economic Order*, 1987.
81. See F. Francioni, 'Compensation for Nationalized of Foreign Property: The Borderland between Law and Equity', I.C.L.Q., Vol. 24, 1975, 255-283, L. Rood, Compensation for takeovers in Africa, 11, J. Int'l Law and Economics, 1977, p.521-538, D. Gantz, 'The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property', 71, Am. J. Int'l Law, 1977, pp.474-493, M. Sornarajah, 'Compensation for Expropriation: The Emergence of New Standards', 13, J.W.T. Law., 1979, 103-131, F. Garcia-Amador, 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation', 12, Lawyer of the Americas, 1980, pp.1-58.
82. See *Payne v Iran*, 12, Iran-U.S. C. Trib. Reports, 1986, p.12.
83. See 4, Iran-U.S. C. Trib. Reports, op cit, 1983, p.103.
84. See note, 'International Law: An 'Appropriate' Compensation Standard for Nationalized Property: Banco Nacional de Cuba v Chase Manhattan Bank, 66, Minnes. L. Rev. 1982. See also Rafat, "Legal Aspects of the Cuban Expropriation of American-owned property", 11, St. Louis U.L.J., 45-48, 1966, S.K.S. Asante, *International Law and Foreign Investment: A Reappraisal*, 37, I.C.L.Q., 1988, pp.589-602.
85. See G.A. Res. 17 U.N. GAOR Supp. (No.17), at 15, U.N. Doc. A/5217, 1962.
86. See the text of the "Declaration", 13, I.L.M., 1974, p.238. See also 14, I.L.M., 1975, p.251.
87. See R.B. Lillich and B. Weston, *International Claims: their settlement by lumpsum agreements*, 2 Vols, 1975. See also, R.B. Lillich and B. Weston (eds), *International Claims: Contemporary European Practice*, 1982.
88. Compare Resolution 1803 with Resolution 3281. While the former in its paragraph 4 provides for the payment of appropriate compensation in accordance with the rules in force in the state... and in accordance with international law the latter has dropped any reference to international law as the yardstick of the appropriateness of the compensation. See K. Hossain, ed. *Legal Aspects of the New International Economic Order*, p.208, 1980, also K. Hossain and S.R. Chowdhury, (ed.), *Permanent Sovereignty Over Natural Resources in International Law*, 1984, p.88.
89. See R.B. Lillich and B.H. Weston, *Lumpsum Agreements: Their Continuing Contribution to the Law of International Claims*, 1990, p.69.
90. Ibid, p.70.

91. Ibid. See also R.B. Lillich and B. Weston, *International Claims*, op cit.
92. See Lillich and Weston, *Lumpsum Agreements: Their Continuing Contribution to the Law International Claims*, op cit, p.71.
93. Ibid.
94. See I.C.J. Rep., 1970, at 40.
95. Ibid at 40-41.
96. See Lillich and Weston, *Lumpsum Agreements: Their Continuing Contribution to the Law of International Claims*, op cit, p.71.
97. See *Sedco Inc. v NIOC*, Case No. 129, in 10, *Iran-U.S. C. Trib. Reports*, p.183.
98. Ibid.
99. Ibid.
100. See e.g., Ch. Schreuer, 'Unjustified Enrichment in International Law', 22, *Am. J. Comp. Law*, 1974, pp.281-301, F. Francioni, 'Compensation for Nationalization of Foreign Property: The Borderland Between Law and Equity', op cit, pp.255-283, D. Chr.Dicke, 'Unjust Enrichment and Compensation' in *Foreign Investment in the Present and a New International Economic Order*, ed. by D. Chr.Dicke, 1987, p.268.
101. See M. Sornarajah, *The Pursuit of Nationalized Property*, 1986, p.211.
102. W. Friedmann, *Changing Structures of International Law*, 1964, p.207.
103. Ibid. See also J. de Arechaga, "State Responsibility for the Nationalization of Foreign Owned Property", 11, *N.Y.U.J. Int'l L. & Pol*, 1978, pp.190-191, 27
104. For the dispute, see F. Orego-Vicuna, "Some International law Problems posed by the Nationalization of the Copper Industry by Chile", 67, *Am. J. Int'l Law*, 1973, p.711. See also R.B. Lillich, *The Valuation of Copper Companies in the Chilean Nationalization*, 66, *Am. Society, Int'l Law Prcdgs*, 1972, p.213.
105. See S.K.S. Asante, op cit, p.595.
106. G.A. Res, 17 U.N. GAOR Supp., (No.17) at 15, U.N. Doc. A/5217, 1962.
107. 17(3) U.N. GAOR, at 1134, U.N. Doc. A/PV.1194, 1962.
108. See S.M. Schwebel, 'The story of U.N.'s Declaration of Permanent Sovereignty Over Natural Resources', 49, *Am. B.A. Journal*, 1963, p.463.

109. Ibid. See also Ambassador Stevenson's letter in, 57, Am. J. Int'l Law, 1963, p.406.
110. See W. Friedmann, 'Half a Century of International Law', 50, Va. L. Rev. 1333, 1964, p.1352.
111. See S.K.S. Asante, op cit, pp.596-7.
112. See O. Schachter, 'Compensation for Expropriation', 78, Am. J. Int'l Law, 1984, p.21-130.
113. Ibid.
114. O.E. Bring "Impact of Developing States on International Customary Law Concerning Protection of Foreign Property", 99, Scandinavian Studies in Law, (1980).
115. See in R. Lillich (ed), Valuation of Nationalized Property in International Law, 1972, Chapter 1. Also, Weston, The New International Economic Order and the Deprivation of Foreign Proprietary Wealth", in Lillich, op cit.
116. See Asante, op cit, p.600.
117. Ibid.
118. See *Amoco International Finance Corporation v Iran*, Case No. 56, in 15, Iran-U.S. C. Trib. Reports, p.350.
119. Ibid.
120. Ibid.
121. Ibid, p.255.
122. Ibid.
123. See *American International Group v Iran*, in 4, Iran-U.S. C. Trib. Reports, p.105. See also Starrett, Case No.4, Iran-U.S. C. Trib. Reports.
124. See *Phelps Dodge Corp and Overseas Private Investment Corporation (OPIC) v Iran*, Case No. 99, in 12, Iran-U.S. C. Trib. Reports, p.16.
125. See *American International Group*, op cit, p.103.
126. See *Amoco case*, op cit, Paragraph 183 in 15, Iran-U.S. C. Trib. Reports, p.79.
127. Ibid.
128. Ibid, see Paragraph 187.
129. See M. Pellonpää and M. Fitzmaurice, 'Taking of Property', in Vol. 19, N.Y.B. Int'l Law, 1988, p.107.

130. See *Computer Sciences Corporation v Iran*, in 4, Iran-U.S. C. Trib. Reports.
131. See in 4, Iran-U.S. C. Trib. Reports, p.44.
132. See e.g. *Dames & Moore v Iran*, Award No. 97-54-3 at 23 (20 December 1983, 4, Iran-U.S. C. Trib. Reports, 1983, p.212-223-224 (awarding the approximate present worth at the time of taking, as calculated downward from the original purchase price); *William L. Pereira Assocs., Iran v Iran*, Award No. 116-1-3 at 43, 5, Iran-U.S. C. Trib. Reports, 1984, pp.226-227 (awarding original purchase price less estimated depreciation); *Computer Sciences Corp v Iran*, at 44, op cit, (net book value awarded as claimed), these awards are properly characterized as granting full value even though they may be stated as based on the net book values. Since they involve assets that were not income producing assets, or going concern enterprises, the highest actual value would likely be their sale as at a liquidation, for which the depreciated value would be the closest approximation.
133. See Case No. 56, *AMOCO Int'l Finance Corp. v Iran*, Award No. 310-56-3. The claim arose out of the Khemco Agreement, had entered into on 12 July 1966 between Amoco and National Petrochemical Company (NPC), pursuant to which the parties thereto had agreed to form a joint venture company, Khemco, for the purpose of building and operating a plant for the production and marketing of sulfur natural gas liquids and liquefied petroleum gas derived from natural gas. According to the claimant, by the end of July 1979 the Respondents "had totally and unequivocally breached and repudiated the Khemco agreement and had expropriated Amoco international's rights thereunder, including its ownership interest in Khemco, for their own benefit, use and ownership". See 15, Iran-U.S. C. Trib. Reports, 1987, p.189.
134. See Case No. 129, *Sedco Inc. v NIOC (Sedco, Inc., for itself and on behalf of Sedco International, S.A., and Sediran Drilling Company)*. Sedco's claims were based on contract, some of which were concluded with the Oil Service Company of Iran (OSCO), the expropriation of drilling rigs, the expropriation of warehouse stocks, and additionally, in the case of Sediran, the expropriation of fixed assets. See in 9, Iran-U.S. C. Trib. Reports, 1985, p.250, also see Interlocutory Award No. ITL. 59-129-3, in 10, Iran-U.S. C. Trib. Reports, Ibid, (1986), pp.180, 185.
135. Ibid, p.185. Here the Tribunal relied on the decision of the I.C.J. in *Barcelona Traction Case (Belgium v Spain and the Arbitral Award in Case of Kuwait v the American Independent Oil Company (Aminoil))*. For the former see I.C.J. Report, 1970, p.3 at 40 (Judgement of 5 February 1970, and for the Arbitral Award, see 21, I.L.M., 973, 1036, 1982.
136. Ibid.

137. See D.W. Bowett, "State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach", *op cit*, p.65.
138. See for example the 1972 General Agreement on Participation (in which the Gulf States acquired participation rights rising to 51%); the 1972 Iraqi nationalization of IPC; the 1973 Sales and Purchase Agreement between Iran and the Consortium members; the 1972-3 Libyan acquisitions of the 50% of the equity of AGIP, Occidental, Amereda Hess, Exxon, Mobil; the 1974 Kuwait Acquisition of 50% of the KOC; the 1975 Venezuelan Oil nationalization, see also, Brower, "Recent Developments in the International Law of Expropriation and Compensation: The South Western Legal Foundation", p.153, 1975.
139. Bowett, *op cit*, p.66.
140. *Ibid*.
141. See Lumpsum Agreements: "Their continuing contribution to the Law of International Claims", *A.J. Int'l Law*, 82, 1988, pp.69-78. See also Dolzer, 'New Foundations of the Law of Expropriation of Alien Property', *Ibid*, 75, 1981, pp.559-60 (he shares with the views of the above authors).
142. Lillich & Weston, *op cit*.
143. See Sedco case, *op cit*, p.185 in this regard the Tribunal made a reference to Aminoil case. See Aminoil, *op cit*, para.157.
144. Sedco case Interlocutory Award, *op cit*, p.186.
145. G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17), at 15, U.N. Doc. A/5344, (1962), reprinted in 57, *A.J. Int'l Law*, 710, 1963, G.A. Res. 3201, 28, U.N. GAOR Supp. (No.1) at 3, U.N. Doc. A/9559, (1974), reprinted in 13, *I.L.M.*, 715, (1974); and G.A. Res. 3281, 29. U.N. GAOR Supp., (No. 31) at 50, U.N. Doc. A/9631, (1974), reprinted in 14, *I.L.M.*, 251 (1975).
146. See in Sedco case, *op cit*, p.186.
147. Amoco case *op cit*, p.242. See also the following cases: Texaco Overseas Petroleum Company/California Asiatic Oil Company v Libyan Arb Republic (TOPCO), paras. 86-88, 53 *I.L.R.*, 389/1979, reprinted in 17 *I.L.M.*, at 30 (1978); Aminoil, Para. 143, reprinted in 12 *I.L.M.*, at 1032; Chilean Copper case, reprinted in 12 *I.L.M.*, 251, 276, (1973).
148. Sedco case, *I.T.L.*, 59-129-3, pp.187-8.
149. *Ibid*.
150. See SolaFiles, case No. 317, in 14, *Iran-U.S. C. Trib. Reports*, p.235. See also 17, U.N. GAOR, C.2 (846th Mtg.), para.3., U.N. Doc. A/C.2/SR.846 (1962), 17, U.N. GAOR C2 (850th Mtg.), para.16, U.N. Doc. A/C.2SR.850.
151. See in 14, *Iran-U.S. C. Trib. Reports*, *op cit*, p.235.

151. Ibid.
152. Ibid, see also TOPCO-Libya arbitral award in which Dupuy identified the standard of 'appropriate compensation' as the repository of the *opinio juris communis* representing "the state of customary law existing in the field". Dupuy proceeded to award full compensation in the form of *restitutio in integrum*. See TOPCO-Libya, op cit.
153. Ibid.
154. See *SolaTiles*, case, op cit.
155. See Amoco case, op cit, para. 206, the Tribunal referred to the ICSID cases of *Benvenuti et Bonfant S.A., v People's Republic of the Congo*, award of 8 August 1980, 21 I.L.M., (198), p.740, and *AGIPCO v People's Republic of the Congo*, award of 30 November 1979, 21 I.L.M., (1982), p.726. The I.C.C. Case *S.PP (Middle East) Limited v Arab Republic of Egypt*, award of 11 March 1983, 22 I.L.M. (1983), p.752.
156. See *Chorzow Factory case*, P.C.I.J., Series A, No.17, (Judgement of 13 September 1928).
157. See Amoco partial Award op cit, para. 191, also see Starrett case final Award, para. 264, in 16, Iran-U.S. C. Trib. Report.
158. See Amoco case, op cit, paras. 190-191.
159. Ibid.
160. Ibid.
161. Ibid.
162. Ibid, see also *Chorzow Factory*, op cit, at 46-47.
163. Amoco case, op cit, p.247. See also the concurring opinion of Judge Brower in this regard, in 15, Iran-U.S. C. Trib. Report, para. 17, p.300.
164. See *Norwegian Shipowners Claims*, 1, Rep. Int'l Arb. Awards 307, 334-335, 338 (Award of 13 October 1922).
165. See *Sedco*, case Interlocutory Award, opcit, in p.197.
166. Ibid, here, the Tribunal has made references to e.g. *Delagoa Bay Railway (U.S. & U.K. vs Port)*, summarized in II J.B. Moore, *International Arbitration to which the U.S. has been a party*, 1891, 1896 (1898), *Affaire Goldenberg (Ger. v Romania)*, 11 Rep. Int'l Arb. Awards 905, 909 (1928), *De Saba (U.S. v Panama)*, VI Rep. Int'l Arb Awards 358, 356-67, 1933, ('it is axiomatic that acts of a government in depriving an alien of his property without compensation impose international responsibility' and consequently 'the proper measure of damages is to award to the claimant the full value of the property').

167. Sedco case, op cit, p.187.
168. See the Award of 12 April 1977, 20 I.L.M., 1981, p.1.
169. See LIAMCO, p.32, in 20 I.L.M., Ibid, at 67.
170. 36 - See Sedco case, Interlocutory Award, p.188.
171. Prior to the Interlocutory Award in Sedco (March 1980).
172. See in 6, Iran-U.S. C. Trib. Reports, 219 at 225.
173. See I. Brownlie, Principles of Public International Law, op cit, 538.
174. See Amerasinghe, "The Question of Compensation for Nationalized Property", in III Valuation of Nationalized Property in International Law 91, 114 (R. Lillich ed. 1975).
175. See *Dames & Moore v Iran*, Award No. 97-54-3, of 20 December 1983, op cit.
176. See *Amco Asia Corp. v The Republic of Indonesia*, 1984, the award also is reproduced in 24 I.L.M., 1985, p.1022.
177. Ibid, para. 190.
178. Ibid. para. 280.
179. See the *Phillips Petroleum Company of Iran v Iran* in 21 Iran-U.S. C. Trib. Reports, 1989, p.79, Para. 106.
180. See INA case, op cit, p.378.
181. Ibid.
182. Ibid, the small amount in question was \$285,000 and it had been invested slightly more than a year before the nationalization.
183. See *American International Group* case, op cit, p.46.
184. Ibid, p.105.
185. Ibid, p.106.
186. Ibid, p.102.
187. See *Amoco* case, op cit, p.189.

CHAPTER SIX

THE RELEVANCE OF THE TREATY OF AMITY

6.1 GENERAL CONSIDERATION

As we saw in the first chapter, one of the greatest concerns of Western investors investing abroad is the possible expropriation of their property by a foreign government, particularly in the less developed areas of the world.⁽¹⁾

Again, while foreign investors have always tried to discourage expropriation,⁽²⁾ several developing countries consider it as one of the solutions to their problems of economic independence and economic development.⁽³⁾ However, foreign investors have always contended that such an exercise of sovereignty depends on the payment of adequate compensation. Thus they expect the expropriating state to discharge its obligations under international law by making reparations to a dispossessed alien investor.⁽⁴⁾

International law supports an international minimum standard which guarantees certain rights to aliens.⁽⁵⁾ However it has not solved the problem of the relationship between investors and investees.⁽⁶⁾ As we saw in Chapter 1, while foreign investors rely upon public international law and the decision of arbitrators and also advocate an international minimum standard, the investees claim that the conditions of expropriation are matters to be left to the taking states to regulate at their own discretion, under their own laws.⁽⁷⁾ International law does not offer any device or formula acceptable to developed and developing states; in short it provides no clear-cut solution to resolve obscurity, disputes and doubts.

The instability of developing countries, and the obscurities of international law concerning foreign investment, have in the past caused insecurity for foreign investors and thus tended to discourage foreign investment.⁽⁸⁾ Naturally, investors have always been looking

for various types of guarantees to cover their risks. As a result, inter-governmental means have often been employed to resolve the differences between groups of countries and to define the intentions of the parties. One way of doing this is obviously through treaties which may include provisions for the protection and treatment of nationals of both the high contracting parties

6.1.1 THE ROLE OF TREATIES

All writers concur that treaties have the function of legally recording that which has been agreed between the parties.⁽⁹⁾ They have definite attributes which are generally recognized. Fitzmaurice, the rapporteur on the law of treaties for the U.N. International Law Commission, embodied these legal elements in Article 2(1) of his code definition:

a treaty is an international agreement embodied in a single formal instrument (whatever its name, title or designation) made between entities both or all of which are subjects of international law possessed of international personality and treaty making capacity, and indeed to create rights and obligations, or to establish relationships, governed by international law.⁽¹⁰⁾

Article 2(1) of Vienna Convention also states:

"treaty" means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation...."⁽¹¹⁾

Treaties are the only source of international law to receive universal and unconditional acceptance from all states and are thus of fundamental importance.⁽¹²⁾ As Professor Harris points out a treaty is "the closest analogy to legislation that international law has to offer".⁽¹³⁾

Customary international law generates controversy regarding the extent to which rules may arise and bind the community of states when certain states remain silent, or where the rules originated before the emergence of newly-independent states.⁽¹⁴⁾ The sanctity of treaty obligations, on the other hand, is explained by the undisputed rule of *pacta sunt servanda*.⁽¹⁵⁾

In this regard, Baxter has pointed out:

Psychologically, the act of acceptance of a treaty.... is more likely to induce compliance with the obligation than would subjection to customary obligations under a General Assembly regulation of doubtful legal effect.⁽¹⁶⁾

He thus suggests that the effectiveness of treaty obligations stems from the explicit nature of consent itself, in that states are free to consent to a contractual obligation, or from the underlying *do ut des* concept of reciprocity. Such reciprocity of rights and duties under treaty is founded on the conviction of sovereign equality for both parties to a treaty and as such offers security for small and newly-independent states.⁽¹⁷⁾ Every treaty is presumed to be valid and in force unless there is an occurrence of one of the grounds listed in the Vienna Convention (1969); each of these grounds is considered an exception to the general rule and, thus, can neither be presumed nor be subjected to any extensive interpretation.

The binding nature of treaties have been sufficient to cause investor states to conclude bilateral treaties with many developing countries for the reciprocal promotion, encouragement and protection of investment.⁽¹⁸⁾

These agreements contribute to the reduction of political risks relating to investments. They accommodate the views of the participating states on such threshold issues as industrial policy,

free trade and finance, as well as issues with regard to expropriation or nationalization and settlement of investment disputes through arbitration.⁽¹⁹⁾

Accordingly, these treaties have been employed by the I.C.J. and arbitral tribunals as a source of law applicable in settling disputes.⁽²⁰⁾

The most recent application of such treaties as a source of applicable law, took place in respect of an investment dispute between the U.K. and Sri Lanka in 1990.⁽²¹⁾ The case which had been brought before the ICSID arbitration, involved a claim for compensation for the total loss of the claimant's investment in Sri Lanka which had resulted from a military operation by governmental forces against a rebellious group.

The Tribunal addressed the following issues: (I) applicable law; (II) the scope and nature of a state's obligation under a bilateral treaty; (III) the quantum of compensation payable and the method of assessing damages.

Significantly, the Tribunal held that the rules governing the various aspects of the dispute had to be drawn from the Treaty that had been concluded between U.K. and Sri Lanka, i.e. the Agreement for the Promotion and Protection of Investments (1980).⁽²²⁾

There have been different types of inter-governmental agreements relating to investments. The agreements which are most relevant to our study are treaties of Friendship, Commerce and Navigation (FCNS).

FCNs were designed by the United States after World War II, although their roots lie in the commercial treaties of the 19th Century.⁽²³⁾

The U.S. and Japan are the main countries that have used the FCN formula, but some individual treaties entered into by the United Kingdom and the Federal Republic of Germany are also of this type. Approximately 12 of the 43 FCNs entered into by the U.S. after World War II in force at present have been entered into with developing countries, including the Treaty of 1955 concluded with Iran. (24)

6.2 THE 1955 TREATY OF AMITY BETWEEN IRAN AND THE UNITED STATES

In 1953 the United States Central Intelligence Agency (CIA), with the collaboration of the Secret Service of the British Government, organized the Coup d'etat in Iran which ousted the National Government of Dr. Mossadeq and replaced it by a government disposed to continue the special privileges accorded to the U.S. and western powers. (25) As soon as Mohammad Reza Pahlavi returned as Shah of Iran, the Iranian government began to develop a very good relationship with western countries, especially with the U.S. Consequently, in 1955, the Governments of Iran and the U.S., for the purpose of affirming their relationship, signed the Treaty of Amity which entered into force on 16 June 1957. (26)

The Treaty of Amity includes various provisions dealing with jurisdiction, expropriation, compensation, arbitration and so on. As far as this study is concerned we shall focus on the expropriation provision and in particular on the standard of compensation as it was provided for in this Treaty.

6.2.1 LAWFULNESS OF EXPROPRIATION

The Treaty establishes a number of bases for a lawful taking consistent with traditional standards of international law. Article IV(2) of the Treaty provides that:

Property of nationals and companies of either high contracting party, including interests in property, shall receive the most constant protection and security within the territories of the high contracting party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.⁽²⁷⁾

Reference to principles of international law is a characteristic of all FCNs. In substance as well as in language all signed FCNs have the effect of accomplishing the FCNs programme objective of reinforcing the continuing viability of the traditional concept of lawfulness in the area of expropriation.⁽²⁸⁾ The requirement that a taking must be for a public purpose may be the least controversial element of lawfulness, since it is to a considerable extent self-defining. It would characterize as impermissible purposes, for example, cases of conversion to personal use and motives of political retaliation.⁽²⁹⁾

A second requirement (and the key requirement of a lawful taking under this treaty) is that an expropriatory act be accompanied by the "prompt payment of just compensation".⁽³⁰⁾ The precise wording of the compensation formula in FCNs can vary, whether compensation is described to be without delay or 'just' and actually 'realizable' or any other equivalent choice of words. Reliance on such formulations is an act whereby the parties select and incorporate by reference a

standard of international law elaborated by precedents and practice external to the Treaty.⁽³¹⁾ If these expropriation standards are not met then expropriation is *per se* unlawful under the terms of the treaty. Such a breach of the treaty could be argued to be a ground either for restitution or specific performance in addition to compensation for the value of the property taken.⁽³²⁾

6.2.2 COMPENSATION AND VALUATION

The Treaty of Amity in its Article IV(2) provides "that compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof."⁽³³⁾

This explicit language of the Treaty denotes that under the Treaty Iran must pay effective compensation for the expropriation of U.S. property.

The negotiating history of the Treaty clearly confirms this conclusion. Immediately following World War II, the U.S. negotiated a series of some 21 FCN treaties with other nations.⁽³⁴⁾ One important purpose of these treaties, including the Treaty of Amity, was to protect investment abroad, and thus each of the treaties contained a section which required prompt payment of just compensation for the expropriation of foreign investment.⁽³⁵⁾

As far as the determination of compensation is concerned the treaty declares that, for the purposes of determining the amount of compensation, expropriated property be appraised at its fair market value. However this Treaty, like other treaties of this type, does

not attempt to provide a more detailed methodology of computation, inevitably leaving much to the discretion of the arbitrator under the treaty arbitration mechanism.

International accounting practice also does not provide fixed rules, and the science (or it might be more appropriate to say 'art') of valuation has not yet been standardized. While there are various measures of fair market value, there may be cases where replacement, or even net book value, might be an appropriate device for approximation of the total value.⁽³⁶⁾

Accordingly, the agreed Minutes in the U.S.-Panama Treaty (1982) which also is a friendship treaty, include, in paragraph 4, the understanding that "the estimate of the full value of expropriated investment can be made using several methods of calculation depending on the circumstances thereof".⁽³⁷⁾ Similarly, Article III(1) of the Haiti-U.S. Treaty (1983), which is another friendship treaty, provides that fair market value will be determined "according to different methods of calculation as appropriate in each specific case".⁽³⁸⁾

This language reflects the fact that in the absence of a relevant and ascertainable market price of the investment affected, an approximation will have to be arrived at by indirect means. The indirect method, however must be one that is the most reasonably calculated in the circumstances to provide the investor with fair compensation for the economic value to him of his investment as an on-going enterprise, and not merely for the historical costs of the investment.

6.2.3 DATE OF VALUATION

The Treaty of Amity in its Article IV further requires that, for purposes of determining compensation, expropriated property must be valued as of the date of expropriation, disregarding the effects of any actions attributable to the expropriating government (1) that were unlawful or (2) that were taken in anticipation of the expropriation. These requirements concerning valuation are inherent in the principle of 'just compensation' which is embodied in Article IV(2) of the Treaty. These requirements are also well established in customary international law and were similarly incorporated into the Treaty of Amity by the further provision of Article IV(2), which states that compensation for expropriation must be in "no case less than that required for international law".⁽³⁹⁾

The requirement of valuation from the date of taking has consistently been inserted in the early post-World War II FCN treaties concluded between the U.S. and different countries, as well as in the most recent bilateral investment treaties (BITs). BITs which were concluded with Panama (1982); Senegal (1983); Zaire (1984); and Haiti (1984), lay down exactly the same requirements as were stipulated in FCNs concluded with Korea (1936); Nicaragua (1956); and Pakistan (1959).⁽⁴⁰⁾

6.2.4 TERMINATION OF THE TREATY

The Treaty of Amity provides that it shall continue in effect until terminated by a party. Specifically, Article XXIII(2) states that the Treaty "shall remain in force for ten years and shall continue in force thereafter until terminated as provided herein".⁽⁴¹⁾ The sole method of termination under the treaty is described in Article XXIII,

which provides that the treaty may be terminated only upon one year's written notice by one party to the other. As the Treaty has established the method of its termination, the parties are obliged to adhere to that method.⁽⁴²⁾

The question of termination of the Treaty has been a controversial issue in the context of the Tribunal. The Treaty, however, was never terminated in accordance with its term. Thus the Tribunal has been confronted with the question whether the Treaty still is in force or not.

6.3 THE QUESTION OF VALIDITY OF THE TREATY

The parties of the Treaty of Amity have made and are, in their pleas before the Tribunal, still making extensive reference⁽⁴³⁾ to the Treaty because, as we saw earlier, it lays down the standards which apply to the taking of the property of each other's nationals. American claimants constantly have contended that Iranian expropriations do not comply with obligations set forth in the Treaty of Amity, and Iranians, on the other part, have argued that the Treaty is no longer in force. In some cases Iranians have argued that the Treaty has been terminated by 'implication' as a result of economic and military sanctions imposed on Iran by the U.S. in late 1979 and 1980 and in other cases they have denied the applicability of the Treaty as a result of the changes in U.S.-Iranian relations since the Iranian Revolution, and the signing of 'the Claims Settlement Declaration' (CSD).⁽⁴⁴⁾

Having outlined the position of the both parties before the Tribunal in respect of the validity issue, now we should examine the Tribunal's position in this respect.

6.4 THE TRIBUNAL AND THE VALIDITY OF THE TREATY

The Tribunal in its early decisions in expropriation cases, avoided discussing the status of the Treaty as this issue carried some significant political overtones. As we saw earlier, American claimants, as well as the U.S. government, have been arguing in favour of the application of the Treaty, and the Iranian parties have been protesting that implementation of a treaty of "Amity" was an insult and affront given the polarized "enmity" between the two states. Thus, the Tribunal's early decisions avoided what was seen as a controversial issue.⁽⁴⁵⁾

As a result, in the *American International Group* case,⁽⁴⁶⁾ which was one of those early decisions, the Tribunal, after finding full compensation as the applicable standard prescribed by customary international law, concluded that it "need not here deal with the issues concerning the Treaty of Amity and its relevance with regard to the present dispute".⁽⁴⁷⁾

The Tribunal's refusal to rule on the validity and the relevance of the Treaty of Amity provoked strong reaction. The American arbitrator, Mosk, in a concurring opinion criticized the Tribunal in that regard. Judge Mosk argued that the Tribunal "should have held explicitly that the terms of the Treaty of Amity are controlling as to the requirements for compensation" in the case.⁽⁴⁸⁾ He continued by mentioning that the Treaty was never terminated by either party⁽⁴⁹⁾; that both Iran and the United States claimants had relied on the Treaty in the United States courts,⁽⁵⁰⁾ and that the denial of the benefits of the Treaty's protection to U.S. nationals would amount to a deprivation of "substantive rights" of U.S. claimants on

account of a change in the venue of litigation from the U.S. courts to the Tribunal.⁽⁵¹⁾

Nevertheless, the Tribunal's reluctance to deal with the validity of the Treaty persisted for some time.

Six months later (10 June 1984), Chamber One of the Tribunal, under the Chairmanship of Judge Lagergren, showed a mixed reaction towards the problem of the validity of the Treaty. With regard to the issue in *Sea-Land Services* it stated that:

"Aside from any conclusion as to the continued validity or effect of the Treaty, the Tribunal has one fundamental observation to make as to its interpretation in such a context as the present. There is nothing in either Article II or Article IV of the Treaty, which extends the scope of either state's international responsibility beyond those categories of acts already recognized by international law as giving rise to liability for a taking. The concept of taking is the same in the Treaty as in international law, and though the Treaty might, arguably, affect the level of compensation payable it does not relieve a claimant of the burden of establishing the breach of an international obligation. Accordingly, on the basis of its conclusions, with regard to *Sea-Land's* assertion of expropriation, the Tribunal does not consider that any benefit can be derived in this case from reliance on the provisions of the Treaty".⁽⁵²⁾

However, about one year later (on 12 August 1985) in the *INA*⁽⁵³⁾ case, Chamber One was confronted with the task of defining of the obligations assumed by the parties to the Treaty of Amity. In that case, as the Tribunal noted, the Iranian government had not addressed the question of the continued validity and effect of the Treaty in its written pleadings. Iranian agent, Mohammad Eshragh, during a pre-hearing conference held on 18 January 1983, had indicated that "his government was not at that stage prepared to presents its definitive views as to the validity of the Treaty".⁽⁵⁴⁾ In the absence of arguments on the issue, the Tribunal "assume[d] that for

the purpose of the present case the Treaty remains binding as it is drafted".⁽⁵⁵⁾

Moreover, it added that:

"....for the purpose of this case we are in the presence of a *lex specialis*, in the form of the Treaty of Amity, which in principle prevails over general rules".⁽⁵⁶⁾

This clearly means that whatever the general rules might be on the law of nationalization, and whatever be the developments regarding the standard of compensation, the Tribunal was obliged to apply the Treaty of Amity.

The conclusion of the Tribunal in the *INA* case provoked the Iranian judge's dissent. Judge Ameli's long dissent contested the Tribunal's presumption in favour of the continued validity of the Treaty of Amity on several grounds. He challenged the Tribunal's assertion that the Agent of Iran had failed to present the views of the government of Iran on the subject, and pointed out that the government's views were made available less than two weeks before by the agent in yet another important case (i.e. *Starrett*) to the same Chamber, and in any case, "the issues involved in the question... [were] so notorious and compelling that the Tribunal should have examined them on its own initiative".⁽⁵⁷⁾

More seriously, he objected that concluding in favour of the treaty violates the basic principle of "reciprocity".⁽⁵⁸⁾ He argued that the Articles of the Treaty proclaimed "enduring peace and sincere friendship" between the two parties on the basis of mutual assurances of the "most consistent protection and security" to each other's nationals, "in no case less than that required by international law"

and provided for a mechanism of ensuring just compensation for properties taken, etc.⁽⁵⁹⁾

He further asserted that despite the provision of Article 1 of the Treaty, the course of conduct of the U.S. before and after the Algerian Accords offended against the friendly relations, economic relations and the consular rights of Iran. Then he referred to a series of violations of the Treaty provisions, such as harassment of Iranian nationals by the "hostile and inhuman actions" of the U.S. authorities, blocking of Iranian assets, prohibiting exports to and imports from Iran, and "finally, the armed invasion of the Islamic Republic of Iran, or what is also described by the U.S. as abortive rescue mission". Judge Ameli cited the overthrow of the Mossadeq government by the CIA - sponsored coup d'etat in 1953 and the allegedly continued interventionist policies of the U.S. as militating against the origin and applicability of the Treaty of Amity.⁽⁶⁰⁾ The bottom line was that the U.S. had breached the Treaty and as a result the Treaty was not in force, and the U.S. could not be considered entitled to its benefits.

Despite his strong protest, the Tribunal continued to refer to the Treaty in its later awards.

In the *Phelps Dodge Corp.* case, no party contended that the Treaty was ever terminated in accordance with its terms, but Iran argued that the Treaty had been terminated by implication when the U.S. sanctioned Iran economically as well as militarily in the late 1970s. The Tribunal did not find it necessary in this case to determine whether the Treaty had remained in force between the two states. It stated:

"... whether or not the Treaty still is in force today, it is a relevant source of law on which the Tribunal is justified in drawing in reaching its decisions". (61)

Following this decision, the Tribunal has routinely held that the Treaty of Amity constituted as source of law applicable to cases between Iran and the U.S. As Khan points out:

"Securing recognition by the Tribunal of the Treaty of Amity as a source of law between Iran and the U.S. was a significant triumph for the United States". (62)

Surprisingly, in the *Sola Tiles* case, while the claimant did not rely on the Treaty of Amity and the respondent did not address the applicability of that Treaty, the Tribunal stated that the Treaty:

"cannot be ignored and must in some way form the part of the legal background against which the Tribunal decides the case". (63)

Yet, in the *Amoco International Finance* case, examining different contentions of the Iranian respondents, the Tribunal reached the conclusion that the Treaty was valid and in force.

In the *Amoco* case, Iran challenged the validity of the Treaty on various grounds.

First, it argued that "the Treaty was never binding on Iran since it was executed by a Government installed as a result of foreign intervention". (64) Iran continued that, if the Treaty was held to be validly concluded "it ceased to be operative in November 1979 at the latest, by reason of United States violation of it taking measures against Iranian assets as well as by the general "change of circumstances", which was required by Article V of the CSD to be taken into account by the Tribunal". (65) Furthermore, Iran argued that "the decision to the contrary of the International Court of Justice in the case concerning United States Diplomatic and Consular

Staff in Tehran"⁽⁶⁶⁾ was irrelevant since that "decision only concerned jurisdiction and the case was not argued by Iran".⁽⁶⁷⁾

With regard to the Iranian contention that the Treaty was invalid because it was concluded by a government installed by the intervention of the U.S., which was a clear duress argument framed in the terms of Article 49, 51 and 52 of the Vienna Convention on the Law of Treaties, the Tribunal stated that:

"... at the time the Treaty was signed and ratified the two governments were recognized by the whole international community. There is no evidence, and it has not been contended, that the Treaty was executed under duress, or by fraud,... None of the provisions of the Treaty can be considered as contrary to an imperative norm of international law (Jus Cogens),.... Nothing, therefore, suggests that the Treaty was null and void *ab initio*".⁽⁶⁸⁾

In respect of the Iranian contention against the Treaty based on "change of circumstances"⁽⁶⁹⁾ the Tribunal said that it did not need to determine whether events such as the Islamic Revolution, the attack on the United States Embassy in Tehran, taking of embassy personnel as hostages, and the subsequent presidential freeze orders and rescue attempt, "constituted changes of such a nature and magnitude as to justify the termination of the Treaty in conformity with customary rules of international law as declared in Article 62 of the Vienna Convention". Then it pointed out that as "Article 62 clarifies, change of circumstances never automatically terminates a treaty".⁽⁷⁰⁾ While the Tribunal mentioned that those events could not be without consequences upon the implementation of the Treaty and that such a legal and factual context has to be kept in mind, nevertheless, the Tribunal dismissed the Iranian contention on the ground of "changed circumstances" and concluded that the Treaty was valid.

Similarly the Tribunal did not agree that the negotiation of the Algiers Accords⁽⁷¹⁾ in January 1981 constituted a termination of the Treaty. The Tribunal stated that:

"the Accords, which provided for the release of the 52 United States nationals and lifting of the freeze of the Iranian assets, do not mention the Treaty".⁽⁷²⁾

The Tribunal added that:

"The general reference to "changed circumstances" in Article V of the CSD, which deals with the law to be applied by the Tribunal, cannot be construed as a notice of intention to terminate the Treaty, or as constituting a finding that the Treaty was terminated on such a basis".⁽⁷³⁾

To hold the Treaty valid the Tribunal mainly relied on the decision of the I.C.J. in the *Hostages* case.

In the *Hostages* case, the U.S. filed an application which claimed, *inter alia*, that Iran's seizure of the U.S. Embassy in Tehran violated the Treaty. The Court in its judgement held that the Treaty's provisions "remain part of the corpus of law applicable between the U.S. and Iran".⁽⁷⁴⁾

In its holding the Court explained that the continued applicability of a treaty of this nature is especially important when the parties are in dispute:

"The very purpose of a Treaty of Amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nations in each others' territory. It is precisely when difficulties arise that the Treaty assumes its greatest importance".⁽⁷⁵⁾

The essential basis for this judgement seems to be the sanctity; effect; and importance of the Treaty in peaceful continuation of relationships of both parties and ultimately in settling their disputes.

Examining the Court's judgement, the Tribunal stated that "the Court dismissed the suggestion that the Treaty was rendered inapplicable because of the counter measures the United States had taken against Iran. ... the Court emphasized, in this context that "mutual undertakings [of both parties] to ensure the protection and security of their nationals in each other's territory" are specially related to the "very purpose of amity and, indeed, of a treaty of establishment" like the Treaty".⁽⁷⁶⁾

Following the I.C.J. judgement, the Tribunal said "Iran could easily have denounced the Treaty if it thought it proper to do so"⁽⁷⁷⁾ which was what, for instance, the French Government did after the I.C.J. was invited to found its jurisdiction in the *Nuclear Tests* case⁽⁷⁸⁾ on the General Act which France had considered to have lost effectiveness and fallen into desuetude. The Tribunal added but "Iran took no such action".⁽⁷⁹⁾ Accepting the Iranian argument that no formal notification of treaty termination was necessary, and that it could be implied from conduct of the parties, the Tribunal held that "the conduct of the parties was not such as to warrant such a conclusion".⁽⁸⁰⁾ Pointing out that the closure of the consulate and the rupture of diplomatic relations could be construed as suspending the part of the Treaty which relates to consular relations, the Tribunal found no evidence to suggest that "the parties considered the provisions of the Treaty relating to the Treatment of nationals to be terminated or suspended at the time of the occurrence of the facts to which the claim relates".⁽⁸¹⁾ The Tribunal noted the claimant's contention that the U.S. had "repeatedly invoked the Treaty... continued routinely to confer on Iranian nationals benefits arising from its provisions and Iran itself had invoked the Treaty before United States Courts, as recently as the summer of 1985".⁽⁸²⁾

In this case also, (as it did in the INA case), the Tribunal pointed out that, as *lex specialis* in the relations between the two countries, the Treaty superseded the *lex generalis*, namely customary international law. The Tribunal, however, added that:

"This does not mean, however that the latter is irrelevant in the instant case. On the contrary, the rule of customary law may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions."⁽⁸³⁾

As the foregoing shows, the Tribunal has been trying in one way or another to hold the Treaty valid, and by doing that, of course, the Tribunal meant to preserve the investment protection rules contained in the Treaty. As we shall see below, the Tribunal in almost all of its awards has in fact applied the provisions contained in the Treaty.

6.5 THE TREATY AND THE COMPENSATION AWARDS OF THE TRIBUNAL

We saw earlier that with regard to the three initial cases, i.e. *American International Group*; *Seland-Services*; and *Tippetts*, the Tribunal referred to customary international law as the source of applicable standards. However, while the Tribunal in its initial decisions tended to rely wholly on customary international law and found that these principles require full compensation, in the *INA* case the Tribunal preferred to reach this same result by applying the Treaty of Amity.

In its later cases, the Tribunal has consistently applied the Treaty of Amity and its "just compensation" standard of compensation. In the *Phelps Dodge* case, the Tribunal held that the Treaty of Amity's provisions for unilateral termination had never been invoked. The

Tribunal therefore, held that the Treaty was applicable to the present case. In this case, the Tribunal ignored Iran's argument that net book value, as reduced by subsequent alleged losses, conformed to the definition of "full equivalent" value, and focussed on the extent to which goodwill plus long term and short term profits could confidently be valued.

Several of the Tribunal's more recent awards have affirmed that the standard of full compensation is the same under both the Treaty and customary international law. Thus, while Lagergren regarded the Treaty as *lex specialis*⁽⁸⁴⁾, Chamber Two and Chamber Three awards have found the Treaty and Customary rule of full compensation to be the same.⁽⁸⁵⁾ Chamber Two in the *Phelps Dodge* case found that the Treaty of Amity stipulated compensation standards "similar, if not identical" to those found under customary international law citing, *American International Group* and *Tippetts v TAMS-AFFA Consulting Engineers of Iran*. Another Chamber Two award in *Payne v Iran* applied the provisions of the Treaty concerning compensation standards as similar as those developed through customary international law.

The most extensive award to date which has discussed the compensation standards found in the Treaty and customary international law is *Sedco, Inc. v National Iranian Oil Co.* In this case Chamber Three needed to determine the compensation standard applicable to the expropriation of an oil drilling company because Iran argued that the Treaty of Amity, even if applicable, incorporates the reduced standard of compensation allegedly found in customary international law. The Tribunal rejected the contention that the traditional standard of full compensation has been eroded. The Tribunal reviewed the opinions of international tribunals, and legal publicists, and

concluded that the standard of full compensation is overwhelmingly supported.⁽⁸⁷⁾

In *Amoco International Finance Corp. v Iran*⁽⁸⁸⁾ Chamber Three reached the same conclusion. In this case the Tribunal decided that the claimant's interest in a joint venture chemical enterprise had been lawfully expropriated and that the Treaty established the standard of compensation. However, in this case the majority interpreted the Treaty standard in the light of principles of public international law as declared in the Permanent Court's Judgement in the *Chorzow Factory* case⁽⁸⁹⁾. On the basis of these principles, the Chamber concluded that the Treaty and general principles of international law did not permit application of discounted cash flow methods of valuation (subsequently adopted by Chamber One in the *Starrett* case) to determine damages for a lawful expropriation.⁽⁹⁰⁾ In the *Sedco* case also the Tribunal concluded that full compensation must be awarded "whether or not the expropriation itself was otherwise lawful".⁽⁹¹⁾

CONCLUSION

From the above several conclusions can be drawn. Firstly, the Treaty of Amity has been used as a source of law applicable to expropriation or nationalization cases before the Tribunal. Secondly, the concepts of changed circumstances and implicit termination have not affected the Treaty and its enforceability. Thirdly, the provisions of the Treaty have been considered as a firm ground for applying the full compensation standard for expropriation or nationalization cases. However, this full compensation standard, according to the Tribunal, can be applied either via application of the Treaty of Amity or by

reference to customary international law. This conclusion is consistent with the desire of investors to be protected firmly and, as the American arbitrator Brower points out, "underscores the strong support manifested today for the principle of full compensation".⁽⁹²⁾

NOTES TO CHAPTER SIX

1. See A. Akinsanya, 'International Protection of Direct Foreign Investment in the Third World', I.C.L.Q., Vol.36, 1987, p.58; C.T. Ebenorth & J. Karl, International Investment Contracts and the Debt Crisis, Int'l Lawyer, Vol.22, No.1, 1988, p.180-182, I.F.I. Shihata, 'Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Guarantee Scheme', Int' Lawyer, Vol.21, No.3, 1987, pp.678,680.
2. See E. Synder, 'Protection of Private Foreign Investment: Examination and Appraisal', I.C.L.Q., Vol.10, 1961, pp.474-5; M. Shamsaei, *International Regulation of Transnational Corporation: A Critical Examination of International Codes of Conduct Relating to the Control of Transnational Corporation's Activities in Developing Countries*, LL.M. Thesis (unpublished), Hull University, 1988, pp.42-42
3. See W.D. Verwey & N.J. Schrijver, "The Taking of Foreign Property Under International Law: A New Legal Perspective?", the N.Y.B. Int'l Law, 1984, pp.10-16; S.H. Robock & K. Simonds, *International Business and Multinational Enterprises*, London, 1983; K. Simonds, *Legal Problems of Multinational Enterprises*, London, 1977; R. Brown, "The Relationship Between the State and the Multinational Corporation in the Expropriation of Resources", I.C.L.Q., Vol.33, 1984, p.218-224; M.K. Neville, "The Present Status of Compensation by Foreign States for the Taking of Alien Owned Property", Vand. J. Trans'l Law, Vol.13, 1980, pp.60-61.
4. See S. Gudgeon, "Valuation of Nationalized Property Under United States and Other Bilateral Investment Treaties", in R.B. Lillich (ed), *Valuation of Nationalized Property in International Law*, 1985, pp.101-103; see also A. Akinsanya, "International Protection of Direct Foreign Investment in the Third World", op cit, p.60.
5. See S. Scoonrod, "The United Nations Codes of Conduct for Transnational Corporation", H. Int'l Law Journal, Vol.18, 1977, p.275-77; J.D. Kurek, "Supranational Regulation of Transnational Corporations: The UNCTAD and CTC Efforts", Mich. Y.B. Int'l Legal Studies, Vol.2, 1981, pp.268-9.
6. S. Scoonrod, op cit.
7. See S.K. Asante, "International Law and Foreign Investment: A Re-appraisal", I.C.L.Q., Vol.37, 1988, pp.590-93; M. Sornarajah, "Compensation for Expropriation: The Emergence of New Standards", J.W.T. Law, Vol.21, 1987, pp.110-12.
8. See Synder, op cit, p.469-70, Asante, op cit, pp.590-3. For more information in this regard see H. Moran, *Multinational Corporations and the Policies of Dependence: Copper in Chile*, Princeton University Press, Princeton, N.J., 1974. See also A. Chandhuri, op cit, p.57.

9. See D.P. Myers, "The Names and Scope of Treaties", A.J. Int'l Law, Vol.51, 1957, p.574. See also K. Vamvoukos, *Termination of Treaties in International Law*, 1985, pp.186-206.
10. See Myers, op cit. See also Article 2(1)a of the Vienna Convention on the Law of Treaties (1969), both Articles exclude agreement between states which are governed by municipal law and agreement between states which are not intended to create legal relations at all. See M. Sinclair, *The Vienna Convention on the Law of Treaties*, 1984; T.O. Elias, *The Modern Law of Treaties*, 1984; Lord McNair, *The Law of Treaties*, 1961.
11. See in Vol.8, I.L.M., 1969, p.679. See also Vol.63, A.J. Int'l Law, 1969, p.875.
12. See M.E. Villiger, *Customary International Law and Treaties*, 1985, p.150.
13. See D.J. Harris, *Cases and Materials on International Law*, Fourth Edition, 1991, p.729.
14. Ibid. See also M. Sornarajah, "State Responsibility and Bilateral Investment Treaties", J.W.T. Law, Vol.20, 1980, pp.81-2 and 89.
15. Villiger, op cit, p.151.
16. Ibid.
17. Ibid.
18. See J. Vos, "Investment Protection and Promotion", 31, I.C.L.W., 1982, p.691. See also A. Akinsania, "International Protection of Direct Foreign Investment", op cit, p.58. See also B.M. Claggett, "Protection of Foreign Investment Under the Revised Restatement", Vir. J. Int'l Law, Vol.25, 1984, p.74; F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, B.Y.B. Int'l Law, Vol.52, 1981, p.241; E. Denza & S. Brooks, "Investment Protection Treaties: United Kingdom Experience", Vol.36, I.C.L.Q., 1987, p.908; and E. Robin, "The BIT (Bilateral Investment Treaties) Won't Bite: The American Bilateral Investment Treaty Programme", Am. U.L. Rev., Vol.33, 1984, pp.931-58.
19. Ibid.
20. See application of the 1956 F.C.N. Treaty concluded between Nicaragua and the U.S., by the I.C.J. in the I.C.J. Reports, 1984, at 169; S. Loeper, "Jurisdiction of the I.C.J. - Admissibility of Nicaragua's Application in Case Concerning Military and Paramilitary Activities in and against Nicaragua", Camb. L. Journal, Vol.44, 1985, p.183. For the most recent application of a F.C.N. Treaty see case concerning Elettronica Sicala S.P.A. (ELSI) v Italy. This case arose out of the requisition by the Government of Iran of the plant and other assets of ELSI, an Italian company wholly owned by two U.S. companies. The U.S. claim against Italy was for compensation for breaches of a F.C.N. Treaty of 1948 between the two states

which was decided by the I.C.J. See I.C.J. Report 1989, 15. See also R. McCorquodale, "Expropriation Rights Under a Treaty - Exhausted and Naked" Camb. L. Journal, Vol.49, 1990, pp.197-199.

21. See ICSID Decision in case number ARB/87/3, *ASIAN AGRICULTURAL PRODUCTS LTD (AAPL) V REPUBLIC OF SRI LANKA*, in 30, I.L.M., 1991, p.577. See also D.A. Akrofi, "ICSID Arbitral Decision, Bilateral Investment Treaties - Applicable Law - State Responsibility - Compensation", in 86, A.J. Int'l Law, 1992, p.371.
22. See Agreement for the Promotion and Protection of Investments, 13 February 1980, U.K.-Sri Lanka, reprinted in 19 I.L.M., 1980, p.886.
23. See B. Walker, "Modern Treaties of Friendship, Commerce and Navigation", Minn. L. Rev., Vol.42, 1958, p.508.
24. See ICSID, 1984 Annual Report (Washington DC, ICSID, 1984), pp.18-19; ICSID, 1985 Annual Report, pp.16-17; and 20, I.L.M., 1981, p.565.
25. For a detailed account of the Anglo-American involvement in the overthrow of the Mossadeq regime in 1953, see B. Lapping, *End of Empire*, 1985. Also see K. Roosevelt, *Countercoup: The Struggle for the Control of Iran*, 1979; Homa Katouzian, *The Political Economy of Modern Iran*, 1981; and, "CIA Courted Iran Exiles for 7 Years", *International Herald Tribune*, 20, 1986, p.1, Col.1.
26. Treaty of Amity, Economic Relations and Consular Rights Between the United States of America and Iran Signed at Tehran, on 15 August 1955, see in, *United National Treaty Series*, No.4132, 1957-58. See also in *Iranian Official Gazette*, 3589, 1951.
27. *United Nations Treaty Series*, op cit, p.114.
28. See R. Wilson, *The International Law Standard in Treaties of the United States*, 1953, P.110; and OECD Draft Convention on the Protection of Foreign Property, Art.384, reprinted in 7 I.L.M., 117, (1988).
29. See K.S. Gudgeon, "Valuation of Nationalized Property Under United States and Other Bilateral Investment Treaties", op cit, p.103.
30. See Article IV(2) of the Treaty, *United National Treaty Series*, op cit.
31. K.S. Gudgeon, op cit. See also R. Wilson, 'Property Protection Provisions of U.S. Commercial Treaties', 45 A.M.J. Int'l Law, Vol.83, 1951, pp.103-104 and 114-115.
32. See *Chorzow Factory case (INDEMNITY) (MERITS) Germany v Poland (1928)*, P.C.I.J. Reports, Series A, No.17, pp.47-48.
33. See Treaty of Amity, U.N. Treaty Series, op cit.

34. See Walker, "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice", 5, *Am. J. Int'l Law*, 1956, 229.
35. See R. Wilson, *U.S. Commercial Treaties and International Law*, 1960, *op cit*; R. Wilson, *The International Law Standards In Treaties of the United States*, 1953. Clauses concerning expropriation and compensation are of special importance to the protection of foreign investment. Accordingly, they are found in all FCNs as well as BITs. For a comprehensive list of BITs see 1984, ICSID Annual Report (Washington DC, ICSID, 1984) and 1985 ICSID Annual Report. See also A. Akinsanya, *International Protection of Direct Foreign Investment*, *op cit*, p.58.
36. See K.S. Gudgeon, *op cit*, p.105; see also R. Smith, 'The U.S. Government Perspective on Expropriation and Investment in Developing Countries', 9 *Vand. J. Transnat'l Law*, 1976, p.517.
37. See U.S.-Panama, 27 October 1982, 21 *I.L.M.*, 1982, 1227.
38. See U.S.-Haiti, 13 December 1983, unpublished, U.S. Department State File. See also K.S. Gudgeon, *op cit*, p.127.
39. See R. Wilson, *the International Law Standard Treaties of the United States*, *op cit*, R. Lillich, *The Valuation of Nationalized Property in International Law*, 1972 (especially the chapter on 'Contemporary U.S. Practice' and D.A. Lapres, 'Principles of Compensation for Nationalized Property', 26 *I.C.L.Q.*, pp.97-102, 1977.
40. For the Texts of these treaties see 1984 & 1985 ICSID Annual Reports, *op cit*.
41. See the Text of the Treaty in U.N. Treaty Series, *op cit*.
42. *Ibid.* See also Vienna Convention on the Law of Treaties, Art.54(a), U.N. Doc. A/CONF. 39/27 (entered into force 27 January 1980), reprinted in 63 *AM. J. Int'l Law*, 1969, 875.
43. See e.g. *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA*, 6 *Iran, U.S. C. Trib Reports*, 1984, p.219, *American Int'l Group Inc v Iran*, 4 *Iran-U.S. C. Trib. Reports*, 1983, p.96; and *Starrett HOUS Corp. v Iran-U.S. Corp. v Iran*, 16 *Iran-U.S. C. Trib. Reports*, 1987, p.112.
44. See e.g. cases of *Phelps Dodge Corp. v Iran*, 10 *Iran-U.S. C. Trib. Reports*, 1986, p.121 and *Sedco Inc. v Iran*, 15 *Iran-U.S. C. Trib. Reports*, 1987, p.23.
45. See in C.N. Brower, "Current Developments in the Law of Expropriation and Compensation: A preliminary Survey of Awards of the Iran-United States Claims Tribunal", Vol.21, *Int'l Lawyer*, 1987, p.660. See also B.M. Clagett in *A.S. Int'l Proceedings*, 1984, p.235. (He explained the Tribunal's preference to base its awards on the principles of international law rather than on the Treaty of Amity thus: "politically, it is perfectly clear why the Tribunal did what

it did. The Iranians, of course do not like the rule of customary international law announced by the Tribunal. But they have made it very clear that they would be even more offended by the notion that the 1955 Treaty of Amity between the 'Criminal Shah and the Great Satan' could possibly still be binding on them. The Tribunal, in an effort to please, decided the case on the less offensive, rather than the more offensive ground. In my view, that was a very happy result".)

46. See in 4 Iran-U.S. C. Trib. Reports (1983), p.96,102.
47. Ibid, p.105,109.
48. Ibid, p112.
49. Ibid.
50. Ibid, p.113.
51. Ibid, p.115.
52. See *Sealand Services Inc. v The Islamic Republic of Iran*, Award No.135-33-1, in 6 Iran-U.S. C. Trib. Reports, (1984), p.149.
53. See *INA Corporation v the Government of the Islamic Republic of Iran*, in 8 Iran-U.S. C. Trib. Reports, (1985), p.373.
54. Ibid, p.378.
55. Ibid, p.379.
56. Ibid, p.378.
57. Ibid, p.429-30.
58. For more details about the principle of "reciprocity" see A. Lenhoff, "Reciprocity: The Legal Aspects of Prennial Idea", in 49 North Western Univ. L. Review, 1954-55, p.619. See also E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Counter Measures*, 1984, p.14-27.
59. See in 8 Iran-U.S. C. Trib. Reports, op cit, p.439.
60. Ibid.
61. See *Phelps Dodge Corp. v the Government of the Islamic Republic of Iran*, in 10 Iran-U.S. C. Trib. Reports, 1986, p.131-32.
62. See R. Khan, *The Iran-United States Claims Tribunal, Controversies, Cases and Contribution*, 1990, p.209.
63. See *SolaTiles Inc. v the Government of the Islamic Republic of Iran*, in 14 Iran-U.S. C. Trib. Reports, 1987, p.234.
64. See *Amoco International Finance Corporation v the Government of the Islamic Republic of Iran*, in 15 Iran-U.S. C. Trib. Reports, 1987, p.214.

65. Ibid.
66. See 1980, I.C.J. Reports, p.3, reprinted in 19 I.L.M., 1980, pp.553-566.
67. See Amoco International Finance Corporation, op cit, p.215.
68. Ibid.
69. For a detailed discussion about the principle of "Changed Circumstances" see S. Vamvokos, *Termination of Treaties in International Law*, 1985, pp.186-206. Doctrine of changed circumstances is seen as exception to the paramount rule of *pacta sunt servanda* (agreements are to be observed). Concepts by which parties are excused from contractual obligations by certain changed circumstances are found in many legal systems and are known by various names. In common law systems they are embraced within doctrines of "frustration and impossibility", in the civil law they are often known as *clausula rebus sic stantibus*. All of these doctrines excuse parties in case of supervening circumstances caused by outside events beyond their control that have made continued performance of a contract unreasonable. See separate opinion of Judge Holtzmann, concerning the award of the Tribunal in *Questech, Inc. v Iran*, (1985), in 12 Iran-U.S. C. Trib. Reports, (1986).
70. See in 15 Iran-U.S. C. Trib. Reports, op cit, p.217.
71. See Algiers Declaration in 1 Iran-U.S. C. Trib. Reports, 1981, p.8.
72. See in 15 Iran-U.S. C. Trib. Reports, op cit, p.217.
73. Ibid.
74. See Hostages case, op cit, p.28.
75. Ibid.
76. See 15 Iran-U.S. C. Trib. Reports, op cit.
77. Ibid, p.218.
78. See Nuclear Test cases (Interim protection order of 22 June 1973) in I.C.J. Reports, 1973, pp.99,135. See also, J.G. Merrills, *The International Court of Justice and the General Act of 1928*, in 39, *Camb. L. Journal*, 1980, p.137.
79. See in 15 Iran-U.S. C. Trib. Reports, op cit, p.218.
80. Ibid.
81. Ibid.
82. Ibid.
83. Ibid, p.222.

84. See *Starrett Hous. Corp v Iran*, 4 Iran-U.S. C. Trib. Reports, 1983, p.122; 16 Iran-U.S. C. Trib. Reports, p.112; *INA Corp v Iran*, op cit.
85. Chamber Two found that customary international law required full value in *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA* (1984), 6 Iran-U.S. C. Trib. Reports, 1984, pp.219,225, ("the claimant is entitled under international law and general principles of law to compensation for the full value of the property of which it was deprived"). Chamber Three did so in 1983 in *American Int'l Group, Inc. v Iran* (1983), 4 Iran-U.S. C. Trib. Reports, 1983, p.96, 105, 109 ("standard of compensation under customary international law in cases of lawful expropriation is the full value of the claimant's expropriated interest, determined on the basis of going concern value").
86. See Award No. ITL 59-129-3 (27 March 1986), 9 Iran-U.S. C. Trib. Reports, (1985), p.248 reprinted in 25 I.L.M., 1986, p.629.
87. Ibid, p.274.
88. See the case in 15 Iran-U.S. C. Trib. Reports, 1987II, p.189.
89. *Germany v Poland*, see in 1928, P.C.I.J., Series A, No. 17, (Judgement of 13 September).
90. See *Amoco Int'l Fin. Corp.*, 15 Iran-U.S. C. Trib. Reports, op cit, pp.258-65.
91. See *Sedco Inc. v National Iranian Oil Company*, op cit.
92. See C.N. Brower, op cit, p.662.

CHAPTER SEVEN

QUANTIFICATION OF DAMAGES

QUANTIFICATION OF DAMAGES

In the previous chapter we saw that in its awards the Tribunal has reached the conclusion that full compensation must be paid by an expropriating state. This conclusion was reached via application of the Treaty of Amity, and by reference to customary international law. A crucial area of the Tribunal's awards, which has a close link to the standard of compensation, is the issue of how actually to calculate damages based on the designated compensation standard.

From the point of view of a deprived investor the determination of full compensation as a designated standard may seem of limited value, if the valuation method applied leads to an award which the investor considers as falling far short of proper compensation for the loss suffered. Thus the issue of the valuation of expropriated or nationalized property is in practice one of the most important issues in this field. Moreover, although in some circumstances less than full compensation might be an appropriate standard, in such cases the full value would still be the starting point in the calculation of compensation. Therefore the Tribunal's treatment of the valuation of various kinds of property is of great importance. There are, of course, different methods of valuation, some favoured by the United States and some favoured by Iran, but our primary concern is with the methods which have been used by the Tribunal to meet the full compensation standard and the justifications for its approach. First, however, we shall examine the interpretations of the full compensation standard by the two sides.

7.1 FULL COMPENSATION IN THE VIEWPOINT OF THE U.S. CLAIMANTS

American claimants have argued before the Tribunal that full compensation means full value, or going-concern value, or market value of the property taken, plus the value of lost profits. They have followed the views of the Department of State in regard with the meaning of the term "adequate compensation" in cases of expropriation or nationalization.

The viewpoint of the Department of State has been expressed as follows:

"once it appears that a taking of American-owned property has occurred or is about to occur, it is the long-standing and continuing position of the U.S. government that international law requires payment of fair market value, calculated as if the expropriatory act had not occurred or was not threatened. Since market value is often not directly ascertainable, and since there usually are not recent sales of comparable properties to refer to, market value generally must be approximated by indirect methods of valuation. There are at least three methods.

The going-concern approach attempts to measure earning power (and so encompass elements such as loss of future profits which may be based on projections of past earnings or estimates of future earnings), and in the view of the U.S. Government generally best approximates market value. We recognise that there may be circumstances in which application of this method is impractical, or where it might operate unfairly - for example, where an investment has a limited history of operating result, or where expropriation occurs after significant costs are incurred but before a revenue-generating state is reached. This method of valuation is also vulnerable to governmental actions which adversely affect profitability such as increased taxes, threat of cancellation of contractual or concessionary rights, or withdrawals of privileges. We believe that such actions taken for the purpose of or which have the effect of, unfairly influencing compensation may not properly be allowed.

The replacement cost of the property at the time of expropriation less actual depreciation, a standard which is likely to yield an amount substantially greater than book value but which does not take into account earning capacity is of limited use in valuing intangibles, and in our view is generally less acceptable in most circumstances than the going-concern approach.

Book value or some variation of it, which (unlike the replacement-cost approach) values assets at acquisition cost less depreciation, is a figure which in most cases bears little relationship to their actual value. We believe this to be the least acceptable method for valuation of expropriated property.

We recognize that no single method of valuation is valid under all circumstances. The method or combination of methods most likely to provide joint compensation for expropriated property varies, and depends upon the attendant circumstances of the particular case."⁽¹⁾

In the *AIG* case (1983) which involved nationalization of an insurance company the claimants maintained that full compensation for their property was the "full value of the company as a going concern", including future business prospects, goodwill and interest from the date of nationalization.⁽²⁾

Yet in the *Amoco* case (1987)⁽³⁾ the claimant showed more sensitivity in applying for full compensation. As the case involved an international economic agreement (Khemco agreement) between Amoco and NPC (an Iranian Government instrumentality), the claimant in argument discussed the full compensation standard comprehensively. The claimant argued that the Khemco agreement belonged to a special category of international contracts.⁽⁴⁾ Further, the claimant contended that such contracts by their nature require that "they be insulated from the disruptive effects of changing municipal law and therefore the law from which they derive their binding force (*loi d'enracinement*) is international law."⁽⁵⁾ In fact, by distinguishing international contracts from other existing contracts the claimants tried to make out a case for a higher full value than for other contracts. It is therefore worth briefly examining some characteristics these agreements.

7.2 CHARACTERISTICS OF PETROLEUM AGREEMENTS

Petroleum agreements have specific characteristics which distinguish them from other agreements. The following could be listed as their features:

- (i) The state is always, directly or indirectly implicated in them. Accordingly, they are also called "state contracts".
- (ii) They comprise a mixture of contractual and statutory or regulatory provisions.
- (iii) They are long-term contracts.
- (iv) They are international contracts, often described as "international economic development" or "investment contracts".⁽⁶⁾

Among these features the last has a close link to our discussion. As we saw in the Chapter 3, there are some writers who argue that state contracts are governed by international law. This is said to conform to the intention of the parties as reflected in the provisions referring to international law or the general principles. Weil, for example, points out that economic development contracts concluded between state and private parties are rooted in the international legal order and are, or should be, governed by international law.⁽⁷⁾ Host states, on the other hand, relying on the principle of permanent sovereignty over natural resources, argue that their own national law should be applied to these contracts.⁽⁸⁾ Weil adds that submission to international law is still valid even where the parties refer to the national law of the State, because here the national law has been

elevated to the level of international law (*exhausse all niveau del'ordre juridique international*).⁽⁹⁾

The claimant in the *Amoco* case adopted the above attitude, and relying on the international character of the *Khemco* Agreement, contended that nationalization of *Amoco* was unlawful under international law because it violated the *Khemco* agreement, or more specifically the Stabilization Clause of the Agreement.⁽¹⁰⁾ Furthermore, the claimant maintained that the international law applicable to these types of Agreements was the international law of responsibility of states.⁽¹¹⁾ In fact it argued that the breach of the agreement was against the international responsibility of states and consequently the act of nationalization was unlawful. Bowett points out that "whether the taking is an overt act of expropriation or nationalization, ... an alleged breach of a contract with an alien, the alien claimant is usually at pains to show that the taking is unlawful."⁽¹²⁾ The advantage in showing that the taking is unlawful lies in the fact that the remedies for an unlawful act are more beneficial to the claimant than are the remedies for a lawful taking.⁽¹³⁾ However, it is unnecessary to consider this issue further here because whether the nationalization of *Amoco* was lawful or unlawful was discussed in Chapter 5 and we are now dealing with the position of American claimants concerning the determination of full compensation standards.

7.3 FULL COMPENSATION FOR THE NATIONALIZATION OF INTERNATIONAL AGREEMENTS

On many occasions Americans have argued that compensation for nationalization of an international agreement should be greater than

full compensation, as the claimant did in the *Amoco* case.⁽¹⁴⁾ Relying on the decision of P.C.I.J. in *Chorzow Factory*⁽¹⁵⁾ case the claimant there argued that compensation in the case of unlawful expropriation should be more than the full compensation standard as full compensation applies only to lawful expropriation.

According to the Court in the *Chorzow Factory* case, an obligation to provide reparation for all the damages sustained by the owner of expropriated property arises from an unlawful expropriation.⁽¹⁶⁾ The rules of the international law of responsibility of States apply in such a case. They provide for *restitutio in integrum*, restitution in kind or, if impossible, its monetary equivalent. If need be "damages for losses sustained which would not be covered by restitution" should also be awarded.⁽¹⁷⁾ On the other hand, a lawful expropriation must give rise to the payment of fair compensation "or of the just price of what was expropriated".⁽¹⁸⁾ Such an obligation is imposed by a specific rule of the international law of expropriation.

Restitution is well defined by the Court. It means the restitution in kind or, if that is impossible, the payment of the monetary equivalent. In both cases the principle on which it rests is the same: "that reparation must as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if this act had not been committed".⁽¹⁹⁾

One essential consequence of this principle is that compensation is not necessarily limited to the value of the undertaking at the moment of dispossession (plus, of course, interest to the day of payment). Accordingly, the claimant in the *Amoco* case argued that: "Whenever

foreign owned property is expropriated and specifically when an agreement between a state and a foreign investor, such as the Khemco Agreement is repudiated by the state party and the foreign investor's right under than agreement are expropriated, the foreign investor is entitled to receive just compensation, that is the full value of the property or rights expropriated or repudiated, compensation that will place the foreign investor in as good an economic position as he was in before the expropriation or repudiation occurred".(20)

The claimant in the Amoco case further contended that "the foreign investor rights must be valued without regard to any reduction in value that would have resulted from apprehension that the rights might be expropriated without full compensation or that the state party might otherwise breach the agreement".(21) We shall discuss this contention later in this Chapter.

In addition, the claimant argued that when the expropriated rights involve an ongoing business activity with demonstrable future earning power, the just compensation is the going concern value which, according to the claimant, is equivalent to the fair market value.(22)

Similarly, in the *Phillips Petroleum* case, the claimants argued that their rights in Joint Structure Agreement (JSA) "Constituted part of a going concern".(23)

However, the requirement that fair market value must be paid as compensation is not accepted by the third world countries which in recent times have been largely responsible for expropriations.(24)

These expropriations were motivated by economic nationalism and by the belief that state ownership of resources and industry is

necessary for economic development. As the norm of full compensation would have been beyond the means of third world countries to satisfy thus it became necessary to seek other norms, and justify them.

7.4 THE CLAIM THAT EXCESS PROFITS MADE BY FOREIGN INVESTORS MUST BE DEDUCTED FROM THE COMPENSATION

Claims to deduct excess profits have largely been influenced by the *dependencia* school of economists. Adherents to this school believe that investments by multinational corporations in developing countries perpetuate the economic dominance of the host countries by integrating their economies with the economies of the home countries of the investors.⁽²⁵⁾

The termination of such dependence is the aim of this school and expropriation of foreign assets would be the best mode of such termination.⁽²⁶⁾ Girvan, one of the theorists of this school, referring to the past exploitation of the third world by multinational companies, asserts that it is the third world that has to be paid compensation.⁽²⁷⁾ Such assertions, however, are not grounded in any legal base. Nevertheless, some Latin American countries have tried to provide legal bases for these assertions in some recent expropriations. For instance, the Chilean Governments' claim relating to excess profits in the expropriation of Kennecott Shares in the Chilean Copper Mining Industries, was couched in legal form.⁽²⁸⁾ A Chilean constitutional amendment of 1971 permitted the expropriation of the properties of the copper mining corporations, Kennecott and Anaconda.⁽²⁹⁾ These American corporations were in joint venture associations with CODELCO, a Chilean state owned corporation. Earlier, Kennecott and Anaconda, by an agreement

negotiated with the Frei government, had divested themselves of 51 percent of their shares to CODELCO, thus creating the joint ventures. The 1971 amendment permitted the taking over of the remaining shares, limiting compensation for the expropriated properties to their book values and vested a discretion in the President to deduct from the book value the excess profits he determines the companies had made since 1955.⁽³⁰⁾ The valuation was to be made by the Comptroller General of Chile on the basis indicated, but the power to determine the amount to be deducted as excess profits was within the sole competence of the President.⁽³¹⁾

In the case of Kennecott, the Comptroller assessed compensation due at \$179m but he deducted \$198m for write-ups of asset values made by the corporation, \$21m for deficient installations and \$46m as indemnification for workers. In addition, the President ordered a further deduction of \$410m as excess profits. No indication was given as to how this figure was arrived at. The appeal of Kennecott to the Copper Tribunal which had been created by the nationalization decree was rejected on the ground that the Tribunal had no jurisdiction to pronounce upon the validity of the Presidential determination of the amount of excess profits to be deducted.

However, after the Marxist government responsible for the expropriations was removed from power, the military government which replaced it agreed to pay compensation based on the book value of the property.⁽³²⁾

The validity of the method of assessing compensation stated in the Chilean decree has been subjected to academic criticism in capital exporting countries.⁽³³⁾ It has been pointed out that the method of calculation was *ex post facto* in that the investor had no prior

indication before investing that compensation would be calculated on the basis stated in the amendment of 1971. The only indication as to the permissible limits of profits was in the Andean Code, but its provisions too were not intended to operate retrospectively.⁽³⁴⁾ However, Sornarajah among others have argued that "such an objection admits that an investor may make excessive rewards from his investment and that if his assets are taken over he must be given their full value placing him in an even better position than he was when he commenced his investment. It requires the profiteer to be rewarded twice".⁽³⁵⁾

Rohwer also, by employing the principle of unjust enrichment in favour of the deduction of excess profits, declares that "the idea of excess profits contains an embryonic notion of fairness that commends itself to the unjust enrichment doctrine".⁽³⁶⁾ This is an attractive *idea de lege ferenda*.

The claim relating to deduction of excess profits must be considered with favour in situations where the investment has had an exploitation character. However, difficulties will inevitably be encountered in defining what amounts to excess profits. Foreign investment is made with the object of making more profit than would be made had the capital been kept at home. Thus allowance must be made for the fact that the investment yielded more profits than it would have had the capital stayed at home. The risks involved in making the investment in an incipient business must also be considered. Ultimately, the assessment of excessive profits must be left to the good sense of nationalizing state. The sanction against an improper assessment would be that future foreign investment would shy away from the state.

7.5 CLAIMS THAT ONLY A LIMITED COMPENSATION SHOULD BE PAID

Asian countries, following Resolution 1803, have argued that only limited compensation is payable. Thus Ceylon which nationalized oil installations almost immediately after Resolution 1803, made statutory provision for the payment of compensation.⁽³⁷⁾ Arrangements for payment of compensation were also made when tea estates were taken over in 1976. When India took over the oil installations of Burma Shell in 1976, provision was made in the Statute⁽³⁸⁾ for the payment of compensation. However, the manner of payment provided for indicates that full compensation was not contemplated.

African expropriations have also involved the payment of some compensation. Rood, in a survey of compensation practices in Africa concluded that: "the compensation promised or paid for a take over of foreign industry in British Africa falls far short of what the former owner thinks is due. Fair market value valuation based on capitalized earnings and effective compensation are distant ideals; reality is likely to be partial payment, a value promise of something in the future or a statement of good intentions by the government".⁽³⁹⁾

The Zambian takeover of 51 percent of the shares of copper mines resulted in payment of compensation but, according to some, the replacement value of the property taken was two to five times as much as the compensation paid.⁽⁴⁰⁾

The present practice of developing countries thus indicates that they are conscious of the need to pay some compensation but they are not willing to pay the fair market value of the taken property.

7.6 IRAN'S POSITION WITH REGARD TO THE MARKET VALUE

In nationalization cases before the Iran-U.S. Tribunal Iran has challenged the requirement of fair market value. In the *AIG* case (1983), they argued that modern international law has prescribed "merely the payment of the actual worth of assets owned at the date of nationalization", or "... the net book value defined as assets minus liability without consequential damages".⁽⁴¹⁾

In the *Amoco* case, Iran argued that the most relevant issue in the valuation of compensation was whether the nationalization was lawful or not. In the case of lawful nationalization, the measure of compensation was to be substantially less than the measure of damages for a breach and in any event, no compensation was to be paid for loss of future profits.⁽⁴²⁾ In such a case the compensation should be the equivalent of net book value of the residual nationalized assets. Also in *Phillips Petroleum Co.* case, Iran asserted that compensation should be based on the net book value of the property taken and pointed in support of that assertion to "a series of settlements in the global petroleum industry in recent decades which they assert, demonstrate that both nations with petroleum reserves and companies engaged in finding and extracting those reserves accept net book value as an appropriate basis for compensation".⁽⁴³⁾ Furthermore, in this case as it did in *Amoco*, Iran argued that "the taking of property in the present case was a lawful taking and that for such a taking a lesser standard of compensation is required".⁽⁴⁴⁾

In short, Iran so far has argued that the fair market value of the nationalized assets is best represented by the net book value. Yet in the *Amoco* case, Iran argued that the net book value standard was in conformity with the doctrine of unjust enrichment, state practice

in the oil industry and legitimate expectation of the parties. These arguments must now be examined.

7.6.1 UNJUST ENRICHMENT

Unjust enrichment is a domestic law principle.⁽⁴⁵⁾ However some writers have recommended application of this principle in the field of international expropriation law. Judge *Aréchaga is among these writers. He did so for two main reasons. First, in assessing compensation, the focus was to be put on the beneficial gain obtained by the expropriating state, rather than on the loss of the former owner. Secondly, the equitable foundation of the principle was supposed to allow discarding undue advantages the former owner may have possessed before the expropriation.⁽⁴⁶⁾

Iran's reliance on the principle of unjust enrichment originates from its political attitude towards American investors operating in Iran before the Revolution. Iran argues that before the Revolution, American investors were given undue privileges and accordingly it believes that investors were enriched unjustly. Iran adds that in any case of dispute between it and Americans, the past relationship of America with the Iranian authorities before the Revolution must be taken into account. As we saw in Chapter 5, some writers also pursue this attitude.

As we also saw in Chapter 5, in 1972 Chile put forward the view that excess profits which accrued to the investor must be taken into account in assessing compensation.⁽⁴⁸⁾ Sornarajah states that "when the principle of unjust enrichment is coupled with the economic theory of the *dependencia* school that the developing countries have been subjected to permanent economic dominance through the

instrumentality of multinational investment, the principle could achieve results quite unintended or unforeseen by its modern adherents".(49)

Other writers suggest applying the general principle of unjust enrichment in order to bridge the gap between the concepts of the economically developed and the under developed nations.(50) Aréchaga, Chowdhury and other members of the International Law Association's International Committee on the New International Economic Order plan to use unjust enrichment as the legal foundation of the concept of appropriate compensation in a forthcoming resolution to be adopted by that Committee and the International Law Association itself. The Members of the Committee have argued that this principle constitutes the legal foundation of current state practice.(51) However, as Dolzer has pointed out "various difficult questions are raised by recourse to the principle of unjust enrichment... the relevance of general principles to customary law must be carefully analyzed before their application on the international law level is considered. A survey of national legal orders indicates that the concept of unjust enrichment operates in a manner that nullifies certain transactions without proper legal grounds".(52)

Acknowledging that the unjust enrichment concept constitutes a mechanism that corrects transactions, Dolzer maintains that it provides no independent legal perspective on any situation.(53) Therefore this principle is fundamentally ambiguous at the international law.(54) Yet, unjust enrichment could in principle operate in favour of foreign investors, as well as in favour of the host country. For it would appear to be at least arguable that any

expropriation transaction without full compensation could be viewed as an unjust enrichment of the host country. If the principle is to be used in favour of the host country as a corrective mechanism (as *Aréchaga implies), a principle of justifying the duty to compensate is logically required as an earlier step.⁽⁵⁵⁾

International courts and tribunals have been reluctant to recognise unjust enrichment as a well established international principle. In a dispute which arose out of the confiscation of the Austrian property in Yugoslavia, the tribunal said that in assessing compensation:

"only true compensation will be payable and no account will be taken of any unjustified enrichment that may have occurred".

According to this rule, unjust enrichment has limited the boundaries of compensation, not widened the jurisdiction of the forum and relates to the merits of the case and not to the jurisdiction of the case"⁽⁵⁶⁾

As we shall see later, the Iran-U.S. Tribunal has also been reluctant to implement the unjust enrichment principle, notwithstanding that Iranian respondents have argued repeatedly that this principle should be employed as the guiding principle in assessing compensation. They have argued that should any enrichment on their part entitling claimants to compensation be found, such compensation should be calculated according to the net book value of the assets, a valuation basis allegedly widely used in compensation settlement in oil industry.

7.7 STATE PRACTICE IN THE OIL INDUSTRY SINCE 1972

In *Amoco*, as well as in *Phillips Petroleum* case, the Iranian parties, when supporting net book value principle and denying any loss of

future profits as a part of full compensation, relied on state practice in the oil industry.

Since 1972 there have been a series of takeovers by various OPEC countries of concession interests in whole or in part, in which the compensation (following OPEC guidelines)⁽⁵⁷⁾ was generally based on net book value without apparent regard for loss of profits.

Examples are the 1972 General Agreement on participation in which the Gulf states acquired participation rights rising to 51 percent, the 1972 Iraqi nationalization of IPC; the 1973 Sales and Purchase Agreement between Iran and the consortium members; the 1972-3 Libyan acquisition of 50 percent of the KOC; and the 1975 Venezuelan oil nationalization.⁽⁵⁸⁾ In virtually all of these the price of the shares acquired, or in other words the compensation due, was generally based on net book value, or asset value without any consideration for loss of profits.

Moreover, in the *Aminoil* case the government of Kuwait disputed the market value which had been put forward by Aminoil and supported the net book value standard based on state practice in the oil industry.⁽⁵⁹⁾ It contended that net book value should be the primary measure of any compensation. In its contentions it relied mainly on the OPEC guidelines to that effect, and also on the various takeover agreements which had been negotiated on that basis.⁽⁶⁰⁾ However, it did not adduce any judicial or arbitral authority in support of its position, but offered the testimony of a certified public accountant to confirm that this method had been adopted in the takeover of the Kuwait Oil Company in other unspecified instances.

In the above case the Tribunal noted that this contention was based on a series of negotiations and agreements in the oil industry between 1971 and 1977 and found that these were of a special character insufficient to constitute either an expression of *opinio juris* or a customary rule - a *lex petrolea* - valid generally for government takeovers in the industry. It added that such settlements often provided for valuable benefits in addition to the book value compensation, including service contracts, long term supply arrangements and preferential treatment - none of which were available to Aminoil. Further, they were negotiated under heavy economic pressure; and even if this pressure did not amount to duress legally, the circumstances surrounding the negotiations were not such as to make the agreements "apposite for generating general rules of law applicable in other cases too".⁽⁶¹⁾ Accordingly, the Tribunal concluded that it was "just and reasonable to take some measure of account of all the elements of an undertaking. This leads to a separate appraisal of the value on the one hand of the undertaking itself, as a source of profit, and on the other of the totality of the assets, and adding together the results obtained".⁽⁶²⁾ With respect to valuing the physical assets, it observed that there was no absolute rule, but that in a case such as the present one, where high inflation rates and a general depreciation in the value of money were factors, the use of net book value was not appropriate.⁽⁶³⁾ As we shall see, the Iran-U.S. Tribunal has taken a similar position.

7.8 ARGUMENTS WITH REGARD TO LEGITIMATE EXPECTATION OF THE PARTIES

The third argument which was put forward by Iran to challenge the market value in the *Amoco* case was the legitimate expectations of the parties. They argued that the initial investment was too small to

give rise to legitimate expectations of a compensation of such a magnitude as was claimed by the claimant. (64)

The concept of legitimate expectations was central to the AMINOIL award. In the *Aminoil* case we saw earlier that the Kuwait Government argued that compensation should be based only on net book value of the assets. Aminoil, on the other hand, argued that it was entitled to compensation and damages representing, as far as possible, the monetary equivalent of *restitutio in integrum*. This equivalent, whether stated in terms of *lucrum cessans* and *damnum emergens*, or of full value or going-concern value or market value, corresponded in Aminoil's view to the full value of the property, plus the value of lost profits. The Tribunal found the arguments of the both parties unacceptable. It proceeded to elaborate on two principle elements entering into its concept of legitimate expectations. The first was the presence of the stabilization clauses. Even through these did not forbid a nationalization of Aminoil assets, the Tribunal said they nevertheless protected against confiscation and created an expectation on the part of concessionaire which had to be taken into account. (65)

The second element was that, in the Tribunal's view since 1973 Aminoil had implicitly accepted that its profit should be restricted to a reasonable rate of return, that this concept figured largely in the post 1973 negotiations. While conceding that attitudes taken in an unsuccessful negotiation "cannot be made the basis of an arbitral or judicial decision", the Tribunal asserted nevertheless that this record indicated what in fact Aminoil had come to accept and that this "moderate estimate of profits" constituted its legitimate expectation. (66)

7.9 POSITION HELD BY THE IRAN-U.S. TRIBUNAL WITH REGARD TO UNJUST ENRICHMENT, STATE PRACTICE IN OIL INDUSTRY, AND LEGITIMATE EXPECTATION OF PARTIES

In the *Amoco* and in the *Phillips Petroleum* case the Iran-U.S. Claims Tribunal rejected all three arguments which we have been considering and which were put forward by the Iranian respondents.

With regard to the principle of unjust enrichment in the *Amoco* case, the Tribunal dismissed this theory on the ground that the concept was used "as a *ratio legis* of the applicable rule rather than as the rule itself".⁽⁶⁷⁾ It argued that in any event, the theory did not support the net book value criteria proposed by the respondents.⁽⁶⁸⁾ The Tribunal added that nationalization "does not take place in order to disperse, by auction, the assets of the expropriated undertaking, or to use them for other purposes". On the contrary, the undertaking is nationalized as a going concern to be placed as such under state control, with a view to developing its activity and allowing the community to benefit fully from its returns".⁽⁶⁹⁾ Therefore, "the value of the expropriated assets as a going concern will be the measure of the enrichment of the nationalizing state", and not merely the net book value of the assets.⁽⁷⁰⁾

Concerning state practice in the oil industry, the Tribunal in the *Phillips Petroleum* case noted that: "...such settlements are usually confidential and appear frequently to involve additional consideration, such as continued access to petroleum resources, so that the true compensation may be difficult to identify".⁽⁷¹⁾

Examining the *Aminoil* award, the Tribunal concluded that "such settlements do not constitute an *opinio juris*". Further it stated

that "in any event, such settlements are irrelevant to the applicable law in the present case, that is the standard of compensation set forth in the Treaty of Amity".⁽⁷²⁾

In addition, in the *Amoco* case, endorsing the view expressed by the I.C.J. in *Barcelona Traction* case,⁽⁷³⁾ the Tribunal found that the provisions of settlement agreements in the oil industry are the outcome of negotiations in which many motivations other than legal ones may have prevailed and therefore concluded that these agreements cannot be considered as evidence of customary rules of international law.⁽⁷⁴⁾

With regard to the concept of the legitimate expectation of the parties, while the Tribunal recognized that legitimate expectations was a concept that was central to the *Aminoil* award, it rejected its application to the *Amoco* case on the ground that "the high level of returns obtained on the investment in the first years of the *Khemco* Agreement would normally have given birth to expectations of substantial revenues for the following years and, accordingly, of a higher level of compensation in cases of expropriation".⁽⁷⁵⁾ The Tribunal found no proof, in any event, that these expectations were limited to the net book value of the undertaking.

The Tribunal ruled that the correct method of valuing the expropriated undertaking was "the full value of the asset taken" or "the full equivalent of the property". The expropriated undertaking should be considered as "a going concern" and the going concern value encompassed "not only the physical and financial assets of the undertaking, but also the intangible values which contribute to its earning power, such as contractual rights... as well as goodwill and commercial prospects".⁽⁷⁶⁾ The intangible assets, explained the

Tribunal, are closely linked to the profitability of the concern; they cannot and must not be confused with the financial capitalization of the revenues which might be generated by such a concern after the transfer of property resulting from the expropriation (*lucrum cessans*)⁽⁷⁷⁾.

Having described the principles on which the Tribunal proceeds in determining the issue of compensation, and the considerations which it regards as irrelevant, we are now in a position to consider precisely how it handles the issue of the valuation.

NOTES TO CHAPTER SEVEN

1. See Department of State, Application of the Treaty of Amity to Expropriation in Iran, reprinted in 129 CONG. REC. S16055 (daily ed. No. 14, 1983). See also R. Smith, 'The United States Government Perspective on Expropriation and Investment in Developing Countries', 9 Vand. J. Transn'l Law. 1976, pp.517, 519-20.
2. See *American International Group v The Islamic Republic of Iran*, 4 Iran-U.S. C. Trib. Reports, 1983, p. 96. See also INA Case, *INA Corp. v The Government of Islamic Republic of Iran*, 1985, 8 Iran-U.S. C. Trib. Reports, p.373, and *Thomas Earl Payne v The Government of the Islamic Republic of Iran*, 12 Iran-U.S. C. Trib. Reports, 1986, p.3.
3. See *Amoco International Finance Corp. v The Government of the Islamic Republic of Iran*, 1987, 15 Iran-U.S. C. Trib. Reports, p.189.
4. Ibid, p.234.
5. Ibid.
6. See C.F. Charles Leben, "Les investissements miniers internationaux dans les pays en development: Reflexions sur la decennie ecoulee", (1976-1986), 1986, pp.895-957. Hussain Abdallah, *The economics of Petroleum*, 2nd ed., Cairo, 1979, (in Arabic). M. Yousef Elwan, *The Legal Regime for the Exploitation of Petroleum in the Arab Countries*, Kuwait, 1982; Zuhair Mikdashi, *Transnational Oil: Issues, Policies and Perspectives*, London, 1986, and A.Z. El Chiati, "Protection of Investment in the Context of Petroleum Agreements", *Recueil Des Cours*, 1987, IV, p.26.
7. See P. Weil, "Les clauses de stabilisation ou d'intangibilite inserees dans les accords de developpment economique", in *Me'langes offerts a Charles Rousseau*, 1974, p.319.
8. See P.J. O'Keefe, "United Nations and Permanent Sovereignty Over Natural Resources", 8 J.W.T. Law, 1974; and Gamble and Frankowska, 'International Law's Response to the New International Economic Order: An Overview', 9 B.C. Int'l & Comp. L. Journal, 1986, p.257, 265-68.
9. P. Weil, op cit.
10. Amoco case, op cit, p.234.
11. Ibid.
12. See D.W. Bowett, 'State Contracts With Aliens: Contemporary Developments on Compensation For Termination or Breach". B.Y. Int'l Law, 1989, p.49.
13. Ibid.

14. See e.g. 74, Department State Bulletin 138, 1976. See also Department State, Application of the Treaty of Amity to Expropriation in Iran op cit; and B.M. Clagett, D.B. Poneman, 'The Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law', The Int'l Lawyer, Vol. 22, No., 1988, p.63.
15. *Chorzow Factory* case, (Germany v Poland), 1928, P.C.I.J., Series A No. 17.
16. Ibid.
17. Ibid, at 46.
18. Ibid, at 47.
19. Ibid.
20. Amoco case, op cit, p.244.
21. Ibid.
22. Ibid.
23. See *Phillips Petroleum Co. Iran v Iran*, in Vol. 21, Iran-U.S. C. Trib. Reports, 1989, p.121.
24. See G. Roy, 'Is the Law of State Responsibility a part of Universal International Law', 55, A.J. Int'l Law, 1961, p.863; and R.P. Anand, *Asian States and International Law* (New Delhi), 1973.
25. See N. Girvan, "The Question of Compensation: A Third World Perspective", Van. J. Transn'l Law, 1976, p.340.
26. M. Sornarajah, 'Compensation For Expropriation: The Emergence of New Standards', J. World T. Law, 1979, p.113.
27. Girvan, op cit.
28. R.B. Lillich, "The Valuation of Copper Companies in the Chilean Nationalization", 66, A.S. Int'l Law, 1972, at 213.
29. Ibid.
30. Ibid. See also F. Orego-Vicuna, "Some International Law Problems Posed by the Nationalization of the Copper Industry by Chile", 67, A.J. Int'l Law, 1973, p.711.
31. Ibid.
32. See 13, I.L.M., 1974, 1190; and 14 I.L.M., 1975, p.136.
33. See cases reported in 12, I.L.M. 1973, p.270 and 278 and 13. I.L.M. op cit, p.1115.
34. Ibid.

35. Sornarajah, op cit, p.125.
36. J. Rohwer, 'Nationalization - Chilean Excess Profits Deduction', H. Harvard. J. Int'l Law, 1973, p.378.
37. See C.F. Amerasinghe, *State Responsibility for Injuries to Aliens* (London), 1968, p.158.
38. *Burmah Shell (Acquisition of Undertakings in India) Act*, 1976.
39. L. Rood, 'Compensation for Takeovers in Africa', 11 J. Int'l L & Economics, 1977, p.521 & 525.
40. F.G. Dawson and I.G. Head, *International Law, National Tribunals and the Rights of Aliens*, (Syracuse), 1971, p.232.
41. *American International Group v The Islamic Republic of Iran*, op cit, pp.103-104.
42. Amoco case, op cit.
43. See Phillips Petroleum Co. case, op cit, p.121.
44. Ibid.
45. See D. Chr. Dicke, 'Unjust Enrichment and Compensation' in *Foreign Investment in the Present and a New International Economic Order*, (Ed. by D. Chr. Dicke), 1987, p.268.
46. See J. de Aréchaga, *International Law in the past third of a Century*, RCADI, 1978, Vol. 1, p.299.
47. See W. Friedmann, *The Changing Structure of International Law*, (London), 1964, p.207.
48. See R.B. Lillich, 'The Valuation of Copper Companies', op cit.
49. See Sornarajah, op cit, p.120.
50. See R.G.J. de Arechaga, 'State Responsibility for the Nationalization of Foreign Owned Property', 11 N.Y.U.J. Int'l Law & Pol., 1978, p.179. See also S. Chowdhury, *Permanent Sovereignty Over Natural Resources in International Law*, 1, 13 (K. Hossain & S. Chowdhury eds.), 1984.
51. Ibid.
52. See R. Dolzer, "New Foundations of the Law of Expropriation of Alien Property", A.J. Int'l Law, 1981, p.580.
53. Ibid. See also in Friedmann, op cit.
54. Ibid.
55. Ibid.
56. See H. Lauterpacht, I.L.R., Vol.40, p.175. See also A. Shirazi, 'Iran-U.S. Claims Tribunal: An Unfair International

Award on the Basis of Unjust Enrichment', 5 J. Int'l Arb., 1988, p.124.

57. OPEC Guidelines were linked with Abu Dhabi terms. At a meeting in Abu Dhabi in November 1974, certain OPEC countries imposed on their major producers increases: a royalty rate of 20 percent and a tax rate of 85 percent, both on posted prices (the postings since October 1973 having been fixed unilaterally by the OPEC governments). These increases together with other related adjustments were substantially adopted by OPEC as a whole and became known as the 'Abu Dhabi Formula". See Ahmed Abdel Hamid Achouch, *The Legal Regime of Concession Agreements*, (in Arabic), Cairo, 1975, op cit.
58. See Brower, 'Recent Developments in the International Law of Expropriation and Compensation", The Southwestern Legal Foundation, 1975, p.153.
59. See 21 I.L.M. 976-1053, 1982. See also R. Young and W.L. Owen, 'Valuation of the Aminoil Award' in R.B. Lillich, *Valuation of Nationalized Property in International Law*, (ed.), 1987, pp.8-9.
60. Ibid, p.11.
61. See paras 152-153 of the Award in 21 I.L.M., op cit.
62. Award, para 164.
63. Ibid, paras 165-166.
64. See *Amoco* case, op cit, p.267.
65. See the *Aminoil* case, op cit, paras 152-153 of the Award in 21 I.L.M., op cit.
66. Ibid, para 154.
67. See *Amoco* case, op cit, p.268.
68. Ibid.
69. Ibid, p.267.
70. Ibid, p.269.
71. See *Phillips Petroleum* case, op cit, p.121.
72. Ibid.
73. See I.C.J. Report, 1970, p.3.
74. *Amoco* case, op cit, p.266.
75. Ibid.
76. Ibid. p.269, the Tribunal noted that its formulation of the measure of compensation corresponded with the *Aminoil* ruling,

according to which the going concern value is "made up of the values of the various components of the undertaking separately considered, and of the undertaking itself considered as an organic totality, for going concerns, therefore as a unified whole, the value of which is greater than that of its component parts".

77. Ibid.

CHAPTER EIGHT

THE TRIBUNAL AND THE CALCULATION
OF 'FULL' COMPENSATION

In Chapter 6 of this study we saw that the Tribunal has concluded that 'full compensation' must be paid by an expropriating state. In Chapter 7, which analysed the view point of the parties regarding this standard, we saw *inter alia* that American claimants have argued that the full value of the property taken means the fair market value of the nationalized or expropriated property plus the value of lost profits. In the present chapter, we shall examine how the Tribunal itself has interpreted the concept of 'full compensation' in its awards.

8.1 THE TRIBUNAL'S INTERPRETATION OF THE 'FULL COMPENSATION' STANDARD

In several cases concerning expropriation or nationalization the Tribunal has applied the principle that under the standard of full compensation the deprived owner is entitled to the fair market value of his property as of the date of taking. Thus in the *INA* case⁽¹⁾, for instance, the Tribunal held that: "The full equivalent of the property taken" to which the claimant was entitled meant, "the fair market value of its shares in Bimeh Shargh, assessed as of the date of the nationalization".⁽²⁾ Similarly in the *American International Group* case, the Tribunal stated that:

'the valuation should be made on the basis of the fair market value of the shares in Iran America (i.e.⁽³⁾ the nationalized company) at the date of nationalization'.

In the *Starrett* case,⁽⁴⁾ as well as in the *INA* case, the Tribunal has defined the principle of fair market value as "the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximise his financial gain and neither was under duress or threat".⁽⁵⁾

Determining the market value of property where there is an effective market such as a stock exchange valuation for the property, seems straightforward. However, very often in practice due to lack of such active market for the property, ascertaining the exact market value of the property will be problematic. Thus the Tribunal in the *American International Group* case stated "there has not been an active market for Iran-America's shares"⁽⁶⁾ and went on to determine the equivalent of the market value through indirect methods which will be discussed later. However, even if hypothetical market value can somehow be approximated, other questions demand consideration. Circumstances such as changing economic and political factors will often complicate the task of determining what is the fair market value of the property taken. As we will see, the Tribunal has paid considerable attention to such factors and as a result the compensation awarded has often been substantially less than the amount claimed.

8.2 VALUATION METHODS

When the nationalized or expropriated property is an on-going commercial enterprise, and there is no existing market, the full compensation (in the sense of the closest equivalent to the actual market value) has to be computed on the basis of the going-concern approach which must now be explained.

8.2.1 GOING-CONCERN VALUE - GENERAL PRINCIPLES

Going concern value has been defined as "the full value of the property, business or rights in question as an income producing asset".⁽⁷⁾ Therefore this method of valuation not only considers the

value of the physical assets of the enterprise, but also "takes into account the loss of future profits and, often, such intangible assets as goodwill as well".⁽⁸⁾ Clagett states:

"Value is a forward-looking concept. At any given time, the value of an income-producing asset will depend primarily upon the net cash flow it is expected to generate in the future, "discounted" (reduced) to a 'present value' (value as of the valuation date) at a percentage rate that fully accounts both for the time value of money and for all relevant risks".⁽⁹⁾

Implicit in the notion of going-concern value is the goal of making the owner whole after his loss. It is believed an investor in an on-going business cannot be placed in the same financial position he was in before the expropriation unless he is paid the going concern value of the expropriated investment as of the date of expropriation, calculated as if the expropriatory act had not occurred and business had not been threatened. In other words, as was pointed out in the *Sapphire* award, the deprived person should be placed "in the same pecuniary position that they [sic] would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion".⁽¹⁰⁾ This attitude has been expressed by both the International Court of Justice and international arbitral tribunals.

8.2.2 INTERNATIONAL COURT

The principle of going-concern value was concisely expressed by the P.C.I.J. in the *Chorzow Factory* case.⁽¹¹⁾ The Court held that the monetary compensation due, for a foreign investor as reparation for a taking, must be determined from the full economic value of the interests taken based on the valuation of the enterprise as an on-going profit-generating business. The Court held that, if the

investor seeks damages rather than restitution in kind, the damages should equal "a sum corresponding to the value which a restitution in kind would bear", plus "damages for loss sustained which would not be covered by restitution in kind or payment in place of it...".⁽¹²⁾ In fact, the Court recognised that the amount of damages due in place of restitution depends directly upon the ability of the expropriated enterprise to generate future profits.

International arbitral decisions rendered after the *Chorzow Factory* case also have declared that an investor cannot be fully compensated for the going concern value of his expropriated interests unless he is awarded both the damage that has been sustained as a result of the taking and the reasonably ascertainable profit that has been missed. In the *Lena Goldfields*⁽¹³⁾ arbitration, for example, the Tribunal held that the proper measure of damages was "the present value, if paid, in cash now, of future profits which the Company would have made and which the Government now can make on the assumption of good commercial management and the best technical skill and up-to-date development".⁽¹⁴⁾

As we saw in Chapter 1, future profitability also was considered in the *LightHouses* arbitration.⁽¹⁵⁾ In this arbitration, the arbitrators refused to consider Greece's arguments that the subsequent upheaval of World War II would have reduced the profitability of the lighthouses in the hands of the French owner.⁽¹⁶⁾ Accordingly, in calculation of compensation the disregarding of subsequent events became an element in determining the international law standard.

However, as we shall now explain, decisions made by later tribunals seem to provide no support for taking into account lost profits in

such cases, although it can be argued that in general they have supported the application of the full compensation standard. First we must analyse decisions of various tribunals and then we shall examine the Iran-U.S. Tribunal's decisions specifically.

8.2.3 DECISIONS IN VARIOUS OIL EXPROPRIATIONS

Three significant arbitration decisions resulted from the Libyan nationalizations in the 1970s of the interest and properties of various international oil companies.⁽¹⁷⁾ In the *BP* arbitration⁽¹⁸⁾ the sole arbitrator determined that the appropriate remedy for the expropriation was the award of damages rather than *restitutio in integrum*, but no award on the amount of damages was reached because the dispute was finally settled by the parties for an agreed amount.⁽¹⁹⁾

In the *Topco/CALASIATIC* arbitration⁽²⁰⁾ the sole arbitrator held that *restitutio in integrum* was the appropriate remedy. Therefore it was not necessary for the arbitrator to address in detail the proper compensation standard or methods of valuation when damages are awarded.

In the *Liamco* case⁽²¹⁾ the award, which was published in 1981, recited and then rejected the arguments for a full compensation standard that included lost profits:

"These arguments cannot be taken as relevant in this connection, because they are mostly vague and difficult to apply in practice. Moreover, they are not conclusive on the matter at issue, because international legal theory and practice are not yet in agreement on one general uniform rule in this respect.

The classical doctrine required the payment of 'adequate' compensation for the nationalized property of an alien. Adequate compensation... had to include "*lucrum cessans*", namely the loss of future profits from property which as

invested capital or a concessionary right granted for a specific number of years".

This classical doctrine was not always accepted, neither in the inter-war period nor after World War II. Adequate compensation as including loss of profits, such as was awarded in the old above mentioned arbitral decisions [e.g. in *Delagoa* and *Shufeldt* cases], was not more acceptable as an imperative general rule. It retains only the value of a technical rule for the assessment of compensation, and a useful guide in reaching settlement agreement, as was well and justly asserted. It stands only as a maximum rarely attained in practice.

In conclusion, it may be safely laid down that it is lawful to nationalize concession rights before the expiry of the concession term, provided that the measure be not discriminatory nor in breach of treaty, and provided that compensation be duly paid.

But the question whether or not the concessionaire may claim compensation for all the loss of future profits for the unexpired term is still a controversial point which has not been definitely settled".⁽²²⁾

The arbitrator awarded Liamco an amount he deemed to constitute "equitable" compensation and the claim was then finally settled by confidential agreement.⁽²³⁾

A fourth international arbitration decision involved the determination of full compensation by Kuwait for the expropriation of Aminoil⁽²⁴⁾. This is the most recent award involving the nationalization of rights under oil concession agreements. It was rendered in 1982 just as the Iran-U.S. Tribunal was just getting under way. While the award in this case refers to the going concern value of the concession including the 'legitimate expectations of the owners', it was found, on the facts of this case, that only a "moderate estimate of profits" was justified.⁽²⁵⁾ This appears to have produced a set of compromise awards based on differing reports by accountants for the opposing parties. In that case the Tribunal said:

"In order to calculate the amount of indemnification due, the Tribunal has available to it numerous elements furnished by the parties and by the experts they have commissioned for that purpose. In particular, the Tribunal has had available to it the Joint Report dated 30 October 1981, referred to in paragraph 120 above. This Report had been the subject of Head X of the Order of the Tribunal of 1 July 1981, which stated:

'The takes note of the mutual intention of the parties to direct their respective accountants to produce, if possible, a joint report on questions of quantum or, if this is not possible, to produce separate reports for the Tribunal before 1 November'.

Having given careful consideration to this Report and to the analyses, statements and counter statements to be found in the written proceedings and furnished by counsel and experts during the oral hearing, the Tribunal is persuaded that it is not indispensable for the final adjustment of the present case to hear the parties again on matters of quantum, and the parties were so informed in a communication from the Secretary of the Tribunal. Where there are differences between the accounting firms above mentioned, the Tribunal has taken the mean of the two totals indicated".⁽²⁶⁾

However, practice is not at all consistent. Although in the *Aminoil* case a moderate estimate of profits was awarded, as we saw in Chapter 1 of this study, the Second Circuit Court of Appeals, deciding the *Banco Nacional de Cuba*,⁽²⁷⁾ rejected lost profit in its decision. The Court pointed out that the revolution and its economic consequences made it unlikely that the Chase Manhattan Bank could operate profitably after the Revolution.⁽²⁸⁾ Thus this decision appeared to contradict the *Lighthouses* arbitration principle that events and circumstances subsequent to taking should not be taken into account in fixing the compensation due for expropriation.

It is also notable that the ICSID Arbitration in its recent decision with regard to the case of *Asian Agricultural Products Ltd (AAPL)* (1990),⁽²⁹⁾ rejected compensating for future profits. As we saw in Chapter 6, that case involved a claim for compensation for the total loss of claimants' investment in Sri Lanka. Claimant sought

compensation for physical and financial assets, and \$5,703,677 for other claimed damages, including loss of tangible assets and future profits.⁽³⁰⁾ The respondent argued that international tribunals are bound to project future profits on the basis of the past and that Serendib (the Company in which AAPL held shares) offered no basis for making any such projections.⁽³¹⁾ Furthermore, the respondent argued that the assessment of the value of lost crops was too speculative and indefinite to be included in a proper evaluation of damage under international law. The Tribunal examined the relevant circumstances and rejected all the claims regarding intangible assets and future profits.⁽³²⁾

Therefore, as the Iran-U.S. Claims Tribunal was getting underway in 1981, the extent to which going-concern value should involve lost profits as part of the compensation due in cases of compensation or nationalization, remained a controversial issue. With this as background we can now examine the interpretation of going-concern value in the awards of the Iran-U.S. Tribunal.

8.3 GOING CONCERN VALUATION IN THE TRIBUNAL AWARDS

In takings which involve ongoing business enterprises the Tribunal has ruled that in principle to satisfy the standard of full compensation the expropriated enterprise must be valued as a going concern.

Accordingly, the Tribunal in the *American International Group* case⁽³³⁾ stated:

"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 goodwill and likely profitability, had the company been allowed to continue its business under its former management".⁽³⁴⁾

This in a going-concern valuation a crucial question is how to forecast future profitability, i.e. what should and should not be taken into account in such calculation.

8.3.1 GENERAL VALUATION MAXIM

According to the traditional western approach illustrated in the Draft Convention on the Protection of Foreign Property Adopted by OECD in 1967,⁽³⁵⁾ "the value must remain unaffected by the very seizure which ultimately occurs, similar seizures by the Party concerned or the general conduct of the Party towards the property of Aliens which makes seizures likely".⁽³⁶⁾ Thus (1) changes in the host country, either political or economic, and (2) the act of expropriation, should not be taken into account for the purpose of valuation.

In line with this approach, the Tribunal in several cases has confirmed that in the calculation of the market value "or any diminution of the value to the taking itself or the anticipation thereof"⁽³⁷⁾ should be disregarded, as should any specific "actions taken by the nationalizing state in relation to the enterprise which actions may have depressed its value".⁽³⁸⁾

Moreover, the Tribunal in the *American International Group* disregarded the effects of events that occurred subsequent to the nationalization, declaring:

"Neither the effects of the very act of nationalization should be taken into account nor the effect of events that occurred subsequent to the nationalization".⁽³⁹⁾

Although in the above cases the Tribunal disregarded political or economic changes prior to and after the taking, in other cases it has

taken account of such changes.⁽⁴⁰⁾ Surprisingly, while the Tribunal in the *American International Group* without any hesitation held that such changes should be disregarded, at the same time it held that:

"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".⁽⁴¹⁾

However, the Tribunal was clear that it should not take account of the very impact of the nationalization, for it stated that "it is necessary to exclude the effects of actions taken by the nationalizing state in relation to the enterprise which actions may have depressed its value".⁽⁴²⁾ Nevertheless, it considered such political and economic changes prior to the nationalization stating "whether such changes are ephemeral or long-term will determine their impact upon the value of the enterprise's future prospects".⁽⁴³⁾ It was in part due to this conclusion that the Tribunal reduced the amount of \$39,100,100 claimed by the claimant and ended up with \$10,000,000 as the approximate value of the property in question.

This holding of the Tribunal has been criticized by the agent of the U.S. to the Tribunal. He alleged "there is no legal justification for diminishing the going-concern value of claimant's property on the basis of events surrounding the revolution for which the present government of Iran is largely responsible".⁽⁴⁴⁾

However, the Tribunal's decision was not unprecedented. As we saw earlier, in 1981 the American Second Circuit Court of Appeals, also considered, and changed in its decision. Moreover, the impact of these changes has been repeated in other awards of the Tribunal.⁽⁴⁵⁾ Furthermore, in some awards of the Tribunal the nature of the expropriated property has been considered as well.⁽⁴⁶⁾ Each of these

cases held that the value of the Corporations, which were expropriated after the culmination of the Revolution, had to be reduced by the business outlook then prevailing.⁽⁴⁷⁾ As a result, as we shall now see, the Tribunal has approximated the value of the property.

8.3.2 APPROXIMATION AS THE METHOD OF GOING-CONCERN VALUATION

Just as the Tribunal in the *American International Group* case resorted to approximation of the value of the property, it applied the same method in *Thomas Earl Payne* case.⁽⁴⁸⁾ The claimant in this case sought the fair market value of its shares in two expropriated electronics and cinematographic parts and servicing companies (Berkeh and Irantronics), at \$3,000,180 based on the alleged going-concern value of the companies.⁽⁴⁹⁾ The claimant calculated his claim on the basis of a multiple of 10 times net average earnings for the three years preceding the taking. As the business activity principally consisted of electronic spare parts sales and distribution of Hollywood movies, it seemed evident that such a business activity had no future in Islamic Iran. As Khan points out, "one does not have to be greatly knowledgeable to see that business activity of that kind had no future in revolutionary Iran based on Islamic ideology and fervour".⁽⁵⁰⁾

The Islamic Revolution in Iran caused drastic decrease in the claimant's business because of, as the Iranian Judge Hamid Bahrani pointed out, "the disappearance of demand for sales of U.S. films".⁽⁵¹⁾ The claimant consequently cut back its business activities and left Iran in 1978 and turned over the management of the business to the other Iranian shareholders. After the Revolution

however it was managed by an appointed temporary manager. The Tribunal awarded compensation on the basis of a taking grounded on the appointment of a temporary manager.⁽⁵²⁾ a point which was discussed in Chapter 5. The question related to the present context is: should business activity of this kind be considered as a going-concern?

The Tribunal held that companies were to be valued as going-concerns.⁽⁵³⁾ The respondent's contentions to the effect that the claimant had abandoned the business because of losses resulting from reduced imports, recession, etc. were ignored. The Tribunal all found that "the business of the [claimant] ran relatively smoothly, although at a much reduced pace, throughout the Revolution and afterwards until the summer of 1980", (when the manager was appointed by the Government), and, taking note of the claimant's assertion that it had "properly financed [the activity and] salaries and bonuses of the employees were regularly paid at the time of the alleged expropriation", declared the business a going-concern. However, considering that the prospects of the companies had deteriorated due to the policies of the new Government, the Tribunal concluded that:

"that the effects of the Revolution seriously discounted the reliability of past performance as an indicator of likely future profitability for the two companies and the value of their goodwill, particularly since they are service companies".⁽⁵⁵⁾

Apparently finding confirmation for this conclusion from evidence of the claimant's efforts to transfer some of its business out of Iran prior to the expropriation, the Tribunal in this case, too, rejected the going-concern calculations presented by the claimant.⁽⁵⁶⁾ Instead it again resorted to an approximation of the value of the

claimant's interest, and awarded him \$900,000 which was less than one-third of the amount that had been claimed.

In the recent award by Chamber Two (filed 28 June 1990), in the *CBS* case, the Tribunal again referred to the impact of the Iranian Revolution. The claim in this case involved facts similar to those in the *Thomas Earl Payne* case. Here the claim was for expropriation of a servicing and distribution business in Iran that had been formed in 1976 to market records and tapes, primarily of Western music, in Iran. In concluding the business had a negative net worth on the date it was alleged to have been taken, the Tribunal took account of the impact of the Iranian Revolution and stated:

The claimant's valuations also underestimate the adverse effects of the Islamic Revolution on the music market, and thus on the CBS Iranian companies future business. In particular, in view of the policy of the new Iranian government against music, especially Western music, which constituted a substantial part of the CBS Iranian Companies' field operation, the expectation for these Companies were greatly diminished".⁽⁵⁸⁾

In two other cases involving the expropriation of on-going business enterprises the Tribunal followed the same attitude as it did in the *CBS* and *Thomas Earl Payne* cases. Accordingly, in the *Phelps Dodge* case⁽⁵⁹⁾ considering the "obvious and significant negative effects of the Iranian Revolution" the Tribunal awarded the amount of the original investment as the full value of the property in the *SolaTile* case⁽⁶⁰⁾ had operated for only a brief period of time, it awarded the actual value of physical assets as the market value of the property taken. In both cases elements such as going concern value and lost future profits were ignored.

Because these decisions show the Tribunal's approach very clearly, they are worth considering in a little more detail.

8.3.3 THE AMOUNT OF THE ORIGINAL INVESTMENT AS THE FULL VALUE OF THE PROPERTY

In the *Phelps Dodge* case, the claimant's investment of some \$2.5 million made in mid-1970s in the Iranian cable industry was expropriated on 15 November 1980.⁽⁶¹⁾ Phelps Dodge submitted a consultant's study which "assumed that the Iranian Revolution would have no long-term impact", and estimated the going concern value of the claimant's share (19.36 percent) in the Company taken at \$7,500,000.⁽⁶²⁾ The Tribunal found that the business had not reached the point of a going concern on the date it was expropriated and that the business was likely to be diminished as a result of the Iranian Revolution. It said:

"The Tribunal cannot agree that SICAB had become a going concern prior to November 1980 so that such elements of value as future profits and goodwill could confidently be value. In the case of SICAB any conclusion on these matters would be highly speculative. While no diminution in value should be made because of the anticipation of a taking, the Tribunal could not properly ignore the obvious and significant negative effects of the Iranian Revolution on SICAB's business prospects, at least in the short and medium term. There was no market for Phelps Dodge's shares in November 1980".⁽⁶³⁾

Having rejected going concern value as the appropriate measure in this case, the Tribunal, without further explanation, awarded the amount of Phelps Dodge's original investment:

"taking into account all relevant evidence, the Tribunal concludes that the value of Phelps Dodge's ownership in SICAB on 15 November 1980 was equal to its investment, that is \$2,437,860, the claimants are entitled to compensation in that amount."⁽⁶⁴⁾

The U.S. \$2,437,860 awarded was less than one third of the U.S. \$7,500,000 claimed.

8.3.4 ACTUAL VALUE OF PHYSICAL ASSETS AS THE FAIR MARKET VALUE

In the *Sola Tiles* case,⁽⁶⁵⁾ in which the business involved the import and sale of tiles for luxury housing, going-concern value was likewise rejected. In this case, however, the Tribunal rejected the going-concern value on the dual grounds that (1) the business had operated for only two years during which a loss had been incurred in the first year and only a small profit realized during the second year, and (2) the impact of the Iranian Revolution was likely to have diminished substantially the claimant's prospects for the marketing in Iran of luxury tiles.

In determining whether the Company qualified as a going concern the Tribunal stated:

"the consideration on which the "goodwill" of Simat rests are at best speculative. Goodwill can best be defined, at least for the purposes of the present case, as that part of a Company's value attributable to its business reputation and the relationship it has established with its suppliers and customers....

Different elements had come into play by the time of the expropriation, however. Simat's trade consisted largely of the selling of specialized luxury tiles, the market for which depended in large measure on the continued construction of luxury houses and apartments. The question presents itself - though neither party offered evidence on this point - whether Simat could have expected to continue importing large quantities of tiles without experiencing problems in obtaining the renewal of licences, a crucial factor bearing in mind that Simat depended exclusively on the import of its product to do business. What is even more certain is that the market for items such as those imported by Simat would have suffered a severe diminution as a result of the sweeping social changes brought about by the Islamic Revolution.

The impact of such developments on the value of the goodwill element of Simat's business by the time of the expropriation in 1979 must have been dramatic. Given the picture that emerges, Simat's prospects of continuing active trading after the Revolution were not in the view of the Tribunal, such as to justify treating Simat as a going concern so as to assign any value to goodwill. This decision to assign no value to Simat's goodwill suggests a similar result as to future lost profits, which also depend upon the business

prospects of a going concern. In addition, Simat had the briefest past record of profitability, having shown a loss in 1976, its first year of trading, and a small profit the next year".⁽⁶⁶⁾

Accordingly, the Tribunal did not assign any value to future lost profits and therefore did not decide the question whether and to what extent lost profit can be claimed in expropriation cases in addition to the going concern value.

Although the Tribunal rejected the inclusion of future lost profit in its valuation of the expropriated business, at the same time it recognized that the business did have some market value and that the compensation to be awarded should be based on that value. It then proceeded to itemize what it saw as the elements of the business and place a value on each of these elements of the business and submitted by the claimant. Finally it concluded the market value consisted of \$525,000 as the actual value of physical assets, including inventory, and a "reasonable estimate of accounts receivable...."⁽⁶⁷⁾ amounting to U.S. \$100,000 for a total award of U.S. \$625,000. This amounted to less than twenty percent of the U.S. \$3,208,000 that had been claimed in the case.

Another award belonging to this category was rendered by the Tribunal in the *INA* case. The Tribunal in this case regarded the original investment of the claimant as an estimate of the market value of the claimant's property as a going concern, as we shall now explain.

8.3.5 THE AMOUNT OF ORIGINAL INVESTMENT AS AN ESTIMATE OF ITS MARKET VALUE

On 17 December 1981 the *INA* Corporation, filed with the Tribunal a claim for compensation for the expropriation of its 20 percent share

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holding in Bimeh Shargh (Public Joint Stock Company), an Iranian insurance company. INA claimed US \$285,000 representing what it alleged to be the going concern value of its shares.⁽⁶⁸⁾

INA accepted that "its compensation would have been greater if a valuation had been made to project future profits and discount them to present value as of the date of nationalization". But the claimant considered that "the expense of such a valuation was not warranted in view of the relatively small amount equal to its purchase price for the shares".⁽⁶⁹⁾ The Respondent however, contended that Shargh had a negative net worth between the date of purchase of the shares and the date of nationalization (i.e. June 1978-1979).

In order to show that nothing had occurred to lessen the value of the shares prior to nationalization, the claimant submitted balance sheets for the three years ending 20 March 1979. These were based in part on regular annual audits conducted by an Iranian firm of public accountants, Daghigh & Co. The statements showed that Shargh was financially sound and was gradually increasing its profitability.⁽⁷⁰⁾

The Respondent, on the other hand, based its contention on an audit conducted after nationalization by another Iranian firm of public accountants, Amin & Co. At the hearing the Claimant and the Respondent reached agreement on the basic figures shown in the financial statements submitted by the claimant. However, the Respondent contended that the audit by Amin, which covered only the 3 months between the last Daghigh audit and the nationalization, revealed that the figures submitted by the claimant had to be qualified and supplemented, and that this resulted in a negative net

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worth. The Respondent also contended that the last Daghigh report itself contained footnotes indicating that Shargh was not profitable.

The Tribunal examined the Daghigh and Amin reports and found that the balance sheets and testimony submitted by the claimant were convincing evidence that Shargh's value "had, if anything, increased in the year following INAs investment".⁽⁷¹⁾ The Tribunal further pointed out that "neither the footnotes to the Daghigh report nor the Amin report deny this conclusion". Accordingly, it concluded that the claimant's proposal to value the shares according to their purchase price "appears not only reasonable but, in fact, conservative".⁽⁷¹⁾ An amount corresponding to the original investment (\$285,000) was consequently awarded as representing the fair market value of the shares.

It is interesting to note that a similar method was used by an ICSID tribunal in *Benvenuti et Bonfant v People's Republic of Congo* case (1980).⁽⁷²⁾ In this case, the claimant, an Italian corporation, had agreed with the respondent to establish a bottle company ('Plasco') which commenced production in 1975. One year later, the claimant's interests was expropriated, or more precisely was subjected to what the Tribunal regarded as a kind of *defacto* expropriation.⁽⁷³⁾ The claimant asserted that the business should be valued as a going concern based on projected profits over the period for which it had been guaranteed participation in the Congolese company. The Tribunal appointed an expert to value the Company based on its projected profits. The expert, however, considering the short operational history of Plasco and other circumstances, held that a valuation based on profit projection would be inappropriate.⁽⁷⁴⁾ Instead, the expert characterized the amount of the recent investment as "the best

objective criterion available".⁽⁷⁵⁾ Pellonpää has pointed out that "in case of relatively new investments, which have not developed income producing capacity justifying the value of lost profits, the actual amount of the investment presumptively can be taken to reflect the full value of the property in the most objective way".⁽⁷⁶⁾ As we shall now see, the Iran-U.S. Tribunal has taken the same view.

8.4 DISCOUNTED CASH FLOW (D.C.F.) IN THE AWARDS OF THE TRIBUNAL

Discounted cash flow is a basic approach to going concern valuation utilized in international arbitral practice, to determine the present value of the projected future profits which the undertaking is expected to generate in its lifetime.⁽⁷⁷⁾ This approach seems particularly useful where the property interest in question consists mainly or solely of future earning expectations. This was the case in *Amco v Indonesia*⁽⁷⁸⁾ which was decided by an ICSID arbitral panel. In this case, which concerned the revocation of an investment licence granted with a view to the construction and management of a hotel, the "only prejudice to be taken into account for awarding damages" was the loss of the right to operate the hotel.⁽⁷⁹⁾ The Tribunal in this case stated that:

"While there are several methods of valuation of going-concerns, the most appropriate one in the present case is to establish the net present value of the business, based on a reasonable projection of the foreseeable net cash flow during the period to be considered, said net cash flow being discounted in order to take into account the assessment of the damages at the time of the prejudice, while in the normal course of events, the cash flow would have been spread on the whole period of operation of the business".⁽⁸⁰⁾

According to this case, DCF consists of: (a) the projection of the revenue (net cash flow) to be generated by an income producing asset over its lifetime, and (b) the discounting of this amount so as to

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make it reflect the present value (or in the case of expropriation or nationalization, the value as of the date of the taking) of the future earnings. For the second element of the calculation a discount rate has to be determined which takes into account factors such as inflation and risks connected with the particular investment as investors require the projected cash flow of an asset to account for these factors.

While DCF method was applied in the *Amoco* case the Iran-U.S. Claims Tribunal has taken different approaches. As we saw earlier with regard to the *American International Group*; *Phelps Dodge*; *Sola Tiles*; and *Thomas Earl Payne* cases, notwithstanding that claimants had claimed their compensation calculated on going-concern value, the Tribunal only approximated the full value of the properties in question. And in the *Amoco International Finance Corporation*⁽⁸¹⁾ case, which was considered an enterprise with a long life expectancy, the Tribunal, as we shall see, expressly doubted the utility of this method in valuation. The DCF method has so far been used only in *Starrett*⁽⁸²⁾ and *Phillips Petroleum*⁽⁸³⁾ although in the latter case the Tribunal referred to a method described as "an underlying asset valuation approach", a method in assessing revenue-producing potential which accords more emphasis to actual investment than to forecasts of expected cash flows.⁽⁸⁴⁾ We shall examine the application of DCF methods in these three cases in turn.

8.4.1 D.C.F. IN STARRETT HOUSING CORPORATION V IRAN⁽⁸⁵⁾

In the *Starrett* case the main claimant, Starrett Housing Corporation, had been engaged in a big housing project adjacent to Tehran. To carry out the project, Starrett Housing Corporation had created

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through its subsidiary companies, an Iranian corporation called the Shah Goli Apartment Company of which it owned 79.9 percent. For management of the project Starrett Housing had created another Iranian subsidiary, called the Starrett Construction Corporation Family.

In an interlocutory award in 1983, the Tribunal found that by 31 January 1980, Starrett's interest in the two companies had been expropriated.⁽⁸⁵⁾ The Tribunal also found that the property interest expropriated by the Government of Iran must be deemed to comprise the "physical property as well as the right to manage the project and to complete the construction in accordance with the Basic Project Agreement and related agreements, and to deliver the apartments and collect the proceeds of the sales as provided in the Apartment Purchase Agreements".⁽⁸⁶⁾ In this award, in fact, the claimant's assertion of contractual rights, including the one to 'complete the project' and earn 'reasonable profits' as 'anticipated' were recognized and formulated by the Tribunal as the right to 'manage' and 'complete' the project and to 'deliver' the apartments and 'collect the proceeds' of the sale as laid down in the agreement.⁽⁸⁷⁾ Proceeds of the sales would, of course, include profits; but the profits in the case constitute a component of the predetermined sale price of the apartments and are limited in time to the completion and sale.

Recognizing that the valuation of such a property interest 'involves complex accounting matters' the Tribunal asked expert opinion on the value of the project "considering as he deems appropriate the discounted cash flow method of valuation" and "on the net profit"

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that the claimant "would reasonably have received through the management fees paid" to it.⁽⁸⁸⁾

The terms of reference were sharply criticized by both the American and the Iranian arbitrators. Judge Holtzmann characterized the terms of reference as "needlessly muddled and doubted whether the 'discounted cash flow method' which is typically used to value going concern with a long future expectancy of continuing business" was appropriate for valuing a short term construction project such as the one involved in the Starrett claim.⁽⁸⁹⁾ The Iranian arbitrator, Judge Kashani, strongly criticized the act of appointing an expert to value a project that was far from complete and a "company in a state of insolvency and bankruptcy [that] can never be compared to that of a going-concern which is effectively maintaining its operations".⁽⁹⁰⁾

The expert valuation of the assets and property rights taken, was eventually presented to the Tribunal. It was based on the fair market value defined as "the price at which a willing seller would sell it on condition that none of the two parties are under any kind of duress and that both parties have good information about all relevant circumstances involved in the purchase".⁽⁹¹⁾ The expert used two valuation methods: (1) the company's assets and liabilities were valued on the basis of its net book value; (2) the determination of the fair market value of the claimant in the company expropriated was done by subtracting its adjusted book value from its fair market value, so as to determine the amount of profit it would have made, assuming its one-project-status, the prospect of liquidation, etc.

The claimants endorsed the expert's valuation model, in particular the application of the DCF method. The respondents did not oppose the expert's theoretical concept of fair market value as the model

employed for valuation, but contested the result of the valuation, especially the expert's estimate of future revenues.⁽⁹²⁾ The expert had determined the fair market value of the project by applying the DCF method, according to which the expected cash flow for the remaining lifetime of the project was determined and then discounted back to its present value. In order to establish the net cash flow of the project the expert had drawn up a forecast of future revenue and remaining cost. The main differences between the parties related to the expected revenues which were calculated by the expert by taking into account the number of apartments available for sale after the date of valuation; the price level of unsold apartments; the applicability of the exclusion clause; and the possibility of selling extra parking spaces.

Based on the above elements, the expert calculated the future revenues to be Rials 14,800 (at approximately 70 Rials to a U.S. dollar) million, and the remaining costs at Rials 8,689 million. Discounting the project cash flow at the rate of 28 percent to account for (I) the rate of inflation, (II) the rate of real interest, and (III) the rate of risk, the expert calculated the fair market value of the project as of 31 January 1980 (the date determined by the Tribunal as when expropriation had taken place) to be Rials 4,754 million.⁽⁹³⁾

In calculating future revenues the expert and the Tribunal were confronted with the application of the principle mentioned earlier, namely that the expropriatory act itself and its effect on the value of the property in question should be disregarded, while general social and economic changes and their impact on the value of the property should be taken into account.

The issue of what falls under such general social and economic changes arose in connection with the establishment of the hypothetical prices for apartments which would not be sold until after 31 January 1980. In this connection the expert looked for the last sales before the said date "that were representative and for which he was able to establish the prices",⁽⁹⁴⁾ then adjusted such prices so as to reflect inflation up to October 1980, when he estimated that a "reasonable businessman" would have offered the apartments for sale. The information available concerning the actual final sales before 31 January 1980 was from 1979, but the expert disregarded this on the ground that these sales represented abnormally low prices which were due to the temporary revolutionary turmoil, and as such were not representative of normal market prices. Instead, he selected as a basis the sale price levels in April 1978⁽⁹⁵⁾ Accepting this, the Tribunal noted that:

'While it is recognized that the general changes in social, political and economic conditions created by the Islamic Revolution would endure following 31 January 1980, these must be distinguished from the temporarily uncertain circumstances that affected buyers in the unsettled wake of the Revolution'.⁽⁹⁶⁾

The principle that the situation as it was on the valuation date valuation (the date of the taking) is decisive was further emphasized by the expert's decision regarding the discount rate needed to account for the rate of inflation; the rate of real interest; and the rate of risk. Accordingly the expert's calculation of the net value of the Starrett Construction Company, 201 million rials (\$2,847,025), was accepted by the Tribunal and was awarded without modification. The Tribunal also awarded the claimants \$33,595,009 for the unpaid loans because the claimants had made the loan for the purpose of the housing project. Accordingly the damages awarded, in addition to the

value of the Starrett Housing Corporation's interest in the two Iranian Subsidiaries, included compensation for the loans and totalled some \$36,689,342.⁽⁹⁷⁾

In the *Amoco* case, however, Chamber Three of the Tribunal expressed certain doubts concerning the suitability of the DCF method on the ground that it might lead to unjust enrichment of the investor. We shall therefore examine that ruling of the Tribunal next.

8.4.2 THE APPLICATION OF DCF IN THE *AMOCO* CASE

The claimant in this case claimed \$183,232,986 as the alleged going concern value of Amoco's 50 percent share, calculated applying the discounted cash flow method. In doing that it calculated the future net cash flow of the company nationalized at \$564,795,680 in 1979 dollars and applying a 6.5 percent discount rate, estimated the present value at \$360,076,230.⁽⁹⁸⁾

The Respondents rejected both the quantification and the methodology employed by the claimant.⁽⁹⁹⁾ The Respondents pointed out that the fair value of the nationalized assets was best represented by net book value. It was asserted that Amoco had made an investment of \$6 million in 1967 and 1968 for one-half share of the capital by the end of 1978, the net book value of the investment had increased to \$29.3 million, of which \$14.65 million was Amoco's share. Moreover, the Company had earned, after taxes, \$82.5 million by the end of 1978, that was \$41.25 million in profits, which meant a return in excess of \$50 million on an investment of \$6 million.⁽¹⁰⁰⁾ The Respondents contended that award of compensation of \$183.2 million, as claimed,

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on top of that for loss of future profits would be the opposite of fairness and equity. (101)

The Tribunal assessed the valuations of the parties by reference to the methodologies they had advocated. To ascertain the market value of the property taken, the Tribunal pointed out that market value was an ambiguous or misleading concept to be applied when an open market did not exist for the expropriated asset and its shares were not traded on a stock exchange. Determination of the price on which a hypothetical willing buyer and a hypothetical willing seller negotiating at arms length would eventually agree had to be based on "a pyramid of hypotheses". (102) Then the Tribunal pointed out that the DCF method widely used in business practice was "most usually employed in one of two situations: the purchase or merging of an enterprise, when no market price is available, and the decision to make a new and large investment". (103) The Tribunal added that "a nationalization cannot be equated to a normal business investment", nor was the Tribunal "in the position of a prospective investor. Rather the Tribunal must determine, *ex post facto*, the most equitable compensation required by the applicable law for a compulsory taking, excluding any speculative factor". (104)

Accordingly, the claimant's calculation of the net value of the nationalized property ("*exit damnum emergens*") by a sole reliance on the *lucrum cessans* was completely dismissed. (105) The claimant, according to the Tribunal, had calculated the profitability of the investment (one of the elements of *damnum emergens*), by assessing the amount of the revenues that the undertaking would have earned, year after year, up to 18 years (the contract period), and the forecasted revenues were actualized by way of a discounting calculation, and

capitalized as the method of determining the compensation to be paid. The Tribunal stated that this was inadmissible because "with such method, *lucrum cessans* becomes the sole element of compensation", and the projection of revenues to such a distant future, especially "to such a volatile factor as oil prices" would be "almost purely speculative". (106)

The Tribunal also rejected the respondent's contention that the appropriate measure of compensation in the case of lawful expropriation was the net book value, without taking into account lost profits.

Therefore, the Tribunal ruled that the proper method of valuing the expropriated undertaking was: "the full value of the asset taken" or "the full equivalent of the property", the expropriated asset considered as "a going concern", and the going concern value encompassing "not only the physical and financial assets of the undertaking, but also the intangible values which contribute to its earning power, such as contractual rights... as well as goodwill and commercial prospects". (107) The Tribunal specified that intangible assets "are closely linked to the profitability of the concern, they cannot and must not be confused with the financial capitalization of the revenues which might be generated by such a concern after the transfer of property resulting from the expropriation (*lucrum cessans*)". (108).

The rejection by the Tribunal of future profits as a legitimate component of compensation in the case of lawful expropriation and the dismissal of the DCF method as an appropriate method in the case amounted to a major concession to the Iranian contention and provoked the American arbitrator (Judge Brower) to criticize the award. The

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award, according to him, had committed a "fundamental error.... in excluding as such *lucrum cessans*, or probable future profits, from the "value of undertaking". "What", asked Judge Brower, "does 'going concern value' mean other than the Concern's value as a producer of profits?". "What are an enterprises' future prospects other than its potential profitability?"(109)

While in the above case the non-application of the DCF method was primarily based on the lawfulness of the taking in question, in the next case, as we shall see, the Tribunal avoided making a distinction between lawful and unlawful nationalization and yet still found the application of DCF valuation method to be inadequate.

8.4.3 D.C.F. METHOD OF VALUATION IN *PHILLIPS PETROLEUM V IRAN*

Phillips Petroleum Co. Iran⁽¹¹⁰⁾ a subsidiary of Phillips Petroleum Co., brought a claim before the Tribunal against Iran and the NIOC seeking compensation for the alleged nationalization of its rights under a joint agreement for the exploration and exploitation of petroleum resources in the Persian Gulf. The claimant in this case, using the DCF method of valuation, sought U.S. \$159,199,000 as the full value of its nationalized rights. As we saw in Chapter 6, the Tribunal found the Treaty of Amity to be the relevant source of law and accordingly decided that the Claimant was entitled to just compensation, representing "the full equivalent of the property taken". As the Claimant's JSA (i.e. Joint Structure Agreement) rights were part of a going concern, the Treaty Standard required compensation which would make the claimant whole for the fair market value of its JSA interests at the date of taking. Because the Treaty

Standard was held to be applicable, it was not necessary for the Tribunal to address the customary law issues.

In contrast to the *Amoco* case, the Tribunal also avoided deciding whether a different standard was applicable in the case of a lawful expropriation than in an unlawful expropriation because it ruled that the Treaty established a single standard of compensation and it did not make any distinction between lawful and unlawful takings.⁽¹¹⁾

Having rejected Iran's arguments for a standard less than full compensation, and having decided that the claimant was entitled to compensation based on the fair market value of its nationalized interests, the Tribunal addressed the valuation issue.

Iran had argued that the valuation should be based on the net book value of the property taken. Iran had noted there was no active and free market from which a market value could be derived for the particular interests involved in the case in question. The Tribunal declared it was necessary to resort to various analytical methods to construct the market value and to consider all factors relevant to the valuation. Two particular methods of valuation were presented. One, the DCF method as it had been presented by the Claimant, and two, the so-called "underlying asset valuation method", selected by the Tribunal itself as one "which can help the Tribunal verify its findings concerning the value of the claimant's JSA interest.....".⁽¹¹²⁾

The Tribunal rejected the DCF method and disagreed with a number of the factors utilized in the claimant's DCF calculation, although it did not quantify, or give specific dollar values to, the items disagreed with. Instead, the Tribunal simply fixed the amount of the

compensation at U.S. \$55 million and said this amount was confirmed by the Tribunal's application of its own valuation of the underlying assets. It further pointed out:

"The above finding on the value of the claimant's JSA interests.... can be confirmed when an underlying asset valuation approach is used which takes as a starting point previous investment and determines future profitability based on historic performance".⁽¹¹³⁾

The Tribunal's own calculations on the basis of this approach produced a figure of U.S. \$61 million which it declared was "in a comparable range to the compensation" arrived at. Accordingly, the awarded U.S. \$55 million seems to have been reached on the basis of the Tribunal's own underlying asset valuation analysis using data provided by the claimant in its DCF calculations. Thus the Tribunal found the DCF valuation method, as used by the claimant in this case, to be inadequate, declaring that it "cannot agree that the method has resulted in a proper estimate of market value".⁽¹¹⁴⁾

So far we have been dealing with the determination of the market value of the taken property in the cases of an on-going business. We saw that in almost all cases the Tribunal in principle has awarded the full equivalent of the property taken, or in other words, the fair market value of the property, assessed as of the date of the nationalization or expropriation. However, as far as the valuation of compensation in the pertinent cases is concerned, the Tribunal has been reluctant to apply the DCF method, despite the claimant's suggestion of this method as the proper one for the valuation of compensation in an on-going business. This method has so far been used only in the *Starrett* case, where the period for which the future net cash flow which had to be calculated was relatively short.

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Nevertheless, the claimant in that case was awarded about one third of the claimed amount.

In the above cases, the Tribunal, instead of accepting a valuation method on modern accounting principles, has more often resorted to an approximation of the value, in which context some equitable considerations may have played a role, despite the acceptance of full compensation as the applicable general standard. (115)

Another noteworthy feature of the Tribunal's valuation practice on-going business cases is that it clearly confirms that while the effects of the taking itself and related acts should be disregarded in the valuation, the effect on the value of general changes in the political, social and economic structures are taken into account. Surprisingly, even in valuation concerning tangible objects which are generally traded on the market, the Tribunal has repeated the above stand point that the general political and economic conditions in a country and their effect on the value of the property may be properly considered. The valuation applied in tangible assets and single property items will now be considered.

8.5 VALUATION OF PROPERTY ITEMS OTHER THAN BUSINESS ENTERPRISES

In valuation of single property items also, determining the actual market value is in principle the starting point. But the methods of valuation may differ according to whether or not tangibles are part of the assets belonging to an enterprise. However, in the valuation of such property, questions associated with the determination of lost future profits normally do not arise and the fixed nature of tangible assets makes for a significantly simpler valuation process.

Generally speaking the methods of valuing tangible assets are non-controversial.⁽¹¹⁶⁾ Nevertheless, the Tribunal has used a variety of methods to fix the value of such property and has usually relied in these cases on methods suggested by the claimants. To examine valuation of tangibles in the context of the Tribunal we will focus on the final award in the *Sedco* case⁽¹¹⁷⁾ as this case is the leading one in this regard. The final award in *Sedco* involved the valuation of tangible assets as well as land. The claim in this case was for the value of the claimant's interests in two companies that had been carrying out oil drilling operations in Iran under contracts with Iranian governmental organizations. One of these companies was an Iranian subsidiary called *Sediran* which had operated ten land drilling rigs. In support of the drilling operations, *Sediran* constructed and operated extensive support facilities at Ahwaz in Southern Iran. Consequently, the expropriated properties to be valued consisted of oil rigs, equipment and warehouse stock, as well as the land and buildings.

8.5.1 LIQUIDATION VALUE FOR COMPENSATING OIL RIGS, EQUIPMENT AND WAREHOUSE STOCK

In the *Sedco* case the claimant had proposed that the 'liquidation value' be accepted on the assumption that the affairs of the enterprise had been wound up and its assets disposed of in the open market, but presumably with no discount from this value such as might occur in actual distress liquidation circumstances.⁽¹¹⁸⁾ This criterion was accepted by the Tribunal. To prove the value of the assets on the open market the claimant had produced evidence, including data as to comparable sales and appraisals, the value placed on oil rigs in its insurance policies, what it would have cost

in 1979 to replace the rigs, the rigs current net book value on the books of accounts of the company and the appraisal of an expert. The respondent contested the amount claimed on this basis, giving a value of less than half that amount.

Examining the respondent's contentions the Tribunal held that the respondent's figures were based on several incorrect assumptions and awarded about 79 percent of the amount claimed.⁽¹¹⁹⁾ In doing that, the Tribunal adjusted the figure downward on the basis of its own analysis of the relationship between the claimant's net book value and actual value. In another aspect of the case, the Tribunal awarded as a part of the *damnum emergens* lost profits for the use of oil rigs for nine months - the time considered necessary to procure and assemble replacement rigs.⁽¹²⁰⁾ The Tribunal had decided to include this element in *damnum emergens* in the second interlocutory award in that case. In this case, the Tribunal found that in the case of discrete expropriation full compensation, meaning *damnum emergens*, had to be paid.⁽¹²¹⁾

8.5.2 LAND IN SEDCO

With regard to the valuation of expropriated or nationalized land, the Tribunal has so far been called upon to render judgement in only one award. As Iranian law limits the ownership of land by foreigners,⁽¹²²⁾ this might be the reason, at least in part, for the shortage of awards so far involving expropriation of land. The only award involving land was the final award in Sedco. In this case, the claimant argued for a determination of the fair market value of a variety of tangible assets as well as land, buildings and improvements which were located in two cities in Southern Iran, Ahwaz

and Bandar Abbas. In claiming the fair market value of the land in Ahwaz, the claimant requested an amount based on the price that had been paid for a similar parcel of land one year before the property was expropriated, alleging that land was selling for much higher prices around the time of the taking. For the land, buildings and improvements situated in Bandar Abbas, the claimant asked the Tribunal to award an amount based on a valuation method known as "current cost accounting". The Tribunal, when explaining the above mentioned method, stated:

".... current cost accounting purportedly presents accurately the present value of an asset. It does so by (1) increasing the historical or book cost of an asset through application of an appropriate price index to arrive at an estimate of 'current cost new' of the asset, and (2) subtracting from the 'current cost new' and 'current depreciation' amount derived by application of the same price index to the book depreciation of the asset".⁽¹²³⁾

Thus in this case two different methods to establish the value of different parcels of land, building and improvements were used. The first involved the use of actual market information to determine fair market value and the second involved the use of accounting techniques which referred to published price indicators and depreciation rates used by the claimant in its books of account. As the respondent's only response was not reliable, the Tribunal accepted the claimant's valuation of both parcels of land along with the other fixed assets involved.

8.6 VALUATION OF TANGIBLE ASSETS IN SOME OTHER CASES

In *Dames & Moore v Iran*,⁽¹²⁴⁾ which concerned expropriation of vehicles, office equipment, instruments and other equipment, the Tribunal valued the assets by using the original purchase price as

depreciated. In this case, the claimant claimed the actual purchase price of equipment, \$354,924, as compensation. The Tribunal stated:

"Claimant has submitted materials indicating that the original purchase price of all items stored in the warehouse, including the one field laboratory, was U.S. \$354,924. However, there is no evidence regarding the relationship between the price of each item on the date of purchase and the value in the fall of 1980. Because of this gap in the evidence and the difficulties in quantifying the actual amount of damages in this respect with any precision, the Tribunal is justified in estimating such amounts. Considering all the circumstances, including the age of the equipment, the Tribunal decides that the approximate value of claimant's expropriated property is U.S. \$100,000, to which amount claimant is now entitled".⁽¹²⁵⁾

The Tribunal's estimation here was due to the absence of evidence of the relationship between purchase price and the value at the date that the assets were expropriated. Otherwise perhaps the Tribunal would have decided differently. In case of tangible assets it is the calculation of the replacement cost that is commonly accepted as an appropriate method of arriving at the full value for compensation purposes.⁽¹²⁶⁾ Replacement value can be said to mean the net value of the asset(s) at current prices (i.e. the prices of new equipment), less actual depreciation.⁽¹²⁷⁾ This is how the value of the physical assets was assessed (as a part of the valuation of the whole enterprise as a going concern) in both the *Aminoil* and *Liamco* cases.⁽¹²⁸⁾ Likewise, in the *Oil Field of Texas*⁽¹²⁹⁾ case, concerning the taking of three blow out preventers, the Tribunal employed the replacement value approach as it had been claimed (and appraised) by the claimant. As Pellonpää points out "This indicates that sometimes the amount of compensation may in an important manner depend on how the claimant has prepared its case".⁽¹³⁰⁾

In a similar way to the last case, in *William L. Pereira Associates, Iran v Iran*,⁽¹³¹⁾ the Tribunal awarded Rials 1,000,000 for office

equipment and a company car, citing likely depreciation and nominal resale value for small items, although the claimant had asked for Rials 5,455,990 as the actual purchase price. However, in *Computer Sciences Corporation*,⁽¹³²⁾ the Tribunal awarded net book value of office equipment and furniture as had been requested by the claimant. In this case the Tribunal concluded that "the amount of such value, which the claimant has concluded on the basis of net book value and which was not contested by the respondent is \$24,397".⁽¹³³⁾

According to the view of the United States, as we mentioned earlier, "book value or some variation of it, which... values assets at acquisition cost less depreciation is a figure which in most cases bears little relationship to their actual value".⁽¹³⁴⁾ Nevertheless, in valuation of tangible assets, as it was in the *Computer Sciences Corporation* case,⁽¹³⁵⁾ the net book value may provide an appropriate valuation method where evidence of any other basis is lacking, particularly where the owner refrains from claiming more than the net book value.

Considering the valuation of land, buildings and other fixed or tangible assets, it can be concluded that the Tribunal has made use of a variety of valuation methods as proposed by the claimants in the disputed cases. In *Sedco*⁽¹³⁶⁾ the only award so far in which land and buildings were valued separately, the Tribunal looked to historical market data for one property and to a 'current cost accounting' method for another, relying in both cases on data and arguments proposed by the claimants. In valuing oil rigs and other fixed assets in *Sedco*, the Tribunal used the claimant's current cost accounting approach, but adjusted the claimant's figures downward on the basis of its own analysis and what appeared reasonable on the

basis of the entire record in the case. A similar approach was taken in *Dames & Moore*⁽¹³⁷⁾ and *Pereira*.⁽¹³⁸⁾ With regard to these cases, figures presented by the claimant as to the original purchase price of office equipment, furniture, instruments and automobiles, were reduced by the Tribunal on the basis of the Tribunal's own estimation of the resale value of the assets on the date they were taken. However, in the *Computer Sciences Corporation case*⁽¹³⁹⁾ as the claimant requested only the net book value of office furniture and equipment, the Tribunal awarded the full amount claimed.

CONCLUSIONS ON VALUATION

Based on the above examination of the Tribunal's awards the following can be concluded:

- (I) In the nationalization cases, as well as in cases involving separate expropriation of business enterprises, the awards generally have ruled that the full compensation standard requires a determination of the fair market value of the business involved.
- (II) The awards have also viewed businesses as going concerns, including determinable future profits.
- (III) However, in the awards a variety of valuation methods have been used and the amounts awarded have in most cases been substantially below the amounts claimed. As we saw in the *American International Group (AIG)* case the claimant had argued for U.S. \$39 million but the Tribunal approximated his compensation to only \$10 million, taking into account all relevant circumstances. Similarly, in the *Phillips Petroleum* case the claimant had asked for \$159,000, calculated using the DCF method of valuation, but the Tribunal, denying the DCF

method, made its own 'Underlying asset valuation' which resulted in an award of only U.S. \$55 million. In the *Thomas Earl Payne* case also the Tribunal approximated the due compensation to \$900,000 against the claimed amount of U.S. \$3,001,180.

(IV) The DCF method has only been used by the Tribunal once, in the *Starrett* case. In this case, the Tribunal's own appointed expert, using this method, valued the expropriated property at \$41 million. Nevertheless, the Tribunal reduced the amount of under \$37 million by means of a process of 'reasonable approximation' in the circumstances.

(V) Apart from the above mentioned cases, in certain other cases in which the Tribunal was called upon to determine the going concern value of business enterprises, the Tribunal has made it clear that while lost future profits are properly includable, they need not be included in all cases. As a result, in some cases future profits were excluded. The awards in *Phelps Dodge*, *Sola Tiles* and *CBS* are examples. In these three cases the Tribunal found that the businesses involved had not reached the point of a going concern. Moreover, in *Thomas Earl Payne*⁽¹⁴⁰⁾ future profits were excluded by reasoning that the profits were unlikely to exist due to the impact of the Islamic Revolution on a business which included the import and distribution of Cinema films from the West. In these four awards the Tribunal ruled 'that while the effect of the expropriatory act itself must be disregarded in the valuation, the general state of political, social and economic conditions and their effect on the value should be considered. As Pellonpää and Fitzmaurice point out:

"Not only has the Tribunal confirmed the existence of this rule as a principle applicable to the valuation in general, but it has also given some important illustrations of the interpretation of the border-line between these events and

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acts which should be considered in the valuation, on the other hand, or those which should not, on the other".⁽¹⁴¹⁾

(VI) As with the valuation of alleged going concerns, in its valuation of tangible assets, the Tribunal has applied the principle that "the general political (and economic) conditions in a country and their effect on the value of property may be properly considered".⁽¹⁴²⁾ As a result, in the *Sedco* case the Tribunal, accepting the methods used by the claimants, adjusted the amounts downward on the basis of what the Tribunal deemed reasonable.⁽¹⁴³⁾ In *Dames & Moore*⁽¹⁴⁴⁾ and *Pereira*⁽¹⁴⁵⁾ also, the Tribunal reduced the amounts claimed as the original purchase price of office equipment, furniture and automobiles on the basis of its own estimation of resale value on the date of the taking. However in the *Computer Science Corporation* case,⁽¹⁴⁶⁾ where the claimant had asked only for the net book value of office furniture and equipment, as we have just seen, the Tribunal awarded the full amount which had been claimed.

In conclusion it can be said that the Tribunal's awards have provided an important clarification to the traditional rule that the nationalized property should be valued as of the date of the taking, making it clear that in circumstances where the takings occur as a result of a revolution, the post-taking impact of changes effected by the revolution may be taken into account.

NOTES TO CHAPTER 8

1. See INA case in the 8 Iran-U.S. C. Trib. REports, p.378-381.
2. Ibid, p.380.
3. See Am. Int'l Group case, in 4 Iran-U.S. C. Trib. Reports, p.97.
4. See *Starrett Housing Corp, et al, v the Government of the Islamic Republic of Iran, et al.*, award no. 32-4-1 (19 December 1983), 4 Iran-U.S. C. Trib. Reports, p.122.
5. See INA case, op cit, p.378. See also *Phillips Petroleum Co.* case in which the Tribunal defined the fair market value as "... the price that a reasonable buyer could be expected to have been willing to pay for the asset in a free market transaction, had such a transaction been possible at the date the property was taken". See in 21 Iran-U.S. C. Trib. Reports, 1989, p.122.
6. See Am. Int'l Group case, op cit, p.97.
7. See B.M. Clagett, "The Expropriation Issue Before the Iran-United States Claims Tribunal: Is 'Just Compensation' Required by International Law or Not?", in R. Lillich, (ed.), *The Valuation of Nationalized Property*, 1987, p.25.
8. Ibid.
9. Ibid. See also the *Ditta Luigi Gallotti v Somalia*, 40, I.L.R., 1964, p.158.
10. See the *Sapphire* arbitration, 35, I.L.R., 1963, p.185-86.
11. See the *Chorzow* case (*Germany v Poland*), 1928, P.C.I.J., Ser. A. No. 7, p.258.
12. Ibid.
13. See *Lena Goldfields* case (1930), excerpted in 36, Cornell L.W., 1950, p.31-34.
14. Ibid.
15. See in 23, I.L.R., 1956, p.299.
16. Ibid.
17. See von-Mehren & Kourides, "International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases", 75, A.J. Int'l Law, 1981, pp.476-550. See also J.A. Westberg, "Compensation in Cases of Expropriation and Nationalization: Awards of the Iran-United States Claims Tribunal", 2, ICSID Review - Foreign Investment Law Journal, 1988, p.266.

18. See *B.P. Exploration Co. arbitration (U.K. v Libya)*, 53, I.L.R., 1974, p.397.
19. Ibid.
20. See *Texaco Overseas Petroleum Co. California Asiatic Oil Co. v Libya*, 53 I.L.R., 389, 1979. See also in 17 I.L.M., 1, 1978.
21. See *Libya American Oil Co., v Libya*, 20 I.L.M., 1, 1981. See also von Mehren & Kourides, *op cit*, p.490.
22. *Libya American Oil Co., op cit*.
23. See von Mehren & Kourides, *op cit*.
24. See *Kuwait v American Independent Oil Company*, 21 I.L.M., 976, 1982. See also the valuation of Amin Oil case in R. Lillich *the Valuation of the Nationalized Property*, 1987.
25. Ibid at para.161.
26. Ibid at paras.172-173.
27. See *Banco Nacional De Cuba v Chase Manhattan Bank*, 658 F. 2d 875 (2d Cir. 1981), modifying 505 F. Supp. 412 (S.D.N.Y., 1980).
28. Ibid p.893, Bank branches had operated in Cuba from 1925 until 1956 Revolution.
29. See *Asian Agricultural Products Limited (AAPL) v Republic of Sri Lanka*, Case No. ARB/87/3 in 30 I.L.M., 1991, p.577.
30. Ibid, para.20.
31. Ibid, para.101.
32. Ibid, paras.105-107.
33. *Am. Int'l Group case, op cit*.
34. Ibid.
35. See Draft Convention on the Protection of Foreign Property Adopted by OECD, reproduced in 7 I.L.M. See specially notes and comments to Article 3, Para.96, p.127.
36. Ibid.
37. See *Am. Int'l Group op cit*, p.96. See also *INA Corp v Iran, op cit*.
38. Ibid.
39. See *Am. Int'l Group, op cit*, p.106.
40. See e.g. *Thomas Earl Payne v Iran*, 12 Iran-U.S. C. Trib. Reports, 1986, III, at Para.36, and *Phelps Dodge Corp and*

Overseas Private Investment Corp v Iran, 10, Iran-U.S. C. Trib. Reports, 1986I, p.121.

41. See *Am. Int'l Group*, op cit.
42. Ibid.
43. Ibid, p.107.
44. Ibid. See also in A. Rovine, "Recent Valuation Decision of the Iran-U.S. Claims Tribunal". *Mealey's Litigation Reports Iranian Claims*, 1984, p.18.
45. See e.g. Award No. ITL 32-24-1, 1983, 4 Iran-U.S. C. Trib. Reports, 1983, 122, (Holtzmann, J., Separate Opinion).
46. Ibid.
47. See C. Brower, "Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-U.S. Claims Tribunal", 21, No.3 *the Int'l Lawyer*, 1987, p.664.
48. Op cit.
49. Ibid.
50. R. Khan, *The Iran-United States Claims Tribunal, Controversies, Cases and Contribution*, 1990, p.223.
51. See *Thomas Earl Payne*, op cit, p.17.
52. Ibid.
53. Ibid.
54. Ibid, p.5-6-8.
55. Ibid.
56. Ibid.
57. See *CBS, Inc. v Iran*, CBS Records SSK and the Foundation for the Oppressed, Award No. 486-197-2, reprinted in *Mealey's Litigation Reports Iran Claims*.
58. Ibid.
59. See *Phelps Dodge* case, op cit.
60. See *Sola Tiles Inc. v Iran*, 14 Iran-U.S. C. Trib. Reports, 1987I, p.223.
61. See *Phelps Dodge*, op cit.
62. Ibid.
63. Ibid, p.132-133.

64. Ibid.
65. See *Sola Tiles* case, op cit.
66. Ibid.
67. Ibid.
68. *INA Corp. v Iran*, op cit.
69. Ibid.
70. Ibid, p.381.
71. Ibid, p.381.
72. See Award of 8 August 1980 (Bystricky, Razafindralambo and Trolle, arbitrators) reproduced in 21 I.L.M., 1982, p.740.
73. Ibid. See paras.4.57-4. 65.
74. Ibid.
75. Ibid para.78-79. See also in M. Pellonpää, "International Law and Compensation for the Taking of Alien-owned Property: Recent Trends in Arbitral Practice", 3 *Kansainoikeus-lus Gentium*, 1986, p.13, Gann, 'Compensation Standard for Expropriation', 23, Column J. *Trans'l Law*, 1985, pp.621-22.
76. See Pellonpää, op cit, p.157.
77. See M. Pellonpää & M. Fitzmaurice, 'Taking of Property in the Practice of the Iran-U.S. Claims Tribunal'. *Netherlands Y.B. Int'l Law*, Vol. XIX, 1988, pp.142-43. See also Clagett, op cit, p.884-885.
78. See *Amco Asia Corp. v The Republic of Indonesia*, Award of 21 November 1984 (Goldman, Foighel and Rubin, arbitrators). See also in 24 I.L.M., 1985, p.1023.
79. Ibid, para.271.
80. Ibid. It should be pointed out that damages in this case were awarded on the basis of a kind of a contract breach rather than expropriation, but the Tribunal made it clear that the result would have been the same regardless of which theory was applied. See Award, para.190.
81. See *Amoco International Finance Corp. v Iran*, 15 *Iran U.S. C. Trib. Reports*, p.189.
82. See *Starrett Housing Corp., et al., v The Government of the Islamic Republic of Iran*, 4 *Iran-U.S. C. Trib. Reports*, 1983, p.122.
83. *Phillips Petroleum Co. v Iran*, 22 *Iran-U.S. C. Trib. Reports*, 1989(I), p.79.

84. Ibid.
85. See *Starrett Housing Corp*, op cit.
86. Ibid.
87. Ibid.
88. Ibid.
89. Ibid at 159, 176-77.
90. See dissenting opinion of Judge Mahmoud Kashani of 16 July 1984, 7 Iran-U.S. C. Trib. Reports, 1985, p.119 at 173-174.
91. See *Starret Housing Corp, et al., and the Government of the Islamic Republic of Iran, et al.*, final award No. 314-24-1, 14 August 1987, 16 Iran-U.S. C. Trib. Report, p.112, at 122.
92. Ibid, p.123-130.
93. Ibid, p.192-183.
94. See *Starrett* final award, p.314.
95. Ibid.
96. Ibid.
97. Ibid.
98. *Amoco International Finance Corp and the Government of the Islamic Republic of Iran, et al.*, partial award no. 310-56-3, 14 July 1987, 15 Iran-U.S. C. Trib. Reports, p.189.
99. Ibid, p.223.
100. Ibid.
101. Ibid.
102. Ibid.
103. Ibid, p.256.
104. Ibid, p.258.
105. Ibid.
106. Ibid.
107. Ibid.
108. Ibid.
109. See concurring opinion of Judge Brower, *ibid*, p.290.

110. See *Phillips Petroleum Co. of Iran*, op cit.
111. Ibid.
112. Ibid para.115. (The JSA referred to in the award is a Joint Structure Agreement).
113. Ibid, para.159.
114. Ibid, para.165. It appears likely that the award will be the only Tribunal award involving the nationalization of a foreign oil company's rights under a long term concession agreement following the revolution. For this reason the award is likely to be seen as having special importance.
115. See Pellonpää & Fitzmaurice, op cit, p.146.
116. See J.A. Westberg, op cit, p.286.
117. See *Sedco Inc. v National Iranian Oil Company and the Government of the Islamic Republic of Iran*, 15 Iran-U.S. C. Trib. Reports, 1987, 23.
118. Ibid, p.53.
119. Ibid, para.295.
120. Ibid, para.297.
121. Ibid.
122. See the Iranian Civil Law Article 46, 1981, p.46. See also The Iranian Constitutional Law, Principle 14, 1982, p.3.
123. See *Sedco Final Award*, op cit, para.303.
124. See *Dames & Moore v the Islamic Republic of Iran, the Atomic Energy Organization of Iran, the National Iranian Steel Company, the Iranian Medical Centre and the National Iranian Gas Company*, 4 Iran-U.S. C. Trib. Reports, 1983 III, p.212.
125. Ibid.
126. See Gann, op cit, note 75, p.618-619.
127. Ibid. See Mehren & Kourides, note 17, p.40, Rovine, op cit, note 44, p.22.
128. See *Aminoil Award*, paras.165-166, 178(3); op cit, *Liamco, Award*, pp.163-154. Also see Gann, op cit, p.633,637; Rovine, op cit, p.22.
129. See *Oil Field of Texas, Inc., v the Government of the Islamic Republic of Iran*, Award No. 258-43-1 of 8 October 1986.
130. See Pellonpää, op cit, p.162.

131. *William L. Pereira Associates, Iran v The Islamic Republic of Iran*, 5 Iran-U.S. C. Trib. Reports, 1984, p.198.
132. *Computer Sciences Corporation*, op cit, p.269.
133. Ibid.
134. See Gann, op cit, notes 14, p.619.
135. *Computer Sciences Corporation case*, op cit, p.269.
136. *Sedco case*, op cit.
137. See *Dames & Moore*, op cit, p.212.
138. See *Pereira case*, op cit, p.198.
139. See *Computer Sciences Corporation*, op cit, p.269.
140. See *Earl Payne case*, op cit, p.121.
141. See *Pellonpää & Fitzmaurice*, op cit, p.161.
142. See *Sedco case final award*, op cit, para.69.
143. Ibid.
144. See *Dames & Moore*, op cit, p.212.
145. See *William L. Pereira case*, op cit, p.198.
146. See *Computer Sciences Corporation case*, op cit, p.269.

CHAPTER 9

CONCLUSIONS

CONCLUSIONS

In this study I have been dealing with the awards of the Iran-U.S. Claims Tribunal issued in respect of expropriation and nationalization of American investments in Iran. However, as was mentioned in the first chapter, the main purpose of this study has been exploring the present status of the law of compensation in the awards of the Tribunal. The aim of this chapter is to review the findings of the study and to draw some general conclusions.

9.1 THE TRIBUNAL AND INTERNATIONAL ARBITRATION

Following the Islamic Revolution American investments in Iran⁽¹⁾ either were expropriated *de facto*, or were nationalized formally, and as a result hundreds of claims were filed in the United States Courts against Iran. A substantial portion of the Iranian assets which had been frozen by the U.S. in response to Hostage crisis, were attached in these judicial proceedings.⁽²⁾ Restoration of the financial status of Iran required that these judicial attachments be nullified. Thus, as a substitute for the U.S. Courts' proceedings, the two governments agreed to establish an arbitral body to hear and adjudicate claims by U.S. nationals against Iran and, in addition, certain claims by Iranian nationals against the U.S. government and between the two governments. On 19 January 1981, the governments of the Islamic Republic of Iran and the United States of America therefore established the Iran-U.S. Claims Tribunal.

The Tribunal was established by virtue of the Claims Settlement Declaration (CSD) for the purpose of deciding:

"claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counter-claim which arises out of the same contract,

transaction of occurrence that constitutes the subject matter of that national's claim, if such claims or counter-claims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration... and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specially providing that any disputes there under shall be within the sole jurisdiction of the component Iranian Courts in response to the Majlis position".⁽³⁾

Article V of the CSD declares that the Tribunal has to decide the cases:

"on the basis of respect for law applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the Trade, contract provisions and changed circumstances".⁽⁴⁾

The requirement that the Tribunal's awards be made on the basis of law "evokes a particular conception of international arbitration"⁽⁵⁾ and, as Robinson states, "the Iran-U.S. Claims Tribunal represents on the most ambitious and complex international claims adjudication programmes ever undertaken".⁽⁶⁾

The status of the Tribunal, as has been seen, raises some interesting questions. Is the Tribunal an interstate Tribunal charged with ruling on the responsibility of the respondent state under public international law; or is the Tribunal a private arbitral Tribunal to hear private law claims against Iran and the U.S.; or is it, as a further possibility, performing both functions?

While different academic lawyers have answered the above questions differently, the Tribunal's own statement in the *Esphahanian*⁽⁷⁾ case indicates that in its own view, it is performing a dual function. Examining that case it can be concluded that the Tribunal is a hybrid

which rule on both the responsibility of the respondent state in international law and on its liability in private law.

In this connection it is relevant to recall that whereas Westberg points out that "the Tribunal was organized and operates on the pattern of earlier mixed international arbitral tribunals".⁽⁸⁾ Lauterpacht, has concluded that "though the Tribunal was established by intergovernmental agreement and the two states parties each have an Agent supervising the conduct of cases before the Tribunal, the responsibility for the presentation of claims and the conduct of each case falls directly and exclusively upon the individual claimant. In this respect the Tribunal marked an advance over other claims commission".⁽⁹⁾

The machinery for execution of awards is another special feature of the Tribunal. As we saw in Chapter 2, the Algiers Accords provided for the establishment of a Security Account. The sole purpose of this account is to pay and secure the payment of Tribunal awards against Iran and the awards against the U.S and Judge Lagergren has said that that "Security Account was established as compensation for the annulled attachments in the U.S.".⁽¹⁰⁾

As Khan states, this enforcement machinery greatly strengthen the judicial character of the Tribunal.⁽¹¹⁾ In arbitrations, although there is a binding decision, there is usually no guarantee that the unsuccessful party will carry out its obligation to recognize the awards. This, of course, does not mean that arbitral awards are always disregarded. However, as Merrills points out, one of several ways in which the problem of enforcing arbitral awards may be avoided is providing a security account or fund".⁽¹²⁾ It can therefore be further concluded that the successful functioning of the Iran-U.S.

Claims Tribunal has set a precedent for dealing with the problem of enforcing arbitral awards in the future.

The Tribunal is exceptional in another respect as well. It is the first international arbitral tribunal to function under the UNCITRAL rules - with modification to conform those rules to the special circumstances of this arbitration.⁽¹³⁾

Considering all these special features of the Tribunal we saw that Stewart and Sherman had concluded that:

"The Tribunal is a unique institution, representing of the most ambitious and complex international claims adjudication programmes ever undertaken".⁽¹⁴⁾

Without doubt, the Tribunal represents a major challenge for the resolution of international disputes through arbitration. We can therefore agree with Robinson's observation that, "the Tribunal's ability to meet that challenge is very likely to have significant implications for the future use of arbitration... by governments".⁽¹⁵⁾

9.2 THE TRIBUNAL AND INTERNATIONAL LAW

The Tribunal had addressed an enormous caseload. As Lillich has stated "in recent history no arbitral tribunal has faced the enormous task now before the Tribunal".⁽¹⁶⁾ The cases filed by American claimants generally involved alleged breaches of contract and expropriations and nationalizations. However, we have dealt only with the expropriation and nationalization cases.

In our view the Tribunal's judgements together with the separate and dissenting opinion of arbitrators provide a rich deposit of legal authority on international business transactions. But not everyone

shares this view. In a recent international commercial arbitration an arbitrator stated that "the decisions of the Tribunal were not persuasive because the Tribunal after all involves a special type of arbitration".⁽¹⁷⁾ Similarly, Professor Gray also reached the same conclusion and observed that the jurisprudence of the Tribunal "has little of importance to contribute to the development of international law in general and on the assessment of damages in particular".⁽¹⁸⁾

We, however, agree with Amerasinghe who has stated that:

"the cases decided by the Iran-U.S. Claims Tribunal... have particular value as precedents in a subsidiary source of law".⁽¹⁹⁾

As we have seen throughout this study, public international law has been a significant source of law for the Tribunal and has been applied in a number of decisions. As Crook points out:

".... these should take on particular importance because of the rarity of modern interstate arbitrations and the difficulties in documenting contemporary state practice".⁽²⁰⁾

The Tribunal itself also has recognised the law-making significance of its decisions and in the *Oil Field of Texas* case, stated that:

"The controlling rules have... to be derived from principles of international law applicable in analogous circumstances or from general principles of law. The development of international law has always been a process of applying such established legal principles to circumstances not previously encountered".⁽²¹⁾

By applying international law to the various cases of expropriation and nationalization, Pellonpää has stated that "the Tribunal is likely to give precedents which, despite the fact that 'international law contains no *stare decisis* principle', will be treated as authoritative statements of law by other Tribunals and decision-

makers".⁽²²⁾ This conclusion appears to be fully supported by our own review of the Tribunal's case law.

As far as the legality of a taking in international law is concerned the Tribunal in several cases has re-affirmed that a taking should be for public purpose and the taking should be carried out with non-discriminatory manner. However, as we saw in Chapter 3, the Tribunal has expressed the view that:

"A precise definition of the public purpose for which an expropriation may be lawfully decided has never been agreed upon in international law nor even suggested. It is clear that as a result of the modern acceptance of the right to nationalize, this term is broadly interpreted, and that states, in practice, are granted extensive discretion".⁽²³⁾

With regard to the condition of non-discrimination the Tribunal has suggested that while this is a condition of lawful expropriation, at the same time, however it recognises that it is not an absolute requirement.

This approach by the Tribunal has caused Pellonpää and Fitzmaurice to the important conclusion that:

"While the requirements of 'public purpose' and 'non-discrimination' in takings are well established, a certain shift in favour of the state's economic sovereignty appears to be discernible in the way they are interpreted today".⁽²⁴⁾

As far as the relevance of state contracts in a taking is concerned the Tribunal in the *Amoco* case stated that:

"In international practice, and notably in the cases submitted to international arbitration, the dispute has focussed on the question of the so-called stabilization clauses. For the reasons set forth in the [case] it is not seriously questioned that, in the absence of such a stabilization clause, a contract does not constitute a bar to nationalization. That is an aspect of the evolution of international law in this area and of the general recognition of the right of states to nationalize".⁽²⁵⁾

However, in the same case the Tribunal stated that the language of a contract provision, in order to make that provision a 'stabilization clause', should be quite explicit in obliging the state not to use its legislative power to terminate contractual relationship. The Tribunal added that "this can be seen as another aspect of the evolution of international law in the area and of the general recognition of the right of states to nationalize".(26)

As far as the meaning of a taking is concerned, we saw in Chapter 3, that in the *Tippetts* case, the Tribunal pointed out that a taking may occur under international law "through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected". Furthermore, the Tribunal stated that "a positive intention to expropriate foreign property is not always required to constitute a taking under international law".(27) Yet it emphasized that "the form of measures of control or interference is less important than the reality of their impact".(28)

The Tribunal's pronouncements on the question of the degree of interference necessary to a finding of a taking have been slightly different. In certain cases the Tribunal has used the formula of unreasonable interference in the use of the property rights or control of the property. In others it has described the standard as requiring an "interference... to such an extent that these [property] rights are rendered to useless that they must be deemed to have been expropriated".(29) In still further cases it has declared that a taking occurs whenever an owner is 'deprived of fundamental rights of ownership' and the deprivation is not merely ephemeral".(30) Judge Brower, the American member of the Tribunal, has pointed out that

"the most common bench mark of the Tribunal's decision in this regard, has been unreasonableness".(31)

However, as we saw in Chapter 3, the Tribunal's discussion of the degree of interference necessary to constitute a taking, has not focussed on semantics, but rather on the reality of the impact of the alleged taking. As a result, "the standard both explicitly and implicitly adopted by the Tribunal requires an unreasonable interference with property rights caused by actions attributable to the government".(32)

As far as the issue of attributability is concerned, generally speaking, the Tribunal has found that attributability requires at least one deliberate governmental assertion of control over the corporations, such as the substitution of government-appointed managers. However the Tribunal has added that for the appointment of managers by the government to be considered as a taking, the managers should have assumed a functionally permanent role.

As a result the Tribunal has been consistent in finding an expropriation has taken place in cases where the appointment of temporary managers by the government was accompanied by facts or circumstances indicating that the essential rights of share ownership had been permanently interfered with. As we can see, the case law of the Tribunal has thus established that a taking can occur even without a physical confiscation of a foreign investment.

9.3 THE POLICY ELEMENT IN THE TRIBUNAL'S DECISIONS

One of the ways to evaluate the decisions of the Tribunal is in the light of 'preferred community policy goals'. This could be defined

as "a world public order in which values are shaped and shared more by persuasion than by coercion, and which seeks to promote the greatest production and widest possible sharing, without discriminations irrelevant of merit, of all values among all human beings".⁽³³⁾

Accordingly, a Preferred Community Policy has three major goals. (I) The discouragement of use of force; (II) maximizing the likelihood of economic development; (III) recognizing the sovereign nature of the host state.

We saw that the Tribunal defined a taking as an interference with property that renders that property so useless that it must be considered to have been expropriated. It seems that such construction of the taking standard comports with preferred Community Policy goals. It provides the host state with adequate competence to rule effectively by requiring that state interference reach a very high level before a taking will be found. It provides foreign investors with much needed protection from acts that destroy the value of their investment.⁽³⁴⁾ Also, this should help to encourage more investment and development and as Swanson points out, that "provides a relatively certain basis on which taking determination may be based, which should reduce the likelihood of a resort to coercive measures".⁽³⁵⁾

Also, we saw the Tribunal stated that a taking will be found when an investor is deprived of fundamental rights of ownership of his property has become useless. These are all positive developments when considered in the light of preferred Community Policy goals.

As far as the date of the taking is concerned, as we saw in Chapter 4 of this study, the Tribunal pointed out that the taking of an ongoing business might occur through a chain of events. For example, it might begin with minor management interference and culminate in the transfer of title. The Tribunal stressed that the taking however will not necessarily be found to have occurred at the time of either the first or the last such event. The Tribunal has been of the view that "expropriation of an on-going business occurs when the interference becomes an "irreversible deprivation".⁽³⁶⁾

In the *Starrett* case, the claimant had argued that the anti-American policies of the Iranian government amounted to an unlawful expropriation of his property rights, presumably at the time of the revolution in late 1978 and early 1979.⁽³⁷⁾ The Tribunal rejected that argument and stated that investors assume the risks of revolutions which do not by themselves constitute a taking giving rise to a claim for compensation under international law.⁽³⁸⁾ Finally it settled the date of the expropriation on the date by which it considered the expropriation process to have become irreversible.⁽³⁹⁾ It could be said that in these cases the Tribunal has persisted "with the causative theory".⁽⁴⁰⁾ As a result the Tribunal has dismissed vague allegations of disorder and harassment as inadequate to engage the responsibility of a state.⁽⁴¹⁾

Examining the case law of the Tribunal, Khan has concluded that the Tribunal "was willing to consider with sympathy and understanding some inconveniences and even losses caused to foreign investors by the revolutionary conditions in Iran. It was, consequently, willing to concede a certain measure of control exercised by the government and its instrumentalities over foreign investments".⁽⁴²⁾

As a result several significant expropriation claims were rejected by the Tribunal. Examples of these cases are the in the cases of *Mobil Oil Iran*,⁽⁴³⁾ *Houston Contracting Co.*,⁽⁴⁴⁾ and *Motorola*.⁽⁴⁵⁾ In the *Motorola* case, for instance, the Tribunal found that interference by Iranian officials in the relationship between the claimant and its Iranian subsidiary was not factually sufficient to constitute a taking, although it is worth noting that dissenting arbitrator, Brower declared that this decision "Completely misreads the documentary evidence in the record and ignores the reality of Iran's involvement".⁽⁴⁶⁾

9.4 THE TRIBUNAL AND THE RIGHT TO COMPENSATION

In Chapter 5 of this study we described the process of determination of compensating the claimant for his lost property as an area of controversy in expropriation cases. We said that these determinations necessarily involve an inquiry into what type of remedy should be employed as well as the scope of that remedy. We mentioned that in international law there is a broad range of remedies available to investors whose property interests have been taken. However, virtually all of the Tribunal's decisions focus solely on the return of the claimant of the value of the interest lost. In any of the Tribunal's awards, restitution or specific performance has not been discussed. Even in the *Starrett* case while Iran formally offered restitution as the appropriate remedy for settling the case, the Tribunal refused that.⁽⁴⁷⁾

As far as the issue of determining of the scope of compensation is concerned, in the context of the Tribunal the issue has related to only two standards: full and partial compensation. Iran as the

respondent in the cases before the Tribunal has not denied the very principle of compensation although it has in almost all cases challenged the scope of it.⁽⁴⁸⁾

In determination of the scope of compensation the principal issue is determination of the applicable law, as by application of that law, the scope of compensation can be determined. Therefore, in expropriation cases the Tribunal has had to deal with two issues: first the question of applicable law, Iran's domestic law, the Treaty of Amity, between the United States and Iran, or customary international law; and secondly the question of the precise content of that law.

As we saw earlier, in expropriation cases the Tribunal has applied international law. The Tribunal has rarely applied national rules of either of the participating states in any case, even in cases where the parties might arguably have agreed on them as the rule of decision.

The Tribunal decisions to date have not supported Iran's contentions that its own domestic law governs the standard of compensation payable for nationalized or expropriated property. As a result the Tribunal, when determining the standards of compensation, has mainly relied on customary international law. In some cases it has relied on both customary international law and the Treaty of Amity, and in a few cases exclusively on the Treaty of Amity.

However, the content of customary international law is not clear cut. As we indicated in the first chapter, the customary rules in the area of nationalization of foreign property, particularly with respect to due compensation, have always been controversial and remain

controversial in the relationship between foreign investors and host states, especially third world ones. While Western developed states, along with many legal writers, claim that the traditional rule of customary international law (i.e. the standard of full compensation), still exists, the Third World states, along with some jurists in these countries, argue that the customary law in this regard has changed at least to a principle of less than full compensation.⁽⁴⁹⁾ In this study, however, we have been dealing primarily with the decisions of the Iran-U.S. Tribunal in order to see whether customary international law has changed in the light of the arguments of the parties before the Tribunal. We examined many cases of the Tribunal as well as some decisions of ICSID arbitration in expropriation cases. What conclusions may be drawn from this case-law?

The Tribunal in small claims involving tangible business assets such as office equipment etc, has not discussed any applicable rule and simply has awarded the value of the taken property, upholding the principle of full compensation.⁽⁵⁰⁾ In claims of large scale nationalization or big claims of expropriation, however both parties have discussed the applicable law issue and the Tribunal inevitably has been forced to examine these sources. In these cases, the Tribunal in its search for customary international law has examined settlement practice and the relevance of U.N. Resolutions, as well as international and arbitral awards. However the Tribunal has rejected the former two and has mainly relied on the international and arbitral awards.

In the *Sedco* case, when examining both settlement agreements and lumpsum agreements, between states the Tribunal stated that:

"both types of agreements can be so greatly inspired by non-judicial considerations - e.g. resumption of diplomatic or

trading relations - that it is extremely difficult to draw from them conclusions as to *opinio juris*, i.e. the determination that the content of such settlements was thought by the states involved to be required by international law".

The Tribunal added that:

"The International Court of Justice and international arbitral tribunals have cast serious doubts on the value of such settlements as evidence of custom".⁽⁵¹⁾

However, as Bowett points out "if all state practice had to be isolated from factors other than elements of law, there would be little evidence of state practice - in this or in any other field - which could be used as evidence of custom".⁽⁵²⁾

The Tribunal also declared that:

'United Nations General Assembly Resolutions are not directly binding upon states and generally are not evidence of customary law. Nevertheless, it is generally accepted that such resolutions in certain specified circumstances may be regarded as evidence of customary international law or can contribute - among other factors - to the creation of such laws'.⁽⁵³⁾

In addition, in examining the Resolution 1803, the Tribunal admitted that the Resolution (with its requirement of "appropriate compensation... in accordance with international law") is itself ambiguous and does not give an answer to any of the existing questions concerning the amount of compensation.⁽⁵⁴⁾ The Resolution, as the Tribunal pointed out, "has been argued, on the one hand, to express the traditional standard with different words and on the other hand to signify an erosion of this standard".⁽⁵⁵⁾ Accordingly, the formula of appropriate compensation as used in the Resolution 1803 is of an elusive nature. Nonetheless, the Tribunal admitted that the reference to "international law" suggested that the delegates who had adopted the Resolution intended no break with

prevailing customary international law.⁽⁵⁶⁾ Moreover, to the Tribunal the *travaux preparatoires* were a confirmation that the drafters had used the word 'appropriate' in the sense of adequate.⁽⁵⁷⁾

Accordingly, for the Tribunal the relevance of U.N. Resolutions to customary law has been regarded as rather limited. The Tribunal's awards have therefore been backed up by other authorities such as judicial and arbitral precedents; legal writings; and its own earlier awards. Thus in its awards the Tribunal has made references to classical cases, newer arbitral awards as well as to some ICSID and ICC arbitration awards. However the judgement of the P.C.I.J. in the *Chorzow Factory* case,⁽⁵⁸⁾ despite the fact that it is sixty years old, has been the most authoritative for the Tribunal in making decisions about the compensation due in expropriation and nationalization cases.

In the *Amoco* case, the Tribunal examined the judgement of the Permanent Court and confirmed that in an unlawful expropriation there is an obligation of reparation of all the damages incurred by the owner of the expropriated property. It further explained that in a case of unlawful expropriation the rules of international law relating to international responsibility of states will be applied. To the Tribunal these rules provide for *restitutio in integrum*, i.e. restitution in kind, or if that is impossible, its monetary equivalent. It continued by stating that "a lawful expropriation must give rise to the payment of fair compensation or of the just price of what was expropriated. Such an obligation is imposed by a specific rule of international law of expropriation".⁽⁵⁹⁾

9.5 THE TRIBUNAL AND THE STANDARD OF COMPENSATION

As we saw in Chapter 1 in 1982 as the Tribunal was getting underway, the traditional international law rules requiring full compensation in cases of expropriation and nationalization were being challenged. While many authorities could be cited for the view that full compensation remained the accepted standard of international law, other authorities, including the scholarly American Law Institute in its Restatement (Third)⁽⁶⁰⁾ and the important decision of federal appeals court of the U.S. Second Circuit in the *Cuba v Chase Manhattan Bank* case⁽⁶¹⁾, had acknowledged that a new contemporary standard might be in the making that would permit less than full compensation in some cases. On this key issue the awards of the Tribunal have ruled decisively in favour of the traditional full compensation standard. The only possible exception might be the decision of the Tribunal in the *Sola Tiles*⁽⁶²⁾ award. In this case the Tribunal preferred to use the term 'appropriate' rather than 'full' standard. Apart from this case every award of the Tribunal to address the issue has endorsed the full compensation standard.

In application of the "appropriate standard" the Tribunal however declared that "the debate that has divided the respective protagonists of terms such as 'prompt, adequate and effective', 'fair', 'just' or 'appropriate'. Compensation has been concluded at a theoretical level. An examination of the attempts of various tribunals to invest these terms with a concrete meaning reveals, however that the distance between rhetoric and reality is narrower than might at first appear".⁽⁶³⁾

Examining this decision of the Tribunal, Khan states "If the Tribunal's intention was to suggest - which it did not - that the

varying terminologies were elastic enough to offer it sufficient flexibility and discretion to subsume under each different component of compensation, there would not have been a great problem. Many component writers have supported a flexible standard of compensation, although the Hull formula of 'prompt, adequate and effective' compensation is supposed to militate against a flexible standard. The trouble with the Tribunal's formulation is that it considered that the sources identified obliged to apply the 'full compensation standard', regardless of the variations in terminology, and there, as it is said, hangs a tale".(64)

The Tribunal's reliance in *Sola Tiles* on the U.N. General Assembly Resolution 1803 and its dismissal of the debate over the terminology employed - 'appropriate', 'adequate', 'just', etc, as theoretical represents a slant towards the position of the capital-exporting states in general and the position of the United States in particular.(65) Thus generally speaking in expropriation and nationalization cases, the Tribunal has concluded that under customary international law the claimant must receive full compensation for its expropriated or nationalized interest.

It must be pointed out, however, that while in respect of expropriation cases the Tribunal has required full compensation, with regard to lawful nationalizations it has indicated that less than full compensation in some circumstances might be appropriate. Nevertheless it should be pointed out that according to the Tribunal, if any departure from the full compensation standard is going to happen, this should be limited and affect only compensation for *lucrum cessans*.(66)

However so far the practice of the Tribunal does not suggest that the Tribunal has applied a standard lower than full compensation. Nevertheless Lagergren's *obiter dictum* in the INA case suggested that something less than full compensation might be awarded when the taking involved large scale nationalization of a lawful character. However Lagergren's view in this regard, resulted in the lengthy separate opinion of Judge Holtzman (another arbitrator in the case) against that proposition.⁽⁶⁷⁾

In the *Amoco* partial award, the Tribunal applied the standard of full compensation, but further suggested that there may be an adjustment of damages for *lucrum cessans* where a case can be characterised as a part of nationalization programme, and concerns a lawful taking of property rights relevant to Iran's natural resources.⁽⁶⁸⁾ Accordingly, while the standard of full compensation in the Tribunal's decisions is clearly the main rule in international law, some exceptions to it do not appear totally excluded.

9.6 THE TREATY OF AMITY IN THE TRIBUNAL'S CASE LAW

In application of the full compensation standard in the awards of the Tribunal, the Treaty of Amity between Iran and the U.S. has also been a source of law. As there are many such treaties currently in force, this is another important feature of the Tribunal's practice in relation to the law governing compensation.

As we saw in the Chapter 6, the parties to the Treaty have made and are, still making extensive reference to the Treaty in their litigation before the Tribunal. American claimants constantly have contended that Iranian expropriations do not comply with obligations included in the Treaty. Iranian respondents on the other part, in

some cases, have argued that the Treaty has been terminated by implication as a result of economic and military sanctions imposed on Iran by the U.S. in late 1979 and 1980 and in some other cases they have denied the applicability of the Treaty as a result of the changes in the Iran-U.S. relations since the Iranian Revolution and signing of the Claims Settlement Declaration (CSD).

The Tribunal has consistently treated the Treaty as valid and by taking this position has preserved the investment protection rules contained in the Treaty.⁽⁶⁹⁾ As we saw in the pertinent Chapter, the Tribunal almost in all of its compensation awards has applied the provisions contained in the Treaty. Securing recognition by the Tribunal of the Treaty of Amity as a source of law between Iran and the U.S. was thus a significant achievement for the U.S.

With regard to the initial cases, i.e. *American International Group*;⁽⁷⁰⁾ *Sealand Services*;⁽⁷²⁾ and *Tippetts*,⁽⁷²⁾ the Tribunal referred to customary international law as the source of applicable standards. In application of customary international law to the above cases the Tribunal found that that source of law required full compensation for an expropriated property. However in the *INA*⁽⁷³⁾ case the Tribunal preferred to reach that same result by applying the Treaty of Amity.

In this case the Tribunal declared that:

"... for the purpose of this case we are in the presence of a *lex specialis*, in the form of the Treaty of Amity, which in principle prevails over general rules".⁽⁷⁴⁾

This obviously means that whatever the general rules might be on the law of nationalization, and whatever be the developments regarding the standard of compensation, the Tribunal was obliged to apply the

Treaty of Amity. In later cases too the Tribunal consistently applied the Treaty of Amity and its standard of 'just compensation'.

To sum up, the provisions of the Treaty have been considered as a firm ground for applying the full compensation standard for expropriation and nationalization cases. However this full compensation standard according to the Tribunal can be applied either via application of the Treaty of Amity or by reference to customary international law. This conclusion is consistent with the desire of investors to be protected firmly and, as the American arbitrator Brower points out, "under scores the strong support manifested today for the principle of full compensation".⁽⁷⁵⁾

9.7 THE TRIBUNAL'S INTERPRETATION OF 'FULL' COMPENSATION

The two parties of the cases before the Tribunal have interpreted the full compensation standard differently. As we saw in Chapter 7 American claimants have argued that full compensation means full value, or going-concern value, or market value of the property taken, plus the value of lost profits.⁽⁷⁶⁾ However, with regard to the cases involving an international economic agreement or state contract (as in the *Amoco* and *Phillips Petroleum* cases) the American claimants argued that these types of case belong to a special category of "international contracts". By distinguishing international contracts from other existing contracts the claimant tried to make out a case for a higher full value than for other contracts.⁽⁷⁷⁾

In contrast, nationalizing and expropriation cases before the Tribunal, Iran has argued for the requirement of market value. Iran has argued that the fair market value of the nationalized assets is best represented by the net book value. Moreover, in the *Amoco* case,

Iran argued that the net book value standard was in conformity with the doctrine of unjust enrichment, state practice in the oil industry and legitimate expectation of the parties.⁽⁷⁸⁾

However the Tribunal rejected these arguments. With regard to the principle of unjust enrichment the Tribunal dismissed this theory on the ground that the concept was used "as a *ratio legis* of the applicable rule rather than as the rule itself".⁽⁷⁹⁾ And with regard to the state practice in the oil industry the Tribunal in the *Phillips Petroleum* case noted that "such settlements do not constitute an *opinio juris*".⁽⁸⁰⁾

In respect of the concept of the legitimate expectation of the parties, while in the *Amoco* case the Tribunal recognized that legitimate expectations was a concept that was central to the *Aminoil* award, it rejected its application to the *Amoco*, on the ground that "the high level of returns obtained on the investment in the first years of the *Khemco* Agreement would normally have given birth to expectations of substantial revenues for the following years and accordingly, of a higher level of compensation in cases of expropriation".⁽⁸¹⁾ The Tribunal was not convinced that these expectations were limited to the net book value of the undertakings. As a result, it ruled that the correct method of valuing of the expropriated undertaking was "the full value of the asset taken" or "the full equivalent of the property".⁽⁸²⁾

9.8 THE TRIBUNAL AND THE PRINCIPLES OF VALUATION

While the case law of the Tribunal has affirmed that international law requires the payment of full compensation, the actual amount due may depend not only on the general standard adopted but also on the

more particular methods concerning the valuation of the property. Thus the acceptance of full compensation as the applicable standard does not necessarily determine the amount of the compensation save by indicating certain lower and upper limits.

As we saw in Chapter 8, in the awards in which land and tangible assets were valued, the Tribunal has generally accepted the methods proposed by the claimants, but examined the claimants' evidence and arguments closely when fixing the actual amounts of the properties involved. In the *Sedco* case⁽⁸³⁾ in which land, and buildings as well as oil drilling rigs were involved, the Tribunal accepted the methods used by the claimants but adjusted the amounts downwards on the basis of what the Tribunal deemed reasonable. In the *Computer Sciences Corporation*⁽⁸⁴⁾ case the Tribunal awarded net book value of office equipment and furniture as had been requested by the claimant, but in *Dames and Moore*⁽⁸⁵⁾ in which the claimant had requested US \$354,924 as the actual purchase price of vehicles and office equipment, the Tribunal awarded an estimated value of US \$100,000, in the absence of evidence of the relationship between the purchase price and the value on the date the assets were expropriated.

In the nationalization cases and several of the cases involving separate expropriations of business enterprises, the Tribunal has generally ruled that the full compensation standard required a determination of the fair market value of the business involved, viewed as going concerns, including determinable future profits. However a variety of valuation methods have been used, and the amounts awarded have in most cases been substantially below the amounts claimed.

As the full value means the fair market value, i.e. "the amount which a willing buyer would have paid a willing seller", in a free and effective market, the matter is relatively straightforward. However in the absence of a market the valuation is problematic, especially where the property taken is an income producing asset. Under these circumstances the full compensation (in the sense of the closest equivalent to the actual market value), has to be computed on the basis of going concern approach.

There are several ways of establishing the going concern value, and, as we have seen, the practice of the Tribunal provides some good illustrations of the different methods. In the *American International Group*⁽⁸⁶⁾ case the award indicated that full compensation in this case meant fair market value of the claimant's share interests in the enterprise as a going concern, including goodwill and likely future profitability, that any effects of the nationalization or subsequent events should not be considered in arriving at value, but that the impact of changes in the political, economic and social conditions as a result of events which took place prior to the nationalization should be included in measuring that value. The method of valuation used by the Tribunal was that of "approximation" based on evidence produced by the parties.

In the *Phillips Petroleum Company of Iran* case, the claimant had presented its claim based on the discounted cash flow (DCF) method, while the respondent had argued in favour of the net book value as the amount of compensation. The Tribunal declared that it was necessary to resort to various analytical methods to construct the market value of the property and employed the underlying asset valuation method. The Tribunal disagreed with several factors used

in the claimant's DCF calculation. Finally, it awarded the claimant about 32 per cent of what had been claimed on the basis of the DCF method, after itself reducing the figure reached on its own calculations based on the method of valuation preferred by it.⁽⁸⁷⁾ It is notable in this case that the claimant had requested for U.S. \$159,19,000, using the DCF method of valuation, but the Tribunal awarded only U.S. \$55 million, based on its own underlying asset valuation method.

In the case of ongoing business enterprises it will be recalled that the approach taken by the Tribunal has been different. In the *Starrett Housing Corporation*⁽⁸⁸⁾ case, the Tribunal found that the DCF method had been highly emphasised by the expert to whom the matter had been referred by the Tribunal in circumstances in which the respondent did not object to the use of the method. This case is the only case that the use of DCF method was totally accepted as a means of establishing the market value even though the claim had drastically been reduced.

In the *Phelps Dodge Corporation*⁽⁸⁹⁾ and in the *SolaTiles*⁽⁹⁰⁾ cases, involving the expropriation of on-going business enterprises, the Tribunal rejected going concern value as the measure of compensation on the grounds that the businesses in those cases were not going concerns on the day they were expropriated. This meant that no value would be assigned to goodwill or future profitability. However, in the *Starret*, *American International Group* and *Phillips Petroleum* cases lost future profits were awarded. Nevertheless the ultimate amounts awarded in the cases were substantially below what the claimants had argued for.

One factor cited in some of these cases for the lower amounts awarded was the impact of the Islamic Revolution on the businesses concerned. Similarly, in the more recent *CBS Inc.*⁽⁹¹⁾ case the Tribunal found that because of the effects of the revolution upon the nature of the business which had been expropriated the business had a negative net worth at the time of the taking. A valuation based on the past net profits or on an estimate of profits which induced the investment was therefore rejected and no compensation was awarded.

As we saw in Chapter 1, it was laid down in the *Lighthouses*⁽⁹²⁾ arbitration that when assessing going concern value of expropriated business enterprises, calculations of future profits should be made as of the date of the taking without consideration of subsequent events. It is therefore very significant that several Tribunal awards have now shown that this does not mean that the post-taking effects or pre-taking events may never be taken into account. Thus as Westberg points out, "the Tribunal awards have provided an important clarification to the traditional rule that expropriated property should be valued as of the date of the expropriation, making clear that in circumstances where the takings follow as the result of a revolution, the post-taking impact of changes affected by the revolution may be taken into account".⁽⁹³⁾

Accordingly it can be concluded that while the Tribunal's case law has given support for the continuing existence of the full compensation standard, at the same time it demonstrates that the application of this standard is not wholly unconditional. The standard rather has been applied with certain flexibility and so as to take account of developments such as the principle of every state's permanent sovereignty over natural resources and economic

activities in its territory. This is shown not only in the rather general rejection of *restitutio in integrum* as a proper remedy in the context of taking, but also by the acceptance of the principle that general changes caused by a revolution or other socio-economic changes, although attributable to the respondent government, should be reflected according to their actual impact in the going concern valuation of the expropriated or nationalized property.

This has caused that Pellonpää and Fitzmaurice to conclude that:

"the Tribunal practice cannot be said to support any rigid 'acquired rights' theory as the doctrinal foundation of the duty to pay compensation. This practice, while it recognizes the principle of the foreign owner's right to full compensation, at the same time respects the state's economic sovereignty in that it has put beyond any doubt the state's power to formulate its economy policy without having to pay compensation for such diminution of the market value as it is brought about by changes in the socio-economic orientation of the state".⁽⁹⁴⁾

Affirmation of full compensation standard may be explained by the increasingly widespread recognition that such a standard fosters foreign investment vital to economic development. Thus is a separate opinion in the *INA* case, Judge Holtzman stated "in an economically interdependent world the law should encourage investment, not discourage it by increasing the risk".⁽⁹⁵⁾ Likewise, in the *Aminoil* award the Tribunal declared that "Compensation... must be calculated on a basis such as to warrant the upkeep [sic] of a flow of investment in the future".⁽⁹⁶⁾ This is a recognition by the Tribunal of the role of policy in this part of international law. Today investors are widely accepted as critical to the economic development of Third World states. For as Norton points out "Foreign investors are far more likely to invest in such states if they believe their assets can be taken only with the payment of compensation".⁽⁹⁷⁾

9.9 A FINAL ASSESSMENT

It is notable that many Third World states have entered into bilateral treaties specifically requiring the payment of full compensation. By 1989, over three hundred of these treaties have been concluded. The signatories of these treaties included all of the world's principal capital-exporting states and approximately eighty developing nations.⁽⁹⁸⁾ Thus, the decisions of the Tribunal have been given against a background of the increasing recognition of the need for foreign investment in the Third World countries. As we have seen throughout this study, the Tribunal has added vastly to the body of international law, having dealt with such issues as the conditions of a nation's right to expropriate the foreign owned property; what actions may amount to an expropriations; what constitutes a stabilization clause; the issue of foreign exchange control, the issue of applicability of the Treaty of Amity; and finally the important issue of compensation for an expropriation and the valuation of an expropriated or nationalized property.

As the countries of the developing world continue their struggle for increased economic and political independence, there can be no question that many issues faced by the Tribunal will be revisited and the Tribunal's exposition of the relevant legal norms will be invoked time and again.⁽⁹⁹⁾ It may, of course, be argued that the existence of dissenting opinions may demonstrate that the Tribunal has not reached the proper result in all cases,⁽¹⁰⁰⁾ either between the parties or as a matter of international law. Nevertheless, it can, we suggest, be concluded that the Tribunal has been "a remarkable institution that successfully met the substantial challenges it faced

and managed both to apply and to advance principles of international law, in the context of arbitration". (101)

NOTES TO CHAPTER 9

1. See C.N. Brower and M.D. David, "The Iran-U.S. Claims Tribunal After Seven Years: A respective view from Inside", the Arb. Journal, Vol.93, No.4, 1988, p.19.
2. Ibid.
3. See in 1 Iran-U.S. C. Trib. Reports, 1981-82, p.3, see also in 20 I.L.M., 1981, p.223.
4. Ibid. Crook points out that the phrase that "the Tribunal shall decide all cases on the basis of respect for law" was intended to "curb the perceived supposition of 19th Century arbitrators to decide interstate disputes on non-legal grounds". See J.R. Crook, "Applicable Law in International Arbitration: the Iran-U.S. Claims Tribunal Experience", in 83 Am. J. Int'l Law, 1989, p.280.
5. See T.L. Stein, "Decisions of the Iran-United States Claims Tribunal", 24 Virg. J. International Law, 1984, p.227.
6. See D.R. Robinson, "Recent Developments at the Iran-United States Claims Tribunal", Vol.20, Int'l Lawyer, 1985, p.661.
7. See Case No.157, *Nasser Esphanian v Bank Tejarat*, in 2 Iran-U.S. Claims Tribunal Reports, 1983, p.165.
8. See J.A. Westberg, *International Transactions and Claims Involving Government Parties - Case Law of the Iran-United States Claims Tribunal*, 1991, p.5.
9. See H. Lauterpacht, *Aspects of Administration of International Justice*, 1991, p.70.
10. See G. Lagergren, "Iran-U.S. Claims Tribunal", in *Realism in Law Making: Essays on International Law*, (ed.), In honour of Willem Riphagen (A. Bos and H. Sibiliszi), 1986, p.115.
11. See R. Khan, *The Iran-United States Claims Tribunal, Controversies, Cases and Contribution*, 1990, p.79.
12. See J.G. Merrills, *International Dispute Settlement*, 1991, p.106.
13. See P. Bellett, "Symposium on the Iran-United States Claims Tribunal", (Foreword), 16 L & R Policy in International Business, 1984, p.670.
14. See in D. Stewart and L. Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, 24 Va. J. International Law, 1983, p.6.
15. See Robinson, op cit, p.661.
16. See R. Lillich (ed.), *Iran-United States Claims Tribunal, 1981-1983*, (1984), p.1.

17. See D.D. Caron, "The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution", in 84 A.J. Int'l. Law, 1990, p.106.
18. See C.D. Gray, *Judicial Remedies in International Law*, 1987, p.185.
19. See C.F. Amerasinghe, "Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice" in 41 I.C.L.Q., 1992, p.42.
20. See Crook, op cit, p.298.
21. See *Oil Field of Texas Inc. v Iran*, in 11 Iran-U.S. C. Trib. Reports, 1986, pp.348, 361.
22. See M. Pellonpää, "International Law and Compensation for the Taking of Alien Owned Property: Recent Trends in Arbitral Practice", 3, *Kansainoikeus, Ius Gentium*, 1986, pp.335,363.
23. See *Amoco International Finance Corporation v Iran*, partial award, in 15 Iran-U.S. C. Trib. Reports, 1987, p.233.
24. See M. Pellonpää and M. Fitzmaurice, "Taking of Property in the Practice of the Iran-U.S. Claims Tribunal", 19 N.Y.B., Int'l Law, 1988, p.62.
25. See *Amoco International Finance Corporation case*, op cit, para.179, p.243.
26. Ibid. See also *Mobil Oil Iran Inc. and Mobil Sales and Supply Corporation v Iran*, in 16 Iran-U.S. C. Trib. Reports, 1987, p.3.
27. See *Tippetts, Abbett, McCarthy, Stratton v Iran*, in 6 Iran-U.S. C. Trib. Reports, 1984, p.226.
28. Ibid.
29. See the *Starrett Housing Corporation v Iran*, in 16 Iran-U.S. C. Trib. Reports, 1987, p.156.
30. See *Tippetts case*, op cit, p.225.
31. See C.N. Brower, "Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards in the Iran-U.S. Claims Tribunal", in 21 Int'l Lawyer, 1987, p.643.
32. Ibid, p.644.
33. See M. McDougal & Associates, *Studies in World Public Order*, 1960, p.987. See also H. Weston, "Constructive Taking Takings' Under International Law: A modest foray into the problem of 'Creeping Expropriations'", in 16 Va. J. Int'l Law, 1975, p.102 at 122.

34. See S.R. Swanson, "Iran-U.S. Claims Tribunal: A Policy Analysis of the Expropriation Cases", 18 Case W. Res. J. Int'l Law, 1986, p.357.
35. Ibid, p.358.
36. See *International Technical Products Corp. v Iran* in 9 Iran-U.S. C. Trib. Reports, p.240.
37. See in 4 Iran-U.S. C. Trib. Reports, 1983, p.154.
38. Ibid, p.156.
39. Ibid.
40. See Khan, op cit, p.179.
41. Ibid.
42. Ibid, p.189.
43. See *Mobil Oil Iran v Iran*, 16 Iran-U.S. C. Trib. Reports, 1987, pp.5, 54, 73.
44. *Houston Contracting Company v Iran*, 20 Iran-U.S. C. Trib. Reports, 1988, pp.4, 129, 149.
45. *Motorola Inc. v Iran*, 19 Iran-U.S. C. Trib. Reports, 1987, p.73.
46. Ibid, p.87.
47. See the *Starrett* case, op cit, p.149.
48. Iran has not denied the very principle of compensation in any of the cases before the Tribunal. It is notable that all the Iranian Nationalization and Expropriation Acts promise 'appropriate compensation'. However, while the Americans relying on the traditional standard of the Hull formula, have been insisting on the principle of full compensation, the Iranian side, relying on the U.N. Resolutions, have been insisting on a partial compensation standard.
49. See F. Francioni, 'Compensation for Nationalization of Foreign Property: The Borderland Between Law and Equity', I.C.L.Q., Vol.24, 1975, 255-283, L. Rood, Compensation for Takeovers in Africa, 11, J.Int'l Law and Economics, 1977, p.521-538, D. Gantz, 'The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property', 71, Am. J. Int'l Law, 1977, pp.474-493, M. Sornarajah, 'Compensation for Expropriation: The Emergence of New Standards', 13, J.W.T. Law, 1979, 103-131, F. Garcia-Amador, 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation', 12, Lawyer of the Americas, 1980, pp.1-58, and S.K.S. Asante, "International Law and Foreign Investment: A Reappraisal", 37 I.C.L.Q., 1988, pp.589-602.

50. See e.g. *Dames & Moore v Iran*, 4 Iran-U.S. C. Trib. Reports, 1983, pp.212, 223-224; *William L. Pereira Assocs., Iran v Iran*, 5 Iran-U.S. C. Trib. Reports, 1984, pp.226-227; *Computer Sciences Corp. v Iran*, op cit, at 44, these awards are properly characterized as granting full value, even though they may be stated as based on net book value.
51. See Interlocutory Award No. ITL. 59-129-3, in 10 Iran-U.S. C. Trib. Reports, 1986, p.185. Here the Tribunal relied on the decision of the I.C.J. in *Barcelona Traction case (Belgium v Spain and the Arbitral Award in the case of Kuwait v American Independent Oil Company (Aminoil))*. For the former see I.C.J. Report, 1970, p.3 at 40 (Judgement of 5 February 1970, and for the Arbitral Award, see 21 I.L.M., 973, 1036, 1982.
52. See D.W. Bowett, "State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach", LVIX, B.Y.B. Int'l Law, 1988, p.60.
53. See *Sedco case*, op cit, p.186.
54. Ibid, p.187-8.
55. Ibid.
56. See *SolaTiles case* number 317 in 14 Iran-U.S. C. Trib. Reports, p.235.
57. Ibid.
58. See *Chorzow Factory case*, (Germany v Poland), P.C.I.J., Series A, No.17, (Judgement of 13 September 1928).
59. See *Amoco case*, op cit, p.247.
60. See Restatement of the Law (Third): the Foreign Relations Law of the U.S., (1987).
61. See 658 F. 2d 875 (2d Cir. 1981).
62. See *SolaTiles*, op cit, p.235.
63. Ibid.
64. See *Khan*, op cit, p.252.
65. Ibid.
66. See *Amoco case* op cit, p.189.
67. See *INA case* in 8 Iran-U.S. C. Trib. Reports, 1985, p.378.
68. See Partial Award in the *Amoco case*, op cit.
69. See *Phelps Dodge Corp. v the Government of the Islamic Republic of Iran*, in 10 Iran-U.S. C. Trib. Reports, 1986, p.131-32 in this case the Tribunal stated that "... whether or not the treaty still is in force today, it is a relevant source of law

on which the Tribunal is justified in drawing in reaching its decision".

70. See in 4 Iran-U.S. C. Trib. Reports, 1983, p.96, 102.
71. See in 6 Iran-U.S. C. Trib. Reports, 1984, p.149.
72. See in 6, Ibid, pp.219,225.
73. See in 8, Ibid, 1985, p.373.
74. Ibid, p.378.
75. See Brower, op cit, p.662.
76. See Department of State, Application of the Treaty of Amity to Expropriation in Iran, reprinted in 129 Cong. Rec., S16055 (daily ed. No.14, 1983). See also, *American International Group* op cit, p.96, *INA Corp*, op cit, p.373 and *Thomas Earl Payne* case, in 12 Iran-U.S. C. Trib. Reports, 1986, p.3.
77. See *Amoco International Finance Corp* case, in 15 Iran-U.S. C. Trib. Reports, op cit, p.189. See also Y. Elwan, *The Legal Regime for the Exploitation of Petroleum in the Arab Countries, Kuwait*, 1982, and A.Z. El Chiaty, "Protection of Investment in the Context of Petroleum Agreements", *Recueil De Cours*, 1987, IV, p.26.
78. See *Amoco* case op cit, p.244. See also *Phillips Petroleum Co.* case in 21 Iran-U.S. C. Trib. Reports, 1989, p.121.
79. See *Amoco* case, op cit, p.268.
80. See *Phillips Petroleum Co.* case, op cit, p.121.
81. See *Amoco* case, op cit, p.266.
82. Ibid.
83. See *Sedco Inc. v National Iranian Oil Company and the Government of the Islamic Republic of Iran*, 15 Iran-U.S. C. Trib. Reports, 1987, p.23.
84. See in 5 Iran-U.S. C. Trib. Reports, op cit, p.269.
85. See in 4 Iran-U.S. C. Trib. Reports, op cit, p.212.
86. See in 4 Iran-U.S. C. Trib. Reports, p.122.
87. See *Phillips Petroleum Co.* case, op cit, p.79.
88. See *Starrett* case op cit, p.314.
89. See in 10 Iran-U.S. C. Trib. Reports, op cit, p.132-133.
90. See in 14 Iran-U.S. C. Trib. Reports, op cit, p.223.

91. See *C.B.S. Inc. v Iran*, in 25 Iran-U.S. C. Trib. Reports, 1990, p.131, 151.
92. See *Lighthouses* arbitration, in 23 I.L.R., p.299.
93. See J. Westberg, *International Transactions and Claims Involving Government Parties - Case Law of the Iran-United States Claims Tribunal*, 1991, op cit, p.249.
94. See M. Pellonpää and M. Fitzmaurice, "Taking of Property" op cit, p.175.
95. See *INA* case, op cit, p.373.
96. See *Aminoil* case, 66 I.L.R., p.603.
97. See P.M. Norton, "A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation". 85 Am. J. Int'l Law, 1991, p.497.
98. See J.W. Saldcuse, "BIT by BIT: the Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries", 24 Int'l Lawyer, 1990, p.655. See also E. Pappas, "References on Bilateral Investment Treaties", 4 ICSID Rev-Foreign Investment L. Journal, 1989, pp.189, 194-203.
99. See C.N. Brower and M.D. David, "The Iran-U.S. Claims Tribunal After Seven Years: A Retrospective View from the Inside", 43 Arb. Journal, 1988, p.30.
100. The Iranian dissents to the majority opinions reject many of the traditional judicial and arbitral precedents as archaic and cite the recent General Assembly Resolutions and favourable commentaries on them as evidence of a new international standard. See e.g. the Dissenting Opinion of Judge Ameli in the *INA* case, op cit, p.433. See also statement by Judge Khalilian as to why it would have been premature to sign the award in *Phillips Petroleum Corp.* case op cit, p.279.
101. See Brower and Davis, op cit, p.31.

APPENDICES

APPENDIX I

General Declaration

1. DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR
REPUBLIC OF ALGERIA.
(General Declaration), 19 January 1981

The Government of the Democratic and Popular Republic of Algeria, having been requested by the Governments of the Islamic Republic of Iran and the United States of America to serve as an intermediary in seeking a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran, has consulted extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis within the framework of the four points stated in the Resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran. On the basis of formal adherences received from Iran and the United States, the Government of Algeria now declares that the following interdependent commitments have been made by the two governments:

GENERAL PRINCIPLES

The undertakings reflecting in this Declaration are based on the following general principles:

A. Within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9.

B. It is the purpose of both parties, within the framework of an pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

POINT I: NON-INTERVENTION IN IRANIAN AFFAIRS

1. The United States pledges that it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs.

POINT II AND III: RETURN OF IRANIAN ASSETS AND SETTLEMENT OF U.S. CLAIMS

2. Iran and the United States (hereinafter "the parties") will immediately select a mutually agreeable Central Bank (hereinafter "The Central Bank") to act, under the instructions of the Government of Algeria and the Central Bank of Algeria (hereinafter "the Algerian Central Bank") as depositary of the escrow and security funds hereinafter prescribed and will promptly enter into depositary arrangements with the Central Bank in accordance with the terms of this Declaration. All funds placed in escrow with the Central Bank pursuant to this Declaration shall be held in an account in the name of the Algerian Central Bank. Certain procedures for implementing the obligations set forth in this Declaration and in the Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran (hereinafter "the Claims Settlement Agreement") are separately set forth in certain Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Democratic and Popular Republic of Algeria.

3. The depositary arrangements shall provide that, in the event that the Government of Algeria certifies to the Algerian Central Bank that the 52 U.S. nationals have safely departed from Iran, the Algerian Central Bank will thereupon instruct the Central Bank to transfer immediately all monies or other assets in escrow with the Central Bank pursuant to this Declaration, provided that at any time prior to the making of such certification by the Government of Algeria, each of the two parties, Iran and the United States, shall have the right on seventy-two hours notice to terminate its commitments under this Declaration. If such notice is given by the United States and the foregoing certification is made by the Government of Algeria within the seventy-two hour period of notice, the Algerian Central Bank will thereupon instruct the Central Bank to transfer such monies and assets. If the 72 hour period of notice by the United States expires without such a certification having been made, or if the notice of termination is delivered by Iran, the Algerian Central Bank will thereupon instruct the Central Bank to return all such moneys and assets to the United States, and thereafter the commitments reflected in this Declaration shall be of no further force and effect.

Assets in the Federal Reserve Bank

4. Commencing upon completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank of all gold bullion which is owned by Iran and which is in the custody of the Federal Reserve Bank of New York, together with all other Iranian assets (or the cash equivalent thereof) in the custody of the Federal Reserve Bank of New York, to

be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3 above.

Assets in Foreign Branches of U.S. Banks

5. Commencing upon the completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank, to the account of the Algerian Central Bank, of all Iranian deposits and securities which on or after November 14, 1979, stood upon the books of overseas banking offices of U.S. banks, together with interest thereon through December 31, 1980, to be held by the Central Bank, to the account of the Algerian Central Bank, in escrow until such time as their transfer or return is required in accordance with Paragraph 3 of this Declaration.

Assets in U.S. Branches of U.S. Banks

6. Commencing with the adherence by Iran and the United States to this Declaration and the Claims Settlement Agreement attached hereto, and following the conclusion of arrangements with the Central Bank for the establishment of the interest-bearing Security Account specified in that Agreement and Paragraph 7 below, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank, within six months from such date, of all Iranian deposits and securities in U.S. banking institutions in the United States, together with interest thereon, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3.

7. As funds are received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing Security Account in the Central Bank, until the balance in the Security Account has reached the level of U.S. \$1 billion. After the U.S. \$1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the Security Account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement. Whenever the Central Bank shall thereafter notify Iran that the balance in the Security Account has fallen below U.S. \$500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of U.S. \$500 million in the Account. The Account shall be so maintained until the President of the arbitral tribunal established pursuant to the Claims Settlement Agreement has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied in accordance with the Claims Settlement Agreement, at which point any amount remaining in the Security Account shall be transferred to Iran.

Other Assets in the U.S. and Abroad

8. Commencing with the adherence of Iran and the United States to this Declaration and the attached Claims Settlement Agreement and the conclusion of arrangements for the establishment of the Security Account, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank of all Iranian financial assets (meaning funds or securities) which are located in the United States and abroad, apart from those assets referred to in Paragraphs 5 and 6 above, to be held by the Central Bank in escrow until their transfer or return is required by Paragraph 3 above.

9. Commencing with the adherence by Iran and the United States to this Declaration and the attached Claims Settlement Agreement and the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran or all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.

Nullification of Sanctions and Claims

10. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will revoke all trade sanctions which were directed against Iran in the period November 4, 1979, to date.

11. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this Declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to the United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979 and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence.

POINT IV: RETURN OF THE ASSETS OF THE FAMILY OF THE FORMER SHAH

12. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will freeze, and prohibit any transfer of, property and assets in the United States within the control of the estate of the former Shah or any close relative of the former Shah served as a defendant in U.S. litigation brought about by Iran to recover such property and assets as

belonging to Iran. As to any such defendant, including the estate of the former Shah, the freeze order will remain in effect until such litigation is finally terminated. Violation of the freeze order shall be subject to the civil and criminal penalties prescribed by U.S. law.

13. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will order all persons within U.S. jurisdiction to report to the U.S. Treasury within 30 days, for transmission to Iran, all information known to them, as of November 3, 1979, and as of the date of the order, with respect to the property and assets referred to in Paragraph 12. Violation of the requirements will be subject to civil and criminal penalties prescribed by U.S. law.

14. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will make known, to all appropriate U.S. courts, that in any litigation of the kind described in Paragraph 12 above the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine and that Iranian decrees and judgments relating to such assets should be enforced by such courts in accordance with United States law.

15. As to any judgment of a U.S. court which calls for the transfer of any property or assets to Iran, the United States hereby guarantees the enforcement of the final judgment to the extent that the property or assets exist within the United States.

16. If any dispute arises between the parties as to whether the United States has fulfilled any obligation imposed upon it by Paragraphs 12-15, inclusive, Iran may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the Claims Settlement Agreement. If the tribunal determines that Iran has suffered a loss as a result of a failure by the United States to fulfill such obligation, it shall make an appropriate award in favor of Iran which may be enforced by Iran in the courts of any nation in accordance with its laws.

SETTLEMENT OF DISPUTES

17. If any other dispute arises between the parties as to the interpretation or performance of any provision of this Declaration, either party may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the Claims Settlement Agreement. Any decision of the tribunal with respect to such dispute, including any award of damages to compensate for a loss resulting from a breach of this Declaration or the Claims Settlement Agreement, may be enforced by the prevailing party in the courts of any national in accordance with its laws.

Initialed on January 19, 1981
by Warren M. Christopher
Deputy Secretary of State of the Government of the United States

By virtue of the powers vested in him by his Government as deposited with the Government of Algeria.

APPENDIX II

Claims Settlement Declaration

2. DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA CONCERNING THE SETTLEMENT 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 (Claims Settlement Declaration), 19 January 1981

The Government of the Democratic and Popular Republic of Algeria, on the basis of formal notice of adherence received from the Government of the Islamic Republic of Iran and the Government of the United States of America, now declares that Iran and the United States have agreed as follows:

Article I

Iran and the United States will promote the settlement of the claims described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this Agreement shall be submitted to binding third-party arbitration in accordance with the terms of this Agreement. The aforementioned six months' period may be extended once by three months at the request of either party.

Article II

1. An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counter-claims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position.

2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purpose and sale of goods and services.

3. The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that Declaration.

Article III

1. The Tribunal shall consist of nine members of such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously. Within ninety days after the entry into force of this Agreement, each government shall appoint one-third of the members. Within thirty days after their appointment, the members so appointed shall by mutual agreement select the remaining third of the members and appoint one of the remaining third President of the Tribunal. Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the President shall determine. Each such panel shall be composed by the President and shall consist of one member appointed by each of the three methods set forth above.

2. Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out. The UNCITRAL rules for appointing members of three-member tribunals shall apply *mutatis mutandis* to the appointment of the Tribunal.

3. Claims of nationals of the United States and Iran that are within the scope of this Agreement shall be presented to the Tribunal either by claimants themselves or, in the case of claims of less than \$250,000, by the government of such national.

4. No claim may be filed with the Tribunal more than one year after the entry into force of this Agreement or six months after the date the President is appointed, whichever is later. These deadlines do not apply to the procedures contemplated by Paragraphs 16 and 17 of the Declaration of the Government of Algeria of January 19, 1981.

Article IV

1. All decisions and awards of the Tribunal shall be final and binding.

2. The President of the Tribunal shall certify, as prescribed in Paragraph 7 of the Declaration of the Government of Algeria of January 19, 1981, when all arbitral awards under this Agreement have been satisfied.

3. Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any national in accordance with its laws.

Article V

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

Article VI

1. The seat of the Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States.
2. Each government shall designate an Agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal.
3. The expenses of the Tribunal shall be borne equally by the two governments.
4. Any question concerning the interpretation or application of this Agreement shall be decided by the Tribunal upon the request of either Iran or the United States.

Article VII

For the purpose of this Agreement:

1. A "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.
2. "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement. Claims referred to the arbitration Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.

3. "Iran" means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

4. The "United States" means the Government of the United States, any political subdivision of the United States, and any agency, instrumentality or entity controlled by the Government of the United States or any political subdivision thereof.

Article VIII

This Agreement shall enter into force when the Government of Algeria has received from both Iran and the United States a notification of adherence to the Agreement.

Initialed on January 19, 1981

by Warren M. Christopher

Deputy Secretary of State of the Government of the United States

By virtue of the powers vested in him by his Government as deposited with the Government of Algeria.

APPENDIX III

UNDERTAKINGS

3. UNDERTAKINGS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN WITH RESPECT TO THE DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA, 19 January 1981

1. At such time as the Algerian Central Bank notifies the Governments of Algeria, Iran, and the United States that it has been notified by the Central Bank that the Central Bank has received for deposit in dollar, gold bullion, and securities accounts in the name of the Algerian Central Bank, as escrow agent, cash and other funds, 1,632,917.779 ounces of gold (valued by the parties for this purpose at U.S.\$0.9397 billion), and securities (at face value) in the aggregate amount of U.S.\$7.955 billion, Iran shall immediately bring about the safe departure of the 52 U.S. nationals detained in Iran. Upon the making by the Government of Algeria of the certification described in Paragraph 3 of the Declaration, the Algerian Central Bank will issue the instructions required by the following paragraphs.

2. Iran having affirmed its intention to pay all its debts and those of its controlled institutions, the Algerian Central Bank acting pursuant to Paragraph 1 above will issue the following instructions to the Central Bank.

(A) To transfer U.S.\$3.667 billion to the Federal Reserve Bank of New York to pay the unpaid principal of and interest through December 31, 1980 on (1) all loans and credits made by a syndicate of banking institutions, of which a U.S. banking institution is a member, to the Government of Iran, its agencies, instrumentalities or controlled entities, and (2) all loans and credits made by such a syndicate which are guaranteed by the Government of Iran or any of its agencies instrumentalities or controlled entities.

(B) To regain U.S.\$1.418 billion in the Escrow Account for the purpose of paying the unpaid principal of and interest owing, if any, on the loans and credits referred to in Paragraph (A) after application of the U.S.\$3.667 billion and on all other indebtedness held by United States banking institutions of, or guaranteed by, the Government of Iran, its agencies, instrumentalities or controlled entities not previously paid, and for the purpose of paying disputed amounts of deposits, assets, and interest, if any, owing on Iranian deposits in U.S. banking institutions. Bank Markazi and the appropriate United States banking institutions shall promptly meet in an effort to agree upon the amounts owing. In the event of such agreement, the Bank Markazi and the appropriate banking institution shall certify the amount owing to the Central Bank of Algeria which shall instruct the Bank of England to credit such amount to the account, as appropriate, of the Bank Markazi or of the Federal Reserve Bank of New York in order to permit payment to the

appropriate banking institution. In the event that within 30 days any U.S. banking institution and the Bank Markazi are unable to agree upon the amounts owed, either party may refer such dispute to binding arbitration by such international arbitration panel as the parties may agree, or failing such agreement within 30 additional days after such reference, by the Iran-United States Claims Tribunal. The presiding officer of such panel or tribunal shall certify to the Central Bank of Algeria the amount, if any, determined by it to be owed, whereupon the Central Bank of Algeria shall instruct the Bank of England to credit such amount to the account of the Bank Markazi or of the Federal Reserve Bank of New York in order to permit payment to the appropriate banking institution. After all disputes are resolved either by agreement or by arbitration award and appropriate payment has been made, the balance of the funds referred to in this Paragraph (B) shall be paid to Bank Markazi.

(C) To transfer immediately to, or upon the order of, the Bank Markazi all assets in the Escrow Account in excess of the amounts referred to in Paragraphs (A) and (B).

Initialed on January 19, 1981

by Warren M. Christopher

Deputy Secretary of State of the Government of the United States

By virtue of the powers vested in him by his Government as deposited with the Government of Algeria.

THE DEPUTY SECRETARY OF STATE
WASHINGTON

Algiers, January 19th, 1981

Dear Mr. Minister,

You have drawn my attention to the omission of the words "not less than" before the figure of U.S.\$7.955 in the Declaration of the Government of Algeria designated: "Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria".

I agree and authorize you on behalf of the United States to issue this correction.

Sincerely yours,

(Sgd.) Warren M. Christopher

Mr. M. Benyahia

Minister of Foreign Affairs

of the Government of the Democratic and Popular Republic of Algeria

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