IRAN-UNITED STATES CLAIMS TRIBUNAL

ایالات متحده -

24-146
۲۴-۱۴۶

ORIGINAL DOCUMENTS IN SAFE

Case No. 24 Date of filing: 20Dec83

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

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

** CONCURRING OPINION of Mr. H. M. Holtzman
- Date 20Dec83
47 pages in English _____ pages in Farsi

** SEPARATE OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

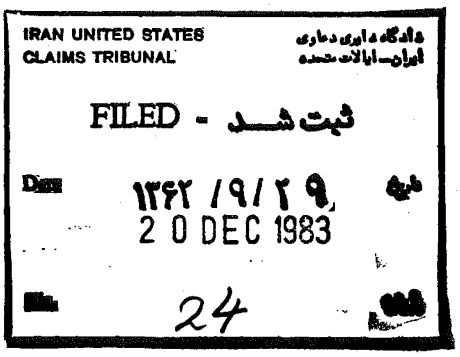
** DISSENTING OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____
_____
- Date _____
_____ pages in English _____ pages in Farsi

R/12

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده




24-146
۲٤-۱٤۶

CHAMBER ONE

CASE NO. 24

NO. ITL 32-24-1


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

Claimant,

and

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

Respondents.

CONCURRING OPINION OF HOWARD M. HOLTZMANN

## I. INTRODUCTION

I concur with reluctance in the Interlocutory Award in this case. I do so in order to form a majority for the key finding that the Government of the Islamic Republic of Iran has expropriated property of the Claimants in Iran. My concurrence is reluctant because the Interlocutory Award

sets the date of the taking far later than when it actually occurred. The Interlocutory Award also includes a number of errors, and contains needlessly muddled terms of reference for the accounting expert who is appointed to give an opinion concerning the value of the expropriated property.

In view of the many errors in the Interlocutory Award, it would be easier to dissent from it than to concur in it. The Tribunal Rules provide, however, that awards can only be made by a majority vote. Thus, in a three-member Chamber, at least two members must join or there can be no decision. My colleague, Judge Kashani, having dissented, I am faced with the choice of joining the President in the present Interlocutory Award despite its faults, or accepting the prospect of an indefinite delay in progress toward final decision of this case. See, Tribunal Rules, Article 31, paragraph 1. See also Sanders, Commentary on UNCITRAL Arbitration Rules, II Yearbook Commercial Arbitration 172, 208 (1977). The Hearing in this case closed more than ten months ago; now that an Award has at last been prepared, no one would benefit from further delay.

## II. HISTORY OF THE PROJECT

The Claimants in this case are Starrett Housing Corporation ("Starrett Housing") and its wholly owned United States subsidiaries Starrett Systems, Inc. ("Starrett Systems") and Starrett Housing International, Inc. ("Starrett International"). They assert claims owned directly by them, as well as claims owned by them indirectly through wholly owned or controlled foreign subsidiaries. (Claimants and their various subsidiaries are herein collectively called "Starrett".)

In the early 1970's Bank Omran, an Iranian development bank which was controlled by the Shah and his Government, instituted a program to create a new residential community in an area adjacent to Tehran known as Farahzad. Bank Omran contracted with Starrett Housing for the construction of a large portion of the Farahzad development. Described in general terms, their agreement provided for the purchase by Starrett of certain tracts of land from or through the Bank, the construction by Starrett of approximately 6000 apartment units on those tracts, and the sale of completed apartments to Iranian purchasers as condominiums (an arrangement under which each purchaser would take title to his own apartment, and to an undivided share of common areas, with Starrett ultimately retaining no ownership interest at all in the land or buildings). Construction was to proceed in three phases; only the first phase, comprising eight buildings

("the Project"), is at issue in this case. Bank Omran undertook to provide at its own expense the infrastructure necessary to the construction and sale of the Project, including water, electricity, roads and telephone services.

Starrett Housing and Bank Omran initially entered into a simple one-page contract (the "Initial Agreement"), to which was annexed the more elaborate contract governing the construction of the Project (the "Basic Project Agreement"). The Initial Agreement, dated 2 November 1974, required Starrett Housing to create a foreign subsidiary for the purpose of entering into the Basic Project Agreement with Bank Omran. However, Bank Omran from the outset intended Starrett Housing, not its specially created subsidiary, to furnish the manpower, expertise and resources necessary for the Project. Accordingly, the Initial Agreement required Starrett Housing to guarantee the subsidiary's performance.

The first Starrett subsidiary to enter into the Basic Project Agreement was Starrett S.A., a Swiss entity. However, since the subsidiary would have to own the land on which the Project was to be built until the apartments were transferred to their ultimate purchasers, the parties for convenience assigned the Basic Project Agreement to Shah Goli, an Iranian company owned 79.7% by Starrett through a wholly owned German subsidiary. Starrett S.A. was thus removed entirely from the transaction, and Bank Omran was

relieved of its obligation under the Basic Project Agreement to obtain for the Swiss subsidiary the governmental permission to own land that would otherwise have been required by the Foreign Nationals Immovable Properties Act (1931) and the "By-law Concerning Landed Property Ownership by Foreign Nationals" (1949).

Shah Goli and Bank Omran entered into the Basic Project Agreement on 18 October 1975. Starrett Housing already had guaranteed Shah Goli's performance to Bank Omran on 16 October 1975.

Starrett Housing also organized a second Iranian subsidiary, wholly owned through a German subsidiary. This Iranian subsidiary, Starrett Construction, was organized to coordinate the planning and design of the Project, to manage all of the construction work, and to supervise the marketing of the Project. It was, in other words, one of the vehicles through which Starrett Housing's expertise and experience were funnelled into the Project. Starrett Construction's compensation was in the form of a percentage of the cash proceeds received by Shah Goli from the sale of apartments; Shah Goli, under the Basic Project Agreement, and Starrett Housing, under the guarantee, retained ultimate responsibility for the Project.

An undertaking as massive as the Project required large amounts of capital. As foreseen in the Basic Project

Agreement, some of this capital was to come from the down payments by Iranian purchasers of apartments. Substantial additional capital was to be supplied from outside Iran by Starrett. Since, pursuant to the Initial Agreement, Starrett Housing was required to accomplish the Project through its specially created subsidiary, it was foreseen by all parties that Starrett would furnish the necessary capital in the form of loans to that subsidiary, Shah Goli. That this method of financing was intended by all sides is evidenced by the prior approval of various loans by Bank Markazi, the Central Bank of Iran. Through loans, Starrett provided to Shah Goli tens of millions of dollars necessary for the construction of the Project.

Thus, from the Project's inception, all parties contemplated that Starrett Housing would manage and control the Project and would provide the necessary design and construction expertise, personnel and financing. All parties contemplated that Starrett Housing would develop the Project through its Iranian subsidiary, Shah Goli, that it would finance the Project through apartment sales and loans to Shah Goli, and that it would remain ultimately responsible for Shah Goli's performance. The matrix of contractual relationships thus created constituted Starrett's rights and obligations in the Project.

## III. STARRETT'S CLAIM

The Claimants assert that the Government of Iran took possession and control of the entire Project -- the land, the buildings, the equipment, and the rights and obligations connected with them. Thus, they contend, the Government expropriated all of their rights in the Project: their ownership of its physical assets as well as their contractual rights to complete the Project and to reap its benefits. The Claimants contend that this taking and other acts of the Respondents were breaches of Iran's international obligations. Claimants seek damages of over $112 million, plus interest and costs.

In addition, Claimants assert two further alternative claims, neither of which are decided in the Interlocutory Award. First, Claimants assert that force majeure has prevented their further performance of the Basic Project Agreement, and that under Item 11 of that Agreement they are entitled to "an equitable solution in consideration of all work performed." Second, Claimants assert that acts of the Government of Iran constituted expropriation and rendered Starrett's further performance impossible, thus entitling them to recover all costs and loans expended on the Project, under both Item 11 of the Basic Project Agreement and a separate guarantee allegedly given by Bank Omran. As noted above, the Tribunal has not decided the merits of these alternative claims, nor has it determined the effect on them of the present Interlocutory Award; further discussion must therefore await a later stage of the proceedings.

## IV. THE DATE OF EXPROPRIATION

### 1. The Applicable International Law

The Interlocutory Award properly holds that expropriation[1] occurs when an owner is deprived of the effective use, control and benefits of its property. It finds that "the Government of Iran did not issue any law or decree according to which the Zomorod Project or Shah Goli expressly was nationalized or expropriated," but goes on correctly to state that

> it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.

I join in those holdings, which summarize well-settled principles of international law. Those principles are

---

[1] The terms "expropriation," "nationalization," "taking" and "confiscation" are used almost interchangeably in the literature on this subject. "Confiscation" might be the most appropriate word in the context of this case, in which there has been no payment of compensation; however for consistency with the Interlocutory Award, I will use the terms "expropriation" and "taking," intending them to have equivalent meaning. See 2 D. O'Connell, International Law 769, 776-77 (2d ed. 1970); Van Hecke Confiscation, Expropriation and the Conflict of Laws, 4 Int'l L. Q. 345-46 (1951); Fawcett, Some Foreign Effects of Nationalization of Property, [1950] Brit. Y.B. Int'l L. 355-56; Fachiri, Expropriation and International Law, [1925] Brit. Y.B. Int'l L. 159.

succinctly stated in the Draft Convention on the International Responsibility of States for Injuries to Aliens (1961), which defines a "taking of property" to include both formal takings of title and takings accomplished through the exclusion of the owner from control and enjoyment of its property:

> A "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.

Id. Article 10, paragraph 3(a), reprinted in Sohn & Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, 55 A.J.I.L. 545 (1961). See also Restatement (Second) Foreign Relations Law of the United States § 192 (1965).

This concept has firm roots in the decisions of international tribunals. See, e.g., German Interests in Polish Upper Silesia (Ger. v. Pol.), 1926 P.C.I.J., ser. A, No. 7 at 14-45 (Judgment of 25 May 1926) (Chorzow Factory Case); Norwegian Shipowners' Case (Nor. v. U. S.), 1 R. Int'l. Arb. Awards 307 (1922). In both of those cases -- as in the present claim -- not only physical property but also the contractual rights connected with such property were deemed taken; indeed, in the Chorzow Factory Case the taking of a factory owned by one corporation was held also to constitute a taking of a different entity's contractual rights to

manage the same factory. One commentator has pointed out that these cases establish that

> [A] State may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention. More important, the two cases taken together illustrate that even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them.

Christie, What Constitutes a Taking of Property Under International Law? [1963] Brit. Y.B. Int'l L. 307, 311.

The same principle has been recognized in this Tribunal. Chamber Two has held that

> [A] taking of property may occur under international law, even in the absence of a formal nationalization or expropriation, if a government has interfered unreasonably with the use of property.

Harza Engineering Co. and The Islamic Republic of Iran, Award No. 19-98-2 (30 December 1982), 1 Iran-U.S. C.T.R. 499, 504. Similarly, Judge Aldrich has written that the finding of a taking

> is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. 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.

ITT Industries, Inc. and The Islamic Republic of Iran, Award No. 47-156-2 (Concurring Opinion of George H. Aldrich) (26 May 1983)(emphasis added).

I underscore Judge Aldrich's statement that we must concentrate not on the "form of measures" but on the "reality of their impact," as I turn now to consider the particular kinds of measures which constitute expropriation. International case law and commentary are rich with examples of the circumstances which deprive an owner of the use, control or benefit of its property. These circumstances include: (i) measures which force the owner to flee the country and thus deprive it of the effective management and control of its property; (ii) measures which deny the owner access to its funds and profits; (iii) coercion and intimidation forcing the owner to sell at unfairly low prices; (iv) interference with the owner's access to needed facilities and supplies; and (v) appointment of conservators or administrators to manage the property in the enforced absence of the owner. Starrett suffered from each of these circumstances, caused or ratified by the Government of Iran. The particular expropriatory acts and measures affecting Starrett are described below.

## 2. The Expropriation of Starrett's Property Rights

The Interlocutory Award finds that the expropriation of the Claimants' property rights did not occur until 30 January 1980, the day on which the Government of Iran appointed a manager of Shah Goli "to direct all further activities in connection with the Project on behalf of the

Government."[2] The Interlocutory Award correctly holds that the this was an act of expropriation because it denied Claimants their right to manage and control Shah Goli and the Project. The appointment of the manager was not, however, the first or only act of expropriation; in fact, it was the last of a series of such measures. The Interlocutory Award ignores the real impact of other decisive acts which resulted in a taking of Claimant's property rights many months before. Although the Government of Iran on 30 January 1980 took the formal step of appointing a manager for the property which it had already taken, that final measure cannot logically serve to obscure the earlier acts of expropriation. In my view, a realistic assessment of the facts would have been preferable to the sterile formalism of the Interlocutory Award.[3]

The progression of expropriatory events was steady and inexorable:

- By the end of February 1979, the cumulative effect of a series of acts by successful revolutionaries and the Government they installed had seriously curtailed Starrett's ability to manage and control the Project.

---

[2] The Tribunal rules that "for ease of accounting . . . 31 January 1980 shall be considered as the date of taking."

[3] I have previously written to protest what I view as exaggerated formalism in the reasoning of the Tribunal. See, e.g., Dissent of Howard M. Holtzmann From Final Decision Refusing to Accept Claim, in which George H. Aldrich and Richard M. Mosk Join, Refusal Case No. 21 (20 December 1982), 1 Iran-U.S. C.T.R. 396.

- By the end of July 1979, there could no longer be any doubt that Starrett's use, control and benefit of the Project had been taken: an armed incursion into the Project, accompanied by detention of its personnel, forced Starrett to agree to accept $22 million less than the contract price for apartments it had already sold; and Bank Omran, under Government control, had frozen Shah Goli's accounts so that it could no longer draw money to pay for continued work on the Project.

- By early November 1979 Starrett's last American construction supervisor was forced to flee Iran. He had remained until after the seizure of the United States Embassy in Tehran, hoping that control of the Project might be restored to Starrett. With the detention of the 53 hostages, that last hope vanished.

These and other acts of taking are described in greater detail below. Considering those events one must ask whether there would not have been an expropriation even if the Government of Iran had not bothered to take the formal step of appointing a manager on 30 January 1980. The answer, compelled by the facts and by established international law, is that Claimants' property rights were taken long before 30 January 1980.

(a) Events Before the Culmination of the Islamic Revolution in February 1979

During the last months of 1978 conditions in Iran forced most of Starrett's 150 American supervisors to leave. Those conditions were so notorious and widespread that it is unnecessary to recite them here. By the end of the year only 10 to 12 of Starrett's supervisors remained. Various subcontractors whose work was necessary in completing construction of the apartments also were forced to leave. By January 1979 the overall Project work force of approximately 2000 had been reduced to 200. The evidence establishes that during the same period the Project was hampered by strikes in the public and private sectors of the Iranian economy, shortages of building materials and fuel, and blockage of port and customs services which prevented delivery of needed materials from abroad. Claimants contend that these events constituted force majeure and expropriation as early as December 1978. It seems clear that these events did create a force majeure situation for Starrett. They may also have constituted a taking, since under international law the Islamic Republic of Iran is responsible for the acts of the successful group which brought about the

victory of the Revolution,[4] and, indeed, is responsible for the unpunished xenophobic and anti-American acts of individuals or mobs.[5]

(b) The Arrest of Starrett's Project Manager, Arthur Radice,and his Forced Departure From Iran in February 1979

In February 1979 four men armed with machine guns entered the offices of Shah Goli at the Project site and announced that, since the Project had once belonged to the former Shah, it now belonged to the new Islamic Republic. Arthur Radice, Starrett's senior manager in Iran, and another Starrett executive were arrested and taken before a governmental official. Released after several hours of

---

[4] De Aréchaga, "International Responsibility," in Manual of Public International Law 531, 562-64 (M. Sorensen ed. 1968); 8 M. Whiteman, Digest of International Law 819-24 (1967); Draft Convention on the International Responsibility of States for Injuries to Aliens, Art. 18, reprinted in Sohn & Baxter, supra, 55 A.J.I.L. at 576; Bolivar Railway Company Case (Gr.Brit. v. Venez.) Robson's Reports 388, 394 (1904); 2 D. O'Connell, International Law 968 (2d ed. 1970); International Law Commission, Revised Draft on Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens Arts. 7, 8 & 16, II Yearbook of International Law Commission 46-48 (1961). Accord, Lillian Byrdine Grimm and The Government of the Islamic Republic of Iran, Award No. 25-71-1 (Dissenting Opinion of Howard M. Holtzmann (filed 22 March 1983).

[5] E. Borchard, The Diplomatic Protection of Citizens Abroad 217, 225 (1927); C. Eagleton, The Responsibility of States in International Law 81 & n.22, 127 & nn. 5 & 6 (1928); D. O'Connell, supra, at 968-69; De Aréchaga, supra, at 562; Bar, De la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas de troubles, d'émeute ou de guerre civile, Revue de Droit International et de Législation Comparée (2d Series, 1) 464, 471 (1899).

detention and interrogation, they immediately left the country. That the armed incursion and arrests caused their flight cannot be doubted, nor can it be doubted that this was a reasonable reaction in the light of the notorious events in Iran. It should be recalled that virtually all United States companies and their personnel had already fled Iran several months before this incident, after a long period of disorders and violence, including assassinations, directed against Americans.[6] It can hardly be maintained that, after the February incident at the Project site, Starrett's executives were unreasonable in concluding that they could no longer safely remain in Iran.

The Government of Iran cannot easily dissociate itself from this and subsequent armed incursions and arrests

---

[6] E.g., in November 1978, leaflets were distributed reminding the "cursed Yonky" that "all the Iranian people" hate him. Newsweek, 20 Nov. 1978, at 23. In December, signs were placed in store windows reading "Yankees Go Home by February or Be Killed." Int'l Herald Tribune, 27 December 1978, at 1. On 23 December 1978, Paul Grimm, a senior American oil company executive was shot to death in Ahwaz. Lillian Byrdine Grimm and The Government of the Islamic Republic of Iran, Award No. 25-71-1 (filed 22 February 1983). Shortly thereafter, as reported in the Iranian press, another American was found in his Kerman apartment with his throat slit and with the warning "Please return to your country" written on the wall. Kayhan, 16 January 1979, at 1. Tehran Domestic Service reported on 12 February 1979 that 25 Americans had been arrested by "people's fighters," and on 26 February that four Americans had been arrested and turned over to the Ayatollah Khomeini's staff. Other acts of violence directed against Americans were extensively reported in the Iranian and international press, e.g., Kayhan 22 January 1979, at 8; id., 30 January 1979, at 2; The Guardian, 19 November 1979, at 6; Newsweek, 20 November 1978, at 23; Time, 27 November 1978, at 23; N.Y. Times, 22 December 1978, at A1; Fortune, 31 December 1978, at 39.

carried out by Revolutionary Guards and others, wrongs which were neither redressed nor punished by the Government. Cf., United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 32, para. 67 (Government of Iran responsible for inaction in face of seizure of private United States nationals).

When a corporate property-owner's managers are forced to flee for their safety, the owner is deprived of the right to manage and control its property. That deprivation is a wrong which, if not merely ephemeral, constitutes a taking. That is a basic rule of international law. As one commentator has emphasized, "the most fundamental right that an owner of property has is the right to participate in its control and management." Christie, supra, [1963] Brit. Y. B. Int'l. L. at 337. Accord, Board of Editors, The Measures Taken by the Indonesian Government Against Netherlands Enterprises, 5 Netherlands Int'l L. Rev. 227, 242 (1958). International case-law likewise consistently holds that the effective exclusion of an owner, or its chosen representatives, from full and free access to its property results in a taking.[7]

---

[7] See, e.g., Ellermann c. Etat polonais (Ger. v. Pol.), 5 Trib. Arb. Mixtes 457, 460 (1924); Jeno Hartmann, Dec. No. HUNG - 717, FCSC Tenth Semiannual Report, p. 45 (1958); Malvin Klein, Dec. No. HUNG - 1123, id. at 53; Geza Danos, Dec. No. HUNG - 1004-A, id. at 56. See also Lena Goldfields Case (3 September 1930), reprinted in Nussbaum, The Arbitration Between the Lena Goldfields, Ltd. and the Soviet Government, 36 Cornell L.Q. 31, 49-50 (1950) (arrest of claimant's officials and coercion of employees resulting in widespread resignations); Fearn International, Inc., Contract Nos. 5969 and 6159, Memorandum of Determination (OPIC, 20 Oct. 1973) (arrests of key employees and blocking access to plant site).

The Interlocutory Award correctly recognizes this principle, stating that "the right freely to select management . . . is an essential element of the right to manage a project." Unaccountably, however, it repeatedly fails to apply this principle and to recognize that the forced departures of Starrett's executives resulted in an expropriation.

(c) Decree of 28 February 1979 Resulting in Change in Control of Bank Omran

One of the first official measures that occurred after the culmination of the Islamic Revolution was the expropriation of the assets and properties of the Pahlavi Foundation, a major asset of which was Bank Omran. Following the expropriation, the top managers of Bank Omran were immediately replaced and thereafter the Bank was managed by persons approved by the new Government and controlled by it.

The Respondents assert that the Pahlavi Foundation was not confiscated, but that the only thing which occurred was a change of its name to "Alavi" Foundation. The documentary evidence proves, however, that much more than a change of name occurred. The Pahlavi Foundation had been formed by a personal decree of the Shah, and its Royal Charter and Articles of Incorporation make quite clear that the Shah

completely controlled the Foundation which bore his name.[8] The Shah's Prime Minister and other members of his Government comprised the majority of the Foundation's Trustees. Moreover, in the Royal Charter the Shah referred specifically to Bank Omran, "which we formed out of our own capital."

It is not surprising that the new Government instituted measures to take over and control all properties formerly controlled by the Shah. On 28 February 1979 the Ayatollah Khomeini signed the "Decree of Imam Concerning Confiscation of the Pahlavi Properties." It provides that

> The Islamic Revolutionary Council is charged by virtue of this decree with confiscating all movable and immovable properties of the Pahlavi Dynasty, its branches, agents and affiliates ....

As can be seen from the provisions of its Charter and Articles of Incorporation, the Pahlavi Foundation was a property of the Pahlavi Dynasty or of one of its "branches,

---

[8] The royal decree establishing the Pahlavi Foundation stated: "We, the Pahlavi King of Kings of Iran ... have willed that . . . a charitable organization be incorporated entitled 'The Pahlavi Foundation.'" The Foundation was to hold the Shah's "inherited" and "personal" property. The Articles of Incorporation required that the Board of Trustees be appointed "through his Majesty's Decree," and that its members be five high Government officers, headed by the Prime Minister, and two "trusted individuals as selected by His Majesty." Article 10. The Managing Director also was required to be appointed "by His Imperial Majesty's Decree." Article 11. Decisions of the Board were to be effective "on approval of His Majesty." Article 15. Reports of future plans were to be reported to the Shah and required not only approval of the Trustees but also "receipt of the Royal Assent." Article 9. Finally, the personal control exercised by the Shah was emphasized by a provision that "only the person of His Imperial Majesty, the grand founder of the Foundation, may revise any of the Articles of this articles of incorporation." Article 25.

agents and affiliates." It was apparently so considered by the Revolutionary Council, because the officers of the Foundation and Bank Omran appointed by the Shah were quickly replaced by persons appointed by the new Government.

The change in the management of Bank Omran had a profound effect on the Project and was a major event in the process of expropriation. As noted above, Bank Omran was a development bank, and was the developer of the Farahzad area. Under the terms of the Basic Project Agreement, it was responsible for carrying out all infrastructure development, without which the construction of the Project could not be completed or the apartments occupied. Moreover, pursuant to the Basic Project Agreement Bank Omran collected all payments by purchasers for apartments; it was obligated to transfer those funds to an account of Shah Goli, after first deducting Bank Omran's share of the purchase price. Finally, Bank Omran was responsible for securing all necessary permits, including import licenses and whatever permissions were necessary for expatriates to work on the Project.[9] Bank Omran was thus an integral part of the Project, and the continued fulfillment of its obligations was essential to Starrett's use and benefit of the Project.

---

[9] A detailed description of Bank Omran's obligations under the Basic Project Agreement is set forth in the Interlocutory Award.

Bank Omran was able to control key aspects of the Project by virtue of its control over the necessary infrastructure and the bank accounts into which proceeds of sales were required to be deposited. Thus, by taking control of the Bank the new Government also took control of essential elements of the Project. Starrett when it entered into the transaction had relied upon Bank Omran -- then controlled by the Shah -- to fulfill its contractual obligations in good faith. Under the new conditions, and in view of the expressed anti-American policy of the new Government, Starrett could no longer enjoy the benefit of such reliance. Far from continuing to provide the cooperation and services required by the Basic Project Agreement, Bank Omran became the means for carrying out the policies of the new Government.

Although Starrett had been able to overcome Bank Omran's delays in supplying electricity at earlier phases of the Project, the problem became critical because delivery of apartments to the purchasers and the collection from them of the balances of the sales price could not be accomplished without the electricity necessary to light the apartments and run the elevators. At this point, Bank Omran's failure to provide infrastructure was akin to the governmental denial of access to essential supplies that paralyzed the Claimant's operations, and was seen as a taking, in the Lena Goldfields Case, supra, 36 Cornell L.Q. at 48-49. Bank Omran's further acts in July 1979, described below, continued this pattern of expropriatory conduct.

(d) Arthur Radice's Second Forced Departure in April 1979

Arthur Radice returned to Iran in April 1979 in an effort to save Starrett's badly deteriorated position there. Following his arrival he was charged with a violation of Iranian law of which he was eventually acquitted. His passport was seized by the Iranian authorities so that he could not depart from the country. His passport was finally returned after a bond was posted. He thereupon left Iran for the second time.

This second departure of Mr. Radice -- which, in view of the evident dangers he faced, must be regarded as forced -- confirmed that Starrett's loss of its ability to manage and control the Project was not ephemeral.

(e) Armed Incursion and Coercion by Revolutionary Guards in July 1979 Preventing Shah Goli from Collecting the Full Contract Price of the Apartments

Despite the severe impairment of its rights of management, Starrett had succeeded in keeping a small force working on the Project and by July 1979 Shah Goli was ready to deliver the apartments in the first building. That building had been largely completed before the Revolution, but earlier delivery had been impossible largely because Bank Omran had delayed providing the electricity necessary

to run the elevators and light the apartments. The Chairman of Starrett Housing, Mr. Henry Benach, testified at the Hearing concerning what occurred when Shah Goli began delivering the apartments:

> MR. BENACH: What happened was, we have in our sales contract [the Apartment Purchase Agreement signed with apartment buyers] the right to make one escalation [in price] of 10 percent. That's from the inception in 1975. When we called the buyers together and told them we are ready now to deliver the apartments and send the notices, we told them that although the inflation had been much more in Iran, that's before the Revolution, we were exercising our 10 percent escalation.
>
> The buyers went to a Mr. Moezi, a new man since the change of Government, and they came -- Mr. Moezi with the National or the . . . Revolutionary Guard -- and they locked up all my people in a room, cut off all the lights, cut off all the communications, and told them that they cannot go out until they will sign an agreement that we will not ask for the escalation.
>
> * * * *
>
> And what they did was, finally, after negotiation, they let Mr. Zilli out, who went to the phone and called me and said, "We are captives here, and unless we agree to not ask for escalation, we cannot get out."
>
> I told him, "Listen, you go back. A life is more important than money. You go back and tell them that you will agree, and we will go forward as best we can."
>
> And this was done. And I believe there is a telex to that effect.
>
> What I am really saying is that that item is some $22 million that we are entitled to in escalation. . . . And there is no question about our entitlement.
>
> MR. KAYE: Mr. Benach, did the people that came, were they under arms when they came to the Project?
>
> MR. BENACH: Yes, they were under arms. I thought I made that clear. They came with guns.

There is no reason to doubt the truth of Mr. Benach's testimony. Correspondence in the record confirms that Shah Goli was prevented from exercising its contractual right to escalate the sales price of its apartments. This was a decisive deprivation of Starrett Housing's control over the Project, and of Shah Goli's right to sell its apartments at the contract price. The coercion by the Revolutionary Guards cannot be dismissed as the unsanctioned conduct of a mob, for the Government of Iran took no action to redress the situation or to restore to Starrett the right to the $22 million which it had been forced to give up.

Sales at inadequate prices, brought about through physical threats or other forms of coercion, have repeatedly been held to constitute expropriation. See, e.g., Poehlmann v. Kulmbacher Spinnerei A.G., 3 U.S. Ct. Rest. App. 701 (1952); Osthoff v. Hofele, 1 U.S. Ct. Rest. App. 111 (1950). Cf., Lena Goldfields Case, supra, 36 Cornell L.Q. at 48 (breach of contract to permit free sale of property produced). Summarizing the case-law on this subject, one commentator has found that there is "a general consensus that proven threats of coercion ... are sufficient duress to make an otherwise valid transfer a [taking]." Weston, "Constructive Takings" under International Law: A Modest Foray into the Problems of "Creeping Expropriation", 16 Va.J.Int'l L. 101, 142 (1975). This consensus would find a taking even when no immediate physical threat was made. Id. When -- as in this case -- "the threats to an alien's

property are accompanied by threats to his physical security," Christie, supra, [1963] Brit. Y.B. Int'l L. at 329, the consensus is even wider that a claim for taking can be maintained.

It is difficult to understand how the Interlocutory Award can ignore the armed coercion that took place at the Project in July 1979, and hold that the Claimants were not deprived of the effective use, control and benefits of their property until more than six months later.

(f) The Blocking of Shah Goli's Bank Omran Accounts in July 1979

When Shah Goli delivered finished apartments to purchasers, the purchasers were obligated to pay the remaining balance owed on their apartments. As noted already, the Basic Project Agreement provided that these payments were to be deposited into Shah Goli's accounts in Bank Omran, the Bank was to deduct its percentage of the payments, and the remainder was to be placed at Shah Goli's disposal.

In fact, however, at the same time that Shah Goli was forced to accept $22 million less than the contractual price for the apartments it delivered, Bank Omran blocked the accounts into which the purchasers' payments were deposited. Thus, Shah Goli was not able to draw on its accounts to meet its existing obligations or to pay for continued work on the Project. Starrett's activities at the Project were paralyzed by this act of Bank Omran. Further progress became

impossible without loans from Bank Omran to replace the blocked funds; the documentary record shows that Starrett's sole activity in the following months was an attempt either to retrieve its own funds or to obtain such a loan from the Bank. By blocking Shah Goli's accounts, Bank Omran was able to usurp the power to approve or disapprove all further initiatives at the Project -- it, not Starrett, was in complete control of the Project.

Bank Omran, which had been under the new Government's control since the expropriation of the Pahlavi Foundation, in February 1979, was also covered by a decree in June 1979 which nationalized all Iranian banks. When it blocked Shah Goli's accounts in July 1979, there can be no doubt whatsoever that it was under Government control.

Denial of free access to its funds deprives an owner of the use and benefits of its property and thereby results in a taking. See, Board of Editors, The Measures Taken by the Indonesian Government Against Netherlands Enterprises, 5 Netherlands Int'l L.Rev. 227, 242 (1958). Thus, in the Lena Goldfields Case, supra, a taking resulted from actions "to deprive the company of available cash resources, to destroy its credit, and generally to paralyze its activities." 36 Cornell L.Q. at 50.

Again, it is difficult to understand how the Interlocutory Award can ignore the consequences of the blocking

of Shah Goli's funds. It is also difficult to understand how the Interlocutory Award can equate that action, directed specifically against Shah Goli, with such general occurrences as "strikes, lock-outs, disturbances, changes of the economic and political system and even revolution," and so dismiss it as simply among the risks investors may assume. The blocking by a Government-owned bank of funds essential to the survival of a Project like the one at issue is an act of expropriation by all standards of international law.

(g) The Forced Departure of Starrett's Last Construction Supervisor on 4 November 1979 Following the Seizure of the United States Embassy

Despite his forced departure in April 1979, Arthur Radice again returned to Iran and attempted to protect Starrett's interests. In September 1979 he was forced to leave Iran for the last time. Thereafter Lewis Johnson, an attorney who held Iranian citizenship, remained on as Managing Director of Shah Goli. Mr. Benach testified that Mr. Johnson had no construction experience, and was simply appointed in an attempt to maintain Starrett's presence at the Project after the Government demanded the installation of Iranian managers. This effort at maintaining a continuing presence appears to have been motivated by a hope, never realized, that conditions would change for the better, and that actual control of the Project might be returned to Starrett.

On 4 November 1979, immediately following the seizure of the hostages at the United States Embassy in Tehran, Starrett's last construction supervisor fled from Iran. Thus, the last vestige of Starrett's management of the operation of the Project ended. Continued construction activities by an American-owned enterprise in Iran were no longer possible. As the Interlocutory Award states, "it is notorious that at least after 4 November 1979, the date when the Embassy hostage crisis began, all American companies with projects in Iran were forced to leave their projects and had to evacuate their personnel."

The decision of the International Court of Justice in the Hostage Case holds that the Government of Iran was responsible for the seizure of the Embassy. Despite that decision of the International Court of Justice and the Interlocutory Award's own finding that by 4 November 1979 "all American companies with projects in Iran were forced to leave their projects and had to evacuate their personnel," the Interlocutory Award nevertheless finds that an expropriation did not occur until 31 January 1980.

### 3. The Effect of the 31 January 1980 Date of Expropriation on the Ultimate Damages in this Case

Although I am critical of the Interlocutory Award for holding that expropriation did not occur until 31 January 1980, that holding may, as a practical matter, have little effect on whatever damages may be determined in the Final Award in this case. There are several reasons for that.

First, it is not yet known what method the expert will use to determine the value of the expropriated property, or whether his opinion will be accepted by the Tribunal. Under some methods of valuation, the later date of expropriation might have relatively little monetary significance as compared to an earlier date.

Second, when valuing the property, international law requires that the expert exclude any diminution in value attributable to wrongful acts of the Government of Iran before the date of taking. That factor is particularly relevant in this case because of the finding in the Interlocutory Award that "events in Iran before January 1980 to which the Claimants refer, seriously hampered their possibilities to proceed with the construction work and eventually paralysed the Project."

Judge Aldrich stated the relevant principle in his opinion in the ITT Industries Case:

> In computing compensation for expropriated property, the Tribunal must ... [exclude] any decline in value resulting from the threat of taking or other acts attributable to the Government itself.

Accord, Draft Convention on the International Responsibility of States for Injuries to Aliens, supra, Art. 10(2)(b) and Explanatory Note thereto; Restatement (Second) Foreign Relations Law of the United States §188, comment (b) (1965); Organization for Economic Cooperation and Development, Draft Convention on the Protection of Foreign Property

Art. 3, comment 9(a) (1967); Lillich, The Valuation of Nationalized Property by the Foreign Claims Settlement Commission, in 1 R. Lillich, The Valuation of Nationalized Property in International Law 95, 97 n.13 (1972).

Third, the Tribunal has not decided whether various acts and measures that occurred before 31 January 1980 caused compensable damage to the Claimants, even if they did not constitute expropriation of the entire Project. Certain of these events constituted either breaches by Bank Omran of the Basic Project Agreement, or wrongful interference by the Government and its agents with Shah Goli's execution of the Project; in either case, added costs resulted for which responsibility will have to be assigned, and this will affect the ultimate valuation of the Project. The question also arises whether the same events constituted acts of the Government of Iran rendering further performance of the Basic Project Agreement impractical or impossible, thus entitling Shah Goli, under Item 11 of that Agreement, to recover its actual costs for the Project; or whether those events constituted force majeure under the same provision, entitling Shah Goli to "an equitable solution in consideration of all work performed."[10] The Tribunal has not yet considered how these rights to compensation are to be taken into account, either as part of the valuation of the Project or separately as part of the Claimant's alternative claims.

---

[10] The Full text of Item 11 of the Basic Project Agreement appears in the Interim Award.

Fourth, the Claimants argue that the events prior to January 1980 constituted violations of Iran's international obligations under the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran.[11] The International Court of Justice has determined that the provisions of the Treaty of Amity "remain part of the corpus of law applicable between the United States and Iran." The Hostage Case, supra, para. 54. The Tribunal has not yet decided whether any of the events prior to January 1980, even if not constituting the expropriation of the Project, were nevertheless compensable violations of the Treaty of Amity.

---

[11] 15 August 1955, 8 U.S.T. 899. Specifically, the Claimants allege that, in addition to expropriating their property rights without payment of compensation in violation of Article IV, paragraph 2 of the Treaty of Amity, Iran violated that Treaty by: (i) depriving Starrett and its American personnel of their right to enter and remain in Iran for purposes of carrying on commercial activities, in violation of Article II, Paragraph 1; (ii) preventing Starrett from developing and directing the operation of the Project in which they had invested, in violation of Article II, paragraph 1 and Article XX, paragraph 4; (iii) depriving Starrett of its right to manage and control the Project, in violation of Article IV, paragraph 4; (iv) depriving Starrett and its personnel of their right to constant protection and security of their property and persons, in violation of Article IV, paragraph 2 and Article II, paragraph 4; (v) depriving Starrett of fair, equitable and non-discriminatory treatment, in violation of Article IV, paragraph 1; and (vi) subjecting the offices and premises of Starrett to entry and molestation without just cause, in violation of Article IV, paragraph 3.

## V. THE EXPERT'S TERMS OF REFERENCE

Having concluded that the property and property rights of Claimants have been expropriated, the Interlocutory Award goes on to the question of determining the amount which the Government of Iran is obligated to pay as compensation for the taking. Noting that valuation of the expropriated property "involves complex accounting matters," the Tribunal determines that advice of an accounting expert is needed. It appoints such an expert and sets forth his initial terms of reference.

### 1. The Standard of Compensation

The Interlocutory Award unfortunately does not enter into any analysis or discussion of the standards of international law which govern the measure of compensation in the event of a taking. Determination of that issue presumably awaits a later stage of the proceedings in this case. Accordingly, I do not in this Concurring Opinion reach the legal issues concerning the appropriate measure of compensation.

### 2. The Property to be Valued

The Interlocutory Award describes the property which was expropriated. After noting that the expropriatory measure, i.e., the appointment of a manager, was "aimed at

the taking of Shah Goli," the Tribunal states its holding as follows:

> 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 sales as provided in the Apartment Purchase Agreements.

The Interlocutory Award then goes on to set out the terms of reference for the accounting expert. These terms of reference recognize -- albeit in a needlessly cumbersome way -- the integrated structure of the Project and the participation of various Starrett companies in it. The expert is directed to give his opinion on the "value of Shah Goli," and is further directed to include the "value of the Project in Shah Goli's hands." In addition, the terms of reference recognize that the value of the Project was not solely in Shah Goli's hands, but that other Starrett companies also were involved. The expert is therefore directed to give his opinion on the "net profit of the Project, if any, Starrett Housing would reasonably have received through management fees paid to Starrett Construction," as well as to determine which Starrett company owned certain construction equipment to be valued. Significantly, the terms of reference recognize that various Starrett companies loaned Shah Goli money to be expended on the Project. Therefore, the expert is directed to give his opinion on the proper

method of taking into account the loans made to Shah Goli, and to indicate which company was the lender or borrower on each such loan, and the extent to which the proceeds were expended for the purposes of the Project.

When one analyzes these interrelated provisions of the terms of reference, it becomes apparent that the entire Project and all the Starrett companies involved in it are to be taken into account in arriving at the value of the property rights which were expropriated. Although I would have preferred to state that in a simpler and more concise way, the terms of reference will, I believe, provide sufficient guidance for the expert.

There remains the potential problem that, because of the way the terms of reference are structured, some gap may exist. This is possible because the Starrett companies, following generally accepted accounting practice, report their financial results on a consolidated basis and, in consequence, some of the evidence focuses on the whole, and does not always identify the particular parts. As a result, the terms of reference may have omitted some element which the expert may discover in his detailed studies, and which should be taken into account in order to achieve a fair valuation of the expropriated property. The terms of reference are, however, sufficiently flexible to deal with that contingency. They provide that the expert may refer to the Tribunal for modification of the terms of the reference

if "in the course of his investigation [he] forms the opinion that modification . . . would be necessary to permit a proper valuation."

3. The Method of Valuing the Expropriated Property

The terms of reference direct the accounting expert in giving his opinion to consider "as he deems appropriate the discounted cash flow method of valuation." The phrase "as he deems appropriate" gives the expert freedom to disregard the discounted cash flow method if, in his opinion, it is an inappropriate method of valuation in the circumstances of this case. I think, however, that it would have been better not to have suggested any particular theory. In stating this I note that no party in this case has proposed use of the discounted cash-flow method. The Tribunal has no knowledge as to whether this method, which is typically used to value going concerns with a long future expectancy of continuing business, is equally appropriate when valuing a short-term construction project to build and sell condominium apartments, in which the owner would have no further participation in the project -- particularly when substantially all of the apartments had been sold before the expropriation. Moreover, the fact that the independent public accounting firm which audited Starrett's financial statements regularly certified the amount of Starrett's profits on a percentage-of-completion basis may suggest the propriety of other valuation techniques. I express no

opinion on these points at this time. I only suggest that it would have been preferable for the Interlocutory Award not to have mentioned any particular method of valuation at this stage of the proceedings.

It would also have been better if the terms of reference had included an express instruction to the expert to exclude any diminution in value attributable to wrongful acts of Iran before the date of taking. See discussion at section IV(3) above. This principle is so firmly established in international law that it should be considered to be implicit in the terms of reference of the Interlocutory Award. If there should be any doubt on this or any other point, the terms of reference invite the expert to refer to the Tribunal for clarification.

4. Consideration of the Counter-claims by the Expert

There are eleven counter-claims asserted by the Respondents in this case. The Claimants deny them all.[11] The Tribunal has not yet decided any of the counter-claims; indeed as to four late-filed counter-claims the issues are not yet ripe for decision, because the Tribunal has only just decided to accept them and to invite responses from the Claimants.

---

[11] A description of the counter-claims appears in the Interlocutory Award.

It is thus premature and impractical to direct the expert to consider the counter-claims in any way. The terms of reference, however, direct the expert to "mention in his report as he deems appropriate the items, if any, referred to in the counter-claims which his investigation shows are liabilities of Shah Goli or the Project." The terms of reference expressly inform the expert that "the Tribunal has not yet made any legal determinations concerning the counter-claims." I do not know how the accounting expert can meaningfully refer to a counter-claim as being a liability, unless he knows whether that counter-claim is substantiated, and he cannot know that until there has been a judicial determination by the Tribunal of the relevant legal issues.

Two examples will suffice to show the problems the expert will face when he attempts to consider the counter-claims before the Tribunal rules on them. One of the counter-claims is for over $32 million of alleged corporate income taxes, based on profits of over $27 million, plus late-payment charges. These taxes might be liabilities of Shah Goli. Serious questions arise, however, which can only be resolved by the Tribunal. These questions include whether the assertion that there was over $27 million in taxable profits can be reconciled with Iran's defense that Starrett abandoned the Project because Shah Goli and the Project were on the verge of bankruptcy; and whether the Government has borne its burden of proving that the taxes

were due, and that they were payable by the counter-Respondent. None of these questions fall within the expert's competence or within the scope of the terms of reference.

Another counter-claim is for approximately $17 million for alleged liabilities to apartment purchasers arising from delay in completion of the Project. The counter-claim is based on provisions of the standard Apartment Purchase Agreement which state that the "date for completion of construction . . . is estimated to be approximately 24 months," and which provide that if events of force majeure or shortages of materials should occur "said period shall be extended accordingly."[13] Legal issues arise as to the meaning and application of the relevant contract provisions. These include whether events of force majeure occurred and whether the Respondents have borne their burden of proof with respect to the existence of the obligation and the calculation of its amount.

The foregoing examples indicate some of the questions inherent in the counter-claims that no accountant can or should answer; they are legal questions which require a judicial determination by the Tribunal. Similar issues, as well as questions of jurisdiction, arise as to many, if not all, the counter-claims.

---

[13] The full text of the relevant provisions of the Apartment Purchase Agreements appear in the Interlocutory Award.

In these circumstances, the only feasible procedure is for the expert to proceed with other aspects of his investigation. During the time he is doing that, the Tribunal should decide the issues relating to the counter-claims. The expert could then consider the counter-claims on the basis of the Tribunal's decisions.

## VI. OTHER ERRORS IN THE INTERIM AWARD

### 1. Misleading Dicta

There are numerous inappropriate dicta in the Interlocutory Award. Two of them are particularly misleading and must therefore be pointed out.

The first is a sentence which states, apparently with regard to pre-January 1980 events, as follows:

> But investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of the economic and political system and even revolution.

This passage is inappropriate as applied to Starrett, which, as noted above, took steps to protect itself against most such risks by securing force majeure provisions in the Basic Project Agreement and the Apartment Purchaser Agreements, as well as through the alleged guarantee from Bank Omran providing for repayment of Starrett's loans in the event the Project was halted due to events of expropriation, war or insurrection. Moreover, Starrett contracted in the context

of the Treaty of Amity. As noted above, many of the events prior to January 1980 of which the Claimants complain may be compensable as violations of that Treaty, of Iran's obligations under international law, or of the Basic Project Agreement. The above-quoted passage might suggest that the Tribunal has ruled on these matters -- this is simply not the case.

The second misleading dictum is a sentence derived from an opinion of Judge Aldrich, but which unfortunately omits a major part of Judge Aldrich's sentence. The omitted portion had been carefully drafted to put the first part into balance and perspective. The sentence as it appears in the Interlocutory Award is as follows:

> It has, however, to be borne in mind that assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law.

As originally written, the sentence read:

> These authorities indicate that, while assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.

ITT Industries Case, supra, (Concurring Opinion of George H. Aldrich) (emphasis added). The use of a half-passage, and of a half-concept, is particularly misleading in this case, in which the facts show that Starrett "was deprived of

fundamental rights of ownership," by means that were not "merely ephemeral," as a result of the events of February and July 1979.

## 2. The Descriptions in the Interlocutory Award of the Contentions of the Parties

Unnecessarily large parts of the Interlocutory Award are devoted to descriptions of the contentions of the parties. These are flawed in ways which reflect adversely on the quality of the work of the Tribunal.

One problem is that it is difficult to identify which statements are findings of the Tribunal and which are only contentions of a party. Many statements which might appear to be findings of the Tribunal are identified as party contentions only in short prefatory clauses which sometimes appear several sentences, paragraphs -- or even pages -- earlier. Adding to the confusion, not all such contentions are confined to the section headed "Facts and Contentions"; many appear elsewhere in the text.

The Interlocutory Award often fails to indicate which contentions are supported by evidence and which are not. Further, certain statements presented as contentions are, in my view, emendations of, or additions to, the record before us.

The Tribunal Rules require that the Tribunal "state the reasons upon which the award is based." Article 32, paragraph 3. That calls for an explanation of the Tribunal's views, but it is not a requirement that an award regurgitate every unsupported allegation in every pleading and argument. The purpose of an award is to express and explain the decision of the Tribunal, not to serve as a vehicle for the polemics of any party.

3. The So-called "Final Remarks"

In an unusual and disturbing step, the following statement has been added under the heading "Final remarks" at the end of the Interlocutory Award:

> The Tribunal, furthermore, deems it appropriate now to invite the Parties to engage in settlement negotiations and in that connection also to discuss and agree upon new and constructive solutions in order to bring the Zomorod Project to a successful completion.

I understand that the invitation to discuss and agree upon "new and constructive solutions in order to bring the Zomorod Project to a successful completion" refers to the ostensible desire of the Government of Iran that the Claimants should return to complete the Project. At the Hearing the President asked one of the representatives of the Government of Iran whether it wished "Starrett to come back to Iran and take charge of the Project." The President added that "it might be an opening for a settlement here." The representative of Iran responded that "our intention is

that the Claimants should come back to Iran, and they should continue the Project." The representative of Iran added that if Americans felt they could not come to Iran, Starrett could send non-Americans to finish the Project.

Because the above-quoted statement under the heading "Final remarks" is not a judicial decision, or even obiter dicta, I am not called upon to dissent from it or to concur with it. I simply state that I dissociate myself from it.

I do so because, while settlement is always to be favored, arbitrators who have a case pending before them must punctiliously avoid any indication that they are exerting pressure on parties to settle. Moreover, arbitrators should not participate in the settlement process by suggesting any particular form of settlement, unless all parties request them to do so. Most importantly, arbitrators must be careful to avoid suggestions for settlement which correspond to the demands of only one of the parties in the case, lest that imply partiality. Here, where there has been no request by all parties that the arbitrators suggest methods of settlement, the invitation "to discuss and agree" upon a "solution" which involves Claimants returning to complete the Project -- one of the counterclaims of the Respondents -- runs the danger of being seen

by one or both parties as an exertion of pressure by the arbitrators, even if it may not be intended as such.[14] Finally, one must wonder whether that suggestion corresponds with the reality of conditions in present-day Iran.

## 4. The Reasons for Holding that the Tribunal Is the Proper Forum for this Case

The Respondents contend that under the Claims Settlement Agreement Shah Goli does not have standing to sue the Government of Iran before this Tribunal, because Shah Goli is an Iranian corporation. The simple answer to that is that Shah Goli is not a Claimant in this case; only Starrett Housing and two of its United States subsidiaries are Claimants. Those United States nationals present their claims here, including claims they own indirectly through their controlling ownership interest in Shah Goli. Claims Settlement Declaration, Article VII, paragraph 2. That is all that need be said to dispose of Respondents' contention. Accordingly, I join in the holding that the Tribunal is the proper forum for this case, but I do not join in the reasons

---

[14] The Code of Ethics for Arbitrators in Commercial Disputes (1977), prepared jointly by the American Arbitration Association and the American Bar Association, contains the following provision as Canon IV-H:

> It is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement of the case. However, an arbitrator should not be present or otherwise participate in the settlement discussions unless requested to do so by all parties. An arbitrator should not exert pressure on any party to settle.

While the Code does not bind this Tribunal, it is instructive.

for that conclusion as set forth in the Interlocutory Award because they relate to issues which we need not reach.

I also join in the holding that the provision for arbitration in London which is contained in the Basic Project Agreement is not a forum selection clause which ousts the jurisdiction of the Tribunal. Stone & Webster Overseas Group, Inc. and National Petrochemical Company et al., ITL 8-293-FT, Part III (5 November 1982), 1 Iran-U.S. C.T. 277-79.

5. The Acceptance of Late-Filed Counter-claims

I believe that it was an error for the Tribunal to have indicated in the Interlocutory Award that it accepts four additional counter-claims which were not included in the Respondents' Statements of Defense, as required by Article 19, paragraph 3 of the Tribunal Rules. That provision of the Rules requires that all counter-claims be included in the Statement of Defense unless the arbitral tribunal decides that a later filing is "justified under the circumstances." The Respondents included a number of counter-claims in their Statement of Defense. The four additional counter-claims were, however, not filed until approximately six weeks before the Hearing. When they presented the new counterclaims, the Respondents offered no justification whatsoever. When the Claimants at the Hearing objected to the late filing, the Respondents contended that they had

been unable to file the counter-claims earlier because they had not had sufficient time to do so. That excuse is unpersuasive in the light of the protracted proceedings in this case, in which Respondents were given repeated extensions of time to file their Statement of Defense and other pleadings. Moreover, a reading of the late counter-claims shows that they are based on circumstances which, if they existed as alleged, must have been known at the time of filing the Statements of Defense.

I am particularly troubled by the acceptance of the additional counter-claims more than ten months after the close of the Hearing. The Claimants must, of course, now be given the opportunity to answer them. As a result, at this late stage in the proceedings, the pleadings are not yet complete. That is an extraordinary circumstance which should not have been permitted to occur.

Had the acceptance of these counter-claims been included in a separate Order, as I think would have been more appropriate, I would have dissented from that Order. Inasmuch, however, as the acceptance is included in the Interlocutory Award with which I concur, I will simply state that, considering the lack of justification and the other circumstances, it would have been better to refuse the four late-filed counter-claims.