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CASE NO. 24
CHAMBER ONE
AWARD NO. 314-24-1

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

and

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

CONCURRING OPINION OF JUDGE HOLTZMANN

I. Introduction

This Case arises from the expropriation by the Government of the Islamic Republic of Iran of property rights of the Claimants and their wholly-owned subsidiaries (herein referred to collectively as "Starrett") in a project to build several apartment buildings in Tehran (the "Project"). Starrett owned 80 percent of Shah Goli, an Iranian corporation that was formed to acquire the land, to construct the apartment buildings, and to sell the apartments as condominiums that would then be owned by the individual apartment purchasers. As is typical in such condominium development projects, once all the apartments had been sold and delivered, and the guaranties as to the quality of construction had been fulfilled, Shah Goli, having no further function, would be liquidated and its assets -- constituting profits of the Project -- would be distributed to its shareholders.

The Tribunal in the first phase of the proceedings issued an Interlocutory Award[1] holding that the rights of Starrett in the Project and in Shah Goli had been expropriated on 31 January 1980. The Tribunal appointed an Expert to report on the value of the expropriated rights as of the date of taking. In this second phase of the proceedings, the Tribunal considers the Report it has received from its Expert and issues a Final Award determining the compensation to be paid by Iran to the Claimants.

I join in the major decisions in the Final Award in this Case. Thus, I fully agree with the Tribunal's holding that the proper standard of compensation for the expropriation of Starrett's property rights is the full equivalent of the fair market value of those rights on the date of taking, including future lost profits. I agree, too, with the analysis in the Final Award concerning the weight the Tribunal should give to the opinions of the Expert it appointed to report on the value of the expropriated property.

I have serious questions, however, concerning the correctness of several findings in the Final Award that lower the valuation below the amount that was carefully and cogently determined by the Tribunal's Expert. Id. paras. 337, 356. I also question the award of interest at the rate of only 8.5 percent, despite the preponderant practice of all Chambers of this Tribunal to award higher interest rates in expropriation cases. Moreover, I believe that in order to provide Starrett with the "just compensation" to which it

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[1] Starrett Housing Corp. and Government of the Islamic Republic of Iran, Interlocutory Award No. ITL 32-24-1 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 122 (the "Interlocutory Award").

is legally entitled,[2] it would be more equitable in the particular circumstances of this Case to award compound interest on the damages it suffered.

I write separately first to expand upon the conclusions of the Final Award concerning the standard of compensation in expropriation cases, which I think are entirely correct.

I also write to discuss the points in the Final Award that I would prefer be decided differently, and to comment on the failure to award Starrett any of its costs of arbitration. Notwithstanding these misgivings, I join in the Final Award in order to form a majority, for otherwise no award can be issued.[3]

II. The Standard of Compensation in Expropriation Cases

The Final Award addresses a number of important issues relating to the standard of compensation to be applied by the Tribunal in deciding expropriation cases, and sets forth significant conclusions with which I fully agree. First, the Final Award confirms, as the Tribunal has done in a

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[2] Treaty of Amity, Economic Relations and Consular Rights Between the United States of America and Iran, signed 15 August 1955, entered into force 16 June 1957, art. IV, para. 2, 284 U.N.T.S. 93. The Tribunal correctly finds that this Treaty provision governs the compensation to be paid in this Case. Final Award, paras. 261-62.

[3] For a fuller discussion of the need under Article 31, paragraph 1, of the Tribunal Rules to join in the Award to form a majority lest no award issue, see Concurring Opinion of Howard M. Holtzmann, Starrett Housing Corp. and Government of the Islamic Republic of Iran, Interlocutory Award No. ITL 32-24-1, p. 2 (20 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 159, 159. See also Concurring Opinion of Howard M. Holtzmann, Economy Forms Corp. and Government of the Islamic Republic of Iran, Award No. 55-165-1, pp. 1-2 (20 June 1983), reprinted in 3 Iran-U.S. C.T.R. 55, 55.

number of earlier cases,[4] that the compensation for expropriation is to be determined according to the standards established by the Treaty of Amity[5] ("the Treaty"). The Treaty provides that those whose property or property rights are taken are entitled to "just compensation" that must "represent the full equivalent of the property taken,"[6] valued at the date of taking.

The Final Award also reaffirms that the Treaty provides protection not only for "property" owned directly by nationals of the two States Parties, but also for "interests in property," a phrase "sufficiently broad to include indirect ownership of property rights held through a subsidiary that is not a United States national." Final Award, para. 262. Indeed, the negotiating history of the Treaty indicates that the phrase "interests in property" was discussed by the representatives of the States Parties and was included in recognition of the fact that protection is needed in the

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[4] See, e.g., SEDCO, Inc. and National Iranian Oil Company, Interlocutory Award No. ITL 59-129-3 (27 Mar. 1986); Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2 (19 Mar. 1986); INA Corp. and Islamic Republic of Iran, Award No. 184-161-1 (13 Aug. 1985).

[5] See supra note 1.

[6] Id. art. IV, para 2. Article IV, paragraph 2, of the Treaty provides:

> "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 other 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."

many international transactions that are conducted through foreign subsidiaries.[7]

The Final Award makes it absolutely clear that when a business is expropriated "the full equivalent of property taken" means its "fair market value," a term that the Tribunal finds is "correctly defined" as "the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat." Id. para. 277. Analysis of the Final Award shows that the compensation awarded is based on the going concern value of the expropriated property, considered as an enterprise that the willing buyer would carry on in the future. Thus, for example, the Final Award analyzes such matters as the amount of future revenues and costs of the Project, as well as the time frame within which revenues would be realized and costs paid.

Moreover, the Final Award leaves no doubt that the standard of compensation mandated by the Treaty includes lost future profits. Thus, the Final Award determines and awards every dollar of what the Tribunal carefully calculates as the profits of Shah Goli and Starrett Construction that the owners lost. See id. paras. 345, 351-52. The Tribunal awards Rials 16.46 million as the "net profit" with respect to Shah Goli and $2,847,025 (Rials 201 million) as the "net profit" to which Starrett is entitled for the expropriation of its property rights related to Starrett Construction. Such precise figures reflect the Tribunal's effort to award fully the profits it determines were lost.

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[7] That negotiating history is summarized in SEDCO, Inc. and National Iranian Oil Company, Award No. 309-129-3, p. 22 n. 9 (7 July 1987).

In deciding to award lost profits, the Tribunal does not dwell on whether the expropriation was lawful or unlawful, because the Treaty requires an award of full value at the time of taking, including lost profits, when the taking is lawful, no less than when it is unlawful -- although additional compensation may be awarded when an expropriating State acts in violation of its international legal obligations. Consequently, the Tribunal does not hesitate to award full compensation for all future profits of which Starrett was deprived when its enterprise was taken. It is interesting to note that it does so in a case which some might catagorize as involving a legal expropriation because the taking had its roots in legislation.[8] Of course, had the Tribunal considered it necessary to address the issue of the lawfulness of the expropriation, it would have had to have found that, notwithstanding the underlying legislative action, the expropriation was unlawful because Iran utterly ignored its international legal obligation under Article IV, paragraph 2, of the Treaty to make "adequate provision . . . at or prior to the time of taking for the determination and payment [of just compensation]."

For the purposes of determining fair market value, the Final Award expressly approves as "logical and appropriate" the valuation principle that "book value does not represent fair market value," and that uses book value only as a

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[8]The taking here was held by the Tribunal to have occurred when the Government of Iran appointed a so-called "temporary manager" of Shah Goli "to direct all further activities in connection with the Project on behalf of the Government." Interlocutory Award, p. 52; reprinted in 4 Iran-U.S. C.T.R. at 154. The Tribunal found that this "appointment was made pursuant to the decree of the Revolutionary Council, adopted on 14 July 1979, called Bill for Appointing Temporary Managers or Managers for the Supervision of Manufacturing, Industrial, Commercial, Agricultural or Service Companies." Id.

starting point in arriving at the amount that a reasonable buyer would pay for the Project. Final Award, paras. 279-80. Thus, the Tribunal approves a valuation methodology in which, after calculating net book value, future revenues and costs are determined, as well as other relevant factors, in order to arrive at a fair market value that takes into full account the future earning power and profitability of the expropriated business.

Also noteworthy is the Tribunal's experience in utilizing the Discounted Cash Flow Method, ("the DCF Method") to arrive at the fair market value. Analysis of the Final Award shows how the DCF Method was applied to determine this value, including future profitability. The Tribunal had indicated in the Interlocutory Award that the DCF Method should be used, provided the Expert it appointed considered it "appropriate" to do so. Interlocutory Award, p. 56, reprinted in 4 Iran-U.S. C.T.R. at 157. The Tribunal's early impression of the utility of the DCF Method was confirmed by the Expert's decision to employ it fully. The decisions of the Final Award on valuation of the Project were made within the framework of the DCF Method. In my view, the valuation procedure proved the great usefulness of the DCF Method as a technique for establishing the fair market value of an enterprise, notwithstanding that in this case the expropriated business consisted of a relatively complex organization of related companies, included minority interests, and involved additional problems arising from the fact that the Claimants were both shareholders and creditors. While the Project in this Case was expected to be completed in about 36 months after expropriation, the Tribunal's experience in employing the DCF Method indicates that the same methodology could be effectively utilized in valuing longer term enterprises -- albeit with the need of some additional effort in assessing the risk factors that make up the discount rate. Indeed, experience in the financial community throughout the world attests to the suitability of the DCF Method in

valuing all kinds of businesses regardless of their purposes or the length of time they are expected to operate.

In adopting and applying the DCF Method, the Tribunal does not shrink from utilizing a valuation methodology that necessarily includes building upon a number of hypotheses. It recognizes that its chosen valuation method involves making determinations of what a hypothetical reasonable businessman would have done more than seven years ago in determining the price he would, as a willing buyer, have been prepared to pay for Shah Goli and the Project. Thus, the Final Award explicitly recognizes that "the concept of fair market value requires, inter alia, determination as to various forecasts that a hypothetical reasonable businessman who was a willing buyer of the Project would have made on 31 January 1980 [the date of taking]." Final Award, para. 274. The Final Award observes that answers to some valuation questions "are not to be found solely by accounting analysis or the application of the technical valuation methods. As to such matters, the Tribunal, like the hypothetical willing buyer, must make a reasonable forecast of future events." Id.[9] For example, in evaluating one aspect of future revenue the Final Award states frankly that "[i]n these uncertain circumstances, the Tribunal must step into the shoes of the hypothetical reasonable businessman who wished to buy the Project in January 1980 and make the assessments that it believes he would have been most likely to have made." Id. para. 305. This metaphor of stepping into the shoes of the reasonable buyer is repeated by the Tribunal in its determinations of several points in the valuation. See,

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[9] Similarly, the tribunal in the Aminoil arbitration recognized that it is not wrong in a valuation to "include speculative elements, since all methods of assessment, whatever they may be, will do that." Kuwait and American Independent Oil Company (AMINOIL), para. 154 (1982), reprinted in 21 Int'l Leg. Mats. 976, 1035 (1982).

e.g., Final Award, paras. 312, 322. As the Tribunal recognizes, applying hypotheses such as these, in a reasoned manner and pursuant to an established valuation methodology, does not result in awarding speculative damages.

Similarly, the Tribunal does not hesitate to find a fair market value, even when in reality it knows that there was probably no actual market for the Project in January 1980. International law teaches that the value of expropriated property must be determined without regard to the effects of taking or threats of taking.[10] In order to apply that principle when valuing property taken in a revolutionary environment, the Tribunal must employ the hypothesis that a market exists -- as, indeed, a market would exist except for the taking or threat of taking. The law demands that an international tribunal do no less. It follows that when a tribunal employs such a hypothesis in determining compensation in an expropriation case it is not awarding speculative damages.

The Tribunal arrives at the amount of compensation that it awarded by using one integrated, coherent valuation method -- the DCF Method. It does not attempt to mix different criteria, and use part of one method such as book value, and part of another such as DCF. In my view, arbitrators trained in the law should exercise maximum self-restraint and not try to "improve" on a long-established method such as the DCF Method by taking only bits and pieces of it and mixing them with bits and pieces chosen from other valuation methods. The experience

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[10] See Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2, para 30 (19 Mar. 1986); INA Corp. and Government of Islamic Republic of Iran, Award No. 184-161-1, p. 10 (13 Aug. 1985); American International Group, Inc. and Islamic Republic of Iran, Award No. 93-2-3, pp. 16-17 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 96, 106.

of the Tribunal in this Case has taught us how carefully interrelated and balanced the elements of the DCF system are, and jurists should not lightly undertake to tinker with a widely respected scheme.

Finally, it is worth noting that the Tribunal in this Case rigorously based the compensation awarded on the value of the property rights at the date of taking, as the Tribunal has done in virtually every expropriation case. The Tribunal did not engage in the problematic gymnastics of establishing a date for taking and then using another date for purposes of valuation. Also, having decided to establish value on the taking date, the Tribunal refused, despite requests to it, to consider events, such as the outbreak of war with Iraq, that were not foreseeable by a reasonable businessman on the date of taking.

In sum, (i) the Tribunal confirms the applicability of the Treaty of Amity in determining the standard of compensation applicable to expropriation cases and recognizes that the Treaty broadly protects not only property rights owned directly by United States nationals but also their rights owned indirectly through foreign subsidiaries; (ii) the Tribunal considers that the "full equivalent of property taken" means, in the case of a business, the fair market value of that enterprise, which necessarily includes its future profitability; (iii) the Tribunal accordingly provides compensation for the full amount of the future profits of which Starrett was deprived; (iv) the Tribunal does not enter the theoretical debate over whether the expropriation was lawful or unlawful, the value being the same in either event; (v) the Tribunal utilizes the DCF Method unreservedly and completely, and does not mix valuation methods; (vi) consequently, the Tribunal refuses to base any part of the amount of compensation on book value, except to the extent that book value is necessarily one element taken into account in applying the DCF Method;

(vii) the Tribunal recognizes that valuation must be based, inter alia, on various hypotheses, and the Tribunal does not hesitate to do so; and, finally, (viii) the Tribunal rigorously determines value at the date of taking only, and refuses to take into account future events that were not reasonably foreseeable on that date.

III. The Expert's Determination of Fair Market Value.

As noted above, the Tribunal makes it absolutely clear that when a business is expropriated "the full equivalent of property taken" means its "fair market value." Final Award, paras. 261, 277. To determine the fair market value of the Project, the Expert calculated, among other things, the amount of revenues that would be received from the sale of apartments, the remaining costs of construction, and the time needed to complete construction. The Final Award accepts the basic positions of the Expert on these matters -- as I agree it should -- but it makes several unwarranted modifications that lower the value. The principle incorrect modifications are (i) that there would be fewer apartments and parking spaces available for sale or resale than the number determined by the Expert, and (ii) that the 10 percent price escalation clause in the Apartment Purchase Agreements would not be exercised in all sales as the Expert assumed, but only in some sales.

A. The Number of Apartments and Extra Parking Spaces Available for Sale or Resale After 31 January 1980

As is usual with attractive apartment developments built in times of housing shortage, almost all of the approximately 1,500 apartments in the Project were sold by 1977 pursuant to Apartment Purchase Agreements entered into long before construction was completed. At the date of expropriation, only 173 apartments remained unsold. By that time, however, it was known that a large number of persons

who had purchased apartments had left Iran or had been caught up in the unrest in Iran at that time, and thus it was reasonable to expect that they would not exercise their rights under their Apartment Purchase Agreements and that their apartments would become available for resale by Shah Goli. The significance of the number of such apartments for the valuation is that, as the Final Award properly finds, "it was expected that apartments which had not yet been sold and those that became available for resale would be sold for more than the original amount due to rising price levels in an inflationary economy." Id. para. 303. The number of such apartments, therefore, is an important element in the valuation.

There never should have been any problem in this Case in determining how many apartments had become available for resale by 31 January 1980. The governmental managers of Shah Goli have access to such information and also know whether they permitted the original purchasers who had left to assign their Apartment Purchase Agreements to others. They also know whether at the expropriation date any legal proceedings concerning such assignments had been decided by Iranian courts or were the subject of pending litigation. A reasonable businessman who was a willing buyer of the Project on 31 January 1980 would have insisted on being given that information, and a willing seller would have provided it, knowing that any attempt to hide the data would quickly turn a willing buyer into an unwilling one. In this connection, it is pertinent to recall that the Expert's definition of fair market value assumed that the willing buyer and the willing seller "each had good information." Id. para. 277.

In an effort to replicate, for the purposes of his hypothetical valuation model, the shared knowledge that would have existed in a real transaction, the Expert requested the Respondents to submit the necessary documents so

that he could calculate and verify the number of apartments that were available for resale on 31 January 1980. The Respondents refused to comply with his request. The Expert summed up the situation quite bluntly: "[The] Respondents, who must be in possession of such information, have failed to make such submissions at my request." Id. para. 84.

The Expert's request to the Respondents for information was authorized both by the terms of reference established by the Tribunal and by the Tribunal Rules. Thus, the Interlocutory Award states that "[t]he expert shall also be entitled to obtain from any Party all documents which he deems necessary for his investigation." Interlocutory Award, p. 57, reprinted in 4 Iran-U.S. C.T.R. at 158. Similarly, the Tribunal Rules provide that "[t]he parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them." Tribunal Rules, Art. 27, para. 2. Faced with recalcitrant Respondents who refused to comply with express provisions of the Interlocutory Award and the Tribunal Rules, the Expert turned to other evidence in the record in order to determine the number of apartments available for resale, and concluded that there were 600 such apartments on 31 January 1980.

The Expert's determination that there were 600 apartments available for resale is based on solid evidence. Final Award, paras. 82-83. In my view, the most persuasive piece of that evidence is information submitted by the Respondents that on 31 January 1980 more than 600 purchasers of apartments were in default on promissory notes for advanced payments that they had given pursuant to provisions of the Apartment Purchase Agreements. The Respondents presented evidence that showed that only 19 of the 600 individuals who had defaulted later cured their defaults, a small number surely outweighed by the larger number of those who continued to flee Iran. These defaults create a strong

inference that the purchasers had abandoned their valuable rights to acquire apartments and were unable to assign those rights to others.[11]

While the Respondents raised statistical and legal smokescreens in an effort to discredit the Expert's conclusion that 600 apartments were available for resale, they persistently refused to disclose information in their possession that would have clarified the matter. It will be recalled that the Expert had found that "there is irrefutable proof that certain apartments became free for re-sale" and that the Respondents "must be in possession of such information" as would permit verification of the precise number. Final Award, paras. 82, 84. International law -- and common sense -- point to the only reasonable inference that can be drawn in such a situation: if the information in the possession of the Respondents had shown that the figure was less than 600, they would, in their own interest, have disclosed the data. Their refusal to submit information to the Expert strongly suggests that the data supports the figure of 600, or an even larger number. The Expert so concluded, and he was right to do so.

The international law that governs situations such as this is well established. Thus, for example, the U.S.-Mexican Claims Commission stated that it "denies the 'right' of the respondent merely to wait in silence in cases where it is reasonable that it should speak" and drew negative inferences from the respondent's silence in the face of

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[11]This is consistent with other evidence in the record. For example, out of 99 apartments as to which title had passed by 31 January 1981, 51 apartments were transferred to persons different from the original purchasers. See Final Award, para. 82.

other evidence.[12] This approach has been widely adopted by other international tribunals.[13]

Applying these established principles of international law to the circumstances in this Case, I believe that the Tribunal should accept the Expert's determination that 600 apartments were available for resale on 31 January 1980, and that this figure should be used in calculating the revenue of the Project for the purpose of the valuation.

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[12] Parker Case (U.S. v. Mex.), 4 Rep. Int'l Arb. Awards 35, 39 (1926). This principle was applied repeatedly by the various Mexican Claims Commissions. See A. Feller, The Mexican Claims Commissions 1923-1934, 260-63 (1935). For example, in the Kalklosch Case (U.S. v. Mex.), 4 Rep. Int'l Arb. Awards 412 (1928), the Commission found that missing evidence could have been submitted by the respondent, and that the respondent's unexplained failure to do so warranted recovery on the basis of the evidence submitted by the claimant. Id. 414. See also Hatton Case (U.S. v. Mex.), 4 Rep. Int'l Arb. Awards 329, 332 (1928) (where respondent had access to evidence which would confirm or contradict the claimant's assertions, but did not submit it, "the Commission should accept without question the claimant's allegation" even though the claimant's evidence was incomplete).

[13] See, e.g., Lighthouses Arbitration (Permanent Court of Arbitration), Claim No. 6, 23 Int'l L. Rep. 677 (1956); Grant-Smith Claim (Anglo-Italian Conciliation Commission) (1952), 22 Int'l L. Rep. 966 (1955); Janin v. Etat allemand (Franco-German Mixed Arbitral Tribunal), 1 Recueil des Décisions des Tribunaux Arbitraux Mixtes 774 (1922); De Lemos Case, reported in J. Ralston, Venezuelan Arbitrations of 1903 302, 319 (1904). See also B. Cheng, General Principles of Law as Applied by International Courts and Tribunals 324-326 (1953); Witenberg, La Théories des Preuves Devant les Juridictions Internationales, 56 Recueil des Cours (Hague Academy of International Law) 5, 47-50 (II-1936); D. Sandifer Evidence Before International Tribunals 108, 115-18, 130-31, 150-51, 172-74 (rev. ed. 1975); Witenberg, Onus Probandi devant les jurisdictions arbitrales, 55 Rev. de Dr. Int'l Pub. 321, 331-35 (1951); J.I. Case Co. and Islamic Republic of Iran, Award No. 57-244-1, pp. 6-12 (27 July 1983), (Dissenting Opinion of Howard M. Holtzmann) reprinted in 3 Iran-U.S. C.T.R. 66, 68-72.

For the same reasons, I believe that the Tribunal should accept, without modification, the Expert's determination of the number of extra parking spaces available for sale. There, too, the Respondents refused to provide the documentation requested by the Expert that would have clarified the matter. Accordingly, adverse inferences must be drawn against them.

B. The Escalation Clause in the Apartment Purchase Agreements

In calculating the revenue of the Project, the Expert included income from the operation of an escalation clause in the Apartment Purchase Agreements that provided for an adjustment of up to 10 percent of the purchase price depending on an increase in construction costs. Finding that construction costs had increased by more than 10 percent, the Expert applied the escalation clause in his valuation.

The Expert indicated in his Report that he was fully aware of the existence of a so-called "Procès-Verbal" by which Shah Goli purportedly waived its rights to exercise the escalation clause, but he did not consider the Procès-Verbal to be valid because of the circumstances in which it was signed. In my view, the Expert was entirely correct in his assessment of the Procès-Verbal -- it is an invalid document, extorted at gunpoint, and no international tribunal should take it into account in any manner whatsoever.

The circumstances in which the Procès-Verbal was signed were vividly described in the unrebutted testimony of Mr. Henry Benach, the Chairman of Starrett, at the Hearing in the first phase of this Case. Mr. Benach recounted the events that occurred following Shah Goli's announcement that it would increase apartment prices in accordance with the

escalation clause. He told what happened when Revolutionary Guards, bearing guns, entered the offices of Shah Goli:

> "[T]hey 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.
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> . . .
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> And what they did was, finally, after negotiation, they let [one executive] 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."

Moreover, any possible doubt concerning the character of the Procès-Verbal is dispelled by its language. Referring to the escalation clause, the Procès-Verbal states:

> "Alavi Foundation, in order to cut the hands of intermediate persons in favor of the Iranian nation and the purchaser of the apartments shall take necessary action in order to cancel unnecessary contracts whish [sic] is a burden to the cost price of the apartments."

That language affirms the true nature of the Procès-Verbal.

The Final Award does not hold that the Procès-Verbal was valid; it merely says that the hypothetical reasonable businessman, aware of it, "would have expected to collect the 10 percent escalation amount on some, but not all, sales." Final Award, para. 312. On that basis the Tribunal reduces the valuation. I believe that the Tribunal, like

the Expert, should refuse to give any effect to a document so tainted as the Procès-Verbal.[14]

IV. The Inadequate Award of Interest

A. The Rate of Interest

The Final Award, without any explanation, finds it "reasonable" to grant interest at the rate of 8.5 percent. That is far below the rate needed to provide the "just compensation" mandated by the Treaty of Amity. In this Case, where the Respondents well knew that Starrett was borrowing from its banks in order to secure funds that were in turn lent to Shah Goli for the purposes of the Project, the proper rate would be equal to the rates Starrett was actually required to pay for the money. Starrett provided detailed, precise, and uncontroverted evidence from their banks showing the rates of interest charged by the banks. At all times the rates Starrett paid were above 8.5 percent, and, indeed, above the banks' prime lending rates. The Respondents' wrongful failure to compensate Starrett for the property rights taken from it has resulted in Starrett having to continue to pay such rates to its banks ever since the date of expropriation, for it has had no alternative except to continue to borrow these amounts from its banks during the more than seven long years since the expropriation. Under these circumstances, only an award of interest at the same rates Starrett had to pay its banks would make it whole for the damages it has suffered.

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[14] Moreover, it is a fundamental principle of international law that when valuing expropriated property the effects of any threats of taking and the taking itself must be excluded. This principle is recognized in the Final Award. Id. para. 281.

If the Tribunal does not award Starrett interest at the rates it paid its banks, then at the very least, it should award interest in accordance with the approach developed and applied by this Chamber since its award in Sylvania Technical Systems, Inc. and Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985). In that Case, the Tribunal stated:

> "This Chamber finds it in the interest of justice and fairness to develop and apply a consistent approach to the awarding of interest in cases before it. . . . In the absence of a contractually stipulated rate of interest, the Tribunal will derive a rate of interest based approximately on the amount that the successful Claimant would have been paid in time and thus had the funds available to invest in a form of commercial investment in common use in its own country. Six-month certificates of deposit in the United States are such a form of interest for which average interest rates are available from an authoritative official source."

The Sylvania formula results in an interest rate of approximately 10.5 percent in this Case -- and if it were applied the award would be more than $5 million greater than the Tribunal now grants.

The preponderant practice of this Tribunal when awarding interest in expropriation cases is to set a rate substantially greater than the 8.5 percent awarded here. The roster of cases is long and their message is clear: Dames and Moore[15] -- 10 percent; Tippetts, Abbett, McCarthy and Stratton[16] -- 12 percent; Phelps Dodge[17] -- 11.25 percent;

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[15] Dames & Moore and Islamic Republic of Iran, Award No. 97-54-3 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 212.

[16] Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, Award No. 184-161-1 (13 Aug. 1985).

(Footnote Continued)

Payne[18] -- 11.25 percent; American Bell International[19] -- 10 percent; Oil Field of Texas[20] -- 11.25 percent; Computer Sciences[21] -- 11.5 percent; Sola Tiles[22] -- 10.75 percent and SEDCO[23] -- 10 percent.

There are only two exceptions to the Tribunal's firmly established practice of granting more than 8.5 percent when awarding interest in expropriation cases. In one of the Tribunal's earliest expropriation cases American International Group,[24] decided in 1983, Chamber 3 awarded only 8.5 percent;[25] but in every subsequent expropriation case Chamber 3, under two different chairmen, has awarded a

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(Footnote Continued)

[17] Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2 (15 July 1986).

[18] Payne and Government of Islamic Republic of Iran, Award No. 245-335-2 (8 Aug. 1986).

[19] American Bell International, Inc. and Islamic Republic of Iran, Award No. 255-48-3 (19 Sept. 1986).

[20] Oil Field of Texas, Inc. and Government of Islamic Republic of Iran, Award No. 258-43-1 (8 Oct. 1986).

[21] Computer Sciences Corp. and Government of Islamic Republic of Iran, Award No. 221-65-1 (16 Apr. 1986).

[22] Sola Tiles, Inc. and Government of Islamic Republic of Iran, Award No. 298-317-1 (22 Apr. 1987).

[23] SEDCO, Inc. and National Iranian Oil Company, Award No. 309-129-3 (7 July 1987).

[24] American International Group, Inc. and Islamic Republic of Iran, Award No. 93-2-3 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 96.

[25] Judge Mosk, however, in his Concurring Opinion objected that "interest awarded should be based on prevailing interest rates" and noted that he saw "no reason why the rate of interest in this case [8.5 %] should be less than awarded by the Tribunal at the same time in another expropriation claim [10 percent in Dames & Moore, supra]." Concurring Opinion of Richard M. Mosk, American International Group, supra, at 18-19.

higher rate of interest. American International Group involved the nationalization of an insurance company. It is, therefore, perhaps understandable that Chamber One, in the only other insurance case, INA,[26] awarded 8.5 percent explaining that it did so because for consistency it "adopts the rate used by Chamber Three in a claim involving a parallel case of nationalization of an insurance company pursuant to the same law."[27] In all seven expropriation cases since INA, however, every Chamber of the Tribunal has awarded more than 8.5 percent interest.

I find it hard to justify that Starrett should receive substantially less in interest than it would have received had it been awarded a rate of interest as high as in all other expropriation claims, except the two insurance nationalization cases. I find it particularly difficult to understand this conclusion because the Final Award nowhere refers to any reason for this result.

The Tribunal early in its history recognized that it should avoid inconsistent awards. Thus, Presidential Order No. 1, issued on 19 October 1981, provided that

> "A Chamber may relinquish jurisdiction to the [Full] Tribunal at any time prior to the final award when the resolution of an issue might result in inconsistent decisions or awards by the Tribunal."

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[26] INA Corp. and Government of the Islamic Republic of Iran, Award No. 184-161-1 (13 Aug. 1985).

[27] Id. at 16 n. 9. But see Concurring Opinion of Judge Holtzmann, INA, supra, at 17 (objecting that a "rate of only 8.5 percent is unreasonably low and ignores the policy . . . stated in our Award in Sylvania."). Also, American International Group gave no particular reason for the choice of 8.5 percent. Id. at 18.

It is true that this provision is not mandatory on a Chamber. But I regret that in this Case, where the interest awarded is so grossly inconsistent with the rates awarded repeatedly in expropriation cases throughout the Tribunal, the Chamber has not exercised restraint and relinquished the matter to the Full Tribunal. I would prefer that we issue a Partial Award now including interest at 8.5 percent and relinquish to the Full Tribunal the question of whether additional interest should be granted to avoid inconsistent awards.

B. The Reasons for Awarding Compound Interest in this Case

I also believe that in the circumstances of this Case interest should be awarded on a compound basis. I reach this conclusion because that is necessary to make Starrett whole for the actual damage it suffered due to the Respondents' expropriation of its property rights. Awarding compound interest would also conform to the methods used by the Expert in his valuation, and would be consistent with international law.

To begin with, as noted above, only an award of interest on a compound basis can adequately compensate Starrett for the damages it suffered due to the Respondents' wrongful taking. Before the date of taking, the Respondents were fully aware that Starrett was borrowing money from its U.S. banks on a compound basis in order to finance the Project and provide loans to Shah Goli. Starrett, like most contractors, operated on the basis of back-to-back loans and a substantial line of credit with their banks. It is normal commercial practice that banks customarily charge compound interest to finance such credit facilities. On the date of taking, Starrett's outstanding indebtedness (including accrued interest) greatly exceeded the $41 million they eventually sought from the Respondents on the basis of the

Expert's Report. Because it was deprived of the compensation it was entitled to from the Respondents, Starrett was forced to continue to borrow from its banks. In this respect, Starrett offered uncontested evidence that these banks charged it interest on a compound basis. Consequently, each dollar of actual interest costs in turn generated additional interest costs, and this compounding effect has burdened Starrett for many years with a heavy and growing indebtedness.

In this Case, the Tribunal is faced with the situation where the Respondents' wrongful acts have led to the direct and foreseeable consequence of forcing Starrett to borrow money on a compound basis. This fact is not disputed, nor is it disputed that the Respondents were completely aware of the serious situation in which they had placed Starrett. Thus, to make Starrett whole and to erase the consequences of the Respondents' wrongful acts, I would award Starrett interest on a compound basis.

An award of compound interest is also in conformity with the Expert's valuation methods. The Expert in several crucial respects employed compound interest in his valuation of the Project. Most significantly, the Expert determined the Project's fair market value using a discount rate (i.e., 28 percent) on a monthly compound basis, thereby reducing the value of the Project in the Starrett's hands. In addition, the Expert credited loans from Bank Omran to Shah Goli with compound interest, thereby increasing the liabilities of Shah Goli. The Expert also made his "alternative computation of interest" on loans from Starrett to Shah Goli on a compound basis. Thus, the Expert recognized, and adjusted his valuation in accordance with, the modern economic reality of compound interest. The Tribunal's failure to award Starrett interest on a compound basis therefore has the effect of reducing even further the

compensation it has found Starrett entitled to on 31 January 1980.

Finally, an award of compound interest in this Case would be consistent with international law. The Tribunal has not yet squarely addressed the issue of compound interest. In R.J. Reynolds Tobacco Co. and Government of the Islamic Republic of Iran, Award No. 145-35-3, p. 19 (6 Aug. 1984), Chamber Three of the Tribunal found that there were no "special reasons" for departing from international precedents "which normally do not allow the awarding of compound interest." The Tribunal relied on a 1943 treatise[28] for the proposition that the rule against compound interest was "settled." Whether or not such a rule existed before 1943, it is no longer appropriate or justifiable.

At the Hearing in this Case, Starrett's attorney read into the record a legal opinion of the noted scholar Professor F.H. Mann on the question of Starrett's entitlement to compound interest. Professor Mann, noting the precedents disallowing awards of compound interest, commented that the international law relating to compound interest:

> "has never been fully analyzed and is in fact far from clear. This is due to the relatively small number of cases in which the point was considered, to the fact that most of the cases . . . were decided many years ago when economic conditions and commercial practices were less developed, and to the absence of profound argument and discussion."

As Professor Mann recognized, times change and the law should not be oblivious to such change. Significantly, Professor Mann's study found no statement in any source of

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[28] M. Whiteman, 3 Damages in International Law 1997 (1943).

international law prohibiting awards of compound interest as such. To the contrary, some cases, most notably the recent Aminoil arbitration,[29] have awarded compound interest. In Professor Mann's opinion, municipal and international law evidence a trend to award compound interest in circumstances, such as exist in this Case, where the injured party has incurred compound interest charges as the direct result of the wrongful acts of the other party. He stated that:

> "If, as the claimants allege, the non-payment of the compensation on the 31st January 1980 involved them in the payment of interest to banks, then it is a well known fact that it is their universal practice to charge compound interest with monthly or half-yearly, or possibly but rarely, yearly rates. Such liability would be a loss directly flowing from the non-payment of compensation . . . . [I]nterest and compound interest paid or not earned was a direct loss or expense to which the victim . . . [is] entitled."[30]

Modern economic reality, as well as equity, demand that injured parties who have themselves suffered actual compound interest charges be compensated on a compound basis in order to be made whole. International tribunals and respected commentators have come to recognize this principle; it is unfortunate that the Final Award does not.

V. The Claimants' Right to Costs

The Final Award refuses to grant Starrett any of its costs of arbitration or even to reimburse it for the one-half of the Expert's fees that it advanced pursuant to

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[29] Kuwait and American Independent Oil Co. (Aminoil), reprinted in 21 Int'l Leg. Mats. 976, 1042 (1982) (Reuter, Sultan, Fitzmaurice, arbs.).

[30] See also Mann, On Interest, Compound Interest, and Damages, 101 L.Q. Rev. 30 (1985); Wetter, Interest as an (Footnote Continued)

Orders of the Tribunal.

Starrett has prevailed to a substantial extent in this proceeding. In the first stage, it prevailed on its key contention that its property rights were expropriated, albeit at a date some months later than it contended. In the second phase, it has prevailed on its principal contentions concerning the standard of compensation and the weight to be given to the Expert's Report. As a result, it has been awarded $36,689,342 of the $41,059,341 it sought in this phase.

Article 40 of the Tribunal Rules establishes the principle that the prevailing party should be awarded its costs of arbitration.[31] Yet, the Final Award grants Starrett no costs at all.

Here Starrett sought total costs of arbitration of only $250,000, plus reimbursement of the amounts it advanced for the fees of the Expert. This is surely a modest request by any standard, for it is obvious that its costs must have been far greater than $250,000. It must be recalled that these costs cover (i) in the first phase of the proceedings, the presentation of extensive memorials and evidence, review of submissions of the Respondents, participation at The Hague in a pre-hearing conference and in a five-day Hearing; (ii) in the phase of the Expert's investigation, the preparation of a mountain of evidence and comments, review of an even greater amount of material submitted by the Respondents, presentation of comments on the Expert's Draft

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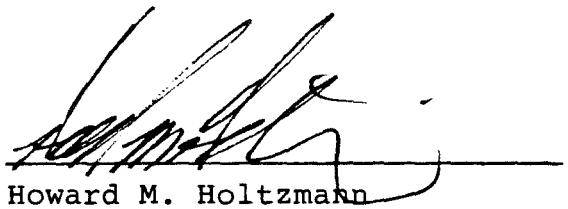
(Footnote Continued)
Element of Damages in the Arbitral Process, Int'l Fin. L. Rev., Dec. 1986, at 20.

[31] I have previously written at length analyzing these provisions. See Separate Opinion of Howard M. Holtzmann, Sylvania Technical Systems, Inc. and Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985).

Report, and participation in two meetings held in Sweden by the Expert and in his two-week inspection visit to New York; and (iii) in the final phase, the preparation of comments on the Expert's Report, review of the very extensive comments of the Respondents, and participation in a six-day Hearing at The Hague. These activities required substantial costs for translation of submissions into Farsi, as well as the costs of international travel for Starrett's legal team, company executives, and witnesses. Nor can it be forgotten that part of Starrett's costs were incurred in reviewing voluminous submissions by the Respondents that the Tribunal eventually found were inadmissible. Considering the extent of the activities of Starrett's counsel, the complexity of the many issues they had to address, and their degree of success, I would not hesitate to award the modest $250,000 it seeks as costs.

In addition, Starrett has paid one-half of the Expert's fees and associated costs which totalled $1,053,710. In view of the fact that it largely prevailed in its position that the Expert's Report should be accepted, I would award Starrett its costs for the Expert.

Date, The Hague
14 August 1987



Howard M. Holtzmann