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IRAN-UNITED STATES CLAIMS TRIBUNAL

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CASES NOS. 44, 46, and 47
CHAMBER NO. THREE
AWARD NO. 560-44/46/47-3

SHAHIN SHAINE EBRAHIMI,
CECILIA RADENE EBRAHIMI,
CHRISTINA TANDIS EBRAHIMI,
Claimants

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

SEPARATE OPINION OF RICHARD C. ALLISON

I. INTRODUCTION

1. I concur in the result reached in the Award in these Cases in order to form the requisite majority. As set forth herein, however, there are elements of the Award's reasoning with which I cannot agree.

2. The Award properly concludes that the Claimants are entitled to receive full compensation for their 19% interest in Gostaresh Maskan Company ("Gostaresh Maskan" or the "Company"), which was expropriated by the Government of Iran on 13 November 1979. The Award, however, arrives at this correct conclusion by reliance upon the amorphous standard of "appropriate compensation," stating that

> while international law undoubtedly sets forth an obligation to provide compensation for property taken, international law theory and practice do not support the conclusion that the "prompt, adequate and effective" standard represents the prevailing standard of compensation. . . . Rather, customary international law favors an "appropriate" compensation standard. . . . The gradual emergence of this rule aims at ensuring that the amount of compensation is determined in a flexible manner, that is, taking into account the specific circumstances of each case. The prevalence of the "appropriate" compensation standard does not

> imply, however, that the compensation quantum should be always "less than full" or always "partial."

Award at para. 88.

3. I must respectfully, but profoundly, disagree with this interpretation of the law. The Award's advocacy of an ill-defined and essentially meaningless standard of "appropriate" compensation is unjustifiable and out of step with the times. In today's world where nations -- great and small -- have come increasingly to recognize their economic interdependence and the need to inspire confidence as the basis for their development and prosperity, a "flexible" rule[1] that looks with indifference upon the deprivation of property for less than its fair value is counterproductive and backward-looking. Moreover, in this respect the Award misreads the state of customary international law as the twenty-first century approaches.[2]

II. THE CUSTOMARY INTERNATIONAL LAW STANDARD OF COMPENSATION FOR EXPROPRIATED PROPERTY

4. Contrary to the view expressed in the Award, when a State takes the property of foreign nationals, customary international law requires the payment of full compensation representing the fair market value of the expropriated property. In order to understand the current state of international law regarding the

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[1] The word "flexible" is coupled in the Award with the phrase "taking into account the specific circumstances of each case." Award at para. 88. In one sense, of course, the compensation due for a deprivation of property always must be determined with reference to the facts and circumstances of the particular case. However, the Award seems to use the word "circumstances" in the very different sense of, inter alia, the political and social conditions prevailing in the nationalizing State at the time of the taking. It is this approach that I believe to be wrong in theory, wrong in practice and hopelessly at odds with Tribunal precedent.

[2] The Award focuses its discussion of the correct standard of compensation upon customary international law and appears to assume sub silencio that customary international law is the sole source for determining the standard of compensation before this Tribunal. This approach erroneously ignores the Treaty of Amity between the United States and Iran. See discussion at paragraphs 40 to 47, infra.

standard of compensation, a brief review of its evolution is useful.

A. The Pre-World War II Standard

5. Perhaps the most celebrated decision concerning compensation for expropriations is that of the Permanent Court of International Justice in Chorzów Factory.[3] In that case, the Court found that Poland had breached its obligation to Germany under the 15 May 1922 Geneva Convention concerning Upper Silesia. Relying upon "international practice and in particular . . . the decisions of arbitral tribunals," it stated that unlawful takings required "[r]estitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; [and] the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it."[4] In contrast, in the case of a lawful expropriation, the measure of damages was "the value of the undertaking at the moment of dispossession, plus interest to the day of payment."[5] Thus, according to the principles set forth in Chorzów Factory, compensation amounting to no less than "the value of the undertaking" is required whether a taking is lawful or unlawful; and when the taking is unlawful additional damages may be awarded.

6. The other leading pre-World War II case on the proper standard of compensation was the decision of the Permanent Court of Arbitration in Norwegian Shipowners' Claims.[6] In that case, fifteen Norwegian nationals entered into contracts with shipyards in the United States for the building of ships to be used by Norway in the First World War. After the United States declared war on Germany, it adopted emergency measures authorizing the

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[3] Factory at Chorzów (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (13 Sept. 1928).

[4] Id. at 47.

[5] Id.

[6] Norwegian Shipowners' Claims (Norway v. U.S.), 1 R.I.A.A. 307 (30 June 1922).

requisitioning of these ships for use in its own war effort against Germany. Having found that Norway's property had been taken, the Tribunal noted that it was not bound by certain United States legislation, "nor by any other municipal law, in so far as these provisions restricted the right of the claimants to receive immediate and full compensation, with interest from the day on which the compensation should have been fully paid ex aequo et bono."[7] The Tribunal then went on to award compensation equal to "the fair market value of the claimants' property."[8]

7. Many other pre-World War II decisions by international tribunals held that a state must pay full compensation for the expropriation of private property owned by foreigners.[9] For example, the U.S.-Venezuela Mixed Claims Commission held in the Upton Case that "[t]he right of the State, under the stress of necessity, to appropriate private property for public use is unquestioned, but always with the corresponding obligation to make just compensation to the owner thereof."[10] Similarly, the U.S.-Germany Mixed Claims Commission held that Germany must "make

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[7] Id. at 340.

[8] Id.

[9] Indeed, the requirement of full compensation for the taking of property is a principle grounded in centuries of international jurisprudence. The Jay Commission in 1794 held, in Betsey v. Great Britain, that the measure of damages for the unlawful seizure of cargo was the "net value of the cargo at its port of destination at such time as the vessel would probably have arrived there." Betsey (U.S.) v. Great Britain, Moore's Arb. 4205, 4216 (19 Nov. 1794). See also Jones (U.S.) v. Great Britain, Moore's Arb. 3049 (1853); Ferrer (U.S.) v. Mexico, Moore's Arb. 2721 (4 July 1868); British Claims in the Spanish Zone of Morocco (Spain v. U.K.), 2 R.I.A.A. 615 (1 May 1925); Goldenberg Case (Ger. v. Rom.), 2 R.I.A.A. 901 (27 Sept. 1928); Hatton v. United Mexican States (U.S. v. Mexico), 4 R.I.A.A. 329 (26 Sept. 1928); Melczer Mining Co. v. United Mexican States (U.S. v. Mexico), 4 R.I.A.A. 481 (30 Apr. 1929); Portuguese-German Arbitration, 2 R.I.A.A. 1035 (30 June 1930); De Sabla v. Panama (U.S. v. Pan.), 6 R.I.A.A. 358 (29 June 1933); Lena Goldfields, Ltd. v. Russia (3 Sept. 1930), reprinted in 36 Cornell L.Q. 42, 51-52 (1950). See generally J.H. Ralston, The Law and Procedure of International Tribunals 250-53 (rev. ed. 1926).

[10] Upton Case (U.S. v. Venez.), 9 R.I.A.A. 234, 236 (1905).

full, adequate, and complete compensation or reparation for all losses sustained by American nationals" calculated as the "reasonable market value of the property as of the time and place of taking."[11] Indeed, I am aware of no reported decision holding that compensation should be less than full.

8. Thus, there can be little doubt that in the early part of this century and before, it was generally accepted that international law required that the deprived owner be placed in as good a position as he had previously enjoyed (i.e., compensated, from the Latin compensare, "to counterbalance") by the return of the property itself or the payment of damages equivalent to its full value.[12] In the words of this Tribunal, "'the overwhelming practice and the prevailing legal opinion' before World War II supported the view that customary international law required compensation equivalent to the full value of the property taken."[13]

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[11] Administrative Decision No. III (U.S. v. Ger.), 7 R.I.A.A. 64, 66 (11 Dec. 1923) (emphasis omitted).

[12] This is not to say that there were no challenges to the traditional rule. The exchange between Secretary of State Hull and the Minister of Foreign Relations of Mexico in 1938 is perhaps the most famous. In that exchange, the United States insisted that property of its nationals was protected by an international standard under which Mexico was required to pay "adequate, effective and prompt" compensation. The Mexican Minister insisted that international law required only that aliens be granted national treatment and that the time and manner of payment was governed by domestic, not international, law. See 3 Green H. Hackworth, Digest of International Law 658 (1942); see also id. at 655-61.

It is sometimes argued that lump sum agreements are evidence of state practice accepting compensation falling short of full value. But the International Court of Justice and this Tribunal have rejected such settlements as evidence of custom. See Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. Rep. 4, 40 (5 Feb. 1970) (holding that such arrangements are sui generis and provide no guide in other cases); Sedco, Inc. and National Iranian Oil Company, et al., Interlocutory Award No. ITL 59-129-3 (27 Mar. 1986), reprinted in 10 Iran-U.S. C.T.R. 180, 185 (hereinafter "Sedco I") (noting that lump sum settlement agreements can be so greatly inspired by non-judicial considerations that it is extremely difficult to draw from them conclusions as to opinio juris).

[13] Sedco I, 10 Iran-U.S. C.T.R. at 184 (footnote omitted).

B. Post-World War II Controversy

9. Following World War II and in particular as a result of decolonization, the spread of communism as a political and economic ideology and the desire of nations in possession of a large part of the world's petroleum reserves to wrest control of that strategic resource from the international oil companies, the traditional legal requirement of full compensation was subjected to a sustained attack. The postwar period saw a great confrontation between the Hull doctrine's[14] standard of prompt, adequate and effective compensation versus the less exacting standard advocated by proponents of the Calvo doctrine[15] or of the so-called New International Economic Order. The newly emergent, developing States asserted permanent sovereignty over their natural resources and questioned whether the traditional standard applied with equal force to them. While natural resources such as petroleum and hard minerals provided the focal point for their argument, it was by no means confined to foreign investments in these fields. Indeed, business and personal property of every kind came to be included within its reach. The communist countries expressed an even more fundamental disagreement, reflecting an aversion to private ownership of property and favoring state control of the means of production.[16]

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[14] See note 12, supra.

[15] See generally Donald R. Shea, The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy (1955).

[16] As the United States Supreme Court stated in 1964 in Sabbatino:

> There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a State's power to expropriate the property of aliens. There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. However, Communist countries . . . commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underde-

(continued...)

10. Opponents of the traditional rule used the United Nations General Assembly as a platform for their attack. Particularly notable confrontations between the States adhering to the traditional rule, on the one hand, and the communist bloc nations joined by numerous developing countries, on the other, were to be found in the debates concerning Resolution 1803 on Permanent Sovereignty over Natural Resources,[17] the Declaration on the Establishment of a New International Economic Order[18] and the Charter of Economic Rights and Duties of States.[19] However, General Assembly resolutions (including the so-called declarations of principles) are not binding legal instruments or the expression of a law-making function of the United Nations.[20] Thus, an understanding of whether such resolutions reflect the

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[16](...continued)
veloped countries . . . [have] argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (footnotes omitted). The Court noted, however, that "[w]e do not, of course, mean to say that there is no international standard in this area; we conclude only that the matter is not meet for adjudication by domestic tribunals." Id. at 428 n.26.

[17] G.A. Res. 1803 (1962), reprinted in 57 Am. J. Int'l L. 710 (1963).

[18] G.A. Res. 3201 (1974), reprinted in 13 I.L.M. 715 (1974).

[19] G.A. Res. 3281 (1974), reprinted in 14 I.L.M. 251 (1975).

[20] See Gaetano Arangio-Ruiz, The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations, 137 Recueil Des Cours 419, 434-518, 730 (1972 III); Stephen M. Schwebel, The Effect of Resolutions of the U.N. General Assembly on Customary International Law, 73 ASIL Proc. 301, 302 (1979). Of course, certain U.N. General Assembly resolutions may be persuasive evidence of practice and opinio juris on customary international law and treaty interpretation. Likewise, certain General Assembly resolutions may also simply reflect the design of various developing and then-communist countries, using the forum of the General Assembly and its "one-nation-one-vote" system, to alter -- not reflect -- the existing international regime and create a "new" international economic order. See Government of Kuwait v. American Independent Oil Company (AMINOIL) (24 Mar. 1982), reprinted in 66 I.L.R. 518, 600.

practice of States or merely the aspirations of a certain group of States requires recourse to other sources of international law,[21] including the case law.

11. During this period there were several important oil company arbitrations, including TOPCO and LIAMCO, which related to Libyan nationalizations,[22] and AMINOIL, which concerned a nationalization by Kuwait. These arbitrations are of special interest here because they arose in the 1970's, a time when the forces bent on undermining the traditional rule were at the peak of their influence and of their rhetoric at the United Nations and elsewhere.[23] Moreover, these arbitrations related to petroleum concessions, the quintessential natural resource adverted to in Resolution 1803. In short, the conditions were ripe to recognize the repudiation of the traditional rule in favor of an ill-defined "flexible" standard of "appropriate" compensation dependent upon the "circumstances" of the taking.

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[21] These sources include (1) international conventions, (2) international custom, as evidence of a general practice accepted as law, (3) general principles of law recognized by civilized nations; and as subsidiary sources, (4) judicial decisions, and (5) teachings of the most highly qualified publicists of the various nations. Statute of the International Court of Justice, Art. 38(1) (1945).

[22] The other Libyan nationalization case, BP Exploration Company, is not entirely relevant to the present discussion in that Sole Arbitrator Lagergren ruled that restitutio in integrum was not an available remedy and held that the claimant was "entitled to damages arising from the wrongful act of the Respondent, to be assessed by this Tribunal in subsequent proceedings." No discussion of the damages remedy or the standard of compensation under customary international law was presented. BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic (10 Oct. 1973 and 1 Aug. 1974), reprinted in 53 I.L.R. 297, 357 (hereinafter "BP").

[23] The United Nations debates coincided with the drive by Middle Eastern oil-producing States to replace the old concessionary system by "participation" and finally ownership, a transition that was partly accomplished by negotiation and partly by outright nationalization. This confluence of forces lent an added impetus for a time to the advocates of a New International Economic Order; however, the ultimate success of the oil-producing States may have diminished their interest in supporting what at bottom was an attempt to lessen the respect accorded to property rights by both the traditional rule of international law and their own value systems.

12. No matter how one reads the holdings and dicta of these cases, it is clear that such a repudiation did not occur. None of them held that the traditional rule had been supplanted by a nebulous and relaxed standard of compensation in international law. In LIAMCO, which is perceived as the most "radical" of the awards,[24] Sole Arbitrator Mahmassani, after reviewing the General Assembly Resolutions and other sources, gave the following appraisal of the state of the law in 1977:

> In such [a] confused state of international law, as is evident from the foregoing precedents and authoritative opinions and declarations, it appears clearly that there is no conclusive evidence of the existence of community or uniformity in principles between the domestic law of Libya and international law concerning the determination of compensation for nationalization in lieu of specific performance, and in particular concerning the problem whether or not all or part of the loss of profits (lucrum cessans) should be included in that compensation in addition to the damage incurred (damnum emergens).[25]

Arbitrator Mahmassani, citing what he considered the "practical impossibility of enforcement . . . of the remedy of restitutio in integrum,"[26] applied "the formula of 'equitable compensation' as a measure for the estimation of damages in the present dispute."[27] Whatever Arbitrator Mahmassani may have meant by this term, it is surely far from the outright rejection of the traditional rule that one might have expected from the most "radical" of the leading arbitral decisions during the period when the movement for a New International Economic Order ("NIEO")

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[24] M.H. Mendelson, Compensation for Expropriation: The Case Law, 79 Amer. J. Int'l L. 414, 418 (1985).

[25] Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic (12 Apr. 1977), reprinted in 62 I.L.R. 141, 209 (hereinafter "LIAMCO").

[26] Id. at 200. The reluctance of Arbitrators Mahmassani (LIAMCO) and Lagergren (BP) to consider restitutio in integrum on the ground that it would be difficult to enforce has been vigorously criticized. See Robert B. von Mehren & P. Nicholas Kourides, International Arbitrations Between States And Foreign Private Parties: The Libyan Nationalization Cases, 75 Amer. J. Int'l L. 476, 533-45 (1981).

[27] LIAMCO, 62 I.L.R. at 210.

was at the height of its influence. Indeed, in LIAMCO, Arbitrator Mahmassani went on to award the claimant damages representing what he found to be the reasonable value of the property taken.[28]

13. In TOPCO,[29] Sole Arbitrator Dupuy examined the force and effect of the relevant U.N. Resolutions in his discussion of the current state of international law concerning sovereignty over natural resources. He noted that Article 4 of Resolution 1803 provided that in cases of nationalization, expropriation or requisition the owner shall be paid "appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law."[30] Because Resolution 1803 was supported by a majority of U.N. Member States representing various shades of opinion, it seemed to Professor Dupuy that it reflected the state of customary international law. That is, Resolution 1803 reflected the "universal recognition" of the rule that nationalizations may be undertaken using the "rules in force in the nationalizing State, but all this in conformity with international law."[31]

14. The problem, of course, is that Resolution 1803 is subject to highly contradictory interpretations. Since the term "appropriate compensation" is modified by "in accordance with international law," the search for meaning is back where it began. The United States representative at the United Nations, for example, expressed his confidence, in supporting Resolution 1803, that Article 4's requirement of "appropriate compensation . . . in accordance with international law" would be "interpreted

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[28] Id. at 211-15.

[29] Texaco Overseas Petroleum Co./California Asiatic Oil Co. (TOPCO) v. Government of the Libyan Arab Republic (27 Nov. 1975), reprinted in 53 I.L.R. 389 (hereinafter "TOPCO").

[30] Id. at 485 (quoting Resolution 1803).

[31] Id. at 492.

as meaning . . . prompt, adequate and effective compensation."[32] Thus, if Resolution 1803 reflected international law, as TOPCO suggests, it is only because and to the extent that it required the payment of compensation "in accordance with international law" as it then existed.

15. After concluding that Resolution 1803 represented the prevailing standard of compensation, the TOPCO award turned to the issue of the principles of international law concerning restitutio in integrum. Professor Dupuy began by quoting Chorzów Factory's classic formulation that:

> [R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear [is required] . . . .[33]

Going on to consider other international precedents and scholarly writings, Professor Dupuy ultimately held "that restitutio in integrum is . . . under the principles of international law, the normal sanction for non-performance of contractual obligations and that it is inapplicable only to the extent that restoration of the status quo ante is impossible."[34] His award ordered restitutio in integrum of the expropriated oil concessions.

16. In AMINOIL, the arbitrators likewise considered the relevant standard of compensation under international law. They observed that Article 4 of Resolution 1803 "codifie[d] positive principles" that were "not . . . contested in the present proceed-

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[32] Stephen M. Schwebel, The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources, 49 A.B.A.J. 463, 465 (1963) (quoting U.S. representative's remarks).

[33] TOPCO, 53 I.L.R. at 497-98 (quoting Chorzów Factory, 1928 P.C.I.J. (ser. A) No. 17, at 47).

[34] Id. at 507-08.

ings."[35] The panel then criticized both sides in the longstanding debate on the concrete interpretation of the term "appropriate compensation," noting that

> [t]here are indeed, several tendencies, all appealing to the same principle, one of which however reduces compensation almost to the status of a symbol, and the other of which assimilates the compensation due for a legitimate take-over to that due in respect of an illegitimate one. These tendencies were in mutual opposition in the United Nations when the Resolutions following No. 1803 were voted, none of which obtained unanimous acceptance, and some of which, such as the Charter of the Economic Rights and Duties of States, have been the subject of divergent interpretations. . . . The Tribunal considers that the determination of the amount of an award of "appropriate" compensation is better carried out by means of an enquiry into all the circumstances relevant to the particular concrete case, than through abstract theoretical discussion.[36]

Thus, the AMINOIL tribunal deftly finessed the need to pronounce itself on the theoretical meaning of "appropriate compensation" (Hull or Calvo or NIEO) and proceeded to deal on a practical basis with the elements of value present in the claim before it. Its award concluded that, considering the expropriated undertaking as a going concern, the claimant was entitled to the depreciated replacement value of the fixed assets together with compensation for loss of future profits.[37]

17. The LIAMCO, TOPCO and AMINOIL awards can best be understood against the background of the political and economic struggles that were raging at the time. The arbitrators, who had cases to decide, acknowledged the existence of these struggles and proceeded to render their awards without coming down decisively upon the side of either Secretary Hull or of Colonel Ghadaffi. In retrospect, it is difficult not to see these decisions as

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[35] Government of Kuwait v. American Independent Oil Company (AMINOIL) (24 Mar. 1982), reprinted in 66 I.L.R. 518, 601 (hereinafter "AMINOIL").

[36] Id. at 601-02.

[37] Id. at 612-13.

marking time as the NIEO pendulum reached its apogee and began its return toward the values embodied in the traditional rule.

C. The Current Standard

18. As discussed above, the middle years of this century witnessed a fundamental clash between the developing and communist countries' call for a flexible standard of "appropriate" compensation and the Western and capital-exporting countries' continued expectation of full and fair protection of foreign investments through the principle of prompt, adequate and effective compensation. But the world moves on and so does the law. Even as the heated confrontations in the United Nations and elsewhere began to subside, an interesting thing was happening. Nations of all descriptions and degrees of development -- the chief actors, subjects and creators of international law -- were adopting the full compensation standard in their relations with other States.

19. This was principally done via a burgeoning network of bilateral investment treaties ("BITs") that incorporated -- in essence and often in haec verba -- the requirement of prompt, adequate and effective compensation.[38] As of 1991, at least 195 BITs employed a compensation formula of "prompt, adequate and effective" compensation.[39] Similarly, a 1992 survey of BITs by

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[38] While these bilateral investment treaties may or may not, in the strictest sense, create customary international law, they must at the very least be viewed as widespread evidence of state practice.

[39] See Mohamed I. Khalil, Treatment of Foreign Investment in Bilateral Investment Treaties, 7 ICSID Rev.-For. Inv. L.J. 339, 366-69 (1992). The number of such agreements continues to increase, reflecting their growing popularity as a mechanism to promote and protect foreign investment. On 15 December 1989 the European Community and sixty-nine developing countries from Africa, the Caribbean and the Pacific signed Lomé IV, which includes a joint declaration committing the contracting parties to examine existing bilateral investment agreements with a view to the negotiation of further such agreements giving particular attention to investment protection in the event of expropriation and nationalization. See African, Caribbean and Pacific States -- European Economic Community: Final Act, Minutes and Fourth ACP-EEC Convention of Lomé, Annex LIII (15 Dec. 1989), reprinted in 29 I.L.M. 783, 802 (1990).

the World Bank noted that these bilateral investment treaties evidence a trend of "each State agree[ing] not to expropriate . . . except against adequate, prompt, and effective compensation," equivalent to "the market value of the investment expropriated."[40]

20. Moreover, in 1992 the World Bank promulgated Guidelines on the Treatment of Foreign Direct Investment ("Guidelines"). Regarding compensation for expropriations, the Guidelines provide that

> [a] State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except . . . against the payment of appropriate compensation. . . . Compensation for a specific investment taken by the State will, according to the details provided below, be deemed "appropriate" if it is adequate, effective and prompt.[41]

21. While not legally binding, these Guidelines, adopted without reservation by the Development Committee representing the entire

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[40] World Bank Group, I Legal Framework for the Treatment of Foreign Investment 50 (1992). See also Ibrahim F.I. Shihata, Legal Treatment of Foreign Investment: "The World Bank Guidelines" 52 n.12 (1993).

[41] Ibrahim F.I. Shihata, supra note 40, at 161 (reprinting World Bank Guidelines). Similarly, the Restatement of the Foreign Relations Law of the United States, in discussing the responsibility of states under customary international law for economic injury to foreign nationals, provides that "[a] state is responsible under international law for injury resulting from: (1) a taking by the state of the property of a national of another state that (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation." Under the Restatement, for compensation to be "just," it "must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken." Restatement (Third) of The Foreign Relations Law of the United States § 712 (1987). The only "exceptional circumstances" suggested by the Restatement are agrarian land reforms and requisitioning of property in time of war. Moreover, the Restatement notes that "[a] departure from the general rule on the ground of such exceptional circumstances is unwarranted if . . . the property was an enterprise taken for operation as a going concern by the state." Id. § 712 cmt. d. For a concise summary of the standard under customary international law, see id. § 712, Reporters' Notes 1-2.

World Bank membership of 171 countries, constitute a most recent and important source for international legal principles. The Guidelines are based on a comprehensive survey of existing legal instruments and, in the words of the General Counsel of the World Bank, "attempted to maintain throughout their provisions a balanced approach which aims at the promotion of FDI [foreign direct investment] but recognizes the legitimate interests of host countries and the difficulties confronting developing host countries in particular."[42]

22. The former Soviet Union -- long the champion and chief proponent of the developing world's desire for a relaxed or non-existent standard of compensation -- committed itself in 1990 to the "prompt, adequate and effective" compensation formula.[43] Moreover, by 1992 the Calvo doctrine had languished and died in Argentina, the land of its birth and for a century a leading host country advocate of a national treatment standard of compensation unencumbered by international norms.[44] Mexico, no less fiercely wedded to Calvo principles than Argentina, turned its back upon them under the progressive administration of President Carlos

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[42] Ibrahim F.I. Shihata, supra note 40, at 151.

[43] See Agreement for the Promotion and Reciprocal Protection of Investments, 14 Dec. 1990, Korea-U.S.S.R., Art. 5(1), reprinted in 30 I.L.M. 762, 766 (1991) ("Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation . . . except for a public purpose. The expropriation shall be carried out under due process of law, on a non-discriminatory basis and shall be accompanied by prompt, adequate and effective compensation."); see also Law on Foreign Investments in the Russian Soviet Federated Socialist Republic, Art. 7 (4 July 1991), reprinted in 31 I.L.M. 408, 410 (1992) (stating that in the event of a nationalization or requisition, the foreign investor is entitled to the payment of prompt, adequate, and effective compensation).

[44] See Treaty Concerning the Reciprocal Encouragement and Protection of Investment, 14 Nov. 1991, Arg.-U.S., Art. IV(1), reprinted in 31 I.L.M. 124, 131 (1992) ("Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization . . . except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation . . . ."). Fully as important, Argentina agreed to the submission of investment disputes to international arbitration.

Salinas de Gortari.[45] It would be, I submit, counterproductive, fruitless and out of step with reality to endeavor to push back the flow of events comprised of a multitude of unequivocal actions by States motivated at least by their own self-interest and, presumably, by a sense of justice.

23. The economic and political measures taken in this area by so many nations during recent years have been reflected in the decisions of their judicial counterparts. Not the least important of these is this Tribunal. The decisions of this body have addressed the standard of compensation often and in a variety of contexts. The result has been clear. Every case decided by this Tribunal addressing the standard of compensation under customary international law has held that the standard is full compensation and none of the cases purports to award the claimants less than the full quantum of their interest in the expropriated entity.

24. The first Tribunal decision addressing the standard of compensation under customary international law was American International Group ("AIG").[46] In AIG, Iran argued that "appropriate" compensation was the correct standard so that only "partial" compensation should be paid, while the claimants argued that "prompt, adequate, and effective" compensation was the standard.[47] The Tribunal found that it need not resort to the

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[45] See North American Free Trade Agreement, 8-17 Dec. 1992, Can-Mex.-U.S., Art. 1110, reprinted in 32 I.L.M. 612, 641-42 (1993) ("(1) No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment . . . except: (a) for a public purpose; (b) on a non-discriminatory basis; . . . and (d) on payment of compensation in accordance with paragraphs 2 through 6. (2) Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('date of expropriation'), and shall not reflect any change in value occurring because the intended expropriation had become known earlier.").

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

[47] Id. at 105-06.

specific terms of the Treaty of Amity between Iran and the United States[48] because customary international law required the award of fair market value.[49] The Tribunal concluded that "it is a general principle of public international law that even in a case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value of the property taken" and held that "the valuation should be made on the basis of the fair market value of the shares . . . at the date of nationalization."[50] It further held that "the appropriate method is to value the company as a going concern, taking into account not only the net book value of its assets but also such elements as good will and likely future profitability, had the company been allowed to continue its business under its former management."[51]

25. The second decision applying customary international law was Tippetts.[52] In the absence of any argument by the parties regarding the relevance of the Treaty of Amity, the Tribunal applied customary international law, relying upon Chorzów Factory and Norwegian Shipowners' Claims in making its determination as to the correct standard of compensation.[53] It concluded that its task was to make its best judgment as to the value of the assets and liabilities of TAMS-AFFA (the expropriated entity) as of the

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[48] Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, signed 15 Aug. 1955, entered into force 16 June 1957, 284 U.N.T.S. 93, T.I.A.S. No. 3853, 8 U.S.T. 900 (hereinafter "Treaty of Amity"). Article IV, paragraph 2 of the Treaty provides that neither Party to the Treaty shall expropriate property belonging to the other's nationals without "the prompt payment of just compensation" representing "the full equivalent of the property taken." See Section III, infra.

[49] AIG, 4 Iran-U.S. C.T.R. at 109.

[50] Id. at 105-06.

[51] Id. at 106.

[52] Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, et al., Award No. 141-7-2 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219 (hereinafter "Tippetts").

[53] Id. at 225.

date of the taking. The Tribunal then determined the company's fair market value and awarded the claimant U.S.$5,594,405, representing the full value of its fifty percent interest in the company.[54] Thus, Tippetts stands for the proposition that customary international law requires compensation equivalent to the full value of the claimant's interest in the expropriated property.[55]

26. The Award in the instant Cases cites INA[56] for the proposition that "at least as far as 'large-scale nationalizations of a lawful character [are concerned], international law has undergone a gradual reappraisal, the effect of which may be to undermine the doctrinal value of any "full" or "adequate" . . . compensation standard.'" But even a casual reading of INA reveals that this equivocal statement is nothing more than dictum, inasmuch as the Tribunal in INA found the Treaty of Amity, and not customary international law, to be dispositive. The holding of INA is that where there is "a lex specialis in the form of the Treaty of Amity, which in principle prevails over general rules" of customary international law, the Tribunal "must therefore assume that . . . the Treaty remains binding as it is drafted."[57] INA then cited Article IV, paragraph 2 of the Treaty of Amity and held that "the words 'the full equivalent of the property taken' entitle[] the Claimant to be granted compensation equal to the fair market value of its shares . . . assessed as of the date of nationalisation."[58]

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[54] Id. at 225-28.

[55] See also Sedco I, 10 Iran-U.S. C.T.R. at 188 ("That international law requires full compensation in cases such as that now before us is supported by the practice of this very Tribunal.").

[56] INA Corporation and The Government of the Islamic Republic of Iran, Award No. 184-161-1 (13 Aug. 1985), reprinted in 8 Iran-U.S. C.T.R. 373, 378 (hereinafter "INA").

[57] Id. at 378-79.

[58] Id. at 379. In a Separate Opinion in INA, Judge Lagergren argued that "an application of current principles of international law, as encapsulated in the 'appropriate compensation' formula, would in a case of lawful large-scale

(continued...)

27. In Sedco,[59] the Tribunal principally relied on the Treaty of Amity, but also considered the applicable standard under customary international law in response to the Government of Iran's argument that the Treaty simply incorporated such customary law. The Tribunal began by noting that "although the Respondents argue otherwise, it is the Tribunal's conclusion that the overwhelming practice and the prevailing legal opinion before World War II supported the view that customary international law required compensation equivalent to the full value of the property taken."[60] As to whether this standard had been eroded since that time, the Tribunal discussed at length U.N. General Assembly Resolution 1803. The Tribunal noted that commentators on this Resolution had focused mainly on its possible impact on the issue of compensation in the context of a formal, systematic, large-scale nationalization of an entire economy, industry or natural resource. With respect to discrete expropriations, the Tribunal held that:

> Opinions both of international tribunals and of legal writers overwhelmingly support the conclusion that under customary international law in a case such as here presented -- a discrete expropriation of alien property -- full compensation should be awarded for the property taken. This is true whether or not the expropriation itself was otherwise lawful.[61]

The Tribunal added that, "[a]s some of these opinions are expressed in the context of large-scale nationalization cases,

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[58](...continued)
nationalisations in a state undergoing a process of radical economic restructuring normally require the 'fair market value' standard to be discounted in taking account of 'all circumstances'." Id. at 390. Judge Holtzmann, in his Separate Opinion, pointed out that Judge Lagergren's Separate Opinion was obiter dictum which, while expressing his personal view, was not an opinion of the Tribunal. Id. at 392. Judge Holtzmann then responded with his own assessment of customary international law and concluded that while certain arbitral tribunals may have used an "appropriate" compensation standard, they in fact had awarded full compensation. Id. at 393, 401.

[59] Sedco I, 10 Iran-U.S. C.T.R. 180.

[60] Id. at 184 (internal quotations omitted).

[61] Id. at 187.

they should a fortiori weigh heavily in a case such as the one here presented."[62]

28. Turning from the opinions of scholars and other arbitral panels to Tribunal precedent, the Sedco award noted that the conclusion that "international law requires full compensation in cases such as that now before us is supported by the practice of this very Tribunal."[63] It further noted that, whether the case involved an unlawful expropriation of a discrete entity or the lawful, large-scale nationalization of an entire industry, "[i]n practice this Tribunal has not applied 'partial' or less than 'full' compensation in any case."[64] The Tribunal then held that the claimant "must receive compensation for the full value of its expropriated interest in SEDIRAN . . . whether viewed as an application of the Treaty of Amity or, independently, of customary international law, and regardless of whether or not the expropriation was otherwise lawful."[65]

29. In Sola Tiles the claimant based its claim for compensation on general principles of customary international law, citing Chorzów Factory.[66] However, the Tribunal found that the Treaty of Amity "must in some way form part of the legal background against which the Tribunal decides the case" and concluded that "the same standard would be required in this case by customary law as by the direct application of the Treaty itself, obviat[ing] the need to decide whether and on what footing it applies here."[67] In discussing the terms "prompt, adequate and effective," "fair," "just," and "appropriate," the Tribunal

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[62] Id. at 187 n.24.

[63] Id. at 188.

[64] Id. at 188 n.28. The Tribunal cited AIG and INA, both of which concerned a large-scale nationalization of the Iranian insurance industry.

[65] Id. at 189.

[66] Sola Tiles, Inc. and The Government of the Islamic Republic of Iran, Award No. 298-317-1 (22 Apr. 1987), reprinted in 14 Iran-U.S. C.T.R. 223, 234 (hereinafter "Sola Tiles").

[67] Id.

stated that, while recent arbitral and judicial opinions, including TOPCO, Banco Nacional de Cuba[68] and AMINOIL, had employed the term "appropriate" compensation, they had regularly awarded compensation equalling the full value of the property taken.[69] The Tribunal further concluded that such tribunals, applying this standard, had awarded compensation not only for physical assets, accounts receivable and cash but also for goodwill and lost future profits where the facts of the case justified such an award.[70] The Tribunal, having found that the expropriated company at issue was not a going concern, went on to award the claimant the full value of the company's physical assets, accounts receivable and cash.[71] Thus, the holding in Sola Tiles is that both the Treaty of Amity and customary international law require the same result: the awarding of the full value of the claimant's interest in the expropriated entity.

30. The Tribunal case that is sometimes cited by those arguing for a less-than-full compensation standard is the Partial Award in Amoco International Finance Corporation.[72] Amoco does not, however, support that proposition. The Tribunal in Amoco noted that "[a]s a lex specialis in the relations between the two countries, the Treaty [of Amity] supersedes the lex generalis, namely customary international law," but added that customary international law "may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions."[73] Having concluded that customary international law remained relevant to the interpreta-

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[68] Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981).

[69] Sola Tiles, 14 Iran-U.S. C.T.R. at 236.

[70] Id. at 237.

[71] Id. at 240-42.

[72] Amoco International Finance Corporation and The Government of the Islamic Republic of Iran, et al., Partial Award No. 310-56-3 (14 July 1987), reprinted in 15 Iran-U.S. C.T.R. 189 (hereinafter "Amoco").

[73] Id. at 222.

tion of the Treaty, the Tribunal went on to consider the applicable standard of compensation under customary international law.

31. The Amoco opinion began its analysis with Chorzów Factory. Amoco interpreted Chorzów Factory as holding that the "compensation to be paid in [the] case of a lawful expropriation (or of a taking which lacks only the payment of a fair compensation to be lawful) is limited to the value of the undertaking at the moment of the dispossession, i.e., 'the just price of what was expropriated'."[74] The Tribunal then reasoned:

> Obviously the value of an expropriated enterprise does not vary according to the lawfulness or the unlawfulness of the taking. This value can not depend on the legal characterization of a fact totally foreign to the economic constituents of the undertaking, namely the conduct of the expropriating State. In the traditional language of international law it equates the damnum emergens, which must be compensated in any case. . . . The difference is that if the taking is lawful the value of the undertaking at the time of the dispossession is the measure and the limit of the compensation, while if it is unlawful, this value is, or may be, only a part of the reparation to be paid. In any event, even in [the] case of unlawful expropriation the damage actually sustained is the measure of the reparation, and there is no indication that "punitive damages" could be considered.[75]

The Tribunal then stated that damnum emergens includes corporeal properties, contractual rights, and other intangible values, including goodwill and future prospects -- a definition of broad scope.[76]

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[74] Id. at 247-48.

[75] Id. at 248.

[76] Id. at 249.

32. Turning to the compensation due to the claimant, the Tribunal in Amoco concluded that in the case of a lawful taking, which it found the expropriation before it to be,

> the measure of . . . compensation shall be the full value of the asset taken, pursuant to Article IV, paragraph 2, of the Treaty, that is the full equivalent of the property. Compensation which would only amount to a part of this value is, therefore, excluded.[77]

Finding that "going concern" value was the proper measure of compensation on the facts before it, the Tribunal held that this encompasses

> not only the physical and financial assets of the undertaking, but also the intangible valuables which contribute to its earning power, such as contractual rights . . . as well as goodwill and commercial prospects. Although those assets are closely linked to the profitability of the concern, they cannot and must not be confused with the financial capitalization of the revenues which might be generated by such a concern after the transfer of property resulting from the expropriation (lucrum cessans).[78]

33. Thus, in the case of a lawful expropriation, the Tribunal in Amoco found that: (1) the measure of compensation is the value of the undertaking at the time of dispossession; (2) compensation which is less than the full equivalent of the property taken is not permissible; and (3) this full value requires an award of compensation for all tangible assets and for intangible assets such as goodwill and future commercial prospects, which are distinct from "future profits." With respect to unlawful expropriations the Tribunal indicated that compensation should include (1) not only the full value of the undertaking at the time of dispossession, but also (2) all of the damages actually sustained, including the future profit that would have accrued

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[77] Id. at 269.

[78] Id. at 270. The issue of lucrum cessans is irrelevant in the instant Cases, where the Claimants are not seeking lost profits.

since the date of the taking.[79] Because Amoco was a Partial Award, it called for further pleadings by the parties in order to arrive at the actual amount of compensation. The case was settled before the Tribunal could give the principles articulated in the Partial Award a practical application.

34. In Phillips Petroleum Company Iran,[80] the Tribunal took an approach somewhat different from that of Amoco by focusing its discussion on the text of the Treaty of Amity. Faced with an argument by the Government of Iran, citing the dicta of Judge Lagergren's Separate Opinion in INA, that the Treaty must be interpreted in light of supposed changes in customary international law, the Tribunal found that it

> need not express any view as to the asserted changes in customary international law . . . . [T]he text of the Treaty provision does not support the Respondents' argument. . . . It provides that the protection and security to be received . . . must be "most constant . . . and in no case less than that required by international law". This reference to international law . . . cannot be understood as modifying the taking and compensation requirements . . . of that [provision], which . . . completely describe the requirements for takings and compensation.[81]

The Tribunal continued: "Concerning the argument that treaties generally should be interpreted in the light of customary international law as it may evolve, the Tribunal has already

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[79] Id. at 248-49. In discussing the difference between future commercial prospects, which are to be compensated in lawful takings, and "future profits," which are to be paid, according to Amoco, only for unlawful takings, the Tribunal drew the following distinction: The former, future prospects, is an element of the company's value at the time of taking that refers to the fact that the undertaking was a "going concern" that had demonstrated a certain ability to earn revenues and was to be considered as keeping such ability for the future. The latter, future profits, relates to the amount of the earnings hypothetically accrued from the date of taking had the enterprise remained in the hands of the former owner. Id. at 250.

[80] Phillips Petroleum Company Iran and The Islamic Republic of Iran, et al., Award No. 425-39-2 (29 June 1989), reprinted in 21 Iran-U.S. C.T.R. 79 (hereinafter "Phillips").

[81] Id. at 120-21.

found in the INA award that the Treaty of Amity as a lex specialis prevails in principle over general rules."[82]

35. On the issue of the significance of the lawfulness or unlawfulness of the taking, the Tribunal held that

> the lawful/unlawful taking distinction, which in customary international law flows largely from [Chorzów Factory], is relevant only to two possible issues: whether restitution of the property can be awarded and whether compensation can be awarded for any increase in the value of the property between the date of taking and the date of the judicial or arbitral decision awarding compensation. The Chorzow decision provides no basis for any assertion that a lawful taking requires less compensation than that which is equal to the value of the property on the date of taking.[83]

36. In sum, there is virtually total uniformity in the Tribunal's rulings on the standard of compensation under international law. Every decision rendered by this Tribunal, whether based upon the Treaty of Amity or customary international law, or both of them, has concluded that compensation must equal the full value of the expropriated property as it stood on the date of taking. Moreover, every award rendered by this Tribunal, including the Award in the instant Cases, has provided claimants what the Tribunal determined to be the full value of their interest in the property taken, regardless of whether the taking was lawful or unlawful or whether the parties relied on the Treaty of Amity or customary international law.

37. The Tribunal, of course, is not the only body that has had occasion to consider the standard of compensation under customary international law in recent years. Most notably, Tribunals of the International Centre for Settlement of Investment Disputes ("ICSID") have ruled that customary international law requires the payment of full compensation. The ICSID Tribunal in AMCO Asia Corp. v. Republic of Indonesia, in addressing the issue of the legal basis for the calculation of damages, concluded that

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[82] Id. at 121.

[83] Id. at 122.

"full compensation of prejudice, by awarding to the injured party the damnum emergens and the lucrum cessans is a principle common to the main systems of municipal law, and therefore, a general principle of law which may be considered as a source of international law."[84] Similarly, in LETCO v. Government of the Republic of Liberia, the ICSID Tribunal applied Liberian law, which it found to be "in conformity with generally accepted principles of public international law," and ruled that "according to international law and, more importantly, Liberian law, LETCO is entitled to compensation for damages for both its lost investments and its foregone future profits."[85] It then awarded LETCO the full value of its investment in the expropriated forestry concession as well as its lost future profits.[86]

D. Conclusion

38. Ever since the arrival of nation States upon the scene, international law has held that when a State takes the property of aliens, compensation representing the full equivalent of the property taken is required. Whatever label is attached to this principle ("just," "adequate," "equitable" or "appropriate" compensation), international tribunals have endeavored in

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[84] AMCO Asia Corp. v. Republic of Indonesia (20 Nov. 1984), reprinted in 24 I.L.M. 1022, 1036-38 (1985), partially annulled, 25 I.L.M. 1439 (ad hoc Com. 1986). After the partial annulment of the first AMCO award, a new Tribunal was convened. That Tribunal upheld the first Tribunal's conclusion as to the applicable standard of compensation. See AMCO Asia Corp. v. Republic of Indonesia, paras. 176-178 (5 June 1990), reprinted in 5 Int'l Arb. Rptr. No. 11, at Sec. D (Nov. 1990); see also John A. Westberg, Applicable Law, Expropriatory Takings and Compensation in Cases of Expropriation; ICSID and Iran-United States Claims Tribunal Case Law Compared, 8 ICSID Rev.-For. Inv. L.J. 1, 5-8, 15-16 (1993).

[85] Liberian Eastern Timber Corporation ("LETCO") v. Government of the Republic of Liberia (31 Mar. 1986), reprinted in 26 I.L.M. 647, 658, 670 (1987), modified (as to amounts of certain costs) in Rectification of the Award Dated 31 March 1986 (14 May 1986), reprinted in 26 I.L.M. 677 (1987).

[86] Id. at 670-77. See also Asian Agricultural Products Limited v. Republic of Sri Lanka (27 June 1990), reprinted in 6 ICSID Rev.-For. Inv. L.J. 526, 565 (1991); Benvenuti & Bonfant Srl v. Government of the Popular Republic of the Congo (1984), reprinted in 67 I.L.R. 345, 374.

practice to restore, if possible, the property taken or, failing that, to award damages corresponding to the loss sustained. Although the would-be architects of a new international economic order labored assiduously in the 1960's and 1970's to eviscerate this rule, these efforts failed. Their failure is evidenced by, inter alia, the many actions discussed above of the very same forces that sought to undermine the standard of prompt, adequate and effective compensation.

39. To argue that this standard should be set aside in favor of "appropriate" compensation -- meaning "flexible" or dependent upon the "circumstances"[87] -- is not to say that a time-honored rule of law should be calibrated or adjusted to modern conditions. To the contrary, it is to say that there is, in effect, no rule and to leave the result to caprice and subjective perception.

III. THE TREATY OF AMITY AND THE STANDARD OF COMPENSATION FOR EXPROPRIATED PROPERTY

40. In addition to misreading the current state of customary international law, the Award further errs by failing to take into account the Treaty of Amity between the United States and Iran.

41. The Claimants in their pleadings specifically rely upon Article IV, paragraph 2 of the Treaty of Amity in arguing that they are entitled to "full" (i.e., prompt, adequate and effective) compensation. That provision of the Treaty reads as follows:

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[87] For example, a "circumstance" sometimes cited in the literature is the length of time the foreign investment has been in place, the argument being that the longer the period the less reason there is to provide the deprived investor with the full equivalent of the property taken. Presumably this proposition rests on the assumption that the investor will have "recovered his investment," which may or may not be correct depending on the length of time before profitability can be achieved, the extent to which earnings are reinvested to expand the business and other factors. If the encouragement of stable long-term commitments (as opposed to high return, "fly by night" capital) is considered desirable, a less salutary "special circumstance" can hardly be imagined.

> 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.

42. Under well-established principles of international law the Treaty of Amity, as a lex specialis in the relations between the two countries, takes precedence over the lex generalis of customary international law.[88] Indeed, this Tribunal has "held that the applicable law for the purpose of determining the compensation owed by the Islamic Republic of Iran for deprivations or takings of property of United States nationals during the years immediately prior to the Algiers Accords is the 1955 Treaty of Amity."[89]

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[88] See INA, 8 Iran-U.S. C.T.R. at 378; Phillips, 21 Iran-U.S. C.T.R. at 121. See also Vienna Convention on the Law of Treaties, 23 May 1969, Art. 26, reprinted in 8 I.L.M. 679 (1969) ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); 1 Hersch Lauterpacht, International Law: Collected Papers 86-87 (Elihu Lauterpacht ed., 1970) ("The rights and duties of States are determined, in the first instance, by their agreement as expressed in treaties -- just as in the case of individuals their rights are specifically determined by any contract which is binding upon them. When a controversy arises between two or more States with regard to a matter regulated by a treaty, it is natural that the parties should invoke and that the adjudicating agency should apply, in the first instance, the provisions of the treaty in question.").

[89] Phillips, 21 Iran-U.S. C.T.R. at 118 (citing Phelps Dodge Corp., et al. and The Islamic Republic of Iran, Award No. 217-99-2 (19 Mar. 1986), reprinted in 10 Iran-U.S. C.T.R. 121, 131-32; Thomas Earl Payne and The Government of the Islamic Republic of Iran, Award No. 245-335-2 (8 Aug. 1986), reprinted in 12 Iran-U.S. C.T.R. 3, 12; Sedco I, 10 Iran-U.S. C.T.R. at 184-85; Amoco, 15 Iran-U.S. C.T.R. at 214-22; Starrett Housing Corporation, et al. and The Government of the Islamic Republic of Iran, et al., Award No. 314-24-1 (14 Aug. 1987), reprinted in 16 Iran-U.S. C.T.R. 112, 195).

43. Thus, to look to customary international law as the sole basis for determining the standard of compensation in these Cases, as the Award does, is to neglect the fundamental law governing that subject. Iran and the United States engaged in careful negotiations to normalize and regulate their economic relations with one another through the signing of the Treaty of Amity. The object of the Treaty was, according to the preamble, to encourage, inter alia, "mutually beneficial trade and investments and closer economic intercourse generally between their peoples."[90] Toward this end Iran and the United States deliberately entered into express mutual commitments on the precise point under consideration here.

44. It would be incorrect to conclude, as the Respondent suggests in these Cases, that because the Claimants are dual nationals of the United States and Iran, the Treaty of Amity somehow does not apply. Neither the text of the Treaty nor its preparatory work provides any support for a belief that it does not apply with equal force to dual nationals.[91]

45. Indeed, the Tribunal expressly applied the Treaty standard in Saghi,[92] a case involving, among other claimants, a dual Iran-U.S. national. There the Tribunal stated:

> The Tribunal has previously held that under the Treaty of Amity a deprivation requires compensation equal to the full equivalent of the value of the interests in the property taken. The Tribunal has found that the Respondent deprived the Claimants of their ownership interests in [the companies] N.P.I. and Novin, and consequently they are entitled to full compensation.[93]

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[90] Treaty of Amity, 8 U.S.T. at 901.

[91] In fact, the text of the Treaty indicates precisely the opposite. Where dual Iran-U.S. nationals are not intended to enjoy the benefit of particular Treaty clauses (e.g., with respect to customs and tax exemptions available to consular officers, see id. Art. XVII, 8 U.S.T. at 911), the Treaty specifically so states.

[92] James M. Saghi, et al. and The Islamic Republic of Iran, Award No. 544-298-2 (22 Jan. 1993), reprinted in ___ Iran-U.S. C.T.R. ___.

[93] Id. at para. 79 (footnotes omitted).

Thus, the Tribunal ruled, without need for elaboration, that the claimants, including the dual national Allan Saghi, were entitled under the Treaty of Amity to full compensation for the expropriation of their ownership interests by the Government of Iran.[94]

46. It seems evident that there can be no justification for treating a dual Iran-U.S. national within our jurisdiction, i.e., a person with dominant and effective U.S. nationality, differently from other U.S. nationals. Subject to application where appropriate of the A18 caveat, such dual nationals enjoy exactly the same rights as other United States nationals before this Tribunal, including the protections afforded by the Treaty of Amity.

47. In sum, the Treaty of Amity, with its clear requirement of compensation equal to "the full equivalent of the property taken," is in itself wholly dispositive on the issue of the proper standard of compensation in these Cases. But even if one were to look to customary international law, as the Award does, the conclusion would be the same -- i.e., that prompt, adequate and effective compensation, representing the full equivalent value of the property taken, is required.[95]

IV. THE VALUATION OF GOSTARESH MASKAN

48. Important as it is to recognize the existence of a clear standard as a guide and a goal, it would be naive to suggest that the quantification of the deprived owner's loss can always be accomplished with absolute precision, no matter what standard of compensation is adopted. The present Cases surely illustrate the point. While I would have arrived at somewhat different amounts for several elements of Gostaresh Maskan's net worth, my chief disagreements are with the Award's treatment of the elements of value discussed below.

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[94] See also Faith Lita Khosrowshahi, et al. and The Government of the Islamic Republic of Iran, et al., Award No. 558-178-2, para. 34 (30 June 1994), reprinted in ___ Iran-U.S. C.T.R. ___.

[95] See Section II, supra.

A. Remaining Contracts

49. In his Report on the value of Gostaresh Maskan, the Tribunal's Expert rejects any value for the Company's remaining contracts, arguing as follows:

> Inclusion of the future income from existing contracts involves double counting. The market value of equipment is equal to the value of the income that this equipment is expected to generate. It is inappropriate both to take the value of the asset and to add to that the value of the income that this asset is expected to produce, since that income is needed to justify the value.

50. At the expertise Hearing, the Expert clarified his position on remaining contracts, but he did not change it. According to the Expert, it is

> wrong to take the replacement cost of the assets and then to take the value of the cash flows, whether from existing contracts or contracts you expect to get . . . . It is quite appropriate to take the replacement cost of the assets and then add to that the value of the abnormal profits, if any, that you expect to make from future business[,] and that would include not only cont[r]acts you've already got but contracts that you could expect to get in the future.

51. The Expert stated that contract backlog is not in itself "an indication of abnormal profits." Rather, in his view, there are several things one has to ask before one can determine the impact of a contract backlog on the share price of a company, including, for example, how profitable the contract would be, the purpose of the contract (e.g., to increase market share), and the like. Thus, for the Expert the question was whether the remaining contracts would produce abnormal profits, and absent such profits, the Expert maintained his position that it is wrong to value both the tangible assets and the cash flows to be generated from such assets.

52. The Award adopts the Expert's approach and therefore refuses to ascribe any value to Gostaresh Maskan's contract backlog. Notwithstanding its recognition of the long and unbroken line of Tribunal precedents awarding compensation for "the likely future profitability of an expropriated owner's property," the Award concludes that the Expert's position on the issue of the outstanding contracts represents "the better approach." Award at para. 160. On several grounds, I disagree.

53. The Tribunal has on numerous occasions included both tangible assets and intangible assets in the valuation of going concerns, like Gostaresh Maskan. As the Tribunal ruled in Amoco:

> Going concern value encompasses not only the physical and financial assets of the undertaking, but also the intangible valuables which contribute to its earning power, such as contractual rights (supply and delivery contracts, patent licen[s]es and so on), as well as goodwill and commercial prospects.[96]

The Tribunal in Amoco further observed that a nationalized asset is not only a collection of discrete tangible goods but also "intangible items . . . such as contractual rights and other valuable assets . . . . To the extent that these various components exist and have an economic value, they normally must be compensated."[97] Thus, according to Amoco, intangible assets such as remaining contracts constitute a "nationalized asset" and if this asset has an economic value, then it must be compensated.

54. Similarly, in Phillips, the Tribunal, in describing the asset valuation approach (as contrasted with the discounted cash flow method of valuation), noted that in the former one must

> first calculate[] the tangible assets at their depreciated replacement value, thereby adjusting book value . . . . [Then, i]n order to quantify the intangible assets including profitability of the property interest taken, an appropriate income figure is determined based on historic earnings, to which a multiple is applied, which takes into account legitimate expecta-

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[96] Amoco, 15 Iran-U.S. C.T.R. at 270.

[97] Id. at 267.

> tions in an oil venture of this type generally and in the context of the JSA [Joint Structure Agreement] more particularly.[98]

Further, in an important clarification, the Tribunal emphasized that

> it should clearly be understood that the Tribunal is not determining price levels and oil production quantities in order to award anticipated profits lost through breach of contract, but rather to determine what was the value of the property interests taken from the Claimant in September 1979. Those property interests constituted part of an income-producing going concern, the value of which at the time of taking, while certainly not the same as the "financial capitalization" value at that time of its anticipated future revenues, . . . nevertheless cannot be determined without taking fully into account its future income-producing prospects as they would have been perceived at that time by a buyer of those interests.[99]

55. Thus, the point, which the Award in the present Cases fails to recognize, is that Gostaresh Maskan was an income-producing going concern, and the Tribunal cannot determine the full and true value of this enterprise "without taking fully into account its future income-producing prospects."[100]

56. To similar effect is AIG, in which the Tribunal was unequivocal in including future profitability in the valuation of the company's intangible assets. The Tribunal determined that fair market valuation includes the "value [of] the company as a going concern, taking into account not only the net book value of its assets, but also such elements as goodwill and likely future profitability, had the company been allowed to continue its business under its former management."[101] The Tribunal further noted:

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98 Phillips, 21 Iran-U.S. C.T.R. at 124.

99 Id. at 128-29.

100 Id. at 129.

101 AIG, 4 Iran-U.S. C.T.R. at 109.

> The most important element of the compensation claimed by the Claimants for the taking of their shares in Iran America is the loss of prospective earnings. When making its own assessment of the market value to be given to these shares, the Tribunal will therefore have to conclude, inter alia, which assumptions could reasonably be made . . . [at the time of the taking] regarding the future life and profitability of the company in view of the relevant conditions then existing in Iran.[102]

57. Likewise, in Starrett,[103] the Tribunal held 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.[104]

58. Thus, the Tribunal has consistently awarded the value of intangibles, such as likely future profitability, in cases involving going concerns. It is also instructive to consider, by way of comparison, other Tribunal decisions not involving going concerns.

59. For example, in Sedco, the Tribunal found that the Government of Iran had expropriated, inter alia, certain oil rigs belonging to Sedco, Inc., and accordingly compensated the claimant for "the fair market value of the properties, i.e., what a willing buyer and a willing seller would reasonably have agreed on as a fair price at the time of the taking in the absence of coercion on either party."[105] The claimant also sought, with respect to these rigs, compensation for the "profits lost during

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[102] Id. at 107.

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

[104] Id. at 156-57.

[105] Sedco, Inc. and National Iranian Oil Company, et al., Award No. 309-129-3 (7 July 1987), reprinted in 15 Iran-U.S. C.T.R. 23, 35 (hereinafter "Sedco II").

the period of time which would have been required to replace the converted property."[106] The Tribunal accepted the claimant's argument that compensation for property taken must include both the fair market value of the property and recovery for loss of use during the time reasonably necessary to secure a replacement.[107] Therefore, the Tribunal awarded the claimant $4,817,064 for "lost revenue damages," in addition to $26 million for the value of the rigs themselves.[108] Significantly, these damages were awarded notwithstanding the fact that only an asset expropriation, and not the expropriation of a going concern, was at issue[109]; in other words, even in that context, the Tribunal deemed it appropriate to compensate the claimant for all of the present and future losses attributable to the taking.

60. In Sola Tiles,[110] the Tribunal was required to rule on whether the subsidiary company (Simat), a trader in specialized luxury tiles, was a going concern. The claimant was seeking the value of Simat's tangible and intangible assets, including equity, goodwill and lost profits. The Tribunal held that Simat was not a going concern.

> Given the picture that emerges, Simat's prospects of continuing active trading after the Revolution were not . . . such as to justify treating Simat as a going concern so as to assign any value to goodwill. The decision to assign no value to Simat's goodwill suggests a similar result as to future lost profits, which also depend upon the business prospects of a going concern. In addition, Simat had the briefest past record of profitability, having shown a loss in 1976, its first year of trading, and a small profit the next year. Accordingly, the Tribunal assigns no value to future lost profits and therefore does not decide the question whether and to what extent lost

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106 Id. at 51 (internal quotations omitted).

107 Id. at 53.

108 Id. at 51, 53, 186.

109 The Sedco case also involved a separate claim for the expropriation of the claimant's ownership interest in a related company. See id. at 101; see also text accompanying notes 63-65, supra.

110 Sola Tiles, 14 Iran-U.S. C.T.R. 223.

> profit can be claimed in expropriation cases in addition to the going concern value.[111]

Thus, in view of the negative impact of the revolution, and the company's checkered past earnings record, the Tribunal in Sola Tiles failed to perceive a value for intangibles inherent in a company whose stock in trade was a luxury item not viewed with favor by the post-revolutionary government. Nevertheless, it is important to note that the Tribunal even then awarded the claimant the "actual value of the physical assets, including inventory" plus "the total amount of accounts receivable . . . and cash expropriated."[112] Sola Tiles may, of course, be distinguished from the instant Cases since, as the Award holds, Gostaresh Maskan was a going concern at the time of its taking. Moreover, Gostaresh Maskan had a very positive earnings record and the Claimants have made a convincing argument that the Company had already weathered the detrimental effects of the revolution and had positive prospects for the future.

61. The foregoing examination of Tribunal precedents compels the conclusion that likely future profitability should be included as a separate element in the going concern valuation of expropriated companies. Just as Starrett examined "the proceeds of the sales" of apartments, just as AIG analyzed the "future life and profitability" of Iran America, just as Phillips considered the "future income-producing prospects" of the joint structure agreement, so too in these Cases should we examine the likely future profitability that Gostaresh Maskan would have enjoyed from the performance of its remaining contracts.

62. The Respondent argues that Gostaresh Maskan's remaining contracts had no value, not because of any theoretical objection such as the Expert's, but because Gostaresh Maskan was not profitable. I believe that the Tribunal should have adopted the approach taken by both the Respondent and the Claimants and made a determination of the value of the remaining contracts based on

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[111] Id. at 241-42.

[112] Id. at 240.

an analysis of the profits that they were likely to produce. The approach taken by the Parties comports with Tribunal precedent and the Expert's Terms of Reference, and I fail to see why we should depart from either.

63. In 1979 Gostaresh Maskan was an established income-producing going concern. Based on (i) the Company's historical earnings (averaging 30% profitability or 634 million rials per year), (ii) its staff of 1000 regular employees and the available pool of additional unskilled labor, (iii) its manufacturing assets and capabilities, (iv) accelerated write-off of heavy capital expenditures, (v) shrinking competition from foreign sources, (vi) the Iranian Government's policy favoring the building of residential housing, and (vii) the Tribunal's determination in Blount Brothers of 10% profitability of the Parandak project,[113] it is reasonable to conclude that Gostaresh Maskan was in a position in November 1979 to reap substantial benefits from its contract backlog. Although the Award acknowledges the long line of Tribunal precedents to the contrary, it nevertheless refuses to attribute any value to the backlog. I believe that this is wrong, and that the revenues that the backlog would have been expected to provide should have been appropriately reflected in the valuation of the Company.

B. Goodwill

64. The Claimants placed a value of Rls 1404.1 million upon the goodwill of Gostaresh Maskan. The Respondent, through its expert, Noavaran, valued Gostaresh Maskan's goodwill at zero. The Expert assigned a negative amount of Rls 240 million[114] to

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[113] Blount Brothers Corporation and Ministry of Housing and Urban Development, et al., Award No. 74-62-3 (2 September 1983), reprinted in 3 Iran-U.S. C.T.R. 225, 234 (hereinafter "Blount Brothers").

[114] The Expert valued Gostaresh Maskan's goodwill at negative Rls 240 million, and not at 13% of the tangible asset value of the Company, as the Award indicates. See Award at paras. 155, 157. The Expert's Report clearly stated that in his view "a discount of 240 million rials is reasonable." Expert's Report at para. 10 (emphasis added); see also id. at para. 150. (continued...)

the Company's goodwill; and the Award arrived at a negative figure of Rls 291.9 million. This remarkable result is largely justified on the same basis as that underlying the Award's rejection of any value for the contract backlog, i.e., the supposed uncertainty of Gostaresh Maskan's business prospects attributable to the Islamic revolution. See Award at paras. 157, 160. Thus, under the Award, the effects of the revolution have been weighed into the balance at least twice. First, they have nullified Gostaresh Maskan's prospects as represented by its contracts in hand for future work and second, they have generated a red figure (Rls 51.9 million greater than the Expert's) for goodwill that the Award deducts directly from Gostaresh Maskan's net worth.

65. The position on goodwill taken by the Award defies sound legal principles, well-established Tribunal precedent and the weight of evidence in these Cases. In the first place, the Respondent claimed, based upon the analysis of its expert, that the value of Gostaresh Maskan's goodwill was zero; put another way, the Respondent conceded that the value of the Company's goodwill was not less than zero. This concession having been made, I believe that the Award errs by assessing a negative goodwill figure against Gostaresh Maskan's value.

66. A further problem with the Award's approach on goodwill is that it improperly reflects the consequences of the nationalization itself. The Expert's unfavorable evaluation of Gostaresh Maskan's prospects in 1979 was based, in part, upon his perception of a liquidity problem resulting from the post-taking freeze of the Company's assets pending a government audit. This consideration was inconsistent with the Expert's Terms of Reference because those Terms -- in keeping with clear Tribunal precedent -- instructed the Expert to ignore the effects "of the very act of nationalization" upon Gostaresh Maskan's value. Because the freezing of Gostaresh Maskan's assets stemmed from

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[114](...continued)
The Expert then went on to note that this amount was equal to 13% of his estimate of the Company's tangible asset value, which is apparently the source of the Award's erroneous reliance on the 13% figure.

the audit -- a requirement imposed by Iranian law in cases of governmental takings -- the perceived liquidity problem resulting therefrom should not have been considered by the Expert, or reflected by the Tribunal in the form of "negative goodwill."

67. Finally, the reduction for negative goodwill goes against the weight of the evidence in these Cases. As the Award correctly states, the Parties and their experts provided the Tribunal with a wide array of data and opinion supporting their respective, and very different, views concerning the opportunities and pitfalls facing Gostaresh Maskan in late 1979. The Claimants' more optimistic appraisal was supported by, inter alia, contemporaneous statements issued by the Government-appointed managers of Gostaresh Maskan. In light of this and other supporting evidence, it is difficult to avoid the conclusion that, at the time of its expropriation, Gostaresh Maskan possessed, and was perceived to possess, all of the elements necessary to enable it to play a significant role in fulfilling the Iranian Government's professed desire to improve upon the housing situation in the country, and to profit from its efforts.

68. In short, I believe that the evidence and the relevant law support the attribution of a positive value to Gostaresh Maskan's goodwill. A fortiori, the Award's attribution of negative goodwill in the amount of Rls 291.9 million is improper and unjustified.

C. Gostaresh Blount Severance Pay Provision

69. The final valuation issue as to which, in my view, serious errors are made in the Award concerns the assessment of the so-called "severance pay provision" of Rls 60 million against the value of Gostaresh Blount ("GB"). The post-taking balance sheet for GB submitted by the Respondent showed a liability of Rls 120 million for that company's anticipated severance pay obligation. The Claimants, relying upon the views of their expert, Mr. Siamak, argued that no severance pay reserve was appropriate. The Tribunal's Expert did not take a firm position on the issue; instead, he simply indicated that the Tribunal "m[ight] well wish

to consider" deleting the severance pay reserve from the calculation of GB's value.

70. As the Award correctly notes, the Claimants' expert testified that the Rls 120 million severance pay liability proposed by the Respondent was exaggerated by a factor of approximately 16. Award at para. 152. Although the Respondent did not challenge the accuracy of the Claimants' calculation, the Award nonetheless concludes that the evidence is insufficient to make a firm judgment on the issue and proceeds to split the difference between the Parties' positions by assessing a Rls 60 million liability against GB.

71. I disagree with both the outcome and the approach taken by the Award. The Claimants' expert, who is the former chief financial officer of a large Iranian construction company, testified at the Hearing that because the laying-off and re-hiring of daily wage laborers was a frequent and ongoing occurrence for large construction companies in Iran, such companies generally remained current on their severance pay obligations and therefore typically would not have carried any reserve at all towards future anticipated severance pay liabilities. This testimony was credible and was unrebutted by the Respondent. Accordingly, I believe that it should have been accepted by the Tribunal and that no severance pay liability should have been charged against GB.

72. In any event, there is certainly no justification for splitting the difference between the Parties' positions on the asserted severance pay liability, as the Award does. It bears repeating that this purported liability first appeared on a balance sheet for GB prepared well after the taking and submitted by the Respondent.[115] Despite having access to all of the materials capable of supporting this purported liability -- a privilege the Claimants did not enjoy -- the Respondent was

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[115] Significantly, no severance pay reserve appeared on GB's balance sheet dated 20 March 1978 -- i.e., prior to the expropriation of the company. See discussion at paras. 145-46, 150 of Award.

utterly unable to justify it at the Hearing or even to rebut the testimony of the Claimants' expert that the Rls 120 million figure was grossly exaggerated. In these circumstances, it is wholly unwarranted to penalize the Claimants by assessing a Rls 60 million liability. Any gaps in the evidence on the issue should have been resolved against the Respondent, which alone had access to the relevant evidence and nonetheless failed to present it.

D. Interest.

73. Chamber Three of the Tribunal customarily has awarded simple interest on awards at the rate of 10% per annum on the ground that this rate fairly compensated claimants for the loss of use of the monies owed them by the Government of Iran.[116] Without either recognizing the existence of this longstanding Chamber practice or offering any rationale for departing from it, the Award sets the rate of interest in these Cases at 8.6% per annum.

74. Although I do not believe that the 8.6% rate is patently unreasonable, I do believe that legitimate questions can be raised as to its adequacy -- particularly in light of the very high interest rates that prevailed during a significant portion of the period since the taking in these Cases and the fact that (in my view, erroneously) the interest is not compounded. I trust that in future cases these issues will receive a more careful and reasoned treatment than they have in this Award.

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[116] See, e.g., Unidyne Corporation and The Islamic Republic of Iran, Award No. 551-368-3 (10 Nov. 1993), reprinted in ___ Iran-U.S. C.T.R. ___, ___; William J. Levitt and Islamic Republic of Iran, et al., Award No. 520-210-3 (29 Aug. 1991), reprinted in 27 Iran-U.S. C.T.R. 145, 185; McCollough & Company, Inc. and The Ministry of Post, Telegraph and Telephone, et al., Award No. 225-89-3 (22 Apr. 1986), reprinted in 11 Iran-U.S. C.T.R. 3, 26-31, 34; Alan Craig and Ministry of Energy of Iran, et al., Award No. 71-346-3 (2 Sept. 1983), reprinted in 3 Iran-U.S. C.T.R. 280, 290; Blount Brothers, 3 Iran-U.S. C.T.R. at 235.

E. Conclusion

75. In sum, I believe that the Award errs in at least three significant respects in its valuation of Gostaresh Maskan. First, contrary to an unbroken string of Tribunal precedents, the Award refuses to attribute any value to Gostaresh Maskan's sizable contract backlog. Second, the Award unfairly penalizes the Claimants through its application of a negative goodwill figure unwarranted in law or fact. Finally, the Award arbitrarily deducts an alleged severance pay liability despite the lack of evidence supporting the Respondent's position. I regret that these errors in the Award have partially deprived the Claimants of that to which the Award rightly finds them to be entitled: the fair market value of their investment in Gostaresh Maskan.

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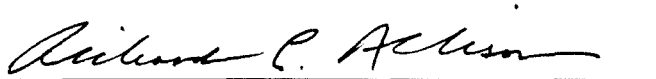
As explained at some length in this Separate Opinion, I believe that the Award's emphasis upon a "flexible" standard of "appropriate" compensation dependent in some unspecified way upon the "circumstances" of the taking misapprehends the state of international law today. Moreover, a standard without objective norms can hardly be deemed a standard at all.

The fact that countless nations, including the former staunchest proponents of Calvo, NIEO and communist doctrine, have expressly adopted the standard of prompt, adequate and effective compensation in their relations with other States is, perhaps, the most revealing manifestation of how far we have come from the United Nations polemics of the 1960's and 1970's.

Insofar as today's Award is concerned, it is important not to lose sight of the fact that, despite its erroneous theoretical postulations, the Tribunal in these Cases does, in fact, accept the full compensation standard and endeavors, albeit imperfectly, to implement it.

Dated: The Hague
12 October 1994



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