CASE NO. 56
CHAMBER THREE
AWARD NO. 310-56-3

AMOCO INTERNATIONAL FINANCE CORPORATION,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
NATIONAL IRANIAN OIL COMPANY,
NATIONAL PETROCHEMICAL COMPANY
and KHARG CHEMICAL COMPANY LIMITED,

Respondents.

CONCURRING OPINION OF JUDGE BROWER

1. I concur generally in the Award's conclusions regarding jurisdiction and governing law and in the fundamental result on the merits: Claimant is to be awarded the full value of its rights in the Khemco Agreement as of July 1979. For these reasons, and in order to form the majority necessary to an award, I concur in the present Partial Award.

2. I write separately nonetheless for two reasons: First, I disagree with much of the analysis on the merits and feel

conscience bound to state my own views. Second, I am deeply concerned that the Award's concepts of what constitutes full compensation are wrong in important respects and may not in fact produce the required full compensation. It follows that I do not believe this Award should have been a partial one; the Tribunal is in as good a position as it ever is likely to be to determine the compensation due Claimant.

I.

3. The Tribunal correctly finds that Claimant's interest in the Khemco Agreement was expropriated. In finding the effective date of the taking to be 24 December 1980, however, virtually a year and a half after the 31 July 1979 date chosen for valuation of the expropriated interest, the Award avoids one problem while at the same time creating (and failing to resolve) another. By regarding the date of the last act in the expropriation process as the date of taking the Award has escaped, albeit not very deftly (see, infra, Section II.A), the necessity of holding Respondents' expropriation unlawful. Placing the date of the taking well after adoption of the Single Article Act (8 January 1980) has allowed the Tribunal to consider that Act as satisfying the requirement imposed by Article IV(2) of the Treaty of Amity, Economic Relations and Consular Rights Between the United States of America and Iran, signed 15 August 1955, entered into force 16 June 1957, 284 U.N.T.S. 92, T.I.A.S. No. 3853, 8 U.S.T. 900 ("Treaty of Amity"), consonant with customary international law, that "adequate provision shall have been made at or prior to the time of taking for the determination and payment of" just compensation.[1] (Emphasis added.) Had the Award followed the precedent this Chamber set in Sedco, Inc. and National Iranian Oil Company, Award

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[1]The Tribunal found no stabilization clause present and saw no other basis for invalidating the taking per se.

No. ITL 55-129-3 (28 Oct. 1985) and regarded the date of the first definitive interference with rights as the date of taking,[2] there would have been no escaping the conclusion that Respondents acted unlawfully. Unfortunately, the Award overlooks the fact that Newton's third law of motion[3] has its legal counterpart: The avoidance of one problem may create a new and equally difficult dilemma.

4. What the Award glosses over is the fact that the Khemco Agreement, if it did not fall victim to expropriation on 31 July 1979, necessarily was breached at that time, at least by Respondents National Petrochemical Company ("NPC") and Kharg Chemical Company Limited ("Khemco"), who were parties to that Agreement, with the consequence that by the end of 1980 there was no contract or enterprise left to expropriate. The Tribunal's Award here correctly concludes that the Agreement had not been terminated as of 31 July 1979, and that force majeure no longer prevailed. Thus the Agreement was in force, but quite plainly NPC and Khemco were not performing as the Agreement required, either then

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[2] In Sedco the Tribunal found there had been an expropriation commencing with the appointment of "temporary" managers. The Tribunal noted:

> When . . . the seizure of control by appointment of "temporary" managers clearly ripens into an outright taking of title, the date of appointment presumptively should be regarded as the date of taking . . . . When, as in the instant case, it also is found that on the date of the government appointment of "temporary" managers there is no reasonable prospect of return of control, a taking should conclusively be found to have occurred as of that date.

Sedco, Inc. and National Iranian Oil Company, Award No. ITL 55-129-3 at 41-42 (28 Oct. 1985).

[3] "For every force there is an equal and opposite force or reaction." Webster's Third New International Dictionary 280 (1976).

or later. This effectively is conceded, and also is implicit in the Award's findings. That being so, it is incumbent on the Tribunal to assess contract damages against the breaching Parties, and the entire discussion relating to the damages to be awarded in case of expropriation becomes largely, if not wholly, irrelevant. More than intellectual tidiness is at stake here.

5. All of this is obliquely acknowledged by the Award's decision that "the date at which such measures took effect" was 31 July 1979 and that the Tribunal therefore will value the expropriated interest as of that date (para. 181). More was needed, however. To say that NPC and Khemco each "acted as an instrument of the Iranian Government when it took, together with NIOC, the measures characterized by the Claimant as breach and repudiation of the Khemco Agreement" and therefore cannot themselves be liable for what "constituted the first steps of a process . . . of nationalization" seems to me a bit disingenuous when the date of expropriation is fixed a year and a half later (paras. 174-75).

6. In my view it would have been more correct, and consistent with Tribunal precedent, to take 31 July 1979 also as the date as of which the lawfulness of Iran's action is judged.[4]

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[4]The fact, if true, that the parties continued after that date to discuss the possibility of an agreed transfer, which would have settled their differences, does not affect the character of Respondents' acts as of that date.

II.

A.

7. I thus would have ruled the expropriation of Claimant's interest in the Khemco Agreement to have been unlawful,[5] and I would have done so even on the Award's view of that act as having taken place on 24 December 1980. I fail to see how the requirement of applicable international law, and specifically that spelled out in Article IV(2) of the Treaty of Amity for "just compensation [which] shall be in an effectively realizable form and shall represent the full equivalent of the property taken," is in any way satisfied by this Single Article Act:

> All oil agreements considered by a special commission appointed by the Minister of Oil to be contrary to the Nationalization of the Iranian Oil Industry Act shall be annulled and claims arising from conclusion and execution of such agreements shall be settled by the decision of the said commission. The representative of the Ministry of Foreign Affairs shall participate in the said commission.

The stated possibility of settlements of claims arising out of agreements treated as nullities is a far cry from the decree provision, establishing a "Compensation Committee" to determine "fair compensation," that apparently was upheld,

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[5] As will be seen in Sections III and IV, infra, especially n. 30, the monetary award in the instant case most likely should be the same whether the taking of Claimant's property be regarded as lawful or unlawful, i.e., the full value of Claimants' interest in the Khemco Agreement. To the extent the Award suggests a greater amount should be due in the latter event, however, it would be my view that it should be granted.

albeit sub silentio,[6] by the tribunal in the AMINOIL case as satisfying the demands of customary international law:

> A committee named the Compensation Committee shall be set up by a decision of the Minister of Oil whose task it will be to assess the fair compensation due to the Company as well as the Company's outstanding obligations to the State or other parties. It shall decide what each party owes the other in accordance with this assessment.
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> The State or the Company shall pay what the Committee decides within one month of being notified of the Committee's decision.

Kuwait and American Independent Oil Company (AMINOIL), para. lxv (Reuter, Sultan & Fitzmaurice arbs., Award of 24 March 1982), reprinted in 21 Int'l Legal Mat'ls 976, 998 (1982).[7] It requires more than I have been able to muster to find in the Single Article Act, as the Award does, anything providing "sufficient guarantee that the compensation will be actually determined and paid in conformity with the requisites of international law." (Para. 137.)

8. A certain discomfort on this point is evident in the Award's express reliance on actual experience under the Single Article Act. Apart from the fact that there is no indication as to how much, if any, of this experience was

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[6] See Separate Opinion of Sir Gerald Fitzmaurice in Kuwait and American Independent Oil Company (AMINOIL), para. 23(4) (Award of 24 March 1982), reprinted in 21 Int'l Legal Mat'ls 1043, 1050 (1982).

[7] The Libyan decrees in TOPCO and LIAMCO also provided specifically for "compensation" to be assessed by a committee (although this never was implemented). Texaco Overseas Petroleum Company v. Libyan Arab Republic ("TOPCO"), para. 6 (Dupuy arb., Award of 19 January 1979), reprinted in 53 I.L.R. 389, 425-26 (1979); Libyan American Oil Company (LIAMCO) v. Libyan Arab Republic, (Mahmassani arb., Award of 12 April 1977), reprinted in 62 I.L.R. 139, 163-64 (1982).

realized by 24 December 1980,[8] as of which date the Act must be judged, such experience clearly diminishes any possibility that the Act conformed to international law rather than enhancing it. The Award first notes that the Special Commission established pursuant to the Act "instituted negotiations with the companies . . . in order to arrive at settlement agreements . . . [and] a number of settlement agreements were executed." (Para. 138.) I know of nothing in the entire corpus of international law that suggests that a sovereign's obligation to make adequate provision for just compensation in due time can be satisfied by its mere willingness to discuss the possibility of a compromise. To so rule is to deprive the obligation of any meaning. All the more is this so here, where all the evidence is that the settlements made were concluded at net book value, a concept the Award itself rejects as not satisfying international law standards for compensation. (Paras. 249-59.)[9] There is no greater merit to the Award's second source of comfort, the availability of "recourse to . . . international arbitration." (Para. 138.) The existence of a dispute settlement mechanism such as arbitration is a means of remedying a sovereign's failure to fulfill its obligations; it does not itself fulfill the disputed obligation, for

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[8]Experience subsequent to this date would be of evidentiary value to the extent consistent with earlier experience. In the absence of any indication in the record, however, that any experience under the Act was gained in the nearly full year intervening between promulgation of the Act on 8 January 1980 and 24 December 1980, the interpretive value of the experience cited is slight at best.

[9]The same principle has repeatedly led international tribunals, including this one, to reject claims settlements as delineating in any degree the international law standard of compensation for expropriation. See Sedco, Inc. and National Iranian Oil Company, Award No. ITL 59-129-3 at 13 (27 March 1986) (collecting cases), reprinted in 25 Int'l Legal Mat'ls 629, 635 (1986); id., Separate Opinion of Judge Brower at 10-11, reprinted in 25 Int'l Legal Mat'ls 636, 641.

otherwise there would be no point to the arbitration. The Award seems to me thus to stretch the limits of credibility to find Respondents' actions lawful.

B.

9. I believe that the expropriation here in issue was unlawful on an additional ground.[10] While I recognize that this issue, more than some others in this Case, permits of legitimate debate, I disagree, on balance, with the Award's conclusion that there was no stabilization clause in the Khemco Agreement barring Iran from abrogating that Agreement.[11]

10. Even though Iran itself was not a party per se to the Khemco Agreement -- a finding of the Award which I think correct -- this did not prevent it from accepting legal obligations vis-à-vis Claimant in relation to that

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[10] I agree that this taking appears to have been for a public purpose, and am also inclined to give Respondents the benefit of such doubt as may exist regarding whether or not it was discriminatory.

[11] I read the Award to say (1) that the international law rule of pacta sunt servanda is limited to treaty relations between States; (2) that, however, there is a general principle of law, which itself has become a rule of international law, particularly as enshrined in the United Nations Resolution of 1962 on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803 (XVII) (1962), reprinted in Basic Documents in International Law 141-43 (I. Brownlie 2d ed. 1972), and consolidated by Article V of the Claims Settlement Declaration, "that a State has the duty to respect contracts freely entered into with a foreign party" (para. 177), subject always to the State's lawful (e.g., non-discriminatory) exercise of its sovereign power for a public purpose (e.g., nationalization); (3) that a State may make a binding legal commitment not to exercise such power; but (4) that such a commitment is not easily established, and certainly is not so where the sovereign is not itself a party to the overall contract with the foreign national and the period of asserted commitment is rather long. I comment only on the last of these propositions.

Agreement, as the Award itself confirms. This much is expressed in Article 2(2) of the Agreement:

> When this Agreement has been ratified by the Joint Economic and Financial Committees of the Iranian Parliament, such ratification shall be considered acceptance by the Government of all obligations of the Government and the grant by the Government of all facilities and privileges conferred by the Government under this Agreement, including privileges accorded to foreign companies under the "Law Concerning the Attraction and Protection of Foreign Investment in Iran" dated 7 Azar, 1334 (November 28, 1955), the "Act of 24 Teer 1344 (July 15, 1965) Concerning the Development of Petrochemical Industries", and any future amendments to such acts. (Emphasis added.)

The "acceptance by the Government of all obligations of the Government" through approval and ratification, as occurred, is general and without any specific reference.[12] For example, even though the Iranian Government is nowhere mentioned in Article 30 of the Khemco Agreement the following provision of its second paragraph binds that Government:

> The provisions of any current laws and regulations which may be wholly or partly inconsistent with the provisions of this Agreement shall, to the extent of any such inconsistency, be of no effect in respect of the provisions of this Agreement.

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[12] The accompanying "grant" of "facilities and privileges" by contrast refers inclusively to those accorded under specified enactments, including "any future amendments to such acts." The latter phrase clearly is intended to extend to the enterprise any additional facilities and privileges created in the future, and not to permit any reduction in those initially granted. It thus is consistent with the view that the Agreement does contain a stabilization clause and does not contradict it as the Award supposes. (Para. 167.)

That is to say, Iran would have been in violation of its obligations had it not in fact, following approval and ratification of the Agreement, permitted the Agreement's provisions to prevail over inconsistent contemporaneous provisions of Iranian law.

11. It seems to me to follow that Iran is equally bound by Article 21(2) not to have expropriated, or, in the phrasing of the Single Article Act, "annulled," the Khemco Agreement:

> Measures of any nature to annul, amend or modify the provisions of this Agreement shall only be made possible by the mutual consent of NPC and AMOCO.

The fact that the Government of Iran is not referred to expressly is of no more consequence here than as to Article 30.[13] Just as only that Government, and not the National Iranian Oil Company ("NIOC"), NPC or Khemco, could supply or affect Iranian substantive law, so, too, is it only that Government that could apply "[m]easures of any nature to annul" any provisions of the Khemco Agreement. "Measures" typically imply sovereign action, as in the Claims Settlement Declaration's delineation of our jurisdiction to embrace "expropriations or other measures affecting property rights." Article II(1) (emphasis added). Nullification, as the Single Article Act itself best illustrates, implies State action. That this is the better way to view Article 21(2) is further confirmed by its heading, "Guarantee Of

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[13] The fact that Khemco is not mentioned in this provision either, from which the Award draws comfort on this point (para. 172), is likewise of no significance. It is true that Khemco is not bound by certain articles of the Khemco Agreement notwithstanding its having become a party to it. There was no reason to refer to it in Article 21(2) along with NPC and Amoco because it had no interest in preservation of the contractual status quo independent of the interests of its two equal shareholders.

Performance And Continuity;" a guarantee ordinarily is an undertaking by a person not the prime obligor under a contract insuring that it will be honored.

12. Added to Article 30, this Article 21(2) completes a perfectly reasonable scheme whereby Iran bound itself to ensure that at the time of its approval and ratification the Khemco Agreement was fully valid in all its terms, notwithstanding any preexisting Iranian laws to the contrary, and that it would remain so thereafter. The Award, in my view, avoids this result by an overly literal, crabbed reading of the Articles in question. Certainly they are not so different from the following clauses regarded as comprising a stabilization provision in TOPCO:

> The Government of Libya will take all steps necessary to ensure that the Company enjoys all the rights conferred by this Concession. The contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties.
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> Any amendment to or repeal of [the Petroleum] Regulations [in force on the date of execution of the concession agreement as amended] shall not affect the contractual rights of the Company without its consent.[14]

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[14] But see LIAMCO, supra, 62 I.L.R. at 217 (ruling on unelaborated grounds that the breach of clauses identical to those in TOPCO was "not unlawful as such, and constitute[d] not a tort but a source of liability to compensate"). I see no material distinction necessarily resulting from the fact that Libya itself was a party to the complete agreement containing these clauses, whereas Iran was not a party as such to the Khemco Agreement. In either case the adjudicative task is to determine on the basis of the entire record whether the sovereign undertook a binding legal obligation.

Texaco Overseas Petroleum Company v. Libyan Arab Republic ("TOPCO"), (Dupuy arb., Award of 19 January 1977), reprinted in 53 I.L.R. 389, 394, 423 (1979).[15]

13. As the Award notes, the protection of some alien investors formerly sought in a stabilization clause is nowadays sometimes provided in a quite different way by a broad renegotiation clause. The Khemco Agreement contains

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[15]Similar provisions were considered by the tribunal in AMINOIL under the rubric of stabilization:

> Save as aforesaid this Agreement shall not be terminated before the expiration of the period specified in Article 1 thereof except by surrender as provided in Article 12 or if the Company shall be in default under the arbitration provisions of Article 18.
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> . . .
>
> The Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement except as provided in Article 11. No alteration shall be made in the terms of this Agreement by either the Shaikh or the Company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interest of both parties to make certain alterations, deletions or additions to this Agreement.

Kuwait and American Independent Oil Company (AMINOIL), paras. xxxiii, 88 (Reuter, Sultan & Fitzmaurice arbs., Award of 24 March 1982), reprinted in 21 Int'l Legal Mat'ls 976, 992, 1020 (1982).

The tribunal in that case (with Judge Sir Gerald Fitzmaurice disagreeing) declined to give these articles effect as stabilization clauses because it felt a more explicit committment to self-restraint should be required where a 60-year concession was considered. Id., para. 95, 21 Int'l Legal Mat'ls at 1023. (The instant case involves a contract for a minimum of 35 years.) In addition, the tribunal found these articles "no longer possessed of their former absolute character" due to "a metamorphosis in the whole character of the Concession" over a period of nearly thirty years since 1948. Id., paras. 97, 100, 21 Int'l Legal Mat'ls at 1023-24.

some express renegotiation clauses on specific points, i.e., Articles 8.1.a and 23,[16] but none of a general nature.[17]

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[16]Article 8.1.a reads as follows:

> The Company will pay NIOC and PANINTOIL, and NIOC and PANINTOIL will each receive, two cents (US $0.02) per 1000 SCF (approximately equivalent to seventy and sixty two one hundredths cents - U.S. $0.7062 - per 1000 Standard Cubic Meters) for their respective separate one-half quantity of the gas sold to the Company, delivered at the appropriate location on Kharg Island. Such price will remain fixed for fifteen (15) years from the date of commencement of commercial production of the plants. After the expiration of this fifteen-year period, the price to be paid for the Natural Gas to be purchased during each subsequent five-year period may be adjusted by an amount agreed upon between the Company and NIOC and PANINTOIL, provided that no such adjustment will reduce the ratio of the Company's average f.o.b. unit sales price of each of its products to its average unit cost for each such product (including selling cost) during the applicable subsequent five-year period below that which existed during the preceding five-year period, provided further, that such adjustment will never result in reducing the price of gas below two cents (US $0.02) per 1000 SCF, and also provided that the price for such gas will not exceed the price charged to other petrochemical and chemical consumers of such gases in Iran (companies wholly owned by NPC and NIOC, manufacturing products for internal consumption in Iran not included).

Article 8.1.a (emphasis added). Article 23 reads as follows:

> This Agreement shall remain in force for so long as the aforementioned Joint Structure Agreement between NIOC and PANINTOIL continues in effect or for a period of thirty-five (35) years from the Effective Date, whichever is the longer period, and may be extended at the request of NPC or AMOCO for additional periods each of fifteen (15) years on basis and terms to be agreed. For the implementation of this Article, both parties shall begin negotiations upon the matter not less than five (5) years before the expiration of the then

(Footnote Continued)

The absence of such a provision suggests that a stabilization was intended in Articles 21(2) and 30(2).

14. If, as I believe, the expropriation here was contrary to an undertaking by Iran to stabilize the Khemco Agreement, then it was for this reason as well an unlawful act. See AGIP v. Popular Republic of the Congo, paras. 86-88 (Trolle, Dupuy & Rouhani arbs., ICSID Award of 30 Nov. 1979), reprinted in 21 Int'l Legal Mat'ls 726, 735-36 (1982); TOPCO, supra, para. 71, 53 I.L.R. at 477; BP Exploration Company (Libya Ltd.) v. Government of the Libyan Arab Republic (Lagergren arb., Award of 1 Aug. 1974), reprinted in 53 I.L.R. 297, 329 (1979); Separate Opinion of Sir Gerald Fitzmaurice in AMINOIL, supra, 21 Int'l Legal Mat'ls at 1043.

(Footnote Continued)
current period of the Agreement.

Article 23 (emphasis added).

[17] See, for examples of such a clause, Supplemental Agreement to the 1960 'LAMCO' Agreement between the Republic of Liberia, the Liberian American-Swedish Minerals Co. and Liberia Bethlehem Iron Mines Co. of 1974, para. 24 ("In case of profound change in the circumstances existing at December 31, 1973, the parties, at the request of any one of them, will consult together for the purpose of considering such changes in or clarifications of this Mining Concession Agreement as the parties deem to be appropriate") (quoted in W. Peter, Arbitration and Renegotiation of International Investment Agreements, ch. 4, §3.2.1, at 155 (1986)); AMINOIL, supra, para. xxxiv, 21 Int'l Legal Mat'ls at 992 ("If, as a result of changes in the terms of concessions now in existence or as a result of the terms of concessions granted hereafter, an increase in benefits to Governments in the Middle East should come generally to be received by them, the Company shall consult with the Ruler whether in the light of all relevant circumstances, including the conditions in which operations are carried out, and taking into account all payments made, any alterations in the terms of the agreements between the Ruler and the Company would be equitable to the parties").

III.

A.

15. The Award also strays from the path, as I see it, in the matter of the compensation to be granted Claimant. It is by now well established at this Tribunal that in a case of expropriation, whether lawful or not, the injured party certainly is to be awarded at least the "full value" of the property taken, or, in the words of the Treaty of Amity, Article IV(2), "the full equivalent of the property taken."[18] Sedco, Inc. and National Iranian Oil Company, Award No. ITL 59-129-3 (27 March 1986), reprinted in 25 Int'l Legal Mat'ls 629 (1986); Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, Award No. 141-7-2 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219; American International Group, Inc. and Islamic Republic of Iran, Award No. 93-2-3 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 96. It is equally well established that this means, in the case of an enterprise, "going concern value," which can only be its value as a potential source of profits. Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2, at 17-18 (19 March 1986), reprinted in 25 Int'l Legal Mat'ls 619, 627-28 (1986); INA Corporation and Islamic Republic of Iran, Award No. 184-161-1, at 8 (13 Aug. 1985); American International Group, Inc. and Islamic Republic of Iran, supra, at 21-22, 4

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[18] The Award's statement (para. 189) that the issue of "lawfulness or unlawfulness" of the taking "must be decided by reference to customary international law" is correct as a fundamental proposition. As the Treaty of Amity establishes applicable law regarding the requisites for expropriation, however, breach of the Treaty rules constitutes an unlawful act. Furthermore, the Treaty requirement that an expropriated party be provided the "full equivalent of the property taken" must be respected when a taking violates the Treaty, i.e., no less could be granted regardless of what customary law might otherwise provide.

Iran-U.S. C.T.R. at 109. Our precedents confirm therefore that expected future profits must be included in the calculation of compensation. Thomas Payne and Islamic Republic of Iran, Award No. 245-335-2 (8 August 1986); Phelps Dodge Corp. and Islamic Republic of Iran, supra, at 17-18, 25 Int'l Legal Mat'ls at 627-28. A fortiori, where the expropriated property consists of contract rights, the compensation must be defined by the anticipated net earnings that would have been realized, as well as one can judge, had the contract been left in place until completion. See Lena Goldfields, Ltd. v. Russia (Judgment of 3 September 1930), reprinted in 36 Cornell L.Q. 42, 51-52 (1950); Norwegian Shipowners Claims (Norway v. U.S.), 1 R. Int'l Arb. Awards 307, 338 (1922). Thus there is, in my view, no need to explore further.[19]

B.

16. Nonetheless the Award takes a different view, seeming to conclude that the Treaty of Amity requires interpretation against the background of customary international law, principally the judgment of the Permanent Court of International Justice in the Chorzów Factory case. Case Concerning the Factory at Chorzów (Germany v. Poland), 1928 P.C.I.J., Ser. A, No. 17 (Judgment of 13 September 1978). I heartily disagree. The "full equivalent of the property taken" is a term with a plain meaning and under conventional rules should be given its natural effect, as the Tribunal in fact repeatedly has done. To do otherwise is to ignore the fact

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[19] The Award does not explain why or how it comes to treat the expropriation (through repudiation or "nullification") of the Khemco Agreement as the expropriation of an enterprise (implicitly without a contractually fixed life span). One suspects that this unexplained and, in my view, unjustified transformation has influenced the Award to view the question of compensation somewhat differently than it should.

that the States Parties to the Treaty of Amity carefully negotiated an express commitment in that Treaty precisely in order to avoid to the maximum extent possible any future reference to customary law.[20]

17. I also dispute the Award's view of Chorzów Factory. I am in accord with its elucidation of that case in some respects but not in others. I agree that in the case of any taking, lawful or unlawful, "the value of the enterprise at the moment of dispossession" is to be awarded (additional remedies being available in the case of an unlawful expropriation). I agree, too, that "the value of an expropriated enterprise does not vary according to the lawfulness or the unlawfulness of the taking." (Para. 197.) Its component elements are the same in either case. I entirely disagree, however, with the supposition that the "value of the undertaking" equates to damnum emergens only and hence excludes lost profits.[21] (Paras. 200-03.) This latter conclusion represents both a misreading of Chorzów Factory and a misunderstanding of economics.

18. In my view Chorzów Factory presents a simple scheme: If an expropriation is lawful, the deprived party is to be awarded damages equal to "the value of the undertaking" which it has lost, including any potential future profits, as of the date of taking; in the case of an unlawful taking, however, either the injured party is to be actually restored to enjoyment of his property, or, should this be impossible

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[20] I of course agree that the Treaty of Amity covers Claimant's "interests in property" held through its wholly owned Swiss subsidiary. Sedco, Inc. and National Iranian Oil Company, Award No. 309-129-3 at 22-23, n. 9 (7 July 1987).

[21] The Court itself nowhere uses the term damnum emergens. I therefore fail to see that its use of lucrum cessans necessarily confirms the Award's reading of Chorzów Factory. (Para. 204, n. 3.)

or impractical, he is to be awarded damages equal to the greater of (i) the value of the undertaking at the date of loss (again including lost profits), judged on the basis of information available as of that date, and (ii) its value (likewise including lost profits) as shown by its probable performance subsequent to the date of loss and prior to the date of the award,[22] based on actual post-taking experience,

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[22]At various places the judgment in Chorzów Factory, if read literally, appears to require that an unlawfully expropriated party be awarded the value of the undertaking as it appears at the time of judgment, even if this be less than the value assessed as of the date of taking. See, e.g., references to "its value at the time of the indemnification," 1928 P.C.I.J. Ser. A, No. 17 at 48; "the value which the undertaking . . . would have had at present," id. at 50; and "the present value of the undertaking," id. at 59. Such a result would be in keeping with the principle of restitutio in integrum, the object of which is "to restore the undertaking," id. at 48. It would have the anomolous result, however, of rewarding the expropriating State for its unlawful conduct: Absent any consequential damages, which the Court in Chorzów Factory would award, or consideration of punitive damages, which the Award here flatly rejects (para. 197, but see Separate Opinion of Judge Brower in Sedco, Inc. and National Iranian Oil Company, supra, at 24-25, nn. 34-35, 25 Int'l Legal Mat'ls at 648-49), the host State would pocket the difference between the lower value the undertaking was shown by post-taking experience to have had and the higher value it objectively enjoyed at the moment of taking. As no system of law sensibly can be understood as intended to reward unlawful conduct, Chorzów Factory must be read as I have suggested, a reading supported by other portions of the judgment (see, e.g., the statement at page 50 that "the value of the undertaking at the moment of dispossesion does not necessarily indicate the criteria for the fixing of compensation") and the Observations of Judge M. Rabel:

> . . . [T]he principles resulting from the unlawful nature of the expropriation . . . are applicable in practice whenever the damage caused appears greater than the compensation which would be due if expropriation had been lawful . . . .
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> It is in fact obvious that the expropriator's responsibility must be increased by the fact that his action is unlawful . . . . [I]t is . . . also

(Footnote Continued)

plus (in either alternative) any consequential damages. Apart from the fact that this is what Chorzów Factory says, it is the only set of principles that will guarantee just compensation to all expropriated parties.

19. The substantive text of the judgment in Chorzów Factory is consonant with the conclusion that the "value of the undertaking" includes its potential for earning profits. The Court thus described such value as including "the cessation of the working and the loss of profit which have accrued;" as encompassing all elements of damage except those that are "outside the undertaking itself;" and as embracing "the worth of the enterprise as a whole" or "the total value of the undertaking" including "profit." 1928 P.C.I.J., Ser. A, No. 17 at 49, 55, 58.[23] Indeed, one would

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(Footnote Continued)

> obvious that the unlawful character of his action can never place the expropriator in a more favourable position . . . by reducing the indemnity due . . . . This point of view, with which the Court in its judgment has not thought fit expressly to deal, appears to me to be in accordance with the general principles of law.

28 P.C.I.J., Ser. A, No. 17 at 66. This understanding of the judgment is confirmed by the Dissenting Opinions of Judges Lord Finlay, id. at 73, and M. Ehrlich, id. at 90. The Award here correctly accepts this reading of Chorzów Factory.

The grant of a higher actual value might supply the element of disincentive otherwise posed by punitive damages. Where actual value is less than that at the time of taking, however, and particularly if there are no consequential damages to be awarded, the relevance of punitive damages as a deterrent remains. See Separate Opinion of Judge Brower in Sedco, Inc. and National Iranian Oil Company, supra, at 24-25, nn. 34-35, 25 Int'l Legal Mat'ls at 648-49.

[23] Although the Court's language here appears in the context of discussions as to whether separate damage awards are to be made as to each of two industrial plants or a single collective amount is to be given, I believe it is broadly reflective of the Court's views regarding the "value of the undertaking."

have thought that the Award here, in equating "the value of the undertaking" with "going concern value" (para. 201), had accepted the inclusion of potential profits. What does "going concern value" mean other than the concern's value as a producer of profits?[24]

20. The Award in fact does not rely on any operative language of the Chorzów Factory judgment for its conclusion. The Award also offers no conceptual rationale for excluding profits as such from "the value of the undertaking" (and none can be advanced). Its conclusion is spun entirely out of a secondary source, namely the questions the Court put to experts in order to generate evidence to which it might ultimately apply the principles it adopted. These questions, however, do not lead to the result stated in the Award, especially when viewed as exactly what they are -- a description of the data the Court would wish to consider in calculating damages.

21. For greatest comprehension it is best to set out here in full the Court's questions to the experts in Chorzów Factory:

> I. - A. What was the value, on July 3rd, 1922, expressed in Reichsmarks current at the present time, of the undertaking for the manufacture of nitrate products of which the factory was situated at Chorzów in Polish Upper Silesia, in the state in which that undertaking (including the lands, buildings, equipment, stocks and processes at its disposal, supply and delivery contracts, goodwill and future prospects) was, on the date indicated, in the hands of the Bayerische and Oberschlesische Stickstoffwerke?

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[24] It is noteworthy that the tribunal in AMINOIL referred to "the value . . . of the undertaking . . ." -- the exact phrase of Chorzów Factory -- "as a source of profit." AMINOIL, supra, para. 164, 21 Int'l Legal Mat'ls at 1038.

> B. What would have been the financial results, expressed in Reichsmarks current at the present time (profits or losses), which would probably have been given by the undertaking thus constituted from July 3rd, 1922, to the date of the present judgment, if it had been in the hands of the said Companies?
>
> II. - What would be the value at the date of the present judgment, expressed in Reichsmarks current at the present time, of the same undertaking (Chorzów) if that undertaking (including lands, buildings, equipment, stocks, available processes, supply and delivery contracts, goodwill and future prospects) had remained in the hands of the Bayerische and Oberschlesische Stickstoffwerke, and had either remained substantially as it was in 1922 or had been developed proportionately on lines similar to those applied in the case of other undertakings of the same kind, controlled by the Bayerische, for instance, the undertaking of which the factory is situated at Piesteritz?

28 P.C.I.J., Ser. A, No. 17 at 51-52.

22. It is essential, first of all, to understand that the two questions were designed to approach a single objective:

> . . . [D]etermining what sum must be awarded to the German Government in order to enable it to place the dispossessed Companies as far as possible in the economic situation in which they would probably have been if the seizure had not taken place . . . .

Id. at 49. In other words, the Court sought assistance, through alternative calculations, in determining "its [the undertaking's] value at the time of the indemnification." Id. at 48.

23. By Question I the Court expressly sought to be informed by experience: "the estimated value of the undertaking" when earlier dispossessed, which the Question defined to include "supply and delivery contracts, goodwill and future prospects," "together with any probable profit that would have accrued" since then had no expropriation taken place.

Id. at 51-52. The only reasonable reading of the Court's action in posing that question is that it instructed the experts to assess the expropriated companies' prospects, necessarily including future profitability, as of the date of taking, and then adjust it in light of actual post-expropriation events. To parse the Court's words in phrasing this Question, as the Award has done, to conclude that use of the phrase "profits or losses" alongside "future prospects" necessitates excluding the former from the latter is mechanically to produce multiple absurdities:

> (1) What are an enterprise's "future prospects" other than its potential profitability?
>
> (2) The Award's fear of "double recovery" (para. 200) of profits is itself produced only by the Award's overly literal approach. The process of adjusting a past estimate by subsequent experience necessarily must preclude any double counting.
>
> (3) The conclusion that "the Court takes into consideration lucrum cessans . . . only for a limited and rather short period of time," i.e., that intervening between the taking and the judgment, and that its quantification thus "supplies no projection into the future" is illogical. "Future prospects," which can only mean prospects of profit, cannot be fairly judged if arbitrary limits are imposed. The phrasing of Question IB simply reflects the inescapable fact that experience as such ends at the moment of judgment; after that one is back in the realm of conjecture. The necessary result of the Award's reasoning on this particular point is that in compensating even an unlawful expropriation no consideration may be taken of probable profits in the future, i.e., post-judgment. Clearly this cannot have been intended; thus the reasoning condemns itself.

24. The Court's own explanation of its Question II, which approaches valuation from a totally current perspective, thoroughly undercuts the present Award's analysis of future profits in Chorzów Factory. Question II makes no mention of "profits or losses," referring only to the "value . . . of the . . . undertaking" (further defined the same as in Question I). Nevertheless, as the Award itself notes, the Court's judgment explains it as follows:

> As regards the lucrum cessans, in relation to question II, it may be remarked that . . . [various costs] are bound to absorb in a large measure the profits, real or supposed, of the undertaking. Up to a certain point, therefore, any profit may be left out of account, for it will be included in the real or supposed value of the undertaking at the present moment.

Id. at 53 (emphasis added). The Court immediately continued:

> If, however, the reply given by the experts to question I B should show that after . . . [certain losses and costs] there remains a margin of profit, the amount of such profit should be added to the compensation to be awarded.[25]

Id. By including profits in the "value of the undertaking," as referred to in Question II, and treating Question IB at the same time, the Court confirms that the "value of the undertaking" identically described in Question I likewise includes them.[26]

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[25]This passage as a whole confirms the suggestion above (para. 23(2)) that to read "the value of the undertaking" in Question I as including prospective profits should not necessitate their double counting.

[26]The Award's stance in respect of lost profits is further contradicted by AMINOIL and LIAMCO; both awarded an amount representing lost profits. AMINOIL, supra, para. 176 (2), 21 Int'l Legal Mat'ls at 1041; LIAMCO, supra, 62 I.L.R. at 217-18. Indeed, the AMINOIL tribunal's refusal to enforce a stabilization clause was expressly conditioned: Kuwait's "'take-over' of Aminoil's enterprise was not . . . inconsistent with the contract of concession, provided always that the nationalisation did not possess any confiscatory character." AMINOIL, supra, para. 102, 21 Int'l Legal Mat'ls at 1024 (emphasis added). Thus while a finding that an expropriation was not unlawful by reason of inconsistency with a stabilization clause may lead some to award less by way of lost profits than would in fact have been projected for the full contract term, even in such cases an award of material profits has resulted.

IV.

25. The fundamental error committed by the Award in excluding as such lucrum cessans, or probable future profits, from the "value of the undertaking," notwithstanding the Award's express reconfirmation that such value is synonymous with "going concern value" (para. 263), leads it into the unfortunate observation, likewise erroneous, that the "DCF [discounted cash flow] method [of calculating the value to be awarded] prima facie seems not fitted to the present issue." (Para. 227.) Nothing could be further from the truth and in the end the Award does not reject it as being irrelevant, but rather declines to rely on it to the exclusion of other methods of analysis.

26. The somewhat Delphic character of the Award in regard to compensation, the amount of which is still to be determined, renders it particularly appropriate that I comment on some of the Award's more specific misconceptions about that method and its applicability as such. First of all, to decry DCF as potentially resulting in legally unacceptable "speculation" misreads the law. Where the alleged fact that damages may result is uncertain, it is true that an international tribunal may not award same. See, e.g., LIAMCO, supra, 62 I.L.R. at 214-15 (no indemnification for "loss of profits" in respect of Petroleum Concession 17 because such profits not "certain and direct," the field in question having never been developed). Where, however, damages are certain to have occurred, as concededly is the case here, and it is only their proper amount that remains uncertain, such a tribunal must make an award in accordance with the best available evidence, even though this process be inherently speculative. As the tribunal said in AMINOIL (in which award the Tribunal here places great stock), declining to apply only a DCF analysis:

> If, however, the Tribunal does not accept them ["the projections as to the future of the petroleum industry based on the consultations of experts that the Company has relied upon"], this is not because they include speculative elements, since all methods of assessment, whatever they may be, will do that. It is because the Tribunal thinks that in the present case . . . the Parties adopted a different conception in the course of their relations and negotiations . . . that must guide the Tribunal.

AMINOIL, supra, para. 154, 21 Int'l Legal Mat'ls at 1035 (emphasis added). Here, where the Tribunal expressly seeks to apply international law as such, and not a "different conception" agreed by the Parties, the DCF method cannot be branded as "not fitted" because "speculative."[27]

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[27]Hence the Award's concerns that the Tribunal is asked to do an 18-year projection (as opposed to 39 in AMINOIL) (para. 236), that there is an inherent risk in sales price forecasts (para. 237), and that there is a "subjective" element in expert opinions on the discount rate to be applied (para. 244) are factors which, while they require great care to be exercised in applying the DCF method, in no way suggest that DCF is "not fitted" to the Tribunal's task here.

It likewise would be incorrect to suppose that the DCF method was wholly rejected in LIAMCO; as to Petroleum Concession 20, a developed field, the sole arbitrator awarded $66,000,000 (of $186,270,000 claimed) "for loss of concession rights" in addition to a separate "indemnification for loss of physical plant and equipment." LIAMCO, supra, 62 I.L.R. at 212-14, 218.

Earlier practice of the United States Foreign Claims Settlement Commission, cited in the Award (para. 230, n. 4), must be understood in light of the fact that the Commission has applied rules municipally legislated by Congress in the special context of lump sum settlements: Any standard, so long as it is uniformly applied to all claimants competing for a "piece of the pie," will produce just results, comparatively speaking, among them; a standard producing a generally lower rather than a higher absolute entitlement, however, produces a higher percentage of recovery for all from the common fund, a result not without its political satisfactions. In any event, as Lillich points out, as of

(Footnote Continued)

27. Second, it is incorrect as a matter of law to consider, in valuing the undertaking, as the Award suggests may be done (paras. 245-46), events following the date of valuation. As is indicated from the analysis of Chorzów Factory above -- and the Award here nowhere disputes this -- experience subsequent to the date of taking is relevant only in the case of an unlawful taking, which the Award denies happened here, and then only to determine whether in fact the undertaking proved to have a higher value than appeared as of the time of taking, which increase then might also be awarded. "20/20 hindsight" is permitted only this limited legal scope. Specifically, to resort to post-July 1979 events in Iran to feed concern that Claimant's experts "underestimated" the currency risk and the possibility of force majeure, and failed to foresee the Iraqi invasion of Iran starting September 1979 and the effects of the ensuing (and still enduring) war on Kharg Island (the site of Khemco operations), is to require of such experts a prescience never before permitted in the law.

(Footnote Continued)
1972, the Commission more recently had been "developing sophisticated evaluation techniques" and, for example, had "adopted the practice of valuing many enterprises at a figure 10 times their average annual net profits after taxes." 1 The Valuation of Nationalized Property in International Law 116 (R.B. Lillich ed. 1972).

Likewise the Award's reliance (para. 230, n.4) on S.P.P. (Middle East) Limited v. Arab Republic of Egypt, paras. 62-65 (Bernini, Elghatit, Littman arbs., Award of 16 Feb. 1983), reprinted in 22 Int'l Legal Mat'ls 752, 782-83, is misplaced. The tribunal there awarded "damages (including 'damnum emergens' as well as 'lucrum cessans')." In doing so it stated its "opinion that an approach to the quantification of damages by means of a discounted cash flow calculation should in this particular case be rejected" because, inter alia, "[b]y the date of cancellation the great majority of the work had still to be done." (Emphasis added.) In the instant Case, to the contrary, commercial production had long since been achieved.

28. Third, in calculating compensation it is legally inappropriate to consider the possibility that the Claimant at some future time might for extraneous reasons surrender some of the rights it here asserts. To dwell, for example, on the possibility that Claimant might, for whatever reasons, consent to renegotiate the $.02 per 1,000 standard cubic feet Khemco Agreement price for gas before the end of the period for which it was fixed by contract (para. 235) is to judge a legal issue, that of the value of Claimant's established rights, by the extralegal standard of what the Claimant might be persuaded by unpredictable future political and economic events to accept in exchange for them. That process is hopelessly circular. It is the same as saying that Farmer Jones' pig is worth only $50, rather than the $100 price for which Farmer Brown has contracted to buy it, because next month Jones may nonetheless be induced to sell it to Brown for the lower amount, e.g., in consideration of receiving further contracts from him. For the same reason, if, as the Tribunal's Award concludes, Claimant is legally protected from an unjustly compensated expropriation, let alone a wholly uncompensated one, how can it be just that the compensation to be awarded pursuant to those legal rules be reduced (para. 247) to reflect the possibility that under other circumstances, e.g., in return for longer term supply, Claimant might have settled for less? Even then, the Tribunal must proceed on the basis that a legal right would be surrendered only for something

of equal or greater value,[28] and hence a just and full value must be given here.[29]

29. Fourth, the Award seems to suggest that the DCF method unjustly enriches (para. 231) to the extent it might produce a recovery exceeding either the amount of the original investment or its current replacement value. To put it in sharp relief, it seems to be saying that one who for the price of a chicken turns out to have acquired the proverbial goose that lays golden eggs can legitimately demand back only the price of a chicken when his goose is taken by his landlord and not the value of the goose. The fact is, however, that the landlord is unjustly enriched by exchanging the price of a mere chicken for the fabled goose, whose former owner is left with neither his goose nor the assured means of acquiring another one.

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[28] As the Tribunal stated in AMINOIL:

> . . . [Certain] large transnational groups may have preferred compensation that had no relation to the value of their undertaking, if it was coupled with the preservation of good relations with the public authorities of the nationalizing State with, presumably, resulting prospects for the future giving promise of greater worth than the compensation foregone.

AMINOIL, supra, para. 156, 21 Int'l Legal Mat'ls at 1036.

[29] The calculation of compensation thus must exclude the possibility of deviation by Iran from the applicable legal norm, whether to accomplish an unlawful expropriation or to act lawfully while failing to grant just compensation. The Award is similarly defective to the extent it would favor the discount rate estimating a higher currency risk based on conduct violating the Khemco Agreement or the Treaty of Amity (paras. 248-249.) See Dissenting Opinion of Richard M. Mosk in Hood Corporation and Islamic Republic of Iran, Award No. 142-100-3 (13 July 1984), reprinted in 7 Iran-U.S. C.T.R. 48 (Iranian exchange control legislation violated Treaty of Amity); Dissenting Opinion of Richard M. Mosk in Schering Corporation and Islamic Republic of Iran, Award No. 122-38-3 (16 April 1984), reprinted in 5 Iran-U.S. C.T.R. 374 (same).

30. I am conscious that the Award here at least equally doubts the relevance of net book value as a proper means for arriving at just compensation, i.e., for full value. In this respect I can only applaud it. Accordingly, I would caution that any data regarding assets (reduced by debts) (para. 256) and their replacement cost can be viewed only in this light, i.e., solely as they may bear, if at all, on the "going concern value" of Claimant's property interests.

31. In my view the Parties have had their day in court and the Tribunal should have proceeded to make a monetary award at this time. No party has suggested that it has had an insufficient opportunity to submit all data it regards as relevant to valuation. The material delay in concluding this case which is inherent in the partial nature of this Award and the further submissions it envisions is, to my way of thinking, not justified. In light of the Award's dispositions, however, I think it appropriate not to express myself at this time regarding the proper amount ultimately to be awarded. I would prefer to indulge the hope that the observations here set forth ultimately will have assisted in guiding the Tribunal to a truly just and full compensation in its Final Award.[30]

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[30] I refrain from discussion of any award of damages additional to the prospective grant of full compensation for the value of the undertaking because (1) the Award excludes the possibility of an unlawful taking; (2) the Claimant does not ask for actual restitution of or any value of its rights beyond what it was as of 31 July 1979; (3) the Khemco facilities on Kharg Island appear to have been destroyed by war, hindering an evaluation of probable post-July 1979 experience; and (4) Claimant has not urged an award of any consequential or punitive damages.

V.

32. I concur completely in the Award's rejection of the counterclaims. I would only add that I think the Award, before reaching the proper result, unnecessarily agonizes over decisions on the merits of the counterclaims for various alleged tax deficiencies, when it is clear from the Tribunal's precedents that we have no jurisdiction over such tax counterclaims. See Sedco, Inc. and National Iranian Oil Company, Award No. 309-129-3 at paras. 230-33 (7 July 1987); Aeronutronic Overseas Services, Inc. and Islamic Republic of Iran, Award No. 238-151-1 at para. 82 (20 June 1986); Computer Sciences Corp. and Islamic Republic of Iran, Award No. 221-65-1 at 58 (16 April 1986); International Technical Products Corp. and Islamic Republic of Iran, Award No. 196-302-3 at 29 (24 October 1985); General Dynamics Telephone Systems Center, Inc. and Islamic Republic of Iran, Award No. 192-285-2 (4 October 1985); Questech, Inc. and Ministry of National Defence of the Islamic Republic of Iran Award No. 191-59-1 (25 September 1985); Sylvania Technical Systems, Inc. and Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985); Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, Award No. 141-7-2 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219; T.C.S.B., Inc. and Iran, Award No. 114-140-2 at 23-24 (16 March 1984), reprinted in 5 Iran-U.S. C.T.R. 160, 173.

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