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Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-United States Claims Tribunal

On January 19, 1981, the Governments of the United States of America and the Islamic Republic of Iran established the Iran-United States Claims Tribunal to resolve, *inter alia*, disputes then outstanding between United States nationals and the Government of Iran arising out of "expropriations or other measures affecting property rights."¹ Since then the Tribunal has issued approximately two dozen awards discussing a broad range of factual and legal issues surrounding such claims. Although a number of expropriation cases remain to be decided, including several major ones,² the awards so far rendered permit a preliminary assessment of the major features of expropriation law as currently articulated by the Tribunal.

This article briefly surveys these awards, analyzing them in three broad areas: First, the types of conduct that engage state responsibility under the rubric of expropriation; second, the standard of com-

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1. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), art. II(1), 1 IRAN-U.S. C.T.R. 9 (1981-82), 20 I.L.M. 231 (1981).

2. More than half a dozen cases involving alleged expropriation are under consideration following hearings and pending issuance of final awards. Given the requirements of arbitral secrecy embodied in article 31, note 2, of the Tribunal Rules and inherent in the very nature of arbitration, those cases, as well as the other expropriation cases pending before the Tribunal, are excluded from any consideration in this article. None of the conclusions of the present article may be taken as indicative of the manner in which any of the cases still pending before the Tribunal will or may be decided.

pensation that must be awarded to the owner of expropriated property; and third, the various valuation methods used to quantify damages. This analysis is prefaced by a general explanation of the legal framework of the Tribunal, as well as the common historical facts out of which most of the expropriation claims arise, and is followed by summary conclusions.

I. Background

A. THE LEGAL FRAMEWORK OF THE TRIBUNAL

The treaty documents on which the Tribunal is based, collectively referred to as the Algiers Accords,³ provide the guidelines by which the Tribunal is to render its awards. The jurisdiction of the Tribunal over disputes arising out of "expropriations or other measures affecting property rights,"⁴ while not further defined, encompasses claims for property nationalized by decree as well as property seized *de facto*.⁵

For the Tribunal to have jurisdiction over an American expropriation claim, it must be shown that the dispute was "outstanding" as of January 19, 1981; that the claimant is a United States "national" (a citizen of the United States or a corporation at least 50 percent owned by U.S. citizens and formed under the laws of a United States jurisdiction); and that the respondent is "Iran" (the Government of Iran, including any agency, political subdivision, instrumentality, or controlled entity thereof).⁶

The Tribunal is required to decide all cases "on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."⁷

3. See Claims Settlement Declaration, 1 IRAN-U.S. C.T.R. 3 (1981-82), 20 I.L.M. 223 (1981). These include (in addition to the Claims Settlement Declaration): the Declaration of the Government of the Democratic and Popular Republic of Algeria, *id.* at 5, 20 I.L.M. at 224; Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, *id.* at 7, 20 I.L.M. at 229; and the Escrow Agreement, *id.* at 12, 20 I.L.M. at 234.

4. See *supra* note 1.

5. See, e.g., *Am. Int'l Group, Inc. v. Iran Award No. 93-2-3* at 9 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 96, 101-02 (1983).

6. See Claims Settlement Declaration, art. VII, *supra* note 1, at 11-12, 20 I.L.M. at 232-33.

7. Art. V, *id.* at 11, 20 I.L.M. at 232.

B. THE COMMON HISTORICAL BACKGROUND OF AMERICAN EXPROPRIATION CLAIMS AGAINST IRAN

As all of the decisions discussed below arose during or shortly after the Islamic Revolution that ushered in the current Government of Iran, comparison and analysis of such decisions are facilitated by a review of the common fact patterns underlying the cases.⁸ These may be divided into two categories: (1) property lost during the height of the civil turbulence occurring from November 1978 into February 1979; and (2) property over which the Islamic Government assumed control or ownership after that time.

The Islamic Revolution was characterized by strong anti-American and anti-Western rhetoric commencing in earnest during 1978 and growing towards the end of that year. This was increasingly accompanied by mass demonstrations, political disturbances, and civil unrest, including strikes and riots. Many American individuals and companies reported receiving anonymous threats; some were subjected to acts of violence. Key industries, including oil production and processing, and banking, were periodically disrupted by strikes, making it difficult for U.S. companies to operate normally and to carry out routine business transactions. These conditions, and their legal ramifications, have been described in Tribunal awards.⁹

As a consequence, many American businesses evacuated the dependents of their expatriate employees, hoping that conditions would improve shortly. When the situation continued to deteriorate, the bulk of American businesses withdrew all or most of their staff between late December 1978 and January 1979. By February 10 only a few American businesses remained operating in Iran, generally with skeleton staffs. Some of these companies' last representatives have testified that they

8. It is not possible in the scope of this article to set out, even briefly, the full course of the Islamic Revolution. For one interesting account see B. RUBIN, *PAVED WITH GOOD INTENTIONS—THE AMERICAN EXPERIENCE AND IRAN* (1981).

9. "[B]y December 1978, strikes, riots and other civil strife in the course of the Islamic Revolution had created classic *force majeure* conditions at least in Iran's major cities. By '*force majeure*' we mean social and economic forces beyond the power of the state to control through the exercise of due diligence." The situation created in Iran at least during the time from December 1978 until 15 Feb., 1979 by civil unrest, strikes, riots and a state of general upheaval was such that both the Claimant and the governmental authorities and agencies in this case were not able to perform certain of the contractual obligations that they had previously undertaken.

The Tribunal finds that revolutionary conditions, including a general disruption of banking operations, existed on 15 Feb. 1979 and constituted *force majeure*. . . . Sylvania Technical Sys., Inc. v. Iran, Award No. 180-64-1 at 15 (June 27, 1985), quoting Gould Marketing, Inc. v. Ministry of Nat'l Defense of Iran, Award No. ITL 24-49-2 at 11-12 (July 27, 1983), 3 IRAN-U.S. C.T.R. 147, 152-53 (1983).

were forced to depart at gunpoint, escorted out of the country by Revolutionary Guards, bands of militia in the vanguard of enforcement of the new policies. Those businesses leaving during this period generally attempted to organize or wind up their affairs as quickly and effectively as possible, but, owing to the circumstances, were not always entirely successful.

After the turmoil had subsided somewhat, during March-June 1979, many businesses made tentative contacts with the new Government in attempts to return and resume work.¹⁰ The new Government also contacted others with invitations to return. Not all invitations were accepted. Some companies took the position that *force majeure* conditions had totally interrupted their contractual obligations. Others, particularly those with subsidiary or affiliate operations, attempted to continue to manage these entities through their local staff and directors by exercising their shareholders' rights.

The new Government took several steps to bring the Iranian economy more under its control. Banks were nationalized on June 7, 1979; insurance companies on June 25, 1979; and certain heavy industries starting July 5, 1979.¹¹ On January 8, 1980, the Revolutionary Council adopted a Single Article Act calling for the nullification of oil contracts inconsistent with the Government's policy of a totally nationalized oil industry.¹²

In addition to these formal steps of nationalization, the Government implemented several other measures affecting the management of businesses in Iran. The Government encouraged the formation of formal workers' councils to deal with management in assuring that employees' rights were adequately respected.¹³ U.S. managers and owners often considered these groups as both hostile to their ownership interests and anxious to pursue political objectives not consistent with the profitable operation of the businesses.

As an additional step to consolidate the political and financial objectives of the Revolution, the Government implemented various laws for the replacement of business management under a variety of circumstances. Pursuant to this authority, many of the remaining U.S. companies operating in Iran were notified that their designated managers had been "provision-

10. See, e.g., *Am. Bell Int'l, Inc. v. Iran*, Award No. 255-48-3 (Sept. 19, 1986).

11. *INA Corp. v. Iran*, Award No. 184-161-1 at 8 (Aug. 13, 1985).

12. See, e.g., *Phillips Petroleum Co., Iran v. Iran*, Award No. ITL 11-39-2 (Dec. 30, 1982), 1 IRAN-U.S. C.T.R. 487 (1981-82).

13. See generally *Schering Corp. v. Iran*, Award No. 122-38-3 at 15-18 (April 16, 1984), 5 IRAN-U.S. C.T.R. 361, 368-71 (1984).

ally" replaced with managers or directors appointed by the Government. Some U.S. companies protested;¹⁴ others appeared to acquiesce.¹⁵

Most direct or indirect U.S. business contacts remaining in Iran through the summer of 1979 were brought to an abrupt end in November 1979 with the seizure of American diplomatic personnel and citizens at the U.S. Embassy in Tehran. When the successful negotiations and implementation of the Algiers Accords secured their release, many U.S. companies filed claims with the Tribunal.

II. Actions Engaging State Responsibility for Expropriation

For a company alleging expropriation of its property two of the most significant issues are whether the State is liable for the conduct said to constitute expropriation, and, if so, the date at which the expropriation occurred. The former is a necessary element to a successful claim; the latter may have a great impact on the valuation of the dispossessed property.

A. DETERMINING WHETHER AN EXPROPRIATION HAS OCCURRED

The Tribunal has had no difficulty in recognizing the expropriatory effect of Iranian public laws expressly nationalizing industries or particular entities. Thus, for example, in *American International Group, Inc. v. Iran*¹⁶ and *INA Corp. v. Iran*¹⁷ the claimants were able to recover damages for their shares of Iranian insurance corporations nationalized pursuant to a "Law of Nationalization of Insurance and Credit Enterprises."¹⁸ It was undisputed that this law constituted a taking of property for which the Iranian Government was responsible.

Most cases brought before the Tribunal, however, involve the gray area of expropriation in which no formal taking is announced by the host government, but the alien argues that the property has been seized de facto. In deciding these cases the Tribunal has consistently ruled that interference by the Government with the alien's enjoyment of the incidents of ownership—such as the use or control of the property, or the income and economic benefits derived therefrom—constitutes a compensable taking. The Tribunal's decisions vary slightly in their discussion

14. See, e.g., *SEDCO, Inc. v. Nat'l Iranian Oil Co.*, Award No. ITL 55-129-3 at 31-33 (Oct. 28, 1985).

15. See, e.g., *Tippetts v. TAMS-AFFA Consulting Eng'rs of Iran*, Award No. 141-7-2 at 8-12 (June 29, 1984), 6 IRAN-U.S. C.T.R. 219, 224-26 (1984).

16. Award No. 93-2-3 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 96 (1983).

17. Award No. 184-161-1 (Aug. 13, 1985).

18. *Id.* at 4.

of the degree of interference necessary to a finding of expropriation, but the most common benchmark appears to be reasonableness. In one of its earliest cases the Tribunal suggested in dictum that an unreasonable interference is sufficient to find expropriation.¹⁹ This standard was followed shortly thereafter in *Golpira v. Iran*,²⁰ and more recently in *International Technical Products Corp. v. Iran*.²¹ Other awards describe the standard as requiring an "interfere[nce] . . . to such an extent that these [property] rights are rendered so useless that they must be deemed to have been expropriated"²² or state that a taking occurs whenever an owner is "deprived of fundamental rights of ownership" and "the deprivation is not merely ephemeral."²³ While these last two groups of cases could be interpreted as somewhat divergent—the one requiring that the arguably more difficult standard of uselessness be proved, the other that of a non-ephemeral loss of fundamental rights—both tend to rely on the others for general support.²⁴ Similarly, in still other cases, the Tribunal examines whether the effective use of the property has been lost.²⁵ The decisions of the Tribunal, therefore, have not focused on semantics, but rather on the reality of the impact of the alleged expropriation. Consequently, the standard both explicitly and implicitly adopted by the Tribunal requires an unreasonable interference with property rights caused by actions attributable to the Government.

What constitutes "unreasonable interference" may vary under different circumstances. The parameters of a linkage to the Government sufficient to support attribution of a taking to it also may vary. The first of these two key issues is discussed below in connection with the three major types of property for which expropriation claims have been lodged with the Tribunal: (1) personal property, such as office equipment or household

19. *Harza Eng'g Co. v. Iran*, Award No. 19-98-2 at 9 (Dec. 30, 1982), 1 IRAN-U.S. C.T.R. 499, 504 (1981-82).

20. Award No. 32-211-2 at 10 (Mar. 29, 1983), 2 IRAN-U.S. C.T.R. 171, 177 (1983).

21. Award No. 196-302-3 at 46 (Oct. 28, 1985).

22. *Starrett Hous. Corp. v. Iran*, Award No. ITL 32-24-1 at 51 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 122, 154 (1983); *Foremost Tehran, Inc. v. Iran*, Award No. 220-37/231-1 at 22, 28 (Apr. 11, 1986).

23. *Tippetts v. TAMS-AFFA Consulting Eng'rs of Iran*, Award No. 141-7-2 at 10, 11 (June 29, 1984), 6 IRAN-U.S. C.T.R. 219, 225 (1984); *Phelps Dodge Corp. v. Iran*, Award No. 217-99-2 at 14 (Mar. 19, 1986), reprinted in 25 I.L.M. 619, 626 (1986).

24. See, e.g., *Payne v. Iran*, Award No. 245-335-2 at 10 (Aug. 8, 1986) (citing, inter alia, *Foremost*, *Starrett*, *Tippetts*, and *Phelps Dodge* for the "well-settled" principle that property may be taken "through interference by a State in the use of that property or with the enjoyment of its benefits"); *Phelps Dodge Corp. v. Iran*, Award No. 217-99-2 at 14 (Mar. 19, 1986), reprinted in 25 I.L.M. 619, 626 (1986) (citing both *Starrett* and *Tippetts*).

25. See *Gianoplus v. Iran*, Award No. 237-314-1 at 7 (June 20, 1986); see also *Starrett Housing Corp. v. Iran*, Award No. ITL 32-24-1 at 54 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 123, 156 (1983).

effects; (2) funds held in bank accounts; and (3) entire businesses or major operating assets. Thereafter follows a discussion of the second issue, attributability to the respondent Government.

1. *Unreasonable Interference*

a. Tangible Property

The cases decided to date involving expropriation of tangible property by Iran have involved the physical seizure of these assets. When such seizures are clearly attributable to the Government,²⁶ the Tribunal has not hesitated to find an expropriation.

*Dames & Moore v. Iran*²⁷ is representative of this type of award. The claimant charged that Government representatives physically occupied a rented warehouse in which the claimant stored its office equipment, vehicles, instruments, and tools; that they declared the warehouse was to be converted to a public use (for emergency housing of war refugees); and that they announced the claimant's private property stored therein was to be turned over to the Iranian Army. The Tribunal regarded the claimant's affidavits and allegations as sufficient proof of this occurrence, especially since it was not denied by the Iranian Government.

The Tribunal held that the dislocation of ownership rights was complete and constituted an unreasonable interference amounting to a taking even in the absence of a formal decree.²⁸ The Tribunal also rejected the respondent's alternative assertion that the custodian named by the claimant to safeguard the property in its absence had previously transferred the property to himself to satisfy certain unsubstantiated debts of a vague origin. Consequently, the claimant was entitled to compensation for its property.²⁹

b. Bank Accounts

Many claimants were unable to withdraw or obtain access to their dollar and rial funds held in their Iranian bank accounts at the time they departed Iran. One of many theories of liability on which claimants have sought to recover for such losses is expropriation.³⁰ In resolving these cases, the

26. See *infra* text section II.A.2.

27. Award No. 97-54-3 (Dec. 20, 1983), 4 IRAN-U.S. C.T.R. 212 (1983).

28. *Id.* at 22, 4 IRAN-U.S. C.T.R. at 223.

29. The same result was also reached in *Computer Sciences Corp. v. Iran*, Award No. 221-65-1 (Apr. 16, 1986); *William L. Pereira Assocs., Iran v. Iran*, Award No. 116-1-3 (Mar. 19, 1984), 5 IRAN-U.S. C.T.R. 198 (1984).

30. Other related theories, beyond the scope of this article, include breach of contract, unjust enrichment, breach of applicable treaties (such as the Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39, *as amended*, and the Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, see *infra* note 81), and violations of domestic Iranian law.

Tribunal appears to have applied the same basic standard of unreasonable interference with the use or control of the property,³¹ but has demanded a showing of a high degree of interference before an expropriation is considered to have occurred.

*American Bell International Inc. v. Iran*³² is the only case to date in which the Tribunal has clearly found a taking of a bank account. The claimant held funds in an Iranian bank account which could be disbursed only upon the joint signatures of claimant's designated agent and the representative of an Iranian governmental entity with which the claimant had been doing business prior to the Revolution. The claimant had been using the account to wind up its affairs after its departure during the Revolution. Once these obligations were concluded, the claimant made several written requests to the joint account party for the release of the funds. These requests were denied. Instead, an agent of the Iranian governmental entity demanded that the claimant's agent accede to its order transferring the funds into an account under the sole control of the Iranian Government. The agent of the Government threatened that noncompliance "would have serious personal consequences," and would, in any case, "not stop" the Government from obtaining access to the funds. Under these circumstances, the Tribunal had no trouble concluding that the funds had been taken: "Where, as here, both the purpose and effect of the acts are totally to deprive one of funds without one's voluntarily given consent, the finding of a compensable taking or appropriation under any applicable law—international or domestic—is inevitable, unless there is clear justification for the seizure."³³ Since the respondent was unable to provide any evidence of any lien or any other justification for continued Government access to those funds, the Tribunal awarded the value of the funds so taken.

When, however, the funds have not actually been transferred and remain subject to the control of the owner, the Tribunal has been much more reluctant to find that an expropriation has occurred. Mere proof that the bank itself has been nationalized does not establish the expropriation of the funds, since the nationalization of the bank affects only the ownership of that bank but not the bank's account liabilities.³⁴

31. See *Harza Eng'g Co. v. Iran*, Award No. 19-98-2 at 9 (Dec. 30, 1982), 1 IRAN-U.S. C.T.R. 499, 504-06 (1981-82).

32. Award No. 255-48-3 (Sept. 19, 1986).

33. *Id.* at 65. The Tribunal did not state whether it regarded the taking as purely an appropriation by the respondent state-owned commercial entity, or an expropriation directly attributable to the Government, but appeared to regard the legal consequences as identical under the circumstances of that case.

34. *William L. Pereira Assocs., Iran v. Iran*, Award No. 116-1-3 at 42 (Mar. 19, 1984), 5 IRAN-U.S. C.T.R. 198 (1984).

Claimants in several cases have challenged exchange control restrictions as constituting a taking. The Tribunal has generally avoided taking a stand on whether exchange control regulations constitute a taking by focusing exclusively on the sufficiency of the demand for access to the funds. Where claimant's demand was specific, and the bank does not show it attempted to obtain approval to disburse the account funds under applicable law, the Tribunal has found a basis for ordering payment of the account funds.³⁵ When the demand is not sufficiently specific, however, no recovery has been permitted.³⁶ The Tribunal's reluctance to make awards related to funds which are still nominally held in an account—despite the futility of earlier attempts to retrieve the funds, the continuing practical unavailability of the funds, and the inability of foreign companies profitably now to use the funds in Iran—has produced sharp dissents.³⁷

c. Businesses

Probably the largest category of *de facto* expropriation cases involves the loss of a business entity or commercial operation in Iran. In applying the standard of unreasonable interference with such interests the Tribunal generally has used a broad approach, focusing on the entire panoply of ownership rights, including the right to appoint directors and participate in management (to the extent of the owner's *pro rata* share in the entity); the receipt in the ordinary course of business of financial and commercial information from the business; receipt of income or other distributions; and other aspects of ownership. None of these factors alone is necessarily controlling.

The Tribunal's decisions have never fixed on a mechanical standard for determining when an expropriation has occurred, and it would be a mistake to attempt to characterize them in this fashion. Nevertheless, one recurrent factual pattern stands out in the cases in which an expropriation has been found to date: The replacement of the owner's management or directors with representatives appointed by the Government generally has

35. *Computer Sciences Corp. v. Iran*, Award No. 221-65-1 at 39-42 (Apr. 16, 1986).

36. *Training Sys. Corp. v. Bank Tejarat*, Award No. 283-448-1, paras. 25-27 (Dec. 19, 1986) and Dissenting Opinion of Howard M. Holtzmann with Respect to Bank Account Claim (Dec. 19, 1986); *McHarg v. Iran*, Award No. 282-10853/10854/10855/10856-1, para. 56 (Dec. 17, 1986) and Separate Opinion of Judge Holtzmann, Dissenting in Part and Concurring in Part, at 5 (Dec. 18, 1986); *Computer Sciences Corp. v. Iran*, Award No. 221-65-1 at 42-43 (Apr. 16, 1986); *Blount Bros. Corp. v. Iran*, Award No. 216-53-1 at 8-9 (Mar. 6, 1986); *Hood Corp. v. Iran*, Award No. 142-100-3 (July 16, 1984); *Harza Eng'g Co. v. Iran*, Award No. 19-98-2 (Dec. 30, 1982), 1 *IRAN-U.S. C.T.R.* 499 (1981-82).

37. *See, e.g., Training Sys. Corp. v. Bank Tejarat*, Award No. 283-448-1 (Dec. 19, 1986) (H. Holtzmann dissenting with respect to bank account claim); dissenting opinions of Richard M. Mosk in *Blount Bros. Corp. v. Iran*, Award No. 216-53-1 (Mar. 6, 1986); *Hood Corp. v. Iran*, Award No. 142-100-3 (July 16, 1984); *Schering Corp. v. Iran*, Award No. 122-38-3 (Apr. 16, 1984), 5 *IRAN-U.S. C.T.R.* 361, 374 (1984).

been a dispositive factor, resulting in a holding of expropriation as of the point when the former managers or directors are no longer able to participate in the management.³⁸ The Tribunal has consistently found a taking, even if the appointed managers purportedly were only temporary, as long as the facts show the managers have assumed a functionally permanent role. Thus, for example, when the owner has been cut off from ordinary dissemination of financial information and income distributions, the expropriation is considered confirmed.³⁹

Other facts may also confirm the permanency of supposedly temporary managers. In *Starrett Housing Corp. v. Iran*⁴⁰ the Tribunal held, for a number of reasons, that the appointment of Government managers to take over a massive housing construction project previously managed by the claimant was the point at which an expropriation effectively occurred,

38. *Starrett Hous. Corp. v. Iran*, Award No. ITL 32-24-1 at 51-52 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 122, 155 (1983); *Tippetts v. TAMS-AFFA Consulting Eng'rs of Iran*, Award No. 141-7-2 at 8-12 (June 29, 1984), 6 IRAN-U.S. C.T.R. 219, 224-26 (1984); *Phelps Dodge Corp. v. Iran*, Award No. 217-99-2 at 11-13 (Mar. 19, 1986), reprinted in 25 I.L.M. 619, 624-25 (1986); *Payne v. Iran*, Award No. 245-335-2 (Aug. 8, 1986); *SEDCO, Inc. v. Nat'l Iranian Oil Co.*, Award No. ITL 55-129-3 (Oct. 28, 1986).

39. See, e.g., *Tippetts v. TAMS-AFFA Consulting Eng'rs of Iran*, Award No. 141-7-2 (June 29, 1984), 6 IRAN-U.S. C.T.R. 219 (1984). The claimant was a partnership which had participated in a 50-50 joint venture. It asserted a claim for the value of its 50 percent interest, allegedly expropriated by the Government of Iran. It presented proof that the Iranian Government appointed a temporary manager who subsequently assumed the right to sign checks issued by the joint venture as well as to make personnel and other decisions, all without consulting the claimant. Subsequent to the appointment of the manager the claimant was able to persuade the manager to accept joint signature procedures under which the claimant's signature would also be required for issuance of checks, and thus the claimant was able to continue participating to some extent in the management. However, after the disruption in Iran-U.S. relations in November 1979, even this modest degree of participation in management was denied to the claimant. The claimant established that after November 1979 the joint venture did not communicate with it; provided no reports on the status of the project for which the joint venture had been created; and gave no answer to the claimant's repeated telexes and inquiries. The Tribunal stated:

While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government . . . such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.

Id. at 10-11, 6 IRAN-U.S. C.T.R. at 225. Applying the standard, the Tribunal held that the expropriation had not occurred merely by the appointment of a manager, since the claimant was able to continue its management and enjoyed certain incidents of ownership through continued cooperation with the government-appointed manager. However, the Tribunal found that expropriation was complete when that cooperation ceased and all contact with the management was terminated. It noted that the subsequent complete cutoff of any communication between the joint venture and the claimant—a rupture confirmed by the passage of time since the appointment of the manager and by the filing of the claim—confirmed the expropriation. Consequently the Tribunal held that the claimant was entitled to recover for its lost interest. See also *Phelps Dodge Corp. v. Iran*, Award No. 217-99-2 (Mar. 19, 1986), reprinted in 25 I.L.M. 619 (1986); *Payne v. Iran*, Award No. 245-335-2 (Aug. 8, 1986).

40. Award No. ITL 32-24-1 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 122 (1983).

despite the Government's subsequent invitations—repeated up to the hearing—for the claimant to return and finish the project. First, it was clear that any return to the project would have been under substantially different conditions than those to which the claimant originally had agreed. The reduced or crippled right “freely to select management, supervisors, and subcontractors” would have violated “an essential element of the right to manage a project.”⁴¹ Moreover, the Tribunal cited Iranian legislation known as a “construction completion bill” for the proposition that the Government contemplated that the ultimate right to manage such housing projects rested with the Ministry of Housing and the Government-owned bank designated in that bill.⁴² Finally, the Tribunal concluded that the expropriation was complete, since there was no evidence that the claimant, if it returned to the project, would have been offered compensation for any reduction in the value of its ownership rights and contract rights caused by the managers appointed by the Government.⁴³

The scope of management functions is also a determinative factor. When the Government-appointed managers have complete authority to run the business, displacing the former management and precluding the owner from selecting any representative, the Tribunal has unhesitatingly found an expropriation.⁴⁴

Moreover, the governmental purpose in appointing the managers has little or no bearing on whether the substitution of managers amounts to an expropriation: “The intent of the Government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.”⁴⁵ Consequently, even when it is argued that the managers were appointed to look after the best interests of the corporation, the Tribunal has generally not held this to be a mitigating factor.

41. *Id.* at 52-53, 4 IRAN-U.S. C.T.R. at 155.

42. *Id.* at 53, 4 IRAN-U.S. C.T.R. at 155.

43. *Id.*

44. *See, e.g.,* SEDCO, Inc. v. Nat'l Iranian Oil Co., Award No. ITL 55-129-3 at 40 (Oct. 28, 1985) (noting that the law authorizing appointment of the directors provided that the government appointees would have “all the authorities necessary for managing the current and routine affairs,” while the former directors were “stripped of their competence” and the shareholders were generally to have “no right ‘to appoint [new] directors’ . . .”); *accord* ITT Indus., Inc. v. Iran, Award No. 47-156-2 (May 26, 1983) (G. Aldrich concurring), 2 IRAN-U.S. C.T.R. 348, 350-51 (1983). *See also* Starrett Hous. Corp. v. Iran, Award No. ITL 32-24-1 at 41 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 122, 147 (1983), in which the Tribunal noted that managers had “every necessary authority for running the day-to-day business of the company,” did “not require special permission from the original managers or owners,” and thus were “in every sense the legal substitute for the original” managers.

45. *Tippetts v. TAMS-AFFA Consulting Eng'rs of Iran*, Award No. 141-7-2 at 11 (June 29, 1984), 6 IRAN-U.S. C.T.R. 219, 225-26 (1984); *see also* *Payne v. Iran*, Award No. 245-355-3 at 12 (Aug. 8, 1986); *Phelps Dodge Corp. v. Iran*, Award No. 217-99-2 at 14 (Mar. 19, 1986), *reprinted in* 25 I.L.M. 619, 626 (1986).

The Tribunal underscored the irrelevance of the Government's motivation for an expropriation in *Phelps Dodge Corp. v. Iran*.⁴⁶ In *Phelps Dodge* the claimant corporation owned approximately 19 percent of a corporation set up to construct and operate a plant for the manufacturing of various industrial products. After the Revolution the Iranian Government, acting through a "Council for the Protection of Industries," transferred management of the factory to two designated organizations, both of which were agencies of the Government.⁴⁷ The factory, however, was the principal operating asset of the company and the reason for which it had been established. As a result of the transfer, no more meetings of the board of directors or shareholders were held. The claimant received no dividends. Similarly, the claimant received no information as to the operations of the plant.

The Tribunal recognized that the legal authorization pursuant to which the Government council had appointed new managers, a "Law of Protection of Industries and Prevention of Stoppage of Factories in the Country," described the managers as "'trustees' and the administration of the factory as 'provisional.'" ⁴⁸ The law nowhere stated, however, whether the managers were trustees for the shareholders, and the nonpayment of dividends and the complete exclusion of the claimant from information as to the operation of the plant suggested that the managers were operating as trustees for the Government. The Tribunal noted that it "fully underst[ood] the reasons why the Respondent felt compelled to protect its interests through this transfer of management and [also] . . . underst[ood] the financial, economic, and social concerns that inspired the law pursuant to which it acted."⁴⁹

The Tribunal held nonetheless that "those reasons and concerns cannot relieve the Respondent of the obligation to compensate Phelps Dodge for its loss."⁵⁰ Since the Government had taken control of the factory and was running it for its own benefit, the Government was liable to the claimant for the value of that property.⁵¹

In cases in which no governmental managers have been appointed, claimants have had more difficulty establishing an expropriation, especially when the claimant cannot establish that the absence of dividend payments or financial information is due to direct governmental action.

46. Award No. 217-99-2 (Mar. 19, 1986), reprinted in 25 I.L.M. 619 (1986).

47. *Id.* at 12, 25 I.L.M. at 625.

48. *Id.* at 13, 25 I.L.M. at 625.

49. *Id.*

50. *Id.*

51. *Id.*, 25 I.L.M. at 626.

Thus, for example, in *Gianoplus v. Iran*, when the claimant himself transferred his shares to an individual who was related to the founder of the company and who was merely coincidentally also employed by the Government, the Tribunal found no expropriation occurred, especially since claimant had continued to exercise some management in the company's affairs thereafter and could not prove duress in the transfer.⁵²

Tribunal precedent is far less developed on the question of whether an unreasonable interference exists when the owner's rights to income are cut off even while it continues to attempt to manage and direct the company to the extent of its pro rata representation on its board of directors. In one recent decision the Tribunal has suggested that no expropriation occurs when the owner attempts to continue management but is excluded from the corporation's earnings.

In *Foremost Tehran, Inc. v. Iran*⁵³ the claimant alleged that its approximately 31 percent interest in an Iranian corporation had been expropriated due to: (1) the expulsion of its expatriate personnel from Iran during the course of the Revolution; (2) the corporation's refusal from 1979 through the day of the award to pay the claimant any dividends; (3) the forced departure of the company's two representatives from the seven-person board of directors in late 1981; and (4) interference with the provision to the claimant of basic financial information about the corporation thereafter.

While admitting that the basic standard is that of undue interference, the Tribunal concluded that in this particular case it was required to evaluate whether the corporation's board had adopted measures "which were not only detrimental in their effect on [the claimant] but which went beyond the legitimate exercise by the majority of the shareholders of Pak

52. Award No. 237-314-1 at 7 (June 20, 1986). Similarly, in *Golpira v. Iran*, Award No. 32-211-1 (Mar. 29, 1983), 2 IRAN-U.S. C.T.R. 171 (1983), the Tribunal was confronted with an alleged de facto expropriation of a shareholder interest in a corporation. The claimant held twenty shares out of 2,500 total outstanding shares in the Borzooyeh Medical Group, an Iranian entity. The claimant did not allege that the Government had appointed its own managers or directors, but rather that (1) the Government's expropriation of the shares of the family of the principal founder of the Iranian entity, (2) the fact that no dividends had been paid, and (3) the fact that no financial information or responses to the claimant's correspondence had been received, proved a de facto expropriation of the interests of all shareholders, including those of the claimant. *Id.* at 7, 2 IRAN-U.S. C.T.R. at 173, 175-76.

The Tribunal, however, concluded otherwise. It held that no distributions had been diverted since the corporation had been unprofitable even prior to the alleged takeover. The lack of financial information was attributable to the claimant's failure to consult locally available sources of legal notice. No management rights were lost, since the claimant's miniscule shareholdings did not entitle him to management representation. *Id.* at 8, 2 IRAN-U.S. C.T.R. at 175-76. See also *FMC Corp. v. Iran*, Award No. 292-353-2, paras. 76-79 (Feb. 12, 1987).

53. Award No. 220-37/231-1 (Apr. 11, 1986).

Dairy [the expropriated company] or by its duly elected board of directors, of their right to manage the company's affairs in what they perceived to be its best interests."⁵⁴

Applying this more elaborated standard, the Tribunal described the evidence as being finely balanced. The Tribunal determined that the claimant's continued attempts to participate in the management of the company through its minority of two directors on the seven-person board of directors nullified its claims for expropriation. The fact that the board adopted a policy, over the objections of these two directors, which expressly and totally excluded the foreign shareholder from any participation in dividends in 1979 and thereafter, was not sufficient to constitute an expropriation. Instead the Tribunal contended itself with awarding the amount of the cash dividends that had not been paid as declared, up to the jurisdictional cutoff point of January 19, 1981.⁵⁵

2. *Attributability to the Respondent Government*

A principle confirmed by the Tribunal's decisions is that loss occurring through revolutionary turmoil and violence is not ipso facto one that may be recoverable against a successor government on an expropriation theory; rather, a claimant must establish that such government intentionally took action to assert control over the property.

The principal Tribunal case in this area is *Sea-Land Service, Inc. v. Iran*.⁵⁶ In *Sea-Land* the claimant operated a container transport service loading and unloading containers at Bandar Abbas. The claimant alleged that it had entered into a special agreement through the Port and Shipping Organization (PSO) and ILB, an Iranian transportation company, by which it was obligated to make substantial investments in the container handling facility in exchange, inter alia, for PSO providing various facilitating services, including expediting handling of the containerized items and customs, health, and immigration clearance. The claimant alleged that, commencing in September 1978, the PSO began to fail to provide pilots and tugboats promptly for its ships and refused or neglected to arrange for customs, health, and immigration clearances. The claimant also charged that by February 1979 the PSO limited the types of commodities that could be unloaded to medicine and foodstuffs. The claimant alleged further that ILB ordered the dismissal of the entire non-Iranian workforce, dictated the wages, terms, and conditions of employment of Iranians, and subsequently prohibited any discipline or discharge of the Iranian workforce. As a result Sea-Land was forced to suspend service temporarily

54. *Id.* at 28.

55. *Id.* at 28-35.

56. Award No. 135-33-1 (June 22, 1984), 6 IRAN-U.S. C.T.R. 149 (1984).

in November 1978, recommencing at a reduced level from February 1979 until August 1, 1979. After August 1979 the claimant concluded there was no prospect for reasonable resumption in the foreseeable future and terminated the service completely. The claimant argued that it was entitled to compensation for an expropriation effective as of the end of December 1978.

The Tribunal recognized that the claimant's ability to operate its business had suffered substantial prejudice. However, it stressed that interference must have been attributable to the Government of Iran as part of a deliberate policy to assert control over the claimant's property: "A finding of expropriation would require, at the very least, that the Tribunal be satisfied *that there was deliberate governmental interference with the conduct of Sea-Land's operation, the effect of which was to deprive Sea-Land of the use and benefit of its investment.*"⁵⁷

The Tribunal accepted the facts as alleged by the claimant and measured them by this standard. It found that no intentional course of conduct had been directed against Sea-Land by the Government: "A claim founded substantially on omissions and inaction in a situation where the evidence suggests a widespread and indiscriminate deterioration in management, disrupting the functioning of the port of Bandar Abbas, can hardly justify a finding of expropriation."⁵⁸

In at least two other cases, however, the Tribunal has determined that the Government was responsible for actions of revolutionary organs taken during the course of the Revolution. In *Computer Sciences Corp. v. Iran*⁵⁹ the claimant alleged that representatives of the Iranian Revolutionary Committee entered the premises of its business, ordered the departure of all of its employees, and physically seized its assets stored therein. The Tribunal held that under public international law the Government of Iran was responsible for the confiscatory actions of the committee. Although the Tribunal did not discuss the relationship of the committee to the Government of Iran, it was accepted that this relationship was direct and that the committee was a legitimate organ of the Government.

Similarly, in *William L. Pereira Assocs., Iran v. Iran*⁶⁰ the Tribunal upheld a claim for expropriation of the contents of business offices by Revolutionary Guards. In that case the copy of the notice of confiscation issued by the Revolutionary Guards was sufficient to engage the State's responsibility.⁶¹

57. *Id.* at 24, 6 IRAN-U.S. C.T.R. at 166 (emphasis added; footnote omitted).

58. *Id.* at 24, 6 IRAN-U.S. C.T.R. at 166.

59. Award No. 221-65-1 at 43-44 (Apr. 16, 1986).

60. Award No. 116-1-3 (Mar. 19, 1984), 5 IRAN-U.S. C.T.R. 198 (1984).

61. *Id.* at 42-43, 5 IRAN-U.S. C.T.R. at 226-27. However, in situations in which evidence

The Tribunal has recognized that either de jure or de facto connections between the Government and a nongovernmental entity could form a basis for attributing the latter's acts to the Government. Thus, when possible, the Tribunal examines the legal status of the purported agent of the Government, as well as any actual supervision by a governmental organ, to determine whether or not an entity's actions can be attributable to the Government. In *Schering Corp. v. Iran*,⁶² for example, the claimant sold pharmaceuticals in Iran through a wholly owned subsidiary financed in part by loans from other corporate subsidiaries. The claimant sought to recover funds held in its bank accounts, as well as loan payments overdue from its Iranian subsidiary, which payments the claimant alleged had been blocked by a "Workers' Council" set up within the subsidiary and consisting of its employees.

The Tribunal found that there was no evidence that the council was in fact acting on behalf of the Government of Iran, or any of its agencies or entities. Unlike so-called temporary managers, the Tribunal noted that there was no evidence of any governmental interference or control over the election of the various members of the council. Moreover, there was no evidence of any orders, directives, or recommendations by the Government to the council, and no proof that it acted upon any instructions of the Government.⁶³ The Tribunal also analyzed the constitutive legislation under which the workers' council had been established. It found that the workers' council was basically created to represent workers' interests vis-à-vis the management and to cooperate with the management to promote those interests. The Tribunal found that the formation of the council on the basis of authorizing legislation by the State should not in

of the actual involvement by the purported organs of the Government has not been strong, the Tribunal has found that alleged expropriatory actions are not attributable to the Government. In *AFHI Planning Assocs., Inc. v. Iran*, Award No. 234-179-2 (May 8, 1986), the claimant, a corporation doing business in Iran, alleged that its offices had been taken over by a revolutionary committee acting on behalf of the Government of Iran and that following such occupation its assets in the office had been seized. The Tribunal denied this claim. It found that the only evidence of actions on behalf of the Government was an affidavit of the claimant's manager stating that he had received a phone call from the landlord, who, in turn, said he had been told by an "unidentified representativ[e] of a revolutionary committee" that the offices had been occupied and the contents seized. The Tribunal apparently found this evidence too vague and therefore rejected it as "an inadequate basis upon which to find responsibility" of the Government of Iran. *Id.* at 14.

A similar claim was denied in *Dames & Moore v. Iran*, Award No. 97-54-3 (Dec. 20, 1983), 4 IRAN-U.S. C.T.R. 212 (1983), where the only evidence of the seizure of certain field laboratories and other equipment was the claimant's assertion that it had obtained no further access to the equipment after property in a warehouse had been expropriated by representatives of the Government.

62. Award No. 122-38-3 (Apr. 16, 1984), 5 IRAN-U.S. C.T.R. 361 (1984).

63. *Id.* at 16-17, 5 IRAN-U.S. C.T.R. at 379-80.

and of itself mean that the council's function was part of the State machinery or that it acted as an agent of the Government.⁶⁴

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

The most recent case to make this point is *Flexi-Van Leasing, Inc. v. Iran*.⁶⁵ The claimant alleged that the Government acquired ownership and control of two private commercial corporations with which the claimant had been doing business; it charged that the failure of the corporations to honor their contracts with the claimant constituted an expropriation of those contract rights by the Government. The Tribunal, however, held that the mere assumption of ownership and control over the two corporations did not constitute expropriation of the rights associated with the contracts entered into by those corporations. The Tribunal held that in order to establish liability of the Government the claimant was required to show direct governmental interference with the contracts, such as "orders, directives, recommendations or instructions" issued to the corporations by the governmental agency controlling the corporations.⁶⁶ While the Tribunal provided no explanation or analysis of the source of this reasoning, it appears to be analogous to the traditional piercing-the-veil standard for disregarding corporate entities.

A similar standard of attributability was articulated in *International Technical Products Corp. v. Iran*.⁶⁷ In that case the claimant alleged that a Government-owned bank, Bank Tejarat, unjustifiably took control of a building owned by the claimant, and ultimately succeeded to title as the legal owner to the building. The bank initially argued that it had acquired the claimant's building through an authorized sale, then later claimed to have succeeded to title through a formal mortgage foreclosure. The Tribunal noted that to hold the Iranian Government responsible for the alleged taking would require one of two findings: (1) that the bank was acting in its capacity as a state organ (rather than as a commercial entity); or (2) that the Government or one of its organs was an accessory to the transfer. The Tribunal held that the bank should be presumed to be acting

64. *Id.* at 15-17, 5 IRAN-U.S. C.T.R. at 379-80.

65. Award No. 259-36-1 (Oct. 13, 1986).

66. *Id.* at 20.

67. Award No. 196-302-3 (Oct. 28, 1985).

in its private commercial capacity when acquiring real estate, an activity within the scope of its ordinary operations. Thus, the Tribunal held that even if the bank had acted unlawfully in acquiring the real estate, governmental responsibility under international law for an expropriation would not be established.⁶⁸

However, if a corporation acts through formal State organs to assume permanent control over operating assets, the Tribunal is more willing to find a sufficient link to the State. In *Oilfield of Texas, Inc. v. Iran*⁶⁹ the Iranian state-owned corporate respondent assumed effectively permanent control over oil production equipment it had leased from the claimant—invoking as justification an Iranian court order prohibiting respondent from returning the equipment or paying rental fees. There, the Tribunal found no evidence that the Iranian court ever notified the claimant or permitted his intervention, and the Tribunal ruled that Iran was liable for an expropriation. It specifically noted: “It is well established in international law that the decision of a court in fact depriving an owner of the use and benefit of his property may amount to an expropriation of such property that is attributable to the state of that court.”⁷⁰ The Tribunal’s analysis of several factors, including the actual deprivation of control, the continuing and permanent nature of the deprivation, and the “impossibility” of the claimant’s challenging the orders in Iranian courts, persuaded it that the Government was responsible for the court order.⁷¹

B. DATE OF THE TAKING

When an expropriation occurs in a revolutionary setting the fixing of the exact date of the expropriation may be critical, since the property value may fluctuate with the volatile political, social, and economic milieu.⁷² For purposes of the Tribunal’s jurisdiction the date of the taking can be dispositive as well. The Tribunal has no jurisdiction over disputes not outstanding on January 19, 1981; therefore, it cannot consider a claim for an expropriation occurring after that date.⁷³

If an expropriation is effected by formal decree, the inquiry is relatively simple: Ordinarily the date of the decree itself will be regarded as the

68. One arbitrator dissented on the grounds that the bank had not carried its burden to show that the property was acquired lawfully. *Id.* (C. Brower dissenting in part and concurring in part).

69. Award No. 258-43-1 (Oct. 8, 1986).

70. *Id.* para. 42.

71. *Id.* para. 43.

72. See *SEDCO, Inc. v. Nat’l Iranian Oil Co.*, Award No. ITL 55-129-3 at 41 (Oct. 28, 1985).

73. See, e.g., *Int’l Technical Prods. Corp. v. Iran*, Award No. 196-302-3 at 48-50 (Oct. 28, 1985).

date of the expropriation, subject to any adjustments that need to be made because of diminutions in value that may have been caused by earlier announcement of the nationalization.⁷⁴

When there is no formal expropriatory decree but expropriation is instead carried out by successive encroachments upon management and ownership rights, the fixing of the date of expropriation is more difficult. In the case of expropriation of assets such as bank accounts or office equipment the Tribunal generally has selected the date as of which the owners' access to the goods has been blocked.⁷⁵ If the taking is of an ongoing business, through a chain of events, for example, beginning with minor management interferences and culminating with the transfer of title, the taking will not necessarily be found to have occurred at the time of either the first or the last such event, but rather when the interference becomes an "irreversible deprivation." In *International Technical Products Corp. v. Iran* the Tribunal stated:

A claim for a taking is outstanding on the day of the taking of property. Where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of the property, *the breach forming the cause of action is deemed to take place on the day when the interference has ripened into more or less irreversible deprivation of the property rather than on the beginning date of the events.* The point at which interference ripens into a taking depends on the circumstances of the case and does not require that legal title has been transferred.⁷⁶

The question was further addressed in the context of the appointment of provisional managers in *SEDCO, Inc. v. National Iranian Oil Co.*⁷⁷ In *SEDCO* the Tribunal was faced with two possible expropriation dates: (1) August 2, 1980, when an order was issued causing the formal transfer of claimant's shares; or (2) November 22, 1979, when claimant was stripped of its management rights by the appointment of Government managers. The Tribunal laid out a two-part standard, holding that a taking is presumptively found to occur upon the appointment of managers, and that such presumption becomes conclusive if at the time of the appointment there was no reasonable prospect of the return of control to the owner:

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

74. See *Am. Int'l Group v. Iran*, Award No. 93-2-3 at 16-17, 21-22 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 96, 106, 109 (1983); *William L. Pereira Assocs., Iran v. Iran*, Award No. 116-1-3 at 43 (Mar. 19, 1984), 5 IRAN-U.S. C.T.R. 198, 226-27 (1984).

75. See, e.g., *Am. Bell Int'l, Inc. v. Iran*, Award No. 255-48-3 at 66 (Sept. 19, 1986); *Dames & Moore v. Iran*, Award No. 97-54-3 at 22 (Dec. 20, 1983), 4 IRAN-U.S. C.T.R. 212, 223, (1983).

76. Award No. 196-302-3 at 49 (Oct. 28, 1985) (footnote omitted; emphasis added); see also *Foremost Tehran, Inc. v. Iran*, Award No. 220-37/231-1 at 29 (Apr. 11, 1986).

77. Award No. ITL 55-129-3 (Oct. 28, 1985).

When . . . it is also found that on the date of the Government appointment of "temporary" managers there is no reasonable prospect of return of control, a taking should conclusively be found to have occurred as of that date.⁷⁸

The Tribunal reasoned that the earlier date was more equitable because the company's value to the claimant should not be affected by the Government's in fact operating the company and having sole control over the generation of income. The Tribunal also found this conclusion to be appropriate in light of the principle of international law that valuation of an expropriated entity must exclude the effect of expropriatory acts.⁷⁹

III. Standard of Compensation

Determining the extent to which a claimant should be compensated for the loss of a property interest is the second major area of controversy in expropriation cases. These determinations necessarily involve an inquiry into what type of remedy should be employed, as well as the scope of that remedy.

A. RANGE OF REMEDIES

Theoretically a broad range of remedies is available to claimants whose property interests have been expropriated. These include restitution or specific performance, substitution of the value of the property taken, award of punitive damages, or other measures that may arguably indemnify the claimant for the wrong done, or the property lost.

As a practical matter, however, virtually all of the Tribunal's decisions focus solely on the return to the claimant of the value of the property interest lost. Restitution or specific performance has not been discussed or seriously contemplated in any of the Tribunal's awards. The reasons for this are evident: The Tribunal does not have adequate enforcement mechanisms for such restitution, but does have available to it the Security Account established in the Algiers Accords out of which monetary awards can be satisfied. Moreover, claimants have seldom, if ever, requested punitive damages.⁸⁰

78. *Id.* at 41-42; *see also* *Payne v. Iran*, Award No. 245-335-2 at 11-13 (Aug. 8, 1986), which held that when a single manager was appointed on two separate dates to control two related corporations, the date of taking was the earliest appointment date.

79. *SEDCO, Inc. v. Nat'l Iranian Oil Co.*, Award No. 55-129-3 at 41-42 (Oct. 28, 1985).

80. *See generally* *SEDCO, Inc. v. Nat'l Iranian Oil Co.*, Award No. ITL 59-129-3 at 24-26 nn. 34-35 (Mar. 27, 1986), *reprinted in* 25 *I.L.M.* 629, 648-49 nn. 24-26 (1986) (Brower, J., separate opinion).

B. DETERMINATION OF THE SCOPE OF COMPENSATION

The debate as to scope of compensation concerns whether the expropriating government must pay the full, genuine economic value of the property or only partial compensation. This issue has been at the center of a vortex of scholarly articles and speculation; some of the Tribunal's decisions and awards on this point have received a degree of attention. It is not possible to explain all the Tribunal's awards in this brief survey. The major features and trends can, however, be identified. What emerges is an overall picture of surprising continuity.

The principal issues confronting the Tribunal in expropriation cases are (1) which law is applicable, Iran's domestic law, the Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran ("Treaty of Amity"),⁸¹ or customary international law; and (2) what is the precise content of that law.

Perhaps because of the large numbers of expropriation cases, and the possibility of a high precedential impact of a case relying on—or rejecting—a particular standard of compensation, the Tribunal has tended to discuss the issues sparingly, confronting them only when unavoidable. That hesitancy has been aggravated by the vigor with which many of the parties have disputed the substantive content of the Treaty of Amity and customary international law.

In cases in which the amount of property in controversy was relatively small, or the expropriation dispute was incidental to the main claims, it is possible that the controversy over the applicable law and legal standard may have outweighed the relative significance of the issue to the disposition of the case. Consequently, in many of the cases involving seizure of tangible business assets, such as office equipment or furnishings, the Tribunal has simply awarded the value of the property seized at the time of seizure, upholding *sub silentio* the principle of full compensation for a taking.⁸²

81. Treaty of Amity, Aug. 15, 1955, United States-Iran, 8 U.S.T. 900, T.I.A.S. No. 3853.

82. See, e.g., *Dames & Moore v. Iran*, Award No. 97-54-3 at 23 (Dec. 20, 1983), 4 IRAN-U.S. C.T.R. 212, 223-24 (1983) (awarding the approximate present worth at the time of taking, as calculated downward from the original purchase price); *William L. Pereira Assocs., Iran v. Iran*, Award No. 116-1-3 at 43 (Mar. 19, 1984), 5 IRAN-U.S. C.T.R. 198, 226-27 (1984) (awarding original purchase price less estimated depreciation); *Computer Sciences Corp. v. Iran*, Award No. 221-65-1 at 44 (Apr. 16, 1986) (net book value awarded as claimed); *Am. Bell Int'l, Inc. v. Iran*, Award No. 255-48-3 at 65-66 (Sept. 19, 1986) (awarding dollar value of expropriated rials at time of taking). These awards are properly characterized as granting full value even though they may be stated as based on the net book values, a formula often advanced by those who argue only partial compensation is required. Since they involve assets that were not income producing assets, or going concern enterprises, the highest actual value would likely be their sale as at a liquidation, for which the depreciated value would be the closest approximation.

In cases in which the expropriated property forms the principal aspect of the claim, the issues of applicable law and compensation standards have been handled more directly.

The Tribunal's decisions to date have not upheld Iran's contentions that its own domestic law governs the standards of compensation payable for expropriated property. In the two cases dealing with expropriations made under formal governmental decree, the Tribunal applied principles of customary international law⁸³ or treaty law⁸⁴ to determine the standard of compensation, without any reliance on Iranian law.⁸⁵

Application of the Treaty of Amity to cases at the Tribunal initially carried some significant political overtones, with the United States (and U.S. claimants) arguing in favor of its application and the Iranian parties protesting that implementation of a treaty of "amity" was an insult and affront given the polarized "enmity" between the two States. The Tribunal's early decisions avoided what was seen as a controversial issue.

*American International Group, Inc. v. Iran*⁸⁶ recognized the outstanding dispute over whether the Treaty of Amity applied to an admitted expropriation and solved the issue by finding that customary international law required the repayment of the full value of the lost interest. The Tribunal justified its refusal to rule on the applicability of the Treaty of Amity by stating "[i]n view of the conclusions in this case, the Tribunal need not here deal with the issues concerning the validity of the Treaty of Amity and its relevance with regard to the present dispute."⁸⁷ In a concurring opinion Judge Mosk explained that he joined in the compromise solution so that an award (for which a majority is required) could be issued, but argued at length that the Tribunal should have held that the Treaty of Amity also applied and required full compensation.⁸⁸

An award six months later also sidestepped the issue. *Tippetts v. TAMS-AFFA Consulting Engineers of Iran*⁸⁹ held that full value was to be paid under "international law and general principles of law," without opining on the Treaty of Amity, which the parties had not briefed. Even as recently as the initial interlocutory award in *SEDCO, Inc. v. National Iranian Oil Co.* the Tribunal was willing to hold that the Treaty of Amity incorporated

83. See *Am. Int'l Group, Inc. v. Iran*, Award No. 93-2-3 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 96 (1983).

84. See *INA Corp. v. Iran*, Award No. 184-161-1 (Aug. 13, 1985).

85. *Am. Bell Int'l, Inc. v. Iran*, Award No. 255-48-3 at 65 (Sept. 19, 1986) (finding of compensable taking or an appropriation under any applicable law in inevitable unless there is clear justification for a seizure).

86. Award No. 93-2-3 at 14, 22 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 96, 105, 109 (1983).

87. *Id.* at 22, 4 IRAN-U.S. C.T.R. at 109.

88. See R. Mosk, concurring opinion at 1, 2.

89. Award No. 141-7-2 at 10 (June 29, 1984), 6 IRAN-U.S. C.T.R. 219, 225 (1984).

international customary standards of liability as to what constitutes a taking, and thus avoided a definitive ruling on its applicability.⁹⁰

Exclusive reliance on customary law generates other controversies, however, particularly those relating to the often widely divergent assertions of the parties as to the content of those principles. Consequently, while the initial decisions tended to place full reliance on customary international law and found that those principles encompassed the obligation of full compensation, the Tribunal preferred to reach this same result through the avenue of the Treaty of Amity in *INA Corp. v. Iran*.⁹¹ Article IV(2) of the Treaty of Amity states that property of U.S. nationals "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."⁹² The claimant in *INA Corp.* asserted that this Treaty provision provided the legal standard governing the expropriation of its interest in an insurance company nationalized pursuant to a formal law. Because the respondent Government of Iran elected not to argue that the Treaty was inapplicable, the Tribunal ruled that its provisions were binding and determinative. Consequently, it avoided placing any reliance on customary international law in awarding full compensation for the taking.

Shortly thereafter the Tribunal issued another award confirming the binding character of the Treaty of Amity in a case in which Iran had challenged its validity. In *Phelps Dodge Corp. v. Iran*⁹³ the Tribunal found that the Treaty applied to a seizure of the claimant's property interest in a company. The Tribunal held that the Treaty of Amity's provisions for unilateral termination had never been invoked.⁹⁴ Similarly, the Tribunal found that the Treaty had not been implicitly terminated as a result of economic and military sanctions imposed by the United States against Iran after the seizure of the hostages in Iran. The Tribunal sidestepped discussion of any issues that might have affected the Treaty's present-day validity, and, in particular, did not discuss whether "changed circumstances" would prohibit reliance on the Treaty today.⁹⁵ The Tribunal held that the Treaty was applicable to the case at hand. Since this seminal award, the Tribunal has routinely held that the Treaty of Amity provides the standard of compensation in expropriation cases.⁹⁶

90. Award No. ITL 55-129-3 at 34 (Oct. 28, 1985).

91. Award No. 184-161-1 (Aug. 13, 1985).

92. See *id.* at 9; Treaty of Amity, *supra* note 81, 8 U.S.T. at 903.

93. Award No. 217-99-2 (Mar. 19, 1986), *reprinted in* 25 I.L.M. 619 (1986).

94. *Id.* at 15, 25 I.L.M. at 626.

95. *Id.* at 15-16, 25 I.L.M. at 626-27.

96. See *Payne v. Iran*, Award No. 245-335-2 at 13-14 (Aug. 8, 1986); *SEDCO, Inc. v. Iran*, Award No. 59-129-3 at 6-7 (Mar. 27, 1986), *reprinted in* 25 I.L.M. 629, 632 (1986).

All awards applying the Treaty of Amity have concluded that the Treaty's standard of "full equivalence" requires the expropriating Government to place the claimant in the same economic position it enjoyed at the time of the expropriation. Even in *INA Corp. v. Iran*⁹⁷—in which all three judges issued elaborate separate opinions exploring their interpretation of customary international law—the nondissenting arbitrators agreed that the Treaty embodied the notion of full compensation, in which "the measure of compensation ought to be such as to approximate as closely as possible in monetary terms . . . the principle of *restitutio in integrum*."⁹⁸ Consequently, in the case of an ongoing commercial enterprise, the Tribunal awarded, as the "full equivalent of the property taken," an amount equal to "the fair market value of [the claimant's] shares [in the expropriated company], assessed as of the date of the nationalization."⁹⁹

In *Phelps Dodge Corp. v. Iran*¹⁰⁰ the Tribunal ignored Iran's contention that net book value as reduced by subsequent alleged losses conformed to the definition of "full equivalent," and focused on the extent to which goodwill plus long-term and short-term profits could confidently be valued.¹⁰¹ Finally, in *Payne v. Iran*¹⁰² the Tribunal determined that if an expropriated company was a going concern when taken, it "must value the claimant's interests on the basis of the fair market value of his shares taking into account the debts of the companies including tax liabilities."¹⁰³ The Tribunal has therefore consistently adopted the position that the Treaty of Amity's requirement of full compensation entails the payment of the genuine economic equivalent of the seized property, measured at fair market value, and including future income in the case of an expropriated going concern.

Several of the Tribunal's more recent awards have explored the interrelationship between the standard of compensation set out in the Treaty of Amity and that developed through customary international law. These awards have concluded, without exception,¹⁰⁴ that the two sources impose

97. Award No. 184-161-1 (Aug. 13, 1985).

98. See *id.* at 1 (Lagergren, J., separate opinion (Aug. 15, 1985)). The dissenting opinion of Judge Ameli, *id.* at 53 (Nov. 26, 1986), did not share this view.

99. *INA Corp. v. Iran*, Award No. 184-16-1 at 10 (quoting the Treaty of Amity, *supra* note 81, art. IV(2)).

100. Award No. 217-99-2 (Mar. 19, 1986), *reprinted in* 25 I.L.M. 619 (1986).

101. *Id.* at 17-18, 25 I.L.M. at 627-28.

102. Award No. 245-335-2 (Aug. 8, 1986).

103. *Id.* at 17-18.

104. The separate opinion of Judge Lagergren in *INA Corp. v. Iran*, Award No. 184-161-1 (Aug. 15, 1985) theorizes as to the standard of compensation in a large-scale nationalization of an entire industry, suggesting that a standard less than *restitutio in integrum* should be adopted in certain circumstances. The accompanying separate opinion of Judge Holtzmann

essentially identical obligations on the expropriating state. In *Phelps Dodge Corp. v. Iran*¹⁰⁵ the Tribunal suggested that the Treaty of Amity stipulated compensation standards "similar, if not identical" to those found under customary international law, citing *American International Group v. Iran*,¹⁰⁶ and *Tippetts v. TAMS-AFFA Consulting Engineers of Iran*.¹⁰⁷ The Tribunal has subsequently confirmed these holdings by citing and relying upon the formulas for valuation of going concerns at fair market value set out in *INA Corp.*¹⁰⁸ and *American International Group*.¹⁰⁹

The most extensive award to date discussing the compensation standards found in the Treaty of Amity and customary international law is *SEDCO, Inc. v. National Iranian Oil Co.*¹¹⁰ In *SEDCO* the Tribunal was required to determine the compensation standard applicable to the expropriation of an oil drilling company when Iran argued that the Treaty of Amity, even if applicable, incorporates the standard allegedly found in customary international law. The Tribunal rejected arguments that United Nations General Assembly resolutions and declarations,¹¹¹ or other purported indications of state practice in the area, had eroded the traditional standard of full compensation. The Tribunal reviewed opinions of international tribunals, legal publicists, and other relevant authorities, and concluded that the standard of full compensation is overwhelmingly supported.¹¹²

The Tribunal's award in *Oilfield of Texas, Inc. v. Iran* appears to reinforce, at least implicitly, the explicit conclusions of *Phelps Dodge* and *SEDCO*.¹¹³ *Oilfield of Texas* awarded the full value of expropriated oil

concludes that "[w]hile some commentators have put forth theories of less than full compensation," the "fact is that courts and international tribunals when faced with the responsibility of deciding actual cases overwhelmingly follow the rule of awarding full compensation for governmental takings." *Id.* at 4 (Holtzmann, J., separate opinion). No award of the Tribunal has yet adopted Judge Lagergren's proposed theory of compensation, while one award, *Am. Int'l Group, Inc. v. Iran*, Award No. 93-2-3 at 21-22 (Dec. 19, 1983), rejected it. *See also* *SEDCO, Inc. v. Nat'l Iranian Oil Co.*, Award No. ITL 59-129-3 at 22 n.31 (Mar. 27, 1986) (Brower, J., separate opinion), *reprinted in* 25 I.L.M. 636, 647 (1986).

105. Award No. 217-99-2 at 16 (Mar. 19, 1986), *reprinted in* 25 I.L.M. 619, 627 (1986).

106. Award No. 93-2-3 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 96 (1983).

107. Award No. 141-7-2 (June 29, 1984), 6 IRAN-U.S. C.T.R. 219 (1984).

108. *INA Corp. v. Iran*, Award No. 184-161-1 (Aug. 13, 1985).

109. *See* *Payne v. Iran*, Award No. 245-335-2 at 14-15 (Aug. 8, 1986).

110. Award No. ITL 59-129-3 (Mar. 27, 1986), *reprinted in* 25 I.L.M. 629 (1986).

111. The cited resolutions were G. A. Res. 3201, 28 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974), *reprinted in* 13 I.L.M. 715 (1974); G. A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974), *reprinted in* 14 I.L.M. 251 (1975); G. A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5344 (1962), *reprinted in* 57 AM. J. INT'L L. 710 (1963). *See* *SEDCO, Inc. v. Nat'l Iranian Oil Co.*, Award No. ITL 59-129-3, at 25 I.L.M. at 9 nn.11-13, 25 I.L.M. at 633 nn.11-13.

112. *See* *SEDCO, Inc. v. Nat'l Iranian Oil Co.*, Award No. ITL 59-129-3 at 11-14, 25 I.L.M. at 634-35. *See also id.* at 10-22, 25 I.L.M. at 641-47 (Brower J., separate opinion).

113. *Oilfield of Texas, Inc. v. Iran*, Award No. 258-43-1 (Oct. 8, 1986).

production assets without finding it necessary to inquire into the interrelationship of the Treaty of Amity or customary international law. Instead, the Tribunal merely cited *Phelps Dodge* and *SEDCO* as the support for its conclusion that, once an uncompensated expropriation is found to have occurred, the full value of the expropriated assets must be awarded to the claimant.¹¹⁴

A remaining question confronted in some cases is whether the standard of compensation should vary depending upon the lawfulness or unlawfulness of the taking. The Tribunal has ruled that an expropriation must meet three criteria to be considered lawful: It must be (1) nondiscriminatory, (2) for a public purpose, and (3) (implicitly) accompanied by compensation meeting the standard prescribed by applicable law.¹¹⁵ In *American International Group v. Iran*¹¹⁶ the Tribunal applied this rule in holding that the nationalization of an insurance company pursuant to an industry-wide law of nationalization did not violate either of the first two elements of the test although compensation had not been paid prior to the award. Because the Tribunal held that the requisite standard of compensation was the full, fair market value of the claimant's nationalized shares in the enterprise,¹¹⁷ the Tribunal implicitly rejected the notion of a two-tiered system of compensation, providing partial compensation in lawful expropriations and full compensation in unlawful ones. This holding was subsequently confirmed in *SEDCO, Inc. v. National Iranian Oil Co.*,¹¹⁸ in which the Tribunal concluded, based upon an analysis of relevant international law authorities, that full compensation must be awarded "whether or not the expropriation itself was otherwise lawful."¹¹⁹

To date, therefore, the Tribunal's awards have consistently reached the conclusion that full compensation must be paid by an expropriating state. That this conclusion has been reached via application of the Treaty of Amity, and by reference to customary international law, in varying contexts including both isolated expropriations and large-scale nationalizations, underscores the strong support manifested today for the principle of full compensation.

IV. Quantification of Damages

A crucial area of the Tribunal's awards, one which has perhaps remained in the shadow of the debate over the standard of compensation, is the

114. *Id.* para. 43.

115. *Am. Int'l Group, Inc. v. Iran*, Award No. 93-2-3 at 14-15 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 96, 105 (1983).

116. *Id.*

117. *See id.* at 21-22, 4 IRAN-U.S. C.T.R. at 109.

118. Award No. I.T.L. 59-129-3 (Mar. 27, 1986), 25 I.L.M. 629 (1986).

119. *Id.* at 11-13, 25 I.L.M. at 634-35.

issue of how actually to calculate damages based on the designated compensation standard.

A. ECONOMIC CONTEXT OF THE TAKING

It is generally recognized that valuation of the expropriated property must exclude any diminution in value caused by the fact of expropriation. The Tribunal has stated: "[N]either the effects of the very act of nationalization should be taken into account nor the effects of events that occurred subsequent to the nationalization."¹²⁰

However, Tribunal precedent has equally recognized that general economic conditions must be considered, including the economic vicissitudes of a revolutionary period, at least to the extent that such conditions are not considered part of the expropriating interference attributable to the Government. In *American International Group, Inc. v. Iran* the Tribunal held:

[P]rior changes in the general political, social and economic conditions which might have affected the enterprise's business prospects as of the date the enterprise was taken should be considered. Whether such changes are ephemeral or long-term will determine their overall impact on the value of the enterprise's future prospects.¹²¹

These principles were also followed in *Payne v. Iran*¹²² and *Phelps Dodge Corp. v. Iran*.¹²³ Each of these cases held that the value of the corporations, which were expropriated after the culmination of the Revolution, had to be reduced by the pessimistic business outlook then prevailing.

B. THE NATURE OF THE EXPROPRIATED PROPERTY

Close attention must also be paid to the precise nature of the expropriated property. Simple assets may be viewed as compensable on a different basis from an integrated business entity. This concern lay behind Judge Holtzmann's criticism of the needlessly muddled terms of reference by which an accounting expert was appointed to value an expropriated business investment in *Starrett Housing Corp. v. Iran*.¹²⁴

120. *Am. Int'l Group, Inc. v. Iran*, Award No. 93-2-3 at 16-17 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 96, 106 (1983); see also *INA Corp. v. Iran*, Award No. 184-161-1 at 10 (Aug. 13, 1985).

121. *Am. Int'l Group, Inc. v. Iran*, Award No. 93-2-3 at 18 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 96, 107 (1983).

122. Award No. 245-335-2 at 16-18 (Aug. 8, 1986).

123. Award No. 217-99-2 at 17 (Mar. 19, 1986), reprinted in 25 I.L.M. 619, 627 (1986).

124. See Award No. ITL 32-24-1 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 122 (1983) (Holtzmann, J., separate opinion).

The particular sector of the economy involved may also be important.¹²⁵ In two decisions of Chamber Two, the Tribunal paid special attention to the type of industry in which the expropriated entity was engaged and the general prospects for economic stability of that entity. *Phelps Dodge Corp. v. Iran*¹²⁶ considered the expected future prospects of an expropriated industrial facility designed for the production of wire and cable products. *Payne v. Iran*,¹²⁷ however, viewed the expropriation of a service sector entity as subject to greater future risk in a post-revolutionary environment, presumably since the demand for such services was more subject to variations in governmental policy, especially when the Government itself was a primary customer. Thus, aspects of the economic setting of the expropriated business cannot be ignored.

C. VALUATION METHODS

When the expropriated property interest is an ongoing commercial enterprise the Tribunal consistently has ruled that the standard of full compensation requires granting the fair market value of the enterprise, taking into account both the present value of reasonably ascertainable future profits as well as any outstanding obligations.¹²⁸ Theories based solely on historical cost, such as net book value, have never been adopted, since they do not take into account future profits and thus exclude a primary ingredient in any actual calculation of the genuine economic value of a business enterprise or income-producing asset.¹²⁹

In some circumstances the claimant has requested merely the dissolution value of the enterprise, based on a liquidation of the individual assets at their individual fair market value and discharge of any outstanding liabilities. When so requested, the Tribunal has usually followed this method.¹³⁰ This approach is consistent with the requirement of full compensation under circumstances in which a prudent investor would liqui-

125. The Tribunal ruled early on that it is the value of the property in the hands of the investor (i.e., as taken), not the value in the hands of the expropriating government, (i.e., as received), that is considered. See *Tippetts v. TAMS-AFFA Consulting Eng'rs of Iran*, Award No. 141-7-2 at 10 (June 29, 1984), 6 IRAN-U.S. C.T.R. 219, 225 (1984).

126. Award No. 217-99-2 (Mar. 19, 1986), *reprinted in* 25 I.L.M. 619 (1986).

127. Award No. 245-335-2 at 14, 18 (Aug. 8, 1986).

128. See *id.* at 17; *INA Corp. v. Iran*, Award No. 184-161-1 at 10 (Aug. 13, 1985).

129. See, e.g., *Payne v. Iran*, Award No. 245-335-2 at 16-17 (Aug. 8, 1986); *Phelps Dodge Corp. v. Iran*, Award No. 217-99-2 at 16-17 (Mar. 19, 1986), *reprinted in* 25 I.L.M. 619, 627 (1986).

130. See *SEDCO, Inc. v. Nat'l Iranian Oil Co.*, Award No. I.T.L. 59-129-3 at 4 n.2 (Mar. 27, 1986), *reprinted in* 25 I.L.M. 629, 631 n. 4 (1986); *Tippetts v. TAMS-AFFA Consulting Eng'rs of Iran*, Award No. 141-7-2 at 12 (June 29, 1984), 6 IRAN-U.S. C.T.R. 219, 226 (1984).

date the enterprise in order to obtain the maximum benefit of an enterprise rather than suffer continued losses.

Similarly, when a claimant seeks the replacement value of specific assets, the Tribunal has found this basis for valuation may be consistent with an award of the legally required full value. In *Oil Field of Texas, Inc. v. Iran* the Tribunal awarded, as the full value, the "amount it would have cost to replace the [specific assets seized], based upon the market conditions for such equipment at the time."¹³¹ Under the prevailing conditions, in which demand for the equipment was high, delays in obtaining new equipment were prolonged, and significant rental income could be obtained through immediate possession and leasing of this equipment. There, the Tribunal recognized that "whether the equipment at issue was used or new is not as such determinative as to its value."¹³² The result reached by the Tribunal appears reasonable since it was directly tied to the real value (the cost of securing functionally identical assets on the open market, taking into account the genuine economic gains that could have been expected to accrue through ownership of the assets).

The Tribunal awards do not yet permit a judgment as to which of the many possible financial theories for valuation of ongoing businesses is preferred. Methods based on price/earnings ratios, discounted cash flow analysis, actual share prices, and other criteria have been suggested.¹³³ None has been rejected outright as implausible or inaccurate, but two themes are evident: First, no theory will be accepted if it does not, in the Tribunal's view, realistically account for all the relevant economic factors affecting the income; second, the claimant is well-served by two or more corroborating valuation models, since in the absence of a single accepted method the Tribunal is more likely to approximate, rather than calculate, its final determination of damages.

The decision in *Payne v. Iran*¹³⁴ is a recent example. The claimant sought the fair value of two electronics parts and servicing companies expropriated after the climax of the Revolution, based on a multiple of ten times the net average earnings for the three years preceding the taking. The Tribunal concluded, however, that the claimant had underestimated the adverse effects on the business prospects caused by the Revolution and the disruption in Iran-U.S. trade relationships. Since much of the preexisting business was Government-related, and the business was also dependent on spare parts and components that could no longer be ex-

131. Award No. 258-43-1, paras. 43, 44 (Oct. 8, 1986).

132. See *id.* para. 44.

133. See, e.g., *Starrett Hous. Corp. v. Iran*, Award No. ITL 32-24-1 at 56 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 122, 157 (1983) (authorizing expert to use discounted cash flow method).

134. Award No. 245-335-2 (Aug. 8, 1986).

ported from the United States, the Tribunal held that past performance was not a reliable "indicator of likely future profitability."¹³⁵ The Tribunal was bolstered in its view by the claimant's preexpropriation attempts to transfer much of the business elsewhere.¹³⁶ After rejecting the financial theory proposed by the claimant, it adopted its own course. It undertook "an approximation of the value of the claimant's interest in the two companies, taking into account all the circumstances of the Case." This was the entire explanation for the resulting figure, which was approximately one-third of the claim.¹³⁷

This result is fairly typical of the Tribunal's awards to date. In *American International Group, Inc. v. Iran* the Tribunal rejected a similar proposed valuation on grounds that the expert appraisals provided by the claimants: (1) did not sufficiently consider changes in economic and social conditions relevant to sales up through the events of 1979; (2) did not account for all applicable taxes; and (3) were based on less than five business years, deemed to be an insufficient period for projecting future income given the periodic industry-wide fluctuations.¹³⁸ After rejecting the proposed net book value generally as not including elements of valuation such as likely future profitability and goodwill, and specifically as being based upon questionable accounting instructions,¹³⁹ the Tribunal opted for an unelaborated estimation, "an approximation of that value, taking into account all relevant circumstances. . . ."¹⁴⁰

It seems clear that the more quantitative data and corroborative valuation models are given, the better the Tribunal is able to calculate a just figure based upon its own conclusions about the relevant business prospects.

V. Conclusion

Fairly consistent patterns on issues involving expropriation have emerged at the Tribunal.

135. *Id.* at 18.

136. *See also* Phelps Dodge Corp. v. Iran, Award No. 217-99-2 at 17-18, *reprinted in* 25 I.L.M. 619, 627-28 (1986) (noting that the claimant had elected not to participate in increased joint capital contributions, and thus basing its valuation on claimant's actual conduct reflecting doubts about the economic viability of the entity being valued).

137. *Id.*

138. Award No. 93-2-3 at 19 (Dec. 19, 1983), 4 IRAN-U.S. C.T.R. 96, 107-08 (1983).

139. *Id.* at 20-21, 4 IRAN-U.S. C.T.R. at 108-09.

140. *Id.* at 22, 4 IRAN-U.S. C.T.R. at 109; *see also* Tippetts v. TAMS-AFFA Consulting Eng'rs of Iran, Award No. 141-7-2 at 14-16 (June 29, 1984), 6 IRAN-U.S. C.T.R. 219, 228 (1984); Phelps Dodge Corp. v. Iran, Award No. 217-99-2 at 17-18 (Mar. 18, 1986), *reprinted in* 25 I.L.M. 619, 627-28 (1986); Dames & Moore v. Iran, Award No. 97-54-3 at 23 (Dec. 20, 1983), 4 IRAN-U.S. C.T.R. 212, 224 (1983).

A taking will be found to occur whenever actions attributable to the Government amount to an unreasonable interference with the owner's use or control of the property. The reasonableness of the interference is generally determined pragmatically, focusing on the owner's rights to management and income. A finding of attributability generally requires at least one deliberate governmental assertion of control over the corporation, such as the substitution of Government-appointed managers. Losses caused by revolutionary unrest not directly traceable to such a governmental action have not generally been held to constitute compensable expropriations.

The Tribunal has explored the requisite standard of compensation. Regardless of the applicable law—the Treaty of Amity or customary international law—the Tribunal has held that full compensation, measured as fair market value including reasonably predictable future profits in the case of ongoing ventures, must be paid.

Issues relating to quantification of damages are more unsettled. Most theoretically sound measures of valuation may be acceptable if they take adequate account of the general economic conditions. Only those actions of the Government associated with the specific expropriation are excluded in the valuation process. Loss of business prospects due to revolutionary turmoil, or changes in governmental policies not forming the basis of the expropriation, must be considered in determining quantification.

In the coming years, as the Tribunal completes arbitration of its many pending and active expropriation cases, it can be expected that these broad legal conclusions will be further articulated, emphasized, and elaborated as the same issues are confronted in new factual situations.

