The long-festering disputes with Colombia over the Panama Canal continued, and Colombia refused the proposals of the U.S. to settle several of the disputes for $10,000,000. It will be recalled that in 1920 the U.S. did pay Colombia $25,000,000 while still bound by a treaty that guaranteed the sovereignty of Colombia over the isthmus. The Committee's report lamented the fact that the year had been one of many unresolved international disputes.

The writer started this research with the idea of including in this paper the history of the section from 1878 to 1933, the year of amalgamation of all of the international groups in the ABA into the Section of International and Comparative Law. As interesting as history is, there is a limit to the dose that can be swallowed at one time. Therefore this is being cut off at thirty-five years with the hope that when the next episode appears, members of the section will have the stomach for more.

VICTOR C. FOLSOM
Former Section Chairman

Implications of the Iranian Assets Case for American Business*

On July 2, 1981, the last day of its 1980 Term, the U.S. Supreme Court handed down its decision in the Iranian assets case, *Dames & Moore v. Regan*, No. 80-2078. Dames & Moore, a Los Angeles-based engineering firm, contended that President Carter had exceeded his constitutional authority when, without the approval of Congress, he agreed (1) to terminate all litigation brought by American companies in American courts against the Iranian government and its agencies and to remit the plaintiffs to an International Tribunal of uncertain effectiveness and (2) to vacate attachments by American plaintiffs on $3-$4 billion worth of Iranian assets in the United States and to transfer such assets to Iran free and clear of American claims. (By contrast, the International Tribunal was to have a security fund of only $1 billion.) Two federal district judges held that the President had acted unconstitutionally in entering into these agreements.[1]

*Editor's Note: Mr. Howard argued the Iranian assets case before the Supreme Court.

[1]Marschalk Co. v. Iran National Airlines Corp., No. 79 Civ. 7035 (CBM) (S.D.N.Y., June 11, 1981); Electronic Data Systems Corp., Iran v. Social Security Organization of the Government of Iran, No. CA3-79-218-F (N.D. Tex., June 8, 1981).

However, the majority of lower federal courts found the President's acts to be within his authority, and a unanimous Supreme Court agreed.

The result reached by the Supreme Court, and the rationale underlying that result, make clear that American businesses engaged in commercial transactions with foreign governments assume the risk of adverse economic effects resulting from diplomatic agreements entered into by our government. The Supreme Court flatly held that the President can utilize the economic interests of American citizens as bargaining chips in international negotiations, although the government may subsequently have to compensate the Americans injured by presidential action. Whether or not such compensation turns out to be meaningful in the Iranian case will have to await a later court decision. For now, about all that American businesses can do is to recognize the risks of entering into business transactions with foreign governments and to take these risks into account in pricing the goods and services that they contract to deliver.

The Iranian Litigation

Following the seizure of the American Embassy in Tehran on November 4, 1979, and the freezing of Iranian assets in this country by executive order on November 14, 1979, approximately 400 American plaintiffs commenced litigation in U.S. courts against the government of Iran and various of its agencies, seeking damages of some $3-$4 billion in the aggregate.[2] In the case of Dames & Moore, it sought to collect approximately $3.5 million in unpaid invoices rendered for professional services in connection with a study of potential nuclear power plant sites in Iran.

Most of the 400 lawsuits were jurisdictionally premised upon the provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. Sections 1330, 1602-11, enacted in 1976, which confers on U.S. courts personal and subject matter jurisdiction over commercial disputes between American citizens and foreign governments based on acts or activities in, or causing a direct effect in, the United States. Prior to enactment of the Foreign Sovereign Immunities Act, claims of American businesses against foreign governments were generally resolved, not by litigation before the courts, but by negotiation with the foreign power conducted by the State Department. This resulted from the fact that, if a foreign government was sued in the United States by an American plaintiff, and if the foreign government could persuade the State Department (for whatever reason) to enter a claim of sovereign immunity in the American court, our courts routinely honored such claims.[3] Once the immunity claim was honored by the courts, the American plaintiff had no practical remedy against the foreign government other than negotiation by the State Department on the plaintiff's behalf. Moreover, even though the State Department adopted a formal policy in

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[2]A few such suits were filed before the embassy seizure and asset freeze.

[3]*See, e.g., Ex parte* Peru, 318 U.S. 578 (1943).

1952 of not entering immunity claims in purely commercial disputes, that policy was not followed in practice, and diplomatic considerations frequently determined whether or not an immunity claim was made.[4]

The purpose of the Foreign Sovereign Immunities Act was to take commercial disputes between American citizens and foreign governments out of the hands of the State Department and place them in the hands of the courts.[5] No immunity would be available as a matter of law, and the State Department was thus relieved—as it asked to be—of the pressure brought to bear by foreign governments to make claims of immunity based on diplomatic considerations.[6] Henceforth, American commercial claims against foreign governments were to be litigated on their merits, not resolved on diplomatic considerations.[7]

The Foreign Sovereign Immunities Act not only abrogated sovereign immunity in commercial disputes, it also provided—mostly for the first time—for service of process, attachment, and execution against the property of foreign countries. Under these provisions, many of the American plaintiffs in the Iranian case obtained judicial attachments on Iranian property in this country—said to total about $3-$4 billion. To the extent that the attached property was of a kind that could be quickly removed from the United States, some of these attachments might not have been successfully levied if it had not been for prior presidential freeze of Iranian assets. A great deal of the attached property, however, was not quickly removable from the United States. For example, Dames & Moore had attached a partially constructed Boeing 747 in a hangar in Everett, Washington, which was being built for delivery to Iran, and Iran's contract rights relating to that aircraft. Other creditors attached such assets as paintings on loan to the National Gallery and boatloads of Iranian property sitting in American harbors awaiting shipment.

The Hostage Deal

Against this background, President Carter, on January 19, 1981, entered into two executive agreements—the so-called Algerian Declarations—that were unprecedented, though ultimately found authorized. In order to secure the release of our hostages, the President agreed to "terminate" all American lawsuits against Iran and its agencies. Despite the fact that the 400 lawsuits pending in U.S. courts (with all of their procedural safeguards)

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[4]*See* H.R. REP. No. 1487, 94th Cong., 2d Sess. 1, 6-10, 12 (1976) (hereinafter FSIA House Report), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604, 6605-608, 6610 (citations hereinafter are to U.S. CODE CONG. & AD. NEWS); *Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. at 25, 34-35 (June 2 and 4, 1976) (hereinafter *1976 House Committee Hearings*).

[5]FSIA House Report at 6605-607, 6610-11, 6613; *see generally 1976 House Committee Hearings*.

[6]*1976 House Committee Hearings* at 25, 29, 34-35, 59; *see* FSIA House Report at 6605-606.

[7]*See* FSIA House Report at 6605-606; *1976 House Committee Hearings* at 24-27, 30-31.

were authorized by an express congressional grant of jurisdiction, the plaintiffs, or at least some of them, were to be remitted to an International Tribunal which the United States and Iran agreed to establish. The Tribunal was to be made up of one-third Iranians, one-third Americans, and one-third from other countries. How well this Tribunal will function—indeed whether it will function at all—was by no means clear in January—nor is it clear now. To date, Iran and the United States have each selected three arbitrators, and they in turn have selected the three other arbitrators; little more has been done. Estimates are that the Tribunal, if it functions at all, may take from five to fifteen years to complete its work.

In addition to agreeing to terminate litigation in American courts, President Carter agreed to wipe out the American plaintiffs' security by vacating all attachments on Iranian property and returning to Iran, free of any American claims, all Iranian property in the United States. The only consolation to the American companies which had attached Iranian assets was that $1 billion of the $3-$4 billion returned would go into a security fund for disposition by the International Tribunal. Although Iran agreed to put additional monies into this fund in the future, this promise is totally unsecured, and American businesses can take little comfort from contentions by our government that Iran will surely put in the additional funds in order to protect its image in the international community. Iran has shown little concern about that image in the recent past.

For most American plaintiffs, with lawsuits pending against Iran in U.S. courts and adequate assets attached to satisfy potential judgments, President Carter's agreement with the Iranians was a disaster.[8] The plaintiffs lost both their American lawsuits and their security; in return they were given, at best, an opportunity to take their claim to a remote Tribunal of uncertain effectiveness with apparently insufficient funds to pay the claims before it. Moreover, plaintiffs with lawsuits based on contracts with certain forum selection clauses requiring litigation in Iran (clauses that would very likely be held unenforceable in United States courts) could not even take their claims to the International Tribunal. For such plaintiffs, litigation in Tehran appeared to be their only remedy.

Some government spokespersons—adopting President Carter's "no ransom" rhetoric—have attempted to portray the Algerian Declarations as actually putting American claimants in a better position than they were in before the deal was struck.[9] It is difficult to understand how American litigants with their cases in U.S. courts and $3-$4 billion available for satisfaction of their claims could be better off with their claims remitted to an uncertain and remote Tribunal with only $1 billion available as security.

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[8]An exception to this generalization is the major U.S. banks—many of whose loans to Iran were paid off as part of the hostage deal.

[9]We are asked to believe in effect that the Iranians offered to give our hostages back for nothing and the United States refused to take them until the Iranians would make additional concessions.

The Algerian Declarations undoubtedly represent a diplomatic triumph by skillful American negotiators; but it demeans that accomplishment to pretend that no price was paid to secure the return of our hostages.

The Supreme Court's Decision

In its decision, the Supreme Court held that, while American businesses might have a claim against the U.S. government for a taking of property without just compensation, President Carter was within his constitutional authority, even acting without Congress, in entering into the Algerian Declarations and carrying them out. In reaching this conclusion, the Court made two sweeping holdings. First, the Court held that a 1977 statute, the International Emergency Economic Powers Act, which had lifted certain obtuse and complex language from an old World War I statute, was to be interpreted literally, allowing the President in times of an international emergency unlimited power over assets in which any foreign government, or foreign citizen, had any interest—even power to dispose of those assets in a manner contrary to the interests of American creditors.[10] Under this statutory grant of power, the Supreme Court held, President Carter had validly voided American attachments in Iranian property and had the power to transfer the $3-$4 billion in Iranian assets out of the country, shielded from all claims of American citizens.[11]

Second, with regard to terminating lawsuits in American courts and remitting the plaintiffs to an International Tribunal, the Supreme Court upheld this portion of the Algerian Declarations as an exercise of an alleged long-established practice of "executive settlements" of private claims against foreign governments—a practice allegedly acquiesced in by Congress by its silence.[12] Dames & Moore had contended that the history of executive settlements before the enactment of the Foreign Sovereign Immunites Act was irrelevant, because American businesses with claims against foreign governments had previously had no way of getting these claims resolved in court, and settlement by assistance from the State Department was the only real remedy. While a practice of executive assistance to private American claimants in resolving their commercial disputes against foreign governments had existed before the enactment of the For-

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[10]Section 1702 of the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.*, which defines "Presidential authorities," provides, in part:

> At the times and to the extent specified in Section 202 [50 U.S.C. § 1701], the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise . . . .
>
> Investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.

[11]Slip op. at 11-16.

[12]Slip op. at 16-30.

eign Sovereign Immunities Act, this practice had dried up after enactment of the Foreign Sovereign Immunities Act (although executive settlements of certain other types of claims outside the Foreign Sovereign Immunities Act—not commercial claims—had continued). At no time in American history had a President ever settled, over the objection of the claimant, a claim of an American citizen validly pending before an American court.

The Supreme Court, however, held that executive power to settle commercial claims of American citizens against foreign governments survived the enactment of the Foreign Sovereign Immunities Act. Thus, if the State Department had desired in 1976, as it then said it did, to be freed from pressure from foreign governments to resolve private commercial claims based upon diplomatic considerations, the Department certainly did not succeed. The Iranian case became exactly what the Foreign Sovereign Immunities Act was supposed to avoid—a situation where a foreign government, illegally holding Americans hostage, successfully pressured the U.S. government to compromise the claims of American citizens in American courts.[13]

The Possibility of Compensation

Dames & Moore also argued in the Supreme Court that, even if the President had been authorized to do what he did, his acts constituted a taking of property for which the plaintiffs were entitled, under the Fifth Amendment of the Constitution, to just compensation. Conceding that some aspects of the taking question might be premature, Dames & Moore pressed the Court to decide, at a minimum, that there was a remedy for any such taking in the Court of Claims. Until the Supreme Court argument in the *Dames & Moore* case, the government had suggested that there was no such remedy because of a certain statutory exception to the jurisdiction of the Court of Claims.[14] During oral argument, Solicitor General-Designate Rex Lee conceded, under tough questioning from the Justices, that the statutory exception did not apply and that there would be a remedy in the Court of Claims for any taking of property that resulted from implementation of the Algerian Declarations. In its opinion, the Supreme Court expressly adopted this concession as its holding.[15]

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[13]The result was remarkably similar to that in Rich v. Naviera Vacuba, 197 F. Supp. 710 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961), where the State Department entered a claim of immunity in an American court in order to get a hijacked airliner back from Cuba. The enactors of the Foreign Sovereign Immunities Act agreed that this situation should never be repeated. *See, e.g., 1976 House Committee Hearings* at 67, 90 ("the so-called flexibility the State Department has under any present practice, if it is flexibility, is achieved at a price that is paid by some individual citizen or corporation. That is not the way this government does business and it is not the way we ought to do business."). Ironically, the Supreme Court has now read the Foreign Sovereign Immunities Act in such a way as to allow history to repeat itself once again.

[14]28 U.S.C. § 1502.

[15]Slip op. at 30-31.

While this portion of the Supreme Court's opinion no doubt gives some comfort to the American plaintiffs, it is not clear just how meaningful this taking remedy may be. The Supreme Court held in a footnote that President Carter's vacating of the attachments and his transferring of Iranian assets out of the country was not itself a taking. If courts should later hold that removing the lawsuits from U.S. courts was a taking of property, one can fairly predict that the government will counter by arguing that the value of the property taken—which the government will characterize as a lawsuit without any security or property to execute upon—is minimal. This argument, if accepted, could render the taking remedy a charade. Whether the courts will allow the government to gut the taking claim in this fashion remains for another opinion.

What Can American Businesses Do?

Under the Supreme Court's decision, unless Congress should intervene with new statutory provisions (which Congress does not appear to be inclined to do), the President is allowed virtually unlimited power (1) to dispose of foreign assets in any way that the President deems fit in the context of an international emergency (including removing those assets from the reach of American creditors) and (2) to "settle" any claim of an American citizen against a foreign government, even a purely commercial claim pending in an American court.

Under these circumstances, American businesses that choose to enter into commercial transactions with foreign governments must recognize that they are taking the risk that disputes that arise in such transactions may not be resolved in a fair manner on the merits; rather diplomatic considerations may take priority. Any foreign fund or property held as security for the resolution of a claim or dispute may be, in effect, seized by the President. This would be true even if funds were held in an American bank from the outset of the business arrangement. Even letters of credit drawn on American banks could be bargained away in an "executive settlement." If American businesses were to provide in their contracts with foreign governments that disputes are to be resolved solely by litigation in American courts, the President could give that point away as well in any settlement, if the foreign policy interests of the United States so dictated. While the injured business might have a taking claim against the United States government, that claim may or may not prove meaningful.

The power afforded the President under *Dames & Moore v. Regan* is so sweeping that there is little that American businesses can do to protect themselves—except to build a risk factor into the price of the goods or services to be supplied. And hope for the best.

C. STEPHEN HOWARD