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# Iran-U.S. Claims Tribunal: A Policy Analysis Of The Expropriation Cases

by Steven R. Swanson\*

## I. INTRODUCTION

The recent events surrounding the Iranian Revolution have provided numerous issues of interest to the international lawyer. The hostage crisis, the freezing of Iranian assets, and the aborted rescue mission have all received a great deal of attention.<sup>1</sup> The seizure of the United States Embassy in Tehran on November 3, 1979,<sup>2</sup> effectively destroyed the political and economic bonds that had developed between the two countries. Trade was cut off, contracts were breached, and the investments of United States citizens were expropriated.<sup>3</sup> In response, the President of the United States ordered that all Iranian assets in the United States and within the jurisdictional reach of the United States be frozen.<sup>4</sup> Private parties also took action to attach the assets of Iran in the United States. It became clear that any solution to the hostage problem would have to provide for the release of the hostages, the thawing of frozen assets, and a remedy for parties allegedly injured by Iran.<sup>5</sup>

The solution was ultimately reached in the Algiers Accords on January 19, 1981. The Accords are made up of two declarations and various technical arrangements.<sup>6</sup> The Declaration of the Government of the

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<sup>1</sup> See, e.g., E. ABRAHAMIAN, *IRAN BETWEEN TWO REVOLUTIONS* (1982); W. FORBIS, *FALL OF THE PEACOCK THRONE: THE STORY OF IRAN* (1980).

<sup>2</sup> For more on the hostage crisis, see P. SALINGER, *AMERICA HELD HOSTAGE* (1981); S. MOODY, *444 DAYS: THE AMERICAN HOSTAGE STORY* (1981).

<sup>3</sup> Stewart & Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, 24 VA. J. INT'L L. 1, 2 (1983).

<sup>4</sup> Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979). For analysis of United States actions taken in response to the hostage seizure, see Gordon, *The Blocking of Iranian Assets*, 14 INT'L LAW. 659 (1980); Piper, *Executive Power Under the Hostage Act: New Life for an Old Law*, 14 CORNELL INT'L L.J. 369 (1981).

<sup>5</sup> Stewart & Sherman, *supra* note 3, at 3.

<sup>6</sup> 1 Iran-U.S. Claims Trib. Rep. 3 (1981-82), 20 I.L.M. 223 (1981). These documents are: The Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments Made by Iran and the United States, *id.* at 5, 20 I.L.M. at 224; Undertakings of the Government of Iran and the United States, *id.* at 7, 20 I.L.M. at 229; The Declaration of the Gov-

Democratic and Popular Republic of Algeria Relating to the Commitments made by the Iran and the United States contained the heart of the agreement. It provided for a United States agreement not to interfere in the internal affairs of Iran,<sup>7</sup> the cessation of litigation against Iran in the United States,<sup>8</sup> the suspension of the United States claim relating to the hostage crisis before the International Court of Justice,<sup>9</sup> and certain measures that the United States would take to freeze the assets of the Shah in the United States.<sup>10</sup> The agreement also stated that the parties had determined to settle various disputes through arbitration.<sup>11</sup>

The arbitration provisions were set out in the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran.<sup>12</sup> The Declaration established the Iran-United States Claims Tribunal. The Tribunal was empowered to decide:

claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and [any] counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights . . . and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position.<sup>13</sup>

In addition, the Tribunal has jurisdiction over disputes between the United States and Iran concerning purchase and sale of goods contracts and interpretation of the Declaration.<sup>14</sup>

Decisions are to be made "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 circum-

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ernment of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by Iran and the United States, *id.* at 9, 20 I.L.M. at 230; and the Escrow Agreement, *id.* at 12, 20 I.L.M. at 234.

<sup>7</sup> 20 I.L.M. at 224 (para. 1).

<sup>8</sup> *Id.* at 227 (para. 11).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 227-28 (para. 12).

<sup>11</sup> *Id.* at 228 (paras. 16, 17).

<sup>12</sup> Iran-U.S. Claims Trib. Rep. at 9, 20 I.L.M. at 230.

<sup>13</sup> *Id.*, 20 I.L.M. at 230-31 (art. II(1)).

<sup>14</sup> *Id.* (art. II(1), (2)).

stances.”<sup>15</sup> The rules of the Tribunal are the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), “except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out.”<sup>16</sup> These rules, as modified by the Tribunal, allow the Tribunal to decide cases *ex aequo et bono* if the arbitrating parties agree that it should do so.<sup>17</sup>

The Tribunal is made up of nine members, three chosen by the United States, three by Iran, and three chosen by the Iranian and United States arbitrators. More arbitrators, in multiples of three, may be chosen if it is deemed necessary by Iran and the United States. The Tribunal has divided itself into three chambers, with three members each, to hear private claims. The Tribunal meets at the Hague.<sup>18</sup>

The General Declaration also provided for a \$1 billion security fund to be created from Iran’s assets in the United States.<sup>19</sup> These funds are to be used to pay awards made by the Tribunal. Iran is required to maintain a minimum balance of \$500 million in the account.<sup>20</sup>

The significance of this Tribunal’s decisions on the development of international law cannot be understated. In recent history no arbitral tribunal has faced the enormous task now before the Tribunal.<sup>21</sup> Over

<sup>15</sup> *Id.* at 11, 20 I.L.M. at 232 (art. V).

<sup>16</sup> *Id.* at 10, 20 I.L.M. at 231 (art. III(2)).

<sup>17</sup> Final Tribunal Rules of Procedure, art. 33, *reprinted in* Iranian Assets Litigation Rep. 6447 (April 1, 1983) [hereinafter cited as Final Tribunal Rules of Procedure].

<sup>18</sup> Things have not always gone smoothly for the Tribunal. On September 7, 1984, the New York Times reported:

An Iranian judge threatened to kill a Swedish judge today at the international tribunal that is handling claims arising from the Iranian takeover of the American Embassy in Teheran in 1979, diplomats said.

The diplomats said the threat was made after the Iranian judge, Mahmoud M. Kashani, refused to apologize for physically assaulting the Swede, Nils Mangard, on Monday.

“If Mangard ever dares to enter the tribunal chamber again, either his corpse or my corpse will leave it rolling down the stairs,” Judge Kashani said today, according to diplomats and tribunal officials.

Judge Kashani and another Iranian Judge Shafey Shafeiei were said to have grabbed Judge Mangard by the collar, twisted his arm behind his back and begun [sic] beating him up during Monday’s session of the tribunal. Judge Mangard was not seriously hurt.

The tribunal president, Judge Gunnar Lagergren of Sweden, issued a letter today that suspended all tribunal proceedings—six sessions due to begin Sept. 24—until further notice.

N.Y. Times, Sept. 7, 1984, at A5, col. 2. Following this, proceedings were suspended on September 17, 1984. In December, the Tribunal once again began its work following the appointment of two new Iranian arbitrators. Stewart, *The Iran-United States Claims Tribunal: A Review of Developments 1983-1984*, LAW & POL. IN INT’L BUS. 677, 680 (1984).

<sup>19</sup> 1 Iran-U.S. Claims Trib. Rep. at 5, 20 I.L.M. at 226 (paras. 5, 6).

<sup>20</sup> *Id.* at 6, 20 I.L.M. at 226 (para. 7).

<sup>21</sup> THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1981-1983 viii (Lillich ed. 1984).

3800 claims were filed, and over 200 decisions have been issued.<sup>22</sup> In terms of the sheer number of decisions, it will be difficult for international legal scholars to ignore the jurisprudence of the Tribunal.

One area of international law that has continuously confounded scholars is host state responsibility for injury to foreign investors. Because a number of measures, both formal and informal, taken by the Iranian government affected the interests of United States investors, the Tribunal is in an unusually good position to affect development of the law in this area. Each of the Tribunal's three chambers has issued significant decisions relating to the taking of foreign investments. One author has argued that the importance of the decisions of the Tribunal is their discussion of the amount of compensation required.<sup>23</sup> Although the Tribunal's discussion of this issue has provided interesting insights, its taking decisions are much more important for their discussion of what level of host state interference amounts to a taking under contemporary standards of international law. There is little question that physical confiscation of property amounts to a taking. What is less clear is whether a taking occurs in other, often informal, acts affecting international investments. The natures of the Iranian Revolution and of the Tribunal itself have afforded the Tribunal a perfect position to further the development of international law in this area. This paper will examine what threshold level of government interference should constitute a compensable taking of a foreign investment in light of a preferred community policy. The paper will then examine the decisions of the Tribunal in an attempt to determine whether those decisions reflect a preferred community policy and further provide some basis with which to predict the outcome of future host state acts that effect foreign investments.

## II. WHAT CONSTITUTES A TAKING?

Takings are difficult to define under international law. Traditional scholars have attempted to define and distinguish different types of taking such as nationalization, expropriation, and confiscation. An expropriation has been defined as the state's taking "possession of personal, individually held assets and rights of foreigners and usually mak[ing] prompt and fair payment for them."<sup>24</sup> In contrast, nationalizations are

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<sup>22</sup> Stewart, *supra* note 18, at 683.

<sup>23</sup> Clagett, *The Expropriation Issue Before the Iran-United States Claims Tribunal: Is "Just Compensation" Required by International Law or Not?*, 16 LAW & POL. IN INT'L BUS. 813 (1984). Given the availability of the \$1 billion fund out of which to pay judgments, it can be argued that the Tribunal has not had to be as sympathetic to the developing nation's claims that something less than prompt, adequate, and effective compensation is required. Its jurisprudence in this area may not be as persuasive as it would otherwise be.

<sup>24</sup> R. RIBIERO, NATIONALIZATION OF FOREIGN PROPERTY IN INTERNATIONAL LAW 1 (1977); see, e.g., B. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 36-41 (1959); G.

seen as more general. The host state takes property in "the larger interests of society to advance a program of economic and social reforms" in order to "have the ownership of wealth and natural resources, as well as the means of production perform a social function."<sup>25</sup> A confiscation has been seen as "the deliberate seizure of property by a State, without provision for adequate compensation; it usually implies the denial of any right to restitution or damages."<sup>26</sup> While these terms may be helpful in describing various acts and intentions of the host state, they are not at all helpful in determining which host state actions relating to property should require an international remedy. The term "taking" includes all of these concepts as well as other state actions affecting property and provides a clearer basis for analysis. Recent attempts to clarify exactly what level of state interference rises to the level of a taking have failed, however, to provide a clear standard on which a taking determination may be based.<sup>27</sup>

The underlying question is when does state action amount to mere regulation by the host state, in which case no true "taking" has occurred, and when does it constitute a compensable taking. A typical example of the difficulties posed by this question can be found in the area of taxation. The state's right to impose reasonable measures of taxation is unquestioned. But what about a tax of one hundred percent or more, which deprives the investor completely of his investment? Other regulations may also prove to be so onerous that the investment loses all value. Such state regulation is often referred to as "creeping expropriation" because a taking occurs without direct action to physically deprive the investor of his property. In the one hundred percent tax example, it appears obvious that a taking has occurred. When the regulation is less burdensome, however, where should the line be drawn between the non-compensable regulation and the compensable taking? There is currently no well-defined international standard for making such a determination.<sup>28</sup>

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WHITE, NATIONALIZATION OF FOREIGN PROPERTY 41 (1961); Domke, *Foreign Nationalizations: Some Aspects of Contemporary International Law*, 55 AM. J. INT'L L. 585, 588; S. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW (1953).

<sup>25</sup> R. RIBIERO, *supra* note 24, at 1.

<sup>26</sup> B. WORTLEY, *supra* note 24, at 39.

<sup>27</sup> See, e.g., Weston, "Constructive Takings" Under International Law: A Modest Foray into the Problem of "Creeping Expropriations", 16 VA. J. INT'L L. 102 (1975); Christie, *What Constitutes a Taking of Property Under International Law?*, 1962 BRIT. Y.B. INT'L L. 307 (1964).

<sup>28</sup> A review of United States eminent domain practice establishes that international law is not alone in its inability to come to grips with the taking problem. The Supreme Court has stated on numerous occasions that there are no rigid rules. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1977); *United States v. Caltex (Philippines) Inc.*, 344 U.S. 149, 156 (1952); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958).

One commentator has gone as far as to claim that the Supreme Court's decisions in the area are "a welter of confusing and apparently incompatible results." Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964). The Supreme Court's approach to the taking problem finds its roots in the

### A. Current State of International Law

Two early international cases established that a taking may occur when the state affects property in such a way as to render the property rights worthless.<sup>29</sup> This is true even when the state denies any intention to take the property.<sup>30</sup> Subsequent decisions by international tribunals and state practice have failed, however, to establish an analytical framework with which to make taking decisions. In an in-depth discussion of international cases dealing with the taking problem, focusing particularly on opinions of the United States Foreign Claims Settlement Commission, Christie came to the following general conclusions:

- (1) Although most interference with property . . . can be clothed under the rubric of some recognized social purpose, the cases have clearly indicated that a State's mere declaration that expropriation is not intended is not determinative of the issue . . . .
- (2) Almost any outright seizure of property if not initially an expropriation, will eventually ripen into an expropriation . . . .
- (3) There are certain types of State interference which, from the outset, will be considered as expropriation even though not labelled as such . . . . This conclusion, as well as the previous one, is founded upon the premise that the most fundamental right that an owner of property has is the right to participate in its control and management.
- (4) The refusal to give permission in advance for the transfer abroad of operating profits, or other funds, does not by itself amount to expropriation. When coupled with other interferences with the use of property,

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opinions of Justices Harlan and Holmes. *Id.* at 37. Harlan based his interpretation on traditional property concepts such as the appropriation of proprietary interests, physical invasion, and nuisance. *Id.* This approach has reappeared on a regular basis in the Court's decisions. In a relatively recent decision, the Court stated that a "taking may more readily be found when interference with property can be characterized as a physical invasion by government . . . ." *Penn Central*, 438 U.S. at 124.

Justice Holmes, on the other hand, found himself in a world of radical changes in which formal legalisms seemed artificial and out of date. *Sax, supra*, at 37. He felt that each case should be decided individually based on a policy analysis of the conflict between public need and private loss. *Id.* Holmes saw the issue in terms of a social conflict between established economic interests and the forces of social change, and he felt it was the courts' duty to serve as the fair and equal arbiter of the controversy. *Id.* This approach can most clearly be seen in Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-15 (1922). According to Holmes, the courts should consider the extensiveness of the harm caused by the regulation in determining whether a taking has occurred. *Sax, supra*, at 41.

The Supreme Court has never adopted Holmes' approach. In *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1961), the Court stated that "although a comparison of values before and after is relevant, it is by no means conclusive (citations omitted)." Thus, the Supreme Court's analysis has been based upon a number of factors, placing greatest emphasis on traditional property values. Diminution in value is considered in this analysis, but it is by no means a primary consideration.

<sup>29</sup> Christie, *supra* note 27, at 311; *German Interests in Polish Upper Silesia* (Ger. v. Pol.), 1926 P.C.I.J., ser. A, No. 7; *Norway v. United States*, 1 Int'l Arb. Awards 307 (1952).

<sup>30</sup> Christie, *supra* note 27, at 310.

however, the refusal to permit transfer of funds abroad is a relevant factor . . . .

(5) The refusal to permit the alienation of real property, or of personal property . . . would seem, under some circumstances, to amount to an expropriation for which . . . compensation is payable. If, however, such prohibition can be justified as being reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that there has been no "taking" of property.

(6) . . . [I]t is not at all clear that the prohibition of the sale of certain items . . . or the grant of a monopoly may not amount to [expropriation] . . . .

(7) A State's declaration that a particular interference with an alien's enjoyment of his property is justified by the so-called "police power" does not preclude an international tribunal from making an independent determination of this issue. But, if the reasons given are valid and bear some plausible relationship to the action taken, no attempt may be made to search deeper to see whether the State was activated by some illicit motive.

(8) Where a State compels an alien to sell his property for less than its true value either to the State or a third party, a compensable claim arises.<sup>31</sup>

Christie concludes that the taking problem can best be addressed through the common law method of case-by-case development.<sup>32</sup> Although his article provides an excellent review of decisional authority, it fails to discuss the need for a policy-oriented analytical model to aid in the determination of what constitutes a taking.

Three relatively recent arbitrations provide additional insight into the taking issue. In *Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic (Caltex Case)*,<sup>33</sup> sole arbitrator Professor René-Jean Dupuy addressed the issues created by the Libyan nationalization of Caltex's interests in an oil concession agreement. The agreements contained stabilization provisions, which prohibited Libya from taking any action in contravention of the agreement.<sup>34</sup> The *Caltex Case* firmly rejects the arguments of the developing nations that the Charter of Economic Rights and Duties of States represents the present state of international law.<sup>35</sup> Professor Dupuy's opinion indicates that nationalization questions are governed by international law rather than the law of the host state.<sup>36</sup>

<sup>31</sup> *Id.* at 337-38.

<sup>32</sup> *Id.* at 338.

<sup>33</sup> 17 I.L.M. 1 (1978).

<sup>34</sup> *Id.* at 4 (para. 3 of judgment).

<sup>35</sup> *Id.* at 11-17 (paras. 22-45 of judgment). See U.N. Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974).

<sup>36</sup> *Id.* at 29-32.

The second major arbitration, *Revere Copper and Brass, Inc. and Overseas Private Investment Corp.*,<sup>37</sup> concerned a claim by Revere against the Overseas Private Investment Corporation (OPIC) under a contract of guaranty relating to an investment in a bauxite mining operation in Jamaica. Under the terms of the Contract of Guaranty, Revere submitted an application for compensation to OPIC, claiming that the acts of the Jamaican Government constituted expropriatory action.<sup>38</sup> Under the guaranty agreement, expropriatory action occurred when the investor was prevented from "exercising effective control over the use or disposition of a substantial portion of its property . . . ."<sup>39</sup> There was no question in this case that Revere remained in possession of the plant; there was no physical intervention on the part of the Jamaican Government.<sup>40</sup> In determining whether effective control has been interfered with, the Award saw the ability to make a continuous stream of decisions as controlling.<sup>41</sup> It focused on the decision-making process, finding that rational decisions require some continuity of management control.<sup>42</sup> The Tribunal rejected the claim that physical seizure is necessary.<sup>43</sup> This notion of expropriatory action is expansive in that any action on the part of the host state that interferes with the power to effectively manage an enterprise may be seen as expropriatory.

In sharp contrast to the view expressed in *Revere*, the decision of Professor Reuter in *The Government of the State of Kuwait and the American Independent Oil Company (Aminoil)*<sup>44</sup> is far more favorable to the claims of the wealth importing countries. In 1948, Aminoil was granted a concession for the exploration and exploitation of petroleum and natural gas by the ruler of Kuwait.<sup>45</sup> On September 19, 1977, Kuwait enacted Decree Law No. 124, "Terminating the Agreement between the Kuwait Government and Aminoil."<sup>46</sup> The Tribunal recognized the special needs of developing countries by acknowledging that changes in the general legal environment may, in some cases, justify unilateral action by one of the parties to the contract.<sup>47</sup> Thus, Reuter concluded that the "take-over" of the Aminoil Concession was not inconsistent with the stabilization clauses, provided that it was not confiscatory in nature.<sup>48</sup>

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<sup>37</sup> 17 I.L.M. 1321 (1978).

<sup>38</sup> *Id.* at 1322.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1325-27.

<sup>41</sup> *Id.* at 1350.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1329-30.

<sup>44</sup> 21 I.L.M. 976 (1982).

<sup>45</sup> *Id.* at 989.

<sup>46</sup> *Id.* at 998.

<sup>47</sup> *Id.* at 1019.

<sup>48</sup> *Id.* at 1023.

He termed the taking a "lawful nationalization."<sup>49</sup> Because Kuwait specifically provided for compensation and willingly referred the matter to arbitration, the nationalization was not confiscatory in this case.<sup>50</sup>

Reuter's approach, then, is much different than that adopted by Dupuy in *Caltex* and Haight in *Revere*. While Dupuy and Haight reject, for the most part, the claims of developing countries for greater control over natural resources, Reuter recognizes that changed conditions may bring about a change in the legal regime. As to what constitutes a compensable taking, Haight looks to the loss of effective control, defined as the ability to make a continuous stream of decisions. Reuter would require that the intrusion be much greater in order to reach the taking threshold. According to Reuter, a taking must be confiscatory in nature, causing serious financial prejudice to the investor.

### B. Preferred Community Policy

In order to create an analytical framework for discussing the taking problem, it is necessary to construct a policy-oriented test that meets the goals of a preferred community policy for the advancement of human dignity: "a world public order in which values are shaped and shared more by persuasion than by coercion, and which seeks to promote the greatest production and widest possible sharing, without discriminations irrelevant of merit, of all values among all human beings."<sup>51</sup>

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<sup>49</sup> *Id.* at 1025.

<sup>50</sup> The minority opinion notes that all nationalizations are confiscatory because they dispossess the investor of his property and transfer it elsewhere: "Nationalisation may be lawful or unlawful, but the test can never be whether they are confiscatory or not; because by virtue of their inherent character, they always are." *Id.* at 1051.

<sup>51</sup> M. McDUGAL & ASSOC., *STUDIES IN WORLD PUBLIC ORDER* 987 (1960).

Such values include not only *security*, in the sense of full opportunity, free from violence and threats of violence, to pursue all values by peaceful, non-coercive procedures, but also all the other value-variables upon which such security depends: the wide sharing of *power*, both formal and effective, including participation in the processes of government and of parties and pressure groups, and equality before the law; freedom of inquiry and opinion and for communication of the *enlightenment* by which rational decisions can be made; the access to resources and technology necessary to the production of *goods and services* for maintenance of rising standards of living and comfort; the fundamental *respect* for human dignity which both precludes discrimination based on race, sex, color, religion, political opinion, or other ground irrelevant to capacity and provides a positive recognition of common merit as a human being and special merit as an individual; health and *well-being* and inviolability of the person, with freedom from cruel and inhuman punishments and positive opportunity for the development of talents and enrichment of personality; opportunity for the acquisition of the *skill* necessary to express talent and to achieve individual and community values to the fullest; opportunity for *affection*, fraternity, and congenial personal relationships in groups freely chosen; and, finally, freedom to justify common standards of responsibility and *rectitude*, to explain life, the universe, and values, and to worship God or gods as may seem best.

More specifically, Professor Weston has pointed out four important objectives relevant to the taking problem:

- (a) reducing the possibility for resort to coercion on the part of capital-exporting, claimant countries;
- (b) maximizing the free flow of beneficial wealth, skills, enlightenment and other important values across national boundaries;
- (c) fostering at least minimum order within capital-importing, depriving countries; and
- (d) facilitating an optimum return from all host-country value processes.<sup>52</sup>

In order to round out these objectives it is important to consider the adequate exclusive competence of the host country.

Thus, a preferred community policy has three major goals. The first is the discouragement of the use of force. Takings should be defined in a way likely to reduce conflict. The definition should accordingly protect the interests of powerful, capital-exporting countries to reduce the possibility that they will feel compelled to take coercive actions. At the same time, the rule should be sensitive to the needs of the host country so that it does not feel compelled to use force. In addition, the definition should provide a degree of certainty to avoid the disputes that often arise when ambiguous rules are in place.

The second major goal is to maximize the likelihood of economic development. Although there may be disputes about how economic development should be achieved, there is substantial agreement that such a goal is desirable. Lesser developed countries find themselves in need of foreign investment from capital exporters in order to develop. Of course, no influx of capital is possible unless the investor is adequately assured that he will not be arbitrarily deprived of his property. Such assurances can only be provided in a system in which compensable takings are clearly defined. If the definition is ambiguous, the resulting uncertainty is likely to dry up the flow of capital, and the goal of economic development will not be achieved. These needs, as well as the goal of reducing conflict, are clearly recognized in the *Revere* and *Caltex* opinions.

Finally, the sovereign nature of the host state must be recognized. In a world system based, to a certain extent, on sovereignty, every state must retain the right to adequately control events that take place within its territory. In order to encourage development, each state must be able to create its own political and economic system, while at the same time preserve certain important host state values. No state would be willing

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McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 YALE L.J. 915, 916-17 (1952).

<sup>52</sup> Weston, *supra* note 27, at 122.

to submit to a norm that deprives it of these rights. Professor Reuter emphasized these values in the *Aminoil* Award.

It is difficult to formulate a standard that will encourage investment, provide the host state with needed latitude, and decrease the resort to force. Previously suggested taking standards have failed to properly balance these three goals in the attempt to formulate a norm that most nearly comports with all three preferred community policy goals. A proper balancing of these interests will provide a basis for the construction of such a standard.

In order to fully understand the taking problem, one must envision the actions of the host state on a spectrum. At one end of the spectrum is state action that has little or no effect on the investment in question. At the other end the investor is totally deprived of any value in his investment. Between these two extremes, state action partially lessens the value of his investment. It is this range that is important in analyzing the taking problem. The question then becomes at what point in the spectrum has the state so involved itself that compensation must be paid.

*Revere* and *Aminoil* suggest two possible solutions to this problem. In adopting a standard that presumes the investor is able to make a continuous stream of decisions, *Revere* places the threshold near the "no interference" end of the spectrum. The implications of such a choice are troublesome; almost any action on the part of the host state government that interferes with the investor's decision-making ability would be suspect. Under such a standard, regulations of the Securities and Exchange Commission or the Federal Trade Commission would appear to constitute expropriatory measures because they limit the ability of an investor to make important business decisions. A failure to act to protect the exclusive control of the investor might also be seen as an expropriation under this standard. Even if this is taking the *Revere* argument too far, the decision does seem to support these contentions.

The *Revere* standard does not comport with the preferred community policy goals outlined above. Although it does lessen the likelihood of coercion by wealth exporting countries and provides stability to encourage international investment, the standard divests the host state of any right to meaningfully regulate the foreign investor. Even developed nations, such as the United States with its myriad of governmental rules and regulations, would find such a rule unacceptable.

At the other end of the spectrum, *Aminoil* required that the action of the government be confiscatory to constitute a taking. Under this holding, no unlawful expropriation occurs unless the host state takes some action to deprive the investor of his property. Exactly what this means is unclear from Professor Reuter's opinion, but it seems to require state intervention in a manner similar to that suggested by adherents to traditional legal concepts requiring some sort of physical invasion by the

host state. Although his test provides for a great deal of host state competence, it does little to decrease the likelihood of coercion or to encourage additional investment. The rule fails to protect the investor who has been deprived of the value of his investment by some means other than a confiscatory act.

Thus, neither approach provides a satisfactory standard on which to make taking determinations. The Reuter opinion requires that the state involvement be too close to the physical seizure end of the taking spectrum, while the Haight opinion finds a taking when government acts only minimally interfere with an investment. A better approach is a substantial diminution of value test: a taking will be found when the state affects a foreign investment in such a way as to deprive the investor of substantially all value in the investment. Diminution in value theories, which compare the value of the investment prior to the government action with the value afterwards, have been heavily criticized by the commentators.<sup>53</sup> Such tests are accused of failing to solve the taking problem because the total destruction of property values is often allowed.<sup>54</sup> They are also criticized because they provide a conservative influence by maintaining established values.<sup>55</sup> Finally, difficulties in quantifying the loss have been pointed out.<sup>56</sup> Although these criticisms merit consideration, they fail to deprive the substantial diminution in value test of its utility. The test, while not providing an automatic standard for determining that a taking has occurred, comes as close to an international minimum standard as is possible. This approach is supported by the position of the American Law Institute:

#### Section 192. Meaning of Taking

Conduct attributable to a state that is intended to, and does, effectively deprive an alien of substantially all the benefit of his interest in property constitutes a taking of the property, . . . even though the state does not deprive him of his entire legal interest in the property.

#### "Comments"

*a. General.* International law has not established clear criteria for determining what constitutes a taking of an alien's property, short of complete transfer of title. The rule stated in this Section is intended to cover only those situations in which conduct attributable to a state is substantially equivalent to the taking of the alien's legal interest in the property.<sup>57</sup>

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<sup>53</sup> See, e.g., Sax, *supra* note 28, at 50; Weston, *supra* note 27, at 119-20.

<sup>54</sup> Sax, *supra* note 28, at 51.

<sup>55</sup> *Id.* at 53.

<sup>56</sup> *Id.* at 60; Weston, *supra* note 27, at 120.

<sup>57</sup> RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 192 (1965). A more recent draft of the Restatement omits this formulation of the taking standard. RESTATEMENT (REVISED) FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (Tent. Draft No.

This substantial diminution in value standard should serve to decrease the use of force in solving investment/taking disputes. It can be applied to any alleged taking situation and provides a certain amount of protection to wealth exporting countries. If the rule is applied uniformly, the wealth exporting state will know that its investments are protected from the worst kinds of expropriations, those in which the investor loses everything. The substantial diminution in value standard should also minimize disputes over lesser intrusions that would not violate this international minimum standard.

Although the substantial diminution in value standard may not meet all of the needs of the international investment community, it does provide enough protection to assure that international investment will continue. By protecting against state regulation that deprives an investor of substantially all interest in his investment, the test assures that no investor will lose everything by investing in another nation. The host state will act carefully knowing that such regulation will require compensation. Obviously the investor would prefer greater protection, but as a minimum standard the substantial diminution in value test provides an amount of certainty that is not present with the previously suggested tests. It should be remembered that an investor may negotiate greater guarantees with the host country itself, and these guarantees will generally be enforceable under international law. Additionally, the substantial diminution in value test does not require a confiscatory act and thus provides greater protection to the investor than the test developed in *Ami-noil*, which did require that the government act be confiscatory.

Finally, in contrast to the rule set out in *Revere*, the substantial diminution in value standard provides a great deal of necessary flexibility to the host country. The state may exercise control over the foreign investor as long as such regulation does not deprive the investor of substantially all value in his investment. Of course, the host state may take the entire investment, provided that it is willing to compensate the investor. Flexibility is necessary if a host state is to organize its economy to encourage development. It also smacks less of economic colonialism than

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3, 1982). Article 10(3) of the Harvard Draft Convention on Responsibility of States for Injuries to Aliens seems to support the proposition:

3. (a) A "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.

(b) A "taking of the use of property" includes not only an outright taking of use but also any unreasonable interference with the use or enjoyment of property for a limited period of time.

SOHN & BAXTER, CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS (Draft No. 12), art. 10, para. 3 (1961). See also *Report of the Committee on Nationalization of Property, 1957-1958 INT'L L. INST. PROC.* 63.

have previous attempts to deal with the problem and should lessen the perception of the host state that it is being oppressed by Western powers.

What about the criticisms of the rule? The quantification problem is less problematic under the substantial diminution in value standard than in many of the other suggested approaches. The problem of drawing a line between a compensable taking and an exercise of police power is eased if a taking occurs only when the investment has been deprived of substantially all value. It should be far less difficult to reach an agreement on when an investor has been deprived of substantially all value than when there has been a lesser diminution, such as in *Revere*. Thus, individual cases will be more easily analyzed. Admittedly, the rule set out in *Aminoil* which requires that a taking be confiscatory would be more easily applied. That rule, however, does not comport with other preferred community policy goals. By failing to provide adequate protection to the foreign investor, the rule would serve to discourage foreign investment and slow economic development. It seems that a certain amount of uncertainty is inherent in any rule that attempts to comport with these policy goals, but the substantially-all rule comes closest to eliminating detrimental uncertainty.

Another criticism is that the standard is inappropriate because courts frequently permit the total destruction of established legal values without compensation. International courts and commentators have focused on whether a "right" has vested in determining whether a property interest that can be taken exists.<sup>58</sup> United States courts have used the argument that no property interest was affected in order to avoid the constitutional requirement that compensation be paid.<sup>59</sup> Critics allege that these cases establish that compensation is not required in all cases in which established economic values are diminished.<sup>60</sup> Although these cases may establish that the taking clause of the Constitution of the United States does not require that compensation be paid in all cases in which established economic values are destroyed, this argument has little merit in creating an international standard. It is necessary to protect all established economic values that are deprived of substantially all value if the goal is to encourage international development. Any other solution fails to provide adequate assurances to the investment community that exported wealth will be adequately protected. If the goal is to provide adequate protection for foreign investments, the rule must include all forms of investments, rather than the limited property rights that have traditionally been protected.

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<sup>58</sup> 2 D.P. O'CONNELL, INTERNATIONAL LAW 764 (2d ed. 1970).

<sup>59</sup> Sax, *supra* note 28, at 51; *see, e.g.,* United States v. Willow River Power Co., 324 U.S. 499, 502 (1945).

<sup>60</sup> Sax, *supra* note 28, at 51.

Critics argue that this type of test is inherently conservative because it discourages change. A host state will be unable to reform its economic and political system if it is forced to pay all of those whose established economic values it destroys. This is of particular concern to developing countries, which may currently lack sufficient capital resources to make these payments. Unfortunately, this conservatism may be necessary in the international investment field. What is sought is not political conservatism but predictability. Without predictability, world trade and investment are slowed because investors are unwilling to take the risks involved. Moreover, such a system does not call for a total halt to change. A host state may "buy out" this conservative bias by paying compensation. The state may also take whatever action it wishes as long as it does not deprive the investor of substantially all value in his investment.

Thus, the substantial diminution in value test seems to provide a standard for takings that is relatively easy to apply and at the same time in line with our preferred community policy goals.<sup>61</sup>

### III. CLAIMS OF THE UNITED STATES AND IRAN RELATING TO THE IRANIAN EXPROPRIATION OF UNITED STATES INVESTMENT

#### A. *United States Claims*

In its statements concerning claims of United States nationals against Iran, the United States has continued to espouse its view that prompt, adequate, and effective compensation must be paid when a taking has occurred. It considers this to be the minimum standard required by international law.<sup>62</sup> The Department of State has argued that an additional basis for its assertion that prompt, adequate, and effective compensation is required can be found in the Treaty of Amity, Economic Relations and Consular Rights Between the United States and Iran.<sup>63</sup>

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<sup>61</sup> For an in depth discussion of the techniques of taking and an analysis of past trends of decision, see Vagts, *Coercion and Foreign Investment Rearrangements*, 72 AM. J. INT'L L. 17, 18 (1978); Weston, *supra* note 27, at 103. Various methods, including seizure, forced sales, state regulation, and ideological deprivation strategies, can be used to accomplish a taking. Each of these techniques of taking, innocent enough if used properly, can ripen into a taking when the host state uses it to deprive the alien of substantially all value in his investment. The taking standard outlined above cuts across all of the different techniques that can be used by applying a single economic standard that can be applied to all state actions affecting property. In this way the method used by the state to achieve its goal becomes less important. What is important is the outcome. No matter what techniques are used by the wealth depriving state, a taking will be found when the action deprives the investor of substantially all value in his investment.

<sup>62</sup> Memorandum of the Legal Advisor of the Department of State relating to the Application of the Treaty of Amity to Expropriations in Iran, 129 CONG. REC. S16,055, S16,059 n. 42 (1983)[hereinafter Legal Advisor's Memorandum].

<sup>63</sup> Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853.

Article IV(2) of the Treaty provides:

Property of nationals and companies of either High Contracting Party, including an interest in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.<sup>64</sup>

The Department of State has concluded that this language requires Iran to pay prompt, adequate, and effective compensation,<sup>65</sup> which the United States considers to be its fair market value, equivalent to the going concern value.<sup>66</sup>

Iran has stated that the Treaty was implicitly terminated by certain actions taken by the United States. The United States position has been that the Treaty remains in force, that any actions taken by the United States in apparent contravention of the Treaty were taken justifiably in response to illegal actions on the part of Iran, and that neither Iran nor the United States has provided written notice of termination as required by the Treaty.<sup>67</sup> In addition, the United States has pointed to the International Court of Justice opinion in *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*.<sup>68</sup> The Court stated that the provisions of the Treaty "remained part of the corpus of law applicable between the United States and Iran."<sup>69</sup>

### B. Iranian Claims

The position of Iran has been less easy to discern. The pleadings before the Tribunal concerning private claims are kept secret, making it difficult to determine exactly what Iran's approach to the expropriation problem has been. One thing is clear: the Iranians have taken inconsistent stances on whether the Treaty of Amity continues in force. Before

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<sup>64</sup> *Id.* at 903 (art. IV(2)).

<sup>65</sup> Legal Advisor's Memorandum, *supra* note 62, at S16,056.

<sup>66</sup> *Id.* at S16,057. As to the date for determining the amount of compensation, the Department of State has argued that "expropriated property must be valued as of the date of expropriation disregarding the effects of any actions attributable to the expropriating government (1) that were unlawful or (2) that were taken in anticipation of the expropriation." *Id.* Although there is no specific provision in the treaty pertaining to this issue, the United States has argued that this interpretation is "inherent in the principle of just compensation," and part of customary international law. *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> 1980 I.C.J. 3.

<sup>69</sup> *Id.* at 28.

the Tribunal, they have claimed that the Treaty has lapsed, while citing it as still being in force in litigation in the United States.<sup>70</sup>

A review of the recent drastic changes in the perspectives of Iranian ruling elites is helpful in understanding the Iranian position. The Shah, like his father, made great headway in the area of socioeconomic progress. As one observer noted, “[b]y 1960, he had established his authority, and emerged as the nonreligious, even antireligious, managing director of the Empire of Iran, orchestrating the country’s modernization in day-to-day charge.”<sup>71</sup> He was impressed with Western ways in the areas of science, technology and especially military weaponry.<sup>72</sup> By the mid-1970s he seemed to have created a secure position for himself with a modern army, an effective secret police, huge bureaucracy, and massive income.<sup>73</sup> But the Shah had failed to control the growing discontent that was brewing in Iran. By 1977 the movements that were to bring about his downfall were in full swing.

The opposition that eventually destroyed the Shah centered around Iran’s conservative Moslem clergy. A basic tenet of Islamic faith is that religion and government are one. Religious doctrine is the law. The seemingly secular reign of the Shah was not compatible with the views of the mullahs and ayatollahs of Iran. One ayatollah of particular importance was Ruhollah Khomeini. His attacks centered on the Shah’s attempts to modernize Iran. He viewed alcohol and gambling as evil.<sup>74</sup> His vision of the state brought about the Revolution and now controls Iran. The change in perspectives was striking. Article 2 of the new Constitution of the Islamic Republic of Iran points out some of these differences:

The Islamic Republic is a system of government based on belief in:

- a. the One God (as stated in the Islamic creed “there is no god but God”), His exclusive possession of sovereignty and the right to legislate, and the necessity of submission to His commands;
- b. divine revelation and its fundamental role of expounding of laws;
- c. the return to God in the hereafter, and the constructive role of this belief in man’s ascending progress toward God;
- d. the justice of God in creation and legislation;
- e. continuous leadership and guidance and its fundamental role in assuring the continuity of the revolution of Islam;

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<sup>70</sup> See sources cited in Legal Advisor’s Memorandum, *supra* note 62, at S16,057 n.6.

<sup>71</sup> W. FORBIS, *supra* note 1, at 64.

<sup>72</sup> *Id.* at 65.

<sup>73</sup> E. ABRAHAMIAN, *supra* note 1, at 439-42.

<sup>74</sup> W. FORBIS, *supra* note 1, at 142.

f. the exalted dignity and value of man, and his freedom, joined to responsibilities before God . . . .<sup>75</sup>

The extreme dislike of foreign influence can also be seen in the new constitution. Chapter I, article 3 provides for the "complete expulsion of imperialism and the prevention of foreign influence,"<sup>76</sup> and chapter X outlines the basis for Iranian foreign policy:

#### Article 152

The foreign policy of the Islamic Republic of Iran is based upon the rejection of all forms of domination, the preservation of the complete independence and territorial integrity of the country, the defense of the right of all Muslims, non-alignment with respect to the hegemonist superpowers, and the maintenance of mutually peaceful relations with all non-belligerent states.

#### Article 153

Any form of agreement resulting in foreign domination over the natural resources, economy, army or culture of the country, as well as other aspects of the national life, is forbidden.<sup>77</sup>

Chapter IV of the Iranian Constitution divides the Iranian economy into three sectors: state, cooperative, and private. The state sector includes "all large-scale and major industries, foreign trade, major mineral resources, banking, insurance, energy, dams and large-scale irrigation networks, radio and television, post telegraphic and telephone services, aviation, shipping, roads, railroads, and the like . . . ."<sup>78</sup> The cooperative sector is to deal with companies involved in the production and distribution of goods.<sup>79</sup> Finally, left for the private sector are agriculture, industry, trade, and "services that supplement the economic activities of the other two sectors."<sup>80</sup> Article 81 of chapter VI provides that "[t]he granting of concessions to foreigners for the formation of companies or institutions for commercial, industrial, and agricultural purposes, or for the extraction of minerals, is absolutely forbidden."<sup>81</sup>

Indeed, the Iranian government did not hesitate to begin making changes in the economic system. A State Department Memorandum outlines the United States' view of these Iranian actions:

During the spring of 1979, the Government of Iran announced its intention to nationalize firms which were poorly managed or unprofitable, or whose owners had left Iran. In June of that year, Iran national-

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<sup>75</sup> ISLAMIC REPUBLIC OF IRAN CONST. (H. Algar trans. 1980).

<sup>76</sup> *Id.* ch. I, art. 3.

<sup>77</sup> *Id.* ch. V, art. 152.

<sup>78</sup> *Id.* ch. IV.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* art. 81. Article 82 provides that the "employment of foreign experts is forbidden, except in cases of necessity and with the approval of the National Consultative Assembly." *Id.* art. 82.

ized all banks and insurance companies. In July, Iran enacted the Law for the Protection and Development of Iranian Industry, which nationalized additional industries, the share-holdings of certain individuals, and all firms whose debts to the banks exceeded their assets. Additional firms were nationalized by the Act Concerning the Appointment of a Temporary Director or Directors for the Custody of Production and Industrial and Commercial and Agricultural and Service Units whether in the Public or Private Sector, enacted June 16, 1979, and by the Act Concerning the Management and Ownership of the Shares of Contracting and Consulting Companies and Firms, enacted March 3, 1980. By February of 1981, according to the Minister of Industries and Mines, some 580 companies had been nationalized since the revolution. (citations omitted.)<sup>82</sup>

These formal acts, as well as other informal measures, have been the focus of the Tribunal as it tries to determine whether United States investments have been taken in violation of international law.

Thus the perspective of Iranian elites changed dramatically with the Revolution. A deeply engrained distrust of foreign influence replaced a general espousal of Western ways. An extremely conservative group of clerics replaced a regime which, while not atheistic, challenged the traditions of Moslem clerics.

The Iranians appear to be espousing the views of the countries proposing a New International Economic Order. In at least one case, Iran has argued that it has a right to nationalize foreign investments as an expression of its permanent sovereignty over natural resources and economic activities.<sup>83</sup> Although a duty to compensate may exist, there is no requirement that such compensation be paid promptly, as long as the expropriating nation indicates that compensation will be paid within a reasonable time. The Iranians argue that there is no international requirement that the full value of the property be paid. Partial compensation is appropriate, "based on resolutions of the United Nations organs and . . . post-war settlement practice."<sup>84</sup> Although espousing the views of the developing nations, the Iranian arguments do not seem to contain the radical anti-imperialist element that might be expected considering the historical relationship between Iran and the United States and the nature of the Iranian Revolution.

#### IV. TRIBUNAL DECISIONS RELATING TO TAKINGS

The Iran-U.S. Claims Tribunal has addressed the question of what constitutes the threshold level of government interference leading to a

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<sup>82</sup> Legal Advisor's Memorandum, *supra* note 62, at S16,054 n.18.

<sup>83</sup> See American Int'l Group, Inc. and Islamic Republic of Iran, Iranian Assets Litigation Rep. 7744, 7747 (Jan. 13, 1984).

<sup>84</sup> *Id.*

finding that a taking has occurred. In doing this, each of the Tribunal's three chambers has developed its own approach to the taking problem. Each emphasizes different values and goals. None of the chambers has, however, created and applied a standard that is completely supported by preferred community policy goals. A close look at these decisions shows this failure and at the same time provides a basis on which to predict the outcomes of similar cases in the future.

### A. Chamber Two Decisions

The development of the first strain of thought began in *ITT Industries, Inc. and the Islamic Republic of Iran*, for which United States Arbitrator George Aldrich wrote an opinion concurring in the Tribunal's Award on Agreed Terms.<sup>85</sup> Aldrich's opinion was based on his belief that "the settlement may well have been inspired, at least in part, by [Iran's] desire to prevent these views from appearing in the Award."<sup>86</sup> The case involved the claim of ITT, the one hundred percent owner of IKO Sweden, a Swedish corporation that held a twenty-five percent interest in IKO Iran, an Iranian joint stock company.<sup>87</sup> On December 22, 1980, Iran appointed four members to the Board of Directors of IKO Iran, and shortly thereafter appointed the final member, removing the five directors elected by the shareholders, including the director chosen by the claimant.<sup>88</sup>

Prior to the settlement of the claim, ITT had argued that this assumption of control over IKO Iran constituted a taking of its interest

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<sup>85</sup> Iranian Assets Litigation Rep. 6652 (June 3, 1983).

<sup>86</sup> *Id.* Under the rules of the Tribunal, all settlements must be approved by the Tribunal. Final Rules of Tribunal Procedure, *supra* note 17, art. 34.

<sup>87</sup> Iranian Assets Litigation Rep. at 6652. IKO Sweden was no stranger to government actions affecting its interest in IKO Iran. It had originally owned 40% of IKO Iran, but laws requiring the sale of shares to the government and the public decreased this to the 1980 level. *Id.*

<sup>88</sup> *Id.* The appointments were made pursuant to the Legal Bill Concerning the Appointment of Provisional Director or Directors for Supervising Production, Industrial, Commercial, Agricultural and Service Units Whether in Public or Private Sector and the Protection and Development of Iranian Industries Act. *Id.* Aldrich described this legislation:

Article 2 of the Bill provides that, upon appointment of directors, ". . . the earlier directors and persons in charge will be stripped of their competence . . ." and that "[s]hareholders are not allowed in any way to appoint directors in their stead." Article 3, which defines the management powers of government-appointed directors, states: "The carrying out of affairs beyond the normal and current affairs of the unit shall be contingent upon the approval of the relevant ministry, government institution or company." Article 5 requires the submission of reports by the directors to the relevant ministries, and its maintenance of employment purposes is succinctly expressed in Article 6 as follows: "During the period in which the units mentioned in Article 1 are subject to the provisions of the law, no legal action whatsoever is allowed that causes lockout or stoppage of its work.

*Id.* at 6653.

and that prompt, adequate, and effective compensation was required.<sup>89</sup> Iran, on the other hand, contended that its assumption of control may be only temporary and accordingly does not constitute a compensable taking.<sup>90</sup> In support of this view, Iran noted that a Supplemental Decree to the Act for the Protection and Development of Iranian Industries had created a five-member committee to determine the ultimate ownership of companies under government supervision.<sup>91</sup> Aldrich determined that IKO Sweden had been deprived of its right to participate in the management and to receive information on the financial affairs of IKO Iran.<sup>92</sup> He noted that government officials in control of the business owed no fiduciary duty to the shareholders and were indeed managing the industry for purposes contrary to the interests of the shareholders.<sup>93</sup> Aldrich stated his views of the appropriate standard for a finding of a taking:

[w]hile 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, thus requiring compensation under international law, 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*. The intent of the government is less important than the effects of the measures on the owner, and the form of control or interference is less important than the reality of their impact. (emphasis added.)<sup>94</sup>

The facts of the case, i.e., that ITT had received no profits or information about the financial situation of IKO Iran, that the shareholders had been denied the right to attend shareholders meetings, vote for directors, or act in any way to control the company, that Iran had failed to take steps to review the ownership of IKO Iran, and that ITT will never receive any profits earned during the period of government control or compensation for any diminution in value during the period, led Aldrich

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* The Decree also provided: "In the event that the concern, upon the issuance of a final ruling, is put at the disposal of the shareholders, the shareholders shall have no claims whatsoever in connection with the profit and loss of the period of the Government intervention in the operation of the concern." *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* The opinion lists the following purposes:

(a) To observe the Islamic system in respect of labor rights.

(b) To disembark the economy of Iran from its affiliation to oil and to obtain independence through local production up to self-sufficiency and to expand exports.

(c) To expand work field, employment and specialization.

(d) To stop agents of dictatorial and exploitative system.

(e) To avoid government patronage, to encourage and protect non-government activities and initiative of the private sector.

<sup>94</sup> *Id.* at 6654.

to conclude that Iran "has . . . rendered IKO Sweden's right of ownership so meaningless as to be the equivalent of an expropriation of those rights."<sup>95</sup>

In another Chamber Two decision, *Tippets, Abbot, McCarthy, Stratten and TAMS-AFFA Consulting Engineers*,<sup>96</sup> the main parties involved in the dispute before the Tribunal were: Tippets, Abbot, McCarthy, Stratten (TAMS), a United States engineering and architectural consulting firm; Aziz Farmanfarmaian and Associates (AFFA), an Iranian engineering firm; TAMS-AFFA, an Iranian entity created by AFFA and TAMS to coordinate efforts in providing consulting services for the construction of the Tehran International Airport (TIA); and the Iranian Civil Aviation Organization (CAO).<sup>97</sup> On March 19, 1975, CAO, TAMS, and AFFA signed a contract providing that TAMS and AFFA would perform engineering and architectural consulting services relating to the construction of TIA.<sup>98</sup> Shortly thereafter in August 1975, TAMS and AFFA formed TAMS-AFFA, a partnership in which each held equal shares to coordinate efforts in providing these consulting services.<sup>99</sup>

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<sup>95</sup> *Id.* at 6655. Interestingly enough, ITT appears to have argued that a taking had occurred prior to Iran's formal appointment of new directors. Unfortunately, Aldrich fails to detail these claims or the facts supporting them, making it difficult to determine whether a taking might have occurred prior to this formal action. ITT argued that the valuation should be made as of a date prior to the Revolution. *Id.* at 6657. In this case, ITT sought full par value for 172,500 shares plus interest. *Id.* Iran argued that this valuation would be far too high because of a decline in the equity value of IKO's stock beginning with the first forced sale. *Id.* Aldrich rejected the idea that acts prior to or during the Revolution could form the basis for a claim:

That Iran might experience revolution was a risk assumed by investors in Iran, as in any country, and any reduction in value of investments as a result of revolution cannot be ignored by the Tribunal. The Islamic Revolution in Iran was not a "wrong" for which foreign investors are entitled to compensation under international law.

*Id.* In determining the amount of compensation due, Aldrich felt that only the real value at the moment of the taking should be considered. *Id.* Only the acts of the government itself should be taken into account in determining whether this amount should be adjusted for a decline in value. *Id.* Aldrich concluded that this real value declined to 75% of par value from the time of the 1978 forced sale to the date of the taking. *Id.* at 6658. On the appropriate measure of compensation, Aldrich found that the Treaty of Amity remained in force, and that both the Treaty and international law require "the prompt payment of just compensation which is effective and adequate to compensate fully for the value of the property taken." *Id.* at 6656. He based this conclusion on the holding of the International Court of Justice that the Treaty of Amity remained in force in 1980 in *Case Concerning United States Diplomatic And Consular Staff in Tehran* (United States v. Iran). *Id.* He also relied on the failure of either party to give notice of termination as provided for in art. XXIII of the Treaty. *Id.* The measure of compensation should be the value of the company as a "going concern" at the time of the taking. *Id.* Aldrich noted that "'going concern' has been defined to mean 'the undertaking itself considered as an organic totality . . . the value of which is greater than that of its component parts . . . .' [citation omitted]." *Id.* at 6656 n.4.

<sup>96</sup> No. 141-7-2, slip op. (Iran-U.S. Claims Trib. June 29, 1984).

<sup>97</sup> *Id.* at 2.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 8.

TAMS-AFFA decisions could only be made with the approval of a representative from each partner.<sup>100</sup>

Everything went smoothly until late December 1978 when the disturbances caused by the Iranian Revolution brought the airport project to a halt.<sup>101</sup> On July 24, 1979, Iran appointed a temporary manager for AFFA, the Farmanfarmaian family being one of the fifty-one families whose businesses were taken over pursuant to the Law for the Protection and Development of Iranian Industry.<sup>102</sup> There was some confusion over whether the manager was to control only AFFA or TAMS-AFFA as well: the Official Gazette listed the temporary manager as the TAMS-AFFA manager, and he proceeded to take control of TAMS-AFFA.<sup>103</sup> The TAMS representative in Iran managed to partially straighten things out in the fall of 1979, and the approval of the United States partner was once again necessary for the expenditure of funds.<sup>104</sup> The Iranian manager even assisted in obtaining payment of 34 million rials owed to TAMS and then exporting the funds to the United States.<sup>105</sup> The crisis in United States-Iran relations beginning in November 1979 brought an end to this cooperation.<sup>106</sup> TAMS's representative left Iran, and TAMS's efforts to contact the manager by mail or telex were fruitless.<sup>107</sup> Although continuing to function, TAMS-AFFA made no attempt to contact TAMS regarding the progress of the project after December 1979.<sup>108</sup> TAMS-AFFA continued to operate under Iranian-appointed managers until the date of the decision.<sup>109</sup>

TAMS argued that Iran had expropriated TAMS's fifty percent interest in TAMS-AFFA.<sup>110</sup> In addressing the taking claim, the Tribunal

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 8-9.

<sup>104</sup> *Id.* at 9.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 9-10.

<sup>110</sup> *Id.* at 2. TAMS claimed that certain funds were owed under the original TIA contract. *Id.* TAMS argued that in the event the Tribunal decided it lacked jurisdiction over the debts, accounts receivable from CAO should be included in determining the amount of compensation payable due to the expropriation. *Id.* TAMS's third claim related to a deposit at Bank Melli that TAMS alleged had been unlawfully retained. *Id.* at 2-3. The fourth claim was an attempt to cancel bank guarantees relating to the TIA project. *Id.* at 3. Respondents denied that the Tribunal had jurisdiction to hear the claims or that an expropriation had occurred. *Id.* CAO counterclaimed that TAMS's performance under the contract had been inadequate. *Id.* TAMS-AFFA counterclaimed that debts for which TAMS was responsible were owed to third parties. *Id.* The two respondent banks counterclaimed for maintenance charges on the bank guarantees. *Id.* Before considering the merits, the Tribunal considered a number of jurisdictional issues. *Id.* The Tribunal concluded that it lacked

made a general statement of the taking standard:

A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.

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, thus requiring compensation under international law, 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*. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of controls or interference is less important than the reality of their impact.<sup>111</sup>

Applying that standard to this case, the Tribunal found that the appointment of the AFFA manager did not amount to an expropriation.<sup>112</sup> TAMS and the temporary manager were able to run the business together in mid-1979.<sup>113</sup> The Tribunal recognized, however, that later developments in 1979 and 1980, including the failure to answer letters and telexes from TAMS did amount to a taking.<sup>114</sup> Thus, the Tribunal was faced with a choice between a formal act and later informal actions of the government representative as the basis for its finding that an expropriation had occurred. Unlike other decisions of the Tribunal, this one chose the less formal acts as the basis for the decision, better reflecting the reality of the impact on the investor.<sup>115</sup>

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jurisdiction to consider TAMS's contract claim because of the forum selection clause in the contract, which deferred to Iranian courts. *Id.* at 4-5. The claims and the counterclaims relating to the bank guarantees were also dismissed because of a lack of jurisdiction. *Id.* at 5-6. The Tribunal felt that the guarantees were entered into pursuant to the contract and that the forum selection clause controlled the obligations incurred thereunder. *Id.* at 6. Pointing to *Harza* and the fact that TAMS had made no demand for the funds in its account, the Tribunal held that it lacked jurisdiction to decide TAMS' claim relating to its bank deposits. *Id.* at 7. Finally, the Tribunal found that TAMS-AFFA lacked standing to pursue counterclaims against TAMS relating to amounts owed to Iranian social security and tax authorities. *Id.* These were debts owed by TAMS to the authorities, and only those authorities had standing to pursue them. *Id.*

<sup>111</sup> *Id.* at 11 (footnotes omitted, emphasis added).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 11-12.

<sup>115</sup> Having determined that an expropriation of TAMS-AFFA had occurred, the Tribunal had to determine the entity's value. In doing this, the Tribunal felt that it had to include "not merely . . . bank accounts and fixed assets, but also the valuation of TAMS-AFFA's accounts receivable, including those under the TIA contract and TAMS-AFFA's debts . . ." *Id.* at 12. The Tribunal recognized that it lacked jurisdiction to determine the rights of the parties under the TIA contract, but felt that it could not ignore the accounts receivable in determining the value of TAMS-AFFA. *Id.* at 14.

Dr. Shafei Shafeiei refused to sign the award. *Id.* at 19. He was disturbed by the majority's

In dissent, Iranian Arbitrator Dr. Shafeiei asserted that Iran's appointment of a temporary manager was a benevolent act necessitated by difficult circumstances:

In actuality, the collapse of the former regime destroyed a social, political, economic and military order. The establishment of a new order appeared difficult. Moreover, certain directors of enterprises, many of which were heavily indebted to Iranian banking institutions, fled Iran at its moment of crisis. It was the task of the newly-installed government to avoid social disorganization, maintain order, and prevent economic activity from coming to a halt. It was in this context that the Bill of 19 June 1979 was voted into force by the Revolutionary Council, whereby the Iranian Government was authorized to appoint provisional managers for enterprises abandoned by their directors, whether these latter had ceased to work or had for some reason or another found it impossible to manage the day-to-day affairs of the enterprise.

I believe that this appointment was made in the sole interest of all those involved with AFFA, of which the sudden disappearance of the directors would otherwise have disrupted the company's operations.<sup>116</sup>

Dr. Shafeiei's reasoning is flawed in two respects. First, it fails to recognize that in many cases the new government was the cause of the disruption. Directors were leaving the country because they feared for their lives under the new "Islamic justice." Second, the dissent's description of the purpose of the temporary manager does not describe what happened in this case. Certainly a government may step in to prevent economic disaster during a period of disorder without violating international law, but here it was not the appointment of a new manager that the Tribunal found to be a taking. On the contrary, it was the manager's later unwillingness to even communicate with one of the rightful owners concerning the completion of the project that provided the basis for the decision. Thus, the dissent's major objection to the Tribunal's decision is without merit.

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approach to the TIA accounts receivable. *See id* at 20. He argued that the Tribunal had failed to recognize that these accounts were owing to TAMS under the TIA contract, rather than to TAMS-AFFA. *See id.* at 28-36. TAMS-AFFA served only as a liaison or agent between TAMS and AFFA on the one hand and CAO on the other. *Id.* at 35. Thus, the accounts receivable should not have been considered in determining the value of TAMS-AFFA. *Id.* at 36.

As pointed out by the majority, this argument lacks merit:

That the accounts receivable are those of TAMS-AFFA, rather than those of the individual partners, seems clear from the conduct of the parties to the contract. The invoices were submitted to the CAO to TAMS-AFFA, and payments were made by the CAO to TAMS-AFFA. Division of revenues between the partners was effected from time to time on the basis of decisions of TAMS-AFFA.

*Id.* at 13.

<sup>116</sup> *Id.* at 30-31.

These two decisions provided the basis for Chamber Two's taking jurisprudence. In both cases a taking was found to have occurred when the investor is "deprived of fundamental rights of ownership and it appears that the deprivation is not merely ephemeral."<sup>117</sup> The key to understanding this standard is to determine what constitutes a fundamental right of ownership. Is Chamber Two looking to the continuous stream of decisions end of the spectrum suggested in *Revere*? Or is a fundamental right at the other end of the spectrum, requiring some sort of physical confiscation? It seems that in speaking of fundamental rights of ownership, Chamber Two is positioning itself on the *Revere* end of the spectrum. The decisions do not speak of deprivation of all value in the investments or of rendering the investment useless. Something less is required; although exactly what is left unclear. Deprivation of a fundamental right of property ownership can mean much less than is required by the substantial diminution of value test. If property rights are considered to be a bundle of rights, it is possible that such an approach could require a taking determination in cases in which only one of those rights has been destroyed or otherwise affected. This may have serious consequences when considered in light of preferred community policy goals.

The standard suggested by Chamber Two would not provide the host state with adequate competence to control its economy in order to encourage development. Although investors will be pleased with the standard because of the additional protection provided, the standard is not likely to lessen the resort to coercive measures. Host states will feel the need to control internal matters despite the standard, leading to conflict between wealth importing and exporting countries.

Chamber Two rejects an intent requirement, arguing that the effect on the investor is more important than whether the host state has deliberately set out to deprive a wealth exporter of his investment. This stance is supported by preferred community policy goals. An intent element is not necessary to further these goals. Indeed, an intent element would run counter to the goal of encouraging development. An investor will not feel protected if he knows that incidental effects of government actions depriving him of all value in his investment will not be remedied.

The other positive element found in Chamber Two's jurisprudence is the rejection of formalism. In the *TAMS* case, Chamber Two was willing to look beyond the formal acts of the host state and base its taking determination on other, informal measures affecting property rights. This evidences a willingness to look to the reality of the situation as opposed to basing decisions only on the decrees of the host state. As previously discussed, any standard must look realistically at the impact on the

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<sup>117</sup> *ITT*, Iranian Assets Litigation Rep. at 6654 (opinion of Aldrich, Arb.). See *TAMS-AFFA*, No. 141-7-2, slip op. at 10-11.

investor in order to comply with preferred community policy goals. Thus, although in minor ways supported by preferred community policy goals, the basic formulation of Chamber Two's taking standard does not adequately reflect these goals.

In two less important decisions, Chamber Two found that no taking had occurred. *Golpira v. The Government of the Islamic Republic of Iran*<sup>118</sup> dealt with a situation in which the claimant argued that his interest in the Borzooyeh Medical Group had been taken by the Oppressed People's Foundation's expropriation of the shares of the principle stockholder in the organization.<sup>119</sup> Golpira, the claimant, contended that Dr. Bahadori, the principle stockholder, had held fifty percent of the stock prior to that stock's expropriation by the Oppressed People's Foundation.<sup>120</sup> Golpira alleged that the expropriation of these shares amounted to an expropriation of his interest even though Iran did not appoint managers or directors of the company.<sup>121</sup> The claimant argued that this expropriation of Bahadori's shares, when added to a failure to pay dividends, provide annual reports, or correspond in some way with the claimant, amounted to a "de facto" expropriation of the interests held by all of the remaining stockholders.<sup>122</sup>

Iran contended that the Foundation held only 27.16 percent of the 2500 shares outstanding, while the remaining shares were in private hands.<sup>123</sup> Golpira had received no dividends because the Medical Group had simply failed to show a profit since Dr. Khansi, the representative of the Foundation, had become the new managing director of the Medical Group.<sup>124</sup> In addition, the Iranians argued that notices of shareholder meetings had been published in local daily newspapers as required by Iranian law.<sup>125</sup>

Chamber Two found that the claimant had failed to prove that his ownership interest in the Medical Group had been expropriated.<sup>126</sup> The Tribunal felt that, although it had been established that the management

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<sup>118</sup> 2 Iran-U.S. Claims Trib. Rep. 171 (1983).

<sup>119</sup> *Id.* at 175. The Iranians maintained that Golpira lacked standing to bring the claim before the Tribunal because of the claimant's status as a dual Iran-United States national. *Id.* at 172. The Tribunal found that although a dual national, Golpira had the right to bring the claim because his "dominant and effective nationality at all relevant times has been that of the United States, and the damages sought in the present claim are related primarily to his American nationality, not his Iranian nationality." *Id.* at 174-75. The Iranian Arbitrator Dr. Shafeiei refused to join in the opinion and penned a separate opinion on the issue of dual nationality. *Id.* at 177.

<sup>120</sup> *Id.* at 173.

<sup>121</sup> *Id.* at 175.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 176.

<sup>126</sup> *Id.* at 175.

of the Group had changed hands due to the nationalization of Dr. Bahadori's stock, the claimant had failed to show that this action had any effect on his ownership interest.<sup>127</sup> Golpira remained on the list of stockholders, and he failed to receive dividends because dividends had not been paid to anyone due to a lack of profits.<sup>128</sup> In the event of future profits, Golpira remained eligible to receive dividends.<sup>129</sup> Although recognizing "that a taking of property may occur by virtue of unreasonable interference in the use of that property,"<sup>130</sup> the Tribunal found that the record failed to establish that the control over the activities of the group exercised by the Foundation was any different from that previously exercised by Dr. Bahadori.<sup>131</sup>

In *Harza Engineering Co. and the Islamic Republic of Iran*,<sup>132</sup> the claimant alleged the expropriation of the contents of two bank accounts in Iran at Bank Melli Iran and Bank Tejarat.<sup>133</sup> In 1979, after having been forced to leave Iran, Harza made four attempts to draw on the accounts in order to satisfy obligations that had been incurred in Iran.<sup>134</sup> In each case, Bank Melli refused to honor the drafts because of an alleged failure to provide the authorized signature.<sup>135</sup> Having tried to obtain the release of its funds for over a year, Harza ceased its efforts, concluding that the funds had been expropriated by "direct and repeated interference with the use and enjoyment in violation of the Treaty of Amity . . . and principles of international law."<sup>136</sup> Harza alleged that these actions were taken pursuant to "a general government policy to block its bank

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 176.

<sup>129</sup> *See id.*

<sup>130</sup> *Id.* at 177. In support of this proposition, the Tribunal cited *Harza. Id.*

<sup>131</sup> *Id.* at 176.

<sup>132</sup> Iranian Assets Litigation Rep. 5952 (Jan. 21, 1983).

<sup>133</sup> *Id.* Harza was an United States engineering consulting firm, which provided services to the Iranian Ministry of Energy in an effort to develop electrical power resources in that country. *Id.* at 5953. The accounts were opened to collect fees and pay expenses incurred in the provision of these services. *Id.*

<sup>134</sup> *Id.* at 5953.

<sup>135</sup> *Id.* The first check was written to the Iranian Ministry of Economic Affairs and Finance and signed by the Secretary-Treasurer of Harza. *Id.* Bank Melli refused to honor the check, claiming that the Secretary-Treasurer's signature was not on file. *Id.* One month later, the official liquidator of Harza wrote a replacement check. *Id.* This too was rejected on the same grounds. *Id.* In December the liquidator sent Harza's Iranian counsel official verification of his appointment as liquidator along with a third check, both of which counsel was to forward to Bank Melli. *Id.* Both this check and a fourth were dishonored on the same grounds as the earlier checks had been rejected. *Id.*

At this point, on the advice of counsel and under the precise instructions of Bank Melli, Harza executed formal signature cards which were witnessed by Harza's bank in the United States. *Id.* Although Harza complied with Bank Melli's instructions, the bank informed Harza that a supplemental verification of the signature would have to be obtained from an Iranian consulate. *Id.* Harza did not seek to provide the verification. *Id.*

<sup>136</sup> *Id.* at 5953-54.

accounts, and perhaps those of American companies in general . . . ."<sup>137</sup> As a measure of damages, Harza sought the balance of the two accounts plus interest from the date of the first check.<sup>138</sup>

Bank Melli contended, however, that it now accepts the liquidator's signature, but that Harza had not attempted to draw on the account since the signature was found to be authentic.<sup>139</sup> The bank further argued that its refusal to honor the checks was lawful because the signatures did not match the most recent signature cards on file.<sup>140</sup> It also stated that the refusal to honor the checks did not amount to an expropriation.<sup>141</sup>

In deciding that no unlawful expropriation had occurred, the Tribunal noted that in ordinary circumstances the wrongful failure to honor a draft constitutes a contract breach rather than an expropriation with damages calculated according to the damages caused by the dishonor.<sup>142</sup> Here Harza was alleging a course of conduct that amounted to something more than a wrongful refusal to honor a check.<sup>143</sup> Although the Tribunal recognized that an unreasonable interference with property can amount to an expropriation under international law,<sup>144</sup> it looked to the facts and determined that Bank Melli's actions had not unreasonably interfered with Harza's use and enjoyment of the funds.<sup>145</sup>

These two cases add little to the development of Chamber Two's taking jurisprudence. An argument can be made that *Golpira* evidences a retreat to formalism. *Golpira* established that the medical group is now under the control of the Oppressed People's Foundation, even though the Foundation did not have majority ownership. The Tribunal appeared to view this in much the same way that a United States court would view the acquisition of a plurality interest by a new party in the shares of a corporation. Provided that there has been no overreaching or breach of duty, the minority shareholder has no remedy. Apparently *Golpira* was unable to convince the Tribunal that the situation was not this simple. The decision can, therefore, be seen either as a retreat to formalism or a simple application of corporate law.

### B. Chamber One Decisions

The second major train of thought relating to the amount of govern-

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<sup>137</sup> *Id.* at 5954.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 5956.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

ment interference necessary to establish a taking can be seen in two decisions of Chamber One. In *Starrett Housing Corp. and The Government of the Islamic Republic of Iran*,<sup>146</sup> Chamber One, chaired by Gunnar Lagergren, issued an Interlocutory Award on the question of whether there had been a taking of the claimant's investment in Iran.<sup>147</sup> The arbitration dealt with an intricate real estate transaction involving an attempt to design, build, and market a complex of condominium apartments just outside of Tehran.<sup>148</sup>

The project began in the early 1970s when Starrett Housing Corporation entered into an agreement with Bank Omran, an Iranian development bank under the control of the Shah, for the construction of a portion of the large development.<sup>149</sup> Starrett was to purchase land through Omran, construct 6000 apartments, and sell those apartments to Iranian purchasers.<sup>150</sup> The agreement required that Starrett organize a foreign subsidiary to sign the Project Agreement.<sup>151</sup> Accordingly, Starrett created Starrett, S.A., a wholly-owned Swiss subsidiary.<sup>152</sup> Due to certain restrictions on foreign ownership of property, an Iranian corporation was created, Shah Goli Apartment Company.<sup>153</sup> Starrett owned 79.7 percent of Shah Goli through a German subsidiary.<sup>154</sup> Starrett assigned its rights under the Project Agreement to Shah Goli and guaranteed Shah Goli's performance.<sup>155</sup> The Project Agreement required that Shah Goli, in addition to constructing the apartments, sell them and deposit all proceeds in Bank Omran.<sup>156</sup> Bank Omran would then deduct amounts owed under a loan agreement and make the balance available to Shah Goli.<sup>157</sup> Starrett and Shah Goli proceeded to build and sell the apartments until the time of the Revolution.<sup>158</sup> In late 1978, the apparent danger for United States citizens in Iran caused most of Starrett's 150 supervisors to leave the country, leaving only a handful to run the project.<sup>159</sup> In addition, of the 2000 people who had been working on the project, only 200 remained.<sup>160</sup> Strikes and materials shortages brought

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<sup>146</sup> Iranian Assets Litigation Rep. 7685 (Jan. 13, 1984).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 7686.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 7687.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 7696.

<sup>159</sup> *Id.* at 7696-97.

<sup>160</sup> *Id.*

work to a virtual halt.<sup>161</sup> To a great extent this halt was caused by the anti-American activities of the revolutionaries.<sup>162</sup>

The first overt act aimed at the project occurred in February 1979, when four men armed with machine guns raided Shah Goli's offices and informed those present that because the project had been the property of the Shah prior to the Revolution, it now belonged to the Islamic Republic.<sup>163</sup> Arthur Radice, the ranking Starrett official, and another Starrett executive were arrested, but later released. They immediately left the country.<sup>164</sup>

On February 28, 1979, Bank Omran was expropriated by the Iranian government pursuant to efforts to take over all entities that had formerly been controlled by the Shah.<sup>165</sup> The change of management had an immediate affect on the Starrett project. Under the terms of the Project Agreement, Starrett relied heavily on Omran for certain infrastructure development, such as the supply of water and electricity to the project.<sup>166</sup> Due to Bank Omran's failure to supply this support, Starrett was unable to deliver apartments to purchasers as promised and therefore unable to collect balances due.<sup>167</sup>

In April 1979, Radice returned to Iran in an attempt to salvage what was left of the project.<sup>168</sup> He was immediately arrested and charged with an unspecified violation of Iranian law.<sup>169</sup> His passport was seized to prevent his leaving Iran, but he was released and his passport returned after a bond had been posted. On release, he once again departed Iran.<sup>170</sup>

In July 1979, Shah Goli found itself in a position to deliver some of the apartments that had been near completion prior to the Revolution despite Bank Omran's failure to provide services.<sup>171</sup> Shah Goli chose to invoke the escalation clauses found in the sales contracts, which allowed a price increase of ten percent to cover increased costs.<sup>172</sup> When told of the increase, the purchasers informed an officer of the government. The Revolutionary Guard came to Shah Goli's offices, locked everyone in a room, turned off the lights, severed all communications, and refused to

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<sup>161</sup> *Id.*

<sup>162</sup> *See id.* at 7697-98.

<sup>163</sup> *Id.* at 7697.

<sup>164</sup> *Id.* At this point most United States nationals had already left the country. Starrett's valiant attempt to retain control over the project should be noted.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 7687.

<sup>167</sup> *Id.* at 7711 (Holtzman, Arb., concurring).

<sup>168</sup> *Id.* at 7687.

<sup>169</sup> *Id.* at 7697. He was later acquitted of the charges.

<sup>170</sup> *Id.* at 7711 (Holtzman, Arb., concurring).

<sup>171</sup> *Id.* at 7697.

<sup>172</sup> *Id.*

allow anyone to leave until an agreement not to invoke the escalation clauses was signed.<sup>173</sup> This cost Starrett \$22 million.<sup>174</sup>

July 1979 found Shah Goli in an even more desperate situation. Bank Omran had blocked its accounts.<sup>175</sup> The blocking deprived Shah Goli of the ability to meet its obligations or do further work on the project.<sup>176</sup> Shah Goli had lost all control over the project, which had essentially passed to Bank Omran.<sup>177</sup>

Doggedly determined to save the project, Radice again returned to Iran, but was forced to leave in September 1979.<sup>178</sup> This left the project in the hands of an Iranian attorney with no experience in construction.<sup>179</sup> It was hoped that the circumstances would change, allowing Starrett to return to finish the project.<sup>180</sup> Unfortunately the seizure of the hostages at the United States Embassy destroyed any hope for further Starrett involvement in the project.<sup>181</sup> Immediately following the seizure the last Starrett official fled Iran.<sup>182</sup>

Shortly thereafter Iran began taking formal measures affecting the project. On January 7, 1980, a Bill Concerning Protection of Buyer's Down-Payments for Incomplete Housing Units was passed.<sup>183</sup> The bill required that all down payments be deposited in the state housing bank, which would make payments to the developer based upon progress in construction.<sup>184</sup>

On January 27, 1980, the Revolutionary Council approved a Bill Concerning the Completion of Construction Works in Housing Cities and Housing Complexes Which Have Remained Incomplete.<sup>185</sup> Under the provisions of the bill, the Ministry of Housing was to locate all unfinished housing projects and prepare a plan for the completion of each project.<sup>186</sup> Although no plan was ever drawn up for the Starrett project, a Temporary Manager for Shah Goli was appointed three days later pursuant to the Bill for Appointing Temporary Manager or Managers for the Supervision of Manufacturing, Industrial, Commercial, Agricultural and Service Companies, either Private or Public, as was the case in the

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 7713 (Holtzman, Arb., concurring).

<sup>178</sup> *Id.* at 7697.

<sup>179</sup> *Id.* at 7713 (Holtzman, Arb., concurring).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 7697.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 7698.

<sup>186</sup> *Id.*

*ITT Case.*<sup>187</sup>

The claimant's major contention was that Iran's acts constituted an expropriation of all of Starrett's rights in the project and that this expropriation was achieved through "acts of insurrection . . . [that] prevented Starrett from completing the project and that the Islamic Republic of Iran authorized, approved and ratified acts and policies which deprived Starrett of the effective use, control and benefits of the project and that this expropriation was later formalized in governmental decrees that made no provisions for any compensation."<sup>188</sup> Thus, the claimant argued that a taking had occurred long before the appointment of a manager.<sup>189</sup> Iran argued that the appointment of the manager was a temporary measure and that Iran and Bank Omran had repeatedly requested that Starrett return to finish the project.<sup>190</sup> In addition, Iran asserted that the real reason that Starrett had abandoned the project was that it was near bankruptcy.<sup>191</sup>

Gunnar Lagergren pointed out the key issue involved in the case:

It is undisputed in this case that the Government of Iran did not issue any law or decree according to which the Zomorod Project or Shah Goli expressly was nationalized or expropriated. However, it is recognized in international law that measures taken by a State can *interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated*, even though the State does not purport to have expropriated them and the legal title to property formally remains with the original owner.<sup>192</sup>

Having established the standard to be applied, the Award noted that by the end of January 1980, Starrett had been deprived "of the effective use, control and benefits of [its] property rights in Shah Goli" through the appointment by Iran of a Temporary Manager for Shah Goli.<sup>193</sup> This appointment deprived the shareholders of the right to manage, use, or control Shah Goli.<sup>194</sup> The Award further noted that the mere assumption of control of an enterprise by the host state does not always mean that a compensable taking has occurred.<sup>195</sup> Iran had argued that it had requested that Starrett return and complete the project, with non-Ameri-

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 7689.

<sup>189</sup> *Id.* at 7702.

<sup>190</sup> *Id.* at 7701.

<sup>191</sup> *Id.* Iran claimed that the "Embassy incident was a political issue not related to the social life and activities of ordinary United States nationals." *Id.* at 7690.

<sup>192</sup> *Id.* at 7701 (emphasis added).

<sup>193</sup> *Id.* at 7702.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

can managers if necessary.<sup>196</sup> Lagergren rejected this argument, saying that the project could not be completed without the participation of a large number of Americans and that the right to select management, supervisors, and subcontractors is an essential part of the right to manage a project.<sup>197</sup> In addition, Lagergren pointed out that if Starrett did return to finish the job, it would be subject to the onerous restrictions imposed by Iranian legislation, including the Ministry of Housing and Bank Masakan's right to manage all such projects.<sup>198</sup> The Award noted that Starrett would not receive any compensation for any reduction in the value of the project caused by the interim government managers.<sup>199</sup>

The Award also dismissed the claimant's contention that interference prior to the appointment amounted to a taking:

There is no reason to doubt that events in Iran prior to January 1980 to which the Claimants refer, seriously hampered their possibilities to proceed with the construction work and eventually paralyzed the Project. But investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of the economic and political system and even revolution. That any of these risks materialized does not necessarily mean that property rights affected by such events can be deemed to have been taken.<sup>200</sup>

Finding that "[a] revolution as such does not entitle investors to compensation under international law," Lagergren determined that the date of the taking was January 30, 1980, when Iran appointed the Temporary Manager.<sup>201</sup> Lagergren's opinion correctly noted that the important factor to be considered in making a taking determination is the impact of the government action on the investor.<sup>202</sup> The standard suggested by the opinion is that a taking has occurred when the investor's property rights have been interfered with to the extent that they are so useless to the investor that they must be deemed to have been expropriated. This test seems to be similar to the substantial diminution in value test suggested earlier: that a taking has occurred when an investor has been deprived of substantially all value in his investment. Thus, Lagergren's approach to the problem appears to comport with the preferred community policy goals outlined earlier.

But the application of this standard appears to have missed the mark. In refusing to consider as takings acts affecting the Starrett invest-

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<sup>196</sup> *Id.* at 7701.

<sup>197</sup> *Id.* at 7702.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *See id.*

ment prior to the formal appointment of the Temporary Manager, Lagergren failed to give proper weight to significant acts adversely affecting the rights of Starrett. A series of acts by revolutionaries and a revolutionary government prior to March 1979 had circumvented Starrett's ability to manage its investment.<sup>203</sup> These actions included the creation of an environment in which it was unsafe for Americans to remain in the country, the invasion of the project site by Revolutionary Guards with machine guns, who arrested Starrett officials and claimed the project for the Islamic Republic, and the nationalization of Bank Omran by the Iranian government. The bank had been responsible for the supply of various services under the agreement. By mid-summer 1979, things were even worse. Starrett officials had been arrested and forced to leave the country again; Starrett was forced to forego its contractual right to \$22 million in payments; and Starrett's accounts at Bank Omran were blocked. These acts were ignored by the majority opinion, even though taken together they would seem to have deprived Starrett of substantially all value in its investment. In the words of the concurring opinion written by United States Arbitrator Howard Holtzman,

International case law and commentary are rich with examples of the circumstances which deprive an owner of use, control or benefit of the property. These circumstances include: (i) measures which force the owner to flee the country and thus deprive it of effective management and control of its property; (ii) measures which deny the owner access to its funds and profits; (iii) coercion and intimidation forcing the owner to sell at unfairly low prices; (iv) interference with the owner's access to needed facilities and supplies; and (v) appointment of conservators and administrators to manage the property in the enforced absence of the owner. Starrett suffered from each of these circumstances, caused or ratified by the Government of Iran.<sup>204</sup>

Holtzman argued that the Award is based on sterile formalism that has been found in other decisions of the Tribunal.<sup>205</sup>

Thus, the acts prior to the appointment of the Temporary Manager should have constituted an expropriation. Any argument that these acts were not the acts of the Iranian government is overly formalistic. The excessive acts of Iranian revolutionaries were approved, ratified, and adopted by the Islamic Republic. The International Court of Justice established in the *Case Concerning United States Diplomatic and Consular Staff in Iran*<sup>206</sup> that the ratification of the acts of a group of revolution-

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<sup>203</sup> *Id.* at 7708.

<sup>204</sup> *Id.*

<sup>205</sup> *See id.* at 7704-05 (Holtzman, Arb., concurring). *See also* *Re Raymond Int'l (U.K.) Ltd.*, 1 Iran-U.S. Claims Trib. Rep. 394 (1982) (Holtzman, Arb., dissenting) (Arbitrators Aldrich and Mosk joined Holtzman's dissent).

<sup>206</sup> 1980 I.C.J. 3.

aries or militants by a government may constitute a basis for international liability for that government. Accordingly, acts prior to January 1980 should have been considered in determining when the taking occurred. The formalistic attitude of the Tribunal could well have a negative effect on foreign investment. The determination of exactly when a taking occurred can have a major impact on the amount of compensation due. Often during a period of social unrest, the value of an investment can fall at an alarming rate. Waiting for a formal act of the government can substantially lessen the amount of compensation that will be due to the foreign investor. This, in turn, could lead to greater hesitance on the part of investors in entering the international investment sphere, decreasing the likelihood of economic investment.<sup>207</sup>

Holtzman's critique of the Award appears to be justified. While articulating a test for takings that appears to look to the effects of the taking on the deprived party, the Award bases its decision on the formal acts of the Iranian government to take control of the ventures in question. Such an approach elevates form in much the same way as other, much criticized, taking standards. In *Starrett* the Tribunal missed an opportunity to reject this formalism in favor of a test that looks to the effect on the deprived party. Perhaps none of the events prior to the appointment would alone amount to a taking, but the series of events collectively should have been more closely analyzed in the Award to determine whether *Starrett* had, at some point, lost control over the venture and been deprived of substantially all value in its investment.

Given its *Starrett* holding, it is not surprising that Chamber One looked to the intent of the host state in *Sea-Land Service Inc. and the Government of the Islamic Republic of Iran, Ports and Shipping Organization*<sup>208</sup> which involved the creation of a containerized shipping facility in Iran by Sea-Land, the claimant.<sup>209</sup> Sea-Land alleged that in February 1976, it reached an oral agreement with the Iranian Ports and Shipping Organization (PSO) that allowed Sea-Land to construct and operate the facility on land provided by PSO and provided that PSO would guarantee Sea-Land's vessels "priority in the provision of tugboats, pilots, customs, health and immigration clearance."<sup>210</sup> Apparently such priority berthing was necessary in order to make a containerized terminal eco-

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<sup>207</sup> On the question of valuation, the Tribunal provided no guidance. As this was an interim order on the merits, the valuation problem was left to a later determination. The Tribunal appointed an accounting expert to assist in the valuation, but failed to provide a legal standard to be applied in determining the amount of compensation to be awarded. This will presumably be found in the final award.

<sup>208</sup> No. 135-33-1, slip op. (Iran-U.S. Claims Trib. June 22, 1984).

<sup>209</sup> *Id.* at 2.

<sup>210</sup> *Id.* at 4.

nominally viable.<sup>211</sup> Unfortunately, this agreement was never reduced to writing.<sup>212</sup> The only agreement that PSO completed regarding the containerized facility (Facility Agreement) had been with ILB Container Company, an Iranian transportation business that had operated as an agent for numerous cargo handling enterprises.<sup>213</sup>

PSO admitted that discussions had been held with Sea-Land, but denied that any agreement had ever been reached.<sup>214</sup> Sea-Land argued that ILB had been its agent and that the Facility Agreement between PSO and ILB had been entered into by ILB rather than Sea-Land only because under Iranian law PSO could not grant land for the container facility to a foreign entity.<sup>215</sup> According to Sea-Land, ILB had been retained as its agent in November 1975 and was present at the February 1976 meeting at which PSO orally affirmed the agreement.<sup>216</sup> No agency agreement was signed, however, until April 1977.<sup>217</sup> At the time of the finalization of the agency agreement, a Preferential Use Agreement was entered into between Sea-Land and ILB, which stated that "the aforesaid license was procured by ILB Container for the uses and purposes of Sea-Land Service, Inc." and that the improvements to the site had been carried out by Sea-Land at its own expense.<sup>218</sup> In addition, it provided that "Sea-Land Service should have sole, exclusive and preferential right to use, occupy and enjoy said land and improvements . . . ." <sup>219</sup>

Construction of the facility was completed in early 1977 and Sea-

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 5. The Facility Agreement provided in part:

The following Agreement has been agreed upon between Port and Shipping Organization . . . and I.L.B. Container Company . . . .

1. The organization agreed to allocate to the Company the parcel of land . . . to be used for loading, off-loading and storage of the goods imported by the ships represented by the Company for a maximum period of six years (subject to the provisions of paragraph 5 of this Agreement). . . .

2. The Company undertook, at its own cost, to make all necessary preparations for the use of the said land . . . .

. . . .

5. The Company agreed that in the event that the organization hands over to the Imperial Navy the existing port facilities prior to the expiration of the term of this Agreement, this Agreement can be terminated by a two-month prior written notice.

6. After the expiration of this Agreement, the Company shall be obligated to remove from the allocated land all of its movable property . . . and to hand over to the organization all immovable facilities . . . .

*Id.* at 5-6.

<sup>214</sup> *Id.* at 5.

<sup>215</sup> *Id.* at 6.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 6-7.

<sup>218</sup> *Id.* at 7.

<sup>219</sup> *Id.* at 5.

Land's ship, the Sea Bridge, stopped regularly.<sup>220</sup> PSO cooperated by providing priority berthing.<sup>221</sup> The trouble began in September 1978 when PSO failed to provide the necessary priority berthing.<sup>222</sup> In February 1979, PSO began to limit the types of cargo allowed into the port.<sup>223</sup> In addition, the local Office of Labor ordered the dismissal of all non-Iranian employees, prohibited Sea-Land from discharging Iranians, and ordered Sea-Land to abide by standard wages and terms of employment.<sup>224</sup> Together these measures slowed the operation of the facility to such an extent that Sea-Land decided to halt service in November 1979 and closed the project completely the following February.<sup>225</sup>

Sea-Land presented four contentions to the Tribunal. The first was that PSO had breached the Facility Agreement between PSO and ILB.<sup>226</sup> Sea-Land alleged that it could enforce this agreement because of its position as a fully disclosed principal or a third party beneficiary.<sup>227</sup> Second Sea-Land alleged that PSO should be forced to pay compensation for interference with Sea-Land's lawfully acquired rights to use the port.<sup>228</sup> Sea-Land's third argument was that because PSO had acquiesced in Sea-Land's construction and operation of the facility, its later actions effecting the project amounted to a compensable expropriation under international law and the Treaty of Amity.<sup>229</sup> Finally, Sea-Land claimed that PSO had been unjustly enriched by its assumption of control over the project and that Sea-Land should receive restitutionary relief.<sup>230</sup> Of major interest to this study are the second and third claims made by Sea-Land, but the Tribunal's approach to the contract claim is important in understanding the outcome on the latter claims.

In deciding the contractual question, the majority opinion of Arbitrator Lagergren first found that interpretation of the Facility Agreement must be governed by Iranian law because "[b]oth parties to it were Iranian, and its subject-matter was a parcel of land in the port of Bandor Abbas."<sup>231</sup> Citing the Civil Code of Iran, the Tribunal noted that there is

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<sup>220</sup> *Id.* at 10.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 10-11.

<sup>225</sup> *Id.* at 11.

<sup>226</sup> *Id.* at 3.

<sup>227</sup> *Id.* at 8.

<sup>228</sup> *Id.* at 3.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 14. Sea-Land also claimed that monies on deposit at Bank Tejarat were expropriated. *Id.* at 25. Despite numerous attempts, the claimant had been unable to convert the account to dollars. *Id.* In light of *Harza* the Tribunal rejected the claim. *Id.* at 26. The Tribunal also dismissed a number of smaller claims and counterclaims involved in the case. *See id.* at 27-36.

a presumption that one entering into a transaction does so for himself, and the burden of proof is on the party trying to prove that the agreement was for the benefit of a third party.<sup>232</sup> In addition, the Tribunal pointed to the fact that under Iranian law, it is illegal for an agent to undertake activities that are forbidden to his principal.<sup>233</sup> Thus, the Tribunal found that Sea-Land had failed to rebut the evidence (the Facility Agreement) that PSO "intended to grant the actual license to ILB itself and not to Sea-Land . . . ."<sup>234</sup> The Tribunal recognized that PSO must have known of Sea-Land's involvement in the project, but based its rejection of the agency theory on the fact that "[i]t was clearly not PSO's intention to enter into contractual relations—at least insofar as the formal allocation of the land was concerned—with Sea-Land, but with an approved Iranian entity."<sup>235</sup> The Tribunal seems to ignore all of the facts supporting the conclusion that this was a transaction between PSO and Sea-Land, with ILB acting as a surrogate to avoid restrictive Iranian regulations.

Sea-Land's third party beneficiary claim was also rejected by Chamber One.<sup>236</sup> Under Iranian law, express mention of such a beneficiary must be made in the contract.<sup>237</sup> In any event, the Tribunal felt that Sea-Land's claims based on priority berthing went far beyond anything mentioned in the Facility Agreement.<sup>238</sup>

Having rejected the claimant's contractual arguments, however, the Tribunal next seemed to recognize that its analysis had been overly rigid:

The Tribunal cautions against any tendency to construe these documents independently of each other, or without reference to the sur-

<sup>232</sup> *Id.* at 15. This conclusion seems to beg the question. If the Tribunal had found that what was really involved here was a contract between PSO and Sea-Land, it could have just as easily held that the contract was internationalized and applied general principles of international law. In any event, it seems doubtful that the applicable law had a great deal of bearing on the outcome of the case.

<sup>233</sup> *Id.* Applicable provisions of the Iranian Civil Code provide:

Article 196. Anyone who enters into a transaction does so for himself unless when entering into the transaction he expressly provides for the contrary, or unless the contrary is subsequently proved. When entering into a transaction for himself, however, anyone can make provision for the benefit of a third party.

Article 231. Transactions and contracts are only binding on the two parties concerned or their legal substitutes except in cases coming under Article 196.

*See id.* The "subsequently proved" language of Article 196 would seem to provide some leeway for finding that Sea-Land was involved in this transaction. *Id.* at 14.

<sup>234</sup> *Id.* at 15. Article 662 of the Iranian Civil Code provides: "An attorneyship must not be given except for a matter which the principle himself is entitled to engage in; and the attorney must be a person who has the capacity to execute that matter." *See Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 16.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 17.

rounding circumstances . . . . In the view of the Tribunal, this broader perspective is critical to an understanding of what took place, and to correct legal characterization of the relationship of the three protagonists.

Although only a few elements of the project were reduced to clear contractual form, the Tribunal is satisfied that very much more was discussed among the three entities concerning the detailed operation of the proposed container facility, including the need for priority berthing, expedited clearances, and a high level of efficient administrative co-operation on the part of PSO as an essential prerequisite to the successful functioning of a sophisticated transportation system. PSO has denied that it undertook any contractual obligation in this regard vis-a-vis Sea-Land. But PSO has not rebutted to the satisfaction of the Tribunal the allegations . . . that consultations had taken place between itself, ILB and Sea-Land as to the implementation of the project, and that these discussions had reached an advanced stage. Sea-Land's formal proposal, submitted to PSO by ILB on 8 February 1976 set out in detail the essential mechanics of the operation of the proposed container facility and was clearly itself the product of a highly developed course of negotiations. The proposal envisaged that Sea-Land would construct and operate the facility at its expense and in collaboration with ILB, and PSO would guarantee certain operational assistance, including priority berthing. There is no question that PSO was fully apprised of Sea-Land's involvement and was prepared to accept the scheme, subject only to any objections the Iranian Navy might raise in connection with its adjacent installations. Indeed, Sea-Land is mentioned by name in the correspondence in this connection between PSO and the Naval Commander.

Sea-Land has not, however, been able to satisfy the Tribunal that this broad, underlying understanding between itself and PSO ever crystallized into a sufficiently precise formulation to constitute an enforceable contract obliging PSO to perform certain functions for the express benefit of Sea-Land. The conclusion might have been otherwise if acceptance of the specific terms of Sea-Land's proposal by PSO or the Ministry of Roads and Transportation had been proven. In the absence of such proof, the Tribunal is left with a proposal, albeit a detailed one, evidently accepted in principle but never reduced to a clear contractual formula. Apart from the limited aspects covered by the Facility Agreement itself, the rest of the "arrangement" appears to have proceeded on the basis of the good faith of the parties.<sup>239</sup>

Sea-Land's second claim was that PSO should be forced to pay damages for having "violated lawfully acquired rights to use the Bandar Abbas and Tehran facilities."<sup>240</sup> The Tribunal rejected this argument because it felt that in the absence of a contract, it was difficult to identify

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<sup>239</sup> *Id.* at 17-19.

<sup>240</sup> *Id.* at 19.

an "acquired right."<sup>241</sup>

The Tribunal also rejected the expropriation claim.<sup>242</sup> Sea-Land had alleged that an expropriation occurred because PSO interfered with its operation of the container facility.<sup>243</sup> In order for the system to work, a finely tuned procedure for berthing had to be followed.<sup>244</sup> In September, 1978, the system began to break down.<sup>245</sup> The necessary clearances could not be obtained, and berthing was often delayed.<sup>246</sup> Sea-Land's worldwide services were affected.<sup>247</sup> The Tribunal admitted that Sea-Land's difficulties were caused by the inability of PSO to properly manage the port.<sup>248</sup> There were no acts of discrimination against Sea-Land, however.<sup>249</sup> It was Sea-Land's form of doing business that left it in a vulnerable position.<sup>250</sup> In addition, Sea-Land claimed that restrictions on the types of cargo that could be unloaded interfered with the operation to such an extent that an expropriation occurred.<sup>251</sup> The Tribunal rejected this argument, stating that such measures are reasonable in a time of social upheaval:

In the Tribunal's view, all this tends to indicate a state of upheaval in PSO's internal management which is consistent with the general picture of disruption which characterized Iran in the months leading up to the success of the Revolution. It does not suggest that PSO had

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<sup>241</sup> *Id.* at 20. In support of this contention, the Tribunal cited 2 D. O'CONNELL, INTERNATIONAL LAW 764 (2d ed. 1970) and the Oscar Chinn case, [1934] P.C.I.J. Ser. A/B No. 63, 88. *Sea-Land*, No. 135-33-1, slip op. at 20 nn. 4, 5. The Tribunal gave this issue too little consideration. The notion of acquired rights espoused by the Tribunal fails to recognize that the requirement of some sort of vested property right is likely to leave many forms of foreign investment unprotected by the international minimum standard. This could serve to discourage the use of innovative forms of foreign investment that do not appear to comport with traditional vested property notions, resulting in slowed world economic development. In this case a determination that PSO had interfered with Sea-Land's contractual relationship with ILP might have been appropriate. Another approach that might have been addressed is whether Sea-Land obtained rights due to a course of dealings with PSO. The Tribunal's failure to address these issues because of its adherence to the traditional vested property rights approach is unfortunate.

<sup>242</sup> *Sea-Land*, No. 135-33-1, slip op. at 21.

<sup>243</sup> *Id.* Sea-Land contended that the Treaty of Amity "sets a particularly high standard for protection of the property of enterprises of foreign nationals." *Id.* at 26. The Tribunal rejected this assertion, stating that "[t]here is nothing in either Article II or Article IV of the Treaty which extends the scope of either States' international responsibility beyond those categories of acts already recognized by international law as giving rise to liability for a taking." *Id.* In light of the language of the Treaty, this conclusion is questionable.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 21-22.

<sup>248</sup> *Id.* at 22.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 23.

embarked upon a policy of deliberate disruption or non-co-operation directed at Sea-Land in particular.<sup>252</sup>

The Tribunal also rejected the contention that labor regulations interfered with the right to manage the project and amounted to an expropriation.<sup>253</sup> It said that the acts complained of had all occurred during the Revolution, and that those acts could not fairly be attributed to the government that eventually came to power.<sup>254</sup>

In addressing the taking issue the Tribunal noted:

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 and of the use and benefit of its investment*. Nothing has been demonstrated here that might have amounted to an intentional course of conduct directed against Sea-Land. 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.

Thus the claim against the Government of Iran based on expropriation must be dismissed.<sup>255</sup>

The decision that no taking had occurred was correct. The deterioration of services and interference in the operation of the facility might have amounted to a breach of contract had such a contract existed, but it is going too far to call this a taking. The failure to provide berthing services cannot be seen as a deprivation of substantially all value of Sea-Land's investment. Sea-Land's operation was vulnerable to disorder in the host state, but the host state cannot be considered a guarantor for vulnerable operations. Assuming that there was no contract here, the government's failure to provide special services should not constitute an expropriation.

What about Sea-Land's claim that the customs and labor regulations amounted to such an expropriation? Although this argument might have been accepted under *Revere's* effective control test, the Tribunal correctly rejected it here. The regulations were certainly within the scope of desired host-state competence. This is particularly true in light of the state of disorder in Iran during this period. In addition there is no indication that these regulations deprived the investor of substantially all value in his investment.

Sea-Land's last argument was that PSO had been unjustly enriched

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<sup>252</sup> *Id.* at 22.

<sup>253</sup> *Id.* at 24.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 24 (emphasis added).

by its actions and that it should be forced to compensate Sea-Land for that enrichment.<sup>256</sup> The Tribunal noted that unjust enrichment is a principle that has been widely accepted in municipal legal systems and applied by international tribunals:

The rule against unjust enrichment is inherently flexible as its underlying rationale is "to re-establish a balance between two individuals, one of whom has enriched himself with no cause, at the other's expense." Its equitable foundation "makes it necessary to take into account all the circumstances of each specific situation." It involves a duty to compensate which is entirely reconcilable with the absence of any inherent unlawfulness of the acts in question. Thus the principle finds an obvious field of application in cases where a foreign investor has sustained a loss whereby another party has been enriched, but which does not arise out of an internationally unlawful act which would found a claim for damages.

There are several instances of recourse to the principle of unjust enrichment before international tribunals. There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched.<sup>257</sup>

Reviewing the record, the Tribunal determined that PSO had made active use of the facility and awarded \$750,000 in compensation.<sup>258</sup>

Chamber One's analysis of the taking standard is based upon a solid foundation, but is flawed in one major area. As a foundation for his taking theory, Arbitrator Lagergren found that a taking has occurred when actions taken by the state "interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated."<sup>259</sup> Although somewhat circular in logic, the standard suggested in Lagergren's opinions seems to be identical to the substantial diminution in value test outlined above. In doing that it appears to comport well with preferred community policy goals. It pro-

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<sup>256</sup> *Id.* at 27.

<sup>257</sup> *Id.* at 28 (footnotes omitted). In determining the amount of damages to award, the Tribunal looked to "the level of investment; the period during which the foreign investor has been able to make a profit; and the benefit actually derived by the host country from the acquisition." *Id.* at 29. The Tribunal noted that PSO had a long term interest in the project in that it was to revert to PSO after six years. *Id.* It also pointed out that Sea-Land had been willing to invest approximately \$3 million dollars in the project. *Id.* Following Sea-Land's desertion of the project, PSO had possession of it for three years and four months prior to the date provided in the agreement. *Id.* at 30. The Tribunal rejected Sea-Land's claim that it should receive compensation under this theory for lost profits of \$6.4 million, stating that the appropriate level of compensation looks to the extent to which PSO was enriched. *Id.*

<sup>258</sup> *Id.* at 32.

<sup>259</sup> *Starrett*, Iranian Assets Litigation Rep. at 7701.

vides adequate competence to the host state authorities by providing a great deal of latitude before a taking will be found. At the same time the investor is assured that his property rights will not be rendered totally useless. This should serve to encourage international investment. Finally, because this standard is relatively clear, disputes regarding measures affecting property should be lessened.

Chamber One's reasoning is flawed, however, in one major respect. The *Starrett* and *Sea-Land* opinions have applied the test in an overly formalistic manner that ignores preferred community policy goals. In *Starrett*, despite numerous informal acts that should have amounted to a taking under the general rule laid out by Lagergren, Chamber One chose to base its taking finding on an official government act. Refusing to recognize that other, less formal, acts could constitute the basis for a taking does not reflect the goals of a preferred community policy. Although providing for adequate, even excessive, host state competence, the Chamber One standard as applied does little to assist in the furtherance of peaceful settlements and economic growth. Any taking regime must take into account informal acts if it is going to be effective in preventing conflict between wealth exporting and importing nations. In addition, an investor will not be assured by a rule that appears to be applicable only in cases involving a governmental decree.

This formalism can also be seen in the *Sea-Land* case. There Lagergren adds an intent element to the taking test. The host state must have deliberately taken an action that renders the investment worthless. Incidental effects caused by government action will apparently not be considered takings. This further removes Chamber One from our preferred community policy goals. Investors are not concerned with whether their investment has become valueless due to an act aimed directly at the investment or one that has the incidental effect of destroying value of the investment. If the goal is to encourage development, incidental takings must be considered. Indeed, it may be the incidental takings that are most likely to cause loss to a wealth exporter.

Although Chamber One's general taking standard is closer to the substantial diminution in value test, and thus preferred community policy goals, than the standard outlined by Chamber Two, the formalism exhibited in its application in these two cases prevent the decisions from becoming major stepping stones in the development of international law that reflects preferred community policy goals.

### C. Chamber Three Decisions

The decisions of Chamber Three relating to the taking of foreign investments are the least satisfying of those issued by the Tribunal to

date. In *Schering Corporation v. the Islamic Republic of Iran*,<sup>260</sup> Chamber Three rejected the claimant's assertion that Iran was responsible for the expropriation of the claimant's property by a "Workers' Council." Claimant Schering is a United States corporation involved in the manufacture and marketing of pharmaceutical products worldwide.<sup>261</sup> Through a complex series of subsidiaries, Schering wholly-owned an Iranian Corporation, Schering Corporation (Iran) Ltd. (Schering-Iran).<sup>262</sup> Schering-Iran was created to trade in Schering pharmaceuticals in Iran.<sup>263</sup> An Iranian corporation named Firooz purchased goods from Schering-Iran for distribution in Iran.<sup>264</sup> Royalties from the sales were paid by Schering-Iran to Schering under a Trademark Licensing Agreement, and dividends were paid in foreign exchange.<sup>265</sup> There was also an outstanding indebtedness of Schering-Iran to a Schering subsidiary of \$1.1 million.<sup>266</sup> After the Revolution, Workers' Councils were created in Iranian businesses and manufacturing plants, and Schering-Iran was no exception.<sup>267</sup> In January 1980, the Workers' Council at Schering-Iran took control of the enterprise.<sup>268</sup> At this point Schering-Iran ceased paying royalties on its sales and making loan payments.<sup>269</sup>

Before the Tribunal, Schering presented three claims. The first claim was for the payment of debts owned by Schering-Iran to Schering and its affiliates in the amount of approximately \$19 million.<sup>270</sup> Schering argued that the Bank Markazi imposed unlawful exchange restrictions and refused to honor drafts; and the Workers' Council at Schering had never paid approximately \$16 million for sales of pharmaceuticals to Schering-Iran; \$238,297 in past due royalties; \$69,000 in dividends; and \$1,854,328.83 for principal and interest on the loan.<sup>271</sup> Schering charged that the failure to honor these claims was in violation of Iranian law, the Treaty of Amity, Economic Relations and Consular Rights Between the United States of America and Iran dated August 15, 1955, the International Monetary Fund Agreement, and general principles of international law.<sup>272</sup>

Schering's second argument was that the Workers' Council, and

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<sup>260</sup> Iranian Assets Litigation Rep. 8325 (1984).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 8325.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 8327.

<sup>271</sup> *Id.* at 8326.

<sup>272</sup> *Id.* at 8328.

thus Iran, had expropriated \$1,135,154.30 from Schering-Iran.<sup>273</sup> Finally, the claimant charged that the Foundation for the Oppressed had taken control of Firooz, and refused to pay the \$5,367,000 that it owed Schering-Iran.<sup>274</sup> The claimant alleged that the Foundation for the Oppressed was an instrumentality of the Iranian government and that the government was responsible for its actions.<sup>275</sup>

Under the first claim, it was established that Bank Markazi had ordered the Foreign Trade Bank not to honor Schering drafts amounting to approximately \$400,000.<sup>276</sup> Finding no legitimate reason for the decision to refuse payment, the Tribunal decided for the claimant.<sup>277</sup> Claimant's assertion, that an additional \$1.2 million in drafts were refused, was rejected because of insufficient evidence.<sup>278</sup> The Tribunal failed to consider the claimant's contention that certain exchange restrictions were in violation of international law and the Treaty of Amity.<sup>279</sup> Arbitrator Mosk, however, felt that the exchange restrictions could have constituted a taking under international law.<sup>280</sup> According to Mosk, in determining whether a taking had occurred, factors such as whether the restrictions are non-discriminatory, whether they are justified on bona fide economic grounds, and whether the restrictions serve to extinguish the investor's enjoyment and use of his currency should be considered.<sup>281</sup> The dissent criticized the majority for failing to consider whether such a compensable taking had occurred, but concluded that, in any event, the restrictions are contrary to the Treaty of Amity because Iran had failed to justify their existence and in violation of the International Monetary Fund Agreement because prior approval had not been obtained for these additional restrictions.<sup>282</sup>

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<sup>273</sup> *Id.* The Tribunal chose to decide the case on the merits rather than decide the jurisdictional issues. *Id.* at 8327. One of the issues involved the effect of an alleged assignment on jurisdiction under the Claims Settlement Declaration. *Id.* One of the claims was based in part on a claim of Schering-Puerto Rico, which had apparently assigned its right to bring the action to Schering-U.S. *Id.* Iran claimed that the cause of action had not been continuously owned by the United States National from the date on which the claim arose to Jan. 19, 1981, as required by the Claims Settlement Declaration, art. VII, para. 2. *Id.* Iran also claimed that the third claim involved a claim by an Iranian corporation (Schering-Iran) against its own government and that the Tribunal lacked jurisdiction to hear such claims. *Id.*

<sup>274</sup> *Id.* at 8326.

<sup>275</sup> *Id.* at 8329.

<sup>276</sup> *Id.* at 8328.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 8328-29. This apparent lack of evidence was assailed by Mosk, the United States arbitrator, as error due to substantial evidence establishing that drafts had been presented for payment. *Id.* at 8333 (Mosk, Arb., dissenting).

<sup>279</sup> *See id.*

<sup>280</sup> *Id.* at 8337.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 8338.

The first claim also involved allegations that the Workers' Council had acted to prevent payment of debts due to Schering by Schering-Iran. Schering argued that the Schering-Iran Workers' Council had used duress in obtaining an agreement from the Schering-Iran Manager. That agreement required that Schering-Iran's cash be used "to purchase chemicals and finished products from affiliated companies of Schering-Iran; and that payments to those affiliated companies for merchandise payables existing on 31 December 1979 would be subject to, among others, completion of such purchase of chemicals and finished products."<sup>283</sup> Thus, because of actions by the Workers' Council, Schering and its affiliates were not paid amounts owing and were thus deprived of their property and contractual rights.

The claimant alleged that Iran was responsible for the action of the Workers' Council because the Council is an arm of the Iranian Government.<sup>284</sup> In determining whether the Workers' Councils are instrumentalities of the Iranian government, the Tribunal first looked to Principle 104 of the Constitution of the Islamic Republic of Iran, which reads:

In order to safeguard Islamic justice in the preparation of programs, and in the coordination of progress in the affairs of industrial and agricultural production units, councils composed of representatives of workers, farmers, and other employees and managers will be organized to operate in educational, administrative, and service units. These councils will thus be comprised of representatives of the members of these units. The manner of organizing these councils and the limits of their duties and privileges shall be prescribed by law.<sup>285</sup>

Further, the Rules for the Formation of Workers' Councils approved by the Council of Ministers of Iran in October 1979 provided:

The Islamic Republic of Iran does not consider the Workers' Council of any institution and the management thereof, as separate from each other, and believes that the interests of the workers are common to the interests of the institution and the interests of the institution are common to the interests of the country and the people, and recommends the following rules for the formation of the councils. These councils are functioning within the framework of the laws of the country and the relevant regulations.<sup>286</sup>

The Tribunal concluded that the councils' only duties are to represent the interests of the workers in dealing with management.<sup>287</sup> In likening

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<sup>283</sup> *Id.* at 8329.

<sup>284</sup> *Id.*

<sup>285</sup> ISLAMIC REPUBLIC OF IRAN CONST. principle 104, *quoted in* Iranian Assets Litigation Rep. at 8329.

<sup>286</sup> ISLAMIC REPUBLIC OF IRAN CONST. preamble, *quoted in* Iranian Assets Lit. Rep. at 8329-30.

<sup>287</sup> Iranian Assets Litigation Rep. at 8330.

the councils to labor unions, the Tribunal found that the Workers' Council was not acting on behalf of Iran:

Furthermore, regardless of what has now been said there is no evidence in this case that the Workers' Council in fact acted on behalf of the Government of Iran or any of its agencies or entities, that there was any government influence over the election of the members of the Council, that any governmental orders, directives or recommendations were issued to the Council or that it acted under instructions of any governmental body.<sup>288</sup>

Although persuasive on the surface, the Tribunal's opinion overlooks a number of facts that are brought out in the dissenting opinion of United States arbitrator Mosk. Mosk felt that Iran had failed to produce evidence regarding the relationship between the Workers' Councils and Iran, making it difficult to determine the exact role of the Councils.<sup>289</sup> In addition to the information relied on by the majority, Mosk pointed to the Legal Bill Establishing Islamic Workers' Councils for Manufacturing, Industrial, Agricultural, and Service Units of June 1980, which provided that the purpose of the Workers' Councils is to "buttress the foundations of the Islamic Republic of Iran" and to "increase the people's sense of their duty to safeguard and defend the Revolution . . . ."<sup>290</sup> In addition, Mosk looked to the Ministry of Labor and Social Affairs' responsibility for holding the elections of the Workers' Councils and to the existence of regional supervisory boards, which have as their presidents government representatives.<sup>291</sup> In concluding that the Workers' Councils were far more than "private labor organizations subject to government regulation," Mosk noted that the Iranian law "required the formation of Workers' Councils, dealt with their internal operation and specified that they serve more than the interests of the workers."<sup>292</sup> Indeed, in this case, the Workers' Council had based its actions on the assertion that Schering-Iran "and its foreign partners" had "selfish, im-

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<sup>288</sup> *Id.* (footnote omitted).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 8336.

<sup>291</sup> *Id.* Mosk further pointed out that

[t]he Office of Employment determines where such boards are to be convened. Article 13 provides that "[i]n order to establish supervisory boards for council affairs, regulate their programs and oversee their activities, as well as to provide the necessary coordination, a bureau to be known as the 'coordination bureau over the supervisory boards for council affairs' will be created within the Ministry of Labor and Social Labor and Social Affairs." Article 16 provides that the Ministry of Labor and Social Affairs is responsible for insuring that the laws concerning the Workers' Councils "are properly implemented." Subsequent laws were enacted concerning the formation and operation of the Workers' Councils.

*Id.*

<sup>292</sup> *Id.* at 8336-37.

perialist motives” and an intent “to gain higher profits and plunder the Iranian people.”<sup>293</sup> Finally, Mosk pointed to the memorandum from the Workers’ Council to Schering-Iran stating that the Council was “responsible to [the] Iran revolutionary government and people.”<sup>294</sup> Concluding that the Tribunal had erred in failing to discuss adequately these issues, Mosk asserted that Iran’s failure to provide evidence on the issue should have led to the conclusion that the Workers’ Councils were state entities.<sup>295</sup>

In view of its finding that the Workers’ Council was not an agency or instrumentality of the state, the Tribunal refused to hold that Iran was responsible for the acts alleged in claim one or two.<sup>296</sup> Thus, the expropriation claim was dismissed.<sup>297</sup>

The final claim, based on a debt allegedly owed by Firooz to Schering-Iran, was dismissed because it was not an outstanding claim as of January 9, 1981, as required by the Claims Settlement Agreement.<sup>298</sup>

The major question of interest in this case is whether Iran should be required to pay compensation for the acts of its Workers’ Council. The Tribunal seemed to be of the opinion that an entity such as the Workers’ Council is either a private labor union or a government agency of the traditional type. The lack of inquiry into the actual functions of the entity reflects the failure to assess the reality of the situation. Arbitrator Mosk correctly noted that there was sufficient evidence to establish that this entity was more than a traditional labor union, and Iran should have been forced to establish otherwise. The Tribunal’s failure to hold is another example of the rigidity that has marked a number of its opinions.

On December 19, 1983, Nils Mangard, the Chairman of Chamber Three, issued an Award in *American International Group, Inc. and Islamic Republic of Iran*.<sup>299</sup> Richard Mosk, the United States arbitrator, filed an opinion concurring in the result,<sup>300</sup> but the Iranian arbitrator, Parviz Ansari Moin, refused to sign the Award.<sup>301</sup>

The claim arose from the nationalization of an Iranian insurance company, Iran America, in which the claimant held an equity interest, pursuant to the Law of Nationalization of Insurance Companies.<sup>302</sup> The

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<sup>293</sup> *Id.* at 8337 n.5.

<sup>294</sup> *Id.* at 8337.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 8330.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 8332. Schering-Iran had apparently granted Firooz an extension beyond this date. *Id.* at 8331.

<sup>299</sup> Iranian Assets Litigation Rep. 7744 (1984).

<sup>300</sup> *Id.* at 7752.

<sup>301</sup> *Id.* at 7751.

<sup>302</sup> *Id.* at 7744-45.

company was subsequently managed by a director chosen by a governmental board, and the assets of the company were later transferred to Asia Iran Insurance Company.<sup>303</sup> The claimants alleged that the nationalization was in violation of international law and that prompt, adequate, and effective compensation must be provided under the principles of customary international law and the provisions of the Treaty of Amity.<sup>304</sup> They also alleged that actions preceding the formal nationalization amounted to an expropriation of the company.<sup>305</sup>

In addition to several technical arguments,<sup>306</sup> Iran argued that the Tribunal lacked jurisdiction to hear the claim because a nationalization is not an expropriation under international law and the Tribunal is limited to hearing cases dealing with expropriation.<sup>307</sup> Substantively the Iranians adopted the position of the developing nations. Iran felt that it had not violated international law in nationalizing Iran America because nationalization is universally recognized "as an expression of the permanent sovereignty which every nation enjoys over national resources and economic activities within its territory."<sup>308</sup> While Iran recognized that there was a duty to compensate, it argued that international law does not require that the compensation be paid promptly, only that the nationalizing state indicate promptly that compensation will be paid "within a reasonable time."<sup>309</sup> Iran also took the position that the Treaty of Amity was no longer in force and that, even if it were, no "taking," as defined in the Treaty, had occurred.<sup>310</sup>

The Award dismissed Iran's claim that the Tribunal lacked jurisdiction because Iran's actions constituted nationalizations rather than expropriations.<sup>311</sup> The Tribunal felt that the term "expropriation" includes nationalizations as well as other forms of taking.<sup>312</sup> Even if it does not, the Tribunal reasoned that the Declaration grants jurisdiction over "other measures affecting property rights," providing an adequate basis for jurisdiction in this case.<sup>313</sup>

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<sup>303</sup> *Id.* at 7745.

<sup>304</sup> *Id.* at 7747.

<sup>305</sup> *Id.* at 7745 n.2.

<sup>306</sup> *See id.* at 7745.

<sup>307</sup> *Id.* Iran also argued that the Iranian Commercial Code gives domestic courts exclusive jurisdiction over domestic corporations, "that the Claimant has failed to exhaust local remedies provided in the Iranian law and that the nationalization of insurance companies was an Act of State which is not subject to review by an international tribunal." *Id.* Although the Tribunal did not directly discuss these claims, its decision indicates that they must have been rejected.

<sup>308</sup> *Id.* at 7747.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 7746.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

On the merits, the Award stated that the nationalizations were not illegal under customary international law or the Treaty of Amity because they were undertaken for a public purpose and were not discriminatory.<sup>314</sup> Without discussion, the Tribunal concluded that even though lawful, a nationalization must be compensated.<sup>315</sup> Since no compensation had been paid, the Tribunal reasoned that Iran is now obligated to pay damages.<sup>316</sup> The remainder of the Award focused on determining the amount of compensation due. The Tribunal found that "the valuation should be made on the basis of the fair market value of the shares in Iran America at the date of nationalization."<sup>317</sup>

In setting the date of the taking, the Award looked to the time of the formal nationalization of the company pursuant to Iranian law. There is no discussion of whether government acts or acts attributable to the government might have constituted a taking prior to this date.

The *Schering* and *American Int'l Group* cases are disappointing in that they do little to address the issue of what measure of host state interference constitutes a taking under international law. There is no evidence of any attempt in either of these cases to come up with a working definition of a taking, despite arguments by the claimants that Chamber Three should reject formalistic notions of what constitutes a taking. Consequently, the cases do little to assist in the development of an international minimum standard that comports with preferred community policy goals.

## V. CONCLUSION

Do the taking decisions of the Iran-U.S. Claims Tribunal provide a basis for the further development of international law in light of preferred community policy goals? The opinions provide a basis for both optimism and pessimism. The basic standard set out in Arbitrator Lagergren's opinions defines a taking as an interference with property that renders that property so useless that it must be considered to have been expropriated. This seems to be identical to the substantial diminution in value standard. Such a construction of the taking standard comports with preferred community policy goals. It provides the host state with adequate competence to rule effectively by requiring that state interference reach a very high level before a taking will be found. It provides investors with much needed protection from acts that destroy the value of their investments. This should help to encourage additional investment and development. Finally, it provides a relatively certain basis on

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<sup>314</sup> *Id.* at 7748.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 7749.

which taking determinations may be based, which should reduce the likelihood of a resort to coercive measures.

Chamber Two's basic standard is less sound. By pointing to the deprivation of fundamental rights as the taking, Chamber Two is adding to the confusion surrounding this issue. Determining what constitutes a fundamental right is very difficult. Depending on the orientation of the decisionmaker, a fundamental right may be seen as some minor stick in the bundle of property rights or as something much more important. This approach fails to adequately provide for host state competence. If a host state action affecting one "fundamental right" can amount to a taking, even when the owner is not deprived of substantially all value in his investment, the ability of the host state to regulate will be curtailed. In addition, the difficulty in defining a fundamental right makes it likely that disputes will arise over what constitutes such a right.

Chamber Three's decisions, which fail even to attempt to create a taking standard, are the least satisfying. A case-by-case analysis without any attempt to define the threshold level for a taking does little to advance preferred community policy goals. Such short-sighted analysis tells us nothing about what the court is doing or what parties may expect in the future.

One element that can be found in all of these opinions, with the possible exception of those from Chamber Two, is a propensity to look to formal acts rather than informal acts in reaching conclusions. This resort to formalism can most easily be seen in the *Starret*, *Sea-Land*, and *Schering* cases. While adopting a standard that seems to reject traditional formalistic views, the Tribunal proceeded to decide cases based on formal measures such as the appointment of managers. Chamber One's requirement that the investment be rendered useless by an intentional act of the host state aimed at the foreign investment is also troubling. Foreign investment is harmed just as much by incidental effects and informal acts as by those that are intended. Perhaps the Tribunal's failure fully to apply its own basic standards reflects the difficult internal political situation on the Tribunal. Made up of one-third Iranians, one-third Americans, and one-third neutrals, it has not been easy to develop any sort of working consensus. This can be seen in the comments of Arbitrator Shafeiei in his *TAMS-AFFA* dissent:

[W]e Iranian arbitrators have written that this Tribunal, as now constituted, is in no sense impartial and is not competent to adjudicate the disputes of a Third World country with the United States. I perceived this clear and overt lack of impartiality in the adjudication of the present case. Mr. Riphagen ignored all the rules of law and even the most elementary technical and accounting rules. At a certain stage of our study and deliberations, it became thoroughly clear to me that Mr. Riphagen's aim is to transfer millions of dollars to the United States

from Iran's security account. Therefore, all my efforts in analyzing the legal, technical, and accounting issues, and even my efforts to arrive at least at a more or less equitable solution, have been to no avail.

Because I am entirely convinced that the deliberations and adjudication in connection with the present case were neither just nor impartial, and that the transfer of these millions of dollars to the United States from the account of the Iranian nation is taking place in an illegal and illegitimate manner, I have refused to sign the present award. Should the "award" be automatically enforced, depriving thereby the Government of the Islamic Republic of Iran of its rights to a meaningful defence and legitimate objections, then what has taken place as "international arbitration" cannot, in my view, be regarded as anything but a clear instance of misappropriation of the national assets of the Islamic Republic of Iran.<sup>318</sup>

Given the history of United States interference in Iranian affairs, it is understandable that there should be some bitterness on the part of the Iranian government towards the United States. This has been reflected in the failure to normalize the relationship between the United States and Iran. There may even be pressure from the home front on the Iranian arbitrators to take a hard line in the Tribunal's deliberations. The attack on the Swedish arbitrator by two Iranian arbitrators may merely be a symptom of these problems.<sup>319</sup> There may also be some concern that the Iranians will desert the arbitration process completely and refuse to provide additional funds for the security fund. These factors may be responsible for the formalistic attitude that has been found in Tribunal decisions to date. It seems easier to justify a decision when it can be based on formal acts or agreements rather than on informal acts. Concern over Iranian participation may be fueling the fires of formalism. It will be interesting to watch the Tribunal as it progresses with two new Iranian arbitrators.<sup>320</sup> Will the formalism persist?

What do these cases portend for the future? Several things have been clearly established by the Tribunal. First, the developing nations argument that there may be no duty to provide compensation was clearly rejected in these cases. When a taking has occurred, compensation will be required. The cases also fail to lend any credence to the argument that compensation should not be required because of American economic or political imperialism.

The cases also establish that a taking can occur without a physical confiscation of a foreign investment. For the most part the economic impact on the investor will be the main consideration. A taking will be

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<sup>318</sup> No. 141-7-2, slip op. at 46 (Shafeiei, Arb., dissenting).

<sup>319</sup> See *supra* note 18 for a description of the event.

<sup>320</sup> *Id.*

found when an investor is deprived of fundamental rights of ownership or his property has become useless. These are all positive developments when considered in light of preferred community policy goals. The Tribunal's decisions have missed the mark, however, due to the formalistic application of the taking standard and an inability to define a precise notion of a "fundamental right." It is unfortunate that the Tribunal did not look at each case to determine at what point the investor was deprived of substantially all value in his investment. Such a test necessarily rejects formalism and comports with all of the preferred community policy goals. It serves to protect investors against measures affecting their property rights. It also provides a definite standard that is likely to lessen the use of coercion. The host state will know that it has flexibility in creating policies to encourage economic and social growth. This test balances all of the preferred community policy goals and provides an appropriate standard for the international community. Given the importance that this Tribunal will play in the development of international law, it will be interesting to see if its future holdings address the shortcomings of these cases.