

**EXPROPRIATIONS AND OTHER MEASURES  
AFFECTING PROPERTY RIGHTS IN THE CASE LAW OF  
THE IRAN-UNITED STATES CLAIMS TRIBUNAL**

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**ABSTRACT**

The international law of expropriation cannot be understood without the case law of the Iran-United States Claims Tribunal. This highly influential jurisprudence construes and applies notions like property, expropriation, deprivation, taking, appropriation, and compensation through a series of decisions that acknowledge the customary international minimum standard of treatment for aliens, and develops it. The Iran-United States Claims Tribunal supported the distinction between lawful and unlawful expropriations, reasserting the traditional requirements of the former: public purpose, non-discrimination, and compensation. Many of the tribunal's decisions dealt with indirect expropriations. This circumstance forced it to establish a threshold for compensable and non-compensable measures, which focused on the nature of the correspondent action or omission. Expropriations were conceptualized as non-ephemeral and unreasonable interferences amounting to a deprivation of the use and control of property. In this respect, the tribunal generally followed an effects approach, stressing the consequences of the respective measure. Such an approach was supplemented by a police-powers exception for *bona fide* regulation, applied from an effects viewpoint. Even though the Iran-United States Claims Tribunal gave host states a wide margin of appreciation in the exercise of their regulatory power, the phrase "other measures affecting property rights" of the tribunal's constituent treaty

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allowed it to compensate for deprivations which did not amount to takings.

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**INTRODUCTION**

The Iran-United States Claims Tribunal (“Iran-U.S. CT”) was set up in 1981 as part of a political compromise reached by the Iranian and U.S. governments.<sup>1</sup> In conformity with its constitutive treaty, the tribunal was established to settle disputes between the nationals of both states arising out of interferences with an international minimum standard of treatment, which protected them against expropriations and other measures affecting property rights.<sup>2</sup> No definition was given in this instrument to property. The Iran-U.S. CT chose the traditional wide notion, comprising tangibles and intangibles.<sup>3</sup> It interpreted expropriation as covering both *de jure* and *de facto* takings, the latter derived not only from acts but also from omissions.<sup>4</sup> Before the establishment of the Iran-U.S. CT, only a handful of decisions given by claims commissions, the Permanent Court of International Justice (“PCIJ”), arbitral tribunals, and the International Court of Justice (“ICJ”), had referred to the expropriation of aliens.<sup>5</sup> The judgments of the Iran-U.S. CT formed the

<sup>1</sup> See *infra* Part I.

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

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

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

<sup>5</sup> See, e.g., Norwegian Shipowners (Nor. v. U.S.), 1 R.I.A.A. 307 (1921); Factory at Chorzow (Ger. v. Pol.) (Perm. Ct. Arb. 1928); Oscar Chinn (Gr. Brit. V. Belg.) (Perm. Ct. Arb. 1934); British Petrol. Exploration Co. v. Libya, 53 I.L.R. 297 (1974); Tex. Overseas Petrol. Co. & Cal.

first clear and detailed international case law on this issue. The link between expropriation, taking, and deprivation was thus established in a generally coherent jurisprudence, which illustrates when an act is expropriatory, and when it is not.<sup>6</sup>

The tribunal recognized and developed the protection against expropriation included in the minimum standard of customary international law, without losing sight of the jurisdiction given in its constitutive treaty.<sup>7</sup> The Iran-U.S. CT did not hesitate to solve the thorny issue of the state's intent at the moment of taking the property of an alien.<sup>8</sup> Adopting an effects approach in most of the cases brought before it, the Iran-U.S. CT awarded compensation when there was a nonephemeral and unreasonable interference of the state with the enjoyment of the constituent elements of the right of property: that is to say, with the use or control of the property and of the economic benefits derived from it.<sup>9</sup> The tribunal also construed and applied the notion of other measures affecting property rights within its jurisdiction.<sup>10</sup> Through the application of this concept, the Iran-U.S. CT was able to award compensation in those situations where the deprivation was not tantamount to a taking.<sup>11</sup> To this effect, the tribunal relied on the interpretation given by the European Court of Human Rights to the notion of other interferences with the peaceful enjoyment of possessions.<sup>12</sup>

In conformity with Article 32 of the Tribunal Rules of Procedure of 3 May 1983, the jurisprudence of the Iran-U.S. CT is publicly available and expressly reasoned.<sup>13</sup> For this reason, the work of the tribunal constitutes an indispensable guide for decision makers confronted with the difficult problem of establishing the boundaries of compensable and noncompensable state measures. The present article studies this case law, profusely quoted and referred to by international arbitral tribunals, particularly in investor-to-state disputes. It deals with

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Asiatic Oil Co. v. Libya, 17 I.L.M. 1 (1978); Libyan American Oil Co. v. Libya, 20 I.L.M. 1 (1977); American Indep. Oil Co. v. Kuwait, 21 I.L.M. 976 (1982); Anglo-Iranian Oil Co. (U.K. v. Iran), 1952 I.C.J. 91 (July 22).

<sup>6</sup> See *infra* Parts I, II.

<sup>7</sup> See *infra* Parts II, III, IV.

<sup>8</sup> See *infra* Part II.

<sup>9</sup> See *infra* Parts III, IV.

<sup>10</sup> See *infra* Part I.

<sup>11</sup> See *infra* Parts I, III.

<sup>12</sup> See *infra* Part I.

<sup>13</sup> Reprinted in 2 IRAN-U.S. CL. TRIB. REP. 433 (1984).

the Iran-U.S. CT's definition of property and expropriation, as well as with its views on those acts that constitute a taking and those that do not. The notion of other measures affecting property rights, as developed in the case law of this tribunal, is analyzed too. Finally, the traditional requirements of public purpose, nondiscrimination, and compensation are seen from the standpoint of the Iran-U.S. CT.

### I. TAKINGS IN AN AD HOC FORUM

The 1979 Iranian revolution that replaced the constitutional monarchy under the *Shah*<sup>14</sup> for an Islamic Republic under the *Rahbar*<sup>15</sup> gave rise to most of the expropriation claims presented to the Iran-U.S. CT.<sup>16</sup> In the context of a strong anti-Western rhetoric that led to political and civil unrest, U.S. business dependents and representatives were gradually repatriated or forced to depart the country.<sup>17</sup> The new Iranian government wanted complete control of vital sectors of the economy, like banks, insurance companies, heavy and oil industries, all of which were nationalized in 1979 and 1980.<sup>18</sup> Besides direct expropriations, Iran also implemented other measures that affected foreign investors. For example, it encouraged the formation of workers' councils to manage their businesses and replaced those managers and directors designated by the respective company for those appointed by the Iranian authorities.<sup>19</sup> In 1979, when the U.S. embassy in Tehran was seized, and nationals of the sending state were taken hostages, all existing business contacts between Iran and the United States were brought to an end.<sup>20</sup>

Iran failed to comply with the orders to release the hostages issued by the ICJ in the *United States Diplomatic and Consular Staff in*

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<sup>14</sup> Persian for "monarch", the title of former Iranian rulers.

<sup>15</sup> Persian for "supreme leader", currently the highest political and religious authority in Iran.

<sup>16</sup> GEORGE H. ALDRICH, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 171 (1996);

See also Charles N. Brower, *Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-United States Claims Tribunal*, 21 INT'L LAW. 639, 641-43 (1987); or CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 369-72 (1998).

<sup>17</sup> BROWER & BRUESCHKE, *supra* note 16, at 370.

<sup>18</sup> *Id.* at 371.

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

<sup>20</sup> *Id.* at 372.

*Tehran* case.<sup>21</sup> The United States launched an unsuccessful rescue operation and adopted internal measures to exert economic pressure on the new government in Iran, the most important of which was the freezing of Iranian assets.<sup>22</sup> Negotiations finally took place between the two states during 1980, under the good offices of the Algerian government.<sup>23</sup> The crisis was settled in 1981 through a group of treaties known as the Algiers Accords.<sup>24</sup> The Claims Settlement Declaration that established the Iran-U.S. CT was one of them.<sup>25</sup>

#### A. DEFINING PROPERTY AND EXPROPRIATION

Most cases brought before the Iran-U.S. CT were related to the injury of aliens caused in the context of the Iranian revolution. For this reason, the Iran-U.S. CT can fairly be considered a contemporary version of the claims commissions or mixed tribunals established at the beginning of the twentieth century.<sup>26</sup> According to Article II, paragraph 1 of the Claims Settlement Declaration, the Iran-U.S. CT was set up to resolve disputes between nationals of both countries arising, among other things, out of “expropriations and other measures affecting property rights.”<sup>27</sup> Individuals were allowed to present their claims directly to the tribunal without having to resort to diplomatic protection or having to exhaust local remedies.<sup>28</sup> The disputes mentioned in Article II, paragraph 1 had to be resolved in conformity with Article V of the same treaty.<sup>29</sup>

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<sup>21</sup> See Stefan A. Riesenfeld & David D. Caron, *United States-Iran Agreement of January 19, 1981 (Hostages and Financial Agreements)*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 1218 (Rudolf Bernhardt ed., 2000), Vol. IV.

*See generally* Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. No. 64 (Dec. 15); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. No. 64 (May 24).

<sup>22</sup> See ALDRICH, *supra* note 16, at 171.

<sup>23</sup> See Riesenfeld & Caron, *supra* note 21, at 1218–19.

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

<sup>25</sup> Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 1 Iran-U.S. Cl. Trib. Rep. 9 (1983); Besides the Claims Settlement Declaration, the Algiers Accords consisted of three political agreements and two technical ones.

*See* Brower, *supra* note 16, at 640; Riesenfeld & Caron, *supra* note 21, at 1219.

<sup>26</sup> Daniel Müller, *Other Specific Regimes of Responsibility: The Iran-US Claims Tribunal*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 843, 844 (James Crawford et al. eds., 2010).

<sup>27</sup> *See* Declaration, *supra* note 25.

<sup>28</sup> Müller, *supra* note 26, at 844.

<sup>29</sup> *See* Declaration, *supra* note 25.

That is: “on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.”<sup>30</sup>

Although Article II, paragraph 1 did not define “property rights,” the tribunal followed the general approach in international legal practice and opted for a broad notion of property, including both tangibles and intangibles. The Iran-U.S. CT’s solution followed those adopted by the 1922 *Norwegian Shipowner’s* claim, the 1926 *Chorzow Factory* case, and the 1934 *Oscar Chinn* case.<sup>31</sup> In the interlocutory award of *Starrett Housing*, the Iran-U.S. CT declared that property must be deemed to comprise physical assets as well as contract rights.<sup>32</sup> This wide concept was confirmed in the final award of the same case, where the tribunal stated that “[i]t is a well-settled rule of customary international law that a taking of one property right may also involve a taking of a closely connected ancillary right.”<sup>33</sup> In conformity with this broad notion of property, management rights,<sup>34</sup> the right to receive dividend payments,<sup>35</sup> and other shareholders’ rights and interests,<sup>36</sup> *inter alia*, would be included within the Claims Settlement Declaration. The partial award of *Amoco International Finance* gave a concept of takings that illustrates the wide scope of its object: “[e]xpropriation, which can be defined as a compulsory transfer of property rights, may extend to any rights which can be the object of a commercial transaction, i.e. freely sold and bought, and thus has a monetary value.”<sup>37</sup> This scope was, nonetheless, not

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<sup>30</sup> See John Westberg, *Applicable Law, Expropriatory Takings and Compensations in Cases of Expropriation: ICSID and Iran-United States Claims Tribunal Case Law Compared*, 8 ICSID REV. 1, 5 (1993).

<sup>31</sup> See generally *Norwegian Shipowners*, *supra* note 5; *Factory at Chorzow*, *supra* note 5; *Oscar Chinn*, *supra* note 5. See also August Reinisch, *Expropriation*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 411–14 (Peter Muchlinski et al., eds. 2008).

<sup>32</sup> *Starrett Hous. Corp. v. Iran*, Interlocutory Award, 4 Iran-U.S. Cl. Trib. Rep. 122, 156–57 (1983).

<sup>33</sup> *Starrett Hous. Corp. et al v. Iran*, Final Award, 16 Iran-U.S. Cl. Trib. Rep. 122 (1988), at 230; see also *Phillips Petrol. Co. v. Iran*, 21 Iran-U.S. Cl. Trib. Rep. 79, 115 (1989).

<sup>34</sup> See *SEDCO Inc. v. Nat’l Iranian Oil Co.*, 9 Iran-U.S. Cl. Trib. Rep. 248, 277 (1985).

<sup>35</sup> See *Foremost Tehran Inc. v. Iran*, 10 Iran-U.S. Cl. Trib. Rep. 228, 244–50 (1987).

<sup>36</sup> See *Payne v. Iran*, 12 Iran-U.S. Cl. Trib. Rep. 3, 7–11 (1988); See generally BROWER & BRUESCHKE, *supra* note 16, at 374–75.

<sup>37</sup> *Amoco Int’l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, 220 (1987).

unlimited. The tribunal excluded, for instance, claims that sought compensation for personal injuries.<sup>38</sup>

The Iran-U.S. CT considered expropriation and taking to be synonyms.<sup>39</sup> According to Allahyar Mouri, a distinction appears to have been made between these concepts and deprivation.<sup>40</sup> As he explains, in the tribunal's case law "expropriation always results in a deprivation of the owner of that property or right," but "the converse is not always true: deprivation is not in all circumstances an act of expropriation."<sup>41</sup> In most cases where a deprivation was found, however, the tribunal did conclude that it amounted to a taking.<sup>42</sup> Judge Charles Brower declared in *Eastman Kodak* that an expropriation usually implies "that the State involved has itself acquired the benefit of the affected alien's property or at least has been the instrument of its redistribution."<sup>43</sup> Acknowledging that this might not always be the case, in *Tippetts, Abbett, McCarthy, Stratton (TAMS)* the tribunal preferred to use "deprivation" over "taking" because "the latter may be understood to imply that the Government has acquired something of value, which is not required."<sup>44</sup> In the same award, nonetheless, the Iran-U.S. CT declared that "[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."<sup>45</sup>

As illustrated in this last paragraph, the Iran-U.S. CT construed the term "expropriation" used in the Claims Settlement Declaration to cover not only *de jure*, but also *de facto* takings.<sup>46</sup> The tribunal dealt with few claims of direct expropriation and it had no problems finding that a taking took place when there was an Iranian law expressly nationalizing an industry or a particular entity.<sup>47</sup> The majority of the cases brought

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<sup>38</sup> See *Haddadi v. U.S.*, 8 Iran-U.S. Cl. Trib. Rep. 20, 22 (1985); *See also Rankin v. Iran*, Award, 17 Iran-U.S. Cl. Trib. Rep. 135, 148 (1987).

<sup>39</sup> See ALLAHYAR MOURI, *THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN-U.S. CLAIMS TRIBUNAL* 66-69 (1994).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 88.

<sup>42</sup> Westberg, *supra* note 30, at 15; George Aldrich, *What Constitutes a Compensable Taking: The Decisions of the Iran-United States Claims Tribunal*, 88 AM. J. INT'L L. 585, 589 (1994); ALDRICH, *supra* note 16, at 178.

<sup>43</sup> *Eastman Kodak Co. v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 153, 173, 181 (1987).

<sup>44</sup> *Tippetts v. TAMS-AFFA*, 6 Iran-U.S. Cl. Trib. Rep. 219, 225 (1986).

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

<sup>46</sup> See MOURI, *supra* note 39, at 70-99; BROWER & BRUESCHKE, *supra* note 16, at 376-83.

<sup>47</sup> See, e.g., *Am. Int'l Grp. Inc. v. Iran*, 4 Iran-U.S. Cl. Trib. Rep. 96 (1983); *Amoco Int'l Fin. Corp.*, *supra* note 37, 220.

before the tribunal was related to claims of indirect expropriation, where there was either a *de facto* seizure of property without any formal declaration announcing the taking or there was such formal declaration, but a *de facto* taking had allegedly occurred at an earlier date.<sup>48</sup> Both acts and omissions were included in the tribunal's case law on indirect expropriation.<sup>49</sup> The Iran-U.S. CT generally required an affirmative action from the government that adopted the challenged measure before finding that a taking attributable to that state had occurred.<sup>50</sup>

The tribunal further distinguished the term "taking" or "expropriation" from "appropriation," the latter being not an act of the state, but of a private person (like the party to a contract) that results in the owner's deprivation.<sup>51</sup> Charles Brower and Jason Brueschke point out that the tribunal's awards often seem "somewhat lax" when keeping strict conceptual distinctions between acts constituting "expropriation," "deprivation," or "appropriation."<sup>52</sup> According to these authors, the main reason for this attitude was the fact that a decision of the tribunal was "immediately and automatically satisfied from the Security Account, regardless of [its] theoretical basis."<sup>53</sup>

Establishing the date of the taking was a difficult task for the judges. Most of the indirect expropriation cases presented before the tribunal corresponded to claims of creeping or constructive takings. This date was important not only in relation to the jurisdictional deadline fixed in the constitutive treaty of the Iran-U.S. CT,<sup>54</sup> but also for the valuation of the property taken, the determination of the exchange rate of the currency in which the compensation was to be paid, and the moment from which the interest was to run on the award.<sup>55</sup> *International*

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<sup>48</sup> See BROWER & BRUESCHKE, *supra* note 16, at 377–78; See also Maurizio Brunetti, *The Iran-United States Claims Tribunal, NAFTA Chapter 11, and the Doctrine of Indirect Expropriation*, 2 CHI. J. INT'L L., no. 2., 2001, at 205.

<sup>49</sup> BROWER & BRUESCHKE, *supra* note 16, at 383.

<sup>50</sup> *Id.*

<sup>51</sup> MOURI, *supra* note 39, at 172–74. See, e.g., *SEDCO Inc. v. Nat'l Iranian Oil Co. and Iran, Award*, 15 Iran-U.S. Cl. Trib. Rep. 23 (1988); *Component Builders, Inc. v. Iran* 23 Iran-U.S. Cl. Trib. Rep. 3, 25 (1989).

<sup>52</sup> BROWER & BRUESCHKE, *supra* note 16, at 380.

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

<sup>54</sup> The tribunal had jurisdiction over claims and counterclaims that were outstanding on January 19, 1981.

Art. II para. 1 of the Claims Settlement Declaration. See Declaration *supra* note 25.

<sup>55</sup> BROWER & BRUESCHKE, *supra* note 16, at 430–31.



*Technical Products* gave a solution to this problem in the following terms:

Where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of the property, the breach forming the cause of action is deemed to take place on the day when the interference has ripened into more or less irreversible deprivation of the property rather than on the beginning date of the events. The point at which interference ripens into a taking depends on the circumstances of the case and does not require that legal title has been transferred.<sup>56</sup>

In this case, the Iran-U.S. CT considered expropriation claims to be outstanding on the date of the taking of property.<sup>57</sup> Several other awards later followed this standard.<sup>58</sup>

#### B. OTHER MEASURES AFFECTING PROPERTY RIGHTS

The international minimum standard, applicable under the Claims Settlement Declaration, offered Iranian and U.S. nationals a protection that went beyond that traditionally offered by the international law of expropriation. The Declaration gave the Iran-U.S. CT jurisdiction over disputes arising not only out of takings, but also out of “other measures affecting property rights.”<sup>59</sup> The tribunal found deprivations that fitted this description in a number of cases where the level of the interference did not amount to an actual taking.<sup>60</sup> The phrase was given a broad meaning, and a variety of measures—whether actions or omissions, and irrespective of their form of execution—were considered to be able to affect the property of Iranian or U.S. nationals. Even the failure to exert due diligence in the protection of the foreign investor, or a tortious act affecting his property, were exceptionally accepted as included in this phrase.<sup>61</sup> According to Mouri, in general:

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<sup>56</sup> Int’l Tech. Prod. Corp. v. Iran, 9 Iran-U.S. Cl. Trib. Rep. 206, 240–41 (1985).

<sup>57</sup> *Id.*

<sup>58</sup> See, e.g., Int’l Sys. & Control Corp. v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 239, 263 (1986); Malek v. Iran, 28 Iran-U.S. Cl. Trib. Rep. 246, 288–89 (1996).

<sup>59</sup> See Declaration, *supra* note 25, at Art. II.

<sup>60</sup> MOURI, *supra* note 39, at 67–68; BROWER & BRUESCHKE, *supra* note 16, at 379. See also SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION 200 (2009).

<sup>61</sup> See, e.g., Schering Corp. v. Iran, Award, 5 Iran-U.S. Cl. Trib. Rep. 361, 363 (1984); Short v. Iran, 16 Iran-U.S. Cl. Trib. Rep. 76 (1987). Compare Grimm v. Iran, Award, 2 Iran-U.S. Cl. Trib. Rep. 78 (1984), at 79; Int’l Sys. & Control Corp. 12 Iran-U.S. Cl. Trib. Rep. 239 (1986). See generally MOURI, *supra* note 39, at 119–29.

the Tribunal's awards based on the phrase 'other measures affecting property rights' required a threshold showing that the State committed serious, specific, and unreasonable acts of interference with the actual use and benefit of a particular property or with the fundamental property rights of a given claimant, with irreversible deprivative consequence similar to that arising from expropriation.<sup>62</sup>

Veijo Heiskanen points out that the Iran-U.S. CT resorted to "other measures" exceptionally and that only few claims were resolved solely on this basis, while the bulk of them involved takings.<sup>63</sup> The tribunal found the Iranian authorities liable for subjecting the claimant to other measures in *TAMS*.<sup>64</sup> An equally owned entity called TAMS-AFFA had been created in 1975 by a U.S. partnership (TAMS) and an Iranian firm (AFFA)<sup>65</sup> for the sole purpose of performing engineering and architectural services on the Tehran International Airport. TAMS-AFFA's articles of partnership established the joint control of the entity by its partners. This meant that any decision required the consent of at least one member appointed by TAMS and one member appointed by AFFA, and that the authority to sign documents creating obligations for TAMS-AFFA was vested in two individuals, one appointed by each partner. At the beginning of 1979, the Tehran International Airport project almost completely stopped as a result of the Iranian revolution. The government of Iran appointed a temporary manager for AFFA, who also assumed the role of manager of TAMS-AFFA and started to sign checks by himself on its behalf, as well as making personnel and other decisions without consulting TAMS. Negotiations took place during 1979 between the U.S. company and the manager of TAMS-AFFA with some success. This trend was reversed after the hostage crisis occurred at the end of the same year, and TAMS-AFFA stopped reporting to the foreign investor and responding to its letters and faxes. The Iran-U.S. CT considered TAMS to be deprived of its property interests in TAMS-AFFA from this moment. No taking, however, was found. The tribunal concluded that Iran was responsible for other measures affecting the claimant's rights.<sup>66</sup>

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<sup>62</sup> MOURI, *supra* note 39, at 129.

<sup>63</sup> Veijo Heiskanen, The Contribution of the Iran-United States Claims Tribunal to the Development of the Doctrine of Indirect Expropriation, 5 INT'L L. F. 176, 179 (2003); Veijo Heiskanen, *The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal*, 8 J. WORLD INVESTMENT 215, 219 (2007).

<sup>64</sup> *See generally* Tippetts v. TAMS-AFFA, 6 Iran-U.S. Cl. Trib. Rep. 219, 225 (1986).

<sup>65</sup> The firm was Aziz Farmanfarmanian & Associates.

<sup>66</sup> *See generally* Tippetts v. TAMS-AFFA, 6 Iran-U.S. Cl. Trib. Rep. 219, 225 (1986).

*Foremost Tehran* is another example of a lesser interference with the property of an alien—that is to say, one that did not amount to an expropriation.<sup>67</sup> In this case, a U.S. group of companies (Foremost) owned a percentage in an Iranian joint stock company (Pak Dairy).<sup>68</sup> After expatriating its personnel in Iran, Pak Dairy declared dividends in 1979, 1980, and 1981, and paid them to Iranian stockholders, while refusing to pay them to the foreign investor.<sup>69</sup> One of Foremost's main representatives in Iran was ousted from the board of directors by the government and replaced by an Iranian national acting on the instructions of his state. Finally, Pak Dairy's board informed Foremost of its decision to make no payments to foreign shareholders. The U.S. group claimed before the Iran-U.S. CT that a taking of its interest in the company had occurred as a "cumulative result of a number of instances of interference with the exercise of its rights as shareholder."<sup>70</sup> The tribunal established that the nonpayment of dividends to Foremost was an interference with its rights, compensable under the rubric of "other measures affecting property rights." The Iran-U.S. CT supported its conclusion by reference to the *Sporrong and Lönnroth* case, decided by the European Court of Human Rights in 1982.<sup>71</sup> In that case, a violation of Article 1 of the First Optional Protocol of the European Convention on Human Rights was found in the form of the residual category of other interference with the protected peaceful enjoyment of possessions.

In *Eastman Kodak*, a U.S. investor established a corporation in Iran to act as distributor of its products and to operate a finishing photo laboratory called Rangiran.<sup>72</sup> With the advent of the Iranian revolution in 1978, Eastman Kodak's expatriate management personnel left the country. Rangiran continued functioning with Iranian nationals appointed by the foreign investor, who were later joined by a couple of U.S. nationals that returned to assume management functions in Iran. After the hostage crisis in 1979, these last remaining expatriate officers left the country and Rangiran's accounts in Iranian banks were frozen by order of the government of Iran. A worker's council formed by employees of

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<sup>67</sup> See generally *Foremost Tehran Inc. v. Iran*, 10 Iran-U.S. Cl. Trib. Rep. 228, 251 (1987).

<sup>68</sup> *Sherkat Sahami Labaniat Pasteurize Pak*.

<sup>69</sup> *Foremost Tehran Inc. v. Iran*, 10 Iran-U.S. Cl. Trib. Rep. 228, 235 (1987). Exceptionally, the stock dividend declared in 1980 was distributed to Foremost too.

<sup>70</sup> See *Foremost Tehran Inc. v. Iran*, 10 Iran-U.S. Cl. Trib. Rep. 228, 244 (1987).

<sup>71</sup> See *id.* at 251-52; see also *Sporrong v. Swed.*, App. No. 7151/75, 7152/75, 52 Eur. Ct. H.R. (ser. A) (1982).

<sup>72</sup> See generally *Eastman Kodak Co. v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 153, 155 (1987).

the company was then instructed to assume the supervision of Rangiran, and an Iranian national was appointed as its manager by the state. The shareholders of the company decided, in 1980, to place it in liquidation. Although the worker's council accepted this decision, Iran sealed Rangiran's office building, preventing the personnel from working until the company appointed a liquidator acceptable to the government. The board of liquidators appointed by the shareholders of the company declared Rangiran bankrupt, an action that was later confirmed by a court in Tehran. The Iran-U.S. CT found no expropriation in its partial award, mostly because ". . .the Claimant, as majority shareholder, was able effectively to decide to liquidate and to declare Rangiran bankrupt."<sup>73</sup> Expressly following the *Sporrong* case and the award in *Foremost*, the tribunal was nevertheless satisfied that Eastman Kodak's claim for expropriation "must be taken to include a claim for a lesser degree of interference with its property rights" and concluded that Iran's actions amounted to "other measures."<sup>74</sup>

*Rouhollah Karubian* is yet another award based on "other measures affecting property rights."<sup>75</sup> In this proceeding, the Iranian state enacted land-reform acts in 1979 and 1982 by which certain undeveloped plots should become government property. The implementation and enforcement of these norms remained contingent upon the determination that the respective immovables were in fact undeveloped. No such action was taken regarding Karubian's properties. The uncertainty as to the status of these plots produced doubts over the ownership of the lands, since the correspondent title deeds were susceptible of being cancelled at any time. Quoting both *Foremost* and *Eastman Kodak*, the Iran-U.S. CT found no expropriation resulting from the Iranian legislation. Nonetheless, the tribunal also concluded that the uncertainty surrounding the ownership of the properties made it difficult for the claimant to find a buyer for his plots. According to the Iran-U.S. CT, this situation represented an impairment of the right to dispose of them, adversely affecting Karubian's property under the Claims Settlement Declaration.<sup>76</sup> The facts of this award bring to mind those of *Sporrong*, the leading case in the jurisprudence of the European Court of Human Rights on other interferences with the peaceful enjoyment of possessions. It comes as no

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<sup>73</sup> *Id.* at 169.

<sup>74</sup> *Id.*

<sup>75</sup> *See generally* Karubian v. Iran, 32 Iran-U.S. Cl. Trib. Rep. 3, 27 (1996).

<sup>76</sup> *See id.* at 35.

surprise that the Iran-U.S. CT found that the state's legislation did not amount to an expropriation in *Karubian*, but to "other measures affecting property rights."

## II. THE PROBLEM OF INDIRECT TAKINGS

The findings on expropriation of the Iran-U.S. CT depended on the circumstances that surrounded the respective claim and the type of property that was taken.<sup>77</sup> In almost all of these cases the tribunal applied customary international law.<sup>78</sup> In *Harza Engineering*, the Iran-U.S. CT agreed with the claimant's assertion ". . .that a taking of property may occur under international law, even in the absence of a formal nationalization or expropriation, if a government has interfered unreasonably with the use of property."<sup>79</sup> Other cases in which this standard was followed include *Ataollah Golpira* and *International Technical Products*.<sup>80</sup> The description of the standard was different in other decisions. For instance, in the interlocutory award of *Starrett*, the Iran-U.S. CT stated that under international law, "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."<sup>81</sup> *TAMS*, on the other hand, considered a taking to occur "whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral."<sup>82</sup> According to Brower and Brueschke, this requirement "is somewhat ambiguous but generally should be taken to mean that the deprivation is not of such a temporary or short duration that compensation should not be awarded."<sup>83</sup> In *Constantine Gianoplus*, the Iran-U.S. CT came out with yet another description, when it declared that "[u]nder appropriate circumstances government interference depriving an owner of effective use and control of property may give rise

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<sup>77</sup> See BROWER & BRUESCHKE, *supra* note 16, at 378-79.

<sup>78</sup> Brunetti, *supra* note 48, at 205.

<sup>79</sup> Harza Eng'g Co.v. Iran, Award, 1 Iran-U.S. Cl. Trib. Rep. 499, 504 (1982).

<sup>80</sup> Golpira v. Iran, Award, 2 Iran-U.S. Cl. Trib. Rep. 171, 177 (1983); Int'l Tech. Prod. Corp. v. Iran, 9 Iran-U.S. Cl. Trib. Rep. 206, 238-39 (1985).

<sup>81</sup> Starrett House Corp. v. Iran, 4 Iran-U.S. Cl. Trib. Rep. 122, 154 (1985).

<sup>82</sup> Tippetts v. TAMS-AFFA, 6 Iran-U.S. Cl. Trib. Rep. 219, 225 (1986). See also Phelps Dodge Corp. and Overseas Priv. Inv. Corp. v. Iran, Award, 10 Iran-U.S. Cl. Trib. Rep. 121, 130 (1987).

<sup>83</sup> BROWER & BRUESCHKE, *supra* note 16, at 378.

to a claim for expropriation.”<sup>84</sup> This standard of effective deprivation had already been used by the PCIJ in the *Chorzow Factory* and *Oscar Chinn* cases.<sup>85</sup>

#### A. CONSTITUTIVE ACTS

Nuances in the tribunal’s wording might suggest that there was more than one applicable standard. However, the Iran-U.S. CT focused on the impact of the alleged taking rather than on semantics.<sup>86</sup> In Brower’s view, the standard applied explicitly and implicitly by the tribunal required an unreasonable interference with the foreigner’s property caused by actions attributable to the host state.<sup>87</sup> What in fact constituted this unreasonable interference varied, depending on the circumstances of the respective case. Because of this, Brower and Brueschke affirm that it is impossible to discern in the Iran-U.S. CT’s case law a single standard for determining when an expropriation has occurred.<sup>88</sup> In this context, Hassan Sedigh concludes that “the boundary between regulation and expropriation becomes the unreasonableness of an interference, and the unreasonableness of an interference would depend on the nature of the affected property and the means used.”<sup>89</sup> Such a conclusion would imply that the Iran-U.S. CT adopted a police powers solution when in fact it applied an effects rule in most expropriation claims. For this reason, it is more accurate to say that the tribunal’s answer to the threshold question called for something more than just an unreasonable interference.

The finding of a formal or informal expropriation by the Iran-U.S. CT required the establishment of two facts by the claimant: first, a taking of possession, a transfer of property, or its distribution by the state; and, second, the denial of its use to the owner.<sup>90</sup> The Iran-U.S. CT applied both requirements to cases involving the indirect taking of

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<sup>84</sup> *Gianoplus v. Iran*, 11 Iran-U.S. Cl. Trib. Rep. 217, 221 (1986); *see also* *Starrett House Corp. v. Iran*, 4 Iran-U.S. Cl. Trib. Rep. 122, 156 (1985).

<sup>85</sup> *See* Hassan Sedigh, *What Level of Host State Interference Amounts to a Taking under Contemporary International Law*, 2 J. WORLD INVESTMENT 631, 644–46 (2001).

<sup>86</sup> BROWER & BRUESCHKE, *supra* note 16, at 644.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 440; *see also* Matti Pellonpää & Malgosia Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal*, 1988 NETH. Y.B. INT’L L. 53, 85.

<sup>89</sup> Sedigh, *supra* note 85, at 682.

<sup>90</sup> MOURI, *supra* note 39, at 88.

physical properties and business operations.<sup>91</sup> In those cases involving the seizure of tangible objects, the tribunal had no difficulties in finding a taking from the date that the owner's access to his property was obstructed if the correspondent act was attributable to the Iranian government.<sup>92</sup> In this respect, even acts performed by the judiciary were considered to be susceptible of producing expropriatory effects.<sup>93</sup> The tribunal's conclusion in *Dames & Moore*, that a "unilateral taking of possession of property and the denial of its use to the rightful owners may amount to an expropriation even without a formal decree regarding title to the property,"<sup>94</sup> is an example of the application of these conditions to a particular claim of this type.<sup>95</sup> Concerning companies and business operations, the Iran-U.S. CT replaced the first requirement (i.e., the taking of possession, transfer or distribution of the property by the state) with that of irreversible control by the state over the business or company, and the second requirement (the denial of the property's use to the owner) with that of deprivative consequences of such control over virtually all of the value of the owner's property.<sup>96</sup> In *ITT Industries*, Judge George Aldrich held that:

...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.<sup>97</sup>

This rule was followed by the Iran-U.S. CT in other awards.<sup>98</sup> The tribunal assessed the appointment of managers and supervisors by the Iranian state pursuant to newly enacted legislation as an "important,"

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<sup>91</sup> See *id.* at 89–99.

<sup>92</sup> Pellonpää & Fitzmaurice, *supra* note 88, at 86; BROWER & BRUESCHKE, *supra* note 16, at 434. See *American Bell Int'l Inc. v. Iran*, 12 Iran-U.S. Cl. Trib. Rep. 170, 214–15 (1986); *Yeager v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 92, 108–09 (1987); see generally BROWER & BRUESCHKE, *supra* note 16, at 384–91.

<sup>93</sup> *Oil Field of Tex. Inc. v. Iran and Nat'l Iranian Oil Co.*, 12 Iran-U.S. Cl. Trib. Rep. 308, 318 (1986).

<sup>94</sup> *Dames & Moore v. Iran*, 4 Iran-U.S. Cl. Trib. Rep. 212, 223 (1985).

<sup>95</sup> See *Pereira Assoc. v. Iran*, 5 Iran-U.S. Cl. Trib. Rep. 198 (1984); *Computer Sci. Corp. v. Iran*, 10 Iran-U.S. Cl. Trib. Rep. 269, 270–71 (1986); *Sola Tiles Inc. v. Iran*, 14 Iran-U.S. Cl. Trib. Rep. 223, 224 (1987); *Daley v. Iran*, 18 Iran-U.S. Cl. Trib. Rep. 232, 233 (1988).

<sup>96</sup> *MOURI*, *supra* note 39, at 94. See generally BROWER & BRUESCHKE, *supra* note 16, at 394–410.

<sup>97</sup> *ITT Indus. Inc., v. Iran*, 2 Iran-U.S. Cl. Trib. Rep. 348, 351–52 (1983).

<sup>98</sup> See, e.g., *Tippetts v. TAMS-AFFA*, 6 Iran-U.S. Cl. Trib. Rep. 219, 225 (1984).

“significant,” or “relevant” factor, but not conclusive at the moment of establishing whether an expropriation had occurred.<sup>99</sup> The decisive element for this determination was, as Aldrich explains, the nontransitory character of the deprivation of property produced as a consequence of the respective measure.<sup>100</sup> In the words of the interlocutory award of *SEDCO*, when there is “no reasonable prospect of return of control, a taking should conclusively be found to have occurred as of that date.”<sup>101</sup> According to Charles Brower and Jason Brueschke:

... given the factual nature of the Tribunal’s inquiry its decisions have never fixed on a mechanical standard for determining whether or when the appointment of managers has effected a taking. It has considered many factors, including whether the owner has been excluded from the ordinary dissemination of financial information and income distributions, as well as the scope of functions assumed by the Government-appointed managers.<sup>102</sup>

The Iran-U.S. CT often declared that an ephemeral interruption of control would not constitute by itself an expropriation.<sup>103</sup> However, with the exception of *Motorola*, the tribunal generally considered the correspondent assumption by the government-appointed individual to be definitive or permanent rather than provisional or temporary, as labeled by the Iranian state.<sup>104</sup> George Aldrich points out that:

by the time the first claims for expropriation or other takings of property began to be decided by the Tribunal in late 1983, the interference with property rights had endured for at least three years or more, and the continuation of strained relations between Iran and the United States gave the Tribunal little reason to believe that such interference would soon end. Consequently, the often difficult question of when allegedly temporary interference with the rights of property owners should be considered to have ripened into a compensable taking or deprivation of those rights rarely troubled the Iran-United States Claims Tribunal.<sup>105</sup>

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<sup>99</sup> See *Payne v. Iran*, 12 Iran-U.S. Cl. Trib. Rep. 3, 11 (1988); *Motorola Inc. v. Iranian Nat’l Airlines Corp.*, 19 Iran-U.S. Cl. Trib. Rep. 73, 85 (1988); *Saghi v. Iran*, 29 Iran-U.S. Cl. Trib. Rep. 20, 41, 44–45 (1993); see also Sedigh, *supra* note 85, at 648–49.

<sup>100</sup> Aldrich, *supra* note 42, at 592.

<sup>101</sup> *SEDCO Inc. v. Nat’l Iranian Oil Co.*, 9 Iran-U.S. Cl. Trib. Rep. 248, 278-79 (1985).

<sup>102</sup> BROWER & BRUESCHKE, *supra* note 16, at 398.

<sup>103</sup> ALDRICH, *supra* note 16, at 187.

<sup>104</sup> *Motorola Inc. v. Iranian Nat’l Airlines Corp.*, 19 Iran-U.S. Cl. Trib. Rep. 73, 85 (1988).

<sup>105</sup> ALDRICH, *supra* note 16, at 172.



In most cases involving the interference of the control over property, the tribunal came to the conclusion that the respective expropriation occurred precisely at this moment (i.e., when the manager or supervisor assumed his duties).<sup>106</sup>

Besides the physical seizure of property or its deprivation through the appointment of managers or supervisors, the Iran-U.S. CT found expropriations in cases involving, for instance, involuntary or forced transactions;<sup>107</sup> the refusal of the Iranian government to return property subject to a lease;<sup>108</sup> the loss of goods left with that state;<sup>109</sup> and its failure to grant a re-export permit for equipment in Iran.<sup>110</sup>

### B. CLAIMS THAT WERE REJECTED

In a number of cases, no taking was found by the Iran-U.S. CT. Expropriation claims were rejected, for example, when the challenged act was not attributable to the Iranian state.<sup>111</sup> As Veijo Heiskanen recalls:

The adoption of the effects doctrine did not mean that the Tribunal automatically attributed all irregularities that occurred in Iran during the Islamic Revolution to the Government of Iran. The Tribunal stressed that the key issue in drawing the line between the deprivation of a property right and the materialization of a political risk was the attributability of the loss to the Government; if the loss could not be attributed to the Government, there could be no liability.<sup>112</sup>

In this regard, the Iran-U.S. CT followed the traditional requirements of state responsibility in international law; today included in Article 2 of the Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001.<sup>113</sup>

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<sup>106</sup> Aldrich, *supra* note 42, at 589; *see, e.g.*, Birnbaum v. Iran, 29 Iran-U.S. Cl. Trib. Rep. 260 (1993).

<sup>107</sup> *See* American Bell Int'l Inc. v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 170 (1986).

<sup>108</sup> *See* Oil Field of Tex. Inc. v. Iran and Nat'l Iranian Oil Co., 12 Iran-U.S. Cl. Trib. Rep. 308, 319 (1986).

<sup>109</sup> *See* United Painting Inc. v. Iran, 23 Iran-U.S. Cl. Trib. Rep. 351, 351 (1989).

<sup>110</sup> *See* Petrolane Inc. v. Iran, 27 Iran-U.S. Cl. Trib. Rep. 64 (1991).

<sup>111</sup> *See* Flexi-Van Leasing Inc. v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 335, 336, 349 (1986).

<sup>112</sup> Heiskanen, *Doctrine, supra* note 63, at 224.

<sup>113</sup> RESPONSIBILITIES OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, UN (2001). According to this provision: There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

Various failures of proof also prevented some claimants from obtaining a finding in their favor.<sup>114</sup> In certain cases, they were not the owners of the allegedly taken properties;<sup>115</sup> in others, the claimant retained some control over the property.<sup>116</sup> The tribunal further refused to conclude that the nationalization of the property of the majority shareholders caused the indirect taking of the investment of the minority shareholders.<sup>117</sup> A similar situation was found in relation with the nationalization of the banking institutions in Iran. The mere assumption of control over these entities was not considered a taking of the funds in the respective bank accounts or an interference with the banking transactions normally provided by them.<sup>118</sup> Exceptionally, the tribunal held the Iranian state responsible for a taking when it found that a specific measure adopted by the government-controlled bank had a serious deprivative impact on the claimant.<sup>119</sup>

Regarding the expropriatory effect of state regulations, the Iran-U.S. CT declared in the interlocutory award of *SEDCO* that it is “. . . an accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide ‘regulation’ within the accepted police powers of States.”<sup>120</sup> At first sight, this might seem a police powers solution. Nevertheless, in the same case the tribunal acknowledged that the duty to compensate will arise if this regulation damages the property to a “substantial or excessive degree.”<sup>121</sup> This is a clear effects approach. The only claim rejected by the Iran-U.S. CT on grounds of police powers was *Emanuel Too*.<sup>122</sup> In this proceeding, an Iranian national owned an insured motel and restaurant in Turlock, California. In 1980, the motel-restaurant was destroyed by fire, the cause of which was identified as arson. Emanuel Too contended that he had

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On the question of attributability in the case-law of the Iran-US CT, *see generally* BROWER & BRUESCHKE, *supra* note 16, at 652–56; Pellonpää & Fitzmaurice, *supra* note 87, at 72–85; Aldrich, *supra* note 42, at 604–5; ALDRICH, *supra* note 16, at 197–200, 207–08; BROWER & BRUESCHKE, *supra* note 16, at 442–71; Sedigh, *supra* note 85, at 666–76.

<sup>114</sup> See *Pointon v. Iran*, 27 Iran-U.S. Cl. Trib. Rep. 49, 51 (1991).

<sup>115</sup> See *Sabbonchian v. Iran*, 27 Iran-U.S. Cl. Trib. Rep. 248 (1991).

<sup>116</sup> *Seismograph Serv. Corp. v. Nat’l Iranian Oil Co.*, 22 Iran-U.S. Cl. Trib. Rep. 3, 5 (1990). In these types of situations, the Iran-US CT sometimes awarded partial compensation under other measures affecting property rights

<sup>117</sup> See *Golpira v. Iran*, Award, 2 Iran-U.S. Cl. Trib. Rep. 171, 177 (1983).

<sup>118</sup> See *Pereira Assoc. v. Iran*, 5 Iran-U.S. Cl. Trib. Rep. 198 (1984);

<sup>119</sup> MOURI, *supra* note 39, at 147.

<sup>120</sup> *SEDCO Inc. v. Nat’l Iranian Oil Co.*, 9 Iran-U.S. Cl. Trib. Rep. 248, 275 (1985).

<sup>121</sup> *Id.* at 275 n.25.

<sup>122</sup> See *generally* *Too v. Greater Modesto Ins. Assoc.*, 23 Iran-U.S. Cl. Trib. Rep. 379, 386 (1989).

been the victim of “unknown prejudiced Americans,” who had previously threatened him.<sup>123</sup> The police and fire departments in Turlock investigated the incident without arriving to any final conclusions.<sup>124</sup> The insurance company did not pay out the proceeds of the respective policy to the claimant, and the motel-restaurant was subject to a forced sale.<sup>125</sup> The Internal Revenue Service of the USA (“IRS”) sold the liquor permit held by Too at public auction and used the proceeds to pay part of the claimant’s overdue employment taxes.<sup>126</sup> The claimant was also the owner of a cold-storage trailer found in the state of Arizona that he argued was wrongfully expropriated by the United States.<sup>127</sup> The authorities of Arizona had made efforts to inform Too about this trailer and the impending auction for abandoned property.<sup>128</sup> The claimant did not try to recover the trailer, and it was sold at auction by the State of Arizona.<sup>129</sup> In a wording that reminds that of *SEDCO*, the Iran-U.S. CT quoted the American Law Institute’s Third Restatement of the Foreign Relations Law of the United States, and declared that:

a State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price.<sup>130</sup>

According to the tribunal, the IRS’s action was not aimed at Too because he was an Iranian, nor was it “deliberately intended to cause him to abandon the property to the State or to sell it at a distress price.”<sup>131</sup> It concluded that the action of the IRS was the result of Mr. Too’s failure to pay taxes withheld by him from his employees’ salaries: a lawful levy for overdue taxes, for which there is no state responsibility. As for the cold-storage trailer left in Arizona, the Iran-U.S. CT said: “[t]here is no question that the disposition of abandoned property is commonly

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<sup>123</sup> *Id.* at 379.

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

<sup>125</sup> *Id.* at 380.

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

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

<sup>128</sup> *Id.* at 381.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 387. See also AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987).

<sup>131</sup> *Too v. Greater Modesto Ins. Assoc.*, 23 Iran-U.S. Cl. Trib. Rep. 379, at 387–88.

accepted as a lawful action within the police powers of States, again provided that such a disposition does not discriminate against aliens."<sup>132</sup>

Exchange control restrictions were a problem related with that of state regulations. In several cases it was claimed that these measures constituted an expropriation.<sup>133</sup> The Iran-U.S. CT did not preclude the possibility of characterizing them as a taking, but subjected this determination to their harmony with the International Monetary Fund's Articles of Agreement.<sup>134</sup> The tribunal found no disharmony with these articles in its awards.<sup>135</sup>

### III. CONDITIONS OF LEGALITY AND THEIR CONSEQUENCE

The Iran-U.S. CT judged the legality of an expropriation by reference to international law.<sup>136</sup> Even though it recognized the three traditional requirements of a lawful taking (i.e., public purpose, nondiscrimination, and compensation), it generally did not support due process of law as an independent condition of legality.<sup>137</sup> The tribunal's interpretation of public purpose and nondiscrimination clearly favored the economic sovereignty of the state. The national authorities' assertion that the expropriatory measure was adopted in conformity with these conditions created a strong presumption for the Iran-U.S. CT that they had been duly fulfilled.<sup>138</sup> This wide margin of appreciation resembles that given to the state in the case law of the European Court of Human Rights concerning Article 1 of the First Optional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>139</sup> It was best illustrated in *Amoco*, where the Iran-U.S. CT declared that:

[a] precise definition of the 'public purpose' for which an expropriation may be lawfully decided has neither been agreed upon

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<sup>132</sup> *Id.* at 388.

<sup>133</sup> See *Hood Corp. v. Iran et al.*, Award, 7 Iran-U.S. Cl. Trib. Rep. 36 (1986).

<sup>134</sup> *MOURI*, *supra* note 39, at 148.

<sup>135</sup> *Id.*

<sup>136</sup> See *BROWER & BRUESCHKE*, *supra* note 16, at 502-03.

<sup>137</sup> See generally *Pellonpää & Fitzmaurice*, *supra* note 87, at 60-72; *MOURI*, *supra* note 39, at 320-47.

<sup>138</sup> *Am. Int'l Grp. Inc. v. Iran*, 4 Iran-U.S. Cl. Trib. Rep. 96, 105 (1983).

<sup>139</sup> See generally *RICHARD CLAYTON & HUGH TOMLINSON*, *THE LAW OF HUMAN RIGHTS* 1301-20 (2000); *DAVID HARRIS ET AL.*, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 655-96 (2009); *CLARE OVEY & ROBIN WHITE*, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 477-505 (2010).

in international law nor even suggested. It is clear that, as a result of the modern acceptance of the right to nationalize, this term is broadly interpreted, and that States, in practice, are granted extensive discretion.<sup>140</sup>

In fact, there was virtually no award in which a taking was found unlawful for lacking a public purpose.<sup>141</sup> For example, in *Amoco* the Iran-U.S. CT stated that the nationalization of foreign properties, aimed at obtaining revenues from the exploitation of natural resources for the development of a country, “has not generally been denounced as unlawful and illegitimate.”<sup>142</sup> Even though the discretion given by the tribunal to national authorities was wide, it was not absolute. The Iran-U.S. CT explicitly declared that a state has no right to expropriate an alien only for financial purposes.<sup>143</sup> It also noted that a taking exclusively aimed at avoiding contractual obligations of a state or a state-controlled entity is unlawful under international norms because it would be contrary to the principle of good faith and to the “well-settled rule that a State has the right to commit itself by contract to foreign corporations.”<sup>144</sup> For this conclusion, the Iran-U.S. CT referred to *American Independent Oil (Aminoil)*, the arbitration against Kuwait settled a year before by a tribunal integrated by Paul Reuter, Hamed Sultan, and Gerald Fitzmaurice.<sup>145</sup> In *Amoco*, the Iran-U.S. CT further declared that:

[c]onformity with domestic law is not usually cited as a condition for an internationally lawful nationalization, and the Treaty specifies no such condition. It is therefore doubtful whether it is one of the requisites of international law. The case law on this point is not very helpful. Violation of domestic law, when invoked, is most often analyzed as evidence of the lack of fulfilment of one of the conditions imposed by international law, such as the existence of a public purpose.<sup>146</sup>

#### A. THE EFFECT OR IMPACT OF THE MEASURE

The state is liable to pay compensation for a taking. According to Matti Pellonpää and Malgosia Fitzmaurice, if some indication of it was

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<sup>140</sup> *Amoco Int'l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, 233 (1987).

<sup>141</sup> MOURI, *supra* note 39, at 325 n.968.

<sup>142</sup> *Amoco Int'l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. at 233.

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

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

<sup>145</sup> *Am. Indep. Oil Co. v. Kuwait*, Award, (1982).

<sup>146</sup> *Amoco Int'l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. at 225.

made at the time of the taking, its nonpayment did not render the expropriation illegal in the case law of the Iran-U.S. CT.<sup>147</sup> For this tribunal, the duty to compensate is based on the loss or damages suffered by the foreign investor as result of the correspondent measure, not on the doctrines of acquired rights, *pacta sunt servanda* or unjust enrichment.<sup>148</sup> Regarding this last theory, however, the tribunal did acknowledge in *Sea-Land Service* that it “is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals,” for “[t]he concept of unjust enrichment had its origins in Roman Law, where it emerged as an equitable device ‘to cover those cases in which a general action for damages was not available,’” and “is codified or judicially recognised in the great majority of the municipal legal systems of the world.”<sup>149</sup> The Iran-U.S. CT quoted the *Lena Goldfields* arbitration on the issue, settled by Otto Stutzer and Sir Leslie Scott.<sup>150</sup>

Concerning the problem of intent, the tribunal adopted an effects solution. It generally found that worthy economic or social objectives motivating an expropriation did not exempt the host state from the obligation to pay compensation. In this approach, the tribunal was apparently influenced by the decisions of the *Chorzow Factory* case and the *Norwegian Shipowners’* claim, the latter settled by Chandler Anderson, Benjamin Vogt, and James Valloton.<sup>151</sup> As George Aldrich points out, Article II, paragraph 1 of the Claims Settlement Declaration:

explicitly gave the Tribunal jurisdiction over claims that arouse out of both ‘expropriations’ and ‘other measures affecting property rights’, thereby suggesting clearly that neither the terminology nor the intent of actions attributable to either Government would affect the Tribunal’s jurisdiction to award compensation if the actions had adversely affected a claimant’s property rights.<sup>152</sup>

Already in the 1983 *ITT* case, Judge Aldrich had declared that “[t]he intent of the government is less important than the effects of the

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<sup>147</sup> Pellonpää & Fitzmaurice, *supra* note 88, at 70.

<sup>148</sup> See MOURI, *supra* note 39, at 311–19.

<sup>149</sup> *Sea-Land Serv. Inc., v. Iran and Ports and Shipping Org.*, Award, 6 Iran-U.S. Cl. Trib. Rep. 149, 168 (1986).

<sup>150</sup> *Lena Goldfields Ltd. v. U.S.S.R.*, 1930 Award (Sept. 3). The Arbitration Between The Lena Goldfields, Ltd. And the Soviet Government, 36 Cornell L.Q. 31, 33 (1951). See MOURI, *supra* note 39, at 315–19.

<sup>151</sup> See MOURI, *supra* note 39, at 258–59.

<sup>152</sup> ALDRICH, *supra* note 16, at 173.

measures on the owner, and the form of [these] measures . . . is less important than the reality of their impact.”<sup>153</sup> A couple of months later, the Iran-U.S. CT affirmed in *Starrett* that state measures rendering property-rights useless must be deemed expropriatory under international law even though the state did not purport to take them.<sup>154</sup> In 1984, the tribunal came to the opposite conclusion in *Sea-Land*.<sup>155</sup> The claimant was a U.S. corporation engaged in international transportation by water of containerized cargo. Since 1978, Sea-Land encountered increasing difficulties in the continued use of a cargo facility built and operated by it in the port of Bandar Abbas, Iran, due to the unexplained absence of government officials in charge of customs, immigration, health, etc. These difficulties led to the suspension and eventual termination of its operations. In this case, the Iran-U.S. CT concluded that the country was in a state of upheaval following the 1979 revolution, and that nothing suggested a policy of intentional disruption or noncooperation with Sea-Land from the Iranian authorities. According to the tribunal, a finding of expropriation would require, at the very least, a deliberate governmental interference with the foreign investor depriving it of the use and benefit of its investment.<sup>156</sup> No intentional course of conduct directed against Sea-Land was found, so the expropriation claim was dismissed. The Iran-U.S. CT cited *Oscar Chinn* in support of its decision.<sup>157</sup> Judge Howard Holtzmann disagreed with this conclusion and expressly declared that “the critical question is the objective effect of a government’s acts, not its subjective intentions. Acts by a government which have the effect of depriving an alien of his property are considered expropriatory in international law, whatever the government’s intentions.”<sup>158</sup>

The police powers finding in *Sea-Land* obtained no support in subsequent awards.<sup>159</sup> In *TAMS* and in *Thomas Payne* the tribunal repeated the effects statement of Judge Aldrich in *ITT* (i.e., that the intent of the government is less important than the effects of the measures on the owner and that the form of the measures of control or interference is

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<sup>153</sup> *ITT Indus. Inc., v. Iran*, 2 Iran-U.S. Cl. Trib. Rep. 348, 352 (1983).

<sup>154</sup> <sup>154</sup> *Starrett Hous. Corp. v. Iran*, Interlocutory Award, 4 Iran-U.S. Cl. Trib. Rep. 122, 154 (1983).

<sup>155</sup> *See generally* *Sea-Land Serv. Inc., v. Iran and Ports and Shipping Org.*, Award, 6 Iran-U.S. Cl. Trib. Rep. 149 (1986).

<sup>156</sup> *Id.* at 166.

<sup>157</sup> *Oscar Chinn*, *supra* note 5.

<sup>158</sup> *Sea-Land Serv. Inc.*, Opinion of Judge Holtzmann, at 207.

<sup>159</sup> Aldrich, *supra* note 42, at 603; ALDRICH, *supra* note 16, at 206–07.

less important than the reality of their impact).<sup>160</sup> *Phillips Petroleum* was no exception. The Iran-U.S. CT again declared that “a government’s liability to compensate for expropriation of alien property does not depend on proof that the expropriation was intentional.”<sup>161</sup> The interlocutory award in *SEDCO* and the award in *Phelps Dodge* also followed Judge’s Aldrich reasoning.<sup>162</sup> Phelps Dodge was a U.S. corporation who had invested in an Iranian company established to manufacture and sell various wire and cable products.<sup>163</sup> During 1979 and 1980, there was a progressive erosion of the claimant’s ability to exercise its ownership rights. At the end of 1980, the management of the company was transferred to agencies of the Iranian government and the control of its factory was directly assumed by these authorities. The Iran-U.S. CT found that from this moment Phelps Dodge was deprived of virtually all of the factory’s value.<sup>164</sup> It also stated:

The Tribunal fully understands the reasons why the Respondent felt compelled to protect its interests through this transfer of management, and the Tribunal understands the financial, economic and social concerns that inspired the law pursuant to which it acted, but those reasons and concerns cannot relieve the Respondent of the obligation to compensate Phelps Dodge for its loss.<sup>165</sup>

The Iran-U.S. CT confirmed this view in *Harold Birnbaum*.<sup>166</sup> This case settled the claim of a U.S. national who alleged to have been expropriated of his ownership interest in an Iranian architectural and engineering partnership named Abdolaziz Farmanfarmaian & Associates (AFFA), liquidated by the state of Iran. The tribunal found that the ownership interests of Mr. Birnbaum were taken on the date the provisional manager appointed by the Iran authorities effectively took control of the company. The Iran-U.S. CT explicitly declared that “[t]he Respondent’s reasons and concerns for taking control of AFFA cannot relieve it from responsibility to compensate the Claimant for the taking,” and that “a government cannot avoid liability for compensation by

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<sup>160</sup> *Tippetts v. TAMS-AFFA*, 6 Iran-U.S. Cl. Trib. Rep. 219, 225–26 (1986); Payne, *supra* note 36, at 10–11.

<sup>161</sup> *Phillips Petrol. Co. v. Iran*, 21 Iran-U.S. Cl. Trib. Rep. 79, 115 (1989).

<sup>162</sup> *SEDCO Inc. v. Nat’l Iranian Oil Co.*, 9 Iran-U.S. Cl. Trib. Rep. 248, 277 (1985); *Phelps Dodge Corp. and Overseas Priv. Inv. Corp. v. Iran*, Award, 10 Iran-U.S. Cl. Trib. Rep. 121, 130 (1987).

<sup>163</sup> *See generally Phelps Dodge Corp.*, 10 Iran-U.S. Cl. Trib. Rep. 121.

<sup>164</sup> *Id.* at 130.

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

<sup>166</sup> *See generally Birnbaum*, *supra* note 106.



showing that its actions were taken legitimately pursuant to its own laws.<sup>167</sup>

## B. COMPENSATION AND ITS STANDARD

For the Iran-U.S. CT, the distinction between lawful and unlawful takings was relevant in relation to the restitution of the expropriated property.<sup>168</sup> Because it could not ensure specific performance, the tribunal was normally reluctant to grant this remedy to the affected claimant.<sup>169</sup> This reluctance also reflected, as Brower and Brueschke explain, “the customary practice that restitution is generally available only where the taking is found to be unlawful and the fact that the Tribunal . . . never found Iran’s taking of American property to have been unlawful.”<sup>170</sup> The 1955 Iran-U.S. Treaty of Amity, Economic Relations, and Consular Rights (“Iran-U.S. FCN”) established the applicable standard of compensation for lawful takings of nationals of either country in the territory of the other.<sup>171</sup> In a clear reference to the Hull Formula, Article IV, paragraph 2 of this treaty provided that the property of these nationals:

shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.<sup>172</sup>

The tribunal did not restrict its analysis to this provision. Numerous awards and separate opinions of several judges also addressed the issue of the standard of compensation in customary international law. John Westberg points out that one of the reasons for this situation was the Iranian challenge to the validity of the treaty in some early disputes:

Choosing in these cases to avoid the question of the Treaty’s status, the Tribunal ruled the question irrelevant on reasoning that the

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<sup>167</sup> *Id.* at 270.

<sup>168</sup> Phillips Petrol. Co. v. Iran, 21 Iran-U.S. Cl. Trib. Rep. 79, 122 (1989).

<sup>169</sup> BROWER & BRUESCHKE, *supra* note 16, at 476.

<sup>170</sup> *Id.* at 476–47.

<sup>171</sup> Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., Aug. 15, 1955, available at [http://www.parstimes.com/law/iran\\_us\\_treaty.html](http://www.parstimes.com/law/iran_us_treaty.html).

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

treaty provisions on compensation were synonymous with the requirements of customary international law.<sup>173</sup>

The first award to do so was *ITT*. Judge Aldrich's concurring opinion to this decision concluded that the applicable rules of customary international law were not significantly different from those of the treaty: "[i]n either case, a taking of property must be accompanied by the prompt payment of just compensation which is effective and adequate to compensate fully for the value of the property taken."<sup>174</sup> Judge Aldrich made express reference to the *Norwegian Shipowners* claim and *Chorzow Factory* case.<sup>175</sup> His position was later confirmed by *American International*, *TAMS*, *Phelps Dodge*, *SEDCO*, *Sola Tiles* and *Petrolane*.<sup>176</sup> The standard of appropriate compensation was only applied exceptionally by the Iran-U.S. CT in *Ebrahimi*.<sup>177</sup> But even in this case, the amount actually awarded to the claimants could reasonably be considered full compensation.<sup>178</sup>

The duty to compensate both expropriations and nationalizations was explicitly acknowledged in the *INA* case. In this award, the tribunal affirmed that nationalizations "are not *per se* unlawful," and that a lawful one would also "impose on the government concerned the obligation to pay compensation."<sup>179</sup> The tribunal then applied the treaty standard, which it considered to be similar to that of customary international norms.<sup>180</sup> The Iran-U.S. CT went on to declare *obiter* that, regarding lawful large-scale nationalizations, international law had undergone a "gradual reappraisal, the effect of which may be to undermine the doctrinal value of any 'full' or 'adequate' (when used as identical to

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<sup>173</sup> John Westberg, *Compensation in Cases of Expropriation and Nationalization: Awards of the Iran-United States Claims Tribunal*, 5 ICSID REV. 256, 271 n.68 (1990).

<sup>174</sup> *ITT Indus. Inc., v. Iran*, 2 Iran-U.S. Cl. Trib. Rep. 348, 354 (1983).

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

<sup>176</sup> *Am. Int'l Grp. Inc. v. Iran*, 4 Iran-U.S. Cl. Trib. Rep. 96, 102–06 (1983); *Tippetts v. TAMS-AFFA*, 6 Iran-U.S. Cl. Trib. Rep. 219, 225 (1986); *Phelps Dodge Corp. and Overseas Priv. Inv. Corp. v. Iran*, Award, 10 Iran-U.S. Cl. Trib. Rep. 121, 132 (1987); *SEDCO Inc. v. Nat'l Iranian Oil Co. and Iran*, Second Interlocutory Award, 10 Iran-U.S. Cl. Trib. Rep. 180, 189 (1987); *Sola Tiles Inc. v. Iran*, 14 Iran-U.S. Cl. Trib. Rep. 223, 234–37 (1987); *Petrolane Inc. v. Iran*, 27 Iran-U.S. Cl. Trib. Rep. 64, 99 (1991).

<sup>177</sup> See *Ebrahimi v. Iran and Nat'l Iranian Oil Co.*, Award, 30 Iran-U.S. Cl. Trib. Rep. 180, 197–202 (1994).

<sup>178</sup> ALDRICH, *supra* note 16, at 238. See also BROWER & BRUESCHKE, *supra* note 16, at 536; Westberg, *supra* note 30, at 15–18.

<sup>179</sup> *INA Corp. v. Iran*, Award, 8 Iran-U.S. Cl. Trib. Rep. 373 (1987), at 378.

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

‘full’) compensation standard.”<sup>181</sup> This declaration triggered separate opinions by Judges Gunnar Lagergren and Howard Holtzmann. The former argued that international law recognised a flexible standard allowing for partial compensation in cases of large-scale nationalizations; the latter was emphatical in denying this change in the law.<sup>182</sup> *INA*’s approach was not followed by other decisions.<sup>183</sup>

According to the case law of the Iran-U.S. CT, the standard of full compensation was generally applicable not only for expropriations and nationalizations, but also for lawful and unlawful takings.<sup>184</sup> Regarding expropriations that involved contract rights, the tribunal found that the valuation should also take into account the legitimate expectations of the alien.<sup>185</sup> Moral damage was excluded from the tribunal’s jurisdiction, limited *ratione materiae* to strictly economic loss.<sup>186</sup> The tribunal did not award punitive damages, not even when the expropriation was considered unlawful under customary international law.<sup>187</sup> Before the establishment of the Iran-U.S. CT, Pierre Cavin had already recognized the full compensation standard, comprising the loss suffered (*damnum emergens*) and the profit lost (*lucrum cessans*), as sole arbitrator in *Sapphire International Petroleum*.<sup>188</sup> The unrestricted application of this distinction has been criticized in doctrine, for the concepts of *damnum emergens* and *lucrum cessans* stem from the law of damages and not from the law of expropriation.<sup>189</sup> *Amoco* was the sole award of the Iran-U.S. CT to depart from the otherwise uniformly applied principle of full compensation. In this case, the tribunal concluded that the taking was lawful and that the Iran-U.S. FCN’s requirement of compensation was applicable. Nevertheless, it sought the aid of customary rules for interpreting and implementing this condition

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

<sup>182</sup> See Westberg, *supra* note 168, at 273–75.

<sup>183</sup> See BROWER & BRUESCHKE, *supra* note 16, at 491 n. 2326.

<sup>184</sup> See Pellonpää & Fitzmaurice, *supra* note 87, at 126–127.

<sup>185</sup> See Mobil Oil Iran Inc. et al. v. Iran and Nat’l Iranian Oil Co., Award, 16 Iran-U.S. Cl. Trib. Rep. 3 (1988); Phillips Petrol. Co. v. Iran, 21 Iran-U.S. Cl. Trib. Rep. 79(1989). See generally MOURI, *supra* note 39, at 399–403.

<sup>186</sup> Müller, *supra* note 29, at 848.

<sup>187</sup> Amoco Int’l Fin. Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 248 (1987). See also BROWER & BRUESCHKE, *supra* note 16, at 477.

<sup>188</sup> See Sapphire Int’l Petrol. Ltd. v. Nat’l Iranian Oil Co., Award, Mar. 15, 1963. This was an arbitration between a Canadian firm and the National Iranian Oil Company, regarding the nationalisation of Iran’s oil industry in 1952.

<sup>189</sup> Irmgard Marboe, *Compensation and Damages in International Law. The Limits of the ‘Fair Market Value’*, 7 J. WORLD INVESTMENT 723, 728 (2006).

and embarked on an extensive analysis of the *Chorzow Factory* case. The analysis led the Iran-U.S. CT to conclude that compensation for a lawful taking only includes the value of the expropriated property—in other words, *damnum emergens*, but not *lucrum cessans*. An unlawful taking, on the other hand, would require both.<sup>190</sup>

According to Pellonpää and Fitzmaurice, the tribunal equated *damnum emergens* to the going concern value of the company taken, with “a somewhat broad meaning, also encompassing elements (notably ‘commercial prospects’) which also might be argued to fall under *lucrum cessans*.”<sup>191</sup> In his concurring opinion to this award, Judge Brower considered the tribunal’s finding to be “a misreading of *Chorzow Factory* and a misunderstanding of economics.”<sup>192</sup> He argued that the PCIJ’s case presented a simple scheme: lawful takings would entitle the claimant to *damnum emergens* and *lucrum cessans*, while unlawful expropriations to restitution of the property taken or, if this is impossible or impracticable, to damages equal to *damnum emergens* and *lucrum cessans*, plus any consequential damages.<sup>193</sup> The finding in *Amoco* was rejected implicitly in *Starrett* and explicitly in *Phillips*.<sup>194</sup> In this last case, the tribunal declared that the distinction between lawful and unlawful expropriation under customary international law, as evidenced in the *Chorzow Factory* case:

is relevant only to two possible issues: whether restitution of the property can be awarded and whether compensation can be awarded for any increase in the value of the property between the date of taking and the date of the judicial or arbitral decision awarding compensation. The *Chorzow* decision provides no basis for any assertion that a lawful taking requires less compensation than that which is equal to the value of the property on the date of taking.<sup>195</sup>

Full compensation was not applied to those cases involving other measures affecting property rights.<sup>196</sup> The applicable standard in these proceedings was that established in *Amoco* for lawful expropriations.

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<sup>190</sup> See *Amoco Int’l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. at 214, 222–24, 244, 246–52.

<sup>191</sup> Pellonpää & Fitzmaurice, *supra* note 88, at 125.

<sup>192</sup> See *Amoco Int’l Fin. Corp.*, 15 Iran-U.S. Cl. Trib. Rep. 300.

<sup>193</sup> *Id.* at 300–01.

<sup>194</sup> See *Starrett Hous. Corp. et al v. Iran*, Final Award, 16 Iran-U.S. Cl. Trib. Rep. 122 (1988); *Phillips Petrol. Co. v. Iran*, 21 Iran-U.S. Cl. Trib. Rep. 79 (1989). See also Westberg, *supra* note 167, at 265–66; BROWER & BRUESCHKE, *supra* note 16, at 506, 512.

<sup>195</sup> *Phillips Petrol. Co. v. Iran*, 21 Iran-U.S. Cl. Trib. Rep. at 122.

<sup>196</sup> See Aldrich, *supra* note 42, at 591; MOURI, *supra* note 39, at 390.

This is *damnum emergens*, but not *lucrum cessans*.<sup>197</sup> The different standard established for “other measures” allowed the Iran-U.S. CT to find an interference with the foreign investor’s right of property in those cases where its members were reluctant to grant the claimant a full compensation. As Aldrich explains, it was questionable:

whether either the *Foremost* or the *Kodak* award would have rejected liability for a taking or deprivation of property rights if the Claims Settlement Declaration had not permitted the Tribunal to give the claimants partial compensation under the guise of compensation for ‘other measures affecting property rights’.<sup>198</sup>

He then adds:

Certainly, it was my impression that Judges Lagergren and Virally, the chairmen of the Tribunal chambers for *Foremost* and *Kodak*, respectively, generally sought what they considered to be equitable results and were not always comfortable with the full compensation standard that the 1955 Treaty of Amity between the United States and Iran made applicable to all takings of property rights.<sup>199</sup>

## CONCLUSION

The Iran-U.S. CT’s interpretation of the protection against expropriation and other measures affecting property rights, established in its constitutive treaty, acknowledges the traditional international minimum standard of treatment. It is not unusual to find references in the tribunal’s decisions to customary international law and statements of international claims commissions, the PCIJ, arbitral tribunals and the ICJ, regarding the expropriation of foreign property. The Iran-U.S. CT recognized the three traditional conditions for a lawful taking. The broad interpretation given to the requirements of public purpose and nondiscrimination gave host states a wide margin of appreciation at the moment of adopting regulatory measures, similar to that enjoyed by the parties of the European Convention on Human Rights. The Iran-U.S. CT presumed that these two conditions had been fulfilled every time the correspondent government asserted that the respective measure was adopted in the general interest of the national community, on a nondiscriminatory basis. As to other measures affecting property rights,

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<sup>197</sup> MOURI, *supra* note 39, at 390.

<sup>198</sup> Aldrich, *supra* note 42, at 591.

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

the tribunal considered this phrase to include not only measures within the scope of the concept of expropriation, but also other acts and omissions that seriously and unreasonably interfered with the property of an alien. Irreversible deprivative consequences, similar to those arising out of a taking, were generally required. The Iran-U.S. CT supported its “other measures” findings on the notion of other interferences found in Article 1 of the First Optional Protocol to the European Convention on Human Rights.

Most of the cases brought before the Iran-U.S. CT involved claims of creeping or constructive expropriations. This situation made the determination of the date of the taking difficult. The tribunal’s solution consisted on establishing, on a case-by-case basis, the moment at which the interference had ripened into a more or less irreversible deprivation of property. A finding on expropriation also depended on the circumstances that surrounded the respective claim. The threshold applied by the tribunal was that of a nonephemeral and unreasonable interference, depriving the owner of the effective use and control of his/her/its property. In other words, the moment when the foreigner’s fundamental rights of ownership were rendered so useless that they must be deemed to have been taken. According to the tribunal, any expropriation—whether formal or informal- required the determination that a taking, transfer, or distribution of the property by the host state had occurred and that the owner had been denied the use of its investment. In cases of expropriation of companies and business operations, these conditions were replaced by the host state’s irreversible control of the respective entity and the deprivative consequences of this control over the property of the foreigner. Almost without exception, the Iran-U.S. CT upheld an effects rule and concluded that the intention of the state is less important than the consequence of the measure. National authorities are therefore liable to compensate an expropriated alien whether the respective measure was motivated by worthy economic or social objectives or not. The tribunal occasionally recognized a police powers exception, but from an effects perspective. It acknowledged that a state is not liable for economic injury as a consequence of *bona fide* regulation within their accepted regulatory powers. However, if this regulation damages the foreigner’s property to a substantial and excessive degree, then the host state will have to pay compensation.

In the case law of the Iran-U.S. CT, only unlawful takings required the restitution of property. The term “just compensation” of the Iran-U.S. FCN was generally understood as equivalent to the full value

of the expropriated property. The Iran-U.S. CT found this standard of full compensation to be similar to that of customary international law and applied it in a majority of the cases of expropriations and nationalizations, either lawful or unlawful. Aliens affected by other measures received a lower amount. This different standard enabled the tribunal to compensate a foreigner for a lesser interference in those situations where the measure was not tantamount to a taking. In this way, the Iran-U.S. CT was able to fulfill its purpose, within its jurisdiction: to successfully settle cases involving expropriation and other measures affecting property rights of Iranian and U.S. nationals.