



Roundabout seizures in the law of the Iran-United States claims tribunal

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Abstract

The country of Iran was a powder keg of social unrest in the late 1970's as the regime of Shah, backed by United States, was on the brink of collapse. The world looked on as the government collapsed and the Islamic regime took over. Part of the new regime's anti-American strategy was to freeze all U.S. assets in Iran, as well as takeover western businesses. Investors were left with no recourse and massive losses. It was not until the government of Algeria became involved through international mediation that the United States and Iran began indirect negotiations to resolve these issues. The Algiers Declarations established a tribunal to resolve both claims from United States nationals against Iranians and vice versa. By far, the most controversial portion of this tribunal was the indirect expropriations decisions, which through analysis and understanding of such cases are found to be both inconsistent and unpredictable. This 30 year old situation is quite revealing into what may happen in other Middle Eastern countries with the collapse of governments from Tunisia to Egypt.

Keywords: Iran, United States, Claims Tribunal, indirect expropriations, International conflict.

INTRODUCTION

Prior to the 1979 Iranian Revolution, the United States and Iran enjoyed a cooperative relationship, in which both countries considered the other a strong ally. This relationship resulted in significant foreign investment by both countries, but ended with a myriad of conflicts as the new Islamic Republic of Iran rebuffed any western influences, let alone investment. Investors, burned by the revolution, urged for a solution and through multiple diplomatic channels, the country of Algeria stepped in as a mediator.

THE ALGIERS DECLARATIONS: BIRTH OF THE TRIBUNAL

On November 2, 1980 four conditions for the resolution of the investor conflicts between Iran and the United States were adopted by the Iranian Islamic Consultative Assembly, Iran's Parliament (Lowenfeld, 1981). Through mediation by the government of Algeria, the United States and Iran began indirect negotiations to draft documents to solve their problems. On January 19, 1981 they agreed on two accords, the "Declaration of the Government of the Democratic and Popular Republic of Algeria" ("General Declaration") and "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" ("Claims Settlement Declaration") (CTR, 1983). These two documents are declarations made by Algeria and merely "adhered to" by the Governments of Iran and the United States. Neither the United States Senate nor the Iranian Parliament has ratified the documents, but their validity has never been questioned. The Algiers Declarations established a Tribunal to decide cases that were defined in the Claims Settlement Declaration and all decisions by the Tribunal are final, binding, and enforceable against either of the two Governments in the courts of any nation (Tribunal Rules of Procedure, 1983). The Claims Settlement Declaration established the Iran-U.S. Claims Tribunal to:

"[d]ecid[e] 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 the claim of those nationals. This is done if such claims and counterclaims are outstanding on the date of this agreement, whether or not they are 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] claims of the United States and Iran against each other arising out of contractual

arrangements between them for the purchase and sale of goods and services (CTR, 1983).

The most controversial issue decided by the tribunal is expropriations and thus is the topic of this analysis, more specifically indirect expropriations. Although some may argue otherwise, the tribunal is subject to international law and can be viewed from three vantage points: (1) the applicable law in interpreting the terms and conditions of the accords, (2) the law to be applied in deciding claims brought by a nation of one state against the government of the other, and (3) procedural law (Mouri, "The International Law of Expropriation as reflected in the work of the Iran-U.S. Claims Tribunal," 1994). It is accepted in both the business and legal communities that international expropriations decisions are inconsistent and unpredictable (Dolzer, 2002).

INDIRECT EXPROPRIATIONS IN THE GENERAL INTERNATIONAL JURISPRUDENCE

Basic expropriation is fairly simple to recognize since it is usually the case that a state will take over a business or nationalize an industry, which deprives the investors of the benefits associated with ownership of the business. It is far more difficult to determine if a "de facto" or "indirect" expropriation has occurred because there is a fine balance between the State's actions that interfere with an investor's property rights. Often times, it takes a tribunal to determine when the host state has crossed the line of valid regulation and impeded on the property rights of the investor. In general, international jurisprudence, an indirect expropriation is one that includes indirect takings that essentially deprive an investor of property without transfer of title. This type of expropriation is an alternative to outright expropriation and refers to the notion that governments, by regulatory means or other measures, can deprive an investor of the use and benefit of the investment without direct physical occupation or transfer of title (Weston, 1976).

Indirect expropriations can come in so many shapes and sizes that often a time, any type of codification of indirect expropriations ends up too complex and inconsistent to assist investors. There are a myriad of different ways in which a State can indirectly expropriate a business, but some of the most common are (1) taking of tangible assets, (2) a taking of shareholder interest by assuming managerial control, and (3) takings based on nationalization law. Courts have had the displeasure of attempting to distinguish between indirect takings and mere regulations. With each case often comes a new test for determining if an indirect expropriation has occurred. Various efforts have been made in an attempt to codify the international law, but often times they are merely quoted as scholarly opinion. (Dolzer, 2002). Case law is the most effective tool in determining expropriations in that past precedent can give us some insight into future

decisions. One of the first cases is the *Norwegian Shipowners* case which was decided in 1922. (R.I.A.A., 1922). Others have been decided in an array of tribunals such as the Permanent Court of International Justice (PCIJ), the International Court of Justice (ICJ), tribunals of the Internal Centre on Settlement of Investment Disputes (ICSID) and the Iran-United States Claims Tribunal which is the focus of this paper. The history of case law consists of about thirty cases that would be considered as important in the international arena (Dolzer, 2002). The most recent indirect expropriations ICSID case (*LG&E Energy Corp and others versus The Argentine Republic*), gives us a good starting point for the international communities view on indirect expropriations and the inconsistencies in many awards.

The claimants in the *LG&E* case were three affiliated US companies. LG&E acquired a position in three Argentine gas distribution companies which were becoming privatized in the early 1990s. Between 1999 and 2002, the Argentine Government took emergency economic measures that devalued LG&E's investment and caused them to commence an ICSID arbitration seeking almost \$250 million dollars. Three separate crises all converged at once in Argentina at the worst possible time given what was also going on in the rest of the world's economies. The devaluation of the peso, extensive borrowing by the government, and dwindling tax revenues put the country in a state of emergency. One of LG&E's claims was that the government had indirectly expropriated their investment without complying with the requirements of the Bilateral Treaty, including due process of law and payment of compensation. On the issue of indirect expropriation, the tribunal focused on balancing two competing interests: the degree of the measure's interference with the right of ownership and the power of the State to adopt its policies. In determining interference, the economic impact of the measure and the measure's duration were analyzed. The tribunal found that during the period of December 2001 until April 2003, Argentina was in a period of crisis and this necessitated emergency measures by the government for the maintenance of public order and the protection of the people. The Government refused to comply with their contractual obligations through LG&E, which required an increase of the public services rates on the Argentinean public. By the end of 2001, the Government had restricted bank withdrawals and prohibited any transfer of currency abroad, so that they would not default on its debt. The tribunal agreed with the government that the country required this action to restore civil order and stop the economic decline. The defense of necessity under customary international law has rarely been successful and courts usually do not excuse conduct on these grounds, thus making this case quite worrisome for foreign investors. The implications of this decision and its comparison with the awards by the Iran-U.S. Tribunal will be discussed in greater detail subsequently.

INDIRECT EXPROPRIATIONS IN THE IRAN-UNITED STATES CLAIMS TRIBUNAL

In the jurisprudence of the Iran-United States Claims Tribunal, a taking will be found to occur whenever actions attributable to the Government amount to an unreasonable interference with the owner's use or control of the property (Brower, 1987). The key language is that the actions must be attributable to the Government. The reasonableness of the interference is generally determined pragmatically, focusing on the owner's rights to management and income. A finding of responsibility generally requires at least one deliberate governmental assertion over the control of the corporation, such as the substitution of Government-appointed managers. Losses, caused by revolutionary unrest not directly traceable to such a governmental action, have not generally been held to constitute expropriations. The broadness of these principles has led to some varying decisions in the history of cases heard by the Tribunal. In one of the earlier cases, *Harza Engineering Company and The Islamic Republic of Iran*, the Tribunal suggested in dictum that "unreasonable interference" is sufficient to constitute expropriation. (Iran-U.S. Cl. Trib. Rep, 1982). Other awards have a higher standard and describe it as requiring "interference... to such an extent that [the property] rights are rendered so useless that they must be deemed to have been expropriated," or declare that a taking occurs whenever an owner is "deprived of fundamental rights of ownership" and the "deprivation is not merely ephemeral" (Iran-U.S. Cl. Trib. Rep, 1983).

In the *International Technical Products Corporation*, the Tribunal stated in clear terms that for the State of Iran to be expropriated, it must be established additionally: "Government organs (acting in that capacity) through acts or omissions participated in the transfer of the property to Bank Tejarat, thereby depriving the claimant of their property in violation of international law."

Therefore, there must be specific evidence that government officials acting in that capacity are responsible. Although expropriation will always result in a deprivation of the owner of that property or right, deprivation is not in all circumstances an act of expropriation.

Expropriation of tangible assets

The award in *Dames and Moore* was one of the first awards, in which the rule of indirect expropriations was applied to the facts of a case. (Iran-U.S. Cl. Trib. Rep, 1982). The claimant alleged expropriation of its tangible properties, which included cars, office equipment, instruments and other materials. The Tribunal ruled:

"Unilaterally taking possession of a 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."

This essentially states that for an indirect expropriation to be found the Claimant must establish more than just inability to use his property. He must establish two elements; (1) a positive act of "taking of possession of property" and (2) "denial of its use to the rightful owners." Once both elements have been established only then has an indirect expropriation occurred. The Tribunal followed similar logic in *Computer Sciences Corporation*. *Computer Sciences Corporation and Government of the Islamic Republic of Iran, et al.*, Award No. 221-65-1. The Claimant alleged that furniture and office equipment belonging to one of its subsidiaries was expropriated in Iran when representatives of the Revolutionary Committee entered their offices, ordered the employees to vacate the premises, and denied the company and its employees the use of those offices and access to the equipment. In this specific case the Government did not even specifically respond to the claims. The Tribunal quoted the ruling of the award in *Dames and Moore* that "[t]he unilateral taking of possession of property and denial of its use to the rightful owner might amount to expropriation." Since it was clear from the facts that the Revolutionary Committee both took the property and denied the employees use of that property then the taking had occurred.

The award in *Solo Tiles, Inc.* is a clear example of an indirect expropriation of tangible goods (Iran-U.S. Cl. Trib. Rep, 1982). The Claimant was pursuing a claim for the alleged expropriation of the assets of an Iranian corporation, *Simat Middle East*. Ninety per cent of the shares of *Simat* were owned by Mr. Yitzhak Hachemoff, an Israeli national, and ten percent by a national of Iran. *Sola Tiles* alleged that all the assets and properties of *Simat* were assigned to it by an instrument signed by Mr. Hachemoff on May 25, 1979 outside of Iran and that its expropriation claim arose after a series of actions taken by the Revolutionary Committees in Iran with regards to this assignment in 1979. The Tribunal found that the Revolutionary Committees' "active and specific steps from June 1979 to assume control over the assets, inventory and business of *Simat*," and the ultimate taking of such inventory and management by the end of 1979 amounted to an effective taking by the government of Iran which consequently deprived the owners of all those properties and rights. The facts that supported this position by the tribunal were a series of documents that were issued by the Revolutionary Committees that impounded tiles and forbid the taking of any tiles without written order of the Committee. Another document was a receipt of 738,500 rials that the Committee received in cash, which the Tribunal found to be a taking of the proceeds from the sale of tiles. Under the circumstances, where an actual taking of money and warehouse inventory was found to have occurred and thus led to

deprivation of the investor, the Tribunal found that the existence of a "specific expropriation decree or similar instrument" is unnecessary and that an indirect expropriation had occurred. This was a case in which there was ample evidence that the takings had occurred and exactly what was taken, including its value in the form of a receipt. The Tribunal looks at extrinsic evidence to establish the legitimacy of a claim, and sometimes, as illustrated below, the Claimant does not meet their burden of proof.

In *Houston Contracting Company*, the claimant was working on two contracts for the construction of oil pipelines in the middle of Iran, between Isfahan and Ray. (Iran-U.S. Cl. Trib. Rep, 1982). The claimant contended that its equipment should be imported into Iran and stored in one of the claimant's warehouses, a yard in Ahwaz, and another facility at Ali Abad. The claimant alleges that in May 1979, armed guards and members of the Ahwaz Revolutionary Committee, acting pursuant to a document signed by the Governor of Ahwaz took control of the Ahwaz facility and confiscated the equipment. The Tribunal first state that the documents were neither allegedly issued by the Governor of Ahwaz, nor any objection of the Governor's actions by the claimant would be allowed in the evidence. The Tribunal went on to say that the evidence showed that even though the Committee guards controlled access to the Ahwaz yard, the claimant was still able to remove, transport and export as much equipment as possible from the yards. Therefore, the Tribunal's view was that while the claimant was prevented from having full access to certain items of equipment at Ahwaz, such regulations were not sufficient for finding an expropriation. Any such liability could only exist "with respect to items seized by the Revolutionary Committee for Iran's use," and the liability could not be extended to all the equipment in the Ahwaz yard. The claimant was unable to prove exactly what specific items, or their value, were actually seized by the Government for their own use and this forced the Tribunal to deny any compensation at all.

The indirect expropriations of the tangible goods are far easier to decide than many of the other cases that are heard by the Tribunal. Tangible goods are usually seized or not seized, and although the *Sola Tiles* case was a bit unique, it is far more difficult to determine expropriation in applying the rules to a business operation.

Expropriation of business operations

The largest category of indirect expropriations cases before the Iran-United States Claims Tribunal involves the loss of a business entity or commercial operation in Iran. The Tribunal takes a global approach in determining whether or not a business operation has been expropriated and looks at various ownership rights that have been encroached on. They generally focused on the

entire array of ownership rights, including the right to appoint directors and participate in management, the receipt of financial and commercial information from the business, the receipt of income or other financial benefits, and other aspects of ownership, none of which is necessarily controlling.

Government-appointed managers

The involuntary replacement of the owners, management, or directors of a business with representatives appointed by the government of Iran is a factual pattern that recurs in many of the cases in which an indirect expropriation has been alleged. The mere appointment of new management has not been viewed as a direct act of expropriation, and the Tribunal has repeatedly held that the "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," (Saghi, 1993). Nevertheless, the Government's appointment of new management is important evidence in any claim. The Tribunal has noted that the appointment of managers is a very significant indication of expropriation because the appointment often denies owners the right to manage the enterprise (Iran-U.S. Cl. Trib. Rep, 1985). When applying expropriation rules to business operations and companies, the Tribunal looked for 1) irreversible control by the State over the business or the company to run it for its own use, which is the same as the takings of tangible property and 2) deprivation consequences of such control, preventing the owner of virtually all of the value of its property or property right. Thus the Tribunal is again saying that assumption of control over property or business by a government does not necessarily mean that property has been expropriated. Many of the awards involved what were supposed to be temporary appointments of supervisors and managers for companies by the government of Iran, by late 1983, when the first claims were heard by the Tribunal, it became clear that, in many cases, the interference had become permanent. When these Government appointed managers have complete authority of a business, displacing the former management and precluding the owner from selecting any representative, the Tribunal has not hesitated in finding that a taking has occurred (Iran-U.S. Cl. Trib. Rep, 1993). A defense that is frequently used by the respondents is that managers were only temporary, and the business remained in the control of the claimant and that they could return to the business at their own convenience (Iran-U.S. Cl. Trib. Rep, 1983).

The Tribunal dealt with this very issue in *StarrettHousing Corporation* and *The Government of the Islamic Republic of Iran*. 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 titles to the property formally remains with the original owner. The Tribunal held that the appointment of Government managers to take-over a massive housing construction project previously managed by the claimant was the point at which a taking effectively occurred. The Ministry of Housing had appointed a temporary manager of the Shah Goli project to direct all further activities in connection with the project on behalf of the Government. This appointment was made pursuant to a decree from the Revolutionary Council entitled "Bill for Appointing Temporary Manager or Managers for the Supervision of Manufacturing, Industrial, Commercial, Agricultural and Service Companies," dated July 14, 1979. The Tribunal found that the "succinct language of this act" made it clear that the appointment of the temporary manager "deprived the shareholders of their right to manage Shah Goli," and that the claimants could no longer exercise their rights to manage Shah Goli and were deprived of their possibilities for effective use and control of it. The bill pursuant to which the Government managers were appointed stated that they had "every necessary authority for running the day-to-day business of the company," and did "not require special permission from the original managers or owners," and therefore they were "in every sense the legal substitute for the original" managers. The Government's defense was that it kept trying to persuade the claimant to return to the project and finish it, and these invitations were repeated all the way up to the date of the hearing. The problem with this invitation was that so much had changed that any return to the project would have been under different conditions than those that Starrett had previously agreed to. The Tribunal held that the claimant's reduced control and inability "freely to select management, supervisors and subcontractors" violated "an essential element of the right to manage a project." Furthermore, the Tribunal noted that the government of Iran presented no evidence that if the claimant returned to the project it would have been offered compensation for any loss of value of its ownership and contract rights that may have occurred as a result of the Government-appointed managers. Interestingly enough, the Tribunal later stated that an invitation to return to the business by the Government was a sign that the appointments were temporary and that a taking had not occurred. This concept is extrapolated in the *Motorola* case. Accordingly, the Tribunal concluded that the government of Iran had interfered with the Starrett's property rights in the project to an extent that left these rights "so useless that they must be deemed to have been taken." Subsequent tribunals, in examining the question of whether or not a taking constitutes an indirect expropriation, have followed the test laid down in this case. The test places emphasis on the effect of the investor's rights in making the

determination.

The Phelps Dodge Corporation award applied the two prong rule explicitly when it stated that where a respondent takes control of a claimant's factor and runs "it for its own benefit and seems likely to continue to do so indefinitely" and also deprives the owner "of virtually all of the value of its property rights," the Tribunal must find that the property "has [been] effectively taken," (Iran-U.S. Cl. Trib. Rep, 1993) Phelps Dodge Corporation and a Danish wire and cable company were the class B shareholders of an Iranian Company, SICAB, formed in 1974. The Bank of Industry and Mines ("BIM"), the successor to the Industries and Mining Development Bank of Iran, Iranian's Bank and several other Iranian persons were among the class A shareholders. Sometime in 1977, Phelps Dodge Corporation's equity ownership in SICAB was reduced from 25 percent to 19.36 percent as a result of the class B shareholders unwillingness to participate in SICAB's share capital increase. The Tribunal found that the transfer of the SICAB factory and the management to BIM was ordered by the Iranian Council for the Protection of Industries in 1979. This order was pursuant to the "Law of Protection of Industries and Prevention of Stoppage of Factories in the Country" due to the increased demand for repayment of loans to BIM's predecessor. The Iranian Government described the State appointed managers as "trustees" and their administration of the factory as "provisional." The Tribunal also pointed out that there had been no meeting of the Board of Directors or shareholders and Phelps Dodge had received neither dividends nor any information concerning the factory following the transfer. Although the Tribunal stated that it "fully underst[ood] the reasons why the Respondent felt compelled to protect its interests through this transfer of management, and [also] ... underst[ood] the financial, economic and social concerns that inspired the law... those reasons and concerns cannot relieve the Respondent of the obligation to compensate Phelps Dodge for its loss." With this language the Tribunal rejected the idea that expropriations in the form of legitimate regulations are not compensable. No where in the law was it stated that the managers were trustees for the shareholders and their failure to pay any dividends and the complete exclusion of the actual shareholders from any information concerning the business made it apparent that they were actually trustees for the government of Iran.

As mentioned before, not all cases that the government appointed managers result in a finding of an expropriation. A host State can still effectively extract value from an enterprise while "tak[ing] advantage of the existing management and their skills, thus avoiding the major costs of an outright expropriation" (Guzman, 1998). One of the more questionable awards of the Tribunal was the decision in *Motorola, Inc. and Iran National Airlines Corporation* (Iran-U.S. Cl. Trib. Rep, 1988). The claimant in that case argued that the Iranian branch of its

subsidiary, Milcom Communications and Electronics Ltd. (hereinafter "Milcom"), had been taken through a series of acts attributable to Iran. Before the Revolution, Milcom had helped Motorola in selling and installing their communications and electronic equipment in Iran and was managed locally by an Iranian national. The conditions during the Revolution caused Milcom to withdraw its expatriate personnel in December 1978, but they continued to operate throughout the Revolution with local workers. The situation changed in March 1979 when armed Revolutionary Guards broke into Milcom's premises and ordered all of its employees to depart; at the same time Milcom's Iranian manager was imprisoned. A month later, the Revolutionary Attorney General appointed a manager who was instructed to "supervise" Milcom "until further notice" and was authorized to sign checks in the name of Milcom. When Motorola requested an explanation of the Government manager's legal authority to act, it was informed that his appointment was based on and in compliance with the "Act Concerning the Appointment of Temporary Directors for the Supervision and Management of Firms and of Temporary Directors for the Supervision and Management of Firms and Companies" because "the directors of Milcom... have abandoned their positions." The Claimant promptly objected to this assertion and stated that it "clearly had not abandoned the firm," and it refused to provide any further assistance to Milcom "unless and until the Company was returned to Motorola and [its] General Manager was reinstated."

In June 1979, representatives from Motorola and the Iranian government met in London to discuss the sale of Milcom to Iran. On September 19 of 1979, the Ministry of Commerce refused Motorola's sale proposal, suggesting that Motorola appoint its own manager from one of its other branches, and that until such time as Motorola appointed a manager the Ministry of Commerce would continue to supervise Milcom. With this long list of facts, the Tribunal had to decide whether an actual taking had occurred. The Tribunal noted that "in previous practice of the Tribunal, the appointment of managers often has been regarded as a 'highly significant indication' of a taking." However in this instance the Tribunal found that the facts pointed to a temporary nature of the appointments and that those facts were supported by subsequent events. The Tribunal cited the request by the Ministry of Commerce asking Motorola to appoint a new external manager as supporting the theory that the manager placed by the Government was temporary. Although the Tribunal considered the appointment of a manager a significant event, it found that in this case it did not constitute an expropriation. This is a major deviation from the decision in the *Starrett*, because in that case the Tribunal felt as though the Government's invitation to take over the project was not sufficient and the Claimant had already incurred too many losses. In contrast, the Tribunal in *Motorola* states that the

Government's offer to give control back was an indication that a taking had not occurred. The Tribunal makes no mention of lost earnings and compensation for Motorola during the period of Governmental control. This type of inconsistent award is exactly why expropriation law cannot be codified by any international body.

Loss of income

There is sparse Tribunal precedent on the issue of whether an expropriation has occurred when an owner's right to income from a business is interfered with even though the owner continues to manage and direct the business. The theory of unlawful interference was developed most in *Eastman Kodak Company and The Government of Iran* (Iran-U.S. Cl. Trib. Rep, 1987). In that case Kodak attempted to collect debts from an Iranian corporation called Rangiran. Rangiran was virtually completely owned by Kodak and only established to act as Kodak's Iranian distributor and photo finishing laboratory. Rangiran's expatriate management personnel left Iran in December 1978 and four Rangiran employees of Iranian nationality were appointed to manage the company. In February of 1979, two of the American managers returned to Iran to resume their duties and Rangiran operated normally until November of 1979 when the United States Embassy in Tehran was taken over. At that point the two American managers left Iran and appointed a management committee consisting of three of the four Rangiran employees who had managed the company during the last time they left. On November 17, 1979 Rangiran's bank accounts were frozen by order of the "General Public Prosecutor of Islamic Revolutionary Republic of Iran" and the freeze was effective until further notice from the prosecutor. Ten days after the freeze, Rangiran's Workers' Council, an organization of its employees, received notice from the Attorney General's office providing that "[p]rior to final decision in respect to foreign companies especially American companies, we hereby inform the Council that you should temporarily supervise" the company. After this date the Workers' Council took over management of the company and the original managers were threatened with bodily harm if they refused to co-operate. Kodak alleged that the combination of the freezing of Rangiran's bank accounts, the Revolutionary Prosecutor's grant of management authority to the Workers' Council and the Government's appointment of a manager "had the effect of depriving the shareholders of their control over Rangiran and that by the end of 1979 it became an entity controlled by Iran." Kodak argued that this entitled them to collect intercompany debts from Rangiran as a respondent controlled by Iran, or that it was due compensation for the taking of Rangiran. The Tribunal disagreed that Iran had control over Rangiran and therefore a claim could not be sustained against it. The Tribunal felt that the high level

of control needed to constitute governmental control had not been met since Kodak was able to maintain enough control over Rangiran to liquidate it and to petition for a declaration of bankruptcy. The Tribunal found that, even though there was no expropriation claim, Iran had interfered so much with the Claimant's ownership interest that they were liable for unlawful interference. Thus a taking occurs when the owner attempts to continue management but is excluded from the corporations earnings (Iran-U.S. Cl. Trib. Rep, 1986). Here we have another discrepancy from the other cases. Even though Kodak seemed to have control and the Government was only indirectly involved through the Workers' Council, the Tribunal still found that compensation was necessary.

Nationalization of the oil industry

The majority of cases in this category involve Iran's nationalization of the petroleum sector. Iran nationalized the petroleum industry with the passage of the Single Article Act Concerning the Nationalization of the Oil Industry of Iran (hereinafter "Single Article Act") on January 8, 1980. The highly political nature of the oil industry in the Middle East and the desire of large international oil companies to settle their differences with Iran to get back into the market has been part of the reason that only two partial awards and one final award have been issued by the Tribunal (Iran-U.S. Cl. Trib. Rep, 1987). The few cases that the Tribunal did decide were very controversial since one of the main goals for the Islamic Revolution in Iran was to regain control over the oil industry.

The first partial award was in Amoco International Finance Corporation. In 1977 the atmosphere in Iran was very tense and this civil unrest was beginning to affect the oil industry. After the Islamic Revolution gained strength in 1978 there were strikes in the petroleum industry. Once the strikes got worse Amoco evacuated its expatriate workers from Iran. Then in 1980 when the Single Article Act went into effect, all oil agreements contrary to the nationalization of Iran's oil industry would be considered annulled. On December 24, 1980 Iran's Minister of Petroleum informed Amoco that their Khemco Agreement had been declared null and void by the Special Commission that was created in accordance with the Single Article Act. The Tribunal found that the events of 1978 and 1979 forced Amoco to remove its foreign workers and Iran argued that these events frustrated the Khemco agreement. The Tribunal rejected Iran's argument and held that the events merely suspended performance of obligations and that the agreement should not have been voided. The Tribunal also felt that the agreement survived because negotiations were being engaged in by both parties between 1978 and 1979. After a thorough analysis of the lawfulness of Iran's nationalization of the oil industry, the Tribunal found that

the enactment of the Single Article Act had expropriated Amoco's interests. Before the Tribunal could reach a final award the parties agreed upon a settlement so that both sides could negotiate a new agreement since there was still oil in Iran and Amoco wanted a piece of it.

One of the more interesting and also the last oil case decided by the Tribunal was Phillips Petroleum Company Iran and The Islamic Republic of Iran (Iran-U.S. Cl. Trib. Rep, 1989). Similar to other oil agreement cases, Phillips constructed its claim in the alternative grounds of expropriation of its contract rights and repudiation of the Joint Structure Agreement (hereinafter "JSA") with the National Iranian Oil Company ("NIOC") for exploration and exploitation of offshore oil reserves in the Persian Gulf. The JSA provided that NIOC would create a company called IMINICO in which both parties would appoint half of its board of Directors and have the right to half of the oil lifted from the field. IMINICO was forced to cease production in December 1978 due to strikes by workers and when production resumed in March 1979 the second party companies were not permitted to take their share of IMINICO's oil. Once again the government of Iran argued that the agreement had been frustrated by the events in 1979 and once again the Tribunal rejected these arguments. The Government did argue in the alternative that if the agreement was not frustrated then it should be considered terminated by a nullification notices served on the Claimant in August 1980. The Tribunal accepted the Claimant's assertion "that the alleged expropriation did not result from any public government decree, but rather from concrete actions of the Government of Iran, often operating through NIOC, which effectively deprived Claimant of its property." A letter which stated in part that "Oil sale contracts shall be signed by the National Iranian Oil Company on behalf of the Government" was part of the evidence that the Tribunal cited as proof of governmental interference. The taking in Phillips was ultimately effected by formal decree, but the Tribunal held that a indirect expropriation had occurred prior to the date of the decree. Essentially the formal decree was just making what had already occurred official and the Tribunal echoed these thoughts.

HAS A LINE OF JURISPRUDENCE EMERGED?

Although not all of the expropriation cases have been described, a majority of the important ones from various topics have been discussed in order to grasp a better understanding of the Iran-United States Claims Tribunal's stance towards indirect expropriations. They have set out specific tests which seem to make one believe that by following each test, the results should be transparent. This however does not seem to be the case. Each case seems to have another twist or add upon already established law.

The cases involving tangible assets seem to follow a

slightly more consistent line of jurisprudence than the other types of expropriations; however, the problem with these cases is the weight afforded to certain evidence. The Tribunal has explored in some detail the evidentiary burden placed on the claimant to establish that the alleged seizure of tangible property occurred. The Tribunal at times has used a claimant's affidavit as evidence, but then becomes more strict in its guidelines as in the 'Houston Contracting Company' case when they refused to award the claimant compensation due to lack of specificity in their evidence of the property expropriated. The Tribunal has attempted to convey that they are merely using common sense in such cases, but their varying approach has left doubts of any method. The types of evidence and testimony that will be acceptable, as entitling a claimant to recover, seem to rely greatly upon the Tribunal's perception of the credibility of the witness. They also seem to focus the measure of credibility on the degree of detail that is present in an affidavit or testimony. The safest way to prove that a seizure of tangible property has occurred is to provide:

(1) In detail an account as possible both of the seizure and the items seized, including times, places, dates and descriptions; (2) Corroboration of that account by independent testimony or some variation of documentary evidence; (3) Sufficient proof that the items were owned by the claims at the date of the alleged taking; and most importantly (4) A belief on the part of the Tribunal that the alleged facts and circumstances have a commonsensical likelihood of taking place.

When determining whether or not business operations and companies have been expropriated, the Tribunal focused on whether the appointed managers were temporary in nature or if they had indications of being permanently placed. The Tribunal also examined whether or not the business operations were controlled by the State itself. They did consistently state that a mere assumption of control does not equate to expropriation. The court gives some sense of reliability in their earlier awards of *Phelps Dodge* and *Starrett*, but it is the *Motorola* award that is very troubling. The Tribunal felt that a mere request by the Ministry of Commerce asking Motorola to appoint a new external manager supported the theory that the management in place by the Government was temporary. This leaves the Government entirely too much discretion in making empty requests that it knows a company would not be able to fulfill. There was no inquiry by the Tribunal of whether the offer was in good-faith, or if it was just made to make it look like temporary managers were in place. The Tribunal went as far as to say that in previous cases, the appointment of managers was a significant indication of a taking, but in this case it was not. The Tribunal is leaving itself open to change the required amount of control necessary to constitute a taking and that should worry any foreign investor that is thinking about putting money in an unstable State.

The nationalization cases are so few and convoluted by politics and the need for petroleum that it does not seem wise to attempt to find a line of jurisprudence. None of the cases turned on any particular line of reasoning or law on the part of the Government, but the oil industry was so eager to get back into the region that it was willing to settle. Each case found the government of Iran merely stating that the events in the late 1970's frustrated their contracts and therefore they could not be held liable to them. The study applauds the Tribunal in determining that those events did not frustrate the purpose of the contracts and merely suspended them for a temporary amount of time. The latest ICSID case did not follow the same reasoning, but that will be discussed further subsequently.

There seems to be a general concept in which the Tribunal finds that an indirect expropriation has occurred in each instance; however, the case law does not seem to follow that logic each time. There seems to be too high of an involvement of outside influences and this does not bid well for the legitimacy of such an organization. The tangible assets cases seem to turn on which claimant's the Tribunal feels is most trustworthy, while the business entity cases have conflicting results, and the nationalization cases are clouded by politics and corporate profits to ever reach a conclusion. One would think that this type of confusion is limited to the Iran-United States Claims Tribunal, but the international law of expropriations seems to be in a flux in other tribunals as well.

IRAN-UNITED STATES TRIBUNAL COMPARISON TO ICSID CASE

The latest ICSID ruling in *LG&E* is very unusual, and it is still not clear if other tribunals dealing with claims against Argentina, or other host States that have economic instability, will adopt similar findings. Allowing necessity to be invoked by the Government in times of crisis could have enormous ramifications for international investors, since it is during these downtrodden times that most opportunities rear their heads. With the latest ruling, the investors will be wary to invest in emerging markets because of the risk that a host nation can almost do as they please and just hide behind the defense that their policies were necessary due to crisis. This type of award also places nations with a history of economic problems in bad spot because the foreign investment could potentially help their already problematic economy, but the new risks may turn investors away. The ICSID Tribunal rightfully conceded that an expropriation had occurred, but to shield the government of Argentina from all liability is a step in a frightening direction.

Had this case been decided twenty years ago, then those arguing in front of the Iran-United States Claims Tribunal could have seen many cases decided in favor of the government of Iran. To accept the defense of

necessity in the way it was used in *LG&E* has to make some foreign investors think twice. It is especially relevant in comparison to the Iran-United States Claims Tribunal because Iran was going through a similar type of turmoil, but the Tribunal still held that this did not excuse them from liability and in fact in the cases above the Tribunal went so far to say that the period of unrest merely suspended the contracts and actions. Although Argentina's crisis was more economic than political, there were still some similarities in the Islamic Revolution in Iran. The nationalization of their oil business had a lot to do with the revolution, and so did the huge division of wealth between the nations' upper and lower classes. The *LG&E* case could be seen as a rogue amongst the other ICSID awards; however they still leave an air of doubt in the minds of those who follow the ICSID decisions. The general principles of indirect expropriations in the Iran-United States Claims Tribunal and the ICSID decisions follow a similar type of logical approach to determine whether or not a taking has occurred.

CONCLUSION

International tribunals have what seems to be a fairly broad authority in determining whether a taking has occurred. The law is written fairly clearly, but it is difficult to have each case fit perfectly into the set requirements. This gives tribunals the ability to mold the rules to the facts and with this power comes a certain level of discretion. There seems to be no magical formula to expropriations and in the world of business it can be very worrisome when there is no guarantee that the same case will have the same outcome regardless of how it is presented and who decides it. It is also impossible to determine that this line of jurisprudence will last over time.

The evolution of economic activity and the acceptance of higher levels of public regulation make the world of indirect expropriations a fairly volatile concept. This does not necessarily mean that there is anything wrong with the international community with regards to expropriations. This area of cases falls into such a grey area of the law that it would be unreasonable to expect every case to have the expected result. This also does not mean that international arbitrators merely go with a gut feeling about what they believe is the right thing to do; rather we see that indirect expropriations as an area of law that requires in-depth analysis of each cases, and to immerse oneself in the facts in order to determine what actually occurred. When such a fact-specific inquiry is required then a greater level of criticism comes from the outside public. After all, it is almost impossible to recreate a series of events through testimony and documents. This study believes that the Iran-United States Tribunal's cases mentioned that do not follow precedent are in fact just an element of human error. The Tribunal was put in

place to determine some very complex business disagreements that often times had a fairly large effect on the international politics in a time of hostility between the two nations.

The *LG&E* case however is quite surprising, especially coming from ICSID. They seem to have taken a huge leap in determining that the government of Argentina should not be liable even though it was found that an expropriation had occurred. With most areas of international law, the passage of time creates a body of work that allows tribunals to look at each other's previous decisions to guide them on their way to their own. The problem with indirect expropriations is that it is almost impossible to find the same fact pattern in any two cases. Even in situations, such as Iran and Argentina, which seem to be similar on their surface, are so different with respects to the involvement of culture, religion and economics. There are now too many variables and with time it can only be assumed that more will arise. One should merely look at the rule of law and then attempt to see how well the facts fit into the elements of that rule. From there, it is really a gamble to go to arbitration, and settlement would be the best option for any risk-averse individual, especially when it comes to the issue of indirect expropriations.

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