Intl. J. Humanities (2009) Vol. 16 (1): (89-114)

State Responsibility for Nationalization and Expropriation:A Preliminary Survey of the Awards of the Iran-United States Claims Tribunal

Homayoun Mafi[1]

Received: 15/1/2007 Accepted: 12/11/2008

Abstract

The present article deals with the issues of nationalization and expropriation in the light of Iran-United States Claims Tribunal Awards by looking at their legality and the limits on the rights of states to nationalise and expropriate, while discussing some case law. I will argue that the state's right to nationalize foreign property is an attribute of its sovereignty and derives from territorial supremacy of the state. It is also proposed to examine the questions of State responsibility for the injurious consequences of certain wrongful acts or omissions during the Revolution of 1979. The question is whether the events of the revolution and the appointment of temporary managers to administer the foreign companies' affairs could be interpreted as constituting an expropriation and whether this measure is in full accord with international jurisprudence. The Tribunal's decisions make it clear that regardless of whether the state has obtained any value of property or not, responsibility exists whenever acts attributable to a state have deprived a foreigner of his property rights.

Keywords: Nationalization, Expropriation, Taking, Responsibility, Property

1. Assistant Professor, Faculty of Law and Political Sciences, Mazandaran University

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

Introduction

On January 19, 1981 the Iran-United States Claims Tribunal Settlement Declaration was established by virtue of Claim Settlement Declaration to resolve legal and financial disputes existing between the Government of Iran and American nationals arising out of expropriations or other measures affecting property rights. For the jurisdiction of the Tribunal over the expropriation claims, it must be demonstrated that the disputes were outstanding as of January 19, 1981 and the claimant was either a US citizen or a company owned by a US national (at least 50 percent) as well as formed under the US laws. The Tribunal was required to resort to a wide variety of legal rules to clarify all cases " on the bases 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". Following the revolution of 1979, the new government took several formal steps to nationalize banks, insurance, oil industry, certain heavy industries and rural and urban lands. In addition, the government also implemented other measures affecting the management of production and service units in public and private sectors by appointing "provisional" or "temporary" managers. It is submitted that these measures were taken in order to safeguard companies' interests and to prevent stoppage of work and lay-off of the workers. Therefore, assumption of responsibility for the company's managers must not be considered as an expropriatory action. Under international law, the expropriation of foreign property incurs the responsibility of the expropriating state. It stems from the fact that the expropriating state has been enriched to the extent of value of property. In this article, I will try to present the Tribunal's case law for the purpose of making known its contributions and to see from the perspective of international law whether its awards are controversial or not. The following exposition is divided into two sections reflecting the controversies regarding the issues of nationalization and expropriation as well as state responsibility, all of which are important from the theoretical and practical point of views.

1. The Legality of Nationalization

(a) Is a premature termination of an oil contract unlawful?

As part of customary international law, the right to nationalize has never been contested. The state's right to nationalize foreign property is derived from international customary law and the state's territorial sovereignty. The legality of nationalization has been accepted in several arbitral awards. In the *Aminoil Arbitration* the Tribunal held:

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

The Tribunal does not see why a government that was pursuing a coherent policy of nationalization should not be entitled to do so progressively. It is hardly necessary, additionally, to stress the reasonable character of a policy of nationalization operating gradually by successive stages, in step with the development of the necessary administration and technical availabilities. [1, p 1019]

By virtue of the United Nations General Assembly Resolution 626 (VII) of December 2, 1962 "the right of peoples freely to use and exploit their national wealth and resources is inherent in their sovereignty and is in accordance with the purpose and principles of the Charter of the United Nations". Referring to the case concerning *Certain German Interests in Polish Upper Silesia* the Tribunal in *Amoco* held that:

This (the right of States to nationalize foreign property for a public purpose) is today unanimously accepted even by States which reject the principle of permanent sovereignty over natural resources, considered by a majority of States as the legal foundation of such a right. [2, paragraph (para.) 113]

The revolution of 1979, gave rise directly or indirectly to various actions including the nationalization of major industries such as the oil industry and banking, insurance as well as certain sectors of agriculture and construction. Major economic objectives of the revolution on the government agenda also included termination of the oil concessions. The rationale was the fact that the oil agreements were contrary to the Nationalization of the Iranian Oil Industry Act of 1951. It should be pointed out that the term nationalization in our discussion involves large scale takings of industries or natural resources as distinguished from a separate take-over of an individual property. By far, the arbitration proceedings relating to oil contracts are the most prominent in the Tribunal's awards.

Three awards of the Tribunal are important in cases arising from the nationalization of Iran's oil industry :

- *Mobil Oil Iran, Inc. v. Iran*
- *Amoco International Finance Corp. v. Iran*
- *Phillips Petroleum Co. Iran v. Iran.*

In the *Mobil Oil*, four of the companies involved in a consortium claimed compensation for breach of the 1973 sale and purchase agreement. Although Iran argued that the agreement was frustrated by changed circumstances, the Tribunal rejected the idea of frustration by analogy of frustration based on the *force majeure*. The Tribunal held that "it is also admitted generally that *force majeure* as a cause of full or partial suspension or termination of contract, is a general principle of law which applies even when the contract is silent ... in the circumstances of these Cases, however, the Tribunal does not find that on 10 March 1979 the situation was such that the Agreement could be considered as frustrated or terminated for cause of *force majeure*."[3,p 270]. Having concluded that there had been no expropriation of rights, the Tribunal went on to say that the claimants were contractually entitled to

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

compensation for their losses pursuant to the negotiation with the National Iranian Oil Company.

In the *Amoco Case*, the issue was an agreement to establish a joint venture to build a plant to process natural gas. In late 1978, following the increasingly revolutionary strikes, the petroleum production was halted. On 11 August 1980, the Iranian Ministry of Oil served a letter to Amoco stating that the Special Committee on Oil Contracts decided to avoid the joint venture agreement concluded in 1958 between Iran and that company and to declare the agreement null and void. In August 1980, the claimant began arbitration proceedings. In defence, Iran argued that the agreement was frustrated by *force majeure* conditions which suspended the contract rather than terminating it. In the alternative, Iran argued that if the Agreement were not found to have been frustrated, it then should be regarded as terminated pursuant to the Single Article Act which was a legitimate nationalization by Iran of Amoco's right under the Khemco Agreement. In other words, the nationalization of the Khemco plant was a lawful by virtue of Iran's sovereign powers. While rejecting these arguments, the Tribunal concluded that when notice of nullification was given to Amoco, the process of expropriation was completed, that is to say, on December 24, 1980. The rationale for the Tribunal to dismiss the plea of frustration was the fact that the *force majeure* circumstances were not found to have developed into a situation by virtue of which, impossibility of performance could be inferred. [4, p 8].

The Tribunal finds that Amoco's rights and interests under the Khemco Agreement, including its shares in Khemco, were lawfully expropriated by Iran, through a process starting in April 1979 and completed by the decision of the Special Committee notified by telex on 24 December 1980. [2, p 82].

In *Phillips Petroleum*, the issue was a claim against Iran by Phillips Petroleum Company seeking compensation for a taking of contractual rights signed with National Iranian Oil Company in 1965 in which *Phillips* was one of the three parties to a Joint Structure Agreement (JSA) called the Second Party. On August 1, 1979 NIOC removed the general manager of the producing company and replaced him by a committee appointed by NIOC with the intention of executing the affairs of the affiliated companies. On September 1979, *Phillips* was informed by NIOC that the Joint Structure Agreement should be considered as terminated. The main question before the Tribunal was whether or not the revolutionary changes in Iran frustrated the performance of the Joint Structural Agreement. Although the theory of frustration as a well-trodden ground was at the core of the respondent's defence, the Tribunal instead focused on the concept of *force majeure* specified in Article 36 of the JSA. According to Judge Khalilian, frustration is a total and absolute impossibility of the

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

performance of the agreement rather than a temporary, surmountable halt or stoppage capable of being characterized as *fore majeure* as provided by Article 36 of the Joint Structural Agreement.[4,p 11] However, Iran's argument of *force majeure* and changed circumstances were rejected by the Tribunal citing the *Tippetts Award* for support of its conclusion. The Tribunal held that the control over property by the Iranian government amounted to a compensable taking under international law. The effects of Iran's actions on the rights of Phillips property was summarized by the Tribunal in the following manner:

> Whereas the First and Second Parties jointly operated the offshore petroleum fields involved in this case and shared the crude petroleum produced by the fields prior to the events of 1979, thereafter the Claimant and the Second Party companies no longer participated in joint operation of the fields, no longer received their share of the petroleum being produced, and were told by Iran that their agreement had been terminated and nullified. These changes resulted from the actions of Iran summarized above, which totally excluded the Second Party from any of its functions under the JSA. [5, paras 115-116].

It would seem that, the award has failed to distinguish between the two essential facts, namely, the *force majeure* and the frustration. *Force majeure* contemplated in Article 36 is a temporary impossibility of performance meaning that it provides certain measures for extending the terms of the agreement after termination of the *force majeure* circumstances. The Tribunal further ignored the fact that the defence was based on the frustration of purpose of the agreement and not the impossibility of performance thereof. In this case, Chamber two of the Tribunal did not consider the finding in *Questech*, by stating that cancellation of military intelligence projects having a unique political sensitivity is not analogous to the cancellation of petroleum contracts. The soundness of this rational is open to doubt as why the oil industry, on which Iran depends for its livelihood, is not as fully sensitive as its military procurement. Meanwhile, the doctrine of changed circumstances upon which Iran substantiated its argument is one that can apply, in principle, to all cases, whether sensitive or non-sensitive. Meanwhile, pursuant to the practice established by the Tribunal itself, the Tribunal could have attempted to refuse to hear the case since *Phillips* did not make a timely objection as of 1979. Having delayed over three years in making its objections for breach of the Joint Venture Agreement, the claimant indeed waived the rights to object to NIOC for lifting oil. The Tribunal failed to understand its proper function under both the established practice and customary international law.[4,pp11,13,22-24].

(b) Does a taking* per se *mean an illegal act?

In studying the elements entailing the taking of property, it is fundamental to ascertain on which criteria an act of taking might be

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

considered legal or illegal. According to international law, expropriation is not *per se* illegal. It is based on this fact that every state shall freely exercise the permanent sovereignty over its natural resources and regulate and supervise authority over foreign investment. Meanwhile, it is an established rule of international law that an act of taking does not require a formal decree of nationalization. In other words, it is argued that a "taking of property may occur under international law, even in the absence of a formal nationalization or expropriation". Therefore, when an action results in an outright transfer of title rather than incidental economic injury, it must be presumed that a taking to have occurred.[6,pp512-513]. The Tribunal's practice reveals that there are three basic conditions of legality in cases involving nationalization, namely: (a) that the taking should be for public purpose, (b) that the taking should be non-discriminatory, and (c) that the compensation should be paid.

In *American International Group,* concerning the taking of an insurance company, the Tribunal concluded that "it cannot be held that the nationalization of Iran America was by itself unlawful, either under customary international law or under the Treaty of Amity ... as there is not sufficient evidence before the Tribunal to show that the nationalization was not carried out for a public purpose as part of a larger reform programme, or was discriminatory".[7,p656]. The question that remains, is what constitutes the element of public purpose. The point is by no means far from doubt. According to the American Restatement of Foreign Relations Law, "there is little authority in international law establishing any useful criteria by which, a State's own determination of public purpose can be questioned. There appears to be few, if any, cases in which a taking has been held unlawful under international law on the sole and specific ground that it was not for a public purpose".[8,p553]. In *Amoco International Finance Corporation*, the Iran-US Claims Tribunal stated that:

> A precise definition of the public purpose for which an expropriation may be lawfully decided has neither been agreed upon 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. [2,para. 145].

The requirement of public purpose, was confirmed in the *Certain German Interests in Polish Upper Silesia Case*.[9,p22]. As a consequence, those expropriations which are not justifiable in the public interest are illegal. However, in the *Liamco Case*, the requirement that nationalization should be for a purpose was dismissed by the arbitrator Mahmassani due to the fact that "it is the general opinion in international law that the public utility principle is not a necessary requisite for the legality of a nationalization ... there is no

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

international authority, from a judicial or any other source, to support its application to nationalization".[10,p194]. Friedman, also denies the existence of real public necessity on the ground that the motives for nationalization "are a matter of indifference to international law, since the latter does not contain its own definition of public purpose".[11,p141]. In the *Aminoil Case*, the Government of Kuwait stated that its nationalization was a necessary measure in the national interest due to Aminoil's failure to agree to its terms.[12,p998]. By 1980, when the Single Article Act nationalized the oil industry, it also annulled all existing oil agreements. In fact the Act "applied to the entire oil industry irrespective of the nationality of the foreign companies involved in this industry". Accordingly, the Tribunal accepted that the Act contemplated compensation and therefore, it has not violated either the Treaty of Amity or customary international law.[13,paras. 229-231]. The fact that the taking was for a public purpose, was confirmed by the Tribunal in the following manner:

> It cannot be doubted that the Single Article Act was adopted for a clear public purpose, namely to complete the nationalization of the oil industry in Iran initiated by the 1951 Nationalization of the Iranian Oil Industry Act, with a view to implementing one of the main economic and political objectives of the new Islamic Government. [2,para.146].

Some scholars, argue that the expropriations which are not for a public purpose due to their discriminatory and arbitrary nature, are unlawful under international law.[14,p18]. The requirement of non-discrimination, was discussed in *Amoco International Finance Corporation*. In this case, the claimant alleged that while all American interests were expropriated, the Japanese share in the Iran-Japan Petrochemical Company (IJPC) was not expropriated. The claimant, further stated that the taking of the Khemco which was a 50-50 joint stock company between the Iranian National Petrochemical Company (INPC) and the Amoco's Swiss subsidiary (AMOCO International S.A.) was discriminatory. Iran, responded by stating that the operation of the IJPC joint venture was not closely linked with other contracts relating to the exploitation of oilfields. It was also asserted that IJPC was not an operational concern at the relevant time. The Tribunal accepted Iran's argument and stated that "it is difficult in the absence of any other evidence, to draw the conclusion that the expropriation of a concern was discriminatory only from the fact that another concern in the same economic branch was not expropriated". The Tribunal has made it clear that: "in the present case, the peculiarities discussed by the Parties can explain why IJPC was not treated in the same manner as Khemco. The Tribunal declined to find that Khemco's expropriation was discriminatory".[2, paras.139,141-142].Thus, since no expropriation of major resources has been declared

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

discriminatory, the issue of unlawful expropriations has not directly arisen.

It follows that, the principle of non-discrimination requires that comparable situations should not be treated differently unless such differentiation is reasonable and objectively justified. However, comparability of the situations does not mean that they should be identical. Basically, two factors are essential in this respect: competitive positions and objective of the measure. On the issue of equality of treatment, the PCIJ held that "there must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law".[14,p192]. The developed states recognize that nationalizations which discriminate against foreigners are contrary to international law.

The principle of non-discrimination, was also cited in the *Sabbatino Case[15,p1104].* in which the United States Circuit Court of Appeals applied it to the Cuban nationalization to hold that nationalization as contrary to the principles of international law. According to international law, the nationalization measure should not discriminate against foreigners and it should apply to all properties in a similar manner. In the *Oscar Chinn Case,* the PCIJ concluded that the inequality of treatment could only amount to a discrimination if such an inequality had been applied to concerns in the same position. There is an implicit assumption in international law that the notion of equality does not include the idea of formal equality. Pursuant to the judgment of the PCIJ "equality in law precludes discrimination of any kind, whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations".[16,pp 81,19].

The third condition, for the legality of a taking, is the duty to provide compensation. According to the Tribunal it is a "general principle of public international law that even in a case of lawful nationalization the former owner is normally entitled to compensation".[17,p105]. However, due process of law as an independent ground of legality was not supported by the Tribunal's Practice. In *Amoco* and pursuant to the Khemco Agreement the claimant stated that the expropriation of its rights was unlawful and in violation of due process of law. In the Tribunal's view compatibility with domestic legal procedures is not usually cited as a condition for an internationally lawful nationalization and the Treaty of Amity between the United States and Iran specifies no such condition.[2,paras.120,129].

2. State Responsibility for Injuries to Persons and Property

(a) Does a revolution give rise to State responsibility? The question of attributability

Claims arising out of the expropriation, have constituted a significant part of the Tribunal

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

case-load. As a matter of domestic jurisdiction, expropriation is a legal act deriving from the state's sovereignty for securing the common good of the state. Expropriation, more or less concerns isolated cases of taking or deprivation of some legally recognized right effected by the State. This is in line with the politically neutral character of expropriation which is not dictated by a philosophy of economic policy which compels the states to regulate and control the foreign private property. Under international law, all states are equally responsible for their illegal acts which are in breach of international law. International law Commission states that "by the very nature of the state, the attribution of conduct to the state is of necessity a normative operation". The essence of a breach of an international obligation, is defined in Article 16 of the Draft Articles in the following formulation: "there is a breach of an international obligation by a state when an act of that state is not in conformity with what is required of it by that obligation". Under Article 3 of the International Law Commission Draft, there is an internationally wrongful act of state when:

- conduct consisting of an action or omission is attributable to the state under international law;
- that conduct constitutes a breach of a international obligation of the state.[18,p 30].

The purpose of the principle of the international responsibility of states, is the fact that international obligations are observed. The Tribunal practice with respect to state responsibility does support that for a claimant alleging expropriation of its property is most significant whether the state is liable for the conduct of expropriation. In this respect, a claimant faces a much higher burden of demonstrating attributability to a state which intentionally assumed control over the property.[19, p 245]. The claimant's obligation is to carry out the burden of producing persuasive evidence and with a degree of certainty. To attribute the international responsibility to the state involved in expropriation and deprivation cases, it is the claimant's obligation to seek hard and conclusive evidence including deliberate government interference or intentional obstruction or illegal interference with the use of the property. Since the Algiers Accords are silent on the issue of burden of proof, it is presumed that the Governments of Iran and United States of America by accepting the UNCITRAL Rules also approved the rules of the law of evidence as being applicable to the settlement of their disputes.

The Tribunal experience, with respect to expropriation, seems to show that the actual deprivation must have been caused by unreasonable interference by the government.

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

Such action is deemed to be the case when the owner was deprived of his fundamental rights of ownership. Thus, whenever the alien's enjoyment of the ownership has been the subject of interference by the government, the Tribunal took the view that it constituted a compensable taking. Interference, should be to such an extent that the properties are rendered so useless that they must be deemed to have been expropriated. As a consequence, it is sufficient that an unreasonable interference with the property rights be attributable to the government.

(b) Responsibilities for acts of State organs

It is a well-established principle of international law,that a state bears responsibility for the acts and omissions of its organs when acting officially in their capacity as state organs. The degree of the state's responsibility, for the acts of its organs thus depends on the scope of powers and positions of those organs. The question, is what can be identified as the organs of the state. Organs of the state, is all the individual or collective entities which have the status of organs of the state under domestic law. The question often arises, to what extent a state is responsible for the acts of its organs. The principle that a state is responsible for breaches of its international obligations by its organs was upheld in several international judicial decisions. By way of example, in the claims of Italian subjects living in Peru (1901) the arbitrator concluded that "a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its organs".[20,p153]. To be held responsible, the conduct of the organs of the state should be attributable to the state for determining its responsibility. In other words, attributability of such acts to the state is a constituent element of state responsibility.

In *Shering Corp. v. Islamic Republic of Iran*, the issue was alleged expropriation of Shering's property by the Iranian Government through the Workers' Council. As regards the question of attribution of acts of Workers' Council as a state organ to the Iranian Government the Tribunal held that:

> The constitutional and regulatory framework for the creation of Workers' Council do not indicate that the Councils were to have other duties than basically representing the workers' interest vis-à-vis the management of companies and institutions and to cooperate with the management. That the formation of the Councils was initiated by the State does not itself imply that the Councils were to function as part of the State machinery.[21,paras.370,379-380].

According to the Tribunal, the Council was not acting on behalf of the Iranian Government. In reaching its conclusion, the Tribunal cited that there was no evidence of the governmental interference over the election of the members of the Council. The Tribunal held, however, that the

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

Council did not act upon any instructions of the Government. In *Sea-Land*, the claimant alleged that it was forced to terminate its investments in the containers handling facility with the Port and Shipping Organization (PSO) because there was no prospect for commencing the work after August 1979. The claimant, thus, argued that it was entitled to compensation for the expropriation. The Tribunal, however, stressed that:

A finding of expropriation would require, at the very best, that the Tribunal be satisfied that there was deliberate governmental interference with the conduct of Sea-Land's operation, the effect of which was to deprive Sea-Land of the use and benefit of its investment. Nothing has been demonstrated here which might have amounted to an intentional course of conduct directed against Sea-Land. A claim founded substantially on omissions and inactions in a situation where the evidence suggests a widespread and indiscriminate deterioration in management, disrupting the functioning of the port of Bandar Abbas hardly justify a finding of expropriation.[22,para.166].

The Tribunal, further stated that the Sea-Land had not been able to satisfy the Tribunal that its understanding with PSO "ever crystallised into a sufficiently precise formulation to constitute an enforceable contract obliging PSO to perform certain functions for the express benefit of Sea-Land". It held that, the state of administrative chaos which prevailed in Iran throughout the relevant period, makes it unsafe to attribute any such ostensibly government acts to a successor government. While expressing understanding for the Iranian Revolution, the Tribunal declined to hold the Government of Iran responsible for the claimant's failure to continue its operations. According to the Tribunal, the governmental authorities in comparable situations of crisis, are entitled to have recourse to very broad powers without being responsible internationally. In support of its argument, the Tribunal cited the *Dickson Car Wheel Co. v. United Mexican States* decided by the Mexican-US General Claims Commission as follows:

States have always resorted to extraordinary measures to save themselves from imminent damages, and the injuries to foreigners resulting from these measures do not generally afford a basis for claims ... the foreigner residing in a country which, by reasons of natural, social or international calamities, is obliged to adopt these measures, must suffer the natural detriment to his affairs without any remedy.[22,paras.162-166].

Thus, there would be no expropriation when the interference with the use of property rights arose out of the revolutionary chaos which is not directly attributable to the policies of the revolutionary government or its successor. This, indeed coincides with the position of international law which recognizes the right of a state to take extraordinary measures for public purpose. This holding, also supports the view that a revolution *per se* does not give rise to State responsibility under international law.

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

In the *Otis Elevator Award*, the claimant sought compensation for its 40 percent ownership in the Iran Elevator Company which was allegedly expropriated by the Ministries of Labour and Commerce. The Tribunal, dismissed the claim on the grounds that the claimant had not established that the infringement of its rights was attributable to the Government of Iran "either individually or collectively to warrant a finding that a deprivation in Iran Elevator had occurred". The Tribunal's conclusion was that it was not convinced that the governmental interference with the claimant's shareholding interest in the said company (Iran Elevator) has substantially deprived the claimant of the use and benefit of its investment. In support of its conclusion, the Tribunal ruled that a multiplicity of factors affected the claimant's use of property rights including "its position as a minority shareholder in an inactive company and the changed circumstances of the Iranian Elevator market". The Tribunal's ruling indicates that for a finding of expropriation a significant degree of interference is required.

For the claimant to be successful on this point it would need to prove not only the involvement of the respective ministries in the workers' syndicate but also, more specifically, that the ministries encouraged and/or participated in an unauthorized dissipation of Iran Elevators' funds.[23,pp622,631-632].

In *International Technical Products v. Government of the Islamic Republic of Iran*, the claimant alleged that a government owned bank, Bank Tejarat, unjustifiably became the owner of claimant's building. The Bank, responded that it had acquired the building through a formal mortgage foreclosure. The question before the Tribunal was, whether acts of the Bank Tejarat were attributable to the Government of Iran? When dealing with the question of attributability, the Tribunal, concluded that "even if it were found that the Bank came into possession of the building in an illegal manner this would not automatically establish responsibility of the Government under international law". It was held that the claimant:

Must establish additionally that some other government organ (acting in that capacity) through acts or omissions participated in the transfer of the property to Bank Tejarat, thereby depriving Claimants of their property in violation of international law. [24,para.47].

The Tribunal, ruled that the bank had acted in its commercial capacity, an activity which was not attributable to the State. It should be pointed out that, for a finding of expropriation through unreasonable interference, a basic condition is that such interference be attributable to the government. For the purpose of international responsibility, it is important to ascertain whether the organs of the State acted in their official or unofficial capacity and with or without their competence. The question, is whether measures carried out by the organs of the State could be ascribed to that State. In

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

order to satisfy the attributibility test, the organs carrying out the measures must be found to have acted, "irrespective of their own real capacity, in an "official role" or an "official" or "governmental capacity" and within the real or, reasonably, apparent "authority" granted to them".[25,p179].

Article 5 of the Draft Articles adopted by the International Law Commission states "... conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question". The governing criteria in the Draft Articles is, therefore, the internal legal order of a state which could be related to the standard of international law. If an organ of the state acts within its apparent authority, the state will be held responsible, provided that such act would be internationally wrongful. The conduct of a state organ having acted in that capacity, shall be regarded as an act of the state in conformity with international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity. Obviously, so long as business corporations do not exercise power and authority on behalf of the state, their acts are not attributed to that state for the purpose of state responsibility. A state may escape responsibility if the following requirements are satisfied: the entity must be (1) a commercial enterprise, (2) a separate juristic person under the law of the state, (3) unable to rely on sovereign immunity in its own courts or in foreign courts.

In another case, *Flexi-Van Leesing, Inc. v. Iran*, the claimant alleged that the Government took control of two commercial companies by which the claimant had been doing business. The Tribunal, took the view that the claimant failed to prove that the control exercised by the Government over these two private Iranian corporations involved Government acts unreasonably interfering with Flexi-Van's contract right sufficient to constitute an expropriation. An expropriation, will not be found if the company remained a separate legal entity and had not become an organ or department of the Government. For a finding of expropriation, one of the conditions stated by the Tribunal is that such interference be attributable to the Government.

The Government would only be liable for the damages arising out of breaches of the lease agreement if it had caused the two companies to breach these agreements or prevented them from fulfilling them ... What is required for the Claimant to prevail on this alternative ground is to demonstrate and show through actions the Government forced the two companies to breach their agreements with the Claimants.[26,pp348-352].

According to the Tribunal, the mere control over the two companies did not amount to

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

expropriation. In fact the claimant in this case could not sufficiently demonstrate the governmental interference with the contracts such as instructions by the Iranian governmental agency corporations. In the *Petrolane, Inc. v. Government of the Islamic Republic of Iran*, the issue was the taking of one of the claimant's facilities in Iran. The attribution of the taking to the Iranian Government was based on the testimony of a witness whereby he stated that in March or April 1980 individuals from the Oppressed Foundation came to Eastman's office and took control of the office and other facilities. The Tribunal found that:

> The evidence before it is not adequate to establish that this loss is attributable to the Government of Iran. Bavarsai's recollections were too uncertain to establish, by themselves that the seizure of Eastman's facility was carried out by persons cloaked with government authority; consequently the claim based on direct expropriation by the Foundation must be dismissed for lack of proof.[27,para.92].

In three other cases, however, the Tribunal concluded that the Government was responsible for actions taken by the Revolutionary Guards during the course of the Iranian Revolution. In *Computer Science Corp. v. Government of the Islamic Republic of Iran*, the claimant alleged that representatives of the Iranian Revolutionary Committee had entered the claimant's offices in Tehran and ordered the departure of all employees and the claimant was denied access to its Tehran subsidiary (CSCSI). The Tribunal held that "it is well settled that the Revolutionary Committee are among those organs whose acts are attributable to the Government" .According to the Tribunal, under public international law, the Government of Iran was responsible for confiscation by the Revolutionary Committee stating that:

> The Tribunal is satisfied that CSCSI was thus denied access to the equipment. As the Tribunal has previously held, "the 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". The interference with the use of CSCSI's office equipment as factually established in the present case amounts to a taking.[28,paras.233,303].

Similarly, in *William L. Pereira Associates, Iran v. Islamic Republic of Iran,* concerning the taking of tangible personal property by Revolutionary Guards, the Tribunal upheld a claim for the expropriation of the contents of the claimant's offices in Tehran by the Revolutionary Guards by stating that "under public international law the Government of the Islamic Republic of Iran must be deemed responsible for the actions of the Revolutionary Guards".[29,paras.226-227]. It was concluded that,interference by the Revolutionary Guards "with the use of office equipment, factually established, amounted to an act of taking". Similar circumstances was also found in *Dames & More v. Iran*, in which the claimant charged

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

that Government representatives of physically occupying the claimant's office equipment stored in a warehouse. The Tribunal, stated that the dislocation of ownership rights by an unreasonable interference amounted to a taking even without a formal decree.[30,para.223]. According to the Tribunal, for a finding of expropriation, the claimant must take into account the following elements(1) the taking of possession of property and (2) the denial of its use to the rightful owners. It thus held:

> 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.[25,pp89-90].

(c) Assumption of managerial control over property in conditions of revolution does not amount to a taking

Following the revolution of 1979, the Revolutionary Council of the Islamic Republic approved the Legal Bill regarding provisional appointment of manager or managers for supervising production and service units whether in public or private sector (14 June, 1979). The Bill, authorized the government to control and appoint managers to all companies which were regarded incapable of coming into operation or whose managers had left Iran and for companies heavily indebted to the nationalized Iranian banks. For example, in the *Starrett Case,* the issue was the expropriation of a large complex housing project in Tehran. In this connection, the Iranian Judge, Kashani discussed the scope of the said law and its *raison d'être*. The law, the Judge argued, contains no provisions for expropriation or nationalization. Meanwhile, the economic and social objectives of the law are totally different from those of expropriation. The reason for its adoption was to bring about economic and social stability and to give proper discretion to the country's affairs and to assure the public welfare. While the country was in the throes of a great revolution, the said law was passed to prevent wastage and dissipation of factories abandoned by their directors. According to the judge the powers of the governments under revolutionary conditions are broader than normal for the self-preservation and protection of the rights of their population.[31,p466].

Under international law, any conduct of a state which is considered as a wrongful act, involves the State's international responsibility. According to this principle, a state is not internationally responsible without a prior unlawful act. This basic criteria of international law, found its expression in the judgment of the international tribunals. In the *Dickson Car Wheel Company Case* (1931) the Mexico-United States General Claims Commission held that for a State in order to be responsible under international law "it is necessary that an unlawful international act be imputed to it, that is that there exists a violation of a duty imposed

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

by an international jurisdictional standard".[32,p678]. In the *Starrett Case,* The Tribunal held that the claimant was entitled to compensation for the expropriation of its property rights in a massive housing construction project taken over by a temporary manager. While reaffirming its ruling in *Sea-Land*, the Tribunal stated that there is no doubt that the revolutionary turmoil in Iran has seriously hampered the claimants' possibilities to proceed with the work. At the same time, the Tribunal emphasised that "investors in Iran like investors in all other countries have to assume a risk that a country might experience strikes, lockouts, disturbances, changes of the economic and political system and even revolution". The Tribunal went on to say that, these risks do not necessarily imply that property rights affected by such events deemed to have been expropriated. Despite its conclusion the Tribunal nevertheless stated:

> It is recognized in international law that measures taken by a State can interfere with property rights to such extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.[33,pp390-392].

The appointment of managers, enables the expropriating state to assume control of the property and to deny the claimant the right to manage and control the allocation of its profit. It has been established by the Tribunal that assumption of control over property does not immediately justify a conclusion that the property has been taken. To be responsible, the events should demonstrate that the owner was deprived of its fundamental rights of ownership, namely, the effective use, control and benefits of their property rights. Taken all together, it is to be noted that although the Tribunal did not countenance the argument of expropriation based on the events enumerated above, it has however, satisfied with the test that the government-appointed manager interfered with the investors' proprietary rights.

The Tribunal's decision, for the assessment of the expropriation claim is not factually sound. As the Iranian Judge Kashani stated, the decree of Iran's Revolutionary Council was enacted in order to safeguard the national interest of the country. The legislative measures, on appointment of managers were aimed at taking temporary control of management in the project. This is in accordance with the rule of international law by virtue of which the deprivations of property rights in the public purpose is accepted. Mean-while, the purport of the said law was clear and explicit. It did not mention expropriation. Its economic and social objectives were totally distinct from the cases of expropriation and nationalization. The main purpose of the law was to bring about economic and social stability, to

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

give proper direction to the country's affairs, and to assure the public interest of the people. What is a matter of question, is the total deprivation which requires the expropriating State to compensate for the loss. Not only the Tribunal's view with respect to the *Starrett* is not convincing but also it is unrealistic. While the company's failure was attributed to the mismanagement, the abandonment of the project and the misallocation of the company's assets, the Tribunal nevertheless held Iran responsible on the mere ground that the appointment of a manager to control the company's affairs was the interference with the claimants' property right. The Tribunal, ignored Iran's argument that the appointment took place in order to manage and run the companies whose owners had left the country. In fact, the company had nothing which could be expropriated by the government of Iran. There exists, solid evidence that the company was financially bankrupt and was encumbered by huge debt as well. The Tribunal's decision seems to lack a sufficient legal basis.[31,pp464,466].

At least, as far as the argument of the Tribunal itself is concerned, the construction work was abandoned due to revolutionary turmoil in Iran prior to January 1980. The investment, according to the Tribunal, was a risk which accordingly did not guarantee the compensation to the investor under international law. Certainly, the Tribunal's decision to reject the rightful power of a sovereign State to assume temporary management control during the revolution does not coincide with the position under international law which recognizes the power of States to resort to emergency powers to save their countries from imminent dangers. In the *ELSI Case*, the International Court of Justice (ICJ) held that "Every system of law must provide, for example, for interferences with the normal exercise of rights during public emergencies and the like".[34,para.74]. Meanwhile, it is also against the established practice of the Tribunal which in *Sea-Land* accepted a State's right to take extraordinary measures aiming at restoring economic order. In short, the Tribunal's ruling speaks against both law and precedent.

In *Phelps Dodge*, the management of the claimant's factory was transferred to two agencies of the Iranian Government through a Council for the Protection of Industries. The transfer of management, was basically made to prevent the closure of factories, to protect the debts to the government as well as to ensure payments to the workers. The legal authorization, for the Government Council to appoint new managers was the "Law of Protection of Industries and Prevention of Stoppage of Factories in the Country" which described the managers as "trustee" and the administration of

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

the factory as "provisional". However, the law did not indicate that they were trustees for the shareholders. As a result of the transfer, "there have apparently been no meetings of the Board of Directors or shareholders and Phelps Dodge has received neither dividends nor any information concerning the operation of the factory". While, the Tribunal expressed its understanding for the Iranian Government's action, it has stated that:

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.[35,paras.21-22].

In *Tippettes, Abbet, McCorthy and Stratton v. TAMS-AFFA Consulting Engineering of Iran*, the claimant alleged a taking of its 50 percent interest in a partnership with an Iranian firm whose purpose was the performance of engineering and architectural services on a Tehran International Airport. In this case, the appointment of a manager by the government *per se* did not amount to a taking. Of great relevance, however, was the action of a government-appointed manager which had resulted in the deprivation of the claimant's use regarding its shareholding benefits. The Tribunal, held that the appointment of a manager was a measure which affected property rights for which the government of Iran should be held responsible. The Tribunal, concluded that the claimant was entitled to compensation holding that a taking of property may occur under the international law either through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.

While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.[36,paras.225-226].

In another case, *Foremost Tehran, Inc, v. Government of the Islamic Republic of Iran*, decided by the Chamber, the claimant alleged that the climate of hostility towards United States nationals forced its expatriate personnel to leave Iran at the end of 1978. According to the claimant, 31 percent of its ownership in an Iranian corporation had been expropriated. The Tribunal, held that the interference with the substance of Foremost's rights did not amount to an expropriation. But, the non-payment of

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

declared cash dividends to the claimants is the only act which can be attributed beyond doubt to the State. According to the Tribunal, the only action which "demonstrably directed against Foremost's interests ... which must be considered to engage the responsibility of the Government, was the withholding of the dividend payments". Therefore, although the expropriation claim was denied by the Tribunal, it however, concluded that the claimant was entitled to compensation for an undebated interference with its rights. By reliance on Article II (1) of the Claims Settlement Declaration, the Tribunal stated that:

> Such interference, attributable to the Iranian Government or other state organs of Iran while not amounting to an expropriation, gives rise to a right to compensation for the loss of enjoyment of the property in question.[37,pp29-35].

The Tribunal, then went on to award the value of the cash dividends that had not been paid up to 19 January, the cut-off date for the jurisdiction of the Tribunal. In *Eastman Kodak Co. v. Iran*, the Workers' Council had been authorized to supervise over the affairs of Kodak's Iranian subsidiary. The Tribunal, however, concluded that at the date of the Algiers Declarations the company was not controlled by Iran and therefore no expropriation had occurred. With regard to the claimant's property rights, the Tribunal found that there had been an interference and thus an award was made to compensate Kodak.[38,para.153]. In *Sedco, Inc. v. National Iranian Oil Co.*, the Tribunal held that a taking must be presumed to have occurred through the appointment of temporary managers. This, became conclusive when on the date of appointment there was no reasonable prospect of return of control to the owner. According to the Sedco award, the seizure of control by appointment of "temporary" managers clearly ripened into an outright taking of title. Consequently, the Tribunal determined the day of the appointment, namely, 22 August 1979, the day of the taking.[39,pp516-517]. In *Ebrahimi*, the claimants alleged that the expropriation of their shares in Gostaresh Maskan was effected by the law Concerning the Appointment of Provisional manager (s). The claimants sought compensation for the expropriation of their 19 percent share in Gostaresh Masken which was an Iranian joint stock company. In response, Iran argued that the appointment of directors was made only due to excessive insistence of the existing directors and shareholders of the company and due to the departure of its main shareholder Ali Ebrahimi. Chamber three, however, took the view that Gostaresh Maskan had been expropriated. In doing so, it relied upon a decision in *Blount Brothers* in which the Tribunal had examined for jurisdictional purposes, that Gostaresh Maskan was an "entity controlled by the Government of Iran". The Tribunal, further

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

concluded that the key issue is the objective impact of measures affecting shareholder interests and not the subjective intention behind these measures. The Tribunal, discounted Iran's contentions that appointment of managers was necessary to stabilize the company's operations. Such a motive according to the Tribunal does not preclude liability for expropriation. In *Etezadi*, Chamber one of the Tribunal rejected the claimant's argument that the appointment of a supervisor and a temporary manager for the Shiraz Plastic Products Corporation constituted an expropriation. According to the Tribunal, there was not sufficient evidence that the governmental supervisor or temporary manager assumed control of the corporation prior to 19 January 1981 (the Tribunal's jurisdictional cut-off date). The Tribunal, further stated that the evidence did not show that the appointment of governmental manager had a sufficiently severe impact on the status of the corporation and its administration to constitute an expropriation.[40,pp404,408,516,522].

In view of all the foregoing considerations, the Tribunal's doctrinal rationale does not seem convincing for holding Iran responsible with respect to appointment of temporary managers to ensure the continuous operation of the companies. Obviously, temporary placing of property under the State control could amount to a taking if there was an indefinitive period of deprivation in respect to foreign owner's right. In the *ELSI Case*, the United States brought an action against the Italian government asserting injuries to two US corporations (Raytheon and Machlett) in relation to their ownership of an Italian company. There, also existed a question of whether the requisition of a firm's plant and equipment may amount to a taking. The International Court of Justice (ICJ), reasoned that "this requisition, independently of the motives which allegedly inspired it, being by its terms for a limited period, and liable to be overturned by administrative appeal, could not, in the Chamber's view, amount to a taking ... unless it constituted a significant deprivation of Raytheon and Machlett's interest in ELSI's plant".[41,para.119]. While, Iranian nationals and governmental instrumentalities were shareholders in the abandoned companies, it is not clear why the take-over of operation control of these companies by the Iranian government for a temporary period to meet economic emergency should be regarded as a taking. A state which admitted an investor could not become an insurer against political disturbances. The legislation according to which the temporary managers were appointed was passed to protect the public purpose and it was not intended to affect the property title. Obviously, the entities for which temporary managers were appointed were not in a good financial situation and their assumption of responsibility must not be considered the

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

equivalent of a expropriatory action. Under international law, a genuine assumption of control over property is not regarded as deprivation of the property rights of the owner engaging the international responsibility of that state. As Christie pointed out "there might even be circumstances where operating control over the enterprise might be completely taken from the alien owner without rendering the state liable even for "damages" for use". [42,pp333-334].The Tribunal's approach, makes one wonder what is the extent of powers of the government to resort to extraordinary measures to save national interest from imminent dangers.

Conclusion

The Iran-United States Claims Tribunal, was established as one of the most significant international arbitral tribunals in 1981 to settle the hostage crisis between Iran and the United States arising from the revolution of Iran. The claims arising from nationalization and expropriation, were between the most important categories of claims presented to the Tribunal. The Tribunal practice, demonstrated that an alien cannot be deprived of virtually all beneficial enjoyment of his fundamental ownership rights. A taking of property may occur, if a government has interfered unreasonably with the use of property to such an extent that these rights are rendered useless or the enjoyment of their benefit was substantially affected. From the perspective of Tribunal, the seizure of control by appointing temporary managers is an important factor that clearly ripen into an outright taking. Therefore, compensation is to be paid for the value of the property taken, when an alien is deprived of his property rights by acts attributable to a state. A lawful nationalization (the transfer of an economic activity from private sector to the public sector) imposes on the state concerned an obligation to pay compensations. Although, the Tribunal has accepted in its decisions that nationalization and expropriation are governed by customary international law, its awards in some cases, seem less justifiable. While, the Tribunal recognized, in theory, the revolutionary situation in Iran, it has placed greater emphasis, in practice, on protecting the private wealth. Very significantly, the Tribunal's approach ignores the interests of the host country and, therefore, is open to strong criticism.

The Tribunal's awards, in the areas of expropriation cannot be said to be as reaffirmations of traditional rules since they based on the specific provisions of the bilateral Treaty of Amity between Iran and the United States. General observations of the Tribunal, on customary international law, are inconclusive. The Tribunal's awards, are particularly disappointing with respect to revolution in Iran

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

and the latter's responsibility for injuries caused to foreign private property. While, national laws of all civilized nations allow to resort to extraordinary measures to meet national emergencies, the Tribunal has taken the position that the assumption of control over foreign property, in conditions of revolution, required compensation under international law. This, is inconsistent with the established practice of the Tribunal in which it has recognized this right and also with its doctrinal rationale in the *Starrett Case*, wherein the Tribunal held that the investors in Iran like investors in all other countries have to assume a risk that the country might experience changes of the economic and political system.[43,p 392]. Therefore, a person engaging in a foreign investment, with a view to securing a profit, must also bear in mind the risk of lockout, disturbance and revolution. International law offers no protection to foreign investors in a state convulsed by revolutionary turmoil, except when damage to property, are specifically directed by the government. Virtually, all states claim lawful powers by virtue of the right of "eminent domain", and there is no reason to believe that the taking of property in such circumstances is unlawful in international law. Although, the Tribunal had outstanding opportunity to deal with and illuminate most of the aspects of state responsibility, it decided the complex issues of international law on narrow, general and arguable grounds which would seem to have ill-considered lacking any meaningful analysis of legal issues.

References

[1] 21 International Legal Materials (ILM) 1982, p 1019.In the LIAMCO case, the sole arbitrator Mahmassani concluded that " most publicists today uphold the sovereign right of a State to nationalize foreign property, in the sense that a State possesses as an attribute of its sovereignty and supreme power the right to nationalize all things belonging to any person within its jurisdiction". Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic, 62 ILR 141 (1982), p 186.

[2] Amoco International Finance Corporation v. Islamic Republic of Iran, 27 ILM 1314 (1988), Para. 113.

[3] 86 International Law Reports (ILR) 230 (1991), p 270.

[4] Khalilian, Seyed Khalil, Controversial Theory of Frustration Before Iran-United States Claims Tribunal, 7 Journal of International Arbitration 3 (1990), p 8. The text of the letter of the Iranian Ministry of Oil reads as follows: This notification is served to confirm verbal notices given to you on earlier occasions that the Special Committee, convened by this Ministry in

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

accordance with the provisions of the Single Article Act, approved by the Revolutionary Council of the Islamic Republic of Iran to declare null and void such oil agreements/contracts as are on its judgment contrary to the Nationalization of the Iranian Oil industry Act, has, after due consideration of all relevant facts, declared null and void the above-captioned Agreement(s), concluded between the National Iranian Oil Company as the First Party and your goodselves as the Second Party" See Amin, S.H., Commercial Law of Iran, Vahid Publication, Tehran, 1986, p 116. The text of the Single Article Act reads as follows: "All oil contracts which in the opinion of a Special Committee set up under the Minister of Oil are considered as contrary to the "Nationalization of Oil Industry Act of Iran" will be deemed null and void. All claims which may arise in connection with the conclusion or performance of such contracts can be settled according to decisions made by this Committee".

[5] 21 Iran-United States Claims Tribunal Reports (Iran-U.S.C.T.R.), paras.115-116. According to the Tribunal " when the effects of actions are consistent with a policy to nationalize a whole industry and to expropriate particular alien property interests, and are not merely the incidental consequences of an action or policy designed for an unrelated purpose, the conclusion that a taking has occurred is all the more evident". Ibid., at 114-115.

[6] Sedco Inc. v. National Iranian Oil Company and Islamic Republic of Iran, Award No. ITL 55-129-3 (Oct.24,1985), reprinted in 84 ILR 483 (1991), pp 512-513.

[7] Award No.93-2-3 (Dec.19,1983), 4 Iran-U.S.C.T.R.105 (1983), reprinted in 84 ILR 645 (1991), p 656.

[8] Restatement (Second) of Foreign Relations Law of the United States,(1965), S.185,Comment at p 553.

[9] PCIJ, Rep.(1929),Ser.A.No.7, p 22.

[10] Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic, 62 ILR 141 (1982), p 194.

[11] Friedman, S., Expropriation in International Law, London,1953,p 141.

[12] 21 ILM (1982), p 998.

[13] International Finance Corporation v. Iran, 15 Iran-U.S.C.T.R.232 (1987), paras.229-231.

[14] White, C.A., Expropriation of the Libyan Oil Concessions-Two Conflicting International Arbitrations, 30 ICLQ 1 (1981), p 18.

[15] American Journal of International Law (AJIL), Vol. LVI (1962), p 1104.

[16] PCIJ, Series A/B. Nos.63,64, pp 81,19.

[17] 4 Iran-U.S.C.T.R.(1983), p 105.

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

[18] 2 Y.B.I.L.C.(1980), part 2, p 30 et seq.

[19] Arthur Young & Co. v. The Islamic Republic, et al, Award No.338-484-1 (Nov.30, 1987), 17 Iran-U.S.C.T.R. p 245.

[20] Przetacznik, Franciszek, Protection of Officials of Foreign States According to International Law,Martinus Nijhof Publishers, The Hague, 1983, p 153.

[21] Award No.122-38-3 (April 16,1984), 5 Iran-U.S.C.T.R.361 (1984), pp370,379-380.

[22] Sea-land Services, Inc. v. Ports and Shipping Organization of the Islamic Republic of Iran, Award No.135-33-1 (June 22, 1984), 6 Iran-U.S.C.T.R.149 (1984), para.166. Although the Tribunal did not find any interference by the government in the claimant's property so as to constitute an expropriation, but it recognized the loss of property without the owner's fault by resorting to the principle of unjust enrichment, stating that the principle: " finds an obvious field of application in cases where a foreign investor has sustained a loss whereby another party has been enriched, but which does not arise out of an unlawful act which would found a claim for damages". Ibid.

[23] Award No.304-282-2 (April 29, 1987) , 14 Iran-U.S.C.T.R.283, reprinted in 84 ILR 618 (1991), pp 622,631-632.

[24] Award No.196-302-3 (Oct.28,1985), reprinted in 9 Iran-U.S.C.T.R.206,para.47.

[25] Mouri, Allahyar, The International Law of Expropriation as Reflected in the Work of the Iran-United States Claims Tribunal, Martinus Nijhof Publishers, Dordrecht, The Netherlands, 1994, p179.

[26] Award No.259-36-1 (Oct.13,1986), 12 Iran-U.S.C.T.R.paras.348-352.

[27] Award No.518-131-2 (Aug.14,1991), 27 Iran-U.S.C.T.R.64.para.92.

[28] Award No.221-65-1 (Apr.16,1986), 10 Iran-U.S.C.T.R.paras.233,303.

[29] Award No.116-1-3 (Mar.19,1984), 5 Iran-U.S.C.T.R.198,pras.226-227.

[30] Award No.97-54-3 (Dec.20,1983), 4 Iran-U.S.C.T.R.212, para.223.

[31] Dissenting opinion of Judge Kashani in Starret Housing International Inc. v. Government of the Islamic Republic of Iran, Bank Omran, Bank Mellat and Bank Markazi, Award No.ITL 32-24-1 (Dec.19,1983), reprinted in 85 ILR 349 (1991), p 466. By virtue of Article 2 of the said Bill "the selection of managers or board of directors or supervisors will be done with an official letter of appointment by the Ministry concerned … with the issuance of the above-mentioned letter of appointment for manager of board of directors and upon notification of the same to the said company, the previous managers and others having responsibilities for running the company shall cease to have authority in the company

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

". Article 3 of the said Bill also states "the manager or board of directors are in every sense the legal substitutes for the original managers of the units and companies mentioned in Article 1, except that they have no right to delegates their authority to someone else. They have every necessary authority for running the day-to-day business of the company. They do not require special permission from the original manager or owners of said company".

[32] 4 U.N.R.I.A.A. (1931), p 678.

[33] 85 ILR349 (1991),pp390-392.

[34] Case Concerning Elettronica Sicula SPA, (United States v. Italy), 20 July 1989, 84 ILR 311 (1991), para.74.

[35] Award No. 217-99-2 (Mar.19, 1986). See 25 ILM 619 (1986),paras.21-22.

[36] Award No. 141-7-2 (June 29, 1984), reprinted in 6 Iran-U.S.C.T.R. 219, paras.225-226.

[37] Award No.220-37231-1 (Apr.11,1986), 10 Iran-U.S.C.T.R.228, pp 29-35.

[38] Award No. 329-227/12384-3 (Nov.11, 1987), 17 Iran-U.S.C.T.R.,para.153.

[39] Award No.ITI 55-129-3 (Oct.24,1985), 9 Iran-U.S.C.T.R.248, reprinted in 84 ILR 483 (1991), pp 516-517.

[40] Van den Berg, Albert Jan., (general ed.), Yearbook Commercial Arbitration, Vol.XX, The Hague, 1995, pp 404-408.

[41] 84 ILR 311 (1991), para.119.

[42] Christie, G.C., What Constitutes a Taking of Property Under International Law? British Yearbook of International Law (BYIL) 1962, Vol.XXXVIII, p 333-334.

[43] 85 ILR 349 (1991), p392.

[DOR: 20.1001.1.25382640.2009.16.1.5.4]

مسئولیت دولت برای ملی کردن و سلب مالکیت : بررسی مقدماتی اراء دیوان دعاوی ایران و ایالات متحده

همایون مافی[1]

تاریخ دریافت: ۱۳۸٦/۷/۲۲ تاریخ پذیرش: ۱۳۸۷/۸/۲۲

مقاله حاضر موضوعات مربوط به ملی کردن و سلب مالکیت را در پرتو اراء دیوان ایران و آمریکا با عنایت به مشروعیت و محدودیت حقوق دولتها در ملی کردن و سلب مالکیت ، ضمن بحث از سابقه قضایی مورد بررسی قرار می‌دهد. استدلال من این خواهد بود که حقوق دولت در ملی کردن اموال خارجی، مشخصه حاکمیت دولت و ناشی از تفوق سرزمینی وی می‌باشد. مقاله همچنین به بررسی سوالات راجع به مسئولیت دولت برای اثار زیان بار برخی اعمال غیر قانونی و ترک فعلهای ناشی از انقلاب ۱۹۷۹ ایران خواهد پرداخت. سوال این است که ایا وقایع انقلاب و انتصاب مدیران موقت برای مدیریت امور شرکتهای خارجی می‌تواند به عنوان سلب مالکیت تلقی شود و ایا این امر در انطباق کامل با رویه بین‌المللی قرار دارد یا خیر . تصمیمات دیوان روشن می‌کند که مسئولیت، هنگامی که اعمال قابل انتساب به یک دولت ، یک خارجی را از حقوق مالکانه محروم نموده است- موجود است، صرف نظر از این که ایا دولت هیچ گونه ارزشی را از دارایی تحصیل نموده است یا خیر.

واژگان کلیدی: ملی کردن، سلب مالکیت، اخذ مال، مسئولیت، اموال

۱. استادیار، دانشکده حقوق و علوم سیاسی، دانشگاه مازندران

[DOR: 20.1001.1.25382640.2009.16.1.5.4]