STARRETT HOUSING CORPORATION,
STARRETT SYSTEMS, INC.,
STARRETT HOUSING INTERNATIONAL, INC., *Claimants*
v.
THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
BANK OMRAN, BANK MELLAT,
BANK MARKAZI, *Respondents*

(Case No. 24)

Chamber One: Lagergren, *Chairman;* Kashani[1], Holtzmann[2], *Members*

Signed 19 *December* 1983[3]

AWARD NO. ITL 32-24-1

The following is the text as issued by the Tribunal:

APPEARANCES:

For the Claimants:
Mr. Henry Benach
Chairman
Starrett Housing Corp.
Mr. Richard Bassuk
President
Starrett Housing Corp.
Mr. Stephen R. Kaye
Attorney
Dr. Jean-Flavien Lalive
Counsel
Mr. Jeffrey A. Mishkin
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Mr. Robert Dillof
Counsel
Mr. Steven C. Krane
Counsel
Mr. Pierre-Yves Tschanz
Counsel
Mr. Hamid Sabi
Counsel

[1 The signature of Mr. Kashani is accompanied by the words "Dissenting Opinion". This opinion is not at present available.]
[2 Concurring Opinion, see p. 159 below.]
[3 Filed 19 December 1983.]

For the Government of the Islamic Republic of Iran and Bank Mellat:
Mr. Mohammad K. Eshragh
Deputy Agent of the Islamic Republic of Iran
Mr. Mojtaba Kazazi
Representative of the Islamic Republic of Iran
Mr. Reza Motamedi
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Mr. Mojtaba Kamarie
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Mr. Haydar Ayaubi
Assistant to the Attorney for Bank Mellat
Mr. G. Riahi
Assistant to the Deputy Agent of the Islamic Republic of Iran
Mr. J. Alaghamani
Assistant to the Deputy Agent of the Islamic Republic of Iran

Also present:
Mr. Arthur W. Rovine
Agent of the United States of America

INTERLOCUTORY AWARD

I. INTRODUCTION

This Interlocutory Award is made for the purpose of deciding certain jurisdictional questions and whether there has been a taking of the Claimants' property by the Government of the Islamic Republic of Iran, and, if so, to appoint an expert to express his opinion as to the value of the property taken and to establish the expert's term of reference in that regard.

II. FACTS AND CONTENTIONS

Starrett Housing Corporation is the parent company of a group of subsidiary corporations engaged in construction and development projects. Starrett Housing Corporation ("Starrett Housing") and two of its allegedly wholly-owned subsidiaries, Starrett Systems, Inc., and Starrett Housing International, Inc., have asserted claims on their own behalf and on behalf of foreign corporations controlled by them

against the Respondents for damages alleged to have been suffered due to events which occurred in the course of the development of a large housing project in Iran. (Starrett Housing and its subsidiaries are hereafter referred to collectively as "Starrett").

The Claimants' involvement in Iran began in 1974, when Starrett Housing agreed to participate in a program to construct a residential community on then-unimproved land adjacent to northwest of Tehran. The area, known as Farahzad, consisted of about 1500 hectares of land, a portion of which would be developed by Starrett Housing, and other portions by other firms.

In a series of agreements between Starrett and Bank Omran, an Iranian development bank, entered into between 2 November 1974 and 18 October 1975, Starrett undertook to purchase parcels of land at Farahzad, to develop and construct on these parcels and to market condominium apartments, *i.e.*, individual apartment units, the title to which would be conveyed to separate purchasers.

Starrett undertook to construct a total of 6000 apartment units in three phases of which only Phase I is at issue in this case. This Phase comprised 1600 such apartment units, grouped in eight, 26-storey buildings. This apartment complex – named "Zomorod" by the Claimants – also included swimming pools, tennis courts, and other amenities.

The first of the agreements regarding this project was entered into on 2 November 1974 by Starrett Housing and Bank Omran. To this agreement was annexed the text of another more detailed agreement (the "Basic Project Agreement"). The 2 November agreement obligated Starrett Housing to create a foreign subsidiary or affiliate to execute the Basic Project Agreement, the performance of which would be guaranteed by Starrett Housing.

Accordingly, Starrett Housing created a Swiss subsidiary, Starrett, S.A., which executed the Basic Project Agreement on 18 December 1974.

In view of certain requirements for foreign nationals to secure permits to own land and after consultation with officials of Bank Omran, Starrett S.A. on 18 October 1975 assigned the Basic Project Agreement to an Iranian subsidiary, Shah Goli Apartment Company ("Shah Goli"). That corporation then executed a supplementary agreement with Bank Omran. Pursuant to this supplementary agreement, Shah Goli and six other Iranian companies assumed all the rights and obligations of Starrett, S.A. under the Basic Project Agreement, with certain amendments. However, as far as these seven companies were concerned only Shah Goli seems to have been involved in the Zomorod Project. The supplementary agreement was also accompanied by a guarantee of performance executed by Starrett Housing on 16 October 1975 according to which Starrett Housing,

Shah Goli and the six other Iranian companies jointly and severally guaranteed to Bank Omran their obligations under the Basic Project Agreement.

The Basic Project Agreement defines the "Project" as referring to the entire operations, the plans, the construction and the sale of apartments, or other types of construction subject to the approval of Bank Omran, to be carried out by Starrett on the two parcels of land at Farahzad. The term "Project" is hereinafter used in the same sense.

Starrett Housing owned 79.7% of Shah Goli through Starrett Systems, Inc., and Starrett Housing International, Inc., and through the latter's wholly-owned subsidiary, Starrett Housing GmbH, a company incorporated in the Federal Republic of Germany. Of the balance 20% was owned by Iranian nationals and 0.3% by others.

Starrett Housing also organized another Iranian corporation, Starrett Construction Company Iran ("Starrett Construction"), which was formed to perform certain management functions relating to the Project. Starrett Housing owned 100% of Starrett Construction. Under the terms of a separate agreement Starrett Construction received 11½% of the cash proceeds from the sales of the apartments as a management fee. Starrett Housing intended that a part of its profit on the Project would be received through Starrett Construction's management fee.

Pursuant to the Basic Project Agreement and the supplements thereto (hereinafter referred to as the "Basic Project Agreement"), Shah Goli purchased two tracts of land belonging to the former Pahlavi Foundation (now the Alavi Foundation), Sites 809 and 1175, comprising an aggregate of 110,000 square metres. Shah Goli further agreed to pay 15% of the cash proceeds from the sale of the apartments to the seller's account in Bank Omran as the price for the land. Shah Goli undertook that regardless of the actual apartment sales, it would pay a minimum of $18 million for the land. At the commencement of the contract $5 million was paid to the bank as a down payment towards the total land price. Based on the estimated sales price of the apartments the Pahlavi Foundation in fact expected to receive between $33 and $36 million for the land. The two tracts of land were in due course deeded to Shah Goli. As security for the price of the land Shah Goli undertook to mortgage the tracts of land to the bank. The bank undertook to release the said mortgage pro-rata with respect to each apartment unit sold by Shah Goli and to fully release the mortgage when the entire amount due under the Basic Project Agreement had been paid to the bank. This mortgage arrangement was eventually entered into by Shah Goli. The mortgage covered "all buildings and structures, fixtures and installations which are affixed to the mortgaged property and according to the laws of Iran are considered to be immovable property".

In the Basic Project Agreement, the parties agreed to fulfill their

obligations in good faith to bring about the efficient completion of the Project. The Agreement also provided that it would be governed by Iranian law.

Pursuant to the Basic Project Agreement Shah Goli was to:

- complete all of the 6,000 apartment units within 5 years from the date of beginning of construction as provided for in the Agreement;[1]
- develop a Master Plan to be approved by Bank Omran and the Municipality of Tehran;
- prepare the detailed architectural and structural plans for the buildings;
- supply the building materials, products, equipment, machinery, etc. necessary for construction and to stockpile such supplies that would enable its contractors to perform according to the schedule;
- construct and equip the apartment buildings in a workmanlike manner as expected from highly qualified international contractors;
- pay suppliers, contractors' bills, consultants' fees and all the expenses concerned with the Project;
- pay for materials and labour;
- sell the apartments in advance of, during or after the construction, and to deposit all such sales proceeds with Bank Omran, who, after deducting the amounts due it according to the terms of the Agreement, would transfer the balance as instructed by Shah Goli, based on a monthly accounting by the bank.

Bank Omran was to:

- carry out all infrastructure development and installations required, including the supply of water, electricity, telephone and roads for the area;
- transfer to Shah Goli the tracts of land required;
- secure the necessary building permits, licenses and any other governmental or municipal permissions required for implementation of the Project upon request by Shah Goli;
- render assistance to Shah Goli in securing import licenses for all construction machinery and material with all exemptions within the laws and regulations granting privileges for highrise buildings, in securing all necessary visas, work permits or other permissions required for the expatriates necessary to work on the Project, and in obtaining, if required, necessary decrees authorizing the acquisition of land, investment, construction and sale of apartments thereon by Shah Goli;
- charge Shah Goli at customary rates for all banking services, to transfer moneys due to Shah Goli within or out of the country free of taxes, levies or duties of any kind within the applicable laws and regulations;
- collect all bills to the apartment purchasers against a fixed fee;
- provide adequate local commercial facilities and local schools within the immediate pertinent areas, and to provide Shah Goli with the use of the facilities of the Farahzad sales office at comparable rates.

[1] However, the claims in this case relate exclusively to Phase I of the Project which involves only 1,600 apartments.

Under the Basic Project Agreement the construction work was to begin within nine months after completion of certain closing transactions, provided that Bank Omran had supplied adequate power and water on the site to allow construction to proceed at the required rate. The closing transactions comprised approval of the Master Plan by Bank Omran, issuance of all building permits and documentation of land deeds, mortgages and the making of the down payment. Construction work began in January 1976 with Site 809 and in September 1977 with Site 1175.

The Basic Project Agreement contains in Items 10 (c) and 12 the following provisions regarding default by a party:

> 10. *Liquidated Damages:*
>
> ......
>
> c) Either Party not in default, even after notice of default to the defaulting party, may elect to proceed to complete the Project without waiving said default or its claims for provable damages consequent thereon.
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> 12. *Notice of Default and Termination:*
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> If any party to this Agreement does not fulfill its obligations as herein mentioned, the other party shall send a notice of default to such defaulting party and allow 30 days to rectify the situation. If the defaulting party, after having received the notice, does not rectify the situation, then the other party shall have the right to refer the case to arbitration in the manner hereinafter mentioned. The arbitration proceedings shall not affect the continuance of the work, and the work may be continued and completed even without the participation and cooperation of the defaulting party.

The Basic Project Agreement made express provision with respect to *force majeure*. Item 11 of the Agreement, as amended, provides:

> *Force Majeure:* It is understood and agreed by the Parties hereto that if performance hereunder by the Parties of their respective obligations is unduly delayed due to *force majeure* such as acts of God, insurrection, riots, fires, wars and warlike operations, explosions, accidents, governmental acts, acts of the public enemy, epidemics, and laws or regulations or restrictions of the Government of Iran or the United States of America, then and in such case the Parties shall be excused from meeting the time schedules and deadlines contained herein after giving due notice in writing of cause for the delay to the other party. In such event both Parties shall use their best efforts to remove or correct the cause for the delay and agree on a new time schedule.
>
> If it appears that further performance hereunder is impractical or impossible for either or both Parties by reason of governmental acts, laws, regulations or restrictions of the Government of Iran, then this Agreement

> and the Project shall be forthwith terminated and a final settlement shall be made so that Starrett shall recover from the Bank all of its downpayment made less any amount already amortized and any actual costs incurred by it for the Project and the Bank shall recover title to the Tract or Tracts of Land referred to herein together with all improvements made thereon. In all other cases of *force majeure* which prevents performance of this Agreement, the Parties shall be relieved of their obligations to proceed with the implementation of the Project and shall seek to reach agreement on an equitable solution in consideration of all work performed up to that date; but if the Parties are unable to reach agreement within a reasonable time, either Party may refer the matter to arbitration pursuant to Item 13 hereunder.

Furthermore, the Claimants assert that Bank Omran in February 1976 furnished Starrett Housing with a guarantee ("the Bank Omran Guarantee"). The Claimants contend that the Bank Omran Guarantee provided that, in the event of expropriation or insurrection directly affecting the Project, Bank Omran would pay all loans made and properly and actually spent for the Project, as well as interest accrued for such loans. Upon the payment of such loans and interest, Bank Omran would be entitled only to the "loan rights" previously held by the lender. The Claimants assert that the Guarantee is authentic and legally binding upon Bank Omran. Although the Claimants state that the original appears to have been left behind in Iran, they point out that a copy with xeroxed signatures was presented in evidence and that other contemporaneous circumstances confirm the existence of the document. Claimants state that the Guarantee was well-known and no objection to its form or substance was ever raised before this litigation, even after Bank Omran was nationalized.

Shah Goli intended to obtain a portion of the funds it needed to finance construction of the Zomorod Project by selling apartments in advance of construction, based on its design plans. By May 1976 all of the apartments in Site 809 had been sold. By March 1977 virtually all the apartments in Site 1175 had been sold or reserved for particular buyers. Under the standard terms of sale, the purchasers paid 30% of the base price in cash on signing a purchase agreement, and at the same time executed 24 promissory notes for an additional 15% of the base price, payable without interest over the next 24 months. The balance of the purchase price became due as of the date of delivery of the apartment. As a result of these advance sales, Shah Goli received approximately $88.5 million which it allegedly expended for the Project.

The standard Apartment Purchase Agreement also contained an escalation clause which provided that the base price would be adjusted by a percentage equal to the percentage of the increase in construction costs during a twelve months period beginning as of the date on which

the base price had been determined. However, the escalation clause limited the adjustment to 10% of the base price.

The standard Apartment Purchase Agreement further contained the following provisions regarding completion of construction work and default by Shah Goli.

> *Article 5. Completion of Construction Work*
> The date for completion of construction of the Apartment is estimated to be approximately 24 months after the date of execution of this Agreement, but in the event that any event constituting *force majeure*, or a shortage of construction supplies and materials should occur as confirmed by the consulting engineers referred to in Article 2 above said period shall be extended accordingly.
>
> *Article 10. Default of the Company*
> In the event the Company does not fulfil its commitments under this Agreement, the Purchaser may send a written notice to the Company and if the Company within sixty days from the date of receipt of such written notice shall fail to take action that would cure the default within a reasonable period of time, the Purchaser shall have the right to cancel this Agreement and shall be entitled to a refund of all sums paid hereunder, with interest at the rate of 7% per annum calculated from the date such money has been received by the Company.

The Claimants contend that in order to obtain the additional funds required for construction, Starrett Housing and its subsidiaries arranged a series of loans to Shah Goli for expenditure on the Project. The loans were made in various forms. Two loans were made by Starrett Housing International to Shah Goli under separate loan agreements for $3 and $5 million. The Claimants further contend that the $3 million was spent on design fees and other project start-up costs, and that the $5 million was used as the down payment to Bank Omran for the land. A third loan for $14,600,000 was made to Shah Goli by Starrett GmbH, the wholly-owned Starrett subsidiary in Germany; the Claimants contend that the proceeds of that loan were spent on construction costs. In addition, the Claimants state that Starrett Housing and certain of its subsidiaries transferred $9,171,009 to Shah Goli by means of deposits to Shah Goli's bank account in New York; they further made $3,543,750 in direct payments to sub-contractors on Shah Goli's behalf. The Claimants likewise contend that this $12,714,759 million was expended on Zomorod's construction. It is further asserted that Starrett Construction made a loan to Shah Goli in the principal amount of $5,277,162. The funds loaned by Starrett Construction to Shah Goli were said to have been derived from the management fee paid by Shah Goli to Starrett Construction up to 30 September 1978. The Claimants contend that these loans, with interest accrued to 30 September 1981, total $68,888,808. All of

these loans were legally made and are binding obligations upon Shah Goli. They were regularly recorded on the books of Starrett. The firm of independent public accountants which regularly audited the books of the Claimants and of Shah Goli certified that the loans were made and the proceeds used for the Project.

The Claimants contend that the Project was well-designed following extensive studies of local conditions, that it met all local requirements and that it was properly constructed. They state that by 30 September 1978 the Project was approximately 75% complete, calculated on the percentage-of-completion basis as audited by independent certified public accountants. The Claimants assert that construction came to a halt when employees were later forced to leave Iran, but even after that Starrett maintained a few executives in Iran who, although unable to continue construction, remained as long as possible in order to be immediately available in the event conditions improved.

The Claimants have asserted three alternative claims in this case:

1. Claims primarily by Starrett Housing and Starrett Housing International in the sum of $112,672,613 against the Government of Iran based on unlawful expropriation and other acts in breach of international obligations with respect to their property rights in the Project and in Shah Goli. In respect of this claim the Claimants contend that acts of insurrection and other events of *force majeure* prevented Starrett from completing the Project and that the Islamic Republic of Iran authorised, approved and ratified acts, conduct and policies which deprived Starrett of the effective use, control and benefits of the Project and that this expropriation was later formalised in governmental decrees that made no provision for any compensation.

2. Claims primarily by Starrett Housing and Starrett Housing International against Bank Mellat, Bank Markazi Iran and the Government of Iran as successors to and fully responsible for the contractual obligations and liabilities of Bank Omran, based on the *force majeure* provisions of the Basic Project Agreement. In respect of this claim the Claimants allege that they in accordance with those provisions are entitled to $112,672,613 as "an equitable solution in consideration of all work performed" or, at least should recover all costs actually incurred by Starrett for the Project, including accrued interest, in the amount of $68,888,808 (i.e. $59,991,121 + $8,897,687).

3. Claims primarily by Starrett Housing in the sum of $68,888,808 against Bank Mellat, Bank Markazi Iran and the Government of Iran as successors to Bank Omran, based on the Bank Omran Guarantee Agreement. Starrett Housing asserts that under the Bank Omran Guarantee it is entitled to recover its actual costs expended for the Project, and its loans to the Project, including accrued interest, but not lost profit.

The Claimants have stated that the claims based on unlawful

expropriation and other acts in breach of international obligations are their primary claims. The Claimants state that their claims are not contradictory and that pleading in the alternative is customary in international litigation. The Respondents have not been denied the right to defend against all three claims, and, in fact, have presented full defenses as to all of them.

In respect of all these claims the Claimants have declared that they would be satisfied to receive a joint award in favour of all three Claimants.

The alleged losses for which the Claimants seek compensation in this case fall into two general groups: first, losses which they had already suffered, amounting to $97,621,253 as of 30 September 1978; and second, profits of at least $15,051,360 which they would have earned after 30 September 1978 had they not been prevented from completing the Project. In addition the Claimants contend that Bank Omran failed to supply electric power to the building site in accordance with the provisions of the Basic Project Agreement and that Starrett as a result thereof had to incur extra costs. The Claimants further contend that Starrett would have recovered about $3.7 million from sale of heavy duty construction equipment upon completion of the Project, but was prevented from doing so.

These claims, with interest calculated as of 30 September 1981, are as follows:

Starrett's unrecovered loans, with interest (excluding Starrett Construction)	$59,991,121
Starrett Construction's unrecovered loans, with interest	8,897,687
Losses resulting from unremitted and unrecovered profit earned, recognized and reported by 30 September 1978	22,579,220
Losses from unrecovered interest on Starrett's deposits with Bank Omran	6,153,225
Subtotal of losses suffered	$97,621,253
Profit Starrett would have earned after 30 September 1978 had it not been prevented from completing the Project	8,763,618
Increased profit Starrett would have earned in the absence of Bank Omran's failure to supply electric power as required by the Basic Project Agreement	2,500,000

Monies Starrett would have recovered from the sale of heavy duty construction equipment after completion of the Project	3,787,742
Subtotal of profit which would have been earned after 30 September 1978 upon completion of the Project	15,051,360
Total	$112,672,613

The Respondents object to the jurisdiction of the Tribunal for the following reasons:

(i) The claims are not "claims of nationals" of the United States within the meaning of Article VII of the Claims Settlement Declaration.

The Claimants have to submit proper documentation to prove that nationals of the United States have continuously owned more than 50% of the shares in Starrett Housing from the date when the claim arose to the date of the final award. They have submitted only a certificate by Starrett Housing's corporate secretary, indicating the names of a number of shareholders alleged to hold in the aggregate more than 50% of the shares of the corporations, and the number of shares held by each of these shareholders. However, a certificate by the corporate secretary cannot be admissible as evidence, because the secretary is an officer of the corporation, is on the payroll of the corporation and is acting under the corporation's instructions. Moreover, Starrett Housing has not sufficiently established the number of shares issued and outstanding during the period 1979-1982 so as to allow a conclusion whether or not the number of shares held by the persons indicated in the certificate by the corporate secretary represents more than 50% of the capital stock. Further, the Claimants have not submitted sufficient evidence to prove their allegation that Starrett Systems, Inc., and Starrett Housing International, Inc., are wholly-owned subsidiaries of Starrett Housing. In particular, the evidence submitted to demonstrate the number of shares issued and outstanding in Starrett Systems, Inc., is ambiguous and contradictory.

The certificate by the corporate secretary contains the names of several persons as "trustees". Although the Claimants have provided copies of some of the trust agreements, they have not established whether the "trustees" shall be considered as owners, and not as beneficiaries, under the relevant state law of the United States, and whether the trustees are United States citizens.

(ii) Increase of the Claimants' claim as compared to their claim before the U.S. District Court for the Southern District of New York.

It follows from General Principle B of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981 that the Tribunal is entitled to decide only claims that previously have been brought before a court in the United States and that the Tribunal is obligated to decide such cases "within the limits of their original characteristics." In support of this contention the Respondents have referred to the provision in General Principle B according to which the United States has agreed to terminate "all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to prohibit all further litigation based on such claims . . . and to bring about the termination of such claims through binding arbitration." The Respondents allege that the words "such claims" refer solely to litigations that have been instituted before United States courts and subsequently terminated as a result of the Algiers Declarations.

Since a claim originally brought before the U.S. District Court for the Southern District of New York for $38,365,000, was much lower than the amount of the claim before the Tribunal the Respondents consequently contend that the difference between the relief sought in the United States and in the instant case should be dismissed "without further judicial investigation".

The Claimants respond, *inter alia*, that in an Amended Complaint filed in the United States District Court on 11 July 1980, and served on the Respondents' authorized attorneys, the amount of the complaint was stated to be $93,905,419 as of 30 June 1980, exclusive of interest and costs since that time.

(iii) *The Tribunal is not a proper forum for this case.*

Under the Algiers Declarations Shah Goli does not have standing to sue the Government of Iran and other Iranian Respondents before the Tribunal, because Shah Goli is an Iranian corporation organized, registered and existing under the laws of Iran. The Iranian nationality of Shah Goli had been the principal reason for assignment of the Basic Project Agreement to it from Starrett, S.A., a Swiss corporation with a branch office in Tehran, in view of the legal prohibition of land ownership by foreigners in Iran. The 18 October 1975 assignment of the Basic Project Agreement provided that:

> WHEREAS, because [Starrett, S.A.] is an expatriate corporation and cannot own land in Iran and build and sell high rise apartment dwellings thereon as contemplated by the Agreement of the Parties expressed in Exhibit II and therefore cannot perform its obligations under Exhibit II, and
>
> WHEREAS, [Shah Goli] (being Iranian joint stock company) can perform the obligations undertaken by [Starrett, S.A.] in Exhibit II.

Only a portion of Shah Goli's shares of stock belong to a West German corporation while the rest of its stock belongs to Iranian nationals. Such a corporation is an Iranian national according to the Iranian Commercial Code as amended, and according to the Claims Settlement Declaration nationals of Iran may not sue the Government of Iran before the Tribunal. The Algiers Declarations refer to the Tribunal only claims of nationals of one State against the other. Shah Goli has been organized and is existing under the laws of Iran and 20% of its shareholders are Iranian nationals. Shah Goli has extensive financial and legal relationships with Iranian nationals, who bought the apartments in advance and made significant advance payments, with Iranian banks, who made loans to Shah Goli, and with Iranian and other non-United States subcontractors. Shah Goli as a juridical person of private law is subject to the laws of Iran and has in no way the standing to sue the Government of Iran before an international tribunal. Nor may the Claimants sue Respondents under the Basic Project Agreement as concluded between Shah Goli and Bank Omran due to lack of privity of contract. Under Item 13 of that Agreement, any claim related to the Project must be referred to the International Chamber of Commerce for arbitration in London, not to courts in the United States or to this Tribunal.

(iv) Bank Mellat, Bank Markazi Iran and the Government of Iran are not properly Respondents in the case.

Bank Mellat as Bank Omran's successor is not liable for any of the claims asserted by Claimants. The claims are attributable to the Pahlavi Foundation as the owner of the tracts of land sold to Shah Goli. Bank Omran was involved in the transactions only as a representative of the Pahlavi Foundation. Bank Markazi Iran through its approval of the sufficiency of foreign exchange reserves for the loans or otherwise is not responsible for Bank Omran's obligations and liabilities. The claims are not attributable to the Government of the Islamic Republic of Iran on the ground that the Government did not expropriate Shah Goli's assets, the Project or the Pahlavi Foundation.

Respondents object that contradictory causes of action cannot be maintained. If the claim is based on the expropriation of Shah Goli, Claimants may not also make a contractual claim against Bank Omran and other Respondents based on the *force majeure* provisions of the Basic Project Agreement between Shah Goli and Bank Omran. Also, neither of these causes of action may stand if the claim is based on the alleged Bank Omran guarantee. The existence of one of those causes of action excludes the existence of the others. Moreover, Claimants have not specified in what capacity, on what cause of action and for which claim each of them is sueing each of the Respondents. Claimants have no contractual relationships with the Respondents, nor any property rights in Shah Goli. The only contractual relationships are those of Shah Goli with Bank Omran and the apartment purchasers. Proceeding with the case before clarification of these issues deprives Respondents of their right of defence and their right to substantiate their counterclaims.

The Respondents make the following contentions with respect to the claims:

(i) The Government of Iran did not expropriate Shah Goli or its property rights. The actions taken by Shah Goli's managers during the relevant period prove the contrary. In late January 1980 when it became certain that Shah Goli's managers would not return to Iran and other managers would not be appointed to take care of the company, the Government appointed a Temporary Manager on the basis of Bank Omran's request. This temporary measure for the caretaking of Shah Goli's interests and for prevention of stoppage of work and lay-off of the workers during the Embassy incident until arrival of the company's managers and their assumption of responsibility for its affairs must not be considered as an expropriatory action against Shah Goli or the Project. In spite of continuous demands of Bank Omran and the Government since November 1979 that the American managers return or appoint persons of their choice to take charge of Shah Goli, the managers have refused to do so or even to appoint persons of the nationality of the 79.7% shareholders in Shah Goli, i.e. Starrett Housing GmbH of West Germany.

Respondents have raised this demand which became their primary counter-claim for specific performance against Starrett Housing based on the latter's performance guarantee of Shah Goli's obligations. But having left Shah Goli with deficits of several million dollars, including debts owed to private Iranian and non-Iranian persons, the American managers and Claimants have ignored this "basic demand" and counter-claim and allege that the Government has expropriated Shah Goli.

(ii) The *force majeure* conditions in Iran, if any, do not relieve Shah Goli from its obligations. The active presence of Shah Goli's American managers in Iran during and after the Revolution until late October 1979, their continuation of the Project until that time – also reflected in the letter of the Chairman of the Board of Directors of Shah Goli and Starrett Housing, Henry Benach, of 6 September 1979 to the then Ministry of Foreign Affairs of the Islamic Republic of Iran – and receipt of several loans from the Alavi Foundation and Bank Omran

months after victory of the Islamic Revolution are ample admissions by the American managers and Starrett that the Revolution, conditions, laws and regulations in Iran, including the Bill for Appointing Temporary Managers of July 1979, did not result in *force majeure* as regards Shah Goli and Starrett. The American managers left Iran prior to the Embassy incident and after realizing that even under the most conservative assessments and with the availabilty of all necessary facilities and an additional loan of $14 million from the Alavi Foundation and Bank Omran, the Project would be destined to bankruptcy by a loss of at least $50 million and 27 months further construction work for completion as of September 1979, i.e. a two year project would take seven years to complete. If, as admitted by the American managers of Shah Goli and Starrett, the United States Government regulations including those severing diplomatic relations with Iran barred the American managers from returning to Iran, the alleged *force majeure* is attributable to their own Government. In any case such regulations did not relieve Shah Goli, an Iranian company, from its obligations. At most, since Shah Goli was 79.7% owned by a West German corporation, the German shareholder could readily appoint German managers, or managers of whatever nationality, that could do the job. There were many incomplete projects with German, French, Italian, Japanese and other contractors whose construction work successfully progressed after the Revolution and during the Embassy incident in Iran. The Embassy incident was a political issue not related to the social life and activities of ordinary United States nationals. The Iranian Government and people did no harm to ordinary United States nationals and in fact clearly distinguished them from the Government of the United States during the Embassy incident.

(iii) The alleged Bank Omran guarantee must be disregarded. It is not genuine. Claimants have failed to present the original for proof of its authenticity despite several requests. Moreover, it lacks the characteristics of a bank guarantee as regards the form and substance. It is in contravention of the Iranian Civil Code provisions and beyond the authority of the issuer. A guarantee may not be called upon by the principal obligor but by the beneficiary. Although unknown, the beneficiaries are banks and entities other than Starrett Housing and its subsidiaries and affiliates. Realization of the guarantee conditions has not been established. Further, its Rial provision is not changed to Dollar simply because the funds securing the payment of the Tribunal awards in favour of United States Claimants are in Dollars. The claim based on the guarantee is in any event not attributable to Bank Markazi Iran and the Government of Iran and must accordingly be dismissed with respect to them.

Respondents contend that the construction work performed by September 1979 physically had progressed no more than 56%, based on an assessment carried out at the time. Based on a technical expert's report the work performed was also of mediocre quality from a technical point of view. The scope of geotechnical studies was inappropriate for the Project. The buildings' safety against earthquake loads is questionable and requires further studies. The architectural design does not comply with the relevant Tehran regulations; in particular, the escape-stairs design in some buildings greatly reduces safety against fire. The interior design does not comply with the regional conditions. A proper Project feasibility study was not carried out. The numerous construction deficiencies greatly reduce the durability of the buildings and indicate that the construction was not carried out on the basis of proper design and working drawings.

As to the loans, Respondents contend that Shah Goli, which had a 35% paid-in capital of Rials 350,000 (about $12,000), undertook to import all necessary funds for implementation of the $220 million construction Project as the owner, builder and seller of the apartments. But Shah Goli neither imported the required capital nor obtained further capital contributions. The alleged loan agreements are invalid. They were concluded by the directors and officers who were common to Shah Goli and Starrett, in contravention of the provisions of Article 129 of the 1968 Iranian Commercial Code on Joint Stock Companies. That Article requires authorization of such transactions by Shah Goli's Board of Directors, voting without the common directors. Also under that Article, Shah Goli's independent inspector was required to submit a detailed report to the Board and to the next shareholders' meeting. In addition to its failure to meet the requirements of Article 129, Shah Goli could not have signed the first and second loan agreements on behalf of four other Iranian companies that were completely dormant at the time. However, assuming their validity, not more than one-fifth of the sums actually received and properly expended could be attributed to Shah Goli. In the absence of a loan agreement the alleged payment of $9,171,009 in cheques by Starrett Housing and certain of its subsidiaries to Shah Goli's New York bank account is only indicative of payment of their prior debts to Shah Goli, assuming actual receipt of the amount. *A priori*, in the absence of particular express authorizations by Shah Goli, the alleged direct payment of $3,543,750 by Claimants to the subcontractors is not a loan to Shah Goli and at any rate it does not entitle them to a claim before this Tribunal. Claimants have presented no proof of any valid underlying contracts on the basis of which they made payments out of Shah Goli's New York bank account for Project expenditures. As to the $5,277,162 loan by Starrett Construction to Shah Goli there is no record to indicate the authorization or receipt of such loan by Shah Goli; at any rate the Tribunal

lacks jurisdiction over a claim based on that loan. Claimants cannot seek double recovery for both the loans to and the assets of Shah Goli. Shah Goli's deposits with Bank Omran were in current accounts, which do not accrue interest; Shah Goli owed the Bank more than $14 million on those accounts prior to their freeze; therefore the $6,153,225 claim for interest on those accounts is without merit. The heavy duty construction equipment, if existent, belongs to Shah Goli and its value has depreciated over time; thus the unsubstantiated claim for $3,787,742 must be dismissed. The lost profit claims of $22,579,220, $8,763,618 and $2,500,000 and the loan claims must be dismissed for several reasons including the fact that Shah Goli and the common directors and officers assumed that risk by failing to qualify for the Iranian foreign investment protection approval and by failing to obtain the OPIC investment risk insurance referred to in Items 5(a) and (d) and 8(e) (2) of the Basic Project Agreement. Moreover, in 1976 Bank Markazi Iran refused to approve in advance the repatriation of such profits. Shah Goli's financial statements and tax declarations for all preceding years show significant losses rather than reflecting the alleged profits. By late 1978, the valuation of the Project, based on internationally accepted accounting principles, required taking into account the events casting serious doubts as to the viability of the Project. These events did not constitute expropriation or other governmental measures interfering with the management of Shah Goli or the Project.

Further, assuming the Tribunal's jurisdiction, the Respondents have asserted counter-claims against Starrett Housing based on, *inter alia*, Starrett Housing's guarantee for the performance of Shah Goli's obligations under the Basic Project Agreement. As their primary counter-claim they have sought specific performance against Starrett Housing for fulfilling Shah Goli's obligations under said guarantee. The other counter-claims which aggregate over $118 million are as follows:

1. Claims in the amount of $19,142,857, plus $291,519 in promissory notes, for unrecovered loans to Shah Goli by 21 September 1981.

The Claimants contend that no more than $15 million was outstanding in unpaid loans from Bank Omran of which $10 million was collatralized by mortgage of 177 apartments and $5 million by purchasers' promissory notes. They also allege that the *force majeure* conditions in Iran and the expropriation prevented them from collecting the balance of the proceeds from apartment sales and that they consequently are excused from re-payment of the bank loans. They further contend that the amounts sought under this counter-claim, if paid, would constitute amounts expended on the Project, for which the Claimants are entitled to compensation under the *force majeure* provision of the Basic Project Agreement and under the Bank Omran Guarantee.

2. Claims in the amount of $20,907,811 plus 12% contractual interest for the balance of the price of the land under the Basic Project Agreement and related agreements according to which Shah Goli was to pay 15% of the apartment sales prices, and to secure which obligations Shah Goli had mortgaged the land, the buildings and the improvements thereon.

The Claimants deny liability for payment of the balance, firstly because the *force majeure* conditions in Iran prevented the delivery of any more apartments and the receipt by Shah Goli of any additional cash proceeds from purchasers, and secondly, because the land and the buildings have been expropriated. They further contend that the amounts sought under this counter-claim, if paid, would constitute amounts expended on the Project, for which the Claimants are entitled to compensation under the *force majeure* provision of the Basic Project Agreement and under the Bank Omran Guarantee.

3. Claim in the amount of $16,927,718 for liabilities to apartment purchasers arising from delay in completion of the Project. This claim is based on Articles 5 and 10 of the standard Apartment Purchase Agreements according to which the purchasers in case of non-delivery of the apartments within 24 months from the conclusion of the Agreements are entitled to cancel the Agreements and to recover the down payments plus 7% interest from the date of payment.

The Claimants contend that the Tribunal lacks jurisdiction over this counter-claim, because it does not arise out of the same contract, transaction or occurrence as does the claim. They also contend that liabilities to apartment purchasers constitute claims of nationals of Iran against a national of the United States, over which the Tribunal lacks jurisdiction. The Claimants further contend that under the Apartment Purchase Agreement a purchaser is required to demand any refund in writing, and that Respondents have submitted no proof that such written demands have been made. Finally, the Claimants invoke Article 10 of the Apartment Purchase Agreement, which provides for extension of the delivery schedule in case of *force majeure.*

4. Claims in the amount of $5,470,820 for Shah Goli's liability to certain subcontractors, including the Claimants in cases Nos. 288 and 819 before this Tribunal. The Respondents assert that Starrett's claims duplicate the claims by these subcontractors. Alternatively, the Respondents argue that the claims by the subcontractors shall be included among the debts within the framework of the valuation of Shah Goli.

The Claimants deny that they are seeking double recovery and assert that the subcontractors' claims now are obligations of the Government of Iran as a result of the expropriation of Shah Goli. The Claimants also assert that the Tribunal lacks jurisdiction over

counter-claims based on alleged debts to Iranian nationals, and that such debts in any event would be characterized as actual costs of the Project, for which the Claimants are entitled to compensation under the *force majeure* provision of the Basic Project Agreement and under the Bank Omran Guarantee.

5. Claims in the amount of $38,364,437 for unreasonable project costs resulting from overpricing of inter-company services to the Project, such as charging 20% of the proceeds of the apartment sales instead of the allegedly normal rate of 3%, and payments made for services by Starrett Construction and Iranian companies owned by officers and shareholders of Shah Goli. The Respondents assert that the principal portion of these services was rendered by Shah Goli's own Technical Bureau.

The Claimants contend that the total fee paid to Starrett Construction was $10 million of which $5.3 million was loaned back to Shah Goli to cover Project expenditures; that the fees paid to other Iranian companies were for a multitude of services; and that normal rates have been paid for the services.

6. Claims in the amount of $1,651,416.60 for employer's insurance premiums and allowances and for compensation to be paid in respect of dismissal of personnel.

The Claimants contend that the Tribunal lacks jurisdiction over this counter-claim, because it does not arise out of the same contract, transaction or occurrence as does the claim. They also contend that this counter-claim constitutes a claim on behalf of nationals of Iran against a national of the United States, over which the Tribunal lacks jurisdiction.

The Claimants deny any liability for these claims and allege that they are excused from payment of such charges because of the *force majeure* situation in Iran. The Claimants further contend that the Government of Iran is liable for such charges, if any, as a result of the alleged expropriation of the company. The Claimants further contend that in any event such charges would be characterized as actual costs of the Project, for which they would be entitled to compensation under the *force majeure* provision of the Basic Project Agreement and under the Bank Omran Guarantee.

7. Claims in the amount of $32,597,998.60 for corporate income tax regarding the years 1977 and 1978 plus applicable charges for late payment as from July 1980, based on the $27,856,382 profit as contended in the Statement of Claim. The Respondents further seek payment of $587,289 in taxes withheld by Shah Goli on subcontractors' remunerations and employees' salaries for the Ministry of Finance.

The Claimants deny liability for any taxes and allege that tax holiday provisions in the Iranian tax laws are applicable in respect of the Project.

8. Claims in the amount of $7,380,976 for approximate transportation charges and seven years of space rents for a plot of land, belonging to the bank, on which plot 534,000 cubic metres of soil excavated from Sites 809 and 1175 had been left by Shah Goli contrary to instructions by the Municipality of Tehran.

9. Claims in the amount of $400,000 for space rents and demolition charges in respect of concrete production workshops and construction material warehouses set up by Shah Goli and Arenco, a company solely owned by shareholders of Shah Goli, on a plot of land belonging to the bank.

10. Claims in the amount of $12,859,000 as compensation for investments the Respondents have made in accordance with the Basic Project Agreement in providing infrastructure and installations, including supply of sewage, water, electricity, telephone, roads and local commercial facilities such as stores, supermarkets, shopping-centre and health clinic for residents of 6,000 apartment units.

11. Claims under Items 10(c) and 12 of the Basic Project Agreement for damages caused by Shah Goli's failure to complete and deliver 1539 apartment units, including damages for increased costs resulting from this delay and due to the inflation of the construction costs in Iran which allegedly has raised the net cost per square metre of apartment construction from 42,000 Rials in 1977 to 81,376 Rials in 1983.

As to the counter-claims mentioned under items 8 through 11, the Claimants argue that these counter-claims have been submitted too late since they were presented first in Part Two of the Respondents' Rejoinder and, in any event, the Claimants deny liability for these counter-claims.

III. JURISDICTIONAL ISSUES

(i) Whether the claims are "claims of nationals" of the United States within the meaning of Article VII of the Claims Settlement Declaration.

Each of the three Claimants was a corporation organized and existing under the laws of a State of the United States continuously from the earliest date a claim in this case arose through at least 19 January 1981.

Starrett Housing is a corporation whose shares are publicly-traded on the New York Stock Exchange.

Although it is a publicly-traded corporation, Starrett Housing is able to identify a relatively limited group of persons who hold, in the aggregate, more than 50% of its shares of outstanding shares of stock. Because of this, Starrett Housing did not follow the Chamber's

guidelines for the proof of corporate nationality as set forth in its Orders in *Flexi-Van Leasing, Inc. v. Iran*, Case No. 36 [1], and *General Motors Corporation v. The Government of Iran*, Case No. 94 [2]. Instead, Starrett Housing submitted certificates of a certified public accounting firm and of its corporate secretary concerning its outstanding shares of stock as well as passport or other evidence proving the United States citizenship of persons who own more than 50% of its outstanding shares in their own names, or in connection with trust agreements or as members of a partnership which owns shares. The Tribunal considers that the evidence submitted is sufficient to prove that the Tribunal has jurisdiction over Starrett Housing's claim as the claim of a United States national within the meaning of Article VII of the Claims Settlement Declaration.

Starrett Systems, Inc. is authorized to issue 1,000,000 shares of common stock, pursuant to its Amended Certificate of Incorporation. The Secretary of Starrett Systems has certified that only 100 shares of the authorized stock are issued and outstanding. A copy of a Share Certificate has been submitted showing Starrett Housing to be the owner of these 100 shares of stock.

Starrett Housing International is, according to its Certificate of Incorporation, authorized to issue 1000 shares of common stock. A copy of a Share Certificate has been submitted showing that Starrett Systems, Inc. is the owner of 1000 shares of stock in Starrett Housing International. The Secretary of Starrett Housing International has certified that 1000 shares of the authorized stock are issued and outstanding.

Since Starrett Housing International is owned by Starrett Systems, and Starrett Systems by Starrett Housing, the Tribunal also has jurisdiction over the claims of these two subsidiaries within the meaning of Article VII of the Claims Settlement Declaration.

(ii) Increase of the Claimants' claim as compared to their claim before the U.S. District Court for the Southern District of New York.

It is clear from the text of the Algiers Declarations that the words "such claims" in General Principle B are modified by the language of Article II, paragraph 1, of the Claims Settlement Declaration, which expressly lays down that the Tribunal has been established for the purpose of deciding such claims as are indicated in that paragraph, "whether or not filed with any court". The words "such claims" refer to litigation as between the Government of one of the States and nationals of the other. There is no language supporting the view that all claims not previously filed with United States Courts are barred

[1 1 IRAN-U.S. C.T.R. 455.]
[2 3 IRAN-U.S. C.T.R. 1.]

from the jurisdiction of the Tribunal. Neither is there any language to support the view that claims before the Tribunal are barred from jurisdiction to the extent they go beyond claims previously filed with United States Courts. *See* Interlocutory Award in Case 39, *Phillips Petroleum Company, Iran v. The Islamic Republic of Iran et al.* ITL-11-39-2, (30 December 1982) [1].

For these reasons the objections raised by the Respondents on this point are rejected.

(iii) Whether the Tribunal is a proper forum for this case.

The Respondents contend that Shah Goli has no standing to sue the Government of Iran and other Iranian Respondents in this case. Having regard to the conclusions as to the expropriation issue, the Tribunal concludes that from the date of the taking Shah Goli – through the Claimants – has no *locus standi* in this case.

The provision for arbitration in London which is contained in the Basic Project Agreement is not a forum selection clause which ousts the jurisdiction of the Tribunal. *See* Interlocutory Award in Case No. 293, *Stone & Webster Overseas Group, Inc. v. National Petrochemical Company et al.* ITL-8-293-FT, Part III, (5 November 1982) [2].

(iv) Whether Bank Mellat, Bank Markazi Iran and the Government of the Islamic Republic of Iran are properly Respondents in this case.

As stated in the Tribunal's Order of 8 December 1982, the claims based on expropriation and other acts in breach of international obligations are directed exclusively against the Government of the Islamic Republic of Iran. There can be no doubts that these claims are attributable to the Government. That Order also stated that Bank Mellat was a proper Respondent in this case. The Tribunal does not in this Interlocutory Award have to address the question whether Bank Markazi Iran is properly a Respondent in the case, since this Award is confined to the questions of taking and valuation.

(v) Late filing of counter-claims.

In accordance with Article 19, paragraph 3, of the Tribunal Rules the Tribunal decides to accept the counter-claims mentioned under items 8 through 11 above although they were not included in the Statement of Defence.

Starrett Housing is requested to file with the Tribunal on or before 29 February 1984 an Answer regarding these counter-claims.

[1 1 IRAN-U.S. C.T.R. 487.]
[2 1 IRAN-U.S. C.T.R. 274.]

IV. THE EXPROPRIATION CLAIM

(a) Background

The Claimants contend that their property interests in the Project have been unlawfully taken by the Government of Iran which has deprived them of the effective use, control and benefits of their property by means of various actions authorizing, approving and ratifying acts and conditions that prevented Starrett from completing the Project.

In support of their expropriation claim, the Claimants introduced evidence by Deloitte, Haskins & Sells, certified public accountants, to show that the Project was profitable until alleged Revolutionary events and Government acts deprived them of their property rights to manage and control it. They asserted that they had been financially able to provide sufficient funds for completion of the Project and had done so prior to the Revolution and even afterwards. Certain loans had been sought in Iran only after Bank Omran, under Government control, had wrongfully frozen Shah Goli's bank accounts and breached its obligations to provide electricity and other infrastructure – conditions which made it unreasonable further to increase loans from outside Iran.

Claimants introduced evidence to show that the Project was properly designed, well constructed and was proceeding on schedule at the time they were deprived of control. They pointed out that after the expropriation Shah Goli had sold apartments at prices higher than those charged under Claimants' management, a fact which they noted was uncontradicted and which further confirmed that the buildings were highly desirable.

The Claimants asserted that they had not left Iran because of financial problems, but only because conditions forced them and all other United States nationals to do so.

As regards the acts and conditions that prevented Starrett from completing the Project, the Claimants have referred to a comprehensive account of events and conditions in Iran from early 1978 to the beginning of 1980. Out of this description the Claimants emphasize the following events and effects of the Islamic Revolution, which in their view prevented completion of the Project and amounted to unlawful taking of Starrett's property interest in the Project. In respect of these events and effects the Claimants contend:

(i) Reduction in the Project work force.

By the end of 1978 and the beginning of 1979 conditions in Iran made it necessary for most of Starrett's 150 American supervisors to leave Iran (by the end of 1978 only 10-12 remained). At this time American and other foreign sub-contractors for the Project left, including employees of the Otis Elevator Company who were responsible for the installation of the required elevators. Also American sub-contractors responsible for the plumbing work and the installation of heating, ventilation and air-conditioning units left as well as European nationals responsible for electric work, plaster work, tile work and the installation of windows and window railings. By January 1979 the project work force was reduced to no more than 200.

(ii) Strikes and shortages of materials.

Recurrent strikes and work stoppages had a devastating impact on securing building materials and carrying on construction at the Project, in particular a customs strike at Iranian ports in 1978, repeated strikes by oil workers which resulted in fuel shortages and the complete closing of the Tehran Bazaar between November 1978 and February 1979.

(iii) Collapse of the banking system.

During the latter part of 1978 all major Iranian banks, including Bank Omran, were frequently closed, and it became impossible to conduct even the most ordinary commercial transactions. The intermittent opening of the banks led to a frantic effort by depositors to withdraw their money. After the victory of the Islamic Revolution, the Revolutionary Council imposed strict limitations on the amounts that could be withdrawn from bank accounts and the amounts that could be paid as salaries to corporate employees.

(iv) Changes in control of Bank Omran.

Pursuant to a 28 February 1979 decree all assets and property of the Pahlavi Foundation, including Bank Omran, were confiscated. Bank Omran was thereupon placed under the control of the Alavi Foundation and, later, the Foundation for the Oppressed. In June 1979 Bank Omran was also declared nationalized under the Bank Nationalization Law, enacted by the Revolutionary Council.

(v) Freeze of Shah Goli's bank accounts.

Also in July 1979, at the time when Shah Goli began to deliver apartments and receive amounts paid by purchasers, Bank Omran, then under Government control, froze the bank accounts into which those payments were required to be deposited pursuant to the Basic Project Agreement. Shah Goli was not permitted to draw on these accounts to pay for continued work on the Project.

(vi) Harassment of Starrett personnel.

In February 1979 four men armed with machine guns entered the offices of Shah Goli at the project site and announced that, since the

Project had been owned by the former Shah, it now belonged to and was under the control of the new Islamic Republic. Arthur Radice, a Starrett executive in Iran, was taken to the headquarters of the Revolutionary Guard in Tehran; upon his release he left the country. He returned some weeks later but had to leave Iran again in April 1979 following seizure of his passport by the Iranian authorities; he returned a few weeks later but left Iran finally in September 1979.

In July 1979, when Shah Goli attempted to invoke its rights under the 10% escalation clauses contained in all Apartment Purchase Agreements, armed Revolutionary Guards entered Shah Goli's offices, detained personnel in one room, cut off the electric power, the water supply and telephone service and threatened to hold the employees until Shah Goli revoked the escalation of price. Shah Goli thereupon agreed to forego its contractual right to escalation, which amounted to over $22 million with respect to the apartments already sold.

(vii) Further official measures of the Islamic Republic of Iran confirming its deprivation of Starrett's property interests in the Project.

The further official measures to which the Claimants refer are as follows:

– On 7 January 1980 the Revolutionary Council of the Islamic Republic of Iran approved a Bill concerning Protection of Buyers' down-payments for Incomplete Housing Units ("Apartment Purchasers Bill"). This Bill provided that all down-payments by purchasers to construction companies for townships or building complexes with more than ten units must be deposited in an account with Bank Maskan (the Housing Bank) in the name of the company concerned. The Bill further provided that the Bank, by taking into consideration the progress of the construction activities, should pay the companies as they proceeded and made progress in their construction activities and that no construction company should have the right to directly receive payments from the advance purchasers.

– On 27 January 1980 the Revolutionary Council approved a Bill concerning the Completion of Construction Works in Housing Cities and Housing Complexes which have remained incomplete ("Construction Completion Bill"). This Bill directed the Ministry of Housing to locate all unfinished housing projects in Iran and to prepare detailed plans for the completion and operation of those projects. The Bill provided that such plans should include a construction work schedule and a procedure for the distribution of the Housing units, taking into account the interests of the public, the availability of government resources and the legitimate rights of the owners.

It further contained in Article 2 of the following provision regarding the execution of such plans:

> The Revolutionary Council shall consider the plan and after a decision is reached on how to secure the required resources, it shall authorize the Ministry of Housing and Planning and Bank Maskan (the Housing Bank) to proceed with the implementation of the Plan either as project operators, purchasers or lenders in cooperation with the executing agency, i.e., the Revolutionary Housing Foundation, or the former owner if he is willing to participate and pay the expenses.

– On 30 January 1980 the Ministry of Housing appointed Mr. Erfan as Temporary Manager of Shah Goli to direct all further activities in connection with the Project on behalf of the Government. Mr. Erfan's appointment was made pursuant to a decree of the Revolutionary Council, adopted on 14 July 1979, entitled "Bill for Appointing Temporary Manager or Managers for the Supervision of Manufacturing, Industrial, Commercial, Agricultural and Service Companies, either private or public." This Bill provides in Article 2:

> The selection of Manager or Board of Directors or supervisors will be done with an official letter of appointment by the ministry concerned.
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> . . . .
>
> With the issuance of the above mentioned letter of appointment for Manager or Board of Directors and upon notification of the same to the said company, the previous Managers and others having responsibilities for running that company shall cease to have any authority in the company.

Article 3 defines the powers of the Directors appointed by the ministry concerned as follows:

> The Manager or Board of Directors are in every sense the legal substitute for the original Managers of the units and companies mentioned in Article 1, except that they have no right to delegate 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 managers or owners of said company.

Article 5 requires the Directors appointed in accordance with the Bill to report to the relevant ministries and Article 6 states further that as long as a company is subject to the law "there shall be no legal action to close them down or to delay their work".

Some of the defenses of the Respondents are summarized above and others are set forth in the paragraphs which follow. In response to these various defenses, the Claimants, in addition to the contentions referred to above, made the following further statements: (i) the telexes demanding that Claimants return to Iran were sent by

Respondents during the crisis following the seizure of the United States Embassy, when it was notorious that United States nationals could no longer safely work in Iran; (ii) it was not feasible for Starrett Housing's German subsidiary to undertake construction of the Project because Starrett's management staff was largely American, and the German subsidiary held the stock of Shah Goli only for reasons of corporate convenience and did not perform operational functions; (iii) the projections of the costs, time for completion and anticipated losses of the Project made by Farrokh Neghabat which are referred to by the Respondents were made many months after the Revolution on the basis of inaccurate calculations which Claimants had not approved; (iv) the allegations of mismanagement and financial difficulties made by the Azarnia brothers which Respondents cite were groundless, self-serving assertions by hostile former associates made in an effort to gain control of the valuable Project for themselves; (v) unjust charges against Mr. Radice resulting in the seizure of his passport also stemmed from hostile actions of the Azarnia brothers, and he was later found not guilty; Mr. Radice was permitted to recover his passport and depart from Iran only after Bank Omran arranged for the bail which the authorities demanded; (vi) although Project buildings were not damaged by the Revolutionary riots in Tehran, numerous events impeded construction and threatened the safety of employees; (vii) Bank Omran was established by the former Shah, was owned by the Pahlavi Foundation and its management came under Government control as part of the confiscation of all Pahlavi properties by decree in February 1979; and (viii) there is no evidence to support Respondents' allegations that Bank Omran was legally justified in impeding and eventually freezing Shah Goli's access to its bank accounts or that the Bank expressed any legal justification when it took that action.

The Government of Iran denies that it has expropriated Shah Goli or prevented it from completing the Project. Taking of a company whose only purpose is construction of an apartment complex, whose apartments have all been sold to third parties in advance of the construction, and whose land with all the improvements thereon is mortgaged to the Alavi Foundation is inconceivable, for the company owns nothing other than obligations and liabilities. The Government contends that the lack of adequate financial resources, the deficit producing nature of the Project and the mismanagement and lack of a proper schedule of work were the basic reasons for Starrett's abandonment of the Project. These problems were known to Shah Goli and Starrett since October 1976. The Azarnia brothers, minority shareholders and directors of Shah Goli, by their telex of 3 October 1976 to Starrett noted the delay in construction work of site 809 and that Starrett's inability to provide the required funds and the high costs and rate of interest had endangered the feasibility of the Project. However, the problems persisted; the Azarnias' telex of 20 December 1978 to Starrett noted the chaos and further delay in delivery of the apartments, the non-compliance with the terms of the purchase agreements, the application by a group of advance purchasers to the Tehran Prosecutor's Office for delivery of the apartments, and that all were the result of Shah Goli's mismanagement and inability to continue the Project. The telex stated that it was a fact that Shah Goli could not continue this Project due to financial problems and that the American managers by abandoning the Project and leaving the company with no supervision had taken advantage of the socio-economic situation of Iran, blaming it as the excuse for non-delivery of the apartments. By their telex of 15 July 1979, the Azarnias further notified Starrett of the total negligence and failure of the latter to act diligently towards the Project; that such inaction had resulted in gross financial failures and dangers not only for the apartment purchasers but also for the shareholders; that, as repeatedly warned by the Azarnias over the prior two years, such financial deficiencies were one of two major reasons for total collapse of the Project, the other being its continuous mismanagement; and that Starrett's breach of its obligation to complete the Project had created a cost over-run of $224,000,000 and had made the completion of the Project an economic disaster for Starrett and everyone involved. In the July 1979 telex the Azarnias particularly referred to Shah Goli's unauthorized sale of equipment and essential materials of the Project at much reduced prices as another example of the mismanagement of the Project, characterizing Starrett's acts as abuses of the revolutionary conditions of the country in order to justify Starrett's failures of the years 1976-79, and as proof that Starrett Housing's intentions were those of an "opportunist and financial conspirator."

The Government states that, in spite of the above, pursuant to negotiations in May 1979, three months after establishment of the Provisional Government, the Alavi Foundation provided Shah Goli $3 million as a loan to go ahead with its American management and to complete the Project. In the summer of 1979 Shah Goli sought a second loan of $14 million as to which the Alavi Foundation and Bank Omran required a careful financial and technical assessment of the Project. The study carried out by Farrokh Neghabat, the construction management expert appointed by the Foundation, in close cooperation with Stanley Davis, then Executive Manager of Shah Goli, on 7 September 1979 revealed that the Project, with the availability of all requisite funds and all necessary facilities, would take 26 months as of 23 August 1979 to complete and would be destined to bankruptcy by a loss of Rials 669 million (about $50 million) even without repayment of the loans allegedly received from Starrett Housing's subsidiaries, based on the critical-path and cash-flow budget assessments also

approved by Stanley Davis. On 1 September 1979 the Alavi Foundation, Bank Omran and Shah Goli entered into an agreement whereby the Foundation and Bank Omran would loan to Shah Goli Rials 1 billion (about $14 million) on a gradual basis, in accordance with a schedule prepared by the West Tehran Development Organization and approved by Shah Goli. However, the new Executive Manager, Louis M. Johnson, unsuccessfully sought a loan from another Iranian bank, Bank Melli Iran, stating in his letter of 22 October 1979 that his specialists had estimated Rials 1,500,000,000 and 36 months were required in order to complete the Project, greatly increasing Neghabat's most conservative assessments. But the Shah Goli managers having for the first time clearly realized that after completion and delivery of the apartments the company would face a loss of at least Rials 668 million (about $50 million) under the most conservative estimates, finally refused to follow the Alavi Foundation – Bank Omran loan provisions and admitted that only a miracle could save Henry Benach. It is during this period that Starrett took advantage of the Embassy incident and the recalling of the United States nationals from Iran by the President of the United States as the miracle it had talked about, and abandoned the bankrupt and failed Zomorod Project.

The Respondents answer Claimant's allegations as follows:

(i) Reduction in the Project work force was not due to the conditions in Iran.

The reduction was due to financial problems of Shah Goli in meeting its past-due obligations of Rials 700 million (about $8 million) during late 1978 and early 1979. In that period Shah Goli was unable to pay the salaries of the many foreign workers it had hired for unspecialized work. In order to meet the payroll it resorted to selling the wooden molds, generators and construction machinery. Otherwise, work on the Project did not stop more than a week during the Revolution, according to Arthur Radice in a letter of 7 April 1979 to Bank Omran. Throughout the uprising not a single window was broken and in fact during the strikes, Starrett only missed two or three days of construction according to Henry Benach in an interview with New York Post in early 1979.

(ii) Strikes did not affect the Project and the shortage of materials, if any, was due to mismanagement of Shah Goli and lack of a proper schedule of work.

Owing to the abundance of cement Shah Goli could not afford to store it. Irregular purchases and resale of construction materials resulted in resales of such materials; for example, a resale of 3,000 tons

of steel took place in 1978. A short port and customs strike and a short closing of the Tehran Bazaar were not the devastating factor, as alleged by the Claimants, in the securing of materials for carrying on the construction. Lack of a proper schedule of work, prepared long in advance and followed closely, resulted in day-to-day programmes prepared by the Executive Manager. For example, Arenco, in charge of concrete production for the Project, attempted but never succeeded in receiving a schedule of Shah Goli's daily concrete requirements at least a week in advance. At Shah Goli no control existed over the warehousing and inventory systems. Incoming and outgoing equipment and materials were not recorded at all.

(iii) Collapse of the banking system, if any, did not adversely affect Shah Goli.

Shah Goli's statements of accounts at Bank Omran show that it conducted its daily banking activities during the six months of November 1978–April 1979 with no difficulty. Records also show that Shah Goli took advantage of its dollar account with Chase Manhattan Bank and engaged in illegal sales of foreign currency for Iranian Rials at much higher than official rates at least during January-March 1979. Any alleged Revolutionary Council Regulations restricting payment of salaries to Shah Goli's employees are denied.

(iv) Change in control of Bank Omran was not attributable to the 28 February 1979 decree but to the June 1979 Banks Nationalization Law and that change did not affect Shah Goli or the Project.

The Pahlavi Foundation and Bank Omran were not owned by the Pahlavi dynasty and were not covered by said decree. The Foundation was and is an endowment in which the donor has no ownership rights under Iranian law, and its change of name to Alavi did not change its status. Nationalization of Bank Omran did not affect its relationship with Shah Goli. With respect to Shah Goli, Bank Omran only acted as representative of the Foundation and under specific powers of attorney. The Foundation for the Oppressed did not control either the Alavi Foundation, Bank Omran or Shah Goli.

(v) Freeze of Shah Goli's accounts with Bank Omran was not aimed at preventing Shah Goli from continuing the Project.

Shah Goli repeatedly issued overdrawn cheques (at least 14) on its accounts, and through court proceedings by some checkholders Arthur Radice was taken to court. Repayment of $15,000,000 on Shah Goli's overdraft facilities had also become due, while there was only

$150 in one of those accounts to cover such indebtedness. Therefore by virtue of a Revolutionary Council Regulation providing for temporary closure of the accounts of natural and juridical persons who owed the banks large amounts of money pending thorough investigation by the authorities, the Bank closed those accounts pending termination of the investigations.

However, in order to release Arthur Radice from prosecution over the overdrawn cheques, Bank Omran arranged with the authorities two bail bonds in the aggregate of Rials 42,000,000 (about $600,000), without having any obligation do so.

(vi) Harassment of Shah Goli personnel by the Revolutionary Guards is denied.

When faced with continuous demands of the purchasers of the apartments, whose delivery had been delayed two years beyond the delivery date, Shah Goli's American managers contacted individual purchasers in order to collect the remainder of the prices at considerable discounts in exchange for delivery of incomplete apartments, without procurement of the required certificate of completion and confirmation of the Architect, in contravention of the contractual provisions, rather than ameliorating the mismanagement, serious financial problems and numerous construction deficiencies of the Project.

In addition to advance purchasers, local suppliers which had cheques drawn by Arthur Radice, had sued him before the Public Courts and had him arrested for prosecution a number of times; in one instance Bank Omran arranged bail for him.

The above instances have been misrepresented as pressure allegedly exerted by the Revolutionary Guards on Shah Goli personnel to lower the prices.

(vii) Official measures of the Government of Iran did not amount to expropriation of Shah Goli.

The Apartment Purchasers' Bill was for protection of advance purchasers' rights, which were abused by a number of constructors and advance sellers in the circumstances before and after the Revolution, who collected large amounts of money and left the country without building and delivering the apartments. The Bill provided for depositing of further instalments on such purchase agreements with the Housing Bank in an account in the name of the construction company concerned, so that payment to the company would be made with due regard to the progress of the construction. Therefore the Bill should not be considered to have had any expropriatory effect, but regulated the payment procedure in the interest of the advance purchasers.

The Construction Completion Bill, which provided for locating unfinished construction projects, for preparation of a "detailed construction plan" and for identification of financial resources for them, was never enforced because the plan was not prepared, the plan was not approved by the Council of Revolution and the Council did not determine in which capacity the Ministry of Housing had to deal with hundreds of construction projects: *i.e.* as an operator, purchaser or lender. Therefore no enforcement measure under that law was taken which might have had an adverse impact on Shah Goli and its construction Project.

The Bill for Appointment of Temporary Managers that was passed in July 1979 was not applied to Shah Goli so long as its American managers were in Iran and in charge of the construction Project. When the American managers realized that under the most conservative assessment Shah Goli would be destined to bankruptcy by a loss of at least Rials 668 million (about $50 million), they did not accept the Rials 1 billion loan of the Alavi Foundation and Bank Omran to be paid *pro rata* with the progress of work under an agreed upon schedule, did not raise the required funds from other sources, but left the country in late October – early November 1979, leaving the company with no immediate supervision and the advance purchasers, who had paid approximately $88.5 million, with no positive answer to their demands. Bank Omran, after several attempts to persuade the American managers to return to Iran or to appoint others to complete the Project (Bank Omran telexes of 12 November 1979 and 11 December 1979), by its telex of 6 January 1979 notified the American managers that if they did not resume the work by 15 January 1980, Shah Goli would be considered as an unmanaged unit whose managers have left the country, and that under the Bill for Appointment of Temporary Managers, Bank Omran would seek such appointment for continuation of the work under items 10 (c) and 12 of the Basic Project Agreement, and that such appointment must not be regarded as expropriation of Shah Goli or the Project. Considering that the American managers by their telex of 11 January 1980 responded that due to the United States Department of State's advisory not to travel to Iran and due to the prevailing political situation in Iran it would be impossible for them to continue with the Project, and considering that they did not appoint a qualified non-American manager to perform their obligations, the Ministry of Housing, based on the request of Bank Omran, appointed Mr. Erfan as the Temporary Manager for Shah Goli, but Bank Omran and the Government of Iran did not give up their attempts to obtain the return of the American managers and performance of their obligations,

including in the Statement of Defence, Statement of Counter-claim, Rejoinder and the Hearing, as the Respondents' basic demand against Starrett Housing, a demand under its letter of guarantee, in which it guaranteed performance of all obligations of Shah Goli under the Basic Project Agreement.

The government control under the Bill does not amount to dominion over the company. Appointment of Temporary Managers for preventing shut-down of economic and industrial units and lay-off of workers or appointment of receivers and liquidators in case of insolvency, are not unusual under the laws of many countries, particularly in the context of the third world and socialist countries, such as the 1964 Iranian Law concerning Protection of Industries and Prevention of the Closure of the Country's Factories. The Temporary Manager under Article 4 of the 1980 Bill has the status and obligations of an attorney to his client with regard to the company and is considered as a trustee. As such Mr. Erfan's appointment must not be considered expropriation of Shah Goli or the Project.

(b) Reasons

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

In one respect the situation in this case is comparatively simple. There can be little doubt that at least at the end of January 1980 the Claimants had been deprived of the effective use, control and benefits of their property rights in Shah Goli. By that time the Ministry of Housing had appointed Mr. Erfan as Temporary Manager of Shah Goli to direct all further activities in connection with the Project on behalf of the Government. This appointment was made pursuant to the decree of the Revolutionary Council, adopted on 14 July 1979, called Bill for Appointing Temporary Manager or Managers for the Supervision of Manufacturing, Industrial, Commercial, Agricultural and Service Companies, either private or public. The succinct language of this act makes it clear that the appointment of Mr. Erfan as a Temporary Manager in accordance with its provisions deprived the shareholders of their right to manage Shah Goli. As a result of these measures the Claimants could no longer exercise their rights to manage Shah Goli and were deprived of their possibilities of effective use and control of it.

It has, however, to be borne in mind that 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. In this case it cannot be disregarded that Starrett has been requested to resume the Project. The Government of Iran argues that it would have been possible for Starrett to appoint managers from any country other than the United States, but the evidence does not in other respects indicate on what conditions Starrett has been afforded any possibility to resume the Project. The completion of the Project was dependent upon a large number of American construction supervisors and subcontractors whom it would have been necessary to replace and the right freely to select management, supervisors and subcontractors is an essential element of the right to manage a project. Further, given the contents of the Construction Completion Bill it must be taken for granted that Starrett can only resume the Project subject to the provisions of that Bill, which entail far-reaching restrictions in the right of former owners to manage housing projects. Indeed, the language of that Bill seems to indicate that the right to manage such projects ultimately rests with the Ministry of Housing and Bank Maskan. Lastly, nothing in the evidence submitted in the case gives reason to believe that Starrett would be offered compensation for any reduction in the value of its shareholding and contractual rights caused by the managers appointed by the Government.

It has therefore been proved in the case that at least by the end of January 1980 the Government of Iran had interfered with the Claimants' property rights in the Project to an extent that rendered these rights so useless that they must be deemed to have been taken.

There is an allegation that Starrett abandoned the Project for economic reasons. The Tribunal does not go into this issue because it is notorious that at least after 4 November 1979, the date when the hostage crisis began, all American companies with projects in Iran were forced to leave their projects and had to evacuate their personnel. Therefore, at least as regards the situation subsequent to that date the Government of Iran cannot possibly rely on any withdrawal of personnel as a justification for the appointment of a new manager. In fact, the evidence shows that Starrett maintained staff in Iran longer than most other American companies, obviously in an attempt to secure future possibilities to complete the Project.

However, in this case the Claimants assert that the effects of what is referred to as "virulent anti-American and other policies and actions of the Revolutionary Group and the Islamic Repulic" – both before and after the establishment of the new Government – rendered it impossible for Starrett to continue operations at the Project and that this amounted to an unlawful expropriation under general principles of international law and under the Treaty of Amity, Economic

Relations and Consular Rights between the United States of America and Iran of 15 August 1955.

Thus the Claimants' argument is that they were deprived of the effective use, control and benefits of its property rights in the Project much earlier than by the end of January 1980.

There is no reason to doubt that the events in Iran prior to January 1980 to which the Claimants refer, seriously hampered their possibilities to proceed with the construction work and eventually paralysed the Project. But investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lockouts, disturbances, changes of the economic and political system and even revolution. That any of these risks materialized does not necessarily mean that property rights affected by such events can be deemed to have been taken. A revolution as such does not entitle investors to compensation under international law. Therefore, when considering the events prior to January 1980 to which the Claimants have referred, the Tribunal does not find that any of these events individually or taken together can be said to amount to a taking of the Claimants' contractual rights and shares. The Tribunal therefore concludes that 30 January 1980 must be considered as the date of the taking. However, for ease of accounting the Tribunal decides that 31 January 1980 shall be considered as the date of the taking.

The next question for the Tribunal is to determine the exact nature of the property rights that were taken. The Claimants contend that it was neither the land and the buildings only nor their shares in Shah Goli that were taken. The Claimants assert that the expropriated rights comprised the assets and contractual rights and other property of, in the first instance, Shah Goli as a controlled subsidiary of Starrett Housing. The Claimants define the principal assets of Shah Goli as the buildings and the principal contractual rights as including the rights to complete the Project and to earn reasonable profits which Starrett anticipated, and to recover the funds which it loaned and which were used to build the Project.

There is nothing unique in the Claimants' position in this regard. They rely on precedents in international law in which cases measures of expropriation or taking, primarily aimed at physical property, have been deemed to comprise also rights of a contractual nature closely related to the physical property. In this case it appears from the very nature of the measures taken by the Government of Iran in January 1980 that these measures were aimed at the taking of Shah Goli. The Tribunal holds that the property interest taken by the Government of Iran must be deemed to comprise the physical property as well as the right to manage the Project and to complete the construction in accordance with the Basic Project Agreement and related agreements, and to deliver the apartments and collect the proceeds of the sales as

provided in the Apartment Purchase Agreements.

V. VALUATION

The Parties have submitted extensive written and oral evidence in support of their contentions regarding the valuation. This evidence shows that the valuation involves complex accounting matters. The Tribunal therefore considers that advice from an accounting expert is needed. The Tribunal appoints Mr. Lennart Svensson, Revisionsfirman Lennart Svensson & Co., Regementsgatan 35, S-21753, Malmö, Sweden, as an accounting expert in this case.

The Tribunal sets forth the following as the terms of reference for the expert:

1. The expert shall give his opinion on the value of Shah Goli as of 31 January 1980, including the value of the Project in Shah Goli's hands, considering as he deems appropriate the discounted cash flow method of valuation.

The expert shall mention in his report as he deems appropriate the items, if any, referred to in the counter-claims which his investigation shows are liabilities of Shah Goli or the Project.

Any substantial items relating to the claims or counter-claims which require further substantiation or determination by the Tribunal of legal issues shall be noted in the report by footnote or other suitable means.

The expert shall examine the counter-claims with a view to including in his valuation such liabilities mentioned therein which are related to Shah Goli or the Project, recognizing that the Tribunal has not yet made any legal determinations concerning the counter-claims.

2. The expert shall also give his opinion as of 31 January 1980 on the net profit of the Project, if any, Starrett Housing would reasonably have received through the management fees payed to Starrett Construction.

3. The expert shall give his opinion as to how the amount of compensation, if any, to which the Claimants are entitled shall be reduced to accurately reflect the 20.3% interest in Shah Goli not owned by the Claimants.

4. The expert shall also give his opinion as of 31 January 1980 on the proper method for taking into account loans made to Shah Goli for the purposes of the Project, as defined in the Basic Project Agreement. In this connection, his report shall include:

a) The amount of principal and accrued interest of each such loan, identifying as to each the lender and the borrower;

b) The extent to which the proceeds of each such loan were expended for the purposes of the Project.

5. The expert shall investigate to which corporation the heavy duty construction equipment, which is referred to in Claimants' Exhibit 34, belonged, and to make an estimation as to the value of that equipment as of 31 January 1980.

The expert shall be entitled to hear any person with knowledge of the Project, if he deems it appropriate and if the Parties have been duly invited to attend such meeting.

The expert shall also be entitled to obtain from any Party all documents which he deems necessary for his investigation. Each party shall without delay give the other Party a copy of any documents which it gives to the expert; if a Party arranges for the expert to inspect documents without giving him a copy, the other Party shall be invited to inspect such documents.

Before beginning the performance of his duties, the expert shall make the declaration required by Note 2 to Article 27 of the Tribunal Rules. The Declaration may be made orally before the Tribunal or may be submitted in writing signed by the expert.

In the event the expert in the course of his investigation forms the opinion that modification of the foregoing terms of reference would be necessary to permit a proper valuation, or if any other difficulty arises, the expert shall be allowed to refer to the Tribunal for modification, clarification or resolution.

The Tribunal further decides, in accordance with Article 41, paragraph 2, of the Tribunal Rules that the Claimants and Respondents shall deposit an aggregate amount of $80,000 as advances for the costs of expert advice. The Claimants, having previously paid $2,000 in compliance with the Tribunal's Order of 16 September 1982, are requested jointly to deposit $38,000 and the Islamic Republic of Iran the remainder, $40,000. These amounts shall be deposited within two months from the date of this Award. These advances shall be remitted to account number 24.58.28.583 at Pierson, Heldring and Pierson, Korte Vijverberg 2, 2513 AB The Hague, in the name of the Secretary-General of the Iran-United States Claims Tribunal (Account No. 24 58 28 583; dollar account). The account is administered by the Secretary-General of the Tribunal. The Tribunal further may request from the arbitrating Parties such other amounts as may be necessary from time to time in connection with the experts' work.

VI. FINAL REMARKS

While waiting for the opinion of the expert, the Tribunal intends to determine further disputed issues in this case. The Tribunal, furthermore, deems it appropriate now to invite the Parties to engage in settlement negotiations and in that connection also to discuss and agree upon new and constructive solutions in order to bring the Zomorod Project to a successful completion.

CONCURRING OPINION OF HOWARD M. HOLTZMANN [1]

I. INTRODUCTION

I concur with reluctance to the Interlocutory Award in this case. I do so in order to form a majority for the key finding that the Government of the Islamic Republic of Iran has expropriated property of the Claimants in Iran. My concurrence is reluctant because the Interlocutory Award sets the date of the taking far later than when it actually occurred. The Interlocutory Award also includes a number of errors, and contains needlessly muddled terms of reference for the accounting expert who is appointed to give an opinion concerning the value of the expropriated property.

In view of the many errors in the Interlocutory Award, it would be easier to dissent from it than to concur in it. The Tribunal Rules provide, however, that awards can only be made by a majority vote. Thus, in a three-member Chamber, at least two members must join or there can be no decision. My colleague, Judge Kashani, having dissented, I am faced with the choice of joining the President in the present Interlocutory Award despite its faults, or accepting the prospect of an indefinite delay in progress toward final decision of this case. *See*, Tribunal Rules, Article 31, paragraph 1. *See also* Sanders, *Commentary on UNCITRAL Arbitration Rules*, II Yearbook Commercial Arbitration 172, 208 (1977). The Hearing in this case closed more than ten months ago; now that an Award has at last been prepared, no one would benefit from further delay.

II. HISTORY OF THE PROJECT

The Claimants in this case are Starrett Housing Corporation ("Starrett Housing") and its wholly owned United States subsidiaries Starrett Systems, Inc. ("Starrett Systems") and Starrett Housing International, Inc. ("Starrett International"). They assert claims owned directly by them, as well as claims owned by them indirectly through wholly owned or controlled foreign subsidiaries. (Claimants and their various subsidiaries are herein collectively called "Starrett".)

In the early 1970's Bank Omran, an Iranian development bank which was controlled by the Shah and his Government, instituted a program to create a new residential community in an area adjacent to

[1 Signed 20 December 1983; filed 20 December 1983.]

Tehran known as Farahzad. Bank Omran contracted with Starrett Housing for the construction of a large portion of the Farahzad development. Described in general terms, their agreement provided for the purchase by Starrett of certain tracts of land from or through the Bank, the construction by Starrett of approximately 6000 apartment units on those tracts, and the sale of completed apartments to Iranian purchasers as condominiums (an arrangement under which each purchaser would take title to his own apartment, and to an undivided share of common areas, with Starrett ultimately retaining no ownership interest at all in the land or buildings). Construction was to proceed in three phases; only the first phase, comprising eight buildings ("the Project"), is at issue in this case. Bank Omran undertook to provide at its own expense the infrastructure necessary to the construction and sale of the Project, including water, electricity, roads and telephone services.

Starrett Housing and Bank Omran initially entered into a simple one-page contract (the "Initial Agreement"), to which was annexed the more elaborate contract governing the construction of the Project (the "Basic Project Agreement"). The Initial Agreement, dated 2 November 1974, required Starrett Housing to create a foreign subsidiary for the purpose of entering into the Basic Project Agreement with Bank Omran. However, Bank Omran from the outset intended Starrett Housing, not its specially created subsidiary, to furnish the manpower, expertise and resources necessary for the Project. Accordingly, the Initial Agreement required Starrett Housing to guarantee the subsidiary's performance.

The first Starrett subsidiary to enter into the Basic Project Agreement was Starrett S.A., a Swiss entity. However, since the subsidiary would have to own the land on which the Project was to be built until the apartments were transferred to their ultimate purchasers, the parties for convenience assigned the Basic Project Agreement to Shah Goli, an Iranian company owned 79.7% by Starrett through a wholly owned German subsidiary. Starrett S.A. was thus removed entirely from the transaction, and Bank Omran was relieved of its obligation under the Basic Project Agreement to obtain for the Swiss subsidiary the governmental permission to own land that would otherwise have been required by the Foreign Nationals Immovable Properties Act (1931) and the "By-law Concerning Landed Property Ownership by Foreign Nationals" (1949).

Shah Goli and Bank Omran entered into the Basic Project Agreement on 18 October 1975. Starrett Housing already had guaranteed Shah Goli's performance to Bank Omran on 16 October 1975.

Starrett Housing also organized a second Iranian subsidiary, wholly owned through a German subsidiary. This Iranian subsidiary, Starrett Construction, was organized to coordinate the planning and design of the Project, to manage all of the construction work, and to supervise the marketing of the Project. It was, in other words, one of the vehicles through which Starrett Housing's expertise and experience were funnelled into the Project. Starrett Construction's compensation was in the form of a percentage of the cash proceeds received by Shah Goli from the sale of apartments; Shah Goli, under the Basic Project Agreement, and Starrett Housing, under the guarantee, retained ultimate responsibility for the Project.

An undertaking as massive as the Project required large amounts of capital. As forseen in the Basic Project Agreement, some of this capital was to come from the down payments by Iranian purchasers of apartments. Substantial additional capital was to be supplied from outside Iran by Starrett. Since, pursuant to the Initial Agreement, Starrett Housing was required to accomplish the Project through its specially created subsidiary, it was forseen by all parties that Starrett would furnish the necessary capital in the form of loans to that subsidiary, Shah Goli. That this method of financing was intended by all sides is evidenced by the prior approval of various loans by Bank Markazi, the Central Bank of Iran. Through loans, Starrett provided to Shah Goli tens of millions of dollars necessary for the construction of the Project.

Thus, from the Project's inception, all parties contemplated that Starrett Housing would manage and control the Project and would provide the necessary design and construction expertise, personnel and financing. All parties contemplated that Starrett Housing would develop the Project through its Iranian subsidiary, Shah Goli, that it would finance the Project through apartment sales and loans to Shah Goli, and that it would remain ultimately responsible for Shah Goli's performance. The matrix of contractual relationships thus created constituted Starrett's rights and obligations in the Project.

III. STARRETT'S CLAIM

The Claimants assert that the Government of Iran took possession and control of the entire Project – the land, the buildings, the equipment, and the rights and obligations connected with them. Thus, they contend, the Government expropriated all of their rights in the Project: their ownership of its physical assets as well as their contractual rights to complete the Project and to reap its benefits. The Claimants contend that this taking and other acts of the Respondents were breaches of Iran's international obligations. Claimants seek damages of over $112 million, plus interest and costs.

In addition, Claimants assert two further alternative claims, neither of which are decided in the Interlocutory Award. First, Claimants assert that *force majeure* has prevented their further performance of the

Basic Project Agreement, and that under Item 11 of that Agreement they are entitled to "an equitable solution in consideration of all work performed." Second, Claimants assert that acts of the Government of Iran constituted expropriation and rendered Starrett's further performance impossible, thus entitling them to recover all costs and loans expended on the Project, under both Item 11 of the Basic Project Agreement and a separate guarantee allegedly given by Bank Omran. As noted above, the Tribunal has not decided the merits of these alternative claims, nor has it determined the effect on them of the present Interlocutory Award; further discussion must therefore await a later stage of the proceedings.

IV. THE DATE OF EXPROPRIATION

1. *The Applicable International Law*

The Interlocutory Award properly holds that expropriation[1] occurs when an owner is deprived of the effective use, control and benefits of its property. It finds that "the Government of Iran did not issue any law or decree according to which the Zomorod Project or Shah Goli expressly was nationalized or expropriated," but goes on correctly to state that

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

I join in those holdings, which summarize well-settled principles of international law. Those principles are succinctly stated in the Draft Convention on the International Responsibility of States for Injuries to Aliens (1961), which defines a "taking of property" to include both formal takings of title and takings accomplished through the exclusion of the owner from control and enjoyment of its property:

> A "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment or

[1] The terms "expropriation," "nationalization," "taking" and "confiscation" are used almost interchangeably in the literature on this subject. "Confiscation" might be the most appropriate word in the context of this case, in which there has been no payment of compensation; however for consistency with the Interlocutory Award, I will use the terms "expropriation" and "taking," intending them to have equivalent meaning. *See* 2 D. O'Connell, *International Law* 769, 776-77 (2d ed. 1970); Van Hecke *Confiscation, Expropriation and the Conflict of Laws,* 4 Int'l L.Q. 345-46 (1951); Fawcett, *Some Foreign Effects of Nationalization of Property,* [1950] Brit. Y.B. Int'l L. 355-56; Fachiri, *Expropriation and International Law,* [1925] Brit. Y.B. Int'l L. 159.

> disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.

Id. Article 10, paragraph 3(a), *reprinted in* Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens,* 55 A.J.I.L. 545 (1961). *See also* Restatement (Second) Foreign Relations Law of the United States § 192 (1965).

This concept has firm roots in the decisions of international tribunals. *See, e.g., German Interests in Polish Upper Silesia* (Ger. v. Pol.), 1926 P.C.I.J., ser. A, No. 7 at 14-45 (Judgment of 25 May 1926) (*Chorzów Factory Case*); *Norwegian Shipowners' Case* (Nor. v. U.S.), 1 R. Int'l. Arb. Awards 307 (1922). In both of those cases – as in the present claim – not only physical property but also the contractual rights connected with such property were deemed taken; indeed, in the *Chorzów Factory Case* the taking of a factory owned by one corporation was held also to constitute a taking of a different entity's contracutual rights to manage the same factory. One commentator has pointed out that these cases establish that

> [A] State may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention. More important, the two cases taken together illustrate that even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them.

Christie, *What Constitutes a Taking of Property Under International Law?* [1963] Brit. Y.B. Int'l L. 307, 311.

The same principle has been recognized in this Tribunal. Chamber Two has held that

> [A] taking of property may occur under international law, even in the absence of a formal nationalization or expropriation, if a government has interfered unreasonably with the use of property.

Harza Engineering Co. v. The Islamic Republic of Iran, Award No. 19-98-2 (30 December 1982), 1 IRAN-U.S. C.T.R. 499, 504. Similarly, Judge Aldrich has written that the finding of a taking

> 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.*

ITT Industries, Inc. v. The Islamic Republic of Iran, Award No. 47-156-2

(Concurring Opinion of George H. Aldrich) (26 May 1983) (emphasis added)[1].

I underscore Judge Aldrich's statement that we must concentrate not on the "form of measures" but on the "reality of their impact," as I turn now to consider the particular kinds of measures which constitute expropriation. International case law and commentary are rich with examples of the circumstances which deprive an owner of the use, control or benefit of its property. These circumstances include: (i) measures which force the owner to flee the country and thus deprive it of the effective management and control of its property; (ii) measures which deny the owner access to its funds and profits; (iii) coercion and intimidation forcing the owner to sell at unfairly low prices; (iv) interference with the owner's access to needed facilities and supplies; and (v) appointment of conservators or administrators to manage the property in the enforced absence of the owner. Starrett suffered from each of these circumstances, caused or ratified by the Government of Iran. The particular expropriatory acts and measures affecting Starrett are described below.

2. *The Expropriation of Starrett's Property Rights*

The Interlocutory Award finds that the expropriation of the Claimants' property rights did not occur until 30 January 1980, the day on which the Government of Iran appointed a manager of Shah Goli "to direct all further activities in connection with the Project on behalf of the Government."[2] The Interlocutory Award correctly holds that this was an act of expropriation because it denied Claimants their right to manage and control Shah Goli and the Project. The appointment of the manager was not, however, the first or only act of expropriation; in fact, it was the last of a series of such measures. The Interlocutory Award ignores the real impact of other decisive acts which resulted in a taking of Claimant's property rights many months before. Although the Government of Iran on 30 January 1980 took the formal step of appointing a manager for the property which it had already taken, that final measure cannot logically serve to obscure the earlier acts of expropriation. In my view, a realistic assessment of the facts would have been preferable to the sterile formalism of the Interlocutory Award.[3]

The progression of expropriatory events was steady and inexorable:

[1 2 IRAN-U.S. C.T.R. 348 at 352.]

[2] The Tribunal rules that "for ease of accounting . . . 31 January 1980 shall be considered as the date of taking."

[3] I have previously written to protest what I view as exaggerated formalism in the reasoning of the Tribunal. *See, e.g.,* Dissent of Howard M. Holtzmann from Final Decision Refusing to Accept Claim, in which George H. Aldrich and Richard M. Mosk Join, Refusal Case No. 21 (20 December 1982), 1 IRAN-U.S. C.T.R. 396.

- By the end of February 1979, the cumulative effect of a series of acts by successful revolutionaries and the Government they installed had seriously curtailed Starrett's ability to manage and control the Project.
- By the end of July 1979, there could no longer be any doubt that Starrett's use, control and benefit of the Project had been taken: an armed incursion into the Project, accompanied by detention of its personnel, forced Starrett to agree to accept $22 million less than the contract price for apartments it had already sold; and Bank Omran, under Government control, had frozen Shah Goli's accounts so that it could no longer draw money to pay for continued work on the Project.
- By early November 1979 Starrett's last American construction supervisor was forced to flee Iran. He had remained until after the seizure of the United States Embassy in Tehran, hoping that control of the Project might be restored to Starrett. With the detention of the 53 hostages, that last hope vanished.

These and other acts of taking are described in greater detail below. Considering those events one must ask whether there would not have been an expropriation even if the Government of Iran had not bothered to take the formal step of appointing a manager on 30 January 1980. The answer, compelled by the facts and by established international law, is that Claimants' property rights were taken long before 30 January 1980.

(a) *Events Before the Culmination of the Islamic Revolution in February 1979*

During the last months of 1978 conditions in Iran forced most of Starrett's 150 American supervisors to leave. Those conditions were so notorious and widespread that it is unnecessary to recite them here. By the end of the year only 10 to 12 of Starrett's supervisors remained. Various subcontractors whose work was necessary in completing construction of the apartments also were forced to leave. By January 1979 the overall Project work force of approximately 2000 had been reduced to 200. The evidence establishes that during the same period the Project was hampered by strikes in the public and private sectors of the Iranian economy, shortages of building materials and fuel, and blockage of port and customs services which prevented delivery of needed materials from abroad. Claimants contend that these events constituted *force majeure* and expropriation as early as December 1978. It seems clear that these events did create a *force majeure* situation for Starrett. They may also have constituted a taking, since under international law the Islamic Republic of Iran is responsible for the

acts of the successful group which brought about the victory of the Revolution,[1] and, indeed, is responsible for the unpunished xenophobic and anti-American acts of individuals or mobs.[2]

(b) The Arrest of Starrett's Project Manager, Arthur Radice, and his Forced Departure from Iran in February 1979

In February 1979 four men armed with machine guns entered the offices of Shah Goli at the Project site and announced that, since the Project had once belonged to the former Shah, it now belonged to the new Islamic Republic. Arthur Radice, Starrett's senior manager in Iran, and another Starrett executive were arrested and taken before a governmental official. Released after several hours of detention and interrogation, they immediately left the country. That the armed incursion and arrests caused their flight cannot be doubted, nor can it be doubted that this was a reasonable reaction in the light of the notorious events in Iran. It should be recalled that virtually all United States companies and their personnel had already fled Iran several months before this incident, after a long period of disorders and violence, including assassinations, directed against Americans.[3] It can hardly be maintained that, after the February incident at the Project site, Starrett's executives were unreasonable in concluding that they

[1] De Aréchaga, "International Responsibility," in *Manual of Public International Law* 531, 562-64 (M. Sorensen ed. 1968); 8 M. Whiteman, *Digest of International Law* 819-24 (1967); Draft Convention on the International Responsibility of States for Injuries to Aliens, Art. 18, *reprinted in* Sohn & Baxter, *supra,* 55 A.J.I.L. at 576; *Bolivar Railway Company Case* (Gr. Brit. v. Venez.) Robson's Reports 388, 394 (1904); 2 D. O'Connell, *International Law* 968 (2d ed. 1970); International Law Commission, *Revised Draft on Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens* Arts. 7, 8 & 16, II Yearbook of International Law Commission 46-48 (1961). *Accord, Lillian Byrdine Grimm v. The Government of the Islamic Republic of Iran,* Award No 25-71-1 (Dissenting Opinion of Howard M. Holtzmann filed 22 March 1983) [2 IRAN-U.S. C.T.R. 78 at 81].

[2] E. Borchard, *The Diplomatic Protection of Citizens Abroad* 217, 225 (1927); C. Eagleton, *The Responsibility of States in International Law* 81 & n. 22, 127 & nn. 5 & 6 (1928); D. O'Connell, *supra,* at 968-69; De Aréchaga, *supra,* at 562; Bar, *De la responsibilité des Etats à raison des dommages soufferts par des étrangers en cas de troubles, d'émeute ou de guerre civile,* Revue de Droit International et de Législation Comparée (2d Series, 1) 464,471 (1899).

[3] *E.g.,* in November 1978, leaflets were distributed reminding the "cursed Yanky" that "all the Iranian people" hate him. *Newsweek,* 20 Nov. 1978, at 23. In December, signs were placed in store windows reading "Yankees Go Home by February or Be Killed." *Int'l Herald Tribune,* 27 December 1978, at 1. On 23 December 1978, Paul Grimm, a senior American oil company executive was shot to death in Ahwaz. *Lillian Byrdine Grimm v. The Government of the Islamic Republic of Iran,* Award No. 25-71-1 (filed 22 February 1983) [2 IRAN-U.S. C.T.R. 78]. Shortly thereafter, as reported in the Iranian press, another American was found in his Kerman apartment with his throat slit and with the warning "Please return to your country" written on the wall. *Kayhan,* 16 January 1979, at 1. *Tehran Domestic Service* reported on 12 February 1979 that 25 Americans had been arrested by "people's fighters," and on 26 February that four Americans had been arrested and turned over to the Ayatollah Khomeini's staff. Other acts of violence directed against Americans were extensively reported in the Iranian and international press, *e.g., Kayhan* 22 January 1979, at 8; *id.,* 30 January 1979, at 2; *The Guardian,* 19 November 1979, at 6; *Newsweek,* 20 November 1978, at 23; *Time,* 27 November 1978, at 23; *N.Y. Times,* 22 December 1978, at A1; *Fortune,* 31 December 1978, at 39.

could no longer safely remain in Iran.

The Government of Iran cannot easily dissociate itself from this and subsequent armed incursions and arrests carried out by Revolutionary Guards and others, wrongs which were neither redressed nor punished by the Government. *Cf., United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 32, para. 67 (Government of Iran responsible for inaction in face of seizure of private United States nationals).

When a corporate property-owner's managers are forced to flee for their safety, the owner is deprived of the right to manage and control its property. That deprivation is a wrong which, if not merely ephemeral, constitutes a taking. That is a basic rule of international law. As one commentator has emphasized, "the most fundamental right that an owner of property has is the right to participate in its control and management." Christie, *supra,* [1963] Brit. Y. B. Int'l. L. at 337. *Accord,* Board of Editors, *The Measures Taken by the Indonesian Government Against Netherlands Enterprises,* 5 Netherlands Int'l L. Rev. 227, 242 (1958). International case-law likewise consistently holds that the effective exclusion of an owner, or its chosen representatives, from full and free access to its property results in a taking.[1]

The Interlocutory Award correctly recognizes this principle, stating that "the right freely to select management . . . is an essential element of the right to manage a project." Unaccountably, however, it repeatedly fails to apply this principle and to recognize that the forced departures of Starrett's executives resulted in an expropriation.

(c) Decree of 28 February 1979 Resulting in Change in Control of Bank Omran

One of the first official measures that occurred after the culmination of the Islamic Revolution was the expropriation of the assets and properties of the Pahlavi Foundation, a major asset of which was Bank Omran. Following the expropriation, the top managers of Bank Omran were immediately replaced and thereafter the Bank was managed by persons approved by the new Government and controlled by it.

The Respondents assert that the Pahlavi Foundation was not confiscated, but that the only thing which occurred was a change of its name to "Alavi" Foundation. The documentary evidence proves,

[1] *See, e.g., Ellermann c. Etat polonais* (Ger. v. Pol.), 5 Trib. Arb. Mixtes 457, 460 (1924); *Jeno Hartmann,* Dec. No. HUNG-717, FCSC Tenth Semiannual Report, p. 45 (1958); *Malvin Klein,* Dec. No. HUNG-1123, *id.* at 53; *Geza Danos,* Dec. No. HUNG-1004-A, *id.* at 56. *See also Lena Goldfields Case* (3 September 1930), *reprinted in* Nussbaum, *The Arbitration Between the Lena Goldfields, Ltd. and the Soviet Government,* 36 Cornell L.Q. 31, 49-50 (1950) (arrest of claimant's officials and coercion of employees resulting in widespread resignations); *Fearn International, Inc.,* Contract Nos. 5969 and 6159, Memorandum of Determination (OPIC, 20 Oct. 1973) (arrests of key employees and blocking access to plant site).

however, that much more than a change of name occurred. The Pahlavi Foundation had been formed by a personal decree of the Shah, and its Royal Charter and Articles of Incorporation make quite clear that the Shah completely controlled the Foundation which bore his name.[1] The Shah's Prime Minister and other members of his Government comprised the majority of the Foundation's Trustees. Moreover, in the Royal Charter the Shah referred specifically to Bank Omran, "which we formed out of our own capital."

It is not surprising that the new Government instituted measures to take over and control all properties formerly controlled by the Shah. On 28 February 1979 the Ayatollah Khomeini signed the "Decree of Imam Concerning Confiscation of the Pahlavi Properties." It provides that

> The Islamic Revolutionary Council is charged by virtue of this decree with confiscating all movable and immovable properties of the Pahlavi Dynasty, its branches, agents and affiliates . . . .

As can be seen from the provisions of its Charter and Articles of Incorporation, the Pahlavi Foundation was a property of the Pahlavi Dynasty or one of its "branches, agents and affiliates." It was apparently so considered by the Revolutionary Council, because the officers of the Foundation and Bank Omran appointed by the Shah were quickly replaced by persons appointed by the new Government.

The change in the management of Bank Omran had a profound effect on the Project and was a major event in the process of expropriation. As noted above, Bank Omran was a development bank, and was the developer of the Farahzad area. Under the terms of the Basic Project Agreement, it was responsible for carrying out all infrastructure development, without which the construction of the Project could not be completed or the apartments occupied. Moreover, pursuant to the Basic Project Agreement Bank Omran collected all payments by purchasers for apartments; it was obligated to transfer those funds to an account of Shah Goli, after first deducting Bank

[1] The royal decree establishing the Pahlavi Foundation stated: "We, the Pahlavi King of Kings of Iran . . . have willed that . . . a charitable organization be incorporated entitled 'The Pahlavi Foundation.'" The Foundation was to hold the Shah's "inherited" and "personal" property. The Articles of Incorporation required that the Board of Trustees be appointed "through his Majesty's Decree," and that its members be five high Government officers, headed by the Prime Minister, and two "trusted individuals as selected by His Majesty." Article 10. The Managing Director also was required to be appointed "by His Imperial Majesty's Decree." Article 11. Decisions of the Board were to be effective "on approval of His Majesty." Article 15. Reports of future plans were to be reported to the Shah and required not only approval of the Trustees but also "receipt of the Royal Assent." Article 9. Finally, the personal control exercised by the Shah was emphasized by a provision that "only the person of His Imperial Majesty, the grand founder of the Foundation, may revise any of the Articles of this articles of incorporation." Article 25.

Omran's share of the purchase price. Finally, Bank Omran was responsible for securing all necessary permits, including import licenses and whatever permissions were necessary for expatriates to work on the Project.[1] Bank Omran was thus an integral part of the Project, and the continued fulfillment of its obligations was essential to Starrett's use and benefit of the Project.

Bank Omran was able to control key aspects of the Project by virtue of its control over the necessary infrastructure and the bank accounts into which proceeds of sales were required to be deposited. Thus, by taking control of the Bank the new Government also took control of essential elements of the Project. Starrett when it entered into the transaction had relied upon Bank Omran – then controlled by the Shah – to fulfill its contractual obligations in good faith. Under the new conditions, and in view of the expressed anti-American policy of the new Government, Starrett could no longer enjoy the benefit of such reliance. Far from continuing to provide the cooperation and services required by the Basic Project Agreement, Bank Omran became the means for carrying out the policies of the new Government.

Although Starrett had been able to overcome Bank Omran's delays in supplying electricity at earlier phases of the Project, the problem became critical because delivery of apartments to the purchasers and the collection from them of the balances of the sales price could not be accomplished without the electricity necessary to light the apartments and run the elevators. At this point, Bank Omran's failure to provide infrastructure was akin to the governmental denial of access to essential supplies that paralyzed the Claimant's operations, and was seen as a taking, in the *Lena Goldfields Case*, *supra*, 36 Cornell L.Q. at 48-49. Bank Omran's further acts in July 1979, described below, continued this pattern of expropriatory conduct.

(d) *Arthur Radice's Second Forced Departure in April 1979*

Arthur Radice returned to Iran in April 1979 in an effort to save Starrett's badly deteriorated position there. Following his arrival he was charged with a violation of Iranian law of which he was eventually acquitted. His passport was seized by the Iranian authorities so that he could not depart from the country. His passport was finally returned after a bond was posted. He thereupon left Iran for the second time.

This second departure of Mr. Radice – which, in view of the evident dangers he faced, must be regarded as forced – confirmed that Starrett's loss of its ability to manage and control the Project was not ephemeral.

[1] A detailed description of Bank Omran's obligations under the Basic Project Agreement is set forth in the Interlocutory Award.

(e) Armed Incursion and Coercion by Revolutionary Guards in July 1979 Preventing Shah Goli from Collecting the Full Contract Price of the Apartments

Despite the severe impairment of its rights of management, Starrett had succeeded in keeping a small force working on the Project and by July 1979 Shah Goli was ready to deliver the apartments in the first building. That building had been largely completed before the Revolution, but earlier delivery had been impossible largely because Bank Omran had delayed providing the electricity necessary to run the elevators and light the apartments. The Chairman of Starrett Housing, Mr. Henry Benach, testified at the Hearing concerning what occurred when Shah Goli began delivering the apartments:

> MR. BENACH: What happened was, we have in our sales contract [the Apartment Purchase Agreement signed with apartment buyers] the right to make one escalation [in price] of 10 percent. That's from the inception in 1975. When we called the buyers together and told them we are ready now to deliver the apartments and send the notices, we told them that although the inflation had been much more in Iran, that's before the Revolution, we were exercising our 10 percent escalation.
>
> The buyers went to a Mr. Moezi, a new man since the change of Government, and they came – Mr. Moezi with the National or the . . . Revolutionary Guard – and they locked up all my people in a room, cut off all the lights, cut off all the communications, and told them that they cannot go out until they will sign an agreement that we will not ask for the escalation.
>
> . . . . .
>
> And what they did was, finally, after negotiation, they let Mr. Zilli out, who went to the phone and called me and said, "We are captives here, and unless we agree to not ask for escalation, we cannot get out."
>
> I told him, "Listen, you go back. A life is more important than money. You go back and tell them that you will agree, and we will go forward as best we can."
>
> And this was done. And I believe there is a telex to that effect.
>
> What I am really saying is that that item is some $22 million that we are entitled to in escalation . . . And there is no question about our entitlement.
>
> MR. KAYE: Mr. Benach, did the people that came, were they under arms when they came to the Project?
>
> MR. BENACH: Yes, they were under arms. I thought I made that clear. They came with guns.

There is no reason to doubt the truth of Mr. Benach's testimony. Correspondence in the record confirms that Shah Goli was prevented from exercising its contractual right to escalate the sales price of its apartments. This was a decisive deprivation of Starrett Housing's control over the Project, and of Shah Goli's right to sell its apartments at the contract price. The coercion by the Revolutionary Guards

cannot be dismissed as the unsanctioned conduct of a mob, for the Government of Iran took no action to redress the situation or to restore to Starrett the right to the $22 million which it had been forced to give up.

Sales at inadequate prices, brought about through physical threats or other forms of coercion, have repeatedly been held to constitute expropriation. *See, e.g., Poehlmann v. Kulmbacher Spinnerei A.G.*, 3 U.S. Ct. Rest. App. 701 (1952); *Osthoff v. Hofele*, 1 U.S. Ct. Rest. App. 111 (1950). *Cf., Lena Goldfields Case, supra*, 36 Cornell L.Q. at 48 (breach of contract to permit free sale of property produced). Summarizing the case-law on this subject, one commentator has found that there is "a general consensus that proven threats of coercion . . . are sufficient duress to make an otherwise valid transfer a [taking]." Weston, *"Constructive Takings" under International Law: A Modest Foray into the Problems of "Creeping Expropriation"*, 16 Va.J.Int'l L. 101, 142 (1975). This consensus would find a taking even when no immediate physical threat was made. *Id.* When – as in this case – "the threats to an alien's property are accompanied by threats to his physical security," Christie, *supra*, [1963] Brit. Y.B. Int'l L. at 329, the consensus is even wider that a claim for taking can be maintained.

It is difficult to understand how the Interlocutory Award can ignore the armed coercion that took place at the Project in July 1979, and hold that the Claimants were not deprived of the effective use, control and benefits of their property until more than six months later.

(f) The Blocking of Shah Goli's Bank Omran Accounts in July 1979

When Shah Goli delivered finished apartments to purchasers, the purchasers were obligated to pay the remaining balance owed on their apartments. As noted already, the Basic Project Agreement provided that these payments were to be deposited into Shah Goli's accounts in Bank Omran, the Bank was to deduct its percentage of the payments, and the remainder was to be placed at Shah Goli's disposal.

In fact, however, at the same time that Shah Goli was forced to accept $22 million less than the contractual price for the apartments it delivered, Bank Omran blocked the accounts into which the purchasers' payments were deposited. Thus, Shah Goli was not able to draw on its accounts to meet its existing obligations or to pay for continued work on the Project. Starrett's activities at the Project were paralyzed by this act of Bank Omran. Further progress became impossible without loans from Bank Omran to replace the blocked funds; the documentary record shows that Starrett's sole activity in the following months was an attempt either to retrieve its own funds or to obtain such a loan from the Bank. By blocking Shah Goli's accounts, Bank Omran was able to usurp the power to approve or disapprove all

further initiatives at the Project – it, not Starrett, was in complete control of the Project.

Bank Omran, which had been under the new Government's control since the expropriation of the Pahlavi Foundation, in February 1979, was also covered by a decree in June 1979 which nationalized all Iranian banks. When it blocked Shah Goli's accounts in July 1979, there can be no doubt whatsoever that it was under Government control.

Denial of free access to is funds deprives an owner of the use and benefits of its property and thereby results in a taking. *See,* Board of Editors, *The Measures Taken by the Indonesian Government Against Netherlands Enterprises*, 5 Netherlands Int'l L.Rev. 227, 242 (1958). Thus, in the *Lena Goldfields Case*, *supra*, a taking resulted from actions "to deprive the company of available cash resources, to destroy its credit, and generally to paralyze its activities." 36 Cornell L.Q. at 50.

Again, it is difficult to understand how the Interlocutory Award can ignore the consequences of the blocking of Shah Goli's funds. It is also difficult to understand how the Interlocutory Award can equate that action, directed specifically against Shah Goli, with such general occurrences as "strikes, lock-outs, disturbances, changes of the economic and political system and even revolution," and so dismiss it as simply among the risks investors may assume. The blocking by a Government-owned bank of funds essential to the survival of a Project like the one at issue is an act of expropriation by all standards of international law.

(g) The Forced Departure of Starrett's Last Construction Supervisor on 4 November 1979 Following the Seizure of the United States Embassy

Despite his forced departure in April 1979, Arthur Radice again returned to Iran and attempted to protect Starrett's interests. In September 1979 he was forced to leave Iran for the last time. Thereafter Lewis Johnson, an attorney who held Iranian citizenship, remained on as Managing Director of Shah Goli. Mr. Benach testified that Mr. Johnson had no construction experience, and was simply appointed in an attempt to maintain Starrett's presence at the Project after the Government demanded the installation of Iranian managers. This effort at maintaining a continuing presence appears to have been motivated by a hope, never realized, that conditions would change for the better, and that actual control of the Project might be returned to Starrett.

On 4 November 1979, immediately following the seizure of the hostages at the United States Embassy in Tehran, Starrett's last construction supervisor fled from Iran. Thus, the last vestige of Starrett's management of the operation of the Project ended.

Continued construction activities by an American-owned enterprise in Iran were no longer possible. As the Interlocutory Award states, "it is notorious that at least after 4 November 1979, the date when the Embassy hostage crisis began, all American companies with projects in Iran were forced to leave their projects and had to evacuate their personnel."

The decision of the International Court of Justice in the *Hostage Case* holds that the Government of Iran was responsible for the seizure of the Embassy. Despite that decision of the International Court of Justice and the Interlocutory Award's own finding that by 4 November 1979 "all American companies with projects in Iran were forced to leave their projects and had to evacuate their personnel," the Interlocutory Award nevertheless finds that an expropriation did not occur until 31 January 1980.

3. The Effect of the 31 January 1980 Date of Expropriation on the Ultimate Damages in this Case

Although I am critical of the Interlocutory Award for holding that expropriation did not occur until 31 January 1980, that holding may, as a practical matter, have little effect on whatever damages may be determined in the Final Award in this case. There are several reasons for that.

First, it is not yet known what method the expert will use to determine the value of the expropriated property, or whether his opinion will be accepted by the Tribunal. Under some methods of valuation, the later date of expropriation might have relatively little monetary significance as compared to an earlier date.

Second, when valuing the property, international law requires that the expert exclude any diminution in value attributable to wrongful acts of the Government of Iran before the date of taking. That factor is particularly relevant in this case because of the finding in the Interlocutory Award that "events in Iran before January 1980 to which the Claimants refer, seriously hampered their possibilities to proceed with the construction work and eventually paralysed the Project."

Judge Aldrich stated the relevant principle in his opinion in the *ITT Industries Case:*

> In computing compensation for expropriated property, the Tribunal must . . . [exclude] any decline in value resulting from the threat of taking or other acts attributable to the Government itself.

Accord, Draft Convention on the International Responsibility of States for Injuries to Aliens, *supra*, Art. 10(2)(b) and Explanatory Note thereto; *Restatement (Second) Foreign Relations Law of the United States* § 188,

comment (b) (1965); Organization for Economic Cooperation and Development, *Draft Convention on the Protection of Foreign Property* Art. 3, comment 9(a) (1967); Lillich, *The Valuation of Nationalized Property by the Foreign Claims Settlement Commission*, *in* 1 R. Lillich, *The Valuation of Nationalized Property in International Law* 95, 97 n.13 (1972).

Third, the Tribunal has not decided whether various acts and measures that occurred before 31 January 1980 caused compensable damage to the Claimants, even if they did not constitute expropriation of the entire Project. Certain of these events constituted either breaches by Bank Omran of the Basic Project Agreement, or wrongful interference by the Government and its agents with Shah Goli's execution of the Project; in either case, added costs resulted for which responsibility will have to be assigned, and this will affect the ultimate valuation of the Project. The question also arises whether the same events constituted acts of the Government of Iran rendering further performance of the Basic Project Agreement impractical or impossible, thus entitling Shah Goli, under Item 11 of that Agreement, to recover its actual costs for the Project; or whether those events constituted *force majeure* under the same provision, entitling Shah Goli to "an equitable solution in consideration of all work performed."[1] The Tribunal has not yet considered how these rights to compensation are to be taken into account, either as part of the valuation of the Project or separately as part of the Claimant's alternative claims.

Fourth, the Claimants argue that the events prior to January 1980 constituted violations of Iran's international obligations under the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran.[2] The International Court of Justice has determined that the provisions of the Treaty of Amity "remain part of the corpus of law applicable between the United States and Iran." The *Hostage Case, supra*, para. 54. The Tribunal has not yet decided whether any of the events prior to January 1980, even if not constituting the expropriation of the Project, were nevertheless compensable violations of the Treaty of Amity.

[1] The full text of Item 11 of the Basic Project Agreement appears in the Interlocutory Award.

[2] 15 August 1955, 8 U.S.T. 899. Specifically, the Claimants allege that, in addition to expropriating their property rights without payment of compensation in violation of Article IV, paragraph 2 of the Treaty of Amity, Iran violated that Treaty by: (i) depriving Starrett and its American personnel of their right to enter and remain in Iran for purposes of carrying on commercial activities, in violation of Article II, paragraph 1; (ii) preventing Starrett from developing and directing the operation of the Project in which they had invested, in violation of Article II, paragraph 1 and Article XX, paragraph 4; (iii) depriving Starrett of its right to manage and control the Project, in violation of Article IV, paragraph 4; (iv) depriving Starrett and its personnel of their right to constant protection and security of their property and persons, in violation of Article IV, paragraph 2 and Article II, paragraph 4; (v) depriving Starrett of fair, equitable and non-discriminatory treatment, in violation of Article IV, paragraph 1; and (vi) subjecting the offices and premises of Starrett to entry and molestation without just cause, in violation of Article IV, paragraph 3.

V. THE EXPERT'S TERMS OF REFERENCE

Having concluded that the property and property rights of Claimants have been expropriated, the Interlocutory Award goes on to the question of determining the amount which the Government of Iran is obligated to pay as compensation for the taking. Noting that valuation of the expropriated property "involves complex accounting matters," the Tribunal determines that advice of an accounting expert is needed. It appoints such an expert and sets forth his initial terms of reference.

1. The Standard of Compensation

The Interlocutory Award unfortunately does not enter into any analysis or discussion of the standards of international law which govern the measure of compensation in the event of a taking. Determination of that issue presumably awaits a later stage of the proceedings in this case. Accordingly, I do not in this Concurring Opinion reach the legal issues concerning the appropriate measure of compensation.

2. The Property to be Valued

The Interlocutory Award describes the property which was expropriated. After noting that the expropriatory measure, *i.e.*, the appointment of a manager, was "aimed at the taking of Shah Goli," the Tribunal states its holding as follows:

> The Tribunal holds that the property interest taken by the Government of Iran must be deemed to comprise the physical property as well as the right to manage the Project and to complete the construction in accordance with the Basic Project Agreement and related agreements, and to deliver the apartments and collect the proceeds of the sales as provided in the Apartment Purchase Agreements.

The Interlocutory Award then goes on to set out the terms of reference for the accounting expert. These terms of reference recognize – albeit in a needlessly cumbersome way – the intergrated structure of the Project and the participation of various Starrett companies in it. The expert is directed to give his opinion on the "value of Shah Goli," and is further directed to include the "value of the Project in Shah Goli's hands." In addition, the terms of reference recognize that the value of the Project was not solely in Shah Goli's hands, but that other Starrett companies also were involved. The expert is therefore directed to give his opinion on the "net profit of the Project, if any, Starrett Housing would reasonably have received through management fees paid to Starrett Construction," as well as to determine which Starrett company owned certain construction

equipment to be valued. Significantly, the terms of reference recognize that various Starrett companies loaned Shah Goli money to be expended on the Project. Therefore, the expert is directed to give his opinion on the proper method of taking into account the loans made to Shah Goli, and to indicate which company was the lender or borrower on each such loan, and the extent to which the proceeds were expended for the purposes of the Project.

When one analyzes these interrelated provisions of the terms of reference, it becomes apparent that the entire Project and all the Starrett companies involved in it are to be taken into account in arriving at the value of the property rights which were expropriated. Although I would have preferred to state that in a simpler and more concise way, the terms of reference will, I believe, provide sufficient guidance for the expert.

There remains the potential problem that, because of the way the terms of reference are structured, some gap may exist. This is possible because the Starrett companies, following generally accepted accounting practice, report their financial results on a consolidated basis and, in consequence, some of the evidence focuses on the whole, and does not always identify the particular parts. As a result, the terms of reference may have omitted some element which the expert may discover in his detailed studies, and which should be taken into account in order to achieve a fair valuation of the expropriated property. The terms of reference are, however, sufficiently flexible to deal with that contingency. They provide that the expert may refer to the Tribunal for modification of the terms of the reference if "in the course of his investigation [he] forms the opinion that modification . . . would be necessary to permit a proper valuation."

3. The Method of Valuing the Expropriated Property

The terms of reference direct the accounting expert in giving his opinion to consider "as he deems appropriate the discounted cash flow method of valuation." The phrase "as he deems appropriate" gives the expert freedom to disregard the discounted cash flow method if, in his opinion, it is an inappropriate method of valuation in the circumstances of this case. I think, however, that it would have been better not to have suggested any particular theory. In stating this I note that no party in this case has proposed use of the discounted cash-flow method. The Tribunal has no knowledge as to whether this method, which is typically used to value going concerns with a long future expectancy of continuing business, is equally appropriate when valuing a short-term construction project to build and sell condominium apartments, in which the owner would have no further participation in the project – particularly when substantially all of the

apartments had been sold before the expropriation. Moreover, the fact that the independent public accounting firm which audited Starrett's financial statements regularly certified the amount of Starrett's profits on a percentage-of-completion basis may suggest the propriety of other valuation techniques. I express no opinion on these points at this time. I only suggest that it would have been preferable for the Interlocutory Award not to have mentioned any particular method of valuation at this stage of the proceedings.

It would also have been better if the terms of reference had included an express instruction to the expert to exclude any diminution in value attributable to wrongful acts of Iran before the date of taking. *See* discussion at section IV(3) above. This principle is so firmly established in international law that it should be considered to be implicit in the terms of reference of the Interlocutory Award. If there should be any doubt on this or any other point, the terms of reference invite the expert to refer to the Tribunal for clarification.

4. Consideration of the Counter-claims by the Expert

There are eleven counter-claims asserted by the Respondents in this case. The Claimants deny them all.[1] The Tribunal has not yet decided any of the counter-claims; indeed as to four late-filed counter-claims the issues are not yet ripe for decision, because the Tribunal has only just decided to accept them and to invite responses from the Claimants.

It is thus premature and impractical to direct the expert to consider the counter-claims in any way. The terms of reference, however, direct the expert to "mention in his report as he deems appropriate the items, if any, referred to in the counter-claims which his investigation shows are liabilities of Shah Goli or the Project." The terms of reference expressly inform the expert that "the Tribunal has not yet made any legal determinations concerning the counter-claims." I do not know how the accounting expert can meaningfully refer to a counter-claim as being a liability, unless he knows whether that counter-claim is substantiated, and he cannot know that until there has been a judicial determination by the Tribunal of the relevant legal issues.

Two examples will suffice to show the problems the expert will face when he attempts to consider the counter-claims before the Tribunal rules on them. One of the counter-claims is for over $32 million of alleged corporate income taxes, based on profits of over $27 million, plus late-payment charges. These taxes might be liabilities of Shah Goli. Serious questions arise, however, which can only be resolved by

1 A description of the counter-claims appears in the Interlocutory Award.

the Tribunal. These questions include whether the assertion that there was over $27 million in taxable profits can be reconciled with Iran's defense that Starrett abandoned the Project because Shah Goli and the Project were on the verge of bankruptcy; and whether the Government has borne its burden of proving that the taxes were due, and that they were payable by the counter-Respondent. None of these questions fall within the expert's competence or within the scope of the terms of reference.

Another counter-claim is for approximately $17 million for alleged liabilities to apartment purchasers arising from delay in completion of the Project. The counter-claim is based on provisions of the standard Apartment Purchase Agreement which state that the "date for completion of construction . . . is estimated to be approximately 24 months," and which provide that if events of *force majeure* or shortages of materials should occur "said period shall be extended accordingly."[1] Legal issues arise as to the meaning and application of the relevant contract provisions. These include whether events of *force majeure* occurred and whether the Respondents have borne their burden of proof with respect to the existence of the obligation and the calculation of its amount.

The foregoing examples indicate some of the questions inherent in the counter-claims that no accountant can or should answer; they are legal questions which require a judicial determination by the Tribunal. Similar issues, as well as questions of jurisdiction, arise as to many, if not all, the counter-claims.

In these circumstances, the only feasible procedure is for the expert to proceed with other aspects of his investigation. During the time he is doing that, the Tribunal should decide the issues relating to the counter-claims. The expert could then consider the counter-claims on the basis of the Tribunal's decisions.

VI. OTHER ERRORS IN THE INTERIM AWARD

1. *Misleading Dicta*

There are numerous inappropriate *dicta* in the Interlocutory Award. Two of them are particularly misleading and must therefore be pointed out.

The first is a sentence which states, apparently with regard to pre-January 1980 events, as follows:

> But investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of the economic and political system and even revolution.

[1] The full text of the relevant provisions of the Apartment Purchase Agreements appear in the Interlocutory Award.

This passage is inappropriate as applied to Starrett, which, as noted above, took steps to protect itself against most such risks by securing *force majeure* provisions in the Basic Project Agreement and the Apartment Purchaser Agreements, as well as through the alleged guarantee from Bank Omran providing for repayment of Starrett's loans in the event the Project was halted due to events of expropriation, war or insurrection. Moreover, Starrett contracted in the context of the Treaty of Amity. As noted above, many of the events prior to January 1980 of which the Claimants complain may be compensable as violations of that Treaty, of Iran's obligations under international law, or of the Basic Project Agreement. The above-quoted passage might suggest that the Tribunal has ruled on these matters – this is simply not the case.

The second misleading *dictum* is a sentence derived from an opinion of Judge Aldrich, but which unfortunately omits a major part of Judge Aldrich's sentence. The omitted portion had been carefully drafted to put the first part into balance and perspective. The sentence as it appears in the Interlocutory Award is as follows:

> It has, however, to be borne in mind that 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.

As originally written, the sentence read:

> These authorities indicate that, while assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, *such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.*

ITT Industries Case, *supra*, (Concurring Opinion of George H. Aldrich) (emphasis added). The use of a half-passage, and of a half-concept, is particularly misleading in this case, in which the facts show that Starrett "was deprived of fundamental rights of ownership," by means that were not "merely ephemeral," as a result of the events of February and July 1979.

2. *The Descriptions in the Interlocutory Award of the Contentions of the Parties*

Unnecessarily large parts of the Interlocutory Award are devoted to descriptions of the contentions of the parties. These are flawed in ways

which reflect adversely on the quality of the work of the Tribunal.

One problem is that it is difficult to identify which statements are findings of the Tribunal and which are only contentions of a party. Many statements which might appear to be findings of the Tribunal are identified as party contentions only in short prefatory clauses which sometimes appear several sentences, paragraphs – or even pages – earlier. Adding to the confusion, not all such contentions are confined to the section headed "Facts and Contentions"; many appear elsewhere in the text.

The Interlocutory Award often fails to indicate which contentions are supported by evidence and which are not. Further, certain statements presented as contentions are, in my view, amendations of, or additions to, the record before us.

The Tribunal Rules require that the Tribunal "state the reasons upon which the award is based." Article 32, paragraph 3. That calls for an explanation of the Tribunal's views, but it is not a requirement that an award regurgitate every unsupported allegation in every pleading and argument. The purpose of an award is to express and explain the decision of the Tribunal, not to serve as a vehicle for the polemics of any party.

3. The So-called "Final Remarks"

In an unusual and disturbing step, the following statement has been added under the heading "Final remarks" at the end of the Interlocutory Award:

> The Tribunal, furthermore, deems it appropriate now to invite the Parties to engage in settlement negotiations and in that connection also to discuss and agree upon new and constructive solutions in order to bring the Zomorod Project to a successful completion.

I understand that the invitation to discuss and agree upon "new and constructive solutions in order to bring the Zomorod Project to a successful completion" refers to the ostensible desire of the Government of Iran that the Claimants should return to complete the Project. At the Hearing the President asked one of the representatives of the Government of Iran whether it wished "Starrett to come back to Iran and take charge of the Project." The President added that "it might be an opening for a settlement here." The representative of Iran responded that "our intention is that the Claimants should come back to Iran, and they should continue the Project." The representative of Iran added that if Americans felt they could not come to Iran, Starrett could send non-Americans to finish the Project.

Because the above-quoted statement under the heading "Final remarks" is not a judicial decision, or even *obiter dicta*, I am not called

upon to dissent from it or to concur with it. I simply state that I dissociate myself from it.

I do so because, while settlement is always to be favored, arbitrators who have a case pending before them must punctiliously avoid any indication that they are exerting pressure on parties to settle. Moreover, arbitrators should not participate in the settlement process by suggesting any particular form of settlement, unless *all* parties request them to do so. Most importantly, arbitrators must be careful to avoid suggestions for settlement which correspond to the demands of only one of the parties in the case, lest that imply partiality. Here, where there has been no request by all parties that the arbitrators suggest methods of settlement, the invitation "to discuss and agree" upon a "solution" which involves Claimants returning to complete the Project – one of the counterclaims of the Respondents – runs the danger of being seen by one or both parties as an exertion of pressure by the arbitrators, even if it may not be intended as such.[1] Finally, one must wonder whether that suggestion corresponds with the reality of conditions in present-day Iran.

4. The Reasons for Holding that the Tribunal is the Proper Forum for this Case

The Respondents contend that under the Claims Settlement Agreement Shah Goli does not have standing to sue the Government of Iran before this Tribunal, because Shah Goli is an Iranian corporation. The simple answer to that is that Shah Goli is not a Claimant in this case; only Starrett Housing and two of its United States subsidiaries are Claimants. Those United States nationals present their claims here, including claims they own indirectly through their controlling ownership interest in Shah Goli. Claims Settlement Declaration, Article VII, paragraph 2. That is all that need be said to dispose of Respondents' contention. Accordingly, I join in the holding that the Tribunal is the proper forum for this case, but I do not join in the reasons for that conclusion as set forth in the Interlocutory Award because they relate to issues which we need not reach.

I also join in the holding that the provision for arbitration in London which is contained in the Basic Project Agreement is not a

[1] *The Code of Ethics for Arbitrators in Commercial Disputes* (1977), prepared jointly by the American Arbitration Association and the American Bar Association, contains the following provision as Canon IV-H:

> It is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement of the case. However, an arbitrator should not be present or otherwise participate in the settlement discussions unless requested to do so by all parties. An arbitrator should not exert pressure on any party to settle.

While the *Code* does not bind this Tribunal, it is instructive.