125

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE NO. 33

CHAMBER ONE

AWARD NO. 135-33-1

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران ـ ایالات متحده

FILED - ثبت شد

Date ۱۳۶۳ /۸/ ۱۰ تاریخ

0 1 NOV 1984

No. 33 شماره

SEA-LAND SERVICE, INC.,
Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, PORTS AND SHIPPING ORGANIZATION,
Respondents.

OPINION OF HOWARD M. HOLTZMANN
DISSENTING AS TO AWARD ON THE CLAIMS
AND CONCURRING AS TO DISMISSAL OF COUNTERCLAIMS

I. Introduction

I dissent with regret from the Award on the claims in this case. I believe that it ignores the facts, misapplies the law, and is blind to realities. It is unjust in awarding a mere $750,000, without interest or costs, to a Claimant who has extensively documented claims for over $40 million.

In my view, it is clear that Sea-Land Service, Inc. ("Sea-Land"), a leading company in the field of container-ized ocean shipping, entered into contracts with the Ports and Shipping Organization ("PSO"), the governmental body

the International Monetary Fund Agreement[2] and the Treaty of Amity with the United States.[3] As to the lost equipment, Sea-Land presented detailed evidence proving that each piece of equipment had been brought into Iran and showing its depreciated value at the time of loss. The Respondents presented no evidence in defense. The Majority, however, denies this aspect of the claim on the ground that Sea-Land failed to show the precise whereabouts of each piece of equipment and to prove that each item actually fell into the hands of the Government of Iran. The equipment involved consisted largely of trucks, other rolling stock and moveable tools. To require Sea-Land to do more than prove that the material was taken into the PSO port and could not be brought out is to place upon it a virtually impossible burden of proof, considering the nature of the equipment and the circumstances surrounding its loss.

In order to frame the issues in this case and to place in perspective my very substantial differences with the Majority, it is necessary to begin with a description of the transaction in which Sea-Land and PSO engaged. As Justice Jackson once wrote, "I must bring these deliberations down to earth by a long recital of facts." Terminiello v. Chicago 334 U.S. 1, 14 (1949) (Jackson, J., dissenting).

---

[2]Articles of Agreement of the International Monetary Fund, signed 22 July 1944, entered into force 27 December 1945, 2 U.N.T.S. 39, T.I.A.S. No. 1501, as amended ("IMF Agreement").

[3]Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, signed 15 August 1955, entered in force 16 June 1957, 284 U.N.T.S. 93, T.I.A.S. No. 3853, 8 U.S.T. 900 ("Treaty of Amity").

II. The Transaction

1. Initiation of the transaction between Sea-Land and PSO

In August 1975 a series of contacts began between representatives of the Government of Iran and Sea-Land, that culminated in Sea-Land's establishing service for container cargo into and out of Iran. Sea-Land had been interested in establishing such a service, believing that Iran would provide a good market for Sea-Land's services. The Government of Iran became interested in the establishment of such a service as a partial solution to the severe congestion in Iran's ports, which was causing significant delays in the delivery of cargo and significant demurrage costs to Iran for containers and other equipment held up by such delays. The Government was attempting to solve some of these problems through the construction of a major new port facility in Bandar Abbas, but problems of extreme congestion were expected to persist until the completion and operation of that facility. Sea-Land was willing to build its own container terminal at Bandar Abbas at its sole expense, in order to permit the initiation of container service pending the completion of the new Bandar Abbas facility. Sea-Land expected during the interim years not only to earn profits on its shipping services while alleviating some of the congestion problems at Bandar Abbas, but also to be in a position at the end of the period to move into the facilities of the new port with its shipping service fully developed.

Sea-Land has been a pioneer of containerized ocean shipping and has been prominent in the development of the specialized ships, containers, container-handling equipment, and port terminals associated with that industry. Sea-Land states that at the time of its initial contacts with the Iranian Government, Sea-Land had approximately 14% of the world's container capacity and 10% of the world's investment in containerized shipping and facilities.

In a container-shipping operation, trailer-sized containers mounted on rolling chassis pulled by trucks are loaded with freight at the points of origin. The loaded containers are then sealed and transported to a port terminal, where the containers are lifted onto a specialized ship and carried to the port of destination. There the containers are put onto chassis pulled by trucks bound for the cargoes' destinations. In international shipments, customs inspections may be carried out either at the port of destination, if customers intend to take possession of their goods there, or in customs facilities in other cities to which the containers, still sealed, have been transported.

Such a system has great advantages of time and expense over traditional "break-bulk" handling of cargo. Substantial efficiencies are realized in the utilization of port facilities, because under proper conditions a container ship can be unloaded many times faster than a break-bulk ship of the same capacity. Similarly, warehouse space at the port

is more efficiently utilized, because much cargo can pass immediately out of the port on its way to its ultimate destination. Since containers can be moved out of the port still sealed and under bond, permitting customs inspections at points inland, the efforts of customs officials at the port are also conserved. These characteristics of container shipping significantly increase the amount of cargo that a given port can handle, and offer the possibility of reducing port congestion and the delays and costs associated with it.

Sea-Land representatives first met with Iranian Government officials on 10 August 1975, when Mr. W.H. Rucker of Sea-Land met with Mr. Y. Moosapour, the Deputy Managing Director for Operations for PSO, the agency of the Iranian Ministry of Roads and Transportation ("MORT") responsible for the development and management of Iranian ports and shipping. At that meeting Mr. Rucker presented the information concerning Sea-Land's operations that was to become the basis for Sea-Land's ultimate proposal to PSO. From this earliest stage, certain cardinal features of the proposed project were already elaborated in essentially the form they were to maintain throughout the negotiations and subsequent transaction. Thus, in the initial presentation of Mr. Rucker Sea-Land proposed to establish container service, with the necessary investment in facilities and equipment, at its sole expense; in return, Sea-Land asked

for the expedited berthing and customs treatment[4] that were necessary for a container operation to function. In a booklet entitled "Iran -- Containerization Development" presented to Mr. Moosapour at the 10 August meeting, Sea-Land emphasized these needs:

> On the land side, the first necessity is that the ship be able to get access to the berth as soon as it arrives in harbor....
>
> The second necessity is that the cargo, once off the boat, would not be stranded in the warehouses or marshalling yard of the port area.

Sea-Land stressed that prompt berthing and customs treatment, to permit the rapid turnaround of vessels and clearing of containers from the port area, were vital not only to the viability of Sea-Land's operation, but also to PSO's objectives of increasing cargo flow while reducing congestion.

---

[4] In order to obtain clearance to enter the harbor and berth, a vessel needed to be boarded for inspection by health, immigration and sometimes customs officals. An official harbor pilot also came on board, and tugs were required for assistance in docking. Once cargo was unloaded, it could not be removed from the port without clearance by customs officals, who would either inspect cargo there or approve it for shipping in bond for inspection at inland locations. PSO provided some of these inspectors, pilots and tugs directly, and coordinated the activities of those provided by other agencies. These various services frequently will be referred to herein collectively as expedited (or priority) berthing and customs treatment.

At Mr. Moosapour's suggestion, Sea-Land met or corresponded in the days that followed with numerous other officials of PSO and other concerned Government agencies. These included Mr. A.R. Sadrieh, Director General of Projects and Surveys of the Iranian Customs Administration; Mr. A.P. Atefi, an official of the Plan and Budget Organization and Advisor to the State Minister in Charge of Communications and Transportation; Dr. Hodjati, Deputy Minister of Economic Affairs and Finance in Charge of Customs; and Mr. Vaziri, assistant to Dr. Hodjati.

In virtually all of Sea-Land's meetings and correspondence with responsible Iranian officials, Sea-Land stressed that it would be induced to make the necessary investment for the initiation of container service only if Iran would commit itself to providing the conditions essential to the viability of such service -- expedited berthing and customs treatment. Thus, in a letter to Dr. Hodjati dated 14 August 1975 Mr. Rucker stated:

> Implementation of our system requires two basic considerations:
>
> 1. The ability to have berth access immediately upon vessel arrival and to quickly discharge and reload the vessel.
>
> 2. The ability to promptly remove the cargo from the port area and to transport it to its destination.

In a letter to Mr. Moosapour dated 15 August 1975 Mr. Rucker reiterated:

> As we discussed the Sea-Land total transportation system provides a complete service from manufacturer to consignee, including truck or rail service at each end, services through the marine terminal at each end, and the marine transportation itself. Implementation of this system requires total control by Sea-Land of all aspects between manufacturer and consignee. Implementation in Iran requires preferential berth access and Customs recognition of the operation. (Emphasis added.)

Similarly, in a letter to Mr. Atefi dated 20 December 1975, Sea-Land emphasized:

> Containerization is one method to overcome [Iran's] congestion problem for the handling of general cargo. In order to accommodate full container vessels it is necessary that they be recognized as specialized vessels and accorded the same preferential berthing priority as applied to refrigerated, passenger, livestock, and ro-ro vessels.

PSO recognized that these concerns were of the essence to Sea-Land. Moreover, PSO recognized that priority berthing and prompt customs clearance coordinated by PSO to clear the containers out of the port area were equally essential to the realization of PSO's aims. Thus, early in the discussions PSO agreed to give expedited treatment to Sea-Land's ships, provided Sea-Land met certain requirements. In a letter received by Sea-Land on 16 September 1975, Mr. Moosapour of PSO requested certain information "enabling us to make necessary decisions for giving priority to your container ships." He underlined PSO's interest in granting such priority:

> In order to give preferential berth access to container ships, the discharging tonnage must be very high. Furthermore, you are to undertake to remove the discharged cargo from port area within a period of 15 days and to provide the facilities and equipment required for cargo handling operations by your own company.

On the basis of the discussions reflected in this letter, Sea-Land was able to report in its letter of 14 August 1975 to Dr. Hodjati that "the Ports and Shipping Organization has agreed to grant preferential berthing rights for our vessels at Bandar Abbas subject to certain performance constraints which they have imposed upon us."

In October 1975 Sea-Land representatives returned to Iran for further discussions with Government officials. In late October, Sea-Land representatives further discussed Sea-Land's proposal in a meeting with Mr. J. Shahrestani, the Minister of Roads and Transportation; Dr. Hodjati; Mr. P. Safari, Assistant to the Minister of Roads and Transportation and Managing Director of PSO; and Mr. Shaigon of PSO. Sea-Land representatives had further meetings with officials of PSO and the Plan and Budget Organization in November and December 1975.

By this point the transaction appears to have taken on the basic shape that it was to retain thenceforth. Sea-Land proposed to build, at its own expense, a container facility at Bandar Abbas, which would serve as the base for the establishment of container service into and out of Iran. Sea-Land likewise proposed to provide at its own expense all

of the equipment, vessels and land support for such service. In return, PSO was to provide the allocation of land within the port necessary for Sea-Land's facility, and was to assure the conditions essential for its operation -- priority clearance for the berthing of Sea-Land's vessels, and the coordination of the tugs, customs officials, and health and immigration officials necessary to such priority treatment.

2. The introduction of I.L.B.

Apparently after negotiations had reached this advanced stage, PSO informed Sea-Land that, while it was prepared to make the necessary land in the port available for Sea-Land's facility, it did not wish to contract for the lease or license of the land directly with a foreign corporation.[5] Sea-Land had already been searching for an Iranian company

---

[5]Respondents have argued that Sea-Land, as a non-Iranian entity, could not legally have entered into an agreement in its own name to occupy land at the port, because of limitations on the ownership of land by foreigners. This argument must fail, first because, as the Tribunal finds, the agreement which was entered into "did not constitute a transfer of title, or even a lease," but merely a license of use; and second because Iranian law permits land ownership by foreign nationals, see Foreign Nationals Immovable Properties Act (1931) and "By-law Concerning Landed Property Ownership by Foreign Nationals" (1949), and apparently does not regulate leases by foreign nationals at all. Moreover, Treaty of Amity Article V specifically provides for the leasing of real property for business purposes by nationals of each Party in the territory of the other Party. That the preference for contracting directly with Iranians was a matter of policy rather than of law is borne out by the affidavit of Mr. Khataei, submitted by PSO. He states that the decision to contract with Iranians was made "[f]or the sake of the country's interests and to promote shipping and handling services."

to serve as its local shipping agent and to provide the overland component of its "door-to-door" shipping service. Sea-Land had found such a company, the T.B.T. Group, an Iranian firm whose interests included major bus and trucking concerns in Iran. It was agreed that Sea-Land would use I.L.B. Company (also called "I.L.B. Container" in later documents), an affiliate of T.B.T., not only as Sea-Land's onshore shipping and port agent, but also for the purpose of contracting with PSO for the lease or license of the land for Sea-Land's facility.

Sea-Land introduced I.L.B. into the negotiations with PSO in approximately December 1975. Thereafter, I.L.B. took part in these negotiations, sometimes alone and sometimes accompanied by the Sea-Land executives who had originally proposed the project and who continued to negotiate with PSO for its acceptance.

There can be no question that I.L.B. did not supplant Sea-Land as principal in this transaction. The proposal discussed continued to be that put forward by Sea-Land. The written proposal made in February 1976, which was accepted in principle at that time by PSO and MORT, and which was only slightly modified in its later implementation to accommodate navigational concerns expressed by the Iranian Navy, was explicitly described as the "proposal for a Sea-Land full containership service to Iran." It was referred to as the proposal of Sea-Land and I.L.B. in

correspondence between PSO and the Navy. Finally, as is discussed more fully below, I.L.B. made clear in its formal application to PSO for the allocation of the parcel of land that Sea-Land continued to be principal in the transaction, and acknowledged this explicitly in the "Preferential Use Agreement" signed between Sea-Land and I.L.B.

3. The February agreement

In November 1975 Mr. Moosapour of PSO had requested Sea-Land to submit a written proposal. Therefore, on 8 February 1976 Sea-Land submitted such a proposal to Mr. Shahrestani, Minister of Roads and Transportation. The proposal was clearly Sea-Land's, although I.L.B. had by then been introduced into the negotiations and was envisaged as the entity that would sign the lease or license of land with PSO.

The written proposal basically reiterated the Sea-Land proposals that had been developed in the course of the negotiations. It stated: "It is the desire of Sea-Land Service, Inc. to institute a bi-weekly service to the Port of Bandar Abbas ...." (Emphasis added.) It described briefly the necessary facilities, reflecting the already established understanding between Sea-Land and PSO that Sea-Land would finance and use such facilities, but that PSO would sign the license of land ("Facility Agreement") with I.L.B. acting for Sea-Land:

> To facilitate this service it is necessary that industrial facilities be provided in the port of Bandar Abbas for the loading and discharge of Sea-Land containerships and for the marshalling and customs inspection of import and export containers. It is proposed that these industrial facilities be constructed and operated at the expense of Sea-Land through partnership arrangement between Sea-Land and I.L.B. and by permission of the Ministry of Roads and Transportation. (Emphasis added.)

This arrangement was again reflected in the provision specifically dealing with the jetty proposed to be built by Sea-Land:

> Sea-Land shall be granted the right to construct and operate at its own expense a floating jetty for the loading and discharge of Sea-Land vessels. . . . Ownership of permanently installed elements of the jetty will be transferred to the Iranian Government upon termination of this agreement. (Emphasis added.)

The same arrangement was reflected in the provision dealing with the terminal complex:

> Sea-Land shall be granted the right to construct and operate at its own expense a terminal complex of approximately 45,000 square meters immediately adjacent, contiguous to, and west of the existing port area . . . . This complex will include parking areas for containers on chassis, offices for Customs and Sea-Land personnel, a warehouse for customs inspection, an equipment maintenance garage, and housing for Sea-Land employees. (Emphasis added.)

Mr. Shahrestani referred Sea-Land's proposal to Mr. Safari of PSO, who referred it to his assistant Mr. M. Khataei, PSO's Executive Deputy Managing Director for Projects and Development. On 23 February 1976 Mr. Khataei

met with Mr. Setayesh of I.L.B., Mr. M. Scott Palen, at that time Sea-Land's General Manager for the Middle East, and Mr. Mattheus Quartel, Sea-Land's Country Manager for Iran. In a contemporaneous Sea-Land internal memorandum dated 8 March 1976, made in the ordinary course of business, Mr. Palen reported on the results of that meeting. He stated that Mr. Khataei -- the PSO official who ultimately signed the Facility Agreement -- communicated the agreement of PSO and MORT to Sea-Land's proposal, including the following specific agreements: the necessary land for the terminal facility would be made available; Sea-Land vessels would receive priority berthing rights; cargo going through customs at the port would be cleared within 48 hours of discharge from the vessel; and cargo travelling in bond for customs inspections at inland locations would receive expedited clearance through the port. Mr. Khataei also stated that the Iranian Navy, which had a facility adjacent to the proposed project, would have to approve the plans for the floating jetty before the project could go forward.

The fact that PSO had agreed to Sea-Land's proposal at the 23 February meeting is confirmed by a letter written by Mr. Safari of PSO to the Commander of the Iranian Navy, also dated 8 March 1976. He stated:

> The international transportation companies of SEA-LAND and I.L.B. have proposed a project for building a floating jetty [in Bandar Abbas] and have requested permission to start construction of the said jetty for their own use .... Copies of SEA-LAND and I.L.B.'s letter and specification of

> the proposed project has been enclosed herein. Also they have proposed establishing a container terminal according to the enclosed plans 6
>
> Taking into account the present congestion at the Iranian Persian Gulf ports this project would contribute significantly to alleviating the congestion problem without any reduction in revenue accruing to the Government through port charges etc.

Mr. Safari's letter indicated that, in view of these considerations, PSO had determined to go forward with Sea-Land's project and therefore requested the Navy's approval for the location and orientation of the terminal and jetty. Thus, he stated:

> Therefore, we request you to review these companies' project and announce the position of the Commander of the Imperial Iranian Navy vis-a-vis this project so that we may proceed with this project accordingly. (Emphasis added.)

4. The Facility Agreement

In the following months Sea-Land's technical consultants and representatives of I.L.B. and the Navy discussed the placement and orientation of the proposed jetty. Finding that the Navy's navigational concerns about the floating jetty could not be met, Sea-Land finally agreed to build a "ro-ro ramp"[7] instead. This appears to have been the only significant modification to Sea-Land's project as

---

[6]No party in this proceeding has asserted that the proposal and plans referred to in this letter were other than those submitted by Sea-Land to Mr. Shahrestani on 8 February and discussed with Mr. Khataei on 23 February -- which proposal specifically laid out that Sea-Land would pay for, build and use the facility in question.

[7]A ro-ro ("roll on-roll off") ramp is a concrete extension to a pier permitting containers to be rolled onto and off of a container ship on chassis pulled by trucks driving directly onto the vessel.

originally proposed. On this basis the Navy approved the design and the project went forward. On 28 November 1976 PSO and I.L.B. signed the Facility Agreement, which constituted a lease or license of the land for the purposes set forth in Sea-Land's proposal.

The Facility Agreement concerned only the allocation of the land for Sea-Land's facility. As such, it represented only one element, albeit a vital one, of the overall agreement previously reached with PSO in February 1976. The Facility Agreement allocated the land for Sea-Land's project for six years, subject only to the condition that,

> in the event that [PSO] hands over to the Imperial Navy the existing port facilities prior to the expiration of the term of this Agreement, this Agreement can be terminated by a two-month prior written notice.

This contingency never occurred. The Facility Agreement further provided that at the expiration of the six years PSO was to repossess the land, together with all permanent improvements, at no charge to PSO.

5. Construction of Sea-Land's facility

In reliance on the agreement reached in February, and on the Facility Agreement, Sea-Land designed and built the facility. Sea-Land had begun this process as early as February 1976, on the strength of the first agreement alone. Thus, beginning in February, Sea-Land retained two Iranian engineering firms to assist Sea-Land in designing and building the facility. After the signing of the Facility

Agreement in November, construction went forward rapidly. Sea-Land invested approximately $3,000,000 in building the Bandar Abbas facility. That Sea-Land financed the construction in the amount claimed is shown in an unusually complete and detailed set of documentary evidence, which includes copies of Sea-Land's contracts with its engineers and building contractors, invoices and matching checks or bank transfer documents, correspondence and Iranian tax documents. In addition to the expenditures on the facility itself, Sea-Land incurred even greater expenses in setting up the necessary administrative structure and in procuring the necessary equipment and personnel to support its Iranian operation. These expenses included the long-term charter of a vessel specifically to call at Bandar Abbas, the allocation of large numbers of chassis to Iran and their actual transportation there, the allocation of large numbers of containers to the Iranian service, and the transfer of necessary personnel, including not only management but also the skilled laborers necessary to operate the machinery and facilities associated with a container operation. Sea-Land presented detailed written and oral testimony, which was never rebutted or even seriously challenged, that its net investment in assets dedicated to carrying cargo to Iran amounted to more than $37,000,000 over and above the $3,000,000 expended on the Bandar Abbas facility itself.

6. The Preferential Use Agreement between Sea-Land and I.L.B.

In April 1977, shortly before the facility was ready to begin operations, Sea-Land and I.L.B. signed an agreement confirming Sea-Land's rights to the facility. This agreement stated that I.L.B. had procured from PSO a "license" to use the land in question, and that "the aforesaid license was procured by I.L.B. Container for the uses and purposes of Sea-Land Service, Inc." It further stated that "the improvements . . . on the aforesaid land are to be financed solely by Sea-Land Service." Thus, for the plainly nominal consideration of one United States dollar, I.L.B. explicitly acknowledged Sea-Land's "sole, exclusive and preferential right to use, occupy and enjoy said land and improvements." This agreement, which has come to be referred to as the "Preferential Use Agreement," was signed by Sea-Land and I.L.B. on 18 April 1977.[8]

That Sea-Land desired a written acknowledgment of the roles that it and I.L.B. had played and were in the future to play is hardly surprising; it was a matter of common commercial caution. What is significant is that Sea-Land did not consider it necessary to obtain this acknowledgment before investing substantial sums in constructing the facility and in acquiring the assets for its Iranian cargo service. The only reasonable conclusion is that Sea-Land

---

[8]On the same day Sea-Land and I.L.B. also signed an Agency Agreement detailing their arrangements concerning I.L.B.'s activities as shipping and port agent for Sea-Land.

would not have made these expenditures unless it felt secure that it already owned the rights acknowledged in the Preferential Use Agreement, and that it would be able to enforce them not only because of the trust it placed in I.L.B. but also because PSO had full knowledge of the transaction memorialized by that Agreement.

7. Successful operation of the facility by Sea-Land until September 1978

By mid-1977 Sea-Land's facility was fully operational. From that time until the events in late 1978 of which Sea-Land complains, the service was highly successful. Sea-Land's large "line-haul" vessels carried containers bound for Iran to Sea-Land's terminal in Dubai; from there, the Sea Bridge, Sea-Land's vessel dedicated to its Iranian service, carried the containers to Bandar Abbas. The Sea Bridge made an average of six calls per month there, carrying up to seventy containers each call. Until September 1978 PSO provided the priority treatment Sea-Land's operation required, coordinating tugs, harbor pilots, and health, immigration and customs inspections so as to permit the Sea-Bridge to dock, unload, reload and depart within 48 hours or less from the time of its arrival at Bandar Abbas. The service was successful and profitable.

Beginning in September 1978 the events began which ultimately forced Sea-Land out of Iran, depriving it of its

facility and of the profitable enterprise it had based there. These events will be discussed in more detail in the sections below dealing with breach of contract; at this point it is sufficient to summarize them as being the failure or outright refusal by PSO to provide the priority berthing and customs treatment formerly accorded Sea-Land, and interference by Government officials which impaired Sea-Land's management of its facility at Bandar Abbas.

The Majority, however, finds that Sea-Land had no contractual rights to be breached. I must therefore examine, as a preliminary matter, the contracts asserted by Sea-Land against PSO.

III. The Contracts

The Majority concludes that Sea-Land had no contractual rights; that even if Sea-Land did have contractual rights, they did not include rights to priority berthing and customs treatment; and, therefore, that the acts complained of could not result in breach of contract or expropriation of contractual rights.

In my opinion, two enforceable agreements were concluded between Sea-Land and PSO. The first was the one reached in February 1976 (the "February agreement") and the second was the Facility Agreement of November 1976. Both, expressly or impliedly, provided for priority berthing and customs treatment.

Sea-Land maintains that the Facility Agreement was a subsidiary contract entered into to implement the broader February agreement. The Majority agrees that, although "only a few elements of the project were reduced to clear contractual form" in the Facility Agreement, it is

> satisfied that very much more was discussed among the three entities [Sea-Land, I.L.B. and PSO] concerning the detailed operation of the proposed container facility, including the need for priority berthing, expedited clearances and a high level of efficient administrative co-operation on the part of PSO as an essential prerequisite to the successful functioning of a sophisticated transportation system.

However, the Majority finds that these discussions never "crystallised" into an enforceable contract. I believe that these discussions did indeed crystallize into the first agreement in February 1976, for which there is ample evidence in the documents and testimony before the Tribunal, as well as in the subsequent actions of the parties. They were later implemented by the Facility Agreement, an agreement which is so skeletal that it must be read against the background of the broader prior agreement, without which it loses its raison d'être.

1. The February Agreement

The Majority acknowledges that on 8 February 1976 Sea-Land made a proposal that included the essentials of the agreement now alleged by Sea-Land. It acknowledges that this proposal was "evidently accepted in principle." The Majority concludes that no contract resulted only because, in its view, Sea-Land did not prove that PSO and MORT had accepted "the specific terms of Sea-Land's proposal."

The evidence before the Tribunal, however, shows that PSO and MORT did in fact accept Sea-Land's proposal in February, with only inconsequential modifications to which Sea-Land agreed. Subsequent modifications of the "specific terms" of the proposal were likewise inconsequential and were agreed to by the parties.

The acceptance of PSO and MORT was first reported in a contemporaneous Sea-Land internal memorandum. It was confirmed in a contemporaneous letter from PSO to the Iranian Navy.

As discussed above, Sea-Land met with PSO on 23 February 1976 to discuss the proposal. In a memorandum dated 8 March Mr. Palen reported that during the meeting Mr. Khataei had "revealed that our proposal was accepted within all departments of P.S.O. and M.O.R.[T]." (Emphasis added.) The memorandum set out certain specifics, which recapitulated Sea-Land's proposal with only minor variations. These included two provisions concerning customs clearances which were more detailed than the original proposal, and the proviso that the approval of the Navy would be required -- not for the entire project but, as a careful reading of the memorandum and subsequent Navy correspondence reveals, for the specific location of the facility and the design of the

pier.[9] In addition, Sea-Land's proposal had contained a provision stating that the parties would begin negotiating in good faith concerning the allocation to Sea-Land of a facility in the new port of Bandar Abbas then under construction; this provision is not mentioned in the Palen memorandum -- which does not necessarily mean that it was dropped from the agreement, although it may well have been deleted as superfluous. With these exceptions, inconsequential by any measure, the agreement reported by Mr. Palen and the proposal as originally made are virtually the same.

Mr. Palen's report of agreement is confirmed by another contemporaneous document, the letter of 8 March 1976 from PSO to the Commander of the Iranian Navy. That letter is quoted extensively above, but it is useful to recall certain aspects of it here. The letter included as an enclosure Sea-Land's proposal and stated that Sea-Land and I.L.B. had requested permission to begin construction. After dwelling briefly on the virtues of the project ("this project would

---

[9]The Regulation of the Ports and Shipping Organization (1970) makes clear that the authority for approval of projects such as Sea-Land's rested with PSO and not with the Navy. However, the Navy apparently was required to approve the specific location of the facility within the port and the design of the pier, with a view to its impact on traffic in the port and on the Navy's own operations there. Thus, the project was contingent on the Navy's approval only in a limited sense. In fact, the Navy did express certain concerns, which were ultimately resolved when Sea-Land -- with PSO's approval -- changed the pier design from a floating jetty to a ro-ro ramp.

contribute significantly to alleviating the congestion problem"), PSO concluded:

> Therefore, we request you to review these companies' project and announce the position of the Commander of the Imperial Iranian Navy vis-a-vis this project so that we may proceed with this project accordingly. (Emphasis added.)

Sea-Land's February proposal, taken together with the contemporaneous writings of both Sea-Land and PSO indicating its acceptance, would be enough by themselves to show that an agreement was reached in February. In addition to these documents, the Tribunal has before it evidence of the subsequent performance of the parties, which is difficult to explain in the absence of such an agreement. Sea-Land, which had from the beginning of negotiations insisted that it would go forward only if PSO agreed to allocate the land and provide priority berthing and customs treatment, immediately began incurring expenses in the design of the facility. Once the specific site was allocated Sea-Land built the facility and commenced service. PSO allocated the necessary land -- in a port where, by PSO's own evidence, competition for such land was intense; it then permitted Sea-Land to build and operate the facility, and routinely provided the priority services that PSO's own correspondence shows was obtainable only by approved carriers, and only pursuant to prior agreement. As a judge once wisely observed, "There is no surer way to find out what parties meant, than to see what they have done." Insurance Co. v. Dutcher, 95 U.S. 269, 273 (1877).

If this were not enough evidence of the February agreement, PSO has provided the Tribunal with more, in the form of an affidavit by Mr. Ali Akbar Bagherzadeh, the representative of I.L.B. who signed the Facility Agreement in November 1976. On the subject of priority berthing, and the existence of an agreement between PSO and Sea-Land in addition to the Facility Agreement, Mr. Bagherzadeh is quite specific:

> As a result of our negotiations . . . agreement was given by the PSO to preferential berthing by Sea-Land vessels . . . . The preferential berthing was not in any way connected with the granting of the licence to ILB of the jetty or the terminal area at Bandar Abbas. (Emphasis added.)

To this is added the affidavits of Sea-Land executives who took part in the negotiations and meetings, and the oral testimony offered at the Hearing in this case by one of them, Mr. Palen.

Under Iranian law, in the absence of a formal contract a binding agreement involving consideration of more than 500 rials cannot be proved by oral or written testimony alone. Civil Code of Iran, Articles 1306 and 1310. However, the writings of the parties and their contemporaneous and subsequent actions, together with such testimony, can support the existence of the agreement:

> In the absence of a written contract, any words used in verbal negotiation, any sign or gesture which indicates the assent of the parties, and any

> act which indicates intention and agreement such as the handing over or taking delivery of any goods or property will be sufficient.
>
> Exchange of correspondence and telephonic messages and the like will be evidence of meeting of the minds.

M. Sabi, "The Commercial Laws of Iran," in IV Digest of Commercial Laws of the World 9, 11 (1982).

In this case, the Tribunal has before it the written proposal made by Sea-Land, the report of its acceptance in a contemporaneous writing by Sea-Land, substantiating evidence of the acceptance in a contemporaneous writing by PSO, the subsequent actions of the parties, and written and oral testimony from both sides supporting the existence of the agreement. This satisfies the requirements of Iranian law, as described above, and is consistent as well with the requirements of United States law. See E. Farnsworth, Contracts § 6.7 (1982).

The Majority finds that these matters were discussed in great detail by the parties; however, it is "not satisfied" that these discussions "crystallised" into agreement. Yet the evidence, which includes not only contemporaneous documents of both Sea-Land and PSO, but also their subsequent actions as well as affidavits and testimony offered by both of them, clearly demonstrates such agreement in February 1976. The Majority simply ignores this evidence.

2. The Facility Agreement

Sea-Land maintains that it acquired enforceable contractual rights against PSO through the Facility Agreement signed by PSO and I.L.B. on 28 November 1976. Sea-Land asserts that I.L.B. signed that Agreement as its agent; it further asserts that, even if I.L.B. had not been its agent, Sea-Land was a third-party beneficiary of the Facility Agreement, within the demonstrated intentions of both PSO and I.L.B.

I believe that the evidence before the Tribunal demonstrates that Sea-Land is entitled to enforce the Facility Agreement on either of these theories.

(i) The agency theory

There can be no doubt that PSO knew that I.L.B. was acting for Sea-Land. Sea-Land had initiated the proposal. The Majority concedes that it was this same proposal that was accepted -- "in principle" at least -- by PSO and MORT in February 1976. The proposal was virtually in final form before I.L.B. was ever introduced into the negotiations. When I.L.B. was finally introduced, it was Sea-Land that introduced it.

When I.L.B. applied for the necessary parcel of land, it was required to answer a standard PSO questionnaire. The questions concerned applicants' qualifications, in terms of

the expertise and resources necessary to build and run a container facility; the questionnaire specifically inquired about the equipment and skilled personnel of applicants. In its answer, I.L.B. frankly conceded that on its own it lacked such expertise, equipment and personnel. Its claim of access to these vital skills and resources was through "the transportation companies working [with] this Company." Against the background of Sea-Land's introduction of I.L.B. into the transaction, this was a transparent allusion to Sea-Land.[10] Moreover, in response to a question asking I.L.B. to identify the "Iranian and Foreign Specialists Serving for the Company," I.L.B. provided the name of Mr. Mattheus Quartel as one of its "specialists". Mr. Quartel was Sea-Land's Country Manager for Iran, and had as a Sea-Land representative been in repeated contact with officials of PSO. I.L.B.'s answer to the questionnaire simply confirmed what PSO already knew from the negotiations -- Sea-Land, not I.L.B., was the principal actor, with the necessary resources and expertise to build and run the proposed facility.

Mr. Bagherzadeh of I.L.B., in the affidavit submitted by PSO, confirms that I.L.B. had no experience in container shipping and little experience in ocean shipping of any kind. He acknowledges that without Sea-Land's known involvement I.L.B. would not have been considered for the license

---

[10] It is not contested that Sea-Land was the only ocean shipping company represented by I.L.B.

of land in Bandar Abbas, unless I.L.B. had formed a connection with some other shipping company which, like Sea-Land, could supply it with the expertise and resources it lacked:

> I would emphasize that all the authorities would have been willing to negotiate with ILB . . . even if Sea-Land had not been involved though in such circumstances ILB and the TBT Group of companies would of course have been working in partnership with another container carrying line because the TBT Group itself was not directly involved in ship owning or running but only as freight forwarders and periodically as charterers of vessels. (Emphasis added.)

Mr. Bagherzadeh likewise confirms in his affidavit that it was Sea-Land that designed the facility and that Sea-Land's plans, signed by Sea-Land engineers, were given to PSO.

Additional evidence as to the identity of the principal in this transaction is a copy of the check with which Sea-Land paid the taxes on the construction of its jetty.

In view of the facts of this transaction, I.L.B.'s position was clearly that of agent for a disclosed principal. See Civil Code of Iran, Articles 198, 658; Restatement (Second) of Agency §§ 4, 292 (1958).

It should be recalled that Bandar Abbas was a highly congested port, and that space for further development was at a premium. PSO's own evidence shows that more than one project was vying for approval to use the limited available land. PSO was charged with the legal duty to "exert all efforts in reducing the freight charges to Iranian ports by

expanding the ports facilities."[11] In doing so, it was authorized to delegate the accomplishment of its duties "to the competent private sectors."[12] In view of the urgency of the situation at Bandar Abbas, it is inconceivable that PSO intended to hand over to a small and admittedly inexperienced company a significant parcel of land there, and simply to hope for the best. The Majority finds that PSO not only knew of Sea-Land's involvement -- as it could hardly avoid, given the history of the transaction -- but that PSO expected and intended Sea-Land to take possession of the land and to develop and run the facility. It is admitted that PSO's policy was to avoid direct contracts with non-Iranian companies, and that this is the reason it signed the Facility Agreement with I.L.B. Such avoidance -- as a policy matter, not because of any legal obstacle -- did not preclude the use of Iranian agents acting, as did I.L.B., for non-Iranian principals. It is the duty of the Tribunal to weigh the facts and ascertain the reality of the transaction, so as to accomplish a just result. The reality of the transaction in this case is evident -- I.L.B., with the full knowledge and approval of PSO, entered into the Facility Agreement for and on behalf of Sea-Land.

---

[11] The Regulation of the Ports & Shipping Organization, Article 3, paragraph 25 (1970).

[12] Id., Article 3, paragraph 24 (emphasis added).

(ii) The third-party beneficiary theory

The contractual rights of third-party beneficiaries are recognized in both Iranian and American laws.[13] I believe that Sea-Land's agency theory best explains the facts of the transaction described above, and I therefore need touch only briefly on Sea-Land's assertion that, whatever I.L.B.'s status, the Facility Agreement signed by it contemplated Sea-Land as a third-party beneficiary.

Sea-Land and I.L.B. made quite clear, as between themselves, that the Facility Agreement had been obtained for Sea-Land's benefit. The Preferential Use Agreement between them stated explicitly that "the . . . license was procured by I.L.B. Container for the uses and purposes of Sea-Land Service, Inc." This intention was known and shared by PSO. Thus, the Majority finds that PSO, in signing the Facility Agreement, also intended that Sea-Land should take possession of the licensed land, build the facility, and run its shipping service out of it:

> [I]t was within the contemplation not only of both Sea-Land and ILB but also, as it appears to the Tribunal, of PSO, that Sea-Land would be using that land to develop a jetty and institute the container service . . . .

This finding by the Majority is close to a classic statement of the circumstances in which United States courts routinely find that rights have been conferred on third parties. See

---

[13]Civil Code of Iran, Article 196; Restatement (Second) of Contracts §§ 302, 304, 306 (1979).

E. Farnsworth, Contracts § 10.3 (1982). There is no reason to suppose that under Iranian law the result would be different. Article 196 of the Civil Code of Iran provides that, in a contract, "anyone can make provision for the benefit of a third person." The Majority speculates that this "would seem to require an express mention of such a beneficiary in the contract." The text of Article 196 does not support such a strict reading, and the Tribunal cites neither argument by the parties nor commentary by Iranian or other scholars for its cavalier assumption.[14]

(iii) The Facility Agreement conferred a right to priority berthing and customs treatment

The Facility Agreement did not stand alone; it was part of a larger agreement and was entered into as part of the implementation of that larger agreement. I have already discussed the promise of priority berthing and customs treatment made by PSO in the February agreement. That same promise of priority berthing likewise became a part of the Facility Agreement, either as a collateral promise to the written agreement or as an implied condition thereto.

It is well-established that in certain circumstances a written contract need not contain the parties' entire agreement.

> [A]lthough the normal presumption is that the parties intend a written contract to be exclusive evidence of their intentions, it is always open to

[14] Similarly, in American law express mention of the beneficiary is not generally required. See Farnsworth, supra, § 10.3 at 718-19 & nn. 10 & 15.

> a party to show that in fact the writing did not exclusively represent their intentions, because of a 'collateral' contract made during the negotiations but not incorporated in the written instrument.

P. Atiyah, An Introduction to the Law of Contract 112 (1961). See also Civil Code of Iran, Article 1306 (requirement of writing "does not prevent the courts examining the statements made by witnesses, for further information and discovery of truth"); id. Article 1324 (circumstantial evidence regarding the contract allowable "where it ... completes other evidence").

In this case, it is plain from the face of the written Facility Agreement that collateral promises were required to reflect the parties' full intentions. Even regarding the matter that it expressly covers, the license of land in Bandar Abbas, the Facility Agreement is little more than a skeleton agreement. It takes on meaning only when read against the background of the larger agreement. The history of the parties' dealings up to the signing of the Facility Agreement establishes that in entering into the Facility Agreement Sea-Land made it absolutely clear that it would not build and operate the facility at its own expense without PSO's promise to provide the necessary conditions for its success, most notably priority berthing and customs treatment. The evidence shows that PSO made that promise. That promise must be seen as part of the Facility Agreement, or as a promise collateral to it.

Moreover, even if an express collateral promise had not been made, PSO could not cease to provide the conditions necessary to Sea-Land's performance without breaching the obligation of good faith that is part of every contract. Sea-Land made clear from its first contacts with PSO and other Government agencies that priority treatment was an absolute necessity, and that the transaction could not and would not go forward without it. Priority berthing and customs treatment were within the control of PSO, and PSO could not in good faith withhold them after having induced Sea-Land to invest in the facility, equipment and other resources necessary to the Iranian service.

The duty of good faith in contract has been variously described. Atiyah has stated that "where a contract can only be performed if certain circumstances continue to exist, there is generally an implied term that neither party will, of his own motion, put an end to these circumstances." Atiyah, supra, at 122.[15] Farnsworth observes that the duty of good faith

> may not only proscribe undesirable conduct, but may require affirmative action as well. A party may thus be under a duty not only to refrain from hindering or preventing the occurrence of conditions of his own duty or the performance of the other party's duty, but also to take some affirmative steps to cooperate in achieving these goals.

Farnsworth, supra, §7.17 at 527 (footnotes omitted). This requirement has been stated, in a slightly more exigent

---

[15] See also Atiyah, supra, at 125 ("the rule . . . that a party must not put an end to a state of affairs necessary for the performance of the contract").

form, as the duty of reasonable efforts: "Such a duty requires a party to make such efforts as are reasonable in the light of his ability and the means at his disposal and of the other party's justifiable expectations." Id. at 529 (footnote omitted).

It seems to be acknowledged by the Majority that PSO did for a time provide the necessary conditions for Sea-Land's performance, and after that time ceased to do so. In the next section I will briefly recapitulate the acts and omissions of PSO that deprived Sea-Land of the benefits of its bargains and of the facility that it had built. I will also examine the basis upon which the Majority unjustifiably absolves PSO of those acts and omissions.

IV. The Breach

1. PSO's failure to provide priority berthing and customs treatment

The Majority accepts that PSO was aware of the absolute necessity, for Sea-Land's operations, of priority berthing and the coordination by PSO of prompt health, immigration and customs inspections. The Majority also accepts that in approximately September 1978 PSO's performance began to break down and that by early 1979 it had virtually ceased.

Mr. Roel Bos, Sea-Land's Port Manager for Bandar Abbas, stated that, beginning in September 1978, PSO officials were

either not at their posts when the Sea-Bridge arrived or, when they were present, refused to provide the services PSO had previously performed for Sea-Land as a matter of course.

Sea-Land was thus deprived of the priority treatment for which it had bargained, and for the promise of which it had invested substantial sums. Deprived of priority treatment, Sea-Land's shipments were subject to long delays, and large numbers of its containers became tied up either in Iran or in Dubai, where they had been deposited to await shipment into Iran. This resulted not only in losses to Sea-Land in its Iranian service, which was reduced to a small fraction of its capacity, but also in disruption of Sea-Land's world-wide services, which were hampered by the large numbers of containers effectively withdrawn from use by their pile-up in Iran and Dubai. Sea-Land was forced, as the Majority finds, to suspend its inbound services in November and eventually to terminate all of its services by 1 August 1979.

PSO's acts, and its refusals to act, were in clear breach of the agreements reached in February and November 1976. In a manner that was entirely foreseeable, they rendered Sea-Land's operation unworkable and forced it to abandon both its enterprise and the physical facilities on which that enterprise was based.

The Majority absolves PSO of responsibility for its nonperformance on the ground that its failures were due to

"a state of upheaval in PSO's internal management which is consistent with the general picture of disruption which characterised Iran in the months leading up to the success of the Revolution." This observation[16] is not only vague but also is applied with surprising carelessness. Even if the Majority were to assume that such disorganization within PSO did exist, and constituted an excuse for PSO's breaches in the "months leading up to the success of the Revolution," that success had occurred by February 1979. Sea-Land continued to attempt to operate in Iran, albeit at a much-reduced level, until August. No Party in this proceeding has ever contended that conditions of upheaval continued into August 1979,[17] nor does any evidence in this or other cases before the Tribunal suggest such a widespread or lengthy breakdown of government. Sea-Land, while it continued its service in Iran, was of necessity in contact with PSO and never relinquished its claims to the conditions necessary to its survival. There is no evidence that, even after the success and installation into power of the revolutionary forces, Sea-Land's requests for priority assistance were ever granted. Moreover, there is no indication that PSO or the Government of Iran ever attempted to contact Sea-Land after August 1979, in order to communicate their willingness to cooperate in reestablishing the

---

[16]The Majority's statement is made in the context of its discussion of expropriation -- it will be recalled that the Majority held that Sea-Land had no contractual rights against PSO -- but since it might appear to be significant to Sea-Land's contract claim, I address it here.

[17]Indeed, PSO denies that any disruptions occurred at all.

service. Thus, unless the Majority considers that conditions of upheaval continued indefinitely, PSO must at some point be chargeable with its failure to provide the conditions for which Sea-Land had bargained.

2. Interference by Government officials in Sea-Land's operations

Sea-Land presented evidence that Government officials interfered in the management of its operations at Bandar Abbas. This evidence shows interference sufficient to constitute expropriatory action against Sea-Land, and it is chiefly in this context that Sea-Land has discussed the interference.

I believe it is also appropriate to discuss it in the context of breach of contract. Although the officials that Sea-Land accuses of interference were from the Labor Office rather than PSO, it is not inappropriate in the circumstances to consider their actions as breaches of the agreements between Sea-Land and PSO. PSO is an agency of the Government of Iran, and the Government pursued its policies through PSO when contracting with Sea-Land. When the Government changed, its policies changed, and the Government acted not only through PSO but through other agencies to deprive Sea-Land of the benefits of its earlier bargain. I do not think it unfair to look realistically at the transaction, and to recognize that the Government stood

behind its agencies in both the making and breaking of the Bandar Abbas agreements. That such a view is realistic is shown by a review of the negotiations and discussions leading up to the agreements. Officials from several Government agencies participated, precisely because it was the Government, not a single agency, that was interested in the transaction.

In February 1979, officials from the local Labor Office began to interfere in Sea-Land's management of the facility at Bandar Abbas. Mr. Bos, Sea-Land's Port Manager, has stated that in March 1979 he was directed to replace all of Sea-Land's non-Iranian personnel, including himself.[18]

The Majority apparently accepts this evidence as credible. It acknowledges that "[i]t appears that efforts were made to enforce a policy of employment of exclusively local labour." Incredibly, the Majority goes on to remark that "it is not established that the replacement of manpower in this particular case would have rendered it unrealistic for Sea-Land to contemplate the resumption of its operation." Aside from ignoring Sea-Land's rights under the Treaty of Amity[19] to manage its enterprise and to select its own personnel, foreign or Iranian, the Majority's casual

---

[18]He further has stated that, prior to this order, he had been prevented from firing or even disciplining Iranian employees, and that the pay and working conditions of employees were dictated to him by Labor Office officials.

[19]Treaty of Amity Article IV(4).

observation suggests that it has ignored or forgotten the evidence in this case concerning the qualifications required of Sea-Land's personnel. Sea-Land's operation depended on workers skilled in operating the large and complex machinery associated with container operations; it depended on executives skilled in overseeing the tasks of such workers, and in directing an enterprise involving the rapid movement of valuable cargo and equipment through the port and to destinations throughout Iran. Container operations, if not unknown in Iran, were relatively new there; it is evident from the course of negotiations that one of Sea-Land's major attractions was its ability to supply not only equipment but skilled personnel. Directing Sea-Land to replace its non-Iranian personnel, including its supervisory staff and its Port Manager, was simply another way of telling Sea-Land to leave.[20]

The Majority also expresses doubt as to whether the actions of the Labor Office officials are attributable to the Government of Iran. It considers that

> the state of administrative chaos which prevailed in Iran throughout the first few months of 1979

---

[20] In addition to violating the specific provision of the Treaty of Amity cited above, the abrupt order to replace specially skilled personnel constituted a violation of Sea-Land's right under general international law to manage its enterprise. See, e.g., Starrett Housing Corporation and The Government of the Islamic Republic of Iran, Case No. 24, Award No. ITL32-24-1 (Chamber One, 19 December 1983) at 52-53, 55; id. (Concurring Opinion of Howard M. Holtzmann, 20 December 1983) at 17; Christie, What Constitutes a Taking of Property Under International Law?, [1963] Brit. Y.B. Int'l L. 307, 337; Board of Editors, The Measures Taken by the Indonesian Government Against Netherlands Enterprises, 5 Netherlands Int'l L. Rev. 227, 242 (1958).

> make it unsafe to attribute any such ostensibly governmental acts to the revolutionary Government that subsequently came to power.

It should be noted that the "success of the Revolution" dates from February 1979, and that after that time the revolutionary forces were in control of Iran. The contents of the subsequently adopted Constitution of the Islamic Republic of Iran demonstrate that the installation of the Islamic Republic did not result in the displacement of the revolutionary forces, but only in the ratification and institutionalization of their roles. There is absolutely nothing in this history to justify the cutting off of responsibility for Government officials acting during the period of February to August 1979.[21] This is particularly true in the absence of any report by Respondents that Sea-Land's complaints were ever investigated[22] or that the actions of the Labor officials were ever disavowed or countermanded. It is also worth noting that Respondents have made no allegation that the Labor Office in Bandar Abbas was at any time acting beyond the control of the

---

[21] The Majority does not appear to base its holding on the fact that actors were minor officials, nor would it be possible to exclude Iran's responsibility in this way. See Jiménez de Aréchaga, "International Responsibility," Manual of Public International Law 531, 546-48 (M. Sørensen ed. 1968)(distinction between superior and minor officials rejected); Christenson, "The Doctrine of Attribution in State Responsibility," International Law of State Responsibility for Injury to Aliens 321, 331 (R. Lillich ed. 1983).

[22] See Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 3, 18 (Merits) (State may be "called upon to give an explanation" and cannot limit itself to "a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal").

Government. Finally, the Majority states that it is

> mindful of the fact that the events of which Sea-Land complains all took place before 1 August 1979, during the very period of foment and disorder which preceded and accompanied the Revolution, and not as a result of post-revolutionary policies.

This observation is of questionable relevance in view of the established principle that a State is responsible for acts of its officials -- whether authorized, unauthorized, or even contrary to specific governmental instructions.[23] Moreover, I again must respectfully suggest that the Majority has arrived at its notions of when the "revolutionary" period ended and the "post-revolutionary" period began, and of the degree of Government control over its officials during both periods, without reference to the arguments of the parties or to any chronicle of the Revolution, whether of Iranian or other provenance.

The Majority's assumptions about what Iran's "post-revolutionary policies" consist of, and how they differ from its "revolutionary" policies, are equally without historical basis. It is notorious that during the Revolution threats against Western, and particularly American, enterprises were rife, and that acts of violence were aimed at such enterprises and their personnel in an effort to expell them from Iran.[24] The attitude that American enterprises were agents

---

[23] Jiménez de Aréchaga, supra, at 548-50.

[24] See Starrett Housing Corp. and the Government of the Islamic Republic of Iran, supra (Concurring Opinion of Howard M. Holtzmann) at 16 & n.6.

of cultural and economic imperialism, and thus inimical to Iranian interests, has not changed, but has in fact been elaborated since the Revolution. Thus, in 1982 the following view of Iran's relations with American enterprises was expressed:

> One of the most important steps taken after the Revolution in respect to economy was to annul the contracts which had been concluded to exploit the Iranians. The rupture of economic relationships with American imperialism is one of the cases which demonstrates the force of the Islamic Revolution of Iran.

Ministry of Islamic Guidance of the Islamic Republic of Iran, Achievements of the Islamic Revolution of Iran 24 (1982) (emphasis added). Likewise, a publication mailed to the Members and staff of the Tribunal as recently as June 1984 refers to "the looting of the national wealth by American companies, trusts, cartels, and so on." The True Nature of the U.S. Regime, the "Great Satan" 34 (undated) (emphasis added).

The actions against Sea-Land in 1979 were consonant with the policies enunciated before the Revolution by the group that successfully overthrew and replaced the previous Government: the breaking off of economic relations with the United States and the explusion of American enterprises. Those policies have been maintained consistently since that time. The Majority cannot, with justice, ignore these policies and the results of their implementation, refusing to acknowledge them because it has not been confronted with a formal piece of legislation. No basis exists for the Majority's assumption that the actions of Government

officials that breached Sea-Land's contracts and forced it out of Iran were aberrations, not attributable to the Government of Iran.

V. Damages for Breach of Contract

I have concluded that PSO breached its contracts with Sea-Land. The general rule of damages for breach of contract aims at placing the injured party in the position it would have enjoyed had the breaching party performed its obligations.[25]

1. Claim for lost profits

The bulk of the damages claimed by Sea-Land is for the loss of the profits it would have earned if PSO had continued to provide the conditions necessary to Sea-Land's performance. Sea-Land has shown that it earned profits of $4.7 million in its Iranian enterprise in 1978, despite PSO's breaches in the last quarter of that year. It contends that this figure would have reached $6.4 million if PSO had continued to perform as required during the last quarter of 1978. Sea-Land asserts that a projection of yearly profits of $6.4 million for the years 1979-1982 is

---

[25] E.g., Pomeroy and Government of the Islamic Republic of Iran, Case No. 40, Award No. 50-40-3 (Chamber Three) (Concurring Opinion of Richard M. Mosk, 13 June 1983) at 2; 5 A. Corbin, Corbin on Contracts §992, at 5 (1964 & Supp. 1982); Farnsworth, supra, §12.1 at 812-14; Atiyah, supra, at 223; Afchar, "Iran," in Contractual Remedies in Asian Countries 94, 98-104 (Minnatur ed., 1975); S. Amin, Wrongful Appropriation in Islamic Law 6-7 (1983).

reasonable and conservative, in view of the size of the Iranian market and Sea-Land's position in that market before the breach. Sea-Land claims the value of these projected profits, discounted to present value as of 1 January 1979, in the amount of $21,431,519.[26]

Damages for lost profits are available when the loss of profits are a foreseeable consequence of the breach and when such profits can be calculated with reasonable certainty.[27] In this case, Sea-Land bargained for PSO's performance -- the availability of the facility and the conditions making its use possible -- for the express purpose of making a profit from the business of shipping cargo into and out of Iran. The loss of these profits was a foreseeable result of PSO's breach. Thus, Sea-Land is entitled to claim for its lost profits, and to recover them if they are proved with reasonable certainty.

"Reasonable certainty" means such accuracy as the facts and the nature of the claim fairly permit. In this case,

---

[26] Although Sea-Land did not finally leave Iran until August 1979, it has shown that Respondents' cumulative breaches of its contracts had by 31 December 1978 deprived it of its contract rights. Sea-Land therefore calculates its lost profits from 1 January 1979.

[27] E.g., Pomeroy and Government of the Islamic Republic of Iran, Case No. 40, Award No. 50-40-3 (Chamber Three, 8 June 1983) at 22-23, 25; id. (Concurring Opinion of Richard M. Mosk, 13 June 1983) at 3-4; Pomeroy Corporation and Government of the Islamic Republic of Iran, Case No. 41, Award No. 51-41-3 (Chamber Three, 8 June 1983) at 17; Blount Brothers Corp. and Ministry of Housing and Urban Development, Case No. 62, Award No. 74-62-3 (Chamber Three, 2 September 1983) at 17-18; Shufeldt Claim (U.S. v. Guat.), 2 Rep. Int'l Arb. Awards 1083, 1099 (1930); 3 M. Whiteman, Damages in International Law 1860 (1943).

Sea-Land has proved that it made profits of $4.7 million in 1978, despite a fourth quarter in which PSO had already begun to breach its obligations. Sea-Land has presented evidence, which in my view is convincing, that its profits would have reached $6.4 million in 1978 if the contract breaches had not occurred, and that it would have earned at least that amount in the succeeding years of the contract. That conclusion is reasonable when one considers that at the time of the breach there were substantial backlogs of goods awaiting shipment to Iran; moreover, although the Tribunal must take notice of the fact that shipments from the United States were largely eliminated after 1979, many of these apparently were replaced by shipments from Europe and Asia, also served by Sea-Land. Respondents have submitted no evidence that a significant overall reduction of shipping took place. Indeed, statistics published by the Iranian Customs agency indicate that from 1977 through 1982, the year in which the Facility Agreement was to expire, the weight and value of goods imported into Iran increased every year but one.[28]

Sea-Land entered the Iranian market as a pioneer. It acquired a dominant place in that market, and there is

---

[28] "Foreign Trade Comparative Table of the First Three Months of the Year, 1356-1363" from the Statistics and International Affairs Office, Iranian Customs, reprinted in Pars Associates, Legal Information Service (19 September 1984) at 11. Using the Iranian calender year 1356 (1977-1978) as a baseline and assigning that year's imports a "par" of 100, the table shows the weight of imported goods in succeeding years as follows: 109 for 1357; 68 for 1358; 89 for 1359; 100 for 1360; 108 for 1361. Similarly, as to value: 100 for 1356; 112 for 1357; 67 for 1358; 95 for 1359; 127 for 1360; and 201 for 1361.

nothing to suggest that it would have lost that place during the remaining years of its contracts with PSO. Sea-Land's evidence shows that a large proportion of the goods shipped into Iran was profitably containerizable, and that Sea-Land's container operation had only begun to tap a small fraction of the potential market. There is no reason to suppose that, even with competitors entering the market, Sea-Land would not have maintained or even expanded its operations during the remaining years of the contracts. Thus, Sea-Land's projections of the profits it would have been able to earn, had PSO continued to perform, must be taken as shown with reasonable certainty. Sea-Land presented detailed and credible calculations, based upon generally accepted accounting and valuation principles, indicating that its lost profits discounted to present value as of 1 January 1979 amounted to $21,431,519. The Respondents presented no evidence to rebut those calculations.[29] Accordingly, on the basis of the record before us I would have awarded the full $21,431,519 claimed by Sea-Land for lost profits, plus interest calculated as described below.

2. Other contract damages

As a result of PSO's breach, Sea-Land was forced to relocate its personnel and equipment, pay severance allowances to local personnel, dispose of equipment dedicated to

---

[29] As the Majority notes, "PSO has not commented specifically on the method used in the calculation of damages claimed, except to observe that account should have been taken of the possible effects of 'the people's movements, U.S. economic sanctions and the imposed war.'"

its Iranian service for which it had no other uses, and incur numerous other expenses that are normal in closing down a substantial operation. These expenses were the foreseeable consequences of PSO's breach, and Sea-Land is entitled to recover them. Sea-Land has extensively documented a claim for such damages in the amount of $2,034,952. The Respondents have never seriously challenged Sea-Land's documentation or the calculations of damage based upon it. I therefore would have awarded Sea-Land damages for termination costs in the amount of $2,034,952, plus interest calculated as described below.

Sea-Land also claims $174,000 for "emergency payments" it was required to make in order to obtain permission to remove 401 of its chassis from Iran. I agree with the Majority that there has been no showing that the Iranian authorities acted improperly in requiring these payments. I believe, however, that the necessity of removing the containers was a direct and foreseeable consequence of the breach, and that Sea-Land is entitled to compensation. I therefore would have awarded Sea-Land damages in the amount of $174,000, plus interest calculated as described below.

Sea-Land further claims $502,000 for ocean freight charges on cargo delivered to or shipped from Iran, which Sea-Land alleges it was unable to collect as a result of the termination of its Iranian service. Sea-Land likewise claims $320,158 for miscellaneous receivables it was unable to collect from its customers. It is not clear from the

evidence that PSO could have foreseen the loss of receivables due from third parties as a consequence of the breach of its contracts with Sea-Land. I therefore would deny these claims.

VI. Expropriation

Issues of expropriation also enter this case. Sea-Land pleaded in the alternative that the events described above constituted both a breach of its contracts and an expropriation of its rights to conduct its enterprise. As discussed above, I would decide Sea-Land's claim for lost profits and certain other matters related to the contracts on the ground of breach of contract, and therefore need not discuss the issue of expropriation as to those matters.

Certain of Sea-Land's claims, however, can only be decided on the basis of expropriation. These relate to Sea-Land's loss of its Iranian bank account and its loss of equipment that it was forced to leave in Iran.

Before turning to those specific claims based on expropriation, I must take strong exception to one of the Majority's general statements concerning the elements of a claim for expropriation. The Majority considers that "[a] finding of expropriation would require, at the very least, that the Tribunal be satisfied that there was deliberate governmental interference with the conduct of Sea-Land's operation ...." (Emphasis added.) As discussed above, I

believe that the pattern of acts and omissions by Respondents did in fact represent a deliberate effort to drive Sea-Land from Iran. More fundamentally, I believe that the critical question is the objective effect of a government's acts, not its subjective intentions. Acts by a government which have the effect of depriving an alien of his property are considered expropriatory in international law, whatever the government's intentions.[30]

While Sea-Land's claims for its lost bank account and its lost equipment involve relatively small sums considering this case as a whole, they raise important issues that require detailed discussion.

1. Expropriation of Sea-Land's bank account

At the time of Sea-Land's departure from Iran, Sea-Land had some $240,901 worth of rials deposited in an account in the Mercantile Bank of Iran and Holland, a bank which was subsequently nationalized and is now part of Bank Tejarat.

---

[30] E.g., Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, Case No. 7, Award No. 141-7-2 (Chamber Two, signed 22 June 1984, filed 29 June 1984) at 11 ("[t]he 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. and The Islamic Republic of Iran, Case No. 156, Award No. 47-156-2 (Concurring Opinion of George H. Aldrich, 26 May 1983) at 6, Iran-U.S. C.T.R. 349, 352; Starrett Housing Corp. and The Government of the Islamic Republic of Iran, Case No. 24, Award No. ITL 32-24-1 (Concurring Opinion of Howard M. Holtzmann, 20 December 1983) at 9-10; Christie, What Constitutes a Taking of Property Under International Law? [1963] Brit. Y.B. Int'l L. 307, 311.

The Majority accepts Sea-Land's assertion that, starting in April 1979, Sea-Land made repeated attempts to obtain permission from Bank Markazi, Iran's Central Bank, to convert the balance of this account into dollars and to repatriate it, and that it never received the requested permission.

Nevertheless, the Majority refuses to find that Sea-Land's account was expropriated because

> there is insufficient evidence that Bank Markazi intentionally obstructed the progress of the application, or that it interfered unlawfully in any way with Sea-Land's use of its account.

The Majority considers that Bank Markazi was "invested with a certain margin of discretion" in foreign exchange matters; in the Majority's opinion, there is insufficient evidence to indicate that the Bank exercised its discretion unreasonably or discriminatorily.

At the risk of overusing a strong word already used once above, this holding is incredible. It does not merely ignore, it actively glosses over, the evidence before the Tribunal. It ignores the customary international law applicable to exchange controls. It ignores two treaties by which Iran is bound, the IMF Agreement and the Treaty of Amity. It reverses universally recognized rules concerning burdens of proof before international tribunals. The Majority's ruling, and the nature of its reasoning, gives the unfortunate impression of indifference toward a breach

of international law that has worked an obvious injustice on this Claimant.[31]

For the reasons that follow, I would have awarded the full $204,901 Sea-Land has claimed for the expropriation of its bank account, plus interest calculated as described below.

(i) The evidence

Sea-Land first requested transfer of its funds on 28 April 1979. It resubmitted its request to Bank Markazi on 23 May 1979, explaining in its letter that Sea-Land had originally transferred dollars into Iran, and pointing out that, while its collections in Iran were in rials, its outlays for providing cargo service to Iran were in dollars. Sea-Land's request was accompanied by bank transfer documents showing its importation of dollars into Iran and collection records documenting the collections it made in rials for its services.

---

[31]The Majority, in passing, notes that neither Bank Tejarat nor Bank Markazi are Respondents in this case, but it does not base its holding on this fact. Their absence is of no significance. It is uncontested that Bank Markazi is an agency or instrumentality of the Government of Iran, and that Bank Tejarat is owned and controlled by the Government of Iran. The Government of Iran is a named Respondent in this case, and the Tribunal has routinely treated it as a proper Respondent in cases involving alleged takings carried out through its agencies or instrumentalities. Indeed, the Tribunal has specifically held that the Government of Iran is a proper Respondent in cases involving the wrongful refusal of Bank Markazi to permit repatriation of funds. Schering Corp. v. The Islamic Republic of Iran, Case No. 38, Award No. 122-38-3 (Chamber Three, signed 13 April 1984, filed 16 April 1984) at 12.

Bank Markazi demanded certification and verification by a firm of recognized auditors. Sea-Land complied by providing a special audit and certification, together with back-up documents, from the firm of Whinney Murray & Company in Tehran. Bank Markazi then requested a Farsi translation of Sea-Land's Articles of Association. Sea-Land provided Farsi translations of both its Articles of Association and By-laws. Sea-Land executives called in person at Bank Markazi to inquire into the status of the application for repatriation of funds; after their departure, the application was followed up by an Iranian attorney and by an executive of the Credit Suisse branch in Tehran. At each step, Sea-Land's request was renewed. This saga is supported by some 17 exhibits submitted by Sea-Land, many of them comprising several separate documents.

Bank Markazi never permitted the repatriation of Sea-Land's funds. Bank Markazi never explained why it would not permit the repatriation of Sea-Land's funds. No provision of any statute or regulation was ever cited, either by Bank Markazi at the time or by the Government of Iran in this proceeding. Sea-Land was simply not permitted to repatriate its funds.

(ii) Customary international law

Whatever the "discretion" invested in Bank Markazi as the Central Bank of Iran, and whatever discretion Iran might have in controlling its currency, international law limits that discretion when its application results in the confiscation of aliens' funds:

> Exchange control legislation is so grave an encroachment upon private rights and liabilities and may cause such serious prejudice, that good faith requires the restricting State to formulate and operate the law with due regard for the legitimate interests of aliens.

F.A. Mann, The Legal Aspect of Money 480 (4th ed. 1982) (emphasis added). Moreover, a State may not

> so excessively delay its reply to an alien applicant as to cause him an injustice. In short, 'the right to accord or refuse permission is in all the circumstances interpreted not as one of absolute discretion but of controllable discretion, one which must be used reasonably and not capriciously, one which must be exercised in good faith'.

Id. at 482 (quoting Case of Right of Passage (Port. v. Ind.), 1960 I.C.J. 107 (Dissenting Opinion of Sir Percy Spender)). International law does not permit a State simply to invoke its discretion; the law proscribes abuses of that discretion:

> [A]n international tribunal . . . 'is entitled to be satisfied that the . . . law is a genuine foreign exchange law . . . and is not a law passed ostensibly with that object, but in reality with some object not in accordance with the usage of nations,' or, in other words, is not abusive.

Id. at 480 (quoting In re Helbert Wagg & Co. Ltd., [1956] Ch. 323 at 351, 352). A fortiori, when no law at all is invoked by the State denying repatriation of funds, an international tribunal is not only entitled but is duty-bound to satisfy itself that the State's action is not abusive. See also Hood Corporation and The Islamic Republic of Iran, Case No. 100, Award No. 142-100-3 (dissenting opinion of Richard M. Mosk, signed 13 July 1984, filed 16 July 1984).

Against this factual and legal background, it is difficult to understand the Tribunal's invocation of Bank Markazi's "discretion," and its ruling that the evidence is "insufficient" to show that the Bank exercised that discretion in an unreasonable or discriminatory way. I should not have thought it necessary, at this late date, to remind the Majority that our rules require that "[e]ach party shall bear the burden of proving the facts relied on to support his claim or defence." Tribunal Rules, Article 24(1) (emphasis added).

I do not know what additional evidence Sea-Land could have produced to prove that it had repeatedly requested the repatriation of its funds, that it had supplied information to satisfy all conceivable concerns that Bank Markazi might have had, and that it had obeyed every direction, reasonable or otherwise, given by the Bank. The permission to repatriate was never granted. Bank Markazi never deigned to

explain why to Sea-Land, and the Government of Iran never deigned to explain why to this Tribunal. If "discretion" was the Government's defense, it was the Government's burden to explain and justify it. In view of the Government's failure to do so, the Majority's ruling can only mean that it understands "discretion" to mean "absolute freedom." This understanding is at variance with international law.

(iii) The IMF Agreement

Iran and the United States are both parties to the IMF Agreement.[32] Under Article VIII(2)(a) of the IMF Agreement, no member "shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions." Iran, which joined the Fund as an "Article XIV member," is exempted from Article VIII(2)(a) only to the extent of being permitted to "maintain and adapt" restrictions that were "in effect on the date on which it became a member." IMF Agreement, Article XIV(2). New restrictions, or old restrictions eliminated and then later reimposed, are subject to Article VIII(2)(a) and thus require Fund approval.

"Current transactions" are defined by the Fund to include "all payments due in connection with foreign trade,

---

[32] Articles of Agreement of the International Monetary Fund, supra note 2.

other current business, including services, and normal short-term banking and credit facilities." IMF Agreement Article XXX(d)(1). Sea-Land's funds clearly were derived from current transactions. See Evans, Current and Capital Transactions: How the Fund Defines Them, 3 Finance and Development 30 (1968).

Thus, Iran was obligated under the IMF Agreement either to permit the repatriation of Sea-Land's funds, or to point to an exchange regulation applicable to those funds that had either been "maintained and adapted" by Iran since the beginning of its Fund membership or had the specific "approval of the Fund." Iran did neither. The Majority's ruling on the "insufficiency" of evidence can only mean that it considered it Sea-Land's burden first to make Iran's defense for it, and then to disprove it. I respectfully suggest that, under our Rules, this is getting things backwards.

(iv) The Treaty of Amity

The Treaty of Amity between Iran and the United States was in force at the time that Sea-Land requested permission to repatriate its funds, and it continues in force. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 32, 36 (Judgment of May 24). Article VII(1) of the Treaty of Amity provides:

> Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party, except (a) to the extent necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people, or (b) in the case of a member of the International Monetary Fund, restrictions specifically approved by the Fund.

As noted in the previous section, Iran has not shown, or even attempted to show, that its refusal to permit the repatriation of Sea-Land's funds was due to the application of any exchange control regulation approved by the IMF. Thus, the exception in Article VII(1)(b) of the Treaty of Amity is unavailable to Iran. Similarly, Iran has not shown, or even alleged, that its action was "necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people," so as to qualify under Treaty of Amity Article VII(1)(a).

I do not understand the Majority's failure even to address the issue of Iran's blatant violation of the Treaty of Amity.

(v) The alleged availability of Sea-Land's funds in Iran

In its Statement of Defence submitted 30 March 1982, PSO stated that "Sealand Services Company is entitled to use at any time the Rial cash in its account with Bank Tejarat."

Apparently in response to that statement, Sea-Land in July 1982 commenced a long correspondence with Bank Tejarat aimed at obtaining the use of its rials in Iran. This correspondence, submitted to the Tribunal, shows that Sea-Land has not even succeeded in obtaining signature cards for its account.

In view of this evidence, and in the absence of any evidence at all from Respondents, I can only wonder what has moved the Majority to proclaim that "[t]he account remains in existence and available, in Rials, at Sea-Land's disposal."

2. Other expropriation claims

Sea-Land has provided detailed documentation concerning the equipment and other property that it left behind in Iran. This includes rolling stock worth $242,300, other equipment worth $168,153 and garage inventories worth $88,203. The Majority considers that Sea-Land failed to indicate the precise whereabouts of this equipment and that it presented no evidence to show that it was in the hands of the Respondents. I believe that once Sea-Land demonstrated that it was forced out of Iran and that the property in question was indeed in Iran at the time, the burden was on the Respondents to explain the property's whereabouts. Particularly in the case of chassis, containers and vehicles -- all large and rather conspicuous forms of property, and all subject to licensing and registration requirements -- such an explanation would not have been unreasonable to

expect. I therefore would have awarded Sea-Land $498,656 for the expropriation of the property at issue, plus interest calculated as described below.

Sea-Land's claims for ocean freight accounts receivable and miscellaneous accounts receivable have already been discussed in the section dealing with damages for breach of contract. Sea-Land has asserted that it also is entitled to compensation for these accounts receivable under its claim for expropriation. However, Sea-Land has not explained how, in its view, the Respondents prevented the collection of these accounts, nor has it presented evidence on this issue. I would therefore deny these claims.

VII. Unjust Enrichment

I believe that Sea-Land has proved its case under its theories of contract and expropriation. I therefore cannot agree with the Majority's decision to proceed under the theory of unjust enrichment. Moreover, the Majority has devised a measure of damages that is difficult or impossible to apply and then, rather than face the difficulties it has created, it has literally pulled the figure of $750,000 out of the air. That figure is derisory when viewed against the evidence concerning the losses suffered by Sea-Land.

It is helpful to remember at this point that the Majority's analysis of unjust enrichment arises against the background of its previous findings that Respondents have neither breached a valid contract nor expropriated any property belonging to Sea-Land. While I disagree strongly with these findings, I note them in order to emphasize that the Majority's holdings on unjust enrichment are limited to the particular "no-fault" situation which the Majority considers to exist in this case.

It is not a novelty, in cases involving the enrichment of one party at the expense of another in the absence of wrongdoing, to measure compensation not by the injured party's loss but by the enriched party's benefit. In such circumstances, the measure of damages has frequently been expressed by the phrase "actual benefit." See Schreuer, Unjustified Enrichment in International Law, 22 Am. J. Comp. L. 281, 289, 290, 291 (1974).

"Actual benefit," however, has seldom if ever been equated with "actual use," the standard the Majority purports to apply. This is probably so because of the injustice that would result to the injured party if property with a determinable value could be cheapened by reference to the potentially wasteful or improvident uses to which it may be put by the party acquiring it. Another reason that an "actual use" standard has seldom if ever been adopted is its inherent difficulty in application. Evidence of "actual

use" -- if that is understood, as it is by the Majority, to mean the actual frequency of use of a given piece of property -- is almost always difficult to obtain and is generally available only to the respondent State. Thus, such evidence is usually lacking, as it is in this case. For this reason, even in those cases which mention the "use" by a respondent of the property at issue, the evidence has generally indicated -- as in this case -- only that the property had come into the respondent's hands and had been used to some extent by it. Having ascertained this fact, tribunals have not itemized and valued such "uses," but have awarded injured parties the value of the transferred property.

In this connection, Schreuer cites Sucrerie de Roustchouk c. Etat hongrois,[33] in which the Hungaro-Belgian Mixed Arbitral Tribunal awarded full compensation to the owner of a barge that had been requisitioned, although the respondent Government had used the barge for only a fraction of the period during which it had held the barge in its possession. The Hungarian army had sunk the barge to prevent enemy armies from crossing the Danube; this, the tribunal ruled, was a legitimate act of war for which no compensation could be ordered. However, the Hungarian army had later refloated and used the barge. The tribunal

---

[33] 5 Recueil des Décisions des Tribunaux Arbitraux Mixtes 772 (1925).

concluded that the respondent was required to pay compensation from the date that the barge was refloated until the date of its return to its owner, even though the barge had remained unused in a shipyard for the greatest part of that period:

> [Q]uant à la quotité de l'indemnité, ... la durée de la perte de jouissance résultant de la mesure exceptionelle de guerre prise par la défendeur doit être calculée à partir de la réquisition (9 septembre 1915) et jusqu'au jour où le chaland a été remis à la disposition de la requérante (23 janvier 1920); ... à cet égard il est indifférent que le défendeur ait cessé déjà en 1916 de se servir du Liège I, puisqu'il a continué à le garder en sa possession en le stationnant dans des chantiers de Ganz et Cie Danubius 34

In the Landreau Claim,[35] cited by the Majority, valuable information concerning guano deposits had been communicated to the Peruvian government pursuant to a contract that was later repudiated by that government. The tribunal upheld the repudiation of the contract, but ruled that Landreau was entitled to the "fair value" of the information

---

[34] Id. at 776. Translation:
> [A]s to the measure of the indemnity, ... the duration of the loss of possession resulting from the exceptional war measure taken by the defendant must be calculated from the requisition (9 September 1915) up to the day when the barge was returned to the disposition of the claimant (23 January 1920); ... in this regard it is immaterial that the defendant had already ceased to use the Liège I in 1916, since it continued to keep it in its possession by placing it in the shipyards of Ganz et Cie Danubius ....

[35] Landreau Claim (U.S. v. Peru), 1 Rep. Int'l Arb. Awards 347, 352 (1922).

communicated.[36] While the tribunal considered it "beyond doubt" that Peru had used the information,[37] it did not inquire into the extent of use, or the actual profits derived therefrom. Its decision was based on the fair value of the information placed at Peru's disposal.

In Zilberszpic v. (Polish) Treasury[38] a contractor who had improved land that had subsequently passed from Russia to Poland was awarded compensation in the amount by which the value of the land had increased, apparently without reference to the use made of the improvements by the Polish Government. Similarly, in the Case of the German Railways in Austria[39] a plaintiff who had performed work on the railway system in Austria, at the time under German occupation, was awarded compensation for the benefit that Austria had derived from the work, again apparently without any reference to the extent of Austria's actual use of the improvements.

---

[36] Id. at 364.

[37] Id.

[38] Discussed in Schreuer, supra, at 292.

[39] Discussed in Schreuer, supra, at 292-93.

all events, the Majority has given the Parties no meaningful opportunity to make it work.

The "actual use" measure of damages was first introduced by the Majority in its Award; neither Party had addressed it or provided appropriate evidence. Not surprisingly, then, the Majority finds the evidence on actual use "scanty."

Having surprised the Parties with a novel measure of damages, the Majority should in justice have given them at least the opportunity to attempt to obtain and present evidence on that issue. Instead, the Majority has pulled -- literally out of the air -- the figure of $750,000. This figure is not supported by arguments or evidence from either Claimant or Respondents. Is is impossible to discover any reasoning in the Majority's Award that leads to its selection. In a well-documented claim for some $40 million, the figure of $750,000 seems to have recommended itself to the Majority on the sole ground that it was low enough.

VIII. Interest and Costs

As explained above, I would award Sea-Land $21,431,519, which represents the discounted value of its lost profits. I would further award Sea-Land a total of $2,948,509 on its separate, additional contract and expropriation claims.

X. Conclusion

For the reasons stated above, I would have awarded Sea-Land $24,380,028 on its claims, together with interest of $16,394,521 through 31 December 1982 and continuing interest at current rates up to the date of the instruction by the Escrow Agent to make payment from the Security Account. I would further have awarded Sea-Land costs of arbitration in the amount of $126,667.

Dated, The Hague
1 November 1984

Howard M. Holtzmann