This case summary was prepared in the course of research for
S Ripinsky with K Williams, Damages in International Investment Law (BIICL, 2008)

IRAN-US CLAIMS TRIBUNAL CASES

Sea-Land Service, Inc. v The Islamic Republic of Iran, Ports and Shipping Organisation (Case No. 33)

Chamber One: Lagergren (Chairman); Kashani; Holtzmann

I. Facts

I(i) The investment

In August 1975 a series of contacts began between representatives of the Government of Iran and Sea-Land, culminating in Sea-Land's establishing a service for container cargo into and out of Iran at Bandar Abbas ("**the facility**"). The information regarding the proposed facility provided by Claimant to Iran emphasized that a high degree of co-ordination between Claimant and the Ports and Shipping Organisation ("**PSO**") (which fell under the Ministry Roads and Transportation ("**MORT**")) was required to ensure the facility's viability. In particular, Claimant emphasized that it required expedited berthing and customs treatment. As PSO did not wish to contract for the lease or license of the

land directly with a foreign corporation, it appears that the parties agreed that the I.L.B Company ("**ILB**") would contract with PSO for the lease or license of the land for the facility. On 8 February 1976 Claimant submitted a detailed written proposal to the Minister of MORT, at the request of the PSO. This submission noted the necessity of priority berthing and customs treatment to ensure the viability of the facility. This submission appears to have been accepted by the PSO. PSO then began communications with the Iranian navy regarding the proposed location of the facility. The navy's concerns regarding its location were met by Claimant and ILB agreeing to change the facility's technical specifications (by building a roll-on roll-off or 'ro-ro' jetty rather than a floating jetty as had been initially planned and provided for in the proposal).

On 28 November 1976 PSO and ILB 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 provided that at the expiration of six years PSO was to repossess the land, together with all permanent improvements, at no charge to PSO. The Facility Agreement did not refer to berthing and customs treatment. Construction began on the facility in February 1976. On April 1977, shortly before the facility was ready to begin operations, Sea-Land and ILB signed an agreement confirming Sea-Land's rights to the facility ("**the Preferential Use Agreement**"). This agreement stated that ILB had procured from PSO a "license" to use the land in question, and that "the aforesaid license was procured by ILB for the uses and purposes of Sea-Land. It further stated that "the improvements ... on the aforesaid land are to be financed solely by Sea-Land Service." For the nominal consideration of one US dollar, ILB acknowledged Sea-Land's "sole, exclusive and preferential right to use, occupy and enjoy said land and improvements." On the same day Sea-Land and ILB also signed an Agency Agreement detailing their arrangements concerning ILB's activities as shipping and port agent for Sea-Land (details of the investment are set out in 6 Iran-U.S C.T.R 151-157; 179-189).

I(ii) Loss of the investment

Claimant contended that, commencing in September 1978, PSO and other Iranian authorities engaged in conduct the effect of which was to deprive Sea-Land of the effective use of the facility and the garage it had constructed in Tehran to service its containers and vehicles. This allegedly came about as a result of PSO's failure to provide pilots and tugboats, at least without long delays; its refusal to organise visits by customs, health and immigration officials to the incoming vessel (without any one of which clearances the ship was not permitted to dock) and eventually in February 1979 by limiting the types of cargo allowed into the port. The local Labour Office is alleged to have interfered in the management of Sea-Land's enterprise by ordering the dismissal of all of the non-Iranian workforce. The Labour Office is also alleged to have dictated to Sea-Land the wages, terms and conditions of employment of its work-force and to have prohibited Sea-Land from disciplining or discharging its Iranian employees. The movement of containers on which the business depended was severely disrupted, and Sea-Land suspended the service in November 1978, but continued to operate at a reduced level from February 1979 until it was terminated completely on 1 August 1979, by which time Sea-Land had made a judgment that there was no prospect of resumption in the

foreseeable future. By the end of December 1978, the facility is said to have been rendered effectively unworkable. (6 Iran-U.S C.T.R 151-2).

Claimant contended that PSO breached an oral agreement reached in February 1976 with PSO, the cardinal elements of which were that Claimant would construct and operate the facility on land made available by PSO, and that PSO would guarantee it priority in the provision of tugboats, pilots, customs, health and immigration clearance, in order to minimize the delay between the arrival of Sea-Land's container vessel and its unloading. The events complained of are alleged to be in breach of that contract, alternatively to amount to an expropriation of Claimant's contractual rights, or further alternatively, that as a consequence of these events, PSO had been unjustly enriched at Claimant's expense.

II. Relevant findings

II(i) Applicable law

The Tribunal held that the Facility Agreement was governed by the law of Iran, as both parties to the contract were Iranian (the Facility Agreement was entered into by ILB, an Iranian company with whom Sea-Land had entered into a business and contractual relationship) and its subject matter was a parcel of a port in Iran. (6 Iran-U.S C.T.R 159). The Tribunal found that no agreement was entered between the Claimant and PSO in February 1976. Holtzmann, dissenting, reached the opposite conclusion, but did not specify whether Iranian law was applicable to the February 1976 agreement.

The Tribunal's (relatively small) award of compensation was ultimately based on the doctrine of unjust enrichment, which it stated "was widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals" (6 Iran-U.S C.T.R 168).

The Tribunal noted that there was nothing in Article II or IV of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and of America and Iran, signed 15 August 1955, entered into force 16 June 1957] ("**the Treaty**") which extended "the scope of either State's international responsibility beyond those categories of acts already recognised by international law as giving rise to liability for a taking." According to the Tribunal, "the concept of taking is the same in the Treaty as in international law, and, though the Treaty might, arguably, affect the level of compensation payable, it does not relieve a Claimant of the burden of establishing the breach of an international obligation." Accordingly, the Tribunal, having found that no expropriation could be proved under international law, stated that no "benefit [could] be derived" from reliance on the provisions of the Treaty (6 Iran-U.S C.T.R 168).

II(ii) Discrete expropriation or nationalization scheme

The Tribunal held, Holtzmann dissenting, that Claimant had no contractual rights against PSO and the government of Iran; that even if it did, 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.

The Tribunal held that the evidence was insufficient to justify a finding that any rights held by the Claimant had been expropriated as "[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, the effect of which was to deprive Sea-Land of the use and benefit of its investment". The Tribunal concluded that "nothing ha[d] been demonstrated [] which might have amounted to an intentional course of conduct directed against Sea-Land.". The Tribunal found that PSO's failure to provide the services necessary for the running of Claimant's facility at the port "indicate 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." As the circumstances did not "suggest that PSO had embarked upon a policy of deliberate disruption or non-co-operation directed at Sea-Land in particular," the Tribunal held that no expropriation had taken place (6 Iran-U.S C.T.R 166).

The Tribunal did find, however, that PSO had been unjustly enriched by obtaining the use and benefit of the facility two years earlier than they would have under the Facility Agreement and that Claimant was entitled to be compensated for this (albeit for only a fraction of the amount claimed).

Holtzmann, dissenting, was of the view that two enforceable agreements were concluded between Sea-Land and PSO. The first was reached in February 1976 (the "February Agreement") following the alleged acceptance by PSO of Claimant's submission and the second was the Facility Agreement of November 1976 between ILB and PSO. In Holtzmann's view both, expressly or impliedly, provided for priority berthing and customs treatment. Holtzmann was of the opinion that the Tribunal had erred in failing to hold that the government of Iran and PSO (i) had breached a contractual agreement with the Claimant and (ii) were liable to place the Claimant in the position it would have been in had the breaching party performed its obligations. (6 Iran-U.S C.T.R 203). Holtzmann held that the Tribunal should have awarded the Claimant its lost profits from operating the facility, as well as the costs of closing down the operation.

Although Holtzmann would have awarded most of the damages claimed on the basis of breach of contract, he held that there were certain amounts sought by Claimant that could only be decided on the basis of expropriation (6 Iran-U.S C.T.R 206). First, he found that Iran had expropriated a Sea-Land bank account denominated in Rials, in breach of customary international law, the IMF Agreement and the Treaty. Second, he found that there had been an expropriation of equipment and other property Claimant had left behind in Iran (6 Iran-U.S C.T.R 212). The Tribunal had rejected both of these claims: the first on the basis that there "insufficient evidence that Bank Markazi [the Iranian Reserve Bank] intentionally obstructed the progress of the application, or that it interfered unlawfully in any way with Sea-Land's use of its account" (6 Iran-U.S C.T.R 167); the second on the basis that there was insufficient evidence to show that PSO or the Government had access to the equipment and property left by Claimant and that it had benefited from them. Holtzmann disagreed with the Majority's reasons for both of these findings (6 Iran-U.S C.T.R 173).

II(iii) Lawful or unlawful taking

As noted in II(ii) above, the Tribunal held that there had been no taking, but rather that PSO had been unjustly enriched by obtaining the use and benefit of the facility two years earlier than they would have under the Facility Agreement. Holtzmann, dissenting, found the expropriation of Sea-Land's bank account in Iran to be in breach of customary international law, the IMF Agreement and the Treaty. He did not address the legality of the other expropriation he had found, namely the expropriation of equipment and other property Claimant had left behind in Iran when it closed the fcaility.

II(iv) Description of the assets

The claim concerned the facility (including includes rolling stock, inventories and equipment) and Claimant's alleged contractual rights against the PSO in respect of the facility. The claim also concerned the costs of closing down the operation; receivables Claimant alleged it was prevented from collecting; as well as the balance of an Iranian bank account Claimant had attempted without success to access.

II(v) Date of taking and date for calculating compensation

The Tribunal held that there had been no taking but rather awarded damages on the basis of unjust enrichment, from November 1980 – the date on which it estimated that PSO had probably benefited from the use of the facility – until 28 November 1982, the date on which PSO would have been entitled to take possession of the facility and all permanent improvements on it, in terms of the Facility Agreement (6 Iran-U.S C.T.R 172).

II(vi) Choice of remedy (restitution/compensation)

The Tribunal awarded compensation based on its approximation (based on what it described as "scanty evidence") of PSO's "actual use and benefit of the facility" between November 1980 and November 1982 (see II(v) above for the basis on which these dates were used) (6 Iran-U.S C.T.R 172). Holtzmann, dissenting, disagreed with Tribunals' decision to proceed under the theory of unjust enrichment, finding that the Claimant had proved its case "under its theories of contract and expropriation". He pointed out that the Majority's holdings on unjust enrichment were "limited to the particular 'no-fault' situation which the Majority considers to exist in this case" (6 Iran-U.S C.T.R 213).

Holtzmann also strongly objected to the "actual use" concept of damages adopted by the Majority and said it was "not a concept to be found in customary international law" (6 Iran-U.S. C.T.R 177). He noted that, while it was "not a novelty" to measure compensation for unjust enrichment "by the enriched parties benefit", actual *benefit* had seldom, if ever been equated with actual *use*. Holtzmann stated that this was "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." In Holtzmann's view, another reason that an 'actual use' standard had seldom if ever been adopted, was "its inherent difficulty in application". Holtzmann noted that "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". "For this reason", said Holtzmann "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" (6 Iran-U.S C.T.R 213-215). (In support of this view, Holtzmann cited Schreuer, *Unjustified Enrichment in International Law,* 22 Am. J. Comp. Law (1974) 281; Sucrerie de Roustchouk c. Etat hongrois 5 Recueil des Decisions des Tribunaux Arbitraux Mixtes 772 (1925); Landreau Claim (U.S. v. Peru), 1 Rep. Int'l Arb. Awards 347, 352 (1922); Zilberszpic v. (Polish) Treasury (discussed in Schreuer, supra, at 292); Jno. P. Putegnat's Heirs (U.S. v. Mex.), reported in 3 M. Whiteman, Damages in International Law 1734 n.427 (1943)).

II(vii) Standard of compensation and elements of compensation

The Tribunal noted that opinions differed as to the basis of computation of damages for unjust enrichment and that "the predominant view seems to be that damages should be assessed to reflect the extent by which the state has been enriched" (6 Iran-U.S C.T.R 169). Holtzmann had no objection to the adoption of an 'actual benefit' standard, but objected to the Majority's "transmogrification of that measure into 'actual use'" (6 Iran-U.S C.T.R 215).

II(ix) Principles of valuation

The Tribunal stated that to award appropriate compensation for unjust enrichment, "must aim [ ] to place a monetary value on the extent to which PSO was enriched by its premature acquisition of the facility" (6 Iran-U.S C.T.R 170). As noted above, this was assessed by the Majority by reference to the "actual use" which PSO had had of the facility (6 Iran-U.S C.T.R 172).

II(x) Method of valuation

The Tribunal provided no explanation of how it approximated PSO's actual use of the facility to be US$750,000. Holtzmann, dissenting, strenuously objected to the basis on which the Majority reached this amount, which he said it "had pulled - literally out of the air" and noted that he found it "impossible to discover any reasoning in the Majority's Award that [led] to its selection". He went as far as to state that "the figure … seems to have recommended itself to the Majority on the sole ground that it was low enough" (6 Iran-U.S C.T.R 216).

II(xi) Approximation of compensation

The Tribunal noted that the unjust enrichment remedy was "inherently flexible as its underlying rationale is to re-establish a balance between two individuals, one of whom has enriched himself, with no cause, at the other's expense" (6 Iran-U.S C.T.R. 168). The Tribunal held that there was "scanty evidence" as to the extent to which PSO had been enriched, and stated that the appropriate level of compensation would "of necessity, be an approximation". (6 Iran-U.S C.T.R 170). Holtzmann criticised the Majority for its use of an unreasoned approximate value in the circumstances of the case and was of the

view that "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" (6 Iran-U.S C.T.R 216).

II(xii) The impact of equitable considerations

The Tribunal noted that unjust enrichment was an "equitable device to cover those cases in which a general action for damages is not available". (6 Iran-U.S C.T.R 168) According to the Tribunal, this remedy's "equitable foundation [made] it necessary to take into account all the circumstances of each specific situation". The Tribunal did not, however, explain what role, if any, equitable considerations played in its determination of the amount of compensation (6 Iran-U.S C.T.R 169).

II(xiii) Amount of award

The Tribunal awarded the Claimant US$750,000 as compensation for unjust enrichment. No costs were awarded to the Claimant. Holtzmann, dissenting from the amount awarded, would have awarded Sea-Land US$21,431,519, representing the discounted value of its lost profits, as well as US$2,948,509 on its separate, additional contract and expropriation claims.

II(xiv) Interest

No interest was awarded. Holtzmann, dissenting, criticised the Tribunal for departing from the Tribunal's routine practice of awarding interest on damages. Holtzmann would have awarded interest based on prevailing interest rates from the date of the breaches of contract, in respect of the contract claims and from the date of which the Claimant finally left Iran, in respect of the separate additional contract and expropriation claims.

III Conclusion

The Tribunal, despite finding that there had been no breach of any contractual obligations owed by PSO and the government of Iran to Claimant and that there had been no expropriation of their property, nonetheless awarded damages based on unjust enrichment. The Tribunal discussed in some detail the basis for an award based on unjust enrichment under international law. The Tribunal described unjust enrichment as an "equitable device to cover those cases in which a general action for damages is not available" and noted that it was "inherently flexible".

With respect to the standard of compensation to be awarded and the elements of such compensation, the Tribunal stated that "the predominant view seems to be that damages should be assessed to reflect the extent by which the state has been enriched". Compensation was to be aimed at "plac[ing] a monetary value on the extent to which PSO was enriched by its premature acquisition of the facility". The method of assessing compensation was to be determined by looking at the respondent state's "actual use and benefit of the facility". The "inherently flexible" nature of the remedy meant that the compensation awarded would, of necessity, be an approximation. The remedy had an "equitable foundation", which required all the circumstances of a particular case to be taken into account.