



ICSID (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES)

ICSID Case No. ARB/83/2

LIBERIAN EASTERN TIMBER CORPORATION V. REPUBLIC OF LIBERIA

AWARD

31 March 1986

Tribunal:

[Jorge Goncalves Pereira](#) (Appointed by the investor)

[D.A. Redfern](#) (Appointed by the State)

[Bernardo M. Cremades Sanz-Pastor](#) (President)

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Award

I. ARBITRAL PROCEEDINGS

1) *Summary of Proceedings*

- [1]. In its "Request for Arbitration" dated 16 June 1983, the Liberian Eastern Timber Corporation (hereinafter "letco" or "the claimant"), a company created and existing under the laws of the Republic of Liberia, addressed, in its own name and in the name of its subsidiary, Letco Lumber Industry-Corporation (hereinafter "lic"), a Request for Arbitration to the Secretary-General of the International Centre for the Settlement of Investment Disputes (hereinafter "icsid"), against the Government of the Republic of Liberia (hereinafter "the defendant", the "Government of Liberia" or, simply, "Liberia").
- [2]. The Request for Arbitration seeks recovery of damages derived from an alleged breach of a concession agreement signed between both parties on 12 May 1970 under the title "Forest Products Utilization Contract" (hereinafter "Concession Agreement" or "Agreement"). Article IX of this Agreement submits any dispute which arises from it to the Rules of Conciliation and Arbitration of the ICSID (hereinafter "Arbitration Rules").
- [3]. Once the Secretary-General received the Request for Arbitration, a copy of the same, as well as the accompanying documents, was sent to the defendant, thereby commencing the arbitration proceedings.
- [4]. The Tribunal was originally constituted on 15 November 1983 and, after the resignation of Senator Frank Church, was reconstituted on 2 March 1984. The reconstituted Tribunal consists of Mr Jorge Goncalves Pereira (nominated by letco), Mr Alan Redfern (nominated by the Government of Liberia) and Mr Bernardo M. Cremades (appointed by the Administrative Council of icsid).
- [5]. In this arbitration letco is represented by its Attorney, Mr Robert L. Simpson. Liberia has abstained from appointing an attorney to represent it, although at the start of the proceedings it was represented by Mr Jan Paulsson of the Paris office of Coudert Brothers, a United States of America law firm. Nonetheless, in a telex dated 30 December 1983, Coudert Brothers indicated that it would no longer represent Liberia. The Government of Liberia was notified of this resignation by the Secretary-General of the icsid in a telex dated 4 January 1984. In the same telex the Secretary-General requested Liberia to name a new representative. On 10 January 1984 the arbitral proceedings were temporarily suspended so that Liberia might appoint a new representative. Despite further requests, Liberia failed to appoint a new representative.
- [6].

On 14 December 1983 the President of the Tribunal sent both parties a telex requesting their opinions on those questions of procedure indicated in Article 20 of the Arbitration Rules, as well as their desired *situs* for the arbitration as provided for in Article 63 of the ICSID Convention.

- [7]. On 21 May 1984 the Tribunal held a preliminary hearing in Washington. DC. Despite adequate notification, the Government of Liberia failed to attend. During the meeting, and pursuant to Article 42(2) of the Arbitration Rules, the Tribunal agreed to grant the defendant a period of grace of thirty days, to expire on 22 June 1984. in order to present its case.
- [8]. At the end of the mentioned period of grace. Liberia had still failed to present its case. The Tribunal thereafter requested both parties to submit their arguments concerning the jurisdiction of the Tribunal.
- [9]. letco submitted a Memorandum in support of the jurisdiction of the Tribunal on 11 July 1984. On 24 October 1984. the Tribunal rendered an Interim Award which confirmed its jurisdiction in respect of letco. but not of LLIC.
- [10]. On 15 November 1984 a procedural order was sent to both parties by telex in which the arbitrators requested further evidence regarding certain issues.
- [11]. Mr Simpson requested an extension of the deadline indicated in the procedural order, which request was granted by the Tribunal and notified to the defendant. On 28 February 1985 letco presented a Supplemental Memorandum.
- [12]. On 25 March 1985. the Tribunal held a meeting in London. At this meeting, the Tribunal agreed on further procedural matters including the appointment of a firm of accountants, Peat Marwick Mitchell & Co. (hereinafter "Peat Marwick"), in order to investigate and report on the amount of damages claimed by LETCO.
- [13]. A new procedural order was sent to the parties requesting them to submit further evidence and information. The parties were also requested to give their opinion as to the appointment of Peat Marwick.
- [14]. On 30 May 1985 the Arbitral Tribunal met again, in Paris, in order to hear further testimony relevant to outstanding issues. In telexes dated 28 October and 12 November 1985. both parties were informed by the Tribunal of its intention to hold further hearings in Paris on 9 and 10 December 1985 at which time either party could submit further evidence bearing on the case. At this hearing, the Tribunal heard testimony from various witnesses concerning the issues of whether LETCO had complied with its contractual obligations and as to the validity of the report prepared by Peat Marwick. (This report had previously been sent to both of the parties). Again Liberia failed to respond to all notifications and failed to appear at the last-mentioned hearing, letco. on the contrary, presented various witnesses on its behalf. Apart from the arbitrators, those present included: Mr Robert L. Simpson. Mr Robert Lasson of Sciages & Grumes (a subsidiary of letco), Mr Alan de Marti (the ex-General Manager of letco in Liberia), Mr Angel Aranda Iriarte (a partner in Peat Marwick) and Mr Martin Igman (an American accountant practising in Paris).

[15]. At this hearing the members of the Tribunal requested further information and, once such information was received, declared the close of the proceedings on 10 February 1986.

2) Jurisdiction of the Tribunal

[16]. As mentioned earlier, this Tribunal rendered an Interim Award concerning its own jurisdiction on 24 October 1984. This Interim Award is self-explanatory and we therefore reproduce the relevant content below.

...

[16.1]. [Article 25\(1\) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States](#) (hereinafter "the Convention") states:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

This Article demands three essential requirements in order for the Tribunal to exercise jurisdiction. Though only one of these requirements needs close examination, the Tribunal will nonetheless examine all three.

1. A Legal Dispute Arising Directly out of an Investment

[16.2]. The Concession Agreement between the Government of Liberia and letco provides for an extensive outlay of capital by letco which was to be dedicated to the harvesting and processing of forest products in Liberia. The Agreement required letco to provide "all capital at such times and in such amounts as may be required for the economic and profitable development of this concession". (Article III(l)) The development of this concession required, among other things, harvesting of timber, the construction and maintenance of a sawmill, the payment of surface rents and stumpage taxes, facilities for its employees including a dispensary, health clinic, education, etc. letco claims to have paid out over \$5 million in machinery and equipment alone from 1970 to 1982. Whether this figure is accurate or not is not of great import for the moment; the fact is that Liberia's own documents indicate that letco paid out extensive amounts for the development of the concession. There is, therefore, no doubt that, based on the Concession Agreement, amounts paid out to develop the concession, as well as other undertakings, this legal dispute has arisen directly from an "investment" as that term is used in the Convention.

2. Consent in Writing to Submit to the Centre

[16.3]. The parties' consent in writing to submit to the Centre, and consequently to the Tribunal's jurisdiction is clearly manifested in Article IX of the Concession Agreement which states:

1. *Conciliation and Arbitration:*

(1) If at any time during the continuance of this Agreement or thereafter, there shall be any questions or disputes with respect to the construction, meaning or effect of this Agreement or arising out of this Agreement or concerning the rights or obligations hereunder the parties shall have the right to require the dispute to be settled by conciliation and arbitration as hereinafter provided. Any of the parties to such dispute may commence conciliation or arbitration proceedings by giving notice to the other party and to the Secretary-General of the International Centre for the Settlement of Investment Disputes (including in such notice a statement of the question or dispute and of the claim or contention of the person giving the notice).

(2) The Rules of Conciliation and Arbitration of the International Centre for Settlement of Investment Disputes shall govern the conciliation and arbitration. The place of conciliation or arbitration shall be such as may be agreed by the parties and in default of Agreement shall be provided in the Rules of the Centre.

(3) Pending the issue of a decision or award, the operations or activities that shall have given rise to the arbitration need not be discontinued, but if a decision or award recognizes that a complaint was justified, provision may be made in the award for such reparation or compensation in respect of such continued operations and as shall be decided by the arbitrator to be appropriate.

(4) The decision of the arbitrator shall be final and binding upon the parties of this Agreement and upon any person who participated as a party in such arbitration proceedings, and they shall comply in good faith with the decision.

(5) Should the International Centre for Settlement of Investment Disputes be replaced by, or its functions substantially devolve upon or be transferred to, any new international body of similar type and competence, the function of the Arbitration Tribunal of the International Centre for Settlement of Investment Disputes provided by this Article shall be exercisable by the chief officer of such international body without further agreement among the parties hereto.

The content of the above Article IX of the Concession Agreement is clear evidence of the parties' consent in writing to submit to the Centre and requires no further discussion.

3. Dispute between a Contracting State and a National of another Contracting State

[16.4]. Article 25(1) of the Convention requires, for the Tribunal's jurisdiction, that the dispute be between a "Contracting State and a national of another Contracting State". Since Liberia has signed and ratified the Convention, it qualifies as a "Contracting State", letco on the other hand, is a company incorporated and registered within the Republic of Liberia. LETCO accordingly appears to have been a Liberian company and a juridical person with Liberian nationality, on the date on which the parties consented to submit the dispute to arbitration. However, Article 25(2)(b) goes on to

define "national of another Contracting State" as:

any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and *any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.* (Emphasis added)

As previously indicated, LETCO would appear to have been a juridical person which had the nationality of the Contracting State party to the dispute (Liberia) on the date the parties consented to arbitration. Yet it is necessary to examine whether, because of foreign control, the parties have agreed that letco should be treated as a "national of another Contracting State" (France) for the purpose of this Convention.

a. Foreign Control of LETCO

[16.5]. The evidence provided by letco clearly indicates that it was under French control at the time the Concession Agreement was signed. This control is not only a result of the fact that letco's capital stock was 100% owned by French nationals as indicated by both letco and official documents of the Liberian Government, it also results from what appears to be effective control by French nationals; effective control in the sense that, apart from French shareholdings, French nationals dominated the company decision-making structure. It appears from the evidence presented that a majority, if not all, of letco's directors, as well as the General Manager, were at all times French nationals.

b. Agreement, because of Foreign Control, to Treat LETCO as a National of Another Contracting State

[16.6]. In order to exercise jurisdiction the Tribunal must determine that, because of French control, the Government of Liberia agreed to treat letco as a French national. This requirement raises a number of difficult questions, in particular: Must there be a causal relationship between effective control and agreement? If so, how can it be proved? What sort of an agreement, implied or expressed, is required? If the agreement may be implied, what facts are capable of implying such an agreement?

[16.7]. Clearly the Convention's use of the word "because" in Article 25(2)(b) establishes a need to show that the agreement to treat letco as a French national was motivated by the fact that it was under French control. However, in most instances the virtually insurmountable burden of proof in showing what motivated a government's actions might well frustrate the purpose of the Convention. Therefore, unless circumstances clearly indicate otherwise, it must be presumed that where there exists foreign control, the agreement to treat the company in question as a foreign national is "because" of this foreign control.

[16.8]. In the case at hand, there is no indication whatsoever that an agreement to treat letco as a French

national resulted from anything other than the fact that it was under French control and we must therefore conclude that the necessary causal relationship exists.

[16.9]. The next question that must be resolved is that of the required nature of the agreement to treat letco as a French national. Though it is not necessary to go so far in the case at hand, it could be argued with some force that the mere fact that Liberia and letco included an icsid arbitration clause in the Concession Agreement constitutes an agreement to treat letco as a "national of another Contracting State". To conclude otherwise would be tantamount to stating that Liberia never intended to honour this part of the Concession Agreement; that Liberia, by agreeing to the icsid clause, acted in bad faith and contrary to the tenor and purpose of the icsid Convention.

[16.10]. When a Contracting State signs an investment agreement, containing an icsid arbitration clause, with a foreign controlled juridical person with the same nationality as the Contracting State and it does so with the knowledge that it will only be subject to ICSID jurisdiction if it has agreed to treat that company as a juridical person of another Contracting State, the Contracting State could be deemed to have agreed to such treatment by having agreed to the icsid arbitration clause. This is especially the case when the Contracting State's laws require the foreign investor to establish itself locally as a juridical person in order to carry out an investment.

[16.11]. Though the Tribunal is not bound by the precedents established by other icsid Tribunals, it is nonetheless instructive to consider their interpretations of what constitutes an agreement to treat a juridical person which had the nationality of the Contracting State party to the dispute as a national of another Contracting State. In the *Holiday Inns* case, the Tribunal indicated that "such an agreement should therefore be explicit. An implied agreement would only be acceptable in the event that the specific circumstances would exclude any other interpretation of the intention of the parties, which is not the case here". In *Amco-Asia et al. v. The Republic of Indonesia*, the Claimant apparently applied to the Indonesian investment authorities for the establishment of a "foreign business". The parties also inserted an icsid clause in their agreement. Since the Indonesian Government approved both the investment application and the ICSID clause, the Tribunal found that there was an expressed agreement. Citing the *Holiday Inns* case, the Tribunal stated:

To refer to the *Holiday Inns* award - in spite of the same not being a binding precedent in this case here - this agreement is by no means implied; it is expressed, and clearly expressed, no formal or ritual clause being provided for in the Convention, nor needed in order for such an agreement to be binding upon the parties.[4]

In the present case, there is adequate evidence to show that there existed an agreement to treat letco as a French national. The actions of the parties indicate that, even if there was no express agreement, there was at least an implied agreement.

[16.12]. Both actions and documents show that Liberia agreed to treat letco as a foreign national. Perhaps most indicative of such treatment are the annual certificates of registration which letco was required to file with the Liberian Ministry of Commerce, Industry and Transportation. These registrations were signed by such government officials as the Director of Domestic Trade, the Assistant Minister for Commerce and the Deputy Minister for Commerce. From 1975 to 1983 these certificates contained a section for indicating the registering company's nationality. During all these years such nationality was indicated as "French".

[16.13]. Another indication of Liberia's treatment of letco as a foreign national is the appointment of the Minister of Foreign Affairs by the Liberian Head of State to participate in an advisory committee established to consider the questions raised by the dispute. Such an appointment indicates that nondomestic matters were involved despite the fact that LETCO was presumably a Liberian company. Though this Committee's opinions apparently were not binding on the Liberian Government, it is nonetheless interesting to note that the Committee's opinion was that Liberia would, based on the icsid clause, be obliged to arbitrate.

[16.14]. These actions, combined with the fact, as indicated in the affidavit of the French Commercial Attach to Liberia, that LETCO was obligated to form a Liberian company to carry out its investment and the fact that an icsid arbitration clause was contained in the Concession Agreement, lead the Tribunal to the inevitable conclusion that Liberia did agree to treat LETCO as a "national of another Contracting State".

[16.15]. Given the fact that Liberia had failed to file a pleading in this dispute, the Tribunal has raised the question of jurisdiction of its own initiative and required LETCO to submit evidence on this question. The evidence submitted has proven beyond a reasonable doubt that this Tribunal has jurisdiction within the meaning of Article 25 of the Convention and that it may now proceed to a consideration of the substance of the dispute between the parties.

[16.16]. The jurisdiction of this Tribunal is necessarily limited to determining the dispute between LETCO and Liberia. No evidence has been submitted which would permit the Tribunal to extend its jurisdiction to the Letco Lumber Industry Corporation ("LLIC"), LETCO's subsidiary. This results from the fact that LLIC is a separate juridical person from letco and has not entered into an ICSID arbitration agreement with Liberia. However, the Tribunal does not exclude letco's seeking damages based on its investments in LLIC which were made pursuant to the ends contemplated in the Concession Agreement.

[16.17]. Finally, in Section VI of its request for arbitration, letco has requested that the Liberian Bank for Development and Investment ("lbdi") become a party to this arbitration. As neither lbdi nor Liberia has consented to such participation, this Tribunal cannot exercise the necessary jurisdiction to determine any possible disputes arising between lbdi, letco and Liberia.

[16.18]. Based on the above findings the Tribunal hereby determines that it has jurisdiction to decide the dispute between the Liberian Eastern Timber Corporation and the Government of the Republic of Liberia and that this jurisdiction extends to no other persons.

...

3) Default by the Government of Liberia

[17]. As indicated, the Government of Liberia failed to respond to the request for arbitration and was absent from all hearings held throughout the proceedings. This is so despite the fact that at the beginning of the proceedings it appointed the law firm of Coudert Brothers to represent it and, in addition, appointed Mr Alan Redfern as one of the arbitrators. The Government of Liberia was at

all times duly notified, in accordance with the Arbitration Rules and the ICSID Convention, of both the request for arbitration and all subsequent proceedings. Included among such notifications were the following:

— telex of 15 November 1983 sent by the Secretary-General of the icsid to Mr Simpson and Mr Paulsson notifying them of the constitution of the Tribunal;

— telex of 5 December 1983 sent by the President of the Tribunal to the attorneys of each of the parties requesting their opinion on procedural matters;

— telex of 14 December 1983 sent to the representatives of both parties by the President of the Tribunal requesting further information on procedural matters;

— telex of 4 January 1984 sent by the Secretary-General of the icsid to the Government of Liberia indicating the resignation of its legal representative, Coudert Brothers, and requesting a new appointment;

— telex of 15 November 1984 in which the Secretary of the Tribunal sent to each of the parties a copy of the procedural order.

— telex of 28 October 1985 sent by the Secretary of the Tribunal to the Secretary of Agriculture of the Republic of Liberia requesting his opinion concerning the holding of a hearing in Paris on 9 December of that same year;

— telex of 12 November 1985 sent by the Secretary of the Tribunal to the Ministry of Justice and Secretary of Agriculture of the Government of Liberia describing the procedural order for the meeting mentioned immediately above.

[18]. In addition, numerous communications have been sent to the Government of Liberia requesting it to make the appropriate deposits for the arbitration (telexes of 8 December 1983, 17 April 1985, 19 August 1985 and 15 October 1985). None of these telexes received a response; nor were the requested deposits made. The necessary deposits for the continuation of the arbitration were made by LETCO in accordance with Article 27 of the Arbitration Rules.

[19]. The Interim Award on the jurisdiction of the Tribunal in this arbitration, rendered on 24 October 1984, was duly notified to both parties.

[20]. It is clear from what has been said above that the absence of the Government of Liberia from the arbitration proceedings was not due to any lack of due notification; it is equally clear that the Government of Liberia has been aware of these proceedings from the outset.

[21]. Given the default of the defendant, the Tribunal has adopted the measures in the icsid Arbitration Rules which govern cases of default in appearance. These include such measures as Article 42, which states:

(1) If a party (in this Rule called the "defaulting party") fails to appear or to present its case at any stage of the proceeding, the other party may, at any time prior to the discontinuance of the

proceeding, request the Tribunal to deal with the questions submitted to it and to render an award.

(2) The Tribunal shall promptly notify the defaulting party of such a request. Unless it is satisfied that the party does not intend to appear or to present its case in the proceeding, it shall, at the same time, grant a period of grace and to this end:

(a) if that party had failed to file a pleading or any other instrument within the time limit fixed therefor, fix a new time limit for its filing; or

(b) if that party had failed to appear or present its case at a hearing, fix a new date for the hearing.

The period of grace shall not, without the consent of the other party, exceed 60 days.

(3) After the expiration of the period of grace or when, in accordance with paragraph (2), no such period is granted, the Tribunal shall resume the consideration of the dispute. Failure of the defaulting [sic] to appear or to present its case shall not be deemed an admission of the assertions made by the other party.

(4) The Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well founded in fact and in law. To this end, it may, at any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations.

[22]. Article 45 of the icsid Convention makes similar provisions.

[23]. In accordance with these provisions, and despite the request by letco at the hearing held in Washington. DC on 21 May 1984 that the Tribunal deal with the questions before it and render an award, the arbitrators granted the defendant a period of grace of thirty days (from 21 May to 22 June 1984) so that it might present its case. Despite this period of grace. Liberia failed to present its case.

[24]. It is regrettable that in these circumstances the Government of Liberia, which is a party to the icsid Convention, should have chosen to ignore its obligation under the Convention. (This is made clear by Article 26 of the icsid Convention: "Consent of the parties to an arbitration under this Convention shall, unless otherwise stated, be deemed to be consent to such arbitration to the exclusion of any other remedy".) It has done so, as we have seen from the documentation, against the strong advice of some of its own ministers; and it has done so not merely by failing to take part in the present arbitral proceedings but also (as we have been told) by subsequently instituting proceedings in its own Courts against the claimant in respect of the subject matter of the present arbitration.

[25]. Nevertheless, the failure of the Government of Liberia to take part in the present arbitral proceedings does *not* entitle the claimant to an award in its favour as a matter of right. The onus is still upon the claimant to establish the claim which it has put forward in its Request for Arbitration and other documents. This is made clear by Article 45 of the icsid Convention which states:

Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

- [26]. What then is to happen if a party fails to appear or to take part in an arbitration under the icsid Arbitration Rules? The situation is dealt with by Rule 42. First, as was done in this case, the Tribunal must accord a period of grace to the defaulting party. Then it must resume its consideration of the case. It must not regard the failure of the defaulting party to appear and to present its case as "an admission of the assertions made by the other party". This is made clear by Rule 42, echoing the words of the icsid Convention. Instead, it must:

... decide whether the submissions made are well founded in fact and in law. To this end. it may, at any stage of the proceedings, call on the party appearing to file observations, produce evidence or submit oral explanations.

- [27]. In this way, the onus of testing the assertions made by the party appearing shifts onto the Tribunal itself. As it is put in the notes to Rule 42:

After the Tribunal has, on the expiration of the period of grace, resumed consideration of the Request, the proceeding is no longer fully contentious in the sense that expression is used in national civil procedures; the initiative is shifted to the Tribunal as far as the substantiation of the submissions is concerned. The Tribunal must now *proprio motu* examine:

...

(b) the substantive merit of the assertions made by both parties in order to satisfy itself whether their submissions are well founded in fact and law. To this end. it may call on the active party for observation, evidence or explanations.

- [28]. It is this procedure which was followed by the Tribunal in the present arbitration. The Tribunal did not take for granted the assertions of law and fact made by the claimant. On the contrary, it submitted them to careful examination; and its award is made on the basis of that examination.

II. APPLICABLE LAW

- [29]. In all proceedings, whether before an arbitral tribunal or whether before a State judge, the question of the applicable law must be dealt with from two perspectives: the law applicable to the procedure itself and the law applicable to the merits of the dispute, otherwise known as the substantive law. Though these laws may coincide, it is not unusual for one law to be applicable to the procedure and yet another one applicable to the merits of the dispute. The fact that a State is party to a contract subject to arbitration causes the analysis applied in determining which are the applicable laws to take on certain unique characteristics.

1) *Applicable Procedural Law*

[30]. The purpose of the icsid Convention is to provide for the peaceful settlement of disputes between a sovereign State and a private investor by means of conciliation or arbitration under the Arbitration Rules. A State which agrees to submit disputes to arbitration under the icsid Convention thereby enters into an agreement that it will submit to arbitration to the exclusion of any other remedy.

[31]. Liberia, the defendant in this arbitration, is a party to the icsid Convention and therefore has an obligation under international law, due to the binding force of international treaties, to comply with these proceedings and the resulting award. Although not itself a party to the icsid Convention, letco is a national of another State which is a party to the Convention (France) and therefore also falls within its terms.

[32]. Article 44 of the icsid Convention states:

Any arbitration proceeding shall be conducted in accordance with the provisions of this section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

[33]. This [sic] Article 44 clearly calls for the application of the Arbitration Rules in the case at hand. In the event of any procedural gaps in the Arbitration Rules (which is not the case here), the arbitrators are granted the power to fill these gaps. No agreement by the parties has been reached concerning procedural rules. Therefore, given the clear mandate of the icsid Convention and its support in international law, this Tribunal concludes that there is no need to resort to any other procedures whether based on national law or not.

2) *Applicable Substantive Law*

[34]. Under the doctrine of party autonomy, parties to a contract are free to choose for themselves the law which is to govern their relationship. This doctrine has gained almost universal acceptance, particularly in international commercial transactions (see Lew, *Applicable Law in International Commercial Arbitration* (1978) at p. 71 *et seq.*) and it is adopted by the icsid Convention which provides, in Article 42:

The Tribunal shall decide any dispute in accordance with such rules of law as may be agreed by the parties.

[35]. The Concession Agreement of 12 May 1970 made between the Government of Liberia and letco states in its opening paragraph that the Concession Agreement is made "under the General Business Law, Title 15 of the Liberian Code of Laws of 1956". This appears to indicate an express choice by the parties of the Law of Liberia as the law governing the Concession Agreement. However, counsel

for the claimant, who put his arguments skillfully and persistently throughout the proceedings, suggested at one stage that there had been *no* express choice of law by the parties (transcript of the hearing on 9 December 1985 at p. 67). Later he appeared to concede (at p. 72) that Liberian law was "probably applicable".

- [36]. In the view of the Tribunal, there is no doubt as to the applicability of Liberian law. No other system or rules of law were chosen by the parties; and even if (leaving aside the opening words of the Concession Agreement itself) there was no *express* choice of Liberian law by the parties, it is plain that the Tribunal must apply Liberian law to the present dispute. The only question is whether Liberian law is applied on its own (as the law chosen by the parties) or in conjunction with applicable principles of public international law. According to Article 42 of the icsid Convention, in the absence of any agreement between the parties as to the rules of law by which a dispute is to be decided: "... the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules of the conflict of laws) and such rules of international law as may be applicable".
- [37]. This provision of the icsid Convention envisages that, in the absence of any express choice of law by the parties, the Tribunal must apply a system of concurrent law. The law of the Contracting State is recognized as paramount within its own territory, but is nevertheless subjected to control by international law. The role of international law as a "regulator" of national systems of law has been much discussed, with particular emphasis being focused on the problems likely to arise if there is divergence on a particular point between national and international law. No such problem arises in the present case; the Tribunal is satisfied that the rules and principles of Liberian law which it has taken into account are in conformity with generally accepted principles of public international law governing the validity of contracts and the remedies for their breach.

III. DETERMINATION OF RELEVANT FACTS

1) *The Concession Agreement*

- [38]. In the Concession Agreement signed by both LETCO and the Republic of Liberia on 12 May 1970, the Government of Liberia granted letco, subject to certain conditions set forth in the Agreement, "the exclusive right to harvest, process, transport and market timber and other forest products and to conduct other timbering operations within the Exploitation Area hereinafter defined and for the terms hereinafter specified" (Article 1.1.(1.)). In consideration for such rights letco agreed, among other undertakings, "to make annual payments, and to pay rents and other fees hereinafter prescribed and to perform and to observe the terms and conditions of this Agreement" (Article 1.1.(1.)).
- [39]. Prior to the exploitation of the concession area, the Concession Agreement required letco to make a survey of the concession area. Such survey was to be carried out within a two-year period from the date of the signing of the Agreement and progress reports were to be submitted every six months to the Secretary of Agriculture (Article 1.3.(1.)). The concessionaire was granted the specific right to survey and harvest timber and other forest products in an area of not less than 350,000 acres and not more than 400,000 acres (Article 1.3.(2.)). The Agreement was to last for a minimum

period of twenty years commencing from the commencement date. In addition, letco was given a right to renew the Concession Agreement for an additional period of fifteen years, so long as it had paid all taxes, fees and rents due and satisfactorily performed its obligations under the Agreement (Article 1.6). As a result of the aforementioned provisions, the Agreement was signed in May 1970 and the survey was to be carried out before May 1972. The completion of the survey marked the effective commencement of the Agreement. Thereafter, the Agreement was to continue for a period of twenty years until May 1992. Finally, the Agreement could be extended for an additional fifteen years ending in May 2007.

[40]. The following is a list of those obligations undertaken by letco in the Concession Agreement and which have been the object of examination during the arbitral proceedings:

— letco's obligation to spend for use in Liberia not less than \$200,000 for equipment directly connected with its operation of the concession (Article 1.4.(2.)).

— letco's obligation to pay certain taxes (Article II.).

— letco's obligation to exploit the concession area according to modern and accepted scientific and technical principles and to avoid exploitation of particular species of trees (Article IV. 1.).

— letco's obligation to conform to the provisions of Liberian labor law and to give preference to competent and qualified Liberian citizens when hiring for the concession. In addition, LETCO was required to employ certain minimum percentages of Liberian citizens in technical, managerial, supervisory and senior managerial posts (Articles IV.10. and IV.11.).

— letco's obligation to erect and maintain an efficient sawmill plant for the purpose of producing 33 1/3% of its annual production as finished or semi-finished sawn lumber to the extent that such quantity was "economically feasible" (Article IV.15.).

— letco's obligation to leave, to the Government of Liberia, in good and safe-running order all fixed assets and plant and equipment necessary for the continued operation of the concession once the Concession Agreement expired or was terminated (Article VII.3.).

[41]. Prior to the signing of the Concession Agreement in question, letco, in 1968. was granted a forestry concession for "the P. Bork Area" and another concession in "Greenville". According to letco, these areas "were considered both by the Government and letco as part and parcel of one overall concession governed by the principles set forth in the Agreement".

[42]. After the Concession Agreement had been signed, the Government of Liberia withdrew portions of letco's forestry concessions in 1970,1971 and 1977. After these withdrawals, LETCO was left with a total of 470,000 acres of exploitable land, including the P. Bork Area. In 1977, letco established its subsidiary llic with a participation of 90% and whose company purpose was to construct the sawmill and use it to produce sawn lumber.

[43]. After a period of normal relations between the contracting parties, certain problems began to appear in 1979. At first, the Forestry Development Authority of Liberia (hereinafter "fda") began to request a renegotiation of the concession granted to letco. Later, in July 1980, the fda accused letco of abandoning quantities of logs in the concession area. Finally, in a letter dated 18 November 1980.

the fda indicated to LETCO that its concession area would be reduced by 279,000 acres "with immediate effect". In support of this decision, the fda alleged a number of breaches of the Concession Agreement by letco.

- [44]. Based on these allegations, the fda determined that letco was incapable of properly exploiting the concession area granted to it.
- [45]. On 19 November 1980, a day after receiving the letter indicating the reduction of its concession area, letco replied to the fda indicating its disagreement with those allegations made by the Government and protesting the reduction of its concession area. It also indicated that such reduction essentially nullified the Concession Agreement since the areas withdrawn had not yet been exploited. Despite this letter and subsequent contacts with Liberian authorities, the fda confirmed its decision in a letter of 2 December 1980.
- [46]. Given this situation, letco continued to petition the highest governmental bodies of the Republic of Liberia so that they might intervene on its behalf to correct the situation. These petitions proved fruitless; on 28 March 1983 letco communicated to the fda the suspension of all its operations concerning the concession "because of the fact that we have no forest to operate".
- [47]. On 16 November 1984, more than a year after this arbitration had commenced (16 June 1983), the fda sent letco a letter in which it indicated that it had decided to annul the Concession Agreement as a result of letco's breach of Articles "(5) and (6)". Three months later on 20 February 1985, the fda indicated to letco that, given the fact that letco had not replied to its last-mentioned letter and failed to rectify the mentioned breaches, it had no "other recourse but to institute the appropriate legal proceedings to annul the said Forest Products Utilization Contract executed by and between the Government and yourselves".

2) Non-Compliance by Liberia

- [48]. Article VII.4. of the Concession Agreement recognizes the right of the Government of Liberia to revoke the Agreement in the event that:
- (a) The concessionaire fails to commence operations within the months as required by Article I of this Agreement or fails to meet its expenditure obligations within the period specified in Article I of this Agreement, or
- (b) No commercial shipment of logs, timber or timber products is made within four years of the effective date of this Agreement, or
- (c) Any rent, stumpage fee or income tax payable by the concessionaire under this Agreement shall be in arrear or unpaid for a period of six calendar months next after any of the days on or before which the same ought to have been paid, or
- (d) The concessionaire assigns to a third party the whole or part of the rights held by it under this Agreement without the previous written consent of the government as provided in this Article VII.
or

(e) The concessionaire has knowingly submitted to the government any false statements which were a material consideration for the execution of this Agreement, or

(f) The concessionaire intentionally extracts any natural resources other than timber and other forest products without the express authorization by the government, or

(g) The CONCESSIONAIRE fails to comply with any final decision by the Arbitral tribunal in a controversy arising with the government under this Agreement, or

(h) There be any other breach or non-observance by the concessionaire of any of the terms, obligations or conditions of this Agreement, or any law of Liberia not superseded by this Agreement, or

(i) The concessionaire shall make or enter into any agreement or composition with its creditors or shall go into liquidation whether compulsory or voluntary (other than for the purpose of reconstruction) or if a receiver is appointed the government may, subject to the provisions of this section, revoke this agreement.

[49]. Any revocation by the Government of Liberia should have been based on the above-mentioned grounds. Article VII.4.(2) of the Concession Agreement goes on to indicate the procedure by which such revocation must be carried out:

(2) In the event that the GOVERNMENT deems it desirable to revoke this Agreement pursuant to subsection 1 of this section or any breach or non-observance by the CONCESSIONAIRE of any term, obligation or condition of this Agreement, the GOVERNMENT shall give to the CONCESSIONAIRE notice in writing specifying the particular breach or non-observance complained of and requiring the CONCESSIONAIRE within three calendar months of such notice (or within such extended time as to the Secretary of Agriculture may seem fair having regard to the circumstances of the particular case) to remedy the same or make reasonable compensation to the GOVERNMENT in a manner acceptable to the Secretary of Agriculture.

If the CONCESSIONAIRE shall fail to comply with the said notice, the Secretary of Planning and Economic Affairs may, after the expiration of said three calendar months or extended time, revoke this Agreement, provided however that where there is any dispute between the parties as to

(a) Whether there has been any breach or non-observance by the CONCESSIONAIRE of any term, obligation or condition of this Agreement, or

(b) Whether any breach or non-observance is remediable or as to the manner in which it shall be remedied, the CONCESSIONAIRE may within the above-mentioned three-month period, refer the dispute to arbitration and the GOVERNMENT shall not exercise its power of revocation until the result of the arbitration is known, and then subject to the terms of the award. Provided however, that if the CONCESSIONAIRE elects to refer the dispute to arbitration, it shall be diligent in prosecuting its claim before the Arbitral tribunal.

[50]. The clear purpose behind the notification procedure indicated in the Concession Agreement is to give the party allegedly in breach an opportunity to remedy the breach or make reasonable

compensation to Liberia. This sort of provision is logical in a contract of this type. The Agreement is a long-term development agreement. The Government grants a long-term concession to a foreign party who in turn makes extensive investments which will bear fruit over many years. The Agreement is meant to last; small or easily remedied breaches are to be notified so that the foreign party is given an opportunity to rectify the situation before losing his long-term investment. This sort of agreement has very little to do with the typical sales agreement which usually requires perfect performance. In such a contract, any small delay or imperfection in the goods may cause the purchaser to suffer substantial hardship due to the vagaries of a volatile market. A long-term development contract is not speculative in nature and is meant to last, despite an occasional lack of proper performance.

- [51]. The notification procedure indicated in Article VII is therefore a crucial element of the Concession Agreement. Failure to give the full three-month notice reduces this Article to a pure formality. Failure to give any notification entirely nullifies the Article's purpose.
- [52]. Article VII also makes it clear that if there is a disagreement between the parties as to the existence of a breach or non-observance of the Concession Agreement, or if there is a disagreement between the parties as to whether such breach or non-observance is remediable or as to the manner in which it shall be remedied, letco may refer such disagreement to arbitration within a three-month period. The resulting arbitration then determines the parties' respective rights.
- [53]. letco's right to arbitration is a guarantee that it will not have its long-term and costly investment arbitrarily rendered useless by the Government of Liberia. Inevitably, such a provision is considered fundamental to the foreign investor and is likely to be a condition of the investment itself.
- [54]. As has been indicated earlier, the decision communicated in the fda's letter of 18 November 1980 had the effect of greatly reducing the concession area and of effectively rendering the investment of letco useless. This effective revocation of the Agreement was not preceded by the notification called for in the Concession Agreement. As a result, Liberia's withdrawal of the 279,000 acres was not in compliance with the Concession Agreement.
- [55]. As mentioned on 16 November 1984 the fda sent letco a letter indicating that it considered that Articles "(5) and (6)" of the Concession Agreement had been breached by letco. In this letter the fda indicated that this document "shall constitute our notice of termination to you in keeping with the requirements of said Agreement". Three months later, on 20 February 1985, the fda sent yet another letter to letco indicating that since it had not received a response to its previous letter and since the mentioned breaches had not been remedied it was proceeding to "institute the appropriate legal proceedings to annul the said Forest Products Utilization Contract".
- [56]. These letters merit little discussion. The first letter was sent well over a year after these arbitration proceedings had begun, two years after LETCO was forced to cease its activities, and four years after the Government of Liberia effectively and improperly revoked the Concession Agreement. These letters therefore are clearly inadequate to meet the requirements of the Concession Agreement.

3) *Compliance by LETCO*

- [57]. Liberia failed to comply with the fundamental notification procedures laid out in the Concession Agreement. Failure to comply with these procedures causes letco's compliance or non-compliance with the Agreement to be irrelevant. By failing to comply with these procedures, Liberia has not only deprived letco of the ability to remedy any possible non-compliance, but has also largely precluded it from demonstrating compliance.
- [58]. Notwithstanding Liberia's failure to comply with the notification procedures and Liberia's absence from these proceedings, prudence has led this Tribunal to examine, to the extent possible, any possible non-compliance by letco. Apart from prudence, such determination of non-compliance by letco could affect the Tribunal's decision concerning an award of possible damages.
- [59]. The Government of Liberia based its withdrawal of the 279,000 acres of the concession area on allegations that letco was unable to properly develop the concession area. To bolster its argument, the Government of Liberia put forth a number of "faults" which led it to reach its decision. The Tribunal has investigated the veracity of these alleged "faults" based on both documentation and testimony taken from witnesses.
- [60]. Among the most important "faults" alleged by Liberia are the following:
- letco had failed to annually exploit 4% of the total area of the concession.
 - As a result of inadequate investments in its installations, letco was forced to abandon logs and permit them to be wasted.
 - letco had used an overly selective process of exploitation.
 - letco failed to process 33 1/3% of its annual production.
 - letco had used inadequate technology, as compared with other companies, in the exploitation of its concession.
 - letco had employed an inadequate number of Liberian workers (less than 200 workers).
 - letco had made inadequate investments in the concession allegedly 2 million US dollars).
- [61]. The Tribunal has determined that none of these allegations is adequately supported by facts. On the contrary, the Tribunal has found, to the extent possible, that letco has substantially complied with its obligations.
- [62]. Although it is true that during the years of 1975 and 1976 letco's production dropped as compared with earlier years, this drop in production reflected the overall inactivity of the market. Such drop in production was reflected in other companies as well, letco, nonetheless, made up for these drops in subsequent years.
- [63]. In 1979 LETCO made a substantial investment in the establishment of llic and the construction of a

sawmill, which was one of the most modern in the country at that time. The so-called "abandoned" logs appear, in fact, to have been waiting to be cut and the number of trunks stored corresponded to the needs of the sawmill. In addition, processing of timber appears to have been slowed somewhat by a *coup d'état* and subsequent political and economic confusion reigning in the country. It should be noted that such a political-economic situation could well be qualified as *force majeure* within the meaning of Article VII.2. of the Concession Agreement. Finally, with respect to abandoned logs, Liberian Government forestry authorities, in documentation submitted to the Tribunal, denied the existence of such abandoned tree trunks.

- [64]. Although it is difficult to determine the meaning of an overly selective timbering process, evidence submitted to the Tribunal indicates that letco exploited approximately twenty different species of trees falling into both the categories of first class and second class qualities. The Tribunal, apart from Liberia's allegations, was unable to determine any other indicia of an overly selective exploitation process.
- [65]. Regarding letco's alleged failure to process 33 1/3% of its annual production of timber, it should be noted that Article IV. 15.(2.) states: "the concessionaire shall ensure that of his total annual production a minimum proportion of thirty-three and one-third percent (33 1/3%) shall be in the form of finished or semi-finished sawn lumber, provided such quantity is *economically feasible*". (Emphasis added) In a study carried out pursuant to the Agreement, it was determined that such economic feasibility did not, in fact, exist in Liberia at that time. Nonetheless, the mere fact of the construction of the sawmill by letco is indicative of its intention and desire to increase its processing capacity.
- [66]. Apart from letco's construction of one of Liberia's most technologically advanced sawmills, it appears that the remainder of its installations was [sic] also technologically competitive with other companies operating in a similar field within Liberia. Government reports submitted to this Tribunal confirmed this fact and, in fact, indicated other companies had a greater volume of "abandoned" logs.
- [67]. Liberia's claim that LETCO employed inadequate Liberian citizens [sic], less than 200 workers, may in fact have been true; but it does not reflect letco's obligations pursuant to the Agreement. Article IV.11. indicates certain percentages of required Liberian workers within certain employment levels. Evidence submitted to this Tribunal indicates that letco complied with these percentages and the educational requirements called for in this same Article.
- [68]. Finally, Liberia has alleged that there was inadequate investment by letco in the concession. As mentioned earlier, this allegation is, in part, contradicted by the extensive investment made by letco in its sawmill. In addition and contradiction to Liberia's claim of only 2 million US dollars invested, evidence submitted to this Tribunal shows that letco in fact invested at least 5 million US dollars in its concession.
- [69]. Again, the Tribunal stresses the fact that, according to the Concession Agreement, letco should not be obligated to demonstrate its compliance with the Concession Agreement in order to prove its right to recovery. Nonetheless, this Tribunal has sought such proof both for reasons of prudence and to assist it in determining the award of possible damages. The evidence which was produced to the Tribunal demonstrates letco's compliance with the Concession Agreement.

IV. LEGAL CONSEQUENCES

1) *Nationalization*

- [70]. As part of its consideration of this case, the Tribunal considered whether the action taken by the Liberian Government in depriving letco of its concession might be considered as an act of nationalization, which might be justifiable both under the law of Liberia and under international law, if accompanied by payment of appropriate compensation. It should be emphasized that the Government of Liberia has not sought to justify its action on this basis; rather, it has consistently claimed that its action was taken because of failure on the part of the claimant to properly carry out its obligations under the Concession Agreement - an argument which the Tribunal has rejected on the facts. However, even if the Government had sought to justify its action as an act of nationalization, it would have had to first point to some legislative enactment, embodying the act of nationalization. It would then have had to show that its action was taken for a *bona fide* public purpose; that it was non-discriminatory; and that it was accompanied by payment (or at least the offer of payment) of appropriate compensation. (For a generally accepted statement of the international law governing acts of nationalization, see United Nations Resolution 1803 (XVII) of 1962 relating to Permanent Sovereignty over natural resources; see also Higgins, "The Taking of Property by the State: Recent Developments in International Law", *Receuil des Cours*, 176 (1982—III), at p. 305; and see the award of the Arbitral tribunal in *Aminoil v. The Government of Kuwait*, *International Legal Materials*, 21 (1982), pp. 976-1053; abridged in *Journal du droit international* (Clunet), 109 (1982) pp. 869-909).
- [71]. None of these conditions is satisfied in the present case. There was no legislative enactment by the Government of Liberia. There was no evidence of any stated policy on the part of the Liberian Government to take concessions of this kind into public ownership for the public good. On the contrary, evidence was given to the Tribunal that areas of the concession taken away from letco were granted to other foreign-owned companies: according to Mr Alain de Marti, who was letco's general manager in Liberia for the entire period of the concession, these foreign companies were run by people who were "good friends" of the Liberian authorities (transcript. Paris hearing. 9 December 1985 (especially at p. 3,48,49,50 and 51)). Finally, no offer of compensation has been made to letco for the loss of its concession; to the extent that the Liberian Government has attempted any justification of its action, it has been on the basis of alleged breaches of the Concession Agreement by letco.
- [72]. Accordingly, it is the opinion of this Tribunal that even if the argument as to nationalization had been raised, it would have failed. Leaving aside the lack of any legislative enactment, the taking of letco's property was not for a *bone fide* public purpose, was discriminatory and was not accompanied by an offer of appropriate compensation.

2) *Breach of Contract and Right to Damages According to Liberian Law*

[73]. The Tribunal has obtained statements from experts in Liberian law, relevant articles of the Liberian Code of Laws of 1956 and reported decisions of the Liberian Courts.

[74]. The primary source of Liberian law and the basic document from which all other sources of law emanate is the Liberian Constitution; other sources include treaties, statutes and what may be called "residual law". Statute law may take the form of a codification of existing principles and rules of law, as with the Liberian Codification Project which led to the Liberian Code of Laws of 1956 (hereinafter "the Liberian Code of Laws" or "LCL"). In the absence of any relevant constitutional or statutory provisions, residual law will be applied. (See Culp, *Sources of Liberian Law* and Berlowitz, Affidavit of 6 September 1985 lodged by the claimant).

[75]. The Liberian Code of Laws states:

Except as modified by laws now in force and those which may hereafter be enacted and by the Liberian common law, the following shall, when applicable, be considered Liberian law:

a) the rules adopted for chancery proceedings in England; and

b) the common law and usages of the courts of England and the United States of America, as set forth in case law and Blackstones' and Kent's *Commentaries* and in other authorised treatises and digests. (2 LCL Title 16. Chapter 3. para. 40).

[76]. The Liberian Code of Laws defines a contract in a manner which, with its reference to consideration, is readily familiar to a common lawyer; then, in relation to breach of contract, the Liberian Code of Laws states:

If the person omits to do an act which he legally contracted to do, or does an act which he legally contracted not to do. he commits an injury and an action for damages will lie against him. (Liberian Code of Laws, para. 2)

[77]. The Liberian Code of Laws also contains provisions dealing with "injury" which it defines as unlawful damage (para. 1); in its classification of injuries (para. 8) it distinguishes between "personal injuries" and "injuries to property", stating that "injuries to property are divided into breaches of contract and other injuries to property". It thus adopts the notion of a contract as a proprietary right. As to measure of damages, the Liberian Code of Laws provides, in paragraph 11:

The object of a civil action for injuries is to indemnify the injured person, not to punish the injurer; therefore it follows that the measure of damages is the actual amount of the loss or inconvenience sustained by the injured person without any reference to the degree of misconduct of which the injurer may have been guilty.

[78]. There are then set out certain exceptions to this rule, which relate to injuries which are said to be "of a particular nature and partake of a criminal character": the only exception relevant to the context of the dispute would seem to be that for "injuries to the reputation for which an action will lie without alleging and proving special damages".

[79]. It is clear that under the law of Liberia (as under most, if not all, developed systems of law) the binding force of contracts is recognized, so long as the contracts in question are validly made and do not offend public policy (*l'ordre publique*). No doubt has been raised as to the validity of the original grant of the concession to foreign persons and corporations (see Berlowitz, *Concessions and Incentives in Liberia*).

[80]. Although the Tribunal has found no indication that the laws of Liberia have been changed so as to affect the Concession Agreement, it should be pointed out that Article X of the Agreement, under the title "Warranty of Concessionaire's Rights" states:

Except as otherwise provided in this Agreement, no amendment or repeal of any law or regulation governing this Agreement or any part thereof shall affect the rights and duties of the CONCESSIONAIRE without its consent.

[81]. This clause, commonly referred to as a "Stabilization Clause", is commonly found in long-term development contracts and, as is the case with notification procedures of the Concession Agreement, is meant to avoid the arbitrary actions of the contracting government. This clause must be respected, especially in this type of agreement. Otherwise, the contracting State may easily avoid its contractual obligations by legislation. Such legislative action could only be justified by nationalization which meets the criteria described above.

[82]. In the opinion of the Tribunal, the particular concession which was granted to letco was a contract binding on both parties. Moreover, it contained its own provisions for what was to happen if there were any breaches of the contract by LETCO. As described earlier, Article VII.4. of the Concession Agreement sets out the Government's power to revoke the Agreement for cause and contains a list of events which might give rise to a revocation of the Concession Agreement.

[83]. Again, revocation is not an automatic remedy, even if one or more of the events set out in Article VII comes to pass, letco has to be given notice of the particular breach or non-observance complained of and allowed a period of three months in which to put it right or to compensate the Government. Even then letco is given the option of arbitration if it does not agree with the alleged breach or remedy.

[84]. This contractual mechanism is confirmed in the Investment Incentive Code of the Republic of Liberia, both in its original edition of 15 April 1966 and in the revised text of 6 March 1973.

[85]. On the one hand, Section 10 (subsequently Section 12) grants the Sponsor a period of 90 days in which to remedy the breach which would entitle the Government to cancel the Investment Incentive Contract.

[86]. At the same time, Section 11 (subsequently Section 13) confirms the binding nature of the arbitral agreement as well as of the arbitral award handed down pursuant to such agreement.

[87]. By its failure to follow the procedure laid down in the Concession Agreement, as well as by its subsequent actions, the Government of Liberia has acted in plain breach of the terms of the Concession Agreement. Its breach of the Agreement entitles letco to the recovery of damages.

V. DETERMINATION OF DAMAGES

1) *Scope of Damages*

[88]. Having determined letco's right to damages, it is now necessary to determine the nature of these damages and the extent to which they must be compensated. It is necessary to determine whether letco is entitled to receive compensation for both the amounts invested in the forestry concession and subsequently lost due to the confiscation and those profits lost that letco would have obtained had the Concession Agreement not been revoked.

[89]. In its request for arbitration, letco requested the Arbitral Tribunal to

award the claimant damages which it has incurred or will incur because of:

(a) loss of investments made pursuant to the Agreement for infrastructure, developments, machinery, equipment, vehicles, fixtures, furniture, office equipment, etc.;

(b) operating losses incurred subsequent to 18 November 1980;

(c) costs and expenses, including employees' termination payments, with respect to letco's closing of its forestry operations;

(d) costs and expenses with respect to letco's loan from the Liberian Bank for Development and Investment;

(e) land and rental taxes unduly imposed by the Government on the expropriated portions of letco's concession;

(f) costs and expenses with respect to letco's numerous attempts to reach an amicable solution of the dispute;

(g) claims brought against LETCO by other companies for letco's failure to deliver wood under various purchase contracts;

(h) lost profits under the Agreement and under letco's two previous concession agreements;

(i) expenses and lost profits resulting from damages to letco's commercial reputation;

(j) the costs of this arbitration including payments to the ICSID for administrative costs and arbitrators' fees, attorneys' fees, the costs of letco's personnel and shareholders to prosecute this claim and miscellaneous out-of-pocket disbursements along with such interest, costs and other relief as LETCO may subsequently request or the Arbitral tribunal may deem appropriate;

the total of the above amounts being not less than US 15 million dollars.

[90]. From the above list of requested damages, it is clear that LETCO has requested both compensation for its lost investments as well as compensation for future profits that it has foregone as a result of

the Government expropriation.

- [91]. As a first step in the determination of compensable damages, the Tribunal has consulted the Concession Agreement itself. In Article VII.5., under the title "Penalty for Breach of Agreement", the Concession Agreement indicates the following:

Unless otherwise specifically provided and notwithstanding the Government's right of revocation under section 4 of this Article, the penalty for any breach of this Agreement shall be damages which shall be fixed by agreement or, if agreement cannot be reached, then damages or specific performance as fixed by the Arbitral tribunal.

- [92]. As the parties have clearly been unable to reach an agreement concerning a determination of damages, it is necessary, pursuant to the powers granted to this Tribunal by the parties and the clear mandate of Article VII.5. of the Concession Agreement, that this Tribunal determine compensable damages. As a first step in its analysis, this Tribunal must necessarily exclude the possibility of granting specific performance. In its request for arbitration letco states:

letco does not request injunctive relief because such relief would be wholly inadequate. For example, an order of specific performance requiring the defendant to return the land would be meaningless since the land has since been significantly exploited by three other timber companies. Likewise the grant of another concession would also be unsatisfactory since there is no comparable forest land in Liberia and letco would in any event be required to expend vast additional sums for mapping and constructing new roads, airstrips, housing, sawmills, etc... letco is, thus, constrained to seek reparation solely in the form of money damages.

- [93]. This Tribunal is entirely in agreement with this statement, letco's activities in Liberia were terminated over two years ago. Start-up expenses would be prohibitive and would repeat those already carried out in the initial investment. It is also questionable, given the circumstances, whether letco and the Liberian Government would be able to cooperate to successfully recommence the concession. Furthermore, given Liberia's failure to participate in this arbitration, one must doubt whether an injunction by this Tribunal would be respected by the Government authorities. Therefore, the Tribunal concludes that only reparation in the form of money damages will be adequate in this case.

- [94]. The decisions of previous arbitral tribunals determining cases similar to the present one have overwhelmingly favoured the award of lost investment costs. In the liamco arbitration the tribunal stated:

De même, il n'y a pas de difficulté à ce que l'indemnité comprenne au minimum le "*damnum emergens*", c'est-à-dire la valeur des biens corporels nationalisés, y compris la totalité de l'actif des installations et des divers frais inconnus.

- [95]. That tribunal went on to award damages for lost future profits in the form of "*indemnisation équitable de la perte des droits de concession*". In the liamco case the tribunal also cited numerous arbitral awards which granted similarly broadly defined damages. Among the cited arbitrations

were:

— *Sapphire International Petroleum* arbitration (15 March 1963) ;

— *Lena Goldfields* arbitration (1930) ;

— *The Greek Telephone Company* arbitration (3 January 1935);

— *Robert May v. Guatemala* arbitration (16 November 1900); and

— *Percy Shufeldt v. Guatemala* arbitration (24 July 1930).

[96]. Although the decisions of previous arbitral tribunals in the determination and definition of damages serve as a useful guide to this Tribunal, these cases, in and of themselves, are inadequate. The Tribunal, once again, returns to the law of the Republic of Liberia as the law applicable in this case and therefore determinative of the nature of damages to be awarded.

[97]. Again, Article II of Title 16, Chapter 3, Section 4d, of the LCL, under the rubric "measure of damages", states:

The object of a civil action for injuries is to indemnify the injured person, not to punish the injurers: therefore, it follows that the measure of damages is the actual amount of the loss or inconvenience sustained by the injured person without any reference to the degree of misconduct of which the injurers may have been guilty.

[98]. The first conclusion that the Tribunal reaches after reading the above quoted section is that punitive damages, as a general rule, are not allowable in civil actions. In the paragraph that follows the above quoted section, the lcl indicates that punitive damages will only be permitted in civil actions when the actions of the liable party are of a "peculiar nature and partake of a criminal character". The same paragraph goes on to state that, only in such cases, may a judge "take into account the misconduct of the defendant and in its discretion increase the damages beyond the amount needed to recompense the injured person in order to penalize the injurers". Not finding these required elements in this case, the Tribunal denies LETCO the award of punitive damages.

[99]. Having determined that Liberian law precludes the award of punitive damages in this particular case, it is necessary to determine whether such law would permit compensation for damages in the event of lost investments as well a profits foregone. Generally the common law systems do permit the recovery of lost profits. In the Restatement of Contracts, Section 329, it is stated that damages shall include "losses caused and gains prevented by the defendant's breach, in excess of savings made possible". The Liberian courts themselves have confirmed the award of both actual losses and foregone profits. (See, for example. *Insurance Company of Africa v. Fantastic Store*, 22 November 1984; *American Life Insurance Company v. Emanuel Sandy*, 22 November 1984; *Levin v. Juvico Supermarket* (244 LLR 187 (1975).)

[100]. This Tribunal therefore determines that both according to international law and, more importantly, Liberian law, letco is entitled to compensation for damages for both its lost investments and its foregone future profits.

2) *Quantification of Damages.*

[101]. It is now necessary to determine the value of letco's lost investment as well as its loss of future profits. Although a determination of lost investment is a relatively simple operation, the determination of the loss of future profits is more complicated. Given the fact that future profits will necessarily depend on future events which cannot be determined at present, such determination is necessarily somewhat inexact. Nonetheless, since such a determination is required, it is sufficient for the Tribunal to use reasonable and consistent criteria in determining future profits. These criteria assume that the Concession Agreement would have been carried out in a normal manner and in a manner which reflects its past administration by letco. This Tribunal has required letco to provide all reasonably obtainable evidence indicating both its lost investments and projected future profits. In addition, this Tribunal has resorted both to the testimony of witnesses and to the reports of experts.

[102]. The amount of damages requested by letco is summarized below:

US dollars

a) Loss of future profits which would have been earned had the concession agreement not been revoked 12,000,000

b) Reimbursement of costs and expenses incurred as a result of the revocation 5,944,479

letco's total claim for damages 17,944,479

[103]. In its determination of damages the Tribunal has relied, in part, on the expert report of Peat Marwick. Nonetheless, it has made certain modifications in accordance with the circumstances of this case. The Tribunal divides its analysis of damages into two categories:

A) those profits which would have been obtained by LETCO had the Liberian Government not revoked the Concession Agreement and

B) those costs and expenses incurred by letco as a result of the revocation.

A) *Lost Profits*

[104]. The Tribunal has based its determination of lost profits on the following findings:

[105]. 1) The determination of damages assumes that the Concession Agreement would have lasted for a total of 35 years; 20 years which correspond to the initial period (from 1972 to 1992) and a second period, available at letco's option, of 15 years (from 1992 to 2007). As a result, the calculation of lost profits corresponds to a period beginning with the initial revocation to the end of the optional renewal (from 1980 to 2007).

[106]. It should be stressed that the renewal of 15 years was at letco's option and according to the following terms contained in Article 1.6.(2.):

If the CONCESSIONAIRE, not more than two years and not less than three months before the expiration date of this Agreement, applies in writing to the Secretary of Agriculture for a renewal of the Concession, the subject of this Agreement, and if it shall have paid all taxes, fees and rents to and shall have satisfactorily performed its obligations under this Agreement up to the date of such application, it shall be entitled to renewal of this Agreement for a further period of fifteen (15) years on the same terms and conditions as set out in this Agreement except those provisions relating to (a) the size and scope of the Concession Area; (b) taxes, royalties, fees, duties and rents; (c) this right of renewal.

Given letco's past compliance with the terms of the Concession Agreement, the Tribunal believes that the Concession Agreement would in fact have been renewed had letco so desired. Nonetheless, as the above Article indicates, the Concession Agreement may not have been renewed on such favourable terms, and this Tribunal has taken this into account when determining lost future profits.

[107]. 2) The Tribunal has also found that letco would have been able to complete a second cut of timber on the concession area. The Tribunal has reached this decision based on letco's prior activities and believes that the allegations made by the Liberian Government in its letter of 18 November 1980, and which referred to irregularities in letco's exploitation of the concession area, were only put forward as a justification for its expropriation and have not been substantiated.

[108]. 3) The Tribunal has determined that damages for lost future profits will not include the P. Bork Area, despite the request of letco. The concession of the P. Bork Area was made to letco in 1968, prior to the signing of the Concession Agreement which is the object of the present dispute, letco has provided inadequate proof to show that the P. Bork Area is in any way included in the 1970 Concession Agreement, whether by reference contained in the same or by a subsequent agreement of the parties. As this Tribunal's jurisdiction is limited to those disputes derived from the 1970 Concession Agreement, it therefore has no power to consider the P. Bork Area.

[109]. 4) The Tribunal found, in its Interim Award on Jurisdiction, that its jurisdiction did not extend to llic. Nonetheless, this Tribunal will include, as damages, those amounts related to the investment made by letco in its subsidiary llic. This results from the fact that letco created and capitalized llic pursuant to the requirements of the 1970 Concession Agreement. Whether these requirements were carried out directly by letco or by means of the creation of a separate subsidiary is irrelevant.

[110]. 5) The Tribunal has adjusted the figures obtained by Peat Marwick concerning letco's loss due to the losses of its subsidiary llic. The Tribunal believes that letco would have liquidated llic prior to letting it incur the extensive losses found by Peat Marwick.

[111]. 6) The economic damages suffered by letco have been calculated based on the assumption that the Concession Agreement would not have been revoked by Liberia in November 1980. These damages are composed of the following:

— the estimated value of the net worth of letco and llic at the date operations were terminated in Liberia; and

— future profits that would normally be expected from the forestry exploitation by letco and from the sawmill of llic during the period of the concession.

[112]. The amounts indicated have been corrected to reflect their 1985 value by means of a determination of the present value for figures prior to 1985 and a financial discount of those figures estimated for the future period.

[113]. 7) In its determination of expected future profits the Tribunal has applied the following criteria which it considers most appropriate in the circumstances:

— For the first cut of the entire concession, letco would have continued its exploitation of the forest area at the same speed and with the same mixture of trees that it had in previous years. It would have produced 45,000 cubic meters annually of unfinished wood. Taking into account that part of the unprocessed trunk and the waste produced in the sawing process, it would have produced 24,000 cubic meters of wood for export sale and 3,600 cubic meters of sawn timber, of which 2,880 cubic meters (80%) would have been destined for export and 720 cubic meters (20%) would have been destined for internal sale in Liberia.

— During the second cut, which would have begun in 1995, LETCO would have accelerated the speed of exploitation in order to complete the second cut by the year 2007. In this way letco would have produced 92,795 cubic meters of wood for direct export, although it is estimated that sawn timber would have been produced in the same quantities as during the first cut since additional production would not have been economically viable.

— The Tribunal has extrapolated from historical price figures an estimate for future prices for each type of tree, assuming that such prices would have evolved similarly to those prices that existed from 1973 to 1985. It is estimated that the prices for local sales would have fluctuated in accordance with the inflation rate, such rate being 8.7% annually based on the years from 1970 to 1983.

— Once the gross revenues for letco and Liberia from the years 1981 to 1986 had been determined, the Tribunal considered it appropriate to determine future profits for letco and llic as the arithmetic mean of the results obtained by applying the two following formulas:

a) A detailed extrapolation of costs and expenses, based on historical figures, that would have been incurred up until the time of the expiration of the Concession Agreement. By subtracting these extrapolated costs and expenses from the gross revenues, obtained as indicated above, the net results for each year can be obtained for the two companies.

b) Application of a constant percentage reflecting profits and which is applied to total sales. This percentage is based on the historical results of the two companies from 1977 until the termination of activities in 1983, as well as an estimation of probable results until 1985 if the expropriation had not taken place. In this calculation, the results for 1980 have been excluded since they were not considered representative given the special social and political circumstances occurring in that

year in Liberia. In addition, the results of 1981 to 1983 have been corrected in order to eliminate the effect of the expropriation of 1980.

— The principal assumptions used by the Tribunal in order to adjust the costs and expenses that would have occurred in the years 1980 to 1983 had the expropriation not taken place, and which are used to estimate future expenses during the first cut, are the following:

a) Fixed assets would have depreciated on a straight line basis throughout their useful life. The replacement cost for substituted assets would have increased in accordance with historical inflation.

b) The estimation of other fixed costs has been based on an estimation of the probable costs for the year 1983 corrected in future years by the estimated inflationary effect.

c) letco's reforestation costs have been estimated based on criteria similar to those used in determining fixed costs.

d) The remaining variable costs and expenses during the first cut are based on a percentage of revenues extrapolated from the historical experience of letco for the years 1977 to 1981 and of llic from 1979 to 1981.

— During the second cut, which would have begun in the year 1995, the Tribunal has used the following additional assumptions in determining costs and expenses on an annual basis:

a) letco is considered to have had sufficient fixed productive and structural capacity to duplicate its production in the second cut. Consequently it is thought that if letco wanted to accomplish more than two cuts, it would have had to make additional investments in fixed assets with a resultant increase in fixed costs; said increase in fixed costs being proportional to the gains from such additional cutting.

b) The stumpage tax on cut trees would have been reduced significantly since the price of the wood produced during the second cut would have been less than that of the first cut.

c) The remaining variable costs and expenses would have increased proportionally to the increase in cubic meters cut, although in the case of letco such costs and expenses would have only represented 70% of the costs that would have been incurred for the same cubic meters during the first cut.

d) The Tribunal has noted that the installations utilized during the concession were to become the property of the Government of Liberia at the conclusion of the Agreement, thus negating letco's right to indemnity. Therefore, the value which such installations would have had at the termination of the Agreement, once corrected to reflect the 1985 value, has been deducted in the determination of damages.

[114]. Based on the above-described criteria, the Tribunal has determined that the damages to be awarded to LETCO for lost profits is equal to an amount of US \$8,095,904. - in accordance with the following breakdown:

US dollars at present value

Joint net patrimonial worth of letco and llic until the termination of activities in 1983 1,975,715

Joint estimated results during the initial period of the concession (1983-1992):

— Detailed estimate of earnings and costs 1,736,607

— Constant percentage of earnings 2,282,153

Mean amount 2,009,380

Joint estimated results during the renewal period of the concession (1992 - 2007):

— Detailed estimate of earnings and costs 3,242,830

— Constant percentage of earnings 4,978,789

Mean amount 4,110,809

Total estimate of lost profits 8,095,904

B) Costs and Expenses to be Awarded to LETCO as a Result of the Expropriation

[115]. The following is a breakdown of the criteria used by the Tribunal in determining the costs and expenses to be awarded to letco as a result of the expropriation:

[116]. 1) As a result of the calculations employed in part A) above in order to determine lost profits, the following amounts have already been taken into account and therefore must be excluded from the following calculations:

US dollars

— Investment in infrastructure, machinery and equipment 1,870,000.00

— Investment of letco and llic 1,594,972.00

— Taxes for rental of land from 1973 to 1980. including interest 313,200.00

— Advance payments made to Sciages et Grumes for future purchases of trunks 265,201.00

— Payment made by Sciages et Grumes to letco for a bank deficit 270,547.21

— Commissions charged on the bank deficit (FF 21,248) 2,623.00

[117]. 2) The Tribunal awards as damages the additional financial cost incurred by letco with the Liberian Bank for Development and Investment as a result of letco's late payment of the loan in question. Nonetheless, the principal amount of such loan must be excluded from the present determination of damages since it has already been included in part A) above.

[118]. 3) Because of a lack of adequate proof, the Tribunal does not award letco damages for loss of commercial reputation.

[119]. 4) The Tribunal awards letco the costs incurred for carrying out this arbitration (Article 27 of the Arbitration Rules) as well as those costs incurred for legal representation by LETCO (Article 47 of the Arbitration Rules). This decision is based largely on Liberia's procedural bad faith. Not only did Liberia fail to partake in these arbitral proceedings, contrary to its contractual agreement, but it has also undertaken judicial proceedings in Liberia in order to nullify the results of this arbitration. The foregoing decision of the Tribunal is made pursuant to Article 61(2) of the icsid Convention and based on the criteria described in the preceding paragraphs of this part B).

[120]. These damages amount to US \$654,382, - according to the following breakdown:

	<i>US dollars</i>	
	<i>Historical value</i>	<i>Present value</i>
— Legal expenses incurred by letco: 1980	10,000	15,923
1981	83,853	121,657
1982 of Mr Toye Barnard (1985)	73,706	97,435
	15,000	15,000
— Professional fees charged by the law firm of Samuel Pisar:		
June/83 to Sept/85	103,888	114,017
September to Dec/85	30,000	30,000
Partial sum	316,447	394,032
— Visits made by Mssrs. de Maestre and de Champfleury to Liberia in 1983 and related expenses	30,000	36,135
— Expenses related to the termination of Mr de Marti's labour contract	9,397	11,319
— Travel expenses incurred by Mr de Marti in 1984 and 1985	8,923	9,348
— Payments made to icsid	100,000	100,000

— Additional expenses incurred as a result of the late repayment of loan number 317/1422 of the Liberian Bank for Development and Investment (Monrovia): Penalty interest 52,882 52.882

Supplementary interest as a result of failure to meet payments 46,000 46,000

Additional expenses for inscription and proof 4,666 4,666

TOTAL OF REIMBURSEABLE EXPENSES 568,315 654,382

C) *Interest*

[121]. The total amount of damages awarded to letco and which must be paid by the Government of Liberia is US \$8,750,286 (eight million seven HUNDRED AND FIFTY THOUSAND TWO HUNDRED AND EIGHTY-SIX US DOLLARS) on the date of this decision. Thereafter, and until the moment of payment, the unpaid amounts shall accrue interest at the annual rate of libor at three months.

FOR THESE REASONS

[122]. the Tribunal unanimously declares that:

- 1) It has jurisdiction to determine the dispute which has arisen as a result of the Concession Agreement signed between letco and the Republic of Liberia on 12 May 1970.
- 2) That contract, which was validly entered into and binding, was improperly revoked by the Government of the Republic of Liberia before the date fixed for its expiration.
- 3) The above constitutes a breach of the Concession Agreement and therefore entitles letco to the corresponding award of damages to be paid by Liberia.
- 4) The Government of Liberia is hereby ordered to pay letco US \$8,095,904 (EIGHT MILLION NINETY-FIVE THOUSAND NINE HUNDRED AND four us dollars) as damages for lost profits as a result of the expropriation; and US \$654,382 (six hundred and fifty-four THOUSAND THREE HUNDRED AND EIGHT-TWO US DOLLARS) as COSTS incurred as a result of the same expropriation.
- 5) The amounts mentioned immediately above shall accrue interest at the annual rate of libor at three months starting with the date of this Award.