CL-55

ICSID (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES)

ICSID Case No. ARB/84/4

MARITIME INTERNATIONAL NOMINEES ESTABLISHMENT V. REPUBLIC OF GUINEA

AWARD

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06 January 1988

Tribunal:
David K. Sharpe (Appointed by the State)
Donald E. Zubrod (President)
Jack Berg (Appointed by the investor)

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Table of Contents

Award 1
1. THE ARBITRATION 1
2. THE BUSINESS VENTURE AND THE CONVENTION 1
3. TRYING TO MAKE SOTRAMAR FUNCTION 3
4. SOTRAMAR BREAKS DOWN 5
5. DISPUTE RESOLUTION PROCEEDINGS 6
(a) Proceedings under the Convention. 6
(b) The ICSID Arbitration Clause. 6
(c) Proceedings in United States Courts. 7
(d) Proceedings in ICSID. 7
6. MINE ATTACHES GUINEA'S EUROPEAN ASSETS 8
7. THE PARTIES' ASSERTIONS OF NON-PERFORMANCE 9
(a) MINE's Assertions. 9
(b) Guinea's Assertions. 10
8. THE TRIBUNAL'S FINDINGS ON LIABILITY 11
9. MINE'S DAMAGES 13
10. GUINEA'S COUNTERCLAIM 16
(a) MINE's Resort to AAA Arbitration. 16
(b) MINE's Attachment of Guinea's Property. 17
11. AWARD RECONCILIATION 18

Award

1. The Arbitration

[1]. This arbitration arises out of a dispute between the parties to a contract, Maritime International Nominees Establishment ("MINE") and The Republic of Guinea ("Guinea"). The contract is the "Convention" that the parties entered into on August 19, 1971, at Conakry, Guinea, as amended by the first codicil, executed October 11, 1971, at Geneva, Switzerland, and the second codicil, executed August 29, 1972, at Conakry, Republic of Guinea. Because the Convention was never performed, the parties have a dispute over which party prevented performance of the Convention. The arbitration has been conducted by the Tribunal, which was constituted by authority of the International Centre for Settlement of Investment Disputes ("ICSID").

2. The Business Venture and the Convention

[2]. In the beginning there was a huge deposit of red earth, bauxite, perhaps a quarter of the world's reserves of aluminium ore, located in the Boké district of the Republic of Guinea, about 85 miles northeast of the coastal village of Kamsar. During the mid-nineteenth century France had occupied this West African territory and called it French Guinea. When the French left Guinea in 1958, the Republic of Guinea was formed; it was independent, French-speaking, Marxist, unstable and desperately poor. Aluminium was then a high-value commodity; the Boké bauxite was perceived by the World Bank as an asset with which to help build the infrastructure for a modem Guinea. Someday the bauxite would be refined into aluminium metal at Boké, but that would require immense investments in electric power generating facilities. For the time being, the bauxite could be mined, processed, transported by rail to Kamsar. and shipped in bulk cargo vessels to refiners in the United States, Canada, and Western Europe.

[3]. Guinea owned the bauxite. Guinea needed capital on a grand scale, and the socialist Republic of Guinea was willing to enter into a "mixed-economy" company with foreign private investors. On October 1, 1963, Guinea and the Harvey Aluminium Co. of Delaware signed an agreement (the "Harvey Agreement") that provided for the mining and land transportation of bauxite from the Boké deposit. A World Bank loan of $64.5 million was to finance the costs in foreign currencies of constructing the railway, seaport facilities, and new towns at Sangaredi (the mine) and Kamsar (the port). The United States lent about $21 million for costs in local currency.

[4]. The bauxite exploitation was to be conducted by Compagnie de Bauxites de Guinée ("CBG"), a new company to be owned 49% by Guinea and 51% by Harvey. Harvey later sold its interest to Halco (Mining) Inc. ("Halco"), whose owners were some of the western world's major refiners of bauxite and alumina into aluminium (the "Bauxite Receivers"); Alcan Aluminium Ltd., Aluminium Company of America, Harvey Aluminium (Inc.), Compagnie Péchiney, Ugine Kuhlmann, Vereinigte Aluminium-Werks A.G., and Montecatini Edison S.p.A. [1] The first mining permit was to be valid for

75 years; the Bauxite Receivers agreed to purchase CBG bauxite for 20 years. How the bauxite was to get from Kamsar to the Bauxite Receivers' refineries overseas remained to be established.

[5]. While the Bauxite Receivers were quite capable of making all of their own transportation arrangements, only 50% of the CBG bauxite was theirs to transport. Art. 9 of the Harvey Agreement allocated to Guinea the right to have 50% of the cgb bauxite carried by ships flying the Guinean flag, or by other "assimilated vessels," or by ships chartered by Guinea itself in the international charter market, as long as the freight rates for Guinea's share were at or below rates obtainable in the international market for chartering vessels (the "Art. 9 freight").[2] From this freight, Guinea intended to pay for creating its own merchant marine: vessels, officers, seamen, management and infrastructure.

[6]. Early in 1971 the Inter-Maritime Group of Geneva, Switzerland, which included maritime banking interests led by Mr Bruce Rappaport, approached Guinea. The group wanted to negotiate on behalf of a corporation to be formed (MINE) for the purpose of implementing Guinea's right to the Art. 9 freight. On August 19, 1971. the Inter-Maritime Bank (the "Bank", agent for MINE) and Guinea entered into the Convention, which established for 30 years a mixed-economy company called La Société Guinéenne de Transports Maritimes ("SOTRAMAR"). The Convention was ratified by the National Assembly of Guinea on December 24, 1971, and promulgated by the President on the same day.

[7]. Under Art. 3 of the Convention, SOTRAMAR was capitalized at US$ 20 per share, 49,000 shares for Guinea (called the "A Shareholders") and 51,000 shares for MINE (the "B Shareholders"), MINE was to deposit $1,020,000 to SOTRAMAR's credit in the Bank. Guinea was to contribute two small vessels which it then owned, half of the Art. 9 freight (the other half it conceded directly to MINE in Art. 8), and stable tax and customs rules and "the guarantee of an untroubled development".[3] MINE and Guinea were to have equal voting rights at shareholder meetings. The presidents and some of the principle officers were to be Guinean.

[8]. Global Bulk Transport. Inc., of Stamford. Connecticut ("Global"), an experienced bulk carrier fleet

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[1] Martin Marietta Aluminium, Inc., later acquired Harvey Aluminium Co. and its interest in Halco, and other interests in Halco have also changed hands.

[2] Guinea's Ex. 144 presents the text in French: "... La Gouvernement se reserve, dans la mesure ou cela n'aura pas d'effets défavorables sur la vente de la bauxite, le droit de faire charger le tonnage exporté, dans une propostion maxima de 50%, par des navires battant pavillion guinéeen ou assimilé, ou encore par des navires affrétés par lui sur le marché international des frets, le tout á la condition expresse que les prix pratiqués soient inférieurs ou égaux á ceux qui seraient constatés sur le marché international des frets dan des conditions identiques pour la période considérée pour le fret et les relations maritimes en cause."Le Gouvernement et Harvey se déclarent, ici-méme, d'accord pour examiner ensemble la possibilité de créer une autre société comprenant des intérêts Américains et des intérêts Guinéens, spécialisée dans les transports routiers, ferroviaires. maritimes ou autres." The translations vary, MINE's Ex. A. at 23-24 reads as follows: "... The Government reserves for itself the right, insofar as this will not have unfavorable effects on the selling of bauxite, to have 50% of the burden to be exported loaded on ships flying the Guinean flag, other assimilated vessels, or ships chartered by the Government itself from the international charter market, and this, at the express condition that the prices in force in these instances be lower or equal to those which would be ascertained on the international charter market under conditions of chartering and international maritime relations similar to those prevailing in the period under consideration."The Government and Harvey here express their agreement to examine together the possibility of creating another society that will include American and Guinean interests which would be specialized in transportation by road, railway, sea, or other means."

[3] Codicil 2, adopted by Guinea and MINE on August 29, 1972, withdrew Guinea's contribution of cargo-carrying rights and the two ships.

operator, joined MINE to plan the shipping aspects of the SOTRAMAR venture.

[9]. Guinea's Boké bauxite was of high quality, and the Bauxite Receivers in North America and Europe wanted to be in at the beginning of the CBG operation in order to maintain their access in the future. The Convention let the Bauxite Receivers make their own ocean transportation arrangements for half of the CBG bauxite, and the rate for Guinea's Art. 9 freight must be competitive with world shipping rates, SOTRAMAR evidently anticipated unusually high profits; where would they come from?

[10]. The answer was that ships on two different types of round voyages would call at Kamsar for bauxite: one round voyage would produce ordinarily competitive freight rates, but the other round voyage was extra-profitable.

[11]. SOTRAMAR's competitive round voyage was the two-legged bauxite trip from Kamsar to the European Bauxite Receivers and back: the Kamsar-to-Europe leg earned revenue, but there were no dry bulk cargoes to haul from Europe back to Kamsar. and hence the back-haul was empty.

[12]. However, both Guinea and MINE saw the prospect of added profit by incorporating the North America-to-Europe grain trade as the third leg of a triangular voyage. Grain is also a dry bulk cargo; it is even profitable to carry grain from North America to Europe with the backhaul to North America empty. If the empty ships in European ports could be sent from Europe to Kamsar and filled with bauxite for North American ports, bauxite would be the backhaul cargo in a triangular voyage where two of the three legs earned revenue, SOTRAMAR vessels in the grain trade thus would earn an extra profit that would be split between Guinea and MINE. In addition, MINE, having half of Guinea's Art. 9 freight rights, could engage in the triangular trade on its own account.

3. Trying to Make SOTRAMAR Function

[13]. When the Convention to establish SOTRAMAR was entered into on August 19, 1971, the worldwide ocean transportation market was stable, with freight rates then considered to be low. Prices of new and used vessels were depressed. Bulk carriers having deadweight capacity from 35,000 to 40,000 tons, the most suitable size for the intended trade, could then be had on ten-year charter parties at $1.85 to $2.75 per deadweight ton per month.

[14].

MINE's initial calculations called for SOTRAMAR to purchase or enter into longterm charter parties for four such vessels in order to commence bauxite shipping operations, adding more vessels as required, MINE recommended acting upon these calculations while the market for ships remained at those levels, but the recommendation was not acted upon by Guinea.

[15].

In May 1972 Global and MINE submitted to Guinea a comprehensive technical study of the SOTRAMAR venture, referred to as the"Red Book." proposing a program of income from freights paid by the Bauxite Receivers and ship financing expenditures that would amortize the cost of a

SOTRAMAR fleet of Guinean-flag ships in eight to ten years. The Red Book also dealt with the composition of the SOTRAMAR board of directors, the establishment of offices in Conakry and Kamsar. the engagement and training of staff, budgeting arrangements, and the education and training of seagoing personnel. Again. Guinea took no action. In August 1972 MINE met with Guinea's representatives in Conakry to reconsider the SOTRAMAR position. Article 8 of the Convention gave MINE itself the right to half of Guinea's Art. 9 freight rights at 25 cents per ton. Perhaps Guinea thought that MINE would absorb the agency and management expenses of the entire SOTRAMAR operation out of MINE's net profits on its own carriage plus its share of SOTRAMAR's net profits. This thought may or may not have been plausible, and Guinea may or may not have held it. In any case, the Convention did not say clearly that SOTRAMAR would pay agency and management expenses before Guinea and MINE divided SOTRAMAR's net profits, and the uncertainty-exacerbated relations between the parties when MINE spelled out the fees. Guinea subsequently called for cancellation of MINE's right to half of Guinea's Art. 9 freight rights, and MINE agreed to the demand in Codicil 2 to the Convention, which was signed August 29, 1972.

[16]. At the November 1972 meeting in Zurich, MINE again offered proposals for the acquisition of vessels on the basis of hire-purchase agreements and long-term chartering, and it sought authority to implement those proposals. At this meeting, Guinea submitted that it no longer had as a basic objective of SOTRAMAR the establishment of a Guinean fleet through long-term contracts of affreightment: it now favored immediate profitability through short-term contracts of affreightment, and it asked MINE to negotiate them. The SOTRAMAR Shipping Committee was established to continue discussions which MINE had initiated with the Bauxite Receivers in September 1972.

[17]. In March 1973 MINE, on behalf of the Shipping Committee, sent to the Bauxite Receivers a standard contract of affreightment which would establish the basis for firm freight rate quotations, and it held meetings with the Bauxite Receivers to discuss contract of affreightment details and shipping requirements; but by this time both freight rates and the costs of vessel acquisition were rising. A new vessel that could have been purchased for $4 million in early 1972 now would cost £6.5 million. Basic freight rates had almost doubled, though the effect on backhaul commodities, such as bauxite, was less severe. The Bauxite Receivers rejected the proposed contracts of affreightment for a variety of reasons.

[18]. In June 1973 MINE met with Guinea's representatives in Conakry to report on its activities, MINE pointed out that because of Guinea's delay in authorizing SOTRAMAR to conclude time chatters and contracts of affreightment, freight rates were much higher than those proposed during March 1973. Guinea proposed for mid-July an "arbitration" meeting with the Bauxite Receivers at which Guinea itself would attempt to secure the Bauxite Receivers' agreement to freight rates.

[19]. The meeting was held in Conakry on July 17, 18. and 19, 1973. The Bauxite Receivers accepted freight rates which according to MINE would—at the time— have permitted SOTRAMAR to earn a profit at existing charter hire rates. However, according to MINE, it still was not given authority to conclude contracts of affreightment with the Bauxite Receivers on behalf of SOTRAMAR. The freight and charter markets continued to move upward.

[20].

On September 5, 1973, MINE wrote to Guinea, pointing out that the object of enlarging SOTRAMAR's Shipping Committee to contain two Guinean members had been to permit the simultaneous execution of SOTRAMAR contracts of affreightment with the Bauxite Receivers, and time charter parties with shipowners, MINE's letter complained that the alleged failure of Guinea to send its members to the Shipping Committee was frustrating the purpose of SOTRAMAR. MINE asked that the Shipping Committee be expanded, and that the Shipping Committee be given authority to conclude contracts of affreightment and charter parties, MINE called for a meeting to be held in Washington D.C., on September 9, 1973, in an attempt to resolve the authority problem.

[21]. At the Washington meeting, MINE contended that because Guinea had failed to give contracting authority to SOTRAMAR in a timely fashion, SOTRAMAR could not proceed on the basis of the July "arbitrated" rates. In a letter written to Guinea on September 11, 1973. MINE reiterated SOTRAMAR's need for authority to execute contracts, and it stressed its view that continued failure by Guinea to provide such authority was at variance with the spirit and letter of the Convention.

[22]. The Bauxite Receivers began shipping CBG bauxite from Kamsar in October 1973 under their own transportation arrangements, SOTRAMAR was not functioning; Guinea's Art. 9 freight was not being earned.

4. SOTRAMAR Breaks Down

[23]. During February 1974 MINE became aware that Guinea had entered into, or was about to enter into, an agreement with a third party to use the Art. 9 freight rights, and MINE notified Guinea that disputes existed under the Convention.

[24]. At the "conciliation meeting" in Conakry April 12, 1974, MINE asked representatives of Guinea if there was substance to the rumors that Guinea was attempting to sell its Art. 9 transportation project to a third party. Guinea's response was noncommittal.

[25]. In fact, on March 16, 1974, Guinea and Afrobulk Ltd., a consortium of Danish and Spanish shipping companies ("AFROBULK"), had executed an agreement under which AFROBULK was to pay Guinea 50 cents per ton for the Art. 9 freight rights. On July 4, 1974, in Zurich, Guinea's Minister of Mines and Geology acknowledged to MINE that Guinea had contracted with AFROBULK for the Art. 9 freight rights. Guinea represented that this was a temporary arrangement, until SOTRAMAR started up. In Conakry in August 1974, Guinea presented to MINE a copy of the AFROBULK agreement, MINE deemed the AFROBULK agreement to be a unilateral substitution of the rights granted to SOTRAMAR, not a temporary measure as Guinea had alleged in Zurich.

[26].

MINE appealed to Guinea to recognize its previous legal obligations and agreements. Between August 11 and October 16, 1974, various telexes and cablegrams were exchanged between MINE and Guinea, MINE maintained that it was willing to go forward under the Convention notwithstanding the alleged breaches by Guinea, provided the AFROBULK agreement was

terminated, but Guinea did not respond affirmatively, SOTRAMAR was past resuscitation at this point, and AFROBULK began to use Guinea's Art. 9 freight rights in 1975. [4]

5. Dispute Resolution Proceedings

(a) *Proceedings under the Convention.*

[27]. On March 11, 1974, MINE notified the Guinean Minister of Economics and Finance in Conakry of the existence of the following disputes:

> (1) Representatives of SOTRAMAR's "A Shareholders" (Guinea) had refused to take actions necessary to the functioning of SOTRAMAR as a viable company.
>
> (2) Information reaching SOTRAMAR's "B Shareholders" (MINE) indicated that Guinea had unilaterally communicated with the Bauxite Receivers with respect to the An. 9 freight rights, which had been reserved to SOTRAMAR by the Convention. Further, Guinea had unilaterally negotiated with third parties for the use of its Art. 9 rights, in derogation of SOTRAMAR's rights and Guinea's obligations under the Convention.

[28]. MINE requested "conciliation", the first dispute-resolving step provided in Art. 18 of the Convention. At the conciliation meeting held April 12, 1974, in Conakry, Guinea reaffirmed its willingness to perform under the Convention, even though Guinea had entered into the AFROBULK agreement a month earlier. However, the parties made no progress toward putting SOTRAMAR into operation, and meetings between MINE and Guinea on July 4, 1974 (Zurich) and August 20-22, 1974 (Conakry) dealt with dispute resolution, not with performance of the Convention.

(b) *The ICSID Arbitration Clause.*

[29]. Article 18 of the Convention provided that if conciliation failed, the dispute was to be settled through arbitration in which the tribunal was to be chosen by the President of ICSID. Arbitration by ICSID provides a forum in which governments like Guinea waive their immunity to suit for alleged breach of contract with private investors. The trouble with Art. 18 was that ICSID did not and does not accept disputes for arbitration where the arbitrators are to be named in the manner

[4] The AFROBULK arrangement lasted about two years. It was followed by a hiatus, during which Halco exercised Guinea's An. 9 freight rights, and CBG paid Guinea a freight commission during the hiatus.In 1978 Guinea contracted with the Klaveness group of Oslo, Norway, establishing a new Guinean company, guino.mar. to exercise the Art. 9 rights. The company was restructured ("gulnomar II") in February 1980. GUINOMar's contracting parties were Guinea and the West African Bulk Shipping Co. ("wabs"). a Liberian company jointly owned by Klaveness and Navios, a subsidiary of United States Steel Co. GUNOMAR II entered into a management agreement for wabs to provide commercial, scheduling, fleet management, and financial services, and training of Guinean personnel. For its services it received management fees based on percentages of revenues from various sources, an incentive fee of 5% of GUINOMAR II's net profits before taxes, and reimbursement of some expenses.

stated.

[30]. On January 23, 1975, the parties modified the dispute resolution procedures of the Convention by jointly executing a document of Consent to Arbitrate all existing disputes between the Host State (Guinea) and the Investor (MINE) pursuant to the International Convention for Settlement of Investment Disputes. The Consent to Arbitrate, drawn pursuant to the form prescribed in official ICSID publications, was not at the time filed with ICSID, nor did MINE submit a formal request for arbitration to ICSID. MINE requested Guinea to execute a revised Consent to Arbitrate on September 2, 1975, but Guinea never responded.

(c) *Proceedings in United States Courts.*

[31]. On January 20, 1978, MINE filed in the United States District Court for the District of Columbia a petition to compel arbitration before the American Arbitration Association ("AAA") pursuant to the United States Arbitration Act, 9 U.S.C. Section 4. The summons and complaint were served in ways permitted under the Foreign Sovereign Immunities Act, but Guinea did not appear at the hearing on the petition held June 15, 1978. MINE contended before the district court that Guinea was refusing to participate in the ICSID arbitration. The district court granted the petition and ordered arbitration before the AAA.

[32]. The AAA panel conducted hearings between February 5, 1979, and April 14, 1980. Guinea did not attend the hearings. On June 9, 1980, the AAA panel rendered an award against Guinea in excess of $27 million.

[33].

On August 22, 1980, MINE moved for confirmation of the AAA award by the district court. On December 9, 1980, Guinea appeared, for the first time, by counsel. Counsel filed a motion to dismiss MINE's action for lack of jurisdiction of the subject matter of the action. The district court denied Guinea's motion to dismiss, confirmed the AAA award in MINE's favour, 9. U.S.C. § 9, and issued a memorandum opinion. *Maritime Int'l Nominees Establishment* v. *Republic of Guinea,* 505 E Supp. 141 (D.D.C. Jan. 27, 1983).

[34]. The United States Court of Appeals for the District of Columbia Circuit stayed enforcement of the award, and on November 12, 1982, it reversed, ruling that the district court lacked subject matter jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(1). The Court of Appeals ignored the intervening brief, filed by the Department of Justice, that urged dismissal on the ground that ICSID arbitration was the exclusive forum under the Convention. 693 F. 2d 1094 (rehearing denied Jan. 27, 1983). The Supreme Court denied certiorari on October 3, 1983. 464 U.S. 815.

(d) *Proceedings in ICSID.*

[35]. On May 7, 1984, MINE registered its claim with ICSID. The Tribunal was formed after the parties

waived the ICSID procedures for composition of tribunals, so that the members did not need to be drawn from lists of ICSID arbitrators. Member Berg was nominated by MINE and Member Sharpe was nominated by Guinea. President Zubrod was chosen by mutual agreement of the parties.

[36]. The initial hearing was held at the World Bank in Washington, D.C., on July 3, 1985.[5] The fifteenth and final hearing was conducted on November 4, 1986. Following extensive post-hearing briefing, the proceedings were closed by the Tribunal on August 10, 1987. On October 9, 1987, the Tribunal extended the 60-day period for issuance of its award by 30 days, pursuant to Ch. VI, Rule 46, of the ICSID Rules and Regulations. On October 9 the Tribunal also requested an extension of the time for presentation of the award through December 31, 1987, and the parties agreed to that request.

6. MINE Attaches Guinea's European Assets

[37].

On June 25, 1985, Guinea presented the Tribunal its "Emergency Request for Relief from Attachment of Its Assets by MINE," requesting an order directing MINE immediately to dissolve all pending attachments of Guinea's bank account in Geneva and of Guinean assets in other nations in Europe. Guinea argued that ICSID had exclusive jurisdiction over the dispute, because Art. 26 of the ICSID Convention rendered arbitration before ICSID exclusive of all other remedies. Guinea further contended that it was entitled to recover for harms resulting from what it termed MINE's "lawless behavior," including attorneys' fees and compensation for any damages resulting from the attachments.

[38].

MINE responded to the Emergency Request with a Reply, arguing that its European actions sought enforcement of the AAA award, and that they were not prejudgment attachments related to the ICSID arbitration, MINE further contended that the denial of Guinea's request would not prejudice or bar enforcement of any award ultimately rendered by the Tribunal, MINE requested the Tribunal to deny Guinea's application for relief.

[39]. At the hearing on July 3, 1985, the Tribunal deliberated Guinea's Emergency Request and denied it as premature, inasmuch as Guinea had not yet offered any defense in the attachment proceedings. The Tribunal suggested that appearance by Guinea in the attachment proceedings would be an initial step toward reconsideration by the Tribunal of the Emergency Request. On August 8, 1985, Guinea submitted a Request for Reconsideration of the Emergency Request, to which MINE responded on August 19, urging the Tribunal to deny the Request for Reconsideration. The Tribunal took no immediate action on the Request for Reconsideration.

[40].

On December 4, 1985, the Tribunal issued its Provisional Measure, ruling that MINE's litigation to enforce the AAA award in European courts constituted an "other remedy" under Art. 26 of the

[5] The subsequent hearings, held in Washington, D.C.. unless otherwise shown, took place as follows: #2. Sep. 6. 1985; #3, Mar. 10. 1986; #4. June 30. 1986; #5. July 9, 1986; #6. July 10. 1986; #7. July 14. 1986 (New York City); #8, July 15, 1986 (New York City); #9, Sep. 17, 1986; #10. Sep. 18. 1986; #11. Sep. 19. 1986; #12. Sep. 22. 1986; #13. Sep. 23, 1986: and #14, Nov. 3, 1986.

ICSID Convention; that the litigation breached MINE's submission of its dispute with Guinea to ICSID for arbitration: and that at the September 3, 1985, hearing conducted to receive evidence on this issue, Guinea had demonstrated that the breach had harmed it and would continue to harm it.

[41]. The Provisional Measure noted that Art. 47 of the ICSID Convention gave the Tribunal power to "recommend any provisional measures which should be taken to preserve the respective rights of either party." The Tribunal recommended that MINE immediately withdraw and permanently discontinue all pending litigation in national courts and that it commence no new action. Litigation based upon the AAA award was deemed to arise out of the ICSID arbitration for purposes of the Provisional Measure. The Tribunal further recommended that MINE dissolve every existing attachment and that it seek no new remedy in any national court. Taking note of the Art. 47 limitation, that the Tribunal merely "recommend" rather than "order", the Provisional Measures provided that the Tribunal would take into account in its award the effects of any non-compliance by MINE with its recommendations. Evidence was subsequently furnished by MINE, showing that the attachments had been withdrawn and the litigation discontinued.

7. The Parties' Assertions of Non-Performance

(a) *MINE's Assertions.*

[42].

MINE argues that Guinea had the obligation to take reasonable steps to make SOTRAMAR viable, and that Guinea neglected to do so. MINE argues further that Guinea breached the Convention in negotiating with other carriers to use its Art. 9 freight rights, and thereafter breached again in contracting with AFROBULK as the Art. 9 earner. Specifically, MINE contends that Guinea in bad faith and without excuse acted contrary to SOTRAMAR's interests by:

(1) Blocking the organization of SOTRAMAR as a viable business by refusing to appoint MINE, or any other entity, as an agent for SOTRAMAR;

(2) Insisting that Conakry be SOTRAMAR's operational center, despite its remoteness and lack of communication links with the commercial world;

(3) Denying MINE the authority to conclude contracts of affreightment and charter parties without first securing the approval of the SOTRAMAR board of directors.

(4) Failing to convene promptly meetings of the board of directors after MINE's specific requests in October and November 1973, thereby violating Guinea's obligation under the Convention to take all necessary steps to insure the success of the joint venture;

(5) Failing to use every possible endeavor to assist SOTRAMAR in obtaining responsible

freight rates, despite MINE's repeated requests throughout 1972 and 1973 for Guinea's active participation and assistance in dealing with the Bauxite Receivers; and

(6) Breaching the Convention when it secretly negotiated and subsequently contracted with AFROBULK, an outside party, to use the Art. 9 freight rights.

(b) *Guinea's Assertions.*

[43].

It is Guinea's position that MINE bears the responsibility for SOTRAMAR's failure to function. Guinea argues that:

(1) MINE indulged in wishful thinking that Guinea could induce the Bauxite Receivers to pay over-market freight rates, even though Art. 9 stated that freight rates should not exceed those obtainable in the international shipping market;

(2) While Guinea relied upon MINE and its expert partners to provide financial strength, technical know-how. and a program that would have permitted Guinea and SOTRAMAR to take advantage of the freight opportunities offered by Art. 9. MINE's proposals were unrealistic, unworkable, and unfair, and MINE never delivered a single contract of affreightment with any Bauxite Receiver or identified a single charter party opportunity;

(3) MINE's initial plan, which provided for contracts of affreightment of 10 years, at freight rates sufficient to amortize purchased vessels irrespective of open market freight rates, was contrary to the Bauxite Receivers' needs and desires, but MINE adhered to the plan for months after the Bauxite Receivers rejected ten-year contracts of affreightment, and it was only after June 1973 that MINE agreed to the shorter terms desired by the Bauxite Receivers;

(4) Although MINE attended the July 1973 rate "arbitration" meetings with the Bauxite Receivers and acquiesced in the agreed rates and in the concept of three-year contracts of affreightment, MINE never demanded, before, during, or immediately after the meetings, that the SOTRAMAR board of directors give it authority to conclude contracts of affreightment or charter parties, or suggested at any time that a volatile shipping market could render the "arbitrated" rates obsolete within a short period of time; the MINE correspondence directed to Conakry a few weeks after the July meetings, which placed conditions on MINE's participation in finalizing the contracts of affreightment with the Bauxite Receivers and in chartering vessels, was the first time that MINE asked Guinea for authorization to conclude such agreements;

(5) When MINE failed to act following the July 1973 meetings, and when the Boké bauxite shipments commenced in September 1973 and the Bauxite Receivers were unhappy at having to cover the Art. 9 shipping requirements on short notice and on a spot basis, and when Guinea received no financial benefit from its Art. 9 freight rights, and when there was no prospect that SOTRAMAR would be able to initiate transportation at a foreseeable date, then Guinea considered that it should search for a company which could perform, and so in March

1973 Guinea entered into an agreement with AFROBULK for approximately two years, an action that was immediately necessary: thus the AFROBULK arrangement bought time for SOTRAMAR to work out its problems and become operational; and

(6) Guinea's duty to cooperate was limited to provisions in the Convention and the SOTRAMAR By-laws, and Guinea did not fail to cooperate when SOTRAMAR refused to give MINE approval to execute contracts, or to allow MINE an agency fee, or to call board of directors meetings.

8. The Tribunal's Findings on Liability

[44]. The Convention was a contract between Guinea and MINE to make SOTRAMAR function. Guinea understood the objectives well enough to form the contract now in dispute, although from the correspondence put in evidence and the testimony given, it appears that Guinea's conduct, through its officials, was not the conduct of a commercially astute investor in a complex international industry. [6]

[45]. Having gone into force, the Convention bound both parties until it was breached. The Convention was written in French, the language of Guinea and of the Swiss nationals in Geneva, and so the dispute does not arise from conflicting interpretations by speakers of different languages. The terms of the Convention were negotiated actively, not dictated by MINE with adhesive force, or misrepresented by MINE as to their effect. The mixed-economy concept of the Convention (1971) resembled the Harvey Agreement (1963) and was employed again in the GUINOMAR agreements (1978, 1980); evidently the concept was familiar and remained workable. The economic power that MINE possessed in ship financing, or its management power in assembling fleets of bulk carriers, does not seem to have coerced Guinea into signing the Convention. Coercive power is more apparent in Guinea's demonstrated ability to destroy MINE's investments in SOTRAMAR planning and, according to testimony, its capacity to control the movements of MINE's negotiators within Guinea and to delay their departure.

[46]. While the radical changes brought about by the Middle East war required MINE to re-educate Guinean negotiators, the changed commercial circumstances did not frustrate the Convention, making it legally impossible for either side to perform it.

[47]. This leaves the dispute where it began: which party prevented SOTRAMAR from performing under

[6] Apparently few Guineans in 1972-1973 knew much about international shipping, and the identities of the high Guinean officials who negotiated with MINE kept changing. Some of the negotiators may even have had the expectation that after Guinea contributed to SOTRAMAR its Art. 9 freight rights, ships, and guarantees, MINE would be the sole active manager, so that MINE, doing business under the name of SOTRAMAR, and acting as a sort of franchisee, would make all the necessary transportation arrangements to exploit Guinea's Art. 9 freight rights. Guinea would receive regular cash payments, a growing ownership share in the carrying vessels, and trained crews and a shoreside establishment. Even if this expectation was held by any Guinean negotiator, the Convention described quite different roles in SOTRAMAR for Guinea and MINE, SOTRAMAR was a capital stock corporation in which Guinea's role, as shareholder and appointer of officers, was an active role, and the Convention and the SOTRAMAR bylaws required Guinea to participate in the business management of SOTRAMAR.

the Convention, and when did the breach take place?

[48]. In hindsight, the Convention failed because both parties had inflated expectations of what could be accomplished with Guinea's Art. 9 freight rights. The initial concept was the creation of a Guinean national fleet and maritime capability through the purchase of vessels to be financed by long-term contracts of affreightment with the Bauxite Receivers. While the concept was plausible, the parties underestimated the resistance of the Bauxite Receivers, which felt no obligation to finance a Guinean fleet and maritime establishment by paying freight rates in excess of the international market, SOTRAMAR could add to its profits by carrying North American grain to Europe as eastbound cargo for which the bauxite cargo would be backhaul, but only after the Bauxite Receivers' contracts of affreightment enabled SOTRAMAR to charter in vessels to carry CBG bauxite to North America, SOTRAMAR could finance the purchase of ships through long-term contracts of affreightment—but only if long-term contracts of affreightment could be had, and by mid-1973 they could not.

[49]. Alternate plans had to be formulated, and formulating them caused further delay in getting SOTRAMAR under way. Short-term arrangements (three years) were substituted as the new objective of both parties. The Bauxite Receivers continued to insist on competitive rates, and this led to the July 1973 so-called "arbitrated" rates, which appeared to be acceptable to the Bauxite Receivers and SOTRAMAR, though MINE apparently did not participate in the negotiations. So far, there had been no breach.

[50]. Guinea has argued that the post-July 1973 period was the time frame during which MINE demonstrated its lack of will and competence to put SOTRAMAR in operation, thereby breaching its obligations under the Convention, because MINE failed to conclude contracts of affreightment and to charter in tonnage. Guinea asserts that MINE had every opportunity to make SOTRAMAR a viable organization during this period. But Guinea's argument misconstrues the facts. The rates developed at the July 1973 meeting were only a part of the whole affreightment package; many conditions still needed to be negotiated with the Bauxite Receivers, particularly with respect to freight to be paid in advance: whether interest was to be paid, and if so, the rate of interest, and SOTRAMAR's management of the advance freight payments.

[51]. Even if the "arbitration" had enabled MINE to bind SOTRAMAR, and MINE as SOTRAMAR's agent had then concluded contracts of affreightment with the Bauxite Receivers based upon the arbitrated rates, and had chartered covering tonnage within a commercially reasonable period after the July 1973 meeting, SOTRAMAR would soon have gone bankrupt, because world shipping rates rose precipitously. For the quantity of tonnage involved here, significant time and extreme care are required to negotiate simultaneous "back to back" contracts of affreightment for cargo and covering charter parties for ships, MINE complained that it lacked authority to conclude the contracts of affreightment and charter parties, and it did lack the authority; but even with authority in hand, the rapidly escalating shipping market during the latter part of 1973 and early 1974 would have made it impossible for MINE properly to mesh three-year contracts of affreightment with chartered-in tonnage, as Guinea suggests. Guinea was simply not attuned to the shipping market, and it did not appreciate that moving ahead without proper planning could be fatal.

[52]. The Tribunal finds that MINE did not breach the Convention in failing to conclude contracts of

affreightment and to charter-in covering vessels following the July 1973 meeting.

[53]. Meanwhile the railway was beginning to deliver CBG bauxite in Kamsar. In the Fall of 1973 Guinea commenced negotiations with other shipping interests to exercise its Art. 9 freight rights, but Guinea did not tell MINE what it was doing. While Guinea contends that it had lost all confidence in MINE's professional ability, Guinea did not try to renegotiate the Convention, or to substitute another company for MINE in SOTRAMAR. At no time prior to Guinea's conclusion of its agreement with AFROBULK did Guinea suggest to MINE either that SOTRAMAR negotiate with third party carriers to exercise the Art. 9 freight rights, or that the sort of arrangement which was ultimately concluded with AFROBULK was one that SOTRAMAR ought to consider on a short-term basis. Actually the AFROBULK arrangement was a simple and easily saleable concept, and there is little doubt in the minds of the Tribunal that MINE could easily have negotiated such an arrangement on behalf of SOTRAMAR if Guinea had expressed the desire.

[54]. Although Guinea has described the AFROBULK arrangement as a temporary, two-year measure designed to permit SOTRAMAR to become a functioning and operational organization, the Tribunal finds that Guinea's entering the AFROBULK agreement was contrary to the spirit and express provisions of the Convention, because SOTRAMAR was the only organization represented to the Bauxite Receivers as authorized user of the Art. 9 freight rights. Guinea's conduct in secretly negotiating the AFROBULK arrangement, and in denying its existence to MINE thereafter, exhibits bad faith on its part, violating the principle of good faith set forth in the French Civil Code.[7] Guinea's subsequent offer, to "cut the pear in half' and permit MINE to share the AFROBULK agreement, did not restore the possibility of performance, and MINE reasonably rejected the offer.

[55]. The Tribunal concludes unanimously that Guinea prevented SOTRAMAR from performing under the Convention, and thereby breached the Convention, when Guinea entered the AFROBULK agreement in March 1974.

9. MINE's Damages

[56]. mine contends that it is entitled to damages measured by the profits it lost because Guinea breached the Convention—that is, the expectancy of mine's share of the net profits that SOTRAMAR would have earned if Guinea had performed the Convention by letting SOTRAMAR go into operation. The leading obstacle to this theory of damages is the fact that SOTRAMAR never earned any profits; and because SOTRAMAR was a new venture, the projection of expectancy of net profit is too speculative to use in assessing damages. Other contract damage theories are also unusable.

[57].

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[7] "Art. 1134. Les conventions légalement formées tiennent lieu de loi á ceux qui les ont faites."Elies ne peuvent étre révoquvées que de leur consentement mutual, ou pour les causes que la loi autorise."Elies doivent étre exécutées de bonne foi."The effect of this article in English is found in the Louisiana Civil Code, Art. 1983 (1985): "Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law. Contracts must be performed in good faith."

MINE chose to claim either the profits that it might have earned under the original Convention, or the profits that were earned following the second Codicil. To project these lost profits, MINE engaged Messrs Grayson & Bock, a New York City accounting firm having extensive expertise in maritime matters. The same firm had previously been engaged by the AAA arbitrators to assist them in determining MINE's damages.

[58].

MINE advanced two basic theories of damages, which were stated in detail in the Grayson & Bock report for the AAA arbitrators, and which were further explained in the testimony of a partner of that firm before the Tribunal.

[59]. "Theory Y" posited that Guinea breached the Convention in 1972, before Codicil 2 was executed. It was based upon the allegation that Guinea refused to take the necessary actions to allow SOTRAMAR to become organized, to proceed with the establishment of shipping operations on the basis of long-term contracts of affreightment, and to build up a fleet through hire-purchase arrangements, so MINE was damaged by losing a hypothetical share to hypothetical profits in a hypothetical form of doing business. The theory projected losses for 20 years, since the Convention had not expired, and the total claim for damages under Theory Y was $66,306,291 as of January 1, 1987.

[60].

"Theory Z" posited that Guinea breached the Convention in 1974, when Guinea concluded its arrangement with AFROBULK for short-term contracts of affreightment with the Bauxite Receivers. Under Theory Z, Guinea is liable for MINE's share of the net profits that SOTRAMAR would have earned, had it functioned under the AFROBULK Agreement and the GUINOMAR Agreements. The total claim under this theory, also projected for 20 years, and valued as of January 1, 1987, amounted to $48,347,749.

[61]. As a "worst-case" minimum, MINE argued that it was entitled to $8,991,683 in damages based upon a combination of calculations covering profits and costs over a 10-year period, including its share of earnings that SOTRAMAR would have derived from the tonnage carried by AFROBULK, payments made by CBG, earnings of GUINOMAR i and GUINOMAR II, various sums earned by wabs as a participant in the GUINOMAR ventures, out-of-pocket expenses, interest, and the costs of the ICSID arbitration.

[62].

Guinea responded that MINE's projections of alleged profits over a 20-year period, for a new business venture with no performance record, where market fluctuations are commonplace, was speculative, therefore, any damages that the Tribunal might award to MINE under Theories Y and Z would unjustly enrich MINE. Guinea argued that MINE's Theory Y was discredited by the weight of the evidence, which showed that the Bauxite Receivers would not agree to 10-year contracts of affreightment, or to rates designed to amortize the purchase of vessels.

[63].

Guinea argued that MINE's Theory Z, while based upon the more reasonable assumption of three-year contracts of affreightment with the Bauxite Receivers, was no more rational. Guinea argued that any theory of damages should look to GUINOMAR's actual financial performance, as GUINOMAR is Guinea's present Art. 9 carrier. Guinea contended that in fact it received a total of $6,048,473 from all sources for the carriage of bauxite under Art. 9 from 1974 through 1984. Guinea submitted that mine's revenue projections were ten times what Guinea actually received, and that this simply accentuated the innate unreliability of mine's initial expectations.

[64]. Guinea also criticized MINE's "worst-case" theory of damages, because it was inherently speculative and did not reflect what actually occurred. Finally, Guinea asserted that MINE failed to meet its burden of proving entitlement to interest on the award, to out-of-pocket expenses, and to the cost of the ICSID arbitration.

[65]. The Tribunal accepts the general principle that MINE is entitled to be compensated for the profits that it would have earned if Guinea had not breached the Convention. The lost profits need not be proven with complete certainty, nor should recovery be denied simply because the amount is difficult to ascertain.

[66]. The Tribunal has considered the detailed presentations of MINE's Theories Y and Z, and it concludes that neither theory represents a usable approach to MINE's loss of profits.

[67]. Theory Y was based upon 10-year contracts of affreightment with the Bauxite Receivers, but clearly they were not available. The Bauxite Receivers refused to enter into long-term contracts of affreightment from the very beginning, and they would never have accepted freight rates inflated over market in order to finance Guinea's purchase of vessels.

[68]. Theory Z is more appropriately based on short-term contracts of affreightment, but even here it is far from certain that these contracts of affreightment could have been concluded. The GUINOMAR operation managed to obtained contracts of affreightment with the Bauxite Receivers only when the shipping partner undertook significant business risks in order to make the resultant rates more attractive to the Bauxite Receivers, GUINOMAR's shipping partner provided a 10-year fixed-rate contract for eastbound grain cargoes from the United States to European ports, thereby permitting GUINOMAR to offer relatively competitive longer-term contracts of affreightment to the Bauxite Receivers, MINE probably could not have concluded significant contracts of affreightment with the Bauxite Receivers without an agreement on its part to undertake some risk for SOTRAMAR in providing east-bound cargo to northern Europe as part of the triangular service. This did not appear to be MINE's intention from the start, nor should it have been.

[69]. The Tribunal finds that MINE's loss of profits may be measured adequately by the AFROBULK

agreement: the 50 cents per ton which Guinea received from AFROBULK for the right to carry bauxite under Art. 9 during a two-year period rightfully belongs to SOTRAMAR. In addition, it seems fair to conclude that such an arrangement could have been extended, or negotiated with others, to a total period of 10 years. While the Convention was to last 30 years, the Bauxite Receivers under the Harvey Agreement were bound to CBG for only 20 years, and 10 years appears to be a reasonable period considering that the Convention contained provisions for early termination.

[70]. The quantity of bauxite carried during the 10-year period under such an arrangement is 38,437,127 tons; and this tonnage, multiplied by 50 cents per ton, produces the total due SOTRAMAR of $19,218,563. Under Art. 9(B) of the Convention, SOTRAMAR's net profits were to be taxed 30% by Guinea, and the remaining 70% was to be divided equally between MINE and Guinea. Therefore MINE is entitled to 35% of the total, producing the principal sum of $6,726,497.

[71]. The Tribunal also awards simple interest on each year's estimated lost profits from 1975 through 1987. calculated at the average United States prime interest rate for each year that is published by the Chase Manhattan Bank, a total of $5,457,986. until the date of this award.

[72]. The Tribunal also awards MINE costs toward its fees and expenses in the ICSID arbitration in the amount of $275,000.

10. Guinea's Counterclaim

[73]. Guinea makes two counterclaims for damages resulting from MINE's disregard of the parties' agreement to arbitrate disputes under the Convention before ICSID.

(a) *MINE's Resort to AAA Arbitration.*

[74]. Guinea claims reimbursement of $322,090.90 in legal fees and expenses that it incurred in order to reverse the United States District Court's confirmation of the AAA award. Guinea argues that the parties agreed to ICSID arbitration, that the first consent which they executed was sufficient to invoke ICSID jurisdiction, and that MINE should have pursued that course. Furthermore. Guinea contends that it failed to receive notice of the district court action and the AAA proceeding until 1980, and that it then took timely and successful steps to prevent confirmation of the arbitration award.

[75]. MINE submits that it took the initiative to bring the SOTRAMAR dispute before ICSID, but its

counsel advised that the first consent to arbitration was insufficient to invoke ICSID jurisdiction because MINE is a Liechtenstein company, and Liechtenstein is not an ICSID contracting state, MINE therefore had legitimate and serious concerns as to whether ICSID jurisdiction could be invoked, but Guinea did not repond to MINE's request to file the revised Consent to Arbitrate, although appropriate notices were served upon Guinea then. Nor did Guinea respond later, in proceedings brought by MINE in the United States District Court for the District of Columbia to compel arbitration, in accordance with the requirements of the Foreign Sovereign Immunities Act, until the district court received MINE's motion to confirm the AAA award.

[76].

The Tribunal has considered Guinea's counterclaim for these legal fees and expenses, and it denies the counterclaim. Under the circumstances, MINE's approach to the district court for an order to compel arbitration was not an improper attempt to avoid ICSID arbitration of the SOTRAMAR dispute. Guinea was given appropriate notice of all proceedings in the district court and before the AAA, but Guinea neither responded nor voiced a timely objection to MINE's selection of what proved to be an improper forum. Perhaps the specific individual whom Guinea wished to receive notices of litigation and arbitration was not directly informed of the AAA proceeding, but personal knowledge is not what the law requires. Appropriate and legally sufficient notice was furnished to Guinea.

(b) *MINE's Attachment of Guinea's Property.*

[77].

Guinea counterclaims for $311,309.87 in legal expenses that it incurred in order to obtain the release of the attachments which resulted from MINE's non-compliance with the Tribunal's recommendation. In the eighteen months that followed MINE's first attachment, one Belgian court and three Swiss courts acknowieged the exclusivity of ICSID's jurisdiction in this dispute, MINE's pursuit of remedies outside the ICSID proceeding is said to have caused Guinea great embarrassment and extraordinary legal expenses, for which it should be reimbursed.

[78].

MINE submits that it withdrew its appeal in Belgium after the Tribunal, on December 3, 1985. recommended that MINE withdraw and permanently discontinue all pending litigation in national courts, MINE contends that Swiss counsel began to discontinue the attachments in Switzerland, but that Guinea initially refused to agree to withdrawal of the security that MINE filed in order to obtain the attachments. After the Tribunal clarified its interim ruling on September 22, 1986, recommending that all attachments be lifted and that all security arrangements by vacated. Swiss counsel caused the attachments to be released.

[79].

The Tribunal considers that MINE's actions in those nations were contrary to the exclusive jurisdiction granted ICSID in this proceeding. Nevertheless, Guinea's lack of response to prior proceedings, the decision of the United States Court of Appeals for the District of Columbia Circuit that left the AAA award at large, and the lack of precedent for the Tribunal's order to discontinue the European attachments, all excused MINE somewhat in seeking to enforce what it argued was a valid AAA award. Upon consideration of the arguments on this counterclaim, the Tribunal awards Guinea the sum of $210,000 toward its costs and legal fees relating to the attachment proceedings in Belgium and Switzerland.

11. Award Reconciliation

[80].

All sums are stated in United States dollars.

Awarded to MINE as damages $ 6,726,497

Interest on MINE's damages 5,457,986

Cost of ICSID arbitration 275,000

Total awarded to MINE: 12,459,483

Awarded to Guinea toward its counterclaim 210,000

Balance due to MINE: $12,249,483

[81]. Guinea is directed to pay MINE the sum of $12,249,483.

[82]. The Tribunal awards simple interest on the net award under the Reconciliation at the rate of nine percent per year from the day after the date of the award until the award is satisfied.

[83]. The Tribunal directs that, except as otherwise provided, the parties bear their own expenses in connection with the proceedings, and that the parties bear equally the fees and expenses of the members of the Tribunal, and the charges for the use of the facilities of ICSID.