

## MEMORANDUM OF DETERMINATIONS

### Confiscation Claim of Marine Shipping Corporation Contract of Insurance No. CO15

#### I. Claim

By letter dated September 14, 1993, as supplemented by additional letters, Marine Shipping Corporation ("MSC" or the "Insured") applied for compensation under the confiscation coverage of OPIC Contract of Insurance No. CO15 (the "Insurance Contract") for the "full value of the insurance coverage" (the "Claim").<sup>1</sup> The maximum insured amount for confiscation under the Insurance Contract is \$3.5 million.

The Insurance Contract requires that an application for compensation demonstrate the Insured's right to compensation in the amount claimed, and that the Insured must provide such additional information as OPIC may reasonably require to evaluate the application. (§10.01). In response to numerous requests made by OPIC from 1993 through 1998 for additional information and supporting documentation, OPIC received letters from MSC dated October 31, 1994 and December 20, 1995 stating that the requested documents relating to the confiscation claim were unavailable. After repeated requests by OPIC for additional information, by a letter from MSC dated July 7, 1997, OPIC did receive some, but insufficient, primary documentation. In response to OPIC's February 25, 1998 request letter, MSC stated on March 12, May 1, June 4, and August 26, 1998 that it would be forwarding information and documentation to OPIC. However, MSC has not provided this information or documentation.

In October 1998, because OPIC still had not received the necessary documentation from MSC, OPIC took steps to make its determination on the basis of the evidence presented to date by MSC. By letter dated and received by MSC on October 9, 1998, OPIC informed MSC that it deemed MSC's Claim application complete and that it was proceeding to make a determination of MSC's Claim. Subsequently, by letter postmarked October 15, 1998, MSC provided certain new information to OPIC, which has also been considered in reaching this determination.

Additionally, OPIC provided MSC with a draft of this determination and invited its comments. Those comments were considered by OPIC and are reflected herein.

OPIC's determination is that the Claim is not valid.

#### II. The Insurance Contract

The Insurance Contract, an OPIC Form 234 KGT 7-78 PL, with one amendment (Exhibit B), was effective as of September 30, 1987. The term of the Insurance Contract was seventy-two (72) months or six (6) years (expiring September 29, 1993) (§1.05). The Insurance Contract provides for up to \$3.5 million in coverage against inconvertibility, confiscation and political violence.

A determination under an OPIC insurance contract addresses three categories of issues: (1) whether the acts complained of satisfy all the elements required to bring them within the scope of coverage; (2) the amount of compensation payable; and (3) whether the insured fulfilled its duties under the Insurance Contract.

As to the scope of coverage, the Insurance Contract provides, in pertinent part, as follows:

##### "4.01 Confiscation

Compensation is payable for confiscation (§5.01), subject to exclusions ... and limitation ..., if an act or series of acts satisfies all of the following requirements:

- (a) the acts are attributable to a foreign governing authority ...;
- (b) the acts are violations of international law ... or material breaches of local law;
- (c) the acts have the effect of confiscation by directly depriving the Insured of the right to use, control or dispose of covered property or any local bank accounts maintained by the Insured in the project country in connection with the project; and
- (d) the violations of law are not remedied ...and the confiscatory effect continues for three months." (§4.01).

One of the exclusions from compensation provides that no compensation shall be payable "[i]f a preponderant cause of the loss is unreasonable action attributable to the Insured ... which provoked the loss." (§4.02.)

Article V deals with the amount of compensation payable, for a confiscation. Section 5.01 provides:

##### "5.01 Confiscation

1. For confiscation of covered property (§4.01), OPIC shall pay compensation ... in an amount equal to the insured portion of the lesser of

- (a) The original cost to the Insured ..., or
- (b) The fair market value ...

less the insured portion of anything of value received by the Insured on account of the property confiscated ..." (§5.01)

"Covered property" is defined as "the tangible property for which the Insured bears the risk of loss, which is located in the project country [Egypt] and used in connection with the project." (§1.01.3.) The "project" is defined as the "unloading, bagging, storing, and conveying of bulk commodities through the U.S. tanker S.S. Observer, moored as a combination dock and unloading facility for bulk cargo vessels in Port Said, Egypt." ("Project.") (§1.01.2.)

The Insurance Contract requires that the Insured fulfill certain "duties." Such duties include that the Insured: (i) maintain in the United States the records and books of account concerning the Project (§11.01.7(a)); (ii) furnish OPIC with such information as OPIC may reasonably request (§11.01.8); (iii) take all reasonable measures to preserve its rights, remedies and property and to negotiate in good faith with the governing authority of the country and other potential sources of compensation (§11.01.10); and (iv) not enter into any agreement related to compensation for acts within the scope of coverage without OPIC's prior written approval (§11.01.11). The Insured promised to comply with these duties and was put on notice that if it violated any of these duties, it "may lose rights, including the right to compensation." (§1.02)

#### III. Summary of Facts Alleged by MSC

The following factual summary is drawn from the materials submitted by MSC. As noted above, the documentation provided in support of MSC's submissions is incomplete or inconsistent and, in many instances, not directly relevant. Insofar as possible, OPIC has sought to distill the allegations contained in MSC's submissions that appear relevant to its claim. OPIC assumes, solely for purposes of this memorandum of determinations, that MSC's factual allegations are accurate, but OPIC reserves all of its rights to dispute any such allegations in the event of arbitration.

It appears that, under a series of contracts with a succession of GOE entities, MSC established and operated from 1976 to 1993 a facility for the unloading of grain and bulk commodities from cargo vessels in Port Said, Egypt. These commodities largely consisted of foodstuffs provided under U.S. foreign assistance programs. The centerpiece of the Project was a vessel, the "Observer", that MSC had converted into a combination dock and unloading facility. For MSC to conduct its business, a license (the "License") was required from the Port Said Port Authority ("Port Authority"). Throughout the period of MSC's operations, the License was obtained, along with other required permits, by the GOE entities with which MSC had contracts.

On October 6, 1988, OPIC received a notice of claim from MSC alleging various instances of harassment directed against the Project by the Canal Stevedore Company ("Canal Company"), the Port Authority and other GOE entities. After various negotiations with GOE authorities, MSC informed OPIC by letter of April 6, 1989, that MSC had agreed to enter into a one-year contract.

As the term of this one-year contract with the GOE entity drew to an end, MSC again sought an extension of its contract. In April 1990, MSC's contract was extended, and it was subsequently extended for two additional annual terms until April 1993. In April 1993, MSC's contract partner exited the business of importing grain and declined any further extension of its contract with MSC.

In 1993, MSC applied for a License to operate the project independently, without a GOE contract partner. In April 1993, the Port Authority agreed to grant MSC a License but required MSC to submit a Certificate of Seaworthiness for the Observer (which, according to MSC's Project Manager, was required for all like ships under Egyptian law), settle certain "financial dues" owed the Port Authority, and send an authorized representative on a certain date to sign the License.

MSC failed to appear to sign the License, and the Port Authority gave notice to MSC's contract partner that the Port Authority was withdrawing the License. The Port Authority also gave notice that MSC had to vacate the site or face eviction proceedings, and that MSC's GOE contract partner would be held jointly responsible with MSC for dismantling the Project and payment of occupancy fees. Shortly thereafter, on May 11, 1993, the GOE taxation authority attached MSC's assets for failure to pay taxes due for 1992-1993 and appointed a Receiver.

MSC did not dismantle the Project as directed by the Port Authority. As a consequence, the Port Said Container and Cargo Handling Company was appointed as a receiver and apparently operated the Project for a period.

MSC also alleges that it was notified, in June 1993, that the "rent" that the Port Authority sought from it for certain properties relating to the site was \$88,000 per month. MSC has provided incomplete information and no substantiating documentation concerning the nature and circumstances of this "rent", and the information that it has provided fails to support MSC's characterization. MSC has asserted that the amount of rent that it was assessed was significantly higher than would be charged to an Egyptian company, and that this constituted a violation of the Treaty between United States of America and The Arab Republic of Egypt concerning the Reciprocal Encouragement and Protection of Investments ("BIT").

Commencing some time in mid-1993, negotiations ensued among the Port Said Container and Cargo Handling Company, the Port Authority and MSC over settlement of MSC's outstanding obligations, and sale of Project assets. At an unspecified time (between 1993 and 1995), MSC realized \$413,000 from the sale of Project assets, which also apparently discharged MSC's various other obligations to the GOE relating to the Project. MSC did not request or obtain OPIC's consent to the sale, did not inform OPIC of the sale at the time, and did not provide OPIC notice of the sale until August 1998. MSC has not provided OPIC with documents relating to the sale or to the amounts it realized as a consequence thereof.

On September 14, 1993, MSC applied for compensation under the Insurance Contract.

The Insurance Contract expired by its terms on September 30, 1993. At various points thereafter MSC sought information on making a claim under the Insurance Contract, which OPIC provided.

#### IV. MSC's Theories of Recovery

Insofar as OPIC can determine, MSC has presented two basic theories of confiscation under the Insurance Contract:

First, MSC alleged in October 1988 that various instances of harassment by stevedores and their representatives at Port Said, the Port Authority, various contractual partners of MSC, and other GOE entities constituted confiscation of the Project.

Second, MSC alleged in 1993 that various actions by the Port Authority and other GOE entities made it economically impossible for MSC to operate and amounted to confiscation of the Project. Among other things, MSC alleged that the Port Authority requested rent from MSC of \$88,000/month (plus \$4,800 per day in "docking charges") in violation of the BIT, refused to issue MSC the required License (except with unacceptable conditions), blocked all of MSC's funds, and seized all of MSC's property for non-payment of various obligations.

#### V. Determinations Under the Insurance Contract

A. The actions taken by the Government of Egypt in relation to the covered property did not constitute a confiscation within the meaning of Article IV, Section 4.01 of the Insurance Contract.

1. The acts on which the Claim is based are attributable to a foreign governing authority that is in de facto control of the part of the country in which the project is located.

OPIC is prepared to assume, arguendo and solely for purposes of this Memorandum of Determinations, that the acts on which the Claim is based are attributable to the GOE. The Port Authority and the GOE taxation authorities appear to be agencies or instrumentalities of the GOE. It is not clear whether the Port Said Container and Cargo Handling Company has similar status, nor what the respective roles of these and other Egyptian entities were in relation to MSC's Claim. For present purposes, however, these issues need not be pursued, since there are independent grounds for denying MSC's Claim.

2. The Insured did not demonstrate that the acts on which the Claim is based are violations of international law or material breaches of local law

First, with respect to the Insured's general harassment theory, this claim is based on fee and price disputes between the Insured and various Egyptian entities, including the Canal Company, the Port Authority, and MSC's various contract partners. The disputes with the Canal Company appear to have involved disagreements over the price offered to purchase MSC's assets. The fee disputes with the Port Authority involved fees assessed on MSC for dredging the quay and a berthing fee. The disputes with MSC's contract partners involved MSC's claim that it was being underpaid, under the terms of its

agreements with these entities, and MSC's dissatisfaction with proposed new Contract terms.

Even as alleged by MSC, each of these fee and price disputes was commercial in nature. The GOE entities involved were parastatal corporations acting for commercial reasons in a commercial capacity rather than from governmental motives. Nothing MSC has submitted demonstrates that these entities acted in bad faith or in violation of their contractual commitments to MSC. Even assuming that this had occurred, a state does not commit a violation of international law by engaging in commercial actions of this character. That is especially true when the state affords the foreign national a dispute settlement procedure. (See generally Restatement (Third) Foreign Relations Law §712 Comment h, Reporters' Note 8.) MSC filed actions, and later at least one appeal, in Egyptian courts regarding some of these matters, and it appears that judgments were found in favor of the GOE entities. There has been no claim that MSC suffered a denial of justice in the proceedings in Egyptian courts. Accordingly, there is no basis for concluding that the alleged instances of harassment constituted violations of international or local law.

Second, MSC's most recent formulation of its claim is based on an alleged violation of the BIT. The BIT became effective on June 28, 1992. The BIT provides, among other things, that foreign investors are to be treated no less favorably than investors of the host country ("national treatment"). (Article II, 2(a).) Under the BIT, each Party has the right to exclude certain sectors from the national treatment obligation. (Article II, 3(a).) Egypt's list of sectors to be excluded from national treatment is extensive and includes "maritime agencies," "commercial activity," and the "use of land." (Annex.) In addition, all matters relating to taxation are excluded from the BIT. (Article XI.)

The Insured alleged, by letter dated August 2, 1993, that it was assessed \$88,000 rental per month by the Port Authority for land on which the Project was located, payable six months in advance, and by letter, dated August 26, 1998, that it was also assessed an additional \$4,800 per day docking charge, whereas if MSC were an Egyptian company it would allegedly only have been charged a total of \$32,000 per year. MSC submits that this disparate treatment constituted a violation of the BIT.

The Insured has provided no persuasive evidence that the Port Authority in fact assessed it \$88,000 per month for the rent of property or a \$4,800 per day docking charge, as distinguished from other charges (including unpaid taxes). The Insured has also provided no evidence to support its contention that the alleged monthly rental figure would not have been reduced through negotiations with the Port Authority. Finally, the Insured has provided no evidence to support the contention that a similarly situated Egyptian company would have been charged materially less than MSC would have been charged.

Even assuming that the Insured's disparate fee allegations were factually correct, such disparate treatment would not constitute a violation of the BIT. "Maritime agencies," "commercial activity," and "use of land" are all expressly excepted from the national treatment requirement of the BIT (BIT, Article II, 3(a), Annex). The Port Authority's actions fall within all three of these exceptions. Moreover, the US-Egypt BIT was heavily negotiated, so that it departs from the standard form in ways that may be material to MSC. Specifically, the applicability of the treaty to investments that were made before it entered into force is limited, and the general right to make investments (the so-called "right of establishment") is conditional, undermining any claim MSC may have had that the treaty applies to terms offered under new contracts. See BIT, Art. II.2(b) and II.3(b). Finally, although the BIT provided MSC with a right to submit any claims it had under the BIT against GOE entities to neutral international arbitration (BIT, Art. VII), MSC did not choose to avail itself of this remedy.

More generally, the Claim reflects an underlying assumption that the GOE was obliged to grant MSC contract terms and operating conditions acceptable to MSC, and that imposition of fees, regulations, etc., was wrongful. Both aspects of the assumption are incorrect as a matter of law. First, the failure of GOE entities to renew expiring contracts and/or enter into new contracts with MSC that were satisfactory to MSC is not a breach of local law nor a violation of international law. Contractual relations between MSC and its Egyptian counterparts are primarily governed by the principles of freedom of contract. Second, international law authorities distinguish expropriation, which requires compensation under international law, from a state's action pursuant to its legitimate police power to regulate, which does not give rise to an obligation to compensate even though a foreign entity suffers loss as a consequence of the regulation. (Restatement (Third) of Foreign Relations Law of the United States §712, Reporters' Note 6). Here, the GOE had the legitimate police power to regulate by requiring a License, setting License fees, assessing taxes, and attaching MSC's assets for failure to pay the taxes owed.

3. The Insured did not demonstrate that the acts on which the Claim is based had the effect of confiscation by directly depriving the Insured of the right to use, control, or dispose of covered property or any local bank accounts maintained by the Insured in the project country in connection with the project

Even assuming that the GOE, or entities whose conduct is attributable to the GOE, violated international law, the evidence adduced by MSC does not support MSC's allegation that its assets and bank accounts were seized because of its failure to pay allegedly unlawful rental fees. Nor does the evidence support MSC's allegation that GOE actions had the effect of confiscation by directly depriving the Insured of the right to use, control, or dispose of the covered property. Rather, even accepting MSC's factual allegations, the evidence indicates that the alleged blockage of MSC's funds and provisional attachment of its assets and appointment of a Receiver were based on MSC's failure to pay undisputed GOE taxes (not rental fees). MSC retained the obligation to pay the taxes and the right to regain the ability to use, control and dispose of the covered property, but made no attempt to do so.

In addition, the record does not support MSC's allegation that it was "forced" to sell its assets to a GOE entity at an inadequate price, thereby losing the right to dispose of the property. After MSC's contract with its GOE counterparty finally expired on April 24, 1993, MSC could have removed the Project from the Project Site as the Port Authority requested and sold it to whomever it wished. Indeed, although it did not disclose the sale to OPIC at the time (or for another 3 years), MSC successfully sold the Project assets for an as yet indeterminate amount, without protesting that it had been forced to do so.

B. Assuming arguendo that the insured had met its burden in Section 4.01 of the Insurance Contract, no compensation would be payable under the Insurance Contract because an exclusion applies: A preponderant cause of the loss was unreasonable action attributable to the Insured. (§4.02(c))

Under the Insurance Contract, compensation for confiscation is excluded if the preponderant cause of the loss is unreasonable action attributable to the Insured, which provoked the loss. (Insurance Contract, §4.02.) The evidence submitted by the Insured demonstrates that any losses it suffered with respect to the Project were caused preponderantly by the Insured's unreasonable actions.

Specifically, any blockage of MSC's funds or attachment of its assets by the GOE taxation authorities were the result of MSC's failure to pay taxes indisputably due for the years 1992-1993. This non-payment of outstanding taxes was unreasonable action attributable to the Insured. Furthermore, MSC's decisions to cease negotiating with the Port Authority with respect to the rental fee issue, to cease seeking to obtain a License, to reject proffered assistance from the American Embassy, and to leave Egypt (abandoning its assets) were also unreasonable.

Upon deciding in June 1993 that it was no longer going to continue in business in Egypt, a reasonable course of conduct on the part of MSC would have been payment of the outstanding taxes, payment of the disputed berthing fees as determined by the Egyptian court, removal of the Project from Port Said, and sale of MSC's assets. Even assuming that Mr. Kell genuinely feared for his personal safety on different occasions, MSC could have continued to protect its interests through the use of local or other representatives.

The available information supports the conclusion that MSC wished to abandon the Project for business reasons and attempted to use the Insurance Contract as an exit vehicle. MSC was performing services under a series of contracts with Egyptian government entities. MSC was not entitled to renewal of these contracts on MSC's own terms. MSC's decision to abandon the Project rather than continue under less attractive terms was a business decision within MSC's discretion and not the basis for a valid claim under the Insurance Contract.

C. The Insured did not demonstrate its right to compensation in the amount claimed as required under Section 10.01 of the Insurance Contract

The Insurance Contract requires that an applicant for compensation demonstrate the Insured's right to compensation in the amount claimed. (Insurance Contract, §10.01; see also Insurance Contract, Article V.) In addition to its failure to demonstrate that compensation was payable, the Insured also did not provide the requisite evidence with respect to supporting the amount claimed (\$3.5 million).

In fact, the materials that were submitted by MSC indicate that the fair market value of the covered property in 1993 was below the \$3.5 million claimed. On January 6, 1988, the MSC Board of Directors approved the purchase of the Observer, the centerpiece and most expensive part of the Project, for \$864,000. And, in September/October 1988, the Canal Company offered to purchase and MSC agreed to sell the assets of MSC for \$2.5 million. After receiving a draft of this determination, by letter dated June 1, 1999, MSC submitted copies of two previously undisclosed letters to OPIC in support of its valuation of the covered property. One letter, March 11, 1993, is from Han-Padron Associates and expresses preliminary interest in purchasing the Observer for an amount in the \$1.5 - \$2 million range or the entire project for somewhere in the range of \$5 million, provided that the project could be delivered to a South American port. The second letter, dated January 18, 1994 from A.L. Burbank (Shipbrokers) Ltd. writing on behalf of Western Overseas, Inc., states that the broker could obtain an offer for the Observer for \$1.425 million if it were delivered to India. Not only was this information only recently submitted to OPIC, but no information was given about the potential purchasers, the circumstances surrounding these letters of interest and the information on which they were based. Accordingly, these letters are not sufficient to demonstrate the fair market value of the covered property. In addition, both are conditional offers, and we have no way of knowing whether the conditions would be met.

Section 5.01.1 of the Insurance Contract provides that for a confiscation of property OPIC shall pay compensation in an amount equal to the lesser of the original cost of the covered property to the Insured and the fair market value, less anything of value received by the Insured on account of the confiscated property. MSC's claim suffers from two deficiencies in connection with Section 5.01.1. First, MSC did not provide any evidence of the original cost of the covered property or its fair market value at the time of the alleged confiscation. Second, MSC received at least \$413,000 from the sale of Project-related assets; MSC has failed to provide documentation or details relating to this sale, and there is reason to believe that it received other benefits (such as forgiveness of indebtedness) in connection with the sale. MSC's failure to supply substantiated information about the original cost, fair market value, or sales proceeds of the property would prevent any payment of compensation, even assuming that the other elements of its Claim were established.

D. The Insured's violation of its duties under Article XI of the Insurance Contract is an independent ground for denying compensation to the Insured. (§1.02.a)

Finally, the Insured has not complied with its duties under Article XI of the Insurance Contract, including the duties to:

1. maintain in the United States the records and books of account concerning the project which are necessary to compute and substantiate compensation. (Insurance Contract, §11.01.7.) The Insured has represented that the records and books are in Egypt.
2. furnish OPIC with such information as OPIC may reasonably request. (Insurance Contract, §11.01.8.) OPIC has repeatedly requested additional information and documentation from MSC to support its Claim. MSC responded that it could not obtain the information and documentation because the required information and documentation is in Egypt.
3. take all reasonable measures to preserve its rights, remedies and property and to negotiate in good faith with the governing authority of the country and other potential sources of compensation. (Insurance Contract, §11.01.10.) As discussed above, the Insured did not fulfill this duty.
4. not enter into any agreement related to compensation for acts within the scope of coverage without OPIC's prior written approval. (Insurance Contract, §11.01.11.) MSC did not request OPIC's approval of the sale of the covered property and sold the covered property without OPIC's prior written approval.

#### VI. Summary of OPIC's Determination

MSC failed to provide information and documentation necessary to permit OPIC to evaluate its Claim. OPIC repeatedly requested such information, but MSC did not materially comply. Solely for present purposes, OPIC has assumed that the factual allegations made by MSC are correct and, insofar as possible, has further assumed the existence of facts favorable to MSC. Notwithstanding this, MSC's Claim must be denied, on multiple grounds.

MSC's generalized allegations of harassment by GOE entities are examples of the difficulty of doing business in Egypt, routine contract disputes between MSC and its counter-parties, and routine labor, taxation, and regulatory disputes with GOE authorities. Indeed, MSC began claiming harassment in 1988, yet continued to do business in Egypt until 1993. MSC's argument that the GOE violated a treaty obligation of national treatment is not supported by MSC's factual allegations or the treaty itself, which contains several exceptions from national treatment that are applicable to the Project. More generally, as a contractor, MSC's rights were determined primarily by the succession of contracts that it negotiated with various Egyptian entities. It had no right to expect that these contracts would be extended indefinitely on any terms.

The documents provided indicate that the loss suffered by MSC was the direct result of the unreasonable action of MSC (e.g. its failure to pay GOE taxes). The Insurance Contract specifically provides that no compensation shall be payable if the preponderant cause of the loss is the unreasonable action of the Insured which provoked the loss. (§4.02.) MSC did not provide any evidence with respect to the amount of compensation claimed. (§5.01.) In addition, MSC did not fulfill a number of its duties (§§11.01.7(a), 11.01.8, 11.01.10 and 11.01.11). Failure to perform contractual duties constitutes independent grounds for denying the Insured's Claim. (§1.02.a.)

Finally, even if MSC's confiscation claim were found valid, and even if MSC had not caused such confiscation by its unreasonable conduct, there is no evidence that MSC suffered any compensable loss. MSC failed to provide evidence of the acquisition price of the covered property, the fair market value of such property in 1993, or the amounts it received by selling the property.

#### Conclusion

For the foregoing reasons, OPIC concludes that the Claim of the Insured is invalid and that the Insured is not entitled to compensation.

OVERSEAS PRIVATE INVESTMENT CORPORATION

By:           signed            
George Muñoz  
President and Chief Executive Officer

Dated: July 2, 1999

**Footnotes:**

<sup>1</sup> A letter from MSC to OPIC dated October 6, 1988, on its face, constitutes notice of a claim for confiscation ("Notice of Claim"). However, MSC did not pursue any demand for compensation from OPIC. Rather, for the next five years, MSC continued to conduct its business in Egypt.

Following inquiries in 1993 from MSC, OPIC provided MSC and its legal counsel information on the procedures and requirements for submitting a claim to OPIC for compensation under the Insurance Contract. These included letters dated August 25 and 27, 1993 and requests for additional information and supporting documentation made on October 29, 1993, January 6, 1994, August 18, 1995, and February 25, 1998.

<sup>2</sup> The Insurance Contract uses the term "confiscation" to describe expropriation risk. The elements of confiscation are the same as the requirements for expropriation under other OPIC Insurance, except that compensation may be payable for confiscation of particular items of covered property, whereas OPIC expropriation coverage generally provides for compensation only in the event of total expropriation of the insured investment.

<sup>3</sup> MSC was insured by OPIC from 1976 to 1987 under another contract of insurance, which was replaced by the Insurance Contract when it became effective.

<sup>4</sup> Specially, MSC alleged that the Port Authority sought to impose charges for which MSC was not liable at all (e.g. dredging) or overcharged MSC (e.g. for port charges), that MSC's contract partner forced MSC to settle for less than was owed for past services, that the Canal Company was offering to purchase the Project at a low price and on other unacceptable terms, that, due to nonpayment of port charges, the Port Authority had placed a lien on the Observer and had scheduled an auction, and that MSC was being driven out of Egypt and would not be granted a new License.

<sup>5</sup> Virtually no evidence was provided by MSC documenting the make-up of the financial dues. The record does not indicate whether the "financial dues" payment required by the Port Authority refers to previously disputed berthing fee amounts dating back to 1988, to a new assessment of rental fees, to both, or to some other obligations. On July 16, 1991, MSC informed OPIC it had lost one of several actions which it was pursuing in Egyptian courts against the Port Authority. MSC provided no further information about the proceedings. Although resolution of the berthing fee assessment is unclear, the record is clear that MSC was not absolved from paying the contested berthing fees and that MSC never paid these fees.

<sup>6</sup> In August of 1998, MSC informed OPIC that the "rent" included not only the previously alleged \$88,000 per month fee, but also an additional \$4,800 per day docking charge. No substantiating documentation was provided by MSC.

<sup>7</sup> Two invoices submitted by MSC contain varying break-downs of charges assessed by the Port Authority, none of which appear to produce figures to support this allegation. The invoices appear to have been submitted to the Port Said Container and Cargo Handling Company, rather than to MSC. Each invoice contains what appear to be references to "rentals", "cement dues", and "warehousing charges". There is no explanation, and MSC has provided no explanation, for how these figures were derived.

<sup>8</sup> Nor would the facts alleged by MSC constitute breaches of customary international law. Under customary international law a state is responsible for economic injury to nationals of other states for injury resulting from, among other things, a discriminatory taking by the state of the property of that national. (See Restatement (Third) of Foreign Relations Law of the United States §712(1)(b).) Even accepting MSC's unsupported allegations, there was no taking by the Port Authority or other GOE entities. MSC had no right to a License, yet one was offered. MSC had no right to national treatment under general principles of law, and the rental rate was a matter of contract, to be negotiated by the parties. And MSC has not alleged that the taxes assessed on it were discriminatory.

<sup>9</sup> Nor did the lien placed on MSC's assets for failure to pay disputed berthing fees in 1988 have the effect of confiscation. This act did not deprive the Insured of the right to use, control, or dispose of the covered property or any local bank accounts.