Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt

Preliminary Decision on Jurisdiction rendered in November 27th 1985, by the Arbitral Tribunal Constituted by ICSID in Case ARB nº 84/3[1]

NOTA INTRODUTÓRIA

Em 27 de novembro de 1985, o Tribunal Arbitral do ICSID (*International Centre for Settlement on Investment Disputes*), composto pelos árbitros Eduardo Jimenez de Arechaga, Mohamed Amin Elabassy El Mahdi e Robert F. Pietrowski Jr., proferiu decisão que se tornaria um marco da arbitragem de investimentos. Trata-se da *Decision on Jurisdiction*, proferida em sede do ICSID Arbitration Case nº 84/3, Southern Pacific Properties (Middle East) Limited *vs.* Arab Republic of Egypt.

Consoante com as normas dispostas no Artigo 25 da Convenção de Wahington, o ICSID é competente para dirimir controvérsias relativas a investimentos quando comprovados três requisitos: (i) uma das partes na controvérsia deve ser um Estado signatário da Convenção de Washington; (ii) a outra parte deve ser um nacional de outro Estado, também signatário da Convenção de Washington; e, (iii) a disputa, em si, deve ser considerada legal e estar diretamente relacionada a um investimento. Por fim, as partes devem ter consentido, por escrito, em submeter a controvérsia ao ICSID[2].

Na visão do Egito, inexistia, no caso, consentimento firmado pelas Partes, em documento escrito, aceitando a jurisdição do ICSID. Por outro lado, a tese defendida pelos advogados da Southern Pacific Properties, dentre eles Jan Paulsson, consistia na alegação de que a Lei de Investimento Estrangeiro Egípcia, ou Lei nº 43/1974 trazia, em suas disposições, a possibilidade de solucionar disputas oriundas de investimentos estrangeiros por meio da arbitragem ICSID[3].

As alegações do Egito fundavam-se em três pontos: as requerentes não haviam concordado expressamente em participar de uma eventual arbitragem ICSID; que a Lei nº 43/1974 não seria aplicável àquele caso, e; mesmo que a

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1 A *Decision on Jurisdiction* em questão foi publicada em: *Yearbook Commercial Arbitration 1991 – Volume XVI, Van den Berg(ed), p. 28 (1991);* 121 *Journal du droit international*, p. 220 (1994); *3 ICSID Reports* (1995), p. 112-130. Enquanto as duas primeiras publicações trazem excertos e comentários à decisão, a última traz a decisão na íntegra, a qual segue publicada nesta seção.

2 Decision on Jurisdiction rendered on November 27th, 1985. In: *Yearbook Commercial Arbitration 1991 - Volume XVI, Van den Berg (ed) (1991)*. Disponível no *site*: www.kluwerarbitration.com.

3 Idem.

Lei de Investimentos Egípcia fosse aplicável ao caso, apenas o disposto em seu art. 8º não seria o suficiente para enquadrar a disputa sob a jurisdição do ICSID[4].

O Tribunal Arbitral decidiu por acatar a tese da Southern Pacific Properties, desconstruindo as objeções da República Árabe do Egito, declarando-se competente para dirimir as controvérsias decorrentes do investimento da SSP no Egito.

Essa decisão revolucionou o que se entende por "consentimento" no âmbito da Convenção de Washington, pois, de acordo com a mesma, os Estados podem, por meio de legislações nacionais, ofertar a submissão de conflitos relativos a investimentos à arbitragem ICSID e, essa "oferta" é considerada, pelos tribunais arbitrais do ICSID, forma válida de manifestação do consentimento por parte do Estado.

A partir do caso SSP v Egypt considera-se que a "oferta unilateral" de submissão à arbitragem ICSID por meio de uma legislação nacional ou de cláusulas constantes de Tratados Bilaterais de Investimentos, constitui manifestação do consentimento do Estado para resolver, mediante arbitragem ICSID, eventuais disputas decorrentes dos investimentos estrangeiros constituídos ao amparo dessa legislação nacional ou do Tratado.

Esta decisão foi fundamental para o futuro do ICSID e da arbitragem de investimentos, uma vez que ampliou o âmbito da competência dos tribunais arbitrais ICSID.

ADRIANA NOEMI PUCCI

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DECISION ON JURISDICTION, 27 NOVEMBER 1985

1. On August 24, 1984, the International Centre for the Settlement of Investment Disputes (hereinafter called "the Centre" or "ICSID") received a Request for Arbitration from Southern Pacific Properties (Middle East) Limited

4 "Article 8 provides in relevant part:

Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such Convention applies.

Disputes may be settled through arbitration. An Arbitration Board shall be constituted, comprising a member on behalf of each disputing party and a third member acting as chairman to be jointly named by the same two members. Failing agreement on the nomination of the third member within thirty days of the appointment of the second member, the chairman shall be chosen, at the request of either party, by the Supreme Council of Judicial Bodies from among counsellors of the judiciary in the Arab Republic of Egypt... (...)" *In*: Preliminary Decision on Jurisdiction rendered in November 27th 1985, by the Arbitral Tribunal Constituted by ICSID in Case ARB nº 84/3.

(hereinafter called "SPP(ME)" or "the Claimant"), a Hong Kong corporation. The Request stated that SPP(ME) wished to institute arbitration proceedings against the Arab Republic of Egypt (hereinafter called "ARE", "Egypt," or "the Respondent), and asked for the following relief:

> SPP(ME) respectfully requests ICSID to establish an arbitral tribunal to:
>
> 1. determine that the ARE has undertaken obligations and incurred duties in respect to SPP(ME) both according to the terms of Law No. 43 and according to the Heads of Agreement of September 1974 specifically entered into by a Member of its Government, as well as by a Supplemental Agreement "approved, agreed and ratified" by the same Member of its Government;
> 2. determine that the ARE violated its obligations thereunder;
> 3. adopt and incorporate as its own the pertinent findings of fact made by the ICC Arbitral Tribunal concerning SPP(ME)'s performance of its obligations under its agreements, the dismissal of EGOTH's counterclaim therein, and the acts bringing about termination of the investment project;
> 4. determine the liability of the ARE to compensate SPP(ME) for the termination of its investment agreements and to award the full measure of indemnification to SPP(ME) on account of the destruction of its investment, increased by the additional costs, including all direct and indirect costs of the present proceedings, occasioned by ARE's wrongful refusal to honor the ice award of February 16, 1983, or otherwise compensate SPP(ME), as well as interest at commercial rates.

2. On August 28, 1984, the Secretary-General sent an acknowledgement of the Request to SPP(ME) and transmitted a copy of the Request to Egypt. On the same day, the Secretary-General registered the Request in the Arbitration Register and notified the Parties accordingly.

3. On August 29, 1984, the Secretary-General of ICSID notified the Parties by telex that:

> ... the Arabic text of Article 8 of Law No. 43 of 1974 refers to the settlement of disputes within the framework of the ICSID Convention in the cases where it (i.e., the Convention) applies, and not, as erroneously mentioned in the English translation, where Law No. 90 of 1971 ratifying the Convention applies. I have thus registered the request of SPP without prejudice to the question whether the said Article eight constitutes consent for the purposes of the ICSID Convention or merely includes a reference to this Convention in the cases where consent for ICSID Jurisdiction is issued separately. This matter, if raised, will be for the Arbitral Tribunal to decide.

4. On August 29, 1984, the Centre received from SPP(ME) a proposal that a sole arbitrator be appointed pursuant to Arbitration Rule 2 (1)(a), or, alternatively, that the Parties jointly nominate an individual as President of the Tribunal.

5. In a communication received by the Centre on November 12, 1984, Egypt stated that it contested the Centre's competence with respect to the present dispute, and that no action undertaken in proceedings concerning SPP(ME)'s request could be deemed a renunciation of such jurisdictional objections. Egypt rejected SPP(ME)'s proposals for the constitution of the Tribunal, and proposed as an alternative a Tribunal consisting of three members, with Dr Eduardo JIMENEZ DE ARECHAGA serving as President of the Tribunal.

6. In accordance with Arbitration Rule 4, the Parties agreed on November 26, 1984, to extend to December 3, 1984, the period for nominating their respective arbitrators and for agreement on the President of the Tribunal.

7. On November 26, 1984, Egypt designated Dr Mohamed Amin EL MAHDI, an Egyptian national, as an arbitrator pursuant to Arbitration Rule 3. SPP(ME) informed the Centre on November 30, 1984, that it did not object to the nationality of the arbitrator named by Egypt, as it might have done under Arbitration Rule 3 (l)(a)(i), and that it was designating Mr Robert F. PIETROWSKI, Jr, a US national, as an arbitrator. Further, SPP(ME) informed the Centre that it consented to Egypt's proposal that Dr JIMENEZ DE ARECHAGA be appointed President of the Tribunal. Dr JIMENEZ DE ARECHAGA accepted his appointment on December 5, 1984, and Mr PIETROWSKI accepted his appointment on December 7, 1984.

8. On December 18, 1984, the Centre received notice that Dr EL MAHDI accepted his appointment as an arbitrator, and the Secretary-General informed the Parties that the Tribunal was constituted and that the proceedings were deemed to have begun in accordance with Arbitration Rule 6 (1).

9. On February 8, 1985, the Tribunal conducted a preliminary meeting with the Parties at the Permanent Court of Arbitration in the Hague. The Parties placed on record their agreement to the effect that:

> ... the Tribunal has been properly constituted in accordance with Section 2 of the ICSID Convention and Chapter 1 of the Arbitration Rules.

In accordance with Arbitration Rule 20 it was decided that the Arbitration Rules in effect up to September 26, 1984, would apply; that the procedural languages would be English and French; and that the seat of the arbitration would be Washington, DC.

10. The Tribunal decided at the preliminary meeting to suspend the proceedings on the merits pending a decision on Egypt's jurisdictional objections, and that the proceedings on jurisdiction would consist of written pleadings and oral argument. The following schedule was set for the filing of the written pleadings on jurisdiction:

(a) Egypt's observations to be filed by May 8, 1985;

and

(b) SPP(ME)'s observations to be filed by June 19 1985.

11. The observations of both Parties were filed within the prescribed time limits. Egypt, in its observations, requested the Tribunal:

> ... for all of the grounds explained above, to declare itself incompetent to hear the claims presented by SPP(ME).

The observations of SPP(ME) asked the Tribunal to:

> ... reject the Respondent's objections to the Centre's jurisdiction over this dispute between SPP(ME) and the Government of Egypt regarding the State's failure to compensate this foreign investor for the losses it suffered as a result of the State's cancellation of the Pyramids Oasis project.

12. On July 8, 1985, the Centre received from Egypt a document responding to certain arguments set forth in SPP(ME)'s observations concerning interpretation of Law No. 43.

13. Oral argument on the question of jurisdiction was held at the Permanent Court of Arbitration in the Hague on July 10 and 11, 1985. The hearings were recorded in the form of a verbatim transcript, in the English and French languages. At the end of the oral proceedings, the Tribunal requested that the Parties submit certain additional materials concerning Egyptian Law No. 43.

14. On July 23, 1985, the Parties advised the Centre that Southern Pacific Properties Limited (hereinafter called "SPP" or "the Claimant"), the parent company of SPP(ME) and also a Hong Kong corporation, had been joined as a claimant in the proceedings, subject to Egypt's reservation of jurisdictional defenses.

15. In response to the request made by the Tribunal at the end of the oral proceedings, the Claimants and the Respondent filed supplemental materials concerning Law No. 43 on August 21 and August 27, 1985.

* * *

16. On September 23, 1974, a contract entitled "Heads of Agreement" was entered into by the Government of Egypt (represented by the Minister of Tourism), the Egyptian General Organization for Tourism and Hotels (hereinafter called "EGOTH"), and SPP, a company engaged in the development of tourist and resort facilities. EGOTH was at the time a public sector enterprise under the Minister of Tourism, organized under Egyptian Law No. 60 of 1971.

17. The Heads of Agreement by its terms was entered into in accordance with certain Egyptian laws, including Law No. 43 of 1974 Concerning the Investment of Arab and Foreign Funds and the Free Zone. In the Heads of Agreement, EGOTH and SPP undertook to incorporate an Egyptian joint venture

company to develop tourist complexes at the Pyramids Oasis site near Cairo and at Ras El Hekma on the Mediterranean coast. These projects were to be developed according to detailed master plans prepared by SPP and approved by EGOTH. The Ministry of Tourism agreed to secure the title to property and the possession of land necessary for the development of the proposed projects. The Ministry of Tourism and EGOTH undertook to transfer the right of usufruct for such property to the joint stock company as part of the capital investment. The Minister of Tourism and EGOTH undertook to assist in obtaining all local approval for the execution of the projects in accordance with the plans to be submitted by SPP and approved by EGOTH. SPP for its part agreed to obtain the necessary financing for the projects, and to provide or arrange for all technical expertise required for designing, constructing, managing, and marketing the projects.

18. The Preamble of the Heads of Agreement, which was expressly made part of the agreement by Article 1, provided:

> Whereas the Ministry of Tourism approved granting both 2nd and 3rd party (i.e., EGOTH and SPP) the right to develop the areas as shown in the attached maps in the Pyramid's area and Ras El Hekma Zone.
>
> This agreement is issued in accordance with laws No. 1 for the year 1973 relating to Hotels Installations and Tourism, and law No. 2 for the year 1972 relating to the supervision by the Ministry of Tourism on touristic sites and the development of such areas, and *law 43 for the year 1974 relating to Arab and foreign funds invested in the ARE with particular reference to government guarantees long term tax holidays, exemptions from import custom duties, etc.* (Emphasis added.)

Article 2 of the Heads of Agreement provided:

> Both 2nd and 3rd parties undertake to incorporate promptly an *Egyptian joint venture company* of which 40 percent would be subscribed by EGOTH and 60 percent by SPP (for the Pyramid area) and 30 percent by EGOTH and 70 percent by SPP (for Ras El Hekma). (Emphasis added.)

Article 4 provided:

> FIRST Party will secure the title of property and possession of land and both First and second party undertake to transfer the right of usufruct to the joint company as its part of the capital investment. Both MT and EGOTH undertake to transfer such right to the joint company immediately upon incorporation, any balance being transferred not later than 90 days thereafter.

19. On December 12, 1974, a contract entitled "Agreement for the Development of Two International Tourist Projects in Egypt" (hereinafter called "the December Agreement") was concluded between EGOTH and SPP concerning the projects at the Pyramids Oasis and Ras El Hekma sites. On the final page of the December Agreement, following the signatures of the representatives of EGOTH and SPP, there appeared the typewritten statement, "Approved, agreed

and ratified by the Minister of Tourism, His Excellency, Mr Ibrahim Naguib, on the Twelfth day of December, 1974". Next to this statement the signature of the Minister and an official stamp were affixed.

20. The Preamble of the December Agreement referred to the Heads of Agreement saying that:

> Following execution of the Heads of Agreement dated 23rd September, 1974, ... and subsequent negotiations between the above parties, the following are agreed ...
>
> Article 1 of the December Agreement then provided that a joint venture company with registered shares would be incorporated in Egypt for a renewable period of fifty years. This company, called the "Egyptian Tourist Development Company" (hereinafter referred to as "ETDC"), was to be responsible for the development and operation of the projects. The nominal capital of ETDC was initially set at two million United States dollars, to be increased to ten million dollars at the end of the fifth year. Sixty percent of this capital was to be subscribed by SPP, and the remaining forty percent by EGOTH. On the fiftieth anniversary of the incorporation of ETDC, EGOTH was to be entitled to increase its shareholding at no cost to fifty percent of the total capital. The participation of EGOTH in the capital of ETDC was represented by the rights of usufruct referred to in Articles 5 and 6 of the agreement. Article 5 of the December Agreement stipulated that EGOTH would use its best efforts to secure all the necessary Government approvals to enable ETDC the immediate possession of the land in both sites, and to ensure the transfer of the rights of usufruct to ETDC for its duration.

21. On the same date that the December Agreement was signed, the representatives of EGOTH and SPP also signed a "statement" which provided:

> It is understood between contracting parties (EGOTH) and (SPP) in concern of the agreement signed on the 12th of December 1974, that obligations which lie on EGOTH are subject to the approval of the competent governmental authorities and that the feasibility study proves the profitability of the projects.

22. The December Agreement was expressly concluded in accordance with certain Egyptian laws, including Law No. 43. It contained an arbitration clause which provided that any disputes relating to the agreement would be submitted to the International Chamber of Commerce (hereinafter called "the ICC") in Paris, France, for arbitration.

23. The December Agreement also provided that SPP would incorporate a holding company to own its shareholding in the joint venture. Article 17 of the December Agreement provided:

> It is understood that SPP will be incorporating a holding company to own its shareholding in ETDc and it is agreed that sit shall have the right to assign its rights, privileges, duties and obligations under this Agreement to this company in which SPP will have a controlling, but not necessarily majority, interest and in which it controls and directs management, provided the company satisfies EGOTH...

Such an assignment was subsequently made to SPP(ME), a wholly-owned subsidiary of SPP formed in 1974 to undertake the execution of the projects at the Pyramids Oasis and Ras El Hekma sites.

24. By a letter dated April 12, 1975, the Board of Directors of the General Organization for Investment of Arab Capital and Tax-Free Zones (hereinafter called "the General Organization for Investment") approved the application for the establishment of a combined tourist company by EGOTH and SPP for the development of the tourist areas at the Pyramids and Ras El Hekma sites. This approval was conditioned upon the presentation by the joint venture company to the Board of Directors of a complete economic feasibility study. The decision provided that the beneficial rights would be for a period of 50 years and then would revert to the State. This period was subsequently extended to 99 years, subject to compliance with certain Egyptian laws.

25. On May 22, 1975, the President of Egypt issued Decree No. 475 of 1975 "[t]o specify the use of the lands on Pyramids Site and Ras El Hekma Site... for tourist purposes". The Decree provided that EGOTH "will either alone or with one of the Companies in which it is a partner develop and use these two sites".

26. On October 19, 1975, EGOTH as sole owner of the sites mentioned in Presidential Decree No. 475, irrevocably transferred its right of usufruct for the sites "without restriction of any kind" to the joint venture ETDC. This right of usufruct was transferred for the life of ETDC.

27. On November 12, 1975, a contract between EGOTH and SPP(ME) for the incorporation of a joint venture was concluded in conformity with Law No. 1 of 1973 Concerning Tourist Establishments and Law No. 43 of 1974. The incorporation was authorized by Ministerial Decree No. 212 of 1975. This Decree referred in its preamble to the Decrees of the Prime Minister, No. 91 of 1975 Promulgating the Executive Regulations of Law No. 43 of 1974, and No. 92 of 1975 Concerning the Pattern of Contract and Statutes Covering the Projects Created Under the Provisions of Law No. 43.

28. By a letter dated April 1, 1976, the Chairman of EGOTH notified the Chairman of ETDC of the "formal approval of the MT (Ministry of Tourism) and EGOTH of the Pyramids Oasis project as a whole... "

29. On October 19, 1976, the Minister of Tourism wrote to the Chairman of ETDC, stating:

> I am writing to confirm my formal approval to the development and construction of your project... This approval entitles you to proceed with your programme without the necessity of further reference to this Ministry.

30. Finally, on June 1, 1977, Ministerial Decree No. 96 of 1977, was issued. Article 1 of this Decree provided:

> The Ministry of Tourism approves the master planning for the tourist Pyramids Plateau Area, as well as the detailed planning of the first phase regarding the

> implementation of villages nos. 1, 3 and 21 of the project of exploiting the tourist Giza Pyramids Plateau...

31. Construction work began at the Pyramids Oasis site in July of 1977. The Claimants have explained in their pleadings that such construction work commenced with roads, sewage systems, water reservoir facilities, artificial lakes, and a golf course.

32. In late 1977, the Pyramids Oasis project began to encounter political opposition in Egypt, and it became the subject of a parliamentary inquiry. Opponents of the project claimed that it posed a threat to undiscovered antiquities.

33. In a decree issued on May 27, 1978, the Ministry of Culture declared "[t]he land surrounding the Pyramids" to be public property. This decree was issued upon the recommendation of the Egyptian Antiquities Authority, which confirmed the presence of antiquities in the western part of the Al Giza Pyramids region.

34. On May 28, 1978, the General Organization for Investments, by Resolution 1/51-78, "decided to drop its former issued agreement... concerning the Pyramids Plateau... ".

35. On June 19, 1978, the Presidential Decree No. 267 cancelled Presidential Decree No. 475 which had designated "the lands on the Pyramids plateau in Giza for touristic exploitation". Finally, on July 11, 1978, the Prime Minister of Egypt issued a decree declaring these same land *d'utile publique*.

36. At the request of EGOTH, ETDC was put under judicial trusteeship by a judgment of the Giza Court for Urgent Matters rendered on June 19, 1978. The court appointed trustees who were put in charge of the management of the company's assets until a general meeting of the shareholders could take place. The trusteeship remains in effect.

* * *

37. On December 7, 1978, SPP and SPP(ME) filed a request for arbitration with the Court of Arbitration of the International Chamber of Commerce in Paris against the ARE and EGOTH, under the arbitration clause in the December Agreement. Egypt objected to the jurisdiction of the ICC tribunal. In the *acte de mission*, Egypt and EGOTH stated:

> The FIRST and SECOND DEFENDANTS wish to make it clear that their submission of an ANSWER and COUNTER-CLAIM does not constitute in any way an acceptance of the initiation of this arbitration proceedings. Their refusal of the arbitration proceedings is to remain firm until the Arbitrators render their final decision on the matter of jurisdiction. In case the Arbitrators affirm their jurisdiction over the subject matter at issue, the COUNTER-CLAIM shall be comprised within the said jurisdiction.

38. The ICC tribunal, in an award rendered on February 16, 1983,[5] held *inter alia*;

1. That the first Defendant, the Arab Republic of Egypt, pay to the First Claimant, Southern Pacific Properties (Middle East) Limited, the sum of US $ 12,500,000 (twelve million five hundred thousand) together with interest thereof at the rate of 5% per annum from the date in which the request for arbitration was received by the Secretary of the ICC Court of Arbitration (i.e. 1st December 1978) until payment.
2. That the claim by both Claimants against the Second Defendant, the Egyptian General Company for Tourism and Hotels, be dismissed.
3. That the counterclaim by the said second Defendant against the Claimants be dismissed.

In dismissing the claim against EGOTH, the ICC tribunal added:

> Different considerations might well apply if the Government had not been a party to the December, 1974 Agreement.

39. On March 28, 1983, Egypt appealed the ICC award to the Paris Court of Appeals.

40. By a letter dated August 15, 1983, SPP(ME) notified the Minister of Tourism that in its view the ICC award "is binding between the parties and finally dispositive of our dispute", on the basis of Article 24 of the ICC Rules which says that:

> By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made.

At the same time, SPP(ME) added in its letter of August 15, 1983, that

> [R]ecognizing that your Government has taken the position that the ICC award was rendered without a jurisdictional basis, we hereby notify you that we accept and reserve the opportunity of availing ourselves of the uncontestable jurisdiction of the International Center for the Settlement of Investment Disputes, under the auspices of the World Bank, which is open to us as a result of Law No. 43 of 1974, Article 8 of which provides that investment disputes may be settled by ICSID arbitration.

SPP(ME) also affirmed that:

> ... This notification does not affect our reliance on the ICC Award, nor does it constitute a waiver of any rights to have the ICC Award immediately recognized and enforced by judicial procedure.

5 [The text of the ICC award is set out at p. 45.]

41. On March 21, 1984, the Paris Court of Appeals annulled the ICC award on the ground that Egypt was not a party to the December Agreement and therefore was not bound by the ICC clause therein. [6]

43. On the same date, the District Court of Amsterdam granted exequatur to the ICC award. [7]

44. On November 28, 1984, the Claimants referred the decision of the Paris Court of Appeals to the French Court of Cassation (Pourvoi No. 84/17-274), requesting that the decision be set aside. This request is presently pending. In the meantime, SPP(ME) has agreed that it will not seek enforcement of the ICC award in the Netherlands as long as the Paris Court of Appeals decision stands. [8]

* * *

45. The Tribunal will now proceed to the consideration of its competence with respect to the present dispute. The general rules which determine the jurisdiction of the Centre, and hence the competence of the Tribunal, are laid down in Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter called "the ICSID Convention" or "the Convention"). These rules prescribe three prerequisites for the jurisdiction of the Centre: the parties to the dispute must be, on the one hand, a "Contracting State," i.e., a party to the Convention, or a constituent subdivision or agency of a Contracting State which has been designated to the Centre by the Contracting State, and, on the other hand, a national of another Contracting State. Article 25 defines the term "national of another Contracting State" to include "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." The dispute itself must be a legal one "arising directly out of an investment." Finally, the parties must have consented "in writing" to submit the dispute to the Centre. Unless the Parties have conferred jurisdiction on the Centre in accordance with Article 25, the Tribunal lacks competence to hear the present case.

46. The Parties are in agreement that the dispute is between a Contracting State and a national of another Contracting State. Egypt is a party to the Convention and therefore a "Contracting State" within the meaning of Article 25. SPP and SPP(ME) are Hong Kong corporations. Hong Kong is a territory for whose international relations the United Kingdom, also a party to the Convention, is responsible. Article 70 of the Convention provides that:

> This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by

6 [See p. 79.]
7 [See p. 92.]
8 [The decision of the Cour de cassation which was rendered on 6 January 1987 is set out at p. 96.]

> written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.

The United Kingdom expressly extended the application of the Convention to Hong Kong in 1967. SPP and SPP(ME) are thus both "nationals of another Contracting State" within the meaning of Article 25.

47. Nor does there appear to be any issue in the present case as to whether the controversy is a "dispute arising directly out of an investment." Egypt has argued that the claim in this case relates only to non-performance of contracts, and that Egypt's Investment Law No. 43, which the Claimants rely on for jurisdictional purposes, is therefore not applicable to the present dispute. Nowhere has Egypt asserted that the dispute does not arise "directly out of an investment" within the meaning of Article 25, however.

48. Where the Parties do disagree is on the question of whether they have consented in writing to submit the present dispute to the jurisdiction of the Centre. The Claimants contend that Egypt gave advance consent to the Centre's jurisdiction when it enacted law No. 43 in 1974, and that their own consent was expressed in the letter from SPP(ME)'s Managing Director, Mr A. Anthony McLellan, to Egypt's Minister of Tourism, dated August 15, 1983, and again by the act of filing their request in the present case.

*

49. The consent of the parties to the dispute is the fundamental condition of the jurisdiction of ICSID. The Preamble of the Convention declares that:

> ... no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.

In the same vein, the Report of the Executive Directors on the Convention asserts that "consent of the parties is the cornerstone of the jurisdiction of the Center".

50. The Convention does not prescribe any particular form for the consent required to establish the Centre's jurisdiction, other than that it be "in writing". The consent need not be contained in a single written instrument, as made clear in the Report of the Executive Directors, which states:

> Nor does the Convention require that consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.

51. Ascertaining that consent exists is a task that this Tribunal must approach with great care. In a consultation submitted by the Respondent, dated July 1, 1985, it was argued that in this case the investment law itself does not constitute a written consent within the meaning of Article 25, and consequently that the

Convention is not applicable. However, in the oral proceedings, Respondent stated that it did not deny the theoretical possibility that a Contracting State might incorporate an advance consent to the jurisdiction of the Centre in its investment promotion legislation.

52. Egypt's objections to the Centre's jurisdiction are based on three grounds: first, that the Claimants themselves have not consented to the Centre's jurisdiction; second, that Law No. 43 is not applicable in the present case; and, third, that, even if Law No. 43 were applicable, Article 8 thereof would not suffice to establish Egypt's consent to the Centre's jurisdiction. The Tribunal will now consider these objections *seriatim*.

* * *

53. Egypt maintains as its first objection that the Claimants' pursuit of an ICC remedy has in effect rendered their alleged consent to ICSID jurisdiction illusory. This contention is based on the language of Article 26 of the ICSID Convention, which provides, in pertinent part:

> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy...

54. In consenting to the Centre's jurisdiction, the Claimants have expressly reserved any rights they may have to pursue enforcement of the ICC award rendered on February 16, 1983. Thus, the letter of August 15, 1983, from SPP(ME) to the Minister of Tourism quoted earlier (paragraph 40) states that the Claimants consider themselves free to take all steps necessary to ensure compliance with the ICC award, and that their consent to ICSID jurisdiction did not constitute a waiver of any rights they may have to seek recognition and enforcement of the ICC award by judicial proceedings. Similarly, the Request for Arbitration received by the Centre on August 24, 1984, states:

> Without waiving any other remedy, SPP(ME) hereby elects to pursue the remedies for the settlement of investment disputes provided by the reference of Law No. 43 to the ICSID remedy in the absence of a specific agreement between the parties for the settlement of disputes.

55. Egypt argues that, for jurisdiction of the Centre to exist, there must be a "meeting of the minds" to that effect, which is expressed in writing in unequivocal terms, and which necessarily excludes recourse to any other remedy. According to Egypt, the alleged consent of the Claimants to the Centre's jurisdiction is both invalid and non-existent, invalid because it contravenes the "exclusive remedy" requirement of Article 26, and non-existent because it contains an inherent self-contradiction and therefore lacks the "certainty" required to establish jurisdiction. According to Egypt, the provision of Article 26 that consent to the Centre's jurisdiction "shall be deemed consent... to the exclusion of any other remedy" precludes a party from consenting to the Centre's jurisdiction and at the same time reserving the right to pursue other remedies. Since the Claimants

have expressly reserved the right to pursue enforcement of the ICC award, their consent to ICSID jurisdiction is, in Egypt's view, in violation of Article 26 and therefore a nullity.

56. Moreover, argues Egypt, the Claimants' alleged consent is illusory and, in fact, non-existent, since the Claimants, while purporting to accept the jurisdiction of the Centre, repudiate a prescribed condition of such acceptance, namely, the waiver of all other remedies.

57. For their part, the Claimants have argued that neither the Convention nor Law No. 43 requires any special form of consent, and that Article 26 does not establish an exclusive remedy rule but merely states the effect of consent expressed without reservation of other remedies.

58. From a purely syntactical point of view, Article 26 does not say that consent to the Centre's jurisdiction will be vitiated if the consenting party does not exclude all other remedies. Rather, it is the other way around: Article 26 says that consent to ICSID jurisdiction, unless otherwise stated, shall be deemed to exclude other remedies. Thus, failure to waive other remedies does not impair consent to ICSID jurisdiction. Further, the proviso "unless otherwise stated" may allow a party to consent to ICSID jurisdiction without waiving other remedies.

59. These conclusions are confirmed by the travaux préparatoires. The comments to the draft articles which ultimately became Article 26 state specifically that a party in consenting to the jurisdiction of the Centre may reserve the right to pursue other remedies. (Documents Concerning the Origin and the Formulation of the Convention, 1968, Vol. II, pp. 23, 219-20.) Accordingly, the Tribunal finds that Article 26 does not bar the claim in the present case.

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60. In connection with this first objection concerning the validity of the Claimants' consent, Egypt also argues that the Claimants' pursuit of an alternative remedy is inconsistent with Law No. 43. The first paragraph of Article 8 of Law No. 43 refers to three alternative forms of dispute resolution: resolution pursuant to any method of settlement agreed to by the parties themselves; resolution pursuant to the terms of any applicable bilateral treaty between Egypt and the State of which the investor is a national; and resolution within the framework of the ICSID Convention if the Convention is applicable. Egypt, while maintaining that Law No. 43 does not by itself establish ICSID jurisdiction without a separate agreement, argues that the three remedies mentioned in the first paragraph of Law No. 43 are mutually exclusive.

61. In principle the Tribunal agrees with this interpretation of Law No. 43. The Claimants are not entitled to both an ICC remedy and an ICSID remedy. So long as the arbitral and judicial processes do not produce more than one enforceable remedy, however, it matters not how many different paths are

pursued in an effort to obtain that remedy. Therefore, the Tribunal finds that the Claimants' pursuit of alternative remedies is not inconsistent with Law No. 43.

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62. Egypt also contends that Claimants' consent to ICSID jurisdiction is invalid because it contravenes general principles of international law. Specifically, Egypt argues that there is a general principle of international law, found also in most national laws, which forbids self-contradiction to the prejudice of another. According to Egypt, the self-contradiction in the present case results from the Claimants' concomitant pursuit of both an ICC remedy and an ICSID remedy; the damage results from the fact that Egypt must defend itself in two different proceedings, and could be subject to duplicate awards.

63. It is true that international tribunals have on occasion applied the principle of estoppel. However, this principle has no application in the present case to the question of the Claimants' consent to jurisdiction. There is in this case no inconsistency in pursuing alternative remedies, nor does it appear to the Tribunal that the Claimants, in so doing, are in any way acting contrary to good faith. The Claimants are trying to find a competent forum in which to adjudicate their claim for compensation for the expropriation of their investment.

* * *

64. As its second principal objection to the Centre's jurisdiction, Egypt maintains that Law No. 43 is not applicable in the present case. In this respect, Egypt has argued that whatever rights may have been conferred upon the Claimants by Law No. 43 were extinguished when approval of the Pyramids Oasis project was withdrawn by the General Organization for Investment on May 28, 1978, before SPP(ME) accepted the Centre's jurisdiction in its letter of August 15, 1983. In advancing this argument, Egypt has relied upon Article 1 of Law No. 43 which provides:

> The term "project" in the application of the provisions of this Law shall mean any activity included within any of the spheres therein specified and approved by the Board of Directors of the General Authority for Investment and Free Zones.

In Egypt's view, since Article 1 makes the approval of a project by the General Organization for Investment a condition to the enjoyment of rights under Law No. 43, the withdrawal of such approval necessarily entails inapplicability of the Law.

65. According to Egyptian law, however, the decisions of the General Organization for Investment concerning the approval of projects are final. Article 23 of the Decree No. 375, which implemented Law No. 43, provides:

> The decision of the Board of Directors shall be considered final as to applications submitted to the Authority...

There are only two exceptions to this rule of finality. Article 27 of Law No. 43 provides

> ... Such approval shall lapse if the investor shall fail to take serious steps to carry out the project within six months of approval, unless the Board shall grant renewed approval for such further period as it shall deem fit.

And Article 24 of Decree No. 375 provides:

> ... Any failure of a project to abide by the conditions and objectives of its approval shall be submitted to the Board of Directors.

Consequently, the General Organization for Investment has no competence to reconsider a previous approval of a project, unless one of the exceptions provided for in Article 23 of Law No. 43 or Article 24 of Decree No. 375 is applicable. Nor does the General Organization for Investment have competence to alter or infringe any acquired right that an approved project has to benefit from Law No. 43. This conclusion is confirmed by the terms of Article 6 of Law No. 43, which provides:

> Irrespective of the nationality or domicile of their owners, projects in the Arab Republic of Egypt approved under the provisions of this Law shall enjoy the guarantees and privileges set forth in this law...

The decision of the General Organization for Investment of May 28, 1978, therefore exceeded the capacity of that authority and has no juridical effect, by itself, as to the legal status of an approved project.

66. In any event, the same conclusion results from general principles of law. Even without going into the question of the autonomy of an arbitration clause, the Tribunal notes that Egypt did not repeal Law No. 43 before the Claimants formally invoked ICSID jurisdiction, and indeed has still not repealed it. If Law No. 43 contained an offer by Egypt to accept ICSID jurisdiction prior to cancellation of the Pyramids Oasis project, that offer did not terminate as a result of the withdrawal of the approval of the project. For cancellation of the project did not alter the fact that an investment had been made under Law 43. Accordingly, the Tribunal finds that Law No. 43 is applicable to the investment dispute in the present case.

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67. Another objection to the jurisdiction of the Centre relating to the applicability of Law No. 43 which has been raised by Egypt is that Article 8 of Law No. 43, on which the Claimants rely to establish jurisdiction, is not applicable to the present dispute. Article 8 begins with the phrase:

> Investment disputes in respect of the implementation of the provisions of this Law shall be settled...

Egypt construes this phrase to restrict the application of Article 8 to disputes concerning the non-performance of obligations under Law No. 43, as distinct from disputes involving non-performance of obligations under a contract. In support of its construction of Article 8, Egypt cites the July 12, 1984, Decision of the Paris Court of Appeals, wherein the Court said that Article 8:

> *... ne vise, au surplus, que les seules contestations ayant trait a 1'investissement et concernent la mise en execution des dispositions de la loi en cause, mais non celles de tel ou tel contrat.*

68. The Tribunal has some difficulty in accepting the above distinction as applying to all contracts and agreements, even those entered into by the Government itself. However, it is not necessary, for the purposes of the present decision, to address this question, since Egypt's objection may be simply answered by a recapitulation of certain facts, established earlier (paragraphs 16 to 35), namely:

(a) The Government of Egypt was a party to the Heads of Agreement of September 1974, the preamble of which stated that it was concluded in accordance with Law No. 43.

(b) The Heads of Agreement provided (i) for the incorporation of a joint venture between EGOTH and SPP; (ii) that Egypt would secure the title to property and possession of land required for the projects; and (iii) that the Government and EGOTH would transfer the right of usufruct to the joint venture.

(c) On May 22, 1975, Presidential Decree No. 475 specified the use of the lands on Pyramids site for tourist purposes and authorised EGOTH either alone or with one of the companies in which it was in partnership to develop and use this site.

(d) The right of usufruct was later irrevocably transferred to the joint venture incorporated between EGOTH and SPP(ME).

(e) This right of usufruct was expropriated by the decree of the Ministry of Culture, on May 27, 1978, for reasons of public utility.

(f) On June 19, 1978, Presidential Decree No. 475 of 1975 was cancelled.

No evidence has been produced in the proceedings that monetary compensation for the alleged expropriation of the Claimants' investment has been offered or even suggested.

69. In view of these facts, it is the Tribunal's opinion that, in the present case, the alleged breach by the Government of Egypt of the contractual obligations emanating from the Heads of Agreement constitutes at the same time a breach of a legal provision enunciated in Article 7 of Law No. 43, which the Government is bound to implement and respect. Article 7 provides that:

> Projects may not be nationalized or confiscated. The assets of such projects cannot be seized, blocked, confiscated or sequestered except by judicial procedures.

In this respect, it is quite clear that expropriation, the legitimacy of which is not being contested, if not accompanied by fair compensation, amounts to a confiscation, which is prohibited by Law No. 43. The present dispute, thus,

is within the scope of Article 8, since it concerns "the implementation of the provisions of this law", namely, the protection from any measure of, or amounting to, nationalization or confiscation.

* * *

70. Egypt's third major objection to jurisdiction in this case focuses on the operative effect of Law No. 43. Egypt argues that, even if Law No. 43 applies to the present investment dispute, Article 8 is not self-executing and therefore cannot confer a right to an ICSID remedy without a separate implementing agreement between the Government of Egypt and the foreign investor. Article 8 provides in relevant part:

> Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such Convention applies.
>
> Disputes may be settled through arbitration. An Arbitration Board shall be constituted, comprising a member on behalf of each disputing party and a third member acting as chairman to be jointly named by the same two members. Failing agreement on the nomination of the third member within thirty days of the appointment of the second member, the chairman shall be chosen, at the request of either party, by the Supreme Council of Judicial Bodies from among counsellors of the judiciary in the Arab Republic of Egypt...
>
> This text is the one resulting from the rectification made by the Secretary-General, referred to earlier (paragraph 3). The Parties have accepted this translation with reservations which are not relevant to the present decision and which will be dealt with by the Tribunal, at a later stage, if necessary.

71. In Egypt's view, Law No. 43 offers investors four alternative methods of dispute settlement among which they may choose. SPP had the right, argues Egypt, to specify in the Heads of Agreement any of the methods mentioned in Law No. 43 which were applicable. Instead of doing so, SPP limited itself to referring in the Heads of Agreement only to the law itself.

72. Egypt's principal contention concerning the effect of Law No. 43 is that it is too ambiguous and equivocal to establish consent to ICSID arbitration. According to Egypt, such consent must be "certain and unequivocal," because consent of a State to ICSID jurisdiction entails a waiver of sovereign immunity which itself requires a clear and unequivocal intent.

73. Egypt argues further that a number of other factors support the conclusion that Law No. 43 is not self-executing. First, Egypt argues that virtually every other national investment law which makes reference to ICSID arbitration expressly requires a separate agreement for the submission of disputes to the

Centre's jurisdiction. Next, Egypt points out that neither Law No. 43 nor Decree No. 375 refers to ICSID arbitration. Rather, Law No. 43 refers to dispute settlement "within the framework of the Convention on the Settlement of Investment Disputes," and Decree No. 375 refers to dispute settlement "in accordance with the provisions of the Convention on the Settlement of Investment Disputes". Since the Convention provides for both arbitration and conciliation, the language used in Law No. 43 and Decree No. 375 is not sufficiently specific to establish consent to arbitration, according to Egypt. Egypt then contends that the phrase "where the Convention applies" at the end of the first paragraph of Article 8 is further evidence that Article 8 is not self-executing. For the Convention to apply, argues Egypt, there must be a separate undertaking. Finally, Egypt argues that the Claimants' conduct in pursuing an ICC remedy is further proof that Law No. 43 does not constitute an "offer" by Egypt to accept ICSID jurisdiction.

74. The Claimants view Law No. 43 somewhat differently. In their opinion, the statute states unequivocally and in mandatory terms that investment disputes shall be settled in one of three different ways, and that the option of domestic arbitration becomes available only if none of the three methods specified in the first paragraph of Article 8 is applicable. The Claimants argue that the statute means just what is says: investment disputes shall be settled in a manner to be agreed upon by the investor and the Government, or in the manner prescribed by any applicable bilateral treaty, or by reference to ICSID, if the Convention is applicable to the investment in question. The Claimants contrast the word "shall" in the first paragraph of Article 8 with the word "may" in the second paragraph, and argue that "shall" indicates a mandatory effect, while "may" indicates an optional effect. Only if there is no agreement between the parties on a form of dispute settlement, and there is no applicable bilateral treaty in force, and ICSID arbitration is not available because the Convention is not applicable to the investment in question, do the parties have the option of using domestic arbitration.

75. The Claimants' argument necessarily assumes a hierarchical relationship between the three methods of dispute settlement provided for in the first paragraph of Article 8. The Claimants contend that if this relationship is not clear on the face of Article 8, Decree No. 375, which implements Law No. 43, leaves no doubt as to its existence. Article 45 of Decree 375 provides:

> In accordance with the provisions of article 8 of Law 43, investment disputes shall be settled pursuant to the rules and procedures agreed upon with the investor. In the absence of such agreement, such disputes shall be resolved according to rules established by agreements in force between the Arab Republic of Egypt and the investor's home country. If in turn there are no such agreements, disputes between the State and the nationals of other countries are to be settled in accordance with the provisions of the Convention for the Settlement of Investment Disputes, to which the Arab Republic of Egypt has adhered pursuant to Law No. 90 of 1971.

> According to the Claimants, the words and the syntax of Article 45 lead one ineluctably to the conclusion that there is a hierarchical relationship between the three methods of dispute resolution. In the Claimants' view, the phrase "in the absence of such agreement" clearly refers to an agreement between the parties on the method of dispute resolution. Consequently, investment disputes may be resolved in accordance with any applicable bilateral treaty in force between Egypt and the investor's State only if the parties have not agreed on some other form of dispute resolution. If the parties have not so agreed, and if an applicable treaty is in force, then the dispute must be settled by the method provided for in the treaty. Similarly, the phrase "If in turn there are no such agreements" refers to an agreement between the parties or an agreement between Egypt and the investor's State. Thus, investment disputes may be resolved by ICSID arbitration only if the parties have not agreed on some other form of dispute resolution and there is no applicable bilateral agreement in force between Egypt and the investor's State. In such event, the Claimants argue, if the Convention applies to the investment in question, resort to ICSID is mandatory.

76. The Claimants also point out that if a separate agreement were required under Law No. 43 to refer a dispute to ICSID, as Egypt contends, such an agreement would be subsumed in the first method of dispute resolution provided for in Article 8, i.e., agreement between the parties. In such case, the reference to ICSID in Article 8 would be superfluous. If reference to ICSID arbitration is to mean anything at all, argue the Claimants, it must mean that disputes shall be submitted to ICSID in the absence of an agreement otherwise, provided the Convention is applicable to the investment.

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77. If, as the Claimants contend, Law No. 43 confers a right on foreign investors to invoke ICSID jurisdiction in cases where no other form of dispute resolution has been agreed to, the Claimants are entitled to maintain their case on the merits against Egypt before this Tribunal. If, on the other hand, Law No. 43 does no more than specify the various options which are available to foreign investors for use in investment agreements, as argued by Egypt, then the Tribunal lacks competence to hear the present case.

78. Thus, the determinative question as to the Tribunal's competence in the present case is the following: does Law No. 43 constitute a self-executing offer by Egypt to accept the Centre's jurisdiction with respect to the present dispute? This question is an important one, but it is a question that the Tribunal does not reach today, for at the threshold it encounters another question, to wit: whether the parties have agreed on some other form of dispute resolution? If they did, then even on the Claimants' theory of the case, this Tribunal is not competent with respect to the present dispute. As the Claimants, themselves, have recognized:

> ... a prerequisite to the submission of an investment dispute between the Government and a foreign investor to ICSID arbitration is that the parties failed to agree upon another means of dispute resolution.

79. Consequently, the question of whether the Parties have agreed on another method of dispute resolution is a question prealable to a finding of jurisdiction by this Tribunal. In other words, before pronouncing on whether or not there is consent to ICSID jurisdiction in the present case it must be established that the parties have not effectively agreed upon another "manner" of settling their investment dispute.

80. The existence or non-existence of a compromissory clause binding the parties to ICC arbitration is a mixed question of fact and law that requires a judicial decision. This type of question is described in continental legal systems as one of *"qualification juridique des faits"*. This *qualification* cannot be affected by the Claimants' statements, made during the course of the proceedings, to the effect that, upon a finding by this Tribunal of jurisdiction, they are prepared to suspend their appeal to the Court of Cassation or stipulate that they will abandon any ICC remedy.

81. The question of whether the Parties have agreed on another method of dispute resolution is one which this Tribunal, as judge of its own jurisdiction, certainly has competence to resolve. However, the same question is also *sub judice* in another forum, where the proceedings involve the same Parties and the same dispute. The ICC tribunal has already answered this question in the affirmative, holding that Egypt and the Claimants agreed to resolve any disputes by ICC arbitration. The Paris Court of Appeals disagreed, but its decision has been appealed to the Court of Cassation, which will pronounce the final answer of the French judiciary on the matter.

82. Thus, we are confronted with the possibility that the above-referenced *question prealable* in the present case may be answered differently by two entirely separate and independent tribunals. In this connection, the Tribunal notes that both Parties are advancing inconsistent contentions before this Tribunal and before the French courts. Thus, the possibility arises that concurrent jurisdiction might be exercised with respect to the same Parties, the same facts and the same cause of action by two different arbitral tribunals.

83. While the concurrent pursuit of a remedy indifferent jurisdictions might be justified to protect legitimate interests of a claimant, it nevertheless entails certain practical problems of international judicial administration, since it invites a clash between competing exercises of jurisdiction. This may result, not only in the concurrent exercise of jurisdiction by different tribunals, but also in a tribunal declining jurisdiction on the assumption, which later proves invalid, that another tribunal was the competent one to deal with the case.

84. When the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. However, in the interest of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal.

85. The law and the courts of the country where a tribunal sits are generally recognized as the proper law and the proper courts to pronounce on the validity and scope *ratione personae* of an arbitration clause. Thus, establishing that arbitration should take place in Paris, those who concluded or approved the December Agreement subjected themselves by their own accord to French law and French courts for the determination of the validity and the scope *ratione personae* of the ICC arbitration clause.

86. Moreover, if the present proceedings on jurisdiction were stayed until such time as the question of ICC jurisdiction has been finally resolved by the French courts, such a stay would not appear to seriously disadvantage either Party.

87. Every court has inherent powers to stay proceedings when justice so requires, and this Tribunal's discretion to do so is established by Article 44 of the Convention.

88. Accordingly, for the reasons set forth above,

THE TRIBUNAL UNANIMOUSLY DECIDES:

A. To reject the objections to its jurisdiction raised by the Respondent alleging that Article 26 of the ICSID Convention, as well as the pursuit by the Claimants of alternative remedies, bar the claim in the present case;

B. To reject the objection to its jurisdiction raised by the Respondent alleging the withdrawal from the Claimant of the benefits of Law No. 43;

C. To reject the objection to its jurisdiction raised by the Respondent contending that the provisions of Article 8 of Law No. 43 do not apply to this investment dispute; and

D. To stay the present proceedings on the Respondent's remaining objections to the Centre's jurisdiction until the proceedings of the French courts have finally resolved the question of whether the Parties agreed to submit their dispute to the jurisdiction of the International Chamber of Commerce.

November 27, 1985