

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/84/3

SOUTHERN PACIFIC PROPERTIES (MIDDLE EAST) LIMITED V. ARAB REPUBLIC OF  
EGYPT

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DECISION ON JURISDICTION

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14 April 1988

Tribunal:

[Eduardo Jiménez de Aréchaga](#) (President)

[Mohamed Amin Elabassy El Mahdi](#) (Appointed by the State)

[Robert F. Pietrowski, Jr.](#) (Appointed by the investor)

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# Decision on Jurisdiction

1. On August 24, 1984, the International Centre for Settlement of Investment Disputes (hereinafter called "the Centre" or "ICSID") received a Request for Arbitration from Southern Pacific Properties (Middle East) Limited (hereinafter called "SPP(ME)" or "the Claimant"), a Hong Kong corporation. The Request stated that SPP(ME) wished to institute arbitration proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter called "the Washington Convention" or "the Convention") 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 ICC 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 of ICSID 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 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 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\(1\)\(a\)\(i\)](#), and that it was designating Mr. Robert F. PIETROWSKI, Jr., a U.S. 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.

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, submitted that the Tribunal should :

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

The observations of SPP(ME) submitted that the Tribunal should ;

... reject 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 8 July 1985, the Centre received from Egypt a document responding to certain arguments set forth in SPP(ME)'s observations concerning interpretation of Egypt's Law No. 43 Concerning the Investment of Arab and Foreign Funds and the free Zones.
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 Egypt's Law No. 43.
14. On July 23, 1985, the Parties advised the Centre that Southern Pacific Properties Limited (hereinafter called "SPP" or "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 November 27, 1985, the Tribunal rendered a decision by which it unanimously rejected certain of Egypt's objections concerning jurisdiction and stayed the proceedings on Egypt's remaining jurisdictional objections pending final disposition by the French courts of certain concurrent proceedings involving the same dispute. The operative part of the Tribunal's decision provided:

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 in 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.
17. On January 6, 1987, the French Court of Cassation issued a decision the effect of which was to finally determine that Egypt had not consented to submit the present dispute to the jurisdiction of the International Chamber of Commerce.
18. On January 29, 1987, the Claimants filed a request with the Tribunal asking that the present proceedings be resumed in view of the Court of Cassation's decision of January 6, 1987,
19. On March 24, 1987, at the request of Egypt, the Tribunal invited the Parties to file further written pleadings and supporting materials.
20. Egypt filed a "[Mémoire](#)" dated April 30, 1987, and requested further hearings on the remaining jurisdictional issues. The Claimants then filed "Observations on Respondent's Jurisdictional Memorandum" dated May 20, 1987.
21. The Tribunal met in London on May 25-27, 1987. After reviewing the new materials filed by the Parties, and in consideration of its Decision of November 27, 1985, and the decision of the French Court of Cassation of January 6, 1987, the Tribunal unanimously decided to accede to Egypt's request for a further hearing on the question of the Centre's jurisdiction. It notified the Parties that a final hearing on the jurisdictional issues would be held in Paris in September of 1987, and that the Parties' final submissions concerning jurisdiction, together with an enumeration of the arguments relied upon to support those submissions, were to be filed following the hearing.
22. The final hearing on the question of jurisdiction was held in Paris on September 8, 1987. At the conclusion of the hearing, the Tribunal instructed the Parties to present in writing their final submissions on the jurisdictional issues, together with an enumeration of the arguments relied on to support those submissions, by September 25, 1987.
23. The "Claimant's Final Submission on Jurisdiction" dated September 25, 1987, submitted that the Tribunal should :

... determine in favor of the Claimants the remaining jurisdictional issue, to rule that the Arab Republic of Egypt ("A.R.E.") has consented to ICSID arbitration in conformity with the requirement of [Article 25\(1\) of the ICSID Convention](#), and to take jurisdiction over the investment dispute between the parties.

24. The Respondent's "[Mémoire en Réplique](#)" dated September 25, 1987, did not contain formal submissions as such, but reiterated certain points made by counsel for Egypt at the hearing held in Paris on September 8, 1987, and responded to arguments made by counsel for the Claimants at that hearing.
25. The Tribunal conducted its final deliberations on the question of jurisdiction in Washington on December 7-12, 1987.
26. The facts which have given rise to the present dispute are as follows:  
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.
27. 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 Zones. 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 approvals 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.
28. 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 :

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 Pas 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 1973 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 A.R.E. with particular reference to government guarantees, long term tax holidays, exemptions from import custom duties, etc.

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 E.G.O.T.H. and 60 percent by S.P.P. (for the Pyramid area) and 30 percent by E.G.O.T.H. and 70 percent by S.P.P. (for Ras El Hekma).

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 M.T. and E.G.O.T.H. undertake to transfer such right to the joint company immediately upon incorporation, any balance being transferred not later than 90 days thereafter.

29. 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 EGOH and SPP concerning the projects at the Pyramids Oasis and Ras El Hekma sites. 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 EGOH. On the fiftieth anniversary of the incorporation of ETDC, EGOH was to be entitled to increase its shareholding at no cost to fifty percent of the total capital. The participation of EGOH 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 EGOH 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....

30. 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 SPP 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.

31. 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 for arbitration.
32. 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.
33. 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 (S.P.P.) 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.

34. By a letter dated April 12, 1975, the Board of Directors of the General Organization for Investment of Arab Capital and Tax-Free Zones 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.
35. 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."
36. 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.
37. On November 23, 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.

38. 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...."
39. 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.
40. 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....
41. In July of 1977, Claimants commenced construction at the Pyramids Oasis site. Work was begun on roads, sewage systems, water reservoir facilities, artificial lakes and a golf course.
42. 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.
43. In a decree issued on May 27, 1978, the Ministry of Culture declared "the 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.
44. 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...."
45. On June 19, 1978, Presidential Decree No. 267 cancelled Presidential Decree No. 475, which had designated "the lands on the Pyramids plateau in Giza for touristic exploitation." On July 11, 1978, the Prime Minister of Egypt issued a decree declaring these same lands d'utilité publique.
46. 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.
47. On December 7, 1978, SPP and SPP(ME) filed a request for arbitration with the Court of Arbitration of the ICC in Paris against Egypt 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.

48. The ICC tribunal, in an award rendered on February 16, 1983, 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,

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

50. 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 provides 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:

...recognizing 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 uncontested jurisdiction of the International Centre 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.

51. On July 12, 1984, prior to the institution of the present proceedings, 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 arbitration clause therein.
52. On November 28, 1984, the Claimants referred the decision of the Paris Court of Appeals to the French Court of Cassation (Pourvoi N° 84/17-274), requesting that the decision be set aside. This request was rejected by the French Court of Cassation on January 6, 1987. '
53. The Tribunal will now proceed to the consideration of Egypt's remaining objections to the Centre's jurisdiction with respect to the present dispute. According to Article 25, paragraph 1, of the Washington Convention, the jurisdiction of the Centre, and hence the competence of the Tribunal, extends to:

...any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre....

The Claimants contend that Egypt's Law No. 43 Concerning the Investment of Arab and Foreign Funds and the Free Zones, enacted in 1974, and specifically Article 8 thereof, constitutes consent to the Centre's jurisdiction in the circumstances of the present case. Egypt, on the other hand, maintains that it has not consented to submit its dispute with the Claimants to the jurisdiction of the Centre, and that the reference to the Washington Convention in Article 8 of Law No. 43 was intended only to inform potential investors that ICSID arbitration is one of a variety of dispute settlement methods that investors may seek to negotiate with Egyptian authorities in appropriate circumstances.

54. In its Mémoire of April 30, 1987, Egypt also raised certain questions concerning the Claimants' domicile. Documents filed by the Claimants with their Observations on Respondent's Jurisdictional Memorandum of May 20, 1987, have satisfied the Tribunal that the Claimants are in fact Hong Kong corporations domiciled in Hong Kong, and Egypt's Mémoire en Réplique of September 25, 1987, makes no further mention of the matter. Hong Kong is a territory for whose international relations the United Kingdom, also a party to the Convention, is responsible, and the United Kingdom has expressly extended the application of the Convention to Hong Kong. Hence, the Claimants are "nationals of another Contracting State" within the meaning of Article 25 of the Washington Convention.
55. Before considering the text of Article 8 of Law No. 43 and its legal effect in relation to the Washington Convention, the Tribunal will deal with several preliminary matters that have been raised by the Parties. The first of these concerns the applicable law. Egypt maintains that the

jurisdictional issues in this case are governed by Egyptian law, either as the law expressly chosen by the Parties (since the Claimants themselves have invoked Law No. 43 to establish Egypt's consent to the Centre's jurisdiction) or by virtue of Article 42(1) of the Convention, which provides in relevant part:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

On the basis of Article 2 of Law No. 43, which provides that any matter not dealt with specifically by that law "is governed by the laws and regulations in force," Egypt argues that the validity of any compromissory clause, as well as the arbitral competence deriving from it, are governed by sections 501 and 502 of the Egyptian Code of Civil Procedure which require a specific and independent compromis or special agreement defining the object of the dispute and naming the arbitrators.

56. The Claimants, on the other hand, argue that Article 42 of the Washington Convention applies only to the substance of the dispute and that jurisdictional issues which involve interpretation of the Washington Convention must be resolved by the application of international law. According to the Claimants, the fact that Egypt's consent is alleged to have taken the form of a legislative provision does not transform the question of whether there has been consent into one of Egyptian law. The Claimants maintain that, from the perspective of international law, municipal law is treated like any other element of factual conduct. In support of this contention, they cite the statement of the Permanent Court of International Justice in the case concerning German Interests in Polish Upper Silesia that:

From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as to legal decisions or administrative measures. (P.C.I.J., Series A, No. 7, p.19 (1926).)

The Claimants also contend that, because the issue in this case is whether Article 8 of Law No. 43 constitutes "consent in writing" within the meaning of the Washington Convention -- an international treaty -- Article 8 must be considered in international terms rather than vice versa. On this basis, the Claimants argue that Article 8 should be construed using the rules of interpretation that have been codified in the Vienna Convention on the Law of Treaties.

57. With respect to the law applicable to the jurisdictional issues in this case, the Tribunal finds that it cannot accept the contentions of either Party, at least in the particular form they have taken. Egypt is correct in its assertion that Law No. 43 is "applicable" to the jurisdictional issues in the present case in the sense that Article 8 of Law No. 43 is alleged by the Claimants to constitute Egypt's consent to the Centre's jurisdiction. However, this does not mean that Article 2 of Law No. 43 makes other provisions of Egyptian law -- particularly sections 501 and 502 of the Code of Civil Procedure -- applicable to the jurisdictional issues in the case. Article 2 of Law No. 43 provides for the application of other Egyptian laws in force to "(a)ny question or matter not provided for by a special provision in the present law..." If, as contended by the Claimants, Article 8 requires that the present dispute be resolved by the procedures set forth in the Washington Convention, Article 2 by its terms is not

applicable and sections 501 and 502 of the Egyptian Code of Civil Procedure, which require inter alia a compromis or special agreement for domestic arbitrations (a requirement that does not appear in the Washington Convention), are irrelevant.

58. As to Article 8 itself, the Claimant's contention that this provision of municipal law should be treated as a "fact" is not helpful. The Parties are in fundamental disagreement as to what Article 8 means and the Tribunal therefore must interpret Article 8 and determine its legal effect in relation to the Washington Convention.
59. Nor can the Tribunal accept the Claimants' contention that Article 8 should be interpreted by application of rules of treaty interpretation. Unlike a treaty, Law No. 43 is not the result of negotiations between two or more States, but rather the result of a unilateral act by a single State.
60. While Egypt's interpretation of its own legislation is unquestionably entitled to considerable weight, it cannot control the Tribunal's decision as to its own competence. The jurisprudence of the Permanent Court of International Justice and the International Court of Justice makes clear that a sovereign State's interpretation of its own unilateral consent to the jurisdiction of an international tribunal is not binding on the tribunal or determinative of jurisdictional issues. (The Electricity Company of Sofia and Bulgaria (Preliminary Objection), P.C.I.J., Series A/B, No. 77, p. 64 (1939); Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978, p. 3.) Indeed, to conclude otherwise would contravene Article 41(1) of the Washington Convention, which provides that:

The Tribunal shall be the judge of its own competence.

61. Moreover, the jurisdictional issue in this case involves more than interpretation of municipal legislation. The issue is whether certain unilaterally enacted legislation has created an international obligation under a multilateral treaty. Resolution of this issue involves both statutory interpretation and treaty interpretation. Also, to the extent that Article 8 is alleged to be a unilateral declaration of acceptance of the Centre's jurisdiction, subject to reciprocal acceptance by a national of another Contracting State, the Tribunal must also consider certain aspects of international law governing unilateral juridical acts. This is a subject that has received considerable attention in the jurisprudence of both the Permanent Court of International Justice and the International Court of Justice in connection with declarations under the so-called "Optional Clause" of the Courts' statutes. As the International Court of Justice observed in its judgment on jurisdiction in the Military and Paramilitary Activities in and Against Nicaragua case (quoting from its earlier judgment on jurisdiction in the Nuclear Tests cases):

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. (I.C.J. Reports 1984, p. 418.)

The issue is whether certain unilaterally enacted legislation has created an international obligation under a multilateral treaty. Resolution of this issue involves both statutory interpretation and treaty

interpretation. Also, to the extent that Article 8 is alleged to be a unilateral declaration of acceptance of the Centre's jurisdiction, subject to reciprocal acceptance by a national of another Contracting State, the Tribunal must also consider certain aspects of international law governing unilateral juridical acts. This is a subject that has received considerable attention in the jurisprudence of both the Permanent Court of International Justice and the International Court of Justice in connection with declarations under the so-called "Optional Clause" of the Courts' statutes. As the International Court of Justice observed in its judgment on jurisdiction in the Military and Paramilitary Activities in and Against Nicaragua case (quoting from its earlier judgment on jurisdiction in the Nuclear Tests cases):

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. (I.C.J. Reports 1984, p. 418.)

Thus, in deciding whether in the circumstances of the present case Law No. 43 constitutes consent to the Centre's jurisdiction, the Tribunal will apply general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations.

62. A second preliminary matter involves the question of whether jurisdictional instruments must be interpreted restrictively. It has been repeatedly emphasized on behalf of Egypt in these proceedings that an international tribunal cannot exercise jurisdiction over a sovereign State without its consent. This of course is an uncontroverted principle of general international law. Such consent is expressly required by Article 25 of the Washington Convention and is described as the "cornerstone of the jurisdiction of the Centre" in the Report of the Executive Directors that accompanied the Convention when it was submitted to the governments of member States of the International Bank for Reconstruction and Development. The Preamble of the Convention makes clear that mere ratification of or accession to the Convention is not sufficient to establish consent to the Centre's jurisdiction. Article 25(4) provides that a State's notification to the Centre of the kinds of disputes that it would consider submitting to the Centre's jurisdiction shall not constitute the consent required to confer such jurisdiction. Thus, the consent of the parties to the jurisdiction of the Centre is an indispensable prerequisite to the competence of any ICSID tribunal.
63. Clearly, then, there is no presumption of jurisdiction -- particularly where a sovereign State is involved -- and the Tribunal must examine Egypt's objections to the jurisdiction of the Centre with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties. This is not to say, however, that there is a presumption against the conferment of jurisdiction with respect to a sovereign State or that instruments purporting to confer jurisdiction should be interpreted restrictively. Judicial and arbitral bodies have repeatedly pronounced in favour of their own competence where the force of the arguments militating in favor of jurisdiction is preponderant. (E.g., [Temple of Preah Vihear \(Preliminary Objections\)](#), I.C.J. Reports 1961, p.34; *Chorzow Factory*, P.C.I.J., Series A, No. 9, p.32 (1925); *Affaire des forêts du Rhodope central*

(question préalable), R.I.A.A., vol. 3, p.3104, (1931).) Moreover, as the Permanent Court of International Justice observed in the Chorzow Factory case:

The fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot of itself create a doubt calculated to unset its jurisdiction. (P.C.I.J., Series A, No. 9, p.32 (1927).)

Thus, jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if -- but only if -- the force of the arguments militating in favor of it is preponderant.

64. A final preliminary matter involves the effect on the present case of the French court judgments which annulled the ICC award of February 16, 1983. According to Egypt, these judgments establish that (1) Article 8 of Law No. 43 is not mandatory but merely offers various possible means of dispute settlement to the Parties; (2) there is no hierarchic ranking among the three means of dispute settlement mentioned in the first paragraph of Article 8; and (3) no presumption of a waiver of sovereign immunity from jurisdiction can be inferred from Law No. 43, a fact that proves Article 8 cannot constitute consent to arbitration since such consent would *ipso facto* entail a waiver of immunity.
65. While the Tribunal is the judge of its own competence under Article 41(1) of the Washington Convention, it should nevertheless give due consideration to the pronouncements of other courts and tribunals which involve the same parties and subject matter as the present dispute. The Tribunal finds, however, that it cannot infer from the French court decisions the particular consequences alleged by Egypt.
66. The issue before the Paris Court of Appeals was not whether Article 8. of Law No. 43 is mandatory or hierarchic, but whether the ICC arbitration clause in the December Agreement between EGOTH and SPP was binding upon Egypt. The possibility of ICSID arbitration had not even been raised at the time. While the court made a passing reference to the Washington Convention, it did not purport to interpret the provision in Article 8 of Law No, 43 concerning the jurisdiction of the Centre. Indeed, what the court said was:

Que l'article 8 de cette loi prévoit en effet C.I.R.D.I., centre de règlement créé par la convention de Washington de 1965; que l'article 8, alinéa 2, aménage en outre une procédure facultative d'arbitrage interne dans laquelle la désignation du tiers arbitre est confiée aux instances judiciaires égyptiennes...

This statement hardly suggests that Article 8 is not mandatory or that the sequence of dispute resolution procedures set forth therein is not hierarchic.

67. As to the court's observations concerning sovereign immunity, these were made in the course of a discussion of the Heads of Agreement, which did not contain an arbitration clause, and with specific reference to the December Agreement between SPP and EGOTH, to which Egypt was not a party. The court said:

Qu'il ne peut donc s'en déduire une quelconque présomption de la renonciation de l'Etat égyptien à son immunité de juridiction et de son acceptation de se soumettre à la clause compromissoire insérée dans le contrat passé entre la société S.P.P. et EGOTH...

Thus, no conclusion as to the effect of Law No. 43 on the Centre's jurisdiction can be reasonably inferred from the the judgment of the Paris Court of Appeals.

68. Nor can any such inference be drawn from the decision of the Court of Cassation. That decision rejected the Claimants' appeal from the Court of Appeals' judgment without discussion of Article 8 or any of the points which Egypt would have the Tribunal infer from the lower court judgment.
69. The Tribunal will now turn to Article 8 of Law No. 43 concerning the Investment of Arab and Foreign Funds and the Free Zones, which is the instrument upon which the Claimants rely to establish Egypt's consent to the Centre's jurisdiction in the present case.
70. The Convention does not prescribe the form of the consent required to establish the Centre's jurisdiction except to say that it must be "in writing." However, the drafters of the Convention anticipated that a State might give its consent to the Centre's jurisdiction in advance through investment legislation, as explicitly noted in the Report of the Executive Directors that accompanied the Convention :

...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. (ICSID, Documents Concerning the Origin and the Formulation~ of the Convention, vol.II, part 2, 1069.)

Egypt does not deny that a State may consent to the Centre's jurisdiction in its investment legislation, and indeed acknowledges that certain other States have done so. Egypt contends, however, that Law No. 43, properly interpreted, does not have such an effect.

71. Article 8 has been translated into both of the procedural languages agreed upon by the Parties for use in these proceedings. The English text published by Egypt's General Authority for Investment and Free Zones and submitted on behalf of the Claimants, as corrected by the Secretary-General of ICSID, provides:

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 it (i.e the 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 two said 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.

The Arbitration Board shall lay down its rules of procedure unrestricted by the rules contained in the Civil and Commercial Code of Procedures, save the rules which relate to the basic guarantees and principles of litigation. The Board shall see to it that the dispute is expeditiously resolved. Awards shall be rendered by majority vote and shall be final and binding on both parties and enforceable as any other final judgment. (Emphasis added.)

The French text of Article 8 submitted to the Tribunal by Egypt provides:

Les contestations ayant trait à l'investissement, et concernant la mise en exécution des dispositions de la présente loi sont réglées par le moyen convenu avec l'investisseur, ou dans le cadre des conventions en vigueur entre la R.A.E. et l'Etat de l'investisseur, ou encore dans le cadre de la convention de règlement des contestations des investissements entre l'Etat et les citoyens des autres Etats, convention à laquelle ~â adhéré "la R.A.E. en vertu de la loi No 90 de 1971, et ce dans les cas où la dite convention est applicable.

Il pourra être convenu que les contestations seront réglées par voie d'arbitrage. Ta commission d'arbitrage sera alors composée d'un arbitre pour chacune des parties du différend et d'un troisième membre, choisi d'un commun accord entre les deux membres susdits. Si les dits membres n'ont pu s'entendre sur le choix du tiers-arbitre dans les trente jours qui suivent la désignation du dernier d'entre eux, le choix du tiers-arbitre a lieu, sur la demande de l'une des deux parties, par décision du Conseil Supérieur des Corps Judiciaires parmi les conseillers judiciaires en R.A.E.

La commission d'arbitrage établit les règles des procédures la concernant, sans être liée en cela par les règles du Code de Procédure civile et commerciale, sauf celles de ces règles concernant les garanties et principes fondamentaux du recours en justice. La commission devra veiller à la célérité du règlement des contestations. Elle rend ses décisions à la majorité des voix. Ces décisions sont irrévocables, opposables aux parties et exécutoires au même titre que les jugements définitifs.

La commission d'arbitrage désigne laquelle des deux parties supportera les frais de l'arbitrage. (Emphasis added.)

72. It is contended on behalf of the Claimants that Article 8 of Law No. 43 establishes a mandatory, hierarchic sequence of dispute resolution procedures. In the Claimants' view, if the investor and the Government of Egypt have not agreed on a means of dispute settlement (the first method of dispute resolution mentioned in Article 8), and if there is no applicable bilateral treaty in force between Egypt and the investor's State (the second method of dispute resolution mentioned in Article 8), legal disputes arising directly out of investments must be settled by the procedures specified in the Washington Convention if the investor's State is a party to the Convention. The decisions of the Paris Court of Appeals and the Court of Cassation have established that the Parties did not agree to resolve their dispute by ICC arbitration. The Parties themselves are in agreement that they have not otherwise agreed on a method of dispute resolution and that there is no bilateral treaty which is

applicable to their dispute. In such circumstances, according to the Claimants, no further or additional act by Egypt is necessary to constitute the "consent in writing" required by Article 25 of the Convention.

73. For Egypt's part, it is contended that Article 8 contains no language expressly consenting to the jurisdiction of the Centre and that on its face the first paragraph of Article 8 is nothing more than a nonlimitative list of possible methods of dispute settlement which may be negotiated by the investor and the Egyptian Government on a case-by-case basis. Consequently, according to Egypt, a separate ad hoc expression of consent is required to establish the jurisdiction of the Centre with respect to the present dispute.
74. The starting point in statutory interpretation, as in the interpretation of treaties and unilateral declarations, is the ordinary or grammatical meaning of the terms used. The English text of Article 8 provides explicitly that investment disputes "shall be settled" by one of three methods, two of which are not applicable to the present dispute and the third of which involves the dispute settlement procedures prescribed in the Washington Convention. As the International Court of Justice found in the Constitution of the Maritime Safety Committee case, the words "shall be" are on their face mandatory. (I.C.J. Reports 19 60, p. 15 9.)
75. Similarly, the French text of the first paragraph of Article 8 provides that disputes sont réglées by one of three methods. Although formulated in the present tense, the phrase sont réglées clearly has a mandatory character and in the context of Article 8 conveys an obligation to submit disputes to one of three methods of settlement if any of these methods is applicable.
76. Moreover, in both the English and the French texts of Article 8 there is a clear and significant difference in the verbs used in the first and second paragraphs. While the first paragraph provides in the English text that disputes "shall be settled", the second paragraph, which authorizes certain procedures for domestic arbitration if the parties agree to use that method of dispute resolution, provides that disputes "may be settled." Similarly, in the French text, the first paragraph provides that disputes sont réglées, whereas the second paragraph provides that il pourra être convenu to settle disputes by domestic arbitration. Thus, in both of the procedural languages of the arbitration, the use of contrasting verb forms in close proximity indicates the mandatory nature of the first paragraph of Article 8.
77. As to the Arabic text of Article 8, the Claimants have submitted to the Tribunal expert opinions of Arabic scholars and practitioners, including the former President of Egypt's Conseil d'Etat, stating that the Arabic text of the first paragraph of Article 8 is mandatory.
78. In its Mémoire en Réplique of September 25, 1987, Egypt argues that the Arabic text, rather than translations into the procedural languages agreed upon by the Parties, must be used for purposes of determining whether Law No. 43 constitutes consent to the Centre's jurisdiction, and that the translations of Article 8 which have been submitted to the Tribunal do not accurately convey the true sense of the Arabic text. According to Egypt, to translate tatimmu -- the verb used in the first paragraph of Article 8 -- into "shall be" settled is to overstate the imperative nature of the Arabic text because the tense of the Arabic verb is present indicative rather than future imperative. Egypt has submitted to the Tribunal a document prepared by specialists at Harvard's Center for Middle Eastern Studies, which compares and translates the verb forms used in Article 8 with those used in

other Egyptian laws as shown below:

[TABLE]

Although its own experts translate tatimmu as "shall/will be effected," Egypt contends that these comparisons and translations show that in the Arabic text the verb used in the first paragraph of Article 8 is not as imperative as it could be.

79. The Tribunal accepts that tatimmu is not the most imperative verb form available in the Arabic language. (Nor, for that matter, is "shall be" the most imperative verb form in the English language, although it is nevertheless mandatory.) The first paragraph of Article 8, however, is only mandatory to the extent that any of the three methods of dispute settlement mentioned therein is applicable to a particular dispute. Thus, if the parties to the dispute have not agreed on a method of dispute resolution, if there is no applicable bilateral treaty in force, and if the Washington Convention is not applicable, Article 8 does not mandate dispute settlement. In such circumstances, the dispute will remain unresolved for lack of an agreed-upon method of settlement unless the claimant elects to seek a remedy in the domestic courts. This conditional aspect of Article 8, which qualifies the mandatory nature thereof, fully explains the use of the term tatimmu rather than a more imperative verb form in the first paragraph of Article 8.
80. It is also significant that in the Arabic text, as in the English and French texts, the verb form used in the first paragraph of Article 8 is decidedly different – and more imperative – than that used in the second paragraph, which authorizes certain procedures in the event that the parties agree to settle their dispute by domestic arbitration. Thus, where the first paragraph of Article 8 uses the term tatimmu, which Egypt's experts translate as "shall/will be effected," the second paragraph uses the term yajuzu, which Egypt's experts translate as "can/are allowed to be effected." As in the English and French texts, the use of these contrasting verb forms in close proximity to one another confirms the mandatory effect of the first paragraph of Article 8.
81. Finally, the Tribunal notes that the terms tatimmu and "shall be..." are used interchangeably in certain treaties concluded in the Arabic and English languages where both texts are equally authoritative. For example, the Treaty between the United States of America and the Arab Republic of Egypt concerning the Reciprocal Encouragement and Protection of Investments, signed on March 11, 1986, provides in Article VII(2) that:

In the event of a legal investment dispute between a Party and a national or company of the other Party with respect to an investment of such national or company in the territory of such Party, the parties shall initially seek to resolve the dispute by consultation and negotiation. The Parties may, upon the initiative of either of them and as a part of their consultation and negotiation, agree to rely upon non-binding, third-party procedures. If the dispute cannot be resolved through consultation and negotiation, then the dispute shall be submitted for settlement in accordance with the applicable dispute-settlement procedures upon which a Party and national or company of the other Party have previously agreed. With respect to expropriation by either Party, any dispute-settlement procedures specified in an investment agreement between such Party and such national or company shall remain binding and shall be enforceable in accordance with the terms of the investment agreement and relevant provisions

of domestic laws of such Party and treaties and other international agreements regarding enforcement of arbitral awards to which such Party has subscribed.

The English text of Article VII(2) uses the terms "shall" or "shall be" four times. The corresponding parts of the Arabic text employ three different verbs as required by the particular contexts in which they occur. Where the English text says that disputes "shall be submitted for settlement," the Arabic text of Article VII uses the term tatimmu -- the same term that is used in the first paragraph of Article 8 of Law No. 43.

82. In view of the expert opinions concerning the Arabic text submitted on behalf of the Claimants, and of the translations into the procedural languages that have been submitted by both Parties, the Tribunal is satisfied that the Arabic text of the first paragraph of Article 8 mandates the submission of disputes to the various methods prescribed therein where such methods are applicable.
83. With respect to the question of priority among the methods of dispute settlement prescribed in Article 8, the particular methods involved and the order in which they are mentioned indicate a hierarchic relationship. Those methods begin with the most specific -- an agreement between the parties as to how the dispute shall be settled -- and proceed to more general bilateral treaties between the investor's State and Egypt, and then finally to the most general method of dispute settlement -- the multilateral Washington Convention. A specific agreement between the parties to a dispute would naturally take precedence with respect to a bilateral treaty between the investor's State and Egypt, while such a bilateral treaty would in turn prevail with respect to a multilateral treaty such as the Washington Convention. Article 8 thus reflects the maxim generalia specialibus non derogant -- a principle that has been endorsed by publicists since Grotius (Bk. II, Cap. xvi, sec. xxix(I)) and appears in the jurisprudence of the Permanent Court of International Justice (Mavrommatis Palestine Concessions (Jurisdiction), Ser. A, No.2, pp. 31-32 (1924)) and various international arbitral tribunals (e.g., Saudi Arabia v. Arabian American Oil Company (Aramco), I.L.R., vol. 27, p.117 (1963)).
84. The hierarchic relationship of the dispute resolution procedures prescribed in Article 8, as well as the mandatory nature of that article, are confirmed by Decree No. 375 of 1977, which was issued in implementation of Law No. 43. The English text of Article 45 of Decree No. 375 published by Egypt's General Authority for Investment and Free Zones and submitted on behalf of the Claimants... 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. (Emphasis added.)

The certified French text of Article 45 of Decree No. 375 submitted by Egypt during the course of

these proceedings provides :

Sans préjudice des dispositions de l'article 8 de la loi, les règles applicables, soit sur le fond soit sur la procédure des litiges concernant l'investissement seront celles contenues dans l'accord conclu avec l'investisseur, à défaut d'un accord, sont applicables les règles incluses dans les Conventions en vigueur entre la République Arabe d'Egypte et l'Etat de l'investisseur, et à défaut de convention à ce sujet, ce sera en application de la Convention pour le règlement des différends relatifs aux investissements entre l'Etat et les ressortissants des autres Etats à laquelle la République Arabe d'Egypte a adhéré en vertu de la loi n° 90 de 1971, dans les cas où elle est applicable, (Emphasis added.)

Egypt has drawn the Tribunal's attention to the fact that the English translation of Article 45 prepared by the General Authority for Investment and Free Zones is incorrect in that the first sentence should begin with the phrase, "Without prejudice to the provisions of Article 8" instead of the phrase "In accordance with the provisions of Article 8," and the final sentence, after the reference to "Law No. 90 of 1971," should contain the phrase "where it (the Convention] applies."

85. Egypt does not contest the translations of those parts of Article 45 which indicate the hierarchic relationship of the dispute settlement methods prescribed therein, however. The use of the phrases "in the absence of such agreement" and "if in turn there are no such agreements" in the English text, and à défaut d'un accord and à défaut de convention in the French text, clearly indicate a sequential relationship and a descending order of applicability.
86. Article 45 of Decree No. 375 also confirms the mandatory nature of the first paragraph of Article 8 of Law No. 8. The English text of Article 45 prepared by the General Authority for Investment and Free Zones, like that of Article 8 itself, provides that disputes "shall be" settled by the methods prescribed therein; the French text uses the verb sera. The Arabic text is even more emphatic; it provides alawa id al-wajibat al-tatbiq. As explained in an expert opinion submitted by the Claimants which has not been controverted by Egypt, the word wajibat derives from wujub, which implies a more forceful notion than "shall be..." and is more correctly translated as "must be...."
87. It is true, as Egypt has pointed out, that according to Egyptian constitutional law, implementing regulations such as Decree No. 375 cannot modify or amend the terms of a statute enacted by Parliament, Article 45 of Decree No. 375 does not purport to modify or amend Article 8 of Law No. 43, however. It only makes explicit the hierarchic sequence which results from the nature of the three methods provided for in Article 8 and from the legal principle that establishes the priority of a special rule with respect to a general one, and confirms the mandatory application of those methods which is otherwise indicated by the ordinary meaning of the terms used in Article 8.
88. Attention has also been called to Article 55 of a prior regulation of Law No. 43, issued by the Prime Minister's Decision No. 91-1975. Article 55 provided that:

Subject to the provisions of Paragraph (one) of Article 8 of Law No. 43 for the year 1974, it may be agreed to settle by arbitration investment disputes related to the implementation of the provisions of the law as well as disputes arising between projects established in the free zones

or between these projects and the Authority or other authorities or administrative agencies connected with the activities or operations in the zones.

The arbitration board may also view disputes that arise between projects established in the free zones and Egyptian or foreign physical or juristic persons when such persons agree to refer the dispute to the arbitration board prior to or after the dispute arises.

This provision, which concerns domestic arbitration, adds little to what has already been said. It is not disputed that under the first paragraph of Article 8 parties may agree to settle investment disputes by domestic arbitration. The question before the Tribunal, however, is whether Article 8 requires ICSID arbitration in situations where the parties have not agreed on domestic arbitration or some other form of dispute settlement and where there is no applicable bilateral treaty. Article 55 simply does not address ICSID arbitration.

89. In support of its argument that the first paragraph of Article 8 is merely a nonlimitative list of dispute settlement methods that investors may seek to negotiate, Egypt contends that the first paragraph cannot be dissociated from the second paragraph, which, according to Egypt, correctly translated begins with the phrase "One can also..." or "Furthermore, one can..." - However, the second paragraph of Article 8 authorizes certain domestic arbitration procedures not otherwise available under Egyptian law which can be employed if the parties agree to settle disputes by domestic arbitration as authorized by the first paragraph of Article 8 ("...in a manner to be agreed upon..."). Hence, the second paragraph of Article 8 does not imply that the first paragraph is not mandatory; rather, it augments the first paragraph by specifying certain procedures that may be used to implement one of the methods of dispute settlement prescribed therein.
90. Nor is the Tribunal able to reconcile the notion that Article 8 is only a list of possible alternatives to be negotiated, none of which is mandatory or binding upon Egyptian authorities without further agreement, with the second method of dispute settlement mentioned in Article 8, *viz.*, settlement pursuant to a bilateral treaty. In circumstances where a bilateral treaty provides for mandatory dispute resolution without further consent or agreement by the parties (as Egypt admits its bilateral treaties with various countries do), Article 8 can hardly be characterized as a mere list of alternatives to be negotiated. Such a construction of Article 8 would in effect deny the investor the right to dispute settlement conferred by the bilateral treaty, in derogation of the principle of *pacta sunt servanda*. Clearly, the Government of Egypt cannot be presumed to have intended such a result when it enacted Law No. 43.
91. Although the text of Article 8 makes no mention of any separate *ad hoc* agreement or further manifestation of consent being required to establish consent to the Centre's jurisdiction, Egypt contends that such a requirement is implicit in the phrases "within the framework of the Convention" and "where it [i.e., the Convention] applies." Egypt maintains that the "framework" of the Washington Convention includes the requirement of a separate, written consent to the Centre's jurisdiction and that the phrase "where it applies" reserves the conditions of applicability of the Convention including the requirement of a special agreement to submit to the Centre's jurisdiction. As the Tribunal has already noted, Egypt also points out that the phrase "where it [the Convention] applies" was erroneously omitted from the English text of Article 45 of Decree No. 375, although it appears in the French text.

92. A number of considerations make it impossible for the Tribunal to accept that the phrases "within the framework of the Convention" and "where it applies" have the effect of introducing into Article 8 an implicit requirement of a further expression of consent in order to establish the Centre's jurisdiction.

93. First, examination of other parts of Law No. 43 reveals that, when the Egyptian Government intended to require separate ad hoc consent for dispute settlement it did so clearly and in explicit terms. Article 45 of Law No. 43, which concerns projects established in "free zones," provides ?

Disputes arising between projects established in free zones, or arising between such projects and the Authority or any other authorities or administrative bodies connected with the business activities within the zone, may be submitted, by agreement, to arbitration,'

An Arbitration Board shall be constituted to decide on the dispute in' accordance with the rules and pursuant to the measures stipulated in Article 8 hereof.

The Arbitration Board may also examine disputes arising between projects existing in the free zone and natural or juridical persons, whether indigenous or alien, if such persons agree to refer the dispute to the Arbitration Board before or after it arises. (Emphasis added.)

Thus, the drafters of Law No. 43 were careful to provide specifically in Article 45 for separate agreement to establish the jurisdiction of the Arbitration Board to settle disputes involving projects in the free zones. Contrasted with the silence of Article 8 with respect to any such separate ad hoc consent to ICSID jurisdiction, the language of Article 45 of Law No. 43 militates against the conclusion that the phrases "within the. framework of the Convention" and "where it applies" were intended to imply a requirement of separate ad hoc consent to establish the jurisdiction of the Centre.

94. To interpret the phrases "within the framework of the Convention" and "where it applies" to mean that the parties to an investment dispute must execute a separate agreement to establish consent to the Centre's jurisdiction would also destroy the internal logic of Article 8 and render much of that provision superfluous. If such a separate agreement were required, ICSID arbitration in effect would be subsumed in the first method of settlement prescribed by Article 8, namely, "a manner to be agreed upon with the investor." Such an interpretation of Article 8 would render meaningless' the entire phrase:

...or within the framework of the Convention for the Settlement of Investment Disputes between the State and nationals of other countries to which Egypt has adhered by virtue of Law no. 90 of 1971, where it applies.

No valid method of legal interpretation would warrant the conclusion that the express reference to the Convention in Article 8 is meaningless or pleonastic. Under general principles of statutory interpretation, a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text.

95. Egypt argues that similar reasoning can be applied to the second paragraph of Article 8, since an agreement to submit a dispute to domestic arbitration as provided for in that paragraph also falls

within the first method of dispute settlement mentioned in the first paragraph of Article 8 ("in a manner to be agreed upon"). However, as Egypt itself has acknowledged in these proceedings, the second paragraph of Article 8 derogates from the rules of Egyptian law applicable to domestic arbitration. Thus, even though the first paragraph of Article 8 authorizes the parties to agree upon domestic arbitration as a means of dispute settlement, the second paragraph is necessary to authorize certain special procedures for domestic arbitration that would not otherwise be available under Egyptian law.

96. Egypt also argues that the requirement of a separate agreement to establish the Centre's jurisdiction would not render part of Article 8 superfluous because the reference to the Washington Convention has the important legal consequence of informing potential investors of the Egyptian Government's willingness in appropriate circumstances to negotiate an agreement conferring jurisdiction on the Centre. The Tribunal is unable to share' this view. Egypt's willingness in principle to negotiate agreements conferring jurisdiction on the Centre was expressed three years before the enactment of Law No. 43, when Egypt enacted Law No. 90, by which Egypt ratified its adherence to the Washington Convention. Moreover, the provision in Article 8 for dispute settlement "in a manner to be agreed upon with the investor" is sufficient to authorize ad hoc consent to the Centre's jurisdiction. In these circumstances the Tribunal cannot accept the contention that Article 8 offered only a promise to negotiate -- a pactum de contrahendo -- by which the parties would undertake to enter into negotiations. Such a promise is devoid of any practical legal effect, since, as the Permanent Court has put it, "an obligation to negotiate does not imply an obligation to reach agreement." ([Railway Traffic between Lithuania and Poland, P.C.I.J. Series A/B No. 42, p.116 \(1931\).](#))

97. Egypt next argues that when Article 8 provides for settlement "within the framework" of the Convention, it means subject to the conditions established by the Convention for the exercise of the jurisdiction of the Centre, including the requirement of a specific consent. In support of this contention, Egypt has cited certain bilateral investment treaties to which it is a party, such as the treaty of July 15, 1978, with Sweden. This treaty provides that :

In the event of a dispute arising between a national or a company of one Contracting State and the other Contracting State in connection with an investment on the territory of that other Contracting State, it shall upon the agreement by both parties to the dispute be submitted for arbitration to the International Centre for Settlement of Investment Disputes established under the [Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States, dated March 18, 1965](#). (Emphasis added.)

Egypt argues that, just as Article 8 of Law No. 43 cannot override the requirement of "agreement by both parties" in the Swedish treaty, it cannot displace the Convention's requirement of "consent in writing." The question, however, is not whether Article 8 can displace the requirement for a "consent in writing," but whether Article 8 is itself a legally sufficient manifestation such consent,

98. It is true that both the Convention and the Swedish treaty require separate manifestations of consent to establish the Centre's jurisdiction. But the Convention and the Swedish treaty articulate this requirement differently: the Convention requires a "consent in writing" whereas the Swedish treaty requires "the agreement by both parties." Thus, the "frameworks" of the Swedish treaty and the Convention are different. As indicated by the Report of the Executive Directors (paragraph 70,

above), the drafters of the Convention, which entered into force eight years prior to the enactment of Article 8, anticipated that a State might unilaterally give advance "consent in writing" to the Centre's jurisdiction through investment legislation. On the other hand, such unilateral legislation clearly could not constitute the "agreement by both parties" required by the Swedish treaty, which was entered into four years after Article 8 was enacted. The fact that Article 8 of Law No. 43 is not the kind of manifestation of consent envisioned by the framework of the Swedish treaty does not mean that it is not a "consent in writing" within the framework of the Convention.

99. Obviously, when a dispute has to be settled "within the framework" of a treaty, all of the conditions required by the treaty for its application must be fulfilled. However, the phrase "within the framework" does not import into a treaty additional requirements which the treaty does not contain. The Convention makes no mention of a separate ad hoc consent. It says only that there must be "consent in writing."
100. Equally unacceptable is the argument that the phrase "where it [i.e., the Convention] applies" introduces a requirement of separate ad hoc consent into Article 8. The Convention may be invoked in any case involving a dispute between a Contracting State and a national of another Contracting State. Of course, the Centre will not have jurisdiction with respect to all such disputes. Jurisdiction will only exist if the dispute is a legal one that arises directly from an investment and if the parties have consented in writing to the jurisdiction of the Centre. These jurisdictional requirements, however, are prescribed in the Convention itself. Thus, it is by application of the Convention that a tribunal determines whether it is competent to hear a particular case. Considered sensu stricto, then, the Convention -- specifically, Article 25 thereof -- "applies" to any case involving a Contracting State and a national of another Contracting State for purposes of determining whether the Centre has jurisdiction with respect to the dispute.
101. For the dispute settlement provisions of the Convention to apply, it is necessary that the jurisdictional prerequisites of Article 25 be satisfied. Thus, the Convention's dispute settlement provisions will not apply if the investor is not a national of another Contracting State. Nor will they apply if the dispute is not a legal one or does not arise directly from an investment. With respect to the consent necessary to establish the Centre's jurisdiction, however, Article 25 requires only that it be "in writing." The Convention does not prescribe any particular form for the consent, nor does it require that consent be given on a case-by-case basis. To the contrary, the drafters of the Convention intended that consent could be given in advance through investment legislation. Accordingly, the Tribunal cannot accept the contention that the phrase "where it applies" in Article 8 of Law No. 43 requires a further or ad hoc manifestation of consent to the Centre's jurisdiction.
102. Egypt also argues that Article 8 of Law No. 43 is insufficient to express consent to arbitration because Article 8 does not refer expressly to "arbitration" but says only that disputes shall be settled "within the framework of the Convention" -- a phrase that embraces both arbitration and conciliation. Nowhere, however, does the Washington Convention say that consent to the Centre's jurisdiction must specify whether the consent is for purposes of arbitration or conciliation. Once consent has been given "to the jurisdiction of the Centre," the Convention and its implementing regulations afford the means for making the choice between the two methods of dispute settlement. The Convention leaves that choice to the party instituting the proceedings. In this case, the Claimants have filed a request for arbitration and none of the Parties has asked for conciliation. Consequently,

the issue before the Tribunal is whether it is competent to entertain -- within "the jurisdiction of the Centre" -- the Claimant's request for arbitration.

103. Certain bilateral treaties to which Egypt is a party and which Egypt itself has cited as examples of its advance consent to the Centre's jurisdiction confirm that consent to the Centre's jurisdiction need not specify whether it is for purposes of arbitration or conciliation. These treaties either make no reference to arbitration or conciliation, or mention both procedures without distinguishing between them. Thus, Article 7 of the treaty of December 22, 1976, between Egypt and France makes no mention of arbitration or conciliation:

Chacune des Parties contractantes accepte de soumettre au Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.), les différends qui pourraient l'opposer à un ressortissant ou à une société de l'autre Partie contractante.

Article 8 of the treaty of June 11, 1975, between Egypt and the United Kingdom, refers to "conciliation or arbitration" but makes no distinction between these procedures:

Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as "the Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States....

Both of these treaties, which Egypt has admitted give advance consent to the Centre's jurisdiction, leave the choice of arbitration or conciliation to be determined by the party instituting proceedings within the framework of the Centre's procedural rules. Accordingly, the Tribunal is unable to accept the contention that, because Law No. 43 does not specify whether it is arbitration or conciliation that is being consented to, a further ad hoc consent is required.

104. The legislative history of Law No. 43 adds very little to the foregoing textual analysis of Article 8. In support of their respective interpretations of that article, both Parties have invoked a report on the draft law presented to parliament by a special Joint Committee, which stated :

...Article 8 of the Draft has set forth the means of resolving conflicts brought about by investment and the possibility of agreeing to have recourse to arbitration.

This statement standing alone is not helpful, one way or the other. There is no indication whether the "means of resolving conflicts" are mandatory or not. Nor is the reference to the "possibility of agreeing to have recourse arbitration" enlightening, since it appears to be directed to domestic arbitration, which clearly is not mandatory unless the parties have specifically agreed upon this method of dispute settlement.

105. Egypt contends that the legislative history would have been much more extensive and explicit if Law No. 43 had been intended to effect a "radical reversal" of the position stated in the explanatory note that accompanied Law No. 90, by which Egypt ratified its adherence to the Washington Convention. That note stated:

...the submission of disputes to this institution [ICSID] is in no way mandatory but derives from explicit written consent of the State and the investor...

The explanatory note, however, merely paraphrased the last paragraph of the preamble of the Washington Convention. It was issued three years before the enactment of Law No. 43 and did not exclude the possibility that Egypt might at some time in the future consent in advance to the Centre's jurisdiction, as is evident from the various bilateral treaties subsequently concluded by Egypt which give advance consent to the Centre's jurisdiction.

106. Egypt in effect relies not on what the legislative history says, but rather on what is left unsaid -- what Egypt refers to as the "instructive silence" that accompanied the enactment of Article 8. This silence is explained, however, by the fact that when Law No. 43 was enacted Egyptian authorities no longer had to explain or discuss the possibility of giving consent to the Centre's jurisdiction. Thus, in the same year that Egypt enacted Law No. 43 it also entered into a bilateral treaty with France that inter alia gave advance consent to the Centre's jurisdiction, and in subsequent years Egypt entered into similar bilateral treaties with other countries. The "radical reversal" of policy occurred not with Law No. 43 so much as with Law No. 90, by which Egypt ratified its adherence to the Washington Convention. By enacting Law No. 90 and becoming a party to the Convention, Egypt represented itself as a State which recognized the validity of the Centre's dispute resolution procedures. This event marked the real change from the policy that had resulted from the capitular system. The subsequent general consent to jurisdiction which occurred later in Law No. 43 and various bilateral treaties merely implemented the fundamental policy change enshrined in Law No. 90.
  
107. Egypt has urged that the Tribunal interpret Article 8 with a view to Egypt's historic reluctance to submit to the jurisdiction of international tribunals -- a reluctance born of the capitular system which severely restricted Egypt's sovereign rights to legislate and adjudicate with respect to foreign nationals. It is clear that, in interpreting a unilateral declaration that is alleged to constitute consent by a sovereign State to the jurisdiction of an international tribunal, consideration must be given to the intention of the government at the time it made the declaration. (Anglo Iranian Oil Co., I.C.J. Reports 1951, p.104; Rights of Minorities in Upper Silesia, P.C.I.J., Series A, No.15, p.22 (1928); Phosphates in Morocco, P.C.I.J., Series A/B, No. 74, pp.22-24 (1938)). In this connection, the Tribunal recognizes that in the aftermath of the -capitular system, which was terminated by the Montreaux Convention of 1937, Egypt was understandably adverse to the notion of submitting its disputes or those of its nationals to the jurisdiction of foreign or international tribunals. However, the Tribunal must also consider the fact that in 1971 -- the year in which Egypt became a party to the Washington Convention -- Egypt embarked upon a major new economic policy designed to attract foreign investment. As Egypt itself has acknowledged in these proceedings, Law No. 43 was the legal expression of this "economic open door policy." The purpose of Law No. 43 was to promote foreign investment by granting certain guarantees and privileges such as tax exemptions, repatriation of profits and exemption from exchange controls to investments approved by the Government. Law No. 43 defined the kinds of investments sought by Egypt and specified the privileges and guarantees to which such investments would be entitled. The incentives and guarantees granted by Law No. 43 were to be enjoyed only by those projects which received the approval of the General Authority for Investment and Free Zones, Law No. 43 requires that all applications for investment be submitted for approval to the General Authority, which has discretionary power to refuse such approval. It is not surprising that these guarantees should include the promise of neutral or impartial dispute

resolution, so as to dispel investors' concerns about Egypt's reputedly hostile attitude towards non-domestic arbitration -- an attitude which was quite understandable in light of Egypt's experience with the capitular regime. Such considerations would explain why Egypt gave advance and general consent to the Centre's jurisdiction, not only in Article 8 of Law No. 43, but in an increasing number of bilateral treaties.

108. Egypt next argues that if Article 8 were interpreted so as to give advance consent to the Centre's jurisdiction, it would implicitly abrogate a provision of existing law in contravention of the Egyptian Civil Code. According to Egypt, Law No. 90 of 1971, by which Egypt ratified its adherence to the Washington Convention, made Article 25 of the Convention a "legal provision" requiring express written consent to establish the jurisdiction of the Centre. This provision, argues Egypt, cannot be implicitly abrogated without contravening Article 2 of the Egyptian Civil Code which provides:

The law can only be abrogated by a subsequent law expressly mandating abrogation of the previous law or containing a provision incompatible with that of the old law, or regulatory matter previously governed by the old law.

However, if Article 8 is itself the "consent in writing" required by Article 25 of the Washington Convention, there can be no question of Article 8 abrogating Article 25.

109. Egypt argues that the United Kingdom's unsuccessful attempts in 1983 and 1985 to extend the application of its bilateral investment treaty with Egypt -- which includes a provision for ICSID arbitration and conciliation -- to Hong Kong shows that Egypt did not give advance consent to the Centre's jurisdiction when it enacted Law No. 43 in 1974. The Tribunal is unable to share this view, which presupposes that the United Kingdom's motive in trying to extend the treaty's application to Hong Kong was to guarantee investors there the benefits of ICSID dispute settlement procedures which were not otherwise available. In the first place, the bilateral investment treaty between the United Kingdom and Egypt involves much more than ICSID arbitration: it contains provisions dealing with the promotion and protection of investments, most-favoured nation treatment, compensation for losses, expropriation, repatriation of investments, and the settlement of disputes between the Government of the Arab Republic of Egypt and the Government of the United Kingdom. There is no evidence before the Tribunal that the United Kingdom's effort to extend the application of this treaty to Hong Kong was motivated by a concern that, absent such an extension, the provisions of the Washington Convention would not apply to disputes between nationals of Hong Kong and Egypt.
110. Nor does the fact that a State enters into a bilateral investment treaty providing *inter alia* for ICSID arbitration or conciliation imply that the State has not already given advance general consent to the Centre's jurisdiction. Egypt has acknowledged in these proceedings that Senegal's law of April 11, 1974, "expresses, beyond all doubt, an unambiguous consent" to the Centre's jurisdiction. Yet subsequent to enacting this legislation, Senegal entered into bilateral treaties providing *inter alia* for ICSID arbitration with Romania (June 19, 1980), the Netherlands (May 5, 1981), the United States (December 6, 1983) and the United Kingdom (February 9, 1984). Indeed, the article in the Senegal/United Kingdom treaty which provides for the reference of disputes to ICSID is worded exactly the same as the article providing for ICSID arbitration in the bilateral treaty between Egypt and the United Kingdom. Thus, the mere fact that Egypt and the United Kingdom entered into a bilateral

investment treaty containing an ICSID clause does not mean that the ICSID remedy was not already available under Egyptian law to nationals of the United Kingdom making investments in Egypt. By the same token, the fact that the United Kingdom sought to extend the treaty's coverage to Hong Kong does not imply that an ICSID remedy was not already available to Hong Kong nationals under Egyptian Law.

111. Both Egypt and the Claimants have invoked comparisons of Egypt's Law No. 43 with legislation of other countries in support of their respective contentions concerning the correct interpretation of Law No. 43. The Claimants argue that Law No. 43 is similar to the legislation of other countries which gives advance consent to the Centre's jurisdiction, while Egypt contends that it is very different from such legislation. The Tribunal does not find such comparisons to be particularly helpful or relevant to the interpretation of Article 8 of Law No. 43. To the extent that the Parties cannot agree on which laws constitute advance consent to the Centre's jurisdiction, their respective arguments in effect invite the Tribunal to interpret the laws of States that are not presently before the Tribunal -- a function that the Tribunal considers neither appropriate nor necessary to its decision in this case. Nor do those laws which the Parties agree give advance consent to the Centre's jurisdiction contribute much to the analysis, other than to illustrate the wide variety of forms in which advance consent to the Centre's jurisdiction may be expressed.
112. Both Parties have also relied on language in certain official investment promotion literature for purposes of supporting their respective interpretations of Article 8 of Law No. 43. Egypt points out that publications by the General Authority concerning Law No. 43 say that investment disputes "may be settled" or "can be settled" by alternative means, but do not use the language "shall be settled." For example, the 1975 Investment Guide published by the General Authority states with respect to Law No. 43 that:

Disputes can be settled in accordance with international or bilateral agreements or by a mutually agreed upon arbitration.

In determining the effect to be accorded this statement and other statements made in promotion investment literature published by the Egyptian Government, the Tribunal must take account of the fact that such statements by their nature are intended to be informative rather than normative. Investment promotion literature does not create rights; it informs potential investors of the rights they will enjoy by virtue of existing law if an investment is made. Hence, the statement in the 1975 Investment Guide that investment disputes "can be settled" by various methods -- a statement informing potential investors of the various means of dispute settlement that are available under existing law -- is entirely consistent with the normative provision in Law No. 43 that disputes "shall be settled" by certain procedures -- a provision that creates a legal right.

113. It is also significant that the statement quoted above from the 1975 Investment Guide uses the phrase "mutual consent" with respect to domestic arbitration but not with respect to settlement pursuant to "international" agreements such as the Washington Convention. Similarly, the Legal Guide to Investment in Egypt published by the General Authority in 1977 states that submission of disputes to domestic arbitration under Article 8 "necessitates an agreement by the parties," but makes no such statement with respect to the Washington Convention. These explicit references to the requirement of a further agreement in connection with domestic arbitration, contrasted with the

silence as to any such requirement in connection with the Washington Convention, further confirm the conclusion that an hoc agreement is not necessary to establish the Centre's jurisdiction.

114. Finally, in Egypt, the Right Orientation for Your Investment, published by the General Authority in 1984, it is said:

Egypt is a signatory of the International Convention for the Settlement of Investment Disputes and the right to arbitration of commercial disputes with the Government is recognized by law.

This statement speaks of a "right to arbitration" in connection with the Washington Convention. Again, the clear implication is that no further agreement is necessary to assure access to ICSID procedures: if the foreign investor must negotiate a further ad hoc consent or agreement to arbitrate, he has no "right to arbitration."

115. While there is no question of investment promotion literature altering the terms of a statute, in the present case the materials published by the General Authority merely confirm the conclusion already reached by the Tribunal on the basis of the text of Law No. 43 and the legislative intent thereof to the effect that Article 8 does not require a further ad hoc expression of consent to establish the jurisdiction of the Centre.
116. On the basis of the foregoing considerations, the Tribunal finds that Article 8 of Law No. 43 establishes a mandatory and hierarchic sequence of dispute settlement procedures, and constitutes an express "consent in writing" to the Centre's jurisdiction within the meaning of Article 25(1) of the Washington Convention in those cases where there is no other agreed-upon method of dispute settlement and no applicable bilateral treaty.
117. In the present case, as a result of the decisions of the French courts nullifying the ICC award of February 16, 1983, it has been established that the Parties have not agreed on a method of dispute resolution. Nor is there any bilateral treaty in force that is applicable to the Parties' dispute. The dispute is a legal one arising directly out of an investment, and the Parties are a Contracting State and a national of another Contracting State. In these circumstances, and in view of the findings made by the Tribunal in its decision of November 27, 1985, the Tribunal finds that Article 8 of Law No. 43 operates to confer jurisdiction upon the Centre with respect to the Parties' dispute.
118. It is true, as Egypt has emphasised in these proceedings, that consent by a State to the jurisdiction of an international tribunal involves a waiver of sovereign immunity. The Tribunal would note, however, that the waiver which results from Article 8 is illusory in several respects. In the first place, because of the hierarchic nature of the first paragraph of Article 8, the Government of Egypt may avoid the Centre's jurisdiction by agreeing with the investor on some other form of dispute settlement. Second, in those cases where a bilateral treaty is applicable, that treaty will take precedence over ICSID arbitration unless it provides for such arbitration, in which case Egypt has already waived its jurisdictional immunity and consented to the Centre's jurisdiction. Finally, Article 8 only becomes operative after the investment has been approved by Egyptian authorities. Thus, even if all of the jurisdictional prerequisites of Article 25 of the Washington Convention are satisfied, Article 8 does not effect a waiver of sovereign immunity unless and until Egypt approves the investment in question without reaching agreement with the investor on some other form of dispute settlement.

119. The Claimants have invoked as subsidiary and alternative grounds upon which to found the jurisdiction of the Centre in this case (1) certain treaties entered into between Egypt and the United Kingdom containing most favored nation clauses; (2) an allegation that the Heads of Agreement of September 13, 1974, constitutes an additional expression of consent to the Centre's jurisdiction; and (3) the contention that acceptance of Egypt's refusal to arbitrate would constitute an international denial of justice. The Tribunal's conclusion that Article 8 of Law No. 43 is sufficient to establish the jurisdiction of the Centre with respect to the Parties' dispute makes it unnecessary for the Tribunal to pronounce upon these other alleged jurisdictional grounds.

120. Having found that Article 8 of Law No. 43 in the circumstances of the present case constitutes "consent in writing" to the Centre's jurisdiction within the meaning of Article 25(1) of the Washington Convention, the Tribunal must now address the Claimant's submission that the Tribunal :

...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 EGOH's counterclaim therein, and the acts bringing about termination of the investment project.

The Tribunal finds this submission to be unacceptable, both in principle and under the Centre's Arbitration Rules. In effect, the submission asks the Tribunal to abdicate its fact finding function and adopt as its own the findings of a tribunal that has been held to have acted in excess of the powers conferred upon it by the arbitration clause. Such an approach is hardly consistent with the basic function of evidence in the judicial process, which is to enable the tribunal to determine the truth concerning the conflicting claims of the parties before it.

121. Moreover, [Rule 47 of the ICSID Arbitration Rules](#) requires that ICSID tribunals make their own findings of fact :

(1) The award shall be in writing and shall contain :

...

(g) a statement of the facts as found by the Tribunal... (Emphasis added.)

Accordingly, the Tribunal will proceed to make its own determination of the facts necessary to render an award in the present case.

For these reasons

THE TRIBUNAL DECIDES

(A) To reject the objection to its jurisdiction raised by the Respondent alleging that Article 8 of Law No. 43 does not suffice to establish Egypt's consent to the Centre's jurisdiction;

(B) To reject the submission of the Claimants that the Tribunal adopt and incorporate as its own the pertinent findings- of fact made by the ICC tribunal; and

(C) Consequently, and in accordance with [Rules 25 and 41](#), to instruct the President to fix the time limits for further proceedings on the merits in consultation with the Parties.

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/84/3

SOUTHERN PACIFIC PROPERTIES (MIDDLE EAST) LIMITED V. ARAB REPUBLIC OF  
EGYPT

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DISSENTING OPINION OF MOHAMED EL MAHDI

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Tribunal:

[Mohamed Amin Elabassy El Mahdi](#) (Appointed by the State)

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# Dissenting Opinion of Mohamed El Mahdi

The present dissenting opinion is divided into two parts : the first part contains the main arguments in answer to whether or not the Claimants have standing to invoke ICSID jurisdiction and the Tribunal's competence over the present case on the basis of the provisions of article (8) of the Egyptian Law N° 43 of the year 1974. The second part deals with comments and observations formulated in response to the draft adopted by the other eminent two members of the Tribunal.

## **FIRST PART - Do the Claimants have standing to invoke ICSID jurisdiction and this Tribunal's competence over the present case?**

1. The main argument regarding ICSID's jurisdiction and this Tribunal's competence over the present case is based on the contention that the two Parties to the dispute, i.e. (SPP group and Egypt) gave their consent in writing to ICSID arbitral jurisdiction:
  - a. Egypt by enacting Law 43/1974, Article 8 of which provides in relevant part as follows:

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 said 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..."

(The above text is mentioned in the Preliminary Decision of this Tribunal of November 27, 1985, para 70, after being rectified by Secretary General of ICSID who notified the Parties i.e., SPP (M.E.) and Egypt, by telex of August 29, 1984, on the occasion of the registration of the request to arbitration that :

...the Arabic text of Article 8 of Law 43 of 1974 refers to the settlement of disputes within the framework of ICSID Convention in the cases where it (i.e. the Convention) applies, and not, as erroneously mentioned in the English translation, where Law 90 of 1971 ratifying the Convention applies. I have thus registered the request of SPP without prejudice to the question whether 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).

It is to be noted, however, that the Claimants in their memorial of May 20, 1987 (p. 32) submitted that "it is proper to rely on the English text disseminated by the A.R.E. itself."

b. And the Claimants by the letter of SPP (M.E.) dated August 15, 1983, notified to the Minister of Tourism of Egypt which states that:

..Recognizing 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 uncontested jurisdiction of the International Centre for the Settlement of Investment Disputes, under the auspices of the World Bank, which is opened to us as a result of Law N° 43 of 1974, Article 8 of which provided that investment disputes may be settled by ICSID arbitration.

and again the filing by SPP (ME) of the request for arbitration to ICSID on August 24, 1984.

2. In support to this contention, the Claimants, in substance, advance various series of arguments:
  - a. That the consent to ICSID is to be governed by international Law applicable to international treaties, and that no international Law principle requires that the wording allegedly containing Egypt's consent should be construed restrictively. Consequently, that the ICSID Convention should be interpreted in view of its purpose and objectives, and that a government's consent to submit disputes to an international tribunal is subject to the same rules of interpretation as ordinary contractual obligations.
  - b. That Article 8 of Law 43/1974 is self-executing. In this respect, Claimants assert that the acceptance of ICSID Jurisdiction over the "settlement" of disputes can only mean the acceptance of arbitration as a mode of settlement to the exclusion of the other settlement mechanism provided for by the Convention which is conciliation, particularly when taking into consideration that the first paragraph of Article 8 of the said Law is mandatory.
  - c. Furthermore, since negotiations with the A.R.E. took place in English only, and the Heads of Agreement were drafted in English alone, the Claimants assert that they are entitled to rely upon the English translation of the text of Law published by A.R.E., as well as upon the official publications addressed by the A.R.E. to foreign investors, thereby concluding that it cannot be admitted to take into consideration Egypt's argument that the verb used in the Arabic text of Article 8 has some floating significance which only a hypersensitive scholar might appreciate. Claimants then affirm that it cannot be accepted that everything not in Arabic the A.R.E. published with respect to its investment regime is clouded by an unstated caveat lector whereby the A.R.E. may at any time contradict anything stated therein on the basis of its own unilateral interpretation of the Arabic text; in that case, Claimants say, good faith would require that Egypt says so before investments are made. Claimants also assert that, even on the basis of the original Arabic text of Article 8, their contention is well based; suffices to consider the comparison of the two verbs used in the first and the second paragraph of Article 8 itself.
  - d. Claimants also advance that Article 8 of Law No 43 should be construed in the light of the general

legislative purpose of Law N° 43, and that it should not be interpreted so as to render its clause (3) redundant. Claimants further assert that by applying the principle of the "effet utile" one comes to the conclusion that Article 8 should have meant the expression of Egypt's consent to arbitration under the convention. Such submission is confirmed by the investment literature issued by the General Authority of Investment and Free Zones as well as by the historical context of Egypt's adherence to the Washington Convention and the enactment of Foreign Investment Law N° 43/1974.

3. The main objections to the Jurisdiction advanced by the Respondent, concerning the correct interpretation of Article 8 of Law N° 43/1974 can be summarized as follows :

a. The interpretation of the investment promotion Law N° 43/1974, and consequently of Article 8 of said Law must be conducted in light of the historical background of Egypt's suffering and struggle for the abolition of the capitular regime which was the manifestation of the most serious strain upon Egypt's sovereignty.

b. That the denial of the application of Law N° 43/1974, as such, and consequently of its Article 8 contravenes Article 42 of the Washington Convention.

c. That the only text susceptible to produce any legal effect is the Arabic text of Law 43/1974, which uses the present tense and that it is not permitted to induce an element of internationalization or to conclude to a finding of an imaginary intention of the Law that does not exist.

d. That for the interpretation of Law 43/1974, it must be borne in mind that Article 2 of the Law issuing Law N° 43 provides that "Matters not covered by this Law are subject to the applicable Laws and regulations", and that the Arabic text of Article 8 of Law 43/1974 contains nothing of a mandatory effect, but simply enunciates the available methods of settlement of investment disputes to be agreed upon between the investor and Egypt. On the one hand because a linguistic study of the verb used in the Arabic text of the first paragraph of Article 8 proves that the verb cannot be correctly translated into the English mandatory verb "shall" and on the other hand because the second paragraph of said Article 8 is not to be disassociated from the first paragraph since the second paragraph begins with "and", consequently, "ou en outre Ton peut..." thereby confirming the facultative nature of the provisions of Article 8 (Egypt's memorial in reply to the oral arguments of the Claimants expressed in the session of September 8, 1987, p. 12). Egypt also points out that the language of Article 45 of Law N° 43 which states : "l'on peut convenir de régler par arbitrage les litiges qui surgissent entre les projets établis dans les zones franches ou entre ceux-ci et l'organisme ou autres autorités et organes administratifs ayant rapport avec les activités exercées dans la zone combined with the language of Article 8 confirms the conclusion that the legislator's intention is simply to indicate the possible procedures for the settlement of investment disputes, and for Egypt to advance that :

"Il devient impossible d'alléguer ou prétendre que les deux ordres de disposition du deuxième alinéa de l'article 8 et de l'article 45 n'ouvrent pas aux parties la possibilité d'éliminer par leur accord propre toutes les alternatives données par le premier alinéa de l'article 8." (The above mentioned Egypt's memorial p. 13).

To the conclusion that :

"Ainsi le tout revient à un choix que les parties font en connaissance de cause."

This conclusion, asserts Egypt, is in accord with: the framework of the Washington Convention explicitly mentioned in Article 8 and the necessity of a separate agreement to ICSID jurisdiction as stated in the explanatory note accompanying Law N° 90/1971 by which Egypt ratified the Convention, the said explanatory note containing that :

"L'introduction des litiges par devant cet organisme (le CIRDI) n'est point obligatoire, mais relève du consentement explicite écrit de l'Etat et de l'investisseur."

e. Egypt also advances that the phrase in fine of paragraph 1 of Article 8 which says "where such Convention applies" is relevant to the effect that the applicability of the Convention is conditional upon the presence of certain prerequisites, inter alia and most importantly, the consent of the Parties to this effect. Furthermore, Egypt asserts that Article 45 of the executive statute of Law 43/74 (the executive statute issued by decree N° 375 of 1977 of the Minister of Economy) states that "sans prejudice des dispositions de Particle 8 de la loi..." and not as erroneously translated to "In accordance with the provisions of Article 8 of Law N° 43..." and that the executive statute cannot have the effect, eventually, to add to the provisions of Law 43/74, to the conclusion that if Law 43/74 does not contain Egypt's consent to the jurisdiction of ICSID, the statute, consequently, cannot have this effect.

4. In my opinion, the issue of jurisdiction, in the present case, is to be determined by the answer to two major questions :
  - a. Which law is applicable to the finding of whether Egypt did or did not consent to. ICSID jurisdiction, and more precisely to the settlement of the present case by arbitration under the auspices of ICSID ?
  - b. Which text is to be considered for the purpose of determining the Tribunal's jurisdiction ? Is it the text of the Law in its original language or the translation into another language, and in case of more than one translation which version should prevail ? In other terms, what are the requirements deemed necessary for a translation to be considered as a basis of a state's declared intention in the matter of consent to ICSID jurisdiction ?
5. Egypt has no point in stating that its historical evolution and specifically the burden of the capitulatory regime has to be taken into consideration in the interpretation of its modern laws and statutes. Egypt is a sovereign State, signatory of the Charter of the United Nations at San Francisco on June 26, 1945, and since the creation of the United Nations, enjoys the same prerogatives as all other sovereign member States, In exercising its legislative power, Egypt acts as a modern sovereign State; hence, the far or near past of the historical evolution has no impact in this respect. Moreover, Egypt is not only a signatory State to the Washington Convention, but also the siege of a regional commercial arbitration Centre created pursuant to a resolution to this effect by the Asian-African Legal Consultative Committee on January 1978 (M. Davis-Business Law in Egypt 1984 p. 138), and ICSID concluded with that Centre an accord in application of Article 63 of the Convention. (G. Delaume, Le Centre International pour le Reglement des differends relatifs aux investements (CIRDI)).

6. It has to be noted that the present Tribunal has been always aware of the importance of the consent of the parties to the dispute as a condition of Jurisdiction of ICSID. In its preliminary decision of November 27, 1985, after reviewing pertinent parts of the Preamble of the Convention and the report of the Executive Directors on the Convention, the Tribunal emphasized the consent as the cornerstone of the jurisdiction of the Centre by stating that ascertaining the existence of the consent "is a task that this Tribunal must approach with great care.' (Paragraph 51 of the Preliminary Decision.)
7. It is true, as mentioned in said preliminary decision, that the Convention does not prescribe any particular form for the consent required to establish the Centre's jurisdiction other than that being "in writing". As made clear in the Report of the Executive Directors, a host State may in its investment promotion legislation offer to submit disputes arising out of certain classes of investment to the jurisdiction of the Centre, and the investor may give his consent by accepting the offer in writing.
8. Needless to point out that an Arbitral Tribunal operating under the auspices of ICSID has to take into account the convention, both in its language and spirit. In the case AMCO ASIA vs the Republic of Indonesia (Award on jurisdiction), it was indicated that according to the very first sentence of the Convention's Preamble ICSID arbitration is a method of settlement which corresponds to the interests, not only of investors, but of the Contracting States as well. In other terms, the Convention is aimed to protect to the same extent and with the same vigor the investor and the host State. However, such correct and accurate statement does not, and indeed cannot, be the basis of an assumption of ICSID jurisdiction. The language of the Convention is explicit: there must be a consent in writing (Article 25/1) and that "any contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre... Such notification shall not constitute the consent required by paragraph (1)" (Article 25/4). In the light of the above mentioned considerations, one may conclude that it is in the mutual benefit of an investor and a host State to submit investment disputes to ICSID jurisdiction, but one should also conclude that in accordance with the language and spirit of the Convention and the subtle combination of the needs of capital exporting and importing countries agreed upon and embodied in the Convention, the jurisdiction of the Centre does not and cannot exceed the limits traced by the Convention allowing the Centre to become the Juge de Droit Commun of investment disputes on the assumption of a consent which does not exist in fact or in law.
9. For the establishment of the jurisdiction of the Centre, the Convention requires that the parties to the dispute consent to that jurisdiction in writing (Article 25 of the Convention). The Convention also necessitates that the request for either conciliation (Article 28/2) or arbitration (36/2) includes the parties' consent to the method of settlement they consented upon under ICSID jurisdiction. It is an obligation under the Convention (Articles 32/2 and 41/2) for the Conciliation Commission and the Arbitral Tribunal to rule upon any objection raised to the effect that the dispute is not within the jurisdiction of the Centre, or is not within the competence of the Conciliation Commission or the Arbitral Tribunal. The conciliation commission and the arbitral tribunal are empowered on their own initiative under "conciliation rules" (rule 30/2) and "Arbitration rules" (rule 41/2) to consider at any stage of the proceeding whether the dispute before them is within the jurisdiction of the Centre or within the competence of either of them.

The Preamble of the Convention states 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."

The Report of the Executive Directors explains that "the term "jurisdiction" of the Centre is used as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings", and also states that, since the Convention does not 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." (paragraphs 22-24 of the Report).

In the same vein, it has been said that the drafters of the Convention have had recourse to the concept of "jurisdiction of the Centre" in spite of that the use of the term "jurisdiction" in relation to the Centre is admittedly open to objections on the purist ground, the Centre not being in any sense a court but merely an administrative body under whose auspices conciliation commissions or arbitral Tribunals may be established and proceedings conducted. (A. Broches, *The Convention on the Settlement of Investment Disputes : Some Observations on Jurisdiction*, Columbia Journal of Transnational Law, 1966, p. 265).

Accordingly, in spite of the fact that under the Convention an institutional element is introduced which allows, through the mechanism of the Centre, the creation of a conciliation Commission or an arbitration Tribunal deriving their competence from the Convention itself, the fact remains that the "jurisdiction" conferred on the Centre is not to be considered as a jurisdiction de droit commun concerning all investment disputes. The whole system of jurisdiction is based upon the consent of the parties as to the jurisdiction indicating at the same time the method of settlement provided for by the Convention; whether conciliation or arbitration.

Conciliation and arbitration are considered according to the Convention as the two alternative methods of settlement of investment disputes among which the parties have to choose." *Le Centre offre aux parties deux voies de règlement, par la conciliation et par l'arbitrage,*" writes M. Anadio in "Le contentieux international de l'investissement privé et la Convention de la banque mondiale du 18 mars 1965", (Paris, LGDJ, 1967, p. 147). The author continued by clarifying that: "une juridictionnalisation notable non seulement de l'arbitrage pour lequel d'ailleurs cette caractéristique est aujourd'hui bien acquise mais aussi de la conciliation que la Convention veut rendre la plus efficace possible" (emphasis added).

10. In order to meet the requirements of the Convention the consent "in writing" to the jurisdiction of the Centre, should indicate unequivocally the method of settlement agreed upon i.e. whether the concerned party consents to conciliation or favours a direct recourse to arbitration.
11. In the light of the variety of the forms of consent admitted in the framework of the Convention, Professor Reuter explains that if the Convention is characterized by its flexibility as to the form in which consent can be expressed and embodied, the Convention "reste cependant assez prudente sur la nature juridique du consentement ; il peut être conventionnel et relever du droit national ou du droit international public; mais rien n'exclut à priori que dans un système juridique national déterminé, il ne présente aucun caractère conventionnel et résulte d'un acte condition d'une part et

d'un statut légal de l'autre. Il se pourrait que ces distinctions ne soient cependant pas sans importance, notamment dans le cas où la validité du consentement serait mise en cause: la détermination du droit applicable et des causes d'invalidité pourrait varier d'un cas à un autre." (Emphasis added) (Investissements étrangers et arbitrage entre Etats et personnes privées : P. Reuter, Réflexions sur la compétence du Centre, Paris, Pedone, 1969. p. 14)

12. In the present case, the alleged consent of Egypt, or rather and more precisely the alleged offer by Egypt to submit investment disputes to ICSID arbitration is contained in the Egyptian Investment Law N° 43 of the year 1974 (Article 8), the Claimants contend that they accepted this offer. Thus the nature juridique of the alleged consent to ICSID arbitration is one resulting from "un acte condition d'une part et d'un statut légal de l'autre" with the result that the applicable law to the consent is, in the present case, the Egyptian Investment Law, N° 43/1974. This is not an application of Article 42 of the Convention, as asserts Egypt, because that article deals with the applicable law to the subject matter of the dispute and provides that in the absence of an agreement to the contrary the law of the contracting State party to the dispute shall be applicable. In essence the applicability of Egypt's Law 43/74 as to the finding of whether or not Egypt offered to submit investment disputes to conciliation or to arbitration in implementation of the provisions of Law N° 43/74 derives from the nature juridique of the offer contained in said legislative text. The legal consequences of this basic reality can be summarized as follows:
  - a. The Egyptian Law N° 43/74 is to be applied, per se, to the finding by this Tribunal of jurisdiction. Precedents by international tribunals to the effect that municipal laws are to be considered as a mere fact, are not of any relevance to the present case.
  - b. The international rules of interpretation of treaties codified in [articles 31 and 32 of the Vienna Convention of 1969](#) on the law of treaties cannot be applied mutatis mutandis to the interpretation of Egypt's Law N° 43/74. Such rules, are conceived as applicable to treaties and other contractually binding obligations governed by the fundamental rule of pacta sunt servanda. Contrarily, with regard to the interpretation of a text of law, there is no place for a search of a common intention. Article (1) of the Egyptian Civil Code stipulates that "Legislative provisions are applicable to all issues which are covered by these provisions, in text and content." (The translation published by the Middle East Library for Economic Services, Cairo.)
13. The preliminary decision rendered by the present Arbitral Tribunal ordering suspension of the proceedings was based on the application of Law 43/74 and of Article 8 of that Law, as the law applicable to the determination of whether or not Egypt, by the effect of the said Law, gave a standing offer to submit investment disputes concerning the application of the provisions of the Law to ICSID arbitration. The decision in question clearly stated, "thus, the determinative question as to the Tribunal's competence in the present case is the following : Does Law 43 constitute a self-executing offer by Egypt to accept the Centre's jurisdiction with respect to the present dispute ?" By such formulation, the Tribunal rightfully referred to Egypt's Law 43 as the Law applicable to the finding of jurisdiction.
14. In this respect, two preliminary observations must be borne in mind :
  - a. That the Convention itself takes the utmost care to ensure that the consent is certain. For that purpose, Article 25 (4) of the Convention explicitly states that the notification by a State to the

Centre that it would consider submitting certain disputes to the jurisdiction of the Centre does not constitute the consent required to the establishment of jurisdiction. Professor Reuter correctly observed that this provision reflects the necessity of the certainty of the consent by stating that: "Ce double consentement doit être certain; une simple déclaration d'intention ne saurait valoir consentement." (P. Reuter, *Réflexions sur la compétence du Centre*, op. cit. p. 14) It results that a declaration of an intention to submit certain investment disputes to the Centre's jurisdiction does not contravene, but in fact can be considered in accordance with the language and the spirit of the Convention.

b. That it does not suffice to accept the Centre's jurisdiction, but the consent must also contain the choice of the method of settlement made and available under the Convention: i.e. conciliation or arbitration. Since the Convention provided for these two methods of settlement of investment disputes it is necessary, when expressing the consent to the jurisdiction, to specify the method of settlement agreed upon. The general idea that conciliation precedes normally arbitration, and that it is not a method of settlement because it concludes to recommendations not binding upon the parties, does not apply under the mechanism of the Convention. The Convention deals with both conciliation and arbitration as methods of dispute settlements and nowhere in the Convention, can one trace a provision to the effect that the acceptance or the consent to the Centre's jurisdiction is to be considered the equivalent of the consent to arbitration to the exclusion of conciliation or vice versa. Article 28 (2) of the Convention, concerning Conciliation, reads as follows: "The request shall contain information concerning the issue in dispute... and their consent to conciliation...", and article 36 (2) of the Convention, concerning arbitration states that "The request shall contain information concerning the issue in dispute... and their consent to arbitration..." It is legitimate, therefore, to conclude that the consent to the jurisdiction of the Centre must necessarily include the choice of the method of settlement agreed upon by the parties to the dispute whether it be conciliation or arbitration. This obligation emanates from the explicit language of both articles 28/2 and 36/2 of the convention.

15. As to the interpretation of a text of a national law, the interpretation must, in principle, be undertaken on the basis of the original text of the law. It goes without saying that said text embodies the legal provision which has been meant to govern the envisaged situation. In the present case, the problem is that the text of the law is in Arabic, and not all the members of the Arbitral Tribunal do have sufficient knowledge of that language. It has to be noted that in the Amco Asia's case vs the Republic of Indonesia, the Arbitral Tribunal was faced with a similar linguistic problem, but the Tribunal did not find itself in need for calling upon experts sufficiently familiar with the Indonesian language. But in the present case, the Claimants initially asserted that they have the right to avail themselves of a certain English translation of the text of Law 43/74. Thereafter, the Claimants did not contest the rectification of the English translation of paragraph (1) in fine of Article (8) effectuated by the Secretary General of ICSID by his telex to the parties dated August 29, 1984 and referred to in paragraph (3) of the preliminary decision.
16. The divergence between the parties in the present case with regard to article (8) of Law 43/74, is limited to two points:
  - I- Does the expression "shall be settled" correspond to the exact wording of the text in Arabic and
  - II- what is the correct translation of the last phrase of the first paragraph of Article (8)? Should

the translation be : "where such law applies" as it figures in the translation effectuated by the "Arab and Foreign Investments and the Free Zones Authority" (Annex 1 to the Claimants request for arbitration), or "where such Convention applies" (the translation as rectified by the Secretary General of ICSID referred to herein above), or "in the case where such treaties and convention apply" (according to the translation effectuated and qualified as the accurate translation by Mr. S. Saleh in his affidavit of Law - Claimants Exhibit N° 45). Mr. Saleh pointed out that "the English version issued by the Egyptian authorities translates "they apply" by "such law applies" (i.e. Law N° 90 of 1971) instead of by "they (such treaties and conventions) apply". The verb in Arabic, however, is "tasri" which is in the plural and therefore strongly indicates that the translation "such law applies" is incorrect". (Affidavit p. 2). That statement is further confirmed by the telex dated June 14, 1985 (Claimant's Exhibit 11) in which Mr. J.F. Rycx stated that "I have read the Arabic record of Egyptian Law 43/1974. In our opinion, the verb "tasri" which is used at the end of the first paragraph of Article 8 clearly refers to treaties and Conventions." The verb has been put in the feminine singular. According to the established Arabic grammar, feminine singular is used for concordance when the subject in the plural denotes irrational or inanimate objects. In this context, the verb "tasri" could not be related to the word "law" which in Arabic is masculine."

17. It appears from the above that the translation to English language effectuated by the "Arab and Foreign Investments and the Free Zones Authority" lacks precision. Setting aside, for the time being the exactitude of the translation of "shall be settled", it is beyond any doubt that the correct translation of the last phrase of paragraph 1 of Article (8) is not as it figures in the translation of the said Authority. The Affidavit of Mr. Saleh presented by the Claimants confirms this conclusion, since he asserted that paragraph 1 of Article (8) should read as follows : "Investment disputes relating to 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 treaties in force between the Arab Republic of Egypt and the investor's State or within the framework of the Convention for the Settlement of Investment Disputes between States and the Nationals of another State to which the Arab Republic of Egypt has adhered by Law No 90 of 1971, in the cases where they (such treaties and Convention) apply" (emphasis added). -
18. For all the above stated reasons, we are of the opinion that the issue of the jurisdiction of the Centre and the competence of the present Tribunal has to be decided upon on the basis of the text of Law N° 43/74 and not upon any other translation. The fact that said law contains the State's offer to submit certain disputes to ICSID's jurisdiction, cannot mean that a translation thereof in a foreign language may by itself have the same effect. The consent to the jurisdiction of the Centre necessitates a will and a clear intention to that effect, which includes the consent upon one or the other of the two methods of settlement of investment disputes provided for by the Convention. Moreover, it has to be noted that in the present case the only text enacted when the Claimants entered into their investment engagements in Egypt (September-December 1974) is the text of Law 43/74, in its original language. All English or other translation, as well as the issuance of the Executive Regulations, came into existence at a later date.
19. Summing up, the last phrase of the first paragraph of Article (8) of Law 43/74 is beyond any doubt erroneously translated by the Arab and Foreign Investments and the Free Zones Authority (Claimants Exhibit 1), as admitted by both parties. Therefore, in our opinion, the present Tribunal cannot base its decision concerning jurisdiction upon that erroneous translation. Consequently, the

Tribunal has, first, to consider the issue of jurisdiction on the basis that Article (8) of Law 43/74 reads as follows: "Investment disputes relating to 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 treaties in force between the Arab Republic of Egypt and the Investor's State, or within the framework of the Convention for the Settlement of Investment Disputes between States and the Nationals of another State to which the Arab Republic of Egypt has adhered by Law N° 90 of 1971 in the cases where they (such treaties and Convention) apply..

Disputes may be agreed to be settled by arbitration. An Arbitration Board shall be composed..."

20. As a general rule of interpretation, a sentence that figures in a law or statute must be construed to have meaning and sense. The proviso which figures in fine in the first paragraph of Article (8), is not in conflict with that rule of interpretation.

The proviso in question has been added to indicate that the settlement within the framework of either bilateral treaties and the Washington Convention has to take place "in the cases where they (such treaties and Conventions) apply". This means in a clear language, and hence conveys the reasonable understanding according to which the conditions related to the application of the relevant bilateral treaty or of the Convention have to be satisfied. Needless to point out that the fundamental sine qua non condition for the Convention to apply is the consent of the parties to the jurisdiction of the Centre and to one or the other method of settlement provided for in the Convention, i.e., conciliation or arbitration. To conclude that it results from the language and the reasonable interpretation of the said article that Egypt by enacting that law offered to submit the investment disputes to ICSID jurisdiction, and further to consent that the method of settlement of these disputes has to be arbitration to the exclusion of conciliation constitutes an unfounded speculation.

21. The proviso in fine of paragraph (1) of Article (8) is unconditional. To specify that it refers to conditions of the application of the Convention: other than consent, is a matter of speculation that has no basis from the plain and clear text of law 43/74. The Convention itself anticipated that a State may declare its intention to submit certain investment disputes to ICSID jurisdiction, and that the said declaration of intention is not to be considered consent to the jurisdiction to ICSID.

Reference in paragraph (1) of Article (8) to bilateral treaties, does not, and cannot be construed as acceptance to ICSID or to any other method of settlement, in case the bilateral treaty necessitates a separate consent to that effect. The same reasoning, as well, applies to the Convention, By enumerating in an investment law the methods of settlement available, such enumeration could not be construed to the effect of assuming an intention to submit unconditionally to all these methods. Such assumption would be in complete contradiction with the express proviso to the effect that these methods shall apply in case the conditions of application are satisfied and in that case only. In other terms, the enumeration contained in paragraph (1) of Article (8) does not necessarily entail the State's consent to the jurisdiction of ICSID, and in particular to a given method (arbitration) under the auspices of ICSID.

It goes without saying that in case the conditions for the application of either bilateral treaties or the Convention are satisfied, the dispute must, or shall, be settled in the manner provided for by such a treaty or by the Convention. On the other hand, if the conditions and requirements are

not satisfied, they cannot be applied and law 43/74 cannot have the effect of conferring consent to arbitration neither in the framework of the bilateral treaties nor in the framework of the Convention. Consequently, reference in article (8) of law 43/74, to both bilateral treaties and the Convention is not to be considered redundant with the eventual method of settlement that may be agreed upon with the investor since in this case the agreement is not limited to any particular form of settlement, neither concerning the procedures nor the law governing the subject matter. Only by acting accordingly, the Tribunal would not exceed its proper sphere of interpretation to infringe upon the domain of imperium which is the domain reserved to the legislator.

22. The French translation of article (8) of Law 43/74 published in the "Bulletin du Centre de documentation d'études juridiques, économiques et sociales" (le Caire, 3<sup>ème</sup> année N° 4, octobre 1976) and submitted to this Tribunal, reads as follows: "Les contestations ayant trait à l'investissement, et concernant la mise en exécution des dispositions de la présente loi, sont réglées par le moyen convenu avec l'investisseur ou dans le cadre des conventions en vigueur entre Ta R.A.E. et l'Etat de l'investisseur, ou encore dans le cadre de la Convention de règlement des contestations des investissements entre l'Etat et les citoyens des autres Etats, Convention à laquelle a adhéré la R.A.E. en vertu de la loi N° 90 de 1971, et ce dans les cas où la dite Convention est applicable." (Egypt's exhibit 73).

In that translation, the expression "shall be settled" does not appear, instead is the expression "sont réglées" meaning are settled, without the shadow of a doubt as to a mandatory significance. Can it be admitted that the issue of the jurisdiction of the Centre be based upon one or the other different translations with the consequence of an eventual different conclusion depending upon whether the party to the dispute is a French speaking investor supposedly relying upon a French translation or an English speaking investor relying upon an English translation ?

23. Since the Tribunal is under the obligation to apply Law N° 43/74, it would have been necessary, for the Tribunal, to have recourse to linguistic expertise in the Arabic language. However, it seems that expertise is not necessary, in the present case, since the uncontested parts of the English translation of article (8) of Law 43, submitted by the Claimants, as well as the French translation, reveal, beyond any doubt, that reference to the Convention in article (8) is conditioned by the proviso: in case the Convention applies. The proper interpretation of paragraph (1) of article (8) of Law N° 43/1974 leads to consider the application of the Convention and hence the establishment of the Centre's jurisdiction subject to a special consent which is required by the proviso construed to the effect that the settlement within the framework of the Convention is to take place only if and in case that the Convention applies; that is whenever the conditions of its application are satisfied i.e. inter alia that the parties to that particular dispute consent to the jurisdiction of the ICSID, be it arbitration or conciliation.

24. Moreover, it has been explained, during the session of this Tribunal held in Paris on September 8, 1987, that the verb used in the Arabic text of article (8) translated to "shall" is "tatim", and the verb in Arabic does not contain the mandatory effect eventually attributed to "shall" in the English language. It has also been pointed out that the same verb, in the same tense is used in the Civil Code of Egypt, for example, as regards contracts to the effect that the contract is concluded "yatim" (yatim being the masculine form of the same verb and in the same tense of "tatim", since the contract in the Arabic language is masculine), and that no mandatory effect can reasonably be attributed to the

use of the verb "yatim" since it would be aberrant to pretend that the legislator orders that the contract envisaged should be necessarily concluded. If the contract "yatim" is concluded in case the conditions set forth by law, to its conclusion, are complied with, in the same vein, the investment disputes "tatim" are settled by one or the other method provided for in article (8) of Law 43/74 in case its conditions of application are satisfied.

In effect, the usage of verb "tatim" in combination with the express proviso "where such convention applies" leads inevitably to the conclusion that article (8) of Law 43/74 does not contain a standing offer to submit ipso facto any investment disputes to ICSID's arbitration.

It is to be noted, in this respect, that the Convention differentiates between the consent and an eventual declaration by a host State of its intention to consider submitting certain class or classes of investment disputes to the jurisdiction of the Centre. That declaration is not to be considered consent as explicitly mentioned in the Convention (article 25/4), and no argument has been advanced to sustain that the provision of that article lacks an effet utile. In the same vein, nothing would prevent an investment law from aiming simply to contain such declaration of intention.

25. If paragraph one of article (8) of Law 43/74 is to be construed, as Claimants argue, to the effect that the investment disputes must be settled in one or the other of the methods provided for in that paragraph to the exclusion of the jurisdiction of the Courts of Law this construction would result in an aberrant conclusion that is: if a certain dispute does not fall in the scope of one or the other of these methods it remains unsettled. The intrinsic illogic of the conclusion suffices, by itself, to refute the argument.
26. Nowhere in the travaux préparatoires of Law 43/74 does there exist any reference that can support the interpretation of the text of article (8) of Law 43, as advanced by the Claimants.

The mandatory self-execution effect of the settlement of investment disputes, whether in the manner agreed upon with the investor, or within the framework of either the bilateral treaties or the Convention is totally inconceivable. Only when all the conditions and prerequisites for the application of one of the methods of settlement are met, the dispute in question can be capable of being settled in accordance to that method.

27. It does not seem that the Convention is intended in the framework of Law 43/74 to be the safety net of all investment disputes. Nothing in the language of Law 43/74 can lead to this conclusion. Professor Goldmann, wrote following the annulment by the Paris Court of Appeal of the ICC Award that: "It is true that Article 25 (1) of the Convention subordinates the jurisdiction of the Centre to the written consent of the parties to submit the dispute to it. But it is permitted that, by adopting legislation that provides for ICSID arbitration for investment disputes, a State gives precisely this consent for any dispute of this nature which would appear in the future" (Claimants final submission on jurisdiction, September 25, 1985, p. 2). In my opinion, the eminent Professor Goldmann kept silent on whether or not Egypt's Law 43/74 contained such an offer. In the same vein and in a more precise assertion, Mr. P.H. Leboulanger, commenting the above mentioned Paris Court of Appeal decision wrote that "La loi 43/74 en disposant que les litiges relatifs aux investissements étrangers peuvent être réglés par l'arbitrage international n'a, à notre sens, aucunement entendu modifier cette distinction et les différends auxquels l'Etat égyptien est partie, s'ils peuvent être soumis à l'arbitrage, ne le sont pas nécessairement." (P.H. Leboulanger -Etat, politique et arbitrage,

l'affaire du plateau des pyramides, Revue de l'arbitrage, 1986 N° 1, p. 11)i.

Since this Tribunal is bound, in the present case, to apply Egyptian Law N° 43/74, per se, to the finding of the Centre's jurisdiction and of its own competence, as already mentioned, the Tribunal cannot for the interpretation of that Law have recourse to, or rely upon, other materials than the text of the Law itself and, if the necessity arises, the travaux préparatoires to elucidate what may seem ambiguous in the text. It is not admissible for the interpretation of a Law to have recourse to, or rely upon, such other materials as the executive regulations and/or a fortiori upon the investment brochures or the like.

If Law N° 43/74 does not contain, by itself, in a clear language and in reasonable understanding the consent of Egypt to the jurisdiction of the Centre and more to arbitration under the auspices of ICSID, then this Tribunal lacks competence in the present case. A State's consent to the jurisdiction of the Centre is not to be presumed. More, in the doubt of it, a State is not to be considered having waived its immunity. In this respect, as a consequence of the obligation to apply the Egyptian Law N° 43/74 per se to the finding of jurisdiction, it is imperative to construe the text of that Law in its context as a national Law. In so doing the Tribunal complies with the language and spirit of the Convention.

28. It is to be noted that, in the present case, Law N° 43/74 had been the only legal text issued or published at the time the Claimants entered into their investment engagements in Egypt (September 23, 1974 for the Heads of Agreement, and December 12, 1974 for the contract concluded between the Claimants and the Egyptian General Organization for Tourism and Hotels). As a logical consequence, all contentions to the effect that the Claimants relied, when they entered into the contract upon any other document issued or published other than the text of Law N° 43/74 are of no relevance since they are in clear contradiction with the facts.

However, only for the sake of argument, we intend to deal with the arguments related to the executive regulations and the investment brochures.

Needless to point out that neither the executive decree of the Minister of Economy N° 375 of 1977 nor the investment brochures can add to the Law 43/74.

The executive regulations are confined to the domain of the implementation of the law. Article 144 of the Constitution (of 1971 referred to above) reads as follows, "The President of the Republic shall issue the necessary regulations for the implementation of the laws in the manner that would not modify, delay or exempt them from execution. He shall have the right to vest others with authority to issue them. The law may determine whoever issues the decision required for its implementation." Moreover, Egypt stated, in the oral hearing held in Paris in September 8, 1987, that article 45 of the Decree N° 375 of 1977 commences as follows "without prejudice to the provisions of Article 8 of Law..." and again Egypt in its final memorial on jurisdiction stated that "A l'audience du 8 septembre, 1987, Me Paulsson, Conseil de SPP, a concédé que si le décret N° 375 de 1977 était invoqué par SPP c'était seulement en tant que texte interprétatif de la loi. Il a ainsi admis qu'un tel décret ne pourrait modifier la loi." (Egypt's final memorial p. 47). Even in the translation effectuated by Mr. Saleh and presented by the Claimants (Affidavit, annex 45) it appears that article 45 of the decree deals with the applicable law which is to be determined by the choice of the method of settlement. As pointed out by Egypt and not contested by the Claimants, the Arabic text of Article 45 of the said executive decree adds in fine the phrase : "dans le cas où elle est applicable" (Egypt's final memorial p. 50).

This proviso dissipates any doubt to the effect that by article 45 of decree, article (8) should be read in the sense that by enacting Law 43/74 Egypt offered to submit the investment disputes to ICSID jurisdiction.

In this respect it is to be noted that the executive regulations of Law No 43 issued by the Prime Minister's Decree No 91-1975 (Egypt's exhibits 73 and 75) contained in article 55 that "Subject to the provisions of paragraph one of article 8 of Law 43 for the year 1974, it may be agreed to settle by arbitration investment disputes related to the implementation of the provisions of the Law as well as disputes arising between projects established in the Free Zones or between these projects and the Authority or other authorities or administrative agencies connected with the activities or operations in the Zones." Supposedly admitting that it is an exact translation of the Arabic text (Egypt's exhibit 74) as regards the words "subject to the provisions", that article does but refer to the provisions of the first paragraph of article (8) of Law 43/74 and hence kept silent on whether or not Egypt did give a standing offer to submit investment disputes to the jurisdiction of the Centre.

29. On the other hand, the investment guides and brochures on investment in Egypt, emphasize that Egypt is a signatory State to the Convention. If Egypt really conceded to ICSID jurisdiction and gave its consent to submit the investment disputes to that jurisdiction, it would have been logical not only to mention the fact that Egypt is a signatory State to the Convention but also to emphasize that it did in fact, after its adherence to the Convention, gave its consent to the Centre's jurisdiction. To point out the only fact of the signature of the Convention, reinforces the conclusion that Egypt did nothing after

In the Investment Guide of 1975 (Claimants' exhibit 14) it is stated that "In addition to Law No 43 further incentives for the investor are provided by Decree Law No 60/1971... Investment guarantees are assured in Law N° 90, 1971, Presidential decrees N°s 109/1972 and 754/1973' made Egypt a party to international investment treaties", (emphasis added, p. 11). It is to be noted that the Law 90 of 1971 is the Law by which Egypt ratified its adherence to the Washington Convention, and reference is made to that Law as an incentive by itself, to the investor. No mention was made to any sort of a standing consent to arbitration under ICSID. On page 13 of the same guide, it is written that "disputes can be settled" in accordance with international or bilateral agreements or by a mutually agreed upon arbitration.

In the Legal Guide of 1977 (Claimants' exhibit 15) the guarantees, privileges and exemptions extended to approved investments... "fall into five categories:

- a) Guarantees against expropriation
- b) Exemption from certain labor, business and other laws
- c) Privileges with respect to exchange controls and the expatriation of funds.
- d) Exemption from taxation and custom duties, and,
- e) Special procedures for the settlement of investment disputes."

(p. 30). The guide adds in comment of article (8) of Law 43 "In the absence of legal provisions to the contrary, investment disputes, like other civil or commercial disputes would be subject to the

jurisdiction of the Courts of Law. As a means to facilitate foreign investment, law N° 43 adopts a flexible approach to questions of investment disputes by providing several means for dispute settlement outside the courts. In examining the legal provisions on investment disputes, one must take account of both article (8) which applies to all disputes related to the implementation of the law, whether inside the country or in the free zones, and article (45) which applies to additional types of disputes in the free zones... Article 8 does not apply to all controversies... Disputes which do not fall within the scope of article (8) are to be settled in the ordinary courts of law or in the administrative courts. Investment disputes falling within the scope of article 8 may be settled in one of four forms" (p. 38 - 39). Further, the guide adds "According to the Convention by virtue of Law N° 90 of 1971, the Arab Republic of Egypt adhered to the above cited Convention..." (p. 40) (emphasis added).

In the official guide to investment in Egypt of 1982 (Claimants' exhibit 68) it is written that "In all there are as many as five different ways for eligible types of disputes to be settled. If the foreign investor is a national of one of the countries with which Egypt has bilateral treaties on this subject, the dispute may be settled according to the principles set forth in the treaty. Failing that, the World Bank sponsored Convention on the settlement of investment disputes between States and Nationals of other States sets up an international mechanism for conflict resolution in this area. Since Egypt is a signatory to this Convention, the foreign investor whose country is also a signatory may take advantage of its terms." (p. 35) (emphasis added).

In "Egypt, the right orientation for your investment" of 1984 (Claimants' exhibit 17) the said pamphlet treats on page (8) about the benefits under investment law 43/74 and no mention was made of the method of dispute settlements. The chapter reads as follows : "Law 43 offers a broad array of benefits to prospective investors: guarantees against nationalisation and confiscation - tax holidays ranging from five to fifteen years from production operation date -clear rules on the international transfer of profits and dividends -repatriation of capital five years after its importation..." (p. 8) On page 9 of the same publication, it is stated that "Egypt is a signatory of the International Centre for the Settlement of Investment Disputes and the right to arbitration of commercial disputes with the Government is recognized by law ", (emphasis added)

Reference to Egypt being a signatory State of the Convention logically excludes any conclusion to the effect that Egypt further gave a standing consent to submit investment disputes to ICSID jurisdiction. Such an acceptance, with the consequences that it entails would have been referred to in the investment guides and brochures. This is not to say that, in the present case, these materials can have the effect of adding provisions that do not exist in the investment Law 43/74. Reference is made to assert that the interpretation of law 43/74 cannot lead to the conclusion that Egypt consented to ICSID jurisdiction, more to the arbitration procedures under ICSID/ in the settlement of investment disputes by enacting the said law.

From the materials submitted by the Claimants (exhibit 17) one may understand the raison d'être of such a statement as it appears in the brochure of 1984, published ten years after the enactment of law 43/74. In an article published in "Arbitration and Domestic Laws: Egyptian Law, Institute of International Business Law and Practice, Paris, December 17-18, 1984." Professor El Kosheri explained that "maintaining a tradition of Islamic Law and/or influenced by old French legal concepts, the Egyptian Code of Civil and Commercial procedures requires, as a general rule, that the parties themselves nominate the arbitrators (article 502 paragraph 3)... this interpretation which met with some support in Court decisions rendered with regard to local arbitration in purely domestic relationship, was thereafter invoked by some Egyptian parties involved in ICC arbitration

cases in order to contest the jurisdiction of the arbitrator or the arbitral Tribunals formed in conformity with the rules and regulations of the ICC Court of Arbitration. By claiming that the arbitration clause was null and void because the parties did not themselves select the arbitrator(s) these Egyptian parties requested that the arbitration process be stopped... The first use was by the Egyptian Government itself... even though the Government's challenge did not relate exclusively to the so-called nullity of the arbitration clause for failure of the parties to nominate by mutual consent the persons chosen to act as arbitrators..." and Professor El Kosheri adds that the Egyptian Cour de Cassation rendered a decision on April 26, 1982 (Case N° 716 of the Judicial year 47) to the effect that "Since article 502 (3) Procedures, when requiring the necessary mention of the arbitrator's names in the arbitration agreement, does not relate to public order as previously stated, its violation could not be considered sufficient justification to exclude the application of the foreign governing law." (pp. 4-12). It is understandable in these circumstances that, after the Cour de Cassation rendered its decision of 1982, the brochure reflected the outcome of the arbitration clause issue as finally settled by that decision.

Moreover, the "right" referred to in that brochure, is conditioned, as any right, by its nature as a situation juridique which necessitates, independently from the recognition of the right by law, the fulfillment of its conditions of establishment in the concrete situation; and on the other hand is, as it is clearly mentioned, restrictively recognized to commercial disputes, to the exclusion of other "noncommercial" disputes as those related to administrative acts i.e. emanating from the competent authorities concerning the implementation of the provisions of Law 43/74 (which are, in principle, in the Egyptian legal system, like the French system, part of the Contentieux administratif and hence of the competence of the Conseil d'Etat).

30. A State's consent to submit itself to the jurisdiction of the Centre is not to be presumed. The language of the Convention is explicit; it differentiates between consent and the intention to submit, or more precisely to consider submitting, a certain dispute or a class of disputes to the jurisdiction of the Centre (Article 25/4 of the Convention). The fact that a State is a signatory to the Convention does not imply a presumption to consent, nor does the fact that request for arbitration is registered. The screening powers of the Secretary General, in this respect, can have no influence upon the issue of jurisdiction which is of the competence of the Arbitral Tribunal.
31. As a matter of principle, whether in international law or in national laws, a sovereign State enjoys an immunity from being subject to adjudication without its consent. A waiver of such an immunity is not to be presumed, but must be proved, and the burden of proof rests upon the party claiming the contrary. The Convention did not intend to deviate from this principle. The corner stone of the jurisdiction of the Centre is the consent. To the conclusion that for the establishment of the Centre's jurisdiction it must be proved that the State and the Investor both consented to the jurisdiction. In my opinion, the Claimants did not present evidence to the effect that Egypt, a signatory State to the Convention, consented, in a clear unequivocal language to submit the present dispute to the jurisdiction of the Centre, and more to the arbitration procedures provided for by the Convention. I may add, in this respect, that it seems that the Claimants themselves, were aware of the fact that Law 43/74 does not contain such a standing offer. The Heads of Agreement concluded on September 23, 1974 between: The Ministry of Tourism, the Egyptian General Organization for Tourism and Hotels and the Southern Pacific Properties Limited (the Claimants), contains reference that it was

issued in accordance with certain laws inter alia Law N° 43/74. Reference to Law 43/74 reads as follows : "This agreement is issued in accordance with Law... and Law 43 for the year 1974 relating to Arab and Foreign Funds invested in the A.R.E. with particular reference to government guarantees long term tax holidays, exemptions from import customs duties, etc..." If Law N° 43/74 contained, as Claimants argue, a standing offer by Egypt to submit investment disputes to arbitration under ICSID it would have, logically, been explicitly referred to.

Moreover, the Claimants could not have relied upon any text or document, other than the only text of Law N° 43 of 1974 since that Law was the only text issued by the time they concluded the Heads of Agreement on September 23, 1974 and entered into the contract of December 12, 1974 with the Egyptian General Organization for Tourism and Hotels.

## SECOND PART - Some Observations and Comments in Reponse to the Decision of April 14, 1988.

1. The Preliminary Decision dated November 27, 1985, (hereinafter called the Preliminary Decision) stated in paragraph (31) that "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." (emphasis added)

The usage of this subtle language is justified by the fact that the only debated question before the Tribunal was the issue of jurisdiction, consequently the Tribunal was under the obligation not to adopt and incorporate in its own fact findings any unproved allegations related to the subject matter, advanced by either party to the dispute.

However, it seems that the Decision of April 14, 1988, (hereinafter called the Decision), departed from that obligation, without any justification, since it states in paragraph (41) that "in July of 1977, Claimants commenced construction at the Pyramids Oasis site. Work was begun on roads, sewage systems, water reservoir facilities, artificial lakes and a golf course", (emphasis added)

2. The Preliminary Decision dealt with Egypt's objection to the jurisdiction of the Centre based upon the legal restrictive nature of the provisions of Article 8 of Law N° 43/1974, to disputes concerning the non-performance of obligations under law 43 as distinct from disputes involving non-performance of obligations under a contractual relation (paragraphs 67, 68 and 69). Article 8 of Law 43, stipulates in relevant part that "Investment disputes in respect of the implementation of the provisions of this Law shall be settled..." (emphasis added). Egypt explained that the means of settlement set forth in article 8 of law 43 are to be applied only as regards disputes arising out of a breach of a provision contained in Law 43 and thus do not cover any other dispute that may arise from a breach of a contract. In this respect, and in support to its contention, Egypt cited the July 12, 1984 decision of the Paris Court of Appeal wherein that Court said that article 8 of Law 43 "... ne vise, au surplus, que les seules contestations ayant trait à l'investissement et concernant la mise en exécution des dispositions de la loi en cause, mais non celles de tel ou tel contrat" (emphasis added). The Preliminary Decision did not address that objection and stated that "however, it is not necessary,

for the purpose of the present decision, to address this question, since Egypt's objection may be simply answered by the recapitulation of certain facts..." (paragraph 68), to the conclusion that in this respect it is quite clear that "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." (paragraph 69).

As the Decision of the majority kept silent as regards this issue and concluded in its operative part that further proceeding on the merits be instructed by the President of the Tribunal, consequently it is legitimate to conceive that the Decision maintained the Tribunal's previous statement to the effect that the Centre's jurisdiction and the Tribunal's competence, in the present case, are to be confined and limited to the only cause of action based upon the allegation of a breach of a legal provision concerning the implementation of the provisions of Law N° 43; i.e., the prohibition of nationalization and confiscation (article 7 of Law 43).'

It would, thus, have been appropriate to indicate in the operative part of the Decision this conclusion explicitly, since the request for arbitration referred to both the breach of the provisions of Law N° 43 and the Heads of agreement of September 1974.

3. The Decision seems to have concluded to the admittance of the intervention, in the course of the arbitration proceedings, of SPP, a third party to the instituted arbitration under the auspices of ICSID. In the preliminary Decision, the Tribunal stated that "On. February 8, 1985, the Tribunal conducted a preliminary meeting with the Parties (i.e. SPP (ME) and Egypt) at the Hague and that 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" (paragraph 9) and further stated that "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" (paragraph 14).

As the question of jurisdiction was the prime issue to be dealt with by the Tribunal, the Preliminary Decision had not to rule over the admissibility of the intervention of SPP in the course of the proceedings. On the other hand as the Decision of April 14, 1988, ruled over the question of jurisdiction and concluded to proceed with the merits, it would have been necessary, from the legal point of view, to address the question of the admissibility of SPP's intervention, even ex officio, before further proceeding to the merits.

As Egypt maintained its objection to the jurisdiction of the Centre, it cannot be assumed that it agreed that SPP joins in the proceedings before a Tribunal of which it contests the competence. It is true that an arbitral Tribunal under the auspices of ICSID is empowered to decide questions of procedure not covered by the Convention or the Arbitration rules on the basis of the provisions of article 44 of the Convention as explained in the Introductory notes to the Arbitration Rules to the effect that "that provision (i.e., article 44 of the Convention) is in fact, only declaratory of the inherent power of any arbitral tribunal to formulate its own rules of procedure in the event of a lacuna. Nevertheless, in compliance to and in accordance with the language and the spirit of the Convention and the general principles of procedures, it is legitimate to necessitate that any request for intervention, whether it be an "intervention principale ou agressive", or an "intervention accessoire ou conservatoire ", be introduced to the Centre by the same way and

complying with all the requirements of a request for arbitration. In this respect, the arbitral Tribunal cannot act separately apart from the Centre. The Tribunal's competence cannot exceed the scope of the disputes, *rationae personae* and *rationae materiae*, deferred to it by the Centre. The Centre, by the Secretary General has screening powers as regards the requests for arbitration, and the rules require documents to be filed with the request for arbitration in *ter alia* documents concerning the nationality of the juridical person (Institution Rules, Rule 2).

Moreover, the provisions of the Convention (Article 36/2) necessitate that the consent to arbitration precedes the request for arbitration and nothing was advanced during the proceedings before this Tribunal to the effect that SPP consented to the jurisdiction of the Centre before its intervention. In this respect it has been explained that "Le consentement doit nécessairement intervenir avant la saisine du Centre. Les articles qui réglementent l'introduction de la requête soit en vue de la conciliation (art. 28 par. 2), soit en vue de l'arbitrage (art. 36 par. 2) font obligation à la partie demanderesse de fournir des informations sur le consentement dans sa requête. L'application du forum prorogatum semble donc exclue." (R. Kovar, *La compétence du Centre... in Investissements étrangers et arbitrage entre Etats et personnes privées*, Paris Pedone 1969, p. 49).

Moreover, it is to be noted, that the Decision of April 14, 1988 expressly mentions that it is rendered in the Arbitration case N° ARB/84/3, between SPP (ME) and Egypt without any mention of SPP while in its operative part it deals with "the Claimants" submissions. Related to the question of the nationality of the "Claimants" the Decision comes to the conclusion that they are "nationals of another contracting State" on the basis that the Claimants are Hong Kong corporations domiciled in Hong Kong, and since Hong Kong is a territory for whose international relations the United Kingdom, a party to the Convention, is responsible and has expressly extended the application of the Convention to Hong Kong "hence the Claimants are nationals of another contracting State within the meaning of article 25 of the Washington Convention" (paragraph 54).

The Convention kept silent as regards the criterion of the nationality of juridical persons, whether it be as explains Kovar "Les critères du siège social, de l'incorporation et du contrôle", (op. cit. p. 44) In the same context it was explained that "on ne voit pas bien pourquoi il faudrait donner la préférence au critère du lieu de constitution plutôt qu'à celui de l'endroit où se trouve le siège social réel, de l'incorporation ou encore du lieu d'exploitation". (L. Levy : *La nationalité des sociétés*, Paris LGDJ 1984, p. 120). It would have been legitimate to expect at least that the Decision mentions that the Tribunal was satisfied eventually, that the Claimants are, in application of the private international law of the United Kingdom, nationals of the United Kingdom within the meaning of article 25 of the Convention.

4. As it seems impossible to demonstrate that Egypt by enacting Law N° 43/1974 gave, in article 8 of that Law, a standing offer to submit investment disputes to arbitration, specifically, under the auspices of ICSID, the Decision stated that "Once consent has been given to the jurisdiction of the Centre, the Convention and its implementing regulations afford the means for making the choice between the two methods of the dispute settlement. The Convention leaves that choice to the party instituting the proceedings" (paragraph 102 (emphasis added),

In support of that statement the Decision does not provide any legal argument or refer to any provision of the Convention or of the implementing regulations,. It is rather a matter of fact

statement.

However, that statement can hardly be supported by a provision of either the Convention or the Regulations and Rules of ICSID. As already mentioned in the first part of this dissenting opinion, the Convention provides for two distinct methods of dispute settlement. Consequently the consent to the "jurisdiction" of the Centre must specify in a clear unequivocal language the method of settlement consented to. In addition to the arguments already explained in detail in the first part of this dissenting opinion, it is significant to review the language of article (25/2-b) of the Convention which reads as follows "Any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration..." and the language of article (26) which provides that "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..."

5. The decision states that "Egypt is correct in its assertion that Law N° 43 is applicable to the jurisdictional issues in the present case in the sense that article 8 of Law N° 43 is alleged by the Claimants to constitute Egypt's consent to the Centre jurisdiction", (paragraph 57) and it further stated that "Also to the extent that article 8 is alleged to be a unilateral declaration of acceptance of the Centre's jurisdiction, subject to reciprocal acceptance by a national of another contracting State, the Tribunal must also consider certain aspects of international law governing unilateral juridical acts" (paragraph 51) to the conclusion that "Thus, in deciding whether in the circumstances of the present case Law N° 43 constitutes consent to the Centre's jurisdiction, the Tribunal will apply general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations (paragraph 61).

If Law N° 43 is applicable, per se, to the issue of whether or not Egypt gave a standing offer to submit investment disputes to the jurisdiction of ICSID, any allegation, to the effect that Law N° 43 does in fact provide for that offer, cannot afford to alter the legal nature of the provisions of the Law as such. Consequently, in the present case, the provisions of Law N° 43, a national Law to be applied as such as -regards the issue of jurisdiction, are not to be construed "taking into consideration the relevant rules of treaty interpretation and the principles of international law". Upon the mere allegations advanced by the Claimants, the Decision seems to consider Law 43 as a unilateral international declaration, to be construed in the light of the jurisprudence of the International Court of Justice concerning unilateral declarations under the so-called "optional clause" of the Court's statutes. (The Decision, paragraph 61).

6. The Decision, after reviewing the text of article 8 of Law N° 43 in its authentic language as well as the various translations submitted to the Tribunal by the Parties, comes to the conclusion that "the first paragraph of article 8, however is only mandatory to the extent that any of the three methods of dispute settlement mentioned therein is applicable to the particular dispute", and explains that "this conditional aspect of article 8, which qualifies the mandatory nature thereof, fully explains the use of the term tatimu rather than a more imperative verb form in the first paragraph of article 8." (paragraph 79)

This accurate statement, seems in contradiction with the conclusion that Egypt by enacting Law N° 43, gave in its article 8 a standing offer to submit investment disputes to arbitration under the auspices of ICSID. The language of that article cannot be reasonably construed to that effect. Since the first paragraph of article 8 of Law N° 43 states that investment disputes are to be settled, or even arguendo shall be settled, in the framework of the Convention and where it applies, it is legitimate to conclude that settlement under the auspices of ICSID is conditional upon the satisfaction of the requirements necessitated by the Convention, inter alia the consent to that effect.

The Decision, however, seems to differentiate between the required consent and the other requirements for the establishment of ICSID's jurisdiction : rationae personae and rationae materiae. In this context, one can legitimately wonder about the raison d'être of the provisio "where it (i.e. the Convention) applies" that appears in fine of the first paragraph of article 8 of Law N° 43. The effet utile, so much referred to during the proceedings, warrant the conclusion that the provisio must have a reasonable meaning, and no such meaning can be drawn from the provisio other than that it necessitates the fulfillment of all the requirements to the establishment of ICSID jurisdiction, inter alia the consent of the parties to that jurisdiction.

7. In support to its conclusion, the Decision seems to have relied upon the difference between the language of the first paragraph of article 8 of Law No 43 and the language of another article of that Law, namely article 45 which provides that "Disputes arising between projects established in Free Zones, or arising between such projects and the Authority or any other Authorities or administrative bodies connected with the business activities within the zone may be submitted, by agreement, to arbitration. An arbitration board shall be instituted to decide the dispute...". The Decision states in this respect that "the drafters of Law N° 43 were careful to provide specifically in article 45 for separate agreement to establish the jurisdiction of the arbitration Board to settle disputes involving projects in the Free Zones. Contrasted with the silence of article 8 with respect to any separate ad hoc consent to ICSID jurisdiction, the language of article 45 of Law N° 43 militates against the conclusion that the phrases within the framework of the Convention" and "where it applies" were intended to imply a requirement of separate ad hoc consent to establish the jurisdiction of the Centre" (paragraph 93).

From the outset, needless to point out that the method of reasoning a contrario is the most feeble method of reasoning. To establish the intention of Egypt to give a standing offer to submit investment disputes to ICSID jurisdiction, by a contrario reasoning is a conclusion in complete contradiction with the express language of article 8 which refers to settlement of investment disputes in the framework of the Convention where it applies, and as a general principle A verbi s Legis non est recendendum. Moreover, it contravenes the whole mechanism of the Convention based upon the consent of the parties to that jurisdiction. The requirement of the consent, in the framework of the Convention, as explained in the first part of this dissenting opinion, necessitates that the consent to the jurisdiction of the Centre be certain. Since Professor Reuter explained this requirement in 1969 it was never contested (P. Reuter, *Réflexions sur la compétence du Centre*, in *Investissements étrangers et arbitrage entre Etats et personnes privées*, Paris, Pedone, 1969, p. 14).

Nowhere in the first paragraph of article 8 of Law No 43 is there any reference to arbitration. Reference is only made to the Convention "where it applies". For the Convention to apply, that is for the jurisdiction of the Centre to be established, it is required that the parties to the dispute give their

consent to that effect. The Decision also states that "the provision in article 8 for dispute settlement in a manner to be agreed upon with the investor is sufficient to authorize ad hoc consent to the Centre's jurisdiction" (Paragraph 96),

That statement seems to overlook two considerations :

a- That nothing would prevent the national legislator, if he deems appropriate, to codify, in an investment law, various provisions even and eventually emanating from applicable treaties. Reference to Egypt's adherence to the Convention, and hence to the possibility to settle investment disputes in the framework of the Convention "where it applies" is manifestly a provision of a declaratory legal nature. By its very legal nature, it adds nothing to Egypt's adherence to the Convention.

b- That nothing prevents Egypt as a contracting State to the Convention from declaring, if and when it considers appropriate, that it would consider submitting a class or classes of investment disputes to the jurisdiction of ICSID. This declaration is not to be construed to the effect that it constitutes the required consent to ICSID jurisdiction unless otherwise unequivocally stated.

For the above mentioned considerations, I feel obliged to dissent from the Decision of the Eminent Members of the Majority. However, I feel obliged to give them their due tribute for the meticulous study and the highest professional care demonstrated in their Decision.