

International Centre for Settlement of Investment
Disputes

In the matter of

Maritime International Nominees Establishment
(MINE)

v.

Government of Guinea (Guinea)
(Case ARB/84/4)

DECISION

on the Application by Guinea for Partial Annulment
of the Arbitral Award dated January 6, 1988
in the above matter

Rendered by the Ad Hoc Committee
constituted by the Chairman of the Administrative Council of the Centre in
accordance with Article 52 of the Convention on the Settlement of Investment
Disputes between States and Nationals of Other States, and composed of:

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Aron Broches, Member
Keba Mbaye, Member

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Table of Contents

	Paras.
I. Introduction	
Background of the Present Proceedings.....	1.01-1.09
II. The Request for Partial Annulment of the Award.....	2.01-2.07
III. Procedural Developments.....	3.01-3.09
IV. Preliminary Questions and General Considerations.....	4.01-4-12
V. General Comments on the Grounds for Annulment	
Relied on by Guinea.....	5.01-5.13
A. Manifest Excess of Power.....	5.02-5.04
B. Serious Departure from a Fundamental Rule of Procedure.....	5.05-5.06
C. Failure to State Reasons.....	5.07-5.13
VI. The Annulment Request	
A. Breach of Contract.....	6.01-6.56
— Background of the Dispute.....	6.04-6.25
— The Tribunal's Decision on "Breach of Contract".....	6.26-6.29
— The Committee's Findings.....	6.30-6.56
— Applicable Law.....	6.31-6.37
— Manifest Excess of Power.....	6.38-6.43
— Failure to State Reasons.....	6.44-6.56
B. Damages.....	6.57-6.109
— The Parties' Contentions before the Tribunal.....	6.59-6.73
— The Award.....	6.74-6.82
— The Parties' Contentions in the Annulment Proceedings.....	6.83-6.96
— The Committee's Findings.....	6.97-6.109
— Failure to State Reasons, including Failure to Address Issues.....	6.98-6.108
— Manifest Excess of Power and Serious Departure from a Fundamental Rule of Procedure.....	6.109
C. Costs.....	6.110-6.112
VII. Temporary Stay of Enforcement of the Award on the Counter-Claims.....	7.0
VIII. Decision.....	8.01
Annex I Procedural Order No. 1	
Annex II Interim Order No. I	

I. INTRODUCTION—BACKGROUND OF THE PRESENT PROCEEDINGS

1.01 *Request for Arbitration.* On May 7, 1984, Maritime International Nominees Establishment ("MINE"), a company incorporated under Liechtenstein law, addressed a request to the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") for arbitration against the Republic of Guinea ("Guinea"). The request was submitted pursuant to Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the Convention") and was registered by the Secretary-General on September 18, 1984, pursuant to the same provision.

1.02 *The Substance of the Dispute.* The dispute concerns an alleged breach by Guinea of the contractual relationship of the parties established by an agreement in the French language dated August 19, 1971, entitled "Convention entre le Gouvernement de la République de Guinée et Inter Maritime Bank—Genève—Suisse" ("the Agreement"). The Agreement recites that it was being entered into by the latter "agissant au nom et pour le compte de Maritime International Nominees Establishment-Genève."¹

1.03 *Applicable Law.* Article XIII of the Agreement provides in substance that the Agreement constitutes the law between the parties, supplemented in case the Agreement "laisserait une difficulté sans solution" by the law of the Republic of Guinea. The present *ad hoc* Committee ("the Committee") will deal with this important provision in detail in paras. 6.31—6.37 *infra*.

1.04 *Settlement of Disputes.* Article XVIII of the Agreement provides for conciliation or, if necessary, arbitration of disputes regarding the interpretation or application of the Agreement which the parties were unable to resolve amicably. The article contains, among others, the following stipulation:

"La langue employée dans la présente Convention est la langue française à laquelle les conciliateurs ou les arbitres doivent se référer en cas de différend."

The Tribunal appears to have disregarded this provision.

1.05 *Constitution of the Arbitral Tribunal.* By a document executed on behalf of MINE on December 6, 1974, and on behalf of Guinea on January 23, 1975, supplementing and *pro tanto* amending the above-mentioned Article XVIII, the parties agreed to submit the disputes which existed between them for settlement by arbitration pursuant to the Convention by a tribunal consisting of one arbitrator appointed by each party and of a third arbitrator, appointed by the Chairman of the Administrative Council of

¹ By Avenant No. 2 of August 31, 1972 (Exhibit 27 to Guinea's Counter-Memorial), "MINE Inc. (Panama) ci-après désignée 'Maritime'" was substituted for "Inter Maritime Bank—Genève—Suisse". Since that time at least one other substitution must have been effected as the ICSID proceedings were instituted by MINE which was described as a Liechtenstein company. The fact that Liechtenstein is not a Contracting State, i.e., a party to the Convention, raised an issue as to the jurisdiction of the Centre which is limited to disputes between Contracting States and nationals of other Contracting States. That issue appears to have been resolved at the outset in favour of jurisdiction based on the Swiss nationality of MINE's controlling share holder. The Award does not mention the issue and Guinea has not commented on it in its application for annulment.

the Centre, who would be president of the tribunal. In fact, the third arbitrator was appointed by agreement of the parties who were each represented by an American law firm with offices in Washington, D.C.²

1.06 The Arbitral Tribunal which was constituted in June 1985, some nine months after the registration of the Request for Arbitration, was composed of Mr. Jack Berg, nominated by MINE, Mr. David J. Sharpe, nominated by Guinea, and Mr. Donald Zubrod, chosen as President by mutual agreement of the parties.

1.07 All three arbitrators were United States nationals. Messrs. Berg and Zubrod are known to be experienced arbitrators in maritime and shipping matters. They are members of the Society of Maritime Arbitrators (SMA). Mr. Berg is a former President of the Society and Mr. Zubrod is its present President.³ Mr. Sharpe is a professor of maritime law. The dispute between the parties is clearly not a maritime dispute but an investment dispute, and the parties did not inquire whether the arbitrators had French language facility or familiarity with any legal system other than the Anglo-American.

1.08 *The Award.* After proceedings extending over two and one-half years, the Tribunal rendered its Award. It was dispatched by the Centre to the parties on January 6, 1988, which in accordance with Article 49(1) of the Convention is the date of the Award.

1.09 Following its findings in regard to MINE's claim for breach of contract and Guinea's counter-claim for damages resulting from MINE's resort to AAA arbitration in disregard of the parties' agreement to arbitrate their disputes under the Convention, and from MINE's attachment of Guinean property, the Tribunal concluded under the heading "Award Reconciliation" as follows:

"All sums are stated in United States dollars.

Awarded to MINE as damages	\$ 6,726,497
Interest on MINE's damages	5,457,986
Costs of ICSID arbitration	<u>275,000</u>
Total awarded to MINE	12,459,483

Awarded to Guinea towards its counter-claim	<u>210,000</u>
Balance due to MINE	\$12,249,483

Guinea is directed to pay MINE the
sum of \$12,249,483

² The exchanges with counsel at the hearing on October 28, 1988 (para. 3.08 *infra*) indicated that they considered their proximity to each other and the Centre helpful to a cost efficient handling of the case, and that such considerations also influenced Guinea's appointment of a Washington, D.C. arbitrator.

³ The SMA consists of more than 110 commercial arbitrators, "all of whom are well versed in shipping activities. . . A good number of the arbitrators have commercial sailing experience or have degrees in naval architecture and engineering". (Howard M. McCormack in "Arbitration in Combined Transportation", p. 17, Conference paper for 1988 ICCA, Tokyo Conference). None of them are practicing lawyers.

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

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

II. THE REQUEST FOR PARTIAL ANNULMENT OF THE AWARD

2.01 On March 28, 1988, within 120 days after the date on which the Award was rendered, Guinea addressed an application in writing to the Secretary-General requesting partial annulment of the Award pursuant to Article 52 of the Convention (the "Application"). In explaining what it meant by "partial annulment", Guinea stated that "Guinea does not seek annulment of the decision on the two counterclaims, but only of the performance dispute and the determination of damages regarding that dispute" (Application, p. 1, note 1). The amount awarded to Guinea on the counter-claims was US\$ 210,000. As appears from page 38 of the Application, Guinea also seeks annulment of the Tribunal's award to MINE of costs towards its fees and expenses in the ICSID arbitration in the amount of US\$ 275,000.

2.02 The three grounds on which Guinea bases its request for annulment are expressed in the Convention as follows:

- a. "that the award has failed to state the reasons on which it was based" (Art. 52(1)(e));
- b. "that the Tribunal has manifestly exceeded its powers" (Art. 52(1)(b));
- c. "that there has been a serious departure from a fundamental rule of procedure" (Art. 52(1)(d)).

2.03 In Section V.A. of the Application, Guinea presented an initial submission regarding the Tribunal's errors requiring annulment.

2.04 As regards failure to state reasons, Guinea alleges that the Tribunal failed to state any reasons for its decision on damages. It alleges further that the Tribunal failed to address pivotal questions which, had they been resolved in Guinea's favour, would have reversed the Tribunal's liability determination. In Guinea's view, failure by an arbitral tribunal to deal with every question submitted to it as required by Article 48(3) of the Convention affords a ground for annulment as a species of failure to state reasons, even though it is not specifically mentioned as such.

2.05 As regards manifest excess of powers, Guinea argues that the Tribunal's failure "to apply any law, much less the correct law" as to both liability and damages constituted such excess (Application, p. 23).

2.06 Thirdly, Guinea argues that the Tribunal departed from a fundamental rule of procedure by adopting a measure of damages that had not been advanced or discussed by the parties and which Guinea had no occasion to address.

2.07 In addition, Guinea requested as a preliminary matter that enforcement of the Award be stayed pending the Committee's decision on the Application.

III. PROCEDURAL DEVELOPMENTS

3.01 After the Committee, composed of Messrs. Broches, Mbaye and Sucharitkul, had been constituted by the Chairman of the Administrative Council in accordance with Article 52(3) of the Convention, its members conferred by telephone on May 17, 1988 from their respective places of residence and elected Professor Sucharitkul President of the Committee.

3.02 The Committee members also took note of the fact that pursuant to Article 52(5) of the Convention, if the applicant requests a stay of enforcement of the award in its application, enforcement shall be stayed provisionally until the Committee rules on the request, and that the Secretary-General had, together with the notice of registration of the Request for Partial Annulment, informed both parties of the provisional stay of the award in accordance with Arbitration Rule 54(2).

3.03 The Committee thereupon, still acting by telephone with the participation of Mr. Bertrand Marchais, Secretary of the Committee, adopted Procedural Order No. 1 of May 17, 1988, a copy of which is attached to this Decision as Annex I.

3.04 The parties were convened to meet with the Committee at The Hague on June 16 and 17, 1988, to review matters of procedure including, in particular, Guinea's request for a stay of enforcement which the Committee was to consider as a matter of priority pursuant to Arbitration Rule 54(1). The Committee also set time-limits within which the parties might submit observations on Guinea's request for a stay. Observations were received within those time-limits from MINE and Guinea on May 27 and June 7, 1988, respectively. MINE did not submit a second round of observations.

3.05 With the agreement of the parties, the Committee met at the Peace Palace in The Hague, pursuant to the administrative arrangements between the Centre and the Permanent Court of Arbitration, on June 15, 1988, for consultations among its members and on June 16 and 17, 1988, for preliminary procedural consultations with the parties.

3.06 *Continuation of Stay of Enforcement.* Both parties supplemented their written presentations on the subject by oral presentations, including exchanges between counsel. The Committee authorized the submission of supplemental written observations on the issue of security in connection with enforcement of the Award. The Committee was thereupon ready to rule on Guinea's request for the continuation of the provisional stay of enforcement until the Committee's decision on the Application. Having considered the written and oral submissions of both parties, the Committee issued its Interim Order No. 1, dated August 12, 1988, the operative part of which reads as follows:

"Having reviewed the circumstances of the case, the Committee is of the view that termination of the stay at this time would impose hardships on Guinea whose interests would be severely affected. This prospect of hardships combined with the risk of frustration of recoupment, in case of Guinea's success in this annulment proceeding, have led the Committee to decide that the provisional stay of enforcement of the Award should continue for the time being."

The full text of Interim Order No. I is attached to this Decision as Annex II.

3.07 *Procedural Consultations and Adoption of Schedule for the Written Procedure.* At the June meeting at The Hague, the Committee and the parties agreed that Guinea's Application was to be considered its Memorial and that the sequence of the further written procedure on the merits would consist of a Counter-Memorial by MINE to be filed by August 1, 1988; a Reply by Guinea to be filed by August 19, 1988; and a Rejoinder by MINE by September 6, 1988, which time-limit was subsequently extended to September 16, 1988.

3.08 *Oral Procedure on the Merits.* On September 23, 1988, in consultation with the other members of the Committee, the Secretary-General and the parties, the President of the Committee scheduled a hearing on October 28, 1988, at the seat of the Centre in Washington, D.C.

3.09 At the morning session of the hearing, counsel for both parties summarized and in some respects further elaborated on the parties' written submissions respectively in support of and in opposition to Guinea's Application. Each side had an opportunity to respond to the presentation made by the other. During the afternoon session, the Committee members posed questions to counsel relating to certain aspects of their submissions.

IV. PRELIMINARY QUESTIONS AND GENERAL CONSIDERATIONS

4.01 In its examination of the Application, the Committee has encountered a number of questions of a preliminary character. The Committee finds it helpful to state its views on these questions and to record some general considerations, before examining the central question whether and to what extent the grounds alleged by Guinea and contested by MINE justify partial annulment of the Award.

A. Finality of ICSID Awards

4.02 Article 53 of the Convention provides that the award shall be binding on the parties "and shall not be subject to any appeal or to any other remedy except those provided for in this Convention". The post-award procedures (remedies) provided for in the Convention, namely, addition to, and correction of, the award (Art. 49), and interpretation (Art. 50), revision (Art. 51) and annulment (Art. 52) of the award are to be exercised within the framework of the Convention and in accordance with its provisions. It appears from these provisions that the Convention excludes any attack on the award in national courts. The award is final in that sense. It is also final in the sense that even within the framework of the Convention it is not subject to review on the merits. It is not final, on the other hand, in the sense that it is open to being completed or corrected, interpreted, "revised" or annulled. It is to this last remedy that Guinea has had recourse in the present case.

B. Annulment

1. Nature of the Remedy

4.03 Paragraph (1) of Article 52 of the Convention provides that either party may request annulment of the award on one or more of the five grounds stated in that paragraph and paragraph (3) provides that the *ad hoc* Committee which will be constituted to rule on the request for annulment "shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)".

4.04 Article 52(1) makes it clear that annulment is a limited remedy. This is further confirmed by the exclusion of review of the merits of awards by Article 53. Annulment is not a remedy against an incorrect decision. Accordingly, an *ad hoc* Committee may not in fact reverse an award on the merits under the guise of applying Article 52.

4.05 The fact that annulment is a limited, and in that sense extraordinary, remedy might suggest either that the terms of Article 52(1), i.e., the grounds for annulment, should be strictly construed or, on the contrary, that they should be given a liberal interpretation since they represent the only remedy against unjust awards. The Committee has no difficulty in rejecting either suggestion. In its view, Article 52(1) should be interpreted in accordance with its object and purpose, which excludes on the one hand, as already stated, extending its application to the review of an award on the merits and, on the other, an unwarranted refusal to give full effect to it within the limited but important area for which it was intended.

4.06 The Committee notes that it is not inconsistent with the foregoing, and that it is in fact incumbent on an *ad hoc* Committee, to give full effect to the wording of Article 52(1) which defines and delimits the grounds for annulment. Thus, Article 52(1)(b) does not provide a sanction for every excess of its powers by a tribunal but requires that the excess be manifest which necessarily limits an *ad hoc* Committee's freedom of appreciation as to whether the tribunal has exceeded its powers. Again, the text of Article 52(1)(d) makes clear that not every departure from a rule of procedure justifies annulment; it requires that the departure be a *serious* one and that the rule of procedure be *fundamental* in order to constitute a ground for annulment.

2. Partial Annulment

4.07 Paragraph (3) of Article 52 authorizes an *ad hoc* Committee to annul *the award or any part thereof*. Guinea's request for partial annulment is clearly admissible. It seeks the annulment of the portion of the Award adjudging MINE's claim. It does not request annulment of the portion of the Award adjudging Guinea's counter-claim. Nor, for that matter, has annulment of that portion been requested by MINE. That portion of the Award will remain in effect regardless of the annulment in whole or in part of the portion of the Award in respect of which Guinea has formulated its request for annulment. This is reflected in Arbitration Rule 55(3), which provides that in case of a resubmission of a dispute after annulment in part of the original award, "the new Tribunal shall not reconsider any portion of the award not so annulled".

3. Powers and Obligations of Ad Hoc Committees

4.08 The Committee notes that an *ad hoc* Committee may annul an award (or any part thereof) only pursuant to a request by a party and only within the scope of that request, unless by necessary implication annulment entails the annulment of other portions.

4.09 Article 52(3) provides that an *ad hoc* Committee "shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)". The Convention does not require automatic exercise of that authority to annul an award whenever a timely application for its annulment has been made and the applicant has established one of the grounds for annulment. Nor does the Committee consider that the language of Article 52(3) implies such automatic exercise.

4.10 An *ad hoc* Committee retains a measure of discretion in ruling on applications for annulment. To be sure, its discretion is not unlimited and should not be exercised to the point of defeating the object and purpose of the remedy of annulment. It may, however, refuse to exercise its authority to annul an award where annulment is clearly not required to remedy procedural injustice and annulment would unjustifiably erode the binding force and finality of ICSID awards.

4.11 In the course of the proceedings, MINE has advanced the argument that a series of annulments of ICSID awards might impair the effectiveness and integrity of ICSID as an international institution for settlement of disputes between States and foreign investors. The Committee was accordingly urged to keep this consideration in mind in its examination of Guinea's application.

4.12 MINE's argument wrongly assumes that frequent annulments will necessarily be the result of overly strict tests applied by *ad hoc* Committees. It overlooks the possibility that such frequent annulments reflect neglect by arbitrators, parties or counsel of requirements flowing from the specificity of ICSID arbitration as defined in the Convention and the Arbitration Rules. A pure statistical approach, for which there is in any event no significant basis at the present time, is wholly inappropriate as a measure of ICSID's effectiveness.

V. GENERAL COMMENTS ON THE GROUNDS FOR ANNULMENT RELIED ON BY GUINEA

5.01 Guinea relies on three of the five grounds of annulment provided in Article 52(1) which in relevant part reads as follows:

"(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

.....

(b) that the Tribunal has manifestly exceeded its powers;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based."

A. Manifest Excess of Power

5.02 Guinea submits that the Tribunal has manifestly exceeded its powers by violating its obligation under the first sentence of Article 42(1) of the Convention to decide the dispute “in accordance with such rules of law as may be agreed by the parties”, alleging that the Tribunal “failed to apply any law whatsoever, much less correct law” (Application, p. 23).

5.03 The full text of the sentence in question reads:

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

The Committee is of the view that the provision is significant in two ways. It grants the parties to the dispute unlimited freedom to agree on the rules of law applicable to the substance of their dispute and requires the tribunal to respect the parties' autonomy and to apply those rules. From another perspective, the parties' agreement on applicable law forms part of their arbitration agreement. Thus, a tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such a derogation include the application of rules of law other than the ones agreed by the parties, or a decision not based on any law unless the parties had agreed on a decision *ex aequo et bono*. If the derogation is manifest, it entails a manifest excess of power.

5.04 Disregard of the applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment (see History of the Convention, Vol. II, pp. 340 and 854).

B. Serious Departure from a Fundamental Rule of Procedure

5.05 A first comment on this provision concerns the term “serious”. In order to constitute a ground for annulment the departure from a “fundamental rule of procedure” must be serious. The Committee considers that this establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.

5.06 A second comment concerns the term “fundamental”: even a serious departure from a rule of procedure will not give rise to annulment, unless that rule is “fundamental”. The Committee considers that a clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which provides:

“The parties shall be treated with equality and each party shall be given full opportunity of presenting his case.”

The term “fundamental rule of procedure” is not to be understood as necessarily including all of the Arbitration Rules adopted by the Centre.

C. Failure to State Reasons

5.07 Article 48(3) of the Convention provides:

“The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.”

Failure to comply with the last part of the above sentence is made an explicit ground for annulment by paragraph (1)(e) of Article 52. Failure to comply with the first part of the sentence is not in so many words made a ground for annulment. The Committee will consider below whether and in what circumstances failure to deal with every question submitted to the tribunal may nevertheless be a ground for annulment as a species of failure to state reasons.

5.08 The Committee is of the opinion that the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention. A Committee might be tempted to annul an award because that examination disclosed a manifestly incorrect application of the law, which, however, is not a ground for annulment.

5.09 In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.

5.10 A statement of reasons is a valuable element of the arbitration process. The Committee has noted that the Committee of Legal Experts, which was to advise the Executive Directors of the World Bank on the draft Convention, by a vote of 28 to 3 rejected a proposal which would allow the parties to dispense with the requirement of a reasoned award (History of the Convention, Vol. II, p. 816). A waiver of the requirement in an arbitration agreement would therefore not bar a party from seeking an annulment for failure of an award to state reasons.

5.11 In the form in which it was submitted to the Legal Committee the draft of what became Article 48(3) only required that the award state the reasons on which it was based. The requirement that the award should deal with every question submitted to the tribunal was added by the Legal Committee but, as already stated, failure to comply with that requirement was not expressly made a ground for annulment. In fact, the only explicit provision dealing with the subject which was added to the draft of the Convention was Article 49(2) which provides, among other things, that upon the timely request of a party a tribunal may after notice to the other party "decide any question which it had omitted to decide in the award". (See for the discussion leading to this result, History of the Convention, Vol. II, pp. 848-849).

5.12 The Committee has considered whether Article 49(2) constitutes the only remedy for non-compliance with the obligation to deal with every question submitted to the tribunal. It has concluded that Article 49(2) provides a satisfactory remedy for the case of a tribunal having failed to exercise its jurisdiction in full. For example, in the present case the Tribunal failed to rule on MINE's claim to be reimbursed for the costs and expenses incurred in the United States District Court and in arbitration before

the American Arbitration Association in earlier stages of its conflict with Guinea. Article 49(2) would have provided a specific remedy and, not having invoked it, MINE could not have relied on that failure for purposes of annulment.

5.13 Guinea's complaint against the Award falls into a different category. Article 49(2) would not have provided a remedy for the Award's failure to deal with questions submitted by Guinea to the Tribunal. The defect complained of by Guinea could not have been cured by supplementing the Award, but would have required in effect that it be reconsidered in the light of the Tribunal's decision on the "omitted" question. The Committee accepts that in such a case failure to deal with a question may render the award unintelligible and thus subject to annulment for failure to state reasons.

VI. THE ANNULMENT REQUEST

A. Breach of Contract

6.01 Guinea has advanced two grounds for annulment of the portion of the Award concerning Guinea's alleged breach of contract.

6.02 Guinea contends that the Tribunal's decision that Guinea breached the Agreement must be annulled because in reaching its decision the Tribunal manifestly exceeded its powers and, in addition, failed to state the reasons on which that decision was based.

6.03 In the process of examining Guinea's contentions, the Committee finds it useful to consider the background of the Agreement and to identify some of its provisions on which the parties based their principal arguments on the breach of contract issue in the proceedings before the Tribunal.

BACKGROUND OF THE DISPUTE

6.04 In 1963, Guinea entered into an agreement with the Harvey Aluminum Company ("Harvey Agreement"). That agreement created a joint-venture company, Compagnie des Bauxites de Guinée ("CBG"), which was established to mine a bauxite deposit near Boké. Harvey's interest was later transferred to Halco, Inc., a company owned by six major aluminum producers who contracted to purchase bauxite from CBG ("the bauxite receivers").

6.05 Article 9 of the Harvey Agreement gave Guinea the right to transport up to 50% of the exported tonnage, provided Guinea could do so at freight rates not in excess of market rates. The precise wording of that provision is as follows:

"Le Gouvernement se réserve, dans la mesure où cela n'aura pas d'effets défavorables sur la vente de bauxite, le droit de faire charger le tonnage exporté, dans une proportion maxima de 50%, par des navires battant pavillon guinéen ou assimilé, ou encore par des navires affrétés par lui sur le marché international des frêts, le tout à la condition expresse que les prix pratiques soient inférieurs ou égaux à ceux qui seraient constatés sur le marché des frêts dans des conditions identiques pour la période considérée pour le frêt et les relations maritimes en cause." (Guinea's Exhibit 144)⁴

⁴ The Committee quotes all French language texts in the original.

6.06 Against this background, Guinea and MINE concluded the Agreement whose object is stated as follows:

"Article Ier

Objet de la Convention:

La présente Convention a pour objet de déterminer entre le 'Gouvernement' et 'Maritime' les principes généraux d'association des signataires dans une SOCIETE D'ECONOMIE MIXTE de transports maritimes au long-cours, ci-après dénommée 'SOCIETE'."

6.07 Article II sets forth the purposes of the joint-venture company, and states its principal purpose as

"...l'armement et la gestion de navires au long-cours sous forme d'achat, de location-vente ou d'affrètement dans des conditions conformes aux intérêts des parties."

6.08 Article III deals with the initial capital of the joint-venture company and the partners' respective contributions. As amended by Avenant No. 2 of August 31, 1972 (Exhibit 27 to Guinea's Counter-Memorial), it reads in relevant part:

"Le Capital initial de la SOCIETE ne sera pas inférieur à US\$ 2,000,000.

Il sera divisé en 100,000 actions d'une valeur minimum chacune de US\$ 20.00 à savoir:

— 49,000 actions 'A' au moins qui seront remises au GOUVERNEMENT en contrepartie:

(a) [deleted]

(b) du droit d'assurer le transport de 50% du tonnage de bauxite revenant au GOUVERNEMENT conformément à l'Article IX de la Convention du 1er octobre 1963 entre le Gouvernement de la République de Guinée et Harvey Aluminum Co. of Delaware.

(c) du régime fiscal et douanier de longue durée et de la garantie d'une exploitation paisible pendant la durée du présent accord, tels que définis par les présentes.

— 51,000 actions 'B' qui seront souscrites au pair par 'MARITIME' en espèces."

6.09 Under the heading "Fonctionnement de la Société" Article IV provides, among other things:

"La SOCIETE sera organisée de manière à pouvoir assurer d'elle-même l'armement, la gérance technique et Commerciale de navires, et prendra à cet effet toutes dispositions utiles sans préjudices à ses intérêts."

6.10 When MINE proposed that it be paid a fee by the company for services to be rendered to it outside Guinea and that MINE also be paid a management fee, this was resisted by Guinea as being inconsistent with Article IV which in Guinea's view called for in-house handling of these matters from the start of operations.

6.11 Governance of the joint-venture company to be created is the subject of a lengthy Article V. The company was to have a Conseil d'Administration of 10 members. The Government and MINE were each to appoint five members. The President of the Conseil would be designated by the Government from among the members appointed by it, while the Vice-President was to be designated by MINE from among its appointees. The company was further to have a Directeur Général chosen by MINE and a Directeur Général Adjoint chosen by the Government.

6.12 Meetings of the Conseil d'Administration were to be called by its President whenever he considered it to be appropriate. The President was obliged to convene the Conseil d'Administration whenever he was requested to do so by three or more of its members. One of MINE's complaints against Guinea was that the President failed to act promptly on such requests.

6.13 Article V also contains the following provision:

"Dans tous les actes la formalité de la double signature est nécessaire pour engager la SOCIETE:

- (a) pour les décisions d'orientation politique de l'action de la SOCIETE, de son action générale d'Administration, de Contrôle, la double signature dont il s'agit concerne celle du Président et du Vice-Président ou de leurs fondés de pouvoirs.
- (b) pour les actes d'Administration portant sur une valeur supérieure à 1,000,000 de Francs guinéens, la double signature visée ci-dessus est celle du Directeur Général et du Directeur Général Adjoint ou de leurs fondés de pouvoirs."

6.14 Guinea relied on this provision to resist proposals by MINE to authorize it, or the Shipping Committee which had been created, not only to negotiate but to conclude contracts of affreightment with the bauxite receivers and charters covering vessels to carry the bauxite. MINE considered such authority indispensable in view of the need to match the contracts and charters in almost simultaneous transactions, and to act promptly in a highly volatile market. Guinea insisted on its rights under Article V denying that approval by the Conseil d'Administration would unduly delay, and thereby frustrate, the conclusion of the contracts and charters after they had been negotiated.

6.15 Article VIII of the Agreement, as amended by Avenant No. 2, deals with the allocation of cargo. The "Article 9" cargo rights of Guinea were to be transferred to the joint-venture company pursuant to Article III (para. 6.08 *supra*) and this was confirmed after the creation of SOTRAMAR by Article 3 of the Decree of March 6, 1972:

"La Société Guinéenne de Transport Maritime 'SOTRAMAR' est habilitée à transporter les 50% du fret de la bauxite du gisement de Boké conformément à l'article 9 de la convention du 1er octobre 1963 entre la République de Guinée et Harvey Aluminum Company." (MINE's Exhibit 1)

6.16 In Article XII ("Assistance Technique"), MINE undertakes among other things to make available to the joint-venture company, at its request,

"le personnel technique nécessaire à son bon fonctionnement, personnel ne pouvant être fourni par le GOUVERNEMENT."

6.17 As a result of the meeting between the partners at Conakry on August 28 and 29, 1972, the following paragraph was added to Article XII:

"MARITIME s'engage à fournir et à garantir à la Société l'acquisition sous forme de location-vente et d'affrètement le nombre de navires correspondant aux besoins de la Société. Ces bateaux doivent être en bon état de navigabilité dans la coque et dans les machines et répondent [sic] aux exigences techniques d'une Société de classification et de surveillance choisie par les 2 parties."

6.18 The minutes of the meeting referred to above (MINE's Exhibit N.) state:

"MINE déclare prendre toute la garantie financière et technique pour l'acquisition des navires en affrètement et en location-vente. La partie Guinée fournira son assistance pour obtenir la signature des Chartes Party [sic] par les partenaires de CBG." (p. 6)

6.19 In answer to Guinea's complaint that notwithstanding the obligations MINE had undertaken it had failed to produce a single ship, MINE stated that in the absence of cargo the joint-venture company had no need for ships.

6.20 By 1973, no contract of affreightment or charter party had been concluded and Guinea informed the bauxite receivers that they would temporarily have to make their own shipping arrangements when cargo would become available in October of that year. MINE ascribed this situation to Guinea's refusal to take the steps necessary to make SOTRAMAR a viable organization, while Guinea blamed MINE for failing to meet the competitive condition for "Article 9" freight, and failing to take prompt action in chartering tonnage after agreement was reached with the bauxite receivers on "arbitrated" rates. These rates were a compromise, arrived at under pressure of Guinea, between MINE's asking price and the bauxite receivers' offer of market rates.

6.21 MINE pointed out that implementation of the "arbitration" required complex negotiations concerning the compensation due to the bauxite receivers for accepting higher-than-market freight rates. It also requested a meeting of the Conseil d'Administration to authorize the conclusion of the compensation arrangement as well as the service and management agreements on which it continued to insist. The President did not convene the Conseil d'Administration.

6.22 Guinea for its part concluded that MINE was unwilling to carry out its obligations under the Agreement and started to explore alternative arrangements for the exercise of its "Article 9" cargo-carrying rights. Guinea did not inform MINE either of its exploratory talks or of the conclusion on March 16, 1974, of an agreement with Afrobulk for the carrying during two years of the "Article 9" cargo and the conclusion of a joint-venture thereafter. Article V of the Afrobulk agreement provides:

"...le Gouvernement s'engage:

1. à notifier immédiatement à Halco et aux acheteurs la désignation de la Société Réunie [Afrobulk] comme transportateur assimilé et habilité pour le transport de la bauxite en application de l'article 9 de la Convention de base de Boké.

2. à apporter son appui à Afrobulk pour son acceptation par les acheteurs comme transporteur selon les conditions et termes de ladite Convention..." (MINE's Exhibit T.)

6.23 At about the same time, on March 11, 1974, MINE served notice on Guinea of the existence of disputes and invoked Article XVIII of the Agreement on the settlement of disputes, naming its appointee for the conciliation procedure which is provided for in that article. Article XVIII further provides that if the conciliation effort fails to achieve the desired result within one month after written notice of a dispute, the dispute will be submitted to arbitration.

6.24 MINE gave notice of two disputes. The first concerned Guinea's refusal to take the necessary measures to make SOTRAMAR a viable company. Specific complaints under this heading were directed at Guinea's refusal to grant SOTRAMAR's management the necessary powers to conclude contracts of affreightment and charter parties, its refusal to conclude service contracts with MINE, its insistence on rates which would bankrupt SOTRAMAR and its refusal to hold meetings of the Conseil d'Administration.

6.25 The second dispute concerned the information which MINE had received from well-informed sources to the effect that the "A" shareholders, i.e., Guinea,

"1. Ont unilatéralement contacté les acheteurs de bauxite pour assurer le transport de la quantité de bauxite à exporter à SOTRAMAR aux termes de la Convention [entre MINE et Guinée].

2. Ont unilatéralement négocié avec des tiers le transport de la bauxite contrairement aux droits et obligations de SOTRAMAR contenus dans la Convention."

THE TRIBUNAL'S DECISION ON "BREACH OF CONTRACT"

6.26 In response to MINE's allegation of Guinea's breach of contract, Guinea argued that it was on the contrary MINE which had breached the Agreement by failing to conclude contracts of affreightment and to charter-in covering vessels following the 1973 "arbitration meeting" and that Guinea's arrangement with Afrobulk was a legitimate measure in mitigation of damages.

6.27 The Tribunal rejected Guinea's defence:

"The Tribunal finds that MINE did not breach the Convention [SOTRAMAR Agreement] in failing to conclude contracts of affreightment and to charter-in covering vessels following the July 1973 meeting." (Award, p. 32)

6.28 The Tribunal further found:

"that Guinea's entering the AFROBULK agreement was contrary to the spirit, and express provisions of the Convention [SOTRAMAR Agreement]." (Award, p. 33)

and that

"Guinea's conduct in secretly negotiating the AFROBULK arrangement, and in denying its existence to MINE thereafter, exhibits bad faith on its part, violating the principle of good faith set forth in the French [sic] Civil Code." (Award, *ibid.*)

6.29 The Tribunal's decision on the breach of contract was stated in the following terms:

"The Tribunal concludes unanimously that Guinea prevented SOTRAMAR from performing under the Convention [SOTRAMAR Agreement], and thereby breached the Convention, when Guinea entered the AFROBULK agreement in March 1974." (Award, p. 34)

THE COMMITTEE'S FINDINGS

6.30 The Committee will now consider Guinea's argument that the portion of the Award relating to the breach of contract must be annulled because the Tribunal "failed to apply any law whatsoever, much less the correct law—Guinean law, based on French law" (Application, p. 23) and "the dearth of stated reasons for many important conclusions" (Application, p. 24).

6.31 *Applicable Law.* The first paragraph of Article XIII of the Agreement reads as follows:

"La Loi de la présente Convention sera la Loi de la République de Guinée en vigueur à la date de signature, sous réserve des dispositions du présent Article XIII."

Thus, the applicable law is Guinean law in force on August 19, 1971.

6.32 The second paragraph records the parties' recognition that the provisions of the Agreement "sont conformes aux Lois et Règlements, et à l'ordre public de la République de Guinée ou y dérogent intentionnellement pour le présent et le futur".

6.33 The third paragraph states that the Agreement will thus be binding on the parties "nonobstant toutes les dispositions du droit interne public, administratif ou privé, qui pourraient intervenir en Guinée, et ce, sans exception ni réserve". Thus, Guinean legislation subsequent to August 19, 1971, cannot affect the Agreement.

6.34 The fourth and final paragraph of Article III states that accordingly "la Loi Guinéenne n'interviendra dans l'interprétation et l'exécution de la présente Convention qu'à titre supplétif et seulement dans le cas où celle-ci laisserait une difficulté sans solution".

6.35 The Committee notes that the term "Loi Guinéenne" must be understood to mean "droit guinéen" (Guinean law), the word "loi" being taken in its substantive sense. The Committee is aware of the fact that Guinean law is independent of French law, although derived from it. Before Guinea became independent in 1958, French law was applicable under certain conditions in the colony (which became an "overseas territory" in 1946), as in all other French-governed colonies in West Africa. It must be

recalled that local custom was applied side by side with the so-called "modern" law, depending on the subject-matter. In civil and commercial matters, modern law rapidly replaced custom. Nevertheless, French laws and regulations were not automatically applicable in the colonies in these matters. They had to be introduced in accordance with the principle of "spécialité législative". In this matter the "Code Civil" was introduced, and the modifications locally enacted were not necessarily the same as those applicable in France. Consequently, certain discrepancies may be found between French law as applied in France, and local Guinean law. As will be seen in para. 6.40 *infra*, this was not the case as far as Article 1134 of the "Code Civil" is concerned. In 1971, when the Agreement was concluded, Guinean law consisted both of pre-1958 laws and regulations that the Guinean legislative power had kept in force and measures adopted after 1958. Both constituted Guinean law.

6.36 Thus, pursuant to Article XIII of the Agreement Guinean law as defined above is to be applied to disputes if the Agreement provides no solution for the difficulty that has arisen in the course of its execution. In other words, the law to be applied between the parties is the Agreement. Nevertheless, when the Agreement is silent or incomplete, recourse must be had to Guinean law in its entirety, subject to the qualification that the only rules of Guinean law (public or private) that are applicable are those that were in existence at the date of the Agreement. Thus, the Agreement can be said to have "frozen" the applicable law at that date.

6.37 The Agreement was concluded by the Republic of Guinea and it would be possible to argue that the applicable Guinean law was public law, but both parties were agreed that the applicable law was private law. In this context, the relevant Guinean law is the law of contract which was contained in Book III, Title III (Des contrats ou des obligations conventionnelles en général) of the "Code Civil de l'Union Française", referred to by MINE as "Union Civil Code", compiled by G.-H. Camerlynck and R. Decottignies.⁵

6.38 *Manifest Excess of Power.* Proceeding now to an examination of Guinea's allegation that the Tribunal "failed to apply any law, let alone the correct law," constituting a manifest excess of power, the Committee notes that Guinea has expressed itself in general terms. It states on p. 24 of the Application:

"Most notable is the almost total lack of citation to legal authorities. The single legal reference is contained in one footnote, citing an article of the French Civil Code as it appears in Louisiana law."⁶

6.39 In its Memorial in the Arbitration proceeding (p. 30) and again in its Post-Hearing Brief in the same proceeding (pp. 57-58), MINE based its case specifically on Article 1134 of the "Union Civil Code". There was no disagreement between the parties as to the binding nature of agreements lawfully entered into and the require-

⁵ Paris, Librairie Générale de Droit et de Jurisprudence, 1951.

⁶ The second sentence of this statement is incorrect. On p. 33 of the Award, the Tribunal stated that Guinea had violated "the principle of good faith set forth in the French Civil Code," quoting Article 1134 in full in French.

ment of good faith in the carrying out of their contractual obligations. The disagreement between the parties concerned the application of the Agreement, which pursuant to its Article XIII was binding on them. Each party argued its view of the facts and their effect under the Agreement and the Tribunal concluded, rightly or wrongly, that MINE had not failed to perform its obligations under the Agreement, so as to be in breach thereof; that Guinea was not entitled under the Agreement to dispose of its cargo-carrying rights which it had agreed to contribute to SOTRAMAR; and that by transferring these rights to a joint-venture between it and an international shipping group Guinea had violated its obligation of good faith imposed by Article 1134 of the "French Civil Code" [sic].

6.40 There is thus no basis for saying that the Tribunal failed to apply any law. Admittedly, the Tribunal erred in citing Article 1134 of the French Civil Code. The Committee notes, however, that the relevant provision of the applicable Guinean law is contained in the "Code Civil de l'Union Française" with the same number and the same contents as Article 1134 of the French Civil Code. For this reason, the Committee does not consider that this error warrants annulment.

6.41 On pp. 30-31 of the Application, Guinea further complains that the Tribunal failed to conduct an inquiry on its own into the "causes que la loi autorise" for the unilateral termination of the Agreement which constitute an exception to the rule of Article 1134 that agreements may be cancelled only by mutual consent. The Committee notes that Guinea did not plead before the Tribunal that such an exception applied.

6.42 In the Committee's view, the annulment proceeding is not an occasion to present arguments and submissions which a party failed to make in the underlying proceedings. Besides, the argument based on the words "causes que la loi autorise" is untenable.

6.43 The Committee concludes accordingly that the Tribunal has not failed to apply the "correct" law and has not manifestly exceeded its power.

6.44 *Failure to state reasons.* Guinea alleges that a number of important decisions of the Tribunal were "unreasoned and unsupported", and that the Tribunal had failed to address and resolve certain issues raised by Guinea. The Award on breach of contract should therefore be annulled pursuant to Article 52(1)(e) of the Convention for violation of Article 48(3) which requires that "the Award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based".

6.45 On pp. 32-33 of the Application, Guinea asserts as an example of the Tribunal's failure to respect Article 48(3) that the Tribunal's statement that the changed commercial circumstances brought about by the Middle East War in 1973 did not make it "legally impossible for either side to perform" the Agreement (Award, p. 29) is "unreasoned and unsupported", and that it is moreover inconsistent with the Tribunal's finding "that neither short-term nor long-term contracts of affreightment were available, through no fault of the parties" (Award, pp. 38-39). The Award should therefore be annulled because of failure to state reasons and the statement of contradictory reasons.

6.46 Guinea's assertions are not well-founded. Neither party had argued that it was legally impossible for it to perform the Agreement and there is nothing in the record that suggests that there might have been a legal impediment. There was no necessity for the Tribunal to give reasons for stating an obvious truth from which it drew no conclusions. The Committee's reading of the Award indicates that the statement served merely as a transition to the Tribunal's discussion of the *commercial*, as opposed to *legal* difficulties. The finding that there were such difficulties is of course in no sense inconsistent with the finding that there was no legal impediment to performance of the Agreement.

6.47 Guinea also complains that the Award does not address, or at any rate did not resolve, the issue of MINE's unwillingness to proceed without acceptance by Guinea of its condition on agency fees and authority for the Shipping Committee to conclude contracts of affreightment and charters. Guinea had argued that these conditions were contrary to the terms of the Agreement which in effect requires the approval of both parties (Application, p. 27). Guinea further complains that the Tribunal did not address the related argument by Guinea that the duty of good faith did not require it to give up its contractual rights to approve contracts of affreightment and to have SOTRAMAR itself handle the operation of the shipping company (Rebuttal to MINE's Counter-Memorial, p. 20).

6.48 The Tribunal was aware of Guinea's arguments on these points, which are reflected in paras. (4) and (6) of the Tribunal's statement of "Guinea's Assertions", summarizing Guinea's position that MINE bore the responsibility for SOTRAMAR's failure to function (Award, pp. 27-29). With particular reference to MINE's demand for agency fees, the Tribunal noted that "the Convention did not say clearly that SOTRAMAR would pay agency and management expenses before Guinea and MINE divided SOTRAMAR's net profits" and that "the uncertainty exacerbated relations between the parties when MINE spelled out the fees" (Award, p. 11).

6.49 In the Tribunal's "Findings on Liability", it started out by stating that "from the correspondence put in evidence and the testimony given, it appears that Guinea's conduct, through its officials, was not the conduct of a commercially astute investor in a complex international industry" (Award, pp. 27-28). In a footnote to that finding, the Tribunal stated that while the Guinean officials may have had the expectation that MINE would be the sole manager, Guinea's role as described in the Agreement was an active role, and the Agreement and SOTRAMAR's by-laws required Guinea to participate in the business management of SOTRAMAR.

6.50 The Tribunal did not explicitly address and decide either of Guinea's arguments set out in para. 6.45 *supra*. Nor did it consider MINE's argument that Guinea violated its obligation to take reasonable steps to make SOTRAMAR viable, specifically by refusing to appoint an agent for SOTRAMAR and denying authority to MINE to conclude contracts of affreightment and charter-parties without first securing the approval of the SOTRAMAR Board of Directors, which Guinea, moreover, failed to convene promptly.

6.51 The Tribunal did not have to address these specific conflicting contentions of the parties because it did address and resolved Guinea's principal argument to the effect that after the July 1973 agreement ("arbitration") with the bauxite receivers, MINE, in the Tribunal's paraphrase, "demonstrated its lack of will and competence to put SOTRAMAR in operation, thereby breaching its obligations under the Convention [Agreement], because MINE failed to conclude contracts of affreightment and charter in tonnage" (Award, p. 31).

6.52 The Tribunal rejected Guinea's argument, which it said "misconstrues the facts" (Award, p. 31), and stated its reasons: the "arbitrated rates" were only a part of the whole affreightment package, leaving important stated conditions still to be negotiated; even if the "arbitration" had sufficed to enable the conclusion of contracts of affreightment at the "arbitrated rates" and covering tonnage had been chartered within a commercially reasonable period after the July 1973 meeting, "SOTRAMAR would soon have gone bankrupt, because world shipping rates rose precipitously"; and "the rapidly escalating shipping market during the latter part of 1973 and early 1974 would have made it impossible for MINE properly to mesh three-year contracts of affreightment with chartered-in tonnage" (Award, pp. 31-32).

6.53 Thus, the Tribunal's finding on p. 32 of the Award that "MINE did not breach the Convention [Agreement] in failing to conclude contracts of affreightment and to charter-in covering vessels" following the 1973 meeting is supported by reasons which can be followed without great difficulty. Their substance is not subject to review by the Committee. The reasons for the Tribunal's findings also make clear why it did not have to address Guinea's assertions mentioned in para. 6.45 *supra*: whether Guinea or MINE was right on the issue of MINE's demand of a service contract and a management fee, or on that of authority to conclude contracts of affreightment and charters, had become irrelevant.

6.54 As the Committee already stated, in the context of its rejection of Guinea's allegation that the Tribunal had manifestly exceeded its powers, the Tribunal's decision on the breach of Agreement was based on the provisions of that Agreement itself and on Article 1134 of the "Code Civil de l'Union Française", the applicable law according to Guinea.

6.55 After concluding that MINE had not breached the Agreement, the Tribunal noted the fact which was not disputed that Guinea had surreptitiously negotiated with third parties and had entered into an agreement with Afrobulk in which it had disposed of a right exercisable by SOTRAMAR without MINE's consent, and arrived at the conclusion that Guinea had breached the Agreement and violated its duty of good faith. Guinea complains that the Tribunal failed to deal with its arguments on the limits of good faith and on its right to conclude the agreement with Afrobulk in response to MINE's prior refusal to go forward without Guinea's relinquishing its contractual rights. This complaint is based on the assumption, contrary to the Tribunal's finding, that MINE was in breach of the Agreement. It is in effect an appeal against the Tribunal's decision on breach of contract, but appeal is excluded by the Convention.

6.56 The Committee concludes accordingly that the Tribunal has not violated Article 48(3) of the Convention and has not failed to state the reasons on which its decision on breach of contract was based.

B. Damages

6.57 Guinea advances three grounds for annulment of the portion of the Award awarding damages to MINE following the Tribunal's finding that Guinea has breached the Agreement.

6.58 Guinea contends that the Tribunal's decision on damages must be annulled, first, because the Tribunal failed to state the reasons on which that decision was based, second, because in reaching its decision it manifestly exceeded its powers and third, because it seriously departed from a fundamental rule of procedure.

THE PARTIES' CONTENTIONS BEFORE THE TRIBUNAL

6.59 MINE's basic position was that it was "entitled to be reimbursed the profits it would have made, had Respondent not breached the Contract" (Memorial, p. 40) and that its compensatory damages should also cover its out-of-pocket costs incurred in seeking to make SOTRAMAR a viable company, as well as its costs and expenses in connection with the prior AAA arbitration.⁷

The Tribunal did not discuss the claim of out-of-pocket costs and AAA costs in its award and did not award MINE damages on account of these two items.

6.60 In support of its claim for compensatory damages, MINE stated that "[T]his theory of damages is universally recognized and accepted not only under the common law system, [citations to U.S. decision omitted] but also under the French system applied both in France and in its colonies", citing Article 1149 of the "Union Civil Code". The Committee notes that Article 1149 provides:

"Les dommages et intérêts dus au créancier sont, en général, de la perte qu'il a faite et du gain dont il a été privé, sauf les exceptions et modifications ci-après."

6.61 Guinea did not contest the principle of compensation for loss of future profits, but rejected MINE's claim on the ground that it was speculative. Reasoning first from the point of view of the common law, Guinea stated that the common law requires MINE to prove its claim for damages with reasonable certainty, citing U.S. Court of Appeals cases. It then went on to say that "[T]reatises on contracts and damages law

⁷ Although the parties had in 1975 executed a consent to ICSID jurisdiction, MINE did not proceed before the Centre, but in January 1978 started proceedings in the District Court of the District of Columbia for an order under Section 4 of the Federal Arbitration Act (FAA) to compel arbitration before the American Arbitration Association (AAA). Guinea did not appear and in June 1980 the AAA arbitral tribunal which had been constituted rendered an award in excess of US\$25 million, which primarily represented compensatory damages for breach of contract. MINE then returned to the D.C. court filing a motion to confirm and enter judgement on the award under Section 9 of the FAA. Guinea appeared and filed a motion to dismiss for lack of subject matter jurisdiction on the grounds among others of sovereign immunity and the existence of an ICSID arbitration agreement. In January 1981, the Court denied Guinea's motion and confirmed and entered judgement on the award. Guinea appealed to the U.S. Court of Appeals for the District of Columbia circuit which concluded, contrary to the court below, that Guinea was immune under the Foreign Sovereign Immunity Act 1976 and reversed the District Court's decision on that ground.

under the Civil Code restate [sic] that principle without qualification" (Counter-Memorial, p. 62), quoting Starck, *Droit Civil: Obligations and Chartier, La Réparation du Préjudice*.

6.62 Replying to Guinea's contention that MINE's claim for damages is too speculative to be allowed, MINE argued, reverting to exclusive reliance on U.S. law, that it has long been established that damages do not need to be proved with mathematical certainty, particularly where the uncertainty has been caused by the defendant's wrongful breach (Reply, pp. 47-48).

6.63 In its Post-Hearing brief (pp. 72-73), Guinea countered that MINE's prospective profits were to be derived from a new business with no performance record, in which market fluctuations are the norm.

6.64 MINE argued that there were no major difficulties in ascertaining what the damages on account of profit foregone were "although they may be calculated in several different ways depending upon which business approach SOTRAMAR would have chosen to take" for the exercise of its "Article 9" cargo-carrying rights (either purchase of vessels or short-term charters). In the AAA proceedings (Note 7 *supra*), MINE proposed alternative calculations "A" and "B", both resulting in damages of approximately US\$ 15 million. Guinea not having appeared, the AAA arbitrators commissioned an independent report by a New York accounting firm, Grayson & Bock, which presented three separate theories (or methods) of calculation, called "X", "Y" and "Z" respectively. The accountants preferred method "Y" which yielded a figure of US\$ 36 million as damages as of 1980 (Memorial, pp. 40-42).⁸

6.65 In its Counter-Memorial before the Tribunal, Guinea contended that the existence of "a veritable alphabet soup of damage theories" was the best demonstration of the speculative nature of MINE's claim for damages. It went on to characterize the Grayson & Bock calculations as based on "factual errors and unproven assumptions", as shown, among other things, by the inclusion of compensation for anticipated earnings from the service and management contracts proposed by MINE, which were not called for by the Agreement and which neither Guinea nor SOTRAMAR had agreed to enter into, and by the assumption that SOTRAMAR operations would have lasted 20 years, even though MINE itself had based its calculations on a 10-year period (pp. 64-66).

6.66 There is no need to mention the parties' detailed arguments in support of an and in opposition to theory "Y" since the Tribunal, largely accepting Guinea's arguments, rejected that theory as a basis for calculating MINE's damages.

6.67 Grayson & Bock's theory "Z" was based on the assumption that SOTRAMAR would have negotiated 3-year contracts with the bauxite receivers over a period of twenty years, and chose Guinea's share of Afrobulk's estimated earnings as a proxy for SOTRAMAR's earnings. Guinea's agreement with Afrobulk provided for exercise by the latter of Guinea's "Article 9" carrying rights for two years, to be followed by the

⁸ US\$ 66 million as of January 1, 1987 (Award, p. 36).

conclusion of an Afrobulk/Guinea joint-venture. Afrobulk was dissolved before the end of the two-year period and Guinea established a joint-venture, Guinomar, with another partner. Guinomar had since continued as Guinea's "Article 9" carrier. Guinea argued that the actual financial performance of Guinomar, rather than the assumed performance of Afrobulk, should therefore be the proxy for SOTRAMAR's earnings (Post-Hearing Brief, p. 90). Guinea stated that during 1974 through 1984 it received a total of only US\$ 6 million from all sources, (Afrobulk, the receivers and Guinomar), that is less than 10% of MINE's claim of US\$ 66 million under theory "Y".

6.68 MINE maintained that theory "Z" and the calculations thereunder remained valid. The Tribunal might make such modifications as it deemed appropriate, such as reducing the earnings period from 20 to 10 years or deducting agency fees, but there was no legal basis for requiring the Tribunal to look exclusively at the actual operating results under Afrobulk, in the interregnum between the termination of the Afrobulk arrangement and the start-up of Guinomar, and under Guinomar. However, even if the Tribunal were to follow Guinea's argument, an amount of damages representing "a classic worst case scenario" could still be calculated. MINE's calculations arrived at an amount just below US\$ 9 million of which somewhat more than half represented interest calculated at 9% per annum and compounded (Post-Hearing Rebuttal Brief, pp. 41-45).

6.69 In its Surrebuttal Brief, Guinea presented a detailed refutation of MINE's "worst case" theory, including the following points: the 10-year period is too long and inherently speculative; while supposedly based on "what actually occurred", the theory is *not* based on what actually occurred (certain items include compensation for profits foregone for a period during which Guinea actually earned no money from "Article 9"); as to other items, it is speculative in that MINE has no basis for assuming that SOTRAMAR's profit would have been comparable to the income Guinea derived from an alternative to the joint-venture; yet other items give MINE credit for profits that it has no legitimate claim to receive (pp. 26-29).

6.70 In the context of criticizing the "worst case" theory, Guinea stated that MINE improperly assumed that it was entitled to interest on its damages. "By simply assuming entitlement to interest, MINE has failed to meet its burden of proving its entitlement to its damage request". Awarding interest would also be "inappropriate" because MINE itself caused the delays. Thus, interest should be excluded in its entirety (*ibid.*, pp. 28-29).

6.71 In a separate attack on MINE's claims, Guinea invoked Article XVI of the Agreement for the proposition that MINE would in no event be entitled to compensation for profits foregone for more than one year. That article provides in relevant part:

"La durée de la SOCIETE est fixée à 30 (trente) ans. Toutefois, 10 (dix) ans après la date de constitution de la SOCIETE, le GOUVERNEMENT pourra s'il le désire, acquérir 51 (cinquante et un) % des actions; et 15 (quinze) ans, après la date de constitution de la SOCIETE, le GOUVERNEMENT aura l'option de racheter partie ou totalité de la participation de MARITIME [MINE]...

Cependant, la SOCIETE peut-être dissoute avant terme d'accord parties.

Si une partie décide de se retirer avant le délai initialement convenu, elle le notifiera formellement 12 (douze) mois à l'avance; l'autre partenaire étant tenu de manifester son avis par écrit au plus tard 6 (six) mois après la date de notification.

Au cas où cet avis serait défavorable au retrait, le requérant acceptera de perdre 10 (dix) % de ses droits sur l'actif net de la SOCIETE, créances communes non-comprises.

Le remboursement s'effectuera en nature constituée essentiellement de navires dont la valeur sera déterminée par une Société fiduciaire internationale choisie par les parties."

Guinea contended, relying on American cases, that Article XVI is a liquidated damages provision and would in any event limit recovery to one year's damages (Counter-Memorial, pp. 57-59).

6.72 In its reply (pp. 42-47), MINE contested both of Guinea's assertions. It denied that Article XVI is a liquidated damages provision, asserted that Article XVI never became operative, and contended that Article XVI is not applicable because the specific notice provisions were not met by Guinea, relying in each instance exclusively on U.S. cases.

6.73 MINE also denied that Article XVI would limit the recovery of damages to a one-year period only. It relied for this purpose on the "applicable law", which it newly defined as "international commercial law, or Guinean law when there is a specific Guinean law in point". MINE claimed to have caused the commercial laws of major European countries (France, Germany, Spain, Switzerland and United Kingdom) to be thoroughly reviewed by "eminent local attorneys" and to have been advised by anonymous "eminent counsel" that Article XVI would not serve to limit MINE'S damages to a one-year period. It recalled that Guinean law "closely tracks French law" without, however, relying especially on "eminent French counsel" or providing his opinion.

THE AWARD

(pp. 34-40 inclusive)

6.74 The Tribunal opened the portion of the Award dealing with damages by stating MINE's contention that it is entitled to damages measured by the profits lost because Guinea breached the SOTROMAR Agreement, and adding in its own words, "that is, the expectancy of MINE's share of the net profits that SOTRAMAR would have earned if Guinea had performed the Convention by letting SOTRAMAR go into operation". The Tribunal rejected this expectancy as a measure of damages:

"The leading obstacle to this theory of damages is the fact that SOTRAMAR never earned any profits; and because SOTRAMAR was a new venture, the projection of expectancy of net profit is too speculative to use in assessing damages. Other contract damage theories are also unusable" (pp. 34-35).

6.75 Particularizing that statement, the Tribunal then described theory "Y", theory "Z" and MINE's "worst-case scenario" and Guinea's objections to each of them.

6.76 Theory "Y" was based on the allegation that Guinea breached the Agreement by refusing to take the necessary action to establish shipping operations on the basis of long-term contracts of affreightment, and to build up a fleet through hire-purchase arrangements, so that MINE was damaged by losing what the Tribunal called "a hypothetical share of hypothetical profits in a hypothetical form of doing business", projected over 20 years (pp. 35-36). Theory "Z" was based on Guinea's breach in 1974 when it concluded the Afrobulk agreement and held Guinea liable for MINE's share of the net profits that SOTRAMAR would have earned, had it functioned under the Afrobulk and Guinomar agreements, projected for 20 years (p. 36).

6.77 The Tribunal then recited Guinea's response to both theories, namely, that MINE's projections of alleged profits over a 20-year period, for a new business venture with no performance record, where market fluctuations are common-place, was speculative. It also recorded that Guinea argued that theory "Y" was discredited by the weight of the evidence, and that theory "Z" was irrational since it disregarded the actual financial performance of Guinomar, Guinea's current "Article 9" carrier, and projected revenue ten times what Guinea actually received from 1974 through 1984 (p. 37).

6.78 The Award also records Guinea's criticism of MINE's "worst-case" theory as not reflecting what actually occurred, and failing to prove entitlement to interest (pp. 37-38).

6.79 The Tribunal stated its view on the principles governing damages for breach of contract in the following terms:

"The Tribunal accepts the general principle that MINE is entitled to be compensated for the profits it would have earned if Guinea had not breached the Convention. The lost profits need not be proven with complete certainty, nor should recovery be denied simply because the amount is difficult to ascertain." (Award, p. 38).

The Tribunal did not cite statutory or case law references.

6.80 The Award then states that, having considered the detailed presentations of MINE's theories "Y" and "Z", the Tribunal has concluded "that neither theory represents a usable approach to MINE's loss of profits". It rejected theory "Y" on substantially the same grounds as had been argued by Guinea (p. 38). Its rejection of theory "Z" was not based on the fact that it disregarded the actual financial performance of Guinomar, as urged by Guinea (see para. 6.67 *supra*), but on the ground that "it is far from certain that these [short-term] contracts of affreightment could have been concluded". The Tribunal noted that Guinomar managed to obtain contracts of affreightment only when the shipping partner undertook significant business risks in order to make the resultant rates more attractive to the bauxite receivers, namely, by providing a 10-year fixed rate contract for eastbound grain cargo from the United States to European ports. It expressed the view that MINE probably could not have concluded significant contracts of affreightment without a similar undertaking, which did not appear to be MINE's intention from the start (pp. 38-39).

6.81 The Tribunal did not comment on MINE's "worst-case" theory as a basis for the calculation of damages but, without introduction, stated its own finding. It started out by saying that MINE's loss of profits may be measured adequately by the Afrobulk agreement since the 50 cents per ton which Guinea received from Afrobulk for its "Article 9" rights during a two-year period rightfully belonged to SOTRAMAR. It went on to state that "it seems fair to conclude that such an arrangement could have been extended, or negotiated with others, to a total period of ten years". The Tribunal added by way of explanation:

"While the Convention was to last 30 years, the Bauxite Receivers under the Harvey Agreement were bound to CBG for only 20 years, and 10 years appears to be a reasonable period considering that the Convention [Agreement] contained provisions for early termination." (Award, pp. 39-40).

6.82 The Tribunal also awarded simple interest on each year's estimated lost profits from 1975 through 1987 at the average U.S. prime interest rate for each year published by the Chase Manhattan Bank. The Tribunal calculated lost profits at US\$ 6,726,497 and interest at US\$ 5,457,986.

THE PARTIES' CONTENTIONS IN THE ANNULMENT PROCEEDINGS

6.83 *Failure to State Reasons, including Failure to Address Issues.* As the Committee stated in para. 5.13 *supra*, a tribunal's failure to address a question submitted to it may render its award unintelligible and thus subject to annulment for failure to state reasons.

6.84 (a) *Limitation of damages to one year.*

Guinea complains that the Tribunal failed to address its contention that Article XVI of the Agreement limits any recovery of damages for lost profits to only one year (Application, p. 34). The Tribunal disregarded or implicitly rejected this contention of Guinea's by awarding damages over a ten-year period without giving reasons (*ibid.*, p. 35). MINE argues that it was for the Tribunal to interpret Article XVI, which constituted the law binding the parties, and that the Tribunal had obviously agreed with the arguments presented by MINE in the arbitral proceedings. Moreover, the Tribunal gave its reason for using a period of 10 years (Counter-Memorial, pp. 49-51). Guinea replies that the Tribunal did not give the slightest indication of its reasoning on the Article XVI point which, if resolved in Guinea's favour, would have reduced the damages to a fraction of the amount awarded by the Tribunal. It is not for MINE to supply the reasoning (Rebuttal to MINE's Counter-Memorial, p. 25).

6.85 (b) *Interest on damages*

Guinea states that in awarding interest to MINE on damages, the Tribunal failed to give any reason for rejecting Guinea's arguments presented in its Post-Hearing Surrebuttal Brief. Guinea also criticizes the Tribunal for having chosen to award interest at the United States prime rate without stating its reasons (Application, pp. 35-36) and submits that it is not for the Committee to imagine what might or should have been the arbitrators' reasons.

6.86 MINE argues that the Tribunal operated under the legal principle that MINE as the injured party was entitled to be made whole and that this necessarily required the Tribunal to grant interest to MINE (citing a United States Supreme Court case). MINE also explains the award of interest expressed in United States Dollars at the prime rate, arguing that the Tribunal knew that the currency of the Agreement was the U.S. dollar, that thus an interest rate related to that currency was appropriate, and that the rate selected was one actually paid by a major U.S. bank (Rejoinder, pp. 15-16).

6.87 (c) *Damages over a ten-year period*

Guinea alleges that the Tribunal stated its own damages theory and conclusion "without benefit of reason". In addition, the conclusion contradicts the reasoning of the Tribunal in rejecting MINE's theory based on the expectancy of profits as too speculative (Application, p. 41). MINE replies that the Tribunal gave its reason for using a 10-year period on pp. 50-51 of the Award, namely, that ten years appears to be a reasonable period considering that the SOTRAMAR agreement contained provisions for early termination (Counter-Memorial, p. 50).

6.88 Guinea denies the validity of MINE's attempt to deem the award to contain reasoning by virtue of the parties' presentation of facts and legal arguments to the Tribunal (Rebuttal to MINE's Counter-Memorial, p. 30).

6.89 (d) *Hypothetical basis of the decision on damages*

Guinea asserts that in awarding MINE royalty damages for 10 years, the Tribunal based itself on assumptions as to the extension of an Afrobulk type agreement for a period of ten years and as to MINE's willingness to accept such an arrangement. The Tribunal gave no reasons and cited no support for its conjecture which is against the evidence in the record. Afrobulk was dissolved even before its two-year agreement was completed and the subsequent royalty fees mentioned in evidence were much lower than the 50 cents Afrobulk royalty (Application, pp. 41-42). MINE denies that the decision was made on hypothetical assumptions, stating that it was on the contrary based on the evidence and constituted a fair and reasonable method to calculate damages "within the principle of adequate certainty" (Counter-Memorial, p. 57).

6.90 Guinea argues that MINE has failed to rebut its assertion that the possibility of extending the same royalty arrangement for ten years is purely hypothetical. MINE does not point to any evidence in the record, "for there is none" (Rebuttal to MINE's Counter-Claim, p. 30). MINE answers that the Tribunal took into account "four factors of record" which constituted the factual basis for its calculation. They were (i) the 50 cents royalty under the Afrobulk agreement; (ii) the fact that the Agreement could be terminated after the expiration of 10 years; (iii) the quantity of bauxite carried; and (iv) MINE's entitlement to 35% of SOTRAMAR's profits.

6.91 (e) *Deduction of interest on MINE's withdrawn capital contribution*

Guinea argues that the Tribunal failed to address its argument that if the Tribunal decides that MINE was entitled to interest on any damages, interest on the amount of US\$ 1,020,000 which had been withdrawn should be deducted. The

damages portion of the award should therefore be annulled pursuant to Article 52(1)(d) and (e) (Application, p. 37). MINE does not deny that the Tribunal did not address Guinea's argument but states that the failure to address every issue tendered to a Tribunal is not a ground for annulment, and that the Tribunal's failure to recognize Guinea's claims "was at best an error of law, but not a 'manifest' disregard of the Tribunal's powers justifying an annulment of the Award" (Counter-Memorial, p. 64).⁹

6.92 Guinea replies that "the awarding of almost \$2 million additional damages without giving the slightest reason in fact or law for overriding a party's strenuous objections" is clearly a ground for annulment (Rebuttal to MINE's Counter-Memorial, p. 29).

6.93 *Manifest Excess of Powers: Failure to Apply "Law"*. Guinea attacks the Award on damages for failure to apply "law" and/or "reference to legal authorities" to the following points, among others: burden of proof (Application, p. 32), interest on damages (*ibid.*, p. 37) and damages calculation (*ibid.*, p. 41). MINE replies that the Tribunal, having all the evidence before it, was able on the basis of that evidence to make its own calculation of damages which constituted in its best judgment the amount of gain or lost profits with reasonable certainty. It is meaningless to discuss the Tribunal's exercise of judgment in terms of "burden of proof" (Counter-Memorial, p. 61). As regards interest on damages, MINE asserts that under French law the assessment of compensatory interest is within the sound discretion of the judge, citing A. Weill & F. Terre, *Droit Civil—Les Obligations* (1987), No. 434 (*ibid.*, p. 62).

6.94 *Serious Violation of a Fundamental Rule of Procedure*. Guinea asserts that, having rejected MINE's damages theories "Y" and "Z" as unusable, the Tribunal should have concluded that MINE had failed to prove its damages. However, the Tribunal devised a different measure of damages without informing the parties and without giving Guinea an opportunity of rebuttal (Application, pp. 42-43).

6.95 MINE answers that the Tribunal based its damages calculation on evidence and information to which both parties had access. The final calculation, based on evidence of record, was clearly within the discretion of the Tribunal (Counter-Memorial, pp. 44-48). In support of its argument, MINE cites the English translation of the 1985 decision of the *ad hoc* Committee in the matter of *Klökner v. Cameroon* (ARB/81/2) for the proposition that where a tribunal in the course of its deliberations reaches a provisional conclusion that the legal basis for its decision may be different from the parties' respective arguments, and provided that its own theory and argument remain within the "legal framework" of the parties' submissions,

"[W]hether to reopen the proceeding before reaching a decision and allow the parties to put forward their views on the arbitrators' 'new' thesis is rather a question of expedience." (para. 91).

6.96 Guinea replies that if MINE had proffered a new damages theory after Guinea had filed its last brief, that theory could not be utilized without permitting Guinea an

⁹ Guinea had not claimed that the Tribunal was guilty in this respect of a manifest excess of power.

opportunity to address it. It then contends that “[I]t can be no different when it is the Tribunal rather than a party who dreams up a new theory”, and that this is especially true where, as Guinea claims to be the case, “the new theory of damages is based on a re-writing of the contract... that required Guinea to continue ‘in partnership’ with MINE even if the contract could not be performed as intended” (Rebuttal to MINE’s Counter-Memorial, p. 31).

THE COMMITTEE’S FINDINGS

6.97 The Committee will now consider Guinea’s argument that the portion of the Award relating to damages must be annulled, first because of the Tribunal’s failure to state reasons, second because of manifest excess of power, and third because of serious departure from a fundamental rule of procedure.

Failure to State Reasons, including Failure to Address Issues

6.98 The Committee has first examined the numerous instances of alleged violations of Article 48(3) of the Convention advanced by Guinea in support of its Application for annulment of the damages portion of the Award (paras. 6.84–6.85 *supra*). Several of these appear to the Committee singly to justify, and collectively to compel, annulment of that portion.

6.99 The Committee will first mention two instances in which the Tribunal failed to deal with questions raised by Guinea, the answer to which might have affected the Tribunal’s conclusion. Failure to address these questions constituted a failure to state the reasons on which that conclusion was based.

6.100 In opposing MINE’s damages claim, Guinea argued that pursuant to Article XVI of the SOTRAMAR agreement, all MINE would be entitled to if Guinea had breached that agreement (which it denied) was damages for one year. It also argued that in any event the award of interest (whose justification it denied) on the amount of damages arrived at by one or the other formula (whose validity it contested) should be reduced by the interest on the sum of US\$ 1,020,000 capital contribution which MINE had withdrawn in 1975. Both arguments were briefed by the parties and evidence was presented.

6.101 If Guinea’s argument on Article XVI had been accepted, it would have meant a radical reduction of the damages claim which was based alternatively on a 20-year and a 10-year period. Acceptance of the argument on the withdrawal by MINE of its cash capital contribution would have substantially reduced the interest element of the damages award. They raised therefore important issues. The Tribunal either failed to consider them, or it did consider them but thought that Guinea’s arguments should be rejected. But that did not free the Tribunal from its duty to give reasons for its rejection as an indispensable component of the statement of reasons on which its conclusion was based.

6.102 Guinea further submits that the award of damages for lost profits must be annulled for failure to state reasons for awarding interest on the damages sum, particularly in the face of Guinea’s challenge of MINE’s entitlement to interest on the ground that MINE waited 9 years to go to ICSID arbitration.

6.103 In objecting to the award of interest on the ground that many United States jurisdictions "do not permit recovery of the pre-judgment interest on unliquidated damages", Guinea disregards the applicable law. It is, on the other hand, not open to doubt that the Tribunal should have stated the reason why it rejected Guinea's argument based on MINE's delay in starting ICSID proceedings.

6.104 Guinea advances a separate objection to the Tribunal's failure to give reasons for the award of interest at the U.S. bank rate. In light of the fact that the U.S. dollar was the currency of the contract, the justification of that currency and bank rate of interest is apparent. An express statement to that effect is however wanting.

6.105 While the violations of the requirements of the Convention mentioned in the foregoing paragraphs affect particular aspects of the Tribunal's damages calculations, Guinea's principal complaint is addressed to its very basis (see paras. 6.87-6.91 *supra*). The Committee finds that to the extent that the Tribunal purported to state the reasons for its decision, they were inconsistent and in contradiction with its analysis of damages theories "Y" and "Z".

6.106 MINE's "worst case" scenario and the damages calculation by the Tribunal have in common that they do not purport to estimate profits that SOTRAMAR would have made, but rather take as a base either the actual or hypothesized profits under the substitute Afrobulk/Guinomar arrangements. The theory underlying this approach, which was not articulated either by the parties or by the Tribunal, may have been that for Guinea to keep the fruits of the substitute arrangements, which according to the Tribunal's ruling on breach of contract it had concluded in violation of the Agreement, would have constituted unjust enrichment, and that MINE should therefore be awarded the same share of those profits as it was entitled to receive if they had been SOTRAMAR profits.

6.107 Guinea had supplied information to the Tribunal concerning the profits it had received under the substitute arrangements for a 10-year period. MINE argued that these were understated. The Tribunal did not decide the issue. It did, however, for its own damages calculations assume, without explanation and contrary to what really happened, that arrangements yielding 50 cents per ton (the royalty rate of the Afrobulk agreement) could have been concluded for a period of ten years. Having concluded that theories "Y" and "Z" were unusable because of their speculative character, the Tribunal could not, without contradicting itself, adopt a "damages theory" which disregarded the real situation and relied on hypotheses which the Tribunal itself had rejected as a basis for the calculation of damages. As the Committee stated in para. 5.09 *supra*, the requirement that the Award must state the reasons on which it is based is in particular not satisfied by contradictory reasons.

6.108 For all these reasons, the Committee finds that the portion of the Tribunal's

Award relating to damages must be annulled for failure to state the reasons on which it is based.¹⁰

*Manifest Excess of Power and Serious Departure
from a Fundamental Rule of Procedure*

6.109 Having reached the Conclusion that the Award on damages must be annulled for failure to state reasons, the Committee sees no need to examine the alternative grounds for annulment advanced by Guinea.

C. Costs

6.110 Guinea requests that the Tribunal's decision on costs be annulled because it has failed to state the reasons on which its award of US\$ 275,000 in costs of the IC-SID arbitration was based.

6.111 The award of costs is not part of the award of damages on account of profits foregone. The amount of costs claimed by MINE was contested by Guinea on the ground that it included costs incurred in the attempted measures of constraint in execution of the AAA award. The Tribunal apparently took this argument into account and awarded a lower amount. Article 61(2) of the Convention provides that the Tribunal shall decide how and by whom the costs of proceedings including the expenses incurred by the parties, the fees and expenses of the members of the Tribunal and the charge for the use of the facilities of the Centre shall be paid. The article confers a discretionary power on the Tribunal which was in particular under no obligation to state reasons for awarding costs against the losing party. Guinea has not alleged that the Tribunal abused its discretion.

6.112 The award of costs can nevertheless not remain in existence since its basis, viz., that Guinea was the losing party, has disappeared as a result of the annulment of the portion of the Award relating to damages. The award of costs cannot survive the annulment of that portion of the Award with which it is inextricably linked. The Committee therefore finds that the award of costs must be annulled in consequence of the annulment of the damages portion of the Award.

VII. TEMPORARY STAY OF ENFORCEMENT OF THE AWARD
ON THE COUNTER CLAIMS

7.01 As noted in paras. 2.01 and 4.08 *supra*, Guinea has not requested annulment of the decision of the Tribunal on its counter-claims. That portion of the Award is therefore final and remains in effect. In the circumstances, the Committee has found it appropriate to order the temporary stay of enforcement of the unannulled portion of the Award under Arbitration Rule 54(3) in order to give either party an opportunity to request a new tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Arbitration Rule 55(3). The Committee considers that a period of

¹⁰ The parties exchanged lengthy arguments in their presentations to the Tribunal and the Committee on another contention of Guinea's, viz., that MINE had failed to mitigate its damages when it refused Guinea's offer to let MINE share half the Afrobulk agreement. In view of the Committee's decision to annul the damages portion of the Award, it does not find it necessary to deal with the question whether the Tribunal's disposition of Guinea's contention might have furnished an independent ground for annulment.

ninety days following the date of its decision will be adequate for the purpose and determines that the stay will automatically terminate on the last day of that period.

VIII. DECISION

8.01 Based on the foregoing,

THE COMMITTEE,

Noting that Guinea has not requested annulment of the portion of the Award in the sum of US\$ 210,000 in respect of its counter-claims and that that portion of the Award remains in effect as *res judicata*,

Noting that the stay of enforcement of the Award ordered by the Committee's Interim Order No. I terminates automatically as of the date of this Decision pursuant to Arbitration Rule 54(3),

UNANIMOUSLY

A. *Rejects* Guinea's request for annulment of the portion of the Award which holds that Guinea breached the SOTRAMAR Agreement;

B. (1) *Grants* Guinea's request for annulment of the portion of the Award awarding MINE damages (including "interest on damages") as reparation for Guinea's breach of contract and annuls that portion of the Award;

(2) *Rules* that as a result of the above annulment, the portion of the Award awarding MINE US\$ 275,000 towards the costs of the ICSID arbitration no longer has any foundation, and is therefore annulled;

C. *Orders*, in accordance with Arbitration Rule 54(3), the temporary stay of enforcement of the portion of the Award in respect of the counter-claims for a period of ninety days following the date of this Decision;

D. *Rules*

(1) that the parties bear their own expenses in connection with the present proceedings;

(2) that the parties bear equally the fees and expenses of the members of the Committee and the charges of the Centre, as determined by the Secretary-General; and

(3) that accordingly MINE shall reimburse Guinea one half of the amounts paid by the latter to the Centre in respect of such fees, expenses and charges pursuant to Administrative and Financial Regulation 14.

Keba Mbaye *Sompong Sucharitkul*

Member

President

Aron Broches

Member

14 December 1989