

Date of dispatch to the Parties: August 6, 2004

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
Washington, D.C.

IN THE PROCEEDING BETWEEN

Joy Mining Machinery Limited
(CLAIMANT)

and

The Arab Republic of Egypt
(RESPONDENT)

(ICSID Case No. ARB/03/11)

AWARD ON JURISDICTION

Members of the Tribunal:

Professor Francisco Orrego Vicuña
Mr. William Laurence Craig
Judge C.G. Weeramantry

Secretary of the Tribunal:

Mr. Ucheora Onwuamaegbu

Representing the Claimant

Mr. Hugh R. McCombs
Mr. James E. Tancula
Mr. Michael D. Regan
Mr. Timothy Tyler
Mr. James Fielden

Mr. James A. Chokey
Kim R. Kodousek

Representing the Respondent

Dr. Ahmed Sadek El-Kosheri
Dr. Andres Reiner

Counselor Hossam Abd-El Azim
Counselor Osama Aboul-Kheir
Mahmoud Soysal

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I PROCEDURE

Registration of the Request for Arbitration

1. The International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) received a request for arbitration, under cover of a letter dated February 26, 2003, against the Arab Republic of Egypt (“Egypt” or the “Respondent”) from Joy Mining Machinery Limited (“Joy Mining” or the “Claimant”), a company incorporated under the laws of England and Wales. The request invoked the ICSID arbitration provisions in the United Kingdom-Arab Republic of Egypt Agreement for the Promotion and Protection of Investments which entered into force on February 24, 1976 (the “Treaty” or “BIT”).

2. On March 4, 2003 the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“Institution Rules”) acknowledged receipt of the request and on the same day transmitted a copy to the Arab Republic of Egypt and to the Embassy of Egypt in Washington, D.C.

3. On April 8, 2003 and May 19, 2003, the Centre requested further information from the Claimant, with regard to the existence of an investment for purposes of Article 25 of the ICSID Convention, and on the investment of Joy Mining “in the territory” of Egypt as envisaged by Article 8(1) of the BIT. The Claimant replied by letters of April 15, 2003 and May 27, 2003. The Centre also received correspondence from the Respondent urging that the request for arbitration not be registered, as well as the Claimant’s responses to those correspondence.

4. The request, as supplemented by several letters of the Claimant between February 28 and May 27, 2003, was registered by the Centre on June 2, 2003, pursuant to Article 36(3) of the ICSID Convention, and on the same day the Acting Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

Constitution of the Arbitral Tribunal and Commencement of Proceeding

5. Following the registration of the request for arbitration by the Centre, the Claimant in a letter of June 12, 2003, proposed that the Arbitral Tribunal comprise of three arbitrators, one appointed by each party and the third, presiding, arbitrator to be appointed by the two party-appointed arbitrators, and that the Chairman of the ICSID Administrative Council be the appointing authority in the event that an appointment is not made within the proposed time limit. The Respondent accepted this proposal and as suggested by the Centre, for administrative convenience, the parties agreed to substitute the Chairman of the ICSID Administrative Council with the ICSID Secretary-General as appointing authority.

6. The Respondent by a letter of June 23, 2003, appointed Judge Christopher G. Weeramantry, a national of Sri Lanka, as arbitrator and the Claimant by a letter of June 24, 2003, appointed Mr. William Laurence Craig, a national of the United States of America, as arbitrator. Both arbitrators accepted their appointments in accordance with ICSID Arbitration Rule 5(3) and, as agreed by the parties, on August 22, 2003, notified the Centre of their appointment of Professor Francisco Orrego Vicuña, a national of Chile, as the presiding arbitrator.

7. All three arbitrators having accepted their appointments, the Centre by a letter of September 4, 2003, informed the parties of the constitution of the Tribunal, consisting of Professor Francisco Orrego Vicuña, Mr. William Laurence Craig and Judge Christopher G. Weeramantry, and that the proceeding was deemed to have commenced on that day, pursuant to ICSID Arbitration Rule 6(1).

Written and Oral Proceedings

8. After consulting with the parties and the Centre the Tribunal, in accordance with ICSID Arbitration Rule 13(1), scheduled a first session for November 4, 2003. The Respondent by a letter of September 11, 2003, notified the Centre that it proposed to file a submission objecting to the jurisdiction of the Centre sometime in the month of October 2003.

9. The first session of the Tribunal was held as scheduled on November 4, 2003, at the Peace Palace in The Hague. At that meeting, the Respondent formally filed a Memorial objecting to the jurisdiction of the Centre and by

agreement of the parties, a schedule was established for the filing of other submissions on jurisdiction. Other procedural issues identified in a provisional agenda circulated by the Tribunal Secretary were also discussed and agreed. All the conclusions were reflected in the written minutes of the session, signed by the President and Secretary of the Tribunal and provided to the parties, as well as all Members of the Tribunal.

10. In accordance with the agreed schedule, the Claimant on January 5, 2004, filed its Counter Memorial on Jurisdiction, and on January 26, 2004, the Respondent filed its Reply, followed by the Claimant's Rejoinder on February 17, 2004. As agreed, the submissions were each filed by electronic mail and in hard copy.

11. Also, in accordance with the agreed schedule, the hearing on jurisdiction was held at the Peace Palace in The Hague on March 29 and 30, 2004. The parties were represented by their respective counsel who made presentations to the Tribunal and, in the case of the Respondent, Dr. Andreas Reiner presented the Respondent's arguments relating to previous ICSID decisions, in the place of Dr. Ahmed El-Kosheri, who argued the other aspects of the Respondent's case.

12. The following persons were present at the hearing on jurisdiction, namely:

Members of the Tribunal: Professor Francisco Orrego Vicuña, President, Mr. William Laurence Craig and Judge Christopher G. Weeramantry.

ICSID Secretariat: Mr. Ucheora O. Onwuamaegbu, Secretary of the Tribunal.

Attending on behalf of the Claimant: Mr. Hugh R. McCombs, Partner, Mayer, Brown, Rowe & Maw, Chicago; Mr. James E. Tancula, Partner, Mayer, Brown, Rowe & Maw, Houston; Mr. Michael D. Regan, Partner, Mayer, Brown, Rowe & Maw, London; Mr. Timothy Tyler, Mayer, Brown, Rowe & Maw LLP, Houston; Mr. James Fielden, Mayer, Brown, Rowe & Maw; Mr. James A. Chokey, Joy Global Inc.; and Kim R. Kodousek, Joy Global Inc.

Attending on behalf of the Respondent: Dr. Ahmed Sadek El-Kosheri, Kosheri, Rashed and Riad, Cairo; Dr. Andres Reiner, Counsel, Vienna; Counselor Hossam Abd-El Azim, President of the State Lawsuits Authority; and Counselor Osama Aboul-Kheir Mahmoud Soysal.

13. Transcripts were made of the hearing and provided to the parties and to Members of the Tribunal after the hearing.

14. Also, following the hearing, Members of the Tribunal deliberated by various means of communication.

II. CONSIDERATIONS

The Dispute Between the Parties

15. The dispute in this case arises out of a “Contract for the Provision of Longwall Mining Systems and Supporting Equipment for the Abu Tartur Phosphate Mining Project” (the “Contract”), executed on April 26, 1998 between Joy Mining Machinery Limited and the General Organization for Industrial and Mining Projects of the Arab Republic of Egypt (“IMC”). Following various disagreements between the parties, the Contract was amended by an agreement of November 8, 2000 (“Amendment Agreement”).

16. The Abu Tartur Phosphate Mining Project (the “Project”) is located in Egypt’s Western Desert and is managed by IMC. The phosphate extracted is used for the production of fertilizers. The Longwall Mining System consists of equipment allowing for the use of a specialized technique for this kind of mining activity. The Contract envisaged two stages. The first concerned the partial replacement of equipment already existing at the Project site supplied by other companies (“Replacement Longwall”), while the second stage comprised a new Longwall System (“First New Longwall”).

17. The total Contract price amounted to UK£13,325,293. Letters of guarantee for Contract Performance, Advance Payment and Remaining Payment or Balance were supplied by the Company for each of the Contract’s stages, amounting to a total of UK£12,950,737. This amount was later reduced by the Amendment Agreement to UK£9,605,228. These guarantees have been renewed at various points in time and are currently in place at the Bank of Alexandria. The Contract and later the Amendment Agreement provided for a timetable and conditions for the release of these guarantees connected to the performance of the equipment and to the achievement of certain levels of production.

18. Installation of the equipment on site began in February 1999 and since the outset each party has claimed that performance problems which surfaced are to be blamed on the other. Joy Mining asserts that there were geological

problems in the mine site as well as poor management of the Project by IMC, while the latter asserts that the problems arose from the malfunctioning of the equipment. As disagreements continued, independent experts were appointed and discussions held later with a committee appointed by the Minister for Industry and Technology. The Amendment Agreement resulted from these discussions and some timetables, conditions and guarantees were adjusted accordingly.

19. Disagreement persisted between the parties as to technical aspects related to the commissioning and performance tests of the equipment. However, the Company was paid the full purchase price of the equipment in accordance with the Contract. The guarantees have not been released by IMC and, as mentioned, have been renewed by the Company several times in order to prevent their drawdown. Further negotiations to resolve the differences between the parties have been unsuccessful.

20. Joy Mining asserts that it is entitled to the release of the guarantees, explaining that if commissioning and testing of the equipment had been carried out in accordance with the Contract and the Amendment Agreement, both Provisional and Final Acceptance Certificates would have been issued at the latest in April and July 2003. Thereafter, the guarantees would have been released at different dates in accordance with their schedule, but ending at the latest on July 31, 2003.

21. IMC contends that the guarantees should remain in place until the commissioning and testing of the equipment is satisfactorily carried out and that in any event the question of performance under the Contract and connected guarantees has to be settled through a separate dispute settlement mechanism agreed to under the Contract, which will be discussed further below in connection with the objections to jurisdiction.

22. Joy Mining submitted the dispute to ICSID arbitration under the United Kingdom-Arab Republic of Egypt Agreement for the Promotion and Protection of Investments, in force as from February 24, 1976. The Company claims that the Contract is an investment under this Treaty and that the decisions by IMC and Egypt not to release these guarantees are in violation of the Treaty. In particular, it is claimed that nationalization or measures having an effect equivalent to expropriation have been undertaken in respect of the bank guarantees, that the free transfer of funds has been prevented, that discrimina-

tion has taken place and that, generally, fair and equitable treatment and full protection and security have not been accorded.

23. In addition, the Company argues that the dispute concerns also the breach of the Contract and Egyptian law, particularly the Egyptian Civil Code, because Joy Mining has not been allowed to carry out the commissioning and performance testing of the equipment, the guarantees have not been released and compensation has not been paid.

24. The Company seeks relief in terms that the Tribunal declare that Egypt has breached its obligations under the Treaty, the Contract and statutory duty by expropriating the investment and wrongfully depriving it of the returns on its investment and by failing to accord fair and equitable treatment and full protection and security. Damages are claimed in the amount of UK£2.5 million plus interest and the full value of the bank guarantees if not released. An order that Egypt releases any claims to the guarantees and arbitration costs and expenses is also requested.

25. The Respondent opposes all such allegations and claims and has submitted objections to jurisdiction. These objections will be discussed by the Tribunal next.

Egypt's Objections to Jurisdiction

26. The Respondent has raised three objections to the jurisdiction of the Tribunal, namely:

- a. The existence of a forum selection clause in the Contract should be respected with regard to all contractual claims.
- b. The absence of any Treaty breaches that can be attributed to the Egyptian Government.
- c. That certain conditions required under Articles 25 and 26 of the ICSID Convention and the Treaty are not fulfilled in this case, in particular the requirement of an investment.

27. The Company has rightly argued that it is best to consider these objections in the reverse order, that is first to establish whether or not there is an investment in this case, second whether there are Treaty claims involved or if it is purely a contractual dispute, and lastly whether the forum selection clause of the Contract should be enforced.

28. The Tribunal agrees with this order and will address the objections accordingly.

29. Before this examination, however, the Tribunal wishes to address an issue that has commonly arisen in many recent arbitrations. It is often argued, and this is the case also in this dispute, that the Tribunal needs only to be satisfied that if the facts or the contentions alleged by the Claimant are ultimately proven true, they would be capable of constituting a violation of the Treaty. This is in fact the *prima facie* test applied in *UPS v. Canada*¹ and the assumption relied upon in *Methanex v. United States*² that, for the limited purpose of determining jurisdiction, the Claimant's factual contentions are *prima facie* deemed to be correct. In the Respondent's submission, however, this is not an absolute rule that prevents the Tribunal from further examining the Claimant's assertions.

30. The Tribunal notes that the *prima facie* test has also been applied in a number of ICSID cases, including *Maffezini*,³ *CMS*,⁴ *Azurix*,⁵ *SGS v. Pakistan*⁶ and *Salini v. Morocco*.⁷ As a *prima facie* approach to jurisdictional decisions this is no doubt a useful rule. However, it is a rule that must always yield to the specific circumstances of each case. If, as in the present case, the parties have such divergent views about the meaning of the dispute in the light of the Contract and the Treaty, it would not be appropriate for the Tribunal to rely only on the assumption that the contentions presented by the Claimant are correct. The Tribunal necessarily has to examine the contentions in a broader perspective, including the views expressed by the Respondent, so as to

¹ *United Parcel Service of America ("UPS") v. Government of Canada*, Award on Jurisdiction of November 22, 2002, available at <http://www.state.gov/s/l/c3749.htm>.

² *Methanex Corp. v. United States of America*, First Partial Award of August 7, 2002, available at <http://www.state.gov/s/l/c5818.htm>.

³ *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision on Objections to Jurisdiction of January 25, 2000, 16 *ICSID Rev.—FILJ* 212 (2001).

⁴ *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003, 42 *ILM* 788 (2003).

⁵ *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, *International Law in Brief* (Dec. 2003), available at <http://www.asil.org/ilib/azurix.pdf>.

⁶ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction of August 6, 2003, 18 *ICSID Rev.—FILJ* 301 (2003).

⁷ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction of July 23, 2001, 129 *Journal du droit international* 196 (2002) [French original]; English translation in 42 *ILM* 609 (2003).

reach a jurisdictional determination. This is the procedure the Tribunal will adopt.

Objection to Jurisdiction Concerning the Existence of an Investment

Respondent's Submissions

31. The Respondent contends that the Contract is nothing but a standard recurrent supply agreement entailing the selling of equipment by the Company and its purchase by IMC, so much so that the delivery is specified as FOB UK/USA Port Basis and the price is established C&F Alexandria Port Basis. The price was paid in full by means of an irrevocable confirmed letter of credit and, therefore, the whole operation was risk-free for the Company.

32. It is further explained that the terms of the Contract are ordinary commercial terms and that the bank guarantees are also of the kind found in any major commercial operation. In fact, it is asserted, the bank guarantees are merely contractual obligations that cannot be legally released as long as there is a claim for failure to perform under the Contract and this has not been settled by means of the dispute resolution mechanisms of the Contract. No draw-down has been effected in connection with such guarantees and the Egyptian Government has not in any way benefited from them.

33. The Respondent also explains that the Project is entirely run by IMC and that it began four decades earlier. The Company's role was to supply equipment as in the case of any other seller and in fact some of this equipment came to replace earlier Russian equipment that was no longer available.

34. In light of the above, the Respondent argues, there is not in this case any form of investment that can meet the requirements of Article 25 of the ICSID Convention and Article 1 of the Treaty inasmuch as the absence of an investment indicates that the dispute cannot arise directly from an investment.

35. Responding to the Company's invocation of certain decisions of ICSID tribunals, the Respondent distinguishes *CSOB*⁸ in that there was in that case a contract clause incorporating a bilateral investment treaty that contained an

⁸ *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic* (ICSID Case No. ARB/97/4), Decision on Objections to Jurisdiction (May 24, 1999), available at http://www.worldbank.org/icsid/cases/csob_decision.pdf; Decision of the Tribunal on the Further and Partial Objection to Jurisdiction of December 1, 2000, 15 *ICSID Rev.—FILJ* 530 (2000).

ICSID clause, but nothing of the sort is found in the present case. The Respondent also argues that *Fedax*⁹ concerned credit transactions, *Salini v. Morocco* dealt with the construction of a highway and *SGS v. Pakistan* involved a public law concession, all elements non-existent in the instant case.

The Claimant's Submissions

36. The Company has argued in connection with this Objection to the Tribunal's jurisdiction that the Contract involved, as explained above, two phases. One was concerned with the replacement of equipment, and the second entailed the engineering, design and supply of a completely new Longwall system.

37. The Contract specifies, it is explained, that the Company's scope of work included, among other items, engineering and design, delivery of materials and equipment, spare parts, maintenance tools, supervision of installation, inspection, test start-up operations and commissioning, training of personnel and technical assistance. Some of these activities involved long-term commitments by the Company, such as the obligation to produce and maintain stocks of spare parts for a period of not less than ten years. Services were to be provided both in and outside Egypt and technical assistance was to last for six months.

38. The Company accepts the fact that letters of guarantee are normally required in this kind of transaction, but argues that it is not normal at all to require the guarantee of over 97% of the Contract price, as was done in this case. A bank guarantee for the amount required is in the Company's argument an investment under the Treaty. Article 1 of the Treaty includes in the definition of investment, among other elements, every kind of asset; mortgage, lien or pledge; and claims to money or to any other performance under contract having a financial value.

39. The Company's participation in the Project, it is claimed, falls squarely within this definition as letters of guarantee are pledges, the entitlement to payment is a claim to money and the equipment and personnel involved in the Project are assets. *Salini v. Morocco* is invoked by the Claimant in support of its views in that a construction of a road was held to be an investment and also bank guarantees were involved; *Fedax* and *CSOB* are also invoked to the extent that financial instruments were held to qualify as investments; and *SGS v. Pakistan* is relied on as having recognized inspection services as an investment.

⁹ *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision on Objections to Jurisdiction of July 11, 1997, 37 *ILM* 1378 (1998).

Atlantic Triton is also mentioned as an example of a decision recognizing the conversion of equipment as investment.¹⁰

40. Several of these cases are also invoked in support of the proposition that, even if one or more activities might not be considered to be an investment, it is the overall operation that has to be taken into account, assessing the various factors globally (*CSOB, Salini v. Morocco*). The fact that the Company was on site for four years, the risk entailed in the termination of the Contract and the contribution made to Egypt's economic development, are all factors that in the Claimant's submission also support its qualification as an investor with a significant investment activity.

The Tribunal's Findings in Respect of the Existence of an Investment

41. The Tribunal must first identify precisely the dispute brought before it. In essence it is the entitlement of the Company to have the bank guarantees released by IMC. As the Company believes that the performance of the equipment supplied is satisfactory and that the start-up test and the commissioning have not been carried out because of IMC having impeded it, it is therefore entitled to have the guarantee released. The Respondent believes the equipment not to be able to perform adequately, that the tests have been impeded by the Company and, hence, that the guarantee cannot be released under the Contract until the question of performance is settled by means of the dispute resolution mechanisms therein provided, namely UNCITRAL arbitration or submission to the Egyptian courts.

42. The question that the Tribunal must answer is accordingly whether or not bank guarantees are to be considered an investment. It is an accepted fact that the ICSID Convention did not define an investment and that this was left to the consent of the parties, expressed by means of contracts, national legislation or bilateral investment treaties, among other features. The often cited Report of the World Bank's Executive Directors was quite explicit in stating that "No attempt was made to define the term 'investment' given the essential requirement of consent by the parties."¹¹

¹⁰ *Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea* (ICSID Case No. ARB/84/1), Award of April 21, 1986, English translation of French original in 3 *ICSID Reports* 13 (1995).

¹¹ Report of the Executive Directors on the ICSID Convention, 1 *ICSID Reports*, at 28; and comments thereon by Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001), at 121-134

43. The Tribunal will examine first the meaning and extent of the Company's claim in the light of the Treaty. As noted above, Article 1 of the Treaty provides for a variety of activities to be considered as investments, including pledges, claims to money, all kinds of assets and other matters.

44. The first contention of the Company in this respect is that the bank guarantees constitute an asset which thus qualifies under the definition of investment of the Treaty. The Tribunal has examined this specific argument concerning the bank guarantees under the Contract in order to establish whether this is an ordinary feature of a sales contract or an investment subject to the protection of the Treaty. The Tribunal is not persuaded by the Company's argument that this is an investment, as a bank guarantee is simply a contingent liability. This same understanding is apparent in a witness statement submitted by the Financial Director of the Company to the effect that:

The value of the guarantee is a real contingent liability which has the ongoing potential to affect the day-to-day operation of Joy and its ability to do business. The contingent liability only exists because Egypt have failed to return the guarantees.¹²

45. To conclude that a contingent liability is an asset under Article 1(a) of the Treaty and hence a protected investment, would really go far beyond the concept of investment, even if broadly defined, as this and other treaties normally do.

46. The Company has also asserted that its claim falls within Article 1(a)(iii) of the Treaty which includes within the scope of investment "claims to money or to any performance under contract having a financial value", and that it also should be considered a "pledge" under Article 1(a)(i) of the Treaty.

47. The Tribunal is not persuaded by this argument either. Even if a claim to return of performance and related guarantees has a financial value it cannot amount to recharacterizing as an investment dispute a dispute which in essence concerns a contingent liability. The claim here is very different from that invoked in *Fedax* where the promissory notes held by the investor were the proceeds of an earlier credit transaction pursuant to which the State

¹² Witness Statement of Mr. Peter Harding, Par. 11, Appendix 2 to Claimant's Counter Memorial on Jurisdiction; Request for Arbitration and Memorials on Jurisdiction, Vol. I, p. 354.

received value in exchange for its promise of future payment.¹³ This case will be discussed further below in the context of the Convention.

48. The Tribunal now turns to examine the claim of the Company in the light of Article 25 of the Convention. This Article provides in relevant part as follows:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

49. The fact that the Convention has not defined the term investment does not mean, however, that anything consented to by the parties might qualify as an investment under the Convention. The Convention itself, in resorting to the concept of investment in connection with jurisdiction, establishes a framework to this effect: jurisdiction cannot be based on something different or entirely unrelated. In other words, it means that there is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals.

50. The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.

51. A number of ICSID cases have dealt with the question of the definition of investment, confirming generally that a host of activities can be included within this concept. Thus, *Alcoa Minerals v. Jamaica* held that contribution of capital was one type of investment;¹⁴ *Amco Asia* first annulment proceeding

¹³ *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision on Objections to Jurisdiction of July 11, 1997, 37 *ILM* 1378 (1998).

¹⁴ *Alcoa Minerals of Jamaica, Inc. v. Jamaica* (ICSID Case No. ARB/74/2), Decision on Jurisdiction and Competence of July 6, 1975, 4 *Yearbook Commercial Arbitration* 206 (1979) (excerpts); and see also the comment by Carolyn B. Lamm, *Jurisdiction of the International Centre for Settlement of Investment Disputes*, 6 *ICSID Rev.—FILJ* 462 at 475.

established that an international tort and an investment dispute were not mutually exclusive categories;¹⁵ *Fedax* recognized that promissory notes issued in certain circumstances qualified as an investment; *CSOB* admitted that a loan was in the circumstances of the case an investment; *Atlantic Triton* accepted as an investment the conversion of equipment of fishing vessels; *Salini v. Morocco* did so in connection with the construction of a highway; and *SGS v. Pakistan* included within the concept of investment pre-shipment inspection activities and other services, as also did *SGS v. Philippines*.¹⁶

52. In all such cases, however, the connection between the defined investment and the framework of Article 25 has been deemed satisfactory. But in other matters this may not be the case. Some matters have been excluded from ICSID jurisdiction because of not meeting the requirement of Article 25 of the Convention. In 1999, for example, the Secretary-General of ICSID refused registration of a request for arbitration in respect of a dispute arising out of a supply contract for the sale of goods, on the basis that the transaction manifestly could not be considered an investment.¹⁷

53. Summarizing the elements that an activity must have in order to qualify as an investment, both the ICSID decisions mentioned above and the commentators thereon have indicated that the project in question should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State's development.¹⁸ To what extent these criteria are met is of course specific to each particular case as they will normally depend on the circumstances of each case.

54. The requirement mentioned above, that a given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole, is a perfectly reasonable one in the view of the Tribunal. Accordingly, it has undertaken an examination of the Contract

¹⁵ *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), *Ad hoc* Committee Decision of May 16, 1986, 1 *ICSID Reports* 503 (1993); and see also the comment by Carolyn B. Lamm, 6 *ICSID Rev.—FILJ* 462 at 475.

¹⁶ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004, available at <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>.

¹⁷ I.F.I. Shihata and A. Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 *ICSID Rev.—FILJ* 299 (1999) at 308 and note 27.

¹⁸ Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001), at 140.

as a whole in order to determine whether it could qualify as an investment under Article 25 of the Convention, although as explained the Tribunal is only called to determine the status and implications of the bank guarantees.

55. First, the Tribunal notes that the scope of the Contract is to replace and “procure” longwall mining equipment, this being an element of normal sales contracts. Second, admittedly the Contract involves a number of additional activities mentioned above, such as engineering and design, production and stocking of spare parts and maintenance tools and incidental services such as supervision of installation, inspection, testing and commissioning, training and technical assistance. This is certainly a special feature of contracts relating to the supply of complex equipment. But it does not transform the Contract into an investment, any more than the procurement of highly sophisticated railway or aircraft equipment would, despite the fact that such equipment would require additional activities such as engineering and design, spare parts and incidental services.

56. The terms of the Contract are entirely normal commercial terms, including those governing the bank guarantees. No reference to investment is anywhere made and no steps were taken to qualify it as an investment under the Egyptian mechanisms for the authorization of foreign investments nor were any steps taken to take advantage of any of the many incentives offered by that country to foreign investors.¹⁹ Moreover, the Tribunal notes that the production and supply of the kind of equipment involved in this case is a normal activity of the Company, not having required a particular development of production that could be assimilated to an investment on behalf of IMC’s demands.²⁰

57. The duration of the commitment is not particularly significant, as evidenced by the fact that the price was paid in its totality at an early stage. Neither is therefore the regularity of profit and return. Risk there might be indeed, but it is not different from that involved in any commercial contract, including the possibility of the termination of the Contract. The amount of the price and of the bank guarantees is relatively substantial, as is probably the contribution to the development of the mining operation, but it is only a small

¹⁹ For the Egyptian foreign investment legislation, authorization and incentives see generally www.gafinet.org.

²⁰ The offer of a variety of Longwall mining equipment by Joy can be seen at www.joy.com/products/longwall.html.

fraction of the Project. Certainly there is nothing here to be compared with the concept of “contrats de développement économique” or even contracts entailing the concession of public services.

58. The Tribunal is also mindful that if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment. International contracts are today a central feature of international trade and have stimulated far reaching developments in the governing law, among them the United Nations Convention on Contracts for the International Sale of Goods,²¹ and significant conceptual contributions.²² Yet, those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order. Otherwise, what difference would there be with the many State contracts that are submitted every day to international arbitration in connection with contractual performance, at such bodies as the International Chamber of Commerce and the London Court of International Arbitration?²³

59. The Tribunal is aware of the many ICSID and other arbitral decisions noted above and the fact that they have progressively given a broader meaning to the concept of investment. But in all those cases there was a specific connection to ICSID, either because the activity in question was beyond doubt an investment or because there was an arbitration clause involved. The same holds true of concession contracts in which the investor is called to perform a public service on behalf of the State.

60. Even the much cited *Fedax* case is to be distinguished from the present one although it admitted that financial contributions made in the form of promissory notes did qualify as an investment. Among other reasons for this distinction, the element that persuaded the tribunal to reach that conclusion was that the financing in question had and was being used by the State to finance its budget under a law of public credit. The tribunal in *Fedax* held in this respect:

²¹ United Nations Convention On Contracts For The International Sale Of Goods, 1980.

²² Paul Lagarde, *L'internationalité du point de vue de l'ordre international*, Revue Lamy Droit des Affaires, No. 46 (February 2002); Philippe Kahn, *L'internationalité du point de vue de l'ordre transnational*, Revue Lamy Droit des Affaires, No. 46 (February 2002); Claude Witz, *L'internationalité et le contrat*, Revue Lamy Droit des Affaires, No. 46 (February 2002).

²³ Horacio A. Grigera Naon, *El Estado y el Arbitraje Internacional con Particulares*, Revista Jurídica de Buenos Aires (1989), II, III; Eduardo Silva Romero, *ICC Arbitration and State Contracts*, International Court of Arbitration, Bulletin, Vol. 13, No. 1, (Spring 2002).

The promissory notes were issued by the Republic of Venezuela under the terms of the Law on Public Credit (the Law), which specifically governs public credit operations aimed at raising funds and resources 'to undertake productive works, attend to the needs of national interest and cover transitory needs of the treasure.' It is quite apparent that the transactions involved in this case are not ordinary commercial transactions and indeed involve a fundamental public interest.²⁴

61. The situation in this case is clearly not of the same nature. Moreover, the Egyptian Government, as noted, has not effected the drawdown of the bank guarantees and has not benefited from it, which is a situation exactly opposite to that in *Fedax*.

62. *Salini v. Morocco* has also occupied the attention of the parties. In that case, however, a major project for the construction of a highway was involved and this indeed required not only heavy capital investment but also services and other long-term commitments. The risk, as noted by the tribunal in that case, was quite evident, as were the elements of duration, regularity of profit and contribution to development. This is not the case here.

63. For the reasons discussed above, the Tribunal concludes that it lacks jurisdiction to consider this dispute because the claim falls outside both the Treaty and the Convention. This conclusion would render it unnecessary to discuss the other jurisdictional objections and issues raised by the Respondent. However, the Tribunal will consider these other issues in order to make certain clarifications concerning the nature of the Contract and the role of the forum selection clause contained therein.

Objection to Jurisdiction Concerning the Absence of Treaty-based Claims

Respondent's Submissions

64. The second objection to the jurisdiction of this Tribunal raised by the Respondent concerns the lack of Treaty-based claims. Such claims would arise from alleged breaches of the Treaty attributable to Egypt and as such would found a cause of action under the Treaty, separate and distinct from causes of

²⁴ *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision on Objections to Jurisdiction of July 11, 1997, 5 *ICSID Reports* 186 (2002), para. 42 (footnotes omitted).

action upon which contract-based claims are founded. Only the first category, it is argued, can be submitted to ICSID arbitration.

65. The Respondent argues that none of the three alleged breaches of the Treaty would found jurisdiction, not even if a *prima facie* test is applied. The first alleged breach is that the action by IMC and Egypt in respect of the bank guarantees constitutes nationalization, or a measure of equivalent effect, in violation of the Treaty. That assumes a taking of property that has not occurred. The second allegation by the Company is that there has been a wrongful retention of the sums represented by those guarantees which is in violation of the Treaty—right to the free transfer of the returns of the investment. This allegation assumes that there were assets invested capable of generating a return for the Claimant. Neither is this the case, according to the Respondent, as the Contract price was paid in full and there were no other assets or returns for the Company.

66. The third Treaty-based right alleged by the Company concerns fair and equitable treatment and full protection and security. But here again, the Respondent argues, there have only been some newspaper articles invoked as the basis of the claim, none of which has any probative value and these cannot imply that the Egyptian Government is involved in any form of wrongdoing against the Company.

67. The Respondent has also raised the connected issue that, in any event, none of the alleged actions can be attributed to the governmental authorities of Egypt as a State Party to the Treaty. This argument was first made in passing in the Respondent's Reply to the Counter-Memorial on Jurisdiction and later, at the hearing, was the subject of more particular detail and discussion, which indicated that IMC is only an operating agency for the Government in respect of mining activities. This does not differentiate it from any other commercial entity that would perform the same functions and activity. IMC actions cannot thus be attributable to the Government or constitute Treaty breaches by the Government of Egypt.

The Claimant's Submissions

68. Joy Mining argues in respect of this jurisdictional objection that, in addition to the three breaches of the Treaty provisions indicated, all the contractual and statutory violations listed in the Request for Arbitration also amount to Treaty violations. Because of the "umbrella clause" included in Article 2(2) of

the Treaty, any breach of Egypt's underlying obligations under the Contract also amount to breaches of the Treaty. But even if this were not so, the consent clause of the Treaty allows any contract claim to be taken to arbitration even if it does not amount to a Treaty breach.

69. To this end, the Claimant invokes *Salini v. Morocco* on the basis that the State consent was held to cover both the violations of the Treaty and any breach of a contract that binds the State directly. Similarly, the Claimant argued that *Vivendi* also held that jurisdiction does not require that a treaty breach be alleged because it is sufficient that the dispute relate to an investment made under the treaty.²⁵ In the Claimant's submission, the Treaty in this case is particularly broad thus allowing any Contract breach to be brought to ICSID arbitration.

70. In this connection the Claimant disputes the correctness of the decision in *SGS v. Pakistan* to the extent that it held that jurisdiction could only include contract claims amounting at the same time to breaches of the treaty and restricted the effect of the umbrella clause in the context of that particular treaty. It submits rather that *SGS v. Philippines* is correct on this point because it allows for the submission to ICSID arbitration of all investment disputes, contractual or not.

The Tribunal's Findings in Respect of Contract and Treaty Based Claims

71. This is not the first time that a tribunal is confronted with the issue of the difference between contract-based claims and treaty-based claims. In point of fact, this matter has been recently discussed in *Lauder*,²⁶ *Genin*,²⁷ *Aguas del Aconquija*,²⁸ *CMS* and *Azurix* and the Annulment Committees in *Vivendi* and *Wena*.²⁹ *SGS v. Pakistan* and *SGS v. Philippines* are two other recent instances of this discussion.

²⁵ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on application for annulment, July 3, 2002, 41 *ILM* 1135 (2002).

²⁶ *Lauder v. Czech Republic*, UNCITRAL Final Award of September 3, 2001

²⁷ *Alex Genin and others v. Republic of Estonia* (ICSID Case No. ARB/99/2), Award of June 25, 2001, available at <http://www.worldbank.org/icsid/cases/genin.pdf>.

²⁸ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Award of November 21, 2000, 16 *ICSID Rev.—FILJ* 641 (2001).

²⁹ *Wena Hotels Ltd. v. Egypt* (ICSID Case No. ARB/98/4), Decision on Application for Annulment rendered on February 5, 2002, 41 *ILM* 933 (2002).

72. The Tribunal is mindful that any answer to this question must be case specific as every contract and many treaties are different. However, a basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some form of State interference with the operation of the contract involved.

73. This issue was clearly explained in the now famous course given by Professor Prosper Weil in 1969 at the Hague Academy of International Law, where he wrote:

...comment prétendre, en effet, que le refus de l'Etat débiteur de payer le prix convenu est extérieur au contrat, sous le prétexte qu'il s'agirait de la confiscation de ce prix (ou des biens qu'il représente), alors qu'il saute aux yeux que l'on est en présence de l'inexécution pure et simple d'une obligation contractuelle, inexécution qui ne peut d'ailleurs être constatée par le juge qu'à la lumière du contenu même de ces obligations?³⁰

74. The Annulment Committee in *Wena* discussed the same Treaty between the United Kingdom and Egypt in respect of a dispute concerning commercial leases, holding in respect of this distinction:

The leases deal with questions that are by definition of a commercial nature. The IPPA [the Treaty] deals with questions that are essentially of a governmental nature, namely the standards of treatment accorded by the State to foreign investors...It is therefore apparent that *Wena* and EHC (the Egyptian Hotels Corporation) agreed to a particular contract, the applicable law and the dispute settlement arrangement in respect of one kind of subject, that relating to commercial problems under the leases. It is also apparent that *Wena* as a national of a Contracting State could invoke the IPPA for the purpose of a different kind of dispute, that concerning the treatment of foreign investors by Egypt. This other mechanism has a separate dispute settlement arrangement and might include a different choice of law provision or make no choice at all...The private and public functions of these various instruments are thus kept separate and distinct.³¹

³⁰ Prosper Weil, *Problèmes relatifs aux Contrats passés entre un Etat et un Particulier*, Recueil des Cours de l'Académie de Droit International, 1969, III, 5-240, at 145.

³¹ *Wena Hotels Ltd. v. Egypt* (ICSID Case No. ARB/98/4), Decision on Application for Annulment rendered on February 5, 2002, 41 *ILM* 933 (2002), paras. 31, 35 (*parenthesis added*).

75. In part, the distinction between these different types of claims has relied on the test of triple identity. To the extent that a dispute might involve the same parties, object and cause of action³² it might be considered to be a dispute where it is virtually impossible to separate the contract issues from the treaty issues and to draw any jurisdictional conclusions from a distinction between them. A purely contractual claim, however, will normally find difficulty in passing the jurisdictional test of treaty-based tribunals, which will of course require allegation of a specific violation of treaty rights as the foundation of their jurisdiction. As the Annulment Committee held in *Vivendi*, “[a] treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard.”³³

76. The Tribunal held in *CMS*, referring to this line of decisions, that “as contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claim to arbitration.”³⁴ This question is of course related to the role of the forum selection clause that will be considered further below.

77. In *SGS v. Pakistan*, the Tribunal came to the conclusion that it did not have jurisdiction over contract claims “which do not also constitute or amount to breaches of the substantive standards of the BIT.”³⁵ In *SGS v. The Philippines*, where contractual claims were more easily distinguishable from treaty claims, the Tribunal referred certain aspects of contractual claims to local jurisdiction while retaining jurisdiction over treaty-based claims.³⁶ A further feature noted by the tribunals in these last two cases was that both treaties contained a broadly defined “umbrella clause.”

³² *Lauder v. Czech Republic*, UNCITRAL Final Award of September 3, 2001, paras. 161, 163.

³³ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/13), Decision on application for annulment, July 3, 2002, 41 *ILM* 1135 (2002), para. 113.

³⁴ *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003, 42 *ILM* 788 (2003), para. 80; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, para. 89, *International Law in Brief* (Dec. 2003), available at <http://www.asil.org/ilib/azurix.pdf>.

³⁵ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction of August 6, 2003, 18 *ICSID Rev.—FILJ* 301 (2003), para. 162.

³⁶ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004, available at <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>, para. 163.

78. In the present case the situation is rendered somewhat simpler by the fact that a bank guarantee is clearly a commercial element of the Contract. The Claimant's arguments to the effect that the non-release of the guarantee constitutes a violation of the Treaty are difficult to accept. In fact, the argument is not sustainable that a nationalization has taken place or that measures equivalent to an expropriation have been adopted by the Egyptian Government. Not only is there no taking of property involved in this matter, either directly or indirectly, but the guarantee is to be released as soon as the disputed performance under the Contract is settled. It is hardly possible to expropriate a contingent liability. Although normally a specific finding to this effect would pertain to the merits, in this case not even the *prima facie* test would be met. The same holds true in respect of the argument concerning the free transfer of funds and fair and equitable treatment and full protection and security.

79. Disputes about the release of bank guarantees are a common occurrence in many jurisdictions and the fact that a State agency might be a party to the Contract involving a commercial transaction of this kind does not change its nature. It is still a commercial and contractual dispute to be settled as agreed to in the Contract, including the resort to arbitration if and when available.³⁷ It is not transformed into an investment or an investment dispute.

80. There has been much argument regarding recent cases, notably *SGS v. Pakistan* and *SGS v. Philippines*. However, this Tribunal is not called upon to sit in judgment on the views of other tribunals. It is only called to decide this dispute in the light of its specific facts and the law, beginning with the jurisdictional objections.

81. In this context, it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case. The connection between the Contract and the Treaty is the missing link that prevents any such effect. This might be perfectly different in other cases where that link is found to exist, but certainly it is not the case here.

³⁷ *Garanties bancaires et procédure arbitrale, Cautions et garanties bancaires*, Lamy, Décembre 2002, Division 9, Article 501.

82. The Tribunal concludes therefore that, even if for the sake of argument there was an investment in this case, the absence of a Treaty-based claim, and the evidence that, on the contrary, all claims are contractual, justifies the finding that the Tribunal lacks jurisdiction. Neither has it been credibly alleged that there was Egyptian State interference with the Company's contract rights.

Objection to Jurisdiction Concerning the Forum Selection Clause under the Contract

Respondent's Submissions

83. The Respondent argues in this connection that the Contract includes a Forum Selection Clause which governs all claims by Joy Mining arising under the Contract, including the question of the performance and the release of the bank guarantees. This clause determines to which forum all such claims must be submitted for resolution. This was expressly consented to by the parties and must be observed. Moreover, as the Treaty was in force for twenty-two years before the execution of the Contract, if the Company had wished to include ICSID arbitration in connection with an investment it could and should have so indicated.

84. Except for the first three claims raised by the Company in the Request for Arbitration which concern alleged breaches of the Treaty, a question discussed above, the Respondent points out that all the other claims are related either to the Contract itself or to statutory provisions, including the Egyptian Civil Code. Questions such as testing and commissioning, failure to release the bank guarantees and failure to issue the Provisional and Final Acceptance Certificates, are listed as claims under the Contract. Questions such as performance of obligations by IMC under the Contract, failure to comply in good faith, failure to pay compensation and abuse of position, are held to be claims concerning breaches of the Civil Code.

85. All such issues, the Respondent argues, are to be submitted to the selected forum and not to ICSID arbitration. The Respondent invokes in support of its views the decision in *SGS v. Pakistan*, which upheld a forum selection clause in respect of Contract claims that do not also amount to treaty claims, and the *Vivendi* decision which also explained that in certain cases a forum

selection clause in respect of contract claims should be given effect, a matter that will be examined further below.

The Claimant's Submissions

86. As the Company believes that the Contract claims are at the same time Treaty claims and that, in any event, the Tribunal would have jurisdiction under the Treaty to decide on Contract claims alone, it invokes the principle that a forum selection clause is not an obstacle to ICSID jurisdiction as held in *Vivendi, Lanco*,³⁸ *Salini v. Morocco* and *Azurix*,³⁹ among other cases. Moreover, the Claimant argues that the umbrella clause should be given broad effects in this context, thus also supporting ICSID jurisdiction in any alternative.

87. The Claimant asserts that on this other point *SGS v. Pakistan* allowed for a concurrent jurisdiction between an ICSID tribunal pursuant to treaty claims and a contractual arbitration forum for purely contract claims, thus not ousting ICSID jurisdiction as claimed by Egypt. The Company has also argued that *SGS v. Philippines* is incorrect on this point because that case found that the forum selected has exclusive jurisdiction and ICSID thereby loses its own exclusivity.

88. The Company submits accordingly that even if a forum selection clause is upheld, this does not detract from the jurisdiction appertaining to the ICSID tribunal. All of this is also in its view compatible with the exclusive remedy rule of Article 26 of the ICSID Convention, as this clause allows for an exception to be agreed to by the parties.

The Tribunal's Findings in Connection with the Forum Selection Clause

89. Having concluded that there is no investment in this case and that, moreover, all the claims involved are in any event contract-based claims, it is necessary also to conclude that in the absence of any ICSID jurisdiction only the forum selection clause stands. There is no question here of either exclusive ICSID jurisdiction or of concurrent jurisdiction; even less so is there room here

³⁸ *Lanco International, Inc. v. Argentine Republic* (ICSID Case No. ARB/97/6), Preliminary Decision on Jurisdiction of December 8, 1998 (English text), 40 *ILM* 457 (2001).

³⁹ *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, *International Law in Brief* (Dec. 2003), available at <http://www.asil.org/ilib/azurix.pdf>.

to adopt the solution of *SGS v. Philippines*, directing the parties to local courts first and suspending ICSID jurisdiction until that first step is completed.

90. The situation in this case is precisely that which the *Vivendi Annulment* Committee envisaged when holding that:

In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.⁴⁰

91. The rationale for this conclusion on contract-based claims and the validity of forum selection clauses is entirely logical, as is the conclusion in the converse situation, that is, as in *Vivendi*, that the claim is treaty-based:

...where “the fundamental basis of the claim” is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.⁴¹

92. This conclusion, however, is not the end of the matter. The forum selection clause in the Contract does not refer the dispute solely to domestic courts, a situation which understandably is of concern to the Company, but provides in addition for a separate mechanism of international arbitration. Article 11 of the Contract provides as pertinent:

Should the Parties fail to agree upon any or all matters in dispute, the disputed matters will be finally settled in accordance with the rules of ‘UNCITRAL’ (United Nations Commission on International Trade rules and Law). The disputes shall be finally settled through arbitration under the auspices of the regional center for arbitration in Cairo after obtaining the consent of the minister of industry or to be settled through Egyptian courts.

93. The Company has expressed its concern about UNCITRAL arbitration in view of the fact that the approval of the Minister of Industry is required, a

⁴⁰ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/13), Decision on application for annulment, July 3, 2002, 41 *ILM* 1135 (2002), para. 98.

⁴¹ *Id.* para.101.

matter that was discussed at length in the case of *SPP* and finally led the French courts to set aside the award because the signature of a Minister involved in that case was held not to imply the will of the Egyptian State to become a party to the contract.⁴² The Respondent, however, argues that in the instant case the consent of the Minister has already been given the moment such Minister approved the Contract.

94. The Company has also made the argument that under the Amendment Agreement there are specific forum selection clauses for disputes concerning the release of bank guarantees. These include, in the terms of Clauses 1.7 and 2.8, arbitration and the right to “pursue other remedies”. This last reference, it is argued further, includes ICSID arbitration. The Tribunal must note, however, that arbitration clauses, including ICSID clauses, need to be much more precise to be given the effect the Company attaches to those references.

95. The Tribunal notes further that the Respondent gave in the hearing the assurance and formal commitment that resort by the Company to UNCTRAL arbitration would be honored and the final award on the merits of the dispute would be the basis governing the release of the bank guarantees. The bank guarantees would not otherwise be called. This statement was made as a solemn Declaration on behalf of the Egyptian State and IMC by Counsel and Agents with the express intent that it can be relied upon. The Declaration made was expressed as follows:

I am solemnly declaring: In the name of the Egyptian Government as well as in the name of IMC that both have never raised and shall never raise in the future any objection against any arbitration that Joy may file against IMC seeking remedies for whatever claims pertaining to or in relation with the contract of 26th April 1998, its amendment or other issues resulting therefrom, including the letters of guarantee. This solemn declaration has to be recorded in the minutes of the meeting and relied upon in any manner the tribunal considers appropriate.⁴³

⁴² *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3) 3 *ICSID Reports* (1995) at 45-336.

⁴³ Transcript of the Hearing held on Monday 29th March, 2004, Statement by Counsel for the Respondent, Professor Ahmed S. El-Kosheri, at 37-38, as amended by the Respondent.

⁴⁴ Permanent Court of International Justice, *Eastern Greenland* case, 1933, PCIJ, Ser. A/B, No. 53, at 52.

⁴⁵ International Court of Justice, *Nuclear Tests* case, ICJ Reports 1974, at 253.

96. The Permanent Court of International Justice in the *Eastern Greenland* case,⁴⁴ like the International Court of Justice in the *Nuclear Tests* case,⁴⁵ has held that formal declarations by States and its officials constitute unilateral acts giving rise to obligations on which third parties may rely to exercise their rights. Similarly, in the *Filetage du Golfe de Saint-Laurent* case,⁴⁶ an arbitral tribunal held that the State was to be held under an obligation to observe certain commitments made by counsel and agents in the proceedings.

97. The Tribunal accordingly notes that IMC is under an obligation to observe the Contract forum selection clause in so far as resort to UNCITRAL proceedings has been agreed to and to abide by the decisions on the merits by the Tribunal thus seized of the matter. The Tribunal also notes that the approval of the Contract by the Minister for Industry is the expression of the consent given by the Egyptian State to UNCITRAL arbitration, as assured by Counsel for the Respondent.

98. As the solemn declaration by Counsel for the Respondent was made on behalf of both the Egyptian State and IMC, the Tribunal also takes note that the Egyptian State is under an international legal obligation to facilitate the enforcement of any award issued in this case to the extent that the intervention of the State is required.

99. The option of resorting to Egyptian courts is also precluded by the Declaration made as the obligations both to resort to arbitration and abide by its results have been solemnly recorded.

III. DECISION

In the light of the above considerations, the Tribunal decides:

- a. The Centre lacks jurisdiction and the Tribunal lacks competence to consider the claims made by the Company.
- b. The Tribunal notes that IMC is under the obligation to observe the Contract forum selection clause in so far as arbitration in the Cairo Regional Arbitration Centre governed by the UNCITRAL

⁴⁶ Tribunal Arbitral institué par le compromis du 23 Octobre 1985 entre le Canada et la France: différend concernant le filetage à l'intérieur du Golfe de Saint-Laurent, Sentence du 17 Juillet 1986, 1986/3, 713-786, p. 756.

Arbitration Rules might be initiated by the Company, and to abide by any award issued in respect of this dispute.

- c. The Tribunal further takes note that the approval of the Contract by the Minister of Industry constitutes the consent given by the Egyptian State for IMC to submit disputes under the Contract to UNCITRAL Arbitration and that such consent to IMC's agreement to arbitrate has been expressly confirmed by Declaration made in this arbitration by counsel on behalf of the Egyptian State.
- d. The Tribunal also takes note that the Egyptian State is under an international legal obligation to facilitate the enforcement of any award issued in this case to the extent that the intervention of the State is required.
- e. The Tribunal further notes that the option of submitting the Contract disputes to the Egyptian courts as provided for in the Contract forum selection clause is effectively precluded by the above mentioned Declaration if the Company initiates arbitration proceedings.
- f. Each Party shall pay one half of the arbitration costs.
- g. Each Party shall bear its own legal costs.

So Decided

PROFESSOR FRANCISCO ORREGO VICUÑA
President of the Tribunal

MR. WILLIAM LAURENCE CRAIG JUDGE C. G. WEERAMANTRY
Co-Arbitrator *Co-Arbitrator*