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

FIRST PART

Do the Claimants have standing to invoke ICSID jurisdiction and this Tribunal's competence over the present case ?

1. The main argument regarding ICSID's jurisdiction and this Tribunal's competence over the present case is based on the contention that the two Parties to the dispute, i.e. (SPP group and Egypt) gave their consent in writing to ICSID arbitral jurisdiction:

   a. Egypt by enacting Law 43/1974, Article 8 of which provides in relevant part as follows:

> Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law No 90 of 1971, where such Convention applies.
>
> Disputes may be settled through arbitration. An arbitration board shall be constituted comprising a member on behalf of each disputing party and a third member acting as chairman to be jointly named by the said two members. Failing agreement on the nomination of the third member within thirty days of the appointment of the second member, the chairman shall be chosen, at the request of either party, by the Supreme Council of Judicial Bodies from among counsellors of the Judiciary in the Arab Republic of Egypt..."

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

> ...the Arabic text of Article 8 of Law 43 of 1974 refers to the settlement of disputes within the framework of ICSID Convention in the cases where it (i.e. the Convention) applies, and not, as erroneously mentioned in the English translation, where Law 90 of 1971 ratifying the Convention applies. I have thus registered the request of SPP without prejudice to the question whether said article eight constitutes consent for the purposes of the ICSID Convention or merely includes a reference to this Convention in the cases where consent for ICSID jurisdiction is issued separately. This matter if raised, will be for the Arbitral Tribunal to decide).

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

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

> ..Recognizing that your Government has taken the position that the ICC award was rendered without a jurisdictional basis, we hereby notify you that we accept and reserve the opportunity of availing ourselves of the uncontestable jurisdiction of the International Centre for the Settlement of Investment Disputes, under the auspices of the World Bank, which is opened to us as a result of Law N° 43 of 1974, Article 8 of which provided that investment disputes may be settled by ICSID arbitration.

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

2. In support to this contention, the Claimants, in substance, advance various series of arguments:

a. That the consent to ICSID is to be governed by international Law applicable to international treaties, and that no international law principle requires that the wording allegedly containing Egypt's consent should be construed restrictively. Consequently, that the ICSID Convention should be interpreted in view of its purpose and objectives, and that a government's consent to submit disputes to an international tribunal is subject to the same rules of interpretation as ordinary contractual obligations.

b. That Article 8 of Law 43/1974 is self-executing. In this respect, Claimants assert that the acceptance of ICSID Jurisdiction over the "settlement" of disputes can only mean the acceptance of arbitration as a mode of settlement to the exclusion of the other settlement mechanism provided for by the Convention which is conciliation, particularly when taking into consideration that the first paragraph of Article 8 of the said Law is mandatory.

c. Furthermore, since negotiations with the A.R.E. took place in English only, and the Heads of Agreement were drafted in English alone, the Claimants assert that they are entitled to rely upon the English translation of the text of Law published by A.R.E., as well as upon the official publications addressed by the A.R.E. to foreign investors, thereby concluding that it cannot be admitted to take into consideration Egypt's argument that the verb used in the Arabic text of Article 8 has some floating significance which only a hypersensitive scholar might appreciate. Claimants then affirm that it cannot be accepted that everything not in Arabic the A.R.E. published with respect to its investment regime is clouded by an unstated caveat lector whereby the A.R.E. may at any time contradict anything stated therein on the basis of its own unilateral interpretation of the Arabic text; in that case, Claimants say, good faith would require that Egypt says so before investments are made. Claimants also assert that, even on the basis of the original Arabic text of Article 8, their contention is well based; suffices to consider the comparison of the two verbs used in the first and the second paragraph of Article 8 itself.

d. Claimants also advance that Article 8 of Law N° 43 should be construed in the light of the general legislative purpose of Law N° 43, and that it should not be interpreted so as to render its clause (3) redundant. Claimants further assert that by applying the principle of the "effet utile" one comes to the conclusion that Article 8 should have meant the expression of Egypt's consent to arbitration under the convention. Such submission is confirmed by the investment

literature issued by the General Authority of Investment and Free Zones as well as by the historical context of Egypt's adherence to the Washington Convention and the enactment of Foreign Investment Law N° 43/1974.

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

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

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

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

   d. That for the interpretation of Law 43/1974, it must be borne in mind that Article 2 of the Law issuing Law N° 43 provides that "Matters not covered by this Law are subject to the applicable Laws and regulations", and that the Arabic text of Article 8 of Law 43/1974 contains nothing of a mandatory effect, but simply enunciates the available methods of settlement of investment diputes to be agreed upon between the investor and Egypt. On the one hand because a linguistic study of the verb used in the Arabic text of the first paragraph of Article 8 proves that the verb cannot be correctly translated into the English mandatory verb "shall" and on the other hand because the second paragraph of said Article 8 is not to be disassociated from the first paragraph since the second paragraph begins with "and",consequently, Egypt contends, the whole text of Article 8 must be read in its entirety. thus it must be read as follows: "l'on

peut également , ou en outre l'on peut..." thereby confirming the facultative nature of the provisions of Article 8 (Egypt's memorial in reply to the oral arguments of the Claimants expressed in the session of September 8, 1987, p. 12). Egypt also points out that the language of Article 45 of Law N° 43 which states : "l'on peut convenir de régler par arbitrage les litiges qui surgissent entre les projets établis dans les zones franches ou entre ceux-ci et l'organisme ou autres autorités et organes administratifs ayant rapport avec les activités exercées dans la zone ...", combined with the language of Article 8 confirms the conclusion that the legislator's intention is simply to indicate the possible procedures for the settlement of investment disputes, and for Egypt to advance that :

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

To the conclusion that :

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

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

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

e. Egypt also advances that the phrase in fine of paragraph 1 of Article 8 which says "where such Convention applies" is relevant to the effect that the applicability of the Convention is conditional upon the presence of certain prerequisites, inter alia and most

importantly, the consent of the Parties to this effect. Furthermore, Egypt asserts that Article 45 of the executive statute of Law 43/74 (the executive statute issued by decree N° 375 of 1977 of the Minister of Economy) states that "sans préjudice des dispositions de l'article 8 de la loi..." and not as erroneously translated to "In accordance with the provisions of Article 8 of Law N° 43..." and that the executive statute cannot have the effect, eventually, to add to the provisions of Law 43/74, to the conclusion that if Law 43/74 does not contain Egypt's consent to the jurisdiction of ICSID, the statute, consequently, cannot have this effect.

4. In my opinion, the issue of jurisdiction, in the present case, is to be determined by the answer to two major questions :

   a. Which law is applicable to the finding of whether Egypt did or did not consent to ICSID jurisdiction, and more precisely to the settlement of the present case by arbitration under the auspices of ICSID ?

   b. Which text is to be considered for the purpose of determining the Tribunal's jurisdiction ? Is it the text of the Law in its original language or the translation into another language, and in case of more than one translation which version should prevail ? In other terms, what are the requirements deemed necessary for a translation to be considered as a basis of a State's declared intention in the matter of consent to ICSID jurisdiction ?

5. Egypt has no point in stating that its historical evolution and specifically the burden of the capitulary regime has to be taken into consideration in the interpretation of its modern laws and statutes. Egypt is a sovereign State, signatory of the Charter of the United Nations at San Francisco on June 26, 1945, and since the creation of the United Nations, enjoys the same prerógatives

as all other sovereign member States. In exercising its legislative power, Egypt acts as a modern sovereign State; hence, the far or near past of the historical evolution has no impact in this respect. Moreover, Egypt is not only a signatory State to the Washington Convention, but also the siege of a regional commercial arbitration Centre created pursuant to a resolution to this effect by the Asian-African Legal Consultative Committee on January 1978 (M. Davis-Business Law in Egypt 1984 p. 138),and ICSID concluded with that Centre an accord in application of Article 63 of the Convention. (G. Delaume, Le Centre International pour le Reglement des differends relatifs aux investements (CIRDI)).

6. It has to be noted that the present Tribunal has been always aware of the importance of the consent of the parties to the dispute as a condition of jurisdiction of ICSID. In its preliminary decision of November 27, 1985, after reviewing pertinent parts of the Preamble of the Convention and the report of the Executive Directors on the Convention,the Tribunal emphasized the consent as the corner-stone of the jurisdiction of the Centre by stating that ascertaining the existence of the consent "is a task that this Tribunal must approach with great care." (Paragraph 51 of the Preliminary Decision.)

7. It is true, as mentioned in said preliminary decision, that the Convention does not prescribe any particular form for the consent required to establish the Centre's jurisdiction other than that being "in writing". As made clear in the Report of the Executive Directors,a host State may in its investment promotion legislation offer to submit disputes arising out of certain classes of investment to the jurisdiction of the Centre, and the investor may give his consent by accepting the offer in writing.

8. Needless to point out that an Arbitral Tribunal operating under the auspices of ICSID has to take into account the convention, both in its language and spirit. In the case AMCO ASIA vs the Republic of Indonesia (Award on jurisdiction), it was indicated that according to the very first sentence of the Convention's Preamble ICSID arbitration

is a method of settlement which corresponds to the interests, not only of investors, but of the Contracting States as well. In other terms, the Convention is aimed to protect to the same extent and with the same vigor the investor and the host State. However, such correct and accurate statement does not, and indeed cannot, be the basis of an assumption of ICSID jurisdiction. The language of the Convention is explicit: there must be a consent in writing (Article 25/1) and that "any contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre... Such notification shall not constitute the consent required by paragraph (1)" (Article 25/4). In the light of the above mentioned considerations, one may conclude that it is in the mutual benefit of an investor and a host State to submit investment disputes to ICSID jurisdiction, but one should also conclude that in accordance with the language and spirit of the Convention and the subtle combination of the needs of capital exporting and importing countries agreed upon and embodied in the Convention, the jurisdiction of the Centre does not and cannot exceed the limits traced by the Convention allowing the Centre to become the Juge de Droit Commun of investment disputes on the assumption of a consent which does not exist in fact or in law.

9. For the establishment of the jurisdiction of the Centre, the Convention requires that the parties to the dispute consent to that jurisdiction in writing (Article 25 of the Convention). The Convention also necessitates that the request for either conciliation (Article 28/2) or arbitration (36/2) includes the parties' consent to the method of settlement they consented upon under ICSID jurisdiction. It is an obligation under the Convention (Articles 32/2 and 41/2) for the Conciliation Commission and the Arbitral Tribunal to rule upon any objection raised to the effect that the dispute is not within the jurisdiction of the Centre, or is not within the competence of the Conciliation Commission or

the Arbitral Tribunal. The conciliation commission and the arbitral tribunal are empowered on their own initiative under "conciliation rules" (rule 30/2) and "Arbitration rules" (rule 41/2) to consider at any stage of the proceeding whether the dispute before them is within the jurisdiction of the Centre or within the competence of either of them.

The Preamble of the Convention states that "no contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration."

The Report of the Executive Directors explains that "the term "jurisdiction" of the Centre is used as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings", and also states that, since the Convenion does not require that consent of both parties be expressed in a single instrument, "thus a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre and the investor might give his consent by accepting the offer in writing." (paragraphs 22-24 of the Report).

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

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

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

10. In order to meet the requirements of the Convention the consent "in writing" to the jurisdiction of the Centre, should indicate unequivocally the method of settlement agreed upon i.e. whether the concerned party consents to conciliation or favours a direct recourse to arbitration.

11. In the light of the variety of the forms of consent admitted in the framework of the Convention, Professor Reuter explains that if the Convention is characterized by its flexibility as to the form in which consent can be expressed and embodied, the Convention

"reste cependant assez prudente sur la nature juridique du consentement; il peut être conventionnel et relever du droit national ou du droit international public; mais rien n'exclut à priori que dans un système juridique national déterminé, il ne présente aucun caractère conventionnel et résulte d'un acte condition d'une part et d'un statut légal de l'autre. Il se pourrait que ces distinctions ne soient cependant pas sans importance, notamment dans le cas où la validité du consentement serait mise en cause: la détermination du droit applicable et des causes d'invalidité pourrait varier d'un cas à un autre." (Emphasis added) (Investissements étrangers et arbitrage entre Etats et personnes privées : P. Reuter, Réflexions sur la compétence du Centre, Paris, Pedone, 1969. p. 14)

12. In the present case, the alleged consent of Egypt, or rather and more precisely the alleged offer by Egypt to submit investment disputes to ICSID arbitration as contained in the Egyptian Investment Law N° 43 of the year 1974 (Article 8), the Claimants contend that they accepted this offer. Thus the nature juridique of the alleged consent to ICSID arbitration is one resulting from "un acte condition d'une part et d'un statut légal de l'autre" with the result that the applicable law to the consent is, in the present case, the Egyptian Investment Law N° 43/1974. This is not an application of Article 42 of the Convention, as asserts Egypt, because that article deals with the applicable law to the subject matter of the dispute and provides that in the absence of an agreement to the contrary the law of the contracting State party to the dispute shall be applicable. In essence the applicability of Egypt's Law 43/74 as to the finding of whether or not Egypt offered to submit investment disputes to conciliation or to arbitration in implementation of the provisions of Law N° 43/74 derives from the nature juridique of the offer contained in said legislative text. The legal consequences of this basic reality can be summarized as follows:

a. The Egyptian Law N° 43/74 is to be applied, per se, to the finding by this Tribunal of jurisdiction. Precedents by international tribunals to the effect that municipal laws are to be considered as a mere fact, are not of any relevance to the present case.

b. The international rules of interpretation of treaties codified in articles 31 and 32 of the Vienna Convention of 1969 on the law of treaties cannot be applied mutatis mutandis to the interpretation of Egypt's Law N° 43/74. Such rules, are conceived as applicable to treaties and other contractually binding obligations governed by the fundamental rule of pacta sunt servanda. Contrarily, with regard to the interpretation of a text of law, there is no place for a search of a common intention. Article (1) of the Egyptian Civil Code stipulates that "Legislative provisions are applicable to all issues which are covered by these provisions, in text and content." (The translation published by the Middle East Library for Economic Services, Cairo.)

13. The preliminary decision rendered by the present Arbitral Tribunal ordering suspension of the proceedings was based on the application of Law 43/74 and of Article 8 of that Law, as the law applicable to the determination of whether or not Egypt, by the effect of the said Law, gave a standing offer to submit investment disputes concerning the application of the provisions of the Law to ICSID arbitration. The decision in question clearly stated, "thus, the determinative question as to the Tribunal's competence in the present case is the following : Does Law 43 constitute a self-executing offer by Egypt to accept the Centre's jurisdiction with respect to the present dispute ?" By such formulation, the Tribunal rightfully referred to Egypt's Law 43 as the Law applicable to the finding of jurisdiction.

14. In this respect, two preliminary observations must be borne in mind :
a. That the Convention itself takes the utmost care to ensure that the consent is certain. For that purpose, Article 25 (4) of the Convention explicitly states that the notification by a State to the Centre that it would consider submitting certain disputes to the jurisdiction of the Centre does not constitute the consent required to the establishment of jurisdiction. Professor Reuter

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

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

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

16. The divergence between the parties in the present case with regard to article (8) of Law 43/74, is limited to two points:

1- Does the expression "shall be settled " correspond to the exact wording of the text in Arabic ? and

11- what is the correct translation of the last phrase of the first paragraph of Article (8)? Should the translation be : "where such law applies" as it figures in the translation effectuated by the "Arab and Foreign Investments and the Free Zones Authority" (Annex 1 to the Claimants request for arbitration), or "where such Convention applies" (the translation as rectified by the Secretary General of ICSID referred to herein above), or "in the case where such treaties and convention apply" (according to the translation effectuated and qualified as the accurate translation by Mr. S. Saleh in his affidavit of Law - Claimants Exhibit N° 45).

Mr. Saleh pointed out that "the English version issued by the Egyptian authorities translates "they apply" by "such law applies" (i.e. Law N° 90 of 1971) instead of by "they (such treaties and conventions) apply". The verb in Arabic, however, is "tasri" which is in the plural and therefore strongly indicates that the translation "such law applies" is incorrect". (Affidavit p. 2). That statement is further confirmed by the telex dated June 14, 1985 (Claimant's Exhibit 11) in which Mr. J.F. Rycx stated that "I have read the Arabic record of Egyptian Law 43/1974. In our opinion, the verb "tasri" which is used at the end of the first paragraph of Article 8 clearly refers to treaties and Conventions." The verb has been put in the feminine singular. According to the established Arabic grammar, feminine singular is used for concordance when the subject in the plural denotes irrational or inanimate objects. In this context, the verb "tasri" could not be related to the word "law" which in Arabic is masculine."

17. It appears from the above that the translation to English language effectuated by the "Arab and Foreign Investments and the Free Zones Authority" lacks precision. Setting aside, for the time being the exactitude of the tranlation of "shall be settled", it is beyond any doubt that the correct translation of the last phrase of paragraph 1 of Article (8) is not as it figures in the translation of the said Authority. The Affidavit of Mr. Saleh presented by the Claimants confirms this conclusion, since he asserted that paragraph 1 of Article (8) should read as follows : "Investment disputes relating to the implementation of the provisions of this law shall be settled in a manner to be agreed upon with the investor, or within the framework of the treaties in force between the Arab Republic of Egypt and the investor's State or within the framework of the Convention for the Settlement of Investment Disputes between States and the Nationals of another State to which the Arab Republic of Egypt has adhered by Law N° 90 of 1971, in the cases where they (such treaties and Convention) apply" (emphasis added).

18. For all the above stated reasons, we are of the opinion that the issue of the jurisdiction of the Centre and the competence of the present Tribunal has to be decided upon on the basis of the text of Law N° 43/74 and not upon any other translation. The fact that said law contains the State's offer to submit certain disputes to ICSID's jurisdiction, cannot mean that a translation thereof in a foreign language may by itself have the same effect. The consent to the jurisdiction of the Centre necessitates a will and a clear intention to that effect, which includes the consent upon one or the other of the two methods of settlement of investment disputes provided for by the Convention. Moreover, it has to be noted that in the present case the only text enacted when the Claimants entered into their investment engagements in Egypt (September-December 1974) is the text of Law 43/74, in its original language. All English or other translation, as well as the issuance of the Executive Regulations, came into existence at a later date.

19. Summing up, the last phrase of the first paragraph of Article (8) of Law 43/74 is beyond any doubt erroneously tranlated by the Arab and Foreign Investments and the Free Zones Authority (Claimants Exhibit 1), as admitted by both parties. Therefore, in our opinion, the present Tribunal cannot base its decision concerning jurisdiction upon that erroneous tranlation. Consequently, the Tribunal has, first, to consider the issue of jurisdiction on the basis that Article (8) of Law 43/74 reads as follows: "Investment disputes relating to the implementation of the provisions of this law shall be settled in a manner to be agreed upon with the investor, or within the framework of the treaties in force between the Arab Republic of Egypt and the Investor's State, or within the framework of the Convention for the Settlement of Investment Disputes between States and the Nationals of another State to which the Arab Republic of Egypt has adhered by Law N° 90 of 1971 in the cases where they (such treaties and Convention) apply.

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

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

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

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

Reference in paragraph (1) of Article (8) to bilateral treaties, does not, and cannot be construed as acceptance to ICSID or to any other method of settlement, in case the bilateral treaty necessitates a separate consent to that effect. The same reasoning, as well,

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

It goes without saying that in case the conditions for the application of either bilateral treaties or the Convention are satisfied, the dispute must, or shall, be settled in the manner provided for by such a treaty or by the Convention. On the other hand, if the conditions and requirements are not satisfied, they cannot be applied and law 43/74 cannot have the effect of conferring consent to arbitration neither in the framework of the bilateral treaties nor in the framework of the Convention. Consequently, reference in article (8) of law 43/74, to both bilateral treaties and the Convention is not to be considered redundant with the eventual method of settlement that may be agreed upon with the investor since in this case the agreement is not limited to any particular form of settlement, neither concerning the procedures nor the law governing the subject matter. Only by acting accordingly, the Tribunal would not exceed its proper sphere of interpretation to infringe upon the domain of imperium which is the domain reserved to the legislator.

22. The French translation of article (8) of Law 43/74 published in the "Bulletin du Centre de documentation d'études juridiques, économiques et sociales" (le Caire, 3ème année N° 4, octobre 1976) and submitted to this Tribunal, reads as follows: "Les contestations ayant trait à l'investissement, et concernant la mise en exécution des dispositions de la présente loi, sont réglées par le moyen convenu avec l'investisseur ou dans le cadre des conventions en vigueur entre la R.A.E. et l'Etat

de l'investisseur, ou encore dans le cadre de la Convention de règlement des contestations des investissements entre l'Etat et les citoyens des autres Etats, Convention à laquelle a adhéré la R.A.E. en vertu de la loi N° 90 de 1971, et ce dans les cas où la dite Convention est applicable." (Egypt's exhibit 73).

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

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

24. Moreover, it has been explained, during the session of this Tribunal held in Paris on September 8, 1987, that the verb used in the Arabic text of article (8) translated to "shall" is "tatim", and the verb in Arabic does not contain the mandatory effect eventually attributed to "shall" in the English language. It has also been pointed out that the same verb, in the same tense is used in the Civil Code of Egypt, for example, as regards contracts to the effect that the contract is concluded "yatim" (yatim being the masculine form of the same verb and in the same tense of "tatim", since the contract in the Arabic language is masculine), and that no mandatory effect can reasonably be attributed to the use of the verb "yatim" since it would be aberrant to pretend that the legislator orders that the contract envisaged should be necessarity concluded. If the contract "yatim" is concluded in case the conditions set forth by law, to its conclusion, are complied with, in the same vein, the investment disputes "tatim" are settled by one or the other method provided for in article (8) of Law 43/74 in case its conditions of application are satisfied.

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

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

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

26. Nowhere in the travaux préparatoires of Law 43/74 does there exist any reference that can support the interpretation of the text of article (8) of Law 43, as advanced by the Claimants.

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

27. It does not seem that the Convention is intended in the framework of Law 43/74 to be the safety net of all investment disputes. Nothing in the language of Law 43/74 can lead to this conclusion. Professor Goldmann, wrote following the annulment by the Paris Court of Appeal of the ICC Award that: "It is true that Article 25 (1) of the Convention subordinates the jurisdiction of the Centre to the written consent of the parties to submit the dispute to it. But it is permitted that, by adopting legislation that provides for ICSID arbitration for investment disputes, a State gives precisely this consent for any dispute of this nature which would appear in the future" (Claimants final submission on jurisdiction, September 25, 1985, p. 2). In my opinion, the eminent Professor Goldmann kept silent on whether or not Egypt's Law 43/74 contained such an offer. In the same vein and in a more precise assertion, Mr. P.H. Leboulanger, commenting the above

mentioned Paris Court of Appeal decision wrote that "La loi 43/74 en disposant que les litiges relatifs aux investissements étrangers peuvent être réglés par l'arbitrage international n'a, à notre sens, aucunement entendu modifier cette distinction et les différends auxquels l'Etat égyptien est partie, s'ils peuvent être soumis à l'arbitrage, ne le sont pas nécessairement." (P.H. Leboulanger - Etat, politique et arbitrage, l'affaire du plateau des pyramides, Revue de l'arbitrage, 1986 N° 1, p. 11).

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

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

28. It is to be noted that, in the present case, Law N° 43/74 had been the only legal text issued or published at the time the Claimants entered into their investment engagements in Egypt (September 23, 1974 for

the Heads of Agreement, and December 12, 1974 for the contract concluded between the Claimants and the Egyptian General Organization for Tourism and Hotels). As a logical consequence, all contentions to the effect that the Claimants relied, when they entered into the contract upon any other document issued or published other than the text of Law N° 43/74 are of no relevance since they are in clear contradiction with the facts.

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

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

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

of the method of settlement. As pointed out by Egypt and not contested by the Claimants, the Arabic text of Article 45 of the said executive decree adds in fine the phrase : "dans le cas où elle est applicable" (Egypt's final memorial p. 50). This proviso dissipates any doubt to the effect that by article 45 of decree, article (8) should be read in the sense that by enacting Law 43/74 Egypt offered to submit the investment disputes to ICSID jurisdiction.

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

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

this signature to the effect to be bound by an obligatory jurisdiction of the Centre.

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

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

a) Guarantees against expropriation

b) Exemption from certain labor, business and other laws

c) Privileges with respect to exchange controls and the expatriation of funds.

d) Exemption from taxation and custom duties, and,

e) Special procedures for the settlement of investment disputes."

(p. 30). The guide adds in comment of article (8) of Law 43 "In the absence of legal provisions to the contrary, investment disputes, like other civil or commercial disputes would be subject to the jurisdiction of the Courts of Law. As a means to facilitate foreign investment, law N° 43 adopts a flexible approach to questions of investment disputes by providing several means for dispute settlement outside the courts. In examining the legal provisions on investment disputes, one must take account of both article (8) which applies to all disputes related to the implementation of the law, whether inside the country or in the free zones, and article (45) which applies to additional types of disputes in the free zones... Article

8 does not apply to all controversies... Disputes which do not fall within the scope of article (8) are to be settled in the ordinary courts of law or in the administrative courts. Investment disputes falling within the scope of article 8 may be settled in one of four forms" (p. 38 - 39). Further, the guide adds "According to the Convention ... by virtue of Law N° 90 of 1971, the Arab Republic of Egypt adhered to the above cited Convention..." (p. 40) (emphasis added).

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

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

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

From the materials submitted by the Claimants (exhibit 17) one may understand the raison d'être of such a statement as it appears in the brochure of 1984, published ten years after the enactment of law 43/74. In an article published in "Arbitration and Domestic Laws: Egyptian Law, Institute of International Business Law and Practice, Paris, December 17-18, 1984." Professor El Kosheri explained that "maintaining a tradition of Islamic Law and/or influenced by old French legal concepts, the Egyptian Code of Civil and Commercial procedures requires, as a general rule, that the parties themselves nominate the arbitrators (article 502 paragraph 3)... this interpretation which met with some support in Court decisions rendered with regard to local arbitration in purely domestic relationship, was thereafter invoked by some Egyptian parties involved in ICC arbitration cases in order to contest the jurisdiction of the arbitrator or the arbitral Tribunals formed in conformity with the rules and regulations of the ICC Court of Arbitration. By claiming that the arbitration clause was null and void because the parties did not themselves select the arbitrator(s) these Egyptian parties requested that the arbitration process be stopped... The first use was by the Egyptian Government itself... even though the Government's challenge did not relate exclusively to the so-called nullity of the arbitration clause for failure of the parties to nominate by mutual consent the persons chosen to act as arbitrators..." and Professor El Kosheri

adds that the Egyptian Cour de Cassation rendered a decision on April 26, 1982 (Case N° 716 of the Judicial year 47) to the effect that "Since article 502 (3) Procedures, when requiring the necessary mention of the arbitrator's names in the arbitration agreement, does not relate to public order as previously stated, its violation could not be considered sufficient justification to exclude the application of the foreign governing law." (pp. 4-12). It is understandable in these circumstances that, after the Cour de Cassation rendered its decision of 1982, the brochure reflected the outcome of the arbitration clause issue as finally settled by that decision.

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

30. A State's consent to submit itself to the jurisdiction of the Centre is not to be presumed. The language of the Convention is explicit; it differentiates between consent and the intention to submit, or more precisely to consider submitting, a certain dispute or a class of disputes to the jurisdiction of the Centre (Article 25/4 of the Convention). The fact that a State is a signatory to the Convention does not imply a presumption to consent, nor does the fact that request for arbitration is registered. The screening powers of the Secretary General, in this respect, can have no influence upon

the issue of jurisdiction which is of the competence of the Arbitral Tribunal.

31. As a matter of principle, whether in international law or in national laws, a sovereign State enjoys an immunity from being subject to adjudication without its consent. A waiver of such an immunity is not to be presumed, but must be proved, and the burden of proof rests upon the party claiming the contrary. The Convention did not intend to deviate from this principle. The corner stone of the jurisdiction of the Centre is the consent. To the conclusion that for the establishment of the Centre's jurisdiction it must be proved that the State and the Investor both consented to the jurisdiction. In my opinion, the Claimants did not present evidence to the effect that Egypt, a signatory State to the Convention, consented, in a clear unequivocal language to submit the present dispute to the jurisdiction of the Centre, and more to the arbitration procedures provided for by the Convention.

I may add, in this respect, that it seems that the Claimants themselves, were aware of the fact that Law 43/74 does not contain such a standing offer. The Heads of Agreement concluded on September 23, 1974 between: The Ministry of Tourism, the Egyptian General Organization for Tourism and Hotels and the Southern Pacific Properties Limited (the Claimants), contains reference that it was issued in accordance with certain laws inter alia Law N° 43/74. Reference to Law 43/74 reads as follows : "This agreement is issued in accordance with Law... and Law 43 for the year 1974 relating to Arab and Foreign Funds invested in the A.R.E. with particular reference to government guarantees long term tax holidays, exemptions from import customs duties, etc..." If Law N° 43/74 contained, as Claimants argue, a standing offer by Egypt to submit investment disputes to arbitration under ICSID it would have, logically, been explicitly referred to.

Moreover, the Claimants could not have relied upon any text or document, other than the only text of Law N° 43 of 1974 since that

Law was the only text issued by the time they concluded the Heads of Agreement on September 23, 1974 and entered into the contract of December 12, 1974 with the Egyptian General Organization for Tourism and Hotels.

[II]

SECOND PART

Some Observations and Comments in Reponse to the Decision of April 14, 1988.

[32] 1. The Preliminary Decision dated November 27, 1985, (hereinafter called the Preliminary Decision) stated in paragraph (31) that "Construction work began at the Pyramids Oasis site in July of 1977. The Claimants have explained in their pleadings that such construction work commenced with roads, sewage systems, water reservoir facilities, artificial lakes, and a golf course." (emphasis added)

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

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

[33] 2. The Preliminary Decision dealt with Egypt's objection to the jurisdiction of the Centre based upon the legal restrictive nature of the provisions of Article 8 of Law N° 43/1974, to disputes concerning the non-performance of obligations under law 43 as distinct from disputes involving non-performance of obligations under a contractual relation (paragraphs 67, 68 and 69). Article 8 of Law 43, stipulates in relevant part that "Investment disputes in respect of the implementation of the provisions of this Law shall be settled..." (emphasis added). Egypt explained that the means of settlement set forth in article 8 of law 43 are to be applied only as regards disputes arising out of a breach of a provision contained in Law 43 and thus do not

cover any other dispute that may arise from a breach of a contract. In this respect, and in support to its contention, Egypt cited the July 12, 1984 decision of the Paris Court of Appeal wherein that Court said that article 8 of Law 43 "...ne vise, au surplus, que les seules contestations ayant trait à l'investissement et concernant la mise en exécution des dispositions de la loi en cause, mais non celles de tel ou tel contrat" (emphasis added) . The Preliminary Decision did not address that objection and stated that "however, it is not necessary, for the purpose of the present decision, to address this question, since Egypt's objection may be simply answered by the recapitulation of certain facts..." (paragraph 68), to the conclusion that in this respect it is quite clear that "the present dispute, thus, is within the scope of article 8, since it concerns the implementation of the provisions of this law, namely the protection from any measure of, or amounting to, nationalization or confiscation." (paragraph 69).

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

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

[34] 3. The Decision seems to have concluded to the admittance of the intervention, in the course of the arbitration proceedings, of SPP, a third party to the instituted arbitration under the auspices of ICSID. In the preliminary Decision, the Tribunal stated that "On February 8, 1985, the Tribunal conducted a preliminary meeting with the Parties (i.e. SPP (ME) and Egypt) at the Hague and that the Parties placed on record their agreement to the effect that "...the Tribunal has

been properly constituted in accordance with Section 2 of the ICSID Convention and Chapter 1 of the Arbitration Rules" (paragraph 9) and further stated that "On July 23,1985, the parties advised the centre that Southern Pacific Properties Limited (hereinafter called SPP or the Claimant), the parent Company of SPP (ME) and also a Hong Kong Corporation, had been joined as a Claimant in the proceedings, subject to Egypt's reservation of jurisdictional defenses" (paragraph 14).

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

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

and rationae materiae, deferred to it by the Centre. The Centre, by the Secretary General has screening powers as regards the requests for arbitration, and the rules require documents to be filed with the request for arbitration inter alia documents concerning the nationality of the juridical person (Institution Rules, Rule 2).

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

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

The Convention kept silent as regards the criterion of the nationality of juridical persons, whether it be as explains Kovar "Les critères du siège social, de l'incorporation et du contrôle". (op. cit. p. 44)

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

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

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

However, that statement can hardly be supported by a provision of either the Convention or the Regulations and Rules of ICSID. As already mentioned in the first part of this dissenting opinion, the Convention provides for two distinct methods of dispute settlement. Consequently the consent to the "jurisdiction" of the Centre must specify in a clear unequivocal language the method of settlement consented to. In addition to the arguments already explained in detail in the first part of this dissenting opinion, it is significant to review the language of article (25/2-b) of the Convention which reads

as follows "Any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration..." and the language of article (26) which provides that "consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy..."

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

If Law N° 43 is applicable, per se, to the issue of whether or not Egypt gave a standing offer to submit investment disputes to the jurisdiction of ICSID, any allegation, to the effect that Law N° 43 does in fact provide for that offer, cannot afford to alter the legal nature of the provisions of the Law as such. Consequently, in the present case, the provisions of Law N° 43, a national Law to be applied as such as regards the issue of jurisdiction, are not to be construed "taking into consideration the relevant rules of treaty interpretation and the principles of international law". Upon the mere allegations advanced by the Claimants, the Decision seems to consider Law 43 as a unilateral international declaration, to be construed in the light

of the jurisprudence of the International Court of Justice concerning unilateral declarations under the so-called "optional clause" of the Court's statutes. (The Decision, paragraph 61).

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

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

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

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

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

Nowhere in the first paragraph of article 8 of Law No 43 is there any reference to arbitration. Reference is only made to the Convention "where it applies". For the Convention to apply, that is for the jurisdiction of the Centre to be established, it is required that the parties to the dispute give their consent to that effect. The Decision also states that "the provision in article 8 for dispute settlement in a manner to be agreed upon with the investor is sufficient to authorize ad hoc consent to the Centre's jurisdiction" (Paragraph 96).

That statement seems to overlook two considerations:

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

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

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

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