Date of dispatch to the parties:
February 16, 1994

International Centre for Settlement of Investment Disputes Washington, D.C.

In the Matter of the Arbitration

between

VACUUM SALT PRODUCTS LIMITED
Claimant

against

GOVERNMENT OF THE REPUBLIC OF GHANA
Respondent

Case No. ARB/92/1 Award

1. The Tribunal below sets forth first the history of the proceedings in this case, and then its reasons for this Award, followed by a provision on costs and the *dispositif.*

A. *HISTORY OF THE PROCEEDINGS*

2. On 28 May 1992 the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") received the Request for Arbitration ("the Request") in this case submitted by "Thacher Proffitt & Wood As

Attorneys for Claimant Vacuum Salt Products Limited" ("Vacuum Salt" or "Claimant"). The Request essentially alleged that Vacuum Salt had suffered both a breach and progressive expropriation of its contractual rights to develop a salt production and mining facility in the Ada-Songor Lagoon in the Republic of Ghana ("Ghana" or "Respondent"). In particular, the Request alleged "continual violation" by Ghana of a lease agreement between Vacuum Salt and Ghana dated 22 January 1988 "and a predecessor agreement," "ultimate repudiation of the [1988] Lease Agreement" by Ghana by decision of 24 April 1992 and "its expropriation of the business and property of Vacuum Salt." The Request asserted that the parties had consented to ICSID arbitration in paragraph 36(a) of the said lease agreement:

> Any dispute or difference between the parties arising out of or in connection with this Agreement or any agreed variation thereof or in respect of the interpretation or enforcement of the provisions of this document or any agreed variation or as to the rights, duties or liabilities of either party shall unless the parties agree to submit to any procedures available in Ghana for the settlement of such dispute be submitted at the instance of any party to the jurisdiction of the International Centre for the Settlement of Investment Disputes for settlement by reconciliation [sic] or arbitration pursuant to the Convention of [sic] the Settlement of Investment Disputes between States and Nationals of other States.

The Request premised jurisdiction *ratione personae* on the fact that Ghana is a State Party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Convention" or "ICSID Convention") and that although Vacuum Salt is "a corporation organized under the Companies Code, 1963 (Act 179), of Ghana," "[i]n the [1988] Lease Agreement, the parties agreed that because Vacuum Salt is controlled by a Greek national,[1] it should be treated as a foreign corporation for the purposes of the Convention... ." The second clause of Article 25(2)(b) of the Convention provides:

> "National of another Contracting State" means:
>
> . . . .
>
> . . . any juridical person which had the nationality of the Contracting State party to the dispute on that date ["the date on which the parties consented to submit such dispute to... arbitration"] and which, because of foreign control, the parties have

[1] The Request identified the Greek national as Gerassimos Alexis Panagiotopulos, who, it is not disputed, held 20 percent of the shares of Vacuum Salt on 22 January 1988.

> agreed should be treated as a national of another Contracting State for the purposes of this Convention.

As relief the Request sought

> "A declaration that the illegal acts of [Ghana]... are null and void *ab initio*;"
>
> An order for *restitutio in integrum*, or, alternatively, "damages measured according to the value of the [1988] Lease Agreement for the remainder of its term and all other property seized or damaged by" Ghana;
>
> "Damages... for the... breaches of contract, illegal acts and expropriation of Vacuum Salt's property;"
>
> "Lost profits, including loss of investment opportunities in the Songor Lagoon;"
>
> "Interest; and"
>
> "Costs and expenses including attorneys' fees."

3. Pursuant to Rule 5 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("Institution Rules"), the Secretary-General of ICSID ("Secretary-General") by letters dated 29 May 1992 sent an acknowledgment of the Request to the Claimant and transmitted a copy of the Request and of the accompanying documentation to Ghana.

4. The Secretary-General by letter dated 11 June 1992 notified the parties of his registration of the Request on that date pursuant to Convention Article 36(3). With that letter the Secretary-General transmitted to Ghana "a copy of a Power of Attorney and a copy of an Extra-Ordinary General Meeting Resolution, both received this week by the Centre from counsel for the Claimant," from which it is evident that the Request was registered only after a copy of the said Power of Attorney (which was notarized 28 May 1992) and of the Extra-Ordinary General Meeting Resolution (which copy was dated 9 June 1992) had been received by ICSID.

5. By letter dated 17 June 1992 counsel for Claimant proposed that one arbitrator be chosen by each party and the third (to serve as President) be appointed by the Secretary-General. In addition, counsel for Claimant suggested that the President be "an English speaking international lawyer familiar with the common law system"; that English be the language to be used in the proceeding; and that New York City, or, alternatively, Washington, D.C., be the place of the arbitral proceedings.

6. By letter dated 7 July 1992 the Attorney-General of Ghana advised that Ghana was in agreement that the Arbitral Tribunal ("the Tribunal") be

comprised of three arbitrators, but proposed that one arbitrator be chosen by each party and the third be appointed by agreement between the two arbitrators thus selected, failing which he should be appointed by the Secretary-General. In addition, the Attorney-General advised that Ghana agreed to English as the exclusive procedural language and to Washington, D.C. as the place of arbitration.

7. By letter dated 17 July 1992 counsel for Claimant confirmed agreement to these procedures.

8. By letter dated 11 August 1992 the Claimant appointed the Honorable Charles N. Brower as arbitrator. By letter dated 1 September 1992 Ghana appointed the Honorable Dr. Kamal Hossain as arbitrator. Each promptly confirmed his acceptance to serve on the Tribunal.

9. By letter of 2 October 1992 Judge Brower and Dr. Hossain advised ICSID of their agreement to the appointment of His Excellency Judge Sir Robert Y. Jennings, President of the International Court of Justice, as President of the Tribunal.

10. By letter dated 9 October 1992 Judge Jennings advised ICSID that he had been able to accept appointment only on the condition that, so long as he was President of the International Court of Justice, *i.e.*, until 7 February 1994, it would not be possible for him to preside over an oral hearing, other than the brief initial one that had to be held pursuant to Rule 13(1) of the Rules of Procedure for Arbitration Proceedings ("Arbitration Rules") within 60 days of the constitution of the Tribunal, and which could be held in the Peace Palace, The Hague. By letter of the same date the Centre notified the parties of such condition.

11. On 22 October 1992 Claimant filed with ICSID a Request for Provisional Measures. It was followed on 4 November 1992 by Claimant's submission of affidavits and a Memorial in Support of Claimant's Request for Provisional Measures. Claimant protested, in particular, that the enactment on 31 August 1992 and subsequent implementation of Provisional National Defence Council Law No. 287 ("Law No. 287"), which formally cancelled the 1988 lease agreement with effect from 24 April 1992, derogated from the jurisdiction of ICSID by requiring Claimant at the same time to submit to municipal proceedings relating to compensation for the cancelled lease. Claimant also expressed concern, *inter alia*, over the preservation of its corporate records.

12. On 26 October 1992 the Centre received a letter dated 8 October 1992 from the Attorney-General of Ghana, *inter alia*, objecting to the jurisdiction of ICSID on the ground that Claimant "essentially is a Ghanaian Company" which "is not foreign controlled and there has been no agreement

between the parties that it should be treated as a national of another contracting state." The Attorney-General's letter indicated it was copied to Claimant but Claimant's counsel advised ICSID it had not been informed of such correspondence prior to its receipt by the Centre and the Centre's prompt notification thereof to the parties.

13. On 27 November 1992 Ghana opposed Claimant's Request for Provisional Measures and both confirmed and expanded its objections to jurisdiction by submitting Respondent's Objections to Jurisdiction and Observations in Opposition to "Claimant's" Request for Provisional Measures. In that submission Ghana asserted that ICSID jurisdiction over the dispute was absent in that (1) the conditions of Article 25(2)(b) of the ICSID Convention were not satisfied; (2) submission of the Request had not been duly authorized by or on behalf of Claimant; and (3) Claimant had agreed "to submit to... procedures available in Ghana for the settlement of such dispute" pursuant to Law No. 287 and under the terms of paragraph 36(a) of the 1988 lease agreement thereby waived any right it might otherwise have had to ICSID arbitration.

14. On 1–3 December 1992 the Tribunal held its first session with the parties and their counsel at the seat of the Permanent Court of Arbitration in the Peace Palace at The Hague, The Netherlands in accordance with Arbitration Rule 13 (1). At the same time the Tribunal considered the Request for Provisional Measures submitted by the Claimant and also entertained preliminary submissions by Ghana and Vacuum Salt with regard to the jurisdictional objections interposed by Ghana.

15. Under those circumstances, in view of the condition upon which Judge Jennings had accepted to serve as President of the Tribunal he was unable to take part in the first session. In his absence, in accordance with Arbitration Rule 14(2) the session was conducted by the other members of the Tribunal, Judge Brower and Dr. Hossain, and Judge Brower presided over it as provided by Arbitration Rule 17. A complete tape recording of the session was made and minutes (30 pages) transcribed by the Secretary of the Tribunal which were submitted to the parties and the Tribunal for their review and then issued in final form on 7 June 1993.

16. At its first session the Tribunal issued on 3 December 1992 its Decision No. 1 on Request for Recommendation of Provisional Measures containing the following operative paragraphs:

> The Tribunal takes note of the fact that at that session the Government of the Republic of Ghana made the following voluntary undertakings:

1) The Government of the Republic of Ghana voluntarily undertakes to negotiate with the duly authorized representatives of Vacuum Salt Products Limited the latter's claim relating to the cancellation of its lease and for the purchase of certain related assets, and to defer formal procedures under Law 287, until (a) uncontested mutual agreement on such claim and purchase arrangements, (b) uncontested mutual agreement to continue formal procedures under Law 287, or (c) ICSID Case No. ARB/92/1 is disposed of or results in a determination that procedures under Law 287 are consistent with applicable contractual arrangements.

2) The Government of the Republic of Ghana assures the Tribunal that it will not deny Vacuum Salt Products Limited (including its duly authorized officers and its external auditor) access to its records, including any which are required for its compensation claim in this proceeding as well as in any negotiations referred to above.

The Tribunal further takes note of the fact that at that session Vacuum Salt Products Limited acknowledged and accepted these undertakings as satisfying the concerns expressed in its Request for Provisional Measures and thereby disposing of the same.

17. At its first session, after consultations with the parties, the Tribunal also issued on 3 December 1992 its Decision No. 2 on Procedures Relating to Objections to Jurisdiction and Related Matters. In accordance with Decision No. 2, Claimant and Respondent submitted their Observations on the Question of Jurisdiction under Article 25(2)(b) of the ICSID Convention on 24 December 1992 and 7 January 1993, respectively. Pursuant to the same Decision No. 2, as later modified, Claimant on 1 February 1993 submitted Observations of Vacuum Salt Products Company Limited on the Company's Authorization of this Arbitration, which also addressed Law No. 287 and, on a limited basis, further addressed ICSID Convention Article 25(2)(b), and Respondent on 1 March 1993 submitted its Observations on the Question of the Capacity and Standing of "Claimant," on the Question of P.N.D.C. Law 287 and on the Question of Jurisdiction.

18. By letter dated 23 March 1993 Claimant renewed its Request for Provisional Measures in relation to Law No. 287 and requested to be heard in support of it. Ghana responded by letter dated 19 April 1993, to which Vacuum Salt replied by letter dated 30 April 1993.

19. On 7–10 June 1993 the Tribunal held its second session with the parties and their counsel at the seat of the Permanent Court of Arbitration in the Peace Palace at The Hague, The Netherlands.

20. As Judge Jennings continued unable to act as President at that session, in accordance with Arbitration Rule 14(2) it was conducted by the other members of the Tribunal, Judge Brower and Dr. Hossain, and Judge Brower presided over it as provided by Arbitration Rule 17. Also present and taking part in the session were:

Counsel for Vacuum Salt:

Mr. Joel B. Harris
Mr. Gerald J. Ferguson
Mr. E. Kwasi Mensah
Mr. Andrew G. McCormick

Counsel for Ghana:

Mr. Joe Reindorf
Mr. Kwabena A.A. Mate
Mr. Samuel A. Stern

The Secretary of the Tribunal:

Mr. Antonio R. Parra

Witnesses presented by Vacuum Salt:

Mr. Leon Appenteng
Mr. Robert John Hayfron-Benjamin

Witnesses presented by Ghana:

Mr. Kwabena A.A. Mate
Mr. Kabutey Olaga
Mr. Gerassimos Alexis Panagiotopulos

Witness whose presence was requested by the Tribunal:

Mrs. Leone de Graft

21. At the second session testimony was heard from witnesses in the following order: Mr. Mate, Mr. Panagiotopulos, Mr. Olaga, Mr. Hayfron-Benjamin, Mr. Appenteng and Mrs. de Graft. Questions were asked of the witnesses by Mr. Harris and Mr. Ferguson on behalf of the Claimant and by Mr. Mate and Mr. Stern on behalf of the Respondent. Questions also were asked of the witnesses by the members of the Tribunal. Following the witness testimony counsel made oral submissions on the issues regarding Article 25(2)(b) of the ICSID Convention, whether or not submission of the Request had been duly authorized by or on behalf of the Claimant, the relationship to this arbitration of procedures under Law No. 287, and the renewed Request

for Provisional Measures. Such submissions were made by Mr. Harris, Mr. Ferguson and Mr. Mensah on behalf of the Claimant and by Mr. Stern, Mr. Mate and Mr. Reindorf on behalf of the Respondent. Questions were put to counsel by the Tribunal after the submissions. A complete tape recording of the session was made and extensive minutes (519 pages) transcribed by the Secretary of the Tribunal which were submitted to the parties and the Tribunal for their review and were issued in final form on 30 September 1993.

22. Following its second session the Tribunal issued on 14 June 1993 its Decision No. 3 on Request for Recommendation of Provisional Measures which declined to recommend such measures.

23. On 1 October 1993 the parties were notified by the Secretary of the Tribunal that Judge Brower and Dr. Hossain had met in London, England on 17 September 1993; that they had proposed to Judge Jennings that the Tribunal proceed to hold its deliberations on the questions before it and that Judge Jennings participate in those deliberations and in the decision of the Tribunal on those questions; and that Judge Jennings had signified his agreement to this proposal. In said notification the Secretary of the Tribunal noted that for the sake of good order the Tribunal would appreciate the parties acknowledging to him their concurrence in this procedure. Claimant and Respondent expressly so concurred by letters dated 1 and 15 October 1993, respectively.

24. The Tribunal (including all three of its members) accordingly held its deliberations at The Hague, The Netherlands, 9–12 November 1993 and 31 January–1 February 1994.

B. *REASONS FOR THE AWARD*

25. The Tribunal is confronted with the necessity of considering Respondent's three objections to jurisdiction.[2] The Tribunal turns to the first one, *i.e.*, that the conditions of Article 25(2)(b) of the ICSID Convention have not been satisfied.

26. On its face the Request is of such a nature as to attract jurisdiction under Article 25(1) of the ICSID Convention.[3] Ghana is a State Party to the

---

[2] They are set out at paragraph 13, *supra*.

[3] Article 25(1) provides as follows:

> 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.

Convention, the dispute as pleaded in the Request is a legal one arising directly out of an investment, and paragraph 36(a) of the 1988 lease agreement embodies the parties' written consent to submit such dispute to the Centre.[4]

27. The parties diverge, however, on the threshold jurisdictional issue posed first by the Attorney-General of Ghana regarding whether "because of foreign control, the parties have agreed [that Vacuum Salt] should be treated as a national of another Contracting State [Greece] for the purposes of [the] Convention," specifically Article 25(2)(b). It is crucial to ICSID jurisdiction in this case and it is to this issue that the Tribunal first must turn.

28. Since it is agreed that Vacuum Salt is and has at all material times been a corporation organized under the 1963 Companies Code of Ghana and hence could not be regarded as "a national of another [ICSID] Contracting State" within the definition of the first clause of Article 25(2)(b) of the Convention, the Tribunal can have jurisdiction *ratione personae* in regard to Vacuum Salt only if in respect of it the requirements of the second clause of Article 25(2)(b) of the Convention are satisfied. It would be convenient to cite here the entire Article 25[5]:

---

[4] Respondent argues, as previously noted, at paragraph 13, *supra*, that Claimant has waived any right it might otherwise have had to ICSID arbitration of the instant dispute by agreeing to pursue the compensation procedures of Law No. 287, *i.e.*, "the parties agree[d] to submit to [the Law No. 287] procedures available in Ghana for the settlement of such dispute"within the meaning of that exclusion in paragraph 36(a) of the 1988 lease agreement. Claimant thus raises an issue of the scope of consent, however, rather than an issue of its existence *vel non*.

[5] The French text and the Spanish text of Article 25 of the Convention, being "equally authentic"with the English text pursuant to the signature clause of this Convention, are as follows:

French text:

(1) La compétence du Centre s'étend aux différends d'ordre juridique entre un Etat contractant (ou telle collectivité publique ou tel organisme dépendant de lui qu'il désigne au Centre) et le ressortissant d'un autre Etat contractant qui sont en relation directe avec un investissement et que les parties ont consenti par écrit à soumettre au Centre. Lorsque les parties ont donné leur consentement, aucune d'elles ne peut le retirer unilatéralement.

(2) "Ressortissant d'un autre Etat contractant"signifie:

(a) toute personne physique qui possède la nationalité d'un Etat contractant autre que l'Etat partie au différend à la date à laquelle les parties ont consenti à soumettre le différend à la conciliation ou à l'arbitrage ainsi qu'à la date à laquelle la requête a été enregistrée conformément à l'Article 28, alinéa (3) ou à l'Article 36, alinéa (3), à l'exclusion de toute personne qui, à l'une ou à l'autre de ces dates, possède également la nationalité de l'Etat contractant partie au différend;

(b) toute personne morale qui possède la nationalité d'un Etat contractant autre que l'Etat partie au différend à la date à laquelle les parties ont consenti à soumettre le différend à la conciliation ou à l'arbitrage et toute personne morale qui possède la nationalité de l'Etat contractant partie au différend à la même date et que les parties sont convenues, aux fins de la présente Convention, de considérer comme ressortissant d'un autre Etat contractant en raison du contrôle exercé sur elle par des intérêts étrangers.

Article 25

(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 the 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.

(2) "National of another Contracting State" means:

---

(3) Le consentement d'une collectivité publique ou d'un organisme dépendant d'un Etat contractant ne peut être donné qu'après approbation par ledit Etat, sauf si celui-ci indique au Centre que cette approbation n'est pas nécessaire.

(4) Tout Etat contractant peut, lors de sa ratification, de son acceptation ou de son approbation de la Convention ou à toute date ultérieure, faire connaître au Centre la ou les catégories de différends qu'il considèrerait comme pouvant être soumis ou non à la compétence du Centre. Le Secrétaire Général transmet immédiatement la notification à tous les Etats contractants. Ladite notification ne constitue pas le consentement requis aux termes de l'alinéa (1).

Spanish text:

(1) La jurisdicción del Centro se extenderá a las diferencias de naturaleza jurídica que surjan directamente de una inversión entre un Estado Contratante (o cualquiera subdivisión política u organismo público de un Estado Contratante acreditados ante el Centro por dicho Estado) y el nacional de otro Estado Contratante y que las partes hayan consentido por escrito en someter al Centro. El consentimiento dado por las partes no podrá ser unilateralmente retirado.

(2) Se entenderá como "nacional de otro Estado Contratante":

(a) toda persona natural que tenga, en la fecha en que las partes consintieron someter la diferencia a conciliación o arbitraje y en la fecha en que fué registrada la solicitud prevista en al apartado (3) del Artículo 28 o en el apartado (3) del Artículo 36, la nacionalidad de un Estado Contratante distinto del Estado parte en la diferencia; pero en ningún caso comprenderá las personas que, en cualquiera de ambas fechas, también tenían la nacionalidad del Estado parte en la diferencia; y

(b) toda persona jurídica que, en la fecha en que las partes prestaron su consentimiento a la jurisdicción del Centro para la diferencia en cuestión, tenga la nacionalidad de un Estado Contratante distinto del Estado parte en la diferencia, y las personas jurídicas que, teniendo en la referida fecha la nacionalidad del Estado parte en la diferencia, las partes hubieren acordado atribuirle tal carácter, a los efectos de este Convenio, por estar sometidas a control extranjero.

(3) El consentimiento de una subdivisión política u organismo público de un Estado Contratante requerirá la aprobación de dicho Estado, salvo que éste notifique al Centro que tal aprobación no es necesaria.

(4) Los Estados Contratantes podrán, al ratificar, aceptar o aprobar este Convenio o en cualquier momento ulterior, notificar al Centro la clase o clases de diferencias que aceptarían someter, o no, a su jurisdicción. El Secretario General transmitirá inmediatamente dicha notificación a todos los Estados Contratantes, Esta notificatión no se entenderá que constituye el consentimiento a que se refiere el apartado (1) anterior.

> (a) any natural person who 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 as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
>
> (b) 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 any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.
>
> (3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.
>
> (4) 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. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Unless the requirements of the second clause of Article 25(2)(b) have been fulfilled the Tribunal does not have jurisdiction. The Tribunal therefore must focus on this point.

29. The Tribunal discerns from the text of Article 25(2)(b) that the conditions of the second clause of Article 25(2)(b) must be fulfilled, at least initially,[6] on the date of consent, in this case 22 January 1988. The antecedent to

---

[6] Respondent has argued (and Claimant has disputed) that the requirements of Article 25(2)(b) also must be satisfied "on the date on which the request was registered pursuant to... paragraph (3) of Article 36,"as indubitably is the case under Article 25(2)(a) in respect of natural persons:

> "National of another Contracting State"means:
>
> any natural person who 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... arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute... .

the phrase "on that date" in the second clause of Article 25(2)(b) necessarily is the reference in the first clause to "the date on which the parties consented to submit such dispute to... arbitration." The Tribunal therefore considers the situation as of 22 January 1988.

30. The issue, then, is whether at that date, "because of foreign control, the parties... agreed [that Vacuum Salt] should be treated as a national of

---

It appears, however, that application of the principle of *expressio unius est exclusio alterius* would argue against such dual requirement in the case of juridical persons; that all reported ICSID decisions under Article 25(2)(b) have considered only the date of consent (although the point Claimant now raises was not in issue), *see Amco Asia et al.* v. *Indonesia*, ICSID ARB/81/1 (decision on jurisdiction dated 25 Sept. 1983), para. 14(ii), *reprinted in* 23 I.L.M. 351, 361 (1984) (nationality under Article 25(2)(b) determined as of the date the parties concluded their agreement in the form of an approval of a foreign investment license application containing an ICSID arbitration clause); *Klöckner* v. *Cameroon*, ICSID ARB/81/2 (decision on jurisdiction dated 21 Oct. 1983), *excerpts reprinted in* 10 Y.B. Com.Arb. 71, 76 (1985) *and in* 111 J.D.I. 409 (1984) (nationality under Article 25(2)(b) determined as of the date the parties concluded an Establishment Agreement that contained an ICSID arbitration clause); *Liberian Eastern Timber Corp. (LETCO)* v. *Liberia*, ICSID ARB/83/2 (award dated 31 March 1986), *reprinted in* 26 I.L.M. 647, 653-54 (1987) (nationality under Article 25(2)(b) determined as of the date the parties concluded a Concession Agreement containing an ICSID arbitration clause); and *SOABI* v. *Sénégal*, ICSID ARB/82/1 (decision on jurisdiction dated 19 July 1984), para. 38, *reprinted in* 6 ICSID Rev. — F.I.L.J. 217, 225 (Spring 1991) (nationality under Article 25(2)(b) determined as of the date the parties concluded an Establishment Agreement containing an ICSID arbitration clause); and that the *travaux préparatoires* of the Convention support the single requirement, *see* Documents Concerning the Origin and the Foundation of the Convention ("Convention History"), Vol. II, 287, 400-01 and 868 (1968). The dual requirement is strongly rejected by Amerasinghe. C.F. Amerasinghe, Jurisdiction Ratione Personae Under the Convention On The Settlement Of Investment Disputes Between States and Nationals Of Other States, 1974-1975 Brit. Y.B. Int'l L. 227, 266-67; *see also* C.F. Amerasinghe, The International Centre for Settlement of Investment Disputes and Development Through the Multinational Corporation, 9 Vand.J.Transnat'l L. 793, 809-10 (1976) ("any change in the nationality of a juridical person after th[e] date [of consent] is immaterial for the purposes of ICSID's jurisdiction, regardless of how inappropriate such an alignment would have been initially"). *But see* Delaume, who, albeit in the different context of an assignment, suggests the dual requirement "might"exist. G. Delaume, ICSID Arbitration: Practical Considerations, 1 J.Int'l Arb. 101, 115 (1984). *See also* G. Delaume, Le centre international pour le règlement des différends relatifs aux investissements (CIRDI), 109 J.D.I. 775, 797 (1982).

Also the Centre itself arguably has authoritatively interpreted Article 25(2)(b) (including its second clause) as needing to be satisfied only as of the date of consent. Rule 2(1)(d)(ii) of its Institution Rules requires that a request for arbitration submitted by an individual "shall... indicate"in addition to his "nationality on the date of consent"

> (A) his nationality on the date of the request; and
>
> (B) that he did not have the nationality of the Contracting State party to the dispute either on the date of consent or on the date of the request.

Institution Rule 2(1)(d)(iii), however, separately provides as to juridical persons that in addition to indicating "nationality on the date of consent"

> if the party is a juridical person which on the date of consent had the nationality of the Contracting State party to the dispute, [the request for arbitration shall indicate] the agreement of the parties that it should be treated as a national of another Contracting State for the purposes of the Convention... .

another Contracting State [Greece[7]] for the purposes of this Convention." This divides into two parts: First, whether there was such agreement, and, second, whether such agreement was indeed "because of foreign control" within the meaning of the second clause of Article 25(2)(b).

31. Turning to the issue of agreement *vel non*, Ghana points out that the parties nowhere have referred to, let alone recited *in haec verba*, the second clause of Article 25(2)(b). Paragraph 36(a) of the 1988 lease agreement nowhere alludes to it. Certainly the better practice, as reflected in ICSID Model Clause 7,[8] would be for the parties at least to make some reference to foreign control.[9] The reported cases suggest, however, that such has not been the practice. *See Amco Asia et al.* v. *Indonesia*, ICSID ARB/81/1 (decision on jurisdiction dated

---

Note J to Institution Rule 2 expressly confirms that "For a juridical person the only date relevant for nationality is that on which the parties consented to the jurisdiction of the Centre." Thus ICSID itself, for the registration of a case premised on the second clause of Article 25(2)(b), requires information as to nationality only as of the date of consent.

Moreover, a quite plausible justification exists for requiring continuous nationality (at least to the date of registration of a request for arbitration) of an individual but not of a juridical person: An individual has substantial control over his nationality, and thus an involuntary change of it, with consequent loss of a right to ICSID arbitration, is improbable; a municipal corporation of the host State which is granted foreign status under the second clause of Article 25(2)(b) of the Convention, however, could be deprived involuntarily of all foreign ownership through expropriation, and thus, were there a requirement of continuous nationality, could be deprived of its right to ICSID arbitration by the very act which it presumptively would wish to challenge in such a proceeding. *See* Convention History, Vol. II, 400-01.

It cannot be denied, on the other hand, that the prospect would be deeply unsettling, for example, of a State being required to submit to international arbitration under the auspices of ICSID a dispute with a municipal corporation all of whose shares had been freely transferred from aliens to nationals of that State in the interim between the conclusion of an investment agreement including an ICSID clause premised on the second clause of Article 25(2)(b) and the registration of a request for arbitration. In that circumstance the issue is raised as to whether in light of the object and purpose of the Convention an interpretation of the second clause of Article 25(2)(b) permitting the Centre to exercise jurisdiction would lead to a result which is "manifestly absurd or unreasonable." *See* Arts. 31(1) and 32(b) of the Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, entered into force on 27 January 1980, U.N. Doc. A/Conf. 39/27, Fourth Annex. *See also* W.M. Tupman, Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes, 35 I.C.L.Q. 813, 836 (1986).

The Tribunal need not resolve this troubling issue, however, given the further terms of this Award.

[7] Greece was a party to the Convention at that date, it having entered into force with respect to Greece on 21 May 1969.

[8] It is hereby agreed that, although the Investor is a national of the Host State, it is controlled by nationals of *name(s) of other Contracting State(s)* and shall be treated as a national of [that]/[those] State[s] for the purposes of the Convention.

ICSID Model Clauses, ICSID Doc. 5/Rev. 2 (1 Feb. 1993).

[9] This would facilitate, *inter alia*, identification of the State Party (or States Parties) to the Convention required by Article 27(1) to forego giving diplomatic protection in the circumstances.

25 Sept. 1983), para. 14(ii), *reprinted in* 23 I.L.M. 351, 361 (1984); *Klöckner* v. *Cameroon*, ICSID ARB/81/2 (decision on jurisdiction dated 21 Oct. 1983), *excerpts reprinted in* 10 Y.B. Com.Arb. 71, 76 (1985) *and in* 111 J.D.I. 409 (1984); *Liberian Eastern Timber Corp. (LETCO)* v. *Liberia*, ICSID ARB/83/2 (award dated 31 March 1986), *reprinted in* 26 I.L.M. 647, 653 (1987). Further, the Tribunal in the particular circumstances of each of those cases concluded that the very agreement by parties to an ICSID arbitration clause in circumstances such that ICSID jurisdiction can exist only on the basis of the second clause of Article 25(2)(b) necessarily implied their agreement to apply that clause. Thus the Tribunal in *Amco Asia* v. *Indonesia* found that it was

> crystal clear that [Indonesia] agreed to treat P.T. Amco as a national of another Contracting State, for the purpose of the Convention.

23 I.L.M. at 361, para.14 (ii). Similarly, the Tribunal in *Klöckner* v. *Cameroon*, expanding on that decision, stated:

> The insertion of an ICSID arbitration clause by itself presupposes and implies that the parties were agreed to consider SOCAME at the time to be a company under foreign control, thus having the capacity to act in ICSID arbitration. This is an acknowledgement which completely excludes a different interpretation of the parties' intent. Inserting this [ICSID arbitration] clause in the Establishment Agreement would be nonsense if the parties had not agreed that, by reason of the control then exercised by foreign interests over SOCAME, said Agreement could be made subject to ICSID jurisdiction.

10 Y.B.Com.Arb. at 76. In *Liberian Eastern Timber Corp. (LETCO)* v. *Liberia* the Tribunal reached the same result:

> [I]t could be argued with some force that the mere fact that Liberia and LETCO included an ICSID arbitration clause in the Concession Agreement constitutes an agreement to treat LETCO as a "national of another Contracting State." To conclude otherwise would be tantamount to stating that Liberia never intended to honour this part of the Concession Agreement; that Liberia, by agreeing to the ICSID clause, acted in bad faith and contrary to the tenor and purpose of the ICSID Convention.
>
> When a Contracting State signs an investment agreement, containing an ICSID arbitration clause, with a foreign controlled juridical person with the same nationality as the Contracting State and it does so with the knowledge that it will only be subject to ICSID jurisdiction if it has agreed to treat that company as a juridical person of another Contracting State, the Contracting State could be deemed to have agreed to such treatment by having agreed to the ICSID arbitration clause. This is especially the case when the Con-

> tracting State's laws require the foreign investor to establish itself locally as a juridical person in order to carry out an investment.

26 I.L.M. at 653.[10] These cases are distinguishable from the instant case in that in none of them was the issue of consent separated from that of foreign control. In each of them the objective existence of foreign control was presumed, in particular because the foreign shareholding was 100 percent (or, in one case, 51 percent). *Amco Asia et al.* v. *Indonesia*, *supra* (100 percent foreign ownership); *Klöckner* v. *Cameroon*, *supra* (51 percent foreign ownership); *LETCO* v. *Liberia*, *supra* (100 percent foreign ownership).

32. In any event there is in this case further evidence which might be regarded as supporting the conclusion that the parties intended to agree to the application of the second clause of Article 25(2)(b). Paragraph 23 of the 1988 lease agreement, headed "*Government Participation*," recited that

> Government shall participate in the Company's operations in accordance with the provisions of section 8 of the Minerals and Mining Law P.N.D.C.L. 153.

Section 8 of Law No. 153, found in "PART I—OWNERSHIP OF MINERALS AND GOVERNMENT RIGHT OF PRE-EMPTION," in turn expressly mandates an initial ten percent host State interest in all mineral rights, "in respect of which no financial contribution shall be paid," and, in any case "where the operation is for the mining of salt," establishes an "option to acquire a further forty-five percent interest in the salt operations," without prejudice to "further participation... under such terms as the parties may agree."

---

[10] Ghana relies on *Holiday Inns* v. *Morocco*, ICSID ARB/72/1 (discussed in P. Lalive, The First "World Bank"Arbitration (Holiday Inns v. Morocco) — Some Legal Problems, 51 Brit. Y.B. Int'l L. 123 (1980)), as a contrary precedent. The Tribunal in that case did address Article 25(2)(b) and said:

> [O]ne would expect that parties should express themselves clearly and explicitly with respect to such a derogation... . An implied agreement would only be acceptable in the event that the specific circumstances would exclude any other interpretation of the intention of the parties, which is not the case here.

It was not the case there because the consent to arbitration was signed by Morocco, Holiday Inns S.A. (a Swiss subsidiary of an American company) and a then unnamed subsidiary of Occidental Petroleum Corporation (an American company) but not by any of the four Moroccan subsidiaries of Holiday Inns S.A. on whose behalf, *inter alia*, the request for arbitration alleged it was submitted. In each of the cases referred to above the company subject to Article 25(2)(b) was itself a signatory to the ICSID clause (or, in one case, the assignee of such a signatory) and thus "the specific circumstances [did] preclude any... interpretation of the intention of the parties"other than that they agreed to apply Article 25(2)(b).

> Where a mineral right is for reconnaissance, prospecting or mining of minerals, the Government shall acquire a ten per cent interest in the rights and obligations of such mineral operations in respect of which no financial contribution shall be paid by Government.

Law No. 153, section 8(1).

> The Government shall have the option to acquire on such terms as shall be agreed upon between the holder of a mining lease and the Government a further twenty per cent interest in the rights and obligations in any mining operations where any mineral is discovered in commercial quantities except that where the operation is for the mining of salt, the Government shall have the option to acquire a further forty-five per cent interest in the salt operations.

Id., section 8(2).

> The provisions in subsections (1) and (2) of this section shall not exclude the Government from further participation in any mineral operations and any further participation shall be under such terms as the parties may agree.

Id., section 8(4). Section 8 also provides, in subsection (3), that

> Where the parties fail to agree on the terms of the acquisition by Government of any interest in any mineral operations under this section, the matter shall be referred to arbitration in accordance with section 31 of this Law.

Id., section 8(3).

33. The referenced section 31 of the Minerals and Mining Law, appearing in "PART IV—TAXES, INCENTIVES AND BENEFITS," provides as follows:

> (1) Where any dispute arises between a holder of a mineral right and the Government in respect of any matter under Part IV of this Law all efforts shall be made through mutual discussion to reach an amicable settlement.
>
> (2) Where any dispute arises between a holder who is a citizen of Ghana and the Government in respect of any matter under Part IV of this Law which is not amicably settled as provided in subsection (1) of this Section, the dispute may be submitted to arbitration for settlement in accordance with the provisions of the Arbitration Act, 1961 (Act 38).
>
> (3) Where any dispute arises between a holder who is not a citizen of Ghana and the Government in respect of any matter under Part IV of this Law which is not amicably settled as provided under

subsection (1) of this Section the dispute may be submitted to arbitration—

(a) in accordance with the rules of procedure for arbitration of the United Nations Commission on International Trade Law; or

(b) within the framework of any bilateral or multilateral agreement on investment protection to which the Government and the country of which the holder is a national are parties; or

(c) in accordance with any other international machinery for the settlement of investment disputes agreed to by the parties.

(4) The Secretary on the advice of the Minerals Commission may specify the particular mode of arbitration to be resorted to in the case of a dispute relating to any matter under Part IV of this Law and such specification shall constitute the consent of the Government or the Agency thereof and of the holder to submit to that forum.

34. The Minerals and Mining Law, in section 84(1), also defines "citizen of Ghana:"

(a) in relation to an individual, an individual who is a citizen of Ghana by virtue of any law for the time being in force in Ghana;

(b) in relation to a partnership or association of individuals, a partnership or association which is composed exclusively of individuals who are citizens of Ghana;

(c) in relation to a body corporate other than public corporation, a body corporate which is incorporated in Ghana under the Companies Code, 1963 (Act 179), and

(i) which is certified by the Secretary to be controlled by Government; or

(ii) whose membership is composed exclusively of persons who are citizens of Ghana; or

(iii) whose directors are exclusively citizens of Ghana; or

(iv) which is controlled by individuals who are citizens of Ghana;

(d) in relation to a public corporation, a corporation that is established in Ghana by or under any enactment... .

35. Reading section 31(3) in light of subsection (c)(iv) of the definition of "citizen of Ghana" in section 84(1), a question arises as to whether at the

date of the 1988 lease agreement Vacuum Salt was "a holder who is not a citizen of Ghana,"[11] and, more specifically, *not* "controlled by individuals who are citizens of Ghana."[12] Be that as it may, the Tribunal's decision on the matter before it ultimately must turn on whether or not "foreign control" as contemplated by the second clause of Article 25(2)(b) existed as a matter of fact on the date of consent.[13]

36. The Tribunal therefore turns to consider that question, for the parties' agreement to treat Claimant as a foreign national "because of foreign control" does not *ipso jure* confer jurisdiction. The reference in Article 25(2)(b) to "foreign control" necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so. *See*

---

[11] Section 84(1) of the Minerals and Mining Law defines "holder"as "the holder of a mineral right under this Law."

[12] No suggestion has been made here that Vacuum Salt was ever "certified by the [Provisional National Defence Council] Secretary [for Lands and Natural Resources] to be controlled by Government,"and the parties concur that as of 22 January 1988 neither subsection (c)(ii) nor subsection (c)(iii) of the definition of "citizen of Ghana"in section 84 (1) would apply. See paragraphs 41-42, *infra*.

[13] Claimant has cited two other Ghanaian statutory provisions. Section 60(1) of the Minerals and Mining Law, in effect, prohibits the corporate holder of a mining lease from transferring shares or entering into any "agreement, arrangement, or understanding... with any particular person, if the effect of doing so would be to give to that particular person or any other person, control of the company,"and section 60(3)(a)(i) provides that "[f]or the purposes of this section... a person is deemed to have control of a company... if that person... holds a total of twenty percent or more of the issued equity shares of the company." Since, as previously was noted at paragraph 2, footnote 1, it is uncontested that a Greek national held 20 percent of the shares of Vacuum Salt as of 22 January 1988, Claimant argues that it thus was deemed under the Minerals and Mining Law to be controlled by him. Respondent counters with some cogency, however, that in logic the presumed purpose of such transfer restrictions is not necessarily related to the jurisdictional concerns now addressed.

Claimant also cites "the Investment Code of 1985, P.N.D.C.L.116, section 21(2)(b)"as "requir[ing] Ghanaian participation in certain foreign investments and establish[ing] 20 percent as the minimum Ghanaian participation in such ventures." Claimant argues that "this 20 percent threshold requirement again suggests that Ghanaian Law recognizes that a 20 percent shareholder can meaningfully participate in and potentially control a company's activities." The Tribunal has not been provided with the text of the cited law, however, and hence is not able properly to evaluate this argument.

On balance the Tribunal does not give weight to the points thus advanced.

The Tribunal likewise is disinclined to find persuasive, as also urged by Claimant, the fact that the 1988 lease agreement in paragraph 11(b) permits engagement of a limited number of non-Ghanaians in skilled positions while requiring training of Ghanaian employees "in all categories"and in paragraph 32 bars both Claimant and any non-Ghanaian employees from engaging in "political activity of any kind in Ghana." The Claimant argues that such limitations imply that the corporate entity so restricted has a foreign character. The Tribunal, however, considers that they could with equal logic be imposed on a purely municipal enterprise.

Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID Doc. 2, 18 March 1965, para. 25, at 9 ("While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.").[14] As one commentator has noted:

> One reason for the restrictive jurisdictional requirements is that the Convention was designed precisely to fill a particular gap in the array of earlier fora available to settle investment disputes... . It is only in the special asymmetrical situation of a dispute between an investor and a foreign government that no convenient forum was previously available... .
>
> . . . .
>
> While the limited purpose of the Convention made it possible to define restrictively the jurisdiction it was to create, the jealous concern of States for their sovereign prerogatives made it necessary that these restrictions be actually imposed.... It had been agreed from the beginning that the jurisdiction of the Centre with regard to any dispute would always have to be based on the mutual agreement of the parties concerned; *nevertheless, the governments of particularly the developing States... wished to preclude a priori any possibility that they might later be pressured into settling disputes under the Centre with* another government, or with *one of their own nationals*, or which did not relate to an investment or did not involve a legal claim... .
>
> Because of their restrictive purpose, *the* several *jurisdictional limitations cannot be waived by the parties...* .

P. Szasz, A Practical Guide To The Convention On Settlement of Investment Disputes, 1 Cornell Int'l L.J. 1, 9–10 (1968) (emphasis added).[15] *See also* E.

---

[14] In this respect the Convention differs from regimes to which parties may submit disputes based on their consent alone. *Compare* Rule 1 of the Internal Rules of the International Court of Arbitration of the International Chamber of Commerce:

> The International Court of Arbitration may accept jurisdiction over business disputes not of an international business nature, if it has jurisdiction by reason of an arbitration agreement.

[15] Thus even though he concurs that "there is no need to give a strict definition to the term 'investment' since in any case both parties must consent to the jurisdiction of the Centre with respect to the dispute" Szasz concludes that "[i]t is easy to conceive of disputes that so obviously do not relate to an investment that in spite of the desire and express stipulation of the parties, a... Tribunal would have to decide that the Centre lacks jurisdiction." Szasz, *supra*, at 14. The same can be no less true of agreements under Article 25(2)(b).

Gaillard, Some Notes on the Drafting of ICSID Arbitration Clauses, 3 ICSID Rev. - F.I.L.J. 136, 140 (1988) (the parties may not modify the limitations set forth in Article 25(2)(b)); A. Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 Recueil des Cours 331, 360-61 (1972); C.F. Amerasinghe, Jurisdiction Ratione Personae Under The Convention On The Settlement Of Investment Disputes Between States And Nationals of Other States, 1974-1975 Brit.Y.B. Int'l L. 227, 264-66. In addressing the present claim of jurisdiction grounded on the second clause of Article 25(2)(b) it is the task of the Tribunal thus to determine whether or not the Convention limit has been exceeded.

37. In undertaking this task the Tribunal first must ascertain where that Convention limit lies. Here, too, consistent with the *travaux préparatoires* of the Convention, the authorities are unanimous in placing great weight on the fact of the parties' consent. Convention History, Vol. II, 579 (comment of Dr. Broches). No detailed definition of "foreign control" has been developed either in the *travaux préparatoires* of the Convention or in ICSID jurisprudence. *See id.* at 359, 361, 447-48, 538; *see also SOABI* v. *Sénégal*, ICSID ARB/82/1 (decision on jurisdiction dated 19 July 1984), para. 29, *reprinted in* 6 ICSID Rev.—F.I.L.J. 217, 223 (Spring 1991). As the consent of the parties is in broad principle the "cornerstone of the jurisdiction of the Centre" (Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID Doc.2, 18 March 1965, para. 23, at 8), it is accorded considerable respect and is not lightly to be found to have been ineffective. Thus the acknowledged authority on the Convention states in specific regard to Article 25(2)(b) that "any stipulation... based on a reasonable criterion should be accepted" and that jurisdiction should be declined "only if... to do so would permit parties to use the Convention for purposes for which it was clearly not intended" (A. Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 Recueil des Cours 331, 360-61 (1972)). In like vein it has been stated that the agreement of the parties "on a foreign nationality based on foreign control would raise a strong presumption that there was adequate foreign control on which to predicate a foreign nationality." C.F. Amerasinghe, Jurisdiction Ratione Personae Under The Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States, 1974-1975 Brit.Y.B. Int'l L. 227, 264-66.[16]

[16] *But see* M. Hirsch, The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes 102 (1993).

Then it is "only... where such foreign control cannot be postulated on the facts on the basis of the application of any reasonable criterion that a tribunal... would not [accept jurisdiction], because in such a case the parties would purport to use the Convention for purposes for which it was not intended." *Id.*

38. Nevertheless the words "because of foreign control" have to be given some meaning and effect. These words are clearly intended to qualify an agreement to arbitrate and the parties are not at liberty to agree to treat any company of the host State as a foreign national: They may only do so "because of foreign control." The Tribunal concludes that the existence of consent to an arbitration clause such as paragraph 36(a) of the 1988 lease agreement in circumstances such that jurisdiction could be premised only on the second clause of Article 25(2)(b) raises a rebuttable presumption that the "foreign control" criterion of the second clause of Article 25(2)(b) has been satisfied on the date of consent.

39. Before addressing the specific facts and circumstances of the instant case it remains for the Tribunal to state its understanding of the object and purpose of the Convention. Initially they are framed in its Preamble:

> Considering the need for international cooperation for economic development, and the role of private international investment therein . . .
>
> Recognizing that while ["disputes... in connection with... investment between Contracting States and nationals of other Contracting States"] would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases... .

In submitting the Convention to governments for consideration the Executive Directors of the International Bank for Reconstruction and Development cited "a larger flow of private international investment" as "the primary purpose of the Convention" and noted that the "creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward... stimulating [such] flow." Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID Doc.2, 18 March 1965, paras. 9, 12, at 4. The Executive Directors simultaneously "recognize[d] that investment disputes are as a rule settled through administrative, judicial or arbitral procedures available under the laws of" the host country. *Id.*, para. 10, at 4. They noted in summary that "the provisions of the Convention maintain a careful balance between the interests of investors and those of host States." *Id.*, para. 13, at 5.

40. The Tribunal proceeds to a review of all of the relevant facts and circumstances presented in the parties' written and oral submissions including the written and oral evidence.

41. The facts initially relevant to the issue of foreign control as regards Vacuum Salt are not in dispute. It is conceded that as of 22 January 1988 Mr. Gerassimos Alexis Panagiotopulos, a Greek national resident in Ghana since 1942, held 20 percent of the shares of Vacuum Salt. It is agreed that on that date three banks owned by Ghana, *i.e.*, National Investment Bank, Development Finance and Holdings Limited and National Savings and Credit Bank, held ten percent each, and that the remaining 50 percent was held by private Ghanaian nationals (including one company) as follows:[17]

Albert Adamako	10%
Appenteng Mensah & Co.	31%
Kwesi Efuna (also known as Robert John Hayfron-Benjamin)	2.5%
Kabutey Olaga	1.5%
Ernest Orgle	5.0%

As Claimant observed, 20 percent of the company's shares could combine with the shareholding Ghanaian state banks to block any action by the Ghanaian private shareholders or, conversely, could join with those private Ghanaian shareholders to override any objections by those state bank interests.[18]

42. The genesis of these shareholdings likewise is not in dispute. Vacuum Salt was incorporated on 4 November 1966 by Mr. Panagiotopulos

---

[17] As noted at paragraph 42, *infra*, Vacuum Salt's shares have been held by the same persons in the same percentages since 11 November 1976.

[18] Were the Tribunal to consider the situation also as of the date of registration of the Request (or even later, as urged by Ghana) it would be required to address contested issues regarding the shareholdings in Vacuum Salt. It is common ground that starting in 1984 Ghana announced its intention to acquire a total of 51 percent of the shares by acquiring 30 percent of each private shareholding and that the 70 percent private shareholders then agreed in principle to sell 30 percent each for value. It is further undisputed that it was agreed that until such shares would be transferred management would remain with the private shareholders but the board of directors would be evenly divided with six seats being filled by the three banks and six by the private shareholders. The parties differ on whether the contemplated transfer in fact was ever made with legal effect. (Since Ghana does not contend it was made prior to 22 January 1988 it has not been necessary for the Tribunal to resolve this issue.) Ghana further contends that in January 1993 Mr. Panagiotopulos transferred his 20 percent to the three banks and that Mr. Olaga similarly has transferred one percent since the Request was registered (the obvious implication being that Ghana now controls 51 percent even absent effectuation of the transfers previously announced). Claimant denies that either of those transfers has become legally effective.

and his brothers,[19] and it was issued a Certificate to Commence Business on 20 December 1966. All shares were transferred, however, on 2 November 1971 to Samuel Christian Appenteng, a Ghanaian national who appears to be the dominant person in Appenteng Mensah & Co. and has served as Managing Director of Vacuum Salt since that time. Thereafter, on 12 June 1975, Mr. Appenteng, while apparently retaining 20 percent for himself, transferred 80 percent of the shares to precisely the same persons (and in exactly the same percentages) as held them on 22 January 1988 (excluding Mr. Panagiotopulos). Then, on 1 November 1976, Mr. Appenteng transferred his remaining 20 percent back to Mr. Panagiotopulos. Mr. Panagiotopulos became a director of Vacuum Salt upon its establishment in 1966, his wife joined him in this capacity in 1978, and they both remained directors on 22 January 1988. It is perhaps relevant, too, that both parties acknowledge that at least until sometime roughly proximate to the date of consent Mr. Panagiotopulos and Mr. Appenteng (and their families) had a quite friendly and cooperative, if not indeed close, personal relationship.

43. The Tribunal notes, and itself confirms, that "foreign control" within the meaning of the second clause of Article 25(2)(b) does not require, or imply, any particular percentage of share ownership. Each case arising under that clause must be viewed in its own particular context, on the basis of all of the facts and circumstances. There is no "formula." It stands to reason, of course, that 100 percent foreign ownership almost certainly would result in foreign control, by whatever standard, and that a total absence of foreign shareholding would virtually preclude the existence of such control. How much is "enough," however, cannot be determined abstractly. Thus, in the course of the drafting of the Convention, it was said variously that "interests sufficiently important to be able to block major changes in the company" could amount to a "controlling interest" (Convention History, Vol. II, 447);[20] that "control could in fact be acquired by persons holding only 25 percent of" a company's capital (*id.*, 447-48); and even that "51% of the shares might not be controlling" while for some purposes "15% was sufficient" (*id.*, 538). As Amerasinghe has said, "the concept of 'control' is broad and flexible... . [T]he question is... whether the nationality chosen represents an exercise of a reasonable amount of control to warrant its choice on the basis of a reasonable criterion." C.F. Amerasinghe, Jurisdiction Ratione Personae Under The Convention On The Set-

[19] It appears that in 1956 they had formed another salt mining company known as Panbros.

[20] Claimant has not argued, and the Tribunal has not discovered any basis in the 1963 Companies Code of Ghana for concluding, that 20 percent of the shares of a Ghanaian company can block any corporate action.

tlement Of Investment Disputes Between States and Nationals Of Other States, 1974-1975 Brit. Y.B. Int'l L. 227, 264-65.[21]

44. Nonetheless, it must be true that the smaller is the percentage of voting shares held by the asserted source of foreign control, the more one must look to other elements bearing on that issue. As one authority has said, "a tribunal... may regard any criterion based on *management*, voting rights, shareholding *or any other reasonable theory* as being reasonable for the purpose." Amerasinghe, *supra*, paragraph 43 (emphasis added). It is on this basis that Claimant has strongly advanced, and Respondent has sharply contested, arguments as to control based on the role Mr. Panagiotopulos personally played in Vacuum Salt on 22 January 1988.

45. At this point a word is in order regarding the Tribunal's approach to the parties' evidence and to their submissions on the issue of control. Respondent strongly urged the Tribunal both at and following its first session to rule on the issue of Article 25(2)(b) without holding a hearing. In view, however, of the importance of the issue, its novelty in ICSID proceedings,[22] the request of the Claimant for oral proceedings and a certain preference in the Arbitration Rules for such proceedings,[23] as well as the potential importance of the Tribunal observing the witnesses,[24] the Tribunal determined to hold oral proceedings. It finds that in regard to the issue under Article 25(2)(b) this decision proved to be justified, for both the evidence developed at such hearing and the

---

[21] The Tribunal acknowledges that an issue may exist as to whether "foreign control" within the meaning of Article 25(2)(b) means exclusive control, or whether it allows for the possibility that more than one shareholder or group of shareholders may enjoy control. The Tribunal need not address that issue here, however.

[22] This case is one of first impression in ICSID proceedings so far as the Tribunal is aware. As previously noted, at paragraph 31, *supra*, all previous cases arising under the second clause of Article 25(2)(b) involved a conceded 100 percent (or, in one case, 51 percent) foreign ownership.

[23] Ordinarily, "a written procedure followed by an oral one" is required by Rule 29 unless "the parties otherwise agree." Rule 41(4), however, gives the Tribunal discretion, in considering objections to jurisdiction, to "decide whether or not the further procedures relating to the objection shall be oral."

[24] It was significant, for example, that affidavits were filed in the written proceedings by *Respondent* signed by Mr. Panagiotopulos, on whose 20 percent shareholding and allegedly key role in Vacuum Salt *Claimant* was relying, advising that since registration of the Request he, so far as he was concerned, had transferred all of his shares to the three shareholding Ghanaian state banks (as later also did Mr. Olaga with regard to one percent of his 1.5 percent holding), and supporting on various points the contentions of Ghana. (At the second session both Mr. Panagiotopulos and Mr. Olaga were presented as witnesses by Respondent.) In addition, it should be noted, the written submissions on the issue of whether or not filing of the Request was duly authorized by or on behalf of Vacuum Salt increasingly compelled the Tribunal to hear the affiants in person. As the Tribunal did not find it possible absent such hearing to determine which issue it should first proceed to decide, oral proceedings became, in fact, unavoidable.

extensive oral submissions by counsel have illuminated the issue significantly more fully than would have been the case had the parties been restricted to a written procedure.[25] Indeed, the hearing was essential to a full elaboration and understanding of the issue.

46. That being said, the Tribunal wishes to make clear, however, that as to all facts regarding which there has been testimony it has relied in reaching its decision here on the version most favorable to Claimant. It is not required to do so, and, indeed, were its Award different, it would not have been able to do so; in that event it would have been compelled to dispose one way or the other of any number of contested issues of fact, including any hinging on a determination of credibility of witnesses. In the event, however, the Tribunal is able to reach its result even on the basis of construing the testimonial record most favorably to Claimant.[26]

47. A poignant statement of Mr. Panagiotopulos' relationship to Vacuum Salt is found in a letter he wrote on 3 May 1991 regarding "MY RETIREMENT SERVICE BENEFITS." In that missive he stated "for the records that Commercial salt winning through the solar system was introduced into this country by me." After reiterating "my pioneering role in the salt industry and hence my love for this industry" he continued "that I have an overriding interest to see to the success of the operations of the company." He ended by noting again that it was he who had "created Vacuum Salt... which is my brain child."

48. Consistent with this relationship, Mr. Panagiotopulos from the start served continuously in a significant technical capacity with Vacuum Salt, *i.e.*, as Technical Director, a position which he held on 22 January 1988 (on which date, however, he was in Greece). According to the terms of the only written contract of his employment as Technical Director that is in evidence, which covered the calendar year commencing 1 March 1986 (but the terms of which appear to have been applicable also on the date of consent), Mr. Panagiotopulos

---

[25] It thus goes without saying that the Secretary-General, whose "screening"of the Request is conducted exclusively "on the basis of the information contained in the request," hardly could find it to be "manifestly outside the jurisdiction of the Centre"and was compelled to register it. *See* Convention, Article 36(3).

[26] Consequently, in particular, the Tribunal is not required to judge the testimony, for example, of Mr. Panagiotopulos (or Mr. Olaga). This should allay any fears that otherwise might be entertained that Claimant's asserted entitlement to ICSID arbitration has in any way been impaired by the very acts which are the subject of the Request.

was to receive (1) 2,500 cedis per month,[27] (2) two months' home leave in Greece for each ten months' employment (including free return passage for himself and his wife), (3) free use of a furnished house, (4) free medical care for himself and his wife, and (5) use of a chauffeur driven automobile. Under such contract Mr. Panagiotopulos was obligated to "devote the whole of his time, skill and energy to the smooth and efficient running of any business under his" charge.

49. Claimant also has placed before the Tribunal corporate board of directors minutes dating from 24 October 1973 through 2 December 1982 (as well as minutes of a staff meeting of 19 August 1985) that, as stated by Mr. Samuel Christian Appenteng, show "how the board gave Mr. Panagiotopulos broad authority to develop the salt manufacturing capability of the Songor Lagoon and routinely agreed to implement his proposals." It is also true that certain of those minutes, without further explanation, refer to Mr. Panagiotopulos as "General Manager" (listed following Mr. Appenteng as Managing Director), *i.e.*, minutes of 11 November 1976, 9 December 1976 and 18 February 1977, and that in those instances Mr. Panagiotopulos (in addition to his usual technical report) gave the financial report theretofore given by the Managing Director. In later minutes, *i.e.*, those of 16 February 1979, 27 June 1979, 3 December 1980 and 2 December 1982, Mr. Panagiotopulos, again without explanation, is listed as Deputy Managing Director. His role in these minutes predominantly is to report on technical issues. The substance of these

---

[27] At the rate of U.S.$ 1/90 cedis prevailing at the commencement of that period (*see* International Financial Statistics, 246 (IMF, Dec. 1993)) this was the countervalue of U.S.$ 27.80 per month. By 22 January 1988 an exchange rate of U.S.$ 1/176 cedis prevailed (*see id.*), reducing the value to U.S.$ 14.20 per month. (Those figures are to be considered in comparison to the annual per capita income in Ghana during that time period, which according to World Bank statistics was approximately U.S.$ 400. *See* The World Bank Annual Report 1990 at 105.) Mr. Panagiotopulos's testimony differs somewhat from those figures. In response to questions by Mr. Stern Mr. Panagiotopulos testified that in 1987 he "was assigned like 1,835 per month." Mr. Stern asked whether that was "substantially less in those days than 100 dollars a month," to which Mr. Panagiotopulos responded, "[l]ater on, yes."

The evidence before the Tribunal also indicates that when Mr. Panagiotopulos concluded an agreement to serve as a technical consultant for Ghana in July 1992 (*see* paragraph 52, *infra*) he was to be paid "the Cedi equivalent of U.S.$2,000... per month" in addition to other benefits similar to those he had received earlier. The difference in salary, however, could be explained by the ultimate loss of Mr. Panagiotopulos's status as shareholder. As a 20 percent shareholder in the company, Mr. Panagiotopulos would have been entitled to collect potentially significant dividend income. (According to the Minutes of the Annual General Meeting of the Company held on 21 October 1992, for example, the members "resolved that the Dividend of [cedis] 150 million that is, [cedis] 150 per share in respect of the period ended 31st December, 1991, recommended by the Board be approved." Under the exchange rate prevailing at the end of 1992, U.S.$ 1/520 cedis (*see* International Financial Statistics, 246 (IMF, Dec. 1993)), this dividend was the countervalue of approximately U.S.$ 289,000.)

minutes is consistent throughout with Mr. Appenteng's description of them. No minutes are submitted for any period during the five years from 2 December 1982 to 22 January 1988.

50. The undeniable importance to Vacuum Salt of Mr. Panagiotopulos' technical involvement in its operations is underscored by the admitted fact that throughout the events of which Claimant complains, the Government of Ghana apparently has found it necessary to ensure his continued involvement in its operations. While it is his status as of 22 January 1988 that is determinative, subsequent events arguably are relevant as bearing on his status at that date.

51. It is asserted by Claimant that in the latter part of 1989 actual management of Vacuum Salt was assumed by an Interim Management Team inserted into its operations by the Government of Ghana. For a time, at least, Mr. Panagiotopulos continued nonetheless as Technical Director. Thereafter, in frustration, it is alleged, he resigned that post. Clearly he then was engaged as "technical consultant" to train a successor. It was in the context of a request to the Interim Management Team "to extend [that] engagement with the company to the end of December, 1991" that he wrote the letter concerning "MY RETIREMENT SERVICE BENEFITS" to which reference was made previously (paragraph 47, *supra*). The minutes of a board of directors meeting of 12 March 1992 record that by then "a new contract agreement had been signed with" Mr. Panagiotopulos as "the Technical Consultant."

52. Later, following action commencing 24 April 1992 by which Claimant alleges that its 1988 lease agreement has been breached and it and other assets expropriated, the Interim Management Team was replaced by a Salt Development Project Task Force of Ghana. A Government of Ghana notification of 21 September 1992 regarding that Task Force lists Mr. Panagiotopulos, described as "Government Consultant for Salt Development in Ghana," among its seven members as the "Technical Member." Such employment is memorialized in correspondence exchanged by Mr. Panagiotopulos with the "PNDC Secretary for Lands and Natural Resources" dated 27 and 30 July 1992 encompassing contractual terms similar to those under which he had been employed as Technical Director by Vacuum Salt.

53. It is significant that nowhere does there appear to be any material evidence that Mr. Panagiotopulos either acted or was materially influential in a truly managerial rather than technical or supervisory vein. At all times he was subject to the direction of the Managing Director, Mr. Appenteng, who himself apparently controlled the largest single block of shares (31 percent held by Appenteng Mensah & Co.), and who in turn responded to the board of directors, of which Mr. and Mrs. Panagiotopulos were but two members. Nowhere in these proceedings is it suggested that Mr. Panagiotopulos, as

holder of 20 percent of Vacuum Salt's shares, either through an alliance with other shareholders, through securing a significant power of decision or managerial influence,[28] or otherwise,[29] was in a position to steer, through either positive or negative action, the fortunes of Vacuum Salt. The fact that it was truly his "brainchild" and, if such be the case, that his technical advice generally was heeded,[30] and even proved to be indispensable, does not fuse with his 20 percent shareholding to render him capable of strongly influencing critical decisions on important corporate matters.[31] This is reflected in the board minutes under review, where he invariably delivered the "technical report," and, while temporarily styled General Manager or Deputy Managing Director, also reported on the company's financial status. In the end, the entire proceedings, even viewed in the light most favorable to Claimant, are instinct with the sense that Mr. Panagiotopulos, for all his admitted talents, was not in any sense "in charge."

54. The Tribunal is constrained to conclude that the presumption from the fact of consent that the requirements of the second clause of Article 25(2)(b) were satisfied in this case on 22 January 1988 is rebutted. Admittedly, "it would

---

[28] Claimant noted the pronouncement of A.A. Berle that "The holder of control is not so much the owner of a proprietary right as the occupier of a power position." A.A. Berle, "Control" in Corporation Law, 58 Col. L. Rev. 1212, 1215 (1958). Here Mr. Panagiotopulos is not shown to have occupied such a "power position."

[29] The Tribunal is mindful of Claimant's reference to the statement of the United States Supreme Court in *North American Co.* v. *S.E.C.*, 327 U.S. 686, 693 (1946) that

> Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control... . Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command.

In this case the Tribunal fails to discern any such "subtle or unexercised power."

[30] Mr. Leon Appenteng, the son of Vacuum Salt's Managing Director and himself a substitute director of the company, summed up Mr. Panagiotopulos' role as follows in answer to the question "[D]id he have the capacity or the ability to impose decision making at the company at that time ['1988 and 1989']":

> Absolutely, I mean the company board members... had always relied entirely on him for technical expertise in all production, construction, maintenance of plant and equipment at the site. I mean that was his role and the company always relied on him for that.

[31] One would think that a person having "control" in any sense of Vacuum Salt would have played a role in the decision to commence this arbitration. The Tribunal notes, however, that according to the evidence of both parties Mr. Panagiotopulos did not even participate in (either in support of or in opposition to) that decision. Claimant alleges that an Extra-Ordinary General Meeting of the shareholders held 14 May 1992 to discuss Ghana's compulsory acquisition of Vacuum Salt's leasehold interest in the Ada-Songor Lagoon and attended by all shareholders but Mr. Olaga validly delegated the decision as to whether or not to arbitrate to the private shareholders by unanimously resolving:

> The Minority Shareholders could reserve the right to take whatever steps they wanted to protect their interest in the Company.

be difficult to challenge later such a stipulation [under Article 25(2)(b)] agreed to by the Contracting State concerned, regardless of the objective situation." P. Szasz, A Practical Guide To The Convention On Settlement Of Investment Disputes, 1 Cornell Int'l L.J.1, 20 (1968). The Tribunal finds the Request here, however, to be such a case. Simply stated, accepting jurisdiction in the particular circumstances of this case, in our view, "would permit parties to use the Convention for purposes for which it was clearly not intended." We do not find here indications of foreign control of Vacuum Salt such as to justify regarding it as a national of an ICSID Contracting State other than Ghana. In our estimation, the drafters of the Convention, and specifically of the second clause of Article 25(2)(b), cannot have contemplated that a case such as this one would bring into play an international dispute settlement regime designed to promote greater private international investment by providing a forum for the resolution of any ensuing disputes between a State and a national of another State.

55. For the reasons set forth above, the Tribunal finds that it lacks jurisdiction and, accordingly, the Request for Arbitration herein must be dismissed.[32]

C. *COSTS*

56. Article 61(2) of the Convention provides as follows:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of

---

Claimant further alleges that at a meeting held that same evening at the home of Mr. S.C. Appenteng, Vacuum Salt's Managing Director, attended also by Mr. Hayfron-Benjamin and Mr. Orgle (collectively representing a majority of the privately held shares), as well as by Mr. Leon Appenteng, it was decided to submit the Request. (The Tribunal notes that the Extra-Ordinary General Meeting Resolution provided to counsel here for Vacuum Salt and submitted by them to ICSID as set forth in paragraph 4, *supra*, included as its resolving clause only the resolution adopted at this second meeting.) (Alternatively, Claimant alleges Mr. S.C. Appenteng validly authorized filing of the Request within his powers as Managing Director.) The evidence is conflicting as to whether Mr. Panagiotopulos had notice of this latter meeting. The fact remains, however, that one reasonably could have expected that a person exercising "foreign control" within the contemplation of Article 25(2)(b) necessarily would have become involved, or would have involved himself, one way or another, in the process whereby such an important decision was made. The Tribunal is conscious, of course, that the date as of which the existence or absence of "foreign control" initially is to be determined is 22 January 1988 and not 14 May 1992. Nonetheless, in the context of the entire record in this case the Tribunal finds the events of 14 May 1992 pertinent. *See* paragraph 50, *supra*.

[32] It thus is unnecessary for the Tribunal to consider further the other objections pleaded by Ghana. *See* paragraph 13, *supra*.

the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

Arbitration Rule 47(1)(j) requires that this Award contain "any decision of the Tribunal regarding the cost of the proceeding."

57. It does not appear that "the parties otherwise agree" within the meaning of Article 61(2).

58. The Tribunal decides that each party shall bear the expenses incurred by it in connection with the proceedings, and that the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid by them in equal shares.

59. Inasmuch as the parties have advanced to the Centre equal deposits in respect of such fees, expenses and charges adequate to pay them, no monetary award is required.

D. *AWARD*

60. For the reasons set forth above

THE TRIBUNAL AWARDS AS FOLLOWS:

1. The Request for Arbitration herein registered 11 June 1992 is dismissed for lack of jurisdiction.

2. Each party shall bear the expenses incurred by it in connection with the proceedings.

3. Each party shall pay one half the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre.

Done at the Peace Palace, The Hague
The Netherlands

1 February 1994

/s/

Sir Robert Y. Jennings
President

/s/

Charles N. Brower
Member

/s/

Dr. Kamal Hossain
Member