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## DECISION ON ANNULMENT, 3 MAY 1985

(Translation)

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## INTRODUCTION

1. On 10 February 1984, the Klöckner Company (hereafter referred to as the Claimant) lodged with the ICSID Secretariat an Application for the Annulment of an Award pursuant to Article 52 of the Convention on the

Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) of 18 March 1965. The Award was rendered on 21 October by an Arbitral Tribunal constituted in 1981 following the registration on 14 April 1981 of a Request for Arbitration lodged on 10 April 1981 by Klöckner Industrie-Anlagen GmbH, a company incorporated under German law having its principal place of business (*siège social*) in Duisburg.

The Tribunal consisted of Messrs Dominique Schmidt, a French national, appointed by the Claimant; William D. Rogers, an American national, appointed by the United Republic of Cameroon and the Cameroon Fertilizer Company (SOCAME SA), the Respondent; and Eduardo Jiménez de Aréchaga, a Uruguayan national, appointed President by agreement of the two arbitrators.

The Application for Annulment was registered by the ICSID Secretariat on 16 February 1984. On 28 February the Chairman of the Administrative Council appointed Professors Ahmed El-Kosheri, an Egyptian national, Ignaz Seidl-Hohenveldern, an Austrian national, and Pierre Lalive, a Swiss national, as members of the *ad hoc* Committee provided for in Article 52(3) of the Washington Convention. Professor Pierre Lalive was elected President of the Committee.

Following a preliminary meeting of the *ad hoc* Committee in Geneva on 8 May 1984, in the presence of ICSID's representative, Mr G. R. Delaume, the parties and their counsel (for Klöckner, Maître Philippe Nouel of Gide, Loyrette and Nouel, Paris, and for Cameroon, Maître Jan Paulsson of Coudert Frères, Paris) held a first meeting with the *ad hoc* Committee on 23 May to discuss various procedural matters. As a result of this meeting, a procedural order was issued on 24 May setting the time limits for the exchange of memorials, the dates for the oral proceedings and miscellaneous questions of detail.

In accordance with this order and the ICSID Arbitration Rules, Cameroon's Counter-Memorial (in reply to Klöckner's Application for Annulment, which was considered as the First Memorial) was filed on 2 July 1984; Klöckner's Reply Memorial on 3 August 1984; and Cameroon's Rejoinder (entitled "Reply") on 31 August 1984. The oral pleadings then took place in Geneva on 24 and 25 September 1984.

On 27 September 1984 the Committee issued two procedural orders requesting the parties to provide various documents and authorizing them to file notes on their oral pleadings no later than 31 October 1984. Both parties complied with these orders.

During November and December 1984, various procedural questions were before the Committee. There was in particular a request from Klöckner for the transcription of oral pleadings before the arbitrators in July 1983. Cameroon objected to this request. On 20 December 1984 the Committee decided to reject the request but authorized the Claimant to submit a summary, not exceeding five pages, of its July 1983 oral pleading by 31 December 1984. The Respondent was authorized to submit a summary of

its reply oral pleading by 10 January 1985. The Claimant submitted its summary on 29 December 1984. The Respondent decided that it would be useless to do so.

During the first months of 1985, the *ad hoc* Committee held several working sessions in Geneva, and requested that the ICSID Secretariat forward to it several documents relating to the arbitral proceeding. Documents requested on 14 January and 10 April 1985 were supplied on 15 January and 22 April respectively.

On 25 April 1985 the President of the Committee requested ICSID to inform the parties that the proceeding was closed.

2. In its Application for Annulment, the Claimant contested the Award on several grounds. These may be grouped as follows:

- I. Manifest excess of powers (Article 52(1)(b)) due to the Arbitral Tribunal's lack of jurisdiction;
- II. Manifest excess of powers (Article 52(1)(b)) due to a violation of Article 42(1) of the Convention;
- III. Serious departure from a fundamental rule of procedure (Article 52(1)(d)); and
- IV. Failure to state reasons (Article 52 (1)(e)).

3. Before proceeding to examine each complaint in the order listed above, the *ad hoc* Committee considers it necessary to note, by way of a preliminary observation, that the remedy provided by Article 52 of the Convention of 18 March 1965 is in no sense an *appeal* against arbitral awards. This provision permits each party in an ICSID arbitration to request the annulment of the award on one or more of the grounds listed exhaustively in the first paragraph of Article 52 of the Convention.

As will be shown later, application of the paragraph demands neither a narrow interpretation, nor a broad interpretation, but an appropriate interpretation, taking into account the legitimate concern to surround the exercise of the remedy to the maximum extent possible with guarantees in order to achieve a harmonious balance between the various objectives of the Convention. The very language of the provision demands a cautious approach: sub-paragraph (b) requires that the Tribunal's excess of powers be "*manifest*." Likewise, under sub-paragraph (d), only a "*serious departure*" from a *fundamental* rule of procedure can justify challenging an award. Finally, the Convention envisages in sub-paragraph (e) a "*failure to state*" reasons and not, for example, a mistake in stating reasons. With respect to each complaint, the *ad hoc* Committee will determine the meaning which must be given to the legal concepts involved.

#### I. EXCESS OF POWERS DUE TO THE ARBITRAL TRIBUNAL'S LACK OF JURISDICTION (ARTICLE 52(1)(b))

4. Starting from the foregoing preliminary observation, it must be noted that the term "excess of powers" (*excès de pouvoir*) used in sub-paragraph

(b)<sup>1</sup> is multi-faceted: it can cover a variety of complaints formulated against the contested award.

Clearly, an arbitral tribunal's lack of jurisdiction, whether said to be partial or total, necessarily comes within the scope of an "excess of powers" under Article 52(1)(b).

Consequently, an applicant for annulment may not only invoke lack of jurisdiction *ratione materiae* or *ratione personae* under Articles 25 and 26 of the Convention, but may also contend that the award exceeded the Tribunal's jurisdiction as it existed under the appropriate interpretation of the ICSID arbitration clause.

Confronted by an application of this nature, the *ad hoc* Committee should: *primo* decide whether the Tribunal has indeed exceeded its jurisdiction in any way whatsoever; and *secundo*, if it has, determine the extent to which such an excess might be characterized as a "manifest excess of powers."

An award would be subject to annulment only where the excess of jurisdiction is sufficiently well established and recognized as manifest.

5. In the present case, the question of jurisdiction was raised for the first time with regard to the counterclaim. The Claimant asked the Tribunal to declare itself incompetent with regard to that claim (Reply Memorial dated 30 October 1982, pp. 10-14), on the ground that the Management Contract concluded exclusively between Klöckner and SOCAMÉ contains an arbitration clause conferring jurisdiction on the ICC Court of Arbitration and not on ICSID.

6. Examining its jurisdiction in general, the Tribunal first noted (p. 21) that it had been seized by the Claimant on the basis of Article 18 of the Fertilizer Factory Turnkey Contract of 4 March 1972; that this jurisdiction was accepted by the Respondent who "expanded" it by also invoking Article 22 of the Protocol of Agreement of 4 December 1971, which is identical to Article 18 of the Turnkey Contract; and that such expansion was not contested by the Claimant.

The Award continues (p. 21) by considering as "important" the Claimant's acceptance (Reply Memorial, p. 11) of ICSID's jurisdiction "with respect to the Protocol of Agreement" because it would "therefore" have accepted:

that the ICSID clause, contained in the Protocol of Agreement, applies to all of the undertakings agreed by the parties in said Protocol, including the Claimant's undertaking in Article 9 to "be responsible for the technical and commercial management of the Company, to be carried out under a Management Contract."

The importance of this acceptance is further underscored on page 23 of the Award. Here the Tribunal considers what it calls "the consent expressed

<sup>1</sup> Translator's note: The French text of Article 52(1)(b) reads "excès de pouvoir manifeste du Tribunal." The English text reads "that the Tribunal has manifestly exceeded its powers."

in this regard (i.e., the Arbitral Tribunal's jurisdiction under Article 9 of the Protocol of Agreement) by the Claimant on page 11 of its Reply Memorial" to be a "decisive consideration" capable of casting aside any doubt. The Award continues (p. 23):

In this document, the Claimant maintained that the Management Contract in and of itself falls outside the scope of this Tribunal's jurisdiction, and that is correct. But it expressly accepted the Tribunal's jurisdiction "with respect to the Protocol of Agreement," without excepting its Article 9.

7. Challenging the award for excess of powers within the meaning of Article 52(1)(b) of the Washington Convention, the Claimant criticized this argument, particularly on pages 8 and 9 of its Application for Annulment. It repeats several of its previous statements (for example on pp. 12-13 of the same Memorial cited by the Tribunal) which show that it has indeed accepted ICSID's and the Tribunal's jurisdiction "with respect to the Protocol of Agreement" generally but while specifying simultaneously how, in its opinion, this acceptance should be interpreted.

Thus, for example, in its Memorial (pp. 12-13) it wrote:

*Neither could jurisdiction result from the arbitration clause of the Protocol of Agreement providing in its Article 9 for the conclusion of a management contract. Article 22 of the Protocol of Agreement confers jurisdiction on ICSID over disputes "regarding the validity, interpretation or application of the provisions of the present Protocol." The arbitration clause of the Management Contract (VI, 8) covers "all disputes arising from the present Contract." Article 22 of the Protocol of Agreement thus only applies to the question of whether KLÖCKNER fulfilled its obligation to conclude a management contract pursuant to Article 9.*

8. Under these circumstances, it must be acknowledged that the Award at the very least suffers from a serious ambiguity when it states (p. 23) that the Claimant has "expressly accepted the Tribunal's jurisdiction with respect to the Protocol of Agreement, without excepting its Article 9."

This statement is only apparently correct. If the Claimant did not think it useful or even possible to make a formal "exception" regarding Article 9 of the Protocol, this was in reality because it expressly confined its scope solely to the obligation to conclude a management contract. Whether this interpretation is correct or not is of no importance here, since we need only determine whether, as the Award states, the Claimant "expressly consented" to the Tribunal's jurisdiction with respect to Article 9 of the Protocol of Agreement *as interpreted by the Tribunal*, not by the Claimant. If the latter did indeed "expressly accept the Tribunal's jurisdiction *with respect to the Protocol of Agreement*," it is because it interpreted the Protocol (correctly or incorrectly) in a specific way, not because it accepted in advance any different interpretation the Tribunal might give it.

9. Whatever the correct interpretation of Article 9, it was impossible to base the Tribunal's jurisdiction on the alleged "express consent" of the

Claimant regarding Article 9 of the Protocol of Agreement as interpreted by the Tribunal. On the contrary, it is obvious that the Claimant never in the arbitral proceeding accepted such jurisdiction "*ratione materiae*" in the sense that the Award accepted it. To this extent, the Claimant's criticism appears well founded. It was therefore superfluous for the Award to add that consent to ICSID's jurisdiction may be expressed at any time, under the principle of "*forum prorogatum*".

10. However, it still does not follow that the Award is tainted by manifest excess of powers as required by the Convention.

The central question in this regard is whether, as the Claimant maintains, the Tribunal manifestly exceeded its powers by finding:

— *on the one hand*, that it had:

jurisdiction to rule on the performance of the parties' obligations with respect to Klöckner's responsibility for the technical and commercial management of SOCAME, which was to be carried out under a Management Contract (Award, p. 29);

and:

— *on the other*, (p. 22) that it did:

not have jurisdiction to rule on disputes "arising exclusively from the Management Contract," Article 8 of which, according to the Tribunal, established the ICC's jurisdiction only for "all disputes arising from the present Contract."

According to the Application for Annulment (p. 7, para. 2, Discussion):

a) The Arbitral Tribunal has clearly exceeded its jurisdiction. Having noted the parties' will, free of any ambiguity or equivocation, to submit the Management Contract and its performance to the jurisdiction of the International Chamber of Commerce, the Tribunal could not without contradicting itself examine the allegedly deficient nature of KLÖCKNER's management of SOCAME since in order to do so the Tribunal should have necessarily applied the provisions of the Management Contract.

This criticism is at the heart of the Claimant's argument that the Tribunal "manifestly exceeded its powers" in its decision on its jurisdiction. It is therefore necessary that the Award's reasons in this regard be examined more closely.

11. On page 29 therein there appears the following:

*As for the Management Contract of 7 April 1977 between KLÖCKNER and SOCAME, also invoked by Respondent, the Claimant is right in denying the jurisdiction of the Arbitral Tribunal to rule on disputes arising from this contract. According to Article 8 of this contract: "All disputes arising from the present Contract shall be finally settled in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce..."*

One immediately notices the absence of any formal correspondence between the reference to "disputes" arising from the Management Contract on the one hand and the text of Article 8 itself on the other hand. The text, which is cited by the Award; speaks of "All disputes arising" from this contract. This difference seems to have escaped the Tribunal. The Tribunal seems to have attached no weight or meaning to the generality, devoid of all qualification, of the terms "*all disputes arising from the present Contract...*"

After quoting the text of the (ICC) arbitration clause of the Management Contract (Article 8), the Award adds:

Nevertheless, on the basis of Article 9 of the Protocol of Agreement, the Tribunal has jurisdiction to rule on the performance of the parties' obligations with respect to KLÖCKNER's responsibility for "the technical and commercial management" of SOCAME, which was to be carried out under a Management Contract.

This statement must be understood in light of the Tribunal's interpretation of Article 9 of the Protocol of Agreement (Award, pp. 21–24) which can be summarized here as follows:

The Protocol of Agreement contained, as "a basic obligation" (*cf.* also p. 34), "KLÖCKNER's obligation to ensure the technical and commercial management of the plant; this was the "essential condition of the investment" (by KLÖCKNER or by the Government?). In other words, the Protocol would not be limited to providing, as the Claimant held, for the conclusion by the parties of the Management Contract. It would be "self-executing," that is, it would contain "by its wording" a sufficiently clear and precise definition of the parties' obligations. (Application for Annulment, p. 7, para. 2(b))

12. The Tribunal saw a basis for, or confirmation of, its interpretation in the chronology of events, and especially in the following factor: the "technical and commercial management was in fact performed by Klöckner, which alone ran SOCAME, before as well as after the signature of the Management Contract." One proof of "*this fact*," in the Tribunal's opinion (p. 23), results from a decision taken in December 1977, after the signing of the Management Contract, to shut down the factory. This was a decision "adopted by the management, comprising (with only one exception) expatriates recommended by Klöckner, and without any evidence in the file that the corporation's Board of Directors had given its prior approval, or had even been consulted."

This passage calls for two remarks:

(i) By "proof of *this fact*," the Award was referring only to the fact of management after the signing, not before. At this point, the Award gives no indication of proof of the fact that before the signing Klöckner had "run SOCAME entirely by itself," *da facto* or *de jure*. Subsequently (p. 119), however, the Award refers to a letter from Klöckner dated 12 April 1973 in which Klöckner notes that it "is responsible for running the factory."

(ii) The Award does not explain why the composition of SOCAME's management in December 1977 (a majority of expatriates "recommended" by Klöckner) would itself be relevant and decisive.

13. Be that as it may, the Claimant's criticism (p. 8) of the Award's "chronology" reasoning essentially addresses the misreading of the

text of the (Management) Contract, the provisions of which had been definitively set and applied about two years before it was signed and "which consequently stipulated that it was retroactive to 1 January 1975; the parties had thus clearly decided to submit SOCAME's management to the provisions of the Management Contract alone."

It is true that in its Chapter III ("Jurisdiction of the Arbitral Tribunal") the Award does not discuss this argument, although it would have warranted some remarks. It may however be assumed that the Tribunal in fact did not accept it: such assumption appears justified when we consider the Tribunal's opinion (p. 22) on what it calls, in rejecting it, the theory that there was an "implicit derogation" of the (ICSID) arbitration clause of the Protocol of Agreement by the (ICC) arbitration clause (Article 8) of the Management Contract:

The Tribunal cannot share this view, under which ICSID jurisdiction would have existed from the date of the Protocol, 4 December 1971, but would have evaporated by a kind of implicit derogation on 7 April 1977, the date the Management Contract was signed. There might doubtless be disputes arising exclusively from the Management Contract – relating for example to the payment of fees established in said Contract – and such disputes would naturally fall beyond the jurisdiction of this Tribunal, and be subject to the ICC clause....

14. Consequently, *even if* the Tribunal had taken into account (which it seems not to have done) the Management Contract's stipulation that "it was retroactive to 1 January 1975," (Application, p. 8), it would not have accepted – given its interpretation of Article 9 of the Protocol – that the (ICC) arbitration clause of the Management Contract could modify in any way whatsoever, i.e., "derogate" from, ICSID's jurisdiction established by the Protocol of Agreement of 4 December 1971.

Clearly, diverse opinions are possible in this regard. It might, for example, be held that nothing prevents contracting parties, *after* concluding a contract containing (as the Protocol does) an ICSID clause, from modifying this clause (like any other clause in the contract), or limiting its scope by another mutually agreed clause, since if they agree, they could equally well modify or even eliminate the entire first contract.

It might also be asked why, in a case where two clauses apply to the same subject matter, the second, more recent, one, could not "implicitly derogate" from the first, assuming that this is a case of "implicit" derogation. In this regard, reference should be made to Article VI(5) of the Management Contract, according to which "*this Contract comprises the*

entire agreement between the parties and cancels all prior correspondence..." This provision does not seem to have attracted the Tribunal's attention, as it did not ask if it was compatible with an examination of Klöckner's management obligations solely on the basis of the Protocol of Agreement.

Finally, a question might be asked regarding the statement in the Award (p. 22) that:

Article 8 of the Management Contract provides for ICC jurisdiction *only* for "all disputes arising from the present Contract" (Emphasis added.)

It could be added that the Award does not seem to give full effect to the terms "*all disputes arising...*" since it refers (p. 22) to "disputes arising *exclusively* from the Management Contract" as being outside its jurisdiction.

15. But the essence of the controversy is not there: it is whether the two successive arbitration clauses indeed have *different* fields of application (the first broader, the second more restricted). This is what the Tribunal maintains, apparently as a necessary consequence of its interpretation of the Protocol of Agreement with respect to Klöckner's obligations.

In the final analysis, it is therefore this interpretation which is at issue in the Claimant's contention that the Tribunal "manifestly exceeded its powers", allegedly by assuming jurisdiction to judge Klöckner's technical and commercial management, while declining jurisdiction over disputes arising from the Management Contract (or, more precisely, arising "exclusively" from this contract, such as those relating to the payment of compensation thereunder, *cf.* p. 22).

16. It is therefore appropriate to recall the text of Article 9 of the Protocol of Agreement:

KLÖCKNER will be responsible for the technical and commercial management of the Company, to be carried out under a Management Contract for at least five years from start-up, with an option to renew.

It has been seen that Klöckner interprets this clause as imposing on the parties an obligation to *conclude* such a management contract. The Tribunal gives it a broader interpretation, essentially on the basis of Klöckner's performance of that obligation *before* the conclusion of the Management Contract and even before the date set by the retroactive effect clause, i.e., 1 January, 1975).

In reading the text of Article 9, it must be admitted that *both* interpretations – the Tribunal's and Klöckner's – are possible. Either one could have corresponded to the parties' joint and genuine intention. But it obviously does not follow that the one adopted by the Award is untenable and that it constitutes an excess of powers.

17. It is neither contestable nor contested that the arbitrators have "the power to determine their own jurisdiction" (*la compétence de la compétence*), subject only to the check of the *ad hoc* Committee in the case

of annulment proceedings provided by the Washington Convention's system. They have exercised this power by interpreting the Protocol of Agreement in itself and with respect to the Management Contract. Even if it is assumed that they thereby exceeded their powers, which remains to be proven, it would, as required by Article 52(1)(b) of the Convention, be necessary that this be "manifest" for the Application to be accepted.

18. We shall deal first with the Award's interpretation of the Management Contract and its arbitration clause (Article 8) which provides that "all disputes arising from the present Contract" shall be submitted to ICC arbitration.

The Tribunal did not ask itself why the parties to the Management Contract, Klöckner and SOCAME, chose an ICC arbitration clause rather than continue to provide for ICSID arbitration. The Tribunal does not seem to have considered the possibility or likelihood that the parties thereby might have wished or sought to avoid the problem posed under the Washington Convention by the Cameroonian nationality of SOCAME, juridically a distinct legal entity but at the same time simply a means of implementing the project.

We should point out in passing that Cameroon's method, followed in many other "development" contracts, was to set up an enterprise, SOCAME, under the laws of the host country, with the latter having at least initially a minority share, and the enterprise being responsible for exercising the country's rights under the contract. This is a formula likely to be the source of legal complications and of conflicts, especially for the enterprise's management, consisting partially of expatriates.

19. The Tribunal adopts an interpretation of the purpose and scope of the ICC arbitration clause which requires examination for its consistency with the Tribunal's power to determine its own jurisdiction. There is of course room for discussion. A question may be asked in particular on the distinction the Award makes, if not explicitly, between disputes arising "exclusively" from the Management Contract and, to use the Tribunal's words (p. 22), disputes that, "flowing from Klöckner's performance, non-performance, or deficient performance of the technical and commercial management of SOCAME were subject to the ICSID clause from the start-up of the factory and remain subject to this clause by virtue of the combined effect of Articles 9 and 22 of the Protocol of Agreement..."

20. According to the Application for Annulment (p. 6 *et seq.*), the Tribunal could not, as it had done, declare itself incompetent with regard to the Management Contract and *at the same time* assert its jurisdiction with respect to Klöckner's management of the factory "by virtue of the combined effect of Articles 9 and 22 of the Protocol of Agreement." (Award, p. 22)

21. Therefore, it should first be determined whether the Tribunal assumed jurisdiction to "hear and determine the rights and obligations of the parties which constituted the *raison d'être*" of the Management Contract (Application, p. 7), or whether it "examined the allegedly deficient nature of Klöckner's management of SOCAME" (Application, p. 7, para. 2) and, in so doing, "necessarily applied the provisions of the Management Contract."

In Section "VI. The Law" of the Award (p. 104 *et seq.*), the Arbitral Tribunal, as part of its examination of the "*exceptio non adimpleti contractus*," considers (under letter c, p. 114 *et seq.*) what it calls the "significance of failure of performance in this case," and finds that:

In the present case, Klöckner's shortcomings in the performance of its undertakings are very far from being minimal.

Reviewing these various undertakings, the Tribunal (after considering the obligation to furnish a factory having the prescribed production capacity) reaches the management obligation (p. 117):

In order to perform the relevant contracts correctly, it was not sufficient to supply a fertilizer factory, the factory had to have the required capacity *and had to be managed* in the way necessary to obtain the proposed goals.

We shall return later to this sentence, which *prima facie* seems to place upon Klöckner (as does the Tribunal's conclusion, p. 120, cited below) an obligation of result (*obligation de résultat*). It will suffice here to relate the sentence to two other assertions in the Award:

First (p. 118):

Klöckner had undertaken to ensure continuous functioning and maintenance of the factory (technical management) and its commercial management.

In addition, the following conclusion of the Tribunal (p. 120, end of Section 3 (c), which it may be noted in passing is followed by a Section 3(e) and not (d)):

The most conclusive proof of Klöckner's failure to perform its duty of technical and commercial management results simply from the shutdown of the factory in December 1977, by decision of Klöckner personnel sent to Cameroon, after 19 months of underproduction and operating losses.

This is not the place to discuss the content of this conclusion, which has been the subject of the Claimant's criticisms, and of a detailed rebuttal in the Dissenting Opinion (p. 26 *et seq.*)

22. The few quotations above in any case suffice to show that the Tribunal undeniably pronounced on Klöckner's management (which, as we have seen, it deemed itself to have jurisdiction to do on the basis of the Protocol of Agreement).

It therefore remains to examine whether in so doing the Tribunal "necessarily applied" the provisions of the Management Contract, as the Claimant alleges, or whether instead it was able to reach the conclusion that Klöckner failed to perform its management obligations *without* applying the provisions of the Management Contract.

In the first case, the Tribunal would have fallen into a patent contradiction and would have manifestly exceeded its powers by taking a decision on a

contract over which it stated it had no jurisdiction. In the second case, it would not have exceeded the limits of its jurisdiction at all.

23. The question is therefore decisive. It calls for close examination and, first, for a reference to the Tribunal's own words justifying its position (p. 121 *et seq.*):

In examining the counterclaim, the Reply Memorial affirms that "Klöckner's responsibility in the management of SOCAME results only from the Management Contract concluded between the companies." (p. 85)

This affirmation does not take into account Article 9 of the Protocol of Agreement, from which three consequences flow: (1) first, that Klöckner "will be responsible for the technical and commercial management of the Company", (ii) that this responsibility will "be carried out under a Management Contract"; and (iii) that this responsibility will last "for at least five years from start-up, with an option to renew."

The Tribunal does not have jurisdiction to pronounce on the Management Contract itself or on its interpretation. It must, however, proceed from the following presumption: That this Contract, intended to make the Claimant "responsible for the technical and commercial management of the Company," could neither qualify nor diminish Klöckner's management undertaking by virtue of the basic agreement: the Protocol of Agreement. Even if the Tribunal does not have jurisdiction to interpret the Management Contract, it should proceed from the presumption of perfect compatibility between the two instruments, the Protocol of Agreement constituting the investment's framework agreement (*l'accord cadre*) and the Management Contract being simply intended to carry out the basic agreement. (p. 122)

24. This passage of the Award raises a number of issues which it will be useful to list in a preliminary manner, without prejudice to the discussion to be undertaken in the light of the Applicant for Annulment's criticisms (especially on the basis of the Dissenting Opinion to which it refers).

(a) The text of Article 9 (like that of Article 6, which provides for the conclusion of a delivery and financing contract), uses the future tense, not the present (as used for example in Articles 5, 7, 8: "Klöckner undertakes..."):

- (i) Klöckner "will be responsible..."; and
- (ii) this responsibility is "to be carried out under a Management Contract ...", etc. The Award does not examine whether any significance can or should be attached to this use of the future tense.

(b) The Award states that the Tribunal "should proceed" from a "presumption of perfect compatibility" between the Protocol of Agreement and the Management Contract. It states but gives no reason why the Tribunal has or would have this obligation, any more than it explains this "presumption," except perhaps indirectly by saying that the first of these instruments (the Protocol) constitutes "the framework agreement" (*l'accord cadre*), while the second, the

Management Contract, is "simply intended to carry out the basic agreement." (p. 122)

(c) This interpretation confirms, or returns to, a previous observation in the Award (p. 116) which is clearly inspired by one of the decisions in the first dispute submitted to ICSID, the *Holiday Inns*<sup>(2)</sup> case:

There is consequently a single legal relationship, even if three successive instruments were concluded. This is so because the first, the Protocol of Agreement, encompasses and contains (*sic*) all three.

25. Other passages in the Award may be cited to shed light on the Tribunal's reasoning. For example, the Award cites a statement to the Board of Directors on 12 January 1977 that "Klöckner, under the Management Contract to be signed, will proceed after study to introduce improvements which will make the Company's management more efficient," and on this basis emphasizes that Klöckner "therefore admits to being the manager of the factory." (p. 122)

Taken by itself, this statement or "admission" appears not only compatible with Cameroon's argument, but also with Klöckner's for whom it is the Management Contract – and it alone – which, once it takes effect (1 January 1975), is the only source of the management obligations. It should however be recalled that the Tribunal also cites in support of its argument the letter of 12 April 1973 in which Klöckner accepts responsibility for managing the factory even well before the retroactive entry into force of the Management Contract.

In addition, the Award explains (p. 122 *in fine*) that:

Article 9 of the Protocol was not a mere promise of future agreement, nor an inoperative stipulation requiring a subsequent contract defining performance in order to become applicable, but an essential, firm, and "self-executing" undertaking.

26. This "self-executing" qualification (a term borrowed from public international law) was criticized by the Claimant as a mere assertion:

... the Arbitral Tribunal has not even taken the trouble to attempt to demonstrate in what way and why this text is "self-executing." This expression would necessarily assume that the parties' respective obligations were defined, which obviously is not the case.

A number of questions may be asked in this regard. Is this "self-executing" character ultimately inconsistent with the conclusion (provided for from the start by the parties in the Protocol) of a Management Contract, i.e., a performance agreement? Is the conclusion of a "framework

[<sup>2</sup> The text of this decision has never been made available for publication. For an account of this case see Annex 1 in Volume 1 of the *ICSID Reports*.]



agreement" to use the Award's own words, or a "programme agreement," sufficient to define the parties' rights and obligations, whether in the areas of delivery, management, etc.?

The Tribunal finds "proof" of the "self-executing" (i.e., independent, autonomous and self-sufficient) character in the fact that the Management Contract was only signed on 7 April 1977. It concludes from this that:

Consequently, the technical and commercial management of the factory during the entire critical period in 1976, and the first three months of 1977, was carried out by Klöckner on the basis of Article 9 of the Protocol alone. This Article was the single source of all the authority Klöckner exercised during this period, and consequently of all its responsibility for the management of the factory. (pp. 122-123)

27. This reasoning seems to raise the following questions or observations:

- (a) The Tribunal does not take into account or even mention the stipulation in the Management Contract expressly giving it retroactive effect (to 1 January 1975). Would this be because it deemed itself incompetent to apply or interpret the contract? How then could it reach a decision on the basis of the signature date (treating it as a fact?) without taking into account at the same time the other "fact," namely the contract's "retroactive" effect? It is true that Cameroon contests this interpretation of Article 9 of the Management Contract. According to Cameroon, there is a simple explanation for the clause. It was in the 1973 draft which became the 1977 contract, without the parties having made the modifications they seem, however, to have considered during their negotiations from 1973 to 1976.
- (b) The Tribunal appears to postulate that, since Klöckner began to manage before the signature of the Management Contract (and in fact even 1 January 1975, the date agreed for it to take retroactive effect), it necessarily follows that such management can *only* be based on the framework agreement, that is, on Article 9 of the Protocol, which the Tribunal considers to be the "single source" of Klöckner's management authority. This seems to dismiss or exclude any possibility that even *without* the Protocol of Agreement (or with this Protocol as Klöckner interprets its Article 9, as a simple "*pactum de contrahendo*"), parties can act (and one of them manage) on the basis of a tacit or oral agreement intended to be made more precise or concrete as soon as possible in a text, for example, on the basis of initial practical experience (several examples of this may be found in international practice).

28. The Tribunal's "proof" for its characterization of the management obligation it finds in Article 9 as "self-executing" therefore appears *prima facie* fragile. This does not, however, make the Tribunal's interpretation untenable, since it is not at all impossible that in this case the parties actually gave to Klöckner the power (and obligation) to manage under Article 9 of

the Protocol, before concluding a management contract (orally or in writing).

29. It is therefore necessary to examine the Award's reasoning in other respects, particularly in the light of three criticisms made by the Dissenting Opinion on this topic.

30. According to that Opinion (p. 51):

Article 9 of the Protocol of Agreement does not state only that "Klöckner will be responsible for the technical and commercial management,"

but the Article carefully adds:

to be carried out under a Management Contract (*assurée par un Contrat de Management*).

This observation is interesting in itself. It may be understood as implicitly reproaching the Award for considering, contrary to the usual principles of interpretation, only the first part of the sentence, that is, the words "Klöckner will be responsible for the technical and commercial management," *without* also taking into account the words which follow.

As the dissenting arbitrator notes, these words clearly mean "that a Management Contract *will have* to be signed on Klöckner's technical and commercial management." However, this does not seem to be helpful in resolving the present question.

31. What would warrant examination but does not seem to have attracted the attention either of the Tribunal or of the dissenting arbitrator is the precise meaning and scope of the term "carry out" (*assurer*). *Prima facie*, several interpretations of the term are possible which are more or less consistent with one or the other of the two arguments.

32. If we leave aside this question of literal interpretation, we must, like the dissenting arbitrator (p. 52), ask:

Why provide that such management will be "carried out under a Management Contract"?

The Dissenting Opinion replies:

It was because the Protocol, being a framework agreement, did no more than lay down a framework and did not have the purpose – nor could it have the effect – of regulating the conditions of performance. These conditions, which related to Klöckner's rights, powers, remuneration, obligations and responsibility in respect of management, and to the arbitration clause, were the subject of a separate agreement, namely the Management Contract.

It may be asked whether these views contradict or not those of the Tribunal. For the Tribunal (p. 122), the Protocol of Agreement is the investment's framework agreement, "the Management Contract *being simply intended to carry out the basic agreement.*"

33. This last formula again uses the rather equivocal term "carry out." Whatever its exact meaning may be in the Tribunal's mind, it does not appear fundamentally different from the Dissenting Opinion's concept (p. 52) of "regulating the conditions of performance"; indeed, it is difficult to see how it would be possible to "carry out the basic agreement" (containing for the Tribunal the principle of the right and obligation to manage) without "regulating the conditions of performance" of the management obligation.

34. The Dissenting Opinion continues (p. 52):

It follows that any attempt to identify Klöckner's powers and its responsibilities in respect of management *must of necessity* involve an analysis and evaluation of the Management Contract.

This statement is *prima facie* persuasive: as indicated above, the Award undeniably pronounces on Klöckner's management responsibility and notes "shortcomings in the performance" in this regard which "are very far from being minimal." (p. 114) It further notes (p. 117) that for there to have been "correct" performance of the contracts in question (which doubtless means the "three successive instruments" mentioned on p. 116), it would have been necessary for the factory "to be managed in the way necessary to obtain the proposed goals" (p. 117). Finally, the Tribunal holds (p. 116) that the facts conclusively demonstrate "that Klöckner's two basic obligations (i.e. the delivery obligation and the technical and commercial management obligation) were performed in an imperfect and partial manner."

35. If the Tribunal had found that the management obligation had *not been performed at all*, or even partially, it would doubtless be easier to accept that the Tribunal could reach the conclusion *solely* on the basis of the Protocol of Agreement, without using the Management Contract, and without interpreting or applying it.

On the other hand, once the Award, to use its own words, passed on the *manner* ("imperfect and partial") (p. 116) in which the obligation was performed, or on the *way* (p. 117) the management would have to be conducted "to obtain the proposed goals," it seems more difficult to understand how the Tribunal made such judgments (on the "manner" or "way," or on the degree of perfection of the performance of the management obligation) *without* bringing in the Management Contract, which it recognized (p. 122) was "intended to carry out the basic agreement" ("*simply* intended" it is true, but this adverb, without further explanation, seems to relegate the Management Contract to a very subsidiary position).

36. The difficulty no doubt did not escape the Arbitral Tribunal. It attempted to get around the obstacle by using (as noted above) a "presumption of perfect compatibility between the two instruments," the Protocol of Agreement and the Management Contract. (p. 122) According to the Tribunal, the latter contract "could neither qualify nor diminish Klöckner's management undertaking by virtue of the basic agreement: the Protocol of Agreement." (p. 122)

37. Both components of its reasoning seem to lack relevance: it in no way proves the "self-executing" character of Article 9 of the Protocol (which as we saw above is affirmed solely because of the *de facto* situation existing *before* the Management Contract took effect).

In addition, it is difficult to see why a subsequent agreement could not modify ("qualify" or "diminish") the same parties' undertaking in a previous agreement, even if the latter is a framework agreement (at least in the absence of an expressly established hierarchy of norms or agreements).

Finally, and above all, even if "the presumption of perfect compatibility between the two instruments" can be accepted, it does not directly answer the question posed here. The question is whether, while the *principle* of Klöckner's management was (in the Tribunal's view) established by Article 9 of the Protocol, a definition, even a hazy one, of the "*conditions of performance*" of this obligation, of the rights, powers and responsibilities of the manager, may be found in the Protocol alone, as the "single source," or must inevitably be sought (also?) in the Management Contract.

38. The "presumption" of perfect compatibility does not answer this question. It certainly states or implies, if we understand the Tribunal correctly, that the Management Contract may not contain anything contrary to Article 9. But it does not state that the Tribunal may by this presumption somehow "transfer" from the Management Contract to the Protocol the conditions of performance and the regulation of Klöckner's rights and duties if these were defined in the Management Contract alone!

39. "If", in the words of the Dissenting Opinion, "we wish to ascertain Klöckner's rights and responsibilities as manager," it would not be enough to consider only Article 9 of the Protocol, which (again in the Tribunal's view) establishes the principle and the "framework" of the obligation. To do this, "we cannot but analyse and evaluate the Management Contract." (p. 52) If there is to be an evaluation of the "*manner*" ("imperfect and partial," according to the Award (p. 116)) in which Klöckner performed its basic management obligation, the Award does not explain how the Tribunal could make this evaluation *without* "pronounc[ing] on the Management Contract itself or on its interpretation." (p. 122)

40. To avoid any misunderstanding, it should be made clear that it is *one thing* to consider (as did the Award, p. 122) that:

Article 9 of the Protocol was not a mere promise of future agreement, nor an inoperative stipulation requiring a subsequent contract defining performance in order to become applicable...;

and it is *another thing* to say that it would be possible to pronounce on the "manner" in which the management obligation was performed, and to evaluate the manager's responsibilities, *without* interpreting or applying the Management Contract.

The fact that Article 9 of the Protocol contains a basic management obligation (and not merely one to conclude a management contract) is affirmed by the Tribunal, no doubt with reason. It sees therein "a firm,

essential undertaking," and a "self-executing" one in the sense (but perhaps in this sense only) that the obligation, in order to exist and to be binding on Klöckner, requires no subsequent performance contract. It will be noted that the Tribunal's view is apparently that this Article has already implicitly provided the application of the basic principles for running a factory; these principles subsist and are not contradicted by any specific provision in the Management Contract (which contains no exceptional clause compared to the average contents of management contracts in general).

However, the conclusion that Article 9 of the Protocol is not "an inoperative stipulation requiring a subsequent contract defining performance in order to become applicable" is ambiguous. It is correct if one is speaking of the existence of the obligation. It seems incorrect if one is speaking of judging as satisfactory or less than satisfactory the *manner* in which the obligation was performed and judging, with any degree of precision, the manager's responsibility. It also seems to underestimate the fact that, however "operative" or even "self-executing" it may be, Article 9 of the Protocol was in fact followed, in accordance with its terms, by a Management Contract which "carried it out."

41. At the very most it may be conceded that if no management contract had in the end been concluded (which is not the case here), contrary to the provisions of Article 9 itself, it would have been possible, though not without great difficulty, for a Tribunal to pronounce *on the extent of the manager's responsibility*. In this case, however, a Management Contract was concluded regulating the parties' rights and duties and the terms and conditions of the basic management obligation. It therefore seems impossible that a Tribunal could pronounce on the manager's responsibilities and avoid pronouncing – admittedly perhaps also on Article 9 of the Protocol, which established the basic obligation – on the Management Contract and its interpretation, something the Tribunal here declared itself incompetent to do.

42. While the Award carefully does not cite any of the Management Contract's provisions, it obviously cannot avoid all reference to this contract. It is curious to note in this regard that, after declaring itself incompetent to interpret the Management Contract and laying down the "presumption of perfect compatibility" between this contract and the Protocol of Agreement (which, as we have seen, was the framework agreement that the Management Contract was "simply intended to carry out"), the Tribunal finds "confirmation" for this conclusion (p. 122) in a statement by Klöckner "admitting on 12 January 1977 that it is the manager of the factory *under the Management Contract to be signed*." The following similar statement of 8 April 1978 on Klöckner's responsibility for technical management is cited by the Tribunal at page 121:

Klöckner obviously retains all its obligations *under the Management Contract*.

43. Clearly the Tribunal did not imagine that these quotations, and these statements by Klöckner, might weaken its argument that it would be

possible for it to pronounce on Klöckner's management obligations *without* pronouncing on or interpreting the Management Contract.

44. The Dissenting Opinion (p. 152) contains another argument as to the impossibility of pronouncing on Klöckner's management responsibilities without interpreting the Management Contract:

What is more, any attempt to do so without such analysis and evaluation would constitute a *violation* of the Protocol of Agreement, which specifies clearly that management is "to be carried out under a Management Contract."

45. It is not certain that this observation can be accepted, at least so absolutely (considering the impression of the term "carried out"). But it rightly brings up one aspect of the basic difficulty the Tribunal encountered once it held itself incompetent to deal with the Management Contract: if it is accepted that this contract was intended to define, i.e., to specify, Klöckner's management undertaking in the Protocol of Agreement, it is difficult to see how judgments could be made on management problems without also necessarily referring to the Management Contract (unless the issue was a matter only of basic principles, or of the *complete* failure to perform the management obligation). This is what the Dissenting Opinion means when it says (p. 52, para. 3) that "the Management Contract's very purpose is to *define the undertaking* made by Klöckner in the framework agreement," by which we should understand that it would spell out the undertaking and fix its modalities, performance conditions, sanctions, etc., in detail.

46. From this point of view, it must be pointed out that the Award provides only a very brief explanation of the Tribunal's idea of the purpose, role and significance of the Management Contract in relation to Article 9 of the Protocol of Agreement, the "framework agreement." It is said (p. 122) that the Management Contract is "*simply* intended to carry out the basic agreement," but no explanation is given of the exact meaning of these terms. It is reasonable to think that for the Tribunal this contract only occupies a subsidiary position in the hierarchy of contractual norms, especially as in another context (p. 116) it is stated that the first of the "three successive instruments," i.e., the Protocol of Agreement, "*encompasses and contains* all three."

47. Here one can see a first way the Tribunal could, in its opinion, avoid what may be called the obstacle of its lack of jurisdiction with respect to the Management Contract.

A second way, already mentioned, is the "presumption of perfect compatibility" between the Protocol of Agreement and the Management Contract. (p. 122)

Neither of these two ways or methods seems decisive: the first amounts to a fairly laconic assertion; the second, as has already been pointed out, in no way resolves the issue: to say that the Management Contract is "perfectly compatible" with the Protocol, it must be repeated, does not explain how the much more detailed regulation of the parties' rights and duties, and

especially of the manager's responsibilities, could be transferred or inserted into the Protocol in order to decide issues regarding the manager's responsibility by applying – the Protocol *without* applying the Management Contract!

48. The foregoing conclusion is in no way affected by the finding the Award makes in another context, following the *Holiday Inns* case. This concerns the “close connection” between the three contractual instruments (p. 115), their “interdependence,” and the idea that the parties are bound by “a single legal relationship” for which the first, the Protocol of Agreement, “encompasses and contains” the three successive instruments. (p. 116) Such an idea could perhaps have led the Tribunal to uphold its jurisdiction also to deal with disputes arising from the Management Contract. However, the Award hardly explains here how this general conception may be reconciled with the finding the Tribunal made elsewhere that it lacked jurisdiction to interpret or pronounce upon the Management Contract.

49. Another objection, raised in the Dissenting Opinion to which the Applicant for Annulment refers, deserves examination:

It is incoherent to claim at one and the same time that the Protocol of Agreement is a framework agreement and also that it is an implementing agreement whose Article 9 defines Klöckner's powers, duties and responsibilities. Given this reasoning, it is illogical to rely on the Turnkey Contract as the basis for evaluating Klöckner's responsibility as the supplier of the factory. It would be enough to invoke Articles, 3, 6 and 7 of the Protocol!

50. It is difficult to deny the weight of this argument, in view of the close parallel between these two implementing agreements of the framework agreement, namely the Turnkey Contract and the Management Contract. This leads the dissenting arbitrator to continue (p. 53):

Just as the Turnkey Contract was intended to describe Klöckner's responsibilities regarding the supply of the factory, the Management Contract purported to describe Klöckner's duties and responsibilities in the management of the factory. Moreover, just as it would be an absurdity to pass judgment on the supplier of the factory without examining the Turnkey Contract, it would be equally absurd to pass judgment on the manager without examining the Management Contract.

It will be recalled in this regard that according to the very terms of the Award (p. 114 *et seq.*) Klöckner had assumed two “basic obligations”: “by the *Turnkey Contract* ... that of supplying a factory ...” (p. 114) and “by the *Protocol of Agreement* ... that of carrying out the responsibility for technical and commercial management.” (p. 115)

51. Considering the parallelism and connections among the various contractual instruments, it will be noted that the Tribunal considers that it is “by the *Turnkey Contract*” that Klöckner had assumed its basic obligation to supply the factory (p. 114), while it is (not by the Management Contract but) “by the *Protocol of Agreement*” that Klöckner had “assumed another

obligation as basic as the first,” that of carrying out the technical and commercial management (p. 115). This divergence seems to be explained by the Tribunal's concern to maintain consistency with the finding that it lacked jurisdiction over the Management Contract.

52. *To summarize*, the following conclusions may be drawn from the preceding examination:

- (a) It is obviously not up to the *ad hoc* Committee constituted under Article 52 of the Washington Convention to say whether the contested Award's interpretation is or is not the best, or the most defensible, or even whether it is correct, but only whether the Award is tainted by manifest excess of powers.
- (b) There may of course be differences on the correct interpretation of the Protocol of Agreement and its Article 9 and, for example, its relationship to a subsequent agreement like the Management Contract. The inclusion of an ICC arbitration clause in this latter contract may also be interpreted in opposing ways. In this case, the Tribunal refused to accept, in the absence of completely precise and unequivocal contractual provisions, that the parties to the Management Contract wanted to “derogate” from the Protocol's ICSID clause. The Tribunal may have implicitly accepted that the ICSID clause constituted for both parties an “essential jurisdictional guarantee,” the relinquishment of which could neither be presumed nor accepted in the absence of clear evidence. Such an interpretation of the agreements and especially of the two arbitration clauses, whether correct or not, is tenable and does not in any event constitute a manifest excess of powers. To this extent, the complaint, while admissible, is unfounded.
- (c) Another complaint is that there was internal contradiction between the Tribunal's finding that it lacked jurisdiction with respect to the Management Contract and its decision to condemn Klöckner for what the Award on several occasions considers its shortcomings in its management obligations. On this subject, a distinction should be made between two processes: (a) the *application* (including the interpretation) of the Management Contract – which, in its own view, is beyond the Tribunal's jurisdiction; and (b) the *taking into consideration* of the same contract for the purposes of interpreting and applying the Protocol of Agreement and for understanding the general context between the parties to the arbitration. A constant practice of international arbitral tribunals shows that the second process is perfectly possible, standard and appropriate, and the Tribunal's lack of jurisdiction with respect to the Management Contract poses no obstacle to this. On the other hand, the first process is forbidden to a tribunal lacking jurisdiction, as the Award itself expressly recognized (e.g., p. 122):

*The Tribunal does not have jurisdiction to pronounce on the Management Contract itself or on its interpretation.*

- (d) Now, in its rejection (pp. 136–137) of the claim for payment of the unpaid promissory notes, particularly because of Klöckner's "responsibility for failures in its technical and commercial management," a rejection it declares a sufficient "penalty" (and also in its interpretation of the Protocol), did not the Tribunal necessarily pronounce on the Management Contract, for the reasons given above? Could it, as it indisputably did, pronounce on the performance of Klöckner's management obligation *solely* on the basis of Article 9 of the Protocol *without* (also) pronouncing on the Management Contract? Could it evaluate the existence and degree of Klöckner's "failures" or shortcomings in performing its management obligations, without interpreting the Management Contract? Could it avoid this difficulty, as it tried to do, by holding that the Protocol of Agreement "encompassed" and "contained" the Management Contract (p. 116) so that, in short, it could not exceed its jurisdiction so long as it decided on the questions encompassed or contained in the Protocol of Agreement?
- (e) It is possible to have different opinions on these delicate questions, or even, as do the Applicant for Annulment or the Dissenting Opinion, to consider the Tribunal's answers to them not very convincing, or inadequate. But since the answers seem tenable and not arbitrary, *they do not constitute the manifest excess of powers* which alone would justify annulment under Article 52(1)(b). In any case, the doubt or uncertainty that may have persisted in this regard throughout the long preceding analysis should be resolved "*in favorem validitatis sententiae*" and lead to rejection of the alleged complaint.

53. Before leaving the subject of jurisdiction, it may also be noted in passing, and solely for the sake of completeness, that the Tribunal (in Chapter III of the Award, p. 21 *et seq.*) bases its jurisdiction not only on the Protocol of Agreement and on the Turnkey Contract but also on Article 21 of the Establishment Agreement of 23 of June 1973 (which it essentially analyses on p. 42 *et seq.* of the Award) between Cameroon and the Cameroon Fertilizer Company (SOCAME). This ground is invoked by the Respondent, but contested by the Claimant (Award, p. 24) for the twofold reason that (a) it is not an agreement between the parties but between the two Respondents and (b) SOCAME, a Cameroonian company, does not meet the condition imposed by Article 46 of the Washington Convention.

54. The Tribunal refuted (pp. 25–28) the second objection at some length, observing that the question of the Tribunal's jurisdiction "*ratione personae*" with regard to SOCAME did not arise in this case (p. 27). It definitively rejected the objection on the basis that the Establishment Agreement, the Protocol of Agreement and the Turnkey Contract formed

an "inseparable whole". (pp. 28–29; *cf.* page 43; as for the Management Contract, however, see pp. 115–116)

It will suffice to observe that in its Application for Annulment, the Claimant did not think it necessary to repeat its objection in this regard, or criticize the Tribunal's reasoning as to its jurisdiction to rule on the counterclaim; and rightly so, as it is difficult to see what complaint the Claimant could have made in this regard.

55. On the other hand, the Claimant asserted that it never occurred to the parties to deal with Klöckner's management *independently* of the Management Contract (over which the Tribunal declared itself incompetent) and that this latter contract was necessary to show what the Protocol meant.

Likewise, the Claimant held that, while Article 9 of the Protocol was indeed the *source* of the management obligation, the *substance* of that obligation was determined by the Management Contract. Article 9 of the Protocol, according to the Claimant, was only a "stipulation for a third party" (*stipulation pour autrui*), requiring Klöckner to sign a Management Contract with a company to be formed, SOCAME, and also requiring Cameroon to have the said contract signed by the said company.

Moreover, the Claimant stressed that the problem in the present case was completely different from that before the Tribunal in the *Holiday Inns v. Morocco* case, where it was a matter of simultaneously applying several contracts and not, as here, a framework agreement, the Protocol of Agreement, *followed* by the conclusion of a Management Contract.

Finally, the Claimant noted that at no time during the arbitration proceeding did the respondent Government claim that the Tribunal could or should base itself solely on Article 9 of the Protocol as "self-executing," and examine Klöckner's management without interpreting or applying the Management Contract.

56. With the exception of the latter, these various arguments do not call for any particular comments, since, as we have seen, the question is not whether they are correct or plausible, or more plausible or more correct than the Tribunal's. The only issue is whether they prove a manifest excess of powers, which is not the case.

Regarding the last argument, it may be added that it is obviously not decisive, even if it is correct. It matters little in principle that the Tribunal's legal construction was different from that of one or the other of the parties, so long as the right of each to be heard was respected and, as will be seen below (*infra*, para. 91) so long as it remains within the "legal framework" provided by the parties. And this is indeed the case here.

## II. EXCESS OF POWERS DUE TO A VIOLATION OF ARTICLE 42(1) OF THE WASHINGTON CONVENTION

57. According to Klöckner's Application for Annulment (p. 11 *et seq.*),

the Award should be annulled for manifest excess of powers, as that term is used in Article 52(1)(b) of the Washington Convention, because of a "violation of Article 42(1) of the Convention."

According to the Application, "this Article requires the Tribunal to respect the rules set forth therein in rendering its award":

The Tribunal shall decide a dispute *in accordance with such rules of law as may be agreed by the parties*. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules [or principles<sup>3</sup>] of international law as may be applicable.

The Claimant maintains that the Tribunal must therefore "render its award by applying Cameroonian law based on French law, since this, as the Tribunal itself has held, is the law applicable to the present dispute." According to the Claimant, the Tribunal "ignored this principle and went beyond its powers."

58. Is this complaint admissible?

We shall not pause over the objection raised in Respondent's oral pleadings against the alleged novelty or lateness of the complaint, which is in no way established and runs counter to the fact that the Application for Annulment itself raises this ground. We shall seek instead to determine whether in its substance it is admissible within the framework of Article 52(1)(b), the one on excess of powers. This raises the question of the interpretation of Article 42(1) of the Washington Convention and of the consequences of a possible failure to observe it.

In the opinion of the *ad hoc* Committee, the provisions of Article 42 could not be interpreted as stating simple advice or recommendations to the arbitrators or an obligation without sanction. Obviously, and in accordance with principles of interpretation that are recognized generally—for example, by Article 31 of the Vienna Convention on the Law of Treaties—Article 52 on the annulment of awards must be interpreted in the context of the Convention and in particular of Articles 42 and 48, and vice versa. It is furthermore impossible to imagine that when they drafted Article 52, the Convention's authors would have forgotten the existence of Articles 42 or 48(3), just as it is impossible to assume that the authors of provisions like Articles 42(1) or 48(3) would have neglected to consider the sanction for non-compliance.

59. The Washington Convention furthermore was not being innovative when it recognized excess of powers with regard to the basic rules to be applied by the arbitrators as a possible grounds for annulment. In the famous *Orinoco Steamship Company* case, the Permanent Court of Arbitration (Award of 25 October 1910, Scott, p. 226) held that

<sup>3</sup> Translator's note: The English text of Article 42(1) of the Convention, unlike the French text, speaks of "rules" of international law, but the use of the word "*principes*" in the French version appears relevant for the discussion in this part of the Committee's decision.

excessive powers may consist, not only in deciding a question not submitted to the arbitrators, but also in misinterpreting the express provisions of the agreement in respect of the way in which they are to reach their decisions, notably with regard to the legislation or the principles of law to be applied.

Excess of powers may consist of the non-application by the arbitrator of the rules contained in the arbitration agreement (*compromis*) or in the application of other rules. Such may be the case if the arbitrator (like Umpire Barge in the *Orinoco* case) applies rules of local law while the arbitration agreement prescribes that he decide "on the basis of absolute equity, without regard ... to the provisions of local law," or if, conversely, he reaches a solution *in equity* while he is required to decide *in law* (*North Eastern Boundary between Canada and the United States* case, Award of 10 January 1831).

60. While the complaint based on failure to observe Article 42 is thus admissible in principle, it remains to be determined what exactly constitutes not deciding "in accordance with such rules of law as may be agreed by the parties," or not "applying the law of the Contracting State party to the dispute." This raises the fine distinction between "non-application" of the applicable law and mistaken application of such law.

61. It is clear that "*error in iudicando*" could not in itself be accepted as a ground for annulment without indirectly reintroducing an appeal against the arbitral award, and the *ad hoc* Committee under Article 52 of the Convention does not, any more than the Permanent Court of Arbitration in the *Orinoco* case, have the "duty ... to say if the case has been well or ill judged, but whether the award must be annulled."

Whether theoretical or practical, the discussions which have taken place on the distinction between excess of powers as a ground for annulment and error in law or mistaken application of the law have drawn attention to the issue's uncertainty or obscurity. This is illustrated by the positions taken before the International Court of Justice by Honduras and Nicaragua regarding the *Arbitral Award Made by the King of Spain*<sup>4</sup>. Honduras maintained in substance that error in law had no independent place as a ground for annulment and should only be taken into consideration when it constituted excess of powers, for instance "if the arbitrator had manifestly misunderstood a clause in the arbitration agreement which should have shown him the principles or rules to be followed to reach his decision." (Reply, para. 55) Nicaragua argued that "the flagrant misinterpretation" of a certain document was an essential error for which the award should be annulled. (Counter-Memorial, paras. 87 and 143; cf. Court's Opinion, ICJ 1960 Reports, p. 216)

From the few known precedents, to which may be added that of the *Trail Smelter*<sup>5</sup> (with respect to the award's revision), it is at least possible to

[<sup>4</sup> 30 ILR 457.]

[<sup>5</sup> 9 Ann. Dig. 315.]

conclude that an error in law, even an essential one, does not generally constitute an excess of powers, at least if it is not "manifest."

62. The attitude of reserve imposed in this regard on the *ad hoc* Committee established under Article 52 of the Washington Convention requires no particular justification. However, it does not mean, as has been alleged, that Article 52 must be interpreted *narrowly*, any more, of course, than it may be interpreted *broadly*. Of course, the system for settling disputes established by the Convention would be seriously jeopardized if there were any laxity in deciding whether the conditions listed in Article 52, taken in itself or in relation to Articles 42 and 48, are met. On the other hand, the rules in Section 5 of the Convention regarding the interpretation, revision, and annulment of the award (Articles 50 to 52) are part of the same system and must be interpreted according to the customary principles of interpretation, including the principle of effectiveness.

63. Is the complaint well founded?

With the admissibility of the complaint now established, we may now examine whether it is well founded in the light of these general considerations. According to the Application for Annulment (pp. 11-12), the Tribunal violated Article 42(1) of the Convention and exceeded its powers because it did not apply Cameroonian law, the "law of the Contracting State party to the dispute," which the Tribunal itself declared (p. 104 *in fine*) applicable in accordance with Article 42 of the Convention. The Award deals with this subject (p. 105) as follows:

One must therefore acknowledge the correctness of the Claimant's position when it says that "since the SOCAME factory project was located in the eastern part of the country, *only that part of Cameroonian law that is based on French law should be applied in the dispute.*"

The Award continues (p. 105):

Among the different arguments of French civil law invoked by the Respondent the following should be cited: absence of consent (*défaul de consentement*), wrongful inducement to contract (*dol*), and hidden defects (*vices cachés*). The two grounds which we deem applicable are (i) the fact that Klöckner did not manifest *vis-à-vis* its Cameroonian partner the frankness and loyalty required in such complex international contractual relations and (ii) the *exceptio non adimpleti contractus*.

64. The first of the Tribunal's "two grounds" is the subject of pages 105 to 109 of the Award, under the headings: "2. *The Duty of Full Disclosure to a Partner.*" These words are repeated at the end of this Section 2, when the Tribunal (p. 109) reaches the "conclusion that Klöckner violated its duty of full disclosure," and therefore "that it is not entitled to the contract price, that it is entitled to payment for the value of what it delivered and which Klöckner [*sic* - the Award reads "Cameroon"] used, and that Cameroon has already paid enough...."

65. It is undeniable that this conclusion is presented by the Award as having been reached by applying the applicable law in accordance with Article 42 of the Convention, i.e., the law of the Contracting State, "Cameroonian law based on French law" or even "French civil law." (p. 105, paras. 2 and 3)

According to the Application for Annulment (p.12), however, the Tribunal actually based itself "not on a principle of French law, but on a sort of declaration, as general as it is imprecise, of principles which are allegedly universally recognized."

66. It is therefore necessary to examine the Award's text from this point of view. On "the duty of full disclosure to a partner," the Tribunal says the following (p. 105):

We assume that the principle according to which a person who engages in close contractual relations, based on confidence, must deal with his partner in a frank, loyal and candid manner is a basic principle of French civil law, as is indeed the case under other national codes which we know of...

67. It may immediately be noticed that here the Tribunal does not claim to ascertain the existence (of a rule or a principle) but asserts or postulates the existence of such a "principle" which (after having postulated its existence) the Tribunal *assumes* or takes for granted that it "is a basic principle of French civil law."

This assumption appears to be based on the idea that the same is "indeed the case under other national codes which we know of." The Award states that "this is the criterion that applies to relations between partners in simple forms of association anywhere," and that "the rule (*sic*) is particularly appropriate in more complex international ventures, such as the present one."

We may also note that the arbitrators state a little later (p. 106) that they are "convinced that it is particularly important that *universal requirements* of frankness and loyalty in dealings between partners be applied in cases such as this one...."

The remainder of the Section (pp. 106-109) is devoted to applying this "basic principle" to the case. The statement of legal grounds is thus limited to the passages quoted above.

68. This reasoning calls for several observations:

First, it should be asked whether the arbitrator's duty under Article 42(1) to apply "the law of the Contracting State" is or can be fulfilled by reference to *one* "basic principle," and what is more, without making any more precise reference. This may be doubted if one considers the difference between "rule" and "principle" (and in particular "basic principle") and the classic definition of law in the objective sense as a *body of rules*. It will also be noted in this context that Article 42(1) itself distinguishes between the concepts of "rules of law" and "principles of law".

69. Furthermore, the reference to "other national codes which we know of," to the "particularly appropriate" character of the rule "in more complex

international ventures, such as the present one" (p. 105) and to the particular importance that "universal requirements of frankness and loyalty ... be applied in cases such as this one" seem to indicate that the Tribunal may have wanted to base, or thought it was basing, its decision on the general principles of law recognized by civilized nations, as that term is used in Article 38(3) of the Statute of the International Court of Justice. It is not impossible that the Tribunal was prompted to do so by the reference in Article 42(1) *in fine* to the "principles of international law as may be applicable" although these are not to be confused with "general principles."

Such an interpretation is conjectural and cannot be accepted. Article 42 of the Washington Convention certainly provides that "in the absence of agreement between the parties, the Tribunal shall apply the law of the Contracting State party to the dispute ... and *such principles of international law as may be applicable.*" This gives these principles (perhaps omitting cases in which it should be ascertained whether the domestic law conforms to international law) a dual role, that is, *complementary* (in the case of a "lacuna" in the law of the State), or *corrective*, should the State's law not conform on all points to the principles of international law. *In both cases*, the arbitrators may have recourse to the "principles of international law" only *after* having inquired into and established the content of the law of the State party to the dispute (which cannot be reduced to *one* principle, even a basic one) and *after* having applied the relevant rules of the State's law.

Article 42(1) therefore clearly does not allow the arbitrator to base his decision *solely* on the "rules" or "principles of international law."

70. It will also be noted that it is only in Section 3, on the *exceptio non adimpleti contractus*, that the Award mentions (p. 112) the "principles of international law to which Article 42 of the ICSID Conventions refers" and the "general principles of law recognized by civilized nations." One is tempted to conclude from this that in Section 2, on the duty of "full disclosure," the Award did *not* mean to refer to these principles of international law. In any event, one can hardly see on what basis the Tribunal could have done so, since this would correspond neither to the complementary function nor to the corrective function of the principles of international law in Article 42.

71. Does the "basic principle" referred to by the Award (p. 105) as one of "French civil law" come from positive law, i.e., from the law's body of rules? It is impossible to answer this question by reading the Award, which contains no reference whatsoever to legislative texts, to judgments, or to scholarly opinions. In this respect the contrast is striking between Section 2 (on the "duty of full disclosure") and Section 3 (on the *exceptio non adimpleti contractus*, pp. 109-114 and pp. 118, 124, 126, etc). Section 3 contains a great number of references to scholarly opinion (*doctrine*) as well as, directly or indirectly, to case law (*jurisprudence*). One could therefore assume that in the case of Section 2, regarding the duty of frankness, the arbitrators either began a similar search for authorities but found it

unproductive or, more likely, thought that a search for positive law was unnecessary.

72. In the latter case, is it possible to hold that the Award has "applied the law of the Contracting State" as required in Article 42(1)?

It is true that the principle of good faith is "at the basis" of French civil law, as of other legal systems, but this elementary proposition does not by itself answer the question. In Cameroonian or Franco-Cameroonian law does the "principle" affirmed or postulated by the Award, the "duty of full disclosure," exist? If it does, no doubt flowing from the general principle of good faith, from the obligation of frankness and loyalty, then *how*, by what *rules* and under what *conditions* is it implemented and within what *limits*? Can a duty to make a "full disclosure," even to one's own prejudice, be accepted, especially without limits? Is there a single legal system which contains such a broad obligation? These are a few of the questions that naturally come to mind and that the Award provides no basis for answering.

73. It is not the responsibility of the *ad hoc* Committee under Article 52 to determine instead of the Tribunal what rules of French civil law might be applicable, to insert them in some *posteriori* way into the Award, either in place of the reasoning found there and cited above, or in place of non-existent reasoning. The Committee can only take the Award *as it is*, interpreting it according to the customary principles of interpretation, and find that it indeed refers to general principles or "universal requirements," postulated rather than demonstrated, and which are affirmed as being "particularly appropriate" or "particularly important" in cases such as the present one.

Of course, one can only applaud the Award's emphasis on the importance of loyalty in dealings, especially in international contracts of the sort which gave rise to the present arbitration, but such approbation cannot exempt the Committee from ascertaining whether the conditions of Article 42 of the Washington Convention have been met.

74. Before concluding on this point it may be permissible, partly "*ex abundanti cautela*," to examine written pleadings filed during the arbitral proceeding for a possible explanation of the Tribunal's approach, even though the *ad hoc* Committee is not required to do this.

The examination, however, proves disappointing. Cameroon did invoke "the principle of good faith and loyalty," (*cf.* Counter-Memorial, p. 102 *et seq.*) "the obligation to advise and the contractual duty of disclosure." (p. 112 *et seq.* 5.2.3) However, Cameroon dwelt mainly on the "*precontractual* duty of disclosure," the non-observance of which, like wrongful inducement to contract (*dol*) (a ground not used by the Tribunal), "vitiates consent." Only rather summarily did Cameroon deal with the duties of advice and disclosure *after* conclusion of the contract. Curiously, the Claimant did not find it necessary to address this issue in writing and contented itself with answering (Reply of 30 October 1982, p. 25) that this was "only a matter of applying the general principles of responsibility." The Claimant may have discussed this point in its final oral pleading, but it did not find it necessary to



accept the ICSID Secretariat's offer of a transcript of this pleading. It is therefore not possible for the Committee to know what arguments the Claimant made or would have made on the "obligation of frankness and loyalty."

75. In any event, in the absence of any information, evidence or citation in the Award, it would seem difficult to accept, and impossible to *presume*, that there is a general duty, under French civil law, or for that matter other systems of civil law, for a contracting party to make a "full disclosure" to its partner. If we were to "presume" anything, it would instead be that such a duty (the basic idea of which may, of course, be accepted as it follows from the principle of good faith; *cf.* Article 1134, para. 3 of the French Civil Code) must, to be given effect in positive law, have conditions for its application and limits!

76. One of the Award's features is that it repeatedly censures Klöckner's violation of "its contractual duty of full disclosure." (p. 109) According to the Award, the Claimant did not "deal frankly with Cameroon," "hid from its partner information of vital importance at critical stages of the project," "failed to disclose facts which, if they had been known to the Government, could have caused it to put an end to the venture" and "did not act frankly and loyally towards its partners" (p. 106), so that, "in a very significant sense, it is its fault."

The repetition of these criticisms, and the harm to reputation (*préjudice moral*) likely to result therefrom, regardless of the Award's material consequences, would have justified, or better, required, special caution by the arbitrators in ascertaining and formulating the rules of law of the State party to the dispute, the applicable law under Article 42(1) of the Washington Convention.

77. Now, the Award's reasoning and the legal grounds on this topic (to the extent that they are not in any case mistaken because of the inadequate description of the duty of "full disclosure") seem very much like a simple reference to equity, to "universal" principles of justice and loyalty, such as amiable compositeurs might invoke.

According to the Award itself, this is one of the decision's two grounds. It may even be the main ground, for on page 109, paragraph 2, the *Tribunal concludes that, because of this violation, Klöckner is not entitled to the contract price*, and this even before the Award examines either the *exceptio non adimpleti contractus* (Section 3, p. 109 *et seq.*) or Klöckner's arguments on "The Reasons for the Failure." (Section 4, p. 127 *et seq.*)

78. Considering the question's fundamental importance and the seriousness of the censure in this regard, it is impossible to explain how the Award can base such censure on a simple postulate or a presumption that there is a "basic principle," without any argumentation whatsoever, and without touching on *rules* defining how this "principle" is to be applied, i.e., the respective rights and duties of the debtor and the creditor, the duty of disclosure, of frankness and loyalty, in general and this particular case, as well as the legal effects of a breach of this duty.

The absence of any indication in the Award, however, imprecise, of the applicable rules of law is all the more regrettable since it was apt to create in one of the parties an impression of injustice. This is precisely what the ICSID system and rules, and in particular Articles 42, 48(3) and 52 of the Convention, are designed to prevent.

79. *In conclusion*, it must be acknowledged that in its reasoning, limited to postulating and not demonstrating the existence of a principle or exploring the rules by which it can only take concrete form, the Tribunal has not applied "the law of the Contracting State."

Strictly speaking, it could not be said that it made this decision without providing reasons, within the meaning of Articles 48(3) and 52(1)(e). It did, however, act outside the framework provided by Article 42(1), applying concepts or principles it probably considered equitable (acting as an amiable compositeur, which should not be confused with applying "equitable considerations" as the International Court of Justice did in the *Continental Shelf* case). However justified its award may be (a question on which the Committee has no opinion), the Tribunal thus "manifestly exceeded its powers" within the meaning of Article 52(1)(b) of the Washington Convention.

80. The finding that there is a ground for annulment of the Award under Article 52 of the Washington Convention immediately raises the question of the *consequences* of that finding. According to Article 52(3) *in fine*, the "Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)."

In concrete terms, the question is whether, applying the principle of *favor validitatis* or "partial annulment of legal acts," *only a part* of the contested award should be annulled, or whether it should be annulled in its *entirety*.

Generally speaking, partial annulment would seem appropriate if the part of the Award affected by the excess of powers is identifiable and detachable from the rest, and if so, the remaining part of the Award has an independent basis.

81. Such is clearly not the case here. Indeed, the Award rejected Klöckner's claim for payment by a single decision. (pp. 136-137) What the Tribunal terms "this company's responsibility for shortcomings in delivering the factory and in its technical and commercial management" and in the alleged duty of "full disclosure" seem, insofar as one can understand in the Award, to be linked both to the delivery obligation and doubtless above all to the management obligation. It is because of the breach of this "contractual duty of full disclosure" that the Award concludes (p. 109) that Klöckner "is not entitled to the contract price" and that it has already been "paid enough." Since in the Tribunal's view the Award forms a whole, and since the Tribunal, in rejecting the counterclaim, as it were made parallel decisions based on the alleged illegality of Klöckner's lack of frankness, the Award's annulment should also extend to the part relating to the counterclaim.

That being the case, one does not see how, at least in the Award's operative parts, one can dissociate matters relating solely to a breach of the

alleged “duty of full disclosure,” and to decide on only a partial annulment. This conclusion is moreover confirmed and reinforced, as will be seen below, by the response to some of the other complaints of the Applicant for Annulment.

82. Once the *ad hoc* Committee has concluded that the Award is to be annulled because of a manifest excess of powers, it could dispense with examining the other complaints of the Applicant for Annulment, who also invoked Articles 52(1)(d) (serious departure from a fundamental rule of procedure) and 52(1)(e) (failure to state reasons).

In view of this case’s importance, the fact this is the first Application for Annulment ever lodged against an ICSID award and, finally, because it may be of interest to the parties and to the new Tribunal that may be constituted under Article 52(6) of the Washington Convention to have additional indications, it would nonetheless be appropriate to examine, albeit in less depth, the main arguments raised and discussed in the course of the annulment proceeding.

### III. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE (ARTICLE 52(1)(d))

82bis. Under a variety of headings, Klöckner refers to various violations of basic rules of procedure in its Application for Annulment. (pp. 27–28; *cf.* also its Reply to the Counter-Memorial, p. 53 *et seq.*) In particular, it alleges that (A) there was no true deliberation, (B) there were various other procedural irregularities, including failure to respect due process (*le contradictoire*), and (C) there was an “obvious lack of impartiality on the part of the Arbitral Tribunal.” In addition, Klöckner makes complaints based also or especially on the idea of absence, contradiction or inadequacy of reasons, and perhaps even on the concept of manifest excess of powers (to the extent that it is apparently claimed that the Tribunal rules “*ultra petita*”).

83. Apart from the precise characterization of the various complaints, which are often overlapping to a certain extent, it should be recalled that as a rule an application for annulment cannot serve as a substitute for an appeal against an award and permit criticism of the merits of the judgments rightly or wrongly formulated by the award. Nor can it be used by one party to complete or develop an argument which it could and should have made during the arbitral proceeding or help that party retrospectively to fill gaps in its arguments.

#### A. Absence of Deliberation

84. The Claimant alleges (p. 2) that it was “impossible that there was serious deliberation among the arbitrators.” It seeks to demonstrate this by comparing the text of the Award to that of the Dissenting Opinion.

While this ground is not expressly provided for in Article 52, it is possible to hold that the requirement of deliberation among the arbitrators is a “basic rule of procedure.” It is also possible to hold that such deliberation must be real and not merely apparent. But the Claimant did not explain how the Committee could determine whether the condition is met. How, for example, could the Committee judge the degree of seriousness of the deliberation in view of its secrecy. (Rule 15 of the Arbitration Rules) Nor did the Claimant explain what it meant by a “normal” process of deliberation. (Application, p. 28)

85. In fact, the Annulment Application’s very text shows that the complaint rests on a simple assertion, or on purely personal conceptions of deliberation and the function and content of a dissenting opinion. (Application, pp. 27–28) “A reading of the dissenting opinion,” the Claimant explains, “shows that such a confrontation (i.e., between the arbitrators’ opposing views, which ‘must in any case have led them to agree on the facts of the case, the applicable principles of law ... and the arguments of the parties which should be answered’) did not take place.”

These assertions do not establish that there was no deliberation. On the contrary, the existence of deliberation is shown or made at least highly likely by the ICSID Secretariat’s minutes, which were communicated to the Committee. Furthermore, the Award refers at least twice (pp. 22 and 23) to a minority opinion which was advanced “within the Tribunal.” This shows that there was at least some deliberation.

The complaint is therefore not sustainable and can only be rejected.

86. Of course, it is understandable that the Claimant was struck by the total divergence between the Award and the Dissenting Opinion. However, the divergence, first, is not such as to establish the alleged absence of deliberation, and second, is probably largely attributable to the ICSID system. Since the minority arbitrator may only prepare his dissenting opinion within the same time limit as the Award, in practice the system hardly allows the majority to study the draft “dissent” and hence perhaps to benefit from it if it thinks this useful. More appropriate provisions for dissenting opinions, perhaps inspired by the practice of the International Court of Justice, would doubtless make it possible to avoid repeating this type of situation in the future, if the observations made below (see para. 113) on the time given to arbitrators are also taken into account.

#### B. Other Irregularities in the Arbitral Procedure

87. Subject to what will be said below regarding respect for due process and the arbitrator’s power to base their decision on an argument other than that made by either party, it must be said that the Claimant’s criticism regarding the irregularity of the arbitral procedure is totally lacking in precision and substance.

It is clear from the parties' explanations in the annulment proceeding and from the documents they produced that the proceeding was conducted in a perfectly normal fashion. In particular, the Claimant had every opportunity to express itself and present its case. It is true that after Cameroon's Reply of March 1983 Klöckner made a "solemn protest against procedures which, because of the lateness and importance of the communication, constitute an attack on its rights as a party in this arbitration," and that it requested that the hearings of late April 1983 be devoted to questions of jurisdiction, the conduct of the proceeding, and the possible submission of new documents.

It also appears that while the Claimant protested against the volume of documents submitted by the Respondent, it did not make use of the opportunity it was given to do likewise, stating that it would reply through its witnesses and its oral pleading. Finally, it may be recalled that the Claimant did not avail itself of its right to reply other than orally to Cameroon's last instrument. Furthermore, it declined the ICSID Secretariat's offer to have the oral pleadings transcribed for the Tribunal.

88. To summarize, it suffices to note that the Claimant has not established that it made a timely protest against the serious procedural irregularities it now complains of. Subject to what will be said later, Rule 26 of the ICSID Rules of Procedure for Arbitration Proceedings would therefore rule out a good part of its complaints. This rule provides as follows:

A party which knows or should have known that a provision of ... these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object.

89. In fact, the "serious departure from a fundamental rule of procedure" complained of by Klöckner (leaving aside the alleged "absence of serious deliberation," commented on above, and the alleged "obvious lack of impartiality," which will be examined below) brings us back to the argument that the Tribunal failed to respect the principle of "due process" by basing its decision on arguments not advanced or at the very least not developed by either of the parties or at any rate not discussed by the parties. One is essentially speaking here of the Tribunal's interpretation of Article 9 of the Protocol of Agreement as "self-executing," which was discussed above. This complaint should apparently be distinguished from that made elsewhere on failure to state reasons (and especially on "failure to deal with every question submitted to the Tribunal").

90. As we saw above, the Award seems to have taken a somewhat intermediate position on the question of jurisdiction and Article 9 of the Protocol of Agreement between the parties' respective positions. It is of course possible that, if counsel had expressed themselves on this "intermediate" position of the ultimately "self-executing" nature of Article 9 of the Protocol, the Tribunal might perhaps have modified its views and the Award might perhaps have been different on one point or another. But the

parties' counsel were not prevented from advancing other, subsidiary hypotheses or interpretations alongside their main arguments, even if only "*ex abundanti cautela*" in case the Tribunal should adopt some other legal argument.

91. As for the Tribunal itself, when in the course of its deliberations it reached the provisional conclusion that the true legal basis for its decision could well be different from either of the parties' respective arguments, it was not, subject to what will be said below, in principle prohibited from choosing its own argument. Whether to reopen the proceeding before reaching a decision and allow the parties to put forward their views on the arbitrators' "new" thesis is rather a question of expedience.

The real question is whether, by formulating its own theory and argument, the Tribunal goes beyond the "legal framework" established by the Claimant and Respondent. This would for example be the case if an arbitral tribunal rendered its decision on the basis of tort while the pleas of the parties were based on contract.

Within the dispute's "legal framework," arbitrators must be free to rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties (although they could have been). Even if it is generally desirable for arbitrators to avoid basing their decision on an argument that has not been discussed by the parties, it obviously does not follow that they therefore commit a "serious departure from a fundamental rule of procedure." Any other solution would expose arbitrators to having to do the work of the parties' counsel for them and would risk slowing down or even paralyzing the arbitral solutions to disputes.

92. Bearing in mind what was said above regarding jurisdiction, it is impossible to hold that the Tribunal failed to respect the principle of "due process" or the equality of the parties in adopting its interpretation of Article 9 of the Protocol of Agreement and deciding that the Management Contract and its ICC arbitration clause did not prevent it from pronouncing on Klöckner's management obligations. A reading of Part III of the Award leaves no doubt on this score. And even if the parties regard the Tribunal's interpretation as incorrect or shaky, they will have difficulty challenging it on the ground that they never anticipated it, or analysed or developed it insufficiently, in their written or oral pleadings.

### C. Obvious Lack of Impartiality

93. The Application for Annulment criticizes the Award as being systematically hostile to Klöckner and as revealing "the Tribunal's obvious lack of impartiality." (p. 2) In particular, it criticizes the Award for having violated fundamental rules of procedure (especially "the Tribunal's duty to maintain strict impartiality." (p. 27) It concludes (p. 28) that "the principle of due process was violated by the total failure to examine Klöckner's arguments in the oral pleadings ..." and that "such exceptionally grave facts

reveal the obvious lack of neutrality and impartiality on the part of the Arbitral Tribunal."

94. Such accusations are certainly serious. Given the terms of the statement signed by each arbitrator pursuant to Article 6 of the Arbitration Rules, and the high reputation of the members of the Tribunal in this case, they are *prima facie* implausible. This implausibility does not exempt the Committee – quite the contrary – from the duty of carefully examining the complaints, if only for the sake of the reputation of the members of the Tribunal.

95. Is the complaint admissible?

There can be no doubt as to the admissibility of this complaint. Impartiality of an arbitrator is a fundamental and essential requirement. Any shortcoming in this regard, that is any sign of partiality, must be considered to constitute, within the meaning of Article 52(1)(d), a "serious departure from a fundamental rule of procedure" in the broad sense of the term "procedure," i.e., a serious departure from a fundamental rule of arbitration in general, and of ICSID arbitration in particular.

96. Is the complaint well founded?

As to whether this serious accusation is well or ill founded, it will first be noted that the Claimant attempts to substantiate its complaint by the Award's text, by what it does and does not contain, and apparently at the same time, by its wording and style. Here again we find complaints made elsewhere, in particular under the headings of "absence or inadequacy of reasons," "failure to deal with questions submitted to the Tribunal," "serious departure from a fundamental rule of procedure," and, in particular, "lack of due process."

While it is superfluous here to return to each criticism of the Award, it is incumbent upon the Committee, in the interest of the Tribunal itself and in the higher interest of the arbitration system set up by the Washington Convention, not to leave any of the Claimant's essential complaints unanswered.

97. The Claimant believes that there are signs of partiality and even hostility towards it particularly in the passages of the Award on "Klöckner's conduct with regard to its partner" (pp. 44–53) and "the duty of full disclosure to a partner." (pp. 105–109)

In Part "V. The Facts" of the Award, there is a section introduced by the heading: "A. Klöckner's Conduct with regard to its Partner." On each page (pp. 44–53) of this section, we find one and often several severe observations by the Arbitral Tribunal on the serious and "very pronounced" character of Klöckner's obligation of frankness and loyalty and particularly on the fact that "Klöckner failed to live up to these obligations," showed "less than a full measure of frankness, of candor," "did not respect its duty of confidence and loyalty," (p. 46) did not make "adequate efforts to deal frankly," (p. 48) did not have "appropriate conduct," (p. 49) wrongfully remained "silent," and "induced" Cameroon or SOCAMÉ into maintaining the project or accepting new financing (pp. 47, 48, 50), did not "act as a contractual partner

should" and did not have the "kind of frank and loyal conduct between partners that the law (*sic*) requires," (p. 51) committed "failures of disclosure" which "are of a capital importance," (p. 52) and that these failures, without being "intentional" or committed with "the intention to deceive" (pp. 52, 46) "may have" caused the Government to forge ahead, or "led Cameroon into error", (pp. 46, 52) and that Klöckner "diligently avoided calling the Government's attention" to specific economic problems (p. 52) – a conduct that "is not compatible with the obligations of a partner in an international joint venture of this importance." (p. 53)

The same expressions are again found in part "VI. The Law" under the heading "2. The Duty of Full Disclosure to a Partner." (pp. 105–109) It is often repeated here, in particular on pages 106–107, that the Claimant "failed to disclose facts" or "information of vital importance" and "did not act frankly and loyally *vis-à-vis* its partners" so that "in a very significant sense, it is its fault."

As we have seen, the Arbitral Tribunal concludes from this that Klöckner "may not insist on payment of the entire price of the Turnkey Contract." (p. 107) According to the Tribunal (p. 109): "we reach the conclusion that Klöckner violated its contractual duty of full disclosure, that it is not entitled to the contract price, that it is entitled to payment for the value of what it delivered, and which Klöckner (*sic*-apparently a slip for "Cameroon") used, and that Cameroon has already paid enough for the components of the factory it received from Klöckner in 1974–1975 which it used in the redesigned operation in 1980."

98. Such evaluations, however severe they are or may be, cannot in themselves justify the allegation or even the suspicion of partiality. Their wording and repetition simply show the high idea the Tribunal had of the duties of cooperation and mutual disclosure of parties to such a legal relationship and reflect a high moral conception.

99. Three additional factors seem – at least it may be assumed, from reading the Application for Annulment – to have aroused the Claimant's sharp reaction, leading it to make the serious accusation of lack of impartiality:

(A) The fact, already mentioned, that according to the Application (p.12) the Tribunal adopted as one of the two grounds for its decision "this obligation of frankness and loyalty, based not on a principle of French law, but on a sort of declaration, as general as it is imprecise, of principles which are allegedly universally recognized."

The present decision has already acknowledged the legitimacy of this complaint in another context, that of Article 52(1)(b) of the Convention. Given the Award's emphasis on the importance of both "the duty of full disclosure" and Klöckner's shortcomings, the absence of any reference to a precise legal basis is all the more regrettable in the present context in that the legal argument's incomplete character was such as to arouse the losing party's incomprehension and even suspicion.

100. (B) A second, additional factor doubtless relates to the Award's very structure. Part "VI. The Law" is subdivided into six sections. Two of these (the first is on applicable law) concern the Claimant's duties and shortcomings, and cover a total of twenty-two pages. Two other, shorter, sections concern the Claimant's arguments. These are Section 4, the Claimant's Reasons for the Failure (pp. 127-134), and Section 5, Alleged Waiver (i.e., Cameroon's acknowledgment of the debt), pp. 134-135. The last Section (6) is on the counterclaim (about one page).

The fact that, in its Law part, the Award devotes much more space (about three times more) to the Claimant's duties and its shortcomings in carrying them out than to the respondent Government's duties obviously does not justify any suspicion of partiality. However, it may have contributed to creating the Claimant's impression that there was "no serious discussion of Klöckner's case" (p. 1) or a "complete failure to examine Klöckner's arguments." (p. 28)

101. Finally, a certain impression of imbalance may have been aroused or reinforced in the Claimant by another aspect of the Award's structure. The Arbitral Tribunal's decision rejecting Klöckner's claim for payment of the price seems already *given* at the very start of Part "VI. The Law," Section 2 ("The Duty of Full Disclosure to a Partner"), *before* any discussion of the other subjects dealt with in the following sections, and in particular before any discussion of the "Claimant's Reasons for the Failure," i.e., Klöckner's principal arguments concerning the Government's duties and responsibility. Indeed, there appears the following on page 109, at the end of Section 2.

Taking these considerations into account, we reach the conclusion that Klöckner violated its contractual duty of full disclosure, *that it is not entitled to the contract price*, that it is entitled to payment for the value of what it delivered..., etc.

The same conclusion was for that matter already formulated, more briefly, at page 107: We decide that Klöckner violated its fundamental contractual obligations and may not insist upon payment of the entire price of the Turnkey Contract.

102. In other words, among the "two legal bases" adopted by the Tribunal as the basis for its award (p. 105), the first ("the fact that Klöckner did not act *vis-à-vis* its Cameroonian partner with the required frankness and loyalty ...") seems to have been enough to justify the final decision. The conclusion is simply repeated at the end of Section 3 (on the *exceptio non adimpleti contractus*) where it is stated (p. 127):

*We have thus concluded* that Klöckner is entitled to what it has already received, but to nothing more.

It is therefore *after* reaching this conclusion (and repeating it) on the basis of the Claimant's shortcomings that the Arbitral Award examines (in Section 4, "The Claimant's Reasons for the Failure") Klöckner's arguments

on the causes of the investment's failure, among which are the Government's alleged failures to perform its obligations. But "*before* analysing these explanations," the Award takes care to stress that "even if they were justified, they in no manner diminish the significance of the facts described above insofar as they show the seriousness of the Claimant's failure of contractual performance." The Tribunal adds that in its opinion (p. 127) "it is not responsibility for the economic failure of the joint venture" that is the question before it, "but the simpler and objective question whether the Claimant's failure of performance was sufficiently serious to justify the refusal to pay the unpaid notes."

103. (C) While it is likely that the structure thus given to the Award played a part in giving the Claimant the impression of imbalance or even bias, this impression was apparently reinforced by a third "additional factor." This was the comparatively brief examination of the Government's obligations, or even an apparent underestimation of the latter's responsibilities (for example, on pages 125, 129 to 132).

104. The Tribunal thus seems to attach little importance to the Claimant's argument giving "dumping by producers as one of the causes of failure." On this point, the Claimant referred to Article 12 of the Establishment Agreement under which Cameroon had undertaken to:

take necessary measures in order to ensure, if needed that SOCAME's production be protected from international competition.

The Tribunal limits itself to rejecting this argument in the following words: "but this Article does not create a *concrete* (*sic*) obligation of the Government and *therefore* does not accord an *absolute* (*sic*) protection ... "—which cannot possibly mean no protection at all if Article 12 of the said Agreement has any meaning (p. 128). Returning to the same subject, the Award notes (p. 131) that:

it is true, as Klöckner points out, that the Establishment Agreement contained a general stabilization clause, as well as a more precise undertaking to "take restrictive measures with respect to trade in this area ..." We do not think, however, that this is tantamount to an *unlimited* (*sic*) undertaking to establish a permanent policy of price protection for the factory ...

105. Likewise, the Arbitral Award attributes only limited importance to the "late payment for the fertilizer" (p. 129) as a cause of the financial difficulties, while admitting that it was one of the causes of these difficulties. The Award concludes (p. 134):

... that Article 12 of the Establishment Contract did not oblige Cameroon to introduce an *indefinite* program of subsidies or of protection, and that the lack of such aid to SOCAME from the Government does not excuse the previous failure of Klöckner, which did not deliver the fertilizer factory in an operating condition as it had promised.

In this regard, we may cite the Award's indirect reference (p. 130) to "unforeseen and unexpected delays in development of the site," which was the Government's responsibility (Article 14 of the Protocol of Agreement). But the Award seems to attach no importance to these delays and does not take them into account in assessing responsibilities.

106. In this same Section 4, on "The Claimant's Reasons for the Failure," the Claimant expected no doubt to see an analysis (as careful as that which had been made of its own obligations) of the obligations and responsibilities of the respondent Government. Yet, the Award begins here by stressing "the seriousness of the Claimant's failure of contractual performance" (p. 127; *cf.* also p. 126 *in fine*). In addition, the analysis of the Government's obligations under the Establishment Agreement may have seemed to the Claimant singularly summary and "assuaging": there is a refusal to recognize the "concrete" nature of the undertakings; no examination of the "limits" within which the Government perhaps could have and should have provided support to the Company; and rapid or summary reasoning, brushing aside the Government's responsibility on the grounds of the "previous failure of Klöckner" to perform its delivery obligation, without any reference to the management obligation and the role the Government's attitude may have played in the management difficulties.

107. To summarize, these various additional factors, and especially these particularities of structure and presentation of the Award, added to the severity and frequency of the censures of the Claimant's conduct, no doubt explain, without justifying, the latter's sharp reaction and its accusations of partiality and hostility.

108. It is clear from the Application for Annulment that the Claimant also had an impression of imbalance, inequality and even hostility because, in its opinion (Application, p. 25), the Tribunal

... ignored the contractual provisions and Klöckner's arguments regarding the clauses limiting liability.

A similar remark may be made regarding Part VI, Section 5 of the Award ("Alleged Waiver," pp. 134-135) in which the Award refuses to attribute any significance, at least as regards Klöckner, to a letter of 12 November 1980 in which the Government of Cameroon informed the Government of the Federal Republic of Germany that "a sum of CFA francs 2 billion had been paid by the Ministry of Finance, in settlement of the overdue installments."

109. Klöckner's argument that Cameroon never held Klöckner responsible, even when it was decided to halt the factory's operation in December 1977, should also be mentioned. (Annulment Rejoinder, p. 14) Cameroon responded to this argument by urging that its requests (to have Klöckner increase SOCAMÉ's capital) should be interpreted as an implicit attempt to bring this responsibility into play.

This point should be related to Klöckner's arguments that Cameroon acknowledged its debt in various ways, without ever invoking the Claimant's

responsibility until the arbitration proceeding. Hence the Application for Annulment, after criticizing various aspects of the Arbitral Award and in particular serious errors of fact or law, "systematically to Klöckner's detriment," (p. 26) adds: "In addition the Tribunal could not have taken into account Cameroon's many acknowledgments of its debts to Klöckner." (p. 26) We shall return to these criticisms later, in another context.

110. Do these various elements and features of the Award, added to those already mentioned, in particular regarding the complaint that there was a failure to deal with questions submitted to the Tribunal, justify the accusation of partiality or hostility, whether systematic or otherwise?

The answer can only be negative. None of these elements would suffice to establish or even to cause one to assume partiality on the part of the arbitrators, who in all conscience and neutrality could perfectly well have arrived at the Award's interpretations and conclusions. The complaint must therefore be rejected, and there can be no question of annulling the Award on this ground.

111. Having regard also to the decision which must be taken on the costs of the present proceeding, it is important to state that the above conclusion does not mean that the Application was rash in this respect. This is true especially if we recall the severity of the Tribunal's moral evaluations of the Claimant and the harm to reputation likely to result therefrom (particularly as the Award was then published by the Respondent's counsel).

It is not up to the Committee to pass on the justice or equity of the Tribunal's solutions but rather to state whether, on the basis of Article 52(1)(d) or on the basis of the fundamental principles of international arbitration as reflected in the ICSID system, the Award is to be annulled for partiality of the arbitrators.

While the *ad hoc* Committee was able without hesitation to respond negatively, it had to note that certain appearances, due to the Award's wording and structure, may rightly or wrongly have aroused the Claimant's emotions and suspicions. This is to be regretted if we recall the English adage, from which every international arbitration could usefully take inspiration: "It is not enough that justice be done, it must be seen manifestly to be done." From this point of view, it is essential to note that an award has not fully attained its purpose if it leaves one of the parties with the feeling - no doubt mistaken but perhaps understandable in the circumstances of the case - of unequal treatment and injustice.

112. Given the importance of this issue, not only in this case, but for the development of international arbitration and especially for the future of the arbitration system established by the Washington Convention, the Committee believes that it should draw the attention here to the most probable cause of the situation which produced these serious accusations. The contested Arbitral Award was rendered on 21 October 1983, while the proceeding was closed the preceding July 23. According to Rule 46 of the ICSID Arbitration Rules:

The award shall be drawn up and signed within 60 days after the closure of the proceeding. The Tribunal may, however, extend this period by a further 30 days if it would otherwise be unable to draw up the award.

It can be seen that the Arbitral Award was rendered two days before expiry of the maximum period allowed by Rule 46. Bearing in mind what was said above regarding the existence of deliberation, this explains why the Tribunal could not have taken material advantage, if it had so desired, of the Dissenting Opinion's arguments. Be that as it may, it is extremely probable that, had they had more time and had they not been threatened by the peremptory time limit of Rule 46, the Tribunal's members could have pursued their study of the case and their deliberations and drawn up the Award differently.

113. The complexity of most international investment disputes, the nature and variety of the many legal problems which arise, involving various branches of domestic law as well as international law, the volume of the parties' memorials and files, in which clarity of organization and coherence are not always the dominant characteristic, the breadth and difficulty of the work required of international arbitrators, and the time for reflection desirable for assimilating and judging important cases of this nature, are all factors which make the rule in Rule 46 of the Arbitration Rules – whose primary effect is no doubt to give potential users certain illusions regarding the speed of international arbitration – seem generally unrealistic and dangerous.

The constraints of such a peremptory time limit cannot always be reconciled with the higher exigencies of a healthy administration of justice, whether national or international. While of course being conscious of the need for speed, international arbitration rules should take inspiration from the following observation by a great judge, Justice Felix Frankfurter of the United States Supreme Court: "The judgments of this court ... presuppose ample time and freshness of mind for the private study and reflection ... indispensable to thoughtful, unhurried decision."

#### IV. FAILURE TO STATE REASONS (ARTICLE 52(1)(e)), INCLUDING FAILURE TO DEAL WITH QUESTIONS SUBMITTED TO THE TRIBUNAL

114. According to the Application for Annulment (p. 14 *et seq.*, in particular pp. 24–26), the Arbitral Award is tainted by a "failure to state reasons", which, for the Claimant,

... covers pure and simple failure to state reasons, but also the different forms which failure to state reasons assumes:

- contradiction of reasons,
- use of dubious or hypothetical reasons or reasons lacking relevance,
- absence or inadequacy of reasons because of misconstruction or distortion (*dénaturation*),

- failure to deal with questions submitted to the Tribunal (on this last point, the application refers to Article 48(3) of the Convention, according to which "the award shall deal with every question submitted to the Tribunal and shall state the reasons upon which it is based").

For the Claimant, this is a matter of rules of "public policy," respect for which is "imperative and non-observance sanctioned by annulment of the arbitral award." They are meant "to protect the parties against arbitrary decisions and to allow the Tribunal (*sic*) constituted under Article 52 to ensure the award's legality."

115. This presentation calls first for several *general comments*.

With regard to Article 48(3) of the Convention, and the obligation to "deal with every question submitted to the Tribunal," it may be noted that there is one sanction in Article 49(2). Article 49(2) provides that: "upon request by one of the parties, made within 45 days after the date on which the award was rendered" the Tribunal may, after notifying the other party, "decide on any question which it had omitted to decide in the award, and shall rectify any clerical arithmetical or similar error in the award." This is not relevant in the present case and the part of Article 48(3) imposing the obligation to give reasons is obviously enforced by Article 52(1)(e).

*Prima facie*, therefore, one does not see how a failure to deal with "every question submitted to the Tribunal" can have a sanction other than annulment for a failure to state reasons – unless, of course, the failure to deal with "every question submitted to the Tribunal" is considered to be a "serious departure from a fundamental rule of procedure" under Article 52(1)(d), a question which need not be examined here under the heading "failure to state reasons."

116. As for "contradiction of reasons," it is in principle appropriate to bring this notion under the category "failure to state reasons" for the very simple reasons that two *genuinely* contradictory reasons cancel each other out. Hence the failure to state reasons. The arbitrator's obligation to state reasons which are not contradictory must therefore be accepted.

Establishing the existence of such a contradiction may certainly give rise to difficulties, for example if one of the reasons involves a principal claim, while the other involves a counterclaim. This, however, cannot in itself warrant passing over the question of contradiction, at least in terms of admissibility.

It should also be noted that, in the event that contradictory reasons lead to the conclusion that there was a failure to state reasons, it may be asked whether this failure causes any harm to the party seeking annulment (*cf.* the principle "no annulment without grievance") and whether the award is not sufficiently well founded by other reasons stated in the award.

117. Another general question: is it possible to liken *inadequacy* of reasons to a failure to state reasons?

The question has been discussed in general international law. In the case of the expropriation of Norwegian shipbuilding contracts (American

Journal of International Law 1923, p. 287), the United States criticized the inadequacy of the Tribunal's reasons, but did not contend that the award was therefore void. In the *Arbitral Award Made by the King of Spain*<sup>6</sup> case before the international Court of Justice, Nicaragua claimed that there had been both failure to state and contradiction of reasons. (Counter-Memorial, paras. 88 and 91) The Court, however, disagreed, observing "that the Award ... deals in logical order and in some detail with all relevant considerations and that it contains ample reasoning and explanations in support of the conclusions arrived at by the arbitrator." (1960 Reports, p. 216)

118. It is worth noting that the "reasons" referred to in Article 52(1)(e) are, as indicated more clearly<sup>7</sup> in the English and Spanish texts of the Washington Convention, "the reasons upon which it is based" or "los motivos en que se funde." The reasons should therefore be the basis of the Tribunal's decision, and in this sense "sufficient." The latter notion should obviously be approached with special caution if the application for annulment under Article 52 is not to serve as an appeal in disguise. One illustration of this danger is found in the Application for Annulment where, criticizing "the inadequacy of reasons because of misconstruction" (*dénaturation*) (pp. 17, 24) (a concept known in French law but absent from the Convention's text), the application puts forward a variety of considerations, some of which belong to an appeal proceeding and are consequently inadmissible.

Interpretation of the concept of "failure to state reasons" is therefore decisive. It is especially delicate because of the absence of any previous interpretation of the Washington Convention and the lack of sufficiently clear or consistent indications from prior international practice.

119. The *ad hoc* Committee, which also has "the power to determine its own jurisdiction," has the power and the duty to interpret Article 52(1)(e). In so doing, it adopts neither a narrow interpretation nor a broad interpretation, but bears in mind the customary principles of treaty interpretation and, in particular, the objective of the Convention and of the system it establishes.

The preparatory works of the Convention seem to indicate that the intention was to limit the institution of annulment proceedings. This would not, however, be enough. What is decisive, more than the "historic" interpretation (assuming it can be established), is the "correct meaning" of the interpreted provision, i.e., Article 52(1)(e).

The text of this Article requires a *statement* of reasons on which the award is based. This does not mean just any reasons, purely formal or apparent, but rather reasons having some substance, allowing the reader to follow the arbitral tribunal's reasoning, on facts and on law.

The questions can be posed in the following terms: in order to rule out annulment under Article 52(1)(e), is it enough that there be "apparently

<sup>6</sup> 30 ILR 457.]

<sup>7</sup> Translator's note: the French text of Article 52(1)(e) reads simply "défaut de motifs."

relevant" reasons, or is it necessary that there be "relevant" reasons? In the first case, control by the Committee will be reduced; in the second, it will be broader.

120. In the opinion of the Committee, one could hardly be satisfied simply by "apparently relevant" reasons. This would deprive of any substance the control of legality Article 52 of the Convention is meant to provide. On the other hand, interpreting this provision as (indirectly) requiring "relevant reasons" could make the annulment proceeding more like an appeal and lead the Committee to substitute its own appreciation of the relevance of the reasons for that of the Tribunal.

A middle and reasonable path is to be satisfied with reasons that are "sufficiently relevant," that is, reasonably capable of justifying the result reached by the Tribunal. In other words, there would be a "failure to state reasons" in the absence of a statement of reasons that are "sufficiently relevant," that is, reasonably sustainable and capable of providing a basis for the decision.

Of necessity, the interpretation here can only be based on general standards or criteria, which do not lend themselves to any abstract and rigorous delimitation.

#### A. Contradiction of Reasons

121. The Application for Annulment complains that the Award contains a contradiction of reasons (p. 15), which it holds to be equivalent to a failure to state reasons. It must first be asked whether this complaint is admissible.

On this subject, it will be noted that the Application refers in this respect to two observations in Part VI, The Law, of the Arbitral Award:

*First observation:* on page 106, the Tribunal holds that Klöckner:

... at critical stages of the project, hid from its partner information of vital importance. On several occasions it failed to disclose facts which, if they had been known to the Government, could have caused it to put an end to the venture and to cancel the contract before the expenditure of the funds whose payment Klöckner now seeks to obtain by means of an award ...

The Tribunal deduces from this that Klöckner, at "fault" and "in a very significant sense," bears responsibility for the "fact that the funds were spent" and that having violated its "duty of full disclosure" to its partner, it "may not insist upon payment of the entire price of the Turnkey Contract." (pp. 106-107).

*Second observation:* on page 136 of the Award, the Tribunal turns to Cameroon's counterclaim (which it distinguished from the *exceptio non adimpleti contractus*, invoked simply to procure the claim's dismissal). This "counterclaim for damages" requests compensation for all losses attributable to its participation in the project, and in the alternative,



compensation for SOCAME's losses. Just as it rejected Klöckner's claim, the Tribunal dismisses the counterclaim, for the following reasons:

There is no justification for charging the Claimant with the losses incurred by the Government in a joint venture where the two parties participated, or should have participated, with open eyes and full understanding of their actions. One could hardly accept that a State, having access to many sources of technical assistance, could be entitled to claim compensation for the fact that it was misled by a private company proposing a particular contract. If this had been the case, the Government would also have had a concurrent responsibility, thereby excluding the counterclaim.

122. A comparison of these two observations elicits the following comment from the Applicant for Annulment (Application, p. 15):

Hence, in order to dismiss Klöckner's claim, the Tribunal holds that it "could have deceived" the Cameroonian Government, while in dismissing the Cameroonian Government's claim, it emphasizes that the latter could not have been deceived.

In response, the Respondent claimed that the supposedly contradictory reasons do not support a single decision but *several* decisions: (i) one involving the principal claim, and (ii) the other regarding the counterclaim. Each decision is based on different reasons: (i) Klöckner has misled; (ii) Cameroon should not have allowed itself to be so misled; and each reason supports a different decision. Therefore there is no contradiction of reasons within the same award.

The argument that there were two different decisions does not stand up to examination. Neither in form nor in substance can the Award of 21 October 1983 be viewed as a number of separate awards. This would not, in any case, correspond to the intentions of the Tribunal, which evidently had an overall view of the dispute and sought to work out a sort of equitable setoff between the opposing claims.

The complaint is therefore admissible in principle, but it remains to be determined whether it is well founded.

123. Is the complaint well founded?

This does not seem to be the case. Indeed, unlike the Application for Annulment's presentation, the true reason for the Tribunal's award on the first point (p. 106) is not that there was or could have been deception, but that there was omission or dissimulation on the part of the Claimant (and in short, disregarding the result). The true reason is that not having "acted frankly and loyally," the Claimant "cannot rightly present a claim to funds ..." It is apparently on this ground, that of the claim or right to claim – which evokes "*préclusion*" or "*estoppel*" – that the Tribunal definitively held that the Claimant "*may not insist upon payment of the entire price of the Turnkey Contract.*"

Similarly, on page 136, the Award denies that the Cameroonian State could be entitled to *claim* compensation for "the fact that it was misled by a

private company"; whether it was deceived or not changes nothing: it acted with either full understanding or with open eye, and if it was "misled," it would have a "concurrent responsibility" which *excludes* the counterclaim. Therefore, we also seem to find ourselves here in the field of "equity," relying on the notions of "*préclusions*" or "*estoppel*."

In reality, the two reasons are not contradictory, despite certain ambiguities in language. In neither case is the decision based on the existence or non-existence of the result, a deception, or on its possibility or impossibility. The complaint must therefore be rejected.

#### B. *Dubious or Hypothetical Reasons*

124. The above analysis makes it possible to deal expeditiously with the Applicant's criticisms of what it calls the "*dubious or hypothetical nature of the reasons adopted*" in various passages of the Award on the consequences which Klöckner's omissions or reticence, or its various shortcomings in fulfilling the "duty of full disclosure to its partner," *could have had* on the Cameroonian Government's decision. (Application, p. 16)

125. For example, the Tribunal criticized the Claimant for not having revealed "facts which, if they had been known to the Government, *could have caused* it to put an end to the venture..." It also found that the "expenditure would *perhaps* never have been necessary" if the Claimant "had been frank and candid in its dealings." (p. 106) Prior to this, in the "Facts" part of the Award, the Tribunal observes that "it is *impossible to determine* whether the Government would have decided to put an end to the project if Klöckner had clearly and plainly revealed .... (p. 48), etc.

The Application for Annulment reproaches the Award for "systematically (using) the conditional, or purely hypothetical formulas." (p. 16) Even if it were admissible, such a vague and general criticism would have no relevance.

126. It was incumbent upon the Applicant for Annulment to show that the contested Award is *based*, on one point or another, on a simple hypothesis, instead of on facts or definite legal arguments. But in this regard the Claimant's analysis either is equivalent to an appellant's criticism of the first judge's evaluation of the facts or law, or makes no distinction or an inadequate distinction between the *ratio decidendi* and simple, overabundant considerations, or, finally, loses sight of the fact that an arbitrator or judge may be perfectly entitled to reason where necessary on the basis of hypotheses or to take into account, as a fact, that one party has been deprived of a certain "possibility" by the conduct or fault of the other party (as in the case of "loss of an opportunity" (*perte d'une chance*), well known to French civil law).

### C. Absence and Inadequacy of Reasons

127. We shall dwell no further on the complaint regarding the hypothetical or dubious character of the reasons and shall now examine the Applicant's main argument for annulment based on Article 52(1)(e): "absence and inadequacy of reasons." (Application, pp. 17-26) This, as the Claimant itself did (p. 22 *et seq.*), is also the place to examine the complaint that there was a "failure to deal with questions submitted to the Tribunal."

In this part of its Application for Annulment (the arguments for which are taken up again in the Reply of 31 July 1984 to the Republic of Cameroon's Counter-Memorial of 30 June 1984) the Claimant cites what it considers to be the main examples of absences and inadequacies of reasons in the Award, of which "several ... are combined with particularly serious misconstructions and distortions." (p. 17)

On this score, the Application successively examines various parts of the Award, comparing them either to its own documents or to those of its adversary, or to documents in the file relating to (1) acceptance of the factory; (2) Klöckner's responsibility for the production shortfall; (3) causes of the production shortfall; (4) the condition of the factory. At the same time, its comparative critique is complemented by various references to the Dissenting Opinion.

128. This presentation of the Application for Annulment calls for an initial general comment: the Committee under Article 52 of the Washington Convention is not an appeal tribunal, and in principle has no jurisdiction to review the arbitrators' findings of fact or law.

As we saw earlier in discussing the concept of excess of powers and Article 42(1)(b) of the Convention, the *ad hoc* Committee has no power to correct a mistaken application of law or "error in *judicando*" beyond the strict limits of Article 52.

While *inadequacy of reasons* may under certain conditions constitute a failure to state reasons within the meaning of Article 52(1)(e), there can be no question of expanding the concept so as to permit a sort of disguised appeal, even though, as we saw above (*supra* para. 120), Article 52(1)(e) should be interpreted as indirectly requiring that the Award generally give sufficiently or reasonably relevant reasons. It has been mentioned that the specific applications of this general standard turn on each particular case, and it should be recalled that it is up to the Applicant for Annulment to establish a "failure to state reasons" in the sense of an absence of "sufficiently relevant" or "reasonably sustainable" reasons under the circumstances of the case.

129. Having recalled this, it must be stated that the Claimant's contentions to a large extent comprise arguments and reasoning which by their nature are those of an appeal memorial, even though they ostensibly address "obvious misconstructions" or "distortions."

This is how the Claimant criticizes (p. 17 of the Application) the Tribunal's conclusion, inferred from Mr Van der Ploeg's absence, on the

irregularity of the factory acceptance. The Tribunal's evaluation of evidence concerning a certain Mr Moudio, the Cameroonian Government's representative (p. 18), or again (p. 19) the Tribunal's conclusion on Klöckner's responsibility for the production shortfall, a conclusion based on the shutdown of the factory and contradicting the report of SOCAMÉ's management committee, a document cited by the Award itself, are criticized in the same way. The Award is similarly criticized as being wrong on questions of fact or in its evaluation of evidence in the shape of certain experts' reports.

It may be that these various statements or evaluations of evidence in the Award are erroneous or contrary to the documents in the file, but the Committee has no power to make judgments in this regard. The question is not whether there was a misconstruction – obvious or otherwise – of the facts and arguments, but whether there is a "failure to state reasons." Now, it is clear from the Claimant's own exposition that to a large extent its criticisms of the Award are aimed not so much at the absence of reasons (or absence of "sufficiently relevant" reasons), but at the reasons themselves!

130. There would be a "failure to state reasons" if no reasoning or explanation whatsoever, or no "sufficiently relevant" or "reasonably acceptable" reasoning could be found for some conclusion or decision in the Award. Such would not be the case if the Tribunal, having justified its finding or a particular decision in a certain way, even if subject to criticism, did not address this or that particular argument (subject to what will be said below on failure to deal with questions submitted to the Tribunal). Yet it is enough to read, for example, the Award's analysis of the parties' respective arguments on the subject of the factory acceptance (pp. 53-54; *cf.* also p. 61 *et seq.*) to see that the Application for Annulment's criticism (pp. 17-18) can in no way be considered as relating to a "failure to state reasons" in the sense that this concept has been interpreted here.

### D. Failure to Deal with Questions Submitted to the Tribunal

131. As for the failure to deal with questions submitted to the Tribunal, reference should be made both to Article 48(3), as we have been, and to Article 52(1)(e) (failure to state reasons) or (d) (serious departure from a fundamental rule of procedure).

According to a general principle, embodied in Article 48(3), the Award must deal with "every question submitted to the Tribunal" (*tous les chefs de conclusions soumises au Tribunal*). Given the relative ambiguity of the term "questions" (*conclusions*), it should first be noted that these may be formulated separately, at the end of an application or memorial, or constitute part of an argument. It may therefore be that certain "questions submitted to the Tribunal" are presented formally in the main text of the parties' documents rather than, for example, in the form of "final conclusions" or "submissions."

On the other hand, while some arguments may therefore really be "questions submitted to the Tribunal," it is clear that the arbitrators do not have to deal with all of the parties' arguments.

132. In its Application for Annulment Klöckner lists (pp. 22-24) "Klöckner's essential arguments on which the Award undertook no study (*sic*)."

This approach is misleading; in order to judge the admissibility and then the validity of the complaints, it need only be determined whether these "essential arguments" constituted or involved "questions submitted to the Tribunal" and whether the Tribunal dealt with them in the Award, regardless of whether it undertook any "study" of them.

The *first complaint* listed is that "the Arbitral Award held that Klöckner had an obligation which is in fact an obligation of result" (*obligation de résultat*).

*Second complaint:* the Tribunal did not examine the conditions required by Article 1116 of the Civil Code for wrongful inducement to contract (*dol*), or consider Klöckner's arguments on the number and importance of the functions assumed by the Cameroonian Government in the performance of the contract.

*Third complaint:* the Award takes no account of Klöckner's pleas regarding contractual limitations of the Claimant's warranties and liability.

*Fourth complaint:* the Award takes no account of Cameroon's unconditional acknowledgement of its debt and of the arguments the Claimant based on this.

*Fifth complaint:* the Award did not respond to the Claimant's pleas regarding the rules of French law limiting a supplier's liability for hidden defects (*vices cachés*) and time barring claims.

#### (1) The First Complaint

133. According to the Application for Annulment (p. 22 *et seq.*), a first ground for annulment is that "Klöckner's pleas ... are never or almost never mentioned," that "the Award undertook no study" of various essential arguments (p. 22) which were "systematically ignored," and that therefore "this failure to deal with questions submitted to the Tribunal should necessarily lead to annulment of the Arbitral Award." (p. 24)

In particular, the Claimant maintains that the Award imposes on Klöckner an "*obligation of result*" even though the Claimant had only assumed a "best efforts obligation" (*obligation de moyen*). (p. 23) This complaint is furthermore apparently linked to a third complaint (p. 23, para. 3) to the effect that the Award "took no account" of the contractual limitations of liability and of the exclusion of any indirect damages.

134. This point of view is elaborated by the Claimant as follows (pp. 22-23):

The Award applied to Klöckner an obligation which is in fact an obligation of result. Indeed, as has been seen above, the mere fact, for the Tribunal, that actual production was below the guaranteed capacity puts Klöckner at fault.

But Klöckner had established (pages 26, 30, 85, 96), and Cameroon had recognized (page 115, Counter-Memorial), that it had only a best efforts obligation, which meant therefore that the Cameroonian party had the burden of proof and had to demonstrate Klöckner's fault; these pleas by Klöckner are completely ignored by the Tribunal, which does not attempt to establish the existence of a fault nor *a fortiori* to determine its seriousness and consequences.

These passages should be read together with the following ones from Chapter 2, "Excess of Powers and the Obligation of Result" of the Application, (p. 10):

... seeking however to judge Klöckner's management, the Arbitral Tribunal finds it defective, inferring from Article 9 of the Protocol of Agreement an obligation of result which was never provided for but violated merely because factory production was not equal to the contractual capacity.

This obligation of result had been expressly excluded in the Management Contract signed by the parties, as Cameroon itself recognized (page 115 of the Counter-Memorial).

It should be noted that a similar criticism is repeated in Klöckner's Rejoinder of 31 July 1984. (p. 7)

135. It is difficult to determine from the Claimant's none too clear explanations whether the complaint is based on Article 52(1)(b) (manifest excess of powers) or on Article 52(1)(e) (failure to state reasons) (and more precisely failure to deal with questions submitted to the Tribunal), or on both. Be that as it may, before determining whether there exists one of the grounds for annulment under Article 52, we should first determine whether, *prima facie* and on a reading of the Award, it may be said that the decision finds that Klöckner has an "obligation of result." If the answer is no, the complaint must be immediately rejected. If the answer is yes, it would remain to be seen whether the Tribunal "manifestly exceeded its powers" within the meaning of Article 52(1)(b) or whether its decision is tainted by a "failure to state reasons." (Article 52(1)(e))

136. Did the Award hold, as claimed, that Klöckner had an obligation of result?

It will be noted in this connection that the Application does not seem to distinguish clearly between the obligation to deliver the factory and the management obligation (although it seems to connect the idea of obligation of result mostly to the second obligation). But a similar comment may no doubt be made on the Award itself, which, especially in Chapter 2, on the *exceptio non adimpleti contractus*, shifts constantly from one to the other of these obligations or considers them together, in their somewhat cumulative effect. This may, of course, be explained from an industrial or economic perspective but does not always facilitate legal analysis.

In order to answer this first question, we should examine, in part "VI. The Law" of the Award, Sections 3(b) "Partial or Imperfect Performance" (p. 112 *et seq.*) and 3(c) "Significance of Failure of Performance in this Case" (p. 114 *et seq.*) to determine whether the Claimant's allegation is well founded.

137. The following passages of the Award will, for example, be noted in this regard:

It is true that the Claimant did not make partial delivery, however defective ..., (p. 125)

which leads us to inquire whether the Tribunal reached this finding on the ground (whether it is one among others is of no importance) that the "result" was not achieved.

It is obvious that the Claimant would have assumed such onerous obligations only in order to obtain a factory capable of producing that which one might reasonably and legitimately have hoped to obtain from the contracts ... (p. 124)

Analysing the *Turnkey Contract* (p. 114), the Tribunal stresses that "a fundamental obligation" of Klöckner was to supply "a factory capable of producing fertilizer products conforming to specific descriptions and in guaranteed quantities..." It adds that what Cameroon had agreed to pay for:

was an integrated total system of production capable of producing the products defined in the agreements.... In our opinion, this meant a factory that could produce these specified quantities at a practical rate of utilization of the factory. (p. 115)

The Award concludes in the next paragraph with the following significant sentence:

In the present case, the factory did not function at the level of production foreseen in the agreements. Klöckner *thus (sic)* did not deliver to Cameroon what it had promised. (p. 115)

It should be noted that the Award immediately goes on to analyse "another obligation just as fundamental as the first," the obligation of technical and commercial management. From this it may be thought that the above citations, to the extent that they establish an obligation of result, relate the obligation to the *Turnkey Contract* alone, and not to the management obligation. As shown below and already mentioned, the Award's reasoning actually most often relates the two. Thus, on page 116, there appears the following:

The facts recited in Chapter III demonstrate that Klöckner's two fundamental obligations were performed in an imperfect and partial manner.

After having dealt with the factory acceptance (which, in its opinion, was not done according to the Contract), the Tribunal continues (p. 117):

Next, the production capacities defined in the *Turnkey Contract* and the *Protocol of Agreement* were never attained after startup of the factory [N.B. For obvious reasons, the Award makes no mention of the *Management Contract*, over which the Tribunal held itself to have no jurisdiction.] This is a failure of performance of the greatest importance....

In order to perform the relevant contracts correctly, it was not sufficient to supply a fertilizer factory; the factory had to have the required capacity and had to be managed in the way necessary to attain the proposed goals.

138. It is difficult not to interpret these various quotes, taken from the Award's Law section, as expressing the Tribunal's opinion that the Claimant incurred liability because *the anticipated results were not achieved*, either in terms of delivery or management, or yet again in terms of both.

However, let us add that in Section "V. The Facts" the Tribunal (p. 45) did not seem so certain of the existence of an obligation of result. There we read that Klöckner "promised its partner *if not unconditional guarantee of the factory's profitability* at all times, at least very pronounced frankness and loyalty."

As Cameroon's alleged admission that Klöckner was bound only by a best efforts obligation, the Application for Annulment (p. 23) cites Cameroon's Counter-Memorial of 15 June 1982 (p. 115). But this refers only to Klöckner's obligation to advise, which is said to be a primary obligation under the *Management Contract*:

Assumed by Klöckner as part of its consulting activities for SOCAMÉ's technical and commercial management, this is a best efforts obligation, liability being incurred only in case of serious professional failing.

139. We will not, at least directly, consider for the purposes of the present question the detailed treatment of the facts, technical reports or discussions between the parties found in Part "V. The Facts" (pp. 44-103) of the Award. The Committee need not seek to determine and much less issue an opinion as to whether the Claimant company in fact bears responsibility for the failure to achieve the results hoped for by the contracting parties.

The issue is whether, as the Applicant for Annulment claims, the Award wrongly held the Claimant to have an "obligation of result" (a classic concept of French or Cameroonian civil law, applicable to this case) and in short, by presuming a failure, reversed the burden of proof to the Claimant's detriment. *And this without taking into account* either the legislative or contractual provisions, in particular the provisions of the Civil Code on the warranty against hidden defects and the period of such warranty's validity and the contractual provisions limiting liability (for example, Article 9 of the *Turnkey Contract*, on "the warranty for the equipment," and in particular Article 9(2)):

the warranty period for each shop shall be one year from the date of its entry into service, but no more than 36 months from the start of performance of the Contract,

and, finally, without taking into account the consideration that no entrepreneur would warrant a result, and hence the success of the enterprise, if he does not have the right to determine the sale price of its product, a right which SOCAMÉ did not possess.

140. This Committee's first task in this regard is to examine the Tribunal's reasons for so interpreting Klöckner's delivery and management obligations and concluding that these two obligations had not been performed largely, if not exclusively, *because the production goal was not reached*. It would only be *after* examining these reasons that it would be possible to determine whether the argument that there was a failure to state reasons (or perhaps that of manifest excess of powers) could possibly be upheld.

141. In this regard, it is essential to note that the Award's text gives no indication of the reasons why the Tribunal decided, in substance if not in so many words, that there was an "obligation of result." Above all, it did not take into consideration Klöckner's pleas on the best efforts obligation or the contractual or legislative provisions limiting seller/supplier liability. Despite many readings of the text, it is impossible to discern how and why the Tribunal could reach its decision on this point. For example, the following is a significant passage from the Award:

The factory's production shortfall was demonstrated by reports of operators of the plant (see para. C, pp. 69 to 58 *supra*) to have causes (*sic*) that without doubt included ones for which Klöckner was responsible... In order to perform the relevant contracts correctly, it was not sufficient to supply a fertilizer factory; the factory had to have the required capacity and had to be managed *in the way necessary to attain the proposed goals*.

That the "factory's production shortfall" was "demonstrated" is in fact of no interest here. What should be noticed is the rather cryptic observation: "... that without doubt *included* ones for which Klöckner was responsible." One may wonder whether this is "technical" responsibility, or "legal" responsibility. But it is especially interesting to note that the Tribunal here necessarily accepts that the "causes" of this "production shortfall" *also "included"* causes not attributable to Klöckner. Finally, more significant still is the statement that the factory "had to be managed in the way necessary to attain the proposed goals." Klöckner's responsibility for the results is later again affirmed (p. 118) when it is stated:

One must recall again that the Claimant's responsibility was not extinguished upon delivery of the factory and satisfactory test runs over three days...

142. In the case of the obligation of result in the area of technical and commercial management, it is possible that the Tribunal thought it necessary to refrain from citing the provisions of the Management Contract

because it had declared itself incompetent in this regard, and had tried to reason solely on the basis of Article 9 of the Protocol of Agreement (interpreted, as was seen above, as "encompassing" the Management Contract – a concept which need not be discussed here but which seems difficult to reconcile *prima facie* with a refusal to take into account the contractual arrangements provided by the parties in the Management Contract). But the same does not hold for the Turnkey Contract. It is very surprising, and regrettable, that in accepting the theory of an obligation of result for Klöckner, the Tribunal considered it unnecessary to explain why it did not have to take into account Article 9 of the Turnkey Contract or why it did not feel it more necessary or appropriate to apply the provisions of Franco-Cameroonian law on the warranty against hidden defects.

143. The absence of any discussion by the Award of the contractual provisions on the warranty or limitation of liability is all the more astonishing as the basic reason given by the Tribunal for its decision is the desire "to maintain *the equilibrium of reciprocal contractual undertakings as defined by the parties themselves*." (p. 124)

Now, it immediately springs to mind that provisions such as those in Article 9 of the Turnkey Contract, or the provisions of the Management Contract, or generally all clauses on the responsibility of the seller and buyer, are an integral part of the desired "equilibrium of reciprocal contractual undertakings as defined by the parties themselves."

144. *In conclusion*, it is superfluous to examine whether, as the Claimant alleges, the Arbitral Tribunal manifestly exceeded its powers on this point, since the Award in no way allows the *ad hoc* Committee or for that matter the parties to reconstitute the arbitrators' reasoning in reaching a conclusion that is perhaps ultimately perfectly justified and equitable (and the Committee has no opinion on this point) but is simply asserted or postulated instead of being reasoned.

The complaint must therefore be regarded as well founded, to the extent that it is based on Article 52(1)(e).

## (2) *The Second Complaint*

145. The Claimant likewise considers that there is a failure to state reasons, due to a "failure to deal with questions submitted to the Tribunal" because "the Award undertook no study" of another of "Klöckner's essential arguments" (p. 22):

Contrary to what Klöckner had requested, the Arbitral Tribunal in no way examines the conditions under which *Article 1116 of the Civil Code on wrongful inducement to contract (dol)* may be invoked. (Application for Annulment, p. 23)

It is difficult to grasp the exact meaning of this complaint, if one considers the fact that the Award neither accepted the Respondent's allegation of

wrongful inducement to contract nor declared on the nullity of the Contract. The counterclaim, primarily for compensation for all losses, *lucrum cessans*, and non-financial damages (*préjudice moral*), was dismissed by the Award because a State, "having access to many sources of technical assistance," could hardly be "entitled to claim compensation for the fact that it was misled." (p. 136) Furthermore, regarding the Claimant's conduct and "the duty of full disclosure to its partner," the Tribunal makes it clear that it did not find there was fraudulent intent (p. 46) or an "intention to deceive." (p. 52)

Having refused to accept that there was wrongful inducement to contract, no doubt within the scope of its power to evaluate the facts and evidence, the Tribunal could not be required to examine or discuss "the conditions under which Article 1116 of the Civil Code on wrongful inducement to contract may be invoked."

146. It could be surmised that the Claimant wished to argue, by analogy to the second paragraph of Article 1116 of the Civil Code, that Klöckner's "lack of frankness" could not be presumed either and should, like wrongful inducement to contract, be proven by the Respondent. Be that as it may, the Tribunal could hardly be blamed for not having pronounced on surmises of this sort or on unelaborated arguments.

### (3) The Third Complaint

147. Under the heading "Failure to Deal with Questions Submitted to the Tribunal," (pp. 23 and 25) the Application for Annulment criticizes the Award which, in its opinion, is tainted by a failure to state reasons on the question of limitation of Klöckner's liability. According to the Claimant:

In its Memorial (page 64) and its oral pleading, Klöckner recalled the existence of contractual provisions limiting the warranties given. In particular, Klöckner's liability could not exceed 3% of the contract price (Article 10.10 of the Turnkey Contract), whereas Articles 9 and 13 excluded any indirect damages. Any modification would in addition exempt Klöckner unless the latter agreed in writing (Article 9.5). (p. 23)

The Claimant continues (p. 25):

The Tribunal then ignores the contractual provisions and Klöckner's arguments regarding the clauses limiting liability. It does likewise with Klöckner's pleas regarding the brief time allowed [in French law, limiting the period during which a claim may be made for hidden defects]. The absence of any response to these decisive arguments deprives the Award of all validity.

The same question of clauses limiting liability was discussed by the Respondent in the arbitration in its Counter-Memorial of June 1982. (pp. 116 *et seq.*)

148. Is this complaint admissible?

It will be noted first that the complaint is admissible, whether it be described as "failure to state reasons" or, more precisely, as a "failure to deal with questions submitted to the Tribunal."

It is clear that the argument Klöckner bases on the contractual clauses limiting liability can and should be considered a "question submitted to the Tribunal" and that this is an essential question for both parties. The Claimant has a major interest in seeing these contractual clauses deemed applicable and applied. The Respondent has a major interest in seeing them judged inapplicable or irrelevant to the present case. Both parties have for that matter addressed this subject.

149. Is the complaint well founded?

It must be noted that the Award says nothing on this essential question and contains no reason on this topic, or, more precisely, no *expressed* reason. Now, as we have seen, the English text of Article 52(1)(e) provides as a ground for annulment that "that award has failed to state the reasons on which it is based" and the Spanish text of the same provision permits an application for annulment on the ground: "que no se hubieren *expresado* en el laudo los motivos en que se funde."

It is thus *prima facie* undeniable that the Tribunal did not deal with one of the Claimant's essential questions. This provisional conclusion must however be tested.

150. The Respondent has submitted that it was not necessary for the Tribunal to deal with this point, as applying the contractual clauses limiting liability would presuppose that Klöckner had always acted honestly, while its lack of frankness and loyalty would make the provisions in question inapplicable. This position could be understood if the Tribunal had reached the conclusion that the Turnkey Contract had become void for wrongful inducement to contract or if, at the very least, the Tribunal had declared that the Claimant could not take advantage of these limiting clauses because of its failure – an argument it would furthermore have had to justify on the basis of the applicable law. Now, while the Tribunal may have *thought* that the Claimant's breaches of its obligations of delivery and management brought about a sort of forfeiture of the right to invoke the clauses limiting liability, nothing in the text of the Award makes it possible to say with certainty that the Tribunal actually considered the question and resolved it in this way.

151. The Tribunal could for example have referred to or adopted the Respondent's arguments in its Counter-Memorial of June 1982 (p. 116 *et seq.*) (arguments on a "fundamental breach" and on the judge's power to increase or moderate (the penalty)) or could have used reasoning analogous to that which it employed on page 136 of the Award to reject the counterclaim.

Be that as it may, it is not for the Committee to imagine what might or should have been the arbitrators' reasons, any more than it should substitute "correct" reasons for possibly "incorrect" reasons, or deal "*ex post facto*" with questions submitted to the Tribunal which the Award left unanswered. The only role of the Committee here is to state whether there is one of the

grounds for annulment set out in Article 52 of the Convention, and to draw the consequences under the same Article. In this sense, the Committee defends the Convention's legal purity, it being understood that, when it has found that there is a ground for annulment, it will remain for it to decide, pursuant to Article 52(3), whether the Award should be annulled in whole or in part. This question, which was already mentioned (*supra*, para. 80) raises a problem, not expressly resolved by Article 52, namely, whether the finding of a ground for annulment leads "automatically" to annulment. This will be examined later.

To conclude on this point, the *ad hoc* Committee can only note that the complaint is not only admissible but well founded, given the failure to state reasons and to deal with the Claimant's pleas concerning the application of contractual clauses limiting liability.

#### (4) *The Fourth Complaint*

152. According to the Application for Annulment, there is also a failure to state reasons and to "deal with questions submitted to the Tribunal" (pp. 24 and 26) because the Tribunal took "no account of the very many confirmations by Cameroon of its debts to Klöckner," mentioned above in connection with the allegation of partiality (para. 93 *et seq.*).

This complaint being admissible *per se*, it should be determined whether it is well founded. The issue is therefore whether, on the one hand, the Claimant made pleas based on an alleged acknowledgement by Cameroon of its debt and whether, on the other hand, the Award was silent on them and gave no reason for the decision to dismiss the claim for payment, despite the Claimant's arguments based on the Respondent's alleged acknowledgment of the debt.

153. On this first point, it is correct that the Claimant (Application, p. 26) availed itself of the fact that Cameroon not only never called upon Klöckner to fulfill its contractual obligations, but moreover, never disputed its obligations and its debts to Klöckner.

In particular, Klöckner cited the Cameroonian Finance Minister's decision No. 001901 authorizing "payment of a sum of CFA francs 2,000,000,000 to SOCAME as an exceptional subsidy, intended for the settlement of the promissory notes due on the Klöckner loan since 11 October 1978." (Klöckner Annex 1.2) The decision was followed by a "payment order" of CFA francs 2 billion "in favour of SOCAME and intended for the settlement of the promissory notes due on the Klöckner loan since 11 October 1978." There was also a letter of 12 November 1980 from the Cameroonian Minister of Foreign Affairs to the FRG Ambassador stating "that payment of the sum of CFA francs 2 billion intended for the settlement of the promissory notes due on the Klöckner loan since 11 October 1978 has been effected by the Ministry of Finance, Budget Division ... to SOCAME." Following this and the final shutdown of the factory, SOCAME kept the

payment, even though it had been made by the Government for Klöckner's benefit.

Clearly such an argument, based on the Respondent's alleged acknowledgment of the debt, must be considered to be a question submitted to the Tribunal, calling for a response.

154. It must be noted that the Award does tackle this question in Part "VI. The Law," Section 5. Under the heading "Alleged Waiver," the Tribunal observes that:

It has also been suggested that the Government of Cameroon waived all rights it may have had to refuse to pay in 1983 and confirmed and accepted Klöckner's defective performance.

In this context, it is appropriate to point out that the Tribunal chose to qualify the Claimant's argument or plea as an "alleged waiver" of the right to refuse to pay, which is not necessarily the same as an alleged acknowledgment of the debt by the debtor. But it is unnecessary to wonder about this nuance, since it is clear that the arbitrators did not fail in their duty to provide reasons by characterizing, in the manner they deemed proper, the question submitted by the Claimant.

155. It is undoubtedly more significant that, according to the Arbitral Award (p. 134):

Klöckner bases itself on the letter of 12 November 1980 (Annex 1.1 to the Memorial) by which the Government of Cameroon informed the Government of the Federal Republic of Germany that a sum of CFA francs 2 billion had been paid by the Ministry of Finance in settlement of the arrears.

The Tribunal considers (pp. 134-135) that "the statement was not made to Klöckner but between two governments ...," that "in addition, the payment was conditional" and that "the letter of 12 November 1980 consequently did not constitute a waiver."

156. Criticism of these reasons is not admissible in the present annulment proceeding. Certainly the Claimant may regret that, from the Claimant's pleading, the Tribunal chose only to rely on the letter of 12 November 1980 between two governments (Annex 1.1 to the Memorial), without mentioning or discussing Annex 1.2 of the Memorial on the Finance Minister's decision and his order for Klöckner's payment through SOCAME. The Award limits itself to mentioning that "Klöckner based none of its actions on this letter" (from Cameroon to the FRG), but it fails to mention that Klöckner did indeed base its action in part on the other documents already cited, and in particular on those contained in Annex 1.2 to its Memorial.

It would be impossible to conclude from this that there is really a failure to state reasons, since the Tribunal held that "in addition, the payment was conditional." The complaint must therefore be rejected.

157. The same is not true for the rest of Cameroon's debts, over and above the CFA francs 2 billion paid to SOCAME, according to the Respondent, as an incentive to renegotiate. The Award does not mention this. To this extent, there is a failure to state reasons and the complaint is well founded.

(5) *The Fifth Complaint*

158. The same complaint regarding failure to deal with questions submitted by the Tribunal and to state reasons is again invoked by the Claimant (p. 24), who recalls:

that it could only be held responsible for *hidden defects*. (pp. 28–30 and 64, and oral pleadings)

According to the Claimant, the brief time limit within which a claim may be made with respect to hidden defects under French law had long since expired and no evidence that there was a hidden defect had ever been advanced by Cameroon. Such evidence could in any case no longer have been adduced, since Cameroon had unilaterally made many modifications contrary to the contractual provisions (Article 9(5) of the Turnkey Contract).

This, too, would be one of "Klöckner's essential arguments on which the Award undertook no study" (p. 22), and an illustration of the fact that:

the Arbitral Tribunal systemically ignored Klöckner's arguments, drawing up the Arbitral Award as if Klöckner had never submitted any questions. (p. 24)

159. The complaint is clearly admissible, for the reasons already given. Is it well founded?

It is true that during the arbitral proceeding (*cf.* especially Klöckner's Reply of 30 October 1982, p. 27 *et seq.*), the Claimant invoked Article 1641 (on the warranty against hidden defects) and Article 1648 (on the obligation of purchaser to act "within a brief time limit") of the Civil Code to show that the Cameroon's argument was "without any legal basis." (p. 28) The Claimant formally concluded that "this claim [the counterclaim filed on June 15, 1982] was inadmissible" because it ignored the obligation to act within a brief time limit, such inadmissibility being "all the more clear as the factory's condition as delivered by Klöckner can no longer be ascertained," for it had been "subjected to an overhaul decided on in 1978 after thorough technical studies carried out unilaterally by the purchaser." Moreover, the Claimant considered the plea of hidden defects to be unsound and expressly referred to Article 9 of the Turnkey Contract, regarding the equipment warranty, and to the contractual warranty period specified in Article 9(2) for each shop.

160. The Award does not discuss these arguments and questions. In Part "VI. The Law," Section 3, "The Exceptio Non Adimpleti Contractus,"

under the heading (c) "*The Significance of Failure of Performance in this Case*," the Award begins by stating that "Klöckner's shortcomings in the performance of its undertakings are very far from being minimal," and that:

by the Turnkey Contract Klöckner had assumed a fundamental obligation: that of supplying a factory capable of producing fertilizer products conforming to specific descriptions and in guaranteed quantities.

The Award then comments on Article 2 of the Turnkey Contract, concluding (p. 115) that:

Klöckner had thus assumed the risk that the factory might reveal itself incapable of functioning at 100 per cent of its estimated capacity. In the present case, the factory did not function at the level foreseen in the agreements. Klöckner thus (*sic*) did not deliver to Cameroon what it had promised.

The Award goes on to analyse the Claimant's other fundamental obligation, that of assuming "responsibility for technical and commercial management."

161. The Award then returns to these subjects, going in turn from the delivery obligation to the management obligation, to the finding that "the expected production capacities ... were never attained after start-up of the factory" and that in order for there to have been proper performance of the contracts in question,

it was not sufficient to deliver a fertilizer factory; the factory had to have the required capacity and had to be managed *in the way necessary to obtain the proposed goals*. (p. 117)

Then, seeking to determine "if a failure of performance is of a sufficient degree of gravity," a task it believes is "always difficult," (p. 117) the Award cites French authors and an English judgment before returning to the technical and commercial management. According to the Award, failure to perform this obligation "results simply from the shutdown of the factory in December 1977." (p. 120) Then, under letter (e) "Responsibility for the maintenance of the Factory," there is another discussion of "one of the key questions of the present case," (p. 121) Klöckner's responsibility for management, which, as we have seen, the Tribunal bases not on the Management Contract but on the Protocol of Agreement. It refers, on the basis of an SCAP<sup>8</sup> report of September 1978 (p. 123), to "serious technical failings in the factory's design" and concludes (p. 124) that:

the rejection of Klöckner's claim for payment of the remainder of the price of the factory *serves only to maintain the equilibrium of reciprocal contractual undertakings as defined by the parties themselves*.

<sup>8</sup> Translator's note: SCAP, Commercial Company for Potash and Azote.



This Section ends (pp. 124-127) with an attempt at an "equitable evaluation" of the "quantitative comparison of the respective failure of performance," (p. 126) (of the two parties) concluding that the amount already paid "corresponds equitably to the value of Klöckner's defective performance." (p. 127)

162. In this entire analysis, one finds no discussion either of the conditions of the seller's warranty under Article 1641 *et seq.* of the Civil Code, or of the provisions of Article 9 of the Turnkey Contract on the equipment warranty, and in particular of the warranty period set forth in Article 9(2). These are conditions which, quite obviously, are also part of the "equilibrium of reciprocal contractual undertakings as defined by the parties themselves," to use the Award's formula. (p. 124)

163. It is difficult to follow the Tribunal's thinking where different considerations, of fact and of law, are mixed together, with the same topics treated in ways that are now similar, now different. Nevertheless, it is possible to discern quite clearly a dominant concern, inspired by equity, which will ultimately send the parties back to "square one" – each keeping what it already has, but each having its claim rejected, be it the principal claim for payment of the balance of the price or the counterclaim for damages. But it must also be recognized here that the Award is based more on a sort of general equity than on positive law (and in particular French civil law) or precise contractual provisions, such as Article 9 of the Turnkey Contract.

164. *In conclusion*, it must be accepted that the Tribunal did not deal, at least expressly, with the questions submitted to it by Klöckner. In order to be exhaustive, it might however be asked whether there is an *implicit* rejection of these questions elsewhere in the reasoning.

This thesis could hardly be accepted. On the one hand, the passages which have just been analysed appear in a chapter dealing with the "*Exceptio non adimpleti contractus*." On the other hand, the general considerations which are stated under this heading can only with difficulty be interpreted as applying to questions as precise as those of a contractual warranty period or the "brief time limit" in Article 1648 of the Civil Code.

On a question as essential as the warranty against defects and the conditions, especially the time limit, for its enforcement, it is in any case difficult to conceive that an indirect and implicit response may be found in reasons given on another subject.

The complaint is therefore well founded.

#### V. OTHER COMPLAINTS OF THE APPLICANT FOR ANNULMENT

##### A. *The Exceptio Non Adimpleti Contractus*

165. On pages 25 and 26, the Application for Annulment challenges the Award for adopting two of the Respondent's arguments (Award, p. 105,

para. 2) on the duty of "full disclosure to a partner" and on the "*exceptio non adimpleti contractus*," in order to dismiss Klöckner's claims. The Application considers (p. 26) that the Tribunal thought it could overcome the "diriment impediments" to its reasoning by:

the concept of the *exceptio non adimpleti contractus*, the only one it thought could be invoked without prior notice and without respecting any deadline; *this is to forget the suspensive nature of such an exception* and to make a serious error in law.

Finally, in its Reply (pp. 16-7) of 31 July 1984 to the Respondent's Counter-Memorial, the Claimant states that:

In order to allow the Government of Cameroon to retain nearly 80% of the price of the factory, the Tribunal applied the *exceptio non adimpleti (sic) contractus* which in French law is normally intended to obtain the performance of a corresponding obligation, not to penalize failure of performance.

It was thus led to establish in Cameroon's favour a claim for damages that could be offset by the balance of the price of the factory.

166. Is this complaint admissible?

It should first be noted that the complaint is not formally characterized by the Claimant. No reference is made in this regard to one of the precise grounds set forth in Article 52 of the Convention. The above-cited passages of the Application are found under the heading "Failure to State Reasons" (p. 24). This leads one to think that the Claimant intended to invoke Article 52(1)(e). On the other hand, the Reply of 31 July 1984 refers to the *exceptio* (p. 46) in Chapter 3 ("Grounds for the application for Annulment") under item "A. Excess of Powers" (p. 29) and not under item "B. Failure to State Reasons" (p. 49). Thus in its chapter on excess of powers (p. 46), the Applicant for Annulment states that:

By adopting Article 9 of the Protocol as the only basis for its decision and by applying the *exceptio non adimpleti (sic) contractus*, the Tribunal has created for Klöckner all sorts of obligations to which the parties had not agreed, thus substituting its own will for that of the parties ...

However incomplete and imprecise they may be, these arguments permit one to infer that the complaint is that the Tribunal manifestly exceeded its powers within the meaning of Article 52(1)(b) or, alternatively or subsidiarily, that the Tribunal failed to state why it thought the *exceptio* of French law could be applied as it was in the Award.

In any case, the complaint is admissible.

167. It remains to be seen whether it is well founded.

The Award devotes rather a lengthy discussion in Part "VI. The Law," Section 3 (p. 109 *et seq.*), to the question of the "*exceptio non adimpleti contractus*."

It begins by noting (p. 109, under the heading "French, English and International Law") that the Cameroonian Government, "in responding to the request for arbitration, and thus in good time, advanced *eo nomine* the *exceptio non adimpleti contractus*." Then it cites the Respondent's Counter-Memorial, according to which the performance of its undertakings towards Klöckner:

may be suspended (*sic*) by virtue of the *exceptio non adimpleti*, that is to say, in the event Klöckner failed to fulfill its own contractual undertakings. Klöckner's faulty performance of its contractual obligations thus had the effect of liberating (*sic*) the Cameroonian Government from its financial undertaking.

The Award also observes that Cameroon expressly requested that, if it were found obliged to pay the price of the factory, it should not be required to pay the entirety of the price, "taking into account Cameroon's claim arising from Klöckner's failure to perform its obligations ... and this on the grounds of the *exceptio non adimpleti contractus* and of judicial setoff." (p. 110)

168. After citing several French authors on the exception based on non-performance (pp. 110 and 111), the Award continues:

In view of the parties' divergence of views as to the applicable law under Article 42 of the ICSID Convention, it is appropriate to note that English law and international law reach similar conclusions. (p. 111)

This superfluous observation is rather difficult to reconcile with the Tribunal's previous decision (p. 105) that, as the Claimant argued, "only that part of Cameroonian law that is based on French law should be applied in the dispute."

In Section 3(b), "Partial or Imperfect Performance" the Award examines and quotes French scholarly opinion and case law. The quotations seem to establish that the exception is also available to a defendant where there is partial or imperfect performance and that judges "have full authority to evaluate whether one party's failure of performance of its obligations under a ... contract is such that it frees the other party from its corresponding obligations."

169. It would be impossible to ask whether there was a "manifest excess of powers" regarding this "exception" without examining the Award's reasoning. We must therefore first consider the complaint that there was a "failure to state reasons" within the meaning of Article 52(1)(e). Only if the Award's reasons reveal, as the Applicant for Annulment alleges (p. 26), a "serious error in law" would it then be necessary to decide whether this alleged error, assuming it is established, may be attributed to a simple "mistaken application of law" or "error in *judicando*," or to an excess of powers, and finally to decide whether this excess of powers is "manifest."

170. As is already apparent from the above, the Award clearly gave reasons on the *exceptio non adimpleti contractus* under French civil law. For

example, it points out, apparently correctly, that the *exceptio* may be invoked at any time without prior formal notice (*mise en demeure*), even during judicial or arbitral proceedings. Supported by references, it also explains that the *exceptio* may be invoked in case of partial non-performance, except where in a case of slight non-performance there would be a violation of good faith. (p. 113)

The Award then evaluates (in Section 3(c)) the "Significance of Failure of Performance in this Case" (p. 114 *et seq.*) on pages where there are also certain general considerations on the criteria to be applied by a judge or arbitrator to evaluate the degree of gravity of the failure to perform. (pp. 117-118, with references to French and English law)

171. Given the Claimant's complaints in this connection, it must be noted that the Award does not examine all of the conditions required under French law for a defendant to invoke the exception based on non-performance, for example the twofold condition of existence and exigibility of the debt relied on by the "*excipiens*." It does not examine the detailed conditions for application of the rule, and especially whether the *excipiens* can itself have failed to perform, or whether the exception merely has a suspensive effect, as claimed by the Claimant, or again whether the burden of proof is reversed.

To summarize, while the Award contains *some* reasoning on the conditions for applying the exception based on non-performance, the question may be asked whether these reasons are sufficient or "sufficiently relevant." It is not necessary to answer this, since on the question of the effects of the exception based on non-performance, the Award does not state the legal grounds nor does it state the rules of civil law (reinforced by references to scholarly opinion and case law comparable to those which the Award cited on the general principle) which could justify its conclusion. In reality, everything occurs as if the Arbitral Tribunal had considered the *exceptio non adimpleti contractus* as a ground for *extinguishing* obligations under French law. On the basis of the Award's own citations, this conclusion does not necessarily follow, nor does it conform to the understanding the *ad hoc* Committee may have of this area of law, but in any case it should have been expressly justified.

The complaint that there was a failure to state reasons therefore appears to be not only admissible but well founded.

#### B. The Calculation of the Respective Amounts Due

172. Similar considerations apply to another criticism by the Applicant for Annulment, which concerns the Tribunal's evaluation of the parties' respective obligations. For example, in the Reply of 31 July 1984 to the Counter-Memorial, pp. 49 and 50, there are the following criticisms:

1. In order to decide that the Government of Cameroon no longer had to pay the balance of the factory price, the Tribunal attempted to establish an

equivalence between the price already paid by the Government of Cameroon and the value of that part of the factory it kept....

... The Tribunal thus deducted, from precisely calculated payments in principal and interest, costs of repairs and operating losses which are not precisely calculated at all. This constitutes a failure to state reasons.

In addition to failure to state reasons, this curious determination of the amount of Klöckner's indemnification amounts to a contradiction in reasons, since the Tribunal assigns responsibility for operating losses to Klöckner and thus accepts the counterclaim, which it expressly rejected on the grounds that operating losses could not be charged to Klöckner. The same is true for the repair costs which were required for the factory to resume operation....

A similar criticism is made in the Dissenting Opinion, in particular on pages 44 and 45.

173. The complaint regarding failure to state reasons and contradiction of reasons is certainly admissible, for reasons already mentioned. It remains to be examined whether it is well founded.

On page 107 of the Award, the Tribunal decides that Klöckner, having violated its fundamental obligations, "may not insist on payment of the entire price," but "is entitled to be paid" for "certain components of the factory delivered by Klöckner." In order "to determine the 1980 value of the Klöckner components," the Tribunal believes it must "deduct from the contract price the following elements..." listed under numbers 1 through 5 on page 108. With one exception, these elements are not quantified; they include certain payments of principal, interest payments, cost of repairs, and "considerable operating losses." The Tribunal notes that:

Klöckner should in any case assume part of the responsibility for these losses, thus setting off its claims regarding the components utilized by the Government in 1980. (p.109)

On pages 126-127, the Tribunal concludes "that the amount paid (by the Respondent) corresponds *equitably* to the value of Klöckner's defective performance. There is *a certain equilibrium, a certain relationship*, as we suggested above, between that which was paid and the *approximate* value of the components supplied by Klöckner... and used by the Respondent."

The Tribunal concludes this Section 3 with the following words:

The two methods of analysis lead to *approximately equivalent* results, and we have thus concluded that Klöckner is entitled to what it has already received, but to nothing more.

174. It is true that the two methods used by the Tribunal seem to lead to "approximately equivalent" results, contrary to what the Dissenting Opinion states (pp. 44-45), but it is also true that the above passages show that the Tribunal's evaluation was "equitable," emphasizing that there is "a certain equilibrium," or "a certain relationship" between the amount already paid and the "value of the defective performance."

175. Finally, under the heading "6. The Counterclaim" (pp. 136 and 137), the Award again refers briefly, in rejecting the counterclaim, to the idea that "there is no justification for charging the Claimant with the losses incurred by the Government...." It concludes that the Claimant's "responsibility for defects in the supply of the factory and in its technical and commercial management have been sufficiently sanctioned by the rejection of its claim under the unpaid promissory notes."

176. In the Award's passages on the evaluation of the respective obligations or debts, the main ones of which have just been cited, it is difficult to find any legal reasoning as required by provisions of Articles 52(1)(e) or 48(3). Instead, there is really an "equitable estimate" (to use the Tribunal's own words, p. 126; *cf.* also p. 127) based on "approximately equivalent" estimates or approximations, which is in any case impossible to justify solely on the basis of the Award's explanations of the *exceptio non adimpleti contractus* or the counterclaim.

The complaint is therefore not only admissible but well founded.

### C. Other Criticisms

177. It is superfluous to examine the Claimant's other, more or less subsidiary or secondary, criticisms of the Award. These criticisms either partially overlap the complaints examined above or were not given any particular characterization and therefore leave uncertain which of the grounds for annulment listed in Article 52 of the Convention they refer to. This is the case for example with "the particularly serious misconstructions (*dénaturations*) and distortions" alleged by the Application. (p. 17, under the heading "Inadequacy of Reasons." In Klöckner's opinion such "misconstruction" affects "an essential element in the reasoning" of the arbitrators and "abundantly" demonstrates "the Award's defects.")

The Application for Annulment gives as examples of these "defects" the Award's explanations for the factory's acceptance, for Klöckner's responsibility for the production shortfall, for the causes of the production shortfall and for the condition of the factory. (pp. 17-22) It has already been mentioned that the concept of "misconstruction" (*dénaturation*) as such is unknown to Article 52 of the Convention, and that, furthermore, the criticism of the alleged errors in the Award's reasoning, which are more in the nature of an appeal than an application for annulment, could drag the Committee into an area which must remain foreign to it.

178. Once one or another of the grounds listed in Article 52(1) of the Washington Convention has been found to exist, what role and powers does the *ad hoc* Committee have?

It obviously cannot remit the case to the Tribunal for a decision, by analogy to Article 49(2), on "any question which it had omitted to decide in the award" or for a fresh decision. Nor can the *ad hoc* Committee decide on

the merits, as a court of appeal would do, or declare that it would have reached the same result on other grounds or for other reasons.

179. It will be noted that according to Article 52(1), taken literally, a party may only “request annulment” (“demandeur ... l’annulation,” “solicitar la anulacion”) of the award “on one or more of the following grounds.” Paragraph 1 of this Article does not therefore seem to confer a right to *obtain* annulment. Article 52(3) *in fine* provides that:

the Committee shall have the authority to annul the award (“Le Comité est habilité à annuler la sentence,” “Esta Comisión tendrá facultad para resolver sobre la anulacion”).

Considered as a whole, it seems that Article 52 of the Washington Convention can be interpreted in two ways, at least if taken literally:

- (a) First, as triggering inevitable and “automatic” annulment on a finding that there is one of the grounds for annulment under Article 52(1), the committee lacking discretion and having no power to abstain from annulling an award tainted on one or other of the grounds listed in paragraph 1;
- (b) Second, as containing a sort of space or “no man’s land” between the finding under Article 52(1) that there is a ground for annulment and the declaration of annulment under Articles 52(3) and 52(6). This would give the Committee a certain margin of appreciation. It could, for example, have the power to abstain from annulling if it believes that the ground for annulment either did not harm the Applicant (*cf.* the adage well-known in some legal systems, “no annulment without grievance”) or did not substantially affect the arbitral award taken as a whole, which perhaps amounts to the same thing. In such a case even a purely partial annulment could seem excessive and contrary to the spirit of the Convention. Finally, the Committee could abstain from annulling because the Claimant abused its rights in invoking the said ground.

Save under exceptional circumstances, which in any case are not present here, the Committee is inclined to consider that the finding that there is one of the grounds for annulment in Article 52 (1) must in principle lead to total or partial annulment of the award, without the Committee having any discretion, the parties to the Washington Convention and the parties to an arbitration under the ICSID system having an absolute right to compliance with the Convention’s provisions, and in particular with the provisions of Article 52.

The contested arbitral Award must therefore be annulled and, for the reasons given above, annulled in its entirety under Article 52(3) (*in fine*) of the Convention.

180. It remains for the *ad hoc* Committee to decide on the costs of the present annulment proceeding, pursuant to Rule 53 and 47(1)(j) of the Arbitration Rules.

Taking into account the nature of the present proceeding, its outcome and all circumstances, it is justifiable to divide the costs equally and to leave each party responsible for its own expenses.

FOR THESE REASONS.

The *ad hoc* Committee constituted under Article 52 of the Washington Convention of March 18, 1965,

Ruling unanimously,

Decides:

- (1) The Arbitral Award rendered on October 21, 1983 by the Arbitral Tribunal constituted by ICSID in Case ARB/81/2 is annulled;
- (2) The costs of the present annulment procedure shall be borne equally by the two parties, each remaining responsible for its own expenses.

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[Source: This English translation from the French original of this decision is published in 1 *ICSID Review – FILJ* No. 1 90 (1986). This translation was prepared by Mr Antonio R. Parra.]

*NOTE:*— In July 1985 the case was resubmitted to a new ICSID tribunal pursuant to Article 52(6) of the Convention. The Award on the Resubmitted Case was issued on 26 January 1988. On 1 July 1988 the parties filed applications for the annulment of the Resubmitted Award. On 17 May 1990 the Decision on the Annulment Application was rendered, rejecting the parties’ applications for annulment of the Award 26 January 1988. These decisions have not been made available for publication.