# CASES

## INTRODUCTORY NOTE

On November 5, 1982, the Société Ouest Africaine des Bétons Industriels (SOABI) instituted ICSID arbitration proceedings against the Republic of Senegal in respect of a dispute arising from the implementation of a project for the construction of low-income housing in Dakar, in conjunction with which a factory for the prefabrication of reinforced concrete was also to be erected by SOABI. The request was registered by the Secretary-General of the Centre on November 8, 1982. In the course of 1983, Senegal and SOABI appointed by mutual agreement Baron Jean van Houtte (Belgian) and Judge Kéba Mbaye (Senegalese) as co-arbitrators and the Acting Chairman of the ICSID Administrative Council appointed Mr. Aron Broches (Netherlands) as President of the Tribunal, with SOABI and Senegal then signifying their acceptance of the composition of the complete Tribunal.

After the commencement of the proceeding, Senegal filed, in March of 1984, an objection to the jurisdiction of the Tribunal *ratione materiae* on the ground that the parties had not consented to submit the dispute, as defined by SOABI in its request for arbitration, to ICSID arbitration. Senegal added an objection to jurisdiction *ratione personae* claiming that SOABI did not satisfy the nationality requirements of the Convention. On August 1, 1984, the Tribunal issued a unanimous decision (*décision sur le déclinatoire de compétence*) rejecting Senegal's objection to the jurisdiction of the Centre *ratione personae* and joining to the merits the question of whether there was consent to submit the dispute to ICSID arbitration.

In May 1985, Professor J.C. Schultsz (Netherlands) was appointed by SOABI as arbitrator to replace Baron van Houtte who had resigned for health reasons. Approximately three years later, on February 25, 1988, a majority award (Broches, Schultsz) was rendered. The Tribunal found that Senegal was liable for the termination of the underlying contract and should indemnify SOABI for the resulting damages (*damnum emergens)* and lost future profits (*lucrum cessans).*[1] Judge Mbaye disagreed with the majority and filed a dissenting opinion in part relating to the jurisdictional decision of August 1, 1984. Noting that although that decision had been unanimous, certain of its reasons had been criticized, the President appended a Declaration to the award relating

[1] Award of February 25, 1988, secs. V to XI.

to the jurisdictional decision. The award and its annexes are reprinted starting at page 125 below,[2] the parties having authorized such publication by the Centre.

The dispute raised a number of complex issues of fact and law which are addressed by the award and its annexes. Of particular general interest among these issues are the jurisdictional ones; the manner in which the Tribunal dealt with these jurisdictional questions is briefly examined below.

*A. The August 1, 1984 Decision on Jurisdiction*

The Centre's jurisdiction is defined in Article 25 of the ICSID Convention. *Ratione personae*, such jurisdiction extends to a dispute arising between an ICSID Contracting State (or a designated agency or subdivision of the State) and a national of another Contracting State. The term "national" applies to both natural and juridical persons. Insofar as juridical persons are concerned, Article 25(2)(b) of the ICSID Convention provides that these may be:

1) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration; or
2) any juridical person which had the nationality of the Contracting State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of the ICSID Convention.

In the present case, SOABI was a company incorporated in Senegal (the host State) and was, at the time of the conclusion of the relevant contract containing a consent to ICSID arbitration, directly controlled by the Flexa Company, a company incorporated in a non-ICSID Contracting State, Panama. However, the Tribunal found that the shares of the Flexa Company were owned by nationals of various Contracting States (mainly Belgians).[3]

The Senegalese Government objected to the jurisdiction of the Tribunal on the grounds that the foreign control referred to in Article 25 of the ICSID Convention must be that of nationals of Contracting States. It argued that SOABI did not meet the requirements of Article 25 because its sole shareholder (the Flexa Company) had the nationality of the Republic of Panama.[4]

In its decision, the Tribunal acknowledged that:

> ...[i]t results from the structure and the purpose of the Convention that the foreign interests, which might serve as a basis for according 'foreign status' to a com-

[2] The award is commented on by Gaillard, Chronique des sentences arbitrales, 117 Journal du Droit International 192 (1990).

[3] Decision of August 1, 1984, at para. 41.

[4] *Id.* at para. 32.

pany established under local law, should be those of nationals of Contracting States. The Tribunal thus does not dispute the Government's first ground.[5]

However, the Tribunal held that indirect control by nationals of Contracting States of the company established under local law was sufficient to satisfy the nationality requirements of Article 25 of the ICSID Convention:

> ...[t]he nationality of the [Flexa] Company which held in 1975 all of the shares of the subscribed capital of SOABI would have determined the nationality of the foreign interests if the Convention were to be interpreted as referring only to the immediate control. But the Tribunal cannot accept such interpretation which is contrary to the purpose of Article 25(2)(b) *in fine*. This purpose, it is hardly necessary to recall, is to reconcile the wish of States hosting foreign investments to see these investments carried out through companies established under local law on the one hand and their desire to give these companies the capacity to be parties to procedures under the auspices of the Centre on the other hand.
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> We find a perfect example of this in the case of SOABI, a company established under Senegalese law, to which the capacity of national of another Contracting State has been granted.
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> It is obvious that just as the legal form of a national company may be chosen for the entity making the investment for reasons proper to the host State, the investors may be led for reasons of their own to invest their funds through intermediaries, while retaining the same degree of control over the national company as they would have been able to exercise as direct shareholders of the latter.
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> ...[t]he Tribunal concludes that, at the date of the conclusion of the Establishment Agreement, the control over the Flexa company was exercised by nationals of Contracting States, notably of the Kingdom of Belgium.[6]

It may be noted that the Tribunal's interpretation of Article 25(2)(b) *in fine* differs from the September 25, 1983 jurisdictional decision in the ICSID case of *Amco et al. v. Indonesia*.[7] In the latter case, the Tribunal held that "the concept of nationality" in the Convention is a "classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat."[8] The Amco Tribunal further held that while the Convention permitted an exception from this classical concept when a juridical person which had the nationality of the host State was under foreign control, "no exception to the classical concept is provided for when it comes to the nationality of the foreign controller."[9]

In his dissent from the jurisdictional decision of the Tribunal, Judge Mbaye refers with approval[10] to the Amco Tribunal's decision that the Convention precludes consideration of the nationality of those controlling the controlling juridical person itself:

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[5] *Id.* at para. 33. (This and other translations herein from the original French of the award and its annexes are translations by the author).

[6] Decision of August 1, 1984, at paras. 35-38.

[7] The Amco decision is reproduced in 23 ILM 351 (1984) and 10 Y.B. Com. Arb. 61 (1985).

[8] Amco decision, *supra* note 7, at para. 14(iii).

[9] *Id.*

[10] Dissenting opinion, at para. 77.

> In my opinion, Article 25-2(b) has a very precise purpose, that is to allow the State to enter into an agreement with a juridical person possessing its nationality. [Article 25-2(b)] should be applied while taking into account the concern of simplification that has inspired its drafters. Thus there is no need to search whether there is, after all, beyond the immediate control an effective control assumed by juridical or natural persons. To proceed otherwise would be inconsistent with the spirit underlying the conception and adoption of the provision.[11]

In his Declaration on the August 1, 1984 decision on jurisdiction, the President of the Tribunal (Mr. Broches) replied to both the Amco Tribunal and the dissenting arbitrator in the SOABI case:

> Article 25(2)(b) of the Convention does not say anything about the direct or indirect nature of the foreign control that may induce the host State and the foreign investor to deal with a company established under local law as a "national of another Contracting State." Thus, the Tribunal in the *Amco* case had no basis for the peremptory statement in its decision on jurisdiction that "no exception to the classical concept [of the nationality] is provided for when it comes to the nationality of the foreign controller."
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> One must recognize that the control which justifies the application of Article 25(2)(b) must be exercised by a national of a Contracting State. However, this control does not have to be direct. Nor need the arbitration clause state the nationality which is recognized to the company established under local law....[12]

In view of the difficulties described above, one might reiterate the importance of drafting arbitration clauses carefully in initial investment agreements.[13] In such instances, the ICSID Model Clauses may provide useful suggestions.[14]

*B. Jurisdictional Decision in the February 25, 1988 Award*

The majority's award and the dissenting opinion also reached conflicting conclusions in respect of the question of consent to submit the dispute to ICSID arbitration. The answer to this question turned on the interpretation of the ICSID arbitration clause which was contained in Title VI of the November 3, 1975 Establishment Agreement for the reinforced concrete factory (Para. 4.02 of the award) and on the relationship between that agreement and two earlier ones related to the project.

Since the dispute had arisen in respect of the construction of the houses and not in respect of the erection of the factory, the Government argued that the arbitration clause contained in the Establishment Agreement did not cover the dispute, which was

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[11] *Id.* at para. 77 bis.

[12] Declaration of the President of the Tribunal, paras. 5-6. The arbitration clause in the Establishment Agreement merely stated that "the Government agrees to consider the nationality condition prescribed by Article 25 of the Convention as having been met."

[13] *See* G. Delaume, Transnational Contracts, ch. 15, para. 15.10 at 19 (May 1990 updating); Delaume, Legal Rules Applied by ICSID Tribunals, 2 News From ICSID, No. 2, at 3,4 (Summer 1985).

[14] ICSID Model Clause VIII provides in this respect:

"For the purposes of Article 25(2)(b) of the Convention, it is hereby agreed that, although [name of the Investor] is a national of [name of the Host State], it is controlled by nationals of [name(s) of other Contracting State (s)] and shall be treated as a national of [that] [those] State[s] for the purposes of the Convention." (Doc. ICSID/5/Rev. 1).

hence not within the jurisdiction of the Centre.[15] SOABI replied that the first two agreements were preliminary agreements followed by a definitive agreement of November 3, 1975 (the Establishment Agreement).[16] The award and the dissenting opinion reflected the parties' differences. After a careful analysis of the various agreements concluded between the parties, the Tribunal reached the following conclusion:

> There is not the slightest doubt about the intention of the parties. It was not their intention to execute two independent projects but to carry out a single project consisting of two closely related parts, one of them being the technical pre-condition for the implementation of the other and would therefore have come first.[17]

The Tribunal held also:

> ...[t]he Tribunal has reached the conclusion that the agreements between the parties (other than the Establishment Agreement) regarding the construction of the factory and the construction of 15,000 houses are implicitly embraced by the Establishment Agreement and that the disputes related to their execution or to the rights and obligations arising thereunder fall within the scope of the Title VI of the Establishment Agreement....[18]

Taking a different approach, Judge Mbaye wrote:

> It is thus clear that the subject-matter of the dispute is the breach of a construction contract for 15,000 houses. The path that the Tribunal had to follow was easy. The problem was to know whether this subject-matter of the dispute actually falls within the November 3, 1975 Establishment Agreement. If so, the jurisdiction of the Tribunal would not have been open to discussion. If not, the Tribunal did not have to embark on an extensive interpretation that led it to its decision by which it claims that the September 17, 1975 agreement for the construction of 15,000 homes is 'incorporated' in the Establishment Agreement. This decision was not within its powers.[19]

The Arbitral Tribunal also addressed the issue of consent in more general terms in the light of Article 25 of the ICSID Convention. Senegal claimed that Article 25, being an exception to the law of the land, should be interpreted restrictively, the more so since it entailed a derogation of the State's sovereignty.[20] The majority did not follow this approach:

> Article 25 of the ICSID Convention is by no means an exception to the law of the land. It is limited to defining the conditions of ICSID jurisdiction, which include the fundamental condition of consent. Without doubt, the consent to an arbitration proceeding constitutes a renunciation or a derogation from the right to have recourse to national courts. Therefore such consent should not be presumed. But the Tribunal does not see in this 'a derogation by a State to its very

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[15] Award of February 25, 1988, at paras. 4.04–4.05.

[16] *Id.* at para. 4.05.

[17] *Id.* at para. 4.17.

[18] *Id.* at para. 4.13.

[19] Dissenting opinion, at para. 165.

[20] Award of February 25, 1988, at para. 4.08.

> sovereignty' and does not find it justified to require an interpretation of the condition of consent that is more strict with respect to a State than with respect to an investor.[21]

In his dissenting opinion, Judge Mbaye emphasized the *unequivocal* character of the consent given by the States to the ICSID jurisdiction:

> ...[i]t is true to say that the parties that have concluded an agreement for the arbitration of future or existing disputes are equal and that once this consent is given, it cannot be withdrawn (the applicable rules being the same for both the State and the private party). But that is the trap. The equality of the parties can only be invoked to the extent that the acceptance of the ICSID jurisdiction is certain, that is to the extent that the State has committed itself to go to arbitration in case of a legal dispute and for that dispute.[22]

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On November 14, 1988, SOABI obtained from the President of the Paris *Tribunal de grande instance* an order for enforcement of the award (*ordonnance d'exequatur*). On the strength of that order, SOABI sought to attach some properties owned by Senegal in Paris. Following Senegal's appeal, the Paris Court of Appeal, in a December 5, 1989 decision, vacated the enforcement order, holding in particular that Senegal "did not waive its right to invoke its immunity from execution" and that SOABI has not demonstrated that execution of the award in France would affect assets which were not subject to the principle of sovereign immunity from execution. The Paris Court of Appeal's decision has been widely criticized for its failure to acknowledge that immunity from execution is separate from recognition and enforcement procedures.[23] The parties later reached a settlement ending the dispute between them. In the meantime, the *Cour de cassation* was reportedly asked to quash the Paris Court of Appeal's ruling. At the time of writing, the outcome of this proceeding is not known.

*Nassib G. Ziadé*

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[21] *Id.* at para. 4.09.

[22] Dissenting opinion, at para. 123.

[23] An English text of this decision appears in 5 ICSID Rev.—FILJ 135 (1990). For comments, see Broches, 1990 Revue de l'Arbitrage 164; Gaillard, The Enforcement of ICSID Awards in France: The Decision of the Paris Court of Appeal in the SOABI Case, 5 ICSID Rev.—FILJ 69 (1990); and Ziadé, 80 Revue Critique de Droit International Privé 124 (1991).