# Joy Mining Machinery Limited
v.
# The Arab Republic of Egypt
(ICSID Case No. ARB/03/11)

## Introductory Note

In its Award that was rendered on August 6, 2004, the Tribunal composed of Mr. William Laurence Craig, a national of the United States, appointed by the Claimant, Judge Christopher G. Weeramantry, a national of Sri Lanka, appointed by the Respondent, and Professor Francisco Orrego Vicuña, a national of Chile, appointed as the President of the Tribunal by the two party-appointed arbitrators, concluded that it lacked jurisdiction over the dispute.

The request for arbitration which was brought to ICSID by a UK company against the Egyptian Government was registered by the Centre on the basis of the ICSID arbitration clause of the 1976 Agreement for the Promotion and Protection of Investments between the Arab Republic of Egypt and the United Kingdom (BIT).

The Claimant alleged that it supplied two sets of phosphate mining equipment to an Egyptian State enterprise, IMC, for a project in Egypt under a contract requiring the Claimant to put in place letters of guarantee (Contract) and that the equipment were paid for but the guarantees were never released. The Claimant argued that it had been prevented by actions of the Egyptian Government or its agents from carrying out the commissioning and performance testing of the equipment, which were prerequisites for the release of the guarantees; and asked the Tribunal to declare that Egypt had breached its obligations under the BIT, the Contract and the Egyptian Civil Code, by expropriating the investment and wrongfully depriving Joy Mining of the returns on its investment and by failing to accord to it fair and equitable treatment and full protection and security. The Claimant sought damages for the full value of the bank guarantees if not released.

Egypt denied all the allegations and raised three objections to the jurisdiction of the Tribunal, namely: that the existence of a forum selection clause in the Contract should be respected with regard to all contractual claims; that there was an absence of any breaches of the BIT which could be attributed to the Egyptian Government; and that conditions required under Articles 25 and 26 of the ICSID Convention and the BIT were not fulfilled in this case, in particular the requirement relating to an investment.

The Tribunal first addressed the question whether or not the bank guarantees could be considered as investment under the BIT and under the Convention. With regard to the BIT, the Tribunal concluded that the guarantees were merely a contingent liability and an ordinary feature of a sales contract and, therefore, not an investment. The Tribunal also concluded that the guarantees did not possess the essential qualities to qualify as investment under Article 25 of the Convention.

Although having concluded that it lacked jurisdiction due to the absence of an investment, the Tribunal considered it necessary to address the other issues and proceeded to also conclude that there were no treaty-based claims presented by the Claimant, but only claims based on contract, which were covered by the valid forum selection clause in the Contract.

Exceptionally, though, the Tribunal stressed that the Respondent was bound by the solemn declaration given by its counsel during the hearing to the effect that resort by the Claimant to UNCITRAL arbitration, agreed in the Contract, would be honored and that the final award on the merits of the dispute would be the basis governing the release of the bank guarantees. The Tribunal also noted that Egypt is under an international legal obligation to facilitate the enforcement of any award issued in the UNCITRAL case to the extent that the intervention of the State is required.

On December 22, 2004, the Centre registered a request by the Claimant for annulment of the Award, except for the paragraphs in which the Tribunal noted the assurances and formal commitment made on behalf of the Respondent by its counsel.

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