I. SHOULD JURISDICTIONAL ISSUES BE DETERMINED IN THE FRAMEWORK OF AN INTERIM AWARD ON JURISDICTION?

1. Compétence/Compétence

[1] "The immediate issues with which this tribunal is concerned are issues as to its jurisdiction. Given the court proceedings which are taking place in [a US] State in parallel with this arbitration, it is important to consider first, as a threshold question, whether or not this tribunal has the authority to decide upon its own jurisdiction.

[2] "As to the preliminary question, that of our authority to decide upon our own jurisdiction, we have no doubts whatsoever. The principle of compétence/compétence is an accepted legal principle: it is well established that an arbitral, properly constituted, is competent to decide whether or not it has jurisdiction over a particular dispute or disputes. Moreover, this principle is enshrined in the ICC Rules, which the parties adopted by reference in the Partnership Agreement. Art. 8(3) of these Rules states:

‘Should one of the parties raise one or more pleas concerning the existence or validity of the agreement to arbitrate, and should the International Court of Arbitration be satisfied of the prima facie existence of such an agreement, the Court may, without prejudice to the admissibility or merits of the plea or pleas, decide that the arbitration shall proceed. In such a case any decision as to the arbitrator’s jurisdiction shall be taken by the arbitrator himself.’ (emphasis added)

[3] "Since the seat of this arbitration is Switzerland, the arbitration itself (as opposed to the merits of the dispute) is governed by that part of Swiss Private International Law (hereinafter “Swiss law”) which governs international arbitrations. This law makes it plain that arbitrators may decide upon their own jurisdiction. Art. 186 states:

(1) The arbitral tribunal shall decide on its own jurisdiction.

(2) Any objection to its jurisdiction must be raised prior to any defence on the merits.
(3) The arbitral tribunal shall, in general, decide on its jurisdiction by a preliminary decision.³

[...]

III. JURISDICTION OF THE ARBITRAL TRIBUNAL

1. The Arbitration Clause in the Partnership Agreement

[12] "There are two basic principles of arbitration law upon which the parties now appear to be agreed:

(i) Arbitration is a consensual process and depends upon the existence of a valid agreement to arbitrate. This general principle is underlined by the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (hereinafter 'the New York Convention') which requires an 'agreement in writing'⁴ which must be valid 'under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.'⁵

(ii) An arbitration clause constitutes a separate and autonomous agreement between the parties, which survives any termination of the main agreement in which it is contained, unless the arbitration agreement as such is expressly terminated. (footnote omitted)

IV. JURISDICTIONAL ISSUES

3. Do the Arbitrators Have Jurisdiction over any Claims Arising from the Cooperation Agreement?

[29] "In our opinion, the answer is that we do not. There is no arbitration clause in the Cooperation Agreement and so nothing on which our jurisdiction could be founded: ex nihilo nihil fit"

4. Do the Arbitrators Have Jurisdiction over any Claims Which Arise from the Cooperation Agreement as Part of a Unified Contractual Scheme?

[30] "The phrase 'unified contractual scheme' is not a new one. It appears, for instance, in the ICC Award of the arbitral tribunal in the Pyramids arbitration,²⁴ where it was held that the transaction as a whole (involving the proposed construction of an international tourist complex at the site of the Pyramids in Cairo), 'although structured in the form of separate agreements... is to be viewed as a unified contractual scheme.../ with a consequent finding (reversed by a later tribunal) that the Egyptian government was in fact party to the arbitration agreement to the arbitration agreement."
"The phrase 'unified contractual scheme' in the present context appears to us to reflect the position frequently encountered in international arbitration with, in the words of Craig, Park & Paulsson, 'complex situations where numerous contractual documents relate to one organic relationship'. Primafacie, it also appears to describe the situation in this case, to the extent that there is a main contract (the Partnership Agreement) which creates a business relationship, and other contracts (notably the Cooperation Agreement) making changes of one sort or another in that relationship. It is generally considered desirable that disputes relating to obligations arising from the relationship as a whole, i.e. under several contractual documents, should be submitted to one, single judicial authority: 'it appears inappropriate for different jurisdictions to deal with necessarily interrelated issues in a piecemeal and potentially inconsistent manner.'26"Ibid."

Neither Court found it appropriate to separate out the issues in dispute to be heard by different judicial authorities....

"The Tribunal de Grande Instance held in Acadi v. Thomson that an arbitration clause in one contract applies equally to disputes arising from other, later contracts which are closely connected to the first and which are intended simply to supplement it. (footnote omitted)

"The same principle is also to be found in the practice of the ICSID. In SOABI v. Republic of Senegal the Tribunal held (by majority decision) that an arbitration clause contained in one contract should cover all connected agreements, as these were 'implicitly encompassed' in the contract containing the clause....

"Finally, we refer again to the interpretation by the United States Court of Appeals of the arbitration clause in Sweet Dreams Unlimited, as reaching 'all disputes having their origin or genesis in the contract, whether or not they implicate interpretation or performance of the contract per se'. (emphasis added) The concept of disputes arising under one contract, but having their 'origin or genesis' in another contract, seems to us simply another way of expressing the concept of a unified contractual scheme.

"In the present case, then, the real question is whether the two agreements, that of 1986 and that of 1987, either alone or in conjunction with other contractual arrangements between the parties, constitute what is described as a 'unified contractual scheme'. From what we know of the case so far, it seems that the Cooperation Agreement did not stand alone. It appears to have been one of a series of agreements concluded between the parties, as part of a business relationship which began in 1985 and which inter alia ex-

pressed the wish to settle any disputes by arbitration.31

Whilst the meaning and effect of the Cooperation Agreement remain to be determined at a later stage in these proceedings, the Agreement itself apparently envisaged that some relationship between the parties would continue, since it stated that the parties would 'continue their existing relationship of mutual respect and business development.' (footnote omitted) This would seem to point to a 'unified contractual scheme' or, to put it in another way, to disputes which have their 'origin or genesis' in the Partnership Agreement. However..., it is too soon for us to form any opinion as to whether or not their is a unified contractual scheme."

1"See for example ICC Arbitration, Craig, Park & Paulsson, 2nd ed., ICC publication no.414 (Oceana Publications Inc, New York); discussion at p.189 et seq."
2"Swiss Private International Law, Chapter 12, Art.176."
3"The English translation here and elsewhere where reference is made to this law is taken from Le Droit de l´Arbitrage..."
Interne et International en Suisse by Lalive, Poudret, Reymond (Editions Payot 1989)."

4“New York Convention, Art.III [rectius II] (1) and (2)."

5“New York Convention, Art.V (1)."


28"Yearbook XVII (1992) p. 51"

29“See paragraph [21] above."

30"For instance, the Secrecy Agreement."

31"....See....Secrecy Agreement which envisages an application to Court, but only for the purpose of specifically enforcing the terms of that Agreement by way of injunction. We are of the view that this reference in the Secrecy Agreement to a possible application to Court in these limited circumstances was intended to supplement the parties’ agreement to settle disputes by arbitration rather than to replace it. The parties recognised that a court would generally be in a better position to give speedy relief by way of injunction, whilst retaining an intention to settle other disputes by way of arbitration, this being partly evidenced by the reference to an arbitrator later in the Agreement. Further, it is clear from Art.8(5) of the ICC Rules that such a provision is not incompatible with an agreement to arbitrate."

Referring Principles:
- XIII.1.1 - Arbitration agreement
- XIII.2.4 - Principle of separability of the arbitration clause