



Course on

## **The *Pyramids* Case**

# **The Berthold Goldman Lecture on Historic Arbitration Stories**



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Year 2012

Official citation

Jan Paulsson, *The Pyramids Case*,  
*in* COLLECTED COURSES OF THE INTERNATIONAL ACADEMY FOR ARBITRATION LAW,  
Year 2012, Volume 1, at 1 (2014)



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Although born to Swedish parents, Jan Paulsson was reared in Liberia and was sent to the United States for schooling, which turned out to be Monrovia High School in California, Harvard College, and Yale Law School, where he was an editor of the *Yale Law Journal*. He started practicing in 1975 with Coudert Frères in Paris, and received a graduate degree from *l'Université de Paris II*. He joined Freshfields in 1989, and for 20 years headed the firm's worldwide international arbitration and public international law groups. He now holds the Michael Klein Distinguished Scholar Chair at the University of Miami, and is a Visiting Professor of Law at the London School of Economics. He has served as counsel or arbitrator in many hundreds of cases. He has been President of the London Court of International Arbitration; President of the World Bank, European Bank, and OECD Administrative Tribunals; a Vice-President of the ICC International Court of Arbitration; and a President of the International Council for Commercial Arbitration. He is currently a member of the AAA Board of Directors, and a member of the Permanent Court of Arbitration in The Hague. His two most recent books are *Denial of Justice in International Law* (Cambridge, 2005) and *The Idea of Arbitration* (Oxford, 2013).

**L**adies and gentlemen, thank you so much for honouring me with your presence. This large and friendly crowd is unmistakable evidence of the success of the Academy. It is hard to imagine a more elegant auditorium than this classic salon. Now where I come from in northern Sweden, it is not considered polite to say much about anything. If you have seen Bergman movies, you will know what I mean. And if you must talk, there is one thing you absolutely should not say anything about at all: yourself. Furthermore, in our profession, we all know that if you want to avoid being a bore you shouldn't tell too many war stories.

Nevertheless I have been invited here to talk about myself, and to tell a very long war story from beginning to end. Yes: I have been given license to indulge myself limitlessly in the forbidden. How could I not be titillated? So here goes, and remember – I didn't ask for this!

I will tell you a story about a single international dispute which was resolved in a way which changed the world of arbitration. Good stories tend to involve some colourful people, and this one certainly does. Let me start with Peter Munk. Today, he is the founder and Chairman of Barrick Gold, the world's largest gold company, which has 20,000 employees. He is a prosperous and prominent Canadian, and a well-known philanthropist. In 1944, he was a 17-year old Jewish Hungarian who escaped the Nazis on what I am tempted to call the last train from Budapest. Eight years later, he had a degree in electrical engineering from the University of Toronto.

When my story starts, Mr Munk was in his mid-fifties and had already become a business tycoon. He had retained a definite trace of a Middle European accent. He was impeccably and expensively dressed, but what anyone would first notice was his pale and piercing blue eyes. He never seemed to blink. The adjectives that would come to mind to describe him would have been: intense and focused. You knew that he was a busy man,

and sensed that he viewed any professional discussion as an investment in a valuable resource – his time – and he was not going to waste it. So if a problem was important enough that he had to spend time getting legal advice about it, his concentration was absolute. Never before and never since have I had the feeling of someone who so absorbed absolutely every word, intent on understanding every point, processing it, testing whether it made sense, and deciding what action to take in response to it. That was Mr Munk, a formidable figure, totally oblivious – at least in a business context – to anything that did not relate to the achievement of his purpose. Thirty seconds of irrelevancies, one felt, and he would end the conversation.

But before scaling the heights of the business world, as a young electrical engineer, Peter Munk had worked on the innovation of sound systems, going from mono to stereo, exploiting the new solid state technology to produce what was then called high fidelity stereo sets for homes. He was a techie. Then he met someone who would become a long-time business partner.

This is the second person in this story. His name is David Gilmour, a native-born Canadian who hardly resembled Peter Munk at all. Mr Gilmour was an urbane socialite, charming, tall, with a sort of languid aristocratic elegance that might make you think he had all the time in the world. He too was exquisitely well dressed, but whereas Munk's clothes seemed to have a business purpose, namely to establish confidence, achievement, and authority, the unhurried Gilmour seemed to exude elegance for its own sake. Someone said that he never carried a wallet in his suit jacket because he was offended by the bulge it would create. His circles were glamorous and he was at home there, from Hollywood to London, a man of great aesthetic awareness, not particularly interested in technology, but in the pursuit of dreams. He could sell snow to the Eskimos, as the saying goes, and probably charge a premium because his trademark made them feel that this snow was different from all other snow....

This odd couple, having met somehow in their twenties, developed an idea and in 1958 started a company called Clairtone. This was the idea: the engineer would make the sound system, and the persuasive aesthete would promote the radical concept that you could house it in gorgeous furniture – perfect sound married to great design. This was the future, and

the future was cool. Clairtone was an immediate success; in a world used to gramophones, no one had seen anything like it – or paid such prices for the sound of recorded music. The two young men struck it rich. The sales of Clairtone units soared to heights that exceeded anything they could have imagined. Suddenly consumer electronics could be fashionable. Sinatra endorsed Clairtone; in magazines you could see Sean Connery, then in his heyday as James Bond, with a Clairtone in the background. In the famous movie *The Graduate*, young Ben (Dustin Hoffman) was seduced by Mrs Robinson (Anne Bancroft) as sultry music wafted from a Project G stereo, the signature Clairtone product, which actually still looks pretty good. With a thousand employees, the company was quoted on the Toronto Stock Exchange.

But this kind of success can be costly, as you need to invest to expand to meet the market, and the income lags behind. Munk and Gilmore turned to government for support, but the public-private partnership was not a success. For example, now decisions were made on the basis of where factories should be located to create employment, and the company launched into colour television years before it and the market were ready. Munk and Gilmore were ousted, and Clairtone ultimately went bust. A dozen books have been written about the Clairtone story – a story of failure, a business-school example of how NOT to turn a flashy venture into an enduring enterprise.

Our two protagonists were now in their 30s. They should have learned a lesson – but what was that lesson? Was it to play it safe, to get a decent job with a decent salary and forget about risk-taking? Not at all, this had been a *valuable* failure, which showed them how you could turn an idea into a fortune, but also that you then needed to be very careful about how you manage your success. Having lost none of their confidence, they launched themselves into a series of very different industries, beginning with hotels.

They founded the Southern Pacific Hotel Corporation, which acquired the largest chain of hotels in Australia and throughout the South Pacific – from New Zealand to Tahiti. Soon they began to think of expanding into other regions. They set up a legal entity under the laws of Hong Kong called Southern Pacific Properties (Middle East), which you all have heard of as the first name of the famous *SPP v. Egypt* case, often referred to – as in the title of this lecture – as the *Pyramids Case*.

The third personality of our story is Anwar Sadat, the President of Egypt. In the early seventies, the previously friendly relations between Egypt and the USSR became very frosty. Sadat set a new course, turning his back on the close cooperation which had been maintained under the Nasser regime between Egypt and the USSR. He proclaimed a new policy of open door to foreign private investment. It took the shape of something called Law Number 43 of 1974 for the Promotion and Protection of Foreign Investment. This law will play a pivotal role in this story – and indeed in the genesis of the modern phenomenon called “investment arbitration” which you have been studying in this Academy. At the same time, President Sadat began a program of negotiating and signing bilateral investment treaties with a number of countries, including the United Kingdom.

Peter Munk and David Gilmour were intrigued by Egypt’s abandonment of pro-Soviet policies, and its invitation to foreign investors. These days Mr Munk is often asked to give lectures, in Canada and elsewhere, about his successful career. He likes to say that his talents are small, but that his dreams have always been big. And the Munk-Gilmour team unquestionably had big dreams, as they started thinking about Egypt. Others might have said “let’s wait and see.” They said “let’s go,” we’ll be the first foreign investors to come in under this new Law – and we are going to do something very big.

Since I am going to be talking about myself, I will now introduce myself as the fourth character, and I can do so in a single sentence. At this time, I was what most of you in this beautiful but crowded salon are today, a law student wondering what my future might be.

Back to Munk’s and Gilmour’s big dream. What did Egypt have? The most obvious answer, one of the Seven Wonders of the world, the Pyramids. They had seen them, of course, and were appalled at the environment around them. They conceived the idea of a prestigious residential and tourism complex in the area of the Pyramids which would protect the environment, generate employment, and enhance revenue inflows. They discussed it directly with the President and with a number of Ministers.

They all agreed to the project, and to its location in the vicinity of the Pyramids. This is a sensitive environment, needless to say. Let me immediately tell you what the dispute was not about. In the international press, this was described as a project which was controversial because it

perhaps endangered the Pyramids. But at the time, the Pyramids were *already* endangered by the suburbs of Cairo which had reached the very steps of the Sphinx, and were encroaching on the Pyramids. A very short walk from the Pyramids, a number of illegal constructions had sprouted, visual eyesores which were referred to in Egypt as *chalets*. It was a long way from the Alps, but that is what they were called. Gambling and other dubious night time activities were going on near the Pyramids, as these buildings mushroomed, making lots of money for their operators. The people who owned them were openly acting outside the law, and seemed somehow to have the influence to entrench themselves. They resisted any idea of zoning.

The SPP project contemplated immense investments, on the order of half a billion dollars (which was serious money at the time), which would remove all of these illegal constructions, in 50/50 partnership with the government, and replace them with a complex of buildings, hotels and residences, the closest of which would be a full three kilometres from the Pyramids. The tallest building could be no taller than a palm tree, so that no edifice could be seen from the Pyramids. Contrary to the image portrayed in the press, this was not a crazy capitalist idea of invading the Pyramids and having people teeing off their golf stokes from the tops of these ancient monuments. It was nothing like that.

Many years have passed, and I believe that I can be objective in saying that the project, had it gone forward, is likely to have been better than the perpetuation of the unregulated mess around the monuments. One of my reasons has to do with the personality of Mr Gilmour and his love of beauty. Some time after my story ended, Gilmour bought a private island in the Fiji archipelago.

The island is called Wakaya. Its size is 8 square kilometres, which is four times larger than Monaco. He bought it for himself and his wife. I guess to break the monotony of the tropical paradise he built ten bungalows for visitors. The Gilmours could have built a palace for themselves and a dozen huge hotels for profit – anything they wanted. Instead they created what must be one of the smallest and most exclusive resorts in the world. If you are an avid reader of *Hello* magazine, you might read the fine print under the photographs and note that celebrities are said to be dashing off to Wakaya to spend their honeymoons, or to be creeping away to Wakaya to restore their souls after divorces. Once they land on the tiny

strip, they understand the words which the Gilmours have used to define this particular enterprise: "The more the world changes, the more we gravitate to places that don't." This leads me to believe that David Gilmour would never have been a party to the desecration of the Pyramids. It is of course only a personal conviction. But someone has already brought pyramids to Las Vegas, and I am quite sure that Munk and Gilmour would not have brought Las Vegas to the Pyramids.

I have not been digressing as much as you might think. I want you to see that this case was not about whether this was or was not a defensible project. That was for the Egyptian Government to decide, not SPP. The investors came in, mobilised substantial resources, and commenced operations on the ground. Then the project ran into political controversy, in the media and in the Parliament. It was said – I do not know if it was true – that at the time it was thought unwise to criticize the Government directly and even more delicate to criticize the President directly. So instead, opposition figures would criticize projects that had been initiated by the Government. This was a high profile project. Perhaps the status quo had strong defenders. The project ran into hot water, and was ultimately cancelled.

The investors' complaint was not, and never became, that they should be allowed to pursue the project no matter what. The case was about an investor who said, "We had an agreement. We agreed that we would do this; we have invested money, now you have cancelled it. We are not asking for specific performance, we are not going to ask an international tribunal to declare that we are entitled to proceed no matter what. We just want our money back and contractual damages." Subsequent talk about saving the Pyramids and respecting a UNESCO world heritage site (a classification that the Pyramids did not have at the time the contracts were signed) was absurd and inflammatory. Egypt was sovereign, and this was never questioned by the investor.

Let's then see where we are: Munk and Gilmour had come to Egypt and had signed contracts. A few details are important. They signed an initial agreement called Heads of Agreement, which was tripartite. The parties were SPP (the investor), on the one hand, and, on the other, the State of Egypt and EGOTH (the Egyptian General Organization for Tourism and Hotels), a State agency. The Government signed through its Minister of Tourism. The Heads of Agreement contemplated the creation of a joint

venture company, fifty-fifty. That was in September 1974. A detailed agreement was then negotiated over the months that followed, and in December 1974 the final Joint Venture Agreement was concluded. It was indeed the first private foreign investment approved under the famous Law No. 43, and the Agreement specifically so stated.

Gilmour, not Munk, was the head of the negotiating team at this time. He observed that the draft presented by the Egyptian party no longer included three parties, but only two, SPP and EGOTH. Gilmour was no lawyer, but his instinct was that this presented a problem. He had shaken the hand of the President, he was dealing with Ministers. He did not exactly know what EGOTH was, and whether a promise of EGOTH would be bankable. He was counting on the Government's involvement. He objected, "This is not what we thought we were going to sign."

The answer was, "We are a joint venture, we are creating a joint venture company, fifty-fifty. You are a shareholder. On the Egyptian side there is also a shareholder, and it is not going to be the State; the State does not do that. We have separate State-owned organs that take shareholdings in commercial ventures. We are not going to have three shareholding parties."

Gilmour remained dubious, and unwilling to sign on this basis. But there was a desire on both sides to conclude, so the matter was discussed at some length. Finally, as so often happens, at the end someone found a solution which seemed to be a good idea at the time. (One hopes that it will never be tested.) The idea was that the Minister would sign the Agreement on some kind of *ad hoc* basis, without formally making the State a named party. So this is what eventuated: an agreement between SPP and EGOTH alone, with the Minister signing it nonetheless, on the last page, under the words "agreed, approved and ratified." What do you think? Was this good enough? Well, it was good enough for Mr Gilmour; he signed, and so the Pyramids Oasis project commenced.

Over the next couple of years, as I said, the project ran into political hot water. The Government was criticized for having agreed to these contracts. Ultimately the President concluded that the project had become too much of a controversy, and unfortunately must be cancelled. The Prime Minister went on the radio and announced, "We regret that this is both the first project under Law No. 43, and the first project we are cancelling. I am very sorry, but the Government has decided as a matter

of policy that we must change direction and not go through with this. We will compensate the investors.”

Negotiations began, but led to no agreement about the amount of compensation. Months went by. Having heard the news on the radio that they would at least be compensated, SPP felt frustrated, and finally understood that it would be necessary to take the initiative to escalate the matter, and to seek legal remedies. SPP announced this intention in public. It became front-page news.

By now we are in the spring of 1978. In the United States, a peanut farmer (as he described himself) was President, a man with a name that sounded like nobility was President of France, and a shah was still in power in Iran. For his part, your speaker today had begun his first job, and was sitting in a little office in Paris, knowing nothing about SPP but drinking his coffee and reading about the company’s misfortune on the front pages of both the *International Herald Tribune* and *Le Monde*: “an enormous investment project near the great Pyramids at Giza has been cancelled, and the investors are going to sue Egypt under the Investment Law.” SPP presented it as a test of whether or not the Government of Egypt stands behind its promises, undoubtedly hoping to generate some international attention that might encourage Egypt to make the voluntary payment that had been announced.

What happened next, as far as I was concerned, perhaps may serve as a few pointers for you future lawyers. SPP became my very first client. That was an important event for me, as it will be for you. You will not forget it, and I certainly have not.

Reading the newspapers, needless to say, I could not have imagined that I would be involved in this significant case, but I read about it avidly. I did not know much about arbitration, I was fresh out of law school, but I had studied international law under Professor McDougal and Professor Reisman, whom you have certainly heard of.

The next day, I had a phone call from someone who introduced himself as a lawyer on the staff of SPP and said, “I have heard good things about you from our mutual friend, Rusty Park. We have a problem in Egypt and I have decided to come to Europe and visit some lawyers to identify someone who might help us.” Professor Park, who is here today, had been kind of enough to say something to the gentleman on the other end

of the line, and he in turn had been asked by Messrs Munk and Gilmour to find out how to sue the State of Egypt.

My boss at the time was Laurie Craig, also sitting right here with us today. I told him what had happened and asked him if it was all right that I see this fellow. I had never met a prospective client before. Mr Craig, I will tell you, was a wonderful boss. He was my supervising partner, and he could well have said “very good – I’ll take over from here!” Instead, in a way which is characteristic of him, he said “good for you, let’s see how you make out!”

Unused as I was to the idea of important people coming to see me with important cases, I supposed that what people did in such circumstances was to invite them to lunch in a very nice place. So I went back to ask Mr Craig, “Is it all right if I take him to a restaurant when he comes to Paris?” After he assented, I asked: “where can I go and how much can I spend?” True to form, he said, “You just make your own judgment.” So I asked around to find out where VIPs might go for lunch. The consensus choice was Jamin, a discreet restaurant on the rue de Longchamps, which was then at its apogee. I had never been there, of course, but I was made to understand that it would be the sign of worldly sophistication if I were to choose this place.

My guest was named John Zuromskis. When he arrived I was pleasantly surprised to find that he was not very much older than I was, and that he did not speak French.... The restaurant was filled with confident, important looking people busily impressing each other. I did not think Mr Zuromskis needed to know that this was my first time there. As we entered, I was happy to see a familiar face, a very distinguished gentleman sitting at a corner table with another gentleman of equally distinguished appearance, and in my slightly nervous state I made the mistake of spontaneously extending my hand as I approached his table, saying “*Bonjour Monsieur.*” As he looked up, I realized that I didn’t know him at all and prepared to be exposed as a complete idiot. But fortunately the man smiled warmly and said, perfectly pleasantly, “*Ah, bonjour, comment allez-vous?*” and I beat a quick retreat. You see, he was a politician, and politicians like to make everyone feel they are their friends even if they don’t know you. After we sat down, Mr Zuromskis said, “Is that who I think it is?” By now I had remembered, and I answered, “Well, yes – if you mean Prime Minister Couve de Murville. He comes here a lot.” (Couve de

Murville had served as prime minister under Charles de Gaulle, and had become a familiar figure internationally as a long-term foreign minister.) And then I quickly started translating the menu, to avoid any questions about how I knew the great man, and how well.

So we had a nice lunch, and he told me that he had been going around to various places in Europe to see who might help SPP in this case. He had just been to Switzerland, and let it slip that he had been to see Professor Pierre Lalive, and I thought, "I'm dead!" I was and have always remained a great admirer of Professor Lalive – the master! Of course he could offer advice and assistance several leagues above anything I could muster. But one should never give up. Sometimes Lady Luck will feel like lending you a hand – and you should give her the opportunity if she is so inclined.

As it turned out, Mr Zuromskis was a generalist, responsible mainly for drafting and monitoring compliance with commercial contracts. The questions he was asking me, about international law, about arbitration, about suing States and how you might recover against them, were unfamiliar territory to him. I had the benefit of my recent studies with Professors MacDougal and Reisman, which I had found very interesting, and of course I had read up as much as I could before our meeting. My guess is that since I didn't know that much, I said everything I knew very slowly – to make it last – and because I was not developing matters with great nuance it was certainly not difficult to understand. SPP was looking for simple answers and a practical game plan – nothing fancy of the kind I couldn't deliver anyway. Somehow my guest felt comfortable with my explanations, and called me a week later to say "We would like you to do this case, if you don't mind coming to meet Mr Peter Munk in London." And that was that, the beginning of a 14-year adventure until SPP finally received its compensation – which shows that arbitration works, even against sovereign States, but that it may require substantial staying power.

Now what exactly was I to do "to sue Egypt?" The final agreement, the December Agreement, the one which the Minister signed as "agreed, approved, ratified" but not as a party, had an ICC clause. That clause certainly bound EGOTH. But it was not EGOTH that had cancelled the project. As SPP's joint venture partner, EGOTH adopted the position that: "we too are sorry that our project has been cancelled, but the Government is responsible, not us." Now, one might imagine seeking to hold EGOTH

liable on some theory that it had given a warranty that the project was and would remain officially authorized, but who knows how that would work? And if one won, would EGOH be good for the money? You would certainly want to sue the Government too. And that is what SPP did, suing the Government and EGOH as twin defendants, relying on the substantive unity of the two agreements and the three famous words – “agreed, approved, ratified” – under which the Minister had signed the December Agreement.

So off we went to ICC arbitration with three arbitrators: Professor Bernini from Florence was the Chairman: a well-known figure in international arbitration. We appointed Mark Littman QC, a very distinguished English barrister. I should tell you something about how one approached arbitrators in those days. There were not that many arbitrations around. It was certainly not every day that you would sue a State. When you approached an arbitrator of great eminence, it typically did not feel as if you were calling a friend. I recall – it was my first client, remember? – that Mr Craig and I discussed at length whom SPP should appoint. We wanted someone of Olympian stature. I do not know which one of us actually called Mr Littman, but neither of us in fact knew him. We had only heard that he would be of a standing commensurate with the remarkable case that we were bringing. This observation touches, it seems to me, on something related to the deontology of arbitration. Today, arbitrators and lawyers are quite familiar with each other, wearing one hat or the other, and then switching yet again. The result is that advocates and arbitrators tend to have less distant relationships than those between judges and advocates. This is not, I think, scandalous in and of itself, but if it were not adequately policed it would be. Thirty years ago even the arbitrator you appointed was often someone you had only ever admired from afar, or heard good things about from reputable sources.

Egypt appointed Dr Aly Elghatit, an Egyptian lawyer who had studied at the University of Berkeley, and that was our ICC tribunal.

At this stage, in the ICC arbitration, our opponent was Ahmed El Kosheri, who will be known to most of you in this room. Professor El Kosheri was a wonderful opponent because he was a loyal adversary. He became a very good friend, and from him I learned abiding lessons about the meaning of collegiality between international lawyers. During pauses in the proceedings, he took the initiative of friendly and constructive discussions

that kept the debates from even running the risk of degenerating into acrimony. When he proposed agreement on matters of procedure, the deal was reliable, wholly innocent of any subterfuge. He was of course acting on behalf of both defendants, the State and EGOTH.

And so off I went to try to seek success for my first client, with Mr Craig's promise that he was watching what I was doing and would come to occupy the first chair once we got to the hearings. I spent a lot of time in Egypt. I had heard that Dr Gamal El Oteifi, the Speaker of the Egyptian Parliament, the same Parliament where the debates against the project had raged, had said that even though he was against the project, he was also in favour of the policy of promoting and protecting investment. He thought it was wrong that despite the Prime Minister's promise the investor had not been compensated. I decided to look him up because we needed an expert on Egyptian law. He had retired from Parliament and was now practicing as a highly regarded lawyer. I asked him, "Would you be interested in being an expert, if this is what you believe?" He answered, "This is what I believe. You are suing the Government, that is fine with me. I will tell them what I think. I think that they should compensate your client. It will be up to you to argue how much, it is for the tribunal to decide and I will not get involved in that, but the principle is, the project was cancelled unilaterally by the State. I was part of it, I agreed with the decision to cancel, but the investor should be compensated, and that is what I will say is the meaning of Egyptian law."

I spent a lot of time in Egypt, trying to understand the facts, and the legal propositions as explained by a number of experts including Dr Oteifi. It gave me the pleasure of spending many weeks at the historic Mena House Hotel near the Pyramids, and I could move around the site every morning. I discovered that if you got up at the crack of dawn you could hire an Arabian stallion from the owners of the "*chalets*" I told you about. At that hour, the horses were very lively. I paid a bit extra to go *without* a guide, pushing my mount fast past the base of the Pyramids, with only the sounds of hoof and wind as the sun rose to splash a profusion of colours onto the dunes, each hue corresponding to their undulating slope, constantly changing as if I were riding on the back of a giant sleeping chameleon.

Our expert on Egyptian administrative law, Hamed Mansour, was a very handsome fellow who told me that he sometimes regretted having

become a lawyer. Mr Mansour explained: when he was a young man, scouts working for an outfit called Horizon Pictures had come to his college and said that they were going to produce a major motion picture, and they were looking for good-looking Arabs who could ride horses. He fit the bill, and they were interested in him. He thought he could act and he liked movies. He was tempted. But Mr Mansour was not sure there was ever really going to be a movie, and opted to stick with his law studies. And so it came to pass that the role of Ali in *Lawrence of Arabia*, as ultimately released by Paramount Pictures, went instead to Omar Sharif, then known as Michel Shalhoub – and a fellow student at Hamed Mansour’s college.

Young lawyers think crazy thoughts sometimes, and they should not always be suppressed. As I walked around the Pyramids, it occurred to me that I ought to show the arbitrators the environment of the Pyramids Oasis Project from the very beginning of the case, without waiting for a site visit, to get them to realize that SPP’s plan would not have desecrated the Pyramids. The best way to do this would be to hire an airplane and fly over the monuments and film the place.

Civil aviation in Egypt, however, was forbidden for reasons of military security. You could not hire an airplane. This is when you have to be determined. I found a man in a uniform to walk me up the great Cheops Pyramid at dawn with my camera, and I took hundreds of photographs from that commanding height. Then I went back to Europe and spoke with someone who was involved in filmmaking, and discovered that something very effective could be done on a low-tech basis. My slides could be projected onto a screen, and a cameraman walking around could manually, moving the camera as though it were rocking in the wind, create the illusion that he was flying around the Pyramids. Then, while you’re at it, no need to settle for an airplane – you add the sound of the helicopter, and show it all as a film. This is what we presented. Having listened to Mr Mansour’s story, I of course thought about contacting Omar Sharif’s agent to see if he might want to do the voice-over – but there were limits to Mr Craig’s indulgence with my initiatives.

At the first meeting with the Tribunal, as the arbitrators were taken on this visual tour of the monuments and their surroundings, Professor El Kosheri was sitting there with his team, all wearing an expression of incredulity, “What have these people done? This is forbidden, you cannot do this in

Egypt without permission! Where did they get it?" Of course I ultimately confessed to my good friend and opponent, and he as always was a very good sport about it – and laughed uproariously.

I must press fast forward. In the end, the award of the ICC tribunal was handed down against the Government, while EGOTH was absolved of liability. The arbitrators found that under the circumstances of this case, the meaning of the Ministerial signature pertained to promises that could only be given by the Government, and so necessarily were intended to be binding as made by the Government. In signing this document in this way, since EGOTH was an autonomous organization and did not need the permission of the Government, the Minister acting for the Government could only have meant that it was agreeing to be a party to the ICC clause as well.<sup>1</sup>

As for EGOTH, the Tribunal found that EGOTH was just like like SPP, powerless either to cancel the project or resist it. So force majeure worked as a defence for EGOTH, but obviously not for the Government. That was the decision, and the damages were fixed at \$12.5 million dollars, with \$730,000 dollars' worth of costs after half a decade of arbitral proceedings.<sup>2</sup>

So, my first client won its arbitration, but as I told you the case lasted 14 years, so you already know we have nine more years to come, and a library shelf full of arbitral and judicial decisions. In this lecture I am going to focus of one of those decisions, because I think it changed the world and I have a reasonable expectation that you will agree, and remember it. This was a jurisdictional decision rendered by an ICSID tribunal on the 14<sup>th</sup> of April in 1988.<sup>3</sup> It is a fundamental decision in the field of international law *tout court*, even more so in investment arbitration. It is a decision without which investor-State arbitration would very likely not exist, in my opinion. I will try to make good on that claim as I describe the case.

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<sup>1</sup> *SPP (Middle East) Ltd. , Southern Pacific Properties Ltd. v. Arab Republic of Egypt, The Egyptian General Company for Tourism and Hotels ('EGOTH')*, Award, ICC Case No. 3493 of 1984, Award, IX Y.B. COMM. ARB. 111; 3 ICSID REP. 45 (ICC Int'l Ct. Arb.).

<sup>2</sup> *Id.*

<sup>3</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction and Dissenting Opinion (Apr. 14, 1988), 3 ICSID REP. 131 (1995).

My satisfaction of having won an important case did not last very long. Let that be a lesson: do not get too excited when you have triumphs, because they may be short lived. Egypt appealed. You might object that there is no appeal against arbitration awards. That is usually so, but not with respect to an issue of jurisdiction, just as though there might be an issue of violation of a fundamental rule of procedure or corruption of an arbitrator. Obviously such things may justify a challenge to the award. Of course the issue of the meaning of the Minister's signature was a matter of jurisdiction with respect to which the arbitrators' own conclusion was unlikely to be definitive; a judicial authority may feel it had the role of verifying whether the Egyptian State as an entity had indeed given valid consent to the very arbitrators who had purported to decide that question in the affirmative. The place of arbitration was Paris, and under French law the challenge to the award accordingly came before the Court of Appeal of Paris.

In the meanwhile, I had been very busy trying to obtain enforcement of the award, because it was also apparent that under French law the award in principle had *force exécutoire* as of the moment it was rendered – without prejudice to its possible annulment.

I had travelled around to various places in Europe, trying to find a jurisdiction where there might be assets against which this award could be brought to bear. I will just mention two of those countries.

In England, I was told that this could be done very expeditiously, obtaining an *ex-parte* order to block monies that are due by the party considered to be the debtor under an award. The barrister whom I instructed to seek this order – some of you Englishmen in the room will recognize his name – was Bernard Eder, who was about my age. I will show you how inexperienced we both were at the time in international practice. I told him about my case. I showed him the award. He said, "Fine, you just have to do an affidavit in support of the application to show the Court, explaining the circumstances in which this award was rendered and has remained unsatisfied." So I prepared and signed an affidavit. Then time came to go to court. The appointed hour for this unilateral application was 12 o'clock on a Friday. I turned up in Mr Eder's chambers, and at twenty minutes to 12, he said to me, "So, Mr Paulsson, where is the bundle?" "Bundle?" I was Swedish, I first learned English in Liberia, I was educated in the United States, and in my opinion "bundles" consisted of clothes, not

papers. "Yes, the bundle!" and then he glanced at me with a look of horror, suddenly realizing that he might be neglecting something which could have awkward consequences – it finally dawned on him that perhaps someone who spoke English with my accent might not be qualified to practice law in England. He said, in a tone of unpersuaded hopefulness, "You *are* a solicitor, aren't you?" I said, "No, I am an *avocat* in France." He then announced, with some exasperation, "I can't go to court without a solicitor, and we are due in 20 minutes."

As it happened, I had a good friend named David Shenton, who was a senior partner at the firm then known as Lovell, White and King. I remembered that their offices were just down Fleet Street, at the Holburn Viaduct. Taking a wild and desperate shot, I called him and was directly and astonishingly connected to him at his desk. He understood my breathless story well enough to say "Hold on, don't worry, I was just sitting here waiting for a sandwich, but I'll run over and help you out – I just hope I can get back in time for my afternoon appointments." Miracle!

Once before the High Court judge, Bernard explained the matter with perfect cogency, the application was granted, and the three of us congratulated each other and happily parted ways – and then all hell broke loose.

Irate answers to service of the Order of the High Court began to come in that very afternoon, and quickly became a flood. What had happened was a consequence of the fact that the Order was drafted in very broad terms, addressed to all kinds of emanations of the Egyptian State, including bodies corporate that belonged to the public sector, for example Egypt Air and some Egyptian banks. Apparently very large sums had been frozen by the delivery of this unilateral Order, and it was creating a lot of difficulty for many of these Egyptian entities in carrying out their ordinary business. On Monday morning, a slew of barristers came into Court to ask for the Order to be withdrawn. The sole judge of the High Court who had rendered the Order declared that he was minded to uphold it, but, having heard the complaints about it, admitted that he was not sure about whether the assets of all these entities were indeed susceptible to be used by legal compulsion for the satisfaction of the debt of the State of Egypt. He expressed the view that there was a fine balance: "I'm not sure that I won't be overturned on this, and in the circumstances I will only uphold my Order on the condition that there will be an instant appeal."

The next thing he said amazed me: “Nobody move. I’m going to go see if a panel of the Court of Appeal might be available.” The judge stood up, left the bench, exited the courtroom, and presently came back to report that he had managed to speak to the Master of the Rolls – the chief judge on the Court of Appeal – and that he was available and prepared to hear the matter with two colleagues. Hearing this, all of the barristers ran off to get their wigs; Bernard shouting over his shoulder that for this kind of a matter wigs had not been required in the High Court, but now we were elevating! And so they all got their wigs, and returned to face Lord Justice Donaldson, Master of the Roles, and his two friends. The matter was argued in an atmosphere of some effervescence, with poor Bernard ably standing his ground against a phalanx of allied opponents which included a supremely confident young barrister named Anthony Grabiner, who today is Lord Grabiner and about as prominent a QC as you can find in London. (Bernard, I should tell you, is now Sir Bernard Eder, a Justice on the Commercial Bench of the English High Court.)

In the very end, Lord Donaldson looked straight at me in a somewhat avuncular way, because he understood that I was the Parisian lawyer who had written the affidavit that underlay all of this, and he said, more or less: “I understand that the award is being challenged before the French courts, and that if it is set aside there that would provide a defence against its enforcement here. Whether the assets seized may be used to satisfy the award is a complex question. There seems to be no necessity of answering it in a rush. I just don’t believe that an important State which has friendly relations with this country will close down all of its banking activities in the City of London just to avoid this particular award, for fear that it will be brought back here for enforcement if the French courts uphold it. I find that this Order must be quashed.” And then he added, still glancing at me: “So I suppose we might have the occasion to deal with this matter again in due course.” I had to admit that his point was persuasive, and of course understood that everything now hung on the decision to be handed down in Paris.

Another attempt had been made in Holland, and on the 12<sup>th</sup> of July 1984, the Amsterdam Court granted enforcement of the award against Egypt. This apparent victory turned out to be a damp squib, however, because that very day, sadly for SPP and deeply disappointingly for me, the Court of Appeal of Paris annulled the award because its judges did not believe that the Egyptian Minister’s signature meant what the ICC arbitrators had

said it meant. I saw the logic; if the Court of Appeal of Paris has the right to review jurisdictional decisions, it must be allowed to do that in a plenary way; and if the judges of that Court had a different opinion than that of the arbitrators, so be it. But why did they have to reach a different conclusion? They had not heard the testimony of Mr Gilmour, who had appeared for many hours before the arbitral tribunal and explained the negotiations of this particular document. That factual evidence had clearly persuaded the arbitrators. The Paris Court, to the contrary, had heard no witnesses at all and had decided on the basis of the papers before it. They were not interested in what we would today call "jurisdictional facts," but rather affirmed the abstract view that the Minister's signature had been given only in his supervisory capacity, as what the French know as EGOTH's *autorité de tutelle*. I thought there were a number of things wrong with this decision, of course. For example, although the Paris Court had said what the signature did not mean, it gave no explanation as to what function it *did* have; this signature, which was negotiated as I have explained on an *ad hoc* basis, was certainly not a requirement under Egyptian law whenever EGOTH signed a contract. But I couldn't see how I could quarrel with the proposition that the French court had the authority, as a matter of law and irrespective of the correctness of its decision, to decide whether the ICC Tribunal had had jurisdiction.

Well, what do I do now? What would you have done in my place, with this day of bitter defeat for your very first client? Of course it was our turn to appeal, so we filed papers with the Court of Cassation, but not feeling much confidence that this was a matter which was likely to be considered reviewable by the Supreme Court. To say that I was gloomy does not cover it – flying so high, now having crashed down into a dark sea! Yet this was no time to be despondent. You do not let yourself drown; you try to figure out which way the current is moving, you try to see a light on the horizon, you try to sense in the shadows the shape of something you might hold onto. Day after day, I wondered "What to do, what do I do?" And somehow an idea started growing slowly in my mind.

I had been reading this Egyptian Foreign Investment Law, Law No. 43, for five years now, and knew its substantive provisions by heart. But there was also an Article 8, which referred to the resolution of disputes. I had not really focused on it before, because the December Agreement contained the ICC clause which we had relied on successfully – until we

came to the Paris Court. Article 8 established that any dispute between an investor and the State could be decided in one of four ways. Follow me now! This is key to the whole story: (1) by a complaint to the Egyptian courts; or (2) in a manner agreed between the investor and the State; or (3) in accordance with the terms of an agreement between the State of Egypt and the home State of the investor; or (4) under the ICSID Rules. For half a decade, we had been taking the position that we were under alternative (1): a specific agreement to go to the ICC. But Egypt had rejected that proposition, and now the French Court had agreed with Egypt. So – this is the beginning of the idea – let us look down the list. Having been disappointed by a promise of compensation made by the Prime Minister himself, SPP was in no frame of mind to have this controversial case heard in the Egyptian courts; the goal of arbitration in these circumstances, as famously explained by none other than the prominent Egyptian international lawyer Ibrahim Shihata, was to “depoliticize” investment disputes by providing for a neutral international forum.<sup>4</sup>

So that got me thinking about alternative (3), an agreement between the investor’s home State and Egypt. SPP was a Hong Kong corporate entity. There was indeed a Bilateral Investment Treaty between the United Kingdom and Egypt. Sure enough, it stipulated that in the event of a dispute as to whether the host State had respected its undertakings pursuant to the Treaty, the unhappy investor could go to arbitration. But did this treaty involving the UK extend to the UK’s overseas territories? The answer turned out to be: to some, but not to others. So I had to look further. Too bad for SPP and for me: the UK had not extended this treaty to Hong Kong.

There was only one lifeboat left in the sea: alternative (4), ICISD arbitration. At that time, 1984, ICSID was known only to specialists and scholars, but of course I began feverishly reading everything I could about it. The Centre had dealt with only three cases since its creation in 1965. So there were hardly any decided cases available for study, but there was much literature, technical and obscure, about how it functioned, including a number of articles written by ICSID’s first Secretary-General Aron Broches, who was considered to be the father of ICSID (he had chaired the

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<sup>4</sup> Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, republished in IBRAHIM SHIHATA, THE WORLD BANK IN A CHANGING WORLD (1991).

deliberations on every continent as the ICSID treaty – the Washington Convention of 1965 – was negotiated). Mr Broches kept repeating the same thing. I saw the same sentence again and again: agreements to ICSID jurisdiction may be expressed by States in contracts – or alternatively in treaties or in laws.<sup>5</sup> *In laws!* The investor cannot create a law, so this must be a law of the host State, expressing consent to arbitration. How exactly might an aggrieved investor rely on this consent? By *accepting* that expression of consent, I reckoned, as though it were an offer to the investor which becomes irrevocable as of its acceptance. But could the State withdraw that consent? Might Egypt say “We hereby revoke Article 8 of Law 43” because they would see that SPP might pursue this alternative?

At this point, I became quite agitated, thinking that we had something to hold on to here, but that it might be taken away from us. I went to see Mr Craig, of course, and I explained that I had concluded that we should go to ICSID immediately, without waiting for the expected confirmation of our defeat by the French Supreme Court. Now Mr Craig had heard of ICSID, but he did not believe that we could go there; so far all ICSID cases had been founded on a clause in an investment contract – never on a treaty or on a law. So I explained my theory, but he said, “That’s not arbitration. Arbitration is an agreement by which either side can make a claim against the other. Egypt could not sue SPP, so how can you say there is an arbitration agreement?”

Now, sometimes ignorance can help, because you do not realise that what you are thinking has never been done, so you just keep questioning conventional assumptions. And indeed I insisted, “but Mr Broches says you can.” Mr Craig remained unconvinced. He pointed out that under “my” theory Egypt might not even know who could sue it in arbitration; Egypt did not know SPP as a possible respondent for the purposes of arbitration; “How can this be a one-way street? Have you ever heard of an arbitration where only one party can go to the arbitrators? And just how many arbitrations has Mr Broches done anyway?” I retorted “But why not? Once SPP accepts the offer and confirms its own consent, we have an arbitration agreement!” On and on we went, around and around, if my

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<sup>5</sup> See, e.g., Aron Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 263 (1966).

memory serves for several weeks, when at last I thought of a killer argument, which was simply “So, do you have a better idea what to do now?” Now finally, being a pragmatist, and perhaps tiring of endless and inconclusive debate, he said the magic words: “All right, young man, you try it.”

I wrote a letter to ICSID immediately, saying “SPP hereby accepts Egypt’s consent to arbitrate under the rules of ICSID” and setting out the relevant elements of Law No. 43, leading to ICSID in just the way endorsed by Mr Broches. This was naturally followed by a formal claim in arbitration.

And so a tribunal was constituted under the ICSID Rules. SPP appointed Robert Pietrowski, an American lawyer specialized in public international law. Egypt appointed a senior judge of the Egyptian administrative courts, Mohammed Amin El Mahdi. The Chairman of the Tribunal was the eminent Dr Eduardo Jiménez de Aréchaga of Uruguay, a former President of the International Court of Justice. The three arbitrators were confronted, as you would expect, with a series of jurisdictional objections from the Egyptian side.

Anyone who has a deep interest in ICSID arbitration needs to know this about the *SPP* case: there were two jurisdictional decisions, not just one. The second is the important one. The first one deals with a simple, logical question: was SPP still maintaining that the ICC Tribunal had been vested with authority? Our response was “Yes, we are still maintaining that. We are, after all, appealing to the Court of Cassation. But Egypt is denying it, and so we have come here.” The compelling reason we had come there was in fact so that Egypt could not withdraw its unilateral offer consenting to ICSID arbitration. As it happened, the first jurisdictional decision by the ICSID Tribunal held that since this was still an open question – the controversial question whether there had been an agreement to ICC arbitration had still not achieved a final resolution since the French Supreme Court had not spoken – the ICSID arbitrators would not, as a matter of respect for the French courts, proceed until that final decision had been rendered. And so all of the *bundles* were closed for many long months, until the French Supreme Court, in January 1987, upheld the decision of the Cour d’Appel; as of that moment, the ICC award was absolutely dead, and thus also alternative (1) under Law No. 43.

Now the essential question arose whether or not the reference to ICSID arbitration in Law 43 sufficed to give jurisdiction to the ICSID Tribunal on

the merits of this complaint. That led to the seminal jurisdictional award of 14 April 1988. That is the big one, ladies and gentlemen. That is the decision on the question that Mr Craig and I had been debating. Never seen before – can this be arbitration? Oral arguments on this seemingly narrow question – could a unilateral act constitute consent to arbitration, irrevocable as of the corresponding acceptance by an investor? – were heard on two separate occasions. They were purely abstract debates. Egypt insisted that the Arabic text of the Law made it clear that the reference to ICSID was incomplete, in the sense that it required joint agreement with the investor. I always found this argument very unattractive, because it invariably resulted in arguments about Arabic words, grammar, and syntax which no non-Arabist could understand. Wasn't the Law intended to attract foreigners? Hadn't the English text of the Law been distributed as an official Government publication and an official translation? Shouldn't foreigners be entitled to rely on it, or was this a trick? But more importantly, it seemed to me quite wrong in substance; if a distinct agreement to ICSID arbitration was required, the possibility simply fell under alternative (1), and there was no purpose whatever in having drafted alternative (4). Such a conclusion contradicts the elemental rule of interpretation that all terms are presumed to have a purpose. Even today, some Egyptian lawyers will mumble about the international arbitrators not having understood the Arabic text of Law No. 43, but I cannot take them seriously. This was not the issue that truly occupied the minds of the arbitrators. It was rather the fundamental question so long debated between Mr Craig and myself; was this new thing possible at all, even assuming the words meant what they said?

After the second hearing, the arbitrators commenced a period of internal deliberations. Here was my last hope for my first client, waiting for a critical decision – waiting and waiting and waiting. It's a narrow point: yes or no? Please! I'm losing sleep! You will smile, but I had a superstitious reason for expecting the best from Judge Jiménez de Aréchaga. You see, the first time I saw him, I did a double take. They say everyone has a *Doppelgänger*, and this man happened to be the visual twin of my father. He had to come closer than five meters to me before I would realize that he was in fact someone else. Moreover, his manner was very much like that of my father, which either shows that Uruguayans can be brought up like Swedes or vice versa. Such are the irrelevancies that fill our minds from time to time, to distract us from more acute preoccupations – how tedious and stressful life would be without them ... At any rate, this surely

had to be a good sign! Or maybe not? Seven-and-a-half months passed in this state of anxiety, and finally the decision came down.

I have thought about this for more than 25 years. What was going on during those seven-and-a-half months? My speculation – and it is only that – was that Judge Jiménez de Aréchaga was hesitating because he was hoping to avoid a two-to-one decision, and did everything to achieve consensus. When that proved impossible, he really wanted to think this through. He understood that this would be a landmark case, as indeed it has proven to be. It was a thorough decision, referring to general principles of law, rejecting the idea that this was only a problem of Egyptian law, based on the plain meaning of the terms of Law No. 43. There was even a learned disquisition by experts about what the word in Arabic *tatimmu* could mean. Is *tatimmu* really “*shall be settled*” or is it something like “*may be settled*” and does it make a difference? In the context of the purpose of this law, the arbitral Tribunal reasoned, “It is of an obligatory sense; otherwise it doesn’t seem to serve any particular purpose in this act.” That is what the decision was: a very learned decision referring to the law of treaties in order to understand how States manifest their will. Public international law concepts about unilateral declarations also figured prominently in the Tribunal’s reasoning. The matter was of course *sui generis*, never decided before.

Now mark my words: if this Tribunal had rejected the proposition that a State can make a unilateral offer to an infinite number of unknown investors, who can then accept that offer as long as it has not been withdrawn; if a majority had emerged in favour of the position of the dissenting arbitrator, under the signature of a former President of the International Court of Justice, I think investor-State arbitration may have been still-born. The proposition at issue is, in its broad terms, the same as that which is essential as a foundation to arbitration under a Bilateral Investment Treaty. That its affirmation was made under the authority of a Latin American scholar and public official of such eminence is noteworthy, given Latin America’s historical misgivings about international arbitration, and gave particular weight to the decision as the cornerstone of something new and exceptionally important.

The rest is aftermath. In May 1992, the award on the merits came down, 14 years after my lunch at Jamin. The claim that SPP’s rights under Law No. 43 had not been respected was upheld, and damages were assessed at

US\$26.5 million. Of course these dollars were not worth as much as dollars had been worth 14 years before, which explains why \$3.8 million of the award represented interest, \$5 million the legal costs. Now it was Egypt's turn to complain and of course Egypt, at this stage advised by Professor Gaillard, whom I salute as I see him here today, sought annulment under the ICSID system, seeking the constitution of a so-called *Ad Hoc* Committee for this purpose. But before anything significant happened at this final level the music stopped. The parties settled the case at a negotiated price, without further disputation. The happy end.

Speaking of the personalities I have mentioned, you may be interested in some incidental updates as a kind of coda to my story. A couple of years ago, my now very close friend Professor Kosheri rang me up and said, "I think I could use your help in an ICSID case where I am representing the Government of Egypt. It so happens that somebody is suing Egypt under a hotel contract, and once again, EGOH finds itself in a dispute with one of its partners, and the Government of Egypt is held responsible for what happened. Would you like to join the team and argue it with me for Egypt?" I did, and that was the *Helnan v. Egypt* case, which was great fun. The same characters: Egypt, EGOH, Professor Kosheri and a foreign investor – but now under a bilateral investment treaty with Denmark. So there is a lesson for all of you: friends are really important, and you should make them everywhere. Professor Park is my friend. He thought of me and recommended me to Mr Zuromskis. Professor Kosheri was never my enemy, and you see that even your opponent can be your friend. Please remember that.

Last year, I went to Montenegro. Sorry, this is probably a pointless story but I can't resist. There was a problem of international law, and I was asked to meet the President of the country. He turned out to be extremely tall, I think well over two meters. After a few moments he said, "You know, if you don't mind, I've asked the Prime Minister to join us." I was of course very pleased to think that I was consulted about a matter of some importance. So the Prime Minister came in, and he too turned out to be over two meters tall. I asked whether height was a requirement for political office, and one of them answered that the explanation was not that; "we are a small country with big people." The other added "but for us size is not necessarily vertical, as you will see when the Speaker of the Parliament arrives." That gentleman did join our talks as well, and he was

no more than my height, around 1m80, but his circumference amply made up for this relative deficit.

At the time, the international media had been talking about some difficulties involving a Russian oligarch who had made major investments in Montenegro. This was not the subject of my meeting, but having these high leaders before me I couldn't help but ask what their policy was toward foreign investment, particularly as reflected in the various investment treaties that they had signed – obviously an interest of mine. "We definitely favour foreign investment," one of them said, "but of course not all of them make as exceptional contributions as Mr Munk." "Are you talking about *Peter Munk*?" I inquired. "Of course," was the answer, "you must know about his wonderful Porto Montenegro." Actually, I didn't, but quickly learned – this was last year – that Peter Munk, who long ago had left the hotel business for other ventures, including the North American commercial real estate business (TrizecHahn, sold for US\$8.9 billion in 2006) and of course Barrick Gold, has now, well into his 80s, set out with minority partners including names such as Arnault and Rothschild, to build a destination resort intended to outshine anything else in the Mediterranean, be it Monaco or the Aga Khan's famous establishment on the Costa Smeralda in Sardinia. So if you see any publicity materials about Porto Montenegro, you are likely to see a photograph of Mr Munk sitting in animated discussion with a very tall man, and perhaps after this lecture it will ring a bell.

As for David Gilmour, you might have thought that he would be content to cultivate his garden in the verdant splendour of Wakaya, his Fijian island. You would be quite wrong. Some people just won't sit still. One day Mr Gilmour noticed one of his visitors drinking mineral water out of a familiar French bottle. "Something is very wrong with this picture," he thought. "Europe is the home of a billion polluters, how can that be a place to find water of such quality that you would want to import to the pristine environment of the Pacific islands? It should be the other way around." And so it happened that Mr Gilmour decided to launch himself in the mineral-waters business, though most people might have thought that the last thing the world needed was another mineral-water label. He disagreed, confident that he could convince buyers that there was a new better-tasting water in the most gorgeous bottles anyone had ever seen. Ladies and gentlemen, you have drunk it, you have seen it, and you know that the "Fiji" brand has pushed its way successfully into a very crowded

market, and has not done it – this you may have realized as well – by offering a less expensive product ... Well after most people's retirement age, David Gilmour was able to start and develop a business which any entrepreneur could be proud to think of as the achievement of a lifetime.

At the end of this experience, which started when I was a young lawyer and ended only as I approached middle age, I reflected on its implications. There were hundreds of investment treaties out there, I knew. As soon as lawyers would notice this *Pyramids Case* and went through the mental process that led to my friendly debate with Mr Craig, I thought, there would be many arbitrations that do not find their foundation in a contractual clause. It could really be something of an avalanche. So I wrote an article called "Arbitration without Privity,"<sup>6</sup> just a couple of years after the case had settled, in which I pointed out that this blip on the radar screen might turn out to be the first promontory of an entire continent of activity, once lawyers understood the power of investment treaties and investment laws as given effect by the tribunal in the *Pyramids Case*.

It seems that once in my life I was right when making a prediction. Still, although that article has been cited from time to time, I worry that not enough readers have gone to the end of it. Here is the conclusion: "Arbitration without privity is a delicate mechanism. A single incident of an adventurous arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may be sufficient to generate a backlash. But if the mechanism is applied judiciously, it will help fill a void that now exists in the absence of compulsory jurisdiction, and thus contribute to enhancing the legal security of international economic life."<sup>7</sup> What do you think?

Thank you very much for your kind attention.

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<sup>6</sup> Jan Paulsson, *Arbitration Without Privity*, 10 FOREIGN INV. L.J. 232 (1995).

<sup>7</sup> *Id.* at 257. Fifteen years later, I developed my reflections in a lecture given at the Universidad Peruana de Ciencias Aplicadas in Lima on August 29, 2008. I developed that lecture into an article, *El poder de los Estados para hacer promesas significativas a los extranjeros*, 6(21) REVISTA DE ECONOMÍA Y DERECHO 7 (2009), and subsequently published the article in English translation as *The Power of States to Make Meaningful Promises*, 1 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 341 (2010).

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