DECISION ON JURISDICTION

in the Arbitration ARB/94/2 of the

International Centre for Settlement of Investment Disputes (ICSID)

Tradex Hellas S.A. (Greece)

represented by Mr. E. Koronis
Counsel: Prof. L. Georgakopoulos

vs.

Republic of Albania

represented by the Ministry of Agriculture and Food
which was represented first by Ms. Rezarta Gaba
and later by Mr. Sali Metani
Counsel: Prof. James Crawford
Mr. Philippe Sands

by the Arbitral Tribunal

consisting of

Prof. Dr. Karl-Heinz Böckstiegel, President
Mr. Fred Fielding, Arbitrator
Prof. Andrea Giardina, Arbitrator

Date of Decision: December 24, 1996

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A. Procedure

On November 2, 1994, the International Centre for Settlement of Investment Disputes (ICSID) received from Tradex Hellas S.A. (Tradex), a company incorporated in Greece, a Request for Arbitration against the Republic of Albania (Albania). The Request asserted a claim for compensation for an alleged expropriation in Albania. Details of the Request and the Claim are described in a later section of this decision.

In the absence of agreement upon the number of arbitrators and the method of their appointment more than 60 days after the registration of the Request, Tradex Hellas chose the formula provided for in Art. 37 (2) (b) of the ICSID Convention, i.e. a tribunal consisting of three arbitrators, one appointed by Tradex, one appointed by the Republic of Albania and the third, who would be the President of the Tribunal, appointed by agreement of the Parties. By letter dated 06 June 1995, Tradex appointed as arbitrator in this case Mr. Fred F. Fielding, a US national. Mr. Fielding subsequently accepted his appointment.

Though ICSID in various ways communicated the Request for Arbitration and subsequent correspondence to Albania, no appointment of a second arbitrator was received from Albania, and no agreement was reached between the Parties with respect to the appointment of the third arbitrator. As Art. 38 of the ICSID Convention and Art. 4 of the ICSID Arbitration Rules provide that, if the tribunal has not been constituted within 90 days after the notice of registration of the Arbitration Request, the Chairman of the ICSID Administrative Council shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator(s) not yet appointed and designate an arbitrator to be President of the tribunal, Tradex requested ICSID to appoint the other two arbitrators.

In December 1995, after notifying the Parties, the Chairman of the Administrative Council of ICSID appointed Prof. Andrea Giardina, an Italian citizen, as the second arbitrator, and Prof. Dr. Karl-Heinz Böckstiegel, a German citizen, as the third arbitrator and President of the tribunal. Both accepted the appointment.

By a decision of 26 December 1995, the Council of Ministers of Albania accepted the appointments of Prof. Giardina and Prof. Böckstiegel as arbi-

trators and charged the Ministry of Agriculture and Food with representing the Republic of Albania in the proceedings.

The Tribunal scheduled a first session with the Parties for February 27, 1996, in Washington. After consultation with the Parties and with their agreement, the session in Washington was cancelled and instead the first session of the Tribunal with the Parties was scheduled to take place in Frankfurt (Germany) on April 10, 1996.

At that session, in addition to other procedural details discussed and agreed, it was agreed that subsequent meetings of the Tribunal with the Parties would take place in London. Also at the session, counsel for Albania confirmed that Albania would shortly be sending to the Centre written objections to jurisdiction in accordance with Arbitration Rule 41 (1). Counsel for Albania gave a summary presentation of the grounds on which such objections would be based. Counsel for Tradex responded. Thereafter the proceedings on the merits were suspended in accordance with Arbitration Rule 41 (3). Dates for written submissions by the Parties were agreed upon and it was also provisionally agreed that an oral hearing on jurisdiction would take place in London on September 10, 1996.

After the session in Frankfurt, written submissions by Albania were received dated 15 April 1996, 10 June 1996, and 09 August 1996, and written submissions by Tradex were received dated 31 May 1996 and 30 July 1996. Starting with Albania's submission dated 10 June 1996, Prof. James Crawford acted as additional counsel for Albania.

At the hearing in London on September 10, 1996, after an introduction by the President of the Tribunal regarding procedural matters, both Parties made presentations regarding jurisdiction, responded to the other Party's presentation in several rounds and answered questions by members of the Tribunal regarding certain factual or legal aspects related to jurisdiction. Also during the Hearing, Tradex asked whether Albania, in view of its objections to ICSID jurisdiction, was ready to accept this case under the UNCITRAL Arbitration Rules as provided for in the Albanian Investment Protection Law of 1992. Counsel for Albania responded that they were not authorized to express any commitment of Albania regarding UNCITRAL arbitration.

By a letter dated 25 September 1996 addressed to Albania represented by the Minister for Agriculture and Food, Counsel for Tradex asked for a binding answer by Albania regarding acceptance of UNCITRAL arbitration in this controversy and added that, if no answer was received within 30 days, he would interpret this to the effect that Albania "has not preferred the arbitration of UNCITRAL".

By a letter dated 8 November 1996 to ICSID, Counsel for Tradex confirmed that no answer had been received from Albania.

On 5 December 1996 ICSID provided the Tribunal with a copy it had received of a letter dated 2 December 1996 from Counsel for Albania to Counsel for Tradex containing the following wording:

> "I am instructed by the Minister to respond to your letter of 25 September 1996.
>
> As indicated during the hearing held in London on 10 September 1996, the Ministry of Agriculture of the Republic of Albania considers that the dispute settlement rules applicable to the facts raised in Tradex's Request for ICSID arbitration, if any, are those set forth in Law No. 7594 of 4 August 1992.
>
> Article 15 of the 1992 Law is therefore applicable. It provides for UNCITRAL arbitration and sets forth certain conditions and exclusions for such arbitration to be effective. Whether those conditions or exclusions have been satisfied or are applicable in respect of the matter brought by Tradex to ICSID raises questions of fact and law which would need to be considered further by the Ministry of Agriculture and eventually by any arbitral Tribunal that might be constituted pursuant to the 1992 Law. In the first place it will be a matter for Tradex whether to decide to make an application for arbitration under UNCITRAL rules in reliance on the 1992 Law."

B. Facts and Contentions

Hereafter, the Tribunal will give a short summary of the facts and contentions in this case insofar as it is considered appropriate in the context of

this decision only dealing with jurisdiction. Regarding further details, reference is made to the various written briefs and documents submitted by the Parties as well as to the oral presentations by the Parties and the documents submitted with these oral presentations.

Tradex entered into negotiations in 1991 with Albania in order to undertake an engineering, industrial, and agricultural investment in Albania. Negotiations were completed and Albania appointed a state owned company, "T.B. Torovitsa", to enter into a joint venture with Tradex for realizing the investment on the basis of a proportional participation of 67 to 33. The land would be contributed by T.B. Torovitsa to the joint venture.

On January 10, 1992, Tradex and T.B. Torovitsa signed an agreement ("the Agreement") which established a joint venture between them. T.B. Torovitsa was the owner of 1170 ha farm land in T.B. Torovitsa, Lezha, Albania, and the object of the joint venture was the commercial and agricultural use of this land connected with "the development of the agricultural engineering, the cultivation of agricultural plants/ crops, fruits and vegetables in the fields, development of stock raising / animal products, and the necessary activities pertaining to the processing of milk, meat, and any activities relative to the land and to products yielded by it for the domestic market or exportation" (Art. 2 of the Agreement). The investment was planned for a duration of 10 years, renewable by either Party for another period of 10 years.

On January 21, 1992, the Agreement was approved by an act of the Albanian Ministry of Foreign Economic Affairs called Authorization No. 26. The registrations of the joint venture with competent courts and administrative authorities were completed by March 7 1992.

Upon the authorization and the completion of formalities concerning the establishment of the joint venture, Tradex commenced the investment according to schedules contained in the Agreement in order to use the farm during the first crop raising period in spring and summer 1992. The investment included various payments totalling US $ 786,343 T.B. Torovitsa contributed further payments and the capital thus established was used to finance the cattle production, the field cultivation, the payment of 700 personnel. A feasibility study for a fodder plant and the plan for a frozen vegetables factory were approved by the European Union and finan-

cing of Ecu 4,800,000 was secured partially by Tradex and partially by the European Union and several banks.

Tradex claims that the following measures made the development of the joint venture impossible and left the participation and investment in the joint venture valueless so that these acts must be considered as acts of expropriation:

a) On August 22, 1992, a most significant part of the farm was formally expropriated and transferred to villages by Albania, namely ha 140 amounting to 15% of the total farm and its most fertile area.

b) Crop production, cattle, and seed supplies were stolen by the villagers at an almost steady rate of 15% between March and October 1992 and work of the management of the joint venture was often impossible because of threats and acts of violence.

c) Beginning December 1992, the entrance of Tradex's personnel to the farm was completely impossible because of the seizure and occupation of the farm by villagers.

d) By letters in late 1992 and early 1993, Tradex requested in vain the intervention by Albania as a last effort to save the investment, but Tradex was obliged to hand over the 140 ha mentioned together with cultivations, cattle, and supplies.

Under the circumstances, Tradex and T.B. Torovitsa found it necessary to dissolve the joint venture; the dissolution was agreed on April 21, 1993 "as of 30.4.1993". The Minutes of the Liquidators Meeting on March 2, 1994, resolved "that the liquidation was completed on 16.12.1993".

Tradex evaluates the market value of its investment according to recognized valuation methods and experience to US $ 2.2 Mill., less the value of the machinery and equipment returned to Tradex as their share of the liquidation proceeds of US $ 176,093. Thus, it estimates the net market value of its loss at US $ 2,023,907 while it estimates its "real damages" to be much higher.

On that basis, Tradex in this arbitration requests that Albania be obliged and condemned to pay:

a) The market value of Tradex's expropriated investment amounting to US $ 2,023,907;

b) interest on that amount mentioned at current banking interest rates, from December 1, 1992, until payment, and

c) fees and legal expenses of Tradex, to be calculated later.

Albania considers Tradex's claim as unjustified. But Albania has not responded to the merits of Tradex's claim, as Albania objected to the jurisdiction of this Tribunal and, therefore, the procedure on the merits was suspended and the present procedure only deals with jurisdiction in this case. Albania claims that it has not, under Art. 25 (1) of the ICSID Convention and Albanian Law No. 7764 of November 2, 1993 (the "1993 Law"), expressed its consent to the matter raised by Tradex in its Request to be subject to ICSID jurisdiction, and that accordingly the Tribunal does not have jurisdiction. In support of this submission, Albania invokes the five arguments which can be summarized as follows:

– The facts presented by Tradex make it obvious that this is a "dispute" between Tradex and T.B. Torovitsa and not between Tradex and Albania;

– The 1993 Law does not apply retroactively and is therefore not applicable to this "dispute";

– Even if the 1993 Law does apply retroactively, Tradex was not a "foreign investor" within the meaning of the 1993 Law when the law came into force and cannot therefore rely on its provisions;

– Even if there is a "dispute" between Tradex and Albania and the 1993 Law is applicable, the "dispute" does not relate to an "expropriation" within the meaning of the 1993 Law; and

– Tradex made no good faith effort to resolve the "dispute" amicably before resorting to arbitration, as required by the 1993 Law and general principles of international law.

For the purposes of this jurisdictional phase of the procedure, Albania relies only upon the factual and evidentiary material provided by Tradex as, in Albania's view, these support Albania's arguments on jurisdiction. But Albania reserves the right to challenge the presentations by Tradex and to introduce additional factual and evidentiary material as necessary at a

subsequent stage in these proceedings. Albania also expressly confirms its commitment to the full protection of foreign investment in Albania, to the ICSID system, and to its international legal obligations.

Regarding the factual background, Albania points out the following additional aspects: Under Albanian law, T.B. Torovitsa is a separate legal entity will full capacity to sue and be sued. The capital provided by Tradex comprised machinery, chemicals, seeds, and irrigation investments while the capital provided by T.B. Torovitsa comprised buildings, machinery, life stock, and finished products as well as other assets. None of the joint venture's capital comprised land. The 1992 Agreement noted that T.B. Torovitsa was the owner of 1170 ha of land, that the area of land would not change "during the term of the agreement", and that the joint venture "shall respect the supplementary needs which will be created for the land" (Art. 15). In particular, Albania refers to Art. 16 of the Agreement which provides that disputes between the Parties shall be resolved by arbitration of the International Chamber of Commerce and that Swiss law shall be applicable. Furthermore Albania points out that the authorization for the joint venture dated January 21, 1992 expressly provided that the joint venture should conform with Albanian legislation concerning land.

As far as the liquidation of the joint venture is concerned, Albania indicates that the Dissolution Agreement dated April 21, 1993, led to the dissolution completed on December 16, 1993 according to the liquidators' report. At the state of liquidation, the liquidators' report valued the joint venture's net worth at lac 6,175,599.05 to be distributed in the proportions 67 % to Tradex and 33 % to T.B. Torovitsa in accordance with Art. 5 of the 1992 Agreement. The liquidators' report proposed that Tradex receive a total of lac 20,842,420 comprising lac 8,804,675 in fixed assets and lac 12,037,745 to be paid by T.B. Torovitsa in installments on the basis of the progress in the liquidation and not later than December 31, 1994. A final partners' meeting was held on March 2, 1994 which resolved to approve the balance sheets drawn up by the liquidators and approved the distribution of the net worth of the joint venture in accordance with the liquidators' report. Tradex did not reserve its rights against T.B. Torovitsa or Albania at that final meeting.

The Tribunal will deal with further contentions by both Parties later in this decision in the context of its reasons insofar as it considers such contention relevant.

C. Legal Framework

The Tribunal will now briefly review the major aspects of the legal framework which are relevant to this decision on jurisdiction.

First, reference must be made to the ICSID Convention which Albania ratified on October 15, 1991 and which entered into force for Albania on November 14, 1991. In this context, however, it should be pointed out that neither of the Parties alleges a specific consent to ICSID arbitration in a contract between Tradex and Albania. According to Tradex, Albania consented to ICSID arbitration both in Albania's law No. 7764 of November 2, 1993 (the "1993 Law") and in the bilateral investment treaty between Greece and Albania of August 1, 1991. On the other hand, Albania claims that no consent to ICSID arbitration was affected in these two instruments for the present case.

Starting in 1990, Albania has enacted several laws relevant for foreign investments:

Albanian Law No. 7406 of July 31, 1990, on the protection of foreign investments provided in particular that foreign investments in Albania would not be subject to expropriation and any other similar measures, except for specific cases made for public purposes, and always against the payment of "damages".

This law was replaced by Albanian Law No. 7512 of August 10, 1991, which provided in particular that foreign investments would not be subject to expropriation or similar measures with exception of particular cases and at any rate against payment of full "compensations".

This law was further replaced by Albanian Law No. 7496 of August 4, 1992, which provided in particular:

> Art. 9 "Foreign investments in Albania enjoy complete protection and guarantee. Foreign investments cannot be nationalized, expropriated, or be object of another measure equal to them including the special cases in the interest of public use and always with a legal procedure, with compensation and without discrimination. Compensation must be given immediately, be real and suitable.

> Art. 15 "Disagreements between the foreign investor provided with authorization according to law and the Council of Ministers, Ministry or the Local power organs in connection to:
>
> a) any question that has to do with discrimination or other question linked with compensation for reason foreseen in Art. 9 and 10 of this Law.
>
> b) Legitimacy or the continuation of legitimacy of authorization will be presented for settling to an international arbitration in accordance to rules of Arbitration Committee of UNO for the International Rights in Trade, that are in force in the time of delivery of authorization, excluding the cases when between the person that releases the authorization and the foreign investor that takes the authorization, had been agreed otherwise and this is written in the authorization. Any decision of this arbitration is of a cut form and obliged for all sides."

In spite of certain aspects of the English translation of this law, both Parties agree that this is a submission to the UNCITRAL Arbitration Rules.

Most relevant to the present case is Albanian Law No. 7764 of November 2, 1993 (the "1993 Law") which came into force on January 1, 1994, and which, in particular, contains the following provisions:

> "Article 1
> Decisions
>
> For the purpose of this Act
>
> 1. "Territory" means the territory under the sovereignty of the Republic of Albania, including the territorial waters, as well as the maritime area and the continental shelf over which the Republic Albania, in accordance with international law, exercises its sovereign and legal rights.
>
> 2. "Foreign investor" means:
>
> a) any natural person who is a citizen of a foreign country, or
>
> b) any natural person who is a citizen of the Republic of

Albania with a permanent domicile in a foreign country, or

c) any legal person that is incorporated or constituted under the law of a foreign country that directly or indirectly seeks to make or is making an investment in the territory of the Republic of Albania under its laws or has made an investment under the laws regarding the period of time from July 31, 1990 and further on.

3. "Foreign investment" means every kind of investment in the territory of the Republic of Albania owned directly or indirectly by a foreign investor, consisting of:

   a) moveable and immoveable, tangible and intangible property and any other property rights;

   b) a company, shares in stock of a company and any form of participation in a company;

   c) loans, claim to money or claim to performance having economic value; (handwritten addition: "and related with an investment")

   d) intellectual property, including literary and artistic works, sound recordings, inventions, industrial designs, semiconductor mask works, know how, trademarks, service marks and trade names; and

   e) any right conferred by law or contract, and any license or permit pursuant to law.

4. "Foreign investment dispute" means any controversy or claim arising out of or relating to a foreign investment.

5. "Return" means an amount derived from or associated with an investment, including profit, dividend, interest, capital gain, royalty payment, management fee, technical assistance fee or other fee, or returns in kind."

"Article 4
Expropriation and Nationalization

Foreign investments shall not be expropriated or nationalized

either directly or indirectly or subject to any measure of tantamount effect, except for a public purpose determined on law; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation and in accordance with due process of law.

"Article 5
Compensation for Expropriation and Nationalization

1. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or become known, whichever is earlier.

2. Compensation shall be paid without delay and include interest at a commercially reasonable rate from the date of the expropriation, be fully transferable and convertible at the market rate of exchange on the date of the expropriation.

3. In cases in which a foreign investor asserts that all or part of its foreign investment has been expropriated or considers the compensation therefor to be unsatisfactory, the foreign investor shall have the right to prompt review by the appropriate judicial or administrative bodies in accordance with the provisions of Article 8 of this Act."

"Article 8
Dispute Settlement

1. If a foreign investment dispute arises between a foreign investor and either an Albanian private party or an Albanian state enterprise, and it cannot be settled amicably, then the foreign investor may choose to submit the dispute for resolution to any applicable, previously agreed upon dispute-settlement procedure. If no dispute settlement procedure has been agreed upon, then the foreign investor may submit the dispute for resolution to a competent court or administrative tribunal of the Republic of Albania in accordance with its laws.

2. If a foreign investment dispute arises between a foreign investor and the Republic of Albania and it cannot be settled amicably, then the foreign investor may choose to submit the dispute for resolution to a competent court or administrative tribunal of the Republic of Albania in accordance with its laws. In addition, if the dispute arises out of or relates to expropriation, compensation for expropriation, or discrimination and also for the transfers in accordance with Article 7, then the foreign investor may submit the dispute for resolution and the Republic of Albania hereby consents to the submission thereof, to the International Centre for Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and National of Other States, done at Washington, March 18, 1965 ("ICSID Convention").

3. Any arbitral award rendered in accordance with this article shall be final and binding on the parties to the dispute. The Republic of Albania shall carry out without delay the provisions of any such award and provide for its enforcement in its territory."

"Article 9
Status of this Act

1. Law No. 7594 of August 4, 1992, and any other provisions within laws or decisions of the Government of Albania that conflict with this Act are hereby abrogated.

2. In the event that the provisions of the Act are not in conformity with any other international agreement or treaty ratified by the Parliament, to which the Republic of Albania or the Government of Albania is a party, the latter shall prevail to the extent they provide greater rights or protection to the foreign investor than those provided in this Act."

In addition, Tradex claims that the jurisdiction of this Tribunal is also based on the Bilateral Agreement between Greece and Albania for the Encourage-

ment and Reciprocal Protection of Investments signed on August 1, 1991, and notified to be in force as of January 4, 1995 (the "Bilateral Treaty"). In particular, this Bilateral Treaty contains the following provisions:

"Article 1
Definitions

For the purposes of this Agreement:

1. "Investment" means every kind of asset and in particular, though not exclusively, includes:

   a) movable and immovable property and any other property rights such as mortgages, liens or pledges,

   b) shares in and stock and debentures of a company and any other form of participation in a company,

   c) loans, claims to money or to any performance under contract having a financial value,

   d) intellectual and industrial property rights, including rights with respect to copyrights, trademarks, trade names, patents, technological processes, know-how, and goodwill,

   e) rights conferred by law or under contract with a Contracting Party, including the right to search for, cultivate, extract or exploit natural resources.

2. "Returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, capital gains, dividends, royalties and other fees.

3. "Investor" shall comprise with regard to either Contracting Party:

   a) natural persons having the nationality of that Contracting Party in accordance with its law,

   b) legal persons constituted in accordance with the law of that Contracting Party and having their seat within its territory.

4. "Territory" means in respect of either Contracting Party the territory under its sovereignty as well as the territorial sea and submarine areas, over which the Contracting Party exercises, in conformity with international law, sovereign rights or jurisdiction."

"Article 4
Expropriation

1. Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.

2. Investments by investors of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against prompt, adequate and effective compensation. Such compensation shall be equivalent to the market value of the expropriated investment before the date on which the actual or threatened expropriation, nationalization or comparable measure has become publicly known. The compensation shall be paid without delay and shall carry the current bank interest until the time of payment; it shall be effectively realizable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalization or comparable measure for the determination and payment of such compensation. The legality of any such expropriation, nationalization or comparable measure and the amount of compensation shall be subject to review by due process of law.

3. Investors of either Contracting Party shall enjoy most-favored nation treatment in the territory of the other Contracting party in respect of the matters provided for in this Article."

"Article 8
Application

This Agreement shall also apply to investments made prior to

its entry into force by investors of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation."

"Article 10
Settlement of Disputes between an Investor and a Host State

1. Any dispute between either Contracting Party and an investor of the other Contracting Party concerning investments or the expropriation or nationalization of an investment shall, as far as possible, be settled by the disputing parties in an amicable way.

2. If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor or the Contracting Party concerned may submit the dispute either to the competent court of the Contracting Party, or to an international arbitration tribunal. Each Contracting Party herewith declares its acceptance of such an arbitration procedure. In the latter case, the provisions of article 9, para 3–9, shall be applied mutatis mutandis. Nevertheless, the President of the Court of the International Arbitration of the International Chamber of Commerce in Paris shall be invited to make the necessary appointments whereas the arbitration shall determine its procedure by applying the UNCITRAL Arbitration Rules, as then in force. The award shall be binding and enforced in accordance with domestic law.

3. During arbitration or the enforcement of an award the Contracting Party involved in the dispute shall not raise the objection that the investor of the other Contracting Party has received compensation under an insurance contract in respect of all or part of the damage.

4. In case both Contracting Parties have become members of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of the Other States, disputes between either Contracting Party and the investor of the other Contracting Party under the first paragraph of this Article shall be submitted for settle-

ment by conciliation or arbitration to the International Centre for the Settlement of Investment Disputes."

"Article 13
Entry into Force—Duration—Termination

1. This Agreement shall enter into force thirty days after the date on which the Contracting Parties have informed each other, through diplomatic channels, of its ratification or approval according to their respective legislation.
2. Unless notice of termination has been given by either Contracting Party at least six months before the date of expiry of its validity, this Agreement shall be extended tacitly for the period of 10 years, each Contracting Party reserving the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.
3. In respect of investments made prior to the date of the termination of this Agreement the foregoing Articles shall continue to be effective for a further period of 10 years from that date."

The Tribunal will return to particular aspects of this legal framework and the respective interpretations by both Parties later in the context of its Reasons for the decision.

D. Reasons for the Decision

As shortly indicated above, Albania has raised four objections to jurisdiction based on the 1993 Law and, when Tradex also relied on the Bilateral Treaty, has objected to jurisdiction on that basis as well. The Tribunal will now examine each of these objections after a brief summary of the position each Party has taken respectively. To facilitate the presentation, however, the Tribunal will take up the objections in different order to that used by the Parties.

1. The Bilateral Investment Treaty

The Tribunal will first deal with Tradex's claim that its jurisdiction is based on the Bilateral Investment Treaty between Albania and Greece. To this

claim, Albania objects by pointing out that the Treaty was not in force at any relevant time to provide for jurisdiction in this procedure.

The Treaty was signed on August 1, 1991, but according to its Art. 13 came into force only on January 4, 1995, as notified in the Official Gazette of the Government of Greece of February 14, 1995.

Its Art. 4 (2) provides that

> "Investments by investors of either Contracting Party shall not be expropriated, ..."

Its Art. 8 provides that the Treaty

> "shall also apply to the investments made prior to its entry into force."

And Art. 10 (4) provides that, in case both states have become members between a Contracting Party and an investor, a dispute

> "shall be submitted"

to ICSID arbitration.

The Tribunal notes that, in the present procedure, the Request for Arbitration is dated October 17, 1994, and was received by ICSID on November 2, 1994, i.e. well before the entry into force of the Bilateral Treaty on January 4, 1995. It is, therefore, clear that at the time of its filing the Request for Arbitration Tradex could not rely on a jurisdiction provided by the Bilateral Treaty. The only question is whether, nevertheless, the later entry into force of the Bilateral Treaty could, with delay, still be a sufficient ground to justify jurisdiction from there on for this procedure. Such a conclusion would be unusual insofar as both in national and international procedural law jurisdiction must mostly be established at the time of filing the claim. To divert from this usual result, here one might arguably rely on the provision in Art. 8 that the Treaty also applies to investments made prior to its entry into force. But this could as well be interpreted to the effect that such application to prior investments can only take place if the claim is filed after the entry into force. Indeed, this latter interpretation seems to be the appropriate one in view of the wording of both Articles 4 (2) and 10 (4) of the treaty which say that investments "shall" not be

expropriated and that disputes "shall" be submitted to ICSID arbitration. From these provisions it seems clear that the Contracting Parties had the intention to only submit to ICSID jurisdiction regarding alleged expropriation and requests for arbitration occurring in the future, even if they concerned investments made earlier.

As both the alleged expropriation and the Request for Arbitration in this procedure occurred before the entry into force of the Bilateral Treaty, that Treaty cannot establish jurisdiction in this case.

2. Dispute only between Tradex and T.B. Torovitsa?

Regarding a possible jurisdiction based on the 1993 Law, first of all Albania claims that, to the extent that a "dispute" has arisen, it is "patently one" between Tradex and its joint venture partner Torovitsa. No evidence was provided that Albania either directly or indirectly expropriated the investment or played any role in commercial difficulties which led to the liquidation of the joint venture. Insofar as Tradex wanted to raise claims in that context, it should have done so against T.B. Torovitsa. But in any case, according to Albania, the proper forum would have been arbitration under the rules of the International Chamber of Commerce (ICC) to which Art. 16 of the joint venture agreement referred.

Tradex, on the other hand, stresses that it does not allege, in this procedure, a dispute with or an interference by T.B. Torovitsa, but that the Albanian State—not T.B. Torovitsa—proceeded to expropriation and equivalent measures for which compensation is due. This claim could not be brought before ICC arbitration on the basis of Art. 16 of the agreement with T.B. Torovitsa.

The Tribunal agrees with both parties that any claim raised *against T.B. Torovitsa* related to obligations arising from the joint venture agreement would be outside its jurisdiction. But this, and the fact that T.B. Torovitsa is a state-owned company, does not exclude that another kind of claim is raised by Tradex against the Republic of Albania on the basis of Albania's consent to ICSID Arbitration and alleging that Albania itself has taken acts of expropriation against Tradex's investment.

This is the case here where Tradex does not claim that any acts of T.B. Torovitsa should be regarded as acts of expropriation, but claims that

acts or failure to act by the state of Albania itself have to be considered as an expropriation. This is the kind of dispute covered by the consent by Albania to ICSID arbitration in Art. 8 of the 1993 Law and this conclusion is not changed by the fact that the alleged expropriation is claimed by Tradex to have affected its investment in the joint venture.

Therefore, there is a dispute with the Republic of Albania without prejudice obviously as to whether other conditions for jurisdiction are fulfilled and whether the claim is justified on the merits.

3. Tradex no "foreign investor"?

Albania argues that, even if the 1993 Law would be applicable "retroactively"—which will be discussed later in this decision—Tradex is not a "foreign investor" within the meaning of the 1993 Law. On the date of entry into force of the 1993 Law, i.e. January 1, 1994, as the liquidation of the joint venture had been completed on December 16, 1993, according to Albania, Tradex could not be considered to still hold an investment at the time relevant for Albania's consent to ICSID arbitration by the 1993 Law.

Tradex, on the other hand, considers the 1993 Law applicable.

The Tribunal feels it can get sufficient guidance in this matter by the wording of the 1993 Law. Art. 1 (Definitions) of the Law expressly says, in its paragraph 2:

> "Foreign investor" means:
>
> a) ... or
>
> b) ... or
>
> c) any legal person that is incorporated or constituted under the law of a foreign country that ... has made an investment under the laws regarding the period of time from July 31, 1990 and further on."

Tradex fulfills these conditions. It is incorporated in Greece. Its investment was made "under the laws" as confirmed by the official authorization of January 21, 1992 by the Republic of Albania. Finally, its investment was made after July 31, 1990.

The clear and detailed wording under the headings "Definitions" and "Foreign investor" does not give room for further conditions, particularly does it not require that the investment still exists at the time the law comes into force or the dispute arises to qualify Tradex as a "foreign investor"" within the meaning of the 1993 Law.

This conclusion is without prejudice to the question of whether the consent to ICSID arbitration in Art. 8 is applicable which will be dealt with later in this decision.

4. No good faith effort to settle amicably?

Even if the 1993 Law were applicable, Albania claims that, according to Art. 8 of the Law, ICSID arbitration can only be started after failure of a good faith effort to settle the dispute amicable, and that Tradex did not make such an effort.

Tradex claims that Art. 8 does not require such an effort and that, in any case, it made such an effort as shown by the various letters to the Government of Albania copies of which it has submitted in this procedure.

The Tribunal notes that Art. 8 (2), in its first sentence, granting access to "a competent court or administrative tribunal of the Republic of Albania", expressly mentions the condition for the investment dispute:

> "If ... it cannot be settled amicably, ..."

The second sentence of Art. 8 (2), which is relevant here granting access to ICSID arbitration, does not mention amicable settlement again and starts as follows:

> "In addition, if the dispute arises out of or relates to expropriation, ... , then the foreign investor may submit the dispute for resolution and the Republic of Albania hereby consents to the submission therefor, to the International Centre for Settlement of Investment Disputes ... "

Reasons can be put forward, as the Parties did, both for the view that the condition regarding amicable settlement in the first sentence should also apply to the second sentence as well as for the view that the lack of this con-

dition in the second sentence shows it not to be a requirement for the starting of an ICSID procedure. The Tribunal, however, does not need to decide this matter, because, in its view, even assuming that a good faith effort for amicable settlement is also required before an ICSID procedure, it considers that Tradex has shown sufficiently such an effort having been made.

Tradex has submitted copies of five letters in this procedure which are relevant in this context.

The first letter of October 31, 1992 to the Ministry of Agriculture reported "serious problems" on the farm of the joint venture such as destructions, stealings, disobedience and threats by the workers and suggested the transfer of the investment to another farm.

The second letter of December 12, 1992 reported further to the first letter to the same Ministry, and in particular that the community of Mali-Kolej detached 15 hectares of land without notice or any other decision communicated and continued:

> "6. We enclose an itemized memorandum of evaluation of the positive damage, which runs to 195.851$ while the loss of future income is in the order of 717.615 $.
>
> 7. After that we kindly request your interference to both following directions:
>
> a. Help to the normalization of our proceedings.
>
> b. Help to the arrangements of our compensation."

The third letter of December 12, 1992 to the same Ministry gave an evaluation of the equipment, products, and livestock Tradex held in the joint venture, reported that Tradex, from the beginning of December 1992 could not go to the farm due to "obstacles from several persons," raised the risk of further damage, and then contained:

> "... we consider that as necessary, to bring to your notice the problem taking into account the law Nr. 7496/4.8.1992 concerning "Law on Foreign Investments" as it is provided for in the article Nr. 9 which appoints: 'The foreign investment in Albania stand under full protection and guarantee.'

> For all the abovementioned we hope for your sincere support."

Tradex's fourth letter to the Ministry of Agriculture, dated January 21, 1993 referred to the former letters, mentioned that attempts to contact the Ministry otherwise had been unsuccessful and that the situation had reached a "deadlock" and then continued:

> " ... only you could give as soon as possible the right solution. We would not like to put in force the terms of the contract concerning commitments."

The fifth letter was a memorandum dated February 25, 1993 sent to the "Sector of Privatization" at the Ministry of Agriculture, enclosing copies of the first four letters and giving an update and, in particular containing the following wording:

> " ... we feel the need to apply to you through this Memorandum to thinking out a solution."

It suggested "to organize a meeting to find an attainable solution as soon as possible."

The Tribunal notes that all five letters are addressed to the Ministry, that the letters contain references to the 1992 Investment Law, to non-commercial difficulties and interference from "outside" the joint venture, to legal obligations, and to the amounts of possible damages, as well as a suggestion to organize a meeting for finding a solution. The Tribunal further notes that none of the letters was answered or resulted in any relevant action by Albania.

The Tribunal finds these letters to be a sufficient good faith effort to reach an amicable settlement within the meaning of Art. 8 of the 1993 Law without prejudice as to whether the non-action by Albania can be considered to be an expropriation, a question which will be addressed hereafter.

5. No "expropriation"?

Albania further claims that there is no jurisdiction of this Tribunal, because the submission to ICSID arbitration in Art. 8 (2) of the 1993 Law

requires a dispute arising out of or relating to "expropriation", and that the conduct of Albania alleged by Tradex in this case cannot be considered as expropriation. Albania points out that a full examination of the alleged expropriation can only take place in the procedure on the merits of this case, but that in this jurisdictional phase of the procedure Tradex has to provide at least prima facie evidence to show that an expropriation occurred, as required by Art. 8 (2), and that Tradex has failed to do so.

Tradex, on the other hand, claims that the conduct of the Albanian government and particularly the lack of protection requested which led to the liquidation of the joint venture on which it relies, fulfill the requirements of Art. 8 (2) and will be supported by full evidence proving expropriation in the procedure on the merits.

The Tribunal notes that the question of whether the alleged conduct of Albania can be considered an expropriation is on one hand relevant under Art. 8 (2) for the jurisdiction of the Tribunal and is on the other hand the decisive issue relevant under Articles 4 and 5 of the 1993 Law or Articles 9 and 10 of the 1992 Law to decide on the merits of Tradex's claim. At least it cannot be excluded that under certain circumstances it would be considered an expropriation if a state permits the deprivation of land use from a joint venture based on foreign investment or fails to grant protection against interference if a legal duty for protection can be found to exist. But the Tribunal feels a further examination of this matter in the context of establishing jurisdiction according to Art. 8 (2) would be so closely related to the further examination of the merits in this case that this jurisdictional examination should be joined to the merits.

Therefore, the Tribunal decides, as it is authorized by Art. 41 (4) 2nd sentence of the ICSID Arbitration Rules, that this objection should be joined to the merits of the dispute, should the Tribunal find that the other objections to jurisdiction raised in this case cannot be accepted and thus this procedure is continued on the merits.

6. No "retroactive" application of 1993 Law?

Both Parties have argued extensively regarding Albania's objection to jurisdiction to the effect that the 1993 Law could not be applied "retroactively". To avoid repetition, the Tribunal will deal with these arguments within the scope of its own reasoning insofar as its considers them relevant.

First of all the Tribunal sees only a limited relevance of a general discussion of possible retroactive application of national laws and international instruments in the context of this procedure. On one hand already there does not seem to be a common terminology as to what is "retroactive" application, and also the solutions found in substantive and procedural national and international law in this regard seem to make it very difficult, if at all possible, to agree on a common denominator as to where "retroactive" application is permissible and where not. What is at stake here is no more and no less than the question of whether the submission by Albania in Art. 8 of the 1993 Law to ICSID arbitration justifies jurisdiction under Art. 25 of the ICSID Convention in this case, irrespective of whether this should be considered a "retroactive" application. The Tribunal will, therefore, concentrate on the criteria established by Art. 8 and Art. 25. This does not exclude that, in interpreting these criteria, it could be found useful to take into account also provisions found in other Articles of the 1993 Law, in other laws, and in international instruments as well as in decisions of national courts or international tribunals.

This analysis has to be done, insofar as it is relevant, in the context of the specific circumstances of this case. Thus it has to be recalled in particular that:

> Tradex made its investments starting in 1992;
>
> the conduct of Albania alleged to be an expropriation occurred in 1992 and 1993;
>
> the Albanian investment laws in force during that period were those of August 10, 1991 and August 4, 1992;
>
> the liquidation of the joint venture was completed on December 16, 1993;
>
> Tradex's five letters to the Ministry of Agriculture were dated between October 31, 1992 and February 25, 1993;
>
> the 1993 Law entered into force on January 1, 1994; and
>
> the Request for Arbitration was received by ICSID on November 2, 1994.

Starting with Art. 25 of the ICSID Convention, the Tribunal notes that, although consent by written agreement is the usual method of submission

to ICSID jurisdiction, it can now be considered as established and not requiring further reasoning that such consent can also be effected unilaterally by a Contracting State in its national laws the consent becoming effective at the latest if and when the foreign investor files its claim with ICSID making use of the respective national law. Therefore, the 1993 Law together with Tradex's Request for Arbitration must be considered as sufficient consent—if the submission in the 1993 Law is applicable as is examined hereafter.

The conclusion reached by the Tribunal is supported by the similar conclusion reached by another ICSID arbitral tribunal in the case Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, Decisions on jurisdiction dated November 27, 1985 (3 ICSID Reports, at 112 et seq.) and April 14, 1988 (3 ICSID Reports, at 131 et seq.), where the consent of Egypt to ICSID arbitration and, consequently, the jurisdiction of the arbitral tribunal was based on Art. 8 of the Egyptian law n. 43 of 1974. That Tribunal considered that such piece of legislation constituted, on the side of Egypt, the "consent in writing" required by Art. 25 of the Washington Convention. The Tribunal based its conclusion on the interpretation offered in the Report to the Executive Directors, accompanying the Convention, which explains that "a host State might in its investment promotion legislation offer to submit disputes ... to the jurisdiction of the Centre, and the investor might give its consent by accepting the offer in writing (ICSID Docments concerning the Origin and the Formulation of the Convention, Vol. II, P.2, at 1069).

In the present case the formulation of Art. 8 of the Albanian Investment Law of 1993 is surely more clear than the corresponding Art. 8 of the Egyptian law mentioned above. Art.8, par. 2, of the 1993 Albanian Law states unambiguously that "The Republic of Albania hereby consents to the submission thereof to the International Center for Settlement of Investment Disputes".

It is conclusively to be added that this point appears uncontested by the Republic of Albania which challenges the jurisdiction of this Tribunal not on the ground of its lack of acceptance of ICSID jurisdiction through Art. 8 (2) of the 1993 Law, but on the ground of its evaluation of the effect in time of such acceptance, which the Republic of Albania considers restricted to the disputes arisen after the entry into force of the 1993 Law.

Regarding the application of Art. 8 (2) of the 1993 Law, its first two criteria mentioned have already been found above to be fulfilled: There is a "foreign investment dispute ... between a foreign investor and the Republic of Albania". And, assumed that it is a condition, Tradex has made a good faith effort for an amicable settlement. Art. 8 (2), in its second sentence, which contains the submission to ICSID arbitration, requires further that the dispute arises out of or relates to "expropriation ...". This criteria was dealt with above in this decision to the effect that it would be joined to the merits, should jurisdiction be otherwise established.

Regarding the "retroactivity"-issue the first question is *when* the dispute "arose" in this case. If the time of the Request for Arbitration is decisive in this regard, as Tradex's Request was filed in November 1994 after the coming into force of the 1993 Law, jurisdiction would be established. As seen above, for application of the Bilateral Treaty, the Tribunal came to the conclusion that the date of filing the Request for Arbitration was considered to be the relevant date. And it might well be argued that a dispute is only identified sufficiently for an arbitration, once the Request for Arbitration is filed. But the wording and criteria used by the Treaty, i.e. "shall be submitted" to ICSID arbitration, differs considerably from Art. 8 where the criteria is when "the dispute arises". It might perhaps still be argued that the unilateral submission to ICSID arbitration by the 1993 Law only turns into the consent required by Art. 25 of the ICSID Convention by the filing of the Request for Arbitration by the investor who thereby notifies that he wants to use this option, but Art. 8 gives no indication that the time of this consent should be considered to be the date when "the dispute arises".

In its contention that it did make a good faith effort to settle the dispute amicably, Tradex itself pointed out that already its 5 letters of late 1992 and early 1993 raise the claim against Albania. And, as seen above, the Tribunal agrees with this. As a consequence, in interpreting the same Art. 8 (2) regarding both aspects, the dispute must be considered to have "arisen" at that time, because one obviously cannot make an effort to settle amicably a dispute which has not yet arisen.

The term "arise" indicates that the beginning of the dispute is relevant and the term "dispute" is rather general and would usually be understood not to be restricted to a legal procedure. Thus the complaints raised in the five letters by Tradex to the Ministry in 1992 and 1993 would already have to

be considered as the "arising" of the dispute. Furthermore, irrespective of whether a good faith effort for amicable settlement is required also before submission to ICSID under the second sentence of Art. 8 (2), it cannot be disregarded that already the first sentence uses the identical wording "dispute arises" and there it is obviously meant to refer to a time before the start of actual legal proceedings, because otherwise the requirement for an effort to settle amicably would not make sense. Therefore, it must be concluded that the "dispute arises" within the meaning of Art. 8 not at the time of the Request for Arbitration to ICSID, but already when substantive complaints were communicated by Tradex in its letters to the Ministry in 1992 and 1993 before the coming into force of the 1993 Law.

It must therefore now be examined whether such an earlier dispute is covered by the submission to ICSID in Art. 8.

The time element which is subject of the arguments of the Parties on "retroactivity" is first of all related to the wording in Art. 8 (2) 2nd sentence: "In addition, *if* the dispute *arises* out of ... , then the foreign investor may submit ..." (emphasis added). The term "arises" would seem to indicate a time in the present or in the future after the coming into force of the 1993 Law, as the legislator has not chosen wording such as "has arisen". On the other hand, the term "if", by which it is introduced could be understood either as a conditional or a time element, while, had the legislator chosen the term "when" instead, clearly only a time element would have been introduced. In particular, the combination of the terms "arises out of or relates to" speaks in favour of a conditional element. Particularly, as the two criteria are connected by the term "or", this combination indicates that the words "arises out of"—similar and supplemental to "relates to"—are meant to describe a substantive relationship between the dispute on one hand and the alleged "expropriation" etc. on the other hand. It is a combination of terms found frequently in arbitration clauses describing the required relationship between the contract and the dispute to establish jurisdiction of the arbitral tribunal. An illustration is the Model Arbitration Clause recommended by UNCITRAL which starts: "Any dispute, controversy or claim arising out of or relating to this contract, ... shall be settled by arbitration ...". Considering these various arguments together, the Tribunal concludes that the wording speaks in favour of an interpretation as a conditional element and that, based on the mere wording of Art. 8, the dispute must not have arisen after the entry into force of the 1993 Law.

Thus, the evaluation of the wording of Art. 8 leads the Tribunal to the preliminary conclusion that a dispute which started before the coming into force of the 1993 Law can be covered by the submission to ICSID jurisdiction. Now the Tribunal will have to examine whether this preliminary result based on the wording of Art. 8 is affected by further considerations for the interpretation of the 1993 Law. Such an additional examination seems particularly appropriate here as the above evaluation of the wording of Art. 8 is based on its translation into English, which, though it is not challenged by either Party and neither Party has relied on the text in the Albanian language, may not in all nuances be identical with the text in the Albanian language.

An express reference to acts predating the effective date of the 1993 Law is found in Art. 1 (2) c of the 1993 Law by which a "foreign investor" qualifies for application of the Law, if he "has made an investment ... from July 31, 1990 and further on". While, as described above, thereby Tradex clearly qualifies as a "foreign investor", this does not necessarily also require that any dispute arising after July 31, 1990 can also be submitted to ICSID arbitration under Art. 8. For, contrary to terms "or has made" in Art. 1 (2) c, as seen above, Art. 8 (2) twice uses the term "arises" and one might have expected the terms "or has arisen" had the legislator wanted to include earlier disputes there as well. It is important to note, however, that the date mentioned in Art. 1 (2) d, i.e. July 31, 1990 is identical with the date at which the first Albanian Decree on Foreign Investment came into force. Thus it seems to have been the intention of the legislator that all investments made thereafter under the Albanian investment laws of 1990, 1991, and 1992 and governed by such laws should now qualify for the new protection of the 1993 Law after its coming into force. However, as far as disputes regarding such earlier investments are concerned, excluding earlier disputes in Art. 8 would not be in contradiction to the inclusion of earlier investments under Art. 1, because it would be an understandable interpretation that, if a dispute started after the entry into force of the 1993 Law regarding a foreign investment made earlier, this should now fall under ICSID jurisdiction, while disputes starting before such entry into force, for which the preceding investment laws provided other jurisdictions for dispute settlement, should remain in that jurisdiction. It would, therefore, seem to the Tribunal that consideration of Art. 1 of the 1993 Law does not necessitate an interpretation of Art. 8 (2) 2 to the effect that all earlier disputes must also fall under ICSID jurisdiction. But on the other hand, the reference to earlier investments in Art.

1 could more convincingly be interpreted as an argument in favour of a similar application of Art. 8 so that not only the new substantive protection of the 1993 Law, but also the new procedural protection of that law, i.e. ICSID jurisdiction, should now apply. This latter interpretation seems more plausible to the Tribunal, because it would save both the investor and Albania the need to engage two procedures and tribunals possibly regarding the same investment should one dispute start before and another start after the coming into force of the 1993 Law.

Art. 2 (2) of the 1993 Law provides that "foreign investment" shall receive fair and equitable treatment, shall enjoy full protection and security" and Art. 4 provides that foreign investments "shall not be expropriated ...". The continuous use of the term "shall" includes an element of a legal undertaking as well as a time element and it does not seem possible to the Tribunal to interpret it as a retroactive commitment by Albania for conduct in the past before the entry into force of the 1993 Law. However, the difference in the wording in Art. 8 is obvious in that it does not indicate such a time element referring only to future disputes. On the other hand, the prospective application of Art. 2 discussed above is easily reconcilable with the application of Art. 8 to earlier disputes, because it occurs frequently that courts and arbitral tribunals have to apply certain substantive rules of law which were in force during the relevant period though they have been replaced by new rules as from a certain date. Accepting ICSID jurisdiction for the present dispute under Art. 8, therefore, by no means implies that the substantive protection rules of the 1993 Law would be applicable in the consideration of the merits of this case.

Art. 9 (1) of the 1993 Law provides that "Law No. 7594 of August 4, 1992, and any other provisions within laws or decisions of the Government of Albania that conflict with this Act are hereby abrogated". Regarding Tradex's investments, as these were made in 1992, the 1992 Law provided for UNCITRAL arbitration for claims regarding compensation for expropriation. As both, the 1992 Law and the 1993 Law, due to its Art. 1 (2) c, apply to earlier investments before January 1, 1994, a conflict within the meaning of Art. 9 of the 1993 Law could be seen if an expropriation dispute could be submitted both to ICSID and UNCITRAL arbitration, at least if one would not conclude that both options should be open to an investor. If the submission to ICSID arbitration in Art. 8 would only apply to disputes that have arisen after the entry into force of the 1993 Law, there would also be no conflict, because such earlier dis-

putes could only be submitted to UNCITRAL arbitration on the basis of the 1992 Law. But again, it is more plausible to the Tribunal to interpret the legislative intention of Art. 9 to the effect that after the coming into force of the 1993 law the submission of a foreign investment dispute to ICSID arbitration should cover also disputes that started earlier, rather than both the investor and Albania having possibly to engage in two parallel arbitration procedures, under the UNCITRAL Rules and under the ICSID Rules, regarding the same investment.

The interpretation of Art. 8 and Art. 9 of the 1993 Albanian Law adopted by the Tribunal appears confirmed by the developments in the Albanian investment laws of 1990, 1992 and 1993. Clearly, there has been a continuous evolution of such investment laws to assure a constantly better protection of the investments; this explains why an investment made in 1990 does not remain submitted to the rules in force at the moment in which it was made, but is subsequently submitted to the new rules. The succession in time of dispute settlement mechanisms is to be evaluated in such a context of progressive evolution. It is consistent with this evolution that the new dispute settlement mechanisms, which are more advanced and efficient, as the recourse to ICSID provided by Art. 8 of the 1993 Law, can be used also in relation to investments made and for disputes arisen before the entry into force of such law, the only negative condition being that previous procedures to settle the dispute have not yet been operated. This solution is moreover confirmed by Art. 9 of the 1993 Law abrogating all incompatible rules existing in previous legislation.

In regarding its conclusion on this issue of "retroactivity", the Tribunal also gave consideration to further arguments raised by the Parties, as follows:

Tradex has pointed out that, when the substantive law is retroactive, the law of procedural remedies must be retroactive as well, unless otherwise provided. While this may be generally correct, as Tradex itself mentions, a law can provide otherwise. Indeed, the above interpretation of the 1993 Law comes to the conclusion that the limited "retroactivity" provided by Art. 1 (2) speaks in favour of a similar retroactivity of Art. 8.

Tradex has further pointed out that it is a general principle of international and national transitional law in procedural matters that new provisions cover disputes as well regarding earlier acts and that courts are entitled and obliged to apply new procedural law also to events prior to its

coming into force. In that context, Tradex has referred to procedural law and jurisprudence in certain countries such as Germany, to the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, and to bilateral conventions on judicial assistance. The Tribunal does not have to enter into a discussion of these general principles, which might perhaps be of relevance if new procedural rules were enacted regarding ICSID Tribunals. But at stake here is the question of submission to ICSID jurisdiction which must be established before any procedural rules can be applied. While jurisdiction of courts does not depend on submission by the parties, but is decided by law, jurisdiction of an arbitral tribunal exists only if and insofar as the parties have expressed their submission to it. This submission must, therefore, be interpreted and found to exist in every given case, and that examination is exactly what has been done above in the interpretation of Art. 8. A comparable situation in court procedure might be if a party relies on a forum clause in a contract, but that is a comparison not used by Tradex, and the Tribunal sees no reason to go into it as well.

Albania has pointed out that, should the jurisdiction of this Tribunal be accepted regarding alleged expropriations before the coming into force of the 1993 Law, this would mean that either the Tribunal would be called upon to apply the 1992 Law in force at that time, or that the substantive rules of the 1993 Law should also apply retroactively, and that neither conclusion could be correct. The Tribunal agrees that, in principle, the substantive rules of the 1992 Law are related to the submission to UNCITRAL arbitration in that law, and that those of the 1993 Law must be seen in relation to the submission to ICSID arbitration in that law. But still, in view of the specific provisions regarding earlier investments in Art. 1 (2) c and regarding earlier laws in Art. 9, the Tribunal gives more weight to the specific interpretation of Art. 8 (2) which the Tribunal has adopted above.

Albania has further pointed out that it is a well established principle of Albanian law that legislation will not apply retroactively unless expressly provided for (with certain exceptions in penal law not relevant here) and that there is no case in which an Albanian law has been applied retroactively. And Albania has added that this presumption for non-retroactivity in Albanian law is consistent with principles of general international law, supported by international jurisprudence, and by analogy to the protection of investment property rights in human rights law.

Although such a presumption may indeed be found, the Tribunal considers that it need not enter into a detailed examination of the existence and extent of such a presumption. Its examination of the 1993 Law was based on the consideration that ICSID jurisdiction could only be established by an express submission by Albania. Then the Tribunal dealt specifically with the question of whether the express submission to ICSID arbitration in Art. 8 (2) covered the alleged earlier expropriations in this case, irrespective of whether this should be considered a "retroactive" application or not.

Albania has also argued that a submission to arbitration must be presumed to be only meant for future disputes unless otherwise expressed. The Tribunal is not convinced that such a presumption can be established in international arbitration. Submissions to arbitration, both in arbitration between states and in international commercial arbitration, are found in practice both regarding disputes that have already arisen and regarding future disputes. In a number of national legal systems, the traditional approach was even that a valid and binding submission to arbitration could only be expressed, after a dispute had arisen. Without the guidance of such an alleged presumption, therefore, the Tribunal has to interpret the specific submission in Art. 8 (2) relevant here as to whether it applies to the dispute in this case. As seen above, the Tribunal finds that this interpretation confirms ICSID jurisdiction in this case.

Finally, some more general considerations may also be taken into account. In several instances Albania has expressly pointed out to the Tribunal that it confirms its commitment to the full protection of foreign investment in Albania, to the ICSID system, and to its international legal obligations. The 1993 Law, its contents and particularly the changes it introduced compared to the preceding investment laws, is an illustration of this confirmation expressed by Albania. It would, therefore, seem appropriate to at least take into account, though not as a decisive factor by itself but rather as a confirming factor, that in case of doubt the 1993 Law should rather be interpreted in favour of investor protection and in favour of ICSID jurisdiction in particular. Furthermore, a finding that ICSID jurisdiction does not exist in the present case would obviously lead to the question of whether the UNCITRAL Rules jurisdiction of the 1992 Law would then be available to the investor Tradex. In that respect, in response to a specific question raised by counsel for Tradex first in the oral hearing and later in his letter of September 25, 1996, Albania has chosen not to express any

binding answer. Although there is, of course, no legal duty of Albania to express itself in this ICSID procedure as to whether it would accept or also object to jurisdiction of an arbitral tribunal under the UNCITRAL Rules should Tradex commence such a procedure, by choosing not to express itself on this question, Albania leaves the option open that again it would contest jurisdiction in such a procedure. It would seem to the Tribunal that the availability of at least one of these two procedural means is a major aspect of the protection of foreign investors. Interpreting, as done above by the Tribunal, the submission to ICSID jurisdiction in Art. 8 of the 1993 Law to cover also this dispute for which UNCITRAL jurisdiction has not been accepted by Albania, would, therefore, also be consistent with the express statements by Albania in favour of investors' protection and ICSID arbitration and the legislative pattern in its foreign investment laws in favour of investors' protection. Furthermore, it would save not only Tradex, but also Albania, the additional considerable efforts and costs that would be necessary for a new procedure under the UNCITRAL Rules regarding the same dispute. These general considerations, therefore, though not decisive, support the conclusion reached above by the Tribunal on the application of Art. 8 of the 1993 Law.

Regarding this objection to jurisdiction, therefore, at the end of its own considerations and of the examination of further arguments put forward by the Parties, the Tribunal finds, irrespective of whether this should be considered a "retroactive" application or not, that the conditions for submission to ICSID arbitration in Art. 8 (2) of the 1993 Law are fulfilled.

7. Conclusion on Jurisdiction

The Tribunal therefore concludes that its jurisdiction is established on the basis of the 1993 Law, except that the issue is joined to the merits whether or not an "expropriation" has been shown as required by the 1993 Law.

8. Further Procedure

Regarding the following procedure on the merits, the Tribunal feels both parties should first be heard, in particular as to which periods of time they require to file their submissions. Thereafter, a procedural order will be issued.

E. Decision

1. The Tribunal has jurisdiction subject to the following: The issue as to whether or not an "expropriation" has been shown as required by the 1993 Law is joined to the merits of this case.

2. After consultation with both Parties a procedural order will be issued regarding the further procedure.

Fred Fielding
Arbitrator

Andrea Giardina
Arbitrator

Karl-Heinz Böckstiegel
President of the Tribunal