

CASES

International Centre for
Settlement of Investment Disputes

SOUTHERN PACIFIC PROPERTIES
(MIDDLE EAST) LIMITED

V.

ARAB REPUBLIC OF EGYPT
CASE No. ARB/84/3

AWARD ON THE MERITS

<i>President</i>	: Dr. Eduardo JIMENEZ DE ARECHAGA
<i>Members of the Tribunal</i>	: Dr. Mohamed Amin EL MAHDI Robert F. PIETROWSKI, Jr., Esq.
<i>Secretary of the Tribunal</i>	: Mr. Nassib G. ZIADE

In Case No. ARB/84/3,
between Southern Pacific Properties (Middle East) Limited and
Southern Pacific Properties Limited,
represented by
Mr. Peter Munk, as Agent; assisted by: Mr. William Laurence Craig, Mr. Jan Paulsson, Mr. Paul D. Friedland, Mr. Jean-Claude Najjar, Mr. Harvey McGregor, Q.C., Mr. Mohammed Kamel, Mr. Charles Kaplan and Mr. Michael Polkinghorne, as Counsel; and Dr. Aron Broches, as Consultant,

and

The Arab Republic of Egypt,
represented by
Dr. Iskandar Ghattas; assisted by: Mr. Hassan Baghdadi, Professor Fawzy Mansour, Professor Jean-Denis Bredin, Mr. Robert Saint-Esteben, Mr. Ahmed Medhat and Professor Emmanuel Gaillard, as Counsel; and Dr. Rudolf Dolzer, as Consultant,

THE TRIBUNAL,
Composed as above,
Makes the following Award:

I. THE PROCEEDINGS

1. On August 24, 1984, the International Centre for Settlement of Investment Disputes ("the Centre" or "ICSID") received a Request for Arbitration from Southern Pacific Properties (Middle East) Limited ("SPP(ME)" or "the Claimant"), a Hong Kong corporation. The Request stated that SPP(ME) wished to institute arbitration proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the Washington Convention") against the Arab Republic of Egypt ("the ARE" or "the Respondent"), and asked for the following relief:

"SPP(ME) respectfully requests ICSID to establish an arbitral tribunal to:

1. determine that the ARE has undertaken obligations and incurred duties in respect to SPP(ME) both according to the terms of Law No. 43 and according to the Heads of Agreement of September 1974 specifically entered into by a Member of its Government, as well as by a Supplemental Agreement "approved, agreed and ratified" by the same Member of its Government.
2. determine that the ARE violated its obligations thereunder,
3. adopt and incorporate as its own the pertinent findings of fact made by the ICC Arbitral Tribunal concerning SPP(ME)'s performance of its obligations under its agreements, the dismissal of EGOH's counterclaim therein, and the acts bringing about termination of the investment project,
4. determine the liability of the ARE to compensate SPP(ME) for the termination of its investment agreements and to award the full measure of indemnification to SPP(ME) on account of the destruction of its investment, increased by the additional costs, including all direct and indirect costs of the present proceedings, occasioned by ARE's wrongful refusal to honor the ICC award of February 16, 1983, or otherwise compensate SPP(ME), as well as interest at commercial rates."

2. On August 28, 1984, the Secretary-General of ICSID sent an acknowledgement of the Request to SPP(ME) and transmitted a copy of the Request to the Respondent. On the same day, the Secretary-General registered the Request in the Arbitration Register and notified the Parties accordingly.

3. On August 29, 1984, the Secretary-General notified the Parties by telex that:

"... the Arabic text of Article 8 of Law No. 43 of 1974 refers to the settlement of disputes within the framework of the ICSID Convention in the cases where it (i.e., the Convention) applies, and not, as erroneously mentioned in the English translation, where Law No. 90 of 1971 ratifying the Convention applies. I have, thus, registered the request of SPP without prejudice to the question whether said Article eight constitutes consent for the purposes of the ICSID Convention or merely includes a reference to this Convention in the cases where consent for ICSID jurisdiction is issued separately. This matter, if raised, will be for the Arbitral Tribunal to decide."

4. On August 29, 1984, the Centre received from SPP(ME) a proposal that a sole arbitrator be appointed pursuant to Rule 2(1)(a) of the Centre's Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), or, alternatively, that the Parties jointly nominate an individual as President of the Tribunal.

5. In a communication received by the Centre on November 12, 1984, the Respondent stated that it contested the Centre's competence with respect to the present dispute, and that no action undertaken in proceedings concerning SPP(ME)'s request could be deemed a renunciation of the Respondent's jurisdictional objections. The Respondent rejected SPP(ME)'s proposals for the constitution of the Tribunal and proposed as an alternative a Tribunal consisting of three members, with Dr. Eduardo JIMENEZ DE ARECHAGA serving as President of the Tribunal.

6. In accordance with Rule 4 of the Centre's Arbitration Rules, the Parties agreed on November 26, 1984 to extend to December 3, 1984 the period for nominating their respective arbitrators and for agreement on the President of the Tribunal.

7. On November 26, 1984, the Respondent designated Dr. Mohamed Amin EL MAHDI, an Egyptian national, as an arbitrator pursuant to Rule 3 of the Centre's Arbitration Rules. SPP(ME) informed the Centre on November 30, 1984 that it did not object to the nationality of the arbitrator named by the Respondent, as it might have done under Rule 3(1)(a)(i) of the Arbitration Rules, and that it was designating Mr. Robert F. PIETROWSKI, Jr., a U.S. national, as an arbitrator. Further, SPP (ME) informed the Centre that it consented to the Respondent's proposal that Dr. JIMENEZ DE ARECHAGA be

appointed President of the Tribunal. Dr. JIMENEZ DE ARECHAGA accepted his appointment on December 5, 1984 and Mr. PIETROWSKI accepted his appointment on December 7, 1984. On December 18, 1984, the Centre received notice that Dr. EL MAHDI accepted his appointment as an arbitrator, and the Secretary-General informed the Parties that the Tribunal was constituted and that the proceedings were deemed to have begun in accordance with Rule 6(1) of the Arbitration Rules.

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8. On February 8, 1985, the Tribunal conducted a preliminary meeting with the Parties at the Permanent Court of Arbitration in the Hague. The Parties placed on record their agreement to the effect that:

"the Tribunal has been properly constituted in accordance with Section 2 of the ICSID Convention and Chapter 1 of the Arbitration Rules."

In accordance with Rule 20 of the Centre's Arbitration Rules, it was decided that the Arbitration Rules in effect up to September 26, 1984 would apply; that the procedural languages would be English and French; and that the seat of the arbitration would be Washington.

9. The Tribunal decided at the preliminary meeting to suspend the proceedings on the merits pending a decision on the Respondent's jurisdictional objections, and that the proceedings on jurisdiction would consist of written pleadings and oral argument. The Tribunal then fixed a schedule for the filing of the written pleadings on jurisdiction, with the Respondent's observations to be filed by May 8, 1985 and the Claimant's observations to be filed by June 19, 1985.

10. The observations of both Parties were filed within the prescribed time limits. The Respondent in its observations submitted that the Tribunal should

"pour l'ensemble des motifs ci-dessus exposés, se dire incompétent pour connaître des demandes présentées par SPP(ME)."

The observations of the Claimant submitted that the Tribunal should

"reject Respondent's objections to the Centre's jurisdiction over this dispute between SPP(ME) and the Government of Egypt regarding the State's failure to compensate this foreign investor for the losses it suffered as a result of the State's cancellation of the Pyramids Oasis project."

11. On July 8, 1985, the Centre received from the Respondent a further pleading addressing certain arguments made by the Claimant in its observations.

12. Oral argument on the question of jurisdiction was held at the Permanent Court of Arbitration in the Hague on July 10 and 11, 1985. The hearings were recorded in the form of a verbatim transcript in the English and French languages. At the end of the oral proceedings, the Tribunal requested that the Parties submit certain additional materials concerning Egypt's Law No. 43 of 1974 concerning the Investment of Arab and Foreign Funds and the Free Zones.

13. On July 23, 1985, the Parties advised the Centre that Southern Pacific Properties Limited ("SPP"), the parent company of SPP(ME) and also a Hong Kong corporation, had been joined as a claimant in the proceedings subject to the Respondent's reservation of jurisdictional defenses.

14. In response to the request made by the Tribunal at the end of the oral proceedings, SPP and SPP(ME) ("the Claimants") and the Respondent filed supplemental materials concerning Law No. 43 on August 21 and August 27, 1985, respectively.

15. On November 27, 1985, the Tribunal rendered a Decision on Preliminary Objections to Jurisdiction. In this decision, the Tribunal unanimously rejected certain of the Respondent's objections concerning jurisdiction and stayed the proceedings on the Respondent's remaining jurisdictional objections pending final disposition by the French courts of certain concurrent proceedings involving the same dispute. The operative part of the Tribunal's decision provided:

"THE TRIBUNAL UNANIMOUSLY DECIDES:

- A. To reject the objections to its jurisdiction raised by the Respondent alleging that Article 26 of the ICSID Convention, as well as the pursuit by the Claimants of alternative remedies, bar the claim in the present case;
- B. To reject the objection to its jurisdiction raised by the Respondent alleging the withdrawal from the Claimant of the benefits of Law No. 43;
- C. To reject the objection to its jurisdiction raised by the Respondent contending that the provisions of Article 8 of Law No. 43 do not apply to this investment dispute; and
- D. To stay the present proceedings on the Respondent's remaining objections to the Centre's jurisdiction until the proceedings in the French courts have finally resolved the question of whether the Parties agreed to submit their dispute to the jurisdiction of the International Chamber of Commerce."

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16. On January 6, 1987, the French *Cour de Cassation* issued a decision the effect of which was to finally determine that the Respondent had not agreed to submit the present dispute to arbitration under the auspices of the International Chamber of Commerce ("ICC").

17. On January 29, 1987, the Claimants filed a request with the Tribunal asking that the present proceedings be resumed in view of the *Cour de Cassation's* decision of January 6, 1987.

18. On March 24, 1987, at the request of the Respondent, the Tribunal invited the Parties to file further written pleadings and supporting materials.

19. The Respondent filed its *Mémoire*, dated April 30, 1987, and requested further hearings on the remaining jurisdictional issues. The Claimants then filed their "Observations on Respondent's Jurisdictional Memorandum," dated May 20, 1987.

20. The Tribunal met in London on May 25-27, 1987. After reviewing the new materials filed by the Parties, and in consideration of its Decision on Preliminary Objections to Jurisdiction of November 27, 1985 and the decision of the French *Cour de Cassation* of January 6, 1987, the Tribunal unanimously decided to accede to the Respondent's request for further hearings on the question of the Centre's jurisdiction.

21. The final hearings on the question of jurisdiction were held in Paris on September 8, 1987. At the conclusion of the hearings, the Tribunal instructed the Parties to present their final written submissions on the jurisdictional issues, together with an enumeration of the specific arguments relied on to support those submissions, by September 25, 1987.

22. The Claimants' "Final Submission on Jurisdiction" dated September 25, 1987 submitted that the Tribunal should

"determine in favor of Claimants the remaining jurisdictional issue, to rule that the Arab Republic of Egypt ("A.R.E.") has consented to ICSID arbitration in conformity with the requirement of Article 25(1) of the ICSID Convention, and to take jurisdiction over the investment dispute between the parties."

23. The Respondent's *Mémoire en Réplique* dated September 25, 1987 did not contain formal submissions as such, but reiterated certain points made by the Respondent's counsel at the hearing held in Paris on September 8, 1987, and responded to arguments made by counsel for the Claimants at that hearing.

24. The Tribunal conducted its final deliberations on the question of jurisdiction in Washington on December 7-12, 1987. On April 14, 1988, a majority Decision on Preliminary Objections to Jurisdiction was signed. The operative part of the Tribunal's decision provided:

"THE TRIBUNAL DECIDES:

(A) To reject the objection to its jurisdiction raised by the Respondent alleging that Article 8 of Law No. 43 does not suffice to establish Egypt's consent to the Centre's jurisdiction;

(B) To reject the submission of the Claimants that the Tribunal adopt and incorporate as its own the pertinent findings of fact made by the ICC tribunal; and

(C) Consequently, and in accordance with Rules 25 and 41, to instruct the President to fix the time limits for further proceedings on the merits in consultation with the Parties."

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25. On October 5, 1988, the Tribunal fixed December 5, 1988 as the date for the filing of the Claimants' Memorial on the merits. On November 17, 1988, this time limit was extended to January 5, 1989 and on January 4, 1989 it was further extended to February 15, 1989. At the same time, the Tribunal fixed June 25, 1989 as the time limit for the filing of the Respondent's Counter-Memorial. The Centre received the Claimants' Memorial on February 16, 1989.

26. Meanwhile, on November 14, 1988, the Centre received from the Respondent an application for annulment of the Tribunal's Decision on Preliminary Objections to Jurisdiction of April 14, 1988. In a letter dated December 9, 1988, the Acting Secretary-General of ICSID notified the Respondent of his decision not to register the application for annulment on the ground that the Tribunal's decision of April 14, 1988 was not an "award" as that term is used in Article 52 of the Washington Convention and Rule 50 of the Centre's Arbitration Rules.

27. The time limit for filing the Respondent's Counter-Memorial was extended on May 16, 1989 to September 7, 1989, and again on August 31, 1989 to September 15, 1989. The Centre received the Respondent's Counter-Memorial on September 18, 1989.

28. On October 12, 1989, the Tribunal fixed a schedule for the filing of the remainder of the written pleadings, with the Claimants' Reply to be filed by December 5, 1989 and the Respondent's Rejoinder to be filed by February 20, 1990. The Centre received the Claimants' Reply on December 28, 1989 and the Respondent's Counter-Reply on February 22, 1990.

29. On March 14, 1990, the President of the Tribunal held a consultation with representatives of the Parties in order to agree on the date and place

for the final hearings on the merits. It was agreed to hold the final hearings in Paris.

30. On April 16, 1990, the President of the Tribunal issued a procedural order fixing September 3–11, 1990 as the dates for the hearings on the merits in Paris and providing further directions to the Parties including, *inter alia*, directions that they file written summaries of the relief claimed after the hearings. Following agreement by the Parties on certain procedures for the oral proceedings, the Tribunal, on August 23, 1990, issued a procedural order in respect of the conduct of the hearings.

31. The final hearings on the merits were held in Paris during the period September 3–11, 1990. The Tribunal heard testimony by witnesses and experts, as well as oral argument. The witnesses and experts appearing on behalf of the Claimants were: Mr. Ralph M. Grierson, Mr. Gerald Walker, Mr. Norbert Stibrany, Mr. William D. Birchall, Mr. A. Anthony McLellan, Mr. Ronald Blainey and Mr. David H. Gilmour. The witnesses and experts appearing on behalf of the Respondent were Professor Rainer Stadelmann, Mr. Michael Renshall, Ms. Soheir Azab and Professor Abdel Moneim Awadallah. In addition, the Respondent submitted an affidavit by Mr. Atif M. El-Azab.

32. At the close of the hearings, the Tribunal—in response to a request by the Respondent—ruled that the Respondent could submit written comments on the exhibits that had been produced for the first time during the hearings by the Claimants' witnesses and experts. The Tribunal asked that these comments be submitted by October 31, 1990.

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33. On September 21, 1990, the Claimants, pursuant to the Tribunal's procedural order of April 16, 1990, submitted a document entitled "Final Conclusions and Prayer for Relief" which summarized the relief sought by the Claimants as follows:

"The Claim

A. The Claimants claim primarily:

(1) the value of the investment in ETDC computed at \$41,000,000, or such other sum as the Tribunal may award, on the basis of (i) the DCF methodology and/or (ii) the share sales to the Saudi Princes; and

(2) the amount of the loan to ETDC, amounting to \$1,650,000; and

(3) post-cancellation costs for 1978 and 1979, amounting to \$623,000; and

(4) post-cancellation, legal, audit and arbitration costs from 1980 to 1990, amounting to \$5,108,000;

together with interest:

a. on the value of the investment ((1) herein) at 12.6% compounded annually, amounting (on a value of \$41,000,000) to \$125,000,000; and

b. on (3) herein at 12.6% compounded annually, amounting to \$1,874,000; and

c. on the loan to ETDC ((2) herein) at the contractual rate, amounting to \$6,931,000.

B. The Claimants claim secondarily, as an alternative to A above, the value of its investment in ETDC on the basis of its out-of-pocket expenses (items 1-6), on the view that the project would necessarily have realized, at the very least, the amount invested in it, and an additional amount (item 7) to compensate for loss of the chance or opportunity of making a commercial success of the project:

(1) the amount of the loan to ETDC, amounting to \$1,650,000; and

(2) further monies lent at no interest to ETDC, amounting to \$408,000; and

(3) the capital invested, amounting to \$1,310,000; and

(4) development costs pre-cancellation, amounting to \$2,254,000; and

(5) post-cancellation costs for 1978 and 1979, amounting to \$623,000; and

(6) post-cancellation, legal, audit and arbitration costs from 1980 to 1990, amounting to \$5,108,000; and

(7) such additional amount as shall be fixed by the Tribunal to compensate for the loss of the chance or opportunity of making a commercial success of the project;

together with interest:

a. on the loan to ETDC ((1) herein) at the contractual rate, amounting to \$6,931,000; and

b. on (3) herein at 12.6%, compounded annually, amounting to \$4,303,000; and

c. on (4) herein at 12.6%, compounded annually, amounting to \$7,404,000; and

d. on (5) herein at 12.6%, compounded annually, amounting to \$1,874,000.

C. The Claimants claim as a further, subsidiary alternative to A and B above the out-of-pocket expenses represented by items B (1)-(6) above, together with interest as set forth in items B a-d above.

Interest on all items has been calculated to 31 August 1990. The Claimants ask that further interest be added to take the computation to the date of award.

Post-Award Interest

The Claimants claim post-award interest at a commercial rate on the final sums awarded, commencing 30 days after the date of the award and running until the date of payment.

The Object of the Award

Claimants claim that any and all amounts recognized by the Tribunal under claims A, B and C above should be awarded:

(i) to SPP (Middle East) Limited and Southern Pacific Properties Limited, jointly; and

(ii) to the extent that the prayer in part (i) herein is not recognized, then to SPP (Middle East) Limited alone; and

(iii) to the extent that the prayers in parts (i) and (ii) herein are not recognized, then to Southern Pacific Properties Limited alone.

Respondent's Counterclaim

Respondent's counterclaim and the relief sought by it should be denied in all respects."

34. The Respondent filed a summary of the relief claimed on September 25, 1990, requesting that the Tribunal decide the case as follows:

"SOUS la réserve expresse de la question de la compétence juridictionnelle (ID2) (1)(1), la R.A.E. demande au Tribunal arbitral qu'il lui plaise dire et juger:

(1) On désigne ci-après:

- le Mémoire en Réponse de la R.A.E. du 15/9/1989,

Facts: *I F*; Droit: *I D*

- le Mémoire en Réplique du 20/2/1990,

Facts: *II F*; Droit: *II D*

I/ SUR LE DROIT APPLICABLE AU LITIGE

1) Qu'en désignant expressément, notamment dans le Heads of Agreement, avec différentes lois égyptiennes, la loi 43/74, les parties ont choisi le droit égyptien comme loi applicable à leurs litiges, y compris le droit administratif, et ce conformément à l'article 42.1, 1ère phrase de la Convention de Washington (ID, 12 et s.; IID 32 et s.);

2) Que le droit égyptien incorpore différents principes et normes de droit international, et spécialement la Convention de l'UNESCO du 16 novembre 1972 pour la protection du Patrimoine Mondial, culturel et naturel applicable à l'espèce; qu'en revanche sont inapplicables les deux Traités bilatéraux entre l'Egypte et le Royaume Uni invoqués par SPP et SPP (ME) (ID 21 et s.; II, D, 40 et s.)

3) Que, de toute manière, la Convention précitée de l'UNESCO s'impose à l'Egypte en tant qu'obligation internationale.

II/ SUR LES DEMANDES DE SPP (ME) ET SPP

A/ SUR L'IRRECEVABILITE DES DEMANDES

1) Que SPP (ME) ne justifie pas que son Projet ait été régulièrement approuvé par le "Board of directors" de l'Autorité Générale des Investissements (G.I.A.) conformément à l'article 1 de la loi 43/74 et aux articles 33 et suivants du Règlement 91/1975 portant application de cette loi (ID 3 et s.; II D, 16 et s.).

2) Qu'en conséquence, le décret du 4 décembre 1975 du Ministre de l'Economie ne peut pas valoir approbation régulière ni du Projet de SPP (ME), ni de l'incorporation d'E.T.D.C. dans le cadre de la loi 43/75, II D, 28 et s.

3) Que SPP n'a présenté dans ses mémoires écrits aucune demande pour son compte; que les demandes de paiement à son profit présentées verbalement et subsidiairement au cours des audiences des 3/11 septembre 1990, sont irrecevables comme étant tardives et non conformes aux dispositions du Règlement de Procédure d'arbitrage du CIRDI; qu'au surplus, elles n'ont été assorties d'aucune justification.

4) Qu'en tout état de cause, les demandes de SPP et SPP (ME) sont irrecevables et en tout cas mal fondées en raison des faits de corruption que révèlent les comportements de SPP et SPP (ME) notamment quant aux "développement costs" non imputés à E.T.D.C.; que, subsidiairement, il conviendrait d'ordonner une expertise pour vérifier la réalité de ces coûts, et les destinataires réels des paiements intervenus (II, F 117 et s.; II D, 110 et s.).

B/ SUR LE MAL FONDE DES DEMANDES de SPP (ME) et SPP

B.1 Principalement

Que la R.A.E. n'a ni nationalisé ni confisqué les droits de SPP (ME) sur un "Projet" au sens de la loi 43/74, art. 7.

a) Qu'il n'y a pas eu de *nationalisation* à défaut de transfert desdits droits et du Projet au profit de l'Etat ou d'une collectivité publique (I D 36; II D 62).

b) Que la mesure de classement et d'expropriation pour cause d'utilité publique du terrain du Plateau était non seulement licite (ce qui n'est pas contesté) mais même obligatoire en raison de la Convention de l'UNESCO de 1972 précitée (I D 92 et s.; II D 68 et s.)

c) Qu'il n'y a pas eu de "*confiscation*" des droits des demandeurs sur le Projet; qu'en effet, il n'y a pas eu privation de tels droits, le Projet étant seulement modifié dans l'une des ses modalités d'exécution conformément au droit administratif égyptien; que, plus précisément,

1) les droits sur RAS EL HEKMA étaient intacts, ce qui n'est pas discuté (I D 111 et s.; II D 83 et s.);

2) le blocage des comptes de E.T.D.C., puis la nomination d'un administrateur judiciaire constituaient des mesures provisoires et conservatoires (I D 114; II D);

3) Il fut offert notamment lors des négociations de 1979 un terrain de remplacement proche des sites initiaux permettant la réalisation d'un projet analogue à celui qui avait été prévu en particulier dans le Heads of Agreement et le contrat du 12 décembre 1974, offre qui fut refusée sans examen sérieux (pièces F 37, F 43, F 51) (II F 111 et s.; I D 150 et s.; II D 87 et s.).

Que si, par extraordinaire, un doute subsistait, le Tribunal ordonnerait soit un transport sur le site, soit une expertise aux fins de vérifier la possibilité de réalisation d'un projet touristique sur ledit site de remplacement (I D 150).

4) La R.A.E. a également offert, au même moment, un dédommagement monétaire pour compenser les conséquences du changement de site (II D 91 et s.).

5) SPP (ME) n'a pas négocié de bonne foi, tant au regard du site de remplacement qu'elle a refusé d'étudier sérieusement, qu'au regard de la compensation monétaire, alors qu'elle présentait des demandes totalement dépourvues de justification, notamment quant aux "development costs" susmentionnés (I D 116 et s.; II F 117 et s.; II D 90 et s.).

6) Enfin, les droits de SPP (ME) sur le Projet étaient annulables ou résiliables en raison des causes de nullité du Projet et des fautes commises, précisées dans les Mémoires, (I F 169 et s.; I D 124 et s.; II F 101 et s.; II D 100 et s.) et en particulier:

- de l'illégalité du Décret n 475/75 qui ne comprenait pas de carte en annexe et concernait un terrain déjà classé en partie domaine public, par le décret n 136 de 1955 (I F 129 et s.; I D 125 et s.).

- de la dérive immobilière ("Housing") du Projet, contraire aux articles 3 et 4 de la loi 43/74 aux contrats et aux études de faisabilité présentées par SPP (I F 139 et s.; I D 126 et s.; II F 101 et s.; II D 104 et s.).

B.2 Très subsidiairement, sur le préjudice

a) que la compensation doit être la "compensation appropriée", tenant compte des circonstances particulières de l'espèce (I D 76 et s. et 140 et s.; III D 119 et s.).

b) Que parmi ces circonstances particulières figure au premier plan le fait -non contesté- que la R.A.E. ne s'est pas enrichie, et même s'est appauvrie sans autre raison que de protéger le patrimoine culturel mondial et de respecter une obligation internationale.

c) Qu'en tout état de cause, le *lucrum cessans* est exclu, en raison du caractère licite, et même obligatoire, des mesures (I D 73 et s. et 146 et s. ; II D 126 et s.).

d) Que les transactions exploitées comme références ne sauraient être retenues comme critère valable (II D 140 et s.), notamment à raison de leur caractère spéculatif.

e) Que la méthode D.C.F. est inappropriée en raison de l'absence d'avancement suffisant du Projet, de même qu'est impossible toute prise en compte d'une quelconque "profitabilité" surtout pour un Projet aussi peu avancé (I D 156 ; II D 143 et s.).

f) Que l'évaluation des éléments de calcul de la méthode D.C.F. sont contestables comme les experts de la R.A.E. l'ont établi (pièces F 50, D 26, D 27, D 28 ; II D 143).

g) Que les autres chefs de préjudice ne sont pas établis (II D 115 et 143).

Que la R.A.E. n'a pas pu vérifier les nombreux volumes de pièces produits par SPP aux audiences des 3/11 septembre 1990 à l'appui de ses demandes ; que si ces pièces tardives devaient être déclarées recevables, une expertise s'avèrerait indispensable pour les vérifier.

g) Que les intérêts moratoires sont soumis au droit égyptien et sont limités, en matière civile y inclus les contrats administratifs, à 4%, à partir du jugement, le montant total ne pouvant dépasser le capital (I D 159 ; II D 145 et s.).

Qu'en tout cas, le retard antérieur à janvier 1986, dû à la procédure C.C.I. engagée à tort par SPP ne saurait être imputé à la R.A.E.

III. SUR LA DEMANDE RECONVENTIONNELLE DE LA R.A.E.

I D 165 ; II D 155)

Dire et juger que SPP, et subsidiairement SPP (ME) sont responsables à l'égard de la R.A.E. de la non réalisation des Projets, et qu'elles devront payer une somme forfaitaire de 30 millions de USD à titre de réparation du préjudice, incluant les frais de procédure.

Qu'en tout état de cause, SPP et SPP (ME) seront condamnées aux entiers dépens et frais de procédure."

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35. On November 27, 1990, the Tribunal extended the time limit for the submission of the Respondent's comments on the documents submitted by the Claimants' witnesses during the hearings on the merits to December 5, 1990. These comments, together with certain additional documents, were received by the Centre on December 3, 1990.

36. On December 21, 1990, the Claimants responded to certain points made by the Respondent in its submission of December 3, 1990.

37. On February 11 to 13, 1991, the Tribunal met in London and on February 13 it issued a procedural order requesting further information from the Parties as follows:

"1. Whereas, the Claimants have explained that they have incurred certain expenses in connection with what they describe as the planning, developing, financing and management of the project, adding that said expenses have been capitalized as development costs in the accounts of SPP(ME) before and after the measures taken in May 1978 by the Respondent.

2. Whereas, the Claimants have submitted as Exhibit 170 a letter dated 19 January 1981 from Coopers & Lybrand, with a summary of SPP(ME)'s development costs for the years 1975-1979, broken down by categories of expense.

3. Whereas, the above-referenced letter dated 19 January 1981 from Coopers & Lybrand states that the summary of development costs for each year from 1975 to 1979 "agrees in total by year to the audited accounts of SPP (Middle East) Limited, and is in accordance with the information contained in our audit files, which do not, however, provide a detailed analysis for each period shown in the summary." The letter further describes the audit procedures followed, indicating that a detailed analysis of these costs, prepared by employees of the company with reference to the various categories of expense, was provided to Coopers & Lybrand each year and "agreed by us to the expense accounts in the company's nominal ledger, in which all expenditure was recorded in the first instance." The letter adds that "[t]hose items which were material in relation to the total of these costs in each year were verified by us in order to ensure that the expenditure as recorded in the nominal ledger had been recorded correctly and had been authorised properly." This verification was carried out "by agreeing the selected items to the documentation supporting the expenditure, such as invoices and loan agreements and by performing tests on procedures operated by the company to ensure all payments were properly authorised" and by reviewing "minutes of the meetings of the Board of Directors."

4. Whereas, for its part the Respondent has stated in its Annex F-49 that the investigation of these expenses "sheds doubt over the components of

the unjustifiable developing costs which were not charged to ETDC. This investigation requires the appropriate and clear details with their supporting legal documents in relation to the nature and components of these costs." In this connection, the Respondent formally requested that the Tribunal order "une expertise pour vérifier la réalité de ces coûts et les destinataires réels des paiements intervenus."

5. Whereas, the Respondent has submitted as Annex F-72 a report by Peat, Marwick, Mitchell and Co. dated 14 August 1981, which states that "[i]t is not possible . . . to be satisfied that the costs incurred either up to 18 June 1978, or subsequently, relate to the Pyramids Project" and that "we do not understand why [these costs] were not directly recovered from ETDC."

6. Whereas, the Tribunal did not receive sufficiently clear and precise information and figures concerning the development costs, nor the necessary indications as to the nature and supporting documents of the expenditures involved, to be in a position to determine all of the related legal consequences.

For these reasons, the Tribunal decides the following:

a. The Claimants shall submit to the Tribunal and to the Respondent, within one month, a document indicating the nature, date and amount of the above-referenced development costs, including the names of the recipients of payments in excess of U.S. \$20,000 and a confirmation that these sums were legitimately and actually expended for the project and were directly connected with it. The document shall also contain an explanation of why these costs were not charged to or were not directly recovered from ETDC.

b. The Parties, within one month, shall submit to the Tribunal and to each other an itemized list of the legal and accounting fees relating to the present proceedings, indicating their amount, the respective dates and the phase of the proceedings to which those fees and expenses relate.

c. After receipt of the documents referred to in paragraphs a and b above, the Parties shall have one month within which to submit their comments thereon to the Tribunal."

38. On March 15, 1991, the time limit for the Claimants' submission of the information requested by the Tribunal in its procedural order of February 13, 1991 was extended to April 21, 1991. On March 25, 1991, the time limit for the Respondent's submission of the information requested in Paragraph 6(b) of the procedural order was extended to April 21, 1991, and the time limit for its submission of the information requested in Paragraph 6(c) was extended to June 21, 1991.

39. On April 22, 1991, the Centre received the Respondent's response to Paragraph 6(b) of the procedural order and on April 23, 1991 the Centre re-

ceived the Claimants' response to Paragraphs 6(a) and (b). The Centre received the Respondent's comments on the Claimants' response to the procedural order on June 26, 1991.

40. On July 9, 1991, the Claimants filed a response to the Respondent's comments of June 26, 1991, and on September 18, 1991, the Respondent filed a response to the Claimants' response. Although this final exchange of communications had not been requested by the Tribunal, the materials submitted by the Parties were nevertheless considered by the Tribunal.

41. The Tribunal convened its final deliberation on the merits in Paris on February 17, 1992. On February 18, 1992, the Tribunal issued a procedural order declaring the proceedings closed.

II. THE FACTS

42. On September 23, 1974, a contract entitled "Heads of Agreement" was entered into by the Respondent (represented by the Minister of Tourism), the Egyptian General Organization for Tourism and Hotels ("EGOTH") and SPP, a company engaged in the development of tourist and resort facilities. EGOTH was at the time a public sector enterprise under the control of the Minister of Tourism, organized under Egyptian Law No. 60 of 1971.

43. The Heads of Agreement by its terms was entered into in accordance with certain Egyptian laws, including Law No. 43 of 1974 Concerning the Investment of Arab and Foreign Funds and the Free Zones. In the Heads of Agreement, EGOTH and SPP undertook to incorporate an Egyptian joint venture company to develop tourist complexes at the Pyramids area near Cairo and at Ras El Hekma on the Mediterranean coast. These projects were to be developed according to detailed "master plans" which were to be prepared by SPP and approved by EGOTH. The Ministry of Tourism agreed to secure the title to property and the possession of land necessary for the development of the proposed projects. The Ministry and EGOTH undertook to transfer the right of usufruct for such property to the joint venture company as part of the capital investment. They also undertook to assist in obtaining all necessary local approval for the execution of the projects in accordance with the master plans. SPP, for its part, agreed to obtain the necessary financing for the projects and to provide or arrange for all technical expertise required for the design, construction, management and marketing of the projects.

44. The Preamble of the Heads of Agreement, which was expressly made part of the Agreement by Article 1, provided:

"Whereas the Ministry of Tourism approved granting both 2nd and 3rd party [i.e., EGOH and SPP] the right to develop the areas as shown in the attached maps in the Pyramid's area and Ras El Hekma Zone.

This agreement is issued in accordance with laws No. 1 for the year 1973 relating to Hotels, Instalations and Tourism, and law No. 2 for the year 1973 relating to the supervision by the Ministry of Tourism on touristic sites and the development of such areas, and law 43 for the year 1974 relating to Arab and foreign funds invested in the A.R.E. with particular reference to government guarantees long term tax holidays, exemptions from import custom duties, etc."

45. Article 2 of the Heads of Agreement provided:

"Both 2nd and 3rd parties undertake to incorporate promptly an Egyptian joint venture company of which 40 percent would be subscribed by E.G.O.T.H. and 60 percent by S.P.P. (For the Pyramid area) and 30 percent by E.G.O.T.H. and 70 percent by S.P.P. (For Ras El Hekma)."

and Article 4 provided:

"FIRST party will secure the title of property and possession of land and both First and second party undertake to transfer the right of usufruct to the joint company as its part of the capital investment. Both M.T. [i.e., Ministry of Tourism] and E.G.O.T.H. undertake to transfer such right to the joint company immediately upon incorporation, any balance being transferred not later than 90 days thereafter."

46. On December 12, 1974, a contract entitled "Agreement for the Development of Two International Tourist Projects in Egypt" ("the December Agreement") was concluded between EGOH and SPP. The Preamble of the December Agreement referred to the Heads of Agreement, saying that:

"Following execution of the Heads of Agreement dated 23rd September, 1974, . . . and subsequent negotiations between the above parties, the following are agreed"

Article 1 of the December Agreement provided for the formation of a joint venture company—the Egyptian Tourist Development Company ("ETDC")—to develop tourist complexes at the Pyramids and Ras El Hekma sites:

"A joint venture (stock) company with registered shares will be incorporated in Egypt for a duration of fifty years renewable, named the "Egyptian Tourist Development Company" (hereinafter referred to as "ETDC") which shall be responsible for the development and operation of the projects. The nominal capital shall be US\$2,000,000 (two million United States dollars) increasing to US\$10,000,000 (ten million United States dollars) at the end of the fifth year. The capital shall be subscribed 60 (sixty) per cent by SPP and 40 (forty) per cent by EGOH. On the fiftieth anniversary of the incorporation of ETDC, EGOH shall be entitled to an additional share at no cost in the capital of ETDC as will increase the EGOH shareholding to 50 (fifty) per cent of the total capital

of the company. The participation of EGOH in the capital of ETDC shall be represented by the rights of usufruct referred to in Articles 5 and 6 hereinafter. These rights are hereby agreed to be equal to the share of EGOH in the capital of ETDC namely 40 (forty) per cent at the incorporation of ETDC and through its duration and 50 (fifty) per cent beginning at the fiftieth anniversary of its incorporation."

47. SPP agreed in Article 3 of the December Agreement to arrange for the financing of the projects:

"SPP will be responsible for the arranging of US\$20,000,000 (twenty million United States dollars) finance on terms and conditions prevailing on the international market to be invested in the projects in the first four years from the date of approval of the Master Plans as referred to in Article 4 hereinafter, and will ensure over and above that all necessary additional finance required for both projects shall be provided by means of short and long term capital, both in free and local currency."

48. Article 4 provided that the development and management of the projects would be undertaken by ETDC

"within the general limits described in the maps attached to the Heads of Agreement, and in general accord with the Confidential Report, and as detailed in the Master Plans to be prepared. Each Master Plan shall recognise the appropriate regional plan and shall specify the various zones for the different types of development and shall include the location and description as well as the stages and priorities of all tourist facilities For the Pyramids area there will be defined within the Master Plan area, the project site area of not less than 10,000 (ten thousand) feddans (approximately 10,000 acres) to which EGOH will receive title and ETDC the right of usufruct as provided in Articles 5 and 6 hereinafter and within which 5,000 (five thousand) feddans (approximately 5,000 acres) will be developed. The remainder will be parkland and other recreational facilities available for public use within the Master Plan."

49. With respect to the rights of usufruct that were to represent EGOH's capital contribution to the joint venture, Article 5 of the December Agreement stipulated that EGOH would

"use its best efforts to secure all the necessary Government approvals to enable ETDC the immediate possession of the land in both sites, and to ensure the transfer of the rights of usufruct to ETDC for its duration"

and Article 6 provided:

"EGOH will pass irrevocably the right of usufruct to ETDC for its duration immediately EGOH receives title. ETDC shall be free to assign its right of usufruct and to rent, lease, manage, promote or assign any site, construction, recreational, residential or commercial facilities in both local and foreign markets, provided that they are developed and utilized in accordance with approved plans, but excluding the monument areas and those which are designated for public use within the project sites."

50. The December Agreement also provided in Article 17 that SPP would incorporate a holding company to own its shareholding in the joint venture:

"It is understood that SPP will be incorporating a holding company to own its shareholding in ETDC and it is agreed that SPP shall have the right to assign its rights, privileges, duties and obligations under this Agreement to this company in which SPP will have a controlling, but not necessarily majority, interest and in which it controls and directs management, provided the company satisfies EGOTH."

Such an assignment was subsequently made to SPP(ME), a wholly-owned subsidiary of SPP formed in 1974 to undertake the execution of the projects at the Pyramids and Ras El Hekma sites.

51. Article 20 of the December Agreement provided that any dispute relating to that agreement would be submitted to ICC arbitration, and Article 21 stated that the December Agreement had been made in accordance with various laws of the ARE, including Law No. 43 of 1974.

52. On the final page of the December Agreement, following the signatures of the representatives of EGOTH and SPP, there appeared the typewritten statement, "Approved, agreed and ratified by the Minister of Tourism, His Excellency, Mr. Ibrahim Naguib, on the Twelfth day of December 1974." Next to this statement the signature of the Minister and an official stamp were affixed.

53. On the same date that the December Agreement was signed, the representatives of EGOTH and SPP also signed a "statement" which provided:

"It is understood between contracting parties (EGOTH) and (S.P.P.) in concern of the agreement signed on the 12th of December 1974, that obligations which lie on EGOTH are subject to the approval of the competent governmental authorities and that the feasibility study proves the profitability of the projects."

*

54. By a letter dated April 12, 1975, the General Organization for Investment of Arab Capital and Tax-Free Areas ("the GIA") notified SPP that the GIA's Board of Directors, by Decree No. 30/16-75, had approved the application for the establishment of a joint venture between EGOTH and SPP for the development of the tourist areas at the Pyramids and Ras El Hekma sites. The approval provided that the beneficial rights would accrue to the joint venture for a period of 50 years and then would revert to the State. This period was subsequently extended by the GIA to 99 years.

55. On May 22, 1975, the President of Egypt issued Decree No. 475 of 1975 which provided:

"The lands lying on each of the plateau of the pyramids and Ras-El-Hekma and whose features and dimensions are determined on the map and in the attached memorandum are assigned for the touristic utilization and the General Egyptian establishment for Tourism and Hotels itself or through one of its contributing companies will reconstruct and utilize these two areas."

56. On October 19, 1975, EGOTH as sole owner of the sites specified in Presidential Decree No. 475 transferred its right of usufruct for the sites "irrevocably" and "without restriction of any kind" to ETDC for the life of the joint venture.

57. On November 23, 1975, EGOTH and SPP(ME) signed a contract entitled "Preliminary Agreement of Incorporation" which provided for the incorporation of ETDC in conformity with Law No. 1 of 1973 Concerning Tourist Establishments and Law No. 43 of 1974. The incorporation of ETDC was subsequently authorized by Ministerial Decree No. 212 of 1975, issued by the Ministry of Economy and Economic Cooperation on December 4, 1975. This decree stated in its preamble that it was issued in conformity with inter alia "the [GIA] Board of Directors' Resolution No. 50/15/1975 at the session of 20th July, 1975; and the memorandum of the Deputy Chairman of the General Authority for Arab Investment dated 1st December, 1975."

58. By a letter dated April 1, 1976, the Chairman of EGOTH notified the Chairman of ETDC of the "formal approval of the MT [Ministry of Tourism] and EGOTH of the Pyramids Oasis Project as a whole"

59. On October 19, 1976, the Minister of Tourism wrote to the Chairman of ETDC, stating:

"I am writing to confirm my formal approval of the development and construction of your project pursuant to all terms of Law No. 2 of 1973.

This approval entitles you to proceed with your programme without the necessity of further reference to this Ministry."

60. On June 1, 1977, the Ministry of Tourism issued Decree No. 96 of 1977. Article 1 of this decree provided:

"The Ministry of Tourism approves the master planning for the tourist Pyramids Plateau Area, as well as the detailed planning of the first phase regarding the implementation of villages nos 1, 3 and 21 of the project of exploiting the tourist Giza Pyramids Plateau"

61. Construction began at the Pyramids site in July of 1977. Roads were laid, water and sewage trunk mains were installed, excavation for artificial lakes and a golf course was undertaken, and work on the main water reservoir was

nearly completed. Planning was completed for the Pyramids Oasis George V Hotel, as were the designs for a second hotel. In addition, ETDC sold 386 lots on which villas and multi-family accommodations were to be built, for a total of US \$10,211,000.

* *

62. In late 1977, the Pyramids Oasis Project began to encounter political opposition in Egypt and it became the subject of a parliamentary inquiry. Opponents of the project claimed that it posed a threat to undiscovered antiquities.

63. In a decree issued on May 27, 1978, the Ministry of Information and Culture declared the land surrounding the Pyramids to be "public property (Antiquity)." This decree was issued upon the recommendation of the Egyptian Antiquities Authority, which confirmed the presence of antiquities in the western part of the Al Giza Pyramids region.

64. On May 28, 1978, the GIA withdrew its approval of the Pyramids Oasis Project by Resolution No. 1/51-78:

"As a result of the Decree of the Minister of Culture and Information dated 28/5/78, considering the Pyramids Plateau one of the monumental areas, and accordingly the nature of the land had changed to be a public domain owned by the State as public property, it is impossible legally to implement this project on this land.

The Board of Directors of the General Investment Authority decided to drop its former issued agreement No 50/19-75, dated 20th July 1975, concerning the Pyramids Plateau, for the impossibility of executing this project on the Plateau, thus, according to the decree of the Minister of Culture and Information."

65. On June 19, 1978, Presidential Decree No. 267 was issued, cancelling Presidential Decree No. 475, which had declared that the lands on the Pyramids Plateau would be used for "tourist utilization." On July 11, 1978, the Prime Minister issued a decree declaring these same lands *d'utilité publique*.

66. At the request of EGOH, ETDC was put under judicial trusteeship by a judgment of the Giza Court for Urgent Matters rendered on June 19, 1978. The court appointed trustees who were put in charge of the management of the company's assets until a general meeting of the shareholders could take place.

67. On December 7, 1978, SPP and SPP(ME) filed a request for arbitration with the ICC in Paris against the Respondent and EGOH under the arbitration clause in the December Agreement. The Respondent objected to

the jurisdiction of the ICC tribunal. In the *acte de mission*, the Respondent and EGOH stated:

"The FIRST and SECOND DEFENDANTS wish to make it clear that their submission of an ANSWER and COUNTER-CLAIM does not constitute in any way an acceptance of the initiation of this arbitration proceedings. Their refusal of the arbitration proceedings is to remain firm until the Arbitrators render their final decision on the matter of jurisdiction. In case the Arbitrators affirm their jurisdiction over the subject matter at issue, the COUNTER-CLAIM shall be comprised within the said jurisdiction."

68. The ICC tribunal, in an award rendered on February 16, 1983, held *inter alia*:

"1. That the first Defendant, the Arab Republic of Egypt, pay to the First Claimant, Southern Pacific Properties (Middle East), Limited the sum of US\$12,500,000 (twelve million five hundred thousand) together with interest thereof at the rate of 5% per annum from the date in which the request for arbitration was received by the Secretary of the ICC Court of Arbitration (i.e. 1st December 1978) until payment.

2. That the claim by both Claimants against the second Defendant, the Egyptian General Company for Tourism and Hotels, be dismissed.

3. That the counterclaim by the said second Defendant against the Claimants be dismissed."

In dismissing the claim against EGOH, the ICC tribunal added:

"Different considerations might well apply if the Government had not been a party to the December, 1974 Agreement."

69. On March 28, 1983, the Respondent appealed the ICC award to the French *Cour d'Appel*.

70. By a letter dated August 15, 1983, SPP(ME) notified the Minister of Tourism that in its view the ICC award "is binding between the parties and finally dispositive of our dispute." At the same time, SPP(ME) added that:

"recognizing that your Government has taken the position that the ICC award was rendered without a jurisdictional basis, we hereby notify you that we accept and reserve the opportunity of availing ourselves of the uncontested jurisdiction of the International Center for the Settlement of Investment Disputes, under the auspices of the World Bank, which is open to us as a result of Law no 43 of 1974, Article 8 of which provides that investment disputes may be settled by ICSID arbitration."

71. On July 12, 1984, prior to the institution of the present proceedings, the *Cour d'Appel* annulled the ICC award on the ground that the Respondent was not a party to the December Agreement and therefore was not bound by the arbitration clause contained therein.

72. On November 28, 1984, the Claimants referred the decision of the *Cour d'Appel* to the *Cour de Cassation* (*Pourvoi* N° 84/17/274), requesting that the decision be set aside. This request was rejected by the *Cour de Cassation* on January 6, 1987.

III. THE ISSUES REMAINING TO BE DECIDED

73. As recalled in Section I of this Award, the Tribunal disposed of the jurisdictional issues in two decisions, one issued on November 27, 1985 and the other on April 14, 1988. There remain to be decided a number of issues concerning the substantive merits of the case.

The Applicable Law

74. In addressing the remaining issues, it is appropriate to begin with the question of the law that is to be applied to the Parties' dispute. Article 42(1) of the Washington Convention provides that:

"The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

75. The Respondent contends that the Parties have implicitly agreed, in accordance with the first sentence of Article 42(1), to apply Egyptian law. It points out that the Parties' agreement with respect to the choice of law need not be express, and argues that in this case the choice of Egyptian law results from the preamble of the Heads of Agreement, which refers to Egyptian Laws No. 1 and No. 2 of 1973 and Law No. 43 of 1974. Pointing out that Law No. 43 provides that "[m]atters not covered by this Law are subject to the applicable laws and regulations," the Respondent argues that, according to this provision, "aucun autre droit que le droit égyptien n'a été choisi par les parties" and "toute lacune doit être comblée par l'application du droit commun égyptien applicable."

76. According to the Respondent, the second sentence of Article 42(1) is not applicable because it operates only "[i]n the absence of such agreement . . ." Thus, the Respondent argues, the role of international law is a limited one: it cannot be applied directly, but only indirectly through those rules and principles incorporated in Egyptian law such as the provisions of treaties ratified by the ARE and, in particular, the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage.

77. The Claimants, for their part, reject the notion that the Parties should be deemed to have agreed implicitly to the exclusive application of Egyptian law. In the Claimants' view, it is not the first sentence but the second sentence of Article 42(1) which becomes operative, so that the Tribunal should apply the "law of the Contracting State party . . . and such rules of international law as may be applicable." The Claimants acknowledge that their investment in Egypt was governed primarily by Law No. 43 of 1974, but they contend that the provisions of Law No. 43 do not cover every aspect of the dispute and that there is no agreement between the Parties on the rules of law to be applied by the Tribunal. In the absence of agreement, the Claimants argue, the second sentence of Article 42 (1) must apply.

78. In the Tribunal's view, the Parties' disagreement as to the manner in which Article 42 is to be applied has very little, if any, practical significance. Both Parties agree that Law No. 43 is applicable to their dispute. Nor is there any question that the UNESCO Convention is relevant: the Claimants themselves acknowledged during the proceedings before the French *Cour d'Appel* that the Convention obligated the Respondent to abstain from acts or contracts contrary to the Convention, stating:

"que les Etats étaient susceptibles d'engager leur responsabilité internationale envers les autres Etats signataires en persistant dans des actes ou contrats devenus contraires aux règles de la Convention."

79. Moreover, a consultation filed by the Respondent states:

"que si on applique l' Article 42, al. ler., 2ème phrase, le résultat est le même, les mêmes sources du droit régissant les mêmes rapports."

80. Finally, even accepting the Respondent's view that the Parties have implicitly agreed to apply Egyptian law, such an agreement cannot entirely exclude the direct applicability of international law in certain situations. The law of the ARE, like all municipal legal systems, is not complete or exhaustive, and where a lacunae occurs it cannot be said that there is agreement as to the application of a rule of law which, *ex hypothesi*, does not exist. In such case, it must be said that there is "absence of agreement" and, consequently, the second sentence of Article 42(1) would come into play.

*

81. The Respondent has contended that certain acts of Egyptian officials upon which the Claimants rely are, under Egyptian law, legally non-existent or absolutely null and void. Specifically, the Respondent has assailed the validity of Presidential Decree No. 475 of 1975 because, *inter alia*, certain areas covered by the decree overlapped land which had been designated "public utilities

(antiquities)" by an *arrêté* of the Minister of Education issued in 1955. The Respondent argues that the quality of public domain is dominant and gives its character and nature to the whole area. The Respondent contends that because the public domain is inalienable and because the establishment of a usufruct constitutes an act of alienation, it follows that such an act would be absolutely null and void. The Respondent argues further that certain decisions of high-ranking government officials are invalid because they were not taken pursuant to the procedures prescribed by Egyptian law.

82. It is possible that under Egyptian law certain acts of Egyptian officials, including even Presidential Decree No. 475, may be considered legally nonexistent or null and void or susceptible to invalidation. However, these acts were cloaked with the mantle of Governmental authority and communicated as such to foreign investors who relied on them in making their investments.

83. Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities, including the highest executive authority of the Government. These acts, which are now alleged to have been in violation of the Egyptian municipal legal system, created expectations protected by established principles of international law. A determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victim who relied on the acts. If the municipal law does not provide a remedy, the denial of any remedy whatsoever cannot be the final answer.

84. When municipal law contains a lacunae, or international law is violated by the exclusive application of municipal law, the Tribunal is bound in accordance with Article 42 of the Washington Convention to apply directly the relevant principles and rules of international law. As explained by one of the authors of the Washington Convention, such a process

"will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it where that law, or action taken under that law, violates international law." (A. Broches, "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States," *Recueil des Cours*, vol. 136, at p. 342 (1972).)

85. The principle of international law which the Tribunal is bound to apply is that which establishes the international responsibility of States when unauthorized or *ultra vires* acts of officials have been performed by State agents under cover of their official character. If such unauthorized or *ultra vires* acts could not be ascribed to the State, all State responsibility would be rendered illusory. For this reason,

"... the practice of states has conclusively established the international responsibility for unlawful acts of state organs, even if accomplished outside

the limits of their competence and contrary to domestic law." (Sorensen (ed.), *Manual of Public International Law*, New York, 1968, at p. 548.)

The Change of Site

86. The Respondent, in its Counter-Memorial and in the oral proceedings, has dealt extensively with what it describes as a "new fact" to which it attaches great importance, namely, that the project sites shown on the maps attached to the Heads of Agreement and the "Confidential Report" referred to in the December Agreement were for the most part outside and below the Pyramids Plateau and thus were different than the site where the project was finally implemented. The Respondent points out that four sites were delineated on the map that was signed by the Minister of Tourism and SPP and attached to the Heads of Agreement. Two of these sites were completely outside the Pyramids Plateau area; a third site—the second largest—was on the southwestern side of the Plateau and was nearer to the Sixth of October City than to the Plateau center; and the fourth site, which was quite small, was on the edge of the Plateau proper. The Respondent further points out that the Heads of Agreement recited that:

"the Ministry of Tourism approved granting both 2nd and 3rd party the right to develop the areas as shown in the attached maps . . ."

and then provided:

"Each complex will be developed according to a detailed Master Plan prepared and submitted by S.P.P. and approved by E.G.O.T.H. in accordance with and shown in the attached maps."

Consequently, the Respondent contends, the project with respect to which the Claimants seek compensation is not the project that the Respondent agreed to in the Heads of Agreement. According to the Respondent,

"A quick glance at the real map attached as "Annex A" to the "Heads of Agreement", and by reference to which the obligations of the Ministry of Tourism regarding the securing of title to the land and the establishment of a right of usufruct, shows that it contains not one compact site on top of the Pyramids Plateau, the limits of which are clearly delineated on the map itself, but in fact four sites . . . It is clear that the sites indicated in the "Heads of Agreement" concluded with the M.T. [Ministry of Tourism] are quite different, in fact have very little in common, with the single site to which the Claimants climbed with their project on top of the Pyramids Plateau."

87. The Respondent adds that the same pattern of several separate sites, situated for the most part outside of the Plateau area, more or less repeats itself in the map attached to the "Confidential Report" referred to in the December Agreement. In contrast, the Respondent points out, the site shown on the map attached to the "Preliminary Agreement of Incorporation" of ETDC, signed

by EGOH and SPP on November 23, 1975, sits all in one piece on top of the Plateau. The Respondent alleges that from the start the Claimants had been pressing for, and contriving to get, a single site on top of the Plateau, while the Egyptian authorities were adamant that the project should be implemented on several sites surrounding the Plateau.

88. The Respondent argues that this alteration of the agreed location of the project violated the Heads of Agreement and encroached upon an area protected by both Egyptian law and international law. According to the Respondent, the violation of the Heads of Agreement in respect of the sites was part of a larger design to transform the project into a "housing and urban development project" and entailed the violation of other imperative laws of the ARE concerning the protection of antiquities, urban development and the right of foreigners to own land in Egypt.

89. The Claimants, for their part, recognize that the map attached to the Heads of Agreement indicated four sites identified as "General Development Areas," none of which corresponds to the eventual project site (although the eventual site overlapped in small part two of the sites shown on the map). The Claimants assert, however, that the project site ultimately settled upon was agreed to and repeatedly endorsed by the Respondent. They contend that the evidence shows that Egyptian authorities suggested the Plateau site in the first place; that the Parties then proceeded to discuss and define the site together; and that by January of 1975 (at the latest) the Respondent had established—and all Parties had agreed to—the final site and that details of the site were approved in numerous decrees and other official documents. As evidence of these contentions, the Claimants call attention to a report of April 1975 on infrastructure availability at the Pyramids site which was commissioned by SPP and which refers to extensive and recorded consultations concerning the final site with numerous Egyptian Government organizations and contains several maps outlining the Plateau site.

90. The Claimants maintain that the map mentioned in the Heads of Agreement only indicated a number of possible development areas and that the precise location of the project was under discussion both prior to and after the signing of the Heads of Agreement. In this connection, the Claimants point to Article 4 of the December Agreement, which provided:

"ETDC will undertake the development and management of both projects within the general limits described in the maps attached to the Heads of Agreement, and in general accord with the Confidential Report, and as detailed in the Master Plans to be prepared. Each Master Plan shall recognize the appropriate regional plan and shall specify the various zones for different types of development and shall include the location and description as well as the stages and priorities of all tourist facilities.

For the Pyramids area there will be defined within the Master Plan area, the project site area of not less than 10,000 (ten thousand) feddans (approximately 10,000 acres) to which EGOH will receive title and ETDC the right of usufruct as provided in Articles 5 and 6 hereinafter and within which 5,000 (five thousand) feddans (approximately 5,000 acres) will be developed. The remainder will be parkland and other recreational facilities available for public use within the Master Plan."

91. The Claimants point out that the December Agreement was "[a]pproved, agreed and ratified" by the Minister of Tourism, and that knowledge of its contents—and particularly Article 4—must therefore be imputed to the Ministry. Article 4, according to the Claimants, makes clear that none of the parties to the Heads of Agreement—the Ministry of Tourism, EGOH or SPP—considered the project site to have been finally determined by the Heads of Agreement or the maps annexed thereto.

92. In response, the Respondent argues that the words "as detailed in the Master Plan to be prepared" in Article 4 of the December Agreement meant no more than that the master plan was to give the details of the project within the general limits described in the maps attached to the Heads of Agreement and the Confidential Report, and was not intended to derogate from those limits. The Respondent also contends that the change of site occurred without the knowledge of the President of Egypt, who had authorized the project on the basis of the original maps.

93. From the evidence, it is not clear precisely when the decision was made to locate the project on the Pyramids Plateau or whether the decision was taken at the initiative of the Claimants or of the Respondent. Resolution of these questions is not necessary to a decision in this case, however. Several documents in the record demonstrate conclusively that, even if the change of site was initiated by the Claimants, Egyptian authorities at the highest levels knew of and agreed to the final selection of the site on the Pyramids Plateau.

94. The most conclusive of these documents is Presidential Decree No. 475 of May 22, 1975. This decree was preceded by a draft decree submitted by the Minister of Tourism on March 30, 1975, together with a memorandum which referred to "two touristic zones on the Plateau of the Pyramids and at Ras El Hekma." On this basis, Presidential Decree No. 475 provided in Article 1 that:

"The lands lying on each of the plateau of the pyramids and Ras-El-Hekma and whose features and dimensions are determined on the map and in the attached memorandum are assigned for the touristic utilization and the General Egyptian establishment for Tourism and Hotels itself or through

one of its contributing companies will reconstruct and utilize these two areas." (Emphasis added.)

Unfortunately, the map referred to in Presidential Decree No. 475 was not placed in evidence by either Party. Nevertheless, the record establishes unambiguously that, in implementing Decree No. 475, the Egyptian Government—acting through and represented by a number of different agencies—authorized the location of the project site on the Plateau.

95. In its Counter-Reply, the Respondent alleges that certain administrative requirements were not observed with respect to the map referred to in Presidential Decree No. 475:

"the map of the Pyramids site which was said to accompany the Presidential Decree no. 475 for the year 1975 allocating the Pyramids land to EGOH was never published in the official Gazette as the law requires . . . Nor did these maps accompany the demand submitted for the registration of the Republic Decree with the Real Estate Registration Department—as law requires—on which ETDC ultimately bases its legal right of usufruct of the land . . ."

But even if such publication and registration was required by Egyptian law, it was the responsibility of the Respondent and not of the Claimants. Moreover, these alleged defects in the administrative registration of the site do not alter the fact that Presidential Decree No. 475 referred expressly to "[t]he lands lying on . . . the plateau of the pyramids."

96. Nor can the Tribunal overlook the fact that, subsequent to the promulgation of Presidential Decree No. 475, the Egyptian authorities repeatedly approved the location of the project on the Plateau. This approval took various forms. For example, the Minister of Tourism signed the contract of November 23, 1975, between EGOH and SPP(ME), incorporating ETDC. This contract referred to maps annexed to it which located the project on the Plateau. The incorporation of ETDC as provided for in this contract was subsequently authorized by the Ministry of Economy and Economic Cooperation in Decree No. 212 of 1975.

97. In February of 1976, four separate Governmental committees—the EGOH Committee, the Pyramids Plateau Committee, the Egyptian Tourist Development Committee and the Committee for Giza Survey Department—participated in the physical demarcation of the initial 4,000 feddan portion of the 10,000 feddan site on the Plateau.

98. Finally, and most importantly, the final master plan required by the Heads of Agreement—after being submitted to and commented upon by various Governmental agencies—placed the project on the Plateau. This defin-

itive master plan was formally approved by both EGOH and the Ministry of Tourism, the two Governmental parties to the Heads of Agreement.

99. In this connection, it should be noted that, even if the parties to the Heads of Agreement had intended when they signed the Heads of Agreement on September 23, 1974 that the project be located on the sites shown on the annexed map, those parties were certainly free to agree to a different site at some subsequent time; and it is clear that on April 1, 1976, when the Ministry of Tourism approved the master plan, all of the parties to the Heads of Agreement were in agreement that the project would be located on the Pyramids Plateau and not in the areas shown on the map annexed to the Heads of Agreement.

The Nature of the Project

100. The Respondent, in its Counter-Memorial and in the oral proceedings, has argued that in reality the project was not a tourist destination project but rather an urban land and housing development project, and thus was in violation of Article 4 of Law No. 43, which provides:

"Housing projects, constructed for the purpose of investment, may be undertaken only by Arab capital; foreign capital may not undertake housing projects even in participation with Egyptian capital."

The Respondent points out that Article 3(iii) of the same law defines "projects for housing and for urban development" as:

"investment in the division of land into parcels and the construction of new buildings together with the public utilities connected therewith."

The Respondent contends that this is precisely what the Claimants did in implementing the Pyramids Oasis Project: their purpose, as revealed in internal memoranda, was to remedy "the acute shortage of quality accommodation" in Cairo and profit from "the demand for recreational and second home accommodation," providing Cairo with "its first, recreational oriented suburb." The Respondent alleges that the Claimants' prime objective was to sell vacant building lots to Egyptians for Egyptian currency in order to obtain cash for their investment. It was asserted in this respect that the Claimants did not have the right to rent or sell vacant lots.

101. The Respondent further argues that the project was "a real estate operation involving the division of land" and was therefore subject to Law No. 52 of 1940 Concerning the Division of Land for the Purpose of Building. The Respondent points out that Article 1 of Law No. 52 defines "division" as:

"every parcelling of a piece of land to a number of pieces with the purpose of offering them for sale, barter, lease or "hekr" in order to construct

building on them if one of these pieces is not connected with an existing road."

and that Article 9 requires that:

"Approval of the division shall be established by a Decree published in the Official Gazette. The publication of the Decree entails the annexation of public roads, squares, gardens and parks to the State's public property."

Finally, the Respondent points to Article 10 of Law No. 52, which provides:

"Shall be forbidden the sale of the divided land, its lease or its 'tahrir' before the issued of Decree referred to in the previous article and before the deposit in the mortgage office of a certified copy of that decree as well as of the list of conditions referred to in Article 7.

Shall also be forbidden the construction of buildings or the execution of work on the divided land before the issuance of the said Decree."

102. The Respondent contends that the violation of an imperative law such as Law No. 43 of 1974 or Law No. 52 of 1940 renders the violating act null and void and the whole project annulable.

103. The Claimants, on the other hand, maintain that the sale of villa lots by ETDC was an integral part of the tourist destination concept and was fundamental to the proposals that SPP made to the Egyptian Government, since the lot sales were what made the project largely self-financing. The Claimants allege that representatives of the Government were fully advised of the concept and approved it. They also point out that lot sales had been used to finance SPP's project in Fiji, which the Respondent's representatives visited and studied prior to approving the Pyramids Oasis Project. In this connection, the Claimants recall that the Heads of Agreement referred to the plan to develop "interlinked residential and tourist destination complexes" and provided that the joint company "will be free to rent, lease, manage or assign any site . . . in both local and foreign markets . . .", and that the December Agreement provided that "ETDC shall be free to assign its right of usufruct and to rent, lease, manage, promote or assign any site . . . in both local and foreign markets."

104. The Claimants also draw attention to the November 23, 1975 joint venture contract—the "Preliminary Agreement of Incorporation"—between SPP(ME) and EGOTH, which provided that ETDC

"may buy, sell right of usufruct, lease, rent the desert lands in the Pyramids and Ras El-Hekma sites (on the Mediterranean Coast) for touristic purposes."

and Article 7 of the resolution of the Board of EGOTH transferring the right of usufruct to ETDC, which stated:

"ETDC will have full authority and power . . . to transfer sell or lease the right of usufruct of any part of the sites to be developed to a third party without any restriction"

105. With respect to Law No. 52 of 1940, the Claimants allege that the Egyptian Government assured ETDC that this law was not applicable. In support of this allegation, the Claimants have submitted a letter dated February 9, 1977, from the GIA to ETDC's attorney, which stated:

"We would like to inform you that said company is not subject to Law 52/1940, concerning the subdivision of lands to be developed, whereas said subdivisions are out of the boundaries of cities and villages included among the resolution of Minister of Housing, but said subdivisions are governed by Law 2/1973, regarding tourist establishments."

106. In the opinion of the Tribunal, the sale to Cairo residents of villa sites where dwellings for permanent use might subsequently be erected did not detract from or conflict with the "interlinked residential and tourist destination" concept. An integrated tourist complex, which included hotels, apartments and villas as well as recreational facilities, would not lose its tourist nature or become a forbidden housing development simply because Cairo residents might purchase lots for weekend or second home accommodation or even for permanent residence. Indeed, the potential market of buyers described in the master plan approved by the Egyptian authorities included:

"3. The retirement market for foreign and domestic investors.

4. The foreign and domestic residential market including first and second homes (week-end villas, etc.)."

107. The Tribunal also heard uncontroverted testimony that in other resort areas local purchasers are attracted by the potential returns that can be earned from letting their furnished villas to tourists.

108. Moreover, a number of features which further the objective of tourist development differentiated this project from most housing development projects. For example, all purchasers of lots in the Pyramids Oasis Project were obliged to build villas within a limited period in order to contribute to the establishment of tourist facilities. The contract of sale for each lot contained a declaration to the effect

"that the Development covered by the sub-division plan is being developed as an integrated tourist and residential complex and that the covenants, conditions and restrictions herein contained are part of a common plan to benefit each and every lot in the Development."

Among the "covenants, conditions and restrictions" referred to were obligations to build within a prescribed period of time, to refrain from subdivision of the lot or the erection of temporary buildings, to obtain approval of the

seller for any building works, to erect only one private house, to observe the building height prescribed for the particular lot and to refrain from conducting any business or trade on the lot. Some of these restrictions were enacted by decree of the Ministry of Tourism.

109. The evidence also shows that the Ministry of Tourism and other Egyptian authorities such as the GIA not only knew, but agreed, that the financing of the project's infra-structure was to be obtained in large part through the sale of vacant lots. The application to the GIA for the incorporation of ETDC specified that the financing of the project would come from "the sale and rent of the utilisations' right in respect of sites" and that "the profits accruing from the project comes through the utilisation of villa sites." Details of the plan to sell building sites were set forth in three separate reports submitted to the GIA prior to its approval of the project and in the master plan approved by the Minister of Tourism.

110. Various agencies and instrumentalities of the Egyptian Government, including the Giza Committee, the Ministry of Housing and Reconstruction, the Ministry of Tourism, EGOH and the GIA, approved or participated in the project with full knowledge that it would be largely financed by the sale of building sites. There is nothing in the record which indicates that any of these agencies or instrumentalities ever questioned the legality of the lot sales. Unless one assumes that these agencies and instrumentalities knowingly acted in disregard of Egyptian law, it is apparent that none of them considered the lot sales to be illegal or to render the project a "housing" project for purposes of Egyptian law.

111. Finally, the Tribunal notes that two reports prepared by the Respondent's financial experts and placed in evidence by the Respondent appear to acknowledge that the project was in fact a tourist project. The first of these reports, prepared by Peat Marwick McLintock, stated:

"It seems clear that the first stated object of ETDC was to develop international tourism within Egypt. We are not lawyers, but our interpretation as accountants of Article 3 as a whole is that other activities specified were either to facilitate this main aim or were ancillary to it. The stated objectives do not appear to rule out the division and sale of land (see Article 3-6'. . . the sale buying and leasing of property of all kinds within the Arab Republic of Egypt.) provided that any such activity serves the overall objective of tourist development."

The second report, prepared by Hazem Hassan & Co., stated:

"The prime objective of ETDC (as stated in its statutes which was published in the official Gazette in December 4, 1975) was to develop International tourism in both the Pyramids Plateau and Ras El Hekma areas through the establishment of hotels, theatres, restaurants, amusement

parks, touristic residential areas, touristic villages, clubs, cafes and other touristic establishments, using the most modern methods in tourism development."

112. In light of the foregoing, the Tribunal cannot accept the contention that the Pyramids Oasis Project was in reality a housing project, the implementation of which would have violated the various imperative laws of the ARE that have been invoked by the Respondent.

The Financial and Technical Capacity of the Claimants

113. The Respondent contends that SPP misrepresented its financial capacity and its tourism expertise when it proposed the Pyramids Oasis Project to the Egyptian Government and that the Claimants in fact lacked the ability to complete the project. In support of these contentions the Respondent has produced reports by financial experts which conclude, *inter alia*, that during the period 1972-1977 SPP's net assets per share and cover for its interest declined; that SPP had experienced certain financial difficulties with its operations in Fiji and Australia; and that ETDC apparently would have required other forms of finance to facilitate development of the Pyramids Oasis Project, including loan finance and revenues from lot sales.

114. The Claimants, for their part, maintain that SPP's experience and history, and that of its principals, were a matter of public record and were thoroughly investigated by Egyptian authorities prior to approval of the project. They point out that the Respondent even sent representatives to Fiji to study SPP's operation there. They further note that the allegations concerning SPP's financial and technical capacity were raised in February of 1978 in the People's Assembly where they were firmly rebutted by the Government.

115. With respect to the alleged financial difficulties in Fiji and Australia, the Claimants maintain that these were of a transitory character, that the economic crisis precipitated by the oil embargo in November of 1973 had a damaging effect on international tourism worldwide, and that SPP's situation improved subsequently to the point where its South Pacific hotel operation was sold in 1981 to a third party for US \$120,500,000.

116. The Tribunal will first note that the reports of financial experts relied upon by the Respondent do not conclude that the Claimants would have been unable to complete the Pyramids Oasis Project; rather, the reports state that SPP had encountered certain financial difficulties and conclude—consistent with what the Claimants have argued—that financing of the project was dependent on lot sales.

117. More importantly, the evidence shows that SPP had obtained at the required times the funds necessary to finance the Pyramids Oasis Project

according to the agreements that had been concluded and the method of financing that had been envisaged. Under the December Agreement, SPP was to "arrange for" US \$20,000,000 in financing over the first four years and "ensure" that all additional financing for both the Pyramids Oasis and Ras El Hekma Projects (total costs for both projects were estimated to be US \$400,000,000) would be provided by short and long term loans. SPP arranged the US \$20,000,000 of financing through a US \$12,000,000 share issue to Triad Holding Corporation S.A. and sales of SPP(ME) shares to two members of the Saudi Arabian royal family totalling US \$8,750,000.

118. Pursuant to the joint venture agreement of November 23, 1975 between EGOH and SPP(ME), the latter was to make capital contributions to ETDC as follows:

<i>Year</i>	<i>Amount</i>
1	\$510,000
2	\$400,000
3	\$400,000
4	\$400,000
5	\$330,000

The first three payments were made on or before the due date. The project was cancelled before the fourth payment was due.

119. Under the loan agreement of April 15, 1976, SPP(ME) granted ETDC a loan facility of up to US \$15,000,000. At the time the project was cancelled, SPP(ME) had advanced ETDC US \$1,650,000, plus interest, under the loan agreement.

120. The Claimants engaged various consultants to undertake the design and planning of the project. In June of 1977, a contract was awarded for the initial civil works and construction began on the site the following month. This construction involved roads, sewage systems, water reservoir facilities, artificial lakes and a golf course. In addition, the design work for two hotels had been completed. At the time of cancellation, ETDC had spent over US \$9,500,000 on development costs.

121. The evidence shows that the subsequent difficulties encountered by ETDC in obtaining financing for the hotels were due in large part to the failure of the Egyptian authorities to provide certain infrastructure services and to obtain customs clearance for materials and equipment imported for the project. The Heads of Agreement provided that the Ministry of Tourism would

"take appropriate measures to ensure the provision of basic infrastructure by Government to the boundaries of the sites."

The December Agreement provided that EGOH would

"use its best efforts to ensure that basic suitable infrastructure is provided to the boundaries of the respective areas at no cost to SPP or ETDC, such infrastructure to comprise roads, water supply, power supply, telephone facilities and ancillary public utilities, all of which shall be sufficient for the adequate development of each area."

and that EGOH would

"assist in acquiring permits for obtaining materials and supplies necessary for the projects."

During the months preceding the cancellation of the project, SPP(ME) wrote to EGOH and the Ministry of Tourism repeatedly, stating that the failure of the Government to provide infrastructure to the project's boundary and to clear equipment and materials through customs was jeopardizing the further financing of the project.

122. It is also apparent from the evidence that opposition to the project in Egypt and the resulting uncertainties about its future further contributed to the reluctance of foreign investors to participate in joint ventures for the construction and operation of the hotels.

123. As to the Claimants' financial means, the record shows that the Parties understood and accepted that most of the costs to be incurred for the project would be "self-financed," that is, financed with revenues generated by the project itself. Thus, the infrastructure was to be financed by lot sales, as had been done in the Fiji operation. The self-financing aspect of the project was explained by the Minister of Tourism and the Minister of Economy and Economic Cooperation in statements to the People's Assembly, as follows:

"The finance of the project is based originally on the concept of self-financing to every step, considering that the project is enormous and needs a large amount of financing, and can not be based on the principle of owned capital of the project, otherwise it will need an enormous capital which is not possible for any company to provide. For this reason the finance will follow gradually the implemented portions of the project which its revenue will be re-invested to implement the following stages."

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124. It is also evident that the Claimants had substantial experience and expertise in the tourism business prior to becoming involved in the Pyramids Oasis Project. At the hearings held in The Hague on July 10-11, 1985, Mr. Peter Munk, Chairman and Chief Executive Officer of SPP, stated that SPP was founded in 1960 for the purpose of developing tourist resorts; that SPP developed only tourist resorts and facilities; that it was the largest hotel owner in

Australia, Fiji and New Guinea; that it operated in seven countries and employed over 5,000 people; and that its major shareholders included the P&O Steamship Company and Jardine Matheson.

125. Moreover, the Egyptian Government itself confirmed SPP's experience in the tourist resort business before entering into the December Agreement. In a letter published in *Al-Akhbar* on September 4, 1977, the Minister of Tourism stated:

"we like to make clear that the General Egyptian Company entered into the contract with S.P.P. only after enquiring about the said company through our Embassy in London and our consulate in Hong Kong and through the relevant security authorities and banks. The company submitted documentary evidence of its capabilities and competence before the Egyptian Company decided to enter into contract. It is important to say that this company is a holding company and has other subsidiaries. Some of the shareholders are companies with international reputations such as the P. V.[sic] O. and the Hotels Company."

And in a written answer to the People's Assembly, the Minister of Tourism stated that the delegation of Egyptian officials which travelled to Fiji "for the purpose of visiting the project which SPP had erected there and to examine its standards of planning, construction, management, marketing and profits," had "certified that the Company has a high degree of expertise, excellent capabilities and the full ability to perform the project."

126. In light of the foregoing, the Tribunal must reject the contention that the Claimants lacked the requisite expertise and experience to properly implement the Pyramids Oasis Project.

The Allegation of Irregular Contacts and Connections

127. The Respondent's pleadings contain repeated allusions to irregular contacts and business connections on the part of the Claimants. The Respondent also alleges that certain individuals upon leaving Government service were employed by the Claimants. Finally, it is alleged that the Claimants bypassed normal Government channels of communication and went "right to the top." On these grounds, the Respondent requests the Tribunal to declare that:

"les demandes de SPP et SPP(ME) sont irrecevables et en tout cas mal fondées en raison des faits de corruption que révèlent les comportements de SPP et SPP(ME)."

128. Nowhere, however, is there any specific allegation of unlawful conduct on the part of the Claimants which could conceivably vitiate the relevant agreements or excuse non-performance of the Respondent's obligations under those agreements. The Respondent, at the end of its Counter-Reply, in effect admits the lack of concrete evidence in this respect when it states:

"Indeed nothing we have said in our Counter-Memorial or Counter-Reply should be construed as an accusation, or allegation of misconduct regarding any particular Egyptian Official referred [to] . . ."

The particular persons whom the Respondent has exempted from any allegation of misconduct are the very same persons who established the initial contacts with the Claimants, who invited the Claimants to visit Egypt for the first time, and who—as high ranking authorities in the Government—were called upon to make important decisions with respect to the project.

129. When the Pyramids Oasis Project was under consideration in the People's Assembly, the Vice Speaker, Dr. Gamal El Oteify, put a number of questions to the Minister of Tourism concerning "the agreement concluded with the foreign company concerning the tourist exploitation of the Pyramids Plateau and the Ras el Hekma site." Among these was the following:

"Was there any intermediary involved in the conclusion of this agreement?"

The Minister answered in writing as follows:

"The Note presented to the Supreme Committee for Economic and Political Planning in its session dated April 27, 1975, is attached herewith. This certifies that there were no intermediaries in this agreement."

130. The Respondent has questioned the English translation of the Minister's answer, asserting that instead of "This certifies that there were no intermediaries in this agreement," the Arabic original should be translated as "It appears from this that there was no intermediation in (for) this agreement." It is not necessary, however, for the Tribunal to resolve this question of translation. Even if the Respondent's translation is accepted, the answer, emanating from the Minister of Tourism and addressed to the People's Assembly, is sufficient to show that the Egyptian authorities at the time were satisfied that no intermediaries had been involved in the making of the agreement.

131. The record also shows that, before entering into any commitments with the Claimants, the Egyptian authorities made a number of inquiries through their embassies in Australia and Hong Kong and "received many letters from international offices which contain many details about this company." It must be concluded that those references satisfied the authorities, since they continued negotiating with the Claimants.

132. Thus, the allegations concerning irregular contacts and connections are not supported by the evidence in the record and are based on suppositions, guilt by association and what the Respondent describes as "*commencement de preuve*." On such grounds, it is simply not possible to reach the findings of fact and conclusions requested by the Respondent.

The Status of SPP and SPP(ME) Under Law No. 43

133. The Respondent has raised an objection of admissibility against the claims in this case on the ground

"1) Que SPP (ME) ne justifie pas que son Projet ait été régulièrement approuvé par le "Board of Directors" de l'Autorité Générale des Investissements (GIA) conformément à l'article 1 de la loi 43/74 et aux articles 33 et suivants du Règlement 91/1975 portant application de cette loi.

2) Qu'en conséquence, le décret du 4 décembre 1975 du Ministère de l'Economie ne peut pas valoir approbation régulière ni du Projet de SPP (ME), ni de l'incorporation d'ETDC dans le cadre de la loi 43/74."

134. By these submissions the Respondent has raised an objection which in its view goes to the very essence of the case: that SPP(ME) does not have the status of an investor under Law No. 43 because the GIA was never asked to consider SPP(ME) as the entity that would make the investment in the Pyramids Oasis Project, and never agreed to extend or transfer to SPP(ME) the authorization which was granted to the parent company, SPP. The Respondent points out that Decree No. 91 of 1975, which contains the regulations for the establishment of new projects under Law No. 43, requires that information concerning the investor be furnished to the GIA. According to the Respondent, the information provided to the GIA in connection with the Pyramids Oasis Project concerned only SPP, not SPP(ME), and the GIA never authorized or approved the substitution of SPP(ME) for SPP as the investor that was to implement the Pyramids Oasis Project under Law No. 43. For these reasons the Respondent contends that SPP(ME) was not an "approved investor" under Egyptian law and consequently cannot invoke any rights or privileges derived from Law No. 43.

135. The Claimants acknowledge that the transfer of rights from SPP to SPP(ME) was never expressly "authorized" as such in a GIA document. They maintain, however, that the GIA did in fact approve the substitution of SPP(ME) for SPP as the investor who was to implement the Pyramids Oasis Project under Law No. 43. The Claimants point out that Decree No. 212 of 1975, issued by the Ministry of Economy and Economic Cooperation, authorized the incorporation of a joint venture between SPP(ME) and EGOTH "[i]n conformity with . . . [t]he [GIA] Board of Directors' Resolution No. 50/19/1975 at the session of 20th July, 1975; and the memorandum of the Deputy Chairman of the General Authority for Arab Investment dated 1st December 1975."

136. The Claimants also point out that it was SPP(ME) who in fact made the investment and implemented the authorized joint venture under Law No. 43, and that it was SPP(ME) who supplied the capital contributions and loans

in accordance with the foreign investment regulations. The Claimants' emphasize that the Respondent accepted SPP(ME)'s performance and that it was SPP(ME)'s rights under the contract and as a shareholder in ETDC that were directly affected by the cancellation of the project. Finally, the Claimants recall that Article 17 of the December Agreement provided that:

"It is understood that SPP will be incorporating a holding company to own its shareholding in ETDC and it is agreed that SPP shall have the right to assign its rights, privileges, duties and obligations under this Agreement to this company in which SPP will have a controlling, but not necessarily majority, interest and in which it controls and directs management, provided the company satisfies EGOTH."

137. The gist of the Respondent's argument is that, for an investment to be protected by Law No. 43, there must be an express and specific decision of the GIA authorizing the company concerned to make the investment, and SPP(ME) cannot produce such an authorization. The Respondent contends that the silence of the GIA with respect to the transfer of rights from SPP to SPP(ME) cannot be deemed a sufficient authorization since the GIA must make an express decision in each case after examining the financial capacity of the party who is to actually make the investment.

138. To decide this issue, it is necessary to examine Decree No. 212 and the circumstances surrounding its promulgation. This decree authorized the incorporation of ETDC as a joint venture between EGOTH and SPP(ME), and consequently recognized SPP(ME) as the foreign investor in the project.

139. As the Respondent points out, Decree No. 212 was issued by the Ministry of Economy and Economic Cooperation, not by the GIA. However, the GIA played a decisive part in the promulgation of Decree No. 212. As noted above, the recitals in the preamble of this decree include a statement that it was issued "In conformity with . . . the memorandum of the Deputy Chairman of the General Authority for Arab Investment dated 1st December, 1975." The full text of this memorandum was requested by the Tribunal during the final hearings in Paris and was produced by the Respondent on November 27, 1990. It is true, as the Respondent has observed, that the first page of this memorandum refers to the creation of joint venture with SPP, without mentioning SPP(ME). It is also true that the memorandum refers to a GIA approval dated July 20, 1975, which did not include SPP(ME). However, on the second page of the memorandum, the Deputy Chairman of the GIA stated:

"Conformément à la loi n° 43 de 1974, l'acte préliminaire et le statut ont été révisés et approuvés par l'Organisme public de l'investissement.

En date du 29/11/1975 n° 11, les deux associés ont homologué les signatures au bureau d'enregistrement des activités d'investissement créé au siège de l'Organisme, et ont présenté la preuve du dépôt à la Banque

ationale Egyptienne, du quart du capital en numéraires souscrit pour la première phase."

There can be no doubt that the corporate documents which, according to the memorandum, were revised and approved by the GIA were those incorporating ETDC, i.e., the Preliminary Agreement of Incorporation ("*l'acte préliminaire*") between EGOH and SPP(ME), and ETDC's articles of incorporation and by-laws. Thus, the substitution of SPP(ME) for SPP was not only known to, but also approved by, the GIA.

140. This conclusion is confirmed by the express reference to the two joint venture partners ("*les deux associés*") who—according to the memorandum—on November 20, 1975 deposited their authorized signatures at the GIA offices and submitted proof that SPP(ME) had deposited its capital contribution with the National Bank of Egypt.

141. The memorandum also shows that Decree No. 212 was actually drafted at the GIA and then submitted to the Minister of Economy and Economic Cooperation for his signature. It is legitimate to infer from this document that the GIA not only knew of the transfer of rights from SPP to SPP(ME), but also reviewed and approved such transfer, which included the rights resulting from Law No. 43 of 1974.

142. Finally, if anything more were needed to establish the status of SPP(ME) as an "approved investor" under Law No. 43, the statement of the Deputy Chairman of the GIA that the Preliminary Agreement of Incorporation between SPP(ME) and EGOH of November 23, 1975, as well as ETDC's articles of incorporation and by-laws, had been revised and approved by the GIA is, in the Tribunal's view, conclusive.

143. The Respondent argues that the regulations implementing Law No. 43 do not envisage the GIA granting formal approval of an investor by means of a memorandum, and that Decree No. 212, if so interpreted, might be considered null and void. There are, however, no apparent irregularities in this instrument. The memorandum was signed by the Deputy Chairman of the GIA Board because the Minister, who presided over the Board, could not sign a decision addressed to himself. For this reason, the GIA's decision was communicated by the Deputy Chairman of the GIA in the form of a memorandum addressed to the Minister.

144. Thus, the evidence shows that the GIA knew that it was SPP(ME) who was in fact making the investment and performing the investor's other obligations under the relevant agreements, and that the GIA, acting pursuant to Law No. 43, approved the joint venture between SPP(ME) and EGOH that

was formed to implement the project. In these circumstances, SPP(ME) must be deemed an investor entitled to the protections of Law No. 43.

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145. At the hearings, the Claimants took the position that if SPP(ME)'s status as a foreign investor could not be recognized under Egyptian law, then SPP would advance the claim in its own name. This position was based on the fact that the parent company, SPP, joined the present proceedings as a second claimant at the request of the Respondent. It announced its voluntary intervention in the hearings held in The Hague on July 10–11, 1985. This intervention was formally agreed to by the Respondent, whose Counsel subscribed a declaration reading:

"Cette intervention est notée et acceptée par la RAE sous les mêmes réserves quant à l'incompétence du CIRDI que celles invoquées à l'égard de SPP (Middle East) Ltd."

146. In its decision of November 27, 1985, the Tribunal took notice that:

"On July 23, 1985, the Parties advised the Centre that Southern Pacific Properties Limited (hereinafter called "SPP" or "the Claimant"), the parent Company of SPP(ME) and also a Hong Kong Corporation, had been joined as a claimant in the proceedings, subject to Egypt's reservation of jurisdictional defenses."

147. The Respondent's reservation referred only to the preliminary objections then raised by the Respondent concerning the competence of the Centre. These preliminary objections were dismissed by the Tribunal in its decisions of November 27, 1985 and April 24, 1988.

148. The objection now raised is a different one, and thus is not covered by the reservation. It does not concern jurisdiction but refers instead to the admissibility of the request on a ground pertaining to the merits. The Respondent has contested the argument concerning the validity of SPP's claims, observing that:

"Que SPP n'a présenté dans ses mémoires écrits aucune demande pour son compte; que les demandes de paiement à son profit présentées verbalement et subsidiairement au cours des audiences des 3/11 septembre 1990, sont irrecevables comme étant tardives et non conformes aux dispositions du Règlement de Procédure d'Arbitrage du CIRDI; qu'au surplus, elles n'ont été assorties d'aucune justification."

This objection concerns the applicability of Rule 40 of the Centre's Arbitration Rules, which provides in paragraph 2 that:

"An incidental or additional claim shall be presented not later than in the reply . . . unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding."

149. The Tribunal cannot accept the Respondent's contention that a claim by SPP at this point in the proceedings would contravene Rule 40. What is involved here is neither an "incidental" nor an "additional" claim: SPP was voluntarily joined as a claimant in the case at the Respondent's request. As a claimant, SPP must be presumed to be claiming something, and there is nothing in the record which suggests that SPP has ever claimed anything different than what SPP(ME) claims. Rather, SPP(ME) and SPP have claimed jointly against the Respondent ever since SPP was joined in the proceedings.

The UNESCO Convention

150. The Respondent maintains that the entry into force on December 17, 1975 of the UNESCO Convention for the Protection of the World Cultural and Natural Heritage made it obligatory, on the international plane, to cancel the Pyramids Oasis Project. In this context, the Respondent relies primarily on Articles 4 and 5 of the Convention. Article 4 provides:

"Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain."

and Article 5(d) provides:

"To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country: . . . to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage . . ."

151. The Convention established a body called the "World Heritage Committee" to register the property to be protected under the Convention. Article 11 of the Convention provides for such registration as follows:

"Every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list provided for in paragraph 2 of this Article . . ."

152. Professor Kahn, in a consultation submitted by the Respondent, explained the system of the Convention in the following terms:

"La procédure est divisée en deux phases: tout d'abord une phase qui est à l'initiative de l'Etat de situation qui consiste en une demande d'inscription sur la liste du Patrimoine Mondial des Monuments ou des sites qui répondent aux conditions posées par la Convention; puis une phase d'examen et éventuellement d'inscription par le Comité du Patrimoine Mondial. Cette procédure préserve la souveraineté des Etats (initiative) et évite les inscriptions des biens intéressants mais non irremplaçables et non uniques grâce au contrôle international."

153. For their part, the Claimants maintain that the Respondent's expropriatory acts were not based on the UNESCO Convention and that none of the Convention's provisions required termination of the project. They point out that the Respondent ratified the Convention on February 7, 1974 and thus was aware of its terms when it authorized the Pyramids Oasis Project more than a year later. The Claimants add that the Convention entered into force on December 17, 1975 and final approval of the master plan occurred in 1976. The Claimants contend that even if antiquities existed on the Plateau, nothing in the Convention required the cancellation of the project, and that measures short of cancellation could have been taken in conformity with the Convention to protect such antiquities. They argue further that the Respondent did not rely on the Convention when it cancelled the project, and that the Respondent has only invoked the Convention as a *post hoc* rationalization for an act of expropriation which in fact had nothing to do with the Convention. In this connection, the Claimants observe that it was only on February 26, 1979—some nine months after the project was cancelled—that the Respondent nominated "the pyramid fields from Giza to Dahshur" for inclusion in the World Heritage list under Article 11 of the UNESCO Convention.

154. In the Tribunal's view, the UNESCO Convention by itself does not justify the measures taken by the Respondent to cancel the project, nor does it exclude the Claimants' right to compensation. According to the system of the Convention, as acknowledged by the Respondent, "*le classement est finalement le fait des autorités internationales de l'Unesco (Comité)*." Thus, the choice of sites to be protected is not imposed externally, but results instead from the State's own voluntary nomination. Consequently, the date on which the Convention entered into force with respect to the Respondent is not the date on which the Respondent became obligated by the Convention to protect and conserve antiquities on the Pyramids Plateau. It was only in 1979, after the Respondent nominated "the pyramid fields" and the World Heritage Committee accepted that nomination, that the relevant international obligations emanating from the Convention became binding on the Respondent. Consequently, it was only

from the date on which the Respondent's nomination of the "pyramid fields" was accepted for inclusion in the inventory of property to be protected in the UNESCO Convention in 1979 that a hypothetical continuation of the Claimants' activities interfering with antiquities in the area could be considered as unlawful from the international point of view.

The Existence of Antiquities in the Area

155. The Respondent has established to the Tribunal's satisfaction that antiquities exist in the project area. This was confirmed by a number of documents that were placed in evidence by the Respondent. The most conclusive of these is a memorandum prepared by the President of the Egyptian Antiquities Authority in May of 1978 which stated:

"The follow-up by the Egyptian Antiquities Authority to the works which were carried out has resulted in the following:

Firstly The presence of Antiquities was confirmed in the Western side of Al Giza Pyramids region which represents the Eastern part of the construction operations carried out. As a result the Egyptian Antiquity Authority has demanded from both the Ministry of Tourism and the Survey Authority to consider this part Public Property (Antiquity) in accordance of the Antiquities Protection Law N° 215 of the year 1951.

Secondly The scientific evidence mentions the probability of Antiquities present in this important Antiquities region in measuring of what were found in other regions."

This memorandum was submitted to the Ministry of Information and Culture, together with the recommendation that a decree be issued declaring certain lands in the vicinity of the project site to be "public property (Antiquity)." The Ministry issued such a decree—Decree No. 90 of 1978—on May 27, 1978, the day before the Pyramids Oasis Project was cancelled.

156. In any event, it is not disputed that in 1979 the World Heritage Committee accepted the Respondent's nomination of "the pyramid fields" for inclusion in the inventory of property to be protected by the UNESCO Convention. The Respondent determined—as it was entitled to do under the Convention—that the Pyramids Oasis Project was not compatible with its obligations under the Convention to protect and conserve antiquities in the areas registered with the World Heritage Committee. Admittedly, the registration of these areas occurred somewhat belatedly in the context of the present dispute. However, other of the Respondent's acts which were contemporaneous with the cancellation of the project indicate the genuineness of the Respondent's concern for the antiquities at the project site and the legitimacy of the registration of that site under the UNESCO Convention. The most important

of these acts was Decree No. 90 of 1978, discussed above (paragraph 157). This decree, which declared lands on the project site to be "public property (Antiquity)," was issued pursuant to Law No. 215 of 1951 for the Protection of Monuments and Antiquities, which, as explained more fully below (paragraph 161), authorizes expropriation when necessary to protect antiquities.

157. The Tribunal's determination that the Claimants' activities on the Pyramids Plateau would have become internationally unlawful in 1979, but not before that date, has significant consequences in other respects which are discussed below (paragraphs 192–93).

The Lawfulness of the Measures Taken by the Respondent to Cancel the Project

158. Clearly, as a matter of international law, the Respondent was entitled to cancel a tourist development project situated on its own territory for the purpose of protecting antiquities. This prerogative is an unquestionable attribute of sovereignty. The decision to cancel the project constituted a lawful exercise of the right of eminent domain. The right was exercised for a public purpose, namely, the preservation and protection of antiquities in the area. Nor have the Claimants challenged the Respondent's right to cancel the project. Rather, they claim that the cancellation amounted to an expropriation of their investment for which they are entitled to compensation under both Egyptian law and international law.

159. The rules of Egyptian law and international law governing the exercise of the right of eminent domain impose an obligation to indemnify parties whose legitimate rights are affected by such exercise. Article 34 of the Egyptian Constitution provides:

"Private ownership shall be safeguarded and may not be put under sequestration except in the cases specified in the law and with a judicial decision. It may not be expropriated except for a public purpose and against a fair compensation in accordance with the law. The right of inheritance is guaranteed in it."

The obligation to pay fair compensation in the event of expropriation applies equally where antiquities are involved. Thus, Article 11 of Law No. 215 of 1951 for the Protection of Monuments and Antiquities provides:

"In the case of accidental discovery of an Antiquity by an individual or an entity, the competent department has the duty to take the measures necessary for its protection and this as of the date of declaration of the Discovery; within two months thereafter it is incumbent on said department either to remove the Antiquity found on private property (and) (or else) to take the necessary measures of expropriation of the site of the object discovered, or to keep it in situ subject to the requirements of registration pursuant to the present law.

Compensation for expropriated land shall not take into account the value of the Antiquities."

The Legal Nature of the Measures Taken by the Respondent

160. The Respondent argues on various grounds that there was no compensable taking of the Claimants' property. The Respondent contends that the cancellation of the project was not a "nationalization" or "confiscation" prohibited by Law No. 43 of 1974. The Respondent argues further that under Egyptian law expropriation does not apply to contractual and other incorporeal rights, but only to real property rights. Thus, according to the Respondent, while the real property rights of EGOH and ETDC may have been expropriated, those interests of the Claimants that were affected by the cancellation of the Pyramids Oasis Project were not the kind of interest that is susceptible of expropriation under Egyptian law. The Respondent further contends that, while the contractual rights of the Claimants may have been diminished in their value, they were not expropriated. Moreover, the Respondent adds, the Ras El Hekma Project was never cancelled and the Claimants were offered a substitute site for that on the Plateau, close to the Sixth of October City. This substitute site, according to the Respondent, offered views and other features similar to those of the Plateau area. Finally, the Respondent argues that an offer of compensation in the amount of US \$1,500,000 was made in order that the Claimants might pursue alternative projects, and it was only because of SPP(ME)'s arbitrary refusal to pursue such alternatives that the project was ultimately abandoned and no compensation was paid.

161. The Claimants, for their part, contend that the Respondent's arguments ignore economic reality. They maintain that the cancellation of the Pyramids Oasis Project and the publicity engendered thereby created a climate of opinion which made it impossible for the Claimants to raise additional funds in international financial markets and to undertake further investments.

162. The evidence shows that, following cancellation of the project, the Prime Minister stated that the Claimants would be compensated for their losses, but no adequate offer of compensation was ever made. The alleged offer of US \$1,500,000 did not involve a cash payment. Rather, the offer was to credit ETDC with an investment of US \$1,500,000 in a new project in which EGOH would have a majority interest. Of this credit, only 60 percent or US \$900,000 would have accrued to the Claimants. This amount must be compared with the cash losses suffered by the Claimants as a result of the project's termination. Even if one considers only the Claimants' undisputed loans and capital contributions to ETDC—some US \$3,368,000—the offer of a US \$900,000 credit, which was conditioned on the Claimants' willingness to

proceed as a minority shareholder with an entirely new and different project, did not, in Tribunal's view, constitute fair compensation for what was taken.

163. As to the argument that the cancellation of the project did not involve a nationalization or confiscation, it is the Respondent's contention that there was no nationalization because there was no transfer of the Claimants' rights or of the project to the State, and there was no confiscation because there was not a total deprivation of SPP's rights accompanied by an absence of compensation. The Tribunal cannot accept this contention. As the Tribunal observed in its decision of November 27, 1985:

"it is quite clear that expropriation, the legitimacy of which is not being contested, if not accompanied by fair compensation, amounts to a confiscation, which is prohibited by Law No. 43." (para. 69.)

164. Nor can the Tribunal accept the argument that the term "expropriation" applies only to *jus in rem*. The Respondent's cancellation of the project had the effect of taking certain important rights and interests of the Claimants. What was expropriated was not the land nor the right of usufruct, but the rights that SPP(ME), as a shareholder of ETDC, derived from EGOH'S right of usufruct, which had been "irrevocably" transferred to ETDC by the State. Clearly, those rights and interests were of a contractual rather than *in rem* nature. However, there is considerable authority for the proposition that contractual rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefore.

165. Moreover, it has been long been recognized that contractual rights may be indirectly expropriated. In the judgment of the Permanent Court of International Justice concerning *Certain German Interests in Polish Upper Silesia*, the Court ruled that, by taking possession of a factory, Poland had also "expropriated the contractual rights" of the operating company. (*P.C.I.J., Series A, No. 7, 1926, at p. 44.*)

166. Decisions of international claims tribunals have been to the same effect. Thus, in the *Amoco Int'l Finance Corp v Iran* case (15 Iran-US CTR, p. 89), the Iran-US Claims Tribunal said:

"Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction . . ." (para. 108.)

167. And in the *Phillips Petroleum Co Iran v Iran* case (21 Iran-US CTR, p. 79) the Iran-US Claims Tribunal held that expropriation gives rise to liability for compensation

"whether the expropriation is formal or de facto and whether the property is tangible, such as real estate or a factory, or intangible, such as the contractual rights involved in the present Case." (para. 76.)

168. It follows that the duty to compensate in the event of expropriation cannot be evaded by contending that municipal regulations give a narrow meaning to the term "expropriation" or apply the concept only to certain kinds of property.

169. As to the argument that the Ras El Hekma Project was not included in the cancellation, this contention is not realistic. The *affectio societatis*, which is the essential basis of any joint venture, had disappeared in the relations between EGOH and SPP(ME) as a result of the measures taken by the Respondent with respect to the Pyramids Oasis Project. In particular, the withdrawal of EGOH's contribution to the joint venture with respect to the Plateau, the blocking by the Central Bank of ETDC accounts, the placing of ETDC in judicial receivership at the request of EGOH, and the sequestration of ETDC's assets rendered impossible and impracticable the continuation of a joint venture between EGOH and SPP(ME) with respect to Ras El Hekma.

170. In these circumstances, it is no answer to say that the Claimants could have proceeded to develop the Ras El Hekma site or a substitute site in the vicinity of the Sixth of October City. In the first place, the Ras El Hekma Project clearly was affected by the cancellation of the Pyramids Oasis Project. Among the obligations assumed by the Respondent in the Heads of Agreement was the obligation to form (through EGOH) and support the joint venture company that would develop both the Pyramids and Ras El Hekma sites. That joint venture company—ETDC—was in effect dissolved as a result of the Respondent's acts. It therefore could not have developed the Ras El Hekma site, even though the Ras El Hekma Project was never formally cancelled in the sense that the Pyramids Oasis Project was.

171. Moreover, even if ETDC had somehow been resurrected, as a matter of commercial and financial reality it is extremely doubtful that ETDC would have been able to attract the capital necessary for the Ras El Hekma project. The evidence shows that the Parties considered Ras El Hekma to be of secondary importance to the overall development plan. The Pyramids Oasis Project received most of the investment and publicity. ETDC's ability to attract capital for that project was due in large part to the enthusiastic endorsement of the project by the Egyptian Government. When that same Government subsequently cancelled the project—the primary part of the development plan envisioned by the Parties' agreements—it clearly impaired ETDC's ability to go back to the world's capital markets and raise financing for another project in Egypt.

172. Finally, as to the substitute site at the Sixth of October City, the Claimants' witnesses gave convincing testimony that the site was totally unsuitable for tourist development. In any event, it is clear that the Parties' agreements

provided for development of the Pyramids site, not a substitute site. The Claimants made a substantial investment pursuant to those agreements, and the investment was in effect expropriated as a result of the Respondent's cancellation of the Pyramids Oasis Project. Furthermore, the same commercial and financial considerations which suggest that financing could not have been raised for the Ras El Hekma site after the cancellation of the Pyramids Oasis Project apply to development at the Sixth of October City site. While the Claimants may have been under an obligation to mitigate the damages incurred as a result of the cancellation of the Pyramids Oasis Project, such an obligation is not so broad and all encompassing as to require the Claimants to accept an unsuitable alternative site that was never contemplated by the Parties' agreement.

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173. As to any residuary rights with respect to Ras El Hekma in favour of the Claimants as shareholders in ETDC, the Claimants advised the Tribunal in a communication dated July 9, 1991 that

"they seek in these proceedings indemnification for the totality of SPP(ME)'s investment in ETDC which includes its entire shareholding interest in ETDC. Upon the award of such indemnification by the arbitral tribunal, and the actual payment of such award by the ARE, Respondent would be entitled to a release from any further investment claims (including if requested a release or transfer of shareholdings in ETDC). . . ."

For its part, the Respondent, in a communication dated September 20, 1991, commenting on the Claimants' communication of July 9, 1991 stated:

"Très subsidiairement, la RAE rappelle que, si par impossible le Tribunal accueillait en tout ou partie les demandes d'indemnisation des demanderes ou de l'une d'entre elles, il lui plairait constater la renonciation (release) par SPP et/ou SPP (ME), exprimée dans la lettre du 9 juillet 1991, à tous leurs droits découlant des contrats relatifs au projet égyptien, et spécialement aux droits d'actionnaires dans ETDC."

In light of this exchange, the Tribunal has decided that, upon payment of the compensation fixed in this Award, the Respondent shall be released from any further investment claims concerning the Egyptian project as a whole and the Claimants' shareholding in ETDC shall be transferred to the Respondent.

The Mutability of Administrative Contracts

174. The Respondent argues that the Claimants were required to accept the Sixth of October City site as a modification of the contract because the contract under Egyptian law belonged to the special category of contracts known as "administrative contracts." The Respondent adds that it was in the

exercise of the powers concerning "the mutability of administrative contracts in response to the requirements of public service" that it decided to allocate to ETDC the usufruct rights over an area of six thousand feddans of land in and around the Sixth of October City, in compensation for the usufruct rights which had been granted to ETDC on the Pyramids Plateau. The Respondent contends that it was the Claimants' refusal to accept this modification of the contract that made them responsible for the total failure of the project.

175. The Claimants answer to this argument is that the alternative site proposed by the Respondent was entirely unsuitable for a tourist destination project, and that they were therefore justified in refusing to proceed with a project on the alternative site.

176. In the *Aminoil v Kuwait* case, the tribunal referred to the doctrine of administrative contracts "as it was originally developed in French law and subsequently in other legal systems such as those of Egypt and Kuwait." (*Lloyds Arb. Rep.*, 1988, at p. 195.) The French doctrine of administrative law concerning "*la mutabilité des contrats administratifs*" authorizes the public administration to introduce unilateral modifications to an administrative contract or concession or even put an end to it provided that certain conditions are fulfilled. The first such condition is that the modification be made in the public interest and concern what is called in France a "*service public*;" the second condition is that the modification be accompanied by adequate compensation designed to preserve what is described as "*l'équilibre financier du contrat*."

177. The conditions upon which the State may modify or terminate an administrative contract were described by the tribunal in the *Aminoil* case as follows:

"(i) The public authority can require a variation in the extent of the other party's liabilities (services, payments) under the contract. This must not however go so far as to distort (unbalance) the contract; and the State can never modify the financial clauses of the contract—nor, in particular, disturb the general equilibrium of the rights and obligations of the parties that constitute what is sometimes known as the contract's "financial equation". . . .

(ii) The public authority may proceed to a more radical step in regard to the contract, namely to put an end to it when essential necessities concerning the functioning of the state (operation of public services) are involved. . . ." (op.cit., at pp. 195-96.)

178. The change of the project's site from the Pyramids Plateau to the vicinity of the Sixth of October City would have involved much more than a mere variation of the Claimants' obligations under the contract. As already explained, it would have fundamentally changed the Parties' bargain and the underlying financial assumptions. The Respondent's argument that the Claimants

were required to accept an alternative site as a modification of the Parties' contract must therefore be rejected.

The Quantum of Compensation

179. The Tribunal having determined that the cancellation of the project was compensable, there remains the question of the measure of compensation. The Claimants have put forward three alternative claims for compensation. First, they claim the following amounts ("the primary claim") as the value of their investment in ETDC at the time the project was cancelled:

- (1) the value of the investment in ETDC computed at US \$41,000,000, or such other sum as the Tribunal may award, on the basis of (i) the DCF methodology and/or (ii) the share sales to the Saudi Princes; and
- (2) the amount of the loan to ETDC, amounting to US \$1,650,000; and
- (3) post-cancellation costs for 1978 and 1979, amounting to US \$623,000; and
- (4) post-cancellation, legal, audit and arbitration costs from 1980 to 1990, amounting to US \$5,108,000;

together with interest to August 31, 1990

- (a) on the value of the investment ((1) herein) at 12.6 percent compounded annually, amounting (on a value of US \$41,000,000) to US \$125,000,000; and
- (b) on (3) herein at 12.6 percent compounded annually, amounting to US \$1,874,000; and
- (c) on the loan to ETDC ((2) herein) at the contractual rate, amounting to US \$6,931,000,

plus further interest to the date of the Award.

180. Alternatively and subsidiarily, the Claimants submit that they should be awarded the following compensation ("the alternative claim") for the value of their investment in ETDC at the time the project was cancelled:

- (1) the amount of the loans to ETDC, amounting to US \$1,650,000; and
- (2) further monies lent at no interest to ETDC, amounting to US \$408,000; and
- (3) the capital invested, amounting to US \$1,310,000; and
- (4) development costs pre-cancellation, amounting to US \$2,254,000; and
- (5) post-cancellation costs for 1978 and 1979, amounting to US \$623,000; and
- (6) post-cancellation legal, audit and arbitration costs from 1980 to 1990, amounting to US \$5,108,000; and
- (7) such additional amount as shall be fixed by the Tribunal to compensate for the loss of the chance or opportunity of making a commercial success of the project;

together with interest to August 31, 1990

- a. on the loan to ETDC ((1) herein) at the contractual rate, amounting to US \$6,931,000; and
- b. on (3) herein at 12.6 percent, compounded annually, amounting to US \$4,303,000; and
- c. on (4) herein at 12.6 percent, compounded annually, amounting to US \$7,404,000; and
- d. on (5) herein at 12.6 percent, compounded annually, amounting to US \$1,874,000,

plus further interest to the date of the Award.

181. As a further alternative and subsidiary claim, the Claimants claim only their out-of-pocket expenses ("the further subsidiary claim"). This further subsidiary claim is identical to their alternative claim except that it does not request compensation for the loss of the opportunity to make a commercial success of the project.

182. The Claimants have acknowledged that they do not challenge the Respondent's right to cancel the project. In the Reply they state that:

"SPP(ME) from the outset sought not to challenge the ARE's acts as wrongful or void, but sought compensation rather than physical restoration of its rights"

While the Claimants maintain that they are entitled to compensation for the "repudiation and taking" of their contract rights, they do not claim damages for breach of contract. Rather, they characterize their claim as follows:

"the claim here by SPP(ME) is not against the ARE for damages for breach of contract. It is for compensation on account of the losses occasioned to it by the ARE's exercise of its sovereign powers, which destroyed its property rights (including its contract rights)."

183. Thus, the Claimants are seeking "compensation" for a lawful expropriation, and not "reparation" for an injury caused by an illegal act such as a breach of contract. The cardinal point to be borne in mind, then, in determining the appropriate compensation is that, while the contracts could no longer be performed, the Claimants are entitled to receive fair compensation for what was expropriated rather than damages for breach of contract.

(i) *The DCF Approach*

184. The Claimants contend that the measure of compensation for the taking of an ongoing enterprise should be equal to the value of the enterprise at the time of taking, and that such value depends on the revenues that the enterprise would have generated had the taking not occurred. In quantifying this value, the Claimants rely primarily on the so-called "discounted cash flow" ("DCF") method. This method is intended to determine the present value of the future earnings expected to be generated by an investment. In applying the

DCF method, the Claimants have first estimated the net revenues that would have been earned over the initial eighteen-year period of development, and then discounted that revenue flow to a present value, which, according to the Claimants, represents the value of SPP(ME)'s rights as of May 28, 1978—the date when the project was cancelled.

185. To project revenues into the future, the Claimants use the actual lot sales made during the project's lifetime. On this basis, they estimate that the project would have generated total net profits after tax of US \$312,200,000 over the first eighteen years. Using a 20 percent discount rate, the Claimants then discount the net profits figure to a present value of US \$80,100,000, which, the Claimants say, is the present value of the projected total net profits after tax for the first eighteen years of the project. This figure is then adjusted downward to US \$68,500,000 to reflect ETDC's other recorded assets and liabilities. Since SPP(ME)'s share of ETDC was 60 percent, the Claimants claim 60 percent of US \$68,500,000 or US \$41,000,000 as the value of SPP(ME)'s equity in ETDC at the time that the project was terminated.

186. The Respondent contests the applicability of the DCF method on the grounds that it leads to speculative results and takes no account of the real value of the expropriated assets. In particular, the Respondent contends that in the present case the project was not sufficiently developed to yield the data necessary for a meaningful DCF analysis.

187. The Respondent has also submitted an expert opinion to the effect that the DCF method of valuation is unsuitable in this case because of the inherent uncertainties of the project and the fragility of a calculation which depends on forecasting cash flows almost twenty years into the future on the basis of revenues generated over a period of little more than a year. The Respondent has also cited the earlier ICC award in this case, where the tribunal refused to apply the DCF method on the ground that when the project was cancelled "the great majority of the work had still to be done." Finally, the Respondent argues that the DCF method would lead to unjust enrichment of the Claimants.

188. In the Tribunal's view, the DCF method is not appropriate for determining the fair compensation in this case because the project was not in existence for a sufficient period of time to generate the data necessary for a meaningful DCF calculation. At the time the project was cancelled, only 386 lots—or about 6 percent of the total—had been sold. All of the other lot sales underlying the revenue projections in the Claimants' DCF calculations are hypothetical. The project was in its infancy and there is very little history on which to base projected revenues.

189. In these circumstances, the application of the DCF method would, in the Tribunal's view, result in awarding "possible but contingent and undeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account." (*Chorzow Factory case, Series A, No. 17, 1928, at p. 51*). As the tribunal in the *Amoco* case observed:

"One of the best settled rules of the law on international responsibility of States is that no reparation for speculative or uncertain damage can be awarded." (op. cit., para. 238.)

190. Quite apart from the inadequacy of the underlying data, there is a second reason why the Claimants' DCF approach must be rejected in the present case: the Claimants' DCF approach would in effect award *lucrum cessans* through the year 1995 on the assumption that lot sales would have continued through that year. Yet lot sales in the areas registered with the World Heritage Committee under the UNESCO Convention would have been illegal under both international law and Egyptian law after 1979, when the registration was made. Obviously, the allowance of *lucrum cessans* may only involve those profits which are legitimate. As A. de Laubadère has stated:

"le *lucrum cessans* correspond au "*bénéfice légitime*" que le co-contractant pouvait normalement escompter." (Traité des Contrats Administratifs, T.II, Paris, 1984, at pp. 556 and 1327.) (Emphasis added.)

191. Thus, even if the Tribunal were disposed to accept the validity of the Claimants' DCF calculations, it could only award *lucrum cessans* until 1979, when the obligations resulting from the UNESCO Convention with respect to the Pyramids Plateau became binding on the Respondent. From that date forward, the Claimants' activities on the Pyramids Plateau would have been in conflict with the Convention and therefore in violation of international law, and any profits that might have resulted from such activities are consequently non-compensable.

(ii) *The Share transactions*

192. To confirm the value indicated by their DCF calculations, the Claimants rely on certain transactions in SPP(ME) shares. These transactions include: (1) the sale in 1976 of 12,500 shares (25 percent of SPP(ME)) to two members of the Saudi Arabian royal family at US \$700 a share; (2) an offer by a third member of the Saudi Arabian royal family to purchase 7,500 shares at US \$850 a share; and (3) the repurchase by SPP(ME) of certain of its shares at prices ranging from US \$598 per share to US \$630 per share.

193. With respect to the sales at US \$700 per share, the Claimants' expert pointed out that if one extrapolates the US \$700 per share value over the entire 50,000 outstanding shares, the overall value for SPP(ME) at the time of the share transactions was US \$35,000,000. The audited financial statements for

SPP(ME) at the relevant time showed that, apart from SPP(ME)'s 60 percent share of ETDC, its other assets and liabilities had a net value of a negative US \$3,100,000. If the overall value of SPP(ME) was US \$35,000,000 (as indicated by the purchase of 25 percent of SPP(ME)), it follows that SPP(ME)'s 60 percent interest in ETDC had an imputed value of US \$38,100,000. The Claimants' expert conducted similar analyses on the basis of the US \$850 per share offer and the repurchase of shares by SPP(ME). These analyses indicated values for SPP(ME)'s 60 percent share of ETDC ranging from US \$33,000,000 to US \$42,500,000.

194. The Claimants argue that these imputed values are, if anything, conservative because (1) the transactions occurred in 1976 when the project was not nearly as far along as it was in 1978 when it was cancelled; (2) the transactions involved minority shareholdings; and (3) certain of the transactions involved non-voting shares.

195. The Claimants' expert testified that the two purchasers of the SPP(ME) shares had undertaken substantial "due diligence" inquiries before making their investments and that they were advised by lawyers and economic consultants.

196. The Respondent's expert, on the other hand, testified that in his opinion the share transactions were not a valid means of estimating the value of SPP(ME)'s share in ETDC because

"The situation was that we had a major project which in 1976 was in the planning stage . . . and it seems to me that we are looking at what should properly be called venture capital. The princes were invited to put up venture capital, that is high risk capital, and to suggest that because they put up that high risk capital that represents the objective value of the enterprise at the date seems to me an exaggeration. I do not think it probable that willing purchasers at that price could have been found in those circumstances."

197. In the Tribunal's view, the purchase and sale of an asset between a willing buyer and a willing seller should, in principle, be the best indication of the value of the asset. This is certainly true in the case of a perfectly competitive market having many buyers and sellers in which there are no external controls or internal monopolistic arrangements. In the present case, however, there was a very limited number of transactions and there was no market as such for the shares that were sold. The price at which the shares were sold was privately negotiated. In these circumstances, the Tribunal does not believe that the share transactions can be used to accurately measure the value of SPP(ME)'s investment in ETDC.

(iii) *The Fair Measure of Compensation*

198. The Tribunal will turn now to the Claimant's alternative claim for compensation, which is essentially a claim for "out-of-pocket" expenses plus an amount to compensate the Claimants for what they have called "the loss of the opportunity to make a commercial success of the project." There is no question that considerable amounts of time and money were spent on negotiating, planning and implementing the project. SPP(ME) made capital contributions and loans to ETDC, the amounts of which are not disputed by the Respondent. In the Tribunal's opinion, these amounts must be reimbursed as part of the fair compensation to which the Claimants are entitled. In addition, the evidence shows that, when the project was cancelled, construction was under way and considerable marketing activity had been carried out. Most of the detailed engineering design and specifications for the first phase of the infrastructure and golf course had been completed. A construction contract had been concluded for the infrastructure, construction had begun and lot sales had commenced. To the extent that the expenses associated with this activity have been proven, the Tribunal is of the view that reimbursement of such expenses is also part of the fair compensation to which the Claimants are entitled.

199. *The Capital Contributions and Loans.* From the record it is evident that there is no dispute as to the amounts of the capital contributions and loans made by SPP(ME) to ETDC: the capital contributions, made in three installments, totalled US \$1,310,000; and the loans consisted of a US \$1,650,000 loan with interest at commercial rates and further loans bearing no interest of US \$408,000.

200. *Development Costs.* The Claimants submit that they are entitled to be reimbursed for pre-cancellation development costs of US \$2,254,000 and post-cancellation costs of US \$623,000. These costs are disputed by the Respondent. After the final hearings in Paris, the Tribunal, at its meeting in London in February of 1991, reviewed the evidence relating to development costs. It determined that the evidence should be supplemented, and accordingly on February 13th, 1991 it issued a procedural order which directed *inter alia* that the Claimants produce

"a document indicating the nature, date and amount of the above-referenced development costs, including the names of the recipients of payments in excess of US \$20,000 and a confirmation that these sums were legitimately and actually expended for the project and were directly connected with it. The document shall also contain an explanation of why these costs were not charged to or were not directly recovered from ETDC."

The procedural order also asked for the Respondent's comments on the information to be submitted by the Claimants. The Parties responded as described in paragraphs 39-40 above.

201. It cannot be disputed that development costs were incurred by the Claimants. Indeed, the expert report received from the Respondent on June 26, 1991 stated with respect to the development costs reported by the Claimants' auditors that "it is reasonable to accept that the costs were actually incurred."

202. The question that arises from the information submitted by the Parties in response to the procedural order of February 13, 1991 concerns the extent to which the development costs that were allocated to SPP(ME) and not reimbursed by ETDC should be taken into account in fixing the compensation to be awarded to the Claimants. For the most part, the items in question involve the allocation of salaries and costs incurred by executives and employees of SPP such as overhead costs, travel and entertainment expenses, and costs incurred for recruiting and relocation of personnel, consultations concerning marketing and banking, and so forth. These expenses were incurred in connection with the project and in order to implement it. If the project had materialized, these expenses would not have been chargeable to ETDC because the Claimants had agreed to provide all of the technical expertise required for the design, construction, management and marketing of the project. However, because the project was cancelled, the Claimants could not recoup these expenses with future profits, and the expenses thus became irrecoverable losses. The Tribunal finds that it is reasonable and legitimate to take these losses into account in determining the fair measure of compensation in this case.

203. Not all of the costs claimed have been properly documented, however. It was explained in an affidavit of SPP(ME)'s former Financial Director that many documents and financial records could not be found or were destroyed by reason of the very long period which has passed since the expenses were incurred. But as the report of the Respondent's expert points out,

"the origins of this claim date from 1978 and I am surprised that in the circumstances the relevant documents have not been retained. It was foreseeable that they were likely to be required in this action."

This report also points out that the information filed by the Claimants in response to the Tribunal's procedural order of February 13, 1991 identified US \$1,719,000 of the claimed costs by payee, but that the recipients of an additional US \$1,545,000 of claimed costs were not identified. In the Tribunal's view, it would not be appropriate to award development costs for which the Claimants are unable to identify the payee. Accordingly, the Tribunal has decided to award development costs only in the amount of US \$1,719,000.

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204. The Respondent also maintains that the information filed by the Claimants in response to the Tribunal's procedural order contains evidence of the Claimants' corruption. Specifically, the Respondent has drawn the Tribunal's attention to a payment of US \$16,000 made in May of 1975 to a former employee of the Egyptian Government. It is claimed that, while this individual was employed by the London agency of the Egyptian Ministry of Tourism, he provided information concerning SPP's financial and technical capacity to the Egyptian authorities who were considering the proposed project and who ultimately approved it. After leaving the Government, this individual allegedly assisted SPP in securing agreements with Egyptian authorities relating to the Pyramids Oasis Project. The Tribunal notes, however, that the same document which shows the US \$16,000 payment also shows that the total payments made by SPP to this individual after he left the Government amounted for the whole of the year 1975 to less than US \$2,000 a month, a figure which does not suggest illicit payments to third parties. Accordingly, the Tribunal cannot accept the Respondent's contention that the information submitted by the Claimants in response to the Procedural Order contains evidence of the Claimants' corruption.

205. *Legal, Audit and Arbitration Costs.* The Claimants seek reimbursement of US \$5,108,000 of "post cancellation legal, audit and arbitration costs from 1980 to 1990." They contend that all of the legal costs they have incurred in order to obtain compensation should be indemnified, including the legal costs resulting from the ICC arbitration and related court proceedings. They argue that all of the legal and related disbursements should be considered as an individual whole, since they were made necessary by the Respondent's wrongful refusal to grant fair compensation. The Claimants add, as a further consideration, that a great deal of the research and preparation involved in the ICC arbitration obviated the need to undertake the same work in the ICSID proceedings.

206. For its part, the Respondent states that the claim for indemnification of costs incurred in other proceedings is absurd from a legal point of view because it infringes the sanctity of *res judicata*, the awards and judgments in the other cases having already decided the question of costs incurred in those proceedings.

207. In a case such as the present one, where the measure of compensation is determined largely on the basis of the out-of-pocket expenses incurred by the claimant, there is little doubt that the legal costs incurred in obtaining the indemnification must be considered as part and parcel of the compensation,

in order to make whole the party who suffered the loss and had to litigate to obtain compensation. This is particularly so when, as in this case, the amount offered as compensation by the Respondent was manifestly insufficient.

208. However, only those legal and accounting fees and expenses that were incurred for work that was relevant and useful to the present ICSID proceedings are to be included in the compensation. This Tribunal cannot award costs for work which was only relevant or useful to the proceedings before the ICC tribunal, whose decision was annulled, or proceedings before national courts to defend the validity of the ICC award or obtain its enforcement.

209. In order to separate the costs that should be allocated to the present proceedings from those that should be allocated to other proceedings, the Tribunal, in its procedural order of February 13, 1991, asked the Parties to submit

"an itemized list of the legal and accounting fees relating to the present proceedings, indicating their amount, the respective dates and the phase of the proceedings to which those fees and expenses relate."

210. In response to the Tribunal's procedural order, the Claimants have submitted a detailed list of all payments made for legal, audit and arbitration costs in connection with the ICC proceedings, related court proceedings and the ICSID proceedings. This list includes the amount and the recipient of each payment. It shows that fees and expenses of US \$4,242,000 were incurred solely in connection with the ICSID proceedings, and that further fees and expenses of US \$1,701,000 were incurred in connection with the ICC arbitration and related court proceedings. However, it is evident from the information submitted by the Claimants that a substantial amount of the work product covered by the US \$1,701,000 of fees and expenses, such as the factual development of the case (including the preparation of various studies, reports and affidavits), was also utilized in the ICSID proceedings. On the basis of this information, the Tribunal estimates that approximately one-half of the US \$1,701,000 was spent on work product that was utilized directly in the ICSID proceedings.

211. In light of these considerations, the Tribunal concludes that the total costs to be reimbursed to the Claimants for legal and accounting work which has been relevant or useful to the present ICSID proceedings amounts to US \$5,092,000. Undoubtedly, this is a high figure, but it is justified by the extraordinary length and complication of the proceedings in this case.

212. *Loss of Commercial Opportunity.* The final element in the Claimants' alternative claim is:

"such additional amount as shall be fixed by the Tribunal to compensate for the loss of the chance or opportunity of making a commercial success of the project."

This element of the alternative claim is what differentiates that claim from the Claimants' further subsidiary claim, which is simply for out-of-pocket expenses. Here, it is important to note that the alternative claim—like the primary claim which was based on the DCF method and the share transactions—is intended to recover the *value of the Claimants' investment*. This was made clear during the oral proceedings, and is also explicitly stated in the Claimants' Final Conclusions and Prayer for Relief:

"The Claimants claim secondarily, as an alternative . . . the *value of its investment in ETDC* on the basis of its out-of-pocket expenses . . . on the view that the project would necessarily have realized, at the very least, the amount invested in it, and an additional amount . . . to compensate for loss of the chance or opportunity of making a commercial success of the project" (Emphasis added.)

213. In contrast, the Claimants' further subsidiary claim as articulated in their Final Conclusions and Prayer for Relief makes no mention of the value of the investment:

"The Claimants claim as a further, subsidiary alternative . . . the out-of-pocket expenses . . . together with interest"

The further subsidiary claim gives up any claim for the value of the investment and seeks only to put the Claimants back in the position they were in before they became involved with the Pyramids Oasis Project.

214. During the final hearings on the merits, the Respondent's expert testified that in his opinion, if damages were to be awarded, the measure of damages should be the value of the Claimants' investment in ETDC as of May 1978, when the Pyramids Oasis Project was cancelled. If it were the case that the Claimants' investment in the Pyramids Oasis Project had no value—or had no value greater than the Claimants' out-of-pocket expenses—then the further subsidiary claim might *ex hypothesi* be the appropriate basis for compensation. In the Tribunal's view, however, it is incontestable that the Claimants' investment had a value that exceeded their out-of-pocket expenses. The record shows that between February of 1977 and May of 1978, ETDC made sales of villa sites and multi-family sites totalling US \$10,211,000—more than twice the Claimants' out-of-pocket expenses. Moreover, construction involving roads, water and sewage systems, reservoirs, artificial lakes and a golf course had commenced and the design work for two hotels had been completed. In these circumstances, the Tribunal cannot accept that the project did not have a value in excess of the Claimants' out-of-pocket expenses.

215. It remains, then, for the Tribunal to determine the amount by which the value of the Claimants' investment in ETDC exceeded their out-of-pocket expenses—that part of the alternative claim which the Claimants have called

the "opportunity of making a commercial success of the project." This determination necessarily involves an element of subjectivism and, consequently, some uncertainty. However, it is well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred.

216. In determining the amount by which the value of the Claimants' investment in ETDC exceeded their out-of-pocket expenses, the Tribunal will take as a starting point the lot sales actually made during the short life of the project and the revenues to be imputed to those sales. As the Tribunal has already observed, the evidence shows that during the period February 1977 to May 1978, ETDC's actual sales of villa and multi-family sites amounted to US \$10,211,000. The lots involved—383 villa sites and 3 multi-family sites—represented only 6 percent of the villa sites and less than 1 percent of the multi-family sites with respect to which ETDC held rights. It is clear, therefore, that the remaining lots were a potential source of very substantial revenues.

217. The Tribunal will next consider what it took in the way of expenditures by the Claimants to generate the revenues imputed to the lot sales. The difference between these expenditures and the portion of imputed revenues corresponding to SPP(ME)'s shareholding in ETDC is, in the Tribunal's view, the minimum measure of the value to be ascribed to the opportunity to make a commercial success of the project.

218. It is not disputed that SPP(ME) made capital contributions to ETDC of US \$1,310,000, and the Tribunal has already determined that the Claimants' development costs were US \$1,719,000. In addition, loans totalling US \$2,058,000 were made to ETDC, but these loans will be disregarded for present purposes because they were intended to be reimbursed—for the most part with interest at commercial rates. The portion of the revenues imputed to the lot sales corresponding to SPP(ME)'s shareholding in ETDC was 60 percent of US \$10,211,000, or US \$6,127,000. Thus, the portion of the sales revenues corresponding to SPP(ME)'s shareholding in ETDC would have exceeded the Claimants' non-reimbursable out-of-pocket expenses by US \$3,098,000. In these circumstances, the Tribunal is of the view that the value of what the Claimants have called the "opportunity of making a commercial success of the project" was not less than US \$3,098,000. Stated differently, the value of the Claimants' investment in May of 1978 when the project was cancelled exceeded their out-of-pocket expenses by at least US \$3,098,000.

219. *Interest.* The Claimants maintain that it has long been accepted under international law that appropriate compensation carries with it interest from the date of the wrong, so as to compensate the injured party for not having had the use of the money between the date when it ought to have been paid and the

date of the payment. In support of this contention the Claimants invoke decisions of the Permanent Court of International Justice and various international arbitration and claims tribunals. The Claimants further assert that the rate of interest should be a reasonable one, based on the amount that a successful claimant would have been in a position to have earned if it had had the funds available to invest. Accordingly, it claims a rate of 12.6 percent per annum, compounded annually from May 28, 1978 to the date of the Award, observing that this is the rate of interest agreed between SPP(ME) and ETDC in the loan agreement of April 15, 1976.

220. For its part, the Respondent contends that, if compensation is to be awarded, the rate of interest requested by the Claimants, as well as the modalities for its computation, should be rejected as contrary to Egyptian law in accordance with Article 42(1) of the Washington Convention. The Respondent calls attention to Article 226 of the Civil Code of Egypt, which provides for a rate of four percent for civil debts (including administrative contracts) and five percent for commercial debts, and contends that this is a civil matter, since the Heads of Agreement, concluded by a Minister of the Government, could not be qualified as a commercial act. The Respondent also points out that Article 232 of the Civil Code forbids compound interest, or interest on interest, and provides that the interest may in no event exceed the principal amount. As to the date at which interest begins to run, the Respondent contends that under Article 226 it is the date of the initiation of proceedings in case of "liquid debts," so that if the amount is fixed by the award it is only from the date of the award that interest begins to run.

221. The Claimants, on the other hand, point out that the limitation in Egyptian law on the rate of interest applies only—according to the terms of Article 226 of the Civil Code—"when the object of an obligation is the payment of a sum of money of which the amount is known at the time when the claim is made," which, they maintain, is not the case here.

222. In light of these various considerations, the Tribunal reaches the conclusion that, subject to the exception discussed below (paragraphs 225–231), Article 42 (1) of the Washington Convention requires that interest be determined according to Egyptian law because there is no rule of international law that would fix the rate of interest or proscribe the limitations imposed by Egyptian law.

223. With respect to the rate of interest, the Tribunal is of the view that it should be five percent rather than four percent. The argument that the Heads of Agreement was not a commercial contract is not conclusive because the present claim is not an action for a breach of that contract, but rather one

seeking compensation for the expropriation of the rights of a commercial enterprise for the development of tourism.

224. The provisions of Egyptian law which prohibit compound interest and require that the interest not exceed the principal are also applicable.

225. The provisions of Egyptian law concerning interest do not apply to the loan of US \$1,650,000 from SPP(ME) to ETDC. The underlying loan agreement of April 15, 1976 by its terms is governed by English law. Clause 17 of the loan agreement provides:

"This Agreement shall be governed by and construed in all respects in accordance with the laws of England."

226. With respect to interest, the loan agreement provides in Clause 4 that:

"During the period from the first Date of Drawdown until the final Date of Payment the Borrower shall pay interest on the Borrowing."

and that:

"Interest shall be paid in dollars to the Lender in London or in such other foreign currency and in such other place as may mutually be agreed from time to time and shall be paid on the relevant Interest Date at the relevant Interest Rate for that Interest Period."

227. The term "Interest Rate" is defined as:

"such rate of interest from the first date of Drawdown until repayment of the Borrowing in respect of each period ending on an Interest Date as shall be two per centum above the three months offered quotation for the deposit in Dollars by prime banks to the Lender (as certified by the Lender) in the London Interbank Market at approximately 11.00 a.m. London time two Business Days before the Date of Drawdown or (as the case may be) before each relevant Interest Date."

228. The loan agreement also provides that the interest shall be compounded if interest payments are not made on time:

"If any interest payable hereunder is not paid by noon (London time) on the day on which the same is due then the interest so in arrears shall thenceforth itself bear interest at the relevant Interest Rate computed from the date the same became payable to the date on which it is in fact paid"

229. Thus, the loan agreement establishes a higher rate of interest than that prescribed by Egyptian law and also provides for compound interest. Moreover, the interest on this loan now amounts to US \$8,134,000 and thus exceeds the principal. However, since the loan agreement is governed by the laws of England, which allow compound interest and the accrual of interest in excess of the principal, the Egyptian limitations on interest do not apply. Under

the loan agreement, SPP(ME) had a contractual right against ETDC to interest at the rate fixed by the loan agreement when the project was cancelled and the Central Bank blocked the Claimants' funds. This contractual right was in effect expropriated. The Claimants do not ask the Tribunal to award interest on the principal amount as such, but rather to compensate them for the value of the contractual right taken. That value clearly includes the interest provided for in the loan agreement.

230. The Respondent argues that it was not a party to the loan agreement and thus is not bound by the choice of English law. But the Claimants are not asking for damages for a breach of the loan agreement; they are seeking compensation on account of an expropriation. The credit that SPP(ME) had with respect to ETDC was expropriated by the Egyptian authorities when the Central Bank of Egypt, acting on the recommendation of the People's Assembly Committee, ordered

"the blockage of funds, papers and documents of EGOH and also the blockage of the foreign partner funds and documents."

Thus, ETDC was prevented from repaying the loan and the interest that it had agreed to. Therefore, this loan is to be reimbursed to the Claimants with all of the interest stipulated in the loan agreement. This is the full and uncontestable value of the expropriated credit.

231. Finally, the five percent interest rate prescribed by Egyptian law does not apply to the loans of US \$408,000, since the Parties agreed that these loans would not bear interest.

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232. With respect to the date from which interest shall run, the Respondent has invoked Article 226 of the Civil Code of Egypt which provides:

"When the object of an obligation is the payment of the sum of money of which the amount is known at the time when the claim is made, the debtors shall be bound, in case of delay in payment, to pay to the creditor, as damages for the delay, interest at the rate of 4% in civil matters and 5% in commercial matters. Such interest shall run from the date of the claim in Court, unless the contract or commercial usage fixes another date. This article shall apply, unless otherwise provided by law."

233. In the Tribunal's opinion, the *dies a quo* established in Article 226, "the date of the claim in Court," only applies to "such interest" which is to be paid "in case of delay of payment," that is, to moratory interest or interest on the award. It does not apply to compensatory interest, that is, to interest which is part of the award. Also, Article 226 refers to "the payment of a sum of money

of which the amount is known at the time when the claim is made," i.e., a liquidated claim. The present case involves neither moratory interest nor a liquidated claim. Consequently, no provision of the Civil Code or other legislation concerning the *dies a quo* applies to compensatory interest for a yet to be determined amount of compensation arising out of an act of expropriation.

234. Given this lacunae, it is legitimate to apply the logical and normal principle usually applied in cases of expropriation, namely, that the *dies a quo* is the date on which the dispossession effectively took place, since it is from that date that the deprivation has been suffered. This principle is supported by the doctrine and the jurisprudence of international tribunals. Moreover, many constitutions and national laws concerning expropriation require that payment be made prior to or simultaneous with the dispossession, thus supporting the *dies a quo* from the date of the taking, in this case May 28, 1978. To fix the *dies a quo* from the date of filing the claim or the date of the award, as requested by the Respondent, would encourage parties who have expropriated property to refuse to pay compensation and to delay the proceedings seeking compensation.

235. As to the *dies ad quem* for the running of interest, there is no Egyptian rule that has been called to the Tribunal's attention. The prevailing jurisprudence in international arbitrations is to the effect that interest runs until the date of effective payment, and this conclusion is supported by doctrinal opinion. This conclusion also seems to result implicitly from Article 226 of the Civil Code of Egypt.

236. Consequently, as requested by the Claimants, post-award interest will commence 30 days after the date on which this Award is notified to the Respondent, and will run until the date of payment. This interest shall be at the rate of five percent per annum and shall not be compounded.

237. *Monetary Adjustment for Currency Devaluation.* The five percent rate of interest which the Tribunal has determined to be applicable in this case does not fully compensate the Claimants for the losses which they incurred as a consequence of being deprived of money owed them between the time when the project was cancelled and the date of this Award. The reason that the five percent rate does not make the Claimants whole is that, since the project was cancelled in 1978, there has been a significant devaluation of the US dollar.

238. Devaluation is a function of inflation. If the Tribunal had determined that a "commercial" rate of interest were applicable in this case, devaluation would be accounted for automatically because commercial interest rates add an adjustment for inflation to the "real" interest rate. The five percent rate which the Tribunal has determined to be applicable is not a commercial rate, however. The record shows that since June of 1978 rates for US dollar deposits quoted in the London Interbank Market averaged more than 12 percent. Since

commercial interest rates are always higher (usually by 2–3 percentage points) than the clearing banks' base rate, it is evident that the five percent rate does not compensate the Claimants for the devaluation of the US dollar that has occurred since 1978.

239. Accordingly, it is the opinion of the Tribunal that certain elements of the compensation based on the Claimants' out-of-pocket expenses should be adjusted upward to take into account the devaluation of the US dollar since 1978. This is required in order that the compensation awarded by the Tribunal give the Claimants the same purchasing power today that they would have had in 1978 with the dollars that they invested in ETDC. Such a correction is necessary if the compensation is to be fair. If it were otherwise, the Claimants would be seriously prejudiced as a consequence of the devaluation of currencies that has occurred during the period in which they have been seeking a remedy for the loss that they have sustained.

240. In making an adjustment to take account of currency devaluation, the Tribunal has followed the approach adopted by the tribunal in the *Aminoil* case, which included an eminent Egyptian jurist. There, in awarding compensation for an expropriated investment, the tribunal stated that

"the proportions assumed by world inflation must lead to appraisals that are more in line with economic realities, and the determination of an indemnification cannot be tied down to the inflexible consequences of a purely monetary designation." (op. cit., at p. 213.)

The tribunal further said that

"if it were thought necessary to arrive at the total figure of the capital invested by Aminoil in its undertaking it would be appropriate to do so without holding the dollars of 1977 to be equivalent to those of 1948." (ibid.)

241. The tribunal referred to "the general principle of the preservation of the value of money" (paragraph 169), and then stated:

"The Tribunal has not overlooked the fact that there may be different ways of assessing the levels of inflation In the compensation to be paid to Aminoil it would be natural to take account of the progress of inflation generally" (op. cit., at p. 214.)

The Tribunal then concluded:

"In order to establish what is due in 1982 account must be taken both of a reasonable rate of interest, which could be put at 7.5 per cent, and of a level of inflation which the Tribunal fixes at an overall rate of 10 per cent—that is to say a total annual increase of 17.5 per cent in the amount due, over the amount due for the preceding year." (op. cit., at p. 216.)

242. A monetary adjustment such as that utilized in the *Aminoil* award also finds support in Egyptian law. Decisions of the Egyptian *Cour de Cassation*

and doctrinal opinions were called to the attention of the Tribunal. These opinions and decisions concluded that "due regard should be given to the increase or decrease of the currency price." These decisions and authoritative opinions confirm that under Egyptian law consideration is given to changes occurring "in the price of currency in which the compensation is to be estimated." (Abdel-Rezzak Ahmed El-Sanhoury, *Sources of Obligation*, Section 649, at pp. 975–6.)

243. In order to compensate the Claimants for the devaluation of the US dollar that has occurred since the Pyramids Oasis Project was cancelled in 1978, the Tribunal has adjusted certain of the out-of-pocket expenses incurred by the Claimants. These adjustments have been made using a "deflator factor" derived from data published by the International Monetary Fund in *International Financial Statistics*. This factor is computed on the basis of the United States Consumer Price Index. For the period May 31, 1978 to December 31, 1991—the most recent date for which the data necessary to calculate the deflator factor is available—the deflator factor was 2.2074. In other words, the purchasing power of 100 U.S. dollars in May of 1978 was equivalent to the purchasing power of 220.74 U.S. dollars in December of 1991.

244. As to the elements of compensation to which the deflator factor is to be applied, the Tribunal is of the view that the invested capital of US \$1,310,000, the development costs of US \$1,719,000 and the interest-free loan of US \$408,000 should be adjusted for monetary devaluation. No adjustment is required for the loan of US \$1,650,000, since that loan carries commercial interest and thus takes account of inflation and the resulting currency devaluation. Nor, in the Tribunal's view, is adjustment of the legal, audit and arbitration expenses necessary, since the bulk of these expenses was either incurred in—or imputed to proceedings that occurred in—the last several years. Finally, no adjustment of the opportunity cost element of the compensation will be made because of the nature of that particular cost and the method by which it was determined.

Mitigating Factors Invoked by the Respondent

245. The Respondent has drawn the Tribunal's attention to certain circumstances which, it is claimed, are mitigating factors that should be taken into account in the event that any compensation is awarded in this case. First, it is alleged that there has been no enrichment of the State, whereas there has been an enrichment of the Claimants as a result of the sale of shares to the members of the Saudi Arabian royal family.

246. It may be true that the Respondent has not benefited financially from the cancellation of the project. However, the Respondent has obtained

certain non-material benefits through the preservation of an area constituting a world cultural heritage, thus becoming entitled to the advantages—including the possibility of outside financial assistance—deriving from the UNESCO Convention.

247. Moreover, although unjust enrichment has on infrequent occasion been used by international tribunals as a basis for awarding compensation, it is generally accepted that the measure of compensation should reflect the claimant's loss rather than the defendant's gain. The question of whether the Respondent was enriched by the cancellation of the Pyramids Oasis Project is not, in the Tribunal's view, relevant to the amount of compensation to be awarded in the present case.

248. As to the alleged enrichment of the Claimants as a result of the share transactions, the Tribunal first notes that it disregarded these transactions in fixing the amount of compensation. If the Tribunal had used the share sales to measure the value of SPP(ME)'s investment in ETDC, the resulting compensation would have been considerably more than that which the Tribunal has determined to be appropriate.

249. Furthermore, the record shows that the proceeds from the share transactions were intended to finance the Pyramids Oasis Project. If some of those proceeds were not ultimately invested in the project, this was presumably due to the Respondent's cancellation of the project rather than to any act attributable to the Claimants.

250. The next factor invoked by the Respondent to mitigate the amount of compensation in the present case is the fact that the reclassification of the land on the Pyramids Plateau was a lawful act. This factor, however, has already been taken into consideration in the Tribunal's decision not to award compensation based on profits that might have accrued to the Claimants after the date on which areas on the Plateau were registered with the World Heritage Committee.

251. Next, the Respondent contends that the project was located in an area where the Claimants should have known there was a risk that antiquities would be discovered. Again, this is a factor that is already reflected in the method used by the Tribunal to value the Claimants' loss, and particularly in the Tribunal's decision and not to base compensation on profits that might have been earned after the Plateau areas were registered with UNESCO.

252. The Respondent also argues that the Claimants' rejection of the Sixth of October City site should be taken into account in fixing the amount of compensation to be awarded. The Tribunal cannot accept this argument. As explained above (paragraph 172), the Claimants' rejection of the substitute site

was entirely justified and is therefore irrelevant to the amount of compensation to be awarded the Claimants.

253. Finally, the Respondent maintains that certain dangerous events which occurred in Egypt after 1978, adversely affecting tourism there, should be taken into account in fixing the amount of compensation. These events are also irrelevant, because the Tribunal has excluded any profits which might have been earned after 1978 from the compensation that it has determined to be appropriate.

The Counter-Claim

254. The Respondent has formally requested the Tribunal to:

"Dire et juger que SPP, et subsidiairement SPP (ME) sont responsables à l'égard de la R.A.E. de la non-réalisation des projets, et qu'elles devront payer une somme forfaitaire de 30 millions de USD à titre de réparation du préjudice, incluant les frais de procédure."

255. In support of the Counter-Claim, the Respondent invokes certain faults alleged to be attributable to the Claimants, namely:

- i) the transformation of the project into a housing project;
- ii) the absence of touristic elements (hotels, commercial centers and villages) in the project;
- iii) the Claimants' abandonment of the Ras El Hekma Project;
- iv) the financial deficiencies of the Claimants; and
- v) above all, the Claimants' refusal to cooperate, and particularly to consider the solution of an alternative site.

256. It results from what the Tribunal has already said that none of these alleged faults was committed and none of them was imputed to the Claimants by the Egyptian authorities as a ground for the cancellation or in any other form before May 28, 1978. It follows that the Counter-Claim is to be dismissed.

IV. THE OPERATIVE PART (*DISPOSITIF*)

257. For these reasons,

THE TRIBUNAL, by a majority,

AWARDS to Southern Pacific Properties (Middle East) Limited and Southern Pacific Properties Limited, jointly,

THE SUM OF US \$27,661,000, consisting of the following:

1. The amount of US \$9,784,000, comprised of the US \$1,650,000 loan by SPP(ME) to ETDC, plus interest at the rate and on the terms specified in the loan agreement;

2. The amount of US \$901,000, comprised of the US \$408,000 loans at no interest, plus an adjustment for monetary devaluation using a deflator factor of 2.2074;
3. The amount of US \$3,799,000, comprised of the US \$1,310,000 of capital invested by the Claimants, plus (i) an adjustment for monetary devaluation using a deflator factor of 2.2074, and (ii) simple interest at the rate of five percent per annum from May 28, 1978 to the date of this Award on the amount of US \$1,310,000;
4. The amount of US \$4,986,000, comprised of US \$1,719,000 of development costs, plus (i) an adjustment for monetary devaluation using a deflator factor of 2.2074, and (ii) simple interest at the rate of five percent per annum from May 28, 1978 to the date of this Award on the amount of US \$1,719,000;
5. The amount of US \$5,093,000, for legal, audit and arbitration costs attributable to these proceedings; and
6. The amount of US \$3,098,000, which the Tribunal has determined to be the amount by which the value of the Claimants' investment in ETDC exceeded their non-reimbursable out-of-pocket expenses at the time the project was cancelled.

Post-Award Interest

The amount of US \$27,661,000 shall earn simple interest of five percent per annum, beginning 30 days after the date on which this Award is notified to the Respondent, until the date of payment.

Decisions on Jurisdiction

The Tribunal's Decision on Preliminary Objections to Jurisdiction of November 27, 1985, and its Decision on Preliminary Objections to Jurisdiction of April 14, 1988, are incorporated in this Award by reference.

The Counter-Claim

The Counter-Claim by the Respondent against the Claimants is dismissed.

Release of Claims

Upon payment of the present Award, the Respondent shall be released from any further investment claims in relation to the Pyramids Oasis Project and the Claimants' shareholding in ETDC shall be considered as released and transferred to the Respondent.

/s/
Eduardo Jiménez de Aréchaga

Mohamed Amin El Mahdi

/s/

Robert F. Pietrowski, Jr.

[Date of dispatch to the parties: May 20, 1992]