INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID):
WENA HOTELS LTD V. ARAB REPUBLIC OF EGYPT (ANNULMENT PROCEEDING)*
[January 28, 2002]
+Cite as 41 ILM 933 (2002)+

CERTIFICATE

Wena Hotels Limited

v.

Arab Republic of Egypt

(ICSID Case No. ARB/98/4)

Annulment Proceeding

I hereby certify that the attached document is a true copy of the Decision of the *ad hoc* Committee on an application for the annulment of the Arbitral Award of December 8, 2000 in the above case.

/s/
Ko-Yung Tung
Secretary-General

Washington, D.C., February 5, 2002

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
Washington, D.C.

Wena Hotels LTD.

v.

Arab Republic of Egypt

Case No. ARB/98/4

DECISION

on the Application by the Arab Republic of Egypt for Annulment
of the Arbitral Award dated December 8, 2000
in the above matter

RENDERED BY THE AD HOC COMMITTEE
composed of
Konstantinos D. Kerameus, President
Andreas Bucher
Francisco Orrego Vicuña

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THE COMMITTEE
Composed as above,
Makes the following Decision:

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I. INTRODUCTION

A. The Proceeding

1. On January 19, 2001, the Arab Republic of Egypt (hereinafter also "Egypt" or "the Applicant") filed with the Secretariat of the International Centre for Settlement of Investment Disputes (hereinafter "ICSID" or "the Centre") an application for annulment, under Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter "the ICSID Convention" or "the Convention"), of an arbitral Award rendered on December 8, 2000 (hereinafter "the Award") in the arbitration proceeding between Wena Hotels Limited and the Arab Republic of Egypt, ICSID Case No. ARB/98/4.

2. Wena Hotels Limited (hereinafter "Wena" or "the Respondent"), a company established under the laws of the United Kingdom, had instituted that arbitration proceedings against Egypt by submitting to the Centre a request for arbitration dated July 10, 1998, which was supplemented by Wena's letters to the Centre of July 16, 1998 and July 17, 1998, and was registered by the Secretary-General of ICSID on July 31, 1998. The request for arbitration invoked the provisions of the Agreement between the United Kingdom and the Arab Republic of Egypt for the Promotion and Protection of Investments, which was concluded on February 24, 1976, and entered into force on February 24, 1976.

3. The Arbitral Tribunal that handed down the Award (hereinafter "the Tribunal") was composed of Professor Ibrahim Fadlallah, a national of Lebanon, appointed by Wena; Professor Don Wallace, Jr., a United States national, appointed by Egypt; and by Mr. Monroe Leigh, a United States national, appointed by the Chairman of ICSID's Administrative Council, who served as President of the Tribunal.

4. The Arab Republic of Egypt's Request for annulment was registered by the Secretary-General of ICSID on January 24, 2001. In due course, the Chairman of ICSID's Administrative Council appointed Professor Andreas Bucher, a national of Switzerland, Professor Konstantinos D. Kerameus, a national of Greece, and Professor Francisco Orrego Vicuña, a national of Chile, as members of the *ad hoc* Committee to consider the application (hereinafter "the Committee"), in accordance with Article 52(3) of the ICSID Convention. By letter of March 6, 2001, the Deputy Secretary-General of ICSID notified the parties that all the members of the Committee had accepted their appointment and that the Committee was therefore deemed to have been constituted, and the proceedings to have begun, on that date. The members of the Committee elected Professor Konstantinos D. Kerameus as its President. Mr. Alejandro Escobar, Senior Counsel, ICSID, served as Secretary of the Committee.

5. The application for annulment was accompanied by a request for stay of enforcement of the Award (hereinafter also "the stay"). In accordance with Article 52(5) of the ICSID Convention, together with the notice of registration of the application, the Secretary-General of ICSID informed both parties of the provisional stay of enforcement of the Award. By letter of January 25, 2001, Wena requested the Committee, upon its constitution, to decided whether the provisional stay of enforcement of the Award should be continued. Wena sought the termination of the stay; in the alternative, it sought for the Committee to modify the stay by requiring the posting of security by Egypt as a condition for continuation of the stay. In accordance with Rule 54 of the Arbitration Rules of the Centre ("hereinafter "Arbitration Rules"), the Committee immediately proceeded to consider the question of continuation of the stay of enforcement of the Award.

6. Having invited and received in due course the written observation of the parties on the question of continuation of the stay, the Committee issued its Procedural Order No. 1 on April 5, 2001, by which it granted the continuation of the stay, conditional upon the posting by Egypt of an unconditional and irrevocable letter of guarantee for the total amount of the Award, plus interest accrued through April 7, 2001. Procedural Order No. 1 set forth the following further proviso concerning such letter of guarantee:

> The letter of guarantee may be entirely drawn down upon by Wena Hotels Limited in the event that the application is denied in its entirety. In the event the application is accepted only in part, the letter of guarantee may be drawn down upon Wena Hotels Limited to the extent of the unannulled part of the Award, subject to any further stay granted by the Committee under Arbitration Rule 54(3) or by a new Arbitral Tribunal under Arbitration Rule 55(3).

The Arab Republic of Egypt posted such letter of guarantee in due course, with an original validity through October 31, 2001. By letter of September 27, 2001, Egypt informed the Committee that the validity of such letter of guarantee had been extended to February 28, 2002.

7. With agreement of the Parties, the Committee held its first session with the parties in Paris on May 7, 2001. Each member of the Committee having signed the declaration required by Arbitration Rule 6, it was agreed at the first session that the Committee had been properly constituted in accordance with the Convention and the Arbitration Rules. The following representation of the parties was also noted at the first session:

> The Applicant, the Arab Republic of Egypt, is represented in this proceeding by
>
> Egyptian State La Suits Authority
> c/o Counselor Osama Ahmed Mahmoud, Vice-President, and
> Counselor Hussein Mostafa Fathi
> El Tahreer Building, 10th Floor
> Cairo, Egypt
>
> and by
>
> Freshfields Bruckhaus Deringer
> c/o Mr. Eric A. Schwartz
> 69 boulevard Haussmann
> 75008 Paris, France
>
> The Respondent, Wena Hotels Limited, is represented in this proceeding by
>
> Shearman & Sterling
> c/o Mr. Emmanuel Gaillard
> and Mr. John Savage
> 114, avenue des Champs-Elysées
> 75008 Paris, France

Mr. Peter Griffin, Shearman & Sterling, also acted as counsel for Wena in the proceeding. Certified copies of the minutes of that first session were distributed to the parties and the members of the Committee by the Secretariat's letter of May 31, 2001.

8. As agreed at the first session, the parties filed in due course their written pleadings on the application for annulment. The Arab Republic of Egypt filed its memorial on annulment, with accompanying documentation, on June 29, 2001. Wena filed its counter-memorial opposing annulment, with accompanying documentation, on August 28, 2001. Egypt filed its reply, with accompanying documentation, on September 10, 2001. Wena filed its rejoinder, with accompanying documentation, on September 26, 2001. Complete copies of each filing were duly delivered by each party to the Paris-based counsel of the other party, and distributed to the members of the Committee by the Secretariat.

9. As further agreed at the first session, the Committee held a hearing with the Parties in Paris on October 22 and 23, 2001. At the hearing, Mr. Eric A. Schwartz addressed the Committee on behalf of Egypt, and Professor Emmanuel Gaillard, Mr. Peter Griffin and Mr. John Savage addressed the Committee on behalf of Wena. In addition the Committee heard the testimony at the hearing of Professor W. Michael Reisman as the expert proposed by Egypt. Wena and Egypt proceeded respectively to the cross- and re-direct examination of Professor Reisman at the hearing. The Committee put questions to the Parties, which were answered by their respective counsel at the hearing. A full verbatim transcript was made of the hearing, under arrangements undertaken by the Parties, and copies of such transcript were distributed to the members of the Committee by the Secretariat.

10. At the first session of May 7, 2001, Egypt submitted documentation concerning a garnishee order on payment of the Award by Egypt, as security for the satisfaction of a claim by a third party against Wena for approximately

US$45,000 (hereinafter "the garnishee order"). Counsel for Egypt indicated that, under Egyptian law, the entire amount of the Award is garnished or frozen until that claim is settled, and that payment of the Award in any part, for example by drawing down on the letter of guarantee posted by Egypt, could result in Egypt's liability and thus double jeopardy as regards the amount of that claim. The Committee at the first session reserved its opinion and further directions on this matter.

11. On May 25, 2001, counsel for Egypt addressed a letter to counsel for Wena, with a copy to the Centre, concerning the garnishee order. By letter of September 27, 2001, Egypt informed the Committee that it had not received a response from Wena to its letter of May 25, and requested the Committee to provide the parties with further directions on this matter. By letters of October 2 and 16, 2001, Wena submitted its observations on the garnishee order, offering to assist Egypt in contesting such order before the Egyptian courts. Further observations on the garnishee order were made by both parties at the conclusion of the hearing on October 23, 2001.

12. At the hearing, Egypt reserved its right to make further written comments in response to Wena's letter of October 2 and 16, 2001, and Wena submitted that it would be premature for the Committee to provide any directions on the matter, arguing that more information was needed from Egypt on the status of the garnishee order. The President of the Committee then informed the parties that the Committee would refrain from making any ruling on the question of the garnishee order until such a time as the Parties submitted further observations. The President outlined certain aspects that the Parties should address in that event. However, neither Party submitted such further observations following the hearing. Accordingly, no determination on this issue by the Committee was required.

13. The Committee began its deliberation following the hearing and held a working session in Paris on January 28, 2002.

14. On January 25, 2002, the President of the Committee requested ICSID to inform the Parties that the proceeding was closed.

B. Background of the dispute and Award

15. The Award subject of this proceeding for annulment concerns a dispute relating to two hotels located in Luxor and Cairo, Egypt, that were leased to Wena in 1989 and 1990 respectively on a long-term basis by the Egyptian Hotel Company, a State-owned Egyptian company with its own legal personality (hereinafter "EHC"). After certain disputes arose between EHC and Wena related to their respective obligations under the lease agreements, the two hotels were seized by EHC on April 1, 1991. Egypt did recognize that the latter event was an act of self-help that was wrongful. It caused the hotels to be returned to Wena in 1992. Wena was ultimately evicted from the Nile Hotel in 1995, while the Luxor Hotel was placed in judicial receivership in 1997. Egypt asserts that Wena failed to pay rent or to fulfill its development obligations to the hotels. It refers to an arbitral award finding that Wena's failure to pay rent for the Nile Hotel entitled EHC to terminate the lease.

16. After the return of the hotels, Wena sought compensation from Egypt, based on rights of nationals of the United Kingdom in respect of their investments in Egypt and arising out of the Agreement for the Promotion and Protection of Investments entered into by the United Kingdom and Egypt on June 11, 1975 (hereinafter "IPPA"). In its Award, the Tribunal concluded that Egypt did violate its obligation under the IPPA by failing to provide Wena's investments in Egypt "fair and equitable treatment" and "full protection and security" (Art. 2[2] IPPA) and by failing to provide Wena with "prompt, adequate and effective compensation" following the expropriation of the investments (Art. 5[1] IPPA). For the reasons stated in the Award, the Tribunal

> "134. FINDS that Egypt breached its obligations to Wena by failing to accord Wena's investments in Egypt fair and equitable treatment and full protection and security in violation of Article 2(2) of the IPPA;

135. FIND that Egypt's actions amounted to an expropriation without prompt, adequate and effective compensation in violation of Article 5 of the IPPA;
and

136. AWARDS to Wena US$20,600,986.43 in damages, interest, attorneys fees and expenses. This award will be payable by Egypt within 30 days from the date of this Award. Thereafter, it will accumulate additional interest at 9% compounded quarterly until paid."

C. The Request for Annulment

17. Under Article 52(1) of the ICSID Convention,

"(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure;

or

(e) that the award has failed to state the reasons on which it is based."

These grounds for annulment are enumerated exhaustively. The Request for annulment is based on three of these grounds. The Applicant contends that the Tribunal has manifestly exceeded its powers (1.b), that there has been a serious departure from a fundamental rule of procedure (1.d), and that the Award has failed to state the reasons on which it is based (1.e).

18. As has been stated in earlier published decisions made on requests for annulment of ICSID awards, the remedy of Article 52 is in no sense an appeal.[1] The power for review is limited to the grounds of annulment as defined in this provision. These grounds are to be interpreted neither narrowly nor extensively.[2]

19. Article 52(2) provides, in relevant part, that the application shall be made within 120 days after the date on which the Award was rendered. The Applicant's Request for Annulment has been deposited within such time limit and it invoked expressly the grounds stated in Article 52(1), letters b), d) and e). It was argued by Wena, however, that several grounds for annulment were time-barred, by the fact that they had not been argued in the initial Request, but only later in the Applicant's Memorial requesting annulment. It is admitted by Wena that these arguments do not exceed the scope of the grounds for annulment initially invoked. Arbitration Rule 50(1)(c) requires indeed that the grounds for annulment be stated "in detail" in the application for annulment. On the other hand, the ICSID Convention does not state any requirement of completeness of the Application, except to the extent that the Application must invoke one or more of the grounds listed in Article 52(1) on which it is based. The ICSID Convention thus does not preclude raising new arguments which are related to a ground of annulment invoked within the time limit fixed in the Convention. This is of no harm to the opposing party, which is not requested to answer the Request, but later only the first memorial of the Applicant. The Committee therefore does not retain Wena's objection.

20. The Committee notes that the Applicant has withdrawn the argument that the Tribunal exceeded its powers under Article 42(1) in refusing to apply Egyptian law to Egypt's defense that Wena's claims were time-barred.

II. DID THE TRIBUNAL MANIFESTLY EXCEED ITS POWERS?

21. In respect of the first ground for annulment it invoked, the Applicant argues that the Tribunal manifestly exceeded its powers in the terms of Article 52(1)(b) of the ICSID Convention. In the Applicant's view this occurred in two ways. First, the Tribunal failed to apply Egyptian law in contravention of Article 42(1) of the Convention. Second, the Tribunal allowed Wena to assert claims on behalf of investors that are not entitled to protection under the IPPA.

22. The Committee is mindful of the views expressed *Klöckner I*,[3] *Amco I*[4] and *MINE*[5] to the effect that the failure to apply the proper law may constitute a manifest excess of power and a ground for annulment. It is also mindful of the distinction between failure to apply the proper law and the *error in judicando* drawn in *Klöckner I*, and the consequential need to avoid the reopening of the merits in proceedings that would turn annulment into appeal.[6]

23. The question is then whether in the instant case the Tribunal, although having referred to the law of the host State, has in fact failed to apply Egyptian law because of having turned to the application of the provisions of the IPPA as the primary source. In the Applicant's opinion in all cases it is the law of the host State that is intended to be the primary source, not international law. The Respondent is of the view that the Tribunal correctly applied the IPPA as the law relevant to this dispute.

24. The Applicant has moreover made the argument that the application of Egyptian law touches upon a fundamental question, that of the "legitimate principle that a country that attracts foreign investment is entitled to insist that investors comply with the laws of that country." There can be no disagreement with such proposition. The quest, however, is whether the resort to international law in any way contradicts the principle stated.

25. In the context of determinations on excess of power, it is further to be considered that for it to be a ground of annulment, the Tribunal must have "manifestly exceeded its powers," as stated in Article 52(1)(b) of the ICSID Convention. The classic example of manifest excess of power under international law is that of a tribunal having been asked to adjudicate on one of two possible boundary lines submitted by the parties chooses a third line.[7] The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest. This is, among others, the reason why earlier decisions reached by *ad hoc* committees have been so extensively debated.

A. Did the Tribunal manifestly fail to apply the applicable law?

26. Article 42(1) of the ICSID 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 Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

27. The first aspect the Committee must establish is whether the Parties agreed to the rules of law to be applied by the Tribunal in the light of the first sentence of the Article. In fact, the question touches upon a prior determination of the proper subject of the dispute brought before the Tribunal and the parties concerned by it.

(i) The dispute brought before the Tribunal

28. It is undisputed that the lease contracts were concluded between Wena and EHC. It is also undisputed that the two leases were subject to Egyptian law. However, there is disagreement about the meaning of this submission to

Egyptian law. In the Applicant's view this was the choice of law required by the first sentence of Article 42(1). Accordingly, the Tribunal was under the obligation to apply such law.

29. The Respondent believes otherwise. Egyptian law was indeed applicable, but only in the context of the disputes concerning those parties and for the commercial aspects specifically arising from the contracts. The dispute before the Tribunal involved different parties, namely the investor and the Egyptian State, and concerned a subject matter entirely different from the commercial aspects under the leases. The dispute before the Tribunal is, in the Respondent's view, about the role of the State in the light of its obligations under the IPPA. Accordingly, the Respondent is of the view that the parties to the instant case made no choice of law under Article 42(1).

30. It is not disputed that EHC is a State-owned company with its own legal personality. Neither is it disputed that its functions are essentially commercial and not governmental in nature. In fact, none of the Parties has claimed that the acts of EHC could be attributed to the State. Therefore, EHC is to be dealt with as an entity different from the Egyptian State, with a legal personality of its own, the functions of which cannot be confused with those of the State.

31. The leases deal with questions that are by definition of a commercial nature. The IPPA deals with questions that are essentially of a governmental nature, namely the standards of treatment accorded by the State to foreign investors. It is therefore apparent that Wena and EHC agreed to a particular contract, the applicable law and the dispute settlement arrangement in respect of one kind of subject, that relating to commercial problems under the leases. It is also apparent that Wena as a national of a Contracting State could invoke the IPPA for the purpose of a different kind of dispute, that concerning the treatment of foreign investors by Egypt. This other mechanism has a different and separate dispute settlement arrangement and might include a different choice of law provision or make no choice at all.

32. The issue was also raised during the jurisdictional phase of the case before the Tribunal. In fact, Egypt objected to the jurisdiction of the Tribunal on the basis that there was no legal dispute between Wena and Egypt. This objection was denied by the Tribunal.

33. The Parties appear to be in agreement that the acts of self-help undertaken by EHC in respect of the hotels were wrongful and that the initiative to undertake those acts is not to be attributed to the State. Indeed, this case involves a claim not against the acts of EHC but against those acts or omissions of the State that the investor considers to be in violation of the IPPA. It is the latter acts that were considered by the Tribunal on the merits as amounting to measures having effects equivalent to expropriation of the investment.

34. However, the Parties again here differ as to the consequences of such dual relationship, existing between Wena and EHC on one hand, and between Wena and Egypt on the other hand. For the Applicant the resolution of the dispute brought before the Tribunal cannot be separated from the leases and the rights of the parties to those contracts. The Applicant has in fact argued that the relationship between Wena and Egypt under the IPPA is entirely dependent upon and a function of the relationship between Wena and EHC under the leases. The Respondent believes that the failure of the State to adopt measures in protection of the investor is a violation of the IPPA independently of any questions arising under the leases.

35. The Committee cannot ignore of course that there is a connection between the leases and the IPPA since the former were designed to operate under the protection of the IPPA as the materialization of the investment. But this is simply a condition precedent to the operation of the IPPA. It does not involve an amalgamation of different legal instruments and dispute settlement arrangements. Just as EHC does not represent the State nor can its acts be attributed to it because of its commercial and private function, the acts or failures to act of the State cannot be considered as a question connected to the performance of the parties under the leases. The private and public functions of these various instruments are thus kept separate and distinct.

36. This Committee accordingly concludes that the subject matter of the lease agreements submitted to Egyptian law was different from the subject matter brought before ICSID arbitration under the IPPA. It follows that it cannot be held that the Parties to the instant case have made a choice of law under the first sentence of Article 42(1) of the ICSID Convention.

(ii) The role of International Law

37. The second sentence of Article 42(1) of the ICSID Convention provides that, in the absence of an agreement on the applicable rules of law, the Tribunal shall apply the law of the host State, including its rules on the conflict of laws, and such rules of international law as may be applicable. It is therefore necessary for the Committee to examine the meaning of this second sentence and the question of the interrelation between domestic and international law in this context.

38. This discussion brings into light the various views expressed as to the role of international law in the context of Article 42(1). Scholarly opinion, authoritative writings and some ICSID decisions have dealt with this matter. Some views have argued for a broad role of international law, including not only the rules embodied in treaties but also the rather large definition of sources contained in Article 38(1) of the Statute of the International Court of Justice.[8] Other views have expressed that international law is called in to supplement the applicable domestic law in case of the existence of *lacunae*.[9] In *Klöckner I* the *ad hoc* Committee introduced the concept of international law as *complementary* to the applicable law in case of *lacunae* and as *corrective* in case that the applicable domestic law would not conform on all points to the principles of international law.[10] There is also the view that international law has a controlling function of domestic applicable law to the extent that there is a collision between such law and fundamental norms of international law embodied in the concept of *jus cogens*.[11]

39. Some of these views have in common the fact that they are aimed at restricting the role of international law and highlighting that of the law of the host State. Conversely, the view that calls for a broad application of international law aims at restricting the role of the law of the host State. There seems not to be a single answer as to which of these approaches is the correct one. The circumstances of each case may justify one or another solution. However, this Committee's task is not to elaborate precise conclusions on this matter, but only to decide whether the Tribunal manifestly exceeded its powers with respect to Article 42(1) of the ICSID Convention. Further, the use of the word "may" in the second sentence of this provision indicates that the Convention does not draw a sharp line for the distinction of the respective scope of international and of domestic law and, correspondingly, that this has the effect to confer on to the Tribunal a certain margin and power for interpretation.

40. What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.

41. In particular, the rules of international law that directly or indirectly relate to the State's consent prevail over domestic rules that might be incompatible with them. In this context it cannot be concluded that the resort to the rules of international law under the Convention, or under particular treaties related to its operation, is antagonistic to that State's national interest.

42. Particular emphasis is put on this view when the rules in question have been expressly accepted by the host State. Indeed, under the Egyptian Constitution treaties that have been ratified and published "have the force of law."[12] Most commentators interpret this provision as equating treaties with domestic legislation.[13] On occasions the courts have decided that treaty rules prevail not only over prior legislation but also over subsequent legislation.[14] It has also been held that *lex specialis* such as treaty law prevails over *lex generalis* embodied in domestic law.[15] A number of important domestic laws, including the Civil Code and Code of Civil Procedure of Egypt, provide in certain matters

for a "without prejudice clause" in favor of the relevant treaty provisions.[16] This amounts to a kind of *renvoi* to international law by the very law of the host State.

43. Most prominent among this treaty law is that embodied in investment treaties.[17] As from 1953 Egypt has been a leader in the field. Examples of this leadership are the Convention on Payments on Current Transactions and the Facilitation of Transfer of Capital among the States of the Arab League of 1953, the Convention on the Investment and Transfer of Arab Capital of 1971, the Convention Establishing the Arab Investment Guarantee Corporation, the ICSID Convention and numerous bilateral investment treaties.

44. This treaty law and practice evidences that when a tribunal applies the law embodied in a treaty to which Egypt is a party it is not applying rules alien to the domestic legal system of this country. This might also be true of other sources of international law, such as those listed in Article 38(1) of the Statute of the International Court of Justice mentioned above.

45. Therefore, the reliance of the Tribunal on the IPPA as the primary source of law is not in derogation or contradiction to the Egyptian law and policy in this matter. In fact, Egyptian law and investment policies are fully supportive of the rights of investors in that country. The ICSID Convention and the related bilateral investment treaties are specifically mentioned in Egypt's foreign investment policy statements.[18]

46. In the light of the above this Committee concludes that in applying the rules of the IPPA in the instant case the Tribunal did not exceed its powers.

(iii) Specific Complaints

47. The Applicant invokes three specific areas in which the Tribunal exceeded its powers as a consequence of not applying Egyptian law. The first concerns the validity of the leases in connection with an alleged incident of corruption or conflict of interest in the person of Mr. Kandil who was consulting Wena while he acted also as Chairman of EHC. While such improper influence can invalidate the lease agreements under Egyptian law, or for the matter of corruption also under international law, such unlawful act has to be proved. The Tribunal did not consider that there was sufficient evidence to prove such a claim. It is therefore not a question of the applicable law but of evidence, the evaluation of which relates to the merits of the case and is not a matter for the ground for annulment related to a purported excess of power by the Tribunal.

48. The second area the Applicant argues should have been considered under Egyptian law is the investor's rights under the leases. There is no doubt that there was a dispute between Wena and EHC in respect of the obligations under the leases, each accusing the other of failure to comply with the agreed terms of the contract. This is precisely the kind of dispute governed by Egyptian law that was, at least in respect of one hotel, submitted to arbitration under the lease agreements. This is not the dispute brought to arbitration under the ICSID Convention and the IPPA.

49. It is here where the relationship between one dispute and the other becomes relevant. The ultimate purpose of the relief sought by Wena is to have its losses compensated. To the extent this relief was partially obtained in the domestic arbitration, the Tribunal in awarding damages under the IPPA did take into account such partial indemnification so as to prevent a kind of double dipping in favor of the investor. The two disputes are still separate but the ultimate result is the compensation of the investor for the wrongdoings that have affect its business.

50. The third area where the Applicant argues the Tribunal should have applied Egyptian law is the determination of interest. It is quite true, as argued by the Applicant, that Article 226 of the Egyptian Civil Code provides for various limits to the determination of interest. But it is also true that various was have been used to increase those limits, particularly by means of the award of supplemental damages.[19] Some of these alternatives were utilized in *SPP v. Egypt*, including the adjustment for devaluation.[20]

51. The issue before this Committee, however, is a different one. Once the Tribunal decided to apply the IPPA to the dispute brought to it, and given the fact that this agreement does not contain provisions on the determination of interest as such, should the Tribunal have reverted to Egyptian law to this end or should it have resorted, as it did, to international law and related ICSID practice?

52. When operating under the rules of the IPPA in a matter of expropriation or measures of equivalent effect, the Tribunal could not ignore the fact that Article 5 of this Agreement provides for two criteria in respect of compensation. Article 5 of the IPPA reads as follows:

> "Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation itself or before there was an official Government announcement that expropriation would be effected in the future, whichever is the earlier, shall be made without delay, be effectively realizable and be freely transferable. The national or company affect shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of whether the expropriation is in conformity with domestic law and of the valuation of his or its investment in accordance with the principles set out in this paragraph."

Compensation must be, first, "prompt, adequate and effective" and, second "compensation shall amount to the market value of the investment expropriated immediately before the expropriation itself." Although not referring to interest, the provision must be read as including a determination of interest that is compatible with those two principles. In particular, the compensation must not be eroded by the passage of time or by the diminution in the market value. The award of interest that reflects such international business practices meets these two objectives.

53. The option the Tribunal took was in the view of this Committee within the Tribunal's power. International law and ICSID practice, unlike the Egyptian Civil Code, offer a variety of alternatives that are compatible with those objectives. These alternatives include the compounding of interest in some cases.[21] Whether among the many alternatives available under such practice the Tribunal chose the most appropriate in the circumstances of the case is not for this Committee to say as such matter belongs to the merits of the decision. Moreover, this is a discretionary decision of the Tribunal. Even if it were established that the Tribunal did not rely on the appropriate criteria this in itself would not amount to a manifest excess of power leading to annulment.

B. Did the Tribunal exceed its powers in permitting Wena to assert claims on behalf of other investors?

54. Besides the invocation of excess of power on the ground of the Tribunal failing to apply the proper law, the Applicant has also raised the question that investors other than Wena and not entitled to claim under IPPA were allowed to do so. It is a matter of act and evidence on the origin of the sums invested and the ultimate beneficiary of the sums awarded. In any event, only Wena was found by the Tribunal to be entitled to damages. Moreover, ICSID practice has also been quite flexible on claims that include the interests of subsidiaries and affiliates, including on occasions entities that are nationals of States that are not contracting parties to the Convention.[22]

C. No finding of excess of power

55. The Committee must reach the conclusion that excess of power, as a ground for annulment, cannot prevail in the instant case. The request to this effect is therefore dismissed.

III. DID THE TRIBUNAL SERIOUSLY DEPART FROM A FUNDAMENTAL RULE OF PROCEDURE?

56. The second ground for annulment, which is based on Article 52(1)(d) of the ICSID Convention, requires from the Applicant to demonstrate "that there has been a serious departure from a fundamental rule of procedure." The Applicant has to identify the fundamental rule of procedure from which the Tribunal departed and it has to show that such departure has been serious.

57. The said provision refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other. Both Parties accept these basic principles. The Applicant makes an additional reference to "the application of the burden of proof" which it further explains in respect of the specific complaints raised in connection with the ground for annulment of Article 52(1)(d) of the Convention.

58. In order to be a "serious" departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed. In the words of the *ad hoc* Committee's Decision in the matter of *MINE*, "the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide."[23]

A. The proof of the consultancy agreement with Mr. Kandil

59. The Applicant contends that the Tribunal stated wrongly that the existence of a consultancy agreement between Wena and Mr. Kandil as "undisputed." It recalls that it did dispute that a document containing such agreement was ever signed by Mr. Kandil. In the Applicant's view, the Tribunal, in so doing, committed an erroneous reversal of the burden of proof, because the burden of proving the existence of such an agreement should have shifted to Wena.

60. The Applicant does not identify the rule on burden of proof on which it is relying upon. It is not disputed that payments were made by Wena to Mr. Kandil in return for services to be provided by Mr. Kandil to Wena. The Applicant's objection is therefore limited to the question whether such agreement was confirmed in writing. This is a purely factual issue which is irrelevant as a matter of minimal standard of procedure.

61. Moreover, the Applicant does not show the impact that this issue may have had on the Award nor does it demonstrate why, and in respect of which fundamental rule of procedure, the burden of proof would have shifted from Egypt to Wena, although Wena admitted the existence of a consultancy agreement with Mr. Kandil. To the extent the Applicant's objection refers to the content of such agreement and to the alleged improper influence exercised by Wena on Mr. Kandil, the Tribunal stated in its Award that the burden of proving corruption was on Egypt and that Egypt had failed to prove its allegations in this respect (paras. 77, 117). The Applicant's disagreement with this conclusion does not show any departure from a fundamental rule of procedure.

B. The assessment of damages

62. The Applicant argues that Wena at no time supplied any evidence of the sums it claimed it had invested in the hotels nor gave any evidence as to the losses it claimed to have suffered. The Application does not identify the fundamental rules of procedure it claims were violated with any more precision than merely requiring Wena to discharge its burden of proof.

63. The Award shows that the Tribunal considered Wena to be in charge of proving its losses. When determining the damages owed to Wena, the Award refers to the Claimant's statement on its actual investment in the two hotels

(paras. 120, 124, 125, 127). It indicates that the Tribunal accepted, in part, objections raised by Egypt that there were certain elements of double counting, leaving as a total an amount "which the Tribunal judges to be the approximate total for Wena's investment" (para. 127), from which it further deducted the amount already received by Wena as a result of the arbitration award rendered in respect of the Nile Hotel.

64. In fact, the Applicant's criticism is directed to the Tribunal's judgment on the pertinence of factual statements presented by Wena in order to prove the losses it claimed to have suffered. The question could be raised whether this objection is not a matter of substance, rather than a procedural issue, as referred to in Article 52(1)(d) of the Convention. The law applicable to the allocation of damages, as designated pursuant to Article 42(1) of the Convention, may indeed contain rules about the method to be applied to the assessment of damages.

65. However, irrespective whether the matter is one of substance or procedure, it is in the Tribunal's discretion to make its opinion about the relevance and evaluation of the elements of proof presented by each Party. Arbitration Rule 34(1) recalls that the Tribunal is the judge of the probative value of the evidence produced. The record also shows that account had to be taken of the loss of part of Wena's financial documentation as a result of the events of April 1, 1991. The Applicant does not show in what respect the Tribunal would have manifestly exceeded its discretion in assessing damages. Its complaint in this respect has therefore to be rejected by this Committee.

C. The assessment of interest

66. The Applicant submits that it was not offered the opportunity to address the issue of the appropriate rule of interest and thus it was deprived of its right to be heard.

67. The record shows, however, that Wena requested on various occasions, and in particular in the relief claimed in its memorials, an award of interest at an appropriate rate, from April 1, 1991 until the date of effective payment. The record also shows that the Applicant was invited to reply to Wena's claims and arguments, thus including the matter of interest.

68. The question raised appears to be rather whether the Applicant's objection is pertinent in respect of the award of compound interest, which was not specifically claimed by Wena nor addressed by the Applicant and, to the Committee's knowledge, not discussed at the hearings before the Tribunal.

69. Both Parties took very broad and undetermined positions in respect of the fixing of interest, basically calling for the fixing of "appropriate" interest. Both Parties admit that the allocation of compound interest is, albeit not dominant, at least one of the methods followed by international tribunals. Therefore, both parties must have been aware of the possibility that the Tribunal, referring to international practice, might consider compound interest as "appropriate" in the particular case.[24]

70. In the light of this, the Committee cannot accept the complaint that the Tribunal fixed interest by reference to a method not included in Wena's claim and on which the Applicant would have no opportunity to express its views.

D. The absence of Mr. Kandil as a witness

71. The Application further contends that the Tribunal breached a fundamental rule of procedure when not requesting further evidence concerning Mr. Kandil, whom neither Party offered as a witness in the arbitration, and then concluded the issue relating to Mr. Kandil against the Respondent. The Applicant notes that the Tribunal had the power to order further evidence under Arbitration Rules 34(2). In its view, the Tribunal was wrong in not exercising its discretion to call for further evidence, and to decide nevertheless the issue against one of the Parties on the basis of the absence of the evidence it had, in its discretion, decided not to ask for.

72. It is true that pursuant to Article 43 of the ICSID Convention and Arbitration Rule 34(2), the Tribunal has the discretionary power to call upon the parties to produce further evidence. The principle underlying this possibility is, however, that it is incumbent to the parties to produce the evidence they wish to present or they intend to request the Tribunal to call for. Under the heading "Marshalling of Evidence," this principle is embodied in Arbitration Rule 33.

73. The Applicant tries to turn the discretionary nature of the rules on evidence to their contrary when it asserts the existence of an obligation of the Tribunal to call for evidence on any item critical for the outcome of the dispute. Neither the Convention nor the Arbitration Rules contain any such provision. The Applicant fails to demonstrate the existence of a fundamental rule of procedure which would have put the Tribunal under an obligation to call for further evidence concerning Mr. Kandil. Therefore, the Applicant's complaint must fail also in this respect.

E. No finding of a serious departure from a fundamental rule of procedure

74. The Committee therefore comes to the conclusion that the ground for annulment relating to a serious departure of the Tribunal from a fundamental rule of procedure cannot prevail in the instant case. The request to this effect is therefore dismissed.

IV. DOES THE AWARD STATE THE REASONS ON WHICH IT IS BASED?

A. Preliminary observations

75. The third ground for annulment invoked by the Applicant is based on Article 52(1)(e) of the ICSID Convention. Under this rule, a party may request annulment of the award on the ground "that the award has failed to state the reasons on which it is based." This provision is related to Article 48(3) of the Convention, which states that "[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based."

76. The Applicant identified three distinct matters on which it contends that the Award does not state the reasons on which it based (hereinafter B to D). It further argues that the Tribunal did not deal with some questions submitted for its decision. In this respect, it is argued that the failure to comply with the first part of Article 48(3) of the ICSID Convention amounts to a failure to state reasons within the meaning of Article 52(1)(e). The latter question will be dealt with separately (under E).

77. Both Parties, when explaining the meaning and scope of Article 52(1)(e) of the ICSID Convention, reply on the standard of reasoning laid down by the *ad hoc* Committee in *MINE* as follows:

> ". . . . the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B, and eventually to its conclusion, even if it made an error of fact or law. The minimum requirement is in particular not satisfied by either contradictory or frivolous reasons."[25]

The same *ad hoc* Committee also stated that:

> ". . . the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph 1(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention."[26]

78. Other *ad hoc* Committees have used similar language, referring to reasons that are "sufficiently relevant," that is, "reasonably sustainable and capable of providing a basis for the decision,"[27] or demonstrating a "reasonable connection between the basis invoked by the tribunal and the conclusions reached by it."[28]

79. The ground for annulment of Article 52(1)(e) does not allow any review of the challenged Award which would lead the *ad hoc* Committee to reconsider whether the reasons underlying the Tribunal's decisions were appropriate or not, convincing or not. As stated by the *ad hoc* Committee in *MINE*, this ground for annulment refers to a "minimum requirement" only. This requirement is based on the Tribunal's duty to identify, and to let the parties know, the factual and legal premises leading the Tribunal to its decision. If such sequence of reasons has been given by the Tribunal, there is no room left for a request for annulment under Article 52(1)(e).

80. Any other than a limited scope given to this ground for annulment would cause some confusion with other remedies provided by the Convention. Indeed, when the reasons stated in the award give rise to doubts about its meaning, either party may request interpretation of the award under Article 50. In the case where the Tribunal omitted to decide on a question or where the award contains an error, either party may request the award be rectified, according Article 49(2). These remedies confirm the understanding that any challenge as to the substance of reasons given in the award cannot be retained as a ground for annulment under Article 52(1)(e).

81. Neither Article 48(3) nor Article 52(1)(e) specify the manner in which the Tribunal's reasons are to be stated. The object of both provisions is to ensure that the Parties will be able to understand the Tribunal's reasoning. This goal does not require that each reason be stated expressly. The Tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision.

82. The Tribunal's duty to state the reasons supporting its conclusions has as its basis the statements on facts and law, together with all the evidence adduced, that were before the Tribunal at the latest at the time it declared the proceeding closed pursuant to Arbitration Rule 38. The award cannot be challenged under Article 52(1)(e) for a lack of reasons in respect of allegations and arguments, or parts thereof, that have not been presented during the proceeding before the Tribunal.

83. It is in the nature of this ground of annulment that in case the award suffers from a lack of reasons which can be challenged within the meaning and scope of Article 52(1)(e), the remedy need not be the annulment of the award. The purpose of this particular ground for annulment is not to have the award reversed on its merits. It is to allow the parties to understand the Tribunal's decision. If the award does not meet the minimal requirement as to the reasons given by the Tribunal, it does not necessarily need to be resubmitted to a new Tribunal. If the *ad hoc* Committee so concludes, on the basis of the knowledge it has received upon the dispute, the reasons supporting the Tribunal's conclusions can be explained by the *ad hoc* Committee itself.

B. The Tribunal's determination that it was not necessary to consider EHC's and Wena's respective obligations under the leases

84. In the first place, the Applicant recalls that it had argued during the arbitral proceedings that Wena had suffered no deprivation as a result of the events of April 1, 1991, as its various defaults under the leases entitled EHC, as of that date, to request the termination of the leases for default. Such termination had subsequently been pronounced by an arbitral tribunal constituted under the Nile Hotel lease. In the Applicant's view, this item is fundamental as Egypt cannot be held liable for having expropriated rights claimed to be attributed to Wena which no longer existed as of the date of April 1, 1991.

85. The Applicant states that the Tribunal, while it acknowledged that disputes had arisen between EHC and Wena concerning their respective obligations under the leases, merely noted, in the statement of facts of the Award, that "in the view which the Tribunal takes of this case it is not necessary at this time to determined the truth of these conflicting allegations. It is sufficient for this proceedings simply to acknowledge, as both parties agree, that there were serious disagreements between Wena and EHC about their respective obligations under the leases" (para. 19).

The Applicant complains in this respect that the Tribunal failed to explain the reasons why it was taking such view, which makes the Award subject to the ground for annulment of Article 52(1)(e).

86. The Award states expressly that it is based on Article 2 and 5 of the IPPA and that its object is to resolve a dispute which opposes Wena to Egypt (*see*, in particular, paras. 78, 108, 118). It follows from this position that the Tribunal declared irrelevant to consider the rights and obligations of the parties to the leases for the purpose of reaching a decision on the dispute submitted to it. The Award confirms that Wena had been expropriated and lost its investment, and this irrespective of the particular contractual relationship between Wena and EHC. The explanation thus given for not determining the respective obligations of Wena and EHC under the leases is sufficient to understand the premises on which the Tribunal's decision is based in this respect.

C. The Tribunal's determination of the amount awarded to Wena

87. Secondly, the Applicant complains that, on the face of the Award, it cannot understand the legal basis on which Wena's claim for payment of damages has been made and how it has been quantified.

88. With respect to the first item, the Award states that the allocation of damages is based on the standard set forth in Article 5(1) of the IPPA (para. 118), which is declared to be the primary source of applicable law (para. 78). Article 5(1) of the IPPA sets out the legal basis for damages to be paid to the investor in case of expropriation, and it identifies such damages by using the fundamental notion of "prompt, adequate and effective compensation." Therefore, this Committee cannot accept the Applicant's objection that the Award, when referring explicitly to Article 5 of the IPPA, did not state the legal basis on which Wena's claim for payment of damages has been awarded.

89. The same holds true in respect of the Applicant's various statements about the Tribunal's finding on expropriation not conforming to Egyptian law or other standards. The finding of the Tribunal on this matter is based on Article 5 of the IPPA which, as discussed further above, applies international law standards. It follows that both the meaning of expropriation and the compensation for damages in the event of it happening are determined by the same source of law. The reasoning for it all becomes clear in the Award when invoking this Article.

90. The Applicant further contends that the Award does not explain the way in which the Tribunal has quantified the damages awarded to Wena.

91. With respect to determination of the quantum of damages awarded, it may be recalled that the notion of "prompt, adequate and effective compensation" confers to the Tribunal a certain margin of discretion, within which, by its nature, few reasons more than a reference to the Tribunal's estimation can be given, together with statements on the relevance and the evaluation of the supporting evidence.

92. In this regard, the Tribunal declared in its Award at the outset that Wena's claims for lost profits, lost opportunities and reinstatement costs were inappropriate because they were too speculative (paras. 122-124). It decided therefore to calculate "the market value of the investment expropriated immediately before the expropriation" under Article 5 of the IPPA by reference to Wena's actual investments in the two hotels (para. 125). The Award further explains that the panel accepted the amount stated by Claimant as its loss as gross figure, from which it deducted an amount corresponding to probable double counting (para. 127). The Award also states that the Tribunal was not persuaded by Respondent's evidence that there were significant other instances of double counting (para. 127). In respect of the alleged investment by Wena's affiliates, the tribunal declared not to be persuaded by Egypt's contention that much of the investment came from affiliates of Wena rather than from Wena and that as long as those investments went into the Nile and Luxor hotels venture, they should be recognized as appropriate investments (para. 126). The reasons given thus allow to understand that the Tribunal accepted Wena's evidence on the losses it claimed to have suffered, to the exception of a correction related to possible double counting.

93. With respect to any further reasons supporting the Tribunal's determination of the amount awarded to Wena, the appropriate information is contained in Wena's documentary evidence. The reasons relevant for the Tribunal's findings are thus stated implicitly by reference to such documentation. The ground for annulment of Article 52(1)(e) does not allow to argue further that the Tribunal evaluated erroneously the evidence submitted by Claimant and thus decided without stating sufficient reasons. This Committee therefore concludes that the quantification of the damages awarded to Wena cannot be challenged for a failure to state reasons in the Award.

D. The Tribunal's determination of the interest awarded

94. In the third place, the Applicant complains that the Tribunal failed to give reasons for its decision to adopt a rate of interest at 9% and for its determination of the date from which interest accrues.

95. When fixing the rate of interest at 9%, the Award specifies that this rate was 1% below long term government bonds in Egypt (para. 128, note 289). The Applicant's view is that such reasoning is not sufficient and does not meet the requirement of "reasons stated" under Article 52(1)(e).

96. As an extended practice shows, international tribunals and arbitration panels usually dispose of a large margin of discretion when fixing interest. It is normal, therefore, that very limited reasons are given for a decision which is left almost entirely to the discretion of the tribunal. When fixing a rate of interest 1% below long term government bonds in Egypt, the Tribunal concluded that Wena should be granted interest close to but still below such bonds. It must be assumed that it took such decision in order to award damages corresponding to an "adequate and effective compensation" as provided for in Article 5 of the IPPA. The reasons underlying the Tribunal's decision in this respect are thus stated sufficiently.

97. The requirement to state the reasons supporting the allocation of interests appears particularly weak when, like in these proceedings, as mentioned in paragraph 69 above, both Parties were not more determinative than referring to the allocation of appropriate interest, thus conferring to the Tribunal a wide discretionary power to assess interest. Under such circumstances, the Tribunal need not be more explicit than the Parties were in their respective positions taken on this particular matter. In addition, this Committee does not have to entertain arguments and submissions a party has not developed before the Tribunal.

98. The Applicant further objects that the Award does not allow to know the date from which interest accrues (the "*dies a quo*"). It is true that no such date is specified expressly in the Tribunal's decision. The Applicant accepts that such date might be determined by an appropriate mathematical calculation, based on the total amount of accrued interest and the interest rate awarded. The Applicant did not undertake any such calculation, nor did it demonstrate that the Tribunal had chosen a wrong "*dies a quo*." In the light of such a lack of support given to the Applicant's own contention, this Committee need not inquire on its own initiative whether the Tribunal's calculation is based on April 1, 1991 as the "*dies a quo*," as this appears implicitly from the Tribunal's statement with respect to the day when the expropriation of Wena's rights occurred. Although this is outside the scope of examination as required in a proceeding under Article 52(1), the Committee has anyhow made its own calculation. In this respect, the Committee concludes that, when taking into account the payment of the amount awarded in the Nile Hotel arbitration on June 14, 1997 and the amounts respectively owed to Wena, before and after this date, together with the respective amounts of interest accrued as stated in the Award, the resulting amount is very close to the total amount as set forth in the Award. The Committee is satisfied that April 1, 1991 is discernible from the Award as the "*dies a quo*."

99. The Applicant further argues that if the relevant date would appear to be April 1, 1991, it would be wrong, because a substantial portion of Wena's investment had been invested long after that date. This argument cannot be heard as a ground for annulment based on Article 52(1)(e) because it invites this Committee to proceed to a re-examination of the merits of the Award.

E. Did the Tribunal not deal with questions submitted for its decision?

100. Article 48(3) of the Convention, quoted above, makes a distinction between the Tribunal's duty to deal with every question submitted to it, and the requirement that the award shall state the reasons upon which it is based. The ground for annulment of Article 52(1)(e) only refers to the latter element. In case a Tribunal had omitted to decide a question in the award, a party may request the Tribunal to decide such question, in an additional proceeding pursuant to Article 49(2) which is distinct from an annulment proceeding under Article 52.

101. However, the remedy provided for in Article 49(2) is not always sufficient in such a case, as other *ad hoc* Committees have pointed out.[29] Indeed, the answer to the question the Tribunal omitted to decide may have direct or collateral effects upon the arguments which are at the basis of the Tribunal's conclusions. A proceeding under Article 49(2) would not allow the Tribunal to go further than to decide upon the question it had omitted to deal with. It is not a sufficient remedy when such a decision may affect the sequence of arguments contained in the Award and require that it be reconsidered in the light of the Tribunal's decision on the omitted question. The ground for annulment under Article 52(1)(e) includes therefore the case where the Tribunal omitted to decide upon a question submitted to it to the extent such supplemental decision may affect the reasoning supporting the Award.

102. The Applicant argues in this respect that the relationship between Wena and Mr. Kandil rendered the lease agreements null and void, irrespective of the purpose of the alleged consultancy agreement between Wena and Mr. Kandil. In the Applicant's view, the Tribunal failed to deal with this argument.

103. The Tribunal explained in its Award that in the light of the fact that Mr. Kandil had not been prosecuted and, on the basis of the evidence before the tribunal, had not been subject to investigation by the Egyptian authorities, it could not share Egypt's view that the agreement with Mr. Kandil was illegal under Egyptian law (para. 116) and that Egypt failed to present any evidence that would refute Wena's evidence that the contract was a legitimate agreement (para. 117). The Applicant's object is directed, therefore, not to any failure to state reasons, but to the merits of the reasons given by the Tribunal. As has been explained, such argument cannot be heard by this Committee in respect of the ground for annulment stated in Article 52(1)(e).

104. The Applicant further argues that the Award deals exclusively with the issue raised as to an alleged case of corruption, but that the Tribunal failed to consider that the lease agreements were null and void for another reason. This reason is, according to the Applicant, a conflict of interest in the person of Mr. Kandil who was a consultant to Wena while he acted also as Chairman of EHC, and which Mr. Kandil allegedly did not declare to EHC's board of directors as required by Article 97 of the Egyptian Companies Law No. 159/1981.

105. The Applicant has not demonstrated to this Committee that the alleged failure of the Tribunal to consider the argument of nullity of the lease agreements based on a conflict of interest in the person of Mr. Kandil, as an argument separate from alleged nullity based on corruption, would have resulted in affecting Wena's right to protection of its investment under the IPPA. Hence, the Applicant did not show that the lack of a decision on the question it has raised would have any effect on the result of the Award, which is a prerequisite to entertain a request based on Article 52(1)(e) complaining that the Tribunal omitted to deal with a question submitted to it.

106. When leaving the latter consideration aside, this Committee observes that the Tribunal did not address in as much express terms the argument based on an alleged conflict of interest than it dealt with the question whether improper influence had been exercised on Mr. Kandil. The said argument is, however, rejected implicitly in the Award, where it is noted that Egypt failed to present "any evidence" which would have led to think that the agreement was not legitimate, and that neither party offered to present live testimony from Mr. Kandil (para. 117). The Award also accepts Wena's contention that "the agreement did not concern the Nile and Luxor hotels, but was to help Wena to pursue development opportunities in Misr Aswan, where Mr. Kandil was a tourist consultant (para. 114). Thus, the Award denies the existence of a factual situation which might have implied that Mr. Kandil's interests in the tourist

development in Misr Aswan would conflict with the interests of EHC in the conclusion of the lease agreements in respect of the Nile and Luxor hotels. Therefore, the Applicant's complaint must fail.

107. The Applicant further contends that the Tribunal failed to consider and give effect to the Nile arbitral award which definitively settled the rights and obligations of Wena in respect of the Nile Hotel and thus had an immediate effect on Wena's purported rights which the Award declared to have been subject of an expropriation. The Applicant believes that its contentions in this regard, irrespective whether they were right or wrong, still need to be addressed, because they concerned the very nature and extent of the rights that Wena claimed had been expropriated.

108. As has been mentioned before, the Tribunal took another view. It concluded that the rights and obligations between Wena and EHC under the lease agreements were not relevant to determine the relationship between Wena and Egypt under the IPPA. The Award did however take account of the damages awarded to Wena in the Nile Hotel award, the respect amount being deducted from the damages claimed by Wena (para. 127). Therefore, reasons were given in the Award to dispose of the Applicant's submission in this respect.

109. The Applicant moreover objects that the Tribunal did not address the fact that Wena still owned, possessed and operated the Luxor Hotel for over five years after the hotel had been returned to it in 1992 and that, in fact, Wena still remained the lessee of that property. The Applicant states that, as a matter of Egyptian law, the receivership ordered in 1997 was in the nature of a conservatory measure, which did not affect Wena's continuing rights under the Luxor lease.

110. The Award states as a matter of fact (para. 62) that on August 14, 1997, Wena was evicted from the Luxor Hotel and, according to a witness, the hotel was turned over to a court-appointed receiver requested by EHC. The Tribunal further stated that Egypt took no immediate action to restore the hotels to Wena (paras. 84 and 85) and to protect Wena's investments after EHC had illegally seized the hotels (para. 88), that neither hotel was restored to Wena until nearly a year after the events of April 1, 1991 (para. 91), nor was it returned to Wena in the same operating conditions that it had been in before the seizures (para. 92). This is amble explanation for the Tribunal's conclusion that the fact of the lease concerning the Luxor Hotel remaining in force, had not the effect of removing Egypt's liability as a consequence of the violation of its obligation to ensure Wena's investment "fair and equitable treatment" and "full protection and security" under Article 2(2) of the IPPA. Hence, the respective part of the Award cannot be challenged for any lack of reasons given by the Tribunal.

F. No finding of lack of reasons

111. This Committee therefore concludes that the objections raised by the Applicant under Article 52(1)(e) of the Convention, to the extent that they are admissible for the Committee's consideration, are not founded and must be rejected.

V. COSTS

112. In the light of the importance of the arguments advanced by the Parties in connection with this case, the Committee considers it appropriate that each Party bear its own litigation costs with respect to this annulment proceeding, and that the Parties bear equally all expenses incurred by the Centre in connection with such proceeding.

VI. DECISION

113. Based on the foregoing, the Committee rejects in its entirety the Application for annulment of the Arbitral Award rendered on December 8, 2000.

114. Independently of the above decision on the Application for annulment the Committee decides as follows the question of the allocation of costs in this proceeding:

(a) Each Party shall bear its own expenses, including legal fees, incurred in connection with this annulment proceeding.

(b) Each Party shall bear one half of the costs incurred by the Centre in connection with this proceeding, including the fees and expenses of the members of the Committee; and,

(c) Accordingly, Wena Hotels Limited shall reimburse the Arab Republic of Egypt one half of the total costs incurred by the Centre in connection with this annulment proceeding once the amount has been determined by the Secretariat of the Centre.

So decided,

/s/	/s/	/s/
Andreas Bucher	Konstantinos D. Kerameus	Francisco Orrego Vicuña
Member	President	Member

January 28, 2002

ENDNOTES

1. *See Klöckner v. Cameroun*, Decision on Annulment, 3 May 1985 (hereinafter "*Klöckner I*"), 2 *ICSID Reports* 95, at 97, 126 (paras. 3,83); *Amco Asia Corporation and others v. Republic of Indonesia*, Decision on Annulment, 16 May 1986 ("*Amco I*"), 1 *ICSID Reports* 509, at 515/516 (para. 23); *Maritime International Nominees Establishment v. Republic of Guinea*, Decision on Annulment, 22 December 1989 ("*MINE*"), 4 *ICSID Reports* 79, at 85 (para. 4.04).
2. *See Klöckner I*, 2 *ICSID Reports*, at 97, 120, 138 (paras 3, 62, 119); *MINE*, 4 *ICSID Reports*, at 85 (para. 4.05).
3. *Klöckner I*, 2 *ICSID Reports*, at 118 (para 58.).
4. *Amco I*, 1 *ICSID Reports*, at 515 (para. 23).
5. *MINE*, 4 *ICSID Reports*, at 87 (para. 5.03).
6. *Klöckner I*, 2 *ICSID Reports*, at 119 (para. 61).
7. *North-Eastern Boundary* case, Untied States-Canada, 1831, Moore, *Arbitrations*, Vol. I, 119, at 133-134, as cited in J.L. Simpson and Hazel Fox, *International Arbitration, Law and Practice*, 1959, at 250.
8. World Bank, *Report of the Executive Directors on the ICSID Convention*, Documents Concerning the Origin and the Formulation of the Convention, 1968, 962, at 1029 (para. 40).
9. *Amco I*, 1 *ICSID Reports*, at 515 (para. 20); *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Award, 20 May 1992 (*SPP v. Egypt*), 3 *ICSID Reports* 189, at 207 (para. 80).
10. *Klöckner I*, 2 *ICSID Reports*, at 122 (para. 69).
11. W. Michael Reisman: "The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of Its Threshold," 15 *ICSID Review — Foreign Investment Law Journal* 362-381 (2000). Professor Reisman also prepared a legal opinion on the matter submitted by the Applicant in the proceeding before the Committee, whereas Wena submitted a legal opinion prepared by Professor Christoph Schreuer.
12. Ibrahim Shihata: "Egypt" *in*: Elihu Lauterpacht and John G. Collier (eds.): *Individual Rights and the State in Foreign Affairs*, 1977, 204-242, at 235, with particular reference to Article 151 of the Egyptian Constitution.
13. *Ibid.*, at 235-236.
14. *Ibid.*, footnotes 126-129.

15. Ruling on the application for cassation No. 1885 for the 50th judicial year. Hearing No. 50, December 1983 excerpt as translated for the record.

16. Shihata, *loc. cit.*, at 236, note 125.

17. *Ibid.*, at 237 and discussion of the investment treaties made by Egypt.

18. Egyptian State Information Service, Foreign Investment, <www.sis.gov.eg/inv2000/html> (Chapter 2); and <www.sis.gov.eg/inv99/html/ent1.htm>.

19. John Y. Gotanda: "Awarding interest in international arbitration," 90 *American Journal of International Law* 40-63, at 48 (1996).

20. *SPP v. Egypt* cited supra note 9, 3 *ICSID Reports* at 242, 244 (paras. 222, 237), and discussion in W. Laurence Craig: "The Final Chapter in the Pyramids Case: Discounting an ICSID Award for Annulment Risk," 8 *ICSID Review —Foreign Investment Law Journal* 264-293, at 278-279 (1993).

21. *Atlantic Triton v. Guinea*, Award of 21 April 1986, 3 *ICSID Reports* 17, at 33, 43; *Compañia del Desarrollo de Santa Elena S. A. v. Republic of Costa Rica*, Award of 17 February 2000, 15 *ICSID Review — Foreign Investment Law Journal* 169, at 200-202 (2000) (paras. 96-107); *Emilio Augustin Maffezini v. The Kingdom of Spain*, Award, 13 November 2000, 16 *ICSID Review — Foreign Investment Law Journal* 248, at 277 (2001) (para. 96).

22. *SOABI v. Senegal*, Decision on Jurisdiction, 1 August 1984, 2 *ICSID Reports* 164, at 182-183 (paras. 33-38).

23. 4 *ICSID Reports*, at 87 (para. 5.05).

24. *See also* in this respect the remarks of *Klöckner I*, 2 *ICSID Reports*, at 129 (para. 91): "Within the dispute's 'legal framework,' arbitrators must be free to rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties (although they could have been). Even if it is generally desirable for arbitrators to avoid basing their decision on an argument that has not been discussed by the parties, it obviously does not follow that they therefore commit a 'serious departure from a fundamental rule of procedure.' Any other solution would expose arbitrators to having to do the work of the parties' counsel for them and would risk slowing down or even paralyzing the arbitral solution to disputes."

25. *MINE*, 4 *ICSID Reports,* at 88 (para. 5.09).

26. *MINE*, 4 *ICSID Reports,* at 88 (para. 5.08).

27. *Klöckner I*, 2 *ICSID Reports*, at 139 (para. 120).

28. *Amco I*, 1 *ICSID Reports*, at 520 (para. 43).

29. *See MINE*, 4 *ICSID Reports*, at 88/89 (paras. 5.11-5.13), 107 (para. 6.101); *Amco I*, 1 *ICSID Reports*, at 517-519 (paras. 32-36).