

**International Centre for Settlement of Investment Disputes**

**Washington D.C.**

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**Jan de Nul N.V.**

**Dredging International N.V.**

CLAIMANTS

**v.**

**Arab Republic of Egypt**

RESPONDENT

**ICSID Case No. ARB/04/13**

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**Award**

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Rendered by an Arbitral Tribunal composed of:

Professor Gabrielle Kaufmann-Kohler, President

Professor Pierre Mayer, Arbitrator

Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal:

Mrs. Claudia Frutos-Peterson

Date of dispatch to the Parties: November 6, 2008

**TABLE OF CONTENTS**

<b>TABLE OF CONTENTS.....</b>	<b>4</b>
<b>I. PROCEDURE.....</b>	<b>6</b>
1. THE PARTIES .....	6
1.1 The Claimants.....	6
1.2 The Respondent .....	6
2. PROCEDURE LEADING TO THE DECISION ON JURISDICTION.....	7
3. PROCEDURE LEADING TO THE AWARD ON THE MERITS.....	10
<b>II. MAIN FACTS .....</b>	<b>16</b>
1. THE TENDER STAGE .....	17
1.1 First tender.....	17
1.1.1 The tender documents .....	17
1.1.2 The bidders' offer .....	19
a) <i>The investigations of the bidders</i> .....	19
b) <i>The Claimants' offer</i> .....	20
1.2 Second tender.....	20
1.3 Third tender.....	21
1.3.1 The tender documents .....	21
1.3.2 The Claimants' offer .....	22
1.3.3 The Respondent's view of the Claimants' offer.....	22
1.3.4 The award of the third tender to the Claimants .....	23
2. THE PERFORMANCE OF THE CONTRACT .....	26
3. THE PROCEEDINGS BEFORE THE EGYPTIAN ADMINISTRATIVE COURTS.....	28
3.1 The two actions brought by the Claimants.....	28
3.2 The First Panel.....	29
3.3 The Commissaire d'Etat.....	31
3.4 The Committee for Settling the Complaints of the Investors.....	33
3.5 The Second Panel .....	33
4. THE DECISION OF THE ISMAÏLIA ADMINISTRATIVE COURT .....	36
<b>III. THE PARTIES' POSITIONS .....</b>	<b>37</b>
1. THE CLAIMANTS' POSITION .....	37
2. THE RESPONDENT'S POSITION .....	40

<b>IV. PRELIMINARY CONSIDERATIONS .....</b>	<b>41</b>
1. JURISDICTION .....	41
1.1 The Parties' positions.....	41
1.2 The Decision on Jurisdiction .....	42
2. APPLICABLE LAW .....	44
3. ATTRIBUTION .....	46
3.1 Acts and omissions of the SCA.....	47
3.1.1 The Claimants' position.....	47
3.1.2 The Respondent's position.....	49
3.1.3 The Tribunal's determination.....	50
a) <i>Are the acts of SCA attributable to Egypt because the SCA is an organ of the State (Art. 4 ILC Articles)? .....</i>	<i>51</i>
b) <i>Are the acts of SCA attributable to Egypt because the SCA is a public entity having exercised governmental authority functions (Art. 5 ILC Articles)? .....</i>	<i>52</i>
(i) <i>Is the SCA empowered to exercise elements of governmental authority? .....</i>	<i>53</i>
(ii) <i>Did the SCA exercise governmental authority in its dealings with the SCA?.....</i>	<i>54</i>
c) <i>Are the acts of SCA attributable to Egypt because the SCA has acted upon the instruction of the State (Art. 8 of the ILC Articles)? .....</i>	<i>55</i>
d) <i>Conclusions on attribution of the acts of the SCA.....</i>	<i>56</i>
3.2 Acts and omissions of the other actors .....	56
4. ALLEGED VIOLATION OF THE FAIR AND EQUITABLE TREATMENT STANDARD .....	56
4.1 The Parties' positions.....	56
4.1.1 The Claimants' position.....	56
4.1.2 The Respondent's position.....	58
4.2 The Tribunal's determination.....	60
4.2.1 Standards.....	60
4.2.2 Fair and equitable treatment and the proceedings leading to the Decision of the Ismaïlia Court .....	63
a) <i>Procedural denial of justice .....</i>	<i>63</i>
b) <i>Substantive denial of justice.....</i>	<i>65</i>
c) <i>Exhaustion of local remedies .....</i>	<i>81</i>
4.2.3 Fair and equitable treatment in relation to the Prime Minister and the Committee for Settling the Complaints of the Investors .....	83
a) <i>The Prime Minister's conduct.....</i>	<i>83</i>
b) <i>The conduct of the Committee for Settling the Complaints of the Investors.....</i>	<i>84</i>
5. ALLEGED VIOLATION OF THE CONTINUOUS PROTECTION AND SECURITY STANDARDS .....	84

6.	ALLEGED VIOLATION OF THE DUTY TO PROMOTE INVESTMENTS.....	85
<b>V.</b>	<b>COSTS .....</b>	<b>86</b>
1.	THE PARTIES' POSITIONS.....	86
2.	THE TRIBUNAL'S DETERMINATION .....	86
<b>VI.</b>	<b>DECISION.....</b>	<b>87</b>

**TABLE OF ABBREVIATIONS**

For the sake of convenience, the Tribunal will use the following abbreviations:

1977 BIT	Agreement between the Belgo-Luxembourg Economic Union on the one hand, and the Arab Republic of Egypt on the other hand, on encouragement and reciprocal protection of investments of 28 February 1977
2002 BIT	Agreement between the Belgo-Luxembourg Economic Union on the one hand, and the Arab Republic of Egypt on the other hand, on encouragement and reciprocal protection of investments of 28 February 1999
1 <sup>st</sup> PHB	First Post-Hearing Brief(s) of 20 December 2007
2 <sup>nd</sup> PHB	Second Post-Hearing Brief(s) of 17 January 2008
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT(s)	Bilateral investment treaty(ies); specifically bilateral investment treaties between the Belgo-Luxembourg Economic Union and the Arab Republic of Egypt (respectively the “1977 BIT” and the “2002 BIT”, collectively the “BITs”)
CMem.	Respondent's Counter-Memorial on the Merits of 15 February 2007
Contract	Contract of 29 July 1992 between the Claimants and the SCA
Exh. [C-] [R-]	Exhibit [Claimants] [Respondent]
ER	Expert Report
First Claimant	Dredging International N.V.
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
Mem.	Claimants' Memorial on the Merits of 15 November 2006
Rej.	Respondent's Rejoinder on the Merits of 16 July 2006
Reply	Claimants' Reply on the Merits of 11 May 2007
Request	Request for Arbitration of 23 December 2003
Respondent	The Arab Republic of Egypt (also referred to as “Egypt”)
SCA	The Suez Canal Authority
Second Claimant	Jan de Nul N.V.
SoC	Claimants' Statement of Claim of 15 March 2005
Tr. W.	Transcript of the evidentiary hearing of 25, 26, 27 September 2007
Tr. H	Transcript of the hearing on the merits of 18 October 2007
WS	Witness statement

## **I. PROCEDURE**

### **1. THE PARTIES**

#### **1.1 The Claimants**

1. The Claimants in these proceedings are (i) Dredging International N.V. (the “First Claimant”) and (ii) Jan de Nul N.V. (the “Second Claimant”) (collectively the “Claimants”).
2. The First Claimant, Dredging International N.V., is a company incorporated under the laws of Belgium with its registered office at Scheldedijk 30, B-2070 Zwijndrecht, Belgium.
3. The Second Claimant, Jan de Nul N.V., is a company incorporated under the laws of Belgium with its registered office at Tragel 60, B-9308 Hofstade-Aalst, Belgium.
4. The Claimants are the two partners of the Joint Venture DI-JDN Suez, an unincorporated joint venture (the “Joint Venture” or “JV”), entered into for the purpose of jointly performing dredging operations in the Suez Canal under a contract awarded by the Suez Canal Authority (the “SCA”), an Egyptian State entity.
5. The Claimants are collectively represented in this arbitration by Prof. Antonio Crivellaro and Prof. Luca Radicati di Brozolo, BONELLI EREDE PAPPALARDO, Via Barozzi 1, 20122 Milan, Italy.

#### **1.2 The Respondent**

6. The Respondent in this arbitration is the Arab Republic of Egypt (“Egypt”).
7. Egypt is represented in this arbitration by
  - Dr. Iskandar Ghattas, Under Secretary, Ministry of Justice; Dr. Mostafa Abdel Ghaffar, Director of International Cooperation, Ministry of Justice; Mr. Hosam Abdel Azim, President of the Office of State Litigation; Mr. Osama Mahmoud, Office of State Litigation, and;
  - Messrs Robert Saint-Esteben and Louis-Christophe Delanoy, BREDIN PRAT, 130, rue du Faubourg Saint-Honoré, 75008 Paris, France.

## 2. PROCEDURE LEADING TO THE DECISION ON JURISDICTION

8. On 23 December 2003, the Claimants submitted a Request for Arbitration (the "Request") to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre"), accompanied by nine exhibits (Exh. C-1 to C-9). In the Request, the Claimants relied upon the provisions of the 1977 and 2002 bilateral investment treaties ("BITs") between the Belgo-Luxembourg Economic Union and Egypt and sought the following relief:

### CLAIMS FOR DECLARATORY DECISIONS IN THE PRINCIPLE

1. The Claimants seek an Arbitral Award:
  - acknowledging that the Respondent induced the Claimants to make an investment in Egypt by negotiating in bad faith and by fraudulently misrepresenting facts of crucial relevance to the evaluation of the cost of the investment by the Claimants;
  - acknowledging that the Respondent has failed to promptly repair the resulting damages by adequate compensation and that all its organs have constantly disregarded the Claimants' rights to a just remedy;
  - therefore, declaring that the Respondent has breached its international obligations under the agreements between it and Belgium, and notably the obligation to ensure fair and equitable treatment and full protection and security to foreign investments.

### MONETARY CLAIMS

1. In addition, the Claimants request that the Arbitral Tribunal award to them complete compensation for all the damages suffered as a result of Egypt's breaches of its international obligations.
2. These damages include in particular:
  - the difference between the fair value of the investment made by the Claimants and the much lower amount received in partial compensation therefore, amounting at least to US\$74 million;
  - the amount unduly retained and expropriated by SCA in relation to the subject-matter of the Second Case amounting at least to US\$2,890,370 (US\$1,148,816.61 plus EGP 5,244,659.82);
  - the amount of the legal fees and other costs incurred by the Joint Venture during the unfair and futile judicial proceedings before the Egyptian domestic courts, amounting approximately to US\$4,500,000;
  - the amount of the financial damages suffered by the Claimants to be calculated by applying to the total amount of damages indicated above a 9% compound interest running from June 30, 1993 (the central point of the performance period of the works) until actual payment by the Respondent. The rate of 9% is the proper rate already applied to an amount due by Egypt in a previous ICSID case;

The exact amount of the damages will be determined more precisely during the proceedings.

- 3 In addition, the Claimants request that the Respondent be ordered to reimburse them for all costs incurred and to be incurred by them in connection with the present arbitration, including legal fees.
9. On 14 January 2004, the Centre transmitted a copy of the Request to the Respondent and to the latter's Embassy in Washington, D.C, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "ICSID Institution Rules").
10. Exchanges of correspondence ensued between the Parties and the Acting Secretary-General of ICSID concerning the jurisdiction of ICSID over the Request and its registerability under Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") and ICSID Institution Rules 6 and 7.
11. On 27 May 2004, the Acting Secretary-General, in accordance with ICSID Institution Rule 7, notified the Parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.
12. By letter of 17 June 2004, the Centre acknowledged that the Parties agreed "that there shall be three arbitrators, one appointed by each party and the third, who shall be the president of the Tribunal, appointed by the two party-appointed arbitrators".
13. On 29 June 2004, the Claimants appointed Professor Pierre Mayer, a national of France, as arbitrator. On 18 July 2004, the Respondent appointed Professor Brigitte Stern, a national of France, as arbitrator. On 7 September 2004, the Centre informed the Parties that the two party-appointed arbitrators had appointed Professor Gabrielle Kaufmann-Kohler, a national of Switzerland, as the President of the Tribunal.
14. On 14 September 2004, the Secretary-General of ICSID, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date. The same letter informed the Parties that Ms. Aurélia Antonietti, Counsel, ICSID, would serve as Secretary of the Tribunal.



The Parties were later informed on 31 August 2006, that Mrs. Claudia Frutos-Peterson, Counsel, ICSID, would act as the Secretary of the Tribunal.

15. In accordance with ICSID Arbitration Rule 13(1), and after consulting with the Parties and the Centre, the Tribunal scheduled a first session on 10 November 2004 in Paris. By letters of 28 and 29 October 2004, the Parties communicated to the Tribunal the agreements they had reached on procedural matters identified in the provisional agenda for the first session, which had been sent to them by the Tribunal's Secretary.
16. Consequently, the Arbitral Tribunal held its first session on 10 November 2004, at the offices of the World Bank in Paris. At the outset of the preliminary hearing, the Parties expressed agreement that the Tribunal had been properly constituted (Arbitration Rule 6) and stated that they had no objections in this respect. The Parties reiterated their agreement on the points communicated to the Tribunal in their letters of 28 and 29 October 2004, and the remainder of the procedural issues on the agenda for the session were discussed and agreed upon, including two alternative procedural calendars depending on whether or not the Respondent would raise objections to jurisdiction. Minutes were drafted, signed by the President and the Secretary of the Tribunal, and provided to the Parties, as well as to the Members of the Tribunal on 29 November 2004.
17. In accordance with Arbitration Rule 22, the Parties in particular agreed on the following arrangements in respect of the procedural language:
  - The Parties will file their written submissions and make their oral arguments either in English or in French without any translation needed.
  - Any communication, decision, order or award issued by the Tribunal will be rendered and the record of the proceeding will be kept in English. At hearings, the Tribunal will use the English language and might also use the French language when appropriate.
  - [...] all instruments including without limitation supporting documentation, as well as witness statements and expert opinions, would be filed either in French or English without translation. Documents filed in Arabic shall be filed together with an English or a French translation.

(Minutes of the First Session, at No. 7).
18. In accordance with the preliminary procedural calendar agreed upon during the first session, the Claimants submitted their Statement of Claim on 15 March 2005 ("SoC"), accompanied by 155 exhibits (Exh. C-10 to C-164), including two witness statements (Mr. Jacques Albert (Exh. C-18) and Mr. Pierre Tison (Exh. C-46)). In

their SoC, the Claimants invoked the provisions of the BITs and sought the following relief:

[...] subject to later amendments during the proceedings, the Claimants seek an award:

- declaring that Egypt has violated its obligations under the First and Second BIT;
- ordering Egypt to compensate the damage caused to the Claimants; and therefore
- ordering Egypt to pay to the Claimants the amounts of US\$ 76.531.040 and € 3.307.008,47, plus interest starting from the dates and at the rate claimed in Section 12.3 above; and
- ordering Egypt to bear the entirety of the costs of the present proceedings.

19. By a letter dated 13 April 2005, the Respondent informed the Tribunal that it intended to raise objections to jurisdiction.

20. Consequently, on 18 April 2005, the Tribunal issued Procedural Order No. 1 (PO#1) which set the calendar for the jurisdiction phase of the proceedings.

21. Following written submissions and a hearing, on 16 June 2006, the Tribunal rendered its Decision on Jurisdiction, in which it held that it had jurisdiction in the following terms:

- a) The Arbitral Tribunal has jurisdiction over the dispute submitted to it in this arbitration.
- b) The Tribunal will, accordingly, make the necessary order for the continuation of the proceedings on the merits.
- c) The decision on costs is deferred to the second phase of the arbitration on the merits.

22. The Decision on Jurisdiction, a copy of which is attached to the present Award and made an integral part of it, is further addressed in Chapter IV.1.2 below.

### **3. PROCEDURE LEADING TO THE AWARD ON THE MERITS**

23. On 11 August 2007, the Tribunal issued Procedural Order No. 2 (PO#2) setting the calendar for the merits phase of the proceedings as follows:

Accordingly, the procedural calendar on the merits shall be as follows:

- The Claimants shall file their Memorial by November 15, 2006;
- The Respondent shall file its Counter-memorial by February 15, 2007;
- The Claimants shall file their Reply by April 20, 2007;
- The Respondent shall file its Rejoinder by June 25, 2007;

- A pre-hearing telephone conference shall take place on July 10, 2007 at 5 pm, Paris time;
  - A hearing for the examination of witnesses and/or experts will take place on September 25 and 26, and, if necessary, on September 27, 2007;
  - The oral arguments on the merits will take place on October 17, and if necessary on October 18, 2007.
24. In accordance with the procedural calendar set in PO#2, the Claimants submitted their Memorial on the Merits on 15 November 2006 (Mem.) together with Exhibits C-171 to C-175, including the supplemental witness statement of Mr. Gideon Hein (Exh. C-171), and a statement by Mr. Hosni Abdelwahed (Exh. C-174).
25. In accordance with the procedural calendar set in PO#2, the Respondent submitted its Counter-Memorial (CMem.), entitled "*Mémoire du 15 février 2007*" accompanied by five exhibits (Exh. R-2 to R-7), including a witness statement by Mr. Abdel Hamid Y. Salman (Exh. R-4), an expert report by Messrs. Christian Brossard and Pierre Taillé (Exh. R-5), and a legal opinion by Prof. James Crawford ("Crawford Opinion 1", Exh. R-6).
26. The Parties requested an extension of time for the submission of their respective remaining pleadings by letters of 10 April and 11 April 2007. On 16 April 2007, the Secretary of the Tribunal informed the Parties that the Tribunal had no objections to modifying the remaining schedule for the second round of submissions.
27. In accordance with the Secretary's letter of 16 April 2007, on 11 May 2007, the Claimants submitted their Reply (Reply) together with exhibits C-176 to C-187, including five witnesses statement (Messrs. Marc Stordiau, H. L. Taverne, Hosni Abdelwahed, Jacques Albert and Pierre Tison, Exh. C-177 to 180), a legal opinion by Prof. Giorgio Sacerdoti (Exh. C-176) and two experts opinions by Messrs. Völker Patzold and Richard Nicholas Bray (Exh. C-181 and C-182).
28. On 31 May 2007, the Respondent asked the Tribunal to dismiss a request made by the Claimants in their Reply that the opinion given by Mr. Taillé and filed as Exhibit R-5 be declared inadmissible and his expert report struck from the record. The Claimants contended that Mr. Taillé was not impartial having been a member of the board of DEME (Dredging International) which knew of the contract in dispute in the present proceedings. After an exchange of letters and the filing of new exhibits on both sides (Exh. C-192 and Exh. R-8), the Tribunal dismissed the Claimants' request in Procedural Order No. 3 (PO#3) of 9 July 2007:

23. Whereas the Tribunal is mindful of the Claimants' allegations and of their significance, it believes that they are not of such nature as to make the report co-authored by Mr. Taillé inadmissible at this stage. The Tribunal first notes that Mr. Taillé is just one of two co-authors of the report and that no objection was presented against his co-author Mr. Brossard.
  24. The Tribunal further takes into account that the Claimants will have an opportunity to cross-examine Mr. Taillé at the hearing. On the basis of such oral testimony, the parties may then comment on the value of Mr. Taillé's evidence and the Tribunal will be in a better position to assess such value and to decide what weight to give to Mr. Taillé's evidence, if any.
  25. This ruling is made without prejudice to any later determination on the evidentiary weight or relevance of the report co-authored by Mr. Taillé and of his oral testimony.
29. In accordance with the Secretary's letter of 16 April 2007, the Respondent submitted its Rejoinder (Rej.), entitled "*Mémoire du 16 juillet 2007*", accompanied by 5 exhibits (Exh. R-9 to R-13), including a witness statement by Mr. Abdel Hamid Y. Salman (Exh. R-9), observations by Messrs. Brossard and Taillé (Exh. R-10), a legal opinion by Prof. Hossam El-Ehwany (Exh. R-12), and a further legal opinion by Prof. Crawford ("Crawford Opinion 2", Exh. R-13).
  30. In accordance with the calendar set in PO#2, on 10 July 2007, the Tribunal held a telephone conference with the Parties in preparation of the hearings for the taking of evidence and for oral arguments. The main content of the telephone conference was reflected in Procedural Order No. 4 (PO#4) of 20 July 2007.
  31. In accordance with the calendar set during the above-mentioned telephone conference, the Parties submitted on 20 July 2007 their lists of witnesses and experts to be called at the evidentiary hearing.
  32. The Arbitral Tribunal held the evidentiary hearing from 25 to 27 September 2007 in Paris. In addition to the Members of the Tribunal and the Secretary, the following persons attended the hearing:
    - (i) On behalf of the Claimants:
      - Prof. Antonio Crivellaro, Bonelli Erede Pappalardo;
      - Prof. Luca Radicati Di Brozolo, Bonelli Erede Pappalardo;
      - Ms. Maria Cristina de Giovanni di Santa Severina, Bonelli Erede Pappalardo;
      - Mr. Tom Lenearts, General Counsel for Dredging International N.V.;

- Mr. Bart Ceenaeme, General Counsel for Jan de Nul N.V.;
  - Mr. Emile Tibjosch, Dredging International, N.V.; and
  - Mr. Thierry Gillon, Dredging International N.V. Allende;
- (ii) On behalf of the Respondent:
- Mr. Robert Saint-Esteben, Bredin Prat;
  - Mr. Louis-Christophe Delanoy, Bredin Prat;
  - Mr. Tim Portwood, Bredin Prat;
  - Mr. Raed Fathallah, Bredin Prat;
  - Dr. Borhan Mohamed Tawheed Amr Allah, International Cooperation, Egyptian Ministry of Justice;
  - Mr. Ahmed Mohamed Hesham Abdul Hakim, International Cooperation, Egyptian Ministry of Justice;
  - Mr. Milad Sidhom Boutros, Egyptian State Litigation Authority;
  - Mr. Hussein Moustafa Fathy, Egyptian State Litigation Authority;
  - Mr. Ahmed Saad Mahmoud, Egyptian State Litigation Authority;
  - Mr. Fouad Negm, SCA;
  - Mr. Mohamed Mokhtar, SCA; and
  - Mr. Yehya Elmahgo, SCA.

33. The following fact and expert witnesses were examined:

- (i) On behalf of the Claimants:
- Mr. Marc Stordiau;
  - Mr. Jacques Albert;
  - Mr. Pierre Tison;
  - Mr. Gideon Hein;

- Mr. Nicholas Bray;
  - Mr. Völker Patzold.
- (ii) On behalf of the Respondent:
- Mr. Abdel Hamid Salman;
  - Mr. Mostafa Mahmoud Saleh and Mr. Ali Abdel Fatah;
  - Mr. Christian Brossard;
  - Mr. Pierre Taillé.
34. An audio-recording and a *verbatim* transcript of the evidentiary hearing were made and later distributed to the Tribunal and the Parties (“Tr. W.”).
35. On 3 October 2007, the Tribunal issued Procedural Order No. 5 (PO#5) in view of the hearing on oral argument which was held on 18 October 2007 in Paris. In addition to the Members of the Tribunal and the Secretary, the following persons attended the hearing:
- (i) On behalf of the Claimants:
- Prof. Antonio Crivellaro, Bonelli Erede Pappalardo;
  - Prof. Luca Radicati Di Brozolo, Bonelli Erede Pappalardo;
  - Ms. Maria Cristina de Giovanni di Santa Severina, Bonelli Erede Pappalardo;
  - Ms. Ieva Kalnina, Bonelli Erede Pappalardo;
  - Mr. Tom Lenearts, General Counsel for Dredging International N.V.;
  - Mr. Bart Ceenaeme, General Counsel for Jan de Nul N.V.;
  - Mr. Emile Tibjosch, Dredging International, N.V.;
  - Mr. Thierry Gillon, Dredging International N.V. Allende; and
  - Laurent Van Cستم, Dredging International N.V.
- (ii) On behalf of the Respondent:
- Mr. Robert Saint-Esteben, Bredin Prat;

- Mr. Louis-Christophe Delanoy, Bredin Prat;
  - Mr. Tim Portwood, Bredin Prat;
  - Mr. Raed Fathallah, Bredin Prat;
  - Dr. Borhan Mohamed Tawheed Amr Allah, International Cooperation, Egyptian Ministry of Justice;
  - Mr. Ahmed Mohamed Hesham Abdul Hakim, International Cooperation, Egyptian Ministry of Justice;
  - Mr. Milad Sidhom Boutros, Egyptian State Litigation Authority;
  - Mr. Hussein Moustafa Fathy, Egyptian State Litigation Authority;
  - Mr. Ahmed Saad Mahmoud, Egyptian State Litigation Authority;
  - Mr. Fouad Negm, SCA;
  - Mr. Mohamed Mokhtar, SCA; and
  - Mr. Yehya Elmahgo, SCA.
36. During the hearing, Prof. Antonio Crivellaro and Prof. Luca Radicati di Brozolo presented oral arguments on behalf of the Claimants and Mr. Robert Saint-Esteben and Mr. Louis-Christophe Delanoy presented oral arguments on behalf of the Respondent.
37. An audio-recording and a *verbatim* transcript of the hearing were made and later distributed to the Tribunal and the Parties (“Tr. H”).
38. In Procedural Order No. 6 (PO#6) of 29 October 2007, the Tribunal settled certain matters with respect to the correction of the transcripts and set dates for the filing of the post-hearing briefs.
39. In accordance with the calendar set in PO#6, as modified by the letter of the Secretary of 19 December 2007, the Parties filed simultaneous first post-hearing briefs on 20 December 2007 and simultaneous second post-hearing briefs on 17 January 2008.

40. The Parties further filed submissions on costs on 11 March 2008 and their respective comments by 26 March 2008.
41. On 15 October 2008, the Tribunal declared the proceedings closed pursuant to Rule 38(1) of the Arbitration Rules.
42. Regarding the admissibility of the expert report and testimony of Mr. Taillé (see ¶ 28 above), the Parties did not comment further pursuant to PO#6. During the hearing, it turned out in particular that, contrary to the Claimants' allegation, Mr. Taillé had not personally applied for a position with the Claimants. Having heard the Parties and the testimony of Messrs. Stordiau and Taillé, the Tribunal came to the conclusion that Mr. Taillé was not biased. Consequently, the Tribunal decided not to strike Mr. Taillé's written and oral evidence from the record.

## II. MAIN FACTS

43. The dispute before this Tribunal relates to a project to dredge the Suez Canal, one of the most important waterways in the world, to allow for the passage of larger vessels. To implement this project, the Suez Canal Authority (the "SCA"), the Egyptian agency in charge of the operation of the Canal, launched an international tender process. After a series of incidents, the process eventually ended with the award of the project to the Claimants, which are among the leading dredging companies worldwide. The SCA thus entered into a contract with the Claimants for the deepening and widening of certain southern stretches of the Canal. In the course of the dredging works, the Claimants encountered a volume and distribution of the materials to be dredged and a proportion of rocks that differed significantly from their expectations. They sought additional compensation. As the SCA refused to pay more, the Claimants filed actions in court in accordance with the contractual dispute resolution clause. They mainly claimed that the contract was null and void for fraud or error. After proceedings that lasted about ten years, the competent court essentially dismissed the actions. The Claimants appealed to the higher court and approximately five months later initiated this treaty arbitration.
44. This chapter sets forth the main facts of the dispute. It starts with the tender process (1), continues with the performance of the contract (2) and ends with the proceedings before the Egyptian Courts (3). Additional facts may be addressed in the Tribunal's analysis if appropriate.



## **1. THE TENDER STAGE**

45. The SCA is a public agency, which was established by Law No. 30/1975 (Exh. C-9). Its mission is the management, maintenance and development of the Suez Canal.
46. On 19 March 1991, the SCA invited the Claimants, together with 21 competing international dredging companies, to submit their pre-qualifications for the widening and deepening of “some southern regions of Suez Canal” (Exh. C-11) in order to accommodate vessels with draught up to 56 or 68 feet.

### **1.1 First tender**

47. On 18 February 1992 (Exh. C-13), the SCA then invited the pre-qualified companies to submit by 3 May 1992 offers for two sets of lots, namely lots (1) and (1-1) from km 150,000 to km 162,250 starting from the Port Said lighthouse, and lots (3) and (3-1) from km 122,200 to km 134,500 (Exh. C-13).
48. The main specifications of these lots were the following:
- Lot (1) was for vessels with draught up to 68 feet, requiring a widening of the Canal by 70 meters to the East and a deepening down from -20.50 meters to -25 meters (from a reference level referred to as the datum level), with a period of execution of 46 months.
  - Lot (1-1), which was a part of lot (1), was for vessels with draught up to 56 feet, requiring a widening of 20 meters to the East and a deepening down to -20,50 meters from the datum level, with a period of execution of 15 months.
  - Lot (3) was for vessels with draught up to 68 feet, requiring a widening of 60 meters to the East and a deepening down from -20.50 meters to -25 meters, with a period of execution of 36 months.
  - Lot (3-1), which was a part of lot (3), was for vessels with draught up to 56 feet, requiring a widening of 20 meters and a deepening of up to -20.50 meters, with a period of execution of 15 months.

#### **1.1.1 The tender documents**

49. The tender documents received by the Claimants on 8 March 1992 (Exh. C-14 and C-15) contained information regarding the hardness and the volumes of the soil to

be dredged. As it will be explained below, the Parties disagree on the relevance and accuracy of these tender documents.

50. The main documents regarding the *composition of the soil* provided by the SCA were the following:

- A soil report for lots (1) and (3) setting forth the results of a campaign during which 37 boreholes were dug in 1975-1976 ("the 1975 Raymond Campaign") and of a seismic survey conducted in 1975 by EG&G Geophysical Ltd. for Raymond International Inc. (Exh. C-14(a)).
- Plan 10433 of February 1992 entitled "Soil Characteristics from km 122.00 to km 135.00, km 150.00 to km 162.250" which contains longitudinal sections for the layers of the soil in the area of the boreholes just mentioned (Exh. C-14(b)).
- Four drawings showing longitudinal sections of the layers of soil in the contracted area based on a "high resolution seismic reflection survey" carried out in 1976 by EG&G Geophysical Ltd. for the SCA (Exh. C-14(c)).
- A soil report for lot (1) with 7 drilling studies of boreholes from 20 meters to 25 meters allegedly made by the SCA in 1988 (actually done in 1987) submitted to the bidders on 31 March 1992 (Exh. C-14(d)), stating that major constituents of subsurface soil are "calcareous sand, calcareous silty clay and highly weathered limestone".

51. The main documents regarding the *volume of soil to be dredged* provided by the SCA were the following:

- Plan No. 10401 of February 1992 showing the general plan of the site of the Works (Exh. C-15(a)).
- Plan No. 10402 of February 1992 entitled "Profiles and Tolerances for Side Slopes and Widening Works" (Exh. C-15(b)). Plan 10402 indicated a "theoretical existing" East side slope 3/1, an "actual existing" East side slope, and a "new theoretical" East side slope.
- Plan No. 10432 of February 1992 entitled "Sedimentation Basins between km 149,000 km 162,250" (Exh. C-15(c)) gave "an idea of the topography of the eastern bank" (Art. 4 of the Specifications).

- Plan No. 10431 of February 1992 entitled “Lot ‘1’ between km 150,000 and 162,250, Detailed Plan and Cross Sections” showed the cross sections of the Canal for the two alternatives (Lot (1) and (Lot (1-1)) (Exh. C-15(d)).
52. On 14 April 1992, the bidders met with the SCA. Faced with a request for a one month extension of time to carry out a soil investigation presented on 16 March 1992 (Exh. C-16) and a request for different documents including a bathymetric survey, the SCA merely stated that it had no other information available than the one already provided to the bidders.
53. Further to that meeting, on 20 April 1992, the SCA sent additional information to the bidders regarding tax and prices together with a document called a “drawing to indicate the eastern boundary line of dredging” and “samples for canal profiles and bathymetric survey” (Exh. C-19). The samples included five new drawings of cross sections of the Canal resulting from a bathymetric survey carried out by the SCA for kms 125, 128, 150, 153 and 157. The SCA stated that these samples were “to be considered as a mere indication and S.C.A is not to be held responsible for any discrepancy”. In the same communication, it added that the “closing date” would be 3 May 1992, thereby impliedly rejecting the JV's request for a one month extension to carry out a soil investigation.

#### **1.1.2 The bidders' offer**

##### **a) The investigations of the bidders**

54. Prior to submitting its offer, the JV carried out two main investigations: a boring campaign and a bathymetric and seismic survey. The Parties to this arbitration dispute the nature, the relevance and the adequacy of these investigations.
55. The bidders commissioned two companies, MISR Raymond Foundation and the Site Investigation Bureau (SIB), to undertake an on-shore soil investigation campaign for lots (1) and (3) and delegated to one of the bidders, Boskalis, the task to assist the SIB. The boring campaign lasted from 11 April to 19 April 1992 and was aimed at verifying the results of the 1975 Raymond campaign (Exh. C-20). The bidders thus used the same consultant as in 1975, Raymond, to drill boreholes in proximity of those of 1975.
56. The bidders also commissioned a Dutch company, GeoCom Groep B.V., to perform a bathymetric and seismic survey of lots (1) and (3) in April 1992 (the “GeoCom Report”, Exh. C-20 and C-168). Whether this survey was actually a

bathymetric survey and to what extent its results could be used is a matter in dispute, as will be shown below.

***b) The Claimants' offer***

57. On 2 May 1992, the Claimants submitted their first offer (Exh. C-21). The following day, that offer was ranked first for lot (1) and second for lot (1-1) (Exh. C-22).
58. On 1 June 1992, the Claimants together with the other bidders met with the SCA upon the latter's request. According to the Claimants, the SCA announced during that meeting that it intended to receive the lowest offer for each couple of lots (i.e., lots (1) and (1-1) or lots (3) and (3-1)) from a single bidder. According to the Respondent, the bidders had quoted prices which were too high in comparison to a feasibility report it had obtained previously from a Dutch firm, named The Netherlands Engineering Consultants or Nedeco, to which the Tribunal will revert below, because they expected to find less than the 100% of the dredging volume specified by the SCA. As a result, the SCA made a second call for tenders in which it guaranteed at least 80% of the estimated dredging quantities (WS Salman, Exh. R-4, ¶ 21).

**1.2 Second tender**

59. In the second round of tenders, a new bid form was issued on 3 June 1992 for lots (1), (1-1), (3) and (3-1) (Exh. C-27). Two other lots were added, namely lot (3') and more importantly lot (1') from km 150,000 to km 162,250.
60. Lot (1'), which is the lot at stake in this dispute, involved widening the Canal by 45 meters on the East slope and deepening the Canal bed from -20.50 meters to -25 meters, with a volume to be dredged estimated at 17,6 million m<sup>3</sup>, the execution time being 35 months.
61. A cross section entitled "Profiles of Alternative Options 1' and 3'", drawn and signed by Mr. Salman, bearing the date of 3 June 1992, was attached to the bid (Exh. C-27).
62. The cover letter to the bid referred to the guaranteed minimum quantity to be dredged and the related pricing in the following terms:
  1. According to article (35) of General Clauses and Conditions S.C.A guarantees that the minimum quantities to be dredged shall not be less than 80% from the indicated quantity.

Accordingly, the contractor is requested to submit two unit prices as follows:

- a) First unit price for the quantity of 80% from the total volume.
- b) Second unit price for the quantities exceeding above mentioned limit (assuming that the mobilization and demobilization cost is calculated on the guaranteed quantities).

(Exh. C-27)

63. The Claimants submitted their second bid on 4 June 1992 (Exh. C-28), i.e. two days in advance of the deadline. They also referred to the minimum quantity to be dredged and to their related assumption with respect to the minimum widening of the Canal:

Our calculations are based on the 'profiles of alternative option 1' & 3'', attached to your new Bill of Quantities, and which we consider to firm an integral part of the tender documents. We have assumed that in accordance with article 35 of General Clauses and Conditions, the quantities to be dredged shall not be less than 80 % of the indicated quantity and that therefore the minimum widening of the canal will be 36 m (45 m x 0,8).

(Exh. C-28)

64. On 6 June 1992, the Claimants' offer was ranked first for lot (1) and second for both lots (1-1) and (1') (Exh. C-29). Two days later, the SCA announced a third round of tenders (Exh. C-31).

### 1.3 Third tender

#### 1.3.1 *The tender documents*

65. The third tender was issued on 22 June 1992. It covered only lot (1') (Exh. C-32) and called for offers to be submitted by 27 June 1992. The specifications of lot (1') were the same as in the second tender, or in the words of the SCA:

- 1) The zone to be dredged is located between Km 150.000 to Km 162.250.
- 2) The approximate volume to be dredged is about 17,600,000 m<sup>3</sup> (seventeen millions six hundred thousand cubic meters).
- 3) The dredging works required involves:
  - 3/1 – Widening the canal by dredging the east bank to distance of 45.0 m (Measured between theoretical slopes).
  - 3/2 – Deepening the channel bed to a depth of -25.00 m. measured under the corresponding datum level in the area (a cross section is attached).

(Exh. C-32)

As the second bid, the third one requested two unit prices.

### 1.3.2 *The Claimants' offer*

66. The Claimants submitted their offer for lot (1') on 27 June 1992 (Exh. C-33) for a price of LE 8,579,200 and USD 65,507,200. The Claimants' offer provided for the use of two powerful dredgers (by the name of "Marco Polo" and "Amazone") with a total power of 70,000 HP on the cutter-heads for a period of twelve months.
67. The Claimants allege that their bid assumed a total volume to be dredged of 19.5 million m<sup>3</sup>, out of which 3% were hard material with a proportion of widening to deepening of approximately 64% to 36%. These assumptions allegedly meant that the works could be completed in 12 months:
- (i) the quantity of hard material was in the order of 3% of the entire volume to be dredged, and therefore the operations could proceed speedily and without excessive wear and tear on the equipment;
  - (ii) the total volume to be dredged — on which the total price (calculated by the agreed unit rate) depended — was approximately 19,5 million m<sup>3</sup>, as confirmed by the fact that the existing profiles of the embankment to be widened were shown by SCA to be uniform and parallel;
  - (iii) of this volume, approximately 64% was widening and approximately 36% was deepening, which allowed (a) widening to continue even when deepening had to be suspended because of convoy traffic, and (b) deepening and widening to proceed in parallel essentially on the same cross-sections of the Canal, thereby avoiding idle time or the need to reposition the dredgers back and forth along the Canal;
  - (iv) as a result of (iii) above, no unproductive time would have been caused by the transit of convoys along the Canal;
  - (v) consistent with all the above assumptions, the duration of the Works (and the presence in Egypt of the equipment) would not exceed 12 months.
- (Mem., ¶ 51)

### 1.3.3 *The Respondent's view of the Claimants' offer*

68. According to the Respondent, the Claimants offered two unit prices (Exh. C-33):
- A first one for 80% of the total quantity, i.e. 14,080,000 m<sup>3</sup>.
  - A second one for quantities exceeding "80% from the quantity", i.e. 3,520,000 m<sup>3</sup>.
69. The amount of these two volumes added up to 17,600,000 m<sup>3</sup>, out of which 80% was guaranteed.

### 1.3.4 *The award of the third tender to the Claimants*

70. The Claimants' offer was the lowest and ranked first (Exh. C-34). Consequently, the Respondent awarded the Contract for lot (1') to the Claimants on 30 June 1992 (the "Contract"; Exh. C-35). The Contract was executed on 29 July 1992 (Exh. C-7) together with the General Clauses and Conditions for widening and deepening of the Canal (the "GCC") (Exh. C-5) and the Specifications (Exh. C-6).
71. According to the GCC, the Contract was concluded for a fixed price and no increase was foreseen, it being the responsibility of the bidders. The relevant parts of the GCC (Exh. C-5) read as follows:

#### Article 5 – Closing date for tendering

Before submitting his offer, each tenderer must under his full responsibility, take all necessary steps and make all required investigations to be able to estimate exactly the nature and extent of his obligations. Having submitted an offer he will be deemed fully aware of all servitudes inherent in the execution of the works.

The Contractor alone is qualified to solve all difficulties arising during the execution of the works, whether these difficulties were foreseen or not at the time of tendering. Consequently, **the Contractor will not be entitled to any increase in the prices of his offer or to any indemnity or compensation whatsoever, on account of these difficulties or of any other unexpected circumstances or for additional expenses incurred, or for any error or omission which may be found in the documents of the Contract or in any other information received by the Contractor. In short, contract prices must include and cover all risks, responsibilities and obligations of the Contractor.** (Emphasis added)

[...]

#### Article 59 – Currency – Prices

[...]

Prices include, this to be taken as a mere annunciation and not a limitation, the expenses for study and transport; all supplies of plants and materials expenses for labour, workshops insurance; incidental and overhead expenses of the Contractor in Egypt and abroad; social insurances; the Contractor's profits and generally all expenses incurred by the Contractor for the execution of the works defined in the Specifications and of anything resulting therefrom during their execution, until the final reception.

**Prices for earthwork and dredging shall be valid whatever the nature of the soil extracted, even should this soil contain obstacles such as angle irons, reinforced concrete or steel sheet piling, concrete debris, rubble, etc.. and whatever the means of extraction, the distance of transport and the level of the spoil and the difficulties of execution of the dredging especially those resulting from the exploitation of the Canal.**

**These prices also include the interruptions due to navigation in the Canal, those necessary for the shifting of the dredges or of the spoil**

evacuating pipelines; those needed for lubrication, repairs or accidents; those caused by stones or debris from the revetments or other waste; unless otherwise stipulated in the Contract.

However in certain cases, to take into account fluctuations in the basic elements of expenses concerning dredging works, the Contract may provide for an increase or a reduction of the rates for dredging by means of a coefficient calculated according to a formula defined in the Contract. (Emphasis added)

72. The Specifications provided for the description of the project for lot 1' (widening by 45 m between the existing slope (theoretically at 3/1) and a new theoretical slope at 3/1 and deepening by 25 m) as well as the estimated volume to be dredged (17,600,000 m<sup>3</sup> out of which 14,080,000 m<sup>3</sup> were guaranteed). The Specifications also addressed the nature of the soil to be dredged and the possibility of encountering hard rock during dredging. The relevant parts of the Specifications (Exh. C-6) read as follows:

Article (2): Object:

The following specifications pertain to dredging operations to be carried out in the Canal between Km 150.000 & Km 162.250 as hereafter described and shown on drawings No. 10401, 10402, 10431 & 10432 named as Lot (1') consists of:

- Widening the Canal by dredging the Eastern side slope by about 45.00 m
- Deepening the Canal bed to 25.00 m below datum level.

Estimated volume of soil to be dredged in Lot (1') amounts to about 17,600,000 m<sup>3</sup>. This quantity is approximate and given as an indication of the volume of the work.

**According to Article (35) of the General Clauses and Conditions, the Authority guarantees that 'the minimum quantity to be dredged shall be not less than 80% of the above indicated quantity (i.e. 14,080,000 M<sup>3</sup>), accordingly two different unit prices are indicated in the Contract.**

- (a) First unit price for the 80% of the total quantity (14,080,000 M<sup>3</sup>) guaranteed quantities.
- (b) Second unit price for the quantities exceeding the above mentioned limit (assuming that the mobilization & demobilization costs will be covered totally by implementing the guaranteed quantify). (Emphasis added)

Article (7): Widening and deepening of the Canal: - Lot (1'):

**The approximate volume of dredging is 17,600,00 m<sup>3</sup>, of which 14,080,000 m<sup>3</sup> is guaranteed.** The zone to be dredged is located in general plan No. 10401.

- Detailed drawing No. 10431 shows the limits of the site, the general layout and the cross section of the Canal.



- **The part to be dredged for widening is situated between the existing slope (theoretically at 3/1) and a new theoretical slope at 3/1.**
- However if it is found that the side slopes will not be appropriate at 3/1, the Authority and the Contractor will decide suitable slopes by mutual agreement.
- The distance between these two slopes measured at a depth of 11m under datum level will be 45.00 m.

The detailed drawings for the new curves will be handed to the Contractor in due time. The starting points, the ends and the widening of the new curves may differ slightly from those shown above. Between Km 157.550 and Km 161.050, the new theoretical slope is to be extended till it meets the existing natural beam of the channel. **The Contractor has to dredge the bed of the widened channel between Km 150.000 and Km 162.250 to a depth of 25.00 m measured under the corresponding datum level.** (Emphasis added)

Article (9): Working schedule and means of execution:

The Contractor has to submit to the Authority – within one month following the Contract signing date – a detailed time schedule for the execution of the work and a complete description of all installation and equipment he proposes to use.

The Contractor may propose whatever equipment and system of evacuation of spoil he thinks suitable.

**Taking into consideration the nature of the soil to be dredged, cutter suction dredgers having not less than 2000 HP on the cutter and exceptionally well designed are expected to be employed in addition to other types of dredgers of suitable power.**

However, the acceptance by the Authority of the time schedule and the proposed means of execution shall not diminish the obligation of the Contractor, who remains solely and entirely responsible for the execution of the work in the time stated in the Contract.

If during the work it is found that the equipment proposed by the Contractor and accepted by the Authority is not sufficient to finish the work in the contracted time, then the Contractor must, on his own expense and on his own responsibility, take the necessary steps to substitute or add new equipment in order to speed up the work. (Emphasis added)

Article (12): Hard rock encountered during dredging:

**The Contractor must extract all types of soil including rock, compact sand, clay, gypsum...etc. whatever the thickness of the strata and difficulties he may encounter during dredging.**

In the event of a thick strata of hard rock being encountered during the work, which cannot be cut and removed by the Contractor's dredgers employed on the site, then the Contractor must procure the necessary equipment to break and remove these hard strata.

The Authority will not consider the work completed until the specified profiles and depths are attained.

**The existence of such rocky strata will not however entitle the Contractor to any increase in the unit price or to an extension of the time of execution.**

The Contractor declares that the unit prices for dredging works mentioned in the Contract will cover completely all the difficulties that he will encounter due to the hard strata whatever may be the amount and degree of hardness of it.

He guarantees to execute the dredging work completely and adequately so that the new slopes and depths correspond to those specified in the Specifications, without leaving any parts above the required profiles, whatever difficulties in dredging may be encountered. (Emphasis added)

73. The Contract also provided a description of the project and of the volume to be dredged over 35 months. In pertinent parts, the Contract (Exh. C-7) reads as follows:

Article (1): Purpose of the contract:

The Contractor agrees to carry out for the Authority, in accordance with the Specifications and Drawings attached to this Contract, the works pertaining to:

Lot (1'): about 17,600,000 m<sup>3</sup>:

Widening the Canal by dredging the eastern bank by a distance of about 45.00 m and deepening Canal bed to -25.00 m under datum level between Km 150.000 and Km 162.250 comprising the dredging and removal of about 17,600,000 m<sup>3</sup> of spoil. This quantity is approximate and given as indication of the work volume.

According to Article (35) of the General Clauses and Conditions the Authority guarantees that the minimum quantity to be dredged shall not be less than 80 % of the above indicated quantity (i.e. 14,080,000 m<sup>3</sup>), accordingly two different unit prices are indicated in the contract:

- a) First unit price for the 80 % of the total quantity (i.e. 14,080,000 m<sup>3</sup>) guaranteed quantity.
- b) Second unit price for the quantity exceeding the above mentioned limit (assuming that the mobilization and demobilization will be covered totally by implementing the guaranteed quantity).

Article (12):Periods of execution:

The Contractor agrees to execute the work mentioned in article (1) of this Contract in accordance with the stipulations of the Specifications, within a period of 35 months (thirty five) starting from the Contract signing date.

However, if the total volume dredged is over or under the estimated volumes indicated in the same article, the period of execution will be increased or decreased on a prorata basis.

## **2. THE PERFORMANCE OF THE CONTRACT**

74. The works started in October 1992 and were completed on 5 May 1994 (Exh. C-80), taking 7,5 months more than the Claimants expected when they submitted their third offer (see ¶ 67 above).

75. As provided in the Contract, from late September to early November 1992, the Claimants carried out a joint in-survey, i.e., a bathymetric survey, with the SCA from km 150,000 to km 162,500 (Exh. C-37). The Claimants wrote to the SCA as early as 21 November 1992 that the widening of the Canal was less than 45 meters and that the deepening was less than 4.5 meters, thus resulting in a lower production rate and reserved the right to claim additional compensation (Exh. C-38). The SCA answered on 5 February 1993 that the Contractor was not entitled to any compensation (Exh. C-44).
76. The Claimants contend that they encountered conditions during the performance of the dredging works that were not mentioned at the tender stage, namely a lesser volume to be dredged, an imbalance between the deepening and widening operations, and a higher proportion of rock. The Respondent denies such contentions.
77. There is common ground, however, on the fact that the Claimants finally dredged a total amount of 14,564,706 m<sup>3</sup>, and that the SCA had pre-dredged certain parts of the lot prior to the tender without expressly disclosing that fact during the tender process. Whether the Claimants could or should have known about the pre-dredging will be discussed below.
78. Consequently, on 4 April 1993, the Claimants submitted to the SCA a request for "compensation of additional costs" (Exh. C-63). On 11 May 1993, they sent the SCA a comparison between the tender theoretical quantities/SCA soil conditions and the actual in survey quantities/soil conditions. The main conclusions were that the volume of hard material had increased from 3% to 43% and that the quantity of volume to be dredged was reduced by 5 million m<sup>3</sup> from 19.5 million m<sup>3</sup> to 14.5 million m<sup>3</sup> (Exh. C-72). On 29 May 1993, the Claimants submitted to the SCA a formal claim for extra-compensation (Exh. C-73), which was rejected in July 1993 (Exh. C-74) on the basis of Articles 5 and 59 of the GCC and Articles 9 and 12 of the Contract mentioned above.
79. On 29 June 1994, the SCA accepted the works and issued a certificate of provisional and final reception for the dredging of lot (1') (Exh. C-81).

### 3. THE PROCEEDINGS BEFORE THE EGYPTIAN ADMINISTRATIVE COURTS

#### 3.1 The two actions brought by the Claimants

80. On 17 July 1993, the Claimants brought proceedings against the SCA before the Administrative Court of Port Saïd pursuant to the dispute resolution clause contained in the Contract<sup>1</sup> (Exh. C-83) (the "First Case"). Relying on Articles 120<sup>2</sup>, 121<sup>3</sup>, and 125<sup>4</sup> (error and fraud) of the Egyptian Civil Code, the Claimants requested the Court (i) to declare the Contract null and void on account of the SCA's acts and omissions during the negotiation of the Contract and (ii) to award compensation for all expenses and losses incurred during the performance of the works, plus lost profits, the total cost of the works being assessed at USD 130 million. In July 1993, the Administrative Court of Port Saïd transferred the First Case to the Administrative Court of Ismaïlia.
81. On 9 December 1995, the Claimants filed a second action against the SCA before the Administrative Court of Ismaïlia seeking relief for a series of deductions made by the SCA from the amounts to be paid under the Contract (Exh. C-114) (the "Second Case"). The SCA was said to have made arbitrary deductions from the monthly payments due under the Contract for an amount of USD 2.9 million in relation with administration charges, customs duties on equipment and regulatory

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<sup>1</sup> Article 22 of the Contract reads as follows: "Any dispute, difference or controversy, which may arise between the parties related to the interpretation, application, implementation or effect of this Contract which cannot be resolved amicably, will be settled by the Egyptian courts, according to Egyptian laws". (Exh. C-35)

<sup>2</sup> Article 120 of the Egyptian Civil Code reads:  
"A contracting person who falls in significant error may ask for nullifying the contract, if the other contracting party has fallen like him in the same error, or if he was aware of it, or it was easy for him to detect it". (Exh. C-84)

<sup>3</sup> Article 121 of the Egyptian Civil Code reads:  
"(1) An error shall be significant if it is so gross that the contracting party would refrain from concluding the contract if he did not fall in that error.  
(2) An error shall be significant specifically:  
a- If it is in the quality of a thing and is considered significant as such by the two contracting parties, or should be considered as such on account of the surrounding circumstances of the contract, and the good intention which should exist in dealings.  
b- If it is in the contract itself or in any one of its qualities, and that such quality of the contract itself was the main reason for concluding the deal". (Exh. C-84)

<sup>4</sup> Article 125 of the Egyptian Civil Code reads:  
"(1) A contract may be annulled for fraudulence, if the deceits to which one of the two contracting parties, or which his deputy resorts are so tremendous that the second party would not have concluded the contract if such tricks had not been there.  
(2) Shall be considered as fraudulence a premeditated silence as to a fact or surrounding circumstances, if it is evidenced the one who fell prey to such fraudulence would not have concluded the contract if he has been aware of the said fact or the surrounding circumstances". (Exh. C-84)

customs duties, mooring light, buoy damages, interest charges and certain so-called arbitrary deductions/retentions.

### 3.2 The First Panel

82. When filing the First Case, the Claimants (referred to by the Egyptian Courts as the Joint Venture, the "JV") requested the appointment by the Court of a commission of experts. Following the transfer of the First Case to the Administrative Court of Ismaïlia, the latter appointed on 6 September 1993 a panel of three experts specialized in soil mechanics (the "First Panel") (Exh. C-89). The First Panel's mission essentially consisted in determining whether soil studies had been carried out at the tender stage (question 1); what volume had actually been dredged in terms of widening and deepening (question 2); whether the Claimants should have foreseen the difficulties encountered (question 3); the effects of the pre-dredging carried out by the SCA on the Claimants' works (question 4); the losses suffered by the Claimants and their causes (question 5). More specifically, the Ismaïlia Court required the First Panel to answer the following questions:

1. Whether the two companies carried out any soil tests and boreholes during the period designated for studying the Tender documents in the light of correspondence exchanged with the Authority in this regard, while indicating any facilities that may have been extended to them for this purpose by the Authority?
2. The volume of deepening and widening works respectively actually executed by the plaintiffs, and the approximate volume of works still to be executed by them under the contract.
3. Whether the difficulties encountered by the plaintiff companies in executing the deepening and widening works are among the difficulties that could have been foreseen from the technical point of view in the light of the obligations of the two companies as defined in the contract, in the specifications of contract and its general conditions and, in particular, in the light of the previous experience of the two companies in deepening and widening works.
4. The ratio of deepening and widening works carried out by the Authority (in the period between notifying the two companies that they had been awarded the contract on 30/6/1992 up till the two companies commenced execution) to the total scope of works under the contract, and to what extent this caused an increase in the proportion of deepening works to widening works; also, to what extent this affected the longitudinal sections, the width of the widening works, the proportion of hard material existing at the time the two companies presented their bid on the basis of the information provided by the Authority on the longitudinal sections, the width of the widening works and the nature of the soil.
5. Whether the two plaintiff companies suffered injuries as a result of executing the works subject of the contract, while defining the elements of these injuries, if any, their extent and causes?

83. From October 1993 to April 1995, the First Panel conducted five meetings with the parties (Exh. C-116) and received at least fourteen written submissions, including expert reports.
84. At the third meeting with the First Panel (Exh. C-97), the SCA filed a report by Nedeco, which in 1991 had analysed the feasibility of four alternative developments of the Canal (56, 62, 68 and 72 feet stage) (the "Nedeco Report", Exh. C-98 – R-2). Both Parties rely on this report in the present arbitration.
85. The parties to the local proceedings filed their last submissions with the First Panel in the first half of 1995.
86. Following an invitation by the Commissaire d'Etat in November 1996, the First Panel rendered its report on 6 February 1997 (Exh. C-116) and issued the following conclusions:
  - There was a difference between the documents provided during the tender and the actual cross sections on the East shore due to prior dredging works. The actual profiles from the 1993 campaign showed that the widening works on the Eastern shore were more extensive than what appeared in the cross sections that the SCA supplied to the bidders. The SCA should have submitted all the available information to the bidders. At the same time, the JV should have conducted a bathymetric survey, the existence of which the Panel was unable to establish, or requested the actual cross sections from the SCA at the tender stage (Exh. C-116, p. 30).
  - The JV should not have based its studies on a dredging volume higher than the one tendered. The total volume of dredging was higher than the quantity guaranteed by the SCA.
  - The difficulties encountered by the JV resulting from the relative imbalance between widening and deepening were due to the pre-Contract dredging carried out by the SCA. In the absence of results from a bathymetric survey, such difficulties could not have been expected.
  - Pre-dredging works led to an increase in the percentage of rock in the soil to be dredged, the total rock components amounting to 37%.
87. Accordingly, the First Panel gave the following answers to the five questions of the Administrative Court of Ismaïlia:

1. The Panel was not in a position to determine whether bathymetric surveys were performed by the JV at the tender stage.
2. The total volume of dredging was less than the total volume referred to in the Tender Documents, but higher than the quantity guaranteed by the SCA.
3. The JV's claim that it had encountered difficulties due to the decrease of the dredging volume was without merit, as the total executed volume was higher than the volume guaranteed. The JV should have conducted a bathymetric survey pursuant to Clause 5 of the GCC and the SCA should have provided the JV with the pre-dredging drawings. The difficulties relating to the nature of the soil were technically unexpected. The volume and hardness of the rock encountered exceeded the level which could have been foreseen.
4. The SCA had carried out pre-dredging works until March 1991, but not any more between the notification of the Contract and the commencement of the works.
5. There was a lack of information during the tender stage as to the actual profile of the Eastern side and the nature of the soil and percentage of rock. The First Panel attributed this lack of information to the JV (absence of a bathymetric survey information, which JV should have conducted pursuant to the GCC), to the SCA (the geological survey provided with the tender documents did not accurately represent the nature of the soil and of the rock), and to unforeseen conditions (higher volume of rock and rock harder than expected).

### 3.3 The Commissaire d'Etat

88. On 5 February 1996, the Administrative Court of Ismaïlia requested on its own motion an opinion in the two cases from the Commissaire d'Etat, who issued such opinion in September 1997 (Exh. C-118) based on the findings of the First Panel. The Commissaire d'Etat reached the following conclusions with regard to the First Case:

- It was established that the SCA's performance had been deficient pursuant to Article 121 of the Civil Code: “[T]he SCA withheld important information from the JV that was available to it, information which, if the latter had known about it at the time of signing the contract, would have caused it not to accept the contract at the prices quoted in its tender” (Exh. C-118, p. 32).

- Due to the SCA's failure, the JV was entitled to be compensated for the actual value of the works executed.
  - The SCA was not entitled to rely on Article 5 of the GCC and claim that the contractor had failed to perform the necessary investigations, because it had given the JV only 8 days, which was insufficient time to conduct the required studies and surveys. To compensate for the brevity of time, the SCA should have presented all the documents in its possession, which it failed to do.
  - There were unforeseen material difficulties (lesser volume, greater deepening than widening, and higher percentage of rock than sand) that entitled the contractor to additional compensation.
  - The JV was therefore entitled to recover the costs actually incurred, i.e., LE 340,553.90 and USD 66,178,594.16.
89. In connection with the Second Case, the Commissaire d'Etat reached the following conclusions:
- The SCA was responsible for the late performance and thus *"should not benefit therefrom by making deductions from the JV's entitlements"* (Exh. C-118, p. 36);
  - The JV's claim for interest for delays in effecting monthly payments was ill-founded;
  - The JV's claim for 10% administrative charges (customs supervision) was upheld;
  - The JV's claim for the value of customs taxes for the 2<sup>nd</sup> year of the Contract was upheld;
  - The JV's claims for the refund of mooring and light charges and deductions regarding alleged damages to the buoy were upheld;
  - As a consequence, the SCA ought to be ordered to pay to the Claimants LE 5,224,659.82 and USD 755,576.61, plus 4% legal interest.
90. In his opinion, the Commissaire d'Etat also suggested consolidating the two cases.



### 3.4 The Committee for Settling the Complaints of the Investors

91. On 30 September 1998, the Claimants resorted to the Committee for Settling the Complaints of the Investors. Composed of three Ministers and of the Secretary of the Cabinet of Ministers, this Committee had been established by the Prime Minister's Decree No. 64 of 1996 to "*settle the complaints of investors arising out of differences between ministries, offices, public authorities, public institution and local administration units in relation of determining the authority competent to finalize applications of purchasing and owning the properties owned by the State or to obtain the necessary licenses to construct and administer projects and other disputes arising out of application of constructing and/or administering an investment project*" (Exh. C-127, p. 2).
92. The Committee held two meetings on 11 November 1998 and 28 December 1998 to deal with the Claimants' complaint. However, the SCA objected to the Committee's jurisdiction. The proceedings were not pursued beyond the spring of 1999 although no decision had been rendered.

### 3.5 The Second Panel

93. After the issuance of the opinion of the Commissaire d'Etat in September 1997, the proceedings resumed before the Ismaïlia Administrative Court.
94. In its second statement of defense of 9 March 1998 filed in the First Case (Exh. C-119), the SCA *inter alia* challenged the Commissaire d'Etat's opinion which allegedly violated the law on many counts and requested that it be disregarded. It further requested the dismissal of the First Case and alternatively the appointment of a panel of experts from the Ministry of Justice to find whether the JV had suffered injuries and to complete the assignment determined by the Court in its first judgment of September 1993 (Exh. C-119). As for the Second Case, the SCA asked the Court to dismiss the actions (including for lack of jurisdiction regarding the buoy claim) (Exh. C-120). Alternatively, it requested the appointment of an accounting and engineering expert to establish whether the JV was entitled to claim for delays in payment, a claim that the Claimants waived later in October 1998 (Exh. C-125). As an alternative relief, the SCA requested that the case be remanded to the Commissaire d'Etat for reconsideration on the basis of a memorandum filed by the SCA after the Commissaire had rendered his opinion (Exh. C-137).

95. According to the record, between March 1998 and November 1999, the SCA filed nine written submissions (five in the First Case and four in the Second Case) and the JV six (five in the First Case and one in the Second Case).
96. Having consolidated the two cases on 24 December 1998 (Mem., ¶¶ 103 and 175), the Administrative Court of Ismaïlia rendered a judgment on 29 May 2000 dismissing the SCA's objections to jurisdiction and entrusting the experts' office of the Ministry of Justice with the appointment of an expert to review certain elements of the Second Case (Exh. C-141). Following such decision, the Claimants requested that the First Case be adjudicated immediately and independently from the Second Case (Exh. C-142, C-143).
97. On 12 September 2000, the Court further requested (Exh. C-144) the experts' office of the Ministry of Justice to appoint a tripartite committee specialized in engineering and accounting (the Second Panel) in order to supplement the First Panel's fifth mission regarding the losses incurred by the Claimants and to review certain elements of the Second Case:

[R]eview the file of the said project and all relevant documents and undertake the necessary inspection of the works site to determine the damage elements, assessment of same and causes thereof, if any, incurred by the plaintiff companies as a result of the contract works. In total, the completion of the fifth mission set forth in the judgment rendered by the Administrative Court in Port Said on September 6, 1993, especially the items which were not dealt within the Report of the Panel of Experts of the faculty of Engineering [First Case], and also to execute the mission set in the judgment rendered by this Court on May 29, 2000 [Second Case], and to increase the experts fees deposit to LE 2,000 instead of LE 1,000 to be paid by the two plaintiff companies. (Exh. C-144) (emphasis added)

98. Once constituted, the Second Panel held a hearing on 12 March 2001 during which it submitted 15 questions to the parties (Mem., ¶ 113), questions which the Claimants considered *ultra vires*. Both parties then filed written submissions and the Second Panel issued its report in March 2002 (Exh. C-152).
99. In its Report, the Second Panel revised the findings of the First Panel as well as the opinion of the Commissaire d'Etat (Exh. C-152). It essentially concluded that the JV was entitled to USD 8.6 million for excess consumption of pick points:

Firstly:

We found that the J.V. suffered damage from executing the contractual works, this damage represented in:

- The numbers of pick points consumed due to the percentage of rocks and sand [...]

Accordingly the total damage suffered by the J.V. regarding the pick points used in the dredging rocks and cemented sand is US\$ 8622090,7 (eight million six hundred twenty two thousand and ninety dollars, seventy cents).

Regarding the other damage referred to in the Commissaires d' Etat and the Faculty of Engineering-Ain Shams University Professor's Panel reports are not founded. [Exh. C-152, p. 33]

Secondly:

Based on the above [contractual provisions], the J.V. suffered no damage from executing the Contractual works according to the principle "The contract makes the law of the parties". [Exh. C-152, p. 34]

100. Regarding the Second Case, the Second Panel found that the SCA was entitled to some of the deductions and owed the Claimants USD 1,087,997.64 and LE 212,045.

101. The Report ends with a conclusion entitled "Final Result", which reads as follows:

The contractual works according to the contract dated 29/7/1992 entered between the J.V and the Authority were the widening and deepening of the Suez Canal between Km 150.00 to Km 162.250.

We clarified in our report the fifth mission set forth in the Judgement rendered by the Court of Administrative Jurisdiction in Port Said on September 6th, 1993.

We clarified the following

- 1) According to the report of the professors of soil mechanics - Faculty of Engineering - An-Shams University - and the Commissaires d' Etat report, if the Court elects to follow, the total damage suffered by the J.V from executing the contractual works is the amount of US\$ 8,622,090.7 (eight million, six hundred twenty two thousands and ninety USD and seven cents) (pages 31,32,33).
- 2) Pursuant to the Contract entered between the Parties and pursuant to our report, there are no damage suffered by the J.V. from executing the contractual works as "the contract makes the law of the parties" [p. 34].

According to the preliminary judgement dated 29/5/2000, there are amounts due to the J.V. which were unduly deducted by the Authority from the J.V. dues, these amounts are:

- 1) The amount of US\$ 1,087,997.64 (one million eighty seven thousand, nine hundred ninety seven USD and sixty four cents)
- 2) The amount of L.E.216,045 (two hundred sixteen thousand and forty five L.E.) as have been clarified in our report pages 38, 39.

And it is left for the court justice. (Exh. C-152)

102. In April 2002, the Claimants submitted their comments on the Second Panel's report to the Court contending that the Second Panel had acted *ultra vires* as it was empowered to complete but not to revise the findings of the First Panel (Exh. C-153 and Exh. C-154). The JV also argued that the Panel should not have relied on the Contract as the Court had not yet adjudicated on the validity or revocation of the

latter (Exh. C-153). In August and October 2002, the SCA submitted its comments on the Second Panel's findings and asked that the case be resubmitted to the Commissaire d'Etat for the latter to issue a second report (Exh. C-155, Exh. C-156 and Exh. C-157). The parties presented oral arguments on 26 December 2002 (Exh. C-178).

#### 4. THE DECISION OF THE ISMAÏLIA ADMINISTRATIVE COURT

103. The proceedings just described were completed on 22 May 2003, when the Administrative Court of Ismaïlia rendered its decision in both cases (Exh. C-158).
104. In substance on the First Case, the Court declined to annul the Contract for fraudulent misrepresentation or error and dismissed the claim for extra compensation, because the Claimants had failed to make the necessary investigations and had undertaken to perform at the price agreed regardless of the dredging conditions. Specifically, it held as follows:

It is clear from the aforementioned [art. 5 of the Specifications and 56 of the GCC] that the Contract wording and the General Conditions were clear and explicit without any misunderstanding or ambiguity. However, the material difficulties encountered were related to the soil nature whereat the project was executed which difficulties are due to unexpected natural phenomenon. **Therefore, the conditions of annulment of the Contract for fraudulent misrepresentation are not fulfilled since the Defendant Authority did not have knowledge about these difficulties encountered by the Claimants during the execution of the works the subject-matter of the dispute. Therefore, the Claimants' request has no basis in law and shall be rejected.** [p.11]

[...]

The Administrative jurisprudence established that the contracting party's rights and obligations with the Authority shall be determined pursuant to the Contract Conditions entered with the Administrative Authority. Therefore, **the provision agreed upon between the parties in the administrative contract bind the parties thereto and shall be applicable and could not be revoked**, as what was agreed upon between the parties is their law whereat their will had met and concluded upon its basis their rights and obligations. "High Administrative Court Judgment on Case No. 933 year 33 J hearing 20/4/1993" [p.12]

[...]

In light of the above [art. 5 and 12 of the Specifications, art. 59 of the GCC and 62 days granted to study the tender], the Claimants are not entitled [sic] allege that there were difficulties encountered by them during the execution of the Contract **as the Claimants should have performed guiding boreholes and Bathymetric surveys during the period of studying the tender in order to be aware of the entire expected and unexpected technical matters.** In addition, the Claimants had obliged themselves by Prices determined for dredging whatever the nature of soil and frustrations therein. Therefore, **the Claimants request to order SCA to pay the difference between the**

**actual cost of the carried out works and the amounts certified for payment by the Defendant shall be rejected.** [p.13] (emphasis added)

105. The Claimants were held liable for the costs of the proceedings, the SCA having prevailed.
106. With respect to the Second Case, the Court awarded the Claimants USD 1,087,997.64 and LE 216,045, that is approximately one third of the deductions claimed. The SCA was held liable for the costs of the proceedings of the Second Case.
107. The Claimants appealed the judgment on both Cases before the High Administrative Court of Egypt on 20 July 2003. The SCA also appealed in relation to the findings of the Second Case (mentioned by the Respondent's legal expert, Exh. R-12, ¶¶ 9-10; Rej., ¶ 228). A few months thereafter, on 23 December 2003, the Claimants submitted the dispute under discussion to ICSID.

### **III. THE PARTIES' POSITIONS**

108. In this section, the Tribunal will summarize the main aspects of the Parties' positions. It will refer to further arguments and allegations if appropriate in the course of its analysis.

#### **1. THE CLAIMANTS' POSITION**

109. The Claimants' case is based on an alleged violation by Egypt of the two successive bilateral investment treaties between the Belgo-Luxembourg Economic Union and the Arab Republic of Egypt (respectively the "1977 BIT" and the "2002 BIT"; collectively the "BITs").
110. In substance, the Claimants assert that Egypt's conduct since 1992 constitutes not only a breach of the Contract and of Egyptian law (as submitted before the Egyptian Courts) but also a breach of the rules of international law concerning the treatment of foreign investments, specifically the provisions of the BITs.
111. In their pleadings on the merits, the Claimants revisited the issue of jurisdiction and submitted that the Tribunal has jurisdiction over the entire dispute before it, including over breaches predating the entry into force of the 2002 BIT. In reliance on the Decision on Jurisdiction, the Claimants consider that the jurisdiction of the Tribunal is primarily based on the 2002 BIT and encompasses facts that took place

prior to the judgment of the Court of Ismaïlia. In the alternative, the Claimants invoke the 1977 BIT to assert the Tribunal's jurisdiction over those facts.

112. On the merits, it is the Claimants' case that Egypt committed a series of severe illegalities, namely:

- (i) It made fraudulent misrepresentations at the tender stage about the scope and nature of the contract works, thereby inducing the Claimants to a loss-making investment, and it failed to redress this illegality after the commencement of the works forcing the Claimants to resort to the local courts and to incur even more losses (SoC, pp. 126 to 130; Mem., ¶ 309);
- (ii) It committed a "*gross miscarriage of justice*" because of the "*inordinate duration and blatant defiance of the principles of fairness and due process*" of the local proceedings (Mem., ¶ 317), the behavior of the Egyptian judiciary amounting to an "*abuse of process and obstruction of justice*" (Mem., ¶ 318). In relation with the conduct of the local proceedings, the Claimants have more particularly insisted on
  - "*The systematic disregard of all evidence and findings favourable to the Claimants*" (Mem., ¶ 317), the conduct of the proceedings thus being biased (SoC, p. 130);
  - "*The joining of the First and the Second Case merely for dilatory purposes*" (Mem., ¶ 317), the joinder being a pretext to overrule the findings of the First Panel and of the Commissaire d'Etat (SoC, p. 131);
  - "*The appointment of a new and non-independent body of experts by the Ministry of Justice, as a pretext to overrule the findings unfavorable to the State*" (Mem., ¶ 317);
  - "*The passive espousal [by the Court] of the unreasoned and ultra vires conclusions of a panel of technical experts with no legal qualifications who overruled the fully reasoned findings of the two competent bodies, the First Panel and the Commissaire*" (Mem., ¶ 317), the judgment having merely rubber-stamped the report of the Second Panel (SoC, p. 131) and being in flagrant breach of all the rules of Egyptian law and "*the antithesis of due process*" (SoC, p. 134).

- The duration of the proceedings that lasted more than ten years prior to reaching a decision of first instance, within which the Claimants especially question the duration of the proceedings before the First Panel (Reply, ¶¶ 231-232).

113. These illegalities are attributable to the Egyptian State, including the acts and omissions of the SCA, and constitute violations of Egypt's international obligations. More particularly, Egypt allegedly committed the following treaty violations:

- It failed to grant the Claimants fair and equitable treatment pursuant to Article I.1 of the 1977 BIT and Article 3.1 of the 2002 BIT.
- It failed to grant continuous protection and security to the investment pursuant to Article I.2 of the 1997 BIT and Article 3.2 of the 2002 BIT.
- It failed to promote the investment pursuant to Article II.1 of the 1977 BIT and Article 2.1 of the 2002 BIT.

114. On the basis of these contentions, the Claimants request that the Tribunal:

- (i) Declare that it has jurisdiction over the entire dispute submitted to it by the Claimants;
  - (ii) Declare that Egypt has violated its obligations under international law towards the Claimants, rejecting any and all of the Respondents' objections and counterclaims; and
  - (iii) Award the Claimants the compensation requested by them for damages suffered as a consequence of the behavior of Egypt.
- (Reply, ¶ 293; 2<sup>nd</sup> PHB, ¶ 145)

115. In respect of the last relief sought, the Claimants request the following financial compensation:

- (i) US\$73.631.040, equivalent to the difference between the total amount of the execution costs (i.e. US\$139.625.550) and the total amount paid by SCA under the Contract, i.e. US\$ 65.994.510;
  - (ii) €3.307.008,47 for legal costs relating to the domestic judicial proceedings;
  - (iii) US \$2.900.000 for the unlawful deductions made by SCA.
  - (iv) Interest at the rate of 9% p.a. to be compounded quarterly on the above amounts (starting from June 30, 1993 for the amounts set out in (i) and (iii) above, and from July 30, 1998 for the amount set out in (ii) above).
  - (v) The costs of the present arbitration.
- (Mem., ¶ 329; 2<sup>nd</sup> PHB, ¶ 144)

## 2. THE RESPONDENT'S POSITION

116. For its part, the Respondent considers that the dispute which crystallized on 17 July 1993, that is on the date of the filing of the First Case, is not the same as the one that crystallized on 22 May 2003, that is on the date of the judgment of the Ismaïlia Court. The question to be solved by the Tribunal is whether that judgment constitutes in itself a violation of the 2002 BIT (CMem., ¶¶ 6 and 210). The Respondent submits that the judgment does not violate the 2002 BIT, and does not constitute a denial of justice by reason of its content or of the time needed for the proceedings. The Respondent further recalls that the Claimants have not exhausted the available local remedies (Rej., ¶ 255).
117. The Respondent also claims that the Tribunal has no jurisdiction on facts that took place prior to the entry into force of the 2002 BIT (such as the SCA's alleged acts and omissions) and that it would be an excess of power on the part of the Tribunal to assert such jurisdiction. In addition, the Respondent contends that it cannot be held responsible for the alleged wrongful acts of the SCA since the SCA is not an organ of the Egyptian State (CMem., ¶ 282).
118. As an alternative, the Respondent contends that there were no misrepresentations on the part of the SCA and that the case is ill-founded on the merits. It argues that the Claimants acted in bad faith when entering into the Contract with a view towards exploiting the existing difference in the Parties' calculations and filing a claim for additional compensation (CMem., ¶ 62), as well as after entering into the Contract.
119. Consequently, the Respondent invites the Tribunal to
- Constater que le litige dont il est saisi, né du Jugement, ne peut porter que sur l'éventuelle illicéité de ce Jugement au regard du BIT 2002, c'est-à-dire sur l'existence d'un déni de justice, et non sur l'illicéité de faits antérieurs à l'entrée en vigueur du BIT 2002, tel le prétendu dol de la SCA ;
  - Constater l'absence de tout déni de justice et débouter les Demanderesses de l'intégralité de leurs prétentions ;
  - Très subsidiairement, si le Tribunal s'estime habilité à statuer directement sur le grief de dol prétendu de la SCA, constater l'inexistence de ce dol et, de ce fait, l'absence de toute violation du BIT 1977 et, a fortiori, du BIT 2002, et débouter en conséquence les Demanderesses de l'intégralité de leurs prétentions ;
  - En tout état de cause, condamner solidairement les Demanderesses à lui rembourser l'intégralité des frais qu'elle aura exposés depuis le début de la procédure pour faire face à leur



action malveillante et infondée, en ce compris les frais de conseil, de consultants et d'experts, et les sommes versées au C.I.R.D.I., et les condamner sous la même solidarité à payer à la R.A.E. la somme de 5.000.000 US\$ à titre de dommages et intérêts pour procédure abusive.

- A titre infiniment subsidiaire, pour le cas où, par impossible, le Tribunal Arbitral débouterait la R.A.E. de la totalité des prétentions qui précèdent et la jugerait coupable de violation du BIT 1977 ou du BIT 2002, désigner un expert financier de réputation internationale chargé de déterminer contradictoirement, au vu de tous documents pertinents, si les Demanderesses ont réellement subi un préjudice compte tenu de toutes les circonstances appropriées, et, le cas échéant, de le chiffrer.

(Rej., ¶ 315)

#### IV. PRELIMINARY CONSIDERATIONS

120. Before turning to the merits of this case, the Tribunal wishes to address certain preliminary matters regarding its jurisdiction (1) and the applicable law (2).

##### 1. JURISDICTION

121. The Parties have addressed jurisdiction in their submissions on the merits. They have a different understanding of the Decision on Jurisdiction essentially with respect to the scope of the dispute before this Tribunal. Therefore, the Tribunal will firstly summarize the Parties' positions (1.1), and then restate the outcome of its determination on jurisdiction (1.2). Doing so, it will be careful not to revisit any issue which is *res judicata*.

##### 1.1 The Parties' positions

122. The Claimants understand the Decision on Jurisdiction to hold that the jurisdiction of the Tribunal, which is based on the 2002 BIT, encompasses all the facts they have alleged, including facts that took place prior to the entry into force of the 2002 BIT. In other words, they understand that jurisdiction covers facts from the call for tenders (Mem., ¶ 252) to the Judgment of the Ismaïlia Court as the "*last straw of a crescendo of illegalities which began at the tender stage*" (Reply, ¶ 31). Among these illegalities, in addition to those of the Court of Ismaïlia, they count the acts and omissions of the SCA, the Prime Minister, the Committee for Settling the Complaints of the Investors, the Second Panel of Experts (Reply, ¶ 325).

123. Alternatively, the Claimants consider that the Tribunal has jurisdiction over the entire dispute comprising all the facts alleged on the basis of a combination of the

2002 and the 1977 BITs (Reply, ¶ 18), which offer a continuity of standards of protection (Prof. Sacerdoti, Exh. C-176 ¶ 18).

124. Upon the Tribunal's question, the Claimants specified that the Decision on Jurisdiction carried *res judicata* to the extent that the Tribunal had asserted jurisdiction over the entire set of facts brought before it. By contrast, if the Tribunal had restricted its jurisdiction to facts arisen after the entry into force of the 2002 BIT, then it still needed to rule on its jurisdiction under the 1977 BIT, a matter left unresolved which could thus not be *res judicata* (1st PHB, ¶ 122).
125. The Respondent objects that the Decision on Jurisdiction asserted jurisdiction pursuant to the 2002 BIT over a new dispute which arose after the Ismaïlia Judgment. Such dispute cannot extend to facts predating the 2002 BIT, which provides that it does not apply to "*disputes having arisen prior to its entry into force*" (Art. 12 i.f.). It also contends that "*the substantive guarantees of the [2002] BIT only apply to the conduct of Egypt occurring after that date*" (Prof. Crawford, Exh. R-6 ¶ 12 and Exh. R-13 ¶ 12). Therefore, for the Respondent, the only conduct that can constitute a breach of the 2002 BIT is the one of the Ismaïlia Court and any discussion of a possible attribution of responsibility to Egypt for the acts of the SCA is inapposite.
126. The Respondent further objects to the application of the 1977 BIT to which the Claimants refer in the alternative (Rej, ¶ 294). It mainly alleges that at the time of the Request for Arbitration, Egypt's consent to arbitrate under the 1977 BIT had lapsed.
127. Finally, the Respondent asserts that the Decision on Jurisdiction carries *res judicata*, the Tribunal having affirmed jurisdiction on the basis of the 2002 BIT over a dispute that arose at the time of the Ismaïlia Judgment, which cannot include a claim for fraud of the SCA (2nd PHB, ¶ 30). In other words, the subject matter of the dispute so defined is *res judicata* (Tr. H. p. 86, French version) and cannot be reopened.

## 1.2 The Decision on Jurisdiction

128. According to the terms of the *dispositif* of the Decision on Jurisdiction, "the Tribunal has jurisdiction over the dispute submitted to it in this arbitration". In the conclusion to the analysis, the Tribunal specified that it had jurisdiction "to decide the *present* dispute under the 2002 BIT" (¶ 137, emphasis added). The terms "dispute

submitted to it" and "present dispute" cannot but mean the dispute of which this Tribunal is seized, including all the facts alleged. The Decision makes no mention of certain facts being excluded from the scope of the jurisdiction so asserted. To the contrary, it emphasizes that the Tribunal has reached its affirmative conclusion after having "*extensively considered*" – and thus affirmed – the question whether a dispute arising after the Ismaïlia Judgment "*could include claims that do not arise directly out of the judgment but out of previous facts*". It goes on to consider that the submissions at this stage of the proceedings were sufficient to establish jurisdiction and notes that at the merits phase the Claimants would in particular have to show that the acts of the SCA were attributable to the State (¶ 138). Such a statement would make no sense if the acts of the SCA were outside the scope of the Tribunal's jurisdiction (see also ¶ 89).

129. In the Decision on Jurisdiction, the Tribunal reaches the conclusion just set forth, i.e., that the entire set of facts alleged falls within its jurisdiction under the 2002 BIT, after having defined the dispute before it and the time when it arose. For purposes of this definition, it distinguished in terms of parties involved and applicable legal standards, the treaty dispute brought before it under international law (¶¶ 116 ff.) from the contractual dispute brought before the local courts under national law, the relevant consideration being that "*the local dispute antedated the international dispute and ultimately led to it*" (¶ 119). On this basis, it held that the international dispute only crystallized or arose after the date of the Ismaïlia Judgment (¶ 121), which together with the conduct of other organs of the State compounded the harm caused by the alleged fraud of the SCA (¶ 118). As a result, the reliance on the exclusion of disputes arisen prior to the entry into force of the 2002 BIT contained in Article 12 of such treaty was inapposite and the dispute resolution clause of the BIT 2002 applied to the whole dispute brought before this Tribunal. Consequently, there was no reason to review the applicability of the 1977 BIT for jurisdictional purposes.
130. Accordingly, the issue of jurisdiction is *res judicata*. No aspect has been left unresolved. Hence, having restated the content of the Decision on Jurisdiction, the Tribunal will abstain from entertaining further arguments put forward by the Parties after that decision was rendered.

## 2. APPLICABLE LAW

131. Unlike the issue of jurisdiction, the question of the law governing acts that occurred before the entry into force of the 2002 BIT while forming part of a dispute that arose thereafter has not been finally determined and will be addressed now.

132. It is undisputed, and rightly so, that the legality of an act must be assessed in the light of the law applicable at the time of its performance.<sup>5</sup> This rule of intertemporal law is well established in international judicial and arbitral practice.<sup>6</sup> It is a consequence of the rule on non-retroactivity, which for treaties is codified in Article 28 of the Vienna Convention in the following terms :

### ARTICLE 28

#### *Non-retroactivity of treaties*

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

133. The rule that acts are governed by contemporaneous law is also reflected in Article 13 of the ILC Articles on State Responsibility ("ILC Articles"), which rules out responsibility for an act in violation of an obligation not in effect at the time of the performance of the act :

### ARTICLE 13

#### *International obligation in force for a State*

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

134. In other words, the Tribunal must apply the provisions of the 2002 BIT with regard to the acts of the Ismaïlia Court in relation to its judgment and the provisions of the 1977 BIT with regard to conduct that took place prior to the entry into force of the 2002 BIT. This said, in practical terms the application of different texts will make no

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<sup>5</sup> Schreuer Opinion, Exh. C-165 ¶¶ 81 ff; Rej. ¶ 239 and CMem. ¶ 213, as well as Crawford Opinion 1, Exh. R-6 ¶ 12.

<sup>6</sup> See among others *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), at ¶ 311: "Impregilo complains of a number of acts for which Pakistan is said to be responsible. The legality of such acts must be determined, in each case, according to the law applicable at the time of their performance". See also *Island of Palmas Case (or Miangas) (United States of America v. The Netherlands)*, found at: <http://www.pca-cpa.org/upload/files/Island%20of%20Palmas%20award%20only%20-%20TOC.pdf>, at p. 14 (3<sup>rd</sup> indent): "Both Parties are also agreed that a juridical fact **must be appreciated in the light of the law contemporary with it**, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled." (Emphasis added).

meaningful difference as the protections of the two treaties are essentially identical. The guarantee of fair and equitable treatment is provided in almost identical terms in Art. I (1) of the 1977 BIT and in Art. 3 (1) of the 2002 BIT. The same is true of the guarantee of continuous protection and security embodied in Art. I (2) of the 1977 BIT and Art. 3 (2) of the 2002 BIT, as well as of the duty to encourage investments contained in Art. II (1) of the 1977 BIT and in Art. 2 (1) of the 2002 BIT.

135. As a result, the substantive provisions of both treaties will apply, while, as it follows from the Decision on Jurisdiction, the jurisdiction over the dispute is based on the 2002 BIT only. In other terms, as was stressed by Prof. Schreuer, one of the Claimants' legal experts, "jurisdiction is independent of the substantive law applicable to the dispute".<sup>7</sup>
136. The application by a tribunal established under one treaty (here the 2002 BIT) of provisions of another treaty (here the 1977 BIT) implies that the dispute resolution clause of the first treaty (the 2002 BIT) contains no restriction with respect to the applicable law and that the acts at issue fall within the scope of application of the second treaty (the 1977 BIT). The Tribunal will examine these questions in turn.
137. Article 8 of the 2002 BIT entitles the investor to submit to ICSID "any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting State". Unlike the dispute resolution clauses of the 1977 BIT and of certain other treaties<sup>8</sup>, this wording does not restrict the State's consent to arbitration of disputes involving the application of the substantive rules of the 2002 BIT.
138. Several ICSID decisions, including *Salini v. Morocco*, *SGS v. Philippines* and *Impregilo v. Pakistan*<sup>9</sup> have interpreted such broad dispute resolution provisions to include claims arising from a contract in connection with an investment entered by an investor with the State, as opposed to being limited to claims of breach of the

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<sup>7</sup> Schreuer Opinion, Exh. C-165, ¶ 81.

<sup>8</sup> Art. IX of the 1977 BIT refers to "any disputes relating to a measure contrary to this Agreement [...]". Further, the NAFTA dispute settlement provision for instance apply only to breaches of certain obligations under the treaty (Art. 1116); the same is true of the Energy Charter Treaty (Art. 26(1)), or of the UK Model BIT, which refers to disputes "concerning an obligation of the host state under this Agreement (Art. 8(1)).

<sup>9</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision on Jurisdiction, 29 January 2004, 8 ICSID Rep. 518 (2005); *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/02/2), Decision on Jurisdiction, 22 April 2005, 12 ICSID Rep. 245 (2007).

substantive provisions of the treaty containing the arbitration provision. *SGS v. Pakistan* in particular has preferred the latter restrictive approach.<sup>10</sup>

139. Absent specific circumstances to the contrary, this Tribunal sees no reason to deviate from the “ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”, which is the primary rule of interpretation under Article 31 of the Vienna Convention on the Law of Treaties. This is particularly so since the BIT embodying the broad clause replaces the former whose substantive provisions are applicable, with the aim of giving a continuity of protection of investments made in the territories of the Contracting States.
140. Turning now to the scope of application of the 1977 BIT, in the Decision on Jurisdiction, the Tribunal has already reviewed and affirmed the latter’s application *ratione materiae* (see, ¶¶ 97-104).<sup>11</sup> Further, with respect to the scope *ratione personae*, there is no doubt that the Respondent is a Contracting State and that the Claimants are nationals of the other Contracting State. Finally, the question of the application *ratione temporis* is resolved by the observation that the 1977 BIT is the law contemporaneous to the facts, which is the only one that governs acts performed while it was in force and that may give rise to the responsibility of the host State.
141. If need be, this last conclusion is supported by the Commentary to Article 13 of the ILC Articles. The Commentary specifies that the principle stated in Article 13 is not only a necessary but also a sufficient basis for responsibility. It adds that “once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty or of a change of international law.”<sup>12</sup>

### 3. ATTRIBUTION

142. The Claimants complain about the acts and omissions of a number of different actors: the SCA, the Prime Minister, the Committee for Settling Disputes of Foreign Investors, and the Court of Ismaïlia. It is only if the conduct of these actors is attributable to the State that Egypt may be held responsible for any treaty breach.

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<sup>10</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Jurisdiction, 6 August 2003, 8 *ICSID Rep.* 406 (2005).

<sup>11</sup> Decision on Jurisdiction issued on 16 June, 2006 (Attachment 1).

<sup>12</sup> Commentary on ILC Articles, 2001, Art. 13, ¶ 7, p. 58.

The Decision on Jurisdiction has expressly left the issue of attribution to be determined at the merits phase because the debate was not exhausted at the stage of the jurisdictional objections (¶¶ 85 and 89). Accordingly, the Tribunal will first deal with the SCA (3.1) and then turn to the other actors (3.2).

### 3.1 Acts and omissions of the SCA

#### 3.1.1 *The Claimants' position*

143. According to the Claimants, irrespective of its precise characterization, the conduct of the SCA is attributable to Egypt on the alternative following grounds:

- The SCA is an organ of the State within the meaning of Article 4 of the ILC Articles. For Professor Sacerdoti, the SCA is a *de jure* organ of the State since it is a public authority that exercises a public function and is part of the structure of the State according to domestic law (Prof. Sacerdoti Opinion, Exh. C-176, ¶ 51, ¶¶ 57-58).
- The SCA is an entity that exercises governmental authority within the meaning of Article 5 of the ILC Articles.
- The SCA acts under the control and direction of the State within the meaning of Article 8 of the ILC Articles.

144. More particularly, the Claimants argue that the SCA is an organ of the State and satisfies the structural and functional test set out in *Maffezini v. Spain*, *Salini v. Morocco* and *RFCC v. Morocco*, as well as *Noble Venture v. Romania*, *Eureko v. Poland* and *EnCana v. Ecuador*. Even if it were not to be considered a *de jure* organ, following *Noble Venture v. Romania* (¶ 69-70), the SCA is in any case a *de facto* organ of the Egyptian State according to Professor Sacerdoti (¶ 58) in that it is empowered by law to exercise elements of governmental nature (Mem., ¶¶ 219-230).

145. According to the Claimants, it is sufficient to satisfy one of these tests – structural or functional – to attribute the conduct of the SCA to Egypt (Mem., ¶ 204). Moreover, the distinction between *acta iure imperii* and *acta iure gestionis* plays no role whatsoever when it comes to the attribution of State responsibility (Reply, ¶ 94; Professor Sacerdoti, Exh., C-176, ¶ 68). In addition, the fact that the Contract was an administrative contract is a strong indication that the contracting entity is engaging the State's responsibility (Mem., ¶ 241).

146. Applying a *structural test*, the Claimants put forward that:

- (i) SCA is considered a "Public Authority" by Egyptian law (Article 2, para. 1 of Law No. 30/1975);
- (ii) SCA's Chairman, Directors of the Board, Managing Director and General Manager are all appointed by means of presidential decrees of the President of the Republic (who also decides on their salaries, their removal and their bonuses) (Article 3 of Law No. 30/1975);
- (iii) SCA reports to the Prime Minister, who must also approve all the decisions of its Board of Directors before they become effective (Article 2, para. 2 and Article 3, para. 2, of Law No. 30/1975);
- (iv) the charges collected by SCA are included in the Public Treasury Balance Sheet and SCA's accounts and balance sheets are supervised by the Central Auditing Department, the State organ exercising financial control over the administration of public funds (Article 5 of Law No. 30/1975);
- (v) all SCA's employees have the status of public officials (Article 13 of Law No. 30/1975);
- (vi) SCA is subject to the rules on public procurement which apply to ministries and State authorities (*citation omitted*);
- (vi) SCA's acts are subject to the judicial review of the administrative courts, whose jurisdiction is limited to disputes with the government and government entities (as demonstrated also by the judicial proceedings discussed in Chapters 4-7 above).

(SoC, pp. 96-97)

147. The Claimants also apply a *functional test*. On that basis, they find that the SCA performs functions that are exclusively governmental in nature and is vested with typically governmental powers. It has the responsibility of governing and maintaining the Suez Canal, which is one of the most important waterways of the world and an essential asset of the Egyptian economy (SoC, p. 97).

148. The Claimants find further useful indication in the SCA's budget which shows that *"almost half of SCA's yearly revenues (the "governmental surplus") are transferred to the Public Treasury every year and that the amount transferred equals almost one fifth of the current revenues of the entire State budget"* (Mem., ¶ 215, emphasis in the original).

149. As the SCA is the authority mandated by the Egyptian government to administer the Suez Canal, the Claimants contend that it is also delegated to fulfill Egypt's international obligations relating to the Canal. The SCA carries out these functions by issuing decrees and by imposing and collecting charges, which are the most characteristic manifestations of "*puissance publique*." Furthermore,



- (i) SCA is entrusted with "*the management, utilization, maintenance, improvement of the Suez Canal Utility*" (Article 1 [of Law No. 30/175]);
- (ii) SCA has the exclusive power "*to issue the decrees that are related to the navigation in the canal and any other decrees required for good performance of the utility and the execution of these decrees*" (Article 6);
- (iii) SCA is also responsible for the management of Port Saïd harbour and for access to the Canal, for imposing and collecting "*charges for the navigation and passing through the Canal Utility also for the guidance, towage, anchoring*" (Articles 7 and 8);
- (iv) SCA enjoys "*all the required powers for the performance of all its duties and competencies, especially it has the right to possess the land and the real estate by any way*" (Article 9).

(SoC, pp. 97-98)

150. Therefore, there can be no question that the SCA was acting in its governmental capacities in the context of its relations with the Claimants. The works were a typical instance of "maintenance" and "improvement" of the Suez Canal for which the SCA is responsible by law. They were intended to improve the conditions of the Suez Canal by making it accessible to larger vessels, thereby increasing the opportunities for revenues of the Egyptian State (SoC, p. 98).

151. The works were awarded by a tender process governed by the laws on public procurement, and the SCA's actions throughout the entire duration of its relations with the Claimants were subject to administrative law and to the typical constraints of a public authority. This is demonstrated *inter alia* by the fact that the SCA's refusal to grant an extension of the tender period was justified by constraints linked to the State budget and the risk of loss of financing from Arab funds (SoC, p. 99).

152. In addition, the Claimants submit that the SCA is an entity that exercises governmental authority within the meaning of Article 5 of the ILC Articles. In the alternative, the Claimants contend that the SCA also acts under the control and direction of the State within the meaning of Article 8 of the ILC Articles (Mem., ¶ 231).

### **3.1.2 The Respondent's position**

153. For the Respondent, while it is clear that the Ismaïlia Court is an organ of the State, the SCA is not. More particularly, the SCA is not an organ of the State in the terms of Article 4 of the ILC Articles because it has independent legal personality:

Aucun texte de droit interne égyptien n'assimile la SCA à un organe de l'Etat *de jure* au même titre que le Gouvernement, le Parlement, les

tribunaux ou des administrations dépourvues de personnalité juridique propre.

Tout au contraire, la loi n° 30 de 1975 qui a créé la SCA prévoit expressément à son article 2 que **'Suez Canal Authority' is a Public authority [which] enjoys an independent Juristic Personality**.

Cette **personnalité juridique propre** exclut que la SCA soit considérée comme faisant partie intégrante de l'Etat égyptien. (CMem., ¶¶ 282-284. Emphasis in the CMem.).

Referring to *Noble Venture v. Romania* (¶ 69), the Respondent argues that the existence of an independent personality is the relevant test, this determination being made pursuant to Egyptian law as long as it is not contrary to international law (Rej., ¶ 299).

154. Regarding the application of Article 5 of the ILC Articles, the Respondent does not deny that the SCA is entitled to exercise governmental authority, but it contends that the SCA did not act in this capacity in the particular instance. The tender stage did not imply the exercise of any governmental authority and the fact that the Contract is an administrative contract is irrelevant (Rej., ¶ 303). The SCA acted as a private contracting party (Rej., ¶¶ 303-304), as allegedly acknowledged by the Claimants in the Request for Arbitration, where they consider that the dispute submitted to the Administrative Court of Ismaïlia, which is at the root of this arbitral procedure, was a "private law dispute" between foreign investors and the "SCA acting in its capacity as a private contracting party" (Request, ¶ 27-3). Accordingly, while the Respondent acknowledges that the SCA is an entity that exercises governmental authority pursuant to Article 5 of the ILC Articles in certain instances, it denies that it has acted in this capacity vis-à-vis the Claimants (CMem., ¶ 291). It therefore concludes that the SCA's acts cannot be attributed to Egypt.

### **3.1.3 The Tribunal's determination**

155. The discussion between the Parties primarily hinges upon whether the SCA is a State organ pursuant to Article 4 of ILC Articles or an entity that exercises governmental authority pursuant to Article 5 of the ILC Articles. The distinction is of importance. Indeed, should the SCA be a State organ, any of its acts would be attributable to the Respondent. Should it be an entity pursuant to Article 5, Egypt's liability will depend on whether the SCA did exercise elements of governmental authority vis à vis the Claimants at the relevant time.

156. The ILC Articles have been embodied in Resolution A/56/83 adopted by the General Assembly of the United Nations on 28 January 2002. This resolution is considered as a statement of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which is applicable by analogy to the responsibility of States towards private parties.

157. In order for an act to be attributed to a State, it must have a close link to the State. Such a link can result from the fact that the person performing the act is part of the State's organic structure (Article 4 of the ILC Articles), or exercises governmental powers specific to the State in relation with this act, even if it is a separate entity (Article 5 of the ILC Articles), or if it acts under the direct control (on the instructions of, or under the direction or control) of the State, even if being a private party (Article 8 of the ILC Articles).

**a) *Are the acts of SCA attributable to Egypt because the SCA is an organ of the State (Article 4 ILC Articles)?***

158. The Tribunal will assess whether the SCA is an organ of the State, as contended by the Claimants, pursuant to Article 4 of the ILC Articles, which reads:

ARTICLE 4

*Conduct of organs of a State*

- I. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

159. In the 2001 Commentary to Article 4 of the ILC Articles it was specified:

(1) Paragraph 1 of article 4 states the first principle of attribution for the purpose of State responsibility in international law – that the conduct of an organ of the State is attributable to that State. The reference to a “State organ” covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase. (p. 40)

160. An organ is part of the central or decentralized structure of the State, which means that it is a person or entity which is part of the legislative, executive, or judicial

powers. To determine whether an entity is a State organ, one must first look to domestic law.<sup>13</sup> The SCA was created by Law No. 30/1975. It appears that the SCA is not classified as a State organ under Egyptian law. Article 2 of Law No. 30/1975, embodying the Suez Canal Authority Statutes (Exh. C-9), states that *“Suez Canal Authority is a Public Authority”* and that SCA *“enjoys an independent juristic personality.”*

161. Indeed, the SCA was created to take over the management and utilization of a nationalized activity. There is no doubt that from a functional point of view, the SCA can be said to generally carry out public activities, as acknowledged by the Respondent itself. However, structurally, it is clear that the SCA is not part of the Egyptian State, as results from Articles 4, 5 and 10 of the Law No. 30/1975. Indeed, these provisions insist on the commercial nature of the SCA activities and its autonomous budget. They read respectively as follows :

Article 4

The SCA shall follow the appropriate methods of management and exploitation in accordance with what is being followed in the business enterprises without any commitment by the governmental systems and conditions.

Article 5

The SCA shall have an independent budget that shall be in accordance with the rules adopted in the business enterprises without prejudice to the supervisory of the Central auditing Department on the final account of the SCA.

Article 10

The SCA's funds are considered private funds.

162. For these reasons, the Tribunal concludes that the SCA is not an organ of the State, and that, as a consequence, its acts cannot be attributed to Egypt.

**b) Are the acts of SCA attributable to Egypt because the SCA is a public entity having exercised governmental authority functions (Article 5 ILC Articles)?**

163. Article 5 of the ILC Articles reads as follows:

ARTICLE 5

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<sup>13</sup> B. Stern, La responsabilité des Etats. Perspectives récentes, *Cursos Euromediterraneos Bancaja de Derecho Internacional*, vol. VII-2003, p. 671. Generally, on the questions of attribution, see, B. Stern, Responsabilité internationale, *Répertoire de droit international public*, Encyclopédie Dalloz, Paris, Dalloz, 1998.

*Conduct of persons or entities exercising elements of governmental authority*

The conduct of a person or entity which is not an organ of the State, under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority [*“à exercer des prérogatives de puissance publique”*, in the French version] shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

In other words, for an act to be attributed to a State under Article 5, two cumulative conditions have to be fulfilled:

- first, the act must be performed by an entity empowered to exercise elements of governmental authority (i);
- second, the act itself must be performed in the exercise of governmental authority (ii).

164. The issues before the Tribunal are therefore whether the SCA (i) is empowered to exercise elements of governmental authority under Egyptian law and, if so, (ii) if it has exercised such authority vis à vis the Claimants at the time of the tender, i.e., at the time of the alleged fraud (*doI*), as well as during the performance of the Contract. The Tribunal will examine these two questions in turn.

*(i) Is the SCA empowered to exercise elements of governmental authority?*

165. The test to determine if an entity falls within the scope of application of this provision is limited to the exercise of governmental authority. Indeed,

[t]he fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control — these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. **Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.**<sup>14</sup>

166. There is no doubt that the SCA was and still is empowered to exercise elements of governmental authority. This is clearly acknowledged by the Respondent (CMem., ¶ 286). The SCA is in particular empowered “*to issue the decrees related to the navigation in the canal*” (Article 6 of the Law No. 30/1975) or to “*impose and collect*

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<sup>14</sup> ILC Official Commentary, J. Crawford, op. cit., p. 100, ¶ 3. Emphasis added.

*charges for the navigation and passing through the canal*" (Article 8). The Tribunal therefore concludes that the SCA is an entity under Article 5 of the ILC Articles.

(ii) *Did the SCA exercise governmental authority in its dealings with the SCA?*

167. It is common ground that for an act of an independent entity exercising elements of governmental authority to be attributed to the State it must be shown that the act in question was an exercise of such governmental authority.<sup>15</sup>
168. Relying on the functional test adopted by the *Maffezini* tribunal, this Tribunal "*must establish whether specific acts or omissions are essentially commercial rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial. Commercial acts cannot be attributed to the State, while governmental acts should be so attributed*".<sup>16</sup>
169. Consequently, the fact that the subject matter of the Contract related to the core functions of the SCA, i.e., the maintenance and improvement of the Suez Canal, is irrelevant. The Tribunal must look to the actual acts complained of. In its dealing with the Claimants during the tender process, the SCA acted like any contractor trying to achieve the best price for the services it was seeking. It did not act as a State entity. The same applies to the SCA's conduct in the course of the performance of the Contract.
170. It is true though that the Contract was awarded through a bidding process governed by the laws on public procurement. This is not a sufficient element, however, to establish that governmental authority was exercised in the SCA's relation to the Claimants and more particularly in relation to the acts and omissions complained of. What matters is not the "*service public*" element, but the use of "*prérogatives de puissance publique*" or governmental authority. In this sense, the refusal to grant an extension of time at the time of the tender does not show either

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<sup>15</sup> See for example the case of *Rolimpex*, in which although Rolimpex was under the strict control of the State in a centralised economy, Lord Denning did not consider that its acts could be attributed to the State: "I do not think that Rolimpex can be considered to be a department of the Government of Poland ... Rolimpex is a State trading agency" (Court of appeals, 26 May 1977, *ILR*, 1983, vol. 64, p. 195, see also House of Lords, 6 July 1978, *id.*, p. 204). Another case to the same effect is the one of the *Bank of Nigeria*, where a distinction was made between the activities performed by the Bank as a central monetary authority, and the act of buying cement for the construction of offices, which could not be attributed to the State (England Court of Appeals, 13 January 1977, *ILR*, vol. 64, p. 122).

<sup>16</sup> *Maffezini v. Spain* (ICSID Case No. ARB/97/7), Decision on Jurisdiction, 25 January 2000, ¶ 52.

that governmental authority was used, irrespective of the reasons for such refusal. Any private contract partner could have acted in a similar manner.

171. On such basis, the Tribunal concludes that, although the SCA is a public entity empowered to exercise elements of governmental authority, the acts of the SCA vis à vis the Claimants are not attributable to the Respondent in this arbitration on the basis of Article 5 of the ILC Articles, as they were not performed pursuant to the exercise of governmental authority.

**c) *Are the acts of SCA attributable to Egypt because the SCA has acted upon the instruction of the State (Article 8 of the ILC Articles)?***

172. Article 8 of the ILC Articles reads as follows:

ARTICLE 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

173. International jurisprudence is very demanding in order to attribute the act of a person or entity to a State, as it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake; this is known as the “effective control” test.<sup>17</sup> There is no evidence on record of any instructions that the State would have given to the SCA in regard to the very specific acts and omissions of the SCA that are complained of in this arbitration. Accordingly, the Tribunal concludes that there can be no attribution of the acts of SCA to the Respondent under Article 8 of the ILC Articles.

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<sup>17</sup> Case concerning military and paramilitary activities in and against Nicaragua, (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, *ICJ Reports* 1984, ¶¶ 113 and 115.  
 “113. The question of the degree of control of the contras by the United States Government is relevant to the claim of Nicaragua attributing responsibility to the United States for activities of the contras whereby the United States has, it is alleged, violated an obligation of international law ...”.  
 115. The Court has taken the view ... that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had **effective control** of the military or paramilitary operations in the course of which the alleged violations were committed.” (Emphasis added).

**d) Conclusions on attribution of the acts of the SCA**

174. For the reasons just stated, the Tribunal concludes that the acts of the SCA vis à vis the Claimants are not attributable to the Respondent. Therefore, the Tribunal cannot review the conduct of the SCA in the conclusion and performance of the Contract as such, since Egypt cannot be held liable for the SCA's actions and omissions. This will not however prevent the Tribunal from reviewing elements of the conclusion and performance of the Contract in the context of its analysis of the decision of the Ismaïlia Court. Such review will, however, be exclusively performed through the prism of the Ismaïlia Judgment.

**3.2 Acts and omissions of the other actors**

175. It is clear that the acts and omissions of the Prime Minister are attributable to Egypt, the latter being an organ of the State pursuant to Article 4 of the ILC Articles. There is no doubt either that the Administrative Court of Ismaïlia qualifies as an organ of the State within the meaning of Article 4 of the ILC Articles, as acknowledged by the Respondent's expert (Exh., R-6 ¶ 6). Furthermore, one may debate whether the Second Panel of Experts appointed by the Ministry of Justice to issue a report within the judicial proceedings is a State organ or an entity empowered to exercise governmental functions. A final conclusion would require an in-depth inquiry into Egyptian law. Such an inquiry does not appear necessary here. Indeed, the acts of the Second Panel of Experts are in any event attributable to the State, whether they are considered as acts of an organ or as acts of a public entity performing judicial functions vis à vis the Claimants. Lastly, it is not disputed amongst the Parties that the conduct of the Committee for Settling the Complaints of Foreign Investors is attributable to the Respondent.

**4. ALLEGED VIOLATION OF THE FAIR AND EQUITABLE TREATMENT STANDARD**

**4.1 The Parties' positions**

**4.1.1 The Claimants' position**

176. The Claimants argue that their legitimate expectations were violated "*not only by a breach of explicit promises made by the State, but also by its lack of transparency and predictability in the conduct of negotiations leading to the conclusion of the investment contract*" (1<sup>st</sup> PHB, ¶ 135) in order "*to obtain an unacceptably low price*



*at the expenses of the Claimants*” (Tr. H., p. 77, English version). For them, Egypt’s behavior was “*shocking and disgraceful*” (Tr. H., p. 80, English version).

177. The Claimants’ legitimate expectations were further violated by Egypt’s failure to redress the consequences of the initial breach (Tr. H., p. 83, English version). Relying on *CME v. The Czech Republic*<sup>18</sup>, the Claimants insist on the need for remediation of previous undue interference (Tr. H., p. 84, English version).
178. The fair and equitable treatment (FET) standard was further violated by the illegalities committed by the judiciary. In that respect, the behavior of Egypt is not to be assessed under the standards of ordinary denial of justice, but rather “*as part of a broader violation of the obligation of fair and equitable treatment*” and protection of foreign investments (Reply, ¶ 256). The “*failings of the Egyptian court could also amount to a denial of justice per se, but this is not the object of the claim*” (1<sup>st</sup> PHB, ¶ 124). The focus is not on the flaws of the judicial system. It is only an “*aggravating circumstance*” of the previous illegality (Tr. H., p. 87, English version). Indeed, the decision of the Ismaïlia Court is not to be evaluated in isolation but “*as the terminal point of a long series of illegalities*” (Reply, ¶ 254), since it “*failed to set right the wrongs committed by other organs of the State*” (Reply, ¶ 256, also in 1<sup>st</sup> PHB, ¶ 124).
179. Even if the standards of denial of justice were to apply, there would be a breach of the BITs. Contrary to the Respondent’s assertion, the Claimants had no obligation to exhaust local remedies or else, “*illegalities committed by lower courts could [n]ever constitute a violation of international law*” (Reply, ¶ 259). Investors are exempted from this requirement whenever the ICSID Convention applies, except if so required by the State in conformity with Article 26 of the Convention (Reply, ¶ 74). This is so “*because the rationale for requiring previous exhaustion as a precondition to resort to and to exercise diplomatic protection has no basis when the BIT does not subject recourse to international arbitration directly by the aggrieved investor to such exhaustion*” (Prof. Sacerdoti, Exh. C-176, ¶ 79). In any event, “*[i]f the local remedies is [sic] inapplicable in the case of denial of justice, it is all the more so where the behavior of the domestic courts is called into question qua violation of the FET standard*” (1<sup>st</sup> PHB, ¶ 133).

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<sup>18</sup>

¶ 564.

180. On that basis, “denial of justice can be realized by the unfair conduct and/or manifest unjust judgment of a lower court. Such denial of justice is per se a form of unfair treatment irrespective of the ability of the domestic system to redress it through the quashing or reversal of the judgment of the lower court” (Prof. Sacerdoti, Exh., C-176 ¶ 73). As a result, denial of justice can take the form of “unjust decisions”, “clear and malicious misapplication of the law” and “lack of judicial propriety of the outcome” and occur “at the level of an individual case” (Exh., C-116 ¶ 76).
181. Quoting *PSEG v. Turkey*, the Claimants argue that the FET standard “does allow for justice to be done in the absence of more traditional breaches of international law standards”<sup>19</sup> (1<sup>st</sup> PHB, ¶ 125). On that basis, “the FET sort of complements the other rules, and sort of fills in gaps where the rigidity of the traditional rules may not be sufficient to provide the level of protection implied” by the BIT (Tr. H, p. 89, English version). Relying by analogy on the finding of *Sempra v. Argentina* on expropriation, the Claimants submit that the FET standard “ensure[s] where there is no clear justification for making a finding ... there is still a standard which serves the purpose of justice and redress damage that is unlawful and that would otherwise pass unattended”<sup>20</sup> (1<sup>st</sup> PHB, ¶126).

#### **4.1.2 The Respondent’s position**

182. As a main argument, the Respondent submits that the standards of denial of justice ought to apply in the present case, and that the Tribunal is in any event entitled to characterize “the object of the dispute” of its own motion (Rej., ¶ 251).

The Respondent denies any treaty violation since the decision of the Ismaïlia Court cannot constitute a denial of justice – whether substantive or procedural<sup>21</sup> – on essentially two grounds. First, the claim cannot be entertained, because the decision is not final. Second, even if the Tribunal could entertain the claim, nothing in the Judgment would warrant a finding of denial of justice. More specifically,

- The decision is not binding. It has been appealed and there is a 20% chance of reversal on appeal (Rej., ¶ 262).

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<sup>19</sup> *PSEG v. Turkey*, ¶ 239 ff.

<sup>20</sup> *Sempra v. Argentina*, ¶ 300 ff.

<sup>21</sup> “Le Jugement ne constitue pas et ne consacre pas un déni de justice, que ce soit en raison de sa teneur (1) ou du délai dans lequel il a été rendu (2).” (CMem., ¶ 250).

- The Claimants have thus failed to exhaust local remedies as required under international law (CMem., ¶ 226). Such requirement was affirmed in *Loewen v. United States* and reaffirmed in *Saipem v. Bangladesh*. The mere fact that the appeal is pending is “fatal” to the claim for denial of justice (CMem., ¶ 253, quoting Prof. Crawford’s Opinion 1, Exh., R-6). The fact that the State itself or one of its organs is party to the domestic proceedings provides no exception to the requirement of exhaustion of local remedies (Rej., ¶ 255).
- Indeed, “[i]t is fundamental to the definition of denial of justice that the system of justice has failed, not only the individual court or judge” (CMem., ¶ 228, quoting Prof. Crawford’s Opinion 1, Exh. R-6).
- An incorrect or erroneous judgment is insufficient to constitute a denial of justice. There needs to be “a manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety” (Prof. Crawford’s Opinion 1, Exh. R-6, ¶¶ 4 and 27, quoting *Loewen*). The burden is on the Claimants to establish that there was a clear and malicious misapplication of the law.
- The content of the decision of the Ismaïlia Court is not “shocking” (CMem., ¶ 257); and international tribunals are not meant to be courts of appeal for domestic tribunals (2<sup>nd</sup> PHB, ¶ 32).

183. More particularly, as far as procedural aspects are concerned, it is the Respondent’s view that the decision of the Ismaïlia Court does not involve a denial of justice for the following reasons:

- There has been no bad faith nor intent to discriminate against the Claimants on the part of the experts or the Egyptian judges;
- The Claimants were able to raise objections throughout the proceedings;
- There was no systematic bias against the Claimants, as arguments of the SCA were also dismissed (CMem., ¶ 260);
- The joinder of the two cases made common sense and was not dilatory (CMem., ¶ 261);
- The Ismaïlia Court made its own independent analysis and did not simply follow the recommendations of the Second Panel (CMem., ¶ 263);

- Lastly, the duration of the proceedings was due to the complexity of the matter and the need for two expert reports (CMem., ¶ 268), as well as to the Claimants' "*dissimulation frauduleuse*" of their 1992 bathymetric studies and their refusal to have the First Panel review the damages (CMem., ¶ 269).

## 4.2 The Tribunal's determination

184. The Tribunal will first examine the standards of fair and equitable treatment (4.2.1) prior to reviewing each of the acts and conduct which have allegedly violated such treatment (4.2.2 to 4.2.3).

### 4.2.1 Standards

185. Fair and equitable treatment is a flexible and somewhat vague concept<sup>22</sup>, which must be appreciated *in concreto* taking into account the specific circumstances of each case.<sup>23</sup> It is accepted today that a breach of fair and equitable treatment does not presuppose bad faith on the part of the State.<sup>24</sup>
186. Tribunals have considered that fair and equitable treatment was denied when the protection of the investor's expectations had not been warranted, provided that these were reasonable and legitimate. In the words of the tribunal in *Tecmed*, the purpose of the fair and equitable treatment guarantee is "*to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment*"<sup>25</sup>. And in the terms of the tribunal in *Saluka*:

By virtue of the 'fair and equitable treatment' standard, the host State must [...] be regarded as having assumed an obligation to treat foreign

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<sup>22</sup> See C. Schreuer, Fair and Equitable Treatment in Arbitral Practice, 6 JWIT 3, pp. 357-386. *Waste Management Inc. v. United Mexican States*, Award, 30 April 2004, ¶ 99; *PSEG v. Turkey* (ICSID Case No. ARB/02/05), Award, 19 January 2007, ¶ 239; *Enron Corp. and Ponderosa Assets S.A. v. Argentine Republic* (ICSID case No. ARB/01/3), Award, 22 May 2007, ¶ 256.

<sup>23</sup> *Mondev International Ltd v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, ¶ 118.

<sup>24</sup> See *CMS Gas Transmission Company v. Argentine Republic* (ICSID case No. ARB/01/08), Award, 12 May 2005., ¶ 280; *Azurix Corp v. Argentine Republic* (ICSID case No. ARB/01/12), Award, 14 July 2006, ¶ 372 referring to *Mondev International Ltd v. United States of America*, *Loewen v. United States of America*, *Waste Management Inc. v. United Mexican States*, *TECMED v. United Mexican States*. See also *LG&E et al. v. Argentine Republic* (ICSID case No. ARB/02/1), Decision on Liability, 25 July 2007, ¶ 129.

<sup>25</sup> *Técnicas Medioambientales TECMED S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003, ¶ 154. See also *Waste Management v. United Mexican States*, *op. cit.* ¶ 98 and *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, 26 January 2006, ¶ 147; *LG&E*, *op. cit.*, ¶ 127.

investors so as to avoid the frustration of investors' legitimate and reasonable expectations. [...].<sup>26</sup>

187. It is also common ground that the fair and equitable treatment may be violated when procedural propriety and due process are denied. For example, the *Waste Management* tribunal considered that fair and equitable treatment could be denied *"if the conduct is grossly unfair or idiosyncratic, discriminatory and exposes the claimant to sectional or racial prejudice or involves lack of due process leading to an outcome which offends judicial propriety - as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."*<sup>27</sup>
188. The Tribunal recognizes that the 2002 and 1977 BITs do not comprise a specific provision regarding the miscarriage or denial of justice. It considers, however, that the fair and equitable treatment standard encompasses the notion of denial of justice.<sup>28</sup> The Parties and their experts are in agreement on that point.
189. This said, the Parties disagree on the applicable test. The Claimants favour a flexible test which takes into account the factual situation in its entirety and focuses on the outcome thereby giving greater weight to the FET standard and bypassing the requirement for exhaustion of local remedies. By contrast, in reliance on the limited jurisdiction of the Tribunal under the 2002 BIT, the Respondent considers that the only conduct which can arguably form the basis for the claim is the judgment of the Ismaïlia Court. It therefore only discusses the matter of denial of justice.
190. Since the conduct of the SCA is not attributable to Egypt, the Tribunal is now faced with two sets of acts: first, the acts and omissions in relation to the judicial proceedings and, second, the acts and omissions involving the Prime Minister and the Committee for Settling the Complaints of the Investors.
191. The first set of acts relates to the judicial proceedings which culminated in the Ismaïlia Judgment. Even though the Claimants deny that the Judgment is "the

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<sup>26</sup> *Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, Partial Award, 17 March 2006, ¶ 302.

<sup>27</sup> *Waste Management*, *op. cit.* ¶ 98.

<sup>28</sup> See e.g., *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Award, ¶ 7.4.11. See also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, (2008) OUP, p.142 ff.

object" of their claim (1<sup>st</sup> PHB, 124), the delay in the proceedings, the conduct of the Court and of the Second Panel all materialized with the issuance of the Judgment. The Judgment lies at the core of this set of acts. Therefore, the Tribunal is of the opinion that the relevant standards to trigger State responsibility for the first set of acts are the standards of denial of justice, including the requirement of exhaustion of local remedies as will be discussed below. Holding otherwise would allow to circumvent the standards of denial of justice. The second set of acts will be reviewed under the standards of the fair and equitable treatment described above.

192. The definition adopted by the *Loewen* tribunal pursuant to which denial of justice implies “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety”<sup>29</sup> constitutes good guidance. This is thus the standard that the Tribunal will apply to the acts in relation to the judiciary.
193. Denial of justice may occur irrespective of any trace of discrimination or maliciousness, if the judgment at stake shocks a sense of judicial propriety. A reference to the test formulated by the *Mondev* tribunal is useful in this context:

In the *ELSI* case, a Chamber of the Court described as arbitrary conduct that which displays “a wilful disregard of due process of law ... which shocks, or at least surprises, a sense of judicial propriety”. It is true that the question there was whether certain administrative conduct was “arbitrary”, contrary to the provisions of an FCN treaty. Nonetheless (and without otherwise commenting on the soundness of the decision itself) the Tribunal regards the Chamber’s criterion as useful also in the context of denial of justice, and it has been applied in that context, as the Claimant pointed out. The Tribunal would stress that the word “surprises” does not occur in isolation. The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. **In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable**, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.<sup>30</sup>

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<sup>29</sup> *Loewen, op. cit.*, ¶ 132.

<sup>30</sup> *Mondev, op. cit.*, ¶ 127. Emphasis added, footnote omitted.

194. Albeit rendered in the context of Article 1105(1) of the NAFTA and the minimum standard of customary international law, the Tribunal finds this test appropriate.

#### **4.2.2 Fair and equitable treatment and the proceedings leading to the Decision of the Ismaïlia Court**

195. The Claimants' allegations with respect to the Ismaïlia proceedings can be viewed as a procedural (a) or a substantive denial of justice (b). After examining these, the Tribunal will deal with the issue of exhaustion of remedies (c). This latter requirement applies to both substantive and procedural denial of justice, with the exception of the claim of procedural denial of justice arising from delays in the proceedings.

##### **a) Procedural denial of justice**

196. The Claimants' allegations are threefold: they relate to due process before the Ismaïlia Court (i), to the duration of the proceedings (ii), and to the conduct of the Second Panel (iii).

##### *(i) Due process*

197. According to the Claimants, the "*main illegalities*" concerning the domestic judicial proceedings were as follows: "*(i) the systematic disregard of all evidence and findings favourable to the Claimants; (ii) the joining of the First and the Second Case merely for dilatory purposes; (iii) the appointment of a new and non-independent body of experts by the Ministry of Justice, as a pretext to overrule the findings unfavorable to the State; and (iv) the passive espousal of the unreasoned and ultra vires conclusions of a panel of technical experts with no legal qualifications who overruled the fully reasoned findings of the two competent bodies, the First Panel and the Commissaires*" (Mem., ¶ 317).

198. The first and fourth points raised by the Claimants relate to the decision of the Ismaïlia Court and therefore to the notion of fraud discussed below. As it will be explained, since no fraud was established, one cannot maintain that a judgment denying a fraud constitutes a denial of justice.

199. Concerning the form of the Ismaïlia Judgment (Exh. C-158), the Tribunal notes that the Judgment is fairly short (15 pages in the English translation) and hardly qualifies as an "ideal" decision to close nearly ten years of proceedings. This said,

it is not a mere espousal of the report of the Second Panel and cannot be said to amount to a denial of justice on this ground.

200. In connection with the joinder of the First and Second Cases by the Ismaïlia Court, there is no evidence on record that such joinder pursued dilatory purposes. The Tribunal notes that even the Commissaire d'Etat on whom the Claimants rely heavily suggested joining the two cases (Exh. C-118), notwithstanding the SCA's objections (Exh. C-119). Even though the cases were filed more than two years apart, they related to the same Contract. Had the Contract been declared void for mistake or fraud as requested by the Claimants in the First Case, this would have had consequences on the Second Case. The Tribunal further notes that the joinder was decided on 24 December 1998 and that the Claimants did not move to "re-separate" the two cases until a year and a half later on 5 June 2000 (Exh. C-142). By any standard, the joinder does not "*offend a sense of judicial propriety*".

201. The Claimants also contest the appointment of the Second Panel on 29 May 2000 (Exh. C-141). The Court of Ismaïlia appointed the Second Panel upon the request of one of the parties to the proceedings, namely the SCA. Although the appointment was left to the Ministry of Justice, it does not appear to have been an arbitrary decision, nor does it show a breach of due process. The Tribunal further notes that the Claimants had opportunities to put forward their positions in writing and orally. It also appears that as an alternative position the JV filed a submission concluding that the First Panel had not completed its fifth mission in that it did not assess the damages incurred by the JV. At the same time, the JV also requested the split of the two cases. On that basis, the Court decided on 12 September 2000 to widen the Panel's mission to complete the fifth mission of the First Panel (i.e., assessing damages) (Exh. C-144). Considering these facts, the appointment of the Second Panel cannot qualify as a lack of due process or denial of justice.

(ii) *Duration of the proceedings*

202. The Claimants complain of the excessive duration of the proceedings, which lasted nearly ten years. The longer time period was spent at the stage of the First Panel. Indeed, the First Panel was appointed on 6 September 1993, the Parties filed their last submissions mid-1995, but the report was not issued before 6 February 1997, upon the insistence of the Commissaire d'Etat.



203. For the rest of the duration, the parties to the local proceedings exchanged extensive submissions until the appointment of the Second Panel. That panel issued its report in March 2002, and the hearing before the Court took place on 26 December 2002. The Court kept the case for deliberation in late December 2002 and rendered its decision on 22 May 2003. In the Tribunal's view, this string of events cannot be deemed to constitute a denial of justice.

204. This said, there is no doubt that ten years to obtain a first instance judgment is a long period of time. However, the Tribunal is mindful that the issues were complex and highly technical, that two cases were involved, that the parties were especially productive in terms of submissions and filed extensive expert reports. For these reasons, it concludes that, while the duration of the proceedings leading to the Ismaïlia Judgment is certainly unsatisfactory in terms of efficient administration of justice, it does not rise to the level of a denial of justice.

(iii) *The conduct of the Second Panel*

205. For the Claimants, the Second Panel “*exceeded its authority by investigating on the fundamental and complicated legal issue of the liability of SCA*” (SoC, p. 131). It acted *ultra vires*.

206. As a rule, in the context of a claim for denial of justice, the Tribunal does not review the scope of the jurisdiction of the national authorities or the application of the law. This may be different if the result were to show discrimination or severe impropriety, a situation that does not arise here. Hence, the Tribunal can see no element of denial of justice in this allegation.

**b) Substantive denial of justice**

(i) *Applicable test*

207. As explained above, the Claimants contend that the SCA committed a fraud which the Ismaïlia Court failed to remedy. In order to determine whether the Ismaïlia Judgment is “*improper and discreditable*” because it did not remedy the fraud, the Tribunal needs to first establish whether there was a fraud. If the Tribunal finds a fraud, it will then have to examine if the Ismaïlia Judgment was “*improper*” because it did not redress it. To analyze whether there was a fraud, the Tribunal will look to

the facts prior to the date on which the Judgment was rendered.<sup>31</sup> As already mentioned, these facts will only be analyzed through the prism of the claim for denial of justice.

(ii) *Assessment of allegations*

208. The Parties did not discuss the standards on which the alleged fraud must be measured. They have argued their case on the basis of the facts. The Tribunal understands, however, from the Egyptian rules on fraud<sup>32</sup> that intent is a necessary element and that there is no fraud when the alleged victim could have known about the relevant facts by another means<sup>33</sup>. For this reason, the Tribunal will proceed to an assessment of the facts and review whether the SCA has intentionally withheld material information leading the JV to enter into the Contract on wrong premises and whether the JV had no other means of knowing the relevant facts.

209. The Tribunal is mindful that this is a high threshold for the Claimants to meet, but it reflects the demanding nature of the concept of fraud and of a claim for denial of justice. In this case, the Claimants have alleged in passing in their Reply, that there “*was a clear and malicious [mis]application of the law*” which was “*discriminatory, being obviously determined by the desire to prevent the success of a claim by a foreign investor against the home State*” (Reply, ¶ 264). The Tribunal cannot follow

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<sup>31</sup> Or in the words of the *Mondev* tribunal: “*Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach. [...]*”, *op. cit.*, ¶ 70.

<sup>32</sup> Article 125 of the Civil Code provides (Exh. C-84):

- (1) A contract may be annulled for fraudulence, if the deceits to which one of the two contracting parties, or which his deputy resorts are so tremendous that the second party would not have concluded the contract if such tricks had not been there.
- (2) Shall be considered as fraudulence a premeditated silence as to a fact or surrounding circumstances, if it is evidenced the one who fell prey to such fraudulence would not have concluded the contract if he has been aware of the said fact or the surrounding circumstances.

<sup>33</sup> See Expert Opinion of Professor Hossam El-Ehwany who states: “16. [...] *Le dol est une faute volontaire et intentionnelle. L'intention de tromper est un élément nécessaire du dol. La simple négligence ne constitue pas un dol même lorsqu'elle provoque une erreur. L'imprévisibilité des difficultés exclut la réticence et en même temps l'intention dolosive.*

17. *Il faut de même souligner le fait que les Demanderesses sont des professionnelles ayant de l'expérience dans les travaux de dragage concernés par le contrat.*

*D'après AL-SANHOURY, rédacteur principal du code civil, la réticence au sujet d'un fait ou d'une modalité ne constitue pas un dol quand la partie, prétendant être victime du dol, aurait pu être en mesure de s'informer par un autre moyen que son cocontractant (Traité T. I, N. 181, p. 429, 3ème éd., 1981, cour d'appel d'Assiout, 12 février 1940 Al-Mouhamma 22 N. 244 p. 698, Al-Sadda : Les sources de l'obligatoire N. 169, p. 200, Le Caire, 1958, Morcos AL-WAFI dans Le Droit des Obligations T. 2, Vol I, N. 207, p. 383, 4 ème éd. 1987). AL- SANHOURY précise, de même, que celui qui est en mesure de s'informer commet une faute en négligeant de s'informer.” (Exh. R-12).*

the Claimants in this line of arguments. There is no evidence on record of any discrimination, bias or malicious application of the law based on a sectional prejudice. In this instance, it is not the role of the Tribunal to review whether the Ismaïlia Court conducted a correct contractual analysis or correctly applied Egyptian law. Whether under Egyptian law the Court could (as argued by the Respondent's expert, Prof. Hossam El-Ehwany, Exh. R-12) or on the contrary could not (as alleged by the Claimants' expert, Mr. Hosni Abdelwahed, Exh. C-178) invoke the provisions of the Contract in its Judgment is not for this Tribunal to decide. It is not the role of a tribunal constituted on the basis of a BIT to act as a court of appeal for national courts.<sup>34</sup> The task of the Tribunal is rather to determine whether the Judgment is "*clearly improper and discreditable*" in the words of the *Mondev* tribunal.

(iii) *Analysis*

210. According to the Claimants, the fraud is constituted by the fact that the SCA committed a "*willful withholding of vital information*" (Reply, ¶ 106). More precisely, the SCA allegedly (i) failed to disclose that it had engaged into pre-dredging activities on the lot, (ii) failed to provide correct information to the bidders on geology and volumes that the SCA obtained on the basis of the pre-dredging works (including the Nedeco Report), providing instead obsolete information, and (iii) failed to disclose that it had encountered rocks in pre-dredged areas.

211. The Tribunal has reviewed these allegations. Having thoroughly examined the facts, the statements and reports on record and having heard the main protagonists involved in the negotiation and performance of the Contract, the Tribunal is of the opinion that the Claimants have not satisfactorily established the alleged fraud. There are indeed elements to be held against both Parties to the Contract, as it will now be explained.

\* *The volumes to be dredged*

*The Claimants' position*

212. Based on Plan 10432 (Exh. C-15(c)), the Claimants expected to dredge approx. 19.5 million m<sup>3</sup>. They also expected, based on the drawing attached to the bid form

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<sup>34</sup> *Mondev, op. cit.*, ¶ 127.

which indicated “*existing slope*”, that the slope profiles would be regular and close to 3/1, uniform and parallel. The indication “*existing slope 3:1*” on the Eastern slope of the Canal which appears on the cross section signed by Mr. Salman dated 3 June 1992 “*strengthened the Claimants’ understanding that the volume actually to be dredged was 100% of the one indicated by SCA as set out in the bid forms*” (SoC, p. 20). The Claimants further dispute the relevance of the documents sent by the SCA on 20 April 1992. They contend that the five cross sections sent on 20 April 1992 “*were completely false and misleading*” because they pre-dated SCA’s pre-dredging works (SoC, p. 16). Jacques Albert, former area manager for Jan de Nul, contends that, in a meeting on 1 June 1992, the SCA instructed the bidders to destroy and disregard these cross sections (Reply, ¶ 180; WS J. Albert, Exh. C-179, Tr. W., pp. 85, 123-124, 129, 172). In the Claimants’ words, “*Mr. Salman instructed the Claimants to provide for their fixed costs (i.e. mobilisation and demobilisation) to be covered by a so-called “guaranteed” volume of 80%, and to spread all the time-related costs over 100% of the volume. Such an instruction implied that the cross sections attached to the April 21 fax (as well as any information obtainable from the limited and unreliable surveys of April 1992) should be disregarded and that the bidders were to consider valid only the original tender information plus the information which would be provided by SCA on June 3 (see Witness Statement by Mr. Jacques Albert, Exh. C-18)*”. (Mem., ¶ 35). For the Claimants, the SCA gave this instruction because it knew that it had already removed 5 million m<sup>3</sup> and that the “*Claimants would never have been able to recoup their time-related costs which, according to those instructions, were to be covered by the lower unit rate spread over 100% of the volume*” (SoC, p. 38).

213. The Claimants argue that none of the investigations they made prior to submitting their offer showed the actual situation. The SIB boring campaign (Exh. C-20) appeared to corroborate the 1975 Raymond campaign. In addition, due to adverse weather conditions and time constraints, the resulting data from the GeoCom Report were inaccurate and unreliable (WS Gidéon Hein, Exh. C-168 and C-171). Most importantly, the Claimants argue that the SCA failed to provide a sufficient number of reference Easting and Northing co-ordinates to properly carry out the surveys (Mem., ¶ 24). At the most, the GeoCom survey was an unsuccessful attempt at a bathymetric survey and only resulted in a seismic survey (WS G. Hein, Exh. C-168, ¶¶ 11-13). In any event, the volumes to be dredged could not be calculated on the basis of the GeoCom survey because that survey lacked the theoretical profiles of the slopes (WS G. Hein, Exh. C-171), out of which the

Tribunal understands cross sections are derived. In addition, the irregularity of the slopes could not be detected using the bathymetric chart of the GeoCom's survey, and were not expected from the profiles delivered by the SCA.

214. Ultimately, the results of the 1993 joint bathymetric survey (Exh. C-37) showed that the slope profile was irregular and that the volume to be dredged in the widening was substantially less - by 5 million m<sup>3</sup> - than expected. Accordingly, the widening was less than 45 meters and the deepening less than 4.5 meters in some parts of the Canal, resulting in a lower production rate and therefore higher cost per m<sup>3</sup> dredged. For the Claimants, only 18% of the contracted area corresponded to the SCA's representations (Mem., ¶ 57).
215. Had the SCA disclosed that the company Penta Ocean had over-dredged certain areas from km 157,5 to km 161,5 in 1977-1980, i.e., during the first phase of the works on the Canal, and that the SCA itself had pre-dredged the lot awarded to the Claimants between 1989 and 1991, the Claimants would have quoted higher unit prices per cubic meter. The drawing showing pre-dredging works (Exh. C-45) was only delivered to Pierre Tison, works manager for the JV, during a meeting in January 1993.

*The Respondent's position*

216. The Respondent contends that there was no guarantee of 100% volume. Lot (1') covered 17,600,000 m<sup>3</sup> with 80% of volume guaranteed. The Claimants actually dredged 14,564,706 m<sup>3</sup>, i.e., 82.75% of the total estimated quantities (CMem., ¶ 26).
217. Mr. Salman, the head of SCA's Engineering Department, denied having given any instruction to disregard the cross sections sent on 20 April 1992 (WS, Exh. R-4, ¶ 20). He also denied giving oral assurances that there was a 100% guaranteed volume (CMem., ¶ 43; WS Salman, Exh. R-4). The Respondent also points out that the Claimants never referred to Mr. Salman's alleged oral instructions before it first appeared in the 1994 Patzold Report filed in the course of the local proceedings (Exh. C-95).
218. Mr. Salman further testified that the SCA did not provide Exhibit C-45 (pre-dredging drawings) to the bidders at the time of the tender as it was not the SCA's practice (Tr. W., pp. 92-94) to share internal documents that were not up to date (Exh. R-4,

¶ 3). In addition, the profiles and side slopes continually changed due to the erosion and sedimentation in the canal (Exh. R-4, ¶ 18).

219. According to the Respondent, the Claimants should have been aware of the lesser volume on the basis of the documents available to them although the SCA did not expressly mention pre-dredging works. Specifically, Egypt refers to the following documents:

- Three of the cross sections sent on 20 April 1992 for kms 150, 153 and 157 showed that non-systematic pre-dredging operations had been carried out and completed on 3 March 1991 (CMem., ¶ 30 and ¶ 77; Rej., ¶ 27).
- The 1988 borehole documents submitted on 31 March 1992 (Exh. C15(d)) showed that the water level was deeper than what appeared in drawing 10431, i.e., that widening works had been performed (Rej., ¶ 34; ER Taillé, Exh. R-5, p. 55).
- The first tender form which the Claimants used in their offer of 2 May 1992 (Exh. C-21) specified "*Lot (1-1) between Km 151,500 [instead of 150,000] and Km 162,500*", meaning that the Canal had already been widened by at least 20 meters which implied a missing volume of 450,000 m<sup>3</sup> (CMem., ¶¶ 37-39).
- The GeoCom survey contained an accurate bathymetric survey, on the basis of which the SCA had drawn up 46 drawings of profiles (Exh. R-3) that showed an irregularity in the slopes and the volume of material to be dredged (WS Salman, Exh. R-4, ¶ 12).

220. According to the Respondent, the Claimants were actually aware of the lower volume and took it into account in the price quoted in their second offer for which they quoted for 80% of the volume of Lot 1.

*The Tribunal's determination on the volumes to be dredged*

221. It is obvious on the basis of the record that the SCA did not disclose the existence of pre-dredging works before the tender. It only provided Exhibit C-45 dated 13 March 1991 (which indicated that pre-dredging works had been done between km 150,200 and 157,000 in 1989 and 1991) after the Contract had been awarded in 1993. The reasons put forward by Mr. Salman for not releasing this plan, namely the changing nature of the slopes, are unconvincing. It has been established during

the hearing that sedimentation and erosion were not at issue in the Southern part of the Canal (P. Tison, Tr. W., p. 221, lines 1-2). The Nedeco Report stated that no siltation occurs south of km 127 (J. Albert, Tr. W., p. 75, line 13). The First Panel also stated that there is “neither erosion nor sedimentation” in that part of the canal (Report of the First Panel, p. 29, ¶ 5.3, Exh. C-116). In other words, the reason of the changing nature of the slopes due to erosion and sedimentation does not pass muster. The SCA did not provide all the information it had. Was it obliged to do so? The Tribunal would be inclined to think so. This said, the Tribunal must also examine whether the Claimants were nevertheless in a position to know of the pre-dredging works.

222. As a preliminary consideration, the Tribunal asked itself why the Claimants would have entered into the Contract had they known about the volume shortage, as the Respondent argues. As a result of poor business judgment, did the Claimants understand, as the Respondent claims, that only 80% was guaranteed but did intend to spread 100% of the mobilization and demobilization costs over the guaranteed volumes (R. 1<sup>st</sup> PHB, ¶ 89 and ¶ 91)? These questions remain open.
223. The Tribunal also notes that the volumes to be dredged raised concerns for all the bidders as of the first tender. As explained by Mr. Salman (Exh. R-4), the bidders expected to find less than 100% of the estimated volumes and hence presented higher prices leading the SCA to announce a second tender. The JV explained in its second offer (Exh. C-28) that the first offer assumed considerably lower volumes based on the information supplied by the SCA, including the Canal profiles (Exh. C-28). Since the SCA guaranteed that the volumes would not be less than 80% of the stated quantity, the JV explained that it had lessened its prices (Exh. C-28).
224. This said, the Tribunal finds the Parties’ respective positions as to the expected volume to be dredged unpersuasive. The SCA had planned 14.6 million m<sup>3</sup> with a tolerance of more or less 20%, thus amounting to 17.6 million m<sup>3</sup> at the upper limit. According to the Respondent, this long established internal practice allowed the SCA to pay over-dredging in a proportion of 20% without waiting for the necessary budgetary authorizations (R. 1<sup>st</sup> PHB, ¶ 72). Be this as it may, the Tribunal is ready to concur with the Claimants that the offer was so drafted because the SCA knew that the actual volume would be less than 80% of the theoretical quantities because of prior dredging. By contrast, the Claimants put forward an initial theoretical volume of 19.5 million m<sup>3</sup> (i.e., a net volume of 18,125,690 m<sup>3</sup> plus a tolerance

volume of 1,430,758 m<sup>3</sup> in case of over-dredging). This does not appear to correspond to the terms of the Contract.

225. The Tribunal must now assess whether the JV had the means of knowing that the final volume would be less than it expected prior to making its offer.
226. The Tribunal is aware that the Claimants are recognized professionals in their field and that the success of a project such as the one at stake is contingent upon various elements, amongst which preparation is crucial. The Claimants do not dispute that fact but submit that the *"extent of the bidder's duty of investigation depends on the duration of tender period as well as on the nature and exhaustiveness of the information provided by the employer"* (SoC., p. 16). The facts of this case lead the Tribunal to question whether the JV sufficiently investigated the project. It is true that the time period between the first tender and the first submission was short, and that the SCA refused a time extension. However, the Claimants had actually from March 1992 to June 1992 to prepare themselves. In addition, the characteristics of lot (1') show that it was only a variation of lot (1) which was the first lot to be tendered. The main difference resided in shorter widening (only 45 meters instead of 70) with the same deepening (- 4, 5 meters). In addition, although it is a remeasurement contract and not a lump sum contract, Article 5 of the GCC especially provided that *"each tenderer must under his full responsibility, take all necessary steps and make all required investigations to be able to estimate exactly the nature and extent of his obligations"*. Thus, the Claimants were aware of the importance of the preparation period.
227. To conduct its analysis, the Tribunal must now look at the documents that the JV had in its possession. The Parties have discussed at length the relevance of the GeoCom Report. Two issues arise in connection with such Report: (i) whether it included a bathymetric survey and (ii) what its results showed or could have showed.
228. The first question arises because when asked by the First Panel whether they had performed a bathymetric survey, the Claimants answered in the negative and explained that there was no need for such survey in this type of contract. They also stated that they only conducted a limited soil investigation campaign (Exh. C-109, Question No. 3). They added that a bathymetric survey was not necessary as the



tender documents and the additional information provided by the SCA further to the meeting of 14 April 1992 “*could be relied upon*” (Exh. C-109, Question No. 3). Further, if such a survey had been performed by Boskalis, it was “*on their own initiative and independently from the JV*” (Exh. C-116, Report of the First Panel, p. 26; Exh. C-109, Answer of the JV, Question No. 4). The JV reiterated its statement before the Commissaire d’Etat (Exh. C-117), who concluded that no bathymetric survey had been made, and again before the Second Panel (Exh. C-146). Mr. Albert testified that the decision not to disclose the GeoCom Report to the First Panel was made by the Claimants at the time (Tr. W., p. 121, lines 1-2). This led the First Panel to conclude that it was not in a position to confirm whether or not the JV had made a bathymetric survey (Exh. C-116, p. 66).

229. It is clear that the JV intended to perform a seismic and bathymetric survey as evidenced by the wording of the GeoCom Report (Exh. C-168, p. 1). It has also been established in this arbitration that investigations were carried out to that effect. However, the JV and the SIB decided to disregard the results in a meeting of 27 April 1992 (Tr. W., J. Albert, p. 81, lines 7-11 and p. 194, line 10). The reason put forward by the Claimants is that they lacked coordinates (not provided by the SCA) and that time was short. Nonetheless, cross lines were drawn up but disregarded. Having heard the experts of both Parties, the Tribunal believes that a bathymetric survey was carried out, albeit possibly in an incomplete manner. It cannot help finding it disturbing that the JV decided not to disclose to the First Panel, as well as to the Commissaire d’Etat and the Second Panel, that it had conducted a bathymetric survey but had later disregarded it.

230. Turning now to the inferences that the JV could have drawn from the GeoCom Report had it been used, the situation is at best unclear. Mr. Bray, expert for the Claimants, acknowledged that a comparison of the cross lines with the theoretical profiles would have likely “*alerted [the JV] to the facts that in some locations there was a major discrepancy*” (Exh. C-182, ¶ 8.5). Bearing this in mind, it appears difficult to find that the GeoCom Report was useless, as alleged by the Claimants. For the Tribunal, there is no doubt that the JV acted lightly in disregarding the results of the GeoCom Report and that the Claimants have not established that based on its own investigations the JV did not or could not have any knowledge of the prior dredging.

231. The next question the Tribunal needs to address is whether the information in the tender documents provided by the SCA was deficient. Did these documents, and more particularly the cross sections provided by the SCA on 20 April 1992, as well as the drawings attached to the second and third tender show any prior pre-dredging? First, the Tribunal notes that it has not been established that Mr. Salman instructed the bidders, and more particularly the JV, to disregard the cross sections sent on 20 April 1992.
232. In their last post-hearing brief, the Claimants argued that the other bidders did not infer any results from the GeoCom Report either and that they all disregarded the April 1992 cross sections. That argument remains unsupported. The prices quoted by the bidders may all have decreased but it has not been established that it was because the bidders all had the same understanding of the tender. Indeed, such decrease in price could have been related to commercial issues such as the joint award of two lots. Any other conclusion would be mere speculation on the part of the Tribunal.
233. During the hearing, the discussion focused on the indication “existing slope” made on the very basic sketches attached to the second and third tenders (Exh. C-27 and C-32), and on whether this indication referred to the actual existing slope as contended by the JV or to the theoretical existing slopes as put forward by Mr. Salman (Tr. W., p. 140). Mr. Albert, witness for the Claimants, testified that the JV only had to start dredging an additional 45 meters from the existing slope (Tr. W., p. 134, line 23).
234. The Tribunal is not convinced that, at the stage of the second tender, Mr. Salman instructed the JV to take only into account the existing line, nor that the mention “existing line 3:1” in the third tender on Exhibit C-32 was an instruction to disregard the theoretical line. Indeed, the text of the third tender refers expressly to a widening of 45 meters “*measured between theoretical slopes*” (Exh. C-32). This said, the Tribunal understands that the concept of theoretical slopes of the Canal is somehow virtual since the SCA did not possess the actual cross sections of the Canal, as admitted by the Respondent<sup>35</sup>. Nevertheless, Mr. Bray, expert for the Claimants, found a volume of 17.713 million m<sup>3</sup> on the basis of the drawing of

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<sup>35</sup> « La SCA ne disposant pas de coupes du Canal tous les 25 mètres, ni même tous les 250 mètres, ne pouvait en effet faire autrement que de présenter un **schéma théorique global pour toute la longueur du Lot 1'**, le profil réel du Canal étant quant à lui très variable comme le montraient les coupes du 20 avril 1992 » (R. 1<sup>st</sup> PHB, ¶ 59, emphasis in the original).

22 June 1992 (Exh. C-32; Exh. C-182, ¶¶ 6.4-6.5), meaning that the drawing could be used. Be this as it may, the Tribunal believes that while the SCA was not sufficiently transparent, the JV could have obtained further clarification prior to entering into the Contract.

235. Coming now to certain drawings and other documents provided to the JV, the Tribunal is ready to concur with the Respondent that Exh. C-14(d) and 15 (c) (drilling holes made in 1986-1987 and plan 10431) could have shown that prior dredging had occurred since it showed a discrepancy between the theoretical and the actual depths (R. 1<sup>st</sup> PHB, ¶ 69-70). This said, the Tribunal understands that some other drawings (Plans 10431 and 10402 – Exh. 15 (a) and (b)) even if dated February 1992 were made on the basis of the 1975 Raymond campaign (Tr. W., p. 74). In these circumstances, they could not reflect the actual underwater conditions at the time of the tender.

236. The Tribunal does not agree with the Respondent's assertion that the JV should have known the actual volume because lot 1-1 started at km 151,500, instead of km 150,000. The contractual documents (e.g., Art. 2 of the Specifications, Art. 13 of the Contract (provisional reception), Annex 1 attached to the Contract (list of quantities and prices)) all refer to km 150. There are thus no elements on record showing that the JV should have known the actual volume from this limited indication.

237. Overall and notwithstanding the silence of the SCA during the tender process regarding pre-dredging works, the Tribunal concludes that it has not been satisfactorily established that the SCA led “*the bidders to believe that it existed an additional 5 million m<sup>3</sup>*” as argued by the Claimants (1<sup>st</sup> PHB, ¶ 10), nor that the JV had no means to actually know that the volume would be less than expected by them.

\* *Proportion of rock*

*The Claimants' position*

238. The Claimants contend that it appeared from Exh. C-14(b) (Plan No 10433) and from the SIB's results of April 1992, that the quantity of hard material was 3% of the entire volume to be dredged (Mem., ¶ 19). Dredging NV had a positive previous experience on lot K carried out in 1977-1980 and considered the information given

by the SCA to be true (Reply, ¶ 14). Mr. Hein also mentioned that the GeoCom seismic survey could not reveal a significant presence of rocks because the survey was not reliable failing to have lateral positioning. Dr. Patzold, expert for the Claimants, confirmed that the survey was useless for any production and unit price estimates (Exh. C-182, p. 21).

239. When the Claimants began dredging, they encountered patches of very hard sandstone in unforeseen areas. From October 1992 to December 1992, the Claimants wrote to the SCA (Exh. C-39, C-40), which answered that first it had submitted all the available information (Exh. C-40), that such information were only indications, and second that the contractor had to carry out all the necessary borings under Article 5 of the Specifications in order to evaluate the situation. (Exh. C-43/C-44).
240. According to the Claimants, they encountered hard soils resulting in a reduction of productivity (the dredging process being slower) and damage to equipment. The Claimants then deemed it necessary to carry out a borehole drilling campaign and obtained the oral consent of the SCA on 19 January 1993 (SoC, p. 41).
241. In February/March 1993, the Claimants instructed MISR Raymond Foundation to carry out their own borehole drilling campaign. Raymond submitted a report in March 1993 (Exh. C-61 and C-62) allegedly confirming the presence of large volume of rocks instead of the expected soft material. An additional campaign was carried out in June/July 1993 to locate and identify the quantities of rock. The Claimants contracted Foundation Engineering of Dubai (Costain) which submitted a report in September 1993 (Exh. C-75). The University of Ghent was also instructed to carry out tests on soil samples found in the above mentioned surveys to ascertain the characteristics of the soil (Exh. C-76). It allegedly emerged from the campaigns that hard material (rock and hard strata) amounted to 43% of the entire volume to be dredged. Results of the surveys were sent to the SCA on 4 April 1993 (Exh. C-63).
242. The Claimants argue that the SCA was aware that at least 40% of the soil was composed of hard materials, but provided the bidders with misleading information indicating only 3% of sandstone and a minor portion of cemented sand (Patzold, C-182, p. 19). For the Claimants, the SCA knew the soil condition because of the Nedeco Report (disclosed by the SCA during the local court proceedings in

January 1994 upon the First Panel's request, Exh. C-97), which showed that there was at least 29.5% of hard to dredge materials, namely cemented sand (16.5%) and rock (12.5%) (1<sup>st</sup> PHB, ¶ 74; Exh. C-196 – Dr. Patzold's documentation at the hearing). However, Nedeco itself was misinformed by the SCA as to the exact degree of cementation of the sand (Reply, ¶ 157). Indeed, Dr. Patzold's calculation gave a proportion of 53,4% of rock based on the actual 1993 boreholes. The SCA was also aware of the rock since it had encountered hard strata in its pre-dredging work but moved on each time to seek soft soil (SoC, p. 3).

*The Respondent's position*

243. On the expected nature of the soil, Egypt puts forward the following contentions:

- No tender documents, including Plan 10433, ever referred to 3% of hard rock. There was no guarantee in this respect on the part of the SCA, nor was it mentioned in the Claimants' offers. The figure of 3% came up for the first time on 11 May 1993 when the JV submitted documents in support of its request for additional costs (Exh. C-72) (CMem., ¶¶ 97-103).
- The information provided in the tender documents (Exh. C-14) was not incorrect, even though the SCA could not guarantee that it was fully accurate. As usual in dredging contracts (Exh. R-10), the Respondent's liability in this respect was waived in Article 5 of the CCG (Exh. C-6) (CMem., ¶¶ 104-110).
- It was not reasonable to forecast a 3% rate:
  - The GeoCom seismic studies showed soil strata ("sandstone") that were hard to be dredged (Exh. R-1, ¶ 2).
  - Article 9 of the Specifications required cutter section dredgers of not less than 200 HP on the cutter, demonstrating that powerful cutters were needed because of the nature of the soil (ER Taillé, Exh. R-5, p. 8).
  - Article 12 of the GCC specifically provided that the existence of rocky strata does not entitle the contractor to an increase in the price or an extension of time. It is common ground in the industry that unforeseen conditions are borne by the contractor.

- In addition, Dredging NV knew the nature of the soil since it had dredged part of the Canal in 1977-1980 (Exh. C-190, dredging report of lot K). At that time, it already encountered 25% of cemented sand (CMem., ¶ 146).
- The Respondent further challenges the Claimants' alleged percentage on the following grounds:
  - The SCA made some calculation during the First Panel's expertise and found 41.35% of hard rock and hard material. However, it only found 8.78% of hard rock per se (class 4 C/4D) and for the rest cemented clay and sand (class 4A/4B) (Exh. C-99).
  - Before the First Panel, Dr. Patzold only found 2% of soil class 4C/D (Exh. C-108, annex 4).
  - The Claimants have submitted inconsistent figures: 45.67% of hard rock before the First Panel and now 43%, both figures being unverifiable (CMem., ¶¶ 149-153).

244. On SCA's disclosure of documents, the Respondent makes the following assertions:

- The SCA had no obligation to provide the Nedeco Report or the dredging pre-plan (Exh. C-45) since the bidders had the possibility – and the obligation – of conducting the required bathymetric surveys out themselves (CMem., ¶ 39).
- The Nedeco Report was a feasibility study. The SCA chose not to give this data to the bidders so as not to “*restrict their freedom to carry out their own studies in line with their technical capabilities*” (Answers to the First Panel, Exh. C-110).
- The Nedeco Report included cost information that was lower than the Contract prices. Even if the Claimants would have had the Nedeco Report, they would have in any event quoted a similar price. The Claimants' expert, Dr. Patzold, confirmed on 10 November 1994 that the Claimants reached results that were similar to that of the Nedeco Report (CMem., ¶¶ 16-18).

- More importantly, the Claimants had been provided with the same underlying information as contained in the Nedeco Report (CMem., ¶¶ 112-119), a fact that the Claimants deny (Reply, ¶ 154; Mem, ¶ 79).
- The SCA did not know about the nature of the soil. It did not reach that area when it carried out pre-dredging works. Even when it did occasionally, the pre-dredging encountered silty clay, not hard rock, and not in large areas (CMem., ¶¶ 121-128).

*The Tribunal's determination on the proportion of rock*

245. It is true that the JV requested a month extension to carry out “a supplementary soil investigation” (Exh. C-16) that was refused by the SCA. It is also clear that prior dredging led to an increase in the percentage of rock as acknowledged by the First Panel (Exh. C-116, ¶ 3.2) and by Messrs. Brossard and Taillé, experts for the Respondent (Exh R-5, p. 45). This said, the question here is whether the SCA knew about the rock proportion and whether the JV could have known.
246. The Tribunal is aware that the Nedeco Report had not been submitted to the bidders and that, even in the words of the Respondent's expert, Mr. Taillé, *“it was of such a nature that it should have been communicated to the various tenderers”* (Tr. W., p. 207, lines 14-17). This said, it has not been established that Nedeco received more or other information than the JV when it examined the dredging costs. Annex G, ¶ 2.4.1 (borelogs) of the Nedeco Report listed the information received by Nedeco (1975 Raymond borelogs and the 1986/1987 SCA borelogs) which appear to be materially the same as the one received by the JV.
247. The Claimants' arguments based on the retention of the Nedeco Report by the SCA have not persuaded the Tribunal. First, the Claimants' expert Dr. Patzold himself considered that the JV reached similar results as the Nedeco Report. Indeed, according to Dr. Patzold, Nedeco and the JV reached similar results in terms of rock proportion on the basis of the 1975 Raymond campaign by “a remarkable coincidence” (Tr. W., pp. 23, 19-20, 30, 40, 55) (such results related to an alleged 2% of core volume for Nedeco and 3% for the JV). They thus also reached similar weekly costs and unit rates for large cutters. The coincidence was termed remarkable because the JV reached such results without having the Nedeco Report (Tr. W., p. 60, line 23). If the JV had reached similar results as those set in the Nedeco Report, how could it have suffered from not having the

report? The argument according to which even Nedeco was not given the correct figures appears farfetched to say the least.

248. The Tribunal needs not enter into technical discussions as to what constitutes rock and what was the actual proportion finally present. Suffice it to note that the experts could not agree, and that no consistent figures have been adduced since 1993 (not even as to the percentage stated in the Nedeco Report). Irrespective of the final rock proportion, it is clear, however, that such a high proportion of rock was unforeseen. It is clear from the documents on record that the Southern part of the Canal was rockier than the rest. The Claimants themselves offered to use the biggest of the very large cutters in the world, the Marco Polo and the Amazone. Dr. Patzold on the basis of the 1992 in-survey, made by the JV and the SCA before the 1993 thorough boreholes, found at first 3.7% of rock (Exh. C-181). That shows that the final proportion of rock was unforeseen. Equally, it has not been proven that the SCA knew that a high proportion of rock would be found. Indeed, it has not been established that the SCA reached the rock layer when it performed previous dredging works from km 157.300 to 159,000 (R. 2<sup>nd</sup> PHB, ¶ 34; Exh. C-116, p. 38), nor that it stopped dredging in that section because it knew that rock existed. It has not been argued nor established that the SCA had in its possession records of other boreholes or other documents that would have shown the actual proportion of rock (except for the Nedeco Report, which was discussed above).

249. Conversely, it has not been established that the JV's expected low rate was reasonable, nor that on the basis of the SIB results the Claimants were not in a position to ascertain a higher proportion of rock (as argued by Messrs. Brossard and Taillé, Exh. R-10, p. 12; Exh R-5, p. 29).

250. The Tribunal realizes that 75% of the Claimants' monetary claim relates to unexpected soil conditions (C. 1<sup>st</sup> PHB, ¶ 112). However, it being satisfied that the SCA had no prior knowledge of the proportion of rock and that the contractual documents did not contain any warranty as to the rock proportion, the Tribunal concludes that the alleged fraud has not been established.

\* *Imbalance between deepening and widening operations*

251. When convoys were to pass in the Canal, the Claimants were supposed to be able to stop deepening (which allegedly represented 36% of the works) and engage in widening operations (allegedly representing 64% of the works - 50% of which was



allegedly missing). Because of the shortfall in the volumes from the widening and SCA's poor management of the traffic in the Canal, the Claimants allege that they were unable to proceed as planned and thus incurred idle time and negative productivity.

252. For the Respondent, the ratio 36/64 relied upon by the Claimants was not mentioned during the tender, and the SCA never gave a guarantee of width of widening of 36%, nor of a width of 45 meters (CMem., ¶ 87). Further, the Respondent alleges that the impact of the ratio on the costs incurred has not been established.
253. According to the Tribunal, the issue of the deepening-widening ratio is directly linked to the regularity of the slopes and even more to the question of time needed to perform the dredging, which also arose in the preceding discussion. In addition, the Tribunal notes that the SCA made no representation in that respect and would regard the discussion about the ratio to be part of the commercial assessments made by the JV.

\* *Conclusion*

254. It follows that the evidence before the Tribunal does not establish that the SCA committed a fraud. Hence, there can be no issue of substantive denial of justice based on the ground that the Ismaïlia Court failed to remedy a fraud that did not exist.

***c) Exhaustion of local remedies***

255. The analysis of the requirement of exhaustion of local remedies supports the foregoing conclusions that the local judicial proceedings did not give rise to a denial of justice. For the avoidance of doubt, the Tribunal notes before pursuing that the requirement at issue here relates to the merits of the denial of justice claim<sup>36</sup>. It must be distinguished from the requirement addressed in Article 26 of the ICSID Convention which deals with the admissibility of the claims brought before an ICSID Tribunal.

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<sup>36</sup> See e.g. *Saipem v. Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 Mars 2007, ¶ 151. See also Christopher Greenwood, "State Responsibility for the Decisions of National Courts" in *Issues of State Responsibility before International Judicial Institutions*, edited by M. Fitzmaurice and D. Sarooshi, The Clifford Chance Lectures, Vol. 7, (2004) Hart Publishing, pp. 55-73.

256. The Tribunal also notes at this juncture that the requirements of exhaustion of local remedies would not have been a bar to a claim of denial of justice on the basis of excessive delays in the judicial proceedings had such delays been deemed a treaty breach. Indeed, it would make no sense to insist on the exhaustion of remedies that are unavailable precisely because the issuance of an appealable decision is delayed. Such insistence might constitute a denial of justice in and of itself.
257. The Parties have conflicting views with respect to the issue of exhaustion of remedies. In substance, for the Claimants it is not a necessary requirement, while the Respondent assesses the contrary.
258. The Tribunal considers that the respondent State must be put in a position to redress the wrongdoings of its judiciary.<sup>37</sup> In other words, it cannot be held liable unless "*the system as a whole has been tested and the initial delict remained uncorrected*".<sup>38</sup> An exception to this rule may be made when there is no effective remedy or "*no reasonable prospect of success*",<sup>39</sup> which was not argued by the Claimants.
259. The Tribunal cannot concur with the Claimants' expert that an unjust judgment of a lower court may *per se* constitute unfair and inequitable treatment and, therefore, denial of justice without any prior conditions being met. Equally, the fact that an appeal is pending is not irrelevant.
260. In this case, the Claimants have lodged an appeal against the Judgment of the Ismaïlia Court on 20 July 2003 (Exh. C-8). According to the Claimants' legal expert, Prof. Hosni Abdelwahed, the SCA has also lodged an appeal (Exh. C-178, ¶ 40). Be this as it may, the Judgment is in any event under appeal. Thus, the Claimants do not complain of the failure of the Egyptian legal system as such, but merely of the conduct of the Ismaïlia Court and its appointed experts. This is not sufficient to

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<sup>37</sup> Or in the words of the *Loewen* tribunal: "*The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision. The requirement has application to breaches of [NAFTA] Articles 1102 and 1110 as well as Article 1105.*" (¶ 156).

<sup>38</sup> Jan Paulsson, *Denial of Justice in International Law*, (2005) Cambridge, p. 125.

<sup>39</sup> *Loc. cit.*, p. 130. Or in the words of Prof. Greenwood, "*Secondly, the decision of a national court, however badly flawed, will not amount to a denial of justice engaging the international responsibility of the State unless the system of appeals and other challenges which exists in that State either does not correct the deficiencies of the lower court's decision or is such that it does not afford a prospect of correcting those deficiencies which is reasonably available to the alien who has suffered from that decision.*", *op. cit.*, p. 68.

justify a claim for denial of justice, let it be through the fair and equitable claim, at least when there is no claim that the appellate proceedings are in any manner dysfunctional.

261. Faced with this situation, the Tribunal has asked itself whether, in the exercise of its residual procedural powers under Article 44 of the ICSID Convention, there would be ground to stay the arbitration until the appeal is finally determined and then rule on the claim taking into account the outcome of the appeal. It has concluded in the negative, because the Parties have not requested a stay and because a stay would run counter the interests of justice and the interests of the Parties. Indeed, the Request for Arbitration was filed late 2003, the Parties have now fully argued their case before this Tribunal and the dispute is ready to be decided. Moreover, the Tribunal has no information about the status and the timing of the appeal. Under these circumstances, it appears in the best interest of the Parties and in conformity with good administration of justice that clarity be created at this stage.

#### **4.2.3 Fair and equitable treatment in relation to the Prime Minister and the Committee for Settling the Complaints of the Investors**

##### **a) The Prime Minister's conduct**

262. The Claimants question the conduct of the Prime Minister in his role of authority responsible for the acts of the SCA. According to the Claimants, the Prime Minister was informed of the situation and failed to find a solution or to address the Claimants' claims (SoC, p. 126). For the Claimants,

As recognized by the arbitral tribunal in *CME*, [t]his non-response and inaction by the [organ of the host State] aggravated the deterioration of the [investor's] legal basis for its investment in the [host State] by reiterating and further supporting [the interference with the investment]. (SoC, p. 128)

263. The facts and the evidence on record provide no ground to conclude that there was a violation of the duty to provide fair and equitable treatment. In particular, it was not established that the Claimants had any expectations with regard to the actions of the Prime Minister, nor that any representations were made to that effect.

**b)      *The conduct of the Committee for Settling the Complaints of the Investors***

264. According to the Claimants, the Committee failed to render a decision (SoC, p. 137), while it has an obligation to do so under its constituting (1996) decree (Exh. C-127). As a result, the Claimants' legitimate expectations were allegedly frustrated.

265. The Tribunal has found nothing in the record that seems to imply that the Committee had an obligation to issue a decision. Neither did it find that the investors were diligent in pursuing this remedy. They left the proceedings inactive without moving to activate them, for instance by complaining about the inaction and requesting that a decision be issued. In addition, the legitimate expectations that are protected are the ones at the time of the making of the investment and the Committee was only set up in 1996. For this reason, the Tribunal finds no breach of the fair and equitable standard in relation with the Committee for Settling the Complaints of the Investors.

**5.      ALLEGED VIOLATION OF THE CONTINUOUS PROTECTION AND SECURITY STANDARDS**

266. According to the Claimants, the failure of a State to prevent damages and restore a previous situation or to punish the author of the injury is a breach of the full protection and security standard in the terms of the *Parkerings v. Lithuania* award (Tr. H, p. 85, English version). The Prime Minister "*was bound*" by this obligation to "*induce SCA to change its attitude and to provide the compensation justifiably requested by the Claimants*" (SoC, p. 126).

267. Article I.2 of the 1977 BIT provides:

Such investments, goods, rights and interests shall also enjoy continuous protection and security, excluding all unjustified or discriminatory measures which would "de jure" or de facto" hinder their management, maintenance, utilization, enjoyment or liquidation.

268. Article 3.2 of the 2002 BIT also provides for continuous protection and security in the following terms:

Such investment shall also enjoy continuous protection and security, excluding any unjustified or discriminatory measure which could hinder their management, maintenance, utilization, enjoyment or liquidation.

269. The notion of continuous protection and security is to be distinguished here from the fair and equitable standard since they are placed in two different provisions of the BIT, even if the two guarantees can overlap. As put forward by the Claimants, this concept relates to the exercise of due diligence by the State<sup>40</sup>.

270. As seen above and contrary to the Claimants' allegation, the latter have not established that there was an actual breach to be remedied. Indeed, the findings of the Tribunal could lead to question the merits of the Claimants' contractual case. They have not established either that there has been any discriminatory measure, or that the management and enjoyment of the investment was consequently hindered.

271. On that basis and irrespective of the precise scope of the standard, the Tribunal finds no breach of the Treaty.

## **6. ALLEGED VIOLATION OF THE DUTY TO PROMOTE INVESTMENTS**

272. The Claimants invoked a breach of the duty to promote investments with regards to the Prime Minister (SoC, p. 126), and because no constructive attempt was made by any organ of the State to find a solution and to address the Claimants' predicament (Mem., ¶ 309).

273. The duty to promote investment is embodied in Article II.1 of the 1977 BIT in the following terms:

Each Contracting Party shall admit to its territory investments by national or legal persons of the other Contracting Party in accordance with its legislation and shall encourage such investments.

And the BIT 2002 provides as follows:

Each Contracting Party shall promote investment on its territory by investors of the other Contracting Party and shall accept and encourage all investment in accordance with its legislation.

274. The Tribunal has pondered whether the intention of the Contracting Parties was to create a positive duty as alleged by the Claimants (Mem., ¶ 312). This issue can be left open. Indeed, even if such a concept entailed a positive duty on the part of the

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<sup>40</sup> See Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration*, (2007) OUP, ¶ 7.142.

State, it has not been established by the Claimants that the Respondent breached this article in any manner, not even by an omission to act.

275. The Tribunal cannot concur with the Claimants that the fact that the JV had to initiate local proceedings against the SCA before local courts and bring its claim before the Committee for Settling the Complaints of the Investors constitutes a failure of the Respondent to promote investment within its territory (Mem., ¶ 309). A BIT is not an insurance that an investor's claim will be satisfied, irrespective of the merits of the claim.

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276. For all the above reasons, the Tribunal dismisses the Claimants' case.

## **V. COSTS**

### **1. THE PARTIES' POSITIONS**

277. Each party asks that its opponent be ordered to bear the costs and expenses of the arbitration and to pay legal costs (supra, ¶¶ 115 and 119). The Parties presented their statements of costs on 11 March 2008, in the total amounts of € 2 342 305.40 and USD 352 000.00 for the Claimants and of EGP 253 089.05, £ 8 500.00, € 874 803.65 and USD 373 182.50 for the Respondent.

278. The Respondent also requested the Tribunal to order the Claimants to pay USD 5 million on the ground of "*procédure abusive*".

### **2. THE TRIBUNAL'S DETERMINATION**

279. The Claimants succeeded at the stage of jurisdiction and the Respondent prevailed on the merits. The dispute raised serious and difficult issues, both factual and legal. Both Parties cooperated in a very professional manner in the proceedings.

280. Taking these specific aspects into consideration and weighting all the circumstances, the Tribunal in the exercise of its discretion in matters of allocation of costs, finds it fair that the Parties bear the costs of the arbitration equally and that each party bears its own legal and other costs.

281. The Tribunal further dismisses the Respondent's claim for compensation for abusive proceedings as no abuse has been established and that no arguments were satisfactorily put forward to justify such a claim, not to speak of its amount.

## VI. DECISION

282. For the reasons set forth above, the Tribunal makes the following decision:

- The claims are dismissed on the merits;
- The Parties shall bear the costs of the arbitration in equal shares;
- Each party shall bear its own costs and legal fees;
- All other claims are dismissed.

[Signed]

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Prof. Pierre Mayer  
Arbitrator  
Date: 17 October 2008

[Signed]

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Prof. Brigitte Stern  
Arbitrator  
Date: 20 October 2008

[Signed]

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Prof. Gabrielle Kaufmann-Kohler  
President  
Date: 24 October 2008