

**INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
WASHINGTON, D.C.**

IN THE PROCEEDINGS BETWEEN

**HELNAN INTERNATIONAL HOTELS A/S
CLAIMANT**

AND

**THE ARAB REPUBLIC OF EGYPT
RESPONDENT**

ICSID CASE No. 05/19

AWARD

MEMBERS OF THE TRIBUNAL

Mr Yves Derains, Chairman of the Tribunal
Prof. Rudolf Dolzer, Co-arbitrator
Mr Michael Lee, Co-arbitrator

SECRETARY OF THE TRIBUNAL

Natalí Sequeira

DATE OF DISPATCH TO THE PARTIES: 3 July 2008

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I. The Parties

THE CLAIMANT

1. HELNAN INTERNATIONAL HOTELS A/S (hereinafter “HELNAN” or the “Claimant”) is a hotel management and development company incorporated and registered in the Kingdom of Denmark, with its offices at Vesterbro 77, DK 9000 Aalborg, Denmark. Claimant is represented by Mr Michael P. Lennon, Jr, Ms Ania Farren and Mr Devashish Krishan of the law firm Baker Botts (UK) LLP, 41 Lothbury, London, EC2R 7HF and Mr Peter Griffin, formerly Baker Botts (UK) LLP, now Conyngham Advisors, 31 Minister Road, London, NW2 3SH.

THE RESPONDENT

2. The ARAB REPUBLIC OF EGYPT (hereinafter “EGYPT” or “Respondent”) is represented by its legal representative, Counselor Milad Sidhom, President States Lawsuits Authority, Mogamaa El Tahrir, Tahrir Square, Cairo, Egypt; and its counsel Dr Ahmed El Kosheri, of the law firm Kosheri, Rashed & Riad, 16A Maamal El Sokkar Street, Garden City 11451, Cairo, Egypt; Prof. Jan Paulsson, of the law firm Freshfields Bruckhaus Deringer, 2 rue Paul Cézanne, 75008 Paris, France; Dr Karim Hafez, of the law firm Hafez, 5 Ibrhaim Naguib Street, Garden City, Cairo 11451 Egypt; Dr Mohamed Abdel Raouf, of the Abdel Raouf Law Firm, 17, Mohamed Mahmoud Street, Bab El-Louk, Cairo 11461, Egypt.

II. Factual Background

3. HELNAN (formerly Scandinavian Management Co. A/S) and the Egyptian Organization for Tourism and Hotels (hereinafter “EGOTH”, formerly Egyptian Hotels Company) entered into a Management Contract (hereinafter the “Contract”) on 8 September 1986 by which HELNAN would manage the Shepheard Hotel (hereinafter the “Shepheard” or the “Hotel”) located in Cairo, Egypt, which is owned by EGOTH. The Contract had an expected duration of 26 years, with the possibility of extensions. On 15 October 2002, an amendment (hereinafter the “Amendment”) was concluded between the Parties in regard to the Contract, by which EGOTH was permitted to sell the Shepheard, *inter alia*; in case of a sale, the HELNAN’s management of the Shepheard could either continue or, HELNAN would give up its rights and be adequately compensated.
4. On 24 June 1999 a Bilateral Investment Treaty (hereinafter “the Treaty”) was concluded between the Government of the Arab Republic of Egypt and the Kingdom of Denmark for the promotion and reciprocal protection of investments.
5. On 7 September 2003, following several inspections by the Ministry of Tourism, the Shepheard was downgraded (hereinafter the “Downgrade”) from a five-star hotel status to a four-star status by the Ministry of Tourism.
6. Arbitration proceedings were commenced by EGOTH in 2003, after the Downgrade (hereinafter the “Cairo Arbitration”), in accordance with the arbitration agreement found in the Contract, demanding the termination of the Contract due to the Downgrade. An award in *amicable composition* was rendered on 30 December 2004 in Cairo (hereinafter the “Cairo

Award”). The Tribunal considered that the Contract had become “impossible to execute” and therefore declared the Contract terminated. The claims filed by both Parties were dismissed. HELNAN was awarded 12.5 Million EGP under the concept of settlement of debts in performing its management obligations. This amount was paid by EGOTH to HELNAN. HELNAN’s further request to set aside this Award was dismissed by the Cairo Court of Appeal on 7 June 2005 and confirmed by the *Cour de Cassation* on 12 July 2005. Finally, the Court of Appeal granted *exequatur* on 19 July 2005. The *juge des référés* subsequently dismissed two objections to enforcement brought by HELNAN.

7. The amount of 12.5 Million EGP awarded to HELNAN was paid by EGOTH.
8. On 23 March 2006, the Cairo Award was enforced and, HELNAN was evicted from the Shepheard and EGOTH now took over the Hotel’s management.

III. Procedural History

- A) *Procedure Leading up to the Decision on the Objection to Jurisdiction*
9. On 8 March 2005, HELNAN filed a request for arbitration against EGYPT before the Secretary-General of the International Centre for Settlement of Investment Disputes (hereinafter the “Centre” or “ICSID”), pursuant to Rule 4 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “Institution Rules”) of the Centre. Within this Claim, HELNAN filed a request for Provisional Measures.
 10. After having reached an agreement on the manner the Arbitral Tribunal would be constituted, Claimant appointed Mr Michael Lee as co-arbitrator

on 9 November 2005 and Respondent appointed Prof. Rudolf Dolzer on 22 December 2005. Both Parties agreed to permit the co-arbitrators the appointment of the Chairman of the Tribunal. On 1 February 2006, Mr Yves Derains was appointed Chairman of the Arbitral Tribunal by common agreement between the co-arbitrators.

11. On 17 February 2006, the Centre transmitted, on behalf of the Tribunal, a draft Agenda being prepared for the Tribunal's first session.

By letter dated 22 February 2006, HELNAN reiterated its request for Provisional Measures. It contended that its rights needed to be preserved to the extent they were put in danger by the threat of its eviction from the Shepheard Hotel by EGYPT. EGYPT responded by letter dated 6 March 2006, indicating that it would file an objection to the Tribunal's jurisdiction at the First Session. Further, after the taking over of the Shepheard Hotel, HELNAN filed an amended Request for Provisional Measures on 4 April 2006, requesting, *inter alia*, to be reinstated as manager and operator of the Shepheard Hotel. After hearing the two parties' positions at the session of 14 April 2006, the Arbitral Tribunal decided on 17 May 2006 that (i) on the basis of Article 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention") and Article 39 (1) of the Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), it had the power to recommend provisional measures even though the parties had not yet expressed their views as to its jurisdiction, but (ii) dismissed HELNAN's request for Provisional Measures.

12. On 31 May 2006, Respondent filed its Memorial on its Objections to Jurisdiction by which it presented its objections to the Arbitral Tribunal's jurisdiction in regard to the dispute.

13. On 14 July 2006, Claimant filed its Counter-Memorial on Jurisdiction.
14. On 17 August 2006, a hearing on the jurisdictional issues took place in the World Bank offices in Paris, France.
15. On 17 October 2006, the Arbitral Tribunal rendered its Decision on the Objection to Jurisdiction which stated:

“THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS:

1. *The Arbitral Tribunal has jurisdiction over the dispute submitted to it in this arbitration.*
 2. *The Arbitral Tribunal will, accordingly, make the necessary order for the continuation of the proceedings on the merits.*
 3. *The Arbitral Tribunal will take a decision regarding the costs in connection to this part of the proceedings in its Award.”*
16. The procedure predating the Tribunal’s Decision on the Objection to Jurisdiction (hereinafter the “Decision”) rendered on 17 October 2006, is set out in detail in the Decision. A copy of the Decision is attached to this Award and is to be considered an integral part of it.

B) Procedure Leading up to the Award

17. Having decided on the objections to jurisdiction, the Tribunal proceeded to establish the calendar for the remainder of the proceedings.
18. On 24 October 2006, the Centre informed the Parties of the schedule that has been set up after the conference call that took place on 19 October 2006 between the Tribunal and the Parties. The schedule agreed upon stated as follows:

“The Claimant shall file a Memorial on the Merits by January 31, 2007, accompanied with all documentary evidence, witness declarations and expert reports and any other evidence it may wish to rely upon.

The Respondent shall file a Counter-Memorial on the Merits by April 30, 2007, accompanied with all documentary evidence, witness declarations and expert reports and any other evidence it may wish to rely upon.

The Claimant shall file its Reply by June 29, 2007, the evidence provided with the Reply must be restricted to points or evidence submitted along with the Respondent's Counter-Memorial.

The Respondent shall file its Rejoinder by September 17, 2007, the evidence provided with the Rejoinder must be restricted to points or evidence submitted along with the Claimant's Reply.

The Hearing on the Merits will be held from October 8, 2007 until October 13, 2007 (inclusive). The parties and the Arbitral Tribunal will also keep as a fall back option October 15, 16 and 17, 2007 available.

Further, it has been agreed by the (sic) Arbitral Tribunal and the parties that issues relating to the disclosure of documents pertaining to the Wena case will be settled between the parties prior to the Claimant's submission of its Memorial on the Merits. However, if any difficulty arises, the parties should address the Arbitral Tribunal accordingly.”

19. On 30 November 2006, the Centre transmitted a letter submitted by Claimant, which it had received from Wena Hotels Ltd., by which Wena Hotels Ltd. gave its consent to ICSID for the disclosure of documents as had been ordered in Procedural Order No. 1 dated 23 June 2006 and referred to on page 7 of the Decision on the Objection to Jurisdiction.
20. By email sent on 8 December 2006, the Centre requested Respondent's confirmation regarding the production of the Wena documents.
21. By email sent on 15 December 2006, Respondent stated that in light of the documents having been requested for the matter of jurisdiction and because by that time the Decision on jurisdiction had already been rendered, the document production request was no longer relevant.

22. On 19 December 2006, Claimant addressed the Centre on the matter of the production of the Wena documents. Claimant stated that the matter had already been settled by the Tribunal, which had been contingent upon Wena Hotels Ltd. agreement to the production, and that therefore it was entitled to receive the documents.
23. On 27 December 2006, Claimant requested the Tribunal to order the production of the Wena documents.
24. On 28 December 2006, Respondent responded in regard to the production of the Wena documents. It reiterated that the Wena documents had been ordered for purposes relevant to the issues of jurisdiction, and because the Tribunal had already rendered its Decision on jurisdiction, the production of said documents had become moot. Respondent also emphasized that the issues concerning document production were to be settled between the parties primarily and that it had received no such request from Claimant.
25. On 4 January 2007, the Centre transmitted the Tribunal's request to the Parties regarding the production of the Wena documents. The Tribunal requested Claimant to confirm whether the presently requested documents were the same ones as those cited in Procedural Order No. 1 and to indicate their relevancy to the merits of the case. It also requested Claimant's confirmation that it was prepared to undertake a confidentiality agreement as the model found in Procedural Order No. 1.
26. On 8 January 2007, Claimant responded to the Tribunal's request of 4 January 2007, stating that the documents were the same and that they were relevant to Claimants case regarding the quality of the hotels and their management held by HELNAN.

27. On 9 January 2007, the Tribunal rendered Procedural Order No. 2 regarding the issues of the Wena documents, which stated:

“THE ARBITRAL TRIBUNAL HAS DECIDED THE FOLLOWING:

1) the following documents:

-Transcript of Tribunal’s session held on 25 May 1999;
-Transcript of Tribunal’s session held on 25-29 April 2000;
-Transcript of Tribunal’s session held on 22-23 October 2001;
-Transcript of Tribunal’s session held on 14 June 2005;
-All expert reports/opinions (in relation to the Egyptian Tourism industry) and any accompanying document thereof,

in the ICSID Case No. ARB/98/4 Wena Hotels Ltd shall be produced by Respondent by January 16, 2007 subject to the execution by Claimant of the text of an understanding of confidentiality worded on the basis of the model attached to Procedural Order n°1.”

28. On 11 January 2007, Claimant transmitted a signed copy of the Confidentiality Agreement that would cover the Wena documents.
29. On 31 January 2007, Claimant filed its Memorial on the Merits.
30. On 2 February 2007, the Centre informed the Tribunal by email, of Claimant’s confirmation of its reception of the documents referred to in Procedural Order No. 2 from Respondent.
31. On 23 April 2007, the Centre transmitted Respondent’s letter, dated 21 April 2007, by which it requested a 90-day extension to file its Counter-Memorial on the Merits (i.e. by 29 June 2007). On 24 April 2007, the Centre transmitted the Tribunal’s request for Claimant to provide its comments on Respondent’s request.
32. On 25 April 2007, Claimant stated its agreement to a maximum one-month extension to be allowed to Respondent.

33. On 27 April 2007, the Centre transmitted the Tribunal's decision regarding the request for an extension made by Respondent. The Tribunal decided that in light of the Respondent's difficulties and Claimant's agreement to a one-month extension, the Tribunal would grant said extension. Respondent was to file its Counter-Memorial by 31 May 2007.
34. On 9 June 2007, Respondent filed its Objection to Jurisdiction and Counter-Memorial on the Merits. Respondent stated that the delay was caused by computer problems and that it was in contact with Claimant regarding the delay. On 12 June 2007, the Centre transmitted the Tribunal's request that it be informed of the situation regarding the delay.
35. On 21 June 2007, Claimant submitted its comments regarding the Respondent's delayed filing. It proposed a new calendar, as had been agreed to by the Parties, by which Claimant's Reply would be submitted by 10 August 2007, Respondent's Rejoinder - by 17 September 2007, and the Hearings would take place on 8-12 October 2007. Claimant stated that it could not accept any more delays due to the already tight procedural schedule. Claimant also submitted its comments regarding Respondent's Objection to Jurisdiction filed along with its Counter-Memorial. Claimant stated that the objection was without merit, that the issue had already been decided and that Respondent had not submitted it in time. Claimant requested the Tribunal to accept the new procedural calendar and reject Respondent's objection to jurisdiction.
36. On 28 June 2007, the Centre transmitted the following instructions on behalf of the Tribunal:

"The Tribunal has taken note of the new schedule agreed by the parties. With respect to the length of the hearing the Arbitral Tribunal would appreciate receiving confirmation by the parties that October 15, 16 and 17, 2007 will be necessary.

The Respondent's objection to jurisdiction, as submitted with its Counter-Memorial of 10 June 2007, is hereby joined to the merits. Accordingly, the calendar for pleadings will be as follows:

- Reply on the Merits and Response to Objection to Jurisdiction: 10 August 2007

- Rejoinder on the Merits: 17 September 2007

Finally, the Tribunal does not consider necessary to have a second written exchange on the objection to jurisdiction.”

37. On 10 August 2007, Claimant filed its Response to the Objection on Jurisdiction and Reply on the Merits.
38. On 17 September 2007, Respondent filed its Rejoinder on the Merits.
39. On 27 September 2007, Claimant requested the Tribunal to strike Mr Mounir Doss's [Respondent's expert witness] expert witness statement from the record and preclude him from testifying. Claimant claimed that Mr Mounir Doss was a former employee of HELNAN who was working for the Respondent's legal team making him unqualified to testify as an independent expert witness.
40. On 28 September 2007, the Centre, on behalf of the Tribunal, requested Respondent to provide its comments in regard to Claimant's request relative to its expert witness.
41. On 2 October 2007, the Centre communicated the Respondent's reply. Respondent stated that Mr Mounir Doss had left HELNAN employment under favourable circumstances and contested the allegation that he now worked for Respondent.
42. On 3 October 2007, the Tribunal stated that it would accept Mr Mounir Doss witness statement while taking into consideration the Parties' observations.

43. On 3 October 2007, Claimant requested permission to submit further documents for the record.
44. On 5 October 2007, the Arbitral Tribunal rejected Claimant's request due to the lateness of the request.
45. On 8 to 12 October 2007, the Hearing was held in Paris, France.
46. On 26 November 2007, both Claimant and Respondent filed their Post-Hearing Briefs.
47. On 3 December 2007, Claimant submitted its Application for Costs, which was amended on 14 December 2007.
48. On 3 December 2007, Respondent submitted its Application for Costs.

49. On 15 December 2007, Respondent filed its Comments on Claimant's Application for Costs.

ICSID Arbitration Rule 38 (1) requires that when the presentation of the case by the Parties is complete, the proceeding shall be declared closed. Having reviewed all of the presentations by the parties, the Tribunal came to the conclusion that there is no request by a Party or any reason to reopen the proceeding, as is possible under ICSID Arbitration Rule 38 (2). Accordingly, by letter dated 16 May 2008, the Secretariat of the Tribunal declared the proceedings closed.

IV. The Parties' Positions

A) HELNAN's Position

50. HELNAN contends that it and its investments in the Shepheard Hotel were subject to unfair, discriminatory and inequitable treatment by EGYPT, which therefore committed multiple breaches of the Treaty.

51. In particular, HELNAN contends that EGYPT has breached its obligations under the Treaty and should be held liable for the following:
 - Not providing HELNAN and its investments fair and equitable treatment, as provided by Article 3 of the Treaty;
 - Not providing HELNAN and its investments full protection and security at all times and impairing HELNAN's use of its investments by unreasonable or discriminatory measures, as provided by Article 2 (2);
 - Expropriating HELNAN's investments without satisfying the conditions provided by the Treaty in Article 5.
52. It is Claimant's position that EGYPT considered the Management Contract an obstacle for the Shepheard's sale and therefore proceeded to orchestrate a series of events which lead to the downgrading of the Hotel, the Cairo Arbitration and finally to HELNAN's eviction from the Hotel. Claimant submits that the Amendment signed in 2002 did not change EGYPT's perception of the Management Contract as an obstacle and its consequences for the possibility to sell the Shepheard.
53. HELNAN contends that EGYPT used the Ministry of Tourism and EGOTH to achieve its objective of expelling HELNAN from the Hotel.

HELNAN WAS SUBMITTED TO UNFAIR, DISCRIMINATORY AND INEQUITABLE TREATMENT

54. HELNAN refers to Egypt's obligation to treat HELNAN and its investments in a fair and equitable manner. Claimant states that it submitted numerous renovation and upgrade plans for the Shepheard, which were rejected by EGYPT. It states that these rejections lacked transparency and were arbitrary; Claimant contends that EGYPT's lack of proper communication with HELNAN in regards to the rejections constitutes a breach of fair and equitable treatment.

55. HELNAN contends that EGYPT's conduct was discriminatory when it continued to invest in other similar projects and hotels while at the same time rejecting its [HELNAN's] own proposals. HELNAN submits that EGYPT has an obligation to make its investment decisions in an even-handed and non-discriminatory way.

THE 2003 MINISTRY INSPECTIONS AND DOWNGRADE

56. Claimant submits that the manner in which the 2003 inspections and the later Downgrade were carried out constitute a breach of EGYPT's obligation of fair and equitable treatment of HELNAN's investments.
57. Claimant contends that the inspections did not conform to accepted policy and practice. Claimant alleges that the inspection carried out on 14 June 2003 was hostile; it states that the number of persons composing the inspection teams was larger than usual, that it was conducted on Saturday (the Ministries' day-off) and was not drawn up in advance. HELNAN further contends that the inspection report which followed was also out of norm because it was neither issued nor delivered in a timely manner, was unjustifiably harsh and did not provide HELNAN with a grace period to cure any alleged violations.
58. Claimant states that the Hotel was re-inspected on 4 September 2003 and a second inspection report was filed unprecedently fast on that same day. HELNAN contends that both reports were made with the aim of downgrading the Hotel. HELNAN states that the Downgrade came only three days after the inspection and submits that normally such a downgrade would take six to seven weeks to take place.
59. HELNAN states that it was standard procedure to allow a hotel discuss or cooperate with the Ministry over such matter. HELNAN contends that it

was entitled to at least three inspections and several warnings before the Ministry would downgrade the Hotel. Claimant states that the second inspection report was never delivered to it.

60. Claimant contends that the downgrade was unjustified and only took place because of EGYPT's improper motives to downgrade the Hotel. HELNAN states that the Hotel was operating at a five-star standard and that EGYPT's attacks on the quality of the Shepheard were not credible. HELNAN also submitted that the previous negative assessments based on inspections carried in 2000 were not the reason for the 2003 downgrade.
61. The downgrade was orchestrated because EGYPT wanted to get rid of the Management Contract and thus to quietly privatize the Shepheard Hotel.
62. HELNAN contends that EGYPT acted in bad faith by deliberately abusing its sovereign powers to ensure HELNAN's eviction from the Shepheard. HELNAN submits that EGYPT used its authority over the Holding Company (hereinafter "HOTAC") and EGOTH (both wholly-owned by EGYPT) to influence the Ministry of Tourism. This conduct amounted to an improper use of this State's administrative power.
63. HELNAN submits that the Downgrade caused a prejudice against it and that there is a direct causal link between the way the Ministry carried out the inspections, the Downgrade and the loss suffered by HELNAN.

THE CAIRO ARBITRATION WAS UNFAIR AND INEQUITABLE

64. Claimant submits that even if the Ministry of Tourism had sufficient grounds for the Downgrade, the initiation of the arbitration proceedings with the express purpose of terminating the Contract constituted a breach of EGYPT's obligation to provide fair and equitable treatment to its investors.

65. HELNAN states that EGOTH initiated arbitration proceedings just 25 days after the Downgrade on 2 October 2003 and disregarded Article 12 of the Contract which provided for a 60-day cure period. HELNAN also contends that EGYPT had planned to initiate proceedings even before the Downgrade had taken place. HELNAN submits that a fair and equitable approach to the situation created by the Downgrade would have been for EGOTH to cooperate with HELNAN on the renovation plans and to address any alleged shortcomings in the Shepheard. HELNAN contends this would have been the reasonable expectation of a long standing manager in the Egyptian hotel industry.
66. HELNAN presents authorities to support its claim that there existed an obligation to renegotiate between the Parties under the fair and equitable standard. HELNAN contends that EGYPT could have assisted HELNAN with its appeals before the Ministry of Tourism but chose not to do so.

THE CAIRO AWARD

67. HELNAN submits that EGYPT acted in an unfair manner when it decided to pursue the enforcement of the Cairo Award. HELNAN contends that, in light of the Cairo Tribunal finding that the Parties had outperformed their respective obligations, to seek the termination of the Contract was unfair and the proper approach would have been to renegotiate the Contract.

EGYPT'S UNREASONABLE MEASURES AND DISCRIMINATORY TREATMENT

68. HELNAN claims that EGYPT breached its obligation under Article 2(2) of the Treaty to provide protection for investors from unreasonable and discriminatory measures. HELNAN states a series of measures by Egyptian authorities which it deems to have been unreasonable:
 - The Shepheard's removal from the list of historical hotels;

- Not consulting with HELNAN on EGYPT's plans to sell the Shepheard;
 - The obstruction of renovation works for the Shepheard;
 - Downgrading the Shepheard after only two inspections, not granting HELNAN grace periods to cure the alleged violations, and not providing HELNAN with an opportunity to present its case;
 - Initiating the Cairo Arbitration with the intent to terminate the Management Contract;
 - Enforcing the Cairo Award without renegotiating with HELNAN.
69. HELNAN further submitted a series of events which it claims were discriminatory:
- EGYPT's refusal of HELNAN's renovation plans while accepting renovation requests from other hotels;
 - Granting grace periods to other hotel managers to cure the violations in their hotels;
 - Treating HELNAN in a harsher manner than other operators that have underperformed.

EGYPT IMPAIRED HELNAN'S MANAGEMENT OF THE SHEPHEARD

70. HELNAN contends that EGYPT's unreasonable and discriminatory measures did not allow it to manage and enjoy its investment. It states that its operations were disrupted because:
- Before March 2006, Claimant had not been able to exercise its right to autonomy over the operation and management of the Shepheard Hotel;
 - In March 2006, Claimant was evicted from the Shepheard Hotel;

- After March 2006, Claimant's business operations in EGYPT and abroad continued to suffer.
71. HELNAN contends that EGYPT's discriminatory measures and conduct entitle it to remedies, even if the Downgrade and the subsequent arbitration could not be found wrongful, due to the trigger that the chains of events created by EGYPT's failure to treat HELNAN in an even-handed manner and in good faith with respect to improvement and renovation plans HELNAN had presented over the years.

HELNAN'S INVESTMENT WAS EXPROPRIATED

72. Claimant submits that its investment in the Shepheard was expropriated by EGYPT in breach of Article 5 of the BIT because it was not in the public interest, it was discriminatory, it was not carried out under due process and it was not accompanied by prompt, adequate and effective compensation.
73. HELNAN contends that its rights, as embodied in the Management Contract, were indirectly expropriated on 7 September 2003 due to the Downgrade and later directly expropriated on 23 March 2006 when its eviction from the Shepheard took place. Claimant submits that contractual rights are susceptible of expropriation and the fact that the Cairo Tribunal terminated the Management Contract does not excuse EGYPT's liability because of its manipulation of the events to produce the Downgrade and the subsequent arbitration. In addition to the Management Contract, HELNAN submits that its operating systems, know-how, staff and marketing opportunities were also expropriated.

HELNAN WAS DENIED FULL PROTECTION AND SECURITY

74. Claimant submits that it was denied full protection and security for its investments and therefore EGYPT breached its obligations under Article 2

(2) of the BIT. Claimant submits that Article 2(2) imposes a positive obligation of due diligence on EGYPT to exercise reasonable care to protect investments.

75. HELNAN contends that EGYPT subjected it to abusive actions by government officials who orchestrated and used the Downgrade and inspections to ensure HELNAN's eviction from the Shepheard. It also contends that it was subject to negative and abusive press reports from which it was not protected by EGYPT or EGOTH. Furthermore, Claimant contends that EGYPT interfered with its attempts to stay the execution of the Cairo Award as well as employing intimidation tactics against it during the course of the present proceedings.

HELNAN IS ENTITLED TO FULL COMPENSATION

76. Claimant submits that it is entitled to receive full compensation for its losses. HELNAN requests the Tribunal to reinstate it as manager and operator of the Shepheard and award it compensation for losses not covered by such a reinstatement. Alternatively, HELNAN requests full compensation for all its losses should it not be reinstated in the Shepheard.
77. Claimant presents case law and authorities to establish its right to non-pecuniary and/or pecuniary reparation when a State has breached its obligations under an international instrument. Claimant contends that there exist only two limitations to the Tribunal's power to award non-pecuniary compensation. This is so where restitution is impossible and where restitution does involve a disproportional burden.
78. HELNAN submits that the Tribunal is empowered to order EGYPT to return the Shepheard and reverse any government edicts which might impair HELNAN's management and operation of the Shepheard. In

addition to the request to be reinstated under competitive terms, HELNAN submits that it suffered damages for loss of daily profits, costs of the present arbitration, reputational and moral loss, costs of the Cairo Arbitration, debts which were written off by HELNAN and costs of replacing marketing materials.

79. HELNAN submits that should the Tribunal award monetary damages only, it is entitled to full reparation. HELNAN contends that to provide full monetary reparation, it must be compensated for the following elements:

- Lost profits for early termination of the Management Contract;
- Value of the employees and know-how;
- Reputational loss;
- Moral loss;
- Advertising damages;
- Out of pocket costs, including the costs of the present arbitration.

THE TRIBUNAL HAS JURISDICTION

80. HELNAN contends that EGYPT's objection to the Tribunal jurisdiction (as presented in its Objection to Jurisdiction and Counter-Memorial on the Merits) is without merit. HELNAN submits that Article 25 of the ICSID Convention requires the dispute to *arise* from an investment and therefore does not require the investment to be owned by the investor at the date of filing the Request for Arbitration.

81. Claimant submits that the requirements of consent to ICSID arbitration and that of a qualifying investment have been established. It submits that consent was given by EGYPT in Article 9 of the Treaty and that

HELNAN accepted this offer in its Request for Arbitration. Claimant further submits that the Tribunal has already decided on the issue of a qualifying investment in its Decision on Jurisdiction by which it stated that in the present case the requirement of Article 1 was satisfied. Claimant submits that the case law used by EGYPT to support its objection is not relevant and not applicable to the present dispute.

HELNAN'S CLAIMS ARE ADMISSIBLE

82. HELNAN submits that its claims are fully admissible despite EGYPT's claims that they should be barred, on the one hand, by *res judicata*, and on the other hand, by non exhaustion of local remedies. HELNAN contends that the question of whether EGYPT breached its obligation under the Treaty by its actions is one that could *not* have been decided in the Cairo Arbitration.
83. HELNAN also contends that EGYPT bears the burden of proving why *res judicata* applies and that it has failed to do so. HELNAN submits case law and authorities to support its position that international tribunals are not bound by local court decisions. Given the fact that the Cairo Tribunal and the present ICSID Tribunal stem from different legal orders, the present Tribunal is not bound by the Cairo Award.

THE *RES JUDICATA* TRIPLE IDENTITY REQUIREMENT

84. Claimant submits that in any case, the triple identity test for *res judicata* to apply is not satisfied in the present case. Also HELNAN contends that its position does not bring about a supposed conflict between the ICSID and the New York Convention as EGYPT claims.
85. Claimant submits that the Parties to the Cairo Arbitration, being EGOTH and HELNAN, are not the same as in the present arbitration, HELNAN

and EGYPT. Furthermore Claimant submits that the claims and causes of action are not the same; in the Cairo Arbitration the claims were filed for breach of the Management Contract, while in the present case they were filed for the breach of the Treaty.

86. HELNAN submits that no other theories relating to *res judicata* apply to the Cairo Award and that there exists no possibility of procedural unfairness or abuse of process, a standard used by some jurisdictions and presented by EGYPT, in the present procedure. In addition, HELNAN contends that there were several issues brought forth in the present case which were not addressed in the Cairo Arbitration.

EXHAUSTION OF DEFENCE TO DOWNGRADE

87. HELNAN submits that EGYPT's argument that HELNAN should be precluded, as a matter of substance rather than procedure, from seeking remedies before the ICSID jurisdiction because it did not seek judicial review of the Downgrade, was not made in a timely manner and fails on the law and facts as well.
88. HELNAN submits that it was under no obligation to exhaust local remedies before bringing its claims before the present Tribunal. Claimant also submits that failure to seek judicial review cannot amount to acquiescence on its part of the Downgrade, since there exists no rule for it to seek review of a wrongful act to prove the existence of a treaty violation. Finally, HELNAN contends, even if it were argued that it did have an obligation to seek local remedies, this requirement was also met. HELNAN states that it sought administrative review of the Downgrade before the Ministry of Tourism on three occasions.

89. The relief sought by HELNAN, as expressed in its Post-Hearing brief of 26 November 2007, is as follows:

“(i) declaring that the Respondent has breached its obligations under the Denmark/Egypt BIT; and

(ii) ordering the Respondent to :

- *Reinstate Helnan as Manager and Operator of the Shepheard Hotel;*
- *Enable Helnan to manage and operate the Shepheard Hotel (without let or hindrance) until at least 2017;*
- *Approve renovation plans in an amount of not less than EPG39 million (appropriately adjusted for the time elapsed since this figure was presented to EGOTH);*
- *Either pay Helnan damages not less than €1,967 per day (daily rate based on Ms. Farr’s no renovation and no extension scenario) to indemnify Helnan for loss of its share in the total operating profits of the Shepheard Hotel up until the date of restatement or extend the period of reinstatement to include the number of days of Helnan’s wrongful eviction from the Shepheard;*
- *Pay Helnan a penalty per day for every day that respondent fails to so reinstate after the award; and*
- *Pay to Helnan €10.8 million in other damages; or in the alternative*

(iii) ordering the Respondent to pay

- *Damages in an amount up to €16,473,000, to indemnify Helnan for loss operating profits of the Shepheard Hotel;*
- *Damages in the amount of €4,739,822, to indemnify Helnan for loss of its “management business in Cairo”;*
- *Damages in the amount of €8,716,266 in compensation for reputational damages;*
- *Damages in the amount of €10,000,000 in compensation for moral damages;*

- *Damages in the amount of €1,068,000 in compensation for lost advertising assets;*
- *€560,358 representing the debt written off by Helnan on 15 October 2002; and*
- *All of Helnan's costs associated with the defence of the arbitration proceedings taken against it by EGOTH in Egypt, in the amount of approximately €228,960; and*
- *Ordering the Respondent to pay all of Helnan's costs associated with the arbitration, including the arbitrator's fees and administrative costs fixed by ICSID, the expenses of the arbitration, and the legal costs (including attorney's fees) incurred by the parties, in an amount to be quantified;*
- *Ordering the Respondent to pay compound interest at a rate of 9% on the amounts awarded in (ii) to (iv) above; and*
- *granting Helnan any other relief that the Tribunal sees fit.”*

B) EGYPT's Position

90. It is EGYPT's position that HELNAN had no right, under the BIT, to demand it to disregard the Cairo Award and reinstate HELNAN in its role as manager and operator of the Shepheard. EGYPT submits that all claims relating to the Parties' contractual obligations under the Management Contract were definitely resolved in the Cairo Arbitration. Furthermore, it states that the only remaining question to determine is whether EGYPT breached its obligations under the Treaty by allegedly abusing its powers vis-à-vis HELNAN in connection to its privatisation program. EGYPT contends that the only specific instance of such an alleged abuse is the Downgrade and which, it contends, HELNAN has not proved.
91. EGYPT submits that HELNAN already had alleged in the Cairo Arbitration that EGOTH and EGYPT colluded to ensure the Shepheard's

downgrade. It contends that since the arbitrators in the Cairo Arbitration found that there had been no breach of the Management Contract, this claim has already been dealt with and rejected. In light of this, EGYPT contends, the present Tribunal cannot find that there was collusion between EGYPT and EGOTH without directly contradicting the *res judicata* of the Cairo Award.

92. Respondent submits that HELNAN was not entitled to bring claims before an international jurisdiction, without previously allowing it [EGYPT] a reasonable opportunity to address the alleged violations. EGYPT submits that this is not a matter of exhaustion of local remedies [which it claims is Claimant's position], but a matter of the material substantiation of the alleged international delict. Respondent submits that it is the merits of the case which are at the heart of the matter, i.e. the alleged international delict cannot be substantiated if Claimant has failed to make reasonable efforts to allow Respondent to address the complaints. EGYPT also stresses the fact that several years after the downgrade took place, the Shepheard has still not been upgraded or sold, quite contrary to Claimant's theory of collusion.
93. EGYPT submits that there are two salient conclusions to be reached in respect of the present proceedings.
94. As regards the first, EGYPT submits that the legal consequences of the Cairo Award, which terminated the Management Contract for impossibility of performance, cannot be escaped. EGYPT submits that these legal consequences will operate on three different levels.
95. Firstly, on the jurisdictional level, EGYPT contends that following the termination of the Management Contract, HELNAN no longer had a legal interest [i.e. the Management Contract or an investment] which could

form the subject matter of an agreement to arbitrate pursuant to Article 25 of the ICSID Convention or Article 1 of the Treaty. Therefore, Claimant had no investment to protect under the Treaty and thus no access to ICSID jurisdiction.

96. Secondly, on the admissibility level, EGYPT contends that due to HELNAN having filed its Request when it did not have an investment, the admission of the claim submitted would constitute a breach of the international rule which provides that the protected investment must be existent at the date of initiation of the proceedings.
97. Thirdly, on the merits, EGYPT contends that most of the issues raised by HELNAN related to the contractual obligations found in the Management Contract. Therefore the whole dispute was to be decided by the Cairo Award which addressed the relevant issues. Since the Cairo Award is *res judicata* in regard to these issues, to contravene the Cairo Award would amount to a breach of Egyptian and international law.
98. As regards the second submission, EGYPT submits that the Cairo Award benefits from the New York Convention; to review, revise or not recognize it would constitute a contradiction between one treaty system and another. Even if *res judicata* can only be applied to the contractual claims arising from the Management Contract, then these findings must be considered by the present Tribunal as established juridical facts not susceptible of being set aside or contradicted. EGYPT contends that these contractual issues fall outside the jurisdictional scope of both the ICSID Convention and the Treaty. EGYPT therefore submits that most of the claims and/or issues addressed by HELNAN in the present proceedings cannot be considered by the Tribunal.

HELNAN'S FAILURE TO SUSTAIN ITS ALLEGATIONS

99. Respondent contends that Claimant's remaining strategy to support its view that its claims fall under the Treaty is to prove that EGYPT abused its powers in the Downgrade. EGYPT submits that HELNAN's only "proof" is Mr Bahi Nasr's testimony. EGYPT contends that the testimony provided by Mr Nasr is baseless and lacking substance since he did not name which Undersecretary of Tourism had informed him [Mr Nasr] that the Downgrade had been ordered to provide a reason for terminating the Management Contract. EGYPT states that Mr Nasr did not provide details or context for the conversation. EGYPT further submits that Mr Nasr has a low opinion of Mr Mostafa Eid (his successor in HOTAC). Respondent submits that HELNAN has not satisfied its burden of proof in regard to the allegations made by Mr Nasr.

V. The Tribunal's position

100. Under Art. 42 (1) sentence 1 of the ICSID Convention, the Tribunal has to apply the law as agreed between the parties. The BIT between Denmark and Egypt is applicable.
101. Under the ICSID Convention and the BIT, the existence of the contract between HELNAN and Egypt raises the question of the possible distinction between the contractual rights of HELNAN under the laws of Egypt and the alleged treaty rights of HELNAN under the Agreement. In addition to this differentiation, the Tribunal will have to determine the effect of the local Cairo Award upon the rights of the Parties before the present Tribunal. Also, and related to this question, the matters to be determined by this Tribunal will have to be delineated from those aspects,

if any, which the Cairo Tribunal has ruled upon and which this Tribunal has to accept without a review of its own. This subject matter will be considered in the light of the principle *res judicata* as it operates under the circumstances of the present case of a local award preceding an international proceeding.

The Tribunal will deal with these matters as appropriate for an international Tribunal, taking into account relevant jurisprudence pertaining to these matters.

102. As regards the distinction between a contractual claim of an investor and a treaty claim subject to the jurisdiction of a competent international tribunal, this Tribunal accepts the approach adopted by a number of investment tribunals¹ and summarized in paragraphs 93 and 94 of the AES v. Argentina, Decision on Jurisdiction, 26 April 2005, as follows:

“... the Entities concerned have consented to a forum selection clause electing Administrative Argentine law and exclusive jurisdiction of Argentine administrative tribunals in the concession contracts and related documents. But this exclusivity only plays within the Argentinean legal order, for matters in relation with the execution of these concession contracts. They do not preclude AES from exercising its rights as resulting, within the international legal order from two international treaties, namely the US-Argentina BIT and the ICSID Convention.

¹ Compañía de Aguas del Aconquija, S.A. & Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic, (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002, 6 ICSID Reports 340, 41 ILM 1135 (2002); Impregilo S.p.A. v. Islamic Republic of Pakistan, Decision on Jurisdiction, 22 April 2005, paras. 286-289; Camuzzi Intl. S.A. v. Argentine Republic, Decision on Jurisdiction, 11 May 2005, paras. 105-119; Sempra Energy International v. Argentine Republic, Decision on Jurisdiction, 11 May 2005, paras. 116-128; Eureko B.V. v. Republic of Poland, Partial Award, 19 August 2005, paras. 81, 89, 92-114; Aguas del Tunari, S.A. v. Republic of Bolivia, Decision on Jurisdiction, 21 October 2005, paras. 94-123; Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic, Decision on Jurisdiction, 16 May 2006, paras. 41-45; National Grid PCL v. Argentine Republic, Decision on Jurisdiction, 20 June 2006, paras. 167-170.

In other terms, the present Tribunal has jurisdiction over any alleged breach by Argentina of its obligations under the US-Argentina BIT.”

103. In other words, the analysis of the Claimant’s rights under the BIT must on the one hand take into account the existence, or non-existence of contractual rights of the Claimant as they exist on the level of Egyptian law. On the other hand, an exclusive focus on contractual rights will not be sufficient to determine whether or not the rights of the Claimant laid down in the Treaty have been respected. Even in the absence of a valid contract, it is possible that a certain kind of conduct of the host state is inconsistent with its obligations under a BIT.
104. As regards jurisdiction, the facts as pleaded by a claimant will have to be accepted in principle without further examination on the part of the Tribunal, as long as they appear plausible in light of the Parties’ pleadings. If the facts so considered may give rise to a valid claim, the Tribunal will accept its jurisdiction².
105. As regards the merits, the Tribunal will have to examine whether a violation of the Treaty has been shown by the Claimant. When, as in the present case, a domestic tribunal has ruled on an issue of domestic law which subsequently has to be considered by an ICSID Tribunal, the ICSID Tribunal will have to take into account that the task of applying and interpreting domestic law lies primarily with the courts of the host country.
106. An ICSID Tribunal will not act as an instance to review matters of domestic law in the manner of a court of higher instance. Instead, the

² See, e.g. Salini Costruttori and Italtrade S.p.A. v. Hashemite Kingdom of Jordan, (ICSID Case No. ARB/02/12), Decision on Jurisdiction, 29 November 2004, paras. 131 *et seq.*, in particular para. 151.

Tribunal will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice.

107. The precise circumstances under which the violation of a contractual right of the investor by a host state will amount to an act also unlawful under an investment treaty have not been answered in a uniform manner in arbitral practices. While some tribunals have considered that acts of the nature typical of a commercial partner will not be deemed to be a treaty violation³, other decisions have been inclined, in the context of the standard of fair and equitable treatment, to protect contractual rights in a broader manner⁴.
108. When in the present case a Tribunal would adopt the wider approach of protection and a domestic award exists dealing solely with contractual matters, the Tribunal would have to ask whether under such circumstances it would be necessary to disregard the rule *res judicata* and to review the facts *de novo* in the light of the requirements of fair and equitable treatment. In this respect, each case will have to be reviewed in the light of the circumstances. When it is found by an international tribunal that the holding of the local award was determined strictly by considerations pertaining to contractual issues, it will not be appropriate for an international tribunal to replace the decision of the local court on a contractual issue subject to local law. Instead, *res judicata* will apply, and

³ See e.g. Consortium R.F.C.C. v. the Kingdom of Morocco, (ICSID Case No. ARB/00/6), Award 22 December 2003, 20 ICSID Review-FILJ (2005), p. 391, paras. 33-34; Impregilo S.p.A. v. Islamic Republic of Pakistan, (ICSID Case No. ARB/02/2), Decision on Jurisdiction, 22 April 2005, 12 ICSID Reports 245, paras. 266-270.

⁴ See e.g. Noble Ventures v. Romania, (ICSID Case No. ARB/01/11), Award, 12 October 2005, para. 182.

the outcome in this respect will be the same as that which a tribunal will reach which assumes that strictly contractual matters generally are not protected under the standard of fair and equitable treatment.

109. Before discussing the merits of HELNAN’s claims (below part C), the Arbitral Tribunal must deal with the new objection raised by EGYPT concerning its jurisdiction (below part A) and EGYPT’s objections relating to the admissibility of HELNAN’s claims (below part B). At the end, the Arbitral Tribunal will deal with the costs of these proceedings (below part D).

A) *EGYPT’s New Objection to Jurisdiction*

110. According to EGYPT, since as of 30 December 2004, the Management Contract was terminated by the Cairo Award, there was no legal interest that could form the subject matter of an “*agreement to arbitrate*” under Article 25 of the ICSID Convention or under Article 1 of the Treaty, which both required the existence of a protected “investment” falling thereunder. HELNAN’s interest in the Management Contract was legally dissolved when it filed its Request for ICSID arbitration and it had no investment susceptible of protection under the Treaty. Thus there can be no ICSID jurisdiction. The only possibility left to HELNAN would be to argue that the post-Award judicial review process in Egypt constituted a denial of justice, but HELNAN failed to do so.
111. This line of arguments was not part of EGYPT’s objections to jurisdiction dismissed by the Arbitral Tribunal in its Decision of 17 October 2006. As a consequence, HELNAN contends that it was raised untimely and was waived in the light of ICSID Arbitration Rule 41(1) which requires that any objection to jurisdiction be raised “*as early as possible*”.

112. EGYPT's new objection to the Arbitral Tribunal's jurisdiction could have been raised sooner. However, it does not mean that the objection was waived by EGYPT. As a matter of fact, the Respondent closely linked it with its objection to the admissibility of HELNAN's claim based on *res judicata*. This is understandable. The contention that the Cairo Award is *res judicata* is a necessary stone in EGYPT's reasoning leading to the absence of an investment susceptible of protection under the Treaty at the date when HELNAN's Request for Arbitration was filed. EGYPT is apparently convinced that it was only within the merits phase of the proceedings that its right to provide the necessary evidence in this respect could be exercised, as explained by its counsel at the Hearing⁵. This conviction may be factually incorrect but it is at odds with the interpretation of EGYPT's procedural behavior as the expression of a waiver of its new objection to jurisdiction. Moreover, as it has been pointed out, "*The admissibility of submissions filed outside time limits would not lead to drastic consequences in the context of Art. 41. The tribunal may examine jurisdictional questions at any time ... and may be expected to do so even if a party's submissions are out of order.*"⁶
113. Thus, the Arbitral Tribunal decides to review Respondent's new objection to its jurisdiction.
114. However, this objection is ill-founded. EGYPT had made clear that it does not have "*the slightest intention to question what was decided*" by the Arbitral Tribunal in its 17 October 2006 decision on jurisdiction⁷. In this Decision, the Arbitral Tribunal reached the following conclusion: "... *the Arbitral Tribunal concludes that the dispute arises out of an investment.*

⁵ Trans. Day 1, p. 108.

⁶ C. H. Schreuer, *The ICSID Convention: A Commentary*, p. 533, para. 37.

⁷ Trans. Day 1, p. 95.

There was no contention by the Respondent that the relation between the Claimant's claims and the Contract would not be direct. Thus the Arbitral Tribunal is satisfied that the dispute directly arises out of an investment⁸.

It is not disputable that this investment embodied in the Management Contract was terminated by the Cairo Award and that this award is now final. Yet, HELNAN was not expelled from the Shepheard hotel before March 2006, about one year after it filed its Request for Arbitration on 8 March 2005 and, at this time, the recourse by HELNAN against the Cairo Award was still pending at the Cairo Court of Appeals. Thus, it is factually incorrect to affirm that HELNAN's interest in the Management Contract was legally dissolved when the Request for Arbitration was filed.

115. But, in the instant case, the very essence of HELNAN's claim is that it has been wrongfully deprived by EGYPT of its investment in the Shepheard Hotel by actions it contends constitute breaches of the Treaty because they were unfair, inequitable, discriminatory and ultimately expropriatory. Should HELNAN be correct in its factual argumentation, the termination of the Management Contract and HELNAN's subsequent expulsion from the Shepheard Hotel would be a violation of the Treaty and HELNAN would be entitled to compensation by EGYPT. As regards the expropriation claims, basically these involve an investor who has no longer an investment as a result of an action by the State.
116. The argument that the investment had ceased to legally exist under Egyptian law when HELNAN filed its request for ICSID arbitration has no relevance to the jurisdiction of the Arbitral Tribunal since HELNAN's claim is precisely that this legal situation is the result of alleged actions by

⁸ Decision on Jurisdiction, 17 October 2006, para. 80.

EGYPT in breach of the Treaty. The reference by Respondent to previous ICSID awards to support its new jurisdictional objection are of no avail.

117. In *Fraport v. Philippines*,⁹ the Arbitral Tribunal declined jurisdiction because the applicable BIT required an investment “*in accordance with the host state’s law*” while the investment at stake had been made through an arrangement which breached provisions of Philippines law. Thus the investment did not qualify for protection under that specific BIT. Since the legality of HELNAN’s investment has never been disputed, the situation is undoubtedly distinguishable.
118. Likewise, the *Salini v. Jordan* case¹⁰ does not support EGYPT’s objection to jurisdiction: the Tribunal said very explicitly that it had no jurisdiction to entertain contractual disputes. However, in the instant case, HELNAN does not ask this Arbitral Tribunal to find that its investment was dissolved as a result of the breach of contractual provisions but as the result of a pattern of actions by EGYPT allegedly in breach of the Treaty.
119. Last, EGYPT’s position on jurisdiction finds no support either in the Award rendered in the *AAPL v. Sri Lanka* case¹¹ on 27 June 1990. In this award the Tribunal retained jurisdiction because it came to the conclusion that the claimant’s investment had been destructed and had disappeared as a result of actions of the Sri Lanka military forces which were in violation of the State’s obligations under the applicable BIT. A similar issue is in front of the Tribunal in the instant case: it must decide whether the Management Contract ceased to exist as a result of actions of the Egyptian State which were in violation of EGYPT’s obligations under the Treaty.

⁹ *Fraport AG Frankfort Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25) Award of 16 August 2007.

¹⁰ *Salini Costruttori S.p.A. and Italstrade S.p.A v. The Hashemite Kingdom of Jordan*, (ICSID Case No. ARB/02/12), Decision on Jurisdiction of 29 November 2004.

¹¹ *Asian Agricultural Products Limited. v. Democratic Socialist Republic of Sri Lanka*, (ICSID Case No. ARB/87/3), Award of 27 June 1990.

120. However, even if the Tribunal were to reach the conclusion that EGYPT was not responsible for the termination of the Management Contract and the resulting disappearance of HELNAN’s investment, it would not decline jurisdiction: it would dismiss HELNAN’s claim. Indeed, whatever be the date the termination of the Management Contract became effective, and independently of EGYPT’s alleged liability for the disappearance of HELNAN’s investment, Article 25 of the ICSID Convention contains no requirement that an investment must continue to exist at the time of filing of a request for ICSID arbitration: it only requires that a legal dispute arises directly out of an investment “*...which the parties to the dispute consent in writing to submit to the Centre.*” The consent to submit the dispute to the Centre was given by EGYPT when it ratified the Treaty. HELNAN gave its consent by starting this arbitration. Consequently, the Arbitral Tribunal has jurisdiction to decide HELNAN’s claims and EGYPT’s new objection to its jurisdiction will be dismissed. The Tribunal has decided earlier that its rights in HELNAN constituted an investment (see Decision on Jurisdiction).

B) EGYPT’s Objections Concerning the Admissibility of HELNAN’s Claims

121. EGYPT’s objections to the admissibility of Helnan’s claims are twofold. On the one hand, EGYPT explains that HELNAN’s claims in this ICSID arbitration almost duplicate its counterclaims in the Cairo Arbitration and that they are contractual claims subject to the arbitration clause included in the Management Contract. As such, the entire debate belonged to the contractual forum. EGYPT also contends that the Cairo Award is *res judicata* with regard to all the matters *sub judice* and that to disregard such *res judicata* would be a violation of both Egyptian law and international law. It points out that HELNAN is asking the Arbitral

Tribunal to ignore the *res judicata* effect of the Cairo Award, in particular in so far as such award terminated the Management Contract on 4 December 2004 on account of conduct having occurred prior to that date.

122. Under its first presentation, EGYPT's objection to the admissibility of HELNAN's claims is nothing else than a further objection to the Arbitral Tribunal jurisdiction: if HELNAN's claims are just contractual claims, the arbitration agreement in the Management Agreement was applicable to them and this ICSID Arbitral Tribunal has no jurisdiction to deal with them. But it is also one aspect of its *res judicata* argument. Indeed, although the *CME v. Czech Republic* Final Award of 14 March 2003 pointed out that the fact that one tribunal is competent to resolve a dispute does not necessarily affect the authority of another tribunal to resolve the same dispute;¹² *res judicata* always requires a previous decision by a competent authority¹³. That the two components of EGYPT's objection to the admissibility of HELNAN's claims are two aspects of a *res judicata* objection was clearly implied by its counsel who pointed out at the Hearing: "*There is a dual effect of res judicata: one effect is jurisdictional and the other one goes to the merits*"¹⁴. Consequently, the Arbitral Tribunal will deal with those two components jointly.
123. There is no doubt that the Cairo Award is a binding and final award and that it is *res judicata* within the Egyptian legal order. The question is whether this national *res judicata* may be relied upon in these international proceedings and, if so, to what extent. The reference to the 1958 New York Convention on the Recognition and Enforcement of

¹² CME Czech Republic B.V. v. the Czech Republic (UNCITRAL Arbitration Proceedings), para. 435.

¹³ The Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1) (Resubmission Proceeding: Jurisdiction) Award of 10 May 1988 describes *res judicata* as "*the general principle ... that a right question or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground for recovery, cannot be disputed*", ICSID, 89 14 R 552 at 560.

¹⁴ Trans. Day 1, p. 64.

Foreign Awards as made by EGYPT is of no avail in that respect. On the basis of the New York Convention, the *res judicata* effect of the Cairo Award may be recognized in any country which is a party to the Convention, i.e. to be introduced in the legal order of that specific country. It may as well be introduced in the legal order of the few countries which are not party to the Convention pursuant to their national rules on the recognition and/or enforcement of foreign awards. Yet, whatever would be the basis for such recognition of the Cairo Award within one or more national legal orders other than the Egyptian one, it would not make it part of the international legal order.

124. It is admitted that “*there is no effect of res judicata from the decision of a municipal court so far as an international jurisdiction is concerned*”¹⁵. This is not so much because, as pointed out by the International Law Association “*an international tribunal is considered to be hierarchically superior to any national court or private arbitral tribunal*”¹⁶, but essentially because although the subject matter may be substantially the same, the causes of action are different. As stressed by EGYPT’s counsel at the Hearing on the Merits held in October, an ICSID arbitral tribunal is not a national court of first instance, a national court and not even a national supreme court, it is “*an international tribunal which has the authority to investigate, evaluate, adjudicate only on international delicts*”¹⁷. A national court and even less a private arbitral tribunal do not have the same authority. They are not performing their duties in the same legal order and their jurisdiction does not have the same scope.

¹⁵ I. Brownlie, Principles of Public International Law, p.50.

¹⁶ International Law Association “Final Report on Lis Pendens and Arbitration”, Toronto Conference, 2006, p. 13.

¹⁷ Trans. Day 1, p. 58 and 59.

125. This has two consequences. On the one hand, a decision by national court or a private arbitral tribunal cannot be opposed as *res judicata* to the admissibility of an action filed with an international arbitral tribunal. Indeed, either the national court or the private arbitral tribunal did not dispose of that action or had no jurisdiction to do it. On the other hand, an international tribunal must accept the *res judicata* effect of a decision made by a national court within the legal order where it belongs. This was correctly underscored by Professor Cremades in his dissenting opinion in the *Fraport v. Republic of the Philippines* case where he made the following remark: “*The ICSID tribunal is not bound by the decision of the Philippine court, even the Supreme Court, but its own judgment on Philippine law must be premised on the Philippine law itself. It is res judicata in Philippine law that the Terminal 3 concession is null and void ex tunc and not ex nunc, and this must be accepted by the arbitral tribunal ...the tribunal should respect the consequences of the Supreme Court decision.*”¹⁸
126. Moreover, even if the Cairo Award and this ICSID arbitral tribunal were addressing the same legal order, the Cairo Award could not be opposed as *res judicata* to the admissibility of HELNAN’s claims. For an earlier final decision, issued by a competent court or arbitral tribunal, to be conclusive in subsequent proceedings, three cumulative basic conditions must be met: identity of parties, identity of subject matter or relief sought and identity of legal grounds or causes of actions. This is largely accepted¹⁹. Those three cumulative conditions are not met in the instant case.

¹⁸ *Fraport AG Frankfort Airport Services Worldwide v. Republic of the Philippines* of 16 August 2007, Dissenting Opinion of Mr. Bernardo M. Cremades, p. 26.

¹⁹ See International Law Association, “Interim Report on Res judicata and Arbitration”, Berlin Conference, 2004, p. 2; *CME v. Czech Republic*, Final Award of 14 March 2003, para. 435.

127. The parties to the Cairo arbitration proceedings and the parties to this ICSID arbitration are not the same. EGYPT was not formally a party to the Cairo arbitration proceedings: the Claimant was EGOTH while HELNAN was the Respondent and Counterclaimant. However, this point may be less significant than it may be in different circumstances. Indeed it is HELNAN's position in this arbitration that EGOTH's deeds are tantamount to EGYPT's deeds. Moreover, in its Decision on the Objection to jurisdiction of 17 October 2006, the Arbitral Tribunal has found that EGOTH's actions within the privatisation process were attributable to the Egyptian State. Last, but not least, it is HELNAN's position that the initiation of the Cairo arbitration proceedings is one of EGYPT's breaches of its obligations to provide fair and equitable treatment to the investors. Thus it is not without some contradiction that HELNAN relies on the own legal personality of EGOTH, distinct from the Egyptian State, for the sole purpose of denying the alleged *res judicata* effect of the Cairo Award.

128. However, this issue need not be further explored since, in any case, the relief sought in each of the two proceedings is not fully identical and there is no identity at all of the legal grounds or causes of actions invoked by HELNAN.

129. In the instant ICSID arbitration, HELNAN is asking the following relief:

“(i) *declaring that the Respondent has breached its obligations under the Denmark/Egypt BIT; and*

(ii) *ordering the Respondent to :*

- *Reinstate Helnan as Manager and Operator of the Shepheard Hotel;*
- *Enable Helnan to manage and operate the Shepheard Hotel (without let or hindrance) until at least 2017;*

- Approve renovation plans in an amount of not less than EPG39 million (appropriately adjusted for the time elapsed since this figure was presented to EGOTh);
- Either pay Helnan damages not less than €1,967 per day (daily rate based on Ms. Farr's no renovation and no extension scenario) to indemnify Helnan for loss of its share in the total operating profits of the Shepheard Hotel up until the date of restatement or extend the period of reinstatement to include the number of days of Helnan's wrongful eviction from the Shepheard;
- Pay Helnan a penalty per day for every day that respondent fails to so reinstate after the award; and
- Pay to Helnan €10.8 million in other damages; or in the alternative

(iii) ordering the Respondent to pay

- Damages in an amount up to €16,473,000, to indemnify Helnan for loss operating profits of the Shepheard Hotel;
- Damages in the amount of €4,739,822, to indemnify Helnan for loss of its "management business in Cairo";
- Damages in the amount of €8,716,266 in compensation for reputational damages;
- Damages in the amount of €10,000,000 in compensation for moral damages;
- Damages in the amount of €1,068,000 in compensation for lost advertising assets;
- €560,358 representing the debt written off by Helnan on 15 October 2002; and
- All of Helnan's costs associated with the defence of the arbitration proceedings taken against it by EGOTh in Egypt, in the amount of approximately €228,960; and
- Ordering the Respondent to pay all of Helnan's costs associated with the arbitration, including the arbitrator's fees and administrative costs fixed by ICSID, the expenses of the arbitration, and the legal costs (including

attorney's fees) incurred by the parties, in an amount to be quantified;

- *Ordering the Respondent to pay compound interest at a rate of 9% on the amounts awarded in (ii) to (iv) above; and*
- *granting Helnan any other relief that the Tribunal sees fit.”.*

HELNAN's prayers for relief in the Cairo Arbitration were as follows²⁰:

“First: An award rejecting the requests of [EGOTH] in the original arbitration application originally, and compelling it with the original arbitration application expenses and counsel's fees.

Second: An award compelling [EGOTH] to proceed immediately with developing and renovating the hotel pursuant to the development and renovation plans submitted by [HELNAN] from the private funds of [EGOTH], together with imposing a delay fine amounting to ten thousand dollars for each month in which [EGOTH] delays in executing its obligation to develop and renovate the hotel.

Third: An award compelling [EGOTH] to pay to [HELNAN] a sum of EGP 31,197,427.00 (thirty one million, one hundred ninety seven thousand, four hundred and twenty seven Egyptian pounds) representing the value lost by [HELNAN] from its share in the profit of operating Shepheard Hotel as a result of the failure of [EGOTH] to execute its obligation to develop and renovate the hotel.

Fourth: An award compelling [EGOTH] to pay to [HELNAN] a sum of EGP 20,000,000.00 (twenty million Egyptian pounds) as

²⁰ Award dated 30 December 2004, pp. 97-100.

indemnity for the moral damage sustained by the latter as a result of the former harming the reputation of the latter by alleging - untruly - that it neglected and ignored executing its obligations arising from the management contract.

Fifth: By way of precaution if the request of [HELNAN] number "Third" is unaccepted an award to extend the period of the management contract for a period of eleven years commencing at the end of the current period of the management contract, which is a period equivalent to the period from Jan. 1st, 1993 till Dec. 31, 2003 during which [HELNAN] abstained from developing and renovating the hotel, and for another period equivalent to the period during which the subsidiary Arbitration Respondent abstains from executing its obligation to develop and renovate the hotel since Jan. 1 st, 2004 till the day preceding the commencement of [EGOTH] to execute this obligation.

Sixth: By way of precaution in case the Panel accepts the request of [EGOTH] to dissolve the management contract and its addendums:

1. *An award compelling [EGOTH] to pay to [HELNAN] the sum indicated in the Third original request of [HELNAN] for the same reasons expressed in it.*
2. *An award compelling [EGOTH] to pay to [HELNAN] a sum of EGP 60,000,000.00 (sixty million pounds) indemnity for the latter for the gain it will miss, namely its share in the total operating profit of the hotel during the years remaining from the current period of the management contract, the years from 2005 till 2012 at the rate of 20% of the total operating profit, 5% burden of financing the Manager for development and the expenses of the*

head office and 3% international advertisement provision. The total missed gain was calculated assuming that [EGOTH] has fulfilled its obligation to develop and renovate the hotel since Jan. 1 st, 1992.

3. An award compelling [EGOTH] to pay to [HELNAN] a sum of EGP 20,000,000.00 (twenty million pounds) as indemnity for the moral damage sustained by [HELNAN] as a result of defaming its reputation.

4. An award compelling [EGOTH] to pay to [HELNAN] a sum of EGP 21,772,241.00 (twenty one million, seven hundred seventy two thousand, two hundred and forty one Egyptian pounds) which is the debit balance in the accounts of the hotel for the provision of the burden of financing the Manager for development and the expenses of the head office during the period from Jan. 1st , 1987 till Oct. 31, 1997 and a sum of 16,105,265.00 (sixteen million, one hundred and five thousand, two hundred and sixty five Egyptian pounds) which is the debit balance in the accounts of the hotel for the said provision during the period from Nov. 1st., 1997 till June 30, 2002 pursuant to the report of the accounts controller of the hotel, due to the fact that the dissolution of the management contract and its addendums includes the addendum of Oct. 15, 2002 by which [HELNAN] relinquished the two mentioned sums, and its dissolution necessitates restoring the status to what it was prior to concluding this addendum.

Seventh: An award compelling [EGOTH] with expenses and counsel's fees for the subsidiary case.

Eighth: A summary award pursuant to Article 42 of the Law of Arbitration in Civil and Commercial Matters, and urgently compelling [EGOTH] to cease immediately after the issuance of the summary award all procedures of selling Helnan Cairo Shepheard Hotel as well as the procedures of establishing or transferring any right thereon to third party that would likely permit this third party to directly or indirectly interfere in the management and operation of the said hotel or affect in any way the rights of [HELNAN] established in the addendum concluded on Oct. 10, 2002 or which would likely introduce any change to the capacity of the Egyptian Organization for Tourism and Hotels (EGOTH) as an original Arbitration Petitioner and an original Arbitration Petitioner in the current arbitration until the award which will be issued resolving the subject matter of all requests expressed in the original case and the subsidiary case in the current arbitration are fully executed.”

130. The comparison of the respective claims and counterclaims in each of the proceedings shows that even if the subject matter of the disputes is the same, i.e. the Management Contract, the relief sought is not identical, although it is globally aiming at the same result: allowing HELNAN to continue to be in charge of the management of the Shepheard Hotel, obliging the owner of the Hotel to renovate it and obtaining compensation for alleged damages. Furthermore, those reliefs are not based on the same legal grounds or the same causes of actions. In the Cairo Arbitration, HELNAN action was grounded on the Management Contract as it purported to enforce its contractual rights. In the instant ICSID arbitration, HELNAN’s actions are grounded on the Treaty: it contends that it and its investment were subject to unfair, discriminatory and inequitable treatment by EGYPT. The issues could not have and were not submitted

to the Cairo Arbitration which would have been incompetent to deal with them. They definitely fall within the jurisdiction of this ICSID tribunal.

131. On the basis of the above, the Arbitral Tribunal concludes that EGYPT's objections concerning the admissibility of HELNAN's claims must be dismissed. The *res judicata* effect of the Cairo Award is limited to the Egyptian legal order and cannot be opposed to the admissibility of HELNAN's claims grounded on the alleged breach of the Treaty. The consequences of the *res judicata* effect of the Cairo Award within the Egyptian legal order will be dealt with when discussing the merits of the case.

C) The Merits of HELNAN's Claims

132. The core of HELNAN's position is that EGYPT wanted to terminate the contractual relationship because it considered the Management Contract an obstacle for the privatization of the Shepheard given that in the case of a sale of the hotel, the 15 October 2002 Amendment allowed the sale of the hotel, but also gave HELNAN the right either to remain as the manager or to be adequately compensated. For this reason, making an improper use of its authority over the holding company HOTAC, EGOTH and the Ministry of Tourism, EGYPT proceeded to orchestrate a series of events which ultimately lead to HELNAN's eviction from the Hotel.
133. In HELNAN's submission, the downgrading of the Shepheard hotel by the Ministry of Tourism on 7 September 2003 from a five-star hotel to a four-star hotel was the pivotal point in EGYPT's strategy aimed at the termination of the Management Contract and HELNAN's loss of its investment. Indeed, the Management Contract obliged HELNAN "to

*manage and operate the hotel as a 5 star*²¹. Consequently, the downgrading of the hotel led to a situation which was not in conformity with HELNAN's contractual obligations and under Egyptian law gave EGOTH the formal legal opportunity to terminate the Management Contract and to obtain, through arbitration proceedings, the eviction of HELNAN from the hotel.

134. HELNAN alleges that in order to allow and implement such a strategy, EGYPT, through EGOTH, rejected the numerous renovation and upgrade plans for the Shepheard prepared and submitted by HELNAN. For the same reason the Ministry of Tourism carried out the 2003 inspections in a way which did not conform to accepted policy and practice. After an inspection was conducted in a hostile fashion on 14 June 2003, an unjustifiably harsh report was issued which did not even provide HELNAN with a grace period to cure any alleged violations. A further inspection took place on 4 September 2003, followed by a second inspection report filed on that same day. The decision to downgrade the hotel was issued three days later, on 7 September 2003.
135. The Cairo arbitration proceedings were initiated 25 days after the downgrading, a move which HELNAN believes to have been actually planned even before the decision to downgrade the hotel was made. After the Cairo Award terminated the Management Contract, EGYPT pursued its enforcement in a way that HELNAN considers to be unfair.
136. According to HELNAN, this series of actions amounts to abusive actions by Egyptian government officials who used the inspections and the downgrade to ensure HELNAN's eviction from the Shepheard. As a

²¹ Article 3.1 of the Management Contract: "*The owner is giving by this contract the management of the hotel to the manager. The manager is hereby engaged to manage and operate the hotel as a 5 star and to provide it with all facilities and services usually presented by managers of other hotels of the same standard.*"

result, its rights under the Management Contract were indirectly expropriated on 7 September 2003 due to the downgrade and later directly expropriated on 23 March 2006 when its eviction from the Shepheard took place and this without fully satisfying the conditions provided by Article 5 of the Treaty. Consequently, HELNAN requests the Tribunal to reinstate it as manager and operator of the Shepheard and award it compensation for losses not covered by such a reinstatement or, alternatively full compensation for all its losses should it not be reinstated in the Shepheard.

137. Moreover, although it does not ask for specific compensation in this respect, HELNAN contends that in implementing its alleged plan aimed at its expulsion from the hotel, EGYPT breached further articles of the Treaty. The manner in which the 2003 inspections and the later downgrade were carried out would constitute a breach of EGYPT's obligation of fair and equitable treatment of HELNAN's investments pursuant to Article 3 of the Treaty. The initiation of the Cairo Arbitration proceedings and the enforcement of the resulting award would be unfair as well. EGYPT's behaviour would be also unreasonable and discriminatory as well, since EGYPT's treatment of HELNAN, under many aspects, was allegedly less favourable than the treatment granted to other hotel managers, in breach of Article 2 (2) of the Treaty.

a) The individual breaches of the Treaty alleged by HELNAN

138. HELNAN points out that the 14 June 2003 inspection did not follow the customary practice. This is confirmed by the record: on a Saturday, a Ministries' day-off in Egypt, with no previous warning, contrary to the usual policy as described in the Joint WTO & IH&RA Study on Hotel Classification of 16 April 2004, the inspection was carried out by an

exceptionally large team. Moreover, contrary to the prevailing practice evidenced by the 10 inspection reports submitted by EGYPT in its Exhibit 18, the inspection report was not sent directly to HELNAN by the Ministry of Tourism but to EGOTH on 28 June 2003. This was done two weeks after the inspection took place whilst with the exception of an inspection of August 1991, the average time between the inspection and the establishment of the report is between 3 and 4 days. EGOTH kept the report one month before forwarding it to HELNAN on 29 July 2003.

139. The letter of 28 June 2003 of the Ministry of Tourism to EGOTH (Claimant's Exhibit 80) complained about the general decline of the hotel as to furniture, services, utilities and rooms and also about its pricing policy. It underscored that the hotel deserved to be downgraded from five to four stars. Attached to that letter was a "*statement of the most observations revealed to the inspection committee*" which mirrored the content of a Memorandum submitted to the Minister of Tourism (Respondent's Exhibit 18 K). The failures pointed out were of such a magnitude that they were not likely to be addressed within a short period. The English translation provided by the Claimant mentions *inter alia* "[c]hanging the entire furnishing, curtains and carpets" of the rooms and corridors, "[u]pgrading the level of the bathrooms of the rooms, accessories of the bathrooms, its requirements, napkins, and towels", "[r]enewing the pathways as to the wall, floors, ceilings, carpets, air conditions and lighting", "[c]omplete upgrading kitchens (Main - Parties- Specialized) should be made as to the walls, ceilings, floors and the electrical links", inadequacy of the staff, etc.
140. HELNAN did not seriously challenge most the observations of the inspection committee. As shown in its letter of 10 August 2003 to the

Chairman of EGOTH (Claimant's Exhibit 87), it puts the blame for the situation on EGOTH for not having made the necessary investments.

141. As a matter of fact, this situation was not unprecedented. A letter of the Ministry of Tourism to the Chairman of EGOTH, of 24 August 2000, had a very similar content (Respondent's Exhibit 19). In that letter, the Ministry, referring to an inspection conducted by a joint committee from the Supervision of Hotels and Veterinary Sector, complained about “*the degradation of the quality of certain facilities and the rooms of the Hotel*” and recalled “*repeated warnings to enhance the quality of the hotel and to set a development plan which has not been presented so far, as the plan presented to the Directorate was unscheduled financial plan*”. The letter added that a development should be presented within one month and that: “*If the plan is not presented, the grade of the hotel shall be down graded (sic) from Five Stars to Four Stars. Such grace shall be considered as a final grace...*” The 24 August 2000 letter contained a long list of requirements for renovation, of less magnitude than those listed with the letter to the Chairman of EGOTH of 28 June 2003, but implying as well the need for a long term action. As in 2003, HELNAN did not deny in 2000 that the renovation required by the Ministry was necessary. On the contrary, its letter of 25 September 2000 to the Ministry of Tourism (Respondent's Exhibit 20) refers to a program for renovation agreed upon with EGOTH and to HELNAN's “*total commitment to achieve the desired results in due time.*”
142. The reference to the 24 August 2000 letter of the Ministry of Tourism to EGOTH is necessary to understand the background to the 14 June 2003 inspection and the fact that it did not follow the customary practice of routine inspections. It is evidenced by the resulting reports (Respondent's

Exhibit 18) that routine inspections addressed relatively discrete issues but not the standing of the hotel Shepheard as a whole and the need for a long term investment. It is interesting to note that after the downgrading of the hotel, routine inspections of the hotel were continued, the reports being sent to HELNAN as usual (Respondent's Exhibit 21). The different nature of the inspection which triggered the 24 August 2000 and 28 June 2003 letters of the Ministry of Tourism may explain that those letters and the result of the inspections were sent to EGOTH and not to HELNAN. This explanation is clearly indicated in the Memorandum submitted to the Minister of Tourism after the 28 June 2003 inspection (Respondent's Exhibit 18 K). Obviously, however, it does not explain why EGOTH waited one month before transmitting the results of the inspection and the Ministry's concern to HELNAN.

143. However, this must be put within the context of the then ongoing dispute between EGOTH and HELNAN regarding the responsibility for the investments in the hotel pursuant to the Management Contract. This was illustrated *inter alia* in the witness statement of Mr El Galaly, founder of the HELNAN group and its president (paras. 27 and 28) and also during his examination at the Hearing²². The dispute between EGOTH and HELNAN was disposed of by the Cairo Award, the *res judicata* effect of which this ICSID Tribunal has to accept as being within the Egyptian legal order, and which is further discussed below. In relation to this arbitration, the only significant finding that the Arbitral Tribunal may reach at this stage is that after a final grace period granted to the owner of the Shepheard hotel to proceed to a significant renovation of the hotel in 2000, this renovation, which HELNAN accepted as necessary, did not take place because of a contractual dispute between EGOTH and

²² Trans. Day 3, p. 36 to 59.

HELNAN concerning the investment burden. In those particular circumstances, the way the 2003 inspection was conducted and the fact that its results were notified to EGOTH, the owner, and not to HELNAN, cannot be deemed to amount to a breach of EGYPT's obligations under the Treaty. The 2003 inspection was not a routine inspection but had a different scope and purpose aimed at the standing of the hotel as a whole and the need to determine its general status. Within this broader context, the Tribunal does not find that the 2003 inspection violated the principle of fair and equitable treatment.

144. The 4 September 2003 inspection raises a different issue. As the one performed in June, it was carried out without any warning, about one month after HELNAN had received the report following the June inspection. The report following the 4 September 2003 inspection does not specifically address the requests for improvement and renovation made in the June report, to which no express reference is made: the focus is more on the prices and occupancy rates of the hotel, the cleaning and the adequacy of the staff (Claimant's Exhibit 91). This is surprising as such. But what is even more surprising is that the inspection took place. The Memorandum submitted to the Minister of Tourism after the 14 June 2003 inspection (Respondent's Exhibit 18 K) indicated after noting that "*The management level does not suit a Five Stars hotel*", that "*The management of the hotel previously received a notice and it was notified several times with remarks in order to act accordingly. However, the management of the hotel does not respond and does not observe such remarks. Consequently the hotel will be downgraded to Four Stars and will be notified of the need to observe the health, Civil and security defense remarks*". Thus, within the logic of the Memorandum, all the conditions were met to decide on the downgrading without a new

inspection which could not bring results very different from those in June, since the requirements for renovation observed at the time could not have been met within two months due to their magnitude. This makes that second inspection very suspicious.

145. The fact that the resulting report was sent out and dated on the very day of the inspection, 4 September 2003, coupled with the sending of this report on the same day to the Minister of Tourism with the recommendation that the Shepeard hotel be downgraded from five stars to four stars adds to that feeling. The same is true for the preparation for the Minister, on that same day as well, of a Memorandum by his Legal Counsellor with the same recommendation, attaching a draft Decree ordering the downgrade of the hotel to four stars. The Decree was issued just three days after, on 7 September 2003.
146. In view of those circumstances, the Arbitral Tribunal comes to the conclusion that the 4 September 2003 inspection was a semblance, carried out as a mere formality deprived of any substance and part of the implementation of an already taken decision to immediately downgrade the Shepheard Hotel.
147. However, this does not necessarily lead to the conclusion that because of this suspicious inspection and the following downgrade, EGYPT is responsible for breaches of the Treaty provisions. It must be recognised that the decision to downgrade the hotel could as well have been taken after the 14 June 2003 inspection, as suggested by the subsequent Memorandum submitted to the Minister of Tourism (Respondent's Exhibit 18 K). This was not done and, instead, the Egyptian administration decided that it had to organise a semblance of inspection to produce a report which reached the same result as the June report. The

Tribunal cannot ignore that after the 28 June 2003 letter of the Ministry of Tourism, HELNAN never seriously challenged the conclusions in favour of the downgrading of the hotel. Its main line of argument was to put the responsibility on EGOTH. As already pointed out, the allocation of responsibility for the downgrading was of a contractual nature outside the scope of jurisdiction of this Arbitral Tribunal. Under these circumstances, the downgrading as such cannot amount to a breach of EGYPT's obligations under the Treaty, even if the procedure followed was rather suspicious.

148. Moreover, HELNAN never attempted to challenge the downgrading before the competent Egyptian administrative courts. It wrote several times to the Ministry of Tourism. At least on three occasions the Ministry of Tourism refused to change its decision on the ground that the four stars rating should be maintained until the necessary improvements and renovation of the hotel was achieved. In one of its statements, the Ministry of Tourism expressed the view that referring to the dispute between EGOTH and HELNAN regarding necessary investments was of no assistance to HELNAN for securing the upgrade of the hotel (Respondent's Exhibit 23C). But HELNAN's efforts stopped at the Ministry's level. At no time did HELNAN try to test the validity of the Ministry decision to downgrade the hotel before the Egyptian administrative courts. The Arbitral Tribunal has to take note of this conduct of HELNAN. The way the 4 September 2003 inspection was carried out and the frantic activities which followed it in order to issue a downgrading Decree of the hotel in 3 days may well have deserved an action in the administrative courts. HELNAN decided not to follow that path. The parties entered into a discussion as to the requirement for HELNAN to exhaust local remedies before starting this arbitration. It was

undisputed at the end of such discussion that no such requirement existed. However, as pointed out in the Award of 15 September 2003 in the case Generation Ukraine “...*an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies, but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable - not necessarily exhaustive - effort by the investor to obtain correction*”²³. This comment is very relevant to the circumstances of the instant case. The ministerial decision to downgrade the hotel, not challenged in the Egyptian administrative courts, cannot be seen as a breach of the Treaty by EGYPT. It needs more to become an international delict for which EGYPT would be held responsible under the Treaty.

149. EGOTH’s recourse to arbitration pursuant to the relevant clause in the Management Contract was the exercise of a contractual right which, as such, cannot amount to a breach of the Treaty by EGYPT. HELNAN underscores that this recourse was filed in a hurry after the downgrading of the hotel, but this could be significant only for the assessment of the existence of a coordinated plan to evict HELNAN from the Hotel, an issue that the Arbitral Tribunal will consider later on.
150. Neither the conduct of the Cairo Arbitral proceedings nor the arbitrators’ decision is presented by HELNAN as a breach of the Treaty by EGYPT, although the Cairo Award terminated the Management Contract. However, HELNAN contends that the enforcement of that award was a breach of the Treaty. HELNAN explains that “*the Cairo tribunal found that Helnan had outperformed its contractual obligations. This constituted*

²³ Generation Ukraine Inc.v. Ukraine (ICSID Case No. ARB/00/9), 16 September 2003, p. 91.

a complete rejection of the basis upon which EGOTH initiated the arbitration. Clearly it was unfair to pursue termination once it was confirmed that HELNAN had not breached the Management Contract”²⁴.

The Arbitral Tribunal cannot accept such a position which is self-contradictory. Although the Cairo Award actually found that none of the parties had breached the Management Contract, it decided to terminate it because it was impossible to be performed. In view of this decision, HELNAN could not expect EGOTH - which had requested the termination of the Management Contract in the arbitration - to accept that part of the award which absolved HELNAN for any contractual fault but to ignore that other part which granted it the relief it had sought. Moreover, HELNAN assumes that EGOTH’s actions should be attributed to EGYPT, which presupposes again the hypothesis of a coordinated plan to evict HELNAN from the Hotel, an issue that the Arbitral Tribunal will consider later on. As such, the enforcement of an arbitration award cannot be a breach of the Treaty.

151. HELNAN further alleges that EGYPT interfered with HELNAN’s attempts to stay the enforcement of the Cairo Award by improper influence on the judge. This serious allegation is mainly based on Mr Diaa Adbel Ghany Ahmed’s testimony, who was present at the hearing of 19 February 2006 of the Abdien Court for Urgent Matters dealing with an application by HELNAN for suspension of the enforcement of the Cairo Award. Mr Diaa Adbel Ghany Ahmed is Administration, Legal and Security Manager in the HELNAN’s Cairo Regional Office and attended the hearing as part of a larger HELNAN’s team. However, his testimony is based on his personal impressions and is highly speculative. His testimony was directly contradicted by Ms Dorreya Refaat’s witness

²⁴ Claimant’s post-hearing memorial, p. 58.

statement. HELNAN's counsel chose not to cross-examine her on this issue, although he did it most efficiently on other issues. Therefore the Arbitral Tribunal concludes that HELNAN did not bring any convincing evidence in this respect.

152. On the basis of the above, the Arbitral Tribunal is satisfied that, individually taken into consideration, none of the elements in the chain of alleged actions and/or omissions by Egyptian parties or authorities which led to the downgrading of the Shepheard hotel and HELNAN's eviction from it, would constitute breaches of the Treaty. It is quite possible that, in similar circumstances, HELNAN was treated less favourably than other hotel managers but this could be a breach of Article 2 (2) of the Treaty only if it was established that EGOTH's actions and/or omissions are attributable to EGYPT and not to EGOTH as HELNAN's contractual partner. If not, the fact that the quality of the relations between contracting partners varies from case to case has nothing to do with a discriminatory treatment in the sense of the Treaty, even if one of the partners is always the same, EGOTH, and is controlled by the State. As pointed out in the Decision on Jurisdiction, this control is not sufficient for EGOTH's acts and/or omissions to be attributed to EGYPT. They would have to fit within the pattern of a coordinated plan engineered by EGYPT as HELNAN alleged to be the case. Conduct by a government relating to contractual matters which is not shown to be governmental in nature will not fall under the guarantees of the Treaty even if it is alleged that third parties receive different treatment. To hold otherwise would mean that in effect all contractual breaches would be covered by the Treaty simply by reference to treatment of third parties. Such a result would find no support in state or arbitral practice and would contravene the accepted difference between contractual rights and treaty rights.

b) The hypothesis of a coordinated plan by EGYPT to evict HELNAN:

153. As will be recalled, HELNAN's contractual thesis is that EGYPT considered the Management Contract an obstacle for the privatization of the Shepheard hotel and that, making an improper use of its authority over the holding company HOTAC, EGOTH and the Ministry of Tourism, it orchestrated a series of events which ultimately led to HELNAN's expropriation of its investment in breach of Article 5 of the Treaty.
154. The Arbitral Tribunal has already found that the 4 September 2003 inspection of the hotel was a semblance, conceived as a mere formality deprived of any substance, and part of the implementation of an already taken decision to immediately downgrade the Shepheard Hotel. The following filing of the arbitration request within the short period of 25 days in order to obtain the termination of the Management Contract appears to have been part of the same plan. This was impliedly confirmed by Mrs Dorreya Refaat of EGOTH's Legal Affairs Department at the Hearing when she indicated, under cross-examination, that the downgrading was known within EGOTH approximately 60 days before the filing of the request for arbitration. The following exchanges with Claimant's counsel were instructing:

Q. “*When did you first learn of the downgrade of the Shepheard Hotel?*

A. *Before initiating the procedures for the arbitration by a very, very short time. Approximately 60 days before.*

Q. *I'm sorry, you learnt of the downgrade 60 days before initiating the arbitration?*

A. *Approximately, yes*²⁵.

.....

Q. “*Who told you about the downgrade?*

²⁵ Transc. Day 4 p. 75

A. The sector concerned within the organisation told me. There is a sector that is concerned with the survey and monitoring of the hotels, and from that I knew about this”²⁶.

155. The indication by Mrs Dorreya Refaat in re-examination that she was mistaken in her answers to Claimant’s counsel was far from being convincing, since the way the question was put by EGYPT’s counsel, if not leading, allowed the witness to understand the consequences of her first, candid, answer. Moreover, a period of 60 days to prepare a request for arbitration seems to be more realistic than the period of 25 days.
156. Thus, the Arbitral Tribunal is satisfied that EGOTH and various Egyptian authorities, including the Ministry of Tourism, played a significant role in the implementation of a plan aiming at terminating the Management Contract. There is no doubt that the 4 September 2003 inspection, the report of the same date containing the recommendation that the Shepheard hotel be downgraded, the preparation for the Minister of Tourism, on that same day as well, of a Memorandum by his Legal Counsellor with the same recommendation, attaching a draft Decree ordering the downgrade of the hotel to four stars, were part of such an overall plan.
157. Together, these manoeuvres evidence a plan aiming at terminating the Management Contract, with the active participation of the Ministry of Tourism in the implementation of the plan. The decisive question is whether this plan was adopted by EGYPT to get rid of HELNAN to be able to privatize the Shepheard hotel more easily. The only evidence of intervention of the administration to obtain, directly or indirectly, the termination of the Contract is based on hearsay, with no further corroborating evidence.

²⁶ Transc. Day 4 p. 76

158. Indeed, HELNAN has in this context filed a witness statement by Mr Bahi Nasr, a former Chairman of the Egyptian Hotels Company (EHC), the predecessor of EGOTH, from 1985 to 1989. In this witness statement, Mr Nasr declared that “*the first undersecretary to the ministry of Tourism*” told him that “*Mr Moustafa Eid the then President of the Holding Company for Housing, Tourism and Cinemas had specifically ordered that the Shepeard Hotel be downgraded by one star to provide EGOTH with an excuse to cancel the management contract with Helnan*”. At the hearing, Mr Nasr was far from being convincing. He did not remember precisely the conversation he reported, but explained that he suspected that Mr Moustafa Eid wanted to get rid of the Management Contract so that EGOTH might sell the Shepheard hotel to a Libyan company of which he also happened to be the Chairman. Mr Moustafa Eid testified and denied having ordered the downgrade of the Shepheard Hotel. He was not cross-examined on this point. Another reason to doubt the accuracy of Mr Nasr’s testimony is that he indicated to have informed at the time Mr El Galaly, HELNAN’s President and a close friend, of the reported conversation with the undersecretary to the Ministry of Tourism. If such has been the case, it is even less understandable that HELNAN abstained from challenging in the administrative courts the downgrade decision.
159. Moreover, even if the conversation referred to by Mr Nasr did actually take place, it would not necessarily prove that EGYPT had engineered a plan to get rid of HELNAN in order to be able to privatize the Shepheard hotel more easily. Mr Nasr’s suspicions that Mr Eid was acting in his own interest, if confirmed, would indicate a completely different scenario, in particular, since HELNAN, informed by Mr Nasr, chose not to challenge the downgrading Decree in the competent administrative jurisdiction. In

any event, Mr Nasr's version of Mr Eid's plan has not been proven to be correct in the proceedings.

160. As already mentioned, the Arbitral Tribunal is convinced that the 4 September 2003 inspection and the following downgrade made in a hurry was part of a plan to terminate the Management Contract. But in the light of the record of this arbitration, the probability that this plan was engineered by EGOTH to put an end to its commercial dispute about the burden of the investment in the hotels seems as least as high as HELNAN's suggestion that the plan was engineered by EGYPT to facilitate the privatization of the hotel. The undisputed facts that the Shepheard hotel was not privatized, and that it has not recovered its five-star status so far, are at odds with HELNAN's explanation. In any case, and whatever be the real explanation, the Arbitral Tribunal is bound to conclude as a result of all these observations, that HELNAN did not discharge its burden to prove that EGYPT had engineered a plan to get rid of HELNAN in order to be able to privatize the Shepheard hotel more easily.
161. The participation of individuals of the Ministry of Tourism in a plan aiming at the termination of the Management Contract is not sufficient to conclude that not only EGOTH but also those individuals wanted that termination or that a breach of the Treaty is established. The downgrade of the hotel and the termination of the Management Contract are two different issues, as evidenced by the Cairo Award.
162. After all, the Ministry of Tourism had the right to downgrade the hotel after the June 2003 inspection. It did not do it for reasons which remain unclear. Then, the downgrade was done in a hurry in September 2003, for reasons which were not elucidated either. The background and the details

of these actions by the Ministry could have been established and reviewed in proceedings before local courts, but HELNAN did not consider it useful to challenge the decision with the competent administrative court where the legality of the downgrading could have been discussed. HELNAN preferred to keep the dispute at the contractual level. In the Cairo arbitration, HELNAN did not insist so much on the illegality of the Decree downgrading the hotel but on the contractual liability of EGOTH in refusing to make the necessary investments in the hotel to maintain its five-star status. HELNAN's own behaviour and its failure to take the legal steps to challenge the downgrade of the hotel disqualify its claim before this Tribunal that such downgrading was made in breach of the Treaty. Furthermore, and most significantly, whatever motivations were behind the sudden decision to downgrade the Shepheard hotel and the suspicious procedure followed to do it, this was not the cause of the Management Contract termination by the Cairo Tribunal.

163. The Management Contract was terminated by the Cairo Award on 30 December 2004 pursuant to the arbitration clause included in the Management Contract. This award was rendered by three arbitrators enjoying the powers of *amiable compositeur* as expressly agreed by the parties. It is final and binding. It has been enforced and has *res judicata* effects in the Egyptian legal order. As Egyptian law was applicable to the Management Contract, the present Arbitral Tribunal cannot ignore its effect, unless it would be established that the rendering of the Award was made in breach of the Treaty, or general international law.
164. The Tribunal has already pointed out that neither the conduct of the Cairo Arbitral proceedings nor the arbitrators' decision was presented by HELNAN as a breach of the Treaty or of international law by EGYPT.

HELNAN was able to freely appoint an arbitrator and it appointed somebody it trusted, Dr Abdel Wahab, who it had previously appointed in another arbitration against EGOTH. Dr Abdel Wahab cannot be suspected of bias towards EGOTH. Indeed, it was EGOTH which seemed to fear the contrary as it indicated during the Cairo Arbitration that Dr Abdel Wahab had been appointed before in several others arbitration proceedings by EGOTH's opponents and invited the arbitrators to consider whether these various appointments would not justify Dr Abdel Wahab's withdrawal. The Cairo arbitral tribunal decided to disregard this information provided by EGOTH²⁷. Yet, the award declaring the termination of the Management Contract was unanimous.

165. The Tribunal has also found *supra* that the enforcement of the Cairo Award was not a breach of the Treaty.
166. The Cairo arbitral tribunal had to decide *inter alia* a claim by EGOTH that the Management Contract “*and its addendums (sic) was automatically dissolved*” for breach of contract and that HELNAN should consecutively be expelled from the Hotel²⁸. EGOTH considered that HELNAN had “*lowered the standards of the hotel to four stars*” and, thus, had breached Article 3 of the Management Contract which required HELNAN “*to manage and operate the hotel as a five star hotel*²⁹”. HELNAN underscored that it was not responsible for the downgrading of the hotel, but that EGOTH was, for breaching its contractual obligation to develop and renovate the hotel³⁰. HELNAN requested *inter alia* the Cairo arbitral tribunal to order that EGOTH should “*proceed immediately with*

²⁷ Award of 30 December 2004, pp. 93-95.

²⁸ Award of 30 December 2004, pp. 95-96.

²⁹ Award of 30 December 2004, p. 10.

³⁰ Award of 30 December 2004, p. 34.

developing and renovating the hotel pursuant to the development plans submitted by (HELNAN) from the private funds of EGOTH³¹.

167. Deciding as *amiable compositeur*, the Cairo arbitral tribunal refused to share the position of any of the parties. It found that none of the parties was in breach of the Management Contract but that:

“The inability of both parties to achieve their target in the contract in spite of their sacrifices which exceeded their obligations by virtue of the contract was attributable to the fact that the structural status of the hotel’s building based on the reports which were prepared by experts did not permit that they would be burdened by services of a five star hotel, unless a finance would be appropriated for its development and renovation which way exceed that (sic) was appropriated and planned for by both parties. The acceptance of both parties to fulfill their target through the obligations which were determined by the contract to achieve the said target was characterized by unreality and short of accurate assessment, due to the fact that it was impossible, by the performance of both parties to their obligations, for the target which they have determined in the contract as regards developing and renovating the hotel and as regards the level of its services, to be achieved. Accordingly, the non-execution of the contract due to the drop in the standard of the hotel and the drop in the prices of its services, as well as the deterioration which afflicted its utilities and services must be based in the first degree on the lack of both parties to an agreed upon accurate assessment and a realistic plan to finance the renovation and development of the hotel and raise its level of services, as it is not possible for the condition reached by the hotel to be based on the breach of any party to its obligations which were arranged in connection with a building some concrete parts of which were damaged, some units of which were out of service and the capabilities and services of which deteriorated”³².

(...)

And whereas the conditions of the automatic dissolution of the contract pursuant to Article 12.2 were not realized pursuant to the provision of the law, and whereas it was revealed from explaining

³¹ Award of 30 December 2004, p. 97.

³² Award of 30 December 2004, p.114.

the facts of the case and that was gathered by the Panel from its papers and documents that it has become impossible to execute the contract together with achieving the target laid down by both parties – without a finance that way exceeds the obligations of both parties by virtue of the contract and also exceeds what they have presented voluntarily without obligation from the contract”³³.

168. Thus, the Cairo arbitral tribunal terminated the Management Contract because it found that it could not be performed. It stressed that “... *the law permits the dissolution of the contract in this case which is not attributed to a foreign reason pursuant to the provision of Article 159 of the Civil Code which stipulates ‘in contracts that are binding to both sides, if an obligation expires as a result of the impossibility of its execution, the obligations corresponding thereto expire and the contract automatically dissolves’.*”³⁴ This shows beyond doubt that the downgrading of the Shepheard hotel was not the cause of the termination of the Management Contract by the Cairo Award. Thus, even if the present Arbitral Tribunal had found that the downgrading was part of a plan engineered by EGYPT in order to evict HELNAN from the hotel - and no finding of that sort was made by this Arbitral Tribunal - such plan would have failed since the termination of the Management Contract and the subsequent eviction of HELNAN was not caused by the downgrading of the hotel. The Management Contract was terminated on the basis of a completely different legal ground, as explained by the Cairo arbitral tribunal. The facts on which the Cairo decision is based fall within the realm of the parties’ commercial and contractual relations and EGYPT has no role whatsoever therein. HELNAN insists that the downgrading gave EGOTH a pretext to start the arbitration. This may be true in itself, even though it has been found above that the Hotel exhibited deficiencies not appropriate

³³ Award of 30 December 2004, p.115.

³⁴ Award of 30 December 2004, p.116

for a five-star hotel and even though HELNAN decided not to challenge the downgrade before the local courts. But under the circumstances it cannot be said that a relation of legal causality existed between the downgrade and the termination of the contract. Should EGOTH have started the arbitration before the downgrading decision, for instance after the report following the June 2003 inspection, the Cairo Arbitral would have been able to render exactly the same decision on the basis of the existing dispute among EGOTH and HELNAN regarding the deterioration of the hotel and the responsibility for investments.

169. In view of the foregoing considerations, the Arbitral Tribunal is of the view that HELNAN has failed to prove that any breach of the Treaty by EGYPT had caused the termination of the Management Contract and its eviction from the Shepheard hotel.
170. Since all the relief sought by HELNAN in this arbitration is grounded on the assumption that its eviction from the Shepheard hotel was the result of the breach of the Treaty by EGYPT, all HELNAN's claims will be dismissed, apart for its claim for costs which is dealt with hereinafter. In view of the Arbitral Tribunal's determination with regard to a lack of liability on the part of Egypt, the question of damages of Claimant and the numerous issues that would need to be addressed in connection with their quantification do not arise.

D) The Costs of the Proceedings

171. The Claimant, by its submission of 3 December 2007, corrected on 14 December 2007, requested that it be awarded a total of £ 2,503,867 for costs.

172. The Respondent, by its submissions of 3 December 2007, requested that it be awarded US\$ 742,556, € 116,133 and EGP 668,610.32 for costs. It confirmed those amounts in its submission of 15 December 2007.
173. Provisions regarding the Tribunal's decision in the matter of costs are to be found in Art. 61 (2) of the ICSID Convention and Arts. 28 and 47 (j) of the ICSID Arbitration Rules. As none of these provisions mentions specific criteria for the decision on costs, the Tribunal has taken into considerations all the circumstances of this case. In particular, it notes that, although all its claims ultimately failed, the Claimant succeeded on issues of jurisdiction and admissibility which significantly contributed to the time and costs spent in this arbitration.
174. Therefore, using the discretion that it has under the ICSID Convention and the ICSID Arbitration Rules, the Arbitral Tribunal deems it fair and reasonable that the cost burden be shared in the sense that each party will bear its own legal and other expenses and that both parties will bear 50 % of the arbitration costs.

On the basis of the foregoing reasons and those presented
in its Decision on Jurisdiction of 17 October 2006, attached

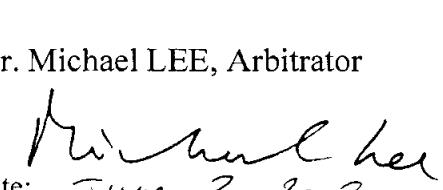
THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS:

1. The Arbitral Tribunal has jurisdiction over the dispute submitted to it in this arbitration.
2. The claims raised by the Claimant are admissible.
3. The claims raised by the Claimant are dismissed.
4. Each party shall bear the expenses incurred by it in connection with the present arbitration.
5. The arbitration costs, including the fees of the members of the Tribunal, shall be borne by the parties in equal shares.

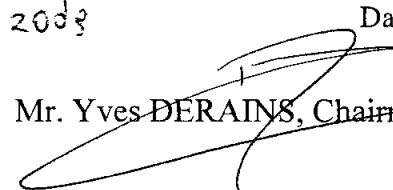
Date :


Prof. Rudolf DOLZER, Arbitrator

Date: JUNE 7, 2008


Mr. Michael LEE, Arbitrator

Date: June 2, 2008


Mr. Yves DERAINS, Chairman

Date: JUNE 2, 2008

ATTACHMENT

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

IN THE PROCEEDINGS BETWEEN

HELNAN INTERNATIONAL HOTELS A/S,

(Claimant)

AND

THE ARAB REPUBLIC OF EGYPT

(Respondent)

CASE n° ARB 05/19

**DECISION OF THE TRIBUNAL ON OBJECTION
TO JURISDICTION**

Members of the Tribunal

Me. Yves DERAINS (Chairman)
Professor Rudolf DOLZER (Arbitrator)
Mr. Michael LEE (Arbitrator)

Secretary of the Tribunal:
Mrs. Gabriela Alvarez-Avila

Representing the Claimant

Mr. Peter R. GRIFFIN,
Mrs. Ania FARREN
Mr. Devashish Krisham

Representing the Respondent

Dr. Ahmed EL KOSHERI
Dr. Mohamed Abdel RAOUF
Dr. Karim HAHEZ

Date of Decision: October 17, 2006

I- LEGAL AND FACTUAL BACKGROUND:

- 1.** The Scandinavian Management Company A/S (Hereinafter " Scandinavian") and the Egyptian Hotels Company (Hereinafter " EHC"), entered into a contract for the management and the operation of the Shepheard Hotel (Hereinafter " the Contract") on September 8, 1986 (Hereinafter "the Contract") whereby Scandinavian was entrusted with the management of the Shepheard Hotel in Cairo, owned by EHC.
- 2.** Two annexes and a protocol to the Contract were signed by the parties on December 31, 1986, May 11, 1989 and July 23, 1987 respectively.
- 3.** On June 24, 1999, a Bilateral Investment Treaty (Hereinafter "the Treaty") was concluded between the Government of the Arab Republic of Egypt (Hereinafter " EGYPT") and the Kingdom of Denmark (Hereinafter Denmark) as to the promotion and reciprocal protection of investments. Article 9 of the Treaty provides that "*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 that other Contracting Party shall, as far as possible, be settled amicably*". However, Article 9 adds that the investor is entitled to submit the case to arbitration and *inter alia* to the International Centre for Settlement of Investment Disputes (Hereinafter "the Centre") in the hypothesis where the dispute continues to exist after a period of six months.
- 4.** On March 7, 2000, the Egyptian Company for Tourism and Hotels (Hereinafter " EGOTH") succeeded to EHC's rights and obligations as the result of a merger.
- 5.** The Contract was originally to remain in force for a period of 26 years. On October 15, 2002, a further Annex to this Contract (Hereinafter " the Annex ") was signed between EGOTH and HELNAN INTERNATIONAL HOTELS A/S (Hereinafter " HELNAN"), the latter being described as the successor in interest of Scandinavian. The Annex indicated that, as part of the privatisation program of the State of Egypt, the Shepheard Hotel could be sold by EGOTH, under terms that respect HELNAN's rights under the Contract or its rights to receive appropriate compensation.
- 6.** On September 7, 2003, pursuant to a notification to HELNAN on July 30, 2003 of an inspection of the Hotel and pursuant to a report of September 4, 2003 of a second inspection, the Shepheard Hotel was downgraded by the Minister of Tourism from 5 stars to 4 stars. On October 2nd, 2003 EGOTH initiated an arbitration procedure against HELNAN pursuant to the arbitration clause included in the Contract providing for arbitration under the *aegis* of the Cairo

Regional Center for International Commercial Arbitration. An Award was issued on December 4, 2004 which, *inter alia*, decided to terminate the Contract, ordered the Claimant to hand over to EGOTH the Shepheard Hotel and condemned EGOTH to pay HELNAN the amount of EGP 12,5 Million.

HELNAN's request to set aside this Award was dismissed by the Cairo Court of Appeal on June 7, 2005. On July 12, 2005, the Cour de Cassation also refused to order enforcement stayed. On July 19, 2005, the Cairo Court of Appeal granted exequatur. Finally, the juge des référés dismissed two objections to enforcement brought by HELNAN.

7. On March 23, 2006, EGOTH took over the Shepheard Hotel.

II- THE PROCEDURE

8. On March 8, 2005, on the basis of the 1965 Convention on the Settlement of Investment Disputes between States and nationals of other States (Hereinafter "the Convention") and the Treaty, HELNAN filed a Request for Arbitration against EGYPT before the Centre asserting that Egypt had violated Article 2, Article 3 and Article 5 of the Treaty which provide investments in another contracting party with "*full protection and security*", "*fair and equitable treatment*" and prohibit expropriation "*except for expropriations made in the public interest (...) against prompt, adequate and effective compensation*".

In its Request for Arbitration, HELNAN requested the following:

"A. Provisional Measures

71. *Claimant, Helnan, respectfully requests that, upon constitution, the Arbitral Tribunal provide urgent interim relief:*
 - (i) *recommending that Egypt refrain from taking any action (through EGOTH or any other instrumentalities) to evict Helnan from the Shepheard Hotel on or after 30 March 2005; and*
 - (ii) *recommending that Egypt (through EGOTH or any instrumentalities) ceases immediately all procedures to sell the Shepheard Hotel to any third party, on terms that directly or indirectly interfere with Helnan's management and operation of the Shepheard Hotel, until the issuance of the final award in this arbitration.*

B. Final Award

72. *In the event that the urgent interim relief requested above is granted, and the Shepheard Hotel is not confiscated, Claimant shall seek an award on the merits:*

- (i) *declaring that Helnan should be free to continue to enjoy its management rights to the Shepheard Hotel under the Management Contract until its expiry in December 2012 with similar co-operation and investment from EGOTH as accorded to other foreign hotel chains;*
 - (ii) *ordering the Respondent to pay to Helnan damages, in an amount to be determined, as compensation for its share of the profits lost as a result of the downgrade of the Shepheard Hotel;*
 - (iii) *ordering the Respondent to pay damages, in an amount to be determined, in compensation for reputational damages suffered by Helnan; and*
 - (iv) *ordering the Respondent to pay interest on the amounts awarded in (ii) and (iii) above at an appropriate rate.*
73. *In the alternative, in the event that the Shepheard Hotel is confiscated from Helnan prior to the outcome of this arbitration, Helnan respectfully requests that the Arbitral Tribunal enter an award:*
- (i) *ordering the Respondent to pay (a) damages in the amount of €10 million, subject to further revision, to indemnify Helnan for loss of its share in the total operating profits of the Shepheard Hotel during the remaining period of the Management Contract; or, in the alternative (b) damages in an amount to be quantified in respect of Helnan's lost investment in the Shepheard Hotel;*
 - (ii) *ordering the Respondent to pay damages in the amount of €15 million, subject to further revision, in compensation for reputational damages suffered by Helnan;*
 - (iii) *ordering Respondent to pay €15 million, subject to further revision, representing the balance in the accounts owing to Helnan for servicing the head office and financing the development and renovation works and the debt written off by Helnan on 15 October 2002;*
 - (iv) *ordering the Respondent to pay all of Helnan's costs associated with the defence of the arbitration proceedings taken against it by EGOTH in Egypt, in the amount of approximately €150 thousand;*
 - (v) *ordering the Respondent to pay all of Helnan's costs associated with this arbitration, including the arbitrator's fees and administrative costs fixed by ICSID, the expenses of the arbitration, any expert's fees and expenses, and the legal costs (including attorney's fees) incurred by the parties, in an amount to be quantified;*
 - (vi) *ordering the Respondent to pay interest on the amounts awarded in (i) to (v) above at an appropriate rate; and*
 - (vii) *granting Helnan any other relief that the Arbitrator sees fit."*

9. On February 10, 2006, an Arbitral Tribunal composed of Professor Rudolf DOLZER, appointed by the Respondent, of Mr. Michael LEE, appointed by the

Claimant and Me. Yves DERAINS, Chairman, appointed by the two above mentioned arbitrators was constituted in accordance with article 6 (1) of the ICSID Arbitration Rules (Hereinafter "the Arbitration Rules").

10. On April 6, 2006, the ICSID Secretariat transmitted a letter from Respondent indicating its position regarding the jurisdiction of the Centre to which it had expressed objections.

11. On April 14, 2006, the First Session was held in the World Bank's offices in Paris. At the session the parties expressed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the Arbitration Rules and that they did not have any objections in this respect. The parties also agreed on a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal. In particular it was agreed that the Respondent's objections on jurisdiction would be dealt with as follows:

" (...) the Tribunal, after deliberation, informed the parties that, on the basis of the Arbitration Rule 41 (3), the proceeding on the merits was suspended and that a time limit for the parties to file a Memorial on jurisdiction and a Counter-Memorial on jurisdiction will be fixed. The President also informed the parties that the Tribunal could then decide, pursuant to Arbitration Rule 41 (4) whether to have a hearing on jurisdiction or to join the objections to the merits".

12. During the first session, the parties presented their respective oral arguments as to the Request for Provisional Measures. Such presentation was followed by rebuttals from both parties as well as by questions from the Arbitral Tribunal.

13. On April 26, 2006, Claimant transmitted to Respondent its First Request for Production of Documents.

14. On May 17, 2006, the ICSID Secretariat transmitted an electronic version of the Arbitral Tribunal's Decision on Provisional Measures whereby the Arbitral Tribunal decided to:

*"1) Dismisses Claimant's Request for Provisional Measures;
2) Declares that the costs of this phase of the proceedings will be allocated in its Final Award".*

15. On the same day, the ICSID Secretariat transmitted a letter from Respondent regarding its objection to Claimant's First Request for Production of Documents.

On May 22, 2006, the ICSID Secretariat transmitted certified copies of the minutes of the First Session held on April 14, 2006 as well as certified copies of the Arbitral Tribunal's decision on Provisional Measures.

16. On May 31, 2006, Respondent transmitted an electronic copy of its Memorial on Jurisdiction to the Arbitral Tribunal and to Claimant.

17. On May 31, 2006, the ICSID Secretariat acknowledged receipt of Respondent's Memorial on Jurisdiction and reminded that every communication among the parties needed to pass through the Centre.

18. On June 6, 2006, the ICSID Secretariat transmitted hard copies of the Respondent's Memorial on Jurisdiction. In this Memorial, the Respondent requests that:

"The Tribunal declare that Claimant's Request for Arbitration does not fall within the jurisdiction of the Centre and the competence of the Tribunal and order Claimant to reimburse to Respondent all costs reasonably incurred by it in connection with this proceeding."

19. On June 12, 2006, the ICSID Secretariat transmitted a letter from Claimant providing its observations on Respondent's objections to its First Request for Production of Documents.

20. On June 15, 2006, the ICSID Secretariat transmitted to the parties a letter from the Arbitral Tribunal whereby it invited Respondent to indicate by June 20, 2006 whether it maintained its objections to the Production of Documents.

21. On June 20, 2006, the ICSID Secretariat transmitted an e-mail from Respondent indicating that it reiterated its objections to the Production of Documents.

22. On June 23, 2006, the ICSID Secretariat transmitted, on behalf of the Arbitral Tribunal, an electronic version of Procedural Order No. 1 stating the following:

"WHEREAS, on April 26, 2006, Claimant sent Respondent a Request for Production of Documents;

WHEREAS, on May 17, 2006, Respondent objected to the foregoing production of documents and refused to comply with this Request;

WHEREAS, on June 12, 2006, Claimant requested that the Arbitral Tribunal order the production of documents if Egypt maintained its objections to this production;

WHEREAS, under Article 43 of the ICSID Convention and Rule 34 of the ICSID, the Arbitral Tribunal is empowered, absent contrary agreement and if it deem it necessary, at any stage of the proceeding, to request from the parties that they produce documents; it may also do it further to a request by one of the parties;

WHEREAS, "the IBA Rules on the Taking of Evidence in International Commercial Arbitration" (and particularly Articles 3 and 9), even though not directly applicable in this proceeding, can be considered as a guidance as to what documents may be requested and produced;

WHEREAS, the Arbitral Tribunal examined the first category of documents tied to the ICSID Case No. ARB/98/4 Wena Hotels Ltd. v. Egypt;

WHEREAS, in order to reject the production of these documents, Respondent referred to Regulation 22 of the Administrative and Financial Regulations stating the following:

"(1) The Secretary-General shall appropriately publish information about the operation of the Centre (...)

(2) If both parties to a proceeding consent to the publication of:

(a) reports of Conciliation Commissions;
(b) arbitral awards; or
(c) the minutes and other records of proceeding,"

WHEREAS, in the light of these provisions, Respondent considered that "a party to arbitration can not solely decide to disclose any information relating to such arbitration unless the consent of the other party is expressly reached";

WHEREAS, the Arbitral Tribunal considers that Regulation 22 is not applicable to the present case on the ground that it deals with publication of Awards and other procedural documents -i.e. making them available to the public in general - but do not concern the production of documents to a third party who might have a legitimate interest to have access to these documents to establish its rights;

WHEREAS, additionally, the Arbitral Tribunal notes the fact that the documents in the ICSID Case No. ARB/98/4 Wena Hotels Ltd. v. Egypt have already been subject to generous publications, even though partial ones which have already been submitted in the instant case;

WHEREAS, pursuant to Article 3 of the "IBA Rules on the Taking of Evidence in International Commercial Arbitration", the documents to be produced need to be relevant and material to the outcome of the case and need to be precisely identified;

WHEREAS, the Arbitral Tribunal finds that it is the case of the first category of requested documents provided they deal with the Arbitral Tribunal jurisdictional issues that need to be examined by it at this stage of the proceedings and will order their production;

WHEREAS, however, the Arbitral Tribunal considers that this Production of Documents should be subject to the execution of a confidentiality undertaking by Claimant;

WHEREAS, the second category of documents requested generally refer to the Egyptian's policy to privatize enterprises in the Tourism Sector;

WHEREAS, they are not precisely identified and no precise explanation is given as to their relevancy to the problem of jurisdiction that the Arbitral Tribunal has to solve;

WHEREAS, pursuant to Article 9 of the "IBA Rules on the Taking of Evidence in International Commercial Arbitration", the Arbitral Tribunal will not order their production;

THE ARBITRAL TRIBUNAL HAS DECIDED THE FOLLOWING:

1) The foregoing documents:

- Transcript of Tribunal's session held on 25 May 1999;*
- Transcript of Tribunal's session held on 25-29 April 2000;*
- Transcript of Tribunal's session held on 22-23 October 2001;*
- Transcript of Tribunal's session held on 14 June 2005;*
- All expert reports/opinions (in relation to the Egyptian Tourism industry) and any accompanying document thereof,*

in the ICSID Case No. ARB/98/4 Wena Hotels Ltd shall be produced by Respondent, in their part or in totality, provided they are relevant for issues of jurisdiction that the Arbitral Tribunal needs to examine at this stage of the procedure and upon execution by Claimant of the text of an undertaking of confidentiality worded on the basis of the model attached to this decision.

2) The request for production of all documents and written communications relating to efforts to privatize enterprises within the Egyptian Tourism Sector pursuant to the United States Agency for International Development (USAID) Egypt Privatization Implementation Project is denied."

23. On July 7, 2006, the ICSID Secretariat transmitted a letter from Respondent dated July 6, 2006 whereby it indicated that it complied with Procedural Order No. 1 concerning the requested production of documents.

24. On July 14, 2006, the ICSID Secretariat transmitted an electronic version of Claimant's Counter-Memorial on Jurisdiction.

25. On July 18, 2006, the ICSID Secretariat transmitted a hard copy of Claimant's Counter-Memorial on Jurisdiction, which was received on July 24, 2006. In this Counter-Memorial, the Claimant requests that the Arbitral Tribunal decides:

- *"That the Tribunal has jurisdiction over the claims presented in [Claimant's] Request for Arbitration, and that they are admissible; and correspondingly*
- *That Egypt's objections to jurisdiction be rejected in their entirety.*

Since each of Egypt's objections fail (and indeed some, if not all, are manifestly contrived) [Claimant] respectfully requests that Egypt pay [Claimant's] costs associated with these proceedings, to be determined by the Tribunal in the final award."

In order to save time in the proceedings, Claimant also requested that EGYPT's jurisdictional objections be addressed in the Final Award on the Merits.

26. On July 20, 2006, the ICSID Secretariat transmitted a letter from Claimant correcting a typographical error as to the number of Exhibits submitted.

27. On July 25, 2006, the ICSID Secretariat transmitted a letter from the President of the Arbitral Tribunal whereby he indicated the involvement of its law firm in a case with the Ministry of Water Resources and Irrigation of the Republic of Egypt.

On July 26, 2006, Counsel for Respondent indicated that the foregoing case did not have any impact on the Chairman's independence and impartiality in the present case. On July 28, 2006, Counsel for the Claimant indicated the same.

28. On August 1, 2006, the ICSID Secretariat transmitted, on behalf of the Arbitral Tribunal, a letter indicating to the parties that in the absence of witnesses or experts to testify, the scheduled hearing on jurisdiction would be held solely on August 17, 2006 instead of August 17, 2006 and August 18, 2006. It also transmitted a provisional agenda of the session and requested that Claimant clarify its position on whether the Tribunal should join the objections to the jurisdiction to the merits of the case.

29. On August 2, 2006, Claimant indicated that it accepted the provisional agenda transmitted by the ICSID Secretariat and indicated that it requested that the Arbitral Tribunal joined the issue on the jurisdiction with the merits.

30. On August 17, 2006, a session on the issues of jurisdiction was held at the World Bank's offices in Paris.

III- DISCUSSION

31. The Respondent objects to the jurisdiction of the Centre and of the Arbitral Tribunal on the following grounds:

- *ratione temporis*: the Claimant's claims would fall beyond the temporal scope of the Treaty;
- *ratione materiae*: there would be no dispute directly arising out of an investment and involving EGYPT;
- *ratione personae*: EGOTH would not be an emanation of the Egyptian State.

32. Pursuant to Article 41 of the Arbitration Rules, the Arbitral Tribunal is authorized to take a decision regarding the jurisdiction of the Centre and its own jurisdiction. Due to the fact that the objections raised by the Respondent are not frivolous and that there is no need to enter into the merits of the case to deal with them, the Arbitral Tribunal decides not to join them to the merits of the dispute and to resolve them as a preliminary issue in this Decision.

Consequently, the Arbitral Tribunal will deal successively with each of the Respondent's objections to its jurisdiction.

A. Do the Claimant's claims fall beyond the temporal scope of the Treaty?

a) *The Respondent's position:*

33. The Respondent relies on Article 12 of the Treaty which reads:

"The provisions of this Agreement shall apply to all investments made by investors of one contracting party in the territory of the other contracting party prior to or after the entry into force of the Agreement by investors of the other contracting party. It shall, however, not be applicable to divergences or disputes, which have arisen prior to its entry into force."

It points out that the Treaty entered into force on January 29, 2000, thirty days after Egypt had notified to Denmark that it had fulfilled the constitutional requirements.

Indeed, Article 15 of the Treaty states that:

"[t]he Contracting Parties shall notify each other when the constitutional requirements for the entry into force of this Agreement [are] fulfilled. The agreement shall enter into force thirty days after the date of that last notification."

34. The Respondent underscores that the parties have determined precisely the scope of the Treaty and that, while they agreed that it would apply to any investment made by the parties notwithstanding the moment at which it occurred, it is clear that the Treaty does not apply to "*divergences or disputes, which have arisen prior to its entry into force*", thereby exempting the State from liability for past conduct. According to Respondent, "*existing and new investments would be afforded full Treaty protection, but that as at 29 January 2000, the slate was utterly and completely clean*".¹

35. The Respondent emphasizes that Egypt and Denmark deliberately excluded from the application of the Treaty not only "*disputes*" that were prior to its entry into force but also mere "*divergences*". Referring to Prof. Ch. Shreuer, it contends that a "*dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim*". "*Divergence*" is, in its mind, a very significantly broader concept, which need not go beyond general grievances and may very well not be susceptible of being stated in terms of a concrete claim². Respondent added at the hearing of August 17, 2006 that facts and situations qualified as divergences shall also be excluded from the application of the treaty provided they occurred before January 29, 2000.

To support its argumentation, the Respondent also referred, at the hearing, to the following canons of interpretation:

- the rule of no retrospective effect;
- the rule of literal meaning;
- the rule against redundancy.

36. Moreover, the Respondent relies on Article 28 of the Vienna Convention stating that the provisions of a treaty "*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*".

¹Respondent's Memorial on its objections to jurisdiction, May 31, 2006, p.5, paragraph 28.

² Prof. Christoph H. Shreuer, Commentary on the ICSID Convention, Article 25, 11 ICSID Rev.- FILJ 318 (1996), at 337.

³Respondent's Memorial on its objections to jurisdiction, May 31, 2006, page 6, paragraph 30.

37. The Respondent is convinced that the Claimant's claims are based on divergences which pre-dated January 29, 2000.

Indeed, it considers that the divergences started in 1993, at the time of the state's privatisation which allowed the Shepheard Hotel to be sold to a third party. This is not denied by Claimant which stated in its Request for Arbitration that: "*after 1993 EGOTH refused to invest further in the Shepheard Hotel and offered property for sale*" and added that "*any initial efforts made by EGO TH to contribute to the upkeep of the Shepheard Hotel were abandoned after 1993 (...)*".

The Claimant also admitted in a letter to the Centre dated September 28, 2005 that "*the origins of this dispute date as far back as 1993, at which point Egypt-in a coordinated effort with EGO TH-embarked on a coordinated strategy to terminate prematurely the Management and Operation Contract of 8 September 1986 (...) These efforts to evict Helnan culminate, however, in the improper downgrade of the Shepheard from five-to four stars establishment by the Ministry of tourism in September 2003 (...) As a result of such downgrade, EGO TH initiated arbitration proceedings against Claimant in October 2003. As already explained above, Claimant put Egypt on notice of its grievances in July 2004."*"

38. In the light of the above arguments, it seems obvious, from the Respondent's point of view, that the divergences pre-dated the Treaty's entry into force of January 29, 2000 and that the claims are outside the scope of the Treaty. Consequently, in the instant case the Tribunal cannot have jurisdiction under the ICSID Convention.

b) The Claimant's position:

39. First, Claimant rejects Egypt's allegation that divergences giving rise to the claims arose prior to the entry into force of the BIT i.e. prior to January 29, 2000. The Claimant explains that:

"The real source of Claimant's dispute with Egypt is:

the State-orchestrated downgrade of the Shepheard Hotel from five to four stars on 7 September, 2003; and

*the threatened eviction of Claimant from the Shepeard Hotel following that orchestrated downgrade; and
the final eviction of Claimant on 23 March 2006⁴ .*

⁴ Helnan's counter- Memorial on jurisdiction of July 14, 2006, p.5, paragraph 8.

40. The Claimant considers that even though the dispute between the parties arose in 2003-2004 and at the latest on July 29, 2004 -i.e. when the President of HELNAN first raised its grievances against EGYPT (see letter to ICSID dated September 28, 2005),- it may rely on relevant events or conduct of EGYPT prior to the entry into force of the Treaty in order to explain the background of the dispute.

41. The Claimant agrees that the Treaty, pursuant to Article 12, applies to divergences or disputes that arose after its entry into force, i.e. after January 29, 2000. However, Article 12 does not exclude relying on facts that occurred prior to January 29, 2000.

Indeed, clauses restraining jurisdiction *ratione temporis* may be divided into two main groups:

- in the first group, the clauses relate to the date on which a dispute arises,
- in the second group, the clauses relate to the date on which events took place or facts at the origin of the dispute arose.

Article 12 solely requires the dispute to have arisen after the critical date (January 29, 2000). There are no consequences if the dispute relates in part to certain facts or situations prior to that date.

Moreover, when States want to exclude from the scope of a treaty facts and situations occurring prior to its entry into force, they say so expressly. Article 27(a) of the European Convention for the Peaceful Settlement of Disputes is an example of such express exclusion. The so-called " Belgian type reservation" to the jurisdiction of the International Court of Justice is another example. The Treaty does not include any wording of that kind.

42. Additionally, the Treaty "*applies to all investments, including those made prior to its entry into force*". Consequently, Claimant is of the view that "*since the express terms of the Treaty contemplate coverage of investments made before January 2000, then the factual matrix of disputes relating to such investments will-unavoidably-also date back to before January 2000*"⁵".

The Claimant finds support in the Decision in the *Tecmed S.A. v. Mexico's* case where the Tribunal declared that:

"... conducts, acts or omissions of the Respondent which, though they happened before the entry into force, may be considered a constituting part, concurrent

⁵ Helnan's counter- Memorial on jurisdiction of July 14, 2006, p.8, paragraph 19.

factor or aggravating or mitigating elements of conducts or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal's jurisdiction⁶.

43. In this respect, the Claimant contends that even though EGOTH has not, since 1993, respected its obligation to invest money for the upkeep of the Shepheard Hotel which led Claimant to base its claims on factual behaviours prior to 2000, other facts or events have led Claimant to file this arbitration against EGYPT and further actions to interrupt the Management Contract that continued long after January 2000 were taken by EGYPT.

44. Further, the Claimant objects to EGYPT's interpretation of the term "*divergence*" which would be a very significantly broader concept than "*dispute*". First, in the Claimant's view, the term "*divergence*" cannot cover facts or situations pre dating the dispute since the term "*divergence*" necessarily requires the existence of a disagreement whereas facts and situations do not. Therefore, it is necessary to distinguish facts and situations, on one hand, and divergence and dispute, on the other hand. Second, the term "*dispute*" relies on 3 determining elements that are the following:

"(i) a disagreement on a point of law or fact, conflict of legal views or of interests between the parties, which (ii) manifests itself in claims of the parties positively opposing each other; these claims in turn (iii) serving as the point of departure for the Tribunal itself to determine on an objective basis the existence of a dispute between the parties⁷."

45. The Claimant does not give a different meaning to the term "*divergence*" which would be "*ejusdem generis*", i.e. are of a like nature. By definition, the term "*divergence*" also requires an "opposition" or "a conflict of view" between the parties. As the Claimant's first grievances were solely communicated in 2004 to Egyptian ministers, the divergence cannot have arisen before the year 2000.

46. The Claimant also argues that, in the hypothesise where the Tribunal would accept that the term "*divergence*" is broader than the term "*dispute*", which opinion Claimant does not share, a restrictive view is adopted under case law as to the scope of a temporal limitation to jurisdiction. Further, the relevancy of the facts to the outburst of the dispute is to be taken into account when interpreting and applying the *ratione temporis* limitation.

⁶ 43 I. L. M. 133, at para. 66.

⁷ Helnan's counter-Memorial on jurisdiction of July 14, 2006, p.10, paragraph 27.

As stated by the Permanent Court of International Justice in 1939 in Electricity Company of Sofia and Bulgaria, (...)" *it is true that a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact. A situation or fact in regard to which a dispute is said to have arisen must be the real cause of the dispute (...)*⁸."

Therefore, "to summarise, in applying *ratione temporis* limitations to facts or situations (if it is accepted that "divergence" covers facts or situation), an international tribunal looks at the facts or situations directly associated with the outbreak of the dispute itself. There must be a direct and proximate link between the facts or situations and the dispute: it is not enough that earlier facts or situations may have in a sense predisposed the parties in respect of a dispute"⁹"

47. In any case, in the present dispute, the triggering event was the downgrade of the Shepheard Hotel which started on September 7, 2003 and the two other critical dates were the official notification by Claimant to Respondent of a dispute (February 14, 2005) and the submission of the Request for Arbitration (March 8, 2005). The dispute thus cannot have arisen before 2003.

c) The Arbitral Tribunal's decision:

48. The parties both agreed in their submissions as well as during the hearing of August 17, 2006 that the Treaty entered into force on January 29, 2000.

49. They however have opposite views on the interpretation of Article 12 which deals with the temporal scope of the Treaty.

Indeed, this Article states that:

"The provisions of this Agreement shall apply to all investments made by investors of one contracting party in the territory of the other contracting party prior to or after the entry into force of the Agreement by investors of the other contracting party. It shall, however, not be applicable to divergences or disputes, which have arisen prior to its entry into force."

50. It results from this wording that whereas any investment falls within the scope of the Treaty irrespective of the date it was made, the Treaty applies only

⁸ Electricity Company of Sofia and Bulgaria, 1939 PCIJ., Ser. A/B, n°77, at p. 81

⁹ Helnan's counter- Memorial on jurisdiction of July 14, 2006, p.13, paragraph 35.

to those divergences or disputes which have arisen subsequently to its entry into force.

51. The parties mainly disagree on the meaning to be given to the two key terms in the second sentence of Article 12 i-e "*divergence*" and "*dispute*". The Respondent makes a clear distinction between both. The Claimant considers that the terms divergence and dispute are *eiusdem generis*, of a "like nature".

52. The Arbitral Tribunal cannot follow the Claimant's interpretation in that regard and agree with the Respondent that, whenever possible, terms must be interpreted literally and given practical effect, which excludes redundancy. As the parties to the Treaty referred both to "*divergence*" and "*dispute*", it must be assumed that they were not giving the same meaning to these two distinct terms.

The Tribunal is satisfied that such an assumption is correct. Although, the terms "*divergence*" and "*dispute*" both require the existence of a disagreement between the parties on specific points and their respective knowledge of such disagreement, there is an important distinction to make between them as they do not imply the same degree of animosity. Indeed, in the case of a divergence, the parties hold different views but without necessarily pursuing the difference in an active manner. On the other hand, in case of a dispute, the difference of views forms the subject of an active exchange between the parties under circumstances which indicate that the parties wish to resolve the difference, be it before a third party or otherwise. Consequently, different views of parties in respect of certain facts and situations become a "*divergence*" when they are mutually aware of their disagreement. It crystallises as a "*dispute*" as soon as one of the parties decides to have it solved, whether or not by a third party.

53. On this basis, the Arbitral Tribunal considers that three hypotheses must be distinguished in order to determine whether or not the Claimant's claims fall within or beyond the temporal scope of the Treaty:

- First, if the dispute has crystallised after January 29, 2000 on the sole basis of divergences prior to that date, the Claimant's claims cannot be submitted to the Centre under the Treaty since divergences prior to 2000 are clearly excluded by Article 12.

- Second, if the dispute has crystallised after January 29, 2000 but on the sole basis of divergences that occurred after that date, it falls within the temporal scope of the Treaty as the divergences, source of the dispute, occurred after the entry into force of the Treaty.

- Third, if the dispute has crystallised after January 29, 2000 as a continuation of divergences that occurred prior to that date but evolved and changed of nature after that date, it falls within the temporal scope of the Treaty as the divergences which are its source are not any longer the divergences which were existing before January 29, 2000.

54. The instant dispute is based on Helnan's allegations that Egypt has violated its obligations under the Treaty i.e. an obligation of full protection and security and fair treatment as set forth in Article 2 and 3 of the Treaty as well as an obligation not to expropriate Helnan's investments without providing prompt, adequate and effective compensation, as set forth in Article 5. These alleged violations are made in the context of the privatisation of the Shepheard Hotel.

It cannot be disputed that the Claimant refers to facts and situations prior to January 29, 2000- as far as 1993- which may be seen as having been the objects of divergences. However, they are not and could not be at the origin of the dispute which gave rise to the Claimant's claims.

55. Indeed, on October 15, 2002, the parties agreed to modify the terms of their Contract by signing an Annex to the Management Contract which put them in a completely different contractual situation than the one prevailing before, as the Annex, *inter alia*, referred to the State's privatisation program.

Consequently, the divergences that occurred before the agreement on the Annex of October 15, 2002, even if they originated from disagreement prior to January 29, 2000, could not be of the same nature as the divergences which crystallised into the instant dispute which occurred under the Management Contract as modified by the Annex. This situation corresponds to the third hypothesis contemplated above.

56. On October 15, 2002, HELNAN acknowledged in the Annex that the Shepheard Hotel formed part of EGYPT's privatisation project. The divergences which may have existed before, in particular before January 29, 2000, could not focus on this issue. As the Arbitral Tribunal is satisfied that the instant dispute is grounded on alleged violations of the Treaty within the process of the Shepheard Hotel privatisation, it is as well satisfied that the crystallisation of the relevant divergence did not occur prior to the entry into force of the Treaty.

57. For these reasons, the Arbitral Tribunal dismiss the Respondent's objection to jurisdiction based on Article 12 of the Treaty.

B. The alleged absence of a dispute arising directly out of an investment and involving EGYPT

a) *The Respondent's position:*

58. The Respondent alleges that the Claimant made no investment in Egypt. It underscores that pursuant to Article 25 (1) of the ICSID Convention, the dispute must arise "*directly out of an investment*". Even though the ICSID Convention does not contain any definition of the term "*investment*", its guiding principle relies on "*a desire to strengthen the partnership between countries in the cause of the economic development*".¹⁰"

59. Moreover, referring to recent ICSID arbitral decisions (in particular the Decision on jurisdiction in the Salini v. Kingdom of Morocco case) and to the Commentary by Prof. Ch. Schreuer¹¹, the Respondent suggests that for being defined as an investment "*a qualifying project must show a certain duration, a regularity of profit and return, an element of risk, a substantial commitment, and a significant contribution to the host State's development*".¹²"

60. The Respondent points out that the transaction object of the dispute does not fulfil these criteria since:

"The Management Contract underlying the present proceedings is a standard commercial agreement featuring ordinary commercial terms, regulating the management of an unremarkable property of no particular consequence to the host state's development. The duration of the Contract is well within industry standards. The nature of Claimant's remuneration it envisages is typical of its kind. The transaction involves no more than the ordinary degree of commercial risk inherent in everyday transactions (...) and managing a hotel on behalf of its owner can hardly be said to contribute to the host state's development".¹³"

61. Moreover, the Respondent relies on the Award on Jurisdiction in the Joy Mining v. A.R.E. case where the Tribunal held that "*The parties to a dispute cannot by contract or by treaty define an investment, for the purpose of ICSID jurisdiction, which does not satisfy the objective requirements of Article 25 of the Convention.*".¹⁴"

¹⁰ Report of Executive Directors of the ICSID Convention., 1 ICSID Reports, at page 25.

¹¹ Christoph H. Schreuer, The ICSID Convention: a Commentary (2001), at 140.

¹² Respondent's Memorial on its objections to jurisdiction, May 31, 2006, p.9, paragraph 51.

¹³ Respondent's Memorial on its objections to jurisdiction, May 31, 2006, p.9, paragraph 52.

¹⁴ Joy Mining Machinery Ltd v. the Arab Republic of Egypt, ICSID case n° ARB/03/11, Award on Jurisdiction of August 6, 2004, para. 50, p.11.

62. In view of the foregoing contentions and on the ground that Claimant has failed to demonstrate the existence of an investment, the Respondent asserts that the transaction cannot be qualified as an investment and simply constitutes a commercial transaction.

63. The Respondent further argues that the Claimant also failed to prove the existence of a *prima facie* dispute directly arising out of an investment and involving EGYPT, although this is the first necessary step in order to determine the jurisdiction of the Centre and the competence of the Arbitral Tribunal. Indeed, the Claimant has solely indicated in its Request for Arbitration that EGYPT had violated its obligations towards HELNAN under the Treaty but did not provide any additional evidence as to this allegation preventing therefore the Arbitral Tribunal of determining whether or not the alleged violations fell within the provisions of the Treaty.

64. The Respondent invokes several ICSID cases¹⁵ in order to contend that failing to establish *prima facie* violations of the Treaty by EGYPT, the Claimant cannot resort to arbitration under the Treaty. It refers also, in the same spirit to the approach adopted by the International Court of Justice¹⁶.

65. Moreover, to the extent that the refusal of EGOTH to finance the renovation of the Shepheard Hotel, its negligence in the maintenance of the hotel and the downgrading of the Hotel are the causes of the dispute, Claimant has no valid cause of action in front of this Tribunal.

Indeed, the essential basis of the claim concerns a contractual dispute with another party that has already been resolved by the Award rendered under the *aegis* of the Cairo Regional Centre for International Commercial Arbitration. The Claimant is attempting to dress up contractual grievances as Treaty claims. The Claimant thus failed to determine the cause of action capable of founding the Tribunal's jurisdiction under article 25 of the ICSID Convention. It concludes, quoting the above-mentioned Award in the Joy Mining v. A.R.E. case, that "*In the absence of a Treaty-based claim, and the evidence that, on the contrary, all claims are contractual, justifies the finding that the Tribunal lacks jurisdiction.*"¹⁷

¹⁵ SGS v. Pakistan, ICSID Case n° ARB/01/13, Decision of the Arbitral Tribunal on objections to jurisdiction of August 6, 2003; SGS v. Republic of the Philippines, ICSID Case n° ARB/02/6, Decision of the Arbitral Tribunal on objections to jurisdiction of January 29, 2004; Salini Costruttori S.P.A. and Italstrade, S.P.A. v Hashemite Kingdom of Jordan, ICSID Case n° ARB/02/13, Decision on jurisdiction of November 29, 2004.

¹⁶ Yugoslavia v. Italy, ICJ Reports 1999-1, p. 490.

¹⁷ See note 14, para. 82 of the Award.

b) The Claimant's position:

66. The Claimant rejects EGYPT's allegation that no "*investment*" was made by HELNAN in Egypt. It denies that the Contract is "*a standard commercial agreement*". On the contrary, it meets the criteria adopted by the Respondent to define an "*investment*", in spite of their excessive narrowness. Indeed, it shows certain duration, a regularity of profit and return, an element of risk, a substantial commitment and a significant contribution to EGYPT's development.

- duration: the Management Contract was concluded for a period of 26 years.
- a regularity of profit and return: it results from article 1.7 of the Contract which defines Total Operating Revenue as follows: "*Means the sum of revenues realized (directly or indirectly) during any given fiscal year, by operating the hotel and its facilities, including the revenue realized through resident or transit hotel guests, or through other activities or leases or privileges approved by the manager.*"
- element of risk: the Claimant covered the initial expenditure required to regenerate the Shepheard Hotel and undertook the operational risk, deductible from the hotel's revenues.
- substantial commitment: the aim of the contract was to transform the Shepheard Hotel into a five-star establishment and HELNAN invested considerably to reach this goal and invest further amounts for maintenance and repair.
- contribution to development: the Contract has contributed to EGYPT's tourism industry. Moreover, HELNAN was the first company investing in the popular areas of Egypt such as Sharm El Sheikh, Ras Sudr, Nuweiba, Port Said and Fayed and that, by its marketing, it induced other companies to invest. In this respect it has largely contributed to the development of the country.

67. Consequently, the Contract qualifies as an "*investment*", even though the above mentioned criteria "*should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention*", as pointed out by Prof. Ch. Schreuer¹⁸.

¹⁸ Christoph H. Schreuer, The ICSID Convention: a Commentary (2001), at 140.

68. The Claimant also relies on decisions of ICSID Tribunals which, according to it gave a broad interpretation to the term "*investment*" in article 25 of the ICSID Convention¹⁹.

69. The Claimant asserts that its contractual rights under the Contract fall within the definition of the term "*investment*" provided in Article 1 of the Treaty i.e. "*every kind of asset*". This precludes Egypt from rejecting that definition on the basis of the principle *alegans contraria non est audientur*. The Respondent reliance on the Award issued in Joy Mining v. A.R.E²⁰ is misplaced as in this case, the jurisdictional issue was that of "*whether or not bank guarantees are to be considered as an investment*". Furthermore, in this Award, it was found that the bank guarantee did not meet the definition of an "*investment*" contained in both the relevant bilateral investment treaty and the ICSID Convention.

70. Therefore, the Claimant concludes that the Respondent's objection to jurisdiction grounded on the notion of investment should be dismissed.

71. The Claimant analyses the Respondent's argument that the Claimant failed to prove the existence of a *prima facie* dispute directly arising out of an investment and involving EGYPT as an assertion that HELNAN has not sufficiently substantiated its claims. According to it, this matter pertains to the merits of the case rather than to the jurisdictional phase and to bring such evidence and such substantiation at this stage of the proceedings is neither required by the ICSID Convention nor by the Arbitration Rules.

72. The Claimant contends that its Request for Arbitration meets all the requirements pursuant to Article 36 (2) of the ICSID Convention and Rule 2 (e) of the Arbitration Institution Rules. Indeed, the Claimant's Request for Arbitration (i) contains information concerning the issues in dispute (ii) indicates the existence of a legal dispute between Claimant and Egypt pertaining to an investment (iii) provides an overview of the factual and legal issues. Therefore, Egypt can not object to Claimant's lack of substance within the Request for Arbitration.

73. In any case, for the *prima facie* standard to be satisfied, it is sufficient that the facts alleged by the Claimant's, provided they are ultimately proven true, be capable of constituting a breach of the Treaty. The Claimant relies in this respect on the Decisions on Jurisdiction made in the ICSID cases Bayindir Insaat

¹⁹ Fedax v. Venezuela, ICSID Case n° ARB/96/4, Decision on jurisdiction of July 11, 1997; COSB v. Slovak , ICSID Case n° ARB/97/4 , Decision on Objections to Jurisdiction of May 24, 1999.

²⁰ See note 14.

Turizm Ticaret Ve Sanayi A.S.v. Islamic Republic of Pakistan²¹ and Jan de Nul N.V. and Dredging International N.V. v. A.R.E.²².

c) The Arbitral Tribunal Decision:

74. It is common ground that the Arbitral Tribunal has jurisdiction only if the requirements of Article 25 of the Convention are met. This Article reads as follow:

"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (...) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."

75. The Arbitral Tribunal has already found that this dispute falls within the temporal scope of the Treaty which includes the consent of the parties to the jurisdiction of the Centre. It must now decide whether this dispute is a legal dispute and arise directly out of an investment between a Contracting State and a national of another Contracting State.

76. It is not disputed that the dispute is a legal dispute. It is not disputed either that the Claimant is a national of a Contracting State, Denmark, but the Respondent denies that it arises from an investment and that it involves a Contracting State, EGYPT.

77. The Arbitral Tribunal is satisfied that the dispute arises directly out of an investment. It disagrees with the Respondent's view that the Contract can solely be "*a standard commercial agreement featuring ordinary commercial terms, regulating the management of an unremarkable property of no particular consequence on the Host State's development*". The Arbitral Tribunal accepts the Respondent's suggestion, based on ICSID precedents, as summarized in the unchallenged statement by Prof. Ch. Schreuer, that to be characterized as an investment a project "*must show a certain duration, a regularity of profit and return, an element of risk, a substantial commitment, and a significant contribution to the host State's development*"²³. But the Arbitral Tribunal also agrees with the Claimant that the Contract meets these requirements. Twenty six years is definitely a "*certain duration*", the Claimant's activity was supposed to provide it with a regular remuneration, refurbishing the Shepheard Hotel to

²¹ Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.v. Islamic republic of Pakistan, , ICSID Case n° ARB/03/29, Decision on jurisdiction of March 14, 2005.

²² Jan de Nul N.V. & Dredging International N.V. v. A.R.E., ICSID Case n° ARB/04/13, Decision on Jurisdiction of June 16, 2006. .

²³ see note n°12

transform it into a five-stars hotel implied the risk of no commercial success and the amount of money necessary to achieve that goal and keep such classification for years qualifies as a substantial commitment. As for the contribution to the development of the EGYPT's development, the importance of the tourism industry in the Egyptian economy makes it obvious.

78. Moreover, Article 1 of the Treaty reads as follow:

"The term "investment" means every kind of asset and shall include in particular, but not exclusively:

- (i) tangible and intangible, moveable and immovable property, as well as any other rights such as leases, mortgages, liens, pledges, privileges, guarantees and any other similar rights,*
- (ii) a company or business enterprise, or shares, stock or other forms of participation in a company or business enterprise [...],*
- (iii) returns reinvested, claims to money and claims to performance pursuant to contract having an economic value [...]*
- (iv) industrial and intellectual property rights [...]*
- (v) concessions or other rights conferred by law or under contract [...]."*

79. The Contract falls without any doubt within this broad definition and, in particular, under Article 1(v). Most significantly also, words as "assets", "any other rights", "any other similar rights", "pursuant to contract having an economic value", "under contract" shows that Article 1 encompass wide concepts that include undoubtfully the contractual obligations contained in the Contract.

80. In this case, both the requirements of ICSID precedents, as referred to by the Respondent and the definition of Article 1 of the Treaty are satisfied. Consequently, the Arbitral Tribunal concludes that the dispute arises out of an investment. There was no contention by the Respondent that the relation between the Claimant's claims and the Contract would not be direct. Thus the Arbitral Tribunal is satisfied that the dispute directly arises out of an investment.

81. Has the Claimant made a *prima facie* case that its case is against EGYPT? The Arbitral tribunal has no doubt in this regard. The Claimant alleges that through a conspiracy, various emanations of the Egyptian State planned the downgrading of the Shepheard Hotel from five-stars to four-stars and the

termination of the Contract in order to facilitate the privatisation of the Hotel. If it was true, and it remains to be proved, HELNAN would have a case against EGYPT. The Tribunal here follows the approach adopted by others ICSID Tribunals²⁴. To ascertain the reality of the situation would require entering further into the merits of the case. This is what the Claimant suggested as it requested that the Respondent's objections to jurisdiction be dealt with the merits of the case. The Respondent took the contrary view and this view was accepted by the Tribunal. The consequence is that it must remain at a *prima facie* level and, at this level, it is satisfied that the Claimant has established the existence of a *prima facie* dispute directly arising out of an investment and involving EGYPT.

Thus, the Respondent's objection to jurisdiction on the ground that the Claimant has failed to prove such a *prima facie* case is dismissed.

C. The status of EGOTH

a) *The Respondent's position:*

82. In order to further help the Tribunal to decide whether Claimant provided or not *prima facie* evidence as to the violation of the Treaty, the Respondent contends that it needs to clarify the legal situation of EGOTH which is considered by Claimant as an emanation of the Egyptian State.

The Respondent refers to the dispute that opposed SPP and Southern properties ltd to the Arab Republic of Egypt and EGOTH, known as the "*Pyramids Plateau*" case. In this case, an Arbitral Tribunal under the *aegis* of the International Court of Arbitration of the International Chamber of Commerce decided that "....) bearing in mind EGOTH's separate legal entity, we find it impossible to say that the breach committed by the Government was also ipso facto a breach of a joint obligation by EGOTH or that the Act of Government in cancelling the Project was an act that may be attributed also to EGOTH. (...). We accordingly hold that EGOTH was not liable for the cancellation".

The Court of Appeal of Paris, which set aside the Award, agreed on that particular subject and held that EGOTH had:

"indiscutablement une personnalité morale et un statut juridique distincts de l'Etat, qu'il pouvait, en conséquence, agir en son nom et avoir un patrimoine

²⁴ Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.v. Islamic republic of Pakistan and Jan de Nul N.V. and Dredging International N.V. v. A.R.E., see notes n° 21 and 22.

propre avant que sa transformation en société anonyme, courant 1976, mette encore en évidence son caractère autonome²⁵.

83. The Respondent further asserted at the hearing of August 17, 2006 that even though EGOTH is within the ownership of the Egyptian government, its administration remains independent. Accordingly, none of its contracts or acts is attributable to the government.

Nevertheless, Claimant's claims are addressed to EGOTH, which is not an entity of the Egyptian State, and thus cannot justify the jurisdiction of the Centre.

b) *The Claimant's position:*

84. The Claimant rejects EGYPT's objections to jurisdiction on the basis of EGOTH's status. Indeed, the claims it brings against Egypt do not solely involve EGOTH but also, *inter alia*, the Egyptian government, the Ministry of Tourism, the Department of Health, the Civil Defence Department, the Tourist Police, the Ministry of Justice, the Judicial Authority Police and the Ministry of Investment that have all contributed to the termination of Contract. The objection to jurisdiction should therefore be rejected.

85. In any case, however, the Claimant contends that EGOTH 's actions or omissions are attributable to Egypt. The Claimant refers to Article 4 to 11 of the ILC Rules applicable in all international obligations of States in order to determinate whether a State is responsible for the action or omission of an entity.

Claimant explains that:

"Article 4 addresses conducts of organs of a State [and] (...) stipulates that the conduct of any State organ, whether exercising legislative, executive, judicial or any other function shall be considered an act of that State under international law, irrespective of the position the organ in question holds in the organisation of the State and whatever its character as an organ of the central government, or of a territorial unit of the State.

Article 5 regulates the conduct of persons or entities which are not an organ of the State, but which are empowered by municipal legislation to exercise elements of governmental authority. These acts are considered acts of the State-

²⁵ Quotation in French in the Respondent's Memorial on its objections to jurisdiction, May 31, 2006, p.15, paragraph 91.

and thus attributable to it- under international law, provided the person or entity is acting in such capacity in the particular situation²⁶".

86. In this light, Claimant contends that EGOTH was *de jure* and *de facto* an emanation of the Egyptian State and that consequently EGYPT should be held responsible for EGOTH's acts.

87. As asserted during the First Session of April 14, 2006, HELNAN recalls that EGOTH's predecessor - EHC- was a public sector company, wholly owned by the Egyptian Government, pursuant to Law No. 97 of 1983 that governed Public Sector Companies and organisation.

88. A new law named the Public Sector Companies Law was enacted in 1991 (hereinafter "the Law") which pooled the public sector companies into twelve State owned holding companies supervised by the Minister for the Public Sector. Claimant emphasizes that the Holding Company, that is 100% owned by EGYPT, also owns 100% of the share capital of EGOTH.

Even though the 1991 law purportedly aimed to separate legal entities from the State, Claimant underscores that the Holding Company is still 100% owned by the State since it appears from the statute that its role is to "*contribute to the development of national economy in its field of activity and through its subsidiary companies [i.e. EGOTH] within the framework of the public policy of the state*²⁷".

89. Further, the Claimant insists on the role of the ministers and their impact on the Holding Company.

90. The Claimant also contends that pursuant to provisions from the 1991 law it is also entirely controlled by the Egyptian State via the Holding Company. EGOTH is then naturally, as the Holding Company, not an independent entity in view of the controls made by Egypt on any action the Holding Company and EGOTH attempt to do on their own.

Therefore, EGOTH is an emanation of the Egyptian State, acting under its entire control.

²⁶ Helnan's counter- Memorial on jurisdiction of July 14, 2006, p.29, paragraph 76.

²⁷ Helnan's counter- Memorial on jurisdiction of July 14, 2006, p.31, paragraph 84.

The Claimant also underlines that, as a matter of fact, after the taking over by EGOTH, the Shepheard Hotel was immediately listed on the Egyptian Ministry of Investment's website, showing, once more, the role of EGYPT.

c) *The Arbitral Tribunal's decision:*

91. The Arbitral Tribunal does not need to decide on the status of EGOTH in order to assess its jurisdiction in this case. It has already found that the Claimant has established the existence of a *prima facie* dispute directly arising out of an investment and involving EGYPT and that the dispute falls within the temporal scope of the Treaty. However, since the parties have thoroughly discussed this point, it considers *ex abundanti cautela* that it is its duty to solve this disputed issue in this Decision.

92. The Arbitral Tribunal is of the opinion that Claimant has convincingly demonstrated that EGOTH, through the Holding Company (which owns EGOTH at 100%), is under the close control of the State. Indeed, the following points must be underscored:

- The purpose of EGOTH is "*to contribute to the development of national economy in its field of activity and through its subsidiaries companies [i.e EGOTH] within the framework of the public policy of the State*" (article 2.2 of the Law);
- EGOTH's memorandum and articles of association are reviewed by the State Council (article 11);
- EGOTH's general assembly is headed by the Chairman of the Holding company's board of directors. Moreover, the Minister exercises administrative and executive powers on the Holding Company;
- Funds of EGOTH are public funds;
- The Manager and Director of EGOTH may be imprisoned if he/she does not distribute State's share of profits (Article 49.3).

However, all these gathered clues are not sufficient to conclude that EGOTH's conduct is attributable to EGYPT. Indeed, as pointed out by M. Crawford²⁸ "*the fact than 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*

²⁸ James Crawford, The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries, Cambridge University Press, 2002, page 100.

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 specific elements of governmental authority".

93. More significantly in this case, EGOTH was an active operator in the privatisation of the tourism industry on behalf of the Egyptian Government. Egypt's privatisation program was scheduled since 2001 and always included EGOTH's assets. The different announcements proposing to invest in Egypt, on the Ministry of Investment website, all refers to Egypt, the Holding Company and EGOTH. In this respect, it must be pointed out that according to Article 5 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts "*the conduct of a person or entity which is not a organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority 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*". Even if EGOTH has not been officially empowered by law to exercise elements of the governmental authority, its actions within the privatisation process are attributable to the Egyptian State.

94. Thus, the Respondent's characterization of EGOTH's status cannot be sustained. On the contrary, the Arbitral tribunal findings in this respect confirm, *ex abundanti cautela*, that the Claimant has established the existence of a *prima facie* dispute involving EGYPT.

95. In consideration of all the above, the Arbitral Tribunal retains jurisdiction.

D. The allocation of costs:

96. Each party requests that the other one be condemned to bear the costs in connection to these proceedings.

97. The Arbitral Tribunal will examine this question in its Award.

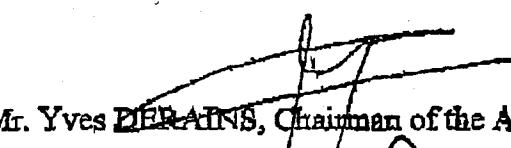
ON THE BASIS OF THE ABOVE

THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS:

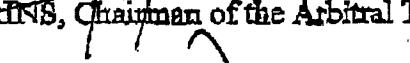
1. The Arbitral Tribunal has jurisdiction over the dispute submitted to it in this arbitration.
2. The Arbitral Tribunal will, accordingly, make the necessary order for the continuation of the proceedings on the merits.
3. The Arbitral Tribunal will take a decision regarding the costs in connection to this part of the proceedings in its Award.

Made on October 17, 2006

Mr. Yves PERRAINS, Chairman of the Arbitral Tribunal


Rudolf Dolzer

Prof Rudolf DOLZER, Arbitrator


Michael Lee

Mr. Michael LEE, Arbitrator