

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 DERAÏNS (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 Shepherd Hotel (Hereinafter "the Contract") on September 8, 1986 (Hereinafter "the Contract") whereby Scandinavian was entrusted with the management of the Shepherd 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 Shepherd 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 Shepherd 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 Shepherd 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 Shepherd 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 Shepherd Hotel on or after 30 March 2005; and*
 - (ii) *recommending that Egypt (through EGOth or any instrumentalities) ceases immediately all procedures to sell the Shepherd Hotel to any third party, on terms that directly or indirectly interfere with Helnan's management and operation of the Shepherd 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 Shepherd 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 Shephard Hotel under the Management Contract until its expiry in December 2012 with similar co-operation and investment from EGOH 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 Shephard 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 Shephard 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 Shephard 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 Shephard 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 EGOH 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 DERAÏNS, 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"*². *"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 claim³. 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"*.

¹ Respondent'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.

³ Respondent'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 Shephard Hotel to be sold to a third party. This is not denied by Claimant which stated in its Request for Arbitration that: "*after 1993 EGOH refused to invest further in the Shephard Hotel and offered property for sale*" and added that "*any initial efforts made by EGOH to contribute to the upkeep of the Shephard 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 EGOH-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 Shephard from five-to four stars establishment by the Ministry of tourism in September 2003 (...). As a result of such downgrade, EGOH 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 Shephard Hotel from five to four stars on 7 September, 2003; and

the threatened eviction of Claimant from the Shephard 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 Sheppard 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 hypothesis 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 Shepherd 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 *ejusdem 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 Shepherd 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 Shepherd 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 Shepherd 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 Shepherd 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 Shepherd Hotel and undertook the operational risk, deductible from the hotel's revenues.
- substantial commitment: the aim of the contract was to transform the Shepherd 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 immoveable 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 undoubtedly 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 Shephard 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 EGOH

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 EGOH 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 EGOH, 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 EGOH'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 EGOH or that the Act of Government in cancelling the Project was an act that may be attributed also to EGOH. (...). We accordingly hold that EGOH 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 EGOH 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 EGOH 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 EGOH, 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 EGOH's status. Indeed, the claims it brings against Egypt do not solely involve EGOH 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 EGOH'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 situation*²⁶".

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 Sheppard 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 that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in*

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.

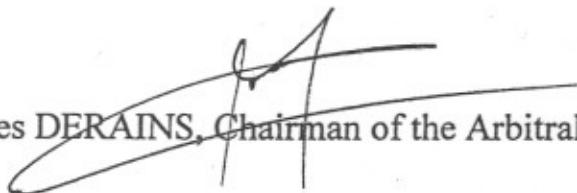
97. The Arbitral Tribunal will examine this question in its Award.

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 DERAÏNS, Chairman of the Arbitral Tribunal

 
Prof. Rudolf DOLZER, Arbitrator


Mr. Michael LEE, Arbitrator