

International Centre for
Settlement of Investment Disputes

SOUTHERN PACIFIC PROPERTIES
(MIDDLE EAST) LIMITED

V.

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

A Dissenting Opinion

INTRODUCTION

1. To dissent from the award agreed upon and masterly written by such Eminent Jurists constituting the Majority of the present Tribunal is not a decision that can be lightly taken. It is not made easier by the fact that the dissent is not limited to the evaluation of a particular fact or the interpretation of this or that particular rule of law. Indeed the diversions cover altogether the perception of the facts of the present dispute and the evaluation of the whole relationship that tied the Claimants and the Respondent, as well as, necessarily and as a result, the identification and the application of the appropriate rule of the law.

2. The starting point of the dissent consists in the perception of the facts. This is due, in my opinion, to the method of approach to these facts; to conceive and evaluate each and every fact as such, in isolation of other facts of the case, as opted for by the Majority Award, or rather evaluate the whole relationship that developed between the parties in the light of the multiplicity of facts forming sequences of their overall relationship. The method of approaching the facts does not constitute, from my point of view, an academic speculation since it is the only overall review of the intricate facts of the case that can best reveal the reality about the effective conduct of the parties during their relationship that took place over the years.

3. The overall approach seems, in the present case, to be mandatory since a major allegation advanced by the Respondent and maintained throughout the proceedings before this Tribunal consists in that the Claimants had recourse for their introduction to the Respondent, the obtaining of the approval for their project and during their activities for its implementation to irregular contacts and corruption. To overlook the significance of the sequences of the relationship that developed between the parties, and how that relationship evolved, *inter alia* by vitiated administrative acts as alleged by the Respondent, seems not to be in consistence with the due legal protection of the Respondent's inherent right of defense. In this case, the *a priori* dismissal of the Respondent's contentions as regards the irregularities and/or the nullity of several administrative acts related to and issued for the benefit of the Claimants' project on the ground that "the principle of international law which the Tribunal is bound to apply is that which establishes the international responsibilities of States when unauthorized or *ultra vires* acts of officials have been performed by State agents under cover of their official characters" (the Majority Award p. 32 [p. 352 of this issue]), seems to be, in this specific case where allegations of corruption are advanced, contrary to the Tribunal's obligation to see to it that the exercise of the right of defense is fully protected to the benefit of the parties in dispute.

4. Where dissent is as extensive as I fear it is, in this extremely complex case, an issue of method is to be found. I do not think that the problem can best be solved by following the steps of the Majority Award indicating, point after point, where and why there is dissent. Rather, I propose, to deal with the case in the following order:

I. *Preliminary Observations* :

1. The Jurisdiction of ICSID and the Tribunal's competence over the present dispute.
2. Guidelines to the settlement of the present dispute:
 - a. The Washington Convention.
 - b. The standard of morality to which the Tribunal expressed its adherence by its procedural order of February 13, 1991.
 - c. The notion of World Cultural Heritage and its implications.

II. *A Summary of Pertinent Facts* :

1. The change of site.
2. The housing activities.
3. The critical date May-June 1978:
 - a. A review of certain facts that marked the parties' relationship.

b. The events that occurred around the critical date; May-June 1978:

- i. The debates in the People's Assembly and the world wide adverse campaign.
- ii. The measures taken by the Respondent.
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4. The allegations related to irregular contacts and corruption.

III. *The Law* :

1. The basis of the Tribunal's competence and the scope of the present dispute.
2. The parties to the dispute and the receivability of SPP (ME)'s claim.
3. The applicable law.
4. The application of the law: the *juris dictio*.

I. *Preliminary Observations*

1. *The jurisdiction of ICSID and the competence of the Tribunal over the present case (a reminder):*

The present Tribunal dealt with the objections, raised by the Arab Republic of Egypt (hereinafter called the Respondent), to the jurisdiction of ICSID and to the Tribunal's competence, over the present dispute, in two decisions; of November 27, 1985 and of April 14, 1988. The Tribunal finally decided, in the Decision of April 14, 1988 to reject the objections to its jurisdiction and hence decided to proceed to the examination of the subject matter of the case, however, the arguments and findings of the Tribunal in these decisions should be taken into due consideration when dealing with the subject matter of the case. Amongst these findings and arguments which are pertinent to the final adjudication of the present case, I may point out the following:

a. In the decision of November 27, 1985 (hereinafter called the first preliminary decision) the Tribunal decided "A. to stay the present proceedings on the Respondent's remaining objections to the Center's jurisdiction until the proceedings in the French Courts have finally resolved the question of whether the Parties agreed to submit their dispute to the jurisdiction of the International Chamber of Commerce." This Tribunal founded its decision to stay the proceedings upon the fact that "... the same question is also sub judice in another forum, where the proceedings involve the same Parties and the same dispute. The ICC Tribunal has already answered this question in the affirmative, holding that Egypt and the Claimants agreed to resolve any disputes by ICC arbitration. The Paris Court of Appeals disagreed, but its decision has been

appealed to the Court of Cassation, which will pronounce the final answer of the French judiciary on the matter."

As it was not until January 6, 1987 that the French Court of Cassation issued a decision the effect of which was to finally determine that Egypt had not consented to submit the dispute to the jurisdiction of the ICC, the Claimants did, only on January 29, 1987, file a request with the Present Tribunal asking that the proceedings be resumed. The Present Tribunal admitting, in the above mentioned decision, that "while the concurrent pursuit of a remedy in different jurisdictions might be justified to protect legitimate interests of a claimant," the Tribunal was nevertheless aware of the eventual consequences thereupon since it stated that that entails certain practical problems of international judicial administration "since it invites a clash between competing exercises of jurisdiction" (the first Preliminary Decision p. 36). Therefore, three facts and dates are to be borne in mind to wit: that the alleged cancellation of the Claimants' project at the Pyramids occurred on May-June 1978, and that the present request for arbitration was received by the International Center for the Settlement of Investment Disputes (hereinafter called the Center or ICSID) on August 24, 1984 and that it was due to the Claimants' concurrent recourse to both the French Courts and to the Center that the Present Tribunal decided to stay the proceedings which were not continued till after the French Court of Cassation rejected the request of the Claimants on January 6, 1987.

b. In its first Preliminary Decision, the Tribunal did not find it necessary to answer the objection raised by Egypt to the effect that Article 8 of Law No. 43, upon which the Claimants rely to establish jurisdiction, is not applicable to the present dispute since the claim is based upon the non-performance of obligations under a contract. In fact, the Tribunal stated that "it is not necessary, for the purpose of the present decision, to address this question, since Egypt's objection may be simply answered by a recapitulation of certain facts..." (the first Preliminary Decision p. 27). As a result, the objection remained unanswered by the two preliminary decisions.

2. *Guidelines to the Settlement of the Present Dispute*

a. The Convention on the Settlement of Investment Disputes between States and Nationals of other States (hereinafter called the Washington Convention or the Convention) is in fact and in law the prime legal instrument which the Present ICSID Tribunal is to observe and implement, in its letter and spirit. It suffices, for the purpose of this preliminary observation to point out that the consideration upon which the Convention was elaborated, as mentioned in the Preamble of the Convention, is "the need for international cooperation for economic development and the role of private international investment therein." The Report of the Executive Directors on the Convention

(hereinafter called the Report) in its turn explains that the *raison d'être* of the creation of an institution designed to facilitate the settlement of disputes between States and foreign investors "can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it" (the Report para 9. Emphasis added). And that the Executive Directors believe that "... adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of international investment into its territories, which is the primary purpose of the Convention" (the Report para 12. Emphasis added).

These statements militate for a specific understanding of the notion of investment and the qualification of an investor, in the framework of the Convention. The main characteristic differentiating investors from developers or promoters or the like, seems to reside in the fact of the flow of invested capital, as instrument for economic development, that brings the investor into the host State. It is to be noticed that the scope *rationae materiae* of the jurisdiction of the Center is limited to legal disputes arising directly out of an investment between a Contracting State and a national of another Contracting State (Article 25 of the Convention). Reference to "investment" anywhere in the Convention should be accorded the same significance, which consists, as above mentioned, in the flow of international capital to the host State. In the same vein the Egyptian law concerning Arab and foreign investments and free zones, enacted by law No. 43 of 1974, states in article (2) that "the term 'invested capital' in the application of this law shall be deemed to mean the following: i- Free foreign currency duly transferred to the Arab Republic of Egypt through a Bank registered at the Central Bank of Egypt for utilization and execution or expansion of a project..." (G. Delaume, *le Centre international pour le règlement des différends relatifs aux investissements* (CIRDI), Clunet 1982, p. 802-803, where the author states that "En revanche, d'autres législations procèdent à une plus ou moins longue énumération des contributions considérées comme entrant dans le concept d'investissement" and cites Law No. 43 of Egypt as an example of the legislations he refers to).

For the purpose of this preliminary observation, it suffices to point out that "investment" means primarily and mainly whether in the framework of the Convention or under the Egyptian Law No. 43 of 1974 the flow of international capital to the host country. The Present Tribunal established in the two preliminary decisions upon jurisdiction that the Claimants applied to the Egyptian Government as investors in the framework of Law No. 43, and that Egypt, as a contracting State to the Washington Convention, embodied in article 8 of the above mentioned Law a standing offer of consent to the jurisdiction of ICSID. Under these circumstances, it appears legitimate to scrutinize the exact effective qualification of the Claimants in the light of the letter and spirit of

both the Convention and the Egyptian Law No. 43 of 1974. In the present case, the application presented to the Competent Authority in Egypt; the General Investment Authority, (herein called GIA) under item A: contains information that the "estimated capital expenditures: imported in foreign currency: 550,000,000.- dollars." Under the same item it was written that "the total estimated expenses for the various constructions on the site amount to five hundred and fifty million dollars during ten years... include (sic) the constructions of hotels providing 15,000 beds." (Resp. annex F 17). Then on May 19, 1975, less than one month after the presentation of the application to the GIA, Mr. Gilmour, the Representative of the Claimants sent a letter directly to the President of the Republic of Egypt demanding the approval that the usufruct right be accorded for a duration of 99 years, instead of 50 years, and as justification for that request he stated that that duration "is a must for such a big sized project which will need a capital of 770 million dollars" (Resp. annex F 23, p. 25). Consequently on July 20, 1975, the Board of Directors issued Decree No. 50/14 - 75 approving the establishment of the joint venture Company between SPP and EGOH for a period of 99 years "on condition that this matter should conform with the regulations of Law No. 129 of 1947 concerning the obligation of the public utilities..." (Claimants exh: 105). Needless to state in this context that the advantages that may be accorded to an investment project are always related to the investment's importance to the host State's economy and needs. (Ph. Leboulanger, *Les contrats entre Etats et entreprises étrangères*, 1985, p. 195). In this respect, I may only point out, for the time being, that ample consideration and serious reflection should be accorded to the realities of the present case, and to their due legal significance and qualification in the framework of both the Washington Convention and the Egyptian Law No. 43 since a major argument and serious allegations, concerning the proper legal qualification to be accorded to the activities of the Claimants, are at the core of the present case. In this respect I may quote the Eminent Professor Reuter commenting the Washington Convention as saying "Toute convention répond à un besoin et la question se pose de savoir quelles sont les sources exactes des inquiétudes et des refus qui paralysent le développement des investissements internationaux. Si c'est vraiment l'absence d'un tiers impartial... mais dans la mesure où il n'en serait pas ainsi son mérite n'en serait qu'indirect, elle vaudrait alors, si l'on peut dire, surtout par son fonctionnement, c'est-à-dire par l'occasion qu'elle donnerait à une jurisprudence d'élaborer et de préciser les règles de fond sur lesquelles elle garde un silence relatif. La question ainsi posée ne fait que souligner toute la différence qu'il peut y avoir à ce point entre l'arbitrage commercial international et le contentieux de l'investissement". However, Professor Reuter adds "Ce n'est pas que dans son indétermination la notion d'investissement ne puisse rejoindre celle d'opération commerciale" (*Investissements étrangers et arbitrage entre*

Etats et personnes privées, 1969, p. 10-11. Emphasis added). As has been explained, the difficulty to find a legal definition to the notion of investment emanates from the fact that it is, by its origin, an economic notion, nevertheless it is relatively easier to recognize a specific case of investment which is the duty of a Tribunal, than to define the notion itself which is of the domain of the doctrine. In this vein, it has been remarked that "... avant d'être une notion juridique, l'investissement est une notion économique et peut en conséquence prendre les formes les plus diverses. Il en résulte que s'il est relativement facile de reconnaître un investissement, il est plus difficile, voire impossible d'en donner une définition exacte susceptible à la fois de couvrir ses multiples aspects et de s'adapter à une réalité économique en évolution constante" (J.D. Roulet: la Convention du 18 mars 1965, annuaire suisse de droit international, 1965 p. 43).

Before concluding on this issue, I wish only to draw the attention to the rules of international development law, the genesis of which may be traced to the First United Nations Development Decade (Resolution 1710 (XVI) of December 19, 1961, whereby the General Assembly proclaimed the ten years from 1960 to 1970 to be the first United Nations Development Decade). Whether considered as soft or hard law, the fact remains that the economical philosophy underlying international development law has changed the climate of investment in the developing countries where new ideas and rules are replacing old certainties. An example of this change can be easily detected in the Resolution 1803 (XVII) of the General Assembly where "appropriate" compensation in case of nationalization replaced the once established rule of "prompt, adequate, and effective" compensation (A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, London 1986, pp. 81 to 84 and Ph. Leboulanger, *Les contrats entre Etats et entreprises étrangères*, p. 168 et s.)

b. The standard of morality to which the Present Honorable Tribunal expressed its adherence in conformity with its legal obligation: Reference here is made to the Procedural Order issued by the Honorable Tribunal on February 13, 1991. In my opinion this Order represents a landmark in the international jurisprudence concerning settlement of investment disputes. Although qualified as a Procedural Order, it has its own inherent logic that radiates, by its legal consequences beyond the strict sphere of procedure. As it would be dealt with, at length *infra*, I may only point out that the Claimants in their final conclusions and prayer for relief requested, secondarily, the value of their investment in ETDC on the basis of their out-of-pocket expenses and an additional amount to compensate for loss of the chance on opportunity of making a commercial success of the project. Under item (4) they indicated the sum of 2,254,000.- dollars as "development costs pre-cancellation" and as supporting document

they presented in Exhibit 170 a letter from Coopers and Lybrand dated January 19, 1981 with a summary of SPP (ME)'s development costs for the years 1975-1979 broken down by categories of expenses. The Respondent for its part stated in its annex F-49 that the investigation of these expenses sheds doubt over the components of the unjustifiable developing costs which were not charged to ETDC and formally requested that the Tribunal order "une expertise pour vérifier la réalité de ces coûts et les destinataires réels des paiements intervenus." Therefore, the Tribunal ordered that "the Claimants shall submit, within one month, a document indicating the nature, date and amount of the above referenced development costs, including the names of the recipients of payment in excess of US\$20,000 and a confirmation that these sums were legitimately and actually expended for the project." (The Procedural Order, para 6-a. Emphasis added). From a legal point of view, the Tribunal had all grounds to refuse a request for payment of sums unless supported by pertinent and conclusive documents on the basis of the well established principle concerning *onus probandi*. As the Tribunal is not empowered to order an injunction to any party to present a proof of any of its contested allegations, this matter being a burden which rests upon the claiming party, the Procedural Order unveils the fact that the Tribunal acquiesced to go forward with, and to scrutinize, the evidence advanced by the Respondent to the effect that the Claimants had recourse, during their activities in Egypt, to irregular contacts and corruption and that the evidence to these allegations resides in what the Claimants call development costs. That is to say that the Procedural Order, requesting the Claimants to produce supporting documents related to the development costs and, especially to unveil the names of recipients of sums exceeding a certain amount, indicates that in the Tribunal's conviction, the existence of the facts, about illegal expenses alleged by the Respondent, is more probable than their non-existence. Thus, the burden of going forward with the evidence, concerning the allegations of corruptive practices was shifted back to the Claimants with all the legal consequences that that engenders. It remains thus, for the Tribunal, to evaluate the issue in the light of the justifications and comments advanced by both parties.

The Claimants stated that "as explained in that affidavit (of Mr. Birchall) it was impossible, due to the loss or destruction of accounting documents dating back 15 years to account for every expenditure per category. However, the documents available do confirm the nature of the expenditures beyond any doubt and that they were legitimately made for the investment project." (Claimants' note dated April 20, 1991). To which explanation the Respondent commented that "En effet, la question des development costs, dont SPP ne demande pas le remboursement en tant que tels, a été soulevée par la R.A.E. à l'appui de son moyen tiré de la corruption" and that "Or l'on est obligé de constater qu'il n'a pas été répondu par SPP comme cela lui a été demandé par le

Tribunal: en effet 1. Les réponses sont gravement insuffisantes. 2. Elles contiennent de graves contradictions ou même contrevérités. 3. Et enfin les explications sont inacceptables." The Respondent points out that "on imagine mal comment dans une affaire aussi importante... SPP aurait pris le risque de détruire les éléments de preuve relatifs à une question déjà contestée à l'époque..." (Respondent's note dated June 20, 1991, emphasis reproduced). The Respondent in the above mentioned note affirms, moreover, that starting from May 1979 the question of the development costs was under debate and discussion with representatives of Egypt and that at that time Mr. McLellan, a Claimants' representative, affirmed the existence of the supporting documents as regards the development costs. That fact seems to be later confirmed by Mr. Blainlay from the firm Coopers and Lybrand, who explained in his testimony before this Tribunal that the documents related to the development costs were examined by his firm in preparation to its letter dated January 19, 1981. In this context, for the sake, and in the limits, of this preliminary observation, I express my conviction that the Tribunal should be considered bound by the letter and spirit of its own Procedural Order, in any further determination of the related legal consequences.

c. The notion of World Cultural Heritage and its implication: The uniqueness of the site on which the Claimants' project was finally intended to be implemented, on the Pyramids' Plateau proper, and its final registration on the list of properties included in the World Heritage on October 26, 1979 (Resp. annex D 29), mandate to take into consideration this element of "public international interest or need" as regards the issue of the present dispute.

In this context, I may draw the attention to that it was revealed, during the proceedings before this Tribunal, that the maps attached to the only formal agreement entered into with the Claimants by an authorized representative of the Egyptian Government, which is the Agreement of September 23, 1974 entitled "Heads of Agreement," indicate the site of the project situated mainly around the Pyramids Plateau. The avatars that occurred later about the change of the site will be explained below in detail, however it seems that the two Parties in dispute do not underestimate the obligation to preserve all and any vestige of the Ancient Civilization on the Pyramids Plateau. By choosing the site of the project on the Pyramids Plateau proper and in the vicinity of the Monuments themselves, those who opted for that choice, instead of the site proposed by the Respondent as shown on the maps attached to the September Heads of Agreement, were necessarily aware of the high risks undertaken. It was in fact and in law a "contrat à grand risque", with all the consequences that emanate from that *qualification juridique*.

In fact, the Claimants themselves pointed out that on September 7, 1977, representatives of the Archeological Authority and of ETDC met and came to an agreement with respect to various procedures to be followed to further coordinate and cooperate with each other (Cls Memorial p. 48 and the minutes of the meeting. Cls. exh. 137). The minutes of that meeting, (the Respondent contests nevertheless the correct representation of the Antiquities Authority at that meeting) indicate that it was agreed upon inter alia that "in the case where-as fixed antiquities are present, such as a complete archeological village or temples... which could not be removed, the Company is bound to leave the area and to eliminate it from the project." It seems, therefore, that the Claimants' explanations in this respect formally confirm the *notion du risque* inherent to their option as regards the site of the project on the Pyramids Plateau proper, and reveal their readiness to comply with any eventual consequence.

The Antiquities argument will be dealt with later, however, it seems appropriate from the outset to state the following:

- That the Claimants trespassed upon the Antiquities zone of the monuments proper. This fact is revealed by the statement of the Minister of Tourism before the People's Assembly (that same statement was relied upon by the Claimants, however in another context. Claimants' exh. 74 p. 45) where the Minister was quoted saying "... when I took over the Ministry, I found out that the construction is being carried out at a distance of 1.250 meters from the Pyramids, immediately I have issued my order for the cancellation of village No. 24 ... "

- That the Claimants' project, as they conceived and had the intention to implement, would have endangered the existing monuments. This fact is founded upon uncontested technical reports entitled "Engineering Hazards and Deleterious Effects of the Pyramids Oasis Project on the Existing Monuments." (Resp. Annex F. 32), "The Cairo Pyramids site: Anticipated Problems of Site Construction from the Geological Point of View" and "Ground Water and Seepage conditions after the Erection of Pyramids Oasis" (Appendix 1-1 and 1-2 to the said technical report, Resp. Annex F. 33 and F. 34).

- That it had been established that antiquities were discovered within the Claimants' zone of activities. The fact which is evidenced by the "Memorandum sur les Monuments de la Région de Gizeh", (Resp. Annex F. 35 p. 21) and corroborated by the video tape projected by the Respondent during the Tribunal's hearings in September 1990.

- That the whole area from the Pyramids of Giza to Dahshur was registered on the list of properties included in the World Heritage on October 26, 1979, in the framework of the Convention concerning the protection of the World Cultural and Natural Heritage (hereinafter called the UNESCO

Convention). In fact, Egypt submitted, in February 1979 to the UNESCO its nomination of "Memphis and its Necropolis - The Pyramids Fields from Giza to Dahshur" to be registered on the list of the World Heritage Properties. (Cls. exh. 198). It seems unconceivable, in the framework of the UNESCO Convention to endanger vestiges of an Ancient Civilization, already and uncontestedly considered part of the Human Civilization till the site or the monuments in jeopardy be formally listed on the World Heritage List. In the same vein, even the scientific high probability of discovery of ancient vestiges mandates, in the spirit of the Unesco Convention the appropriate measures of protection by the National State acting on behalf of the International Community.

To conclude on this point, I may express my adherence to Professor's Kahn statement to the effect that "l'intérêt de la Convention de l'UNESCO, outre la reconnaissance de l'existence d'un Patrimoine mondial en tant que catégorie juridique, est de ne pas se contenter d'une déclaration d'intention mais de mettre en oeuvre un ensemble d'obligations et un système de gestion qui repose sur trois volets..." (Resp. annex D 22 p. 14). And for Professor Kahn to conclude that "actuellement, en dehors de nombreuses conventions sur les atteintes aux droits de l'homme seul exemple certain de *jus cogens*, on ne voit que peu de règles qui puissent bénéficier d'une telle hauteur dans la hiérarchie des sources. Aussi est-ce sans hésitation que j'affirme que le respect du patrimoine culturel mondial constitue une règle impérative". (Resp. Annex D 22 p. 16-17).

Professor Kahn while expressing reserves as to consider the obligation to preserve the properties belonging to the World Heritage as part of the *jus cogens* affirms however that this obligation constitutes elements of international public order "Mais s'agit-il d'obligations d'ordre public international? Sans aller jusqu'à faire appel à une notion aussi controversée et floue que celle du *jus cogens*, il me paraît clair que les règles imposées aux Etats sont des règles impératives auxquelles on ne saurait déroger: Elles constituent des éléments de l'ordre public de la communauté internationale..." (Resp. Annex D 22 p. 16). In my opinion, I consider that the interest of the International Community as regards its Human Cultural Heritage implied a non codified international obligation binding upon both the International Community and the States even before the entry into force of the Unesco Convention. I may just refer here, in this context, to the fact that when Egypt, in the early sixties, had no alternative but to take the hard and painful decision to sacrifice certain monuments, *inter alia* the temple of Abu Simbel, as an inevitable consequence to the construction of the Aswan Dam, the international community saw to it, financially and technically, that these monuments be protected and preserved. This action, that dates thirty years ago, yet reveals *un état d'esprit* of the International Community behind its strive to preserve its own Cultural Heritage and for the least an

international obligation in the making. Originally built into the face of a cliff, the temple was moved to safety 200 meters in land from its original position, the project completed by an international team cut the temple into pieces, carved the entire temple out of the cliff and reconstructed both cliff and temple nearby. The project took 5 years and 40 Million dollars to complete, one of the most ambitious relocation projects, to my knowledge, in history. (Noteworthy in this respect to mention that the Temple of Abu Simbel was, in turn, registered on the list of World Heritage at the same date of the registration of the site of the Pyramids Plateau - Resp. Annex D 29, Unesco, Le patrimoine mondial). *A fortiori*, in case a signatory State to the Unesco Convention identifies a property that responds to the qualifications of the World Heritage Properties, it should be bound to act in accordance to and in compliance with, its obligations emanating from the imperative rule of international law codified by the said Convention. That is to say that it is not by the act of enlistment that a site or a monument acquires its qualification as part of the world heritage.

The enlistment has in law a declarative nature which does not affect the *nature propre* of the site or monument but formally triggers the *qualification juridique* only under the convention to the said site or monument. The needs and interests of the international community to the preservation of the site from the Pyramids to Dahshur, the actual discoveries of antiquities on that site coupled with the high probability of more discoveries and the Claimants' apparent encroachment upon antiquities area are, in my opinion, pertinent elements that should be borne in mind. Moreover, as already explained and as will be demonstrated later, the option for the site on the Pyramids Plateau instead of the one initially proposed by the Egyptian administration around the Plateau seems to be impregnated, from the outset by the acceptance of an evident high risk.

II. A Summary of Pertinent Facts:

The facts related to the present dispute were mentioned in the two Preliminary Decisions of this Tribunal, however, in the limits necessitated to pronounce upon ICSID's jurisdiction and the Tribunal's competence over the present dispute.

Hence, facts represented, and/or developed by the two parties during the proceedings concerning the subject-matter of the dispute, mandate a more developed and extensive review.

The main facts presented during the present proceedings relate 1- to the change of the site upon which the Claimants' project was finally being implemented, 2- to the Claimants' non-compliance with their obligations in the framework of the rules governing their project (the housing argument), 3- the

critical date May-June 1978 and the subsequent conduct of the parties, and 4-facts concerning irregular contacts and corruption allegedly imputed to the Claimants. In the review of these facts, I would nevertheless, state some personal reflections and observations necessitated by the context, without however going through the discussion of the legal consequences thereupon which will be dealt with in the next chapter.

1. *The change of site:*

a. The Respondent's contentions:

I. The Respondent advances (Counter Memorial Vol I, p. 90) that it was assumed, as a matter of fact, that the site of the project at the Pyramids, as shown in the attached map to the November 23, 1975 contract of incorporation of ETDC (between SPP (ME) and EGOH, Cls. exh. 113) upon which the master plan report and the other drawings were later prepared, is the one and the same agreed upon with the Government as shown in the attached maps to the Heads of Agreement dated September 23, 1974. The reproductions of the maps attached to the said agreement presented by the Claimants in exhibit (90) states the Respondent, were misleading since the reproduction consisted of two parts each one containing beside itself a mirror image of the other half of the map superimposed on it. Dissipating any hint of the allegation that the confusion was contrived, the Respondent, however, ascertains that the comparison between these two maps: the one attached to the Heads of Agreement as Annex 'A' delineating the "sites" upon which the government undertook to secure title of usufruct to the projected joint venture, and the other map attached to the November 1975 contract of incorporation of the joint venture on which the site of the project was delineated, illustrates the fact that the two sites do not coincide.

II. Respondent explains (Counter Memorial, pp. 92-93) that the site delineated in the map attached to the September Agreement is in fact composed of four sites mainly outside the Pyramids Plateau and below it, one of which is situated to the south west of the area, bisected by the Fayoum Road (near what has become the new 6th of October city), Respondent adds that even from the most cursory look at the annexed map to the September Heads of Agreement, it appears "that the main development sites agreed upon fall outside, and below the Plateau, and only a minute site, and possibly one half of another one, very far removed from it, can be said to be at the edge of the Plateau" (Counter Memorial Vol I, p. 98).

III. The Respondent alleges that the Claimants' intentions concerning the site of the project, and as far back as at the time of signing the Heads of Agreement, departed from the terms of that Agreement they accepted and entered into. As proof to this allegation, the Respondent refers to the content

of the Affidavit of Mr. Gilmour presented before the ICC tribunal (Cls. exh. 89) in which he explained the background to the September Heads of Agreement. The Respondent quotes Mr. Gilmour giving an account of his visit to Cairo, accompanied by Mr. Munk during the third week of September 1974, as stating that "apparently in response to SPP's concerns about the suitability of the Pyramids Plateau as a development site, General Zaki had encouraged the SPP to consider a development scheme to comprise tourist facilities not only on the Plateau, but also in the area of Mena House Hotel and the 'Gateway' to the Pyramids themselves. Mr. Thomson reported gaining the impression that General Zaki was soliciting SPP to undertake general planning responsibilities for development of major parts of the area entirely surrounding the Pyramids." And that "we abandoned the Egyptian plan, in favor of the fully-integrated, high quality destination resort which we felt uniquely qualified to conceive and implement. The general concept plan we devised for the Pyramids, in contrast, proposed higher density housing on the Plateau grouped in discrete 'desert villages'; and in deference to General Zaki's wishes as we then understood them, we also incorporated plans for tourist development in the area of the Mena House and at the entrance to the Pyramids from Fayoum Road." (Counter Memorial, Vol I, pp. 95, 96).

IV. Respondent explains that, whatever existing divergences between the two parties, it was the site proposed by the Government that had been agreed upon as shown in the attached map to the September Agreement. To the conclusion that the approval of the project by the President of the Republic of Egypt in the meeting held on September 22, 1974 necessarily and logically should be understood in this context, as an approval of the site as demonstrated and delineated in the attached map to the September 23, 1974 agreement.

V. The Respondent, also, points out that the December Contract explicitly stipulates in its article 4 that "ETDC will undertake the development and management of both projects *within the general limits described in the map attached to the Heads of Agreement...*" (emphasis reproduced), and that article 5 of the same contract provides as follows "... EGOH will use its best effort to acquire the titles of property and possession of the land comprising the sites of each project *within the limits referred to in article 4...*" (emphasis reproduced). The same article provides that "... provided that they are developed in accordance with approved plans, *but excluding the monument areas and those which are designated for public use within the project sites.*" (emphasis added)

VI. The Respondent explains that, the attached map to the confidential report which is referred to in the December Contract, shows that the sites designated on the map correspond largely to the sites designated in the map attached to September Heads of Agreement. Respondent adds that "the only

divergence... is that the unlawful activity of urban development for wealthy locals ... began to show its head in the report ... ” (Respondents’ Counter Memorial, Vol I, p. 109)

VII. Respondent concluded that “we also know that it was this unlawful change of site to a doubted forbidden area (because it was already partially protected by existing legislation and because that protection had to be reaffirmed and extended as the result of new discoveries and of local and world public opinion pressure) that formally brought the Pyramids Plateau project to an end.” (Counter-Memorial, Vol I, p. 112)

VIII. Commenting an inter-office memorandum sent from Mr. Munk, on October 2, 1974 (Cls. exhibit 78) which contained that “in the light of the above, two unique development areas have been identified by the SPP project team in cooperation with the Egyptian Authorities. The first ... consists of some 20.000 acres and is on the immediate outskirts of Cairo... located on the Giza Plateau and includes the three Pyramids and the Sphinx...” (emphasis added.), the Respondent explains that that memorandum dated October 2, 1974, gives more evidence as to the strife of the Claimants to implement their project on the Plateau, in full contradiction to the agreed upon Heads of Agreement and also to the Contract of December 1974 they entered into later on December 12, 1974. (Respondent Counter-Memorial, Vol I, p. 115).

b. The Claimants’ explanations: The Claimants explain the facts in a different way, to the conclusion that the Respondent’s allegations concerning the site are unfounded. Their presentation is essentially based upon the assertion that “... The Egyptian Government suggested the Plateau area, that the parties proceeded to discuss and define the area together, and that by January 1975 (at the latest) Egypt had established and all parties were agreed on the location. Details of the location were then refined, discussed, approved, and reapproved in numerous decrees and other official documents.” (Cls. Reply p. 21)

I. Claimants point out that the fact that the attached maps to both the Heads of Agreement and to the Confidential Report to the December Contract, show different sites to the one where the project was finally implemented, should be considered in the light of another fact which is that the final site, on top of the Plateau, was clearly shown in the map attached to the Contract of November 23, 1975, entered into by EGOH and SPP (ME), and aiming to the Constitution of the joint venture ETDC. Claimants add that not only the Head of EGOH signed the above mentioned contract but that the Minister of Tourism himself affixed his signature to the contract.

II. Denying any significance to the fact of the change of the site of the project as there do exist several approvals given by the Government to that ultimate site, *inter alia*, the contract of incorporation of ETDC on November 23,

1975, the Claimants, however, explain the change of the site as a change agreed upon by the two parties.

III. The Claimants advance that the precise location of the Pyramids project was “under discussion prior to the formal signing of the Heads of Agreement, and discussions continued thereafter” (Cls. Reply, p. 24. Emphasis reproduced). The Claimants quote the Minister of Tourism as stating, before the People’s Assembly, describing SPP’s visit to the Plateau in July 1974, that “... to encourage tourist projects in Egypt thus by creating two tourist regions with their complete resort in the Pyramids Plateau...” (Emphasis reproduced).

IV. Claimants also suggest, on the faith of testimonies of Mr. Grierson before the ICC Tribunal and of the written statement by Mr. Walker, PPA’s Chief Planner from mid 1974 to early 1975 that all allegations advanced by the Respondent in this respect should be dismissed. In that written statement, the Claimants point out, Mr. Walker explains that “The suggestion that the site of the project was changed surreptitiously is completely wrong and quite ridiculous.” (Cls. exh. 175)

V. Claimants explain that on the same day, the December 12, 1974 contract was executed, the Ministry of Tourism issued a decree (No. 356) forming a committee, one of the functions of which was “to specialize in the study of the propositions submitted by SPP in connection with the construction of a tourist city in the Pyramids area.” (Cls. Reply, p. 30). The Claimants also point out that the above mentioned Committee called itself “The Pyramid Plateau Committee.” (Cls. exh. 126, concerning the “Report of the Pyramids Plateau Project Committee”)

VI. Claimants, however, rely mainly upon the issuance of Presidential Decree No. 475 of May 22, 1975 and also upon the memorandum preceding that decree and presented by the Minister of Tourism. Claimants point out that the memorandum contains reference that the site to be allocated to touristic use in the framework of the September Agreement lays on private land and on the Pyramids Plateau (Cls. Reply, p. 35), and that the Presidential Decree provides in article (1) the allocation of the land “on each of the Plateau of the Pyramids and Ras el Hekma...” to touristic use. Consequently the Claimants assert that the choice of the site on the Plateau was mutually agreed upon by the Parties.

VII. As additional proof the Claimants refer to the letter and the attached map sent on February 2, 1976 to the Chairman of EGOH, by the Vice-Minister in charge of Survey Services and Expropriation, the comment, in Arabic, written on the map reads as follows “(1) that encircled in red on the plan is the Pyramids Plateau site, object of the Presidential Decree of 1975 attributing this Plateau to EGOH (Ministry of Tourism) for touristic exploitation. Area: 10.000 feddans. (2) That part encircled in blue on the plan and represented by

the letter C is the site reserved for ETDC in implementation of Decree No. 212 of 1975 of the Ministry of Economics and Economic Cooperation. Area: 4,000 feddans" (Cls Reply, p. 39 and exh: 187). That map, as Claimants point out was transmitted by the Chairman of EGOH to Mr. D. Gilmour on February 1976 with a note saying that "these 4,000 acres form a part of the overall 10,000 acres area transferred to EGOH under Presidential Decree 475-1975." (Cls. exh: 108)

VIII. In execution of the December Contract, as the Claimants assert, four committees, representing EGOH, the Pyramids Plateau Committee, ETDC and the Giza Survey Department, visited the area between February 16 and 21, 1976 and physically marked it, preparatory to its formal delivery to ETDC from EGOH: "owner of the said site pursuant to the Presidential Decree No. 475/1975..." (Cls. Reply, p. 39 and exh: 188).

IX. Finally the Claimants refer to the answer of the Minister of Tourism before the People's Assembly where the Minister said that "... The project is situated south of the Pyramids of Giza... The Antiquities Authority participated in the joint committees which studied the Project located in the Governorate of Giza (Pyramids Plateau). The Antiquities Authority approved use of this Tourist site and transferred the site to EGOH in accordance with Presidential Decree 475 for the year 1975, authorizing the allocation of the lands situated on the Plateau for the purpose of tourist development." (Cls. Reply, p. 41 and exh: 87)

c. Personal observations:

I. There is no doubt, as well as it is not argued by the Parties, that the ultimate site of the project, on the Plateau proper, differs from the site shown in both the attached map to the September Heads of Agreement and to the attached map to the Confidential Report referred to in the December Contract.

II. The attached maps to the Presidential Decree No. 475 of 1975, on which the lands allocated to EGOH for touristic use were to be shown had not been published with the said Decree as testified by the competent authority (Respondent exh: F14). The Presidential Decree however, does not contain explicit indications as to the precise site allocated to EGOH since it simply refers to the contours shown in the attached maps. Claimants assert, however, that these maps existed. They say that "These maps were apparently in existence. They are mentioned here, in the Decree itself and by SPP's lawyer in a telex at the time." (Cls. Reply, p. 35 and exh: 100).

III. However, doubt emanates from the fact that in the two memorandums executed by EGOH for the demand for the issuance of a Presidential Decree allocating lands to touristic exploitation in execution of the provisions

of the Heads of Agreement it was stated that "... draft decree was prepared by the Organization (i.e. EGOH) and was sent to the Ministry of Tourism on March 15, 1975 in the form of two separate draft decrees, each project being the subject of an autonomous decree and each accompanied by an explanatory memorandum where it was stated that the areas of the two projects lay *in the land which was part of the public domain of the state.*" (Resp. exh: F.23, p. 21, The Report of the Experts Committee Charged With the Study of the Pyramids Plateau Project. Emphasis added). On the other hand, the memorandum presented by the Minister of Tourism to the President of the Republic for the issuance of a decree to the effect of allocating the lands to the project, in appliance to the Heads of Agreement, states that the lands affected to both the projects, at the Pyramids and Ras el Hekma lay in the private domain of the state. (Resp. exh: F.14. in Arabic). This remark is corroborated by the report of the Expert Committee. (p. 22 of the Report).

It is noteworthy that, besides the fact that while the Memorandum prepared by EGOH mentioned that the lands requested to be allocated to the project lay in the public domain (Antiquities), the Memorandum prepared by the Minister of Tourism and presented for the issuance of the necessary Presidential Decree stated that the lands lay in the private domain of the state.

Neither memorandum mentioned or alluded to any change of the site shown on the maps entitled "Master Plan" attached to the September Agreement to which the Government of Egypt, duly represented by the Minister of Tourism, formally entered into with SPP. The question remains unanswered about the reason of the discrepancy existing between the two memorandums, of EGOH and of the Minister of Tourism, the former stating that the lands lay in the public domain (Antiquities) and the latter stating that the lands lay in the private domain of the state. The fact remains that nowhere there was any allusion to the change of the site as shown in the "Master Plan" map attached to the September Heads of Agreement. It seems also important to point out that the Minister of Tourism stated in his written submission to the People's Assembly of September 10, 1977, that "the Antiquities Authorities approved use of this tourist site, and transferred the site to EGOH in accordance with presidential decree 475 for the year 1975..." (Cls. exh. 87, p. 20). This statement gives ample evidence to the effect that the memorandum of the Minister of Tourism for the issuance of Presidential Decree 475 was incorrect and misleading since it contained information that the lands were part of the private domain of the state in contradiction to what he later stated in the above mentioned written submission in which he affirmed that the land was under the authority of Antiquities, and as such is considered part of the public domain, and was transferred from that authority to EGOH.

IV. The two parties presented translations in the English and the French languages to the Presidential Decree No. 475 of 1975: The Claimants presented, in this arbitration, a translation in English of the said Decree which reads as follows "Article (1): To specify the use of the land on the Pyramids site and Ras el Hekma site which are clearly defined as regards boundaries in the two maps and the attached memorandum for tourist purposes..." (Cls. exh: 25 and exh: 106). The Respondent also presented a French translation of the same Decree which reads as follows "D'effectuer à usage touristique les terrains situés sur le site des Pyramides..."

V. The fact is that the Arabic text of the Presidential Decree No. 475 of 1975 provides, in a more accurate translation, that "The allocation of the lands situated on both: the Pyramids Plateau (In Arabic: 'Al Wakia ala kol min Hadabat al ahram...') (Resp. exh: F.14, page 437 of the official journal: No. 23 of June 5, 1975, and Resp. exh: 16)

VI. The text of the Presidential Decree No. 475 of 1975, thus, may be argued to be evidence suggesting that the Egyptian Administration has approved the implementation of the project on the Plateau, however, as will be explained later in this opinion, the Decree by itself does but allocate the land to EGOH and cannot therefore legally confer *per se* a right to the Claimants nor be construed as evidence to the effect of a departure from or a modification to the September Heads of Agreement by the Egyptian Government.

The Claimants on their part assert that the maps attached to the above mentioned Decree existed, nevertheless these maps were never presented by either party. It is established that the registration of the rights of the use of the lands to EGOH was effectuated without any indication, whether in the Presidential Decree or in any other document, as to the precise location and contours of the lands subject to that registration. (Resp. Annex: F16). In the registration act it was thus precised that the accuracy of the description of the lands and their contours rests upon EGOH without any responsibility engaging the Registration Authority. (In Arabic: Doon mas' ouliat al Shahr al Akary haliyan aw moustakbalan). It is noteworthy in this respect, to point out that the registration act, explicitly mentions that the identification of the lands was effectuated by EGOH, and under its responsibility. Had the maps been presented, the Registration Authority would have been obliged to verify by itself the exact location of the land and its contours. (Resp. Annex: F.16, p. 5)

However, the multiplicity of the misfortune of the Egyptian Administration may require a careful attention in later developments.

VII. It can be argued that the Egyptian Administration for the least did not react to that *fait accompli* concerning the implementation of the project in the determined site on which it was finally undertaken; a conclusion which

may be corroborated by the fact that a new Minister of Tourism later stated before the People's Assembly that "... When I took over the Ministry I found out that the construction is being carried out at a distance of 1.250 meters from the Pyramids, immediately I have issued my order for the cancellation of village No. 24 and made the construction to be at a distance of two kilometers of the Pyramids." (Cls. exh: 74, the Transcript of Proceedings of the People's Assembly of February 7, 1978, p. 45)

VIII. Nevertheless, it seems surprising that the Claimants, with all their international business experience, did neglect, to point out in the basic document of agreement they entered into with the Egyptian Government (the September Heads of Agreement), specifically and clearly, that the attached maps to the Agreement do but indicate a location which is a preliminary one according to their contentions in this respect. In the early stages of the proceedings before this Tribunal, the change of the site was not brought to the Tribunal's attention. Moreover, the Claimants were not reluctant to stress upon the fact that all high officials of Egypt approved the project and that even the President Sadat gave on September 22, 1974 his "unqualified approval" to the project when presented to him, at that date, by the representative of SPP. From the unveiled facts it became certain that, at least at that date, President Sadat could have never agreed upon the location of site on the Plateau since the Maps attached to the September Heads of Agreement, signed the very next day, show the site mainly *around* and not *on* the Plateau. It is also intriguing that the December Contract refers to the site shown in the attached maps to the Heads of Agreement. And then, the December Contract refers also to a Confidential Report which contains reference to an attached map which in turn shows the site on a different location. And later on, the site is shown in a complete different conception on the maps attached to the act of incorporation of the ETDC, dated November 23, 1975.

This fact, put together with the manifest derogation by the administration to the established rules mainly in not publishing the maps, if they ever existed, and the registration of the right of usufruct upon a determined site with specific contours without any available indication, whatsoever, as to their correctness or exactitude, shades doubts about the whole process of the determination of the site of the project on the Plateau Proper. In this context, I may point out that the statement of the Minister of Tourism before the People's Assembly (Relied upon by the Claimants: Cls. exh: 74, p. 45) contained information that "This is what it concerns the region (A). Referring to the region (B) of which the member has said, that the construction is carried out in it without asking the opinion of the Antiquities Authorities, *in fact this had happened before I have taken over the Ministry.*" (Emphasis added). The above mentioned statement of the

new Minister of Tourism, relied upon by the Claimants, reveals at least two facts:

- That the Claimants in region (B) did not comply with their obligations to first ask permission of the Antiquities Authority before beginning the works. The requirement to obtain permission confirms the Claimants' cognizance of the nature of the site and reveal their acceptance of any inherent risks tied to the specific nature of the site.

- That the new minister was in his statement trying to evade the responsibility incumbent upon himself as Minister of Tourism, and by the same, simultaneously asserted the non-compliance of the Claimants with their obligations, in this respect, as regards the preservation of Antiquities, and the default incumbent the Ministry of Tourism in the exercise of its administrative duties as regards the enforcement of rules binding the Claimants.

It is noteworthy to point out that the memorandum presented by the said former Minister of Tourism to the President of the Republic with the draft of the Decree (which was issued finally under No. 475/1975) contained misleading information: ascertaining, contrary to the memorandum prepared by EGOH, that the lands on the Plateau are in the private domain of the state.

IX. If the Claimants cannot be held, in principle, responsible for the malfunction of the Egyptian Administration and its manifest aberrant attitude, their own attitude, being the experienced world-wide business organizations as they affirm and as it appears from the documents they presented to that effect, put together with the Administration's manifest failure to abide by the basic provisions of its elementary obligations as regards the Claimants activities, need more than careful attention and thorough consideration.

X. In this context, I suggest a careful reading of the report of the expert committee (Resp. exh: F23). The report, in fact, contains a review of the stages of negotiations between the two parties.

Concerning the issue of the site I may only point out the following telling facts:

- "On March 8, 1974, a number of responsible personnel from the Egyptian General Organization for Tourism and Hotels met with representatives of a foreign investment group, who declared that the said group wishes to invest big amounts of money in Egypt in the field of tourism and Hotels which could reach up to 1000 millions dollars." (The Report, p. 8. Emphasis added)

- "On September 22, 1974 the first Deputy of the Prime Minister met with the representatives of the said company... on the same date the President of the Republic, who was the Prime Minister in the same time, met the SPP

representatives ... in this meeting, a number of principles was agreed upon as follows:

a) A joint venture shall be incorporated... The first of the company's business shall be the construction of a touristic area at Ras el Hekma... and another area around the Pyramids Plateau in Giza...

b) The company shall prepare the general plan of the projects and present it to the state authorities to be certified. The company shall execute the whole project at its own expenses." (The Report, p. 11. Emphasis added). From the facts, one may safely conclude that the framework of the Claimants' propositions consisted in the possibility of investment up to one billion dollars (in a developing country just emerging from a state of war and trying to find its path from a socialist, controlled economy to a free market economy, encouraging, among other methods, foreign investments) and that the location agreed upon, with the highest officials, was around the Pyramids Plateau. In fact, the attached map to the Heads of Agreement of September 23, 1974 confirms this conclusion. It is noteworthy to mention that the attached map to the Heads of Agreement bears the title of "Master Plan", and that the same Heads of Agreement contains a provision to the effect that "each complex will be developed according to a detailed Master Plan..." (Article 3). It can therefore be assumed that the detailed Master Plan concerning the development of the complexes should be in the location already determined in the "Master Plan" attached to the Heads of Agreement. In this context, the arguments presented by the Claimants to the effect that the Minister of Tourism approved the Master Plan by April 1976, and that a certain committee was formed by Decree of the Minister of Tourism consecutive to the contract of December, which called itself the Pyramids Plateau Committee, necessitates a certain reflection: The map attached to the Confidential Report, which was itself attached to the Contract of December shows that the lands proposed to the implementation of the project do not lay squarely and mainly on top of the Plateau. The appellation of the Committee formed by the Minister of Tourism's Decree No. 356 of 1974 (issued December 12, 1974, the same day the Contract between EGOH and SPP was entered into. Cls. exh:96) the Pyramids Plateau Committee, if happened, is not evidence that the site was not determined by the Parties to that Contract. In fact, a review of that Decree reveals that article (1) provides for that the Committee was entrusted with "the study of the proposition submitted by SPP in connection with the construction of a tourist city in the Pyramids area..." (emphasis added). So it is evident that the Committee was entrusted to study the proposition "submitted" and in "the Pyramids area". On the other hand what was attributed to the Minister of Tourism, on the faith of the September Agreement, which he signed in his capacity as the Government

Representative, was to supervise implementation of the Heads of Agreement, article (3) of which provides that "Each complex will be developed according to a detailed Master Plan prepared and submitted by SPP... *In accordance with and as shown in the attached maps...*" (Cls. exh: 3. Emphasis added). The Master Plan of the whole project is in fact and in law the map attached to the September Heads of Agreement which bears the title "Master Plan." Any corrective Plans or other detailed Master Plans were to be respectful of the, I may say, "*The Master Plan*," agreed upon by a representative of the Egyptian Government and the Claimants. It would have not escaped the Claimants, experienced as they are, to indicate, if they had any doubt, that *the site* was not yet finally determined by the Parties. More, if it happened that the change of the site was agreed upon in later stages, no agreement was entered into to this effect by a representative of the Egyptian Government. Both the December Contract and the Act of Incorporation of the joint venture ETDC was entered into by the Claimants and EGOH. Any equivocal language in their provisions, departing from the clear language of the Heads of Agreement entered into by an authorized representative of the Egyptian Government, seems to be, from the outset, the responsibility of those who entered into these agreements. In this context, I may add that the allocation of the lands on the Pyramids Plateau to EGOH by Presidential Decree No. 475 of 1975, does not indicate by itself the formal approval of the Egyptian Government to the effect that the project be implemented on the plateau proper: because the referred to Presidential Decree did not contain any indication as to the delineation of the contours of the land, and because the allocation the lands on the Pyramids Plateau, to EGOH does not indicate *per se* the departure from the site already agreed upon and delineated on the maps attached to the Heads of Agreement agreed upon by the Egyptian Government. The fact is that the said Decree did not contain any mention or allusion to the effect that the allocation of the land to EGOH for touristic purposes was to benefit the Claimants of a right exceeding what had been agreed upon in the Heads of Agreement. This may be corroborated by the fact that the Memorandum presented by the Minister of tourism to the President of the Republic for the issuance of the necessary decree allocating the land to EGOH did not contain any hint or allusion to the change of the site other than the one as shown in the attached maps to the Heads of Agreement. Had the change of the site *arguendo* been intentionally agreed upon, in later stages, by the Minister of Tourism, it would not have escaped the Ministry of Tourism to mention this important modification to the Heads of Agreement to the President of the Republic, since as above mentioned, he had been involved, in his capacity as Prime Minister, in the making of the Heads of Agreement. Lacking any intention to the effect of the modification of the provisions of the Heads of Agreement, the Presidential Decree 475 of 1975 could not have the effect of

an acquiescence to the change of the site. As apparent from the Heads of Agreement the provision concerning the site as shown on the attached maps would have had necessitated, for its amendment or modification *a post act* of the same strength and authority, to wit an agreement entered into by a representative of the Egyptian Government.

Yet, if a *fait accompli* consisting in the implementation of the project on the Plateau was established, the process is not clear, and the Claimants are, in my opinion, at least partially, if not mainly, responsible: How can they enter into a binding agreement (the September Heads of Agreement) and affix their signature on a map (the Master Plan) at a time they allege that discussions were underway as regards the location of the site? And how it happened that the exact location, once determined, was not clearly embodied in a document amending the September Heads of Agreement? And finally why the change, or more precisely the changes, of the site were not clearly embodied in agreements with the officials they already treated with? That is to say by authorized representatives of the Egyptian Government? It is noteworthy that all the changes in the site happened to be incorporated in annexed documents; to the Confidential Report (which was itself annexed to the December Contract) and to the act of incorporation of ETDC. The two above mentioned documents were entered into by EGOH, and the government was not a party to either. Consequently, a special attention should be focused upon the fact that even the act of incorporation of ETDC itself, does not provide for any reference to the effect that the site lays on top of the Plateau: article (3) of that act provides as follows "The objects of the Company: 1- to develop international tourism *in the Pyramids and Ras el Hekma sites within the limits of the approved Master Plan...*" (Cls. exh: 5. Emphasis added). No doubt that the plain clear language of that article speaks about.

a. *A site in the Pyramids*

and b. *That the site is within the limits of the approved Master Plan*

To the date of incorporation of ETDC, the only approved Master Plan was the map attached to the September Heads of Agreement. Thus, legally and logically speaking, that reference cannot be construed but as reference to that approved Master Plan, or at the least to the map attached to the Confidential Report which was attached, in turn, to the December Contract. However, the map attached to the said act of incorporation of ETDC shows a radically different site. In these circumstances, I may only express my perplexity as to the standard of law, logic or ethics by which one can evaluate the fact of stating something in the text of an agreement in clear and unequivocal language, and to annex a map, showing a completely different location, to the same agreement. The discrepancies between the clear language of an agreement and the

maps attached to the one and same agreement raise questions of law, especially in public international law, where the weight to be accorded to maps are debated. However, without going through the issue of law as regards the facts of the present case, it would have been the propice time for the Claimants, and for EGOH, to include in the text of the act of incorporation of ETDC and in a clear language, their mutual consent, and/or eventually any approval emanating from the authorized representatives, to the effect of the change of the site. On the contrary the two Parties to that act of incorporation refer blatantly to the approved Master Plan (which is, as explained, the map attached to the September Heads of Agreement) and the Parties to that act of incorporation reaffirmed their adherence to its limits. The following question may rise: why the Parties to the act of incorporation of ETDC were intentionally referring to the approved Master Plan, while affixing their signature upon a map which shows the site on a different location? Another question may also need an answer: were the Claimants and EGOH so badly legally advised as to sign a document containing so manifest contradiction? One should, however, notice that the Claimants are experienced international developers, always advised and seconded, as evidenced in the present case, by eminent Jurists. Beyond any legal consideration, it seems that the parties to both the Contract of December 1974 and the Act of Incorporation of ETDC, by their conduct, took the risk of engaging themselves to obligations, as regards the site of the Project, falling outside the framework of the September Heads of Agreement within which the Egyptian Government, duly represented, engaged itself only to it.

In this context, I may only refer, without any comment, to the content of two documents:

a- The inter-office memoranda dated August 28, 1975, that is before the incorporation of ETDC which occurred in November 1975. (Resp. Annex F.10) sent to the SPP executive committee by Mr. Munk, a representative of the Claimants in which he states "in the line with the above stated priorities, we should forgo any current effort to obtain project financing... the deal appears so attractive that these potential prospects may go back to the Egyptians and try to get the deal for themselves, by offering suitable incentives to someone like Zaki (which would still be cheaper to them than having to buy into SPP's deal)... " (Resp. Annex F.10, p. 4. Emphasis added). The Mr. X referred to in that memoranda happened to be the Head of EGOH, who entered into, by his capacity, the act of incorporation of ETDC with the Claimants.

b- The Affidavit of Mr. Gilmour, the representatives of the Claimants, presented during the ICC proceedings and referred in the present case, where he stated that "we abandoned the Egyptian plan, in favor of the fully-integrated high quality destination resort which we felt uniquely qualified to conceive and

implement. *The general concept plan we devised for the Pyramids, in contrast, proposed higher density housing on the Plateau grouped in discreet "desert-villages;" and in deference to General Zaki's wishes as we then understood them, we also incorporated plans for tourist development in the area of the Mena House at the entrance to the Pyramids from Fayoum Road.*" (Cls. exh. 89, Emphasis Added)

In the light of the above mentioned facts, even the act of incorporation of ETDC does not reveal the Government's approval of the change of the site, and contradicts by its clear terms the allegation that the authorized representatives of the Government of Egypt participated in the process of that change. It is worth noting that the Claimants, throughout the proceedings before this Tribunal, did not explain why the act of incorporation of ETDC refers to the "approved Master Plan" since the parties to that act departed, allegedly with the consent of the Government, from the same "approved Master Plan"?

It is clear that a "fait accompli" was later established lacking due conformity with the terms and provisions of the September Heads of Agreement with the Government, and also with manifest deviation from the locations delineated on the attached map to that agreement. The subsequent alleged approval of a detailed, so called, Master Plan by the Minister of Tourism by April 1976 cannot retroactive validate that "fait accompli" or cure the vice of the lack of respect of the provisions of the September Heads of Agreement taking into consideration that the Minister of Tourism, in his ministerial capacities, was to be entrusted with the duty of the implementation of the Heads of Agreement. In this respect any legal consequence thereupon shall be dealt with later.

Noteworthy in this respect, that in their request for arbitration to ICSID dated August 20, 1984, the Claimants stated "September 1974 - the SPP group submitted a project proposal to develop the Pyramids Plateau, to include Hotels, Tourist villages..." (Claimants' request for arbitration, p. 9, emphasis added). As in September 1974 the Heads of Agreement was concluded, with the Claimants, indicating the site of the project, as shown in the attached maps to that Agreement, around the Plateau, and not on the Plateau, this may corroborate the fact that the clear intention of the Egyptian Government was not to accept the "Project proposal to develop the 'Pyramids Plateau,'" as regards the site, hence it was agreed between the parties to implement the project around the Plateau and not on the Plateau.

It seems, however that, *vis-à-vis* that *fait accompli* the Administration was obviously under the pressure of severe critics, internally i.e. culminating in the interpellation before the People's Assembly, as well as internationally by a world wide campaign against the project as will be demonstrated later.

XI. Moreover, the application presented by Mr. El Bably, the attorney to the Claimants, on behalf of both EGOH and SPP to the GIA on April 22,

1975 contains in annex I under item (6) "the chosen site" the following information: "HADABAT EL AHRAM WA RAS EL HEKMA," which can be translated as follows "The Plateau of the Pyramids and Ras el Hekma." However, in annex II to the same application in front of item (2) "the chosen location: The indication of the precise location..." it is mentioned "The area south to the Pyramids Plateau of Giza" and in Arabic: "MANTIKAT GANOUB HADABAT AHRAMAT EL GIZA..." (Resp. annex F.17).

The contradiction in the information given in the two annexes to the same application is puzzling. More, in Appendix No. (2) written in English the contradiction also appears: under the item "For establishing a tourist project having an objective" it is written: "Developing world tourism in the Plateau area." But on the same page (p. 4) and in front of the item: "The location proposed to establish the project..." it is written that it is "*The area south of the Giza Pyramids Plateau...*" (emphasis added. Resp. annex: F.17). It is then "the area south of the Giza Pyramids Plateau" and not as finally implemented on the south area of the Giza Pyramids Plateau.

2- *The Housing Activities*: "or the alleged Claimants' departure" from their legal and contractual obligations

The housing argument advanced by the respondent is based upon the allegation that the claimants, in the implementation of their project, departed from the framework of the approval for their project. In this respect, Respondent alleges that:

- The Egyptian side insisted all along on a Tourist Development project.

And that

- the Egyptian Law bars non-Arab foreign capital from entering into housing activities. (Respondent Counter-Memorial vol. 135)

A. The Respondent's Allegations:

I. The Respondent explains that the status of a project under the provisions of law 43 is conditioned by the approval of the project by the Board of Directors of the GIA, after going through certain procedures and the satisfaction of certain formalities. The Respondent points out that the application presented to the GIA specifically states that it was a touristic project that will be implemented and that "the implementation of the project will result in the creation and development of touristic areas in the pyramids area, the re-planning of the areas, supplying it with the required infrastructures like roads lighting and sewage, and the establishment of touristic hotels and villages, markets and sporting clubs, etc." (Resp. annex F.17)

II. Respondent also points out that in appendix No. (2) to the application it is stated, concerning the annual operational requirement of the project, that "the imported in foreign currency and equivalent in Egyptian currency according to official rate" was estimated as follows: First year: invested amount: 22,500,000 US dollars plus loans amounting to 16,000,000 US dollars etc... , and that the proposed steps to implement the project were indicated as follows "the implementation will be by phases starting with leveling the Pyramids plateau and constructing a touristic hotel, thereafter a touristic complex and sport clubs, establishing the villas area and the commercial market and the conference hall." (Resp. annex 17. Appendix (2) to the application, p. 11)

III. The touristic nature of the project was also evident in the terms of the act of incorporation of ETDC of November 23, 1975, asserts the Respondent. Attention was drawn to the provision of article (3) of the above mentioned act by which it appears that the project was essentially and mainly a touristic project aiming to develop international tourism, consequently any other allowed activity mentioned as "a clause de style" in the act of incorporation should be construed as necessarily falling under the framework of the touristic activity accorded to the Company.

IV. Respondent also draws the attention to the provisions of Law No. 43 which bar non-Arab foreign capital from investment in housing and urban development project and to the provisions of Law No. 52 of 1940 which impose restrictions concerning land division. In this context Respondent also refers to the provisions of Law No. 81 of 1976 which impose restrictions as regards the acquisition by non-Egyptians of real estate property including rights of usufruct and leases which exceed fifty years. (Respondent Counter-Memorial, vol I, p. 147). Moreover, Respondent contends that Law 43 itself explicitly forbids non-Arab foreign capital from entering the field of housing and urban development, a field the essence of which, as explains the Respondent, is the purchase, sale or leasing of built or unbuilt real estate.

V. Respondent alleges that, "the least that could be said is that the Egyptian parties were the subject of an error (in fact were induced to fall into an error) concerning the nature of the obligations assumed by the other party, an error involving both the object of the contractual obligations of that party and the essential motivation which led the Egyptian Parties to enter (each within the limits of their role) into agreements with the Claimants." (Resp. Counter-Memorial vol I, p. 150. Emphasis added).

VI. Respondent also points out that the undue haste in selling, unlawfully, vacant building lots confirms the view that SPP's venture in Egypt was essentially an urban land speculation venture. In this respect, Respondent contends that notwithstanding the fact that ETDC did not receive the title of

usufruct upon the land at the Pyramids until December 12, 1976 it did in fact begin making plans, after only two weeks of its incorporation on December 4, 1975, to sell vacant lots (Board minutes dated December 12, 1975 Resp. Counter-Memorial vol I, p. 165) and made from that operation its major pre-occupation (Resp. Counter-Memorial vol I p. 164). As evidence to that contention Respondent reproduces a list of extracts from ETDC's Board minutes. (Resp. Counter-Memorial vol I, p. 165). An example is produced to the effect that by February 21, 1976 the Board approved the budget with "income of 1.5 million from 250 sales contracts." The Respondent also points out that the Claimants themselves admitted in their memorial to this Tribunal that the outlining of site was determined in the letter to that effect sent by EGOH on February the 3rd 1976 to ETDC and that the site was delivered only on February 21, 1976 (Resp. Counter-Memorial vol I, p. 166).

VII. Respondent thus concludes that, apart from the sale of SPP shares to Mr. Khashoggi in 1976 and of SPP (ME) shares to the Saudi princes in the same year, the sale of drawings of vacant plots on maps was the only serious operation that the Claimants were engaged in. Respondent refers to the joint report of Peat Marwick McIntock and Hazem Hassan Co., which comes to the conclusion that the net revenue from the sales agreed up to June 18, 1978 amounts to 7,428,000.- US dollars (Resp. Counter-Memorial vol I, pp. 167, 168, and annex F. 50 p. 15).

VIII. Moreover, the Respondent points out that no system of Law can uphold a deal which a country enters into, by the admission of all parties, to obtain needed foreign currencies in the form of initial investment and continuous revenue from tourism, but which the other party turns into, not even a housing project, but a land speculation project and in which the money comes from the nationals of those countries (and moreover is potentially transferable abroad).

IX. The Respondent also contends that there are two additional reasons which render the sales contracts, the main activity of ETDC under the management of the Claimants, illegal. These reasons, in view of the fact that the September Heads of Agreement was not implemented, are:

a. That all the acts through which the Egyptian Government gave or recognized the right of EGOH to use and exploit the Pyramids site could but be considered administration permits upon public domain. Such permits, in Egyptian Law, could never establish a right of usufruct.

b. That since the usufruct rights are extinguished in all events, under Egyptian Law, by the death of the beneficiary, the attempt made in the contracts of sale (article 5) to get around the provision of the Law should be considered illegal. The above mentioned clause (5) of the contract stipulates, as a

matter of fact, that, in case of the decease of the purchaser, the seller covenants to transfer the right of usufruct to the purchaser's successors for the unexpired period of 99 years.

X. Respondent also contends that since the claimants and ETDC, the Company they managed, did violate Law 43 in intention and in deed, the Heads of Agreement is to be considered null and void on the grounds of the illegality of both the object and cause, in accordance with articles 136, 137 and 141 of the Civil Code of Egypt. Moreover, Respondent advances that the Heads of Agreement is to be considered null and void on another ground; the illegitimacy of its cause i.e. the illegitimacy of the Claimants' demonstrated intention to embark on a project, the main content of which is a real estate operation involving the division of land, without respect to the provisions of Law No. 52 of 1940 concerning the division of land for the purpose of building.

XI. Respondent explains that it cannot be argued that the Egyptian Government, as such, connived in all the above mentioned irregularities attributed to ETDC or to the Claimants, as they were its actual managers, since:

- No recognition, acceptance or connivance of an official can transform an illegal act into a legal one.

- With the "caducité" of the September Heads of Agreement, their Egyptian partner became exclusively EGOH whose actions do not bind the Egyptian Government.

- That it is not true that the Egyptian partners accepted without protest what ETDC did. Among other examples, Respondent contends that even the decree of the Minister of Tourism No. 96 of 1977 (Cls exh: 132) was meant among other things to reaffirm the inalienable power of the administration to control the purposes for which the lots of land may be used.

B. The Claimants' response:

The Claimants, however, give a totally different presentation to this issue. They assert that the project was not a housing project in which foreign investment was banned. (Cls. Reply, pp. 41-54).

I. Claimants explain that the sale of villa lots by ETDC was an integral part of the entire tourist destination concept which was at the base of the proposals SPP made to the Egyptian Government since 1974. In this respect, Claimants point out that the nature of their project as a "tourist destination resort" was understood and admitted by the Parties starting from the negotiations of the Heads of Agreement which refer to "tourist destination complexes." Moreover, the Claimants refer to the answer of the Minister of Economy before the People's Assembly which contained a clear acknowledgment of the concept. (Cls. exh: 74 p. 50). Claimants also assert that

“representatives of the Government were fully advised of, and approved of, the concept.” (Cls Reply p. 45). The Claimants explain that that knowledge and understanding of the concept “was brought home to Respondent representatives in early 1975 by the visit to SPP’s Pacific Harbor Resort in Fiji.” There, as Claimants point out, those representatives were shown a sales’ program which existed from the time the resort was founded in 1969 and the sales were used to finance the infrastructures of the resort on which were founded a Hotel, golf course and other tourist amenities.

II. Claimants also assert that the basic accords establishing the project were clear:

a. The Heads of Agreement spoke of the plan to develop “residential and tourist destination complexes” and provided that the Joint Company “will be free to rent, lease, manage or assign any site... in both local and foreign markets...” (Cls exh:90).

b. The contract of December 1974 also provided that “ETDC shall be free to assign its rights of usufruct and to rent, lease, manage, promote or assign any site ... in both local and foreign markets, provided that they are developed and utilized in accordance with approved plans.” (Cls exh: 94). In this respect, the Claimants draw the attention to the provisions of article 12 of contract which stated that ETDC’s profits derive from *inter alia* “the assigning [and] leasing of... development sites.”

c. The November 23, 1975 act of incorporation of ETDC pointed out that it “may buy, sell right of usufruct, lease, re-rent the desert lands in the Pyramids and Ras El Hekma sites... for touristic purposes.” (Cls exh: 113)

III. Claimants assert that knowledge and approval of the villa site marketing site program is evidenced by Respondent acceptance of three reports which contained the site sales plan:

a. The economic feasibility study submitted to the GIA for approval of project on April 14, 1975 (cls. exh: 104)

b. The summary economic analysis of March 1975 by Economics Research Associates (cls. exh: 102)

c. The marketing report of February 1975, for the Cairo Pyramids Development, prepared by SPP (cls. exh: 101)

IV. The Claimants also point out that the resolution taken by the Board of EGOH to the effect of the transfer of the usufruct rights over the site to ETDC contained clear provisions concerning ETDC’s right to transfer, sell or lease the right of usufruct (cls. exh: 132). Moreover, as pointed out by the Claimants, ETDC’s program for sales was unanimously approved by its Board of Directors which included representatives of EGOH.

V. Besides reliance upon legal opinions by experts in Egyptian Law, particularly the opinion of Dr. Oteifi, (cls. exh: 82), the Claimants rely upon the answer of the Minister of Tourism on February 7, 1978 before the People’s Assembly, and they quote the said Minister as stating “the Pyramids Plateau project is a tourist development project and not a construction project and family habitation - as it was raised up - depending on what was said in Article 3 of the Company objectives which state what follows: To carry out international tourist development in both the Pyramids and... in the limit of the adopted Master Plan by building hotels, cinemas, restaurants, night clubs... The sale of usufruct of land, on the first tourist villages, is considered only as the first basic step on the way to completion of the project’s first phase. This could not be considered as a partitioning of land because it is within a completed plan...” (cls. exh: 74, p. 38)

C. Personal Considerations:

The issue of the housing argument is to be appreciated, from a legal point of view, in the light of the whole contractual operations entered into and agreed upon by the Claimants and also by the Respondent and in the light of the pertinent provisions of Egyptian law mainly law No. 43 of 1974 and No. 1 of 1973 concerning Tourist establishments. This will be discussed in the next chapter of this opinion.

However, I would like to point out, in this respect, that Law 43 was enacted on the basis of a certain philosophy which is clearly mentioned, as well as obviously apparent in its provisions. Article (3) of Law 43 reads as follows “the investment of Arab and foreign capital in the Arab Republic of Egypt shall be for the purpose of realizing the objectives of economic and social development within the framework of the State’s general policy and national plan provided that the investment is made in projects in need of international expertise in the sphere of modern development or in projects requiring foreign capital...” From the face of it “This statement refers to the need for both foreign capital and foreign technology.” (M.H. Davis, *Business Law in Egypt*, Kluwer 1984, p. 50). Article (1) of the same law gives a definition to the term “project,” it reads as follows “the term project in the application of the provisions of this law shall mean any activity included within any of the spheres therein specified and approved by the Board of Directors of the General Authority for Investment and Free Zones” (emphasis added). Therefore, two prerequisites are necessarily to be justified for a project to enjoy the advantages of the said law: that the activity be within one of the spheres of activities specified by the law and that it receives the approval of the GIA. Special attention should be focused upon the last paragraph of Article (3) of Law No. 43. It reads as follows “Special priority shall be given to those projects which are designed to generate exports, encourage

tourism, or reduce the need to import basic commodities... ” Also it is of importance to review thoroughly the provisions of article (2) of Law 43 which states that “the term <invested capital> in application of the provisions of this law shall be deemed to mean the following:... ” then follow the different aspects that are considered invested capital with a manifest stress upon the fact that the invested capital consists mainly in the foreign currency transferred to the Arab Republic of Egypt.

I. It was clearly stated and hence logically and legally understood that the nature of the project was intended to be a touristic project. A cursory look to the provisions of the Heads of Agreement reveals that in the preamble of that Agreement it was stated that “this Agreement is issued in accordance with law No. 1 for the year 1973 relating to hotels, Installations and Tourism, and law No. 2 for the year 1973 relating to the supervision by the Ministry of Tourism on touristic sites and the development of such areas, and law 43... ” (Cl’s exh. 3)

Also the first of the joint venture’s objectives was “to develop international tourism in the Pyramids and Ras-El-Hekma sites within the limits of the approved Master Plan by establishing, constructing, developing, furnishing, equipping and managing hotels, casinos, restaurants... (Art. 3 of the Act of Incorporation of ETDC, Cl’s, exh. 5). This fact is also corroborated by the language of the request presented to the GIA for the approval of the project (Resp. Annex F.17). Any other way of development that may have been practiced by the Claimants in other projects elsewhere does not by itself indicate that the Egyptian Administration acquiesced to that method. As regards the Egyptian venture, it was clearly stated that “the implementation will be by phases starting with leveling the Pyramids Plateau and constructing a touristic hotel, thereafter a touristic complex...” (The application to GIA. Resp. Annex F17, p. 11)

In this context, I may draw the attention to that the Chairman of ETDC on the meeting of the board of January 26, 1978 “pointed out that he had talks with the Minister of Tourism on the question of the 4000 beds to become available... The Minister sent a letter... asking for confirmation by the company of this obligation. This answer was necessary for the Minister to convince the Assembly of the touristic nature of the project...” (Resp. Annex F20, p. 9 emphasis added)

This may suggest that up to January 1978, the activities of ETDC did not reveal adherence to, and conformity with, the “nature” of the project as understood by the parties, or at least by the Respondent in a legal logical expectation. The Administration, in order to defend itself before the People’s Assembly, seemed begging the Claimants, not even to abide by their obligations, but just to declare their intentions to this effect.

II. The application presented to the GIA on April 22, 1975 by the then Legal Advisor and Consultant to SPP, on behalf of SPP and EGOTH, contains two information:

a. Under the item “Capital expenditures of the project,” it was stated: Imported in foreign currency and equivalent in Egyptian currency: 550,000,000.- US dollars. Under the same item it was written: “The total estimated expenses for the various constructions on the site amount to five hundred and fifty million dollars during ten years... include (sic) the construction of hotels providing 15000 beds.”

b. That the proposed steps to implement the project are “the implementation will be by phases starting with leveling the Pyramids plateau and constructing a touristic hotel, thereafter a touristic complex and...” (emphasis added. Resp. annex F 17, p. 11).

III. It can but be observed that the Claimants rely upon that application, concerning the issue of the site, but seem to overlook the obligations they had engaged themselves to, by the same document. They clearly estimated the imported foreign currency amounting to 550 million dollars over ten years, with the solemn obligation to begin the implementation of the project by the construction of a hotel.

IV. Admitting, *arguendo*, that they had the discretion of selling lots of bare lands, the Claimants’ obligation remains to be fulfilled: that is to say, the importation of the foreign currency and the construction of at least a hotel on the site. The argument of auto financing, which is advanced, should be construed, however, in the light of the clear language of the application to the effect that the investments will take the form of imported foreign currency. Whether or not the Claimants had the financial capacities at the time of the presentation of that application, seems irrelevant, since the fact is that they did not honour their obligation in this respect. It seems to me opportune, in these circumstances, to point out that on May 19, 1975, Mr. Gilmour, the representative of the Claimants, sent a letter directly to the President of the Republic concerning the demand for approval that the usufruct rights be accorded to a duration of 99 years, which letter contained that the justification for that demand rests upon the fact that this duration “is a must for such a big sized project which will need a capital of 770 million dollars...” (Resp. annex F 23, p. 25). So it appears that the estimation given by the Claimants, concerning the total investment in the end of April 1975 amounting to 550 million dollars, escalated in mid-May 1975, not even one month later, to 770 million dollars, the difference being only the trifle amount of 220 million dollars.

One may consider that the presentation of the application to GIA was misleading since the claimants advocate that they had all the way the intention that

the project be auto-financed, and at the same time they present an application, which in fact and in law, embodies their obligations in the framework of the legal status of law 43, in which they explain that the nature of the project is tourism and that "the imported foreign currency" amounts to 550 million dollars.

In this vein, another document may also be considered of importance. Reference is made here to the December 12, 1974 contract concluded between EGOH and SPP. Article 11 of the said contract reads in pertinent parts as follows: "The profits will be derived from the operation and management of hotels, casinos, conferences and convention centers, sporting clubs, shopping complexes and other tourist facilities, and from the assigning, leasing and management of, and the provisions of services to, villas, apartments and development sites..." (cls. exh:4). If the above mentioned article states that profits may be engendered by assigning or leasing of development sites, it does not however make of that activity the main one of the projected Company. This evident fact is confirmed by the language of article (1) of the contract entered into by EGOH and SPP (ME) dated November 23, 1975 which reads as follows "The undersigned have agreed to found a joint stock Egyptian Company with a license from the Government of the Arab Republic of Egypt conforming with Law No. 1 of 1973 concerning tourist establishments..." So the Company (ETDC) is constituted as a tourist Company falling under the provisions of Law No. 1 of 1973 concerning tourist establishments. The objectives of the said Company, as determined in Article (3) of the above mentioned contract, are: "1. to develop international tourism... by establishing, constructing, developing, furnishing, equipping and managing hotels... The Company has the right to manage, operate, lease, sell and in every way dispose of the above mentioned establishments. 2. To create and develop touristic sites by employing the most up to date method for developing tourist industries and replanning them and provide them with infrastructures, roads and services. To achieve this it may buy, sell right of usufruct, lease, rent the desert lands in the Pyramids and Ras El Hekma sites (on the Mediterranean Coast) for *touristic purposes*. 3. ..." (emphasis added). Without going through the whole enumeration of the company's objectives, it may be appropriate to comment upon the language of paragraphs 1 and 2 of article 3 of the contract. It goes without saying that paragraph 1 speaks about the selling or leasing of establishments. However, if paragraph 2 gives ETDC the right to sell or lease the right of usufruct over the lands of the sites, it specifies that that right of selling or leasing is permitted provided it be "for *touristic purposes*." This provision should have an *effet utile* so to say to have a meaning and a significance. The transaction, any transaction, must then comply with that obligation. However, it did not occur to the Claimants to present indications to this Tribunal to the effect that their selling operations of lots of bare lands obeyed to any touristic purpose criteria in the meaning of the

above mentioned article. Selling bare lands to the high accepting purchaser, without any discrimination seems to be more in harmony with activities relating to urban development rather than to activities of investment in operations serving touristic purpose, and necessarily confined to it *inter alia* in compliance with the *raison sociale* of the joint venture ETDC.

V. To begin its activities by selling bare lots of land on the site, and to continue these activities over the period from November 1975 to the date of cancellation of the project in May 1978, may indicate that ETDC under the management of the Claimants departed, at least, from the obligation concerning the phases they clearly were engaged to respect, as stated in their application to GIA dated April 22, 1975. Therefore, it seems of minor importance what Claimants advance concerning approvals, by officials: *inter alia* the Minister of Tourism by decree No. 96 of 1977, of the selling of lots of land. Approvals to the selling should be construed in the framework of the joint ventures legal capacity and cannot alter the obligation the Claimants were under, on the faith of the act of incorporation of ETDC. The selling operations were legally conditioned and determined by the purpose of this activity, that is to say, to serve touristic purposes. In fact this condition is to be considered a clause related to the legal validity of the operation. It is by respecting this clause that touristic projects differ from urban development projects. To conclude otherwise is to render the *provisio in fine* of paragraph 2 of article 3, meaningless and superfluous. It may also be reminded that the issue was raised at a meeting of the Board of Directors of ETDC where "Mr. Lotfy discussed the paper handed to him by Mr. Birchall after the last meeting and said the figure was shown under the assumption that the whole concept of the *paper proposed for principal Company policy was only on the real estate and not on the development of tourism...*" (minutes of the meeting dated March 14, 1978 Resp. annex 20, emphasis added). It may also be reminded that the calculation of compensation requested by the Claimants as their principal submission, rests mainly upon the same concept: the price of the selling of lots of bare land.

VI. Moreover, in any event, the selling of bare lots of land appears, from the whole contractual documents, as a faculty that may be resorted to, but does not constitute the main or even a main objective of the project. It is noteworthy, in this respect, to draw the attention to item 7 and 14 of the Board of ETDC meeting on January 26, 1978. (Resp. annex F-20 p. 9). As a matter of fact, the following was written "a) exchanged letters with the Minister of Tourism: Dr. Salah (the Chairman of ETDC) pointed out that he had talks with the Minister of Tourism on the question of the 4000 beds to become available in the Pyramids Oasis project. *The Minister then sent a letter signed by the first Undersecretary of Tourism, asking for confirmation by the Company of this*

obligation. This answer was necessary for the Minister to convince the Assembly of the tourist nature of the project." (emphasis added). This citation tells much by itself about the weight which may be given to the answers of the Minister of Tourism before the People's Assembly.

VI. The minutes of ETDC Board of October 4, 1976 are, perhaps more relevant as regards the housing issue. Under item 76/53 Marketing Report, it is written "Mr. Raouf presented a recommendation for the sale of 350 villa sites from October 1976 which was approved. It was also agreed that the principal objective will be to maximize cash sales. *Any shortfall of cash sales to non-Egyptian purchasers will be allocated to house sales for Egyptian cash purchasers...*" (Emphasis added)

VII. Without going through the examination of whether or not ETDC's activities in selling bare lots of land contravened certain Egyptian Laws, it is evident that those activities were not to be considered valid unless they serve touristic purposes. Otherwise they are considered activities exceeding the legal capacity of the Company. The interpretation of the clause *in fine* of paragraph 2, reveals the harmony existing between the provisions of both paragraphs 1 and 2 of the said article 3. ETDC was empowered to transact either touristic constructed establishments, or bare land to serve touristic purposes. Consequently, ETDC was bound to act in accordance with its "*raison sociale*" and had no legal capacity to exceed it. The argument advanced by the Claimants to the effect that the project they were implementing was based on the same concept of their project in Fiji, and that representatives of EGOH were shown the destination resort they were implementing in Fiji cannot have relevance, since the concept of their Egyptian venture was essentially based upon the touristic nature; which is clearly mentioned in the application presented to the GIA for approval on April 22, 1975, and also embodied in the act of incorporating ETDC as mentioned above.

VIII. In a brief conclusion, which will be developed later, it is certain that the Claimants departed from the following:

a. Their declared obligation to start implementing the project by phases with the priority of the construction of a hotel (see the application to the GIA dated April 22, 1975).

b. Their commitments as regards the objectives of ETDC which mandates that all and any transaction be permitted only in the limits, and provided that, it serves touristic purposes. In this respect, whatever their intention was, concerning the implementation of a tourist destination resort, the Claimants were obligated to be respectful of the stated objectives of ETDC which mandate that all transactions be justified by the condition of serving touristic purposes.

By first proceeding with its large campaign of selling bare lots of land, for the purchasers, eventually, to construct villas indifferently to what the use may be whether touristic or not, on both the outside and mainly the local markets, before any approval of an agreed detailed Master Plan, in addition to its non-observance and non-compliance with the sequential phases of the implementation of the project as stated in the application presented to the GIA, ETDC was consequently in a precarious legal situation subject to the provisions of Article 27 of Law 43 which provides in pertinent parts that "the Board of Directors of the Authority shall have the authority to approve applications for investment submitted. Such approval shall lapse if the investor fails to take serious steps to carry out the project within six months of approval." It is noteworthy to point out that in the application to the GIA, it was mentioned that the invested amount, in foreign imported currency, totals 38 million dollars for the first year of implementation of the project then accruing during the following years (resp. annex F 20, 17), always in imported foreign currency. This engagement necessarily was binding, and should be taken into consideration by this Tribunal in its impartial evaluation of the nature of the project, the Claimants were intended to implement, mainly in the light of their effective contribution in the capital of the joint venture ETDC and of the loan agreement they concluded between themselves and the joint venture ETDC under their management, even before the payment of the full amount of their agreed upon contribution in the capital of ETDC, all of these amounts totaling the sum of 3,360,000 U.S. Dollars compared to the revenue from the sale of bare lots of land agreed up to June 18, 1978, which amounts to 7,428,000 U.S. Dollars. (Respondent annex F50 p. 15). However, the Majority Award even stated, as a matter of uncontested fact that "... ETDC sold 386 lots... for a total of U.S. Dollars 10,211,000." (The Majority Award p. 25 [p. 348 of this issue]), and later took its findings, in this respect, into consideration as regards the evaluation of "... the value to be ascribed to the opportunity to make a commercial success of the project" (the Majority Award, p. 85 [p. 389 of this issue]).

To conclude on this issue, I may only draw attention to the fact that the Claimants rely as regards their argument of auto-financing to the content of the feasibility study presented to the GIA, nevertheless they seem to consider the same and one feasibility study as not binding when it comes to embody their obligations: in this vein, I may refer to the memoranda prepared by the Claimants' lawyer stating that "the indications included in the feasibility study initially submitted reflect the financial and economic concept of the project *but the company is not bound by it in its activities if this would affect said objectives...*" (Resp. Annex D14 p. 4 Emphasis added). This memoranda was prepared in response to the letter of EGOH dated April 4, 1977 to ETDC, containing reference to

the serious diversions of ETDC's activities from its basic obligations under the provision of its act of incorporation and of the approval of GIA.

In this context, I may add that due attention should be drawn to the content of the inner-office memorandum dated August 28, 1975 in which Mr. Munk addressing the SPP's executive committee explained that the objectives of the Egyptian program were *inter alia* "to create a new significant and saleable asset to enable the SPP if so wishes, to eliminate the current indebtedness...", and that among the required actions figures "to get ETDC operational (i.e. to start land sales etc.)" and that one of the priorities is "to make ETDC operational with the prime objective to start selling land." (Resp. Annex F 56 Emphasis Added)

Then the "prime objective" as mentioned in that memorandum was "to start selling." This prime objective the Claimants were intended to achieve does not by any standard coincide with their solemn obligations, whether under the legal status of investors in the framework of law 43, or their obligations emanating from their contractual agreements. In all events it is a fact, that the Claimants expressed in a letter to the Prime Minister, dated May 12, 1978 that "in spite of these encouraging initial indications of success, the protracted debates in the People's Assembly, the various committee hearings and the adverse world wide publicity have now seriously impaired our effort to create the required credibility to attract the increasingly needed overseas finance for the project." (resp Annex F.38, p. 2, Emphasis Added). As the above mentioned reasons fall beyond the administrations authority and were out of its reach, one can assume that the Claimants were trying to justify their incapacity to honour their obligations, in part, due to the adverse worldwide publicity which impaired their credibility to attract the increasing needed overseas finance for the project. Lacking that credibility the Claimants, at least, from that date seem to have had no other alternative, but to concentrate their activities in the selling of bare lots of land, which manifestly would have extracted definitely their activity not only from the domain of tourism but altogether from the scope of investment under both the Washington convention and the Law No. 43. The real nature of the Claimants' project as they had the intention to implement may be better demonstrated by a quotation of Mr. Gilmour's Affidavit presented both before the ICC and this Tribunal "we abandoned the Egyptian plan in favor of the fully integrated high quality destination resort, which we felt uniquely qualified to conceive and implement. The general concept plan we devised for the Pyramids, in contrast, proposed higher density housing on the Plateau grouped in discreet 'desert villages' and in deference to General Zaki's wishes as we then understood them, we also incorporated plan for tourist development in the area of the Mena House at the entrance to the Pyramids from Fayoum Road." (Cls. exh 89, emphasis added)

3. The Critical date May-June 1978, and the Subsequent Conduct of the Parties

In spite of that this section is mainly consecrated to the review of the facts that occurred around the critical date of May-June 1978 and the subsequent conduct of the Parties; however, it seems appropriate to review rapidly, in the first place, some facts that occurred before that date, which facts may enlighten the evaluation of the whole relationship between the Claimants and the Respondent.

A. A review of some fact that marked the relationship between the two parties:

I. In April 1974, the Claimants present themselves as developers. (Cls. exh. 81). In April 1974, SPP submitted a "proposal on the development program of an international tourist destination - Resort complex for the Arab Republic of Egypt." In the preface to that document, the Claimants explain that the proposal was "prepared by Southern Pacific Properties Limited (SPP) at the kind encouragement of H.E. Osman Ahmed Osman," and that "SPP is a tourism vehicle of a group of major international cooperatives with combined assets in excess of US\$ two billion." Under the title "the program" it was stated that "the Developers (SPP) will undertake to:..." (Emphasis added). The proposal did not contain any hint to a specific location for the project to be implemented on. Under title "the site" it was only stated that "A preliminary study has identified a number of potentially suitable sites. Factors which will influence the final choice are:..."

II. EGOH informed SPP on June 6, 1974 of its interest to the proposal, in principle, provided the submission of a preliminary feasibility study. (Cls exh 83). By telex dated June 17, 1974, the Claimants advised EGOH that they would proceed on June 21, with press release (Cls. exh.: 84). The press release contained information about the announcement in Cairo "that the Egyptian Government has invited Southern Pacific Properties Limited, the Hotel and Resort Development group to start on the development of the major tourist complex in Egypt." (Cls. exh: 85)

III. No feasibility study was submitted. However, the Heads of Agreement was concluded on September 23, 1974, and the Claimants explained that "the SPP group submitted a project proposal to develop the Pyramids Plateau, to include hotels, tourist villages..." (Claimants' request for Arbitration, p. 9). In Claimants' exhibit 174, they state that on September 1974 "after several months of meetings with Government representatives, visits to pre-selected sites (at which time Government representatives urged consideration be given to Pyramids site) and internal discussions, SPP finalizes field studies and submits general concept project proposal for *inter alia* future Pyramids Oasis sites."

Then the Claimants explain that the “project proposal is presented to the President Sadat by David Gilmour and Peter Munk (Chairman of SPP). The President gives his unqualified approval.” In this respect, Claimants refer to their exhibits 902 and 91. From the outset, it should be pointed out that the documents presented to this Tribunal do not reveal any indication to the effect that before the Heads of Agreement of September 23, 1974 was concluded, any other proposal or feasibility studies were presented to the Government of Egypt other than the proposal of April 1974 which in turn, did not contain any indication to a specific site. It seems noteworthy to stress upon the fact that what is qualified by the Claimants as the “*unqualified approval*” given by the President Sadat to their project proposal for “future Pyramids Oasis site” (Claimants exhibit 174, 901 and 902) is necessarily erroneous, since the maps attached to the Heads of Agreement signed the next day to the presentation of the project to President Sadat (acting in his capacity of Prime Minister at that time), show the site of a project on a totally different location, that is *mainly around the Pyramids Plateau* and not on top of it as the project was finally being implemented. The avatars that occurred as regards the site of the project are already treated above and need not be repeated here. However, the Claimants reiterated contentions as regards the full unqualified endorsement of President Sadat to the project, implying his approval, at least by that time, to the specific site of the project where it was finally being implemented, all the way before other Jurisdictions (see the Affidavit of Mr. Gilmour before the ICC, presented in the ICSID proceedings, Cls exh: 89) and even during long stages of the present proceedings before this Tribunal where, presumably, all conclusive and pertinent documents are to be submitted and subjected to the Tribunal’s impartial consideration. This fact may suggest answers to the somehow aberrant conduct of some administrative authorities vis-a-vis the Claimants, and ETDC, under their management, during their activities in Egypt. Whether or not of any legal significance before this Tribunal in the outcome of the present dispute, that erroneous contention raises questions to be answered: why did the Claimants allege the “unqualified approval” of their project by President Sadat when it was materially proven that that allegation was not correct, and what eventual consequences that allegation may have produced in the process of the implementation of their project.

IV. In the Claimants’ exhibit 174 consacrated to the review of the chronology of the events.

- They state that “September 23: Heads of Agreement for project concluded and signed by the Egyptian Government, General Zaki (representing EGOH), and SPP, the Heads of Agreement provide for SPP and EGOH to establish two complexes, *one on the Pyramids Plateau*, the other near Ras el

Hekma (Cls. exh. 90). *Subsequent discussions concerning the re-siting* of the Pyramids Project: see Cls. exh. 175 and 177. (Emphasis added). These two exhibits contain statements of Mr. Gerald Walker and Mr. Ralph M. Grierson both dated November 30, 1989. Without going through the content of these statements, it is noteworthy to point out that if *arguendo* as stated by Mr. Walker “very rough maps of the Pyramids and Ras El Hekma project areas were annexed to that agreement” (Reference is made to the September Heads of Agreement, Cls. exh. 175). The fact remains that even the maps, attached to the confidential report annexed to the December 12, 1974, show the site located in a different zone from that where the project was finally being implemented. It is to be noted that the December 12, 1974 Contract was concluded between the Claimants and EGOH. Thus, the Egyptian Government, contrary to the Heads of Agreement, was not party to that contract. The Contract provides adherence to the September Heads of Agreement and more specifically to the *maps attached to the September Agreement*. Article (4) of the contract provides that “ETDC will undertake the development and management of both *projects within the general limits described in the maps attached to the Heads of Agreement* and in general accord with the confidential report, and as detailed in the Master Plans to be prepared...” (Cls. exh. 4. Emphasis added). From the outset, it is evident by the clear language of the December Contract that:

- The contract was concluded “following execution of the Heads of Agreement dated 23rd September 1974”

- The contract refers in an unequivocal language to the fact that ETDC will undertake the development of both projects *within the general limits of the maps attached to the September Heads of Agreement*.

- The contract bears no mention to any other maps attached to it, but refers only to a so-called confidential report. Then it was to that report, which to my humble knowledge does not contain any confidentiality, that was attached maps that showed the site in a different location than that shown in the attached maps to the September Heads of Agreement.

In the light of these considerations, it is evident that the parties to the contract of December declared their intention to execute the Heads of Agreement and not to amend it, and, in fact and in law, they reiterated their obligation to be respectful to implement their projected activity “within the general limits.” The word within means : *Inside, internally, inwardly* (The Oxford Illustrated Dictionary p. 972) and *Dans - en dedans de - dans l'espace de* (Grand Dictionnaire Garnier, p. 596). In both English and French languages, the word indicates the same meaning which is inside. So the sites should have been inside the *general limits* as shown in the attached maps to the September Heads of Agreement.

Contrary to that clear language, it was annexed to the Contract a "Confidential Report", then attached to that report a map showing a different site not *within* but *outside* the general limits of those indicated in the maps attached to the Heads of Agreement of September. It is noteworthy in this respect, to point out that the December Contract did not mention any reference to any attached maps. It is a matter of Law to decide the legal consequences emanating from this contradiction. However, in the impartial evaluation of all the aspects of the relationship between the Claimants and their Egyptian counterparts, such conduct, with or without the connivance of those who entered into the December Contract may be relevant. The fact that the clear language of the Contract contradicts manifestly with what was shown on "*un-referred to maps*" which were only annexed to the Confidential Report, which in turn was annexed to the Contract, along with other incidents of the like, may be appropriate elements in the evaluation of the overall relationship between the parties. This may be an element in the forming of a conviction to the effect that certain Egyptian administrative authorities may have acted, subsequently, on the faith of a *prima facie* assumption as to the correctness of that statement, thus taking the exactitude of the site as shown in the annexed maps to the attached report to the December Contract as a *fait accompli* as regards its concordance with the one and same site as shown on the maps attached to the September Heads of Agreement which were granted the *unqualified approval*, as the Claimants repeatedly explain, of President Sadat.

V. The incorporation of the joint venture ETDC and the Decree of the Minister of Economy.

The act of incorporation of ETDC of November 23, 1975 (Cls. exh. 5) provides in article (3) that "the objects of the company: 1. to develop international tourism in the Pyramids and Ras El Hekma..." No mention was made to any deviation or, I may say, derogation from the September Heads of Agreement as regards the site of the Project. However, a map was annexed to that act of incorporation, on which a different site was indicated than the one shown on all previous maps. Then occurred the issuance of the Decree of the Minister of Economy according approval for the incorporation of the joint venture. (Decree No. 212 of 1975. Cls. exh. 114). Article (2) of the said Decree is translated as follows "the object of the company is to develop tourism in the Pyramids and Ras El Hekma sites in the limits of the approved Master Plan as indicated in the relevant statute attached here to" the same exhibit contains the Arabic official version of that Decree which is best translated to English as follows "the object of the company is to develop tourism in the region of the Pyramids and Ras El Hekma..." in Arabic "BI MANTIKAT AL AHRAMAT WA RAS EL HEKMA" thus the project climbed on top of the Pyramids Plateau proper

without any duly amendment to the September Heads of Agreement. Moreover, construction was intended to be only about one kilometer distant from the Pyramids proper as revealed by the statement mentioned above and relied upon by the Claimants, of a new Minister of Tourism who explained that he ordered that construction should be at a distance of at least two kilometers. Thus, it seems that the administration was not only trapped by the *fait accompli* consisting in the implementation of the project on the Plateau proper, but also was confronted with the critical issue of the safeguard of the monuments themselves (the Pyramids).

VI. Without going through the legal weight of the information about the "invested capital" the Claimants stated in their application to the GIA, and the commitment they undertook to comply with the requirements emanating from the touristic nature of the project, the inter office memorandum prepared on August 28, 1975 by Mr. Munk to SPP executive committee indicates, concerning the priorities, "that since company resources to attain the objectives are limited, it is vital to focus action on proper priorities... b. Make ETDC operational *with the prime objective to start selling land (showing profits!)*" (Resp. annex F.10), then the memorandum continues as follows "to complete plan and models..." Thus it is the sale of land that have prime priority in the Claimants' point of view, even before the completion of any plan or models. It is in the light of such unveiled intention of the Claimants that the housing argument should be considered. The fact that the Claimants later prepared designs available for the use of eventual purchasers of bare lots of land, cannot be relevant, as such, to accord to the project the nature and essence of a tourist project, in compliance with the declared intention of the parties embodied in several documents. It is noteworthy to mention that it is common practice by developers to arrange facilities to purchasers of bare lots of land *inter alia* to make available architectural designs or even propose the construction of buildings for the account of eventual purchasers. However, these activities cannot confer by themselves to a project the nature and essence of a touristic project.

VII. It should also be pointed out that the act of incorporation of the joint venture ETDC of November 23, 1975 was entered into by the Claimants not as representatives of SPP but of another company SPP (ME). This latter company had been, as revealed by documents presented before this Tribunal, initially incorporated in Hong Kong on October 18, 1974 under the name of "Molins Investments Limited" and then changed its name to SPP (ME) on November 12, 1974 (that is before the signature of the December 12, 1974 contract with EGOH, the Claimants' Egyptian partner). Its capital amounted to 1000 Hong Kong Dollars, roughly less than 200 U.S. Dollars. The Claimants explained that this fact was acknowledged by the Egyptian partner since

article (17) of the December contract reads as follows “it is understood that SPP will be incorporating a holding company to own its shareholding in ETDC and it is agreed that SPP shall have the right to assign its rights, privileges, duties and obligations under this agreement to this company... provided the company satisfies EGOH...” (Cls. exh. 4). The assignment of rights to SPP (ME) was never legally notified to EGOH more as it was proved before this Tribunal never an act of assignment did occur. However, the question rises about the legal significance of the provision in that article (17) of the contract of December, necessitating a fundamental requirement to any eventual assignment of rights by SPP to a third party which consists in “*provided the Company satisfies EGOH.*” No act of assignment was ever effectuated to SPP (ME) and EGOH was never formally notified about the *statut juridique* of SPP (ME). The obvious resemblance between the insignia of the two companies managed, as it seems, by the same people may have misled any unaware administrative authority. Even the Chairman of ETDC, who was a Claimants’ representative seems not to differentiate between SPP and SPP (ME) since he was quoted stating before the Board of Directors on January 24–25 1977 that the statutes of the Company embodied in the Ministerial Decree No. 212 of 1975, “are based on the agreement signed by the two shareholders namely SPP and EGOH” (without any mention to SPP (ME)). However, the provision in article (17) mandates the necessity to obtain the acceptance of EGOH as to any act of assignment nevertheless it was just SPP (ME) replacing SPP as one more *fait accompli* that multiplied in the present case.

VIII. The conduct of the Claimants during the period of implementation of their project; a view from the inside: The minutes of the Board of Directors of ETDC (Respondent annex F.20) may be self telling and more evidence about the intentions and conduct of the Claimants:

- In the meeting held on November 29, 1975, during the week that followed the signature of the act of incorporation of ETDC dated November 23, 1975, was present Mr. Gilmour in his capacity as “Deputy Chairman of Southern Pacific Properties Limited” who presided the meeting. In that meeting representatives of the Claimants were nominated, among others, figures Mr. S.S. Raouf an Egyptian official who introduced the Claimants in his capacity as Chief of the Office of Tourism in London. He was appointed as a representative of the Claimants in that meeting member of the Board for international marketing and accorded a salary of 9000 U.S. Dollars plus expenses, 9000 U.S. Dollars as well as a special allowance of 4000 U.S. Dollars plus 8000 U.S. Dollars as expenses. Under item 75/117 it was stated “the forms of agreement for sale and purchase for cash on terms, of underdeveloped lots in the Pyramids

zone was received, but consideration was deferred until the next meeting of the Board.” (emphasis added)

- In the meeting dated December 17, 1975, it was “*agreed that reimbursement of pre-incorporation expenses to SPP (ME) to the extent of U.S. Dollars 252,860.- and the short term interest free loan totaling US Dollars 57,157.71 be paid immediately.*” (Item 75/28. Emphasis added), even though the minutes do not reveal the presentation to and/or the study of any supporting documents in this respect by the Board of Directors. It was also agreed in the meeting dated February 21, 1976, to reimburse SPP (ME) for its expenditures incurred by it and charged to ETDC on the approval of the Director of the London office who was to be reminded once more the same Mr. S.S. Raouf, the SPP (ME)’s representative at the Board of Directors.

- On the next meeting dated April 27, 1976 under item (76/25) it was mentioned: “Approval of Master Plan: resolved that the Master Plan be formally approved by the Company. General Zaki advised that the Minister of Tourism had approved the Master Plan.” From the outset, it seems puzzling that the Minister would have approved a Master Plan which was not yet approved by ETDC itself. Moreover, the same minutes of the same meeting contained information that General Zaki himself “stated that EGOH would present its remarks and comments on the Master Plan within 7-10 days. He also stated that the Minister of Tourism had approved the Master Plan, but that government agencies had some remarks to make on the question of housing. All this can be ratified when preparing the detailed remarks on the infrastructures and from a touristic point of view.” (Emphasis added). It seems, in all events, that any alleged approval of a Master Plan was clearly conditional upon “remarks to make on the question of housing.” It seems noteworthy to point out the contradictory language attributed to General Zaki, the Head of EGOH, quoting him as stating that the Minister of Tourism approved the Master Plan while reporting in clear language that government agencies had at least some reserves as regards the question of the housing and that EGOH itself had yet to study the Master Plan. In any case, it is obvious, from the above statements, that the nature of the project as a touristic project was of a main concern to the administrative agencies in Egypt. However, it seems that the joint venture under the Claimants’ management embarked on the sale of bare lots of land. In the meeting dated October 4, 1976, “Mr. Raouf presented a recommendation for the sale of 350 villa sites from October 1976 which was approved. *It was also agreed that the principal objective will be to maximize cash sales. Any cash sales to non-Egyptian purchasers will be allocated to house sales for Egyptian cash purchasers.*” (Item 76/53. Emphasis added). This statement by itself needs no comment as regards the concept of the project that the Claimants were adopting and implementing. It

is noteworthy however that a representative of EGOth on the Board helplessly pointed out at that meeting "... 2. no map of the lots to be sold had been presented, 3. the sales contracts had not yet been presented to the Board." The minutes of the same meeting contained information that "General Zaki on behalf of EGOth agreed to obtain any further governmental documentation or approvals required to implement sales." (item 76/54). Thus, it seems that Mr. Zaki engaged himself unconditionally to obtain any further governmental approval required to implement sales and that, obviously, was in contradiction with his previous declared attitude as regards the question of housing without any explanation in justification for this radical change of attitude. However, in the meeting on January 24-25, 1977, Mr. Zaki pointed out that "for the good image of the company we should start this year the implementation for one hotel at least and perhaps one holiday village." (The Minutes, p. 6, emphasis added). What was meant by the good image of the company is, in my humble understanding, the adherence to the company's objectives which aim to the enhancement of tourism and the investment of the necessary capital to that effect, that is to say to comply with the obligations undertaken by the Claimants as investors in a tourist project under laws 1 and 2 of 1973 concerning tourist activities as well as under law 43 of 1974 concerning foreign investments.

- At the same meeting Mr. Zaki also stated "that the budget is based on a certain concept and that is sales and loans..." his proposal was to submit "the budget to the financial committee for the following reasons: it may be that sales are now not legal or that some legal procedures need to be fulfilled." (The Minutes p. 10. Emphasis added). As the motion on the budget was approved by a majority rule (that is to say by the Claimants) Mr. Zaki said that if the Board did not agree on the principles of the budget and the concept how it was done and without time to study it, he and the other EGOth representatives would have to withdraw from the meeting, the action they effectively undertook.

It seems that it was a matter of a *tour de force* that the Claimants had recourse to on the basis of their majority on the Board of Directors. Beyond that fact, it seems appropriate to indicate that the Claimants were obviously intent and determined to maintain their own concept of the project as well as the reality about themselves: the concept being mainly an urban development project and the reality being developers and not investors as they claimed to be to the Egyptian Government, and specifically to the GIA. In this context, I may refer to the letter dated April 4, 1977 sent by the Chairman of EGOth to the Chairman of ETDC in which the former points out the discrepancies between what was decided during the Board meetings of January 24 and February 9, 1977, and what was contained in the application to the GIA, the discrepancies consisted, as explained in the letter, in that "les buts du projet en tant qu'essentielle-

ment un projet touristique et les étapes de sa constitution et ses délais. 2. L'information du financement du projet (volume de l'investissement soit en ce qui concerne le capital ou les emprunts)... " (Resp. Annex F.60, p. 2 Emphasis added).

- At the next meeting held on May 15, 1977, an EGOth representative pointed out that after the last meeting "the Minister of Tourism sent a letter to the company which we received a copy of advising the company to stop sales and everything concerning the exploitation within the limits of the project..." (The Minutes, item 77/20, p. 6. Emphasis added). The Chairman of ETDC confirmed that information and did precise that the referred to letter reached the company on April 12, 1977.

This fact indicates the concern of the authorities in the Claimants compliance with the touristic nature of the project. It is in the light of such facts that should be considered and appropriately evaluated statements emanating from officials, whether to the press or before the People's Assembly in answer to questions and/or interpellations, the contradictory attitudes of certain officials revealed from documents presented before this Tribunal give weight to the Respondent's contention to the effect that certain officials, while defending or being forced to defend the Claimants in public, were, however, trying to make the Claimants act in accordance to the agreed upon nature of the project as touristic.

I may refer, as an example, to the reply of the Minister of Tourism before the People's Assembly to the challenging question of Dr. Oteifi, where the Minister affirmed that "the objects for which the company was established (a) to develop international tourism in the Pyramids and Ras El Hekma regions according to the approved Master Plan and this by building hotels, cinemas, restaurants, parks, tourist accommodations and villages, clubs, cafes and other tourist facilities..." (Cls. exh. 87, p. 3. Emphasis added). Indeed the reply never hinted to the serious diversions as regards the nature of the project between the Claimants and their Egyptian partner.

- At the meeting of the Board of June 7, 1977, all representatives of EGOth were replaced. No reason was advanced, however, one couldn't but notice that during the meeting before, one representative of EGOth was quoted as saying "we are now building a State inside the frame of Egypt" (the referred to Minutes, p. 19).

- In the Board Meeting of November 13, 1977, Mr. Munk, the representative of the Claimants, stated that "the hotel financing was proving to be more difficult than had been anticipated" (Resp. Annex F.20, p. 9). This statement unequivocally indicates that until November 1977, the investors, I mean the Claimants, had difficulties to arrange finance for a single hotel. It may be

in these circumstances understandable that the Claimants had no other alternative but to continue in their activities of selling bare lots of land to any willing purchaser. In this context, I may also point out that it was put on the record that the Minister of Tourism, kindly, requested the Claimants to declare their intentions to the construction of a hotel in order to be in a position to defend the Claimants and convince the People's Assembly of a touristic nature of the project. (Meeting dated January 26, 1978, item 78/4).

IX. By a letter dated May 12, 1978, Mr. Munk, the Claimants' representative, addressed the Prime Minister informing him that "in spite of these encouraging initial indications of success, *the protracted debates in the People's Assembly, the various committee hearings and the adverse world wide publicity have seriously impaired our efforts to create the required credibility to attract the increasingly needed overseas finance for the project*" (Respondent's Annex F.38, p. 3), and he came to the conclusion that "*we find it impossible under the present conditions to proceed rationally or economically with the planned implementation of the project.*" (The above mentioned Annex, p. 4, Emphasis added)

B. The events that occurred around the critical date May-June 1978

Under this item, I intend first to review the two main events that were referred to in the letter of the Claimants to the Prime Minister dated May 12, 1978 to wit:

- The debates in the People's Assembly
- and - The adverse world wide publicity

to the effect, as stated in the letter, that these events "seriously impaired our effort to create the required credibility to attract the increasingly needed overseas finance for the project."

After that, it will be dealt with (ii) the measures taken by the Egyptian authorities in May-June 1978 and the reaction of the Claimants to these measures, and finally, I will indicate, in brief (iii) the subsequent conduct of the two parties during the stage of negotiation.

i. a- *The debates in the People's Assembly*: The Claimants admit that during 1977, opposition to the project developed in Egypt (Cls. Memorial p. 47). However, they explain that that opposition was part of a general political campaign directed less at the project than against the Government. The Claimants concede that the Government came to the defense of the project on several occasions:

- On September 4, 1977 a letter from the Minister of Tourism was published in the Newspaper *Al Aekhbar* by which the Minister responded to a

series of articles written by Dr. N. Fouad criticizing the project. The Minister's letter specifically stated that "the archaeological Board took part in the joint committees studying the project in the [Giza] Directorate. The Board approved plans to exploit the area in the tourist trade and arrangements to assign certain areas for [EGOTH] in accordance with a special presidential Act." (Cls. Memorial p. 48 and exh: 136 bis)

- On September 10, 1977 the Minister of Tourism submitted to the People's Assembly a written answer to a series of questions from Members of the said Assembly. (Cls. Memorial p. 47 and exh: 87)

- On February 7, 1978 during a debate in the People's Assembly, the Ministers of Tourism and of Economy unreservedly endorsed the project "stating that the project is in the national interest of Egypt, that *no danger to antiquity areas existed, and that all laws relating to antiquities were being closely adhered to.*" (Cls Memorial p. 50. Emphasis reproduced, and Cls. exh: 74)

- In an interview given to the magazine "sixth of October", and published on April 23, 1978, President Sadat confirmed that the project had already been studied and approved and that it was "a grave mistake" for the Assembly to take up the question again, and he affirmed that doubts should not be permitted about the "open-door" policy of which the project was an example. (Cls Memorial pp. 50-51 and exh: 141).

It is noteworthy to point out that the project was subject to multiple questions and interpellations before the People's Assembly.

The documents reveal that the Minister of Tourism was first questioned by a member of the People's Assembly about the terms of the agreements concluded with the Claimants, and the Minister answered to that question in writing in September 1977.

Nevertheless, "interpellations" were again addressed to both the Minister of Tourism and the Minister of Economy. Debates about these interpellations took place, before the People's Assembly, on February 7, 1978. It is to be noted that interpellations constitute in the Egyptian Constitutional Law a means of control by the Assembly over the Executive, eventually resulting in the engagement of its responsibility. As noted "les interpellations constituent un moyen de mettre en jeu la responsabilité du gouvernement devant le Parlement." (Institution politique et droit constitutionnel, M. Duverger, p. 172, Themis, P.U.F.). Under the Egyptian Constitution, the questions and the interpellations are governed by the provisions of articles 125 and 126. Article 125/2 provides as follows "Debate on an interpellation shall take place at least seven days after its submission, except in the case of emergency as decided by the Assembly and with the Government's consent."

As pointed out by the Eminent Professor Duverger, the fundamental difference between questions and interpellations consists in the fact that the Assembly, after the debate about the interpellation, must vote either in favor or against, hence eventually engaging the responsibility of the competent Minister, the Prime Minister or eventually the whole cabinet. "Mais une différence fondamentale subsiste; les questions ne donnent lieu à aucun vote; au contraire, les interpellations se terminent par un vote exprimant la satisfaction de l'Assemblée pour les explications fournies par le gouvernement, ou son mécontentement." (Duverger, *op-cit*, p. 172, and in the same vein, G. Burdeau, *Droit constitutionnel et institutions politiques*, p. 320, L.G.D.J. 1966). As for the outcome of the interpellations concerning the Claimants' project, the Assembly approved remitting the question, interpellations and the discussions to the "Cultural information and touristic committee with the participation of both offices, the economical committee and the legislative committee to study the subject and present a report about it to the Assembly..." (Summary of the minutes of the Assembly's session on February 7, 1978, Cls. exh: 74)

On March 12, 1978, the speaker of the People's Assembly, by a letter to the head of the above mentioned committees, suggested that the matter be studied in all its aspects by highly qualified technical experts. (Annex I to the report. Resp. annexes F 22 B and F 23). The experts committee was formed and began its assigned mission by April 5, 1978. (p. 1 of the report). The experts Committee finalized its findings in a "Report," (Resp. annex F 23). That report deserves special attention since it treats about the different aspects of the project, and its elaborated by independent qualified technicians in different domains; *inter alia* the domains of law, economy and antiquities.

The question of whether or not the campaign against the project in the People's Assembly, was of a political nature may have a conclusive answer since the Central Auditory Agency (which as explained, is an independent body headed by an independent high official of the rank of Deputy Prime Minister and which reports directly to Parliament) independently prepared a report dated September 17, 1977 which was sent to the People's Assembly (Resp. Annex F19). The said report contained information about the defects and illegality that affected the project both at the negotiation and at the implementation stages. Consequently the said report is enough evidence, in my opinion, to exclude any doubt about the real scope of the actions emanating from members of the People's Assembly. Moreover any unfounded political campaign would have by the time lost momentum. In this respect the campaign in the People's Assembly resulted in a resolution to the effect of the formation of a specialized committee entrusted with the study of the subject under all its aspects (called here in after the experts committee). Both reports, the one prepared by the Experts Committee and the other, elaborated by the central Auditory Agency (Resp.

Annex F:23) will be dealt with later, as they have their weight in the consideration of points of facts and of Egyptian law brought to the attention of this Honorable Tribunal.

In this vein the Respondent argues that, even if the "Antiquities" reason had not arisen, the Respondent would have had the right and the obligation, on more than one ground, to terminate the project as then implemented by the Claimants (resp. Counter Reply Vol I, pp. 86-87). The Respondent also points out that if it would have failed to exercise that right or to fulfill that duty, Egyptian Courts would have seen to it that this was done, at the initiative of interested citizens. As a matter of fact, the Respondent explained that a demand for the nullification of the project has been brought to the court on the 1st of December 1977, (the Conseil d'Etat), before the 1978 Minister of Culture's *Arrêté* No. 90 of 1978 was issued (Resp. Annex F 64), in request for a summary stay of execution of the *Arrêté* No. 212 of 1975 and as principal demand to abrogate the said decree and consequently to rule to nullify or rescind the said Company's articles of incorporation. The decision of the Court concluded that "whereas the result of these violations is to render null and void ETDC's articles of incorporation as well as Decree No. 212 for 1975... in consequence whereof the legal base of the company ceases to exist..." (p. 50 of the Decision).

These facts put together, may answer by themselves the argument presented by the Claimants to the effect that "it must again be stressed that these allegations did not appear until Respondent's representatives were given the task of constructing a defense, first in ICC proceedings and now again in the current forum" (Cls. Reply. Footnote 18, p. 13).

i. b- *The worldwide adverse publicity*: The Respondent acquiesced that the Pyramids Plateau project generated contrary reactions and protests (Resp. Counter Memorial Vol I p. 205). However, it points out that that was due to the conduct and behavior of the Claimants in the implementation of the project mainly on the Plateau proper. The documents of the case reveal that the Claimants reacted to the so-called adverse worldwide adverse publicity. They, in fact, presented a request *en diffamation* against the French newspaper *Le Monde* before the Court of Paris. The Claimant at that case was Mr. Munk and he was attacking the Newspaper and the editor of an article entitled "Promoteurs contre Pharaons: osera-t-on de construire au pied des Pyramides?" published on March 25, 1978. The Court by a decision of February 5, 1979 dismissed the case (Resp. Annex F:39).

The Respondent presented certain documents which revealed: the concern of the international community as to the safeguard of the World Heritage and the worldwide reaction against the implementation of the project as conceived by the Claimants. In this respect the Respondent presented as samples:

- The letter dated April 6, 1981 from the then Director General of UNESCO in which he reiterated the worldwide concern about the risks to which Memphis and its necropolis - and the zone of the Pyramids from Giza to Dahshour would have been exposed and the profound relief that the Egyptian Government has taken active measures to protect that site "... *ayant cette valeur universelle exceptionnelle...*" (Resp. Annex F.25, p. 2, Emphasis Added)

- The article dated March 7, 1978, published in the London times entitled "Save the Pyramids from the Jet Set Appeal." (Resp. Annex F.26)

- The article dated March 25, 1978, published in *Le Monde* entitled "Promoteurs contre Pharaons: Osera-t-on construire au pied des Pyramides" (Resp. Annex F.27)

- The letter dated October 10, 1978 from the Director General of UNESCO to the Director of *Le Monde* thanking him for the energy and devotion with which the Newspaper defended the world's cultural heritage in connection with the Pyramids Plateau Project (Resp. Annex 28). In fact, the letter contained that "*aussi est-ce avec un véritable soulagement que j'ai appris que l'environnement des Pyramides sera pleinement respecté.*" It is noteworthy to point out that the letter was dated before the formal registration of the site on the list of the World Heritage.

- The article dated January 9, 1979 published in the French "*Libération*" entitled "*Le monde, les Pyramides et les promoteurs.*" (Resp. Annex F.30)

- The article entitled "Egyptian concern over plush city project by the Pyramids-Antiquities threat fear" (Resp. Annex F.31)

ii. *The measures taken by the Egyptian authorities at the critical date May-June 1978*

As a preliminary observation, I may refer again to the letter of Mr. Munk dated May 12, 1978 to the Prime Minister in which he explained the difficulties "to attract the increasingly needed overseas finance for the project (Resp. Annex F.38), due to the debates before the People's Assembly and the worldwide adverse publicity which "have seriously impaired our efforts to create the required credibility." (Emphasis Added).

In this context, I may refer also to the Minutes of the second meeting of negotiations held during 24 and 26 of January 1979, where Mr. Mcgee and Mr. Zerfas insisted upon the housing activities advancing the argument that 75% of the Claimants' capital is held by the Khashoshgy interests and as they had been answered that under the provisions of law No. 43, SPP (ME) cannot be considered as Arab investors, they asked "can we reincorporate and become all Arab" (Resp. Annex F.65, p. 3).

All these facts put together may reveal ample confirmation as to the real concept the Claimants had for the project and the real nature of activities they were practicing. However, it has been demonstrated that the Claimants applied under law 43 as investors in a touristic project and, as such, committed themselves to the compliance with the provisions of the law as well as with their own consented obligations as stated in the application to the GIA. As to the financial capabilities for investment, it may be noteworthy to point out that the Claimants presented themselves to the GIA by "the proposal on the development program" (Cls. exh. 81).

The proposal indicated reference to Appendix (A) which is entitled "Corporate summary of Southern Pacific properties." When the Respondent questioned the financial capabilities of SPP and asked formally that the Claimants produce that Appendix, the Claimants answered by a letter dated January 20, 1990 that "we have confirmed with our clients that, like the Respondent, they cannot locate the Annexes attached to the April 1974 submission" (Resp. Annex D.18). Whatever their investment capabilities for investment had been at that time, the fact remains that till May 1978 they seem to have failed to invest or to arrange finance for a single hotel and therefore were perhaps necessarily obliged to embark in and further commit themselves into the questionable activity of selling bare lots of land on the site. Moreover, the events that occurred later, but before the critical date, "impaired seriously" their credibility to arrange the needed finance as the Claimants themselves admitted in their letter dated May 12, 1978. This may suggest that at least from the date of that letter the Claimants were cognizant of the fact that they were in a situation *d'impossibilité matérielle d'exécution* of the titanic project they committed themselves to.

In the presentation of their case, the Claimants seem to give the impression to the effect that the Egyptian Authorities were conscious about the concept and nature of their activities, as developers. They repeatedly refer to the visit of a certain delegation to their project at Fiji, upon their invitation, and come to the conclusion that this fact reveals the acknowledgment and acquiescence of Egypt to the concept and nature of their activities in the Egyptian venture. The only worthy comment is that the legal appraisal of their activities in Egypt, should be effectuated in the light of their obligations under the rules of law No. 43, and the provisions of the engagements they obligated themselves with.

- By a letter dated May 17, 1978, the Vice Minister of Tourism informed the Manager of SPP (ME) Mr. McLellan that "we warn the company that if it does not carry out what had been agreed... if not we will take the steps which will compel the company to respect the regulations which are: 1. An Agreement should be made... on the form of the contract which will be made between the company and those who are going to exploit... 2. The stop

immediately of any construction works within the monumental zone which is to be marked by the Land Survey Department" (Resp. Annex F.37).

- On May 27, 1978 a memoranda was prepared by the President of the Egyptian Antiquities Authority (Cls. Exh. 144) in which he informed the Minister of Information and Culture of the recommendation by the Board of E.A.A. to consider the region of Al Giza Pyramids as a Public property (Antiquity). The memoranda contained justifications to the recommendation which consist in: 1. that "the presence of Antiquities was confirmed in the Western side of Al Giza Pyramids region which represents the Eastern part of the construction operation carried out..." 2. "The scientific evidence mentions the probability of Antiquities present in this important Antiquities region..." 3. "The Antiquity and Cultural study of the nature of this ancient region imposes the need of a large and wide prohibited space at the Al Giza Pyramids region..."

- On the same day, the Minister of Information and Culture issued Decree No. 90 of 1978 stating in Article (1) that "the land surrounding the Pyramids which its boundaries and signs are shown in the attached memorandum and two maps, is considered of public property (Antiquity)."

- On May 28, 1978, the GIA informed the Chairman of ETDC that the Board of Directors of GIA decided on May 28, 1978 to drop the GIA's former approval dated July 20, 1975 concerning the Pyramids Plateau, for the impossibility of the execution of the project as a result of the issuance of Decree No. 90 of 1978 of the Minister of Information and Culture. (Cls. Exh. 146).

- By telex dated May 29, 1978, Chase National Bank informed ETDC that the Bank received instructions from the Central Bank of Egypt to block ETDC's accounts and deposits pending further instructions. (Cls. exh. 147).

- On May 29, 1978, EGOH informed ETDC to stop work on the project. The letter stated that "please be informed that because of the issuing of the GIA's Decree, thus dropping the agreement on the Pyramids Plateau project... I decided to write to you in order to take the suitable procedures to safeguard our interests and the rights of the investors and shareholders..." (Cls. Exh. 148).

- On May 30, 1978, EGOH filed a request for sequestration of ETDC's assets before the Court of Giza. The Court accepted EGOH's request and made a provisional order for sequestration "on all the money put in the banks and at the Company" (Cls. exh. 150).

- At the Board of Directors' meeting on June 6, 1978, the Chairman of ETDC reviewed the administrative and judicial measures that took place,

and it was agreed unanimously to convene an extraordinary meeting of the General Assembly of the company just after the ordinary meeting of June 20, 1978.

At the Board Meeting, Mr. Gilmour explained that the events of the past weeks were a great shock. He also pointed out that "the attitude we felt always a very close mutual agreement of purpose and aim." He however stated that "due to the events of a week ago it was important that our attitude be clearly understood as over the last year many misunderstandings had taken *and SPP suffered a credibility gap due to the press* which did not always illustrate the attitude in which we came to Egypt." (The Minutes p. 3). A representative of EGOH was quoted saying "that the Government intends to keep ETDC going for Ras El Hekma or any other place. The Government is very keen upon the rights of its investors."

As to the temporary measures, the Chairman explained that EGOH brought a case before the Court of temporary injunctions of Giza, for a judicial sequestration and the nomination of a receiver, but during the hearings of Saturday, 3rd of June, EGOH modified its demand in sequestration and asked for the appointment of two receivers, one neutral and the other being the Chairman of ETDC (who, to be reminded, is the representative of the Claimants) "Having full financial powers to safeguard the funds and property of ETDC and the rights of the shareholders and purchasers" (the Minutes, p. 5). This request was to render an injunction "to appoint these two receivers until the meeting of the General Assembly on 20th June." (the Minutes. Item 78/23. p. 5)

Noteworthy is the fact that during the meeting it was unanimously agreed to appoint a committee of three persons: one representative of both EGOH and SPP and an impartial third. In answer to questions by Mr. Gilmour and Mr. Birchall, the representatives of EGOH affirmed that the appointment of the committee "would be in place of the sequestration and the blocking would be lifted." And that "the request to the Court will be dropped after the formation of the Committee and naturally it means that the claim of 10m. will be dropped." Also in answer to Mr. Gilmour's question about the rationale of EGOH's claim, a representative of EGOH stated that "it was only precautionary, temporary measure." (The Minutes, p. 7)

- On June 19, 1978, Presidential Decree No. 267 of 1978 was issued. On the basis of the Decree of the Minister of Information and Culture No. 90 of 1978, the Presidential Decree provided in article (1) that "the Presidential Decree 475/1975 to be cancelled regarding the assignment of the lands on the Pyramids Plateau in Giza for Touristic exploitation" (Cls. exh. 151)

- Contrary to what had been agreed upon, Mr. McGee, in his capacity as the authorized representative of SPP (ME) sent a memoranda dated June 20,

1978 in which he stated “we concur that a Court order should be immediately sought. 1. Confirming the power of the receiver to instruct him to call General Assemblies at the request of either shareholders and to attend General Assemblies in lieu of Board. And that upon the issuance of such order all members of the existing Board should be discharged.” (Resp. Annex F.44)

The Respondent explained, while the Claimants kept silent, that when the Giza Court decided on June 19, 1978 to appoint, the two proposed persons as co-custodians to act jointly, the Chairman of ETDC who was also the representative of the Claimants declined to serve as co-custodian (Resp. Counter Memorial Vol I, p. 236), instead, the representative of SPP (ME) in Court requested a court order confirming the power of the EGOH designee to serve as sole receiver.

- On July 12, 1978, the judicial custodian issued resolution No. 1 of 1978 (Cls. Exh. 150). That resolution referred to “the resolution of the trio committee appointed by resolution No. 23 for the year 1978 of the Board of ETDC to manage the affairs of the company prior to the appointment of the judicial custodian, and for organizing the work of ETDC during the period of the custodianship.” In this respect, the Respondent explains that after opting for cooperation, the Claimants shifted their attitude to a “refus de toute coopération avec les autorités Egyptiennes” (Resp. Mémoire en Réponse. Vol II p. 115)

This statement may have ground upon the fact, later revealed during the first meeting of negotiation between the two parties where Mr. McGee, representing the Claimants, was quoted as saying “ETDC can be successful, but the combination of ETDC and SPP has lost its credibility” (Resp. Annex F.56 p. 2. Emphasis added).

iii. *The Subsequent conduct of the two parties during the stage of negotiations:*

The Respondent presented in the present case documents relating to subsequent contacts with the Claimants. The contents of these documents were subject of discussions and explanations by both parties during the hearings before this Tribunal in September 1990. However, the veracity of the contents of these documents seem not to be challenged or surmised.

In Annex F.65, the Respondent presented a document entitled “Minutes of Five Meetings of GIA representatives and the Egyptian ‘Legal Group’ with representatives of SPP, dated 24-28 January 1979.” Present to the meetings were, beside the representatives of Egypt, the representatives of SPP (ME), and as such represented “their shareholders who are Prince Nawaf and Prince Fawaz and Mr. Khashoshgy.”

1. It appears from the *procès verbal* of the first meeting that the meetings was held at the initiative of the Minister of Tourism since Mr. McLellan expressed that “He is grateful that the Ministry of Tourism had invited this delegation to Egypt.” The Claimants point of view can be summarized as follows:

- That the problem may be solved in a manner to ensure Egypt’s reputation as a host country for foreign investments.
- That the cancellation of the project caused SPP serious financial losses and damages.
- That the Press attack harmed the reputation of the Claimants, therefore, as explained by Mr. McGee “Any settlement must include a statement by the Egyptian Government to heal his clients’ damaged reputation.”
- That SPP prefers not to continue as a partner in ETDC, since the combination ETDC and SPP lost its credibility.
- That replacing the land does not put ETDC on its feet since it spent 9.5 m. U.S. Dollars in preliminary engineering.
- That the estimated damage amounts to 35 m. U.S. Dollars.
- That a settlement be reached in a short period of time.
- That the basis for compensation is Egypt’s breach of contracted obligations.

On the other hand, the representatives of the Respondent pointed out:

- That Egypt and EGOH did not violate any contracted obligations or Egyptian law.
- That the Minister of Culture did not break the law by issuing Decree No. 90 of 1978.
- That the contract of ETDC is governed by Egyptian law and that the said law should be applied concerning compensation.
- That ETDC will be compensated according to Law No. 215 to 1951 concerning monuments.
- That Egypt and EGOH have the right for compensation because the foreign partner violated the contract and laws in force. The violations being established in both the report of the Central Authority for Auditing, and that of the Experts Committee.
- However, the Egyptian side expressed willingness to find a settlement provided the whole contract and statutes of ETDC are revised in compliance with the provisions of the Law No. 1 of 1973 concerning touristic establishments and law No. 43.

2. At the second meeting, the Egyptian side pointed out the violations committed by the Claimants in their housing activities. In response to a statement by the Egyptian side to the effect that the concept for the future would necessarily drop the housing activities, Mr. McGee the representative of the Claimants was quoted as saying "The law says that Arab Capital can do something with housing and 75% of our capital is held by the Khashoshgy interests. Or we would like to go to the house and have a special law." Mr. Zarfes also asked about the possibility of reincorporation and becoming all Arab. To all that the Egyptian side reaffirmed that both partners EGOH and SPP do not have the right to exercise housing activities in Egypt, EGOH being a tourist company and as such is forbidden to exercise housing activities.

In answer to the interrogation of the Egyptian side as regards what Claimants meant by "residential tourism," Mr. McLellan answered that "It seems to me, there is no dispute about the commercial viability of what was done." At that meeting the project of Ras-El-Hekma was discussed, and the Egyptian side objected to a suggestion that 95% of the cost of construction of a hotel at that site be financed by loans. The Egyptian side pointed out that "it is unacceptable that ETDC work as an intermediary between Egypt and international financial institutions, so it should be a venture where the investors do some parts of financing." (Emphasis added).

In answer to a question about the alternative site of the project, the Egyptian representatives stated that "we will apply law 215 of 1951 according to this law the Ministry of Culture is studying the land which will be given to ETDC."

3. At the third meeting, Mr. Zarfes, representative of the Claimants, pointed out that they "will be responding to a general of concepts and problems to make ETDC work under Egyptian law;"

- ETDC should be a touristic company, he was quoted as saying "we finally agree that this should be the mission of ETDC."

- An economic plan for the carrying out of activities of ETDC is vital.

- A feasibility for a financial plan.

He also pointed out that the Claimants need:

- Indemnification for ETDC.

- Consider the site location.

- Make a master plan to fit the site.

4. At the fifth meeting the Claimants' representatives asked for time to consult with the shareholders, and to make a full plan of feasibility study.

5. The negotiations seem to have been resumed on May 16, 1979 (Resp. Annex F.69).

The *procès verbal* of the meeting reveals that two subjects were under discussion: the compensation and/or the means of cooperation in ETDC's activities. A substitute land was offered to ETDC in case the foreign partner intended to cooperate. Was also discussed the contents of two documents each prepared by a party and communicated to the other for the study and comment.

Mr. McLellan, the Claimants' representative, pointed out that the losses incurred by SPP amount to 7.3 million Dollars, however the Claimants accept to limit their compensation to 4 million, and the rest to be considered as their contribution in the company. And as the Egyptian side questioned some figures included in the note prepared by the Claimants and asked that all supporting documents be presented, in response, Mr. McLellan advanced that the value of SPP (ME) was estimated at 35 m. and subject to increase, and that was the amount of losses.

The Egyptian side raised questions about the figures advanced by the Claimants and asked that certain sums be excluded. These sums were:

- 1.333.244 Dollars representing "leur quote part dans les dépenses de constitution de la société."

- 3.555.285 Dollars "qui représentent des dépenses de développement qui ne concernent pas ETDC."

The *procès-verbal* contains that in response Mr. McLellan had said that "il n'est pas prêt à entrer dans une discussion concernant ce qui a été effectivement dépensé, ni à entrer dans des négociations les concernant." (Procès Verbal, p. 7). However, it seems that, the Egyptian side offered to pay 1.5 million Dollars against the invested capital "comme contre partie des capitaux investis, ce dans le cas de la continuation de la société." (Procès verbal, p. 11) and that "la compensation principale à ETDC sera un terrain alternatif..." (Procès verbal, p. 12).

6. The issue of the proposed land of substitute has been debated in the written submission, and during the hearings before this Tribunal in September 1990. The Claimants asserted that the proposed site was unappealing, located twenty kilometers remote from the Pyramids Plateau. The Claimants pointed out that neither the offer nor the site was defined with precision. They refer to a visit that took place by the Arbitrators of the ICC Tribunal, during which they "were shown a location in the sixth of October city (which covered a very large territory) more than 20 kilometers from the Pyramids Plateau site and with characteristics entirely inappropriate for the tourist destination concept." (Cls. Reply, p. 88).

On the other hand, the Respondent presented maps indicating the location of the proposed site, as well as technical studies which contain evaluation of that site and a comparison with the site of the Plateau (Resp. Annex, F.51). The Respondent also pointed out that the proposed site "corresponds closely to the one of the four sites (the site on the Fayoum Road) to which the Claimants had agreed upon in the Heads of Agreement of September 1974." (Respondent Counter Memorial, Vol I, p. 243).

The Respondent explained that its offer for a land of substitute is relevant as regards both the legal issue and the factual considerations. The Respondent advances that it had the legal right to modify the contract in the sake of public interest on the basis of an established principle of administrative law. And that on the other hand the offer reveals the goodwill for further cooperation with the Claimants who, alleges the Respondent, declined the offer without even giving it serious consideration.

7. Without going through any legal considerations, as regards the nature of any eventual contract that may have been concluded between the two parties to the present dispute, I may only point out that the criteria of administrative contract should be sought in the Egyptian administrative law, and that under Egyptian administrative law, for a contract to be qualified as administrative, it should satisfy, as a general rule, three elements: the administration being a party to it, related to a public service, and containing exorbitant clauses "*Clauses Exhorbitantes*." (S. El Tamawy. General Principles of Administrative Contracts, 1984, p. 54 in Arabic).

However, any contract related to the use of public domain, is by its nature, considered an administrative contract subject to the application of the rules governing administrative contracts. (The Supreme Administrative Court, case 1965 for the judicial year 6, 31.3.1962).

8. As regards the factual consideration; it seems that the review of the *procès verbaux* of the meetings may reveal the divergencies that separated the two parties *inter alia* the reimbursement of the Claimants, the nature of the eventual project and its financing. Therefore, the issue of the substitute site was not at the core of the negotiations.

It seems, moreover, that the proposed site was conditional upon agreement about the activities that should be practiced in the framework of the touristic nature of the project.

However, if the suitability of the site of substitute is to be given weight in the impartial consideration of This Tribunal of the whole relationship between the Parties in dispute, before, during and after the critical date May-June 1978, the Tribunal should evaluate the issue of suitability in the light of the realities revealed by the documents and studies submitted to it, and hence to reject such

gratuitous argument to the effect that the subsequent non implementation of touristic projects on the proposed site of substitute is evidence for its unsuitability. Otherwise, it could have been argued that the site on the Pyramids Plateau proper, where the Claimants were implementing their project, is to be considered by its turn unsuitable since from times immemorial it has never been exploited whether in touristic or other activities.

9. To conclude upon the issue concerning the critical date and the subsequent conduct of the parties, I may refer to two documents:

- The SPP (ME) memorandum dated June 20, 1978, prepared by its authorized representative, Mr. James MacGee which stated the following: "we concur that a court order should be immediately sought 1. confirming the power of EGOH designed to serve as sole receiver in view of the fact that the co-receiver has declined to serve. 2. Expanding the power of the Receiver to instruct him to call General Assemblies at the request of either shareholder... and that upon issuance of such order all members of the existing Board should be discharged." (Resp. Annex F.44)

- The telex dated January 8, 1982, from the Chairman of SPP (ME) to the Judicial Custodian of ETDC, in which SPP (ME) asked that "ETDC and shareholder's meeting be put off pending the Arbitrator's decision." The allusion was made to the case before the ICC, and in the telex SPP (ME) expressed its view that since the ICC Tribunal may make its award conditional on SPP (ME)'s surrendering its shareholding in ETDC, therefore it would "be obvious that any decision taken on behalf of ETDC should await the pending Decision of the Arbitration Tribunal" and that "the substitution of land at the Sixth of October site was proposed and rejected two years ago, and we cannot conceive of any reasons why it should now be urgent to reconsider it." (Resp. Annex F.43).

4. *The allegations related to irregular contacts and corruption*

a. General preliminary considerations:

1. "... It cannot be contested that there exists a general principle of law recognized by civilized nations that contracts which seriously violate *bonos mores* or international public policy are invalid or least unenforceable and that they cannot be sanctioned by courts or arbitrators."

By that statement of 1963, the honorable judge Llargren, acting as sole arbitrator, set the genesis of a basic rule to govern international transactions. Such a rule was necessitated by the fact that "notwithstanding the efforts of national laws and international agencies, financial and other inducements are an established part of the process of obtaining contracts in some parts of the world." (A. Redfern and M. Hunter, Law and Practice of International

Commercial Arbitration, p. 107-108. Also Kosheri and Leboulanger, *L'Arbitrage face à la Corruption et au trafic d'Influence*, Rev. Arb. (1984), p. 3).

International agencies were active in detecting and combating these practices (for example OCED "Guidelines for Multinational Corporation," para 7; The Draft International Convention on Illicit Payments, UN doc. E/1979/104, May 25, 1979, and ICC document No. 315 "Extortion and Bribery in Business Transaction" and document No. 480/2 "Les Commissions illicites; Définition, Traitement Juridique et Fiscale.") Relevant concern seems to be better demonstrated by reference to the "World Development Report for the Year 1991" issued by the World Bank. The report indicates that corruption is an evil that undermines the administration's capacity and may even lead to its paralysis. The report also points out that the phenomenon is not confined to the administration of developing countries, however low salaries may be detected as one of the reasons behind these practices (The report in its Arabic version, p. 165).

2. In this vein, it is noteworthy to point out that the international community saw to it that, in its setting of codification of the rules governing treaties, be embodied the basic principles relating to the issue of fraud and corruption and their consequences as regards the validity of the treaty. Article (49) of the "Convention de Vienne sur le Droit des Traités" provides that "si un état a été amené à conclure un traité par la conduite frauduleuse d'un autre état ayant participé à la négociation, il peut invoquer le dol come viciant son consentement à être lié par le traité," and article (50) of the same convention reads as follows "si l'expression du consentement d'un état à être lié par un traité a été obtenu au moyen de la corruption de son représentant par l'acte direct ou indirect d'un autre état ayant participé à la négociation, l'état peut invoquer cette corruption comme viciant son consentement à être lié par le traité." This aspect of the convention has been qualified as "Moralisation du Droit" as explains the eminent professor Reuter who stated in this respect that "nul ne saurait s'y tromper: la partie progressive de la convention de Vienne est bien celle qui concerne les cas de nullité des engagements internationaux, et qui expose la sanction moderne des vices du consentement et la notion de *jus cogens*." (Pr. Reuter, *La Convention de Vienne sur le Droit des Traités*, Paris 1970, p. 22).

3. Article (11) Bis of Law 43 of 1974 concerning investments of Arab and foreign capital reads as follows "the projects referred to in the first paragraph of the previous article are subject to the restrictions pertaining to employees of government and representative bodies set forth in article (95) to (98) of Law No. 26 of 1954 and to the prohibitions set forth in article (28) of Law 38 of 1972 with regards to members of the People's Assembly. Prohibited activities in accordance with the provision referred to in the previous article include

undertaking any private activity, directly or indirectly or through an intermediary, including consultant activities, if during the year prior to leaving office or employment, the Minister or public official was involved in licensing the establishment of those projects or supervising their activity. In the application of the provisions of this law, the term 'minister' shall refer to the Prime Minister, Deputy Prime Minister, Ministers and Deputy Ministers.

The documents presented to this Tribunal reveal that, as far back as 1977, competent authorities, mainly the independent Central Auditing Authority, had suspicions about circumstances surrounding the contractual process that occurred with the Claimants. In fact, by a letter dated November 10, 1977 concerning the Claimants' project, the Head of the Central Auditing Authority formally asked the Minister of Tourism to "procéder à une enquête avec tous les responsables de cette affaire, et ce par quoi elle a aboutit comme conséquence contraire à l'intérêt du pays, et qui ont détourné les buts poursuivis par l'accord." (Resp. Annex F.63). That request was based upon the observations and conclusions contained in a report prepared by the said authority after reviewing the whole contractual relationship and the activities of the joint venture under the Claimants' management.

Moreover, the Experts' Committee which was constituted under the auspices of the People's Assembly and entrusted with the study of the various aspects of the Claimants' project, came to conclusions which corroborate the findings of the Central Auditing Authority (Resp. Annex F.23). In this respect, it is noteworthy to point out that the above mentioned Experts' Committee submitted in its conclusions that "it would like to point out that the different stages which this project went through... reflect many gaps and excesses and impulsiveness which violated the rules of the law and the constitution besides the inaccuracy and the dishonesty of the display." (Resp. Annex F.23, p. 116).

The findings of both the Central Auditing Authority, in 1977, and the Experts' Committee, in 1978, alongside with an impartial evaluation of the sequence of facts may convey a preliminary answer to the question about whether or not the Claimants were, in fact and in law, *bona fide* developers whom the misfortune led to face a faltering, misfortunate and decadent administration.

4. In case of evidence to corruption, a question arises about what would be the legal consequences thereupon. It is noteworthy, that concerning contracts, the objects of which are illegal, i.e. related to illegal commissions or traffic of influence, it is debated whether to consider the issue as related to the arbitrability of the case or rather to assume jurisdiction yet refuse the claim on the basis of illegality (Yves Derains, *Analyse de Sentences Arbitrales*, les

Commissions Illicites, ICC publication No. 480/2, p. 61 et s., and also Redfern and Hunter *opcit* p. 108).

b. The Respondent's Allegations:

1. The Respondent consacrated a whole section of its Counter-Reply entitled "The Claimants' Corrupting Practices" the Respondent refers first to what it alleges was the general business practice of the Claimants outside Egypt and quote a dominant representative of the Claimants stating on an official record that "if I have a million and a half dollars applications pending, I am not going to take a chance in not pleasing some political party" (Resp. Counter-Memorial, p. 46 and Counter-Reply p. 113 and Annex F.5 B, p. 91 which is a photocopy of the minutes of the standing committee of the Nova Scotia Legislation on Industry, March 18, 1969). The Respondent also points out that the same Claimants' representative also admitted that a certain Mr. X, functionary of Industrial Estate Limited (apparently a subsidiary or a public organization controlled by the Nova Scotia Government) was appointed director of the private company controlled by the Claimants while they were negotiating with Industrial Estate Limited a business deal involving a loan of 1 Million to the Claimants' company. The Respondent also presented in its exhibits a documentation about the business background of the Claimants which reveals, as the Respondent asserts, the critical financial situation the Claimants were suffering at the time they entered into their agreement with the Respondent and engaged themselves to large investments. In this respect the Respondent asked that the Claimants produce the document containing their financial capabilities annexed to their first proposal submitted to the Egyptian Administration in April 1974. (Resp. Letter dated December 22, 1989, Annex D.17). The Claimants answered by a letter dated January 23, 1990, that "we have conferred with our client that, like the Respondent, they cannot locate the annexures attached to the April 1974 submission." (Resp. Annex D.18). And the Respondent seems to rely upon that answer as a supplemental proof that the Claimants misintroduced themselves to the Egyptian administration. The Respondent also stresses upon the critical financial situation of the Claimants, at the time they introduced themselves to the Egyptian Administration, as demonstrated by the "Report on the Financial History of Southern Pacific Properties Group" prepared by Pete Marwik McLintock and Co. (Resp. Annex F.1). From that report, the Respondent alleges that "SPP was debt ridden even as it was dangling before Egyptian eyes visions of one billion, 700 million and 400 million United States not Hong Kong Dollars in foreign investment. It also shows how the Egyptian venture was used and planned to be used, to get SPP out of its desperate situation." (Resp. Counter-Memorial pp. 29-30)

2. The Respondent advances that "hints of understandings and arrangements multiply even before the Claimants set foot in the country" in this context, the Respondent seems to rely upon the affidavit of Mr. Gilmour before the ICC arbitration which contains information that Mr. Gilmour was invited to visit Egypt during a "chance meeting" in London with the then President Sadat's Secretary for External Liaisons, and who received him in the presidential palace the following weekend. The Respondent explains that that Secretary happened to be the one and same who transmitted the "oral" approval of President Sadat as regards the extension of the duration of the usufruct rights to be accorded to the Claimants' joint venture to 99 years instead of 50, and that upon a letter of request to that effect from Mr. Gilmour, directly to the President, dated May 19, 1975. (Resp. Annex F.54). In fact, it is on the record that by a letter dated May 20, 1975, that is the very next day to the above mentioned letter of Mr. Gilmour, dated May 19, the referred to Secretary informed the Minister of Tourism that "veuillez bien être informé qu'après avoir soumis la question à M. le Président, celui-ci a consenti à ce que l'usufruit de ces terrains soit de 99 ans."

In this respect, I may comment upon a fact which is that the same above mentioned letter contained information about that "en ce qui concerne l'ordonnance présidentielle, elle a été adressée à la présidence du Conseil des Ministres *et ce après signature.*" (Resp. Annex F.55, Emphasis added). It would be noteworthy to point out that the above mentioned letter reveals the following:

- That while the draft of a presidential decree concerning the allocation of the use of the land to EGOH was presented by the Minister of Tourism on March 30, 1975, it took but one day to obtain a "verbal" approval as regards the extension to 99 years instead of 50.

- That the "verbal" approval was accorded without presentation of whatsoever supporting document nor any feasibility study that would have justified the request, contained in a letter, for that extension.

- The legality of that extension being questionable, the subsequent approval of the project by the Board of Directors of the GIA did not fail to specify that its decision was conditional upon that it does not eventually contravene Egyptian law.

- That the above mentioned letter contained at least misinformation about the signature by the President of the Decree allocating the use of the land to EGOH for touristic purposes since it was proved on the record that that Decree had been effectively signed on May 22, 1975, that is two days after the date of the Secretary's letter. (Resp. Annex F.14, The Official Gazette, p. 437).

- These facts, with others, may have some relevance as to the apprehension of related facts concerning the above mentioned Presidential Decree mainly the "mysterious vanishing" of the maps referred to in the Presidential Decree that were never published or presented to any administrative agency.

3. The Respondent stresses specifically upon what it called the Claimants' pattern of doing business in Egypt, and presents as an example among others the case of the Official of the Egyptian Tourist Bureau in London who was instrumental in introducing the Claimants to Egypt yet was later appointed member of the Board of ETDC as a representative of the Claimants. The Respondent suggests that these examples, in which names as well as official functions are stated, should be significant in the evaluation of the whole relationship between the parties.

In this respect, I may express my point of view that it would have been necessary for this Tribunal to study, scrutinize and evaluate the allegations presented by the Respondent in this context, had the issue not been sufficiently exposed by the explanations and statements by both parties concerning the development costs in response to the Tribunal's procedural order of February 13, 1991, as will be later explained in detail.

4. Moreover, the Respondent presents as a material proof for corruption what is denominated by the Claimants as development costs. The Respondent explained:

- That a meeting held on May 5, 1975, during the negotiation for a settlement between the parties, the Claimants advanced that they had spent an amount of US Dollars 3,555,285 as development expenses and agreed that in case the Egyptian Government accepts to pay compensation, the Claimants would provide it with the supporting documents.

- However, the Claimants advanced before the Present Tribunal that they incurred "pre expropriation development costs" amounting to 2,532,714 US Dollars. And as supporting documents they presented a letter by Coopers and Lybrand dated January 19, 1981 (Cls. exh. 170). Also Mr. Birchall in an undated affidavit (Cls. exh. 171) stated that after review of the relevant documents and specifically of SPP (ME)'s development costs had found that the total pre-cancellation development costs were of 2,532,714 US Dollars.

- That the discrepancy between the above mentioned figures was never explained.

- That "if the Claimants had really incurred such costs, the conclusion must be drawn that for four years, the life span of the project, they were careful to hide that" to the conclusion that "these development costs, or at least a major part of them, could not have been other than the means with which the Claim-

ants used their well known, well practiced talent for persuasion. Persuasion to gain unmerited advantages, to violate with impunity a countless number of the laws of the land... and to set aside all the solemn engagements and promises with which they paved their way to a project meant by the Egyptian Government to contribute to economic development and willed by the Claimants to pursue an unproductive land speculation path." (Resp. Counter-Reply, Vol I, p. 136)

c. The Claimants' explanations:

1. On their part, the Claimants consider that the Respondent's presentation that SPP introduced itself into Egypt in an irregular manner is false. In this context, the Claimants rely upon a letter from the Minister of Tourism published in *Al Akhbar* newspaper (Cls. exh. 136) containing information that EGOH entered into the contract with SPP after enquiring about the said company through the Egyptian Embassy in London and the General Egyptian Consulate in Hong Kong as well as through the relevant security authorities and the banks (Cls. Reply, p. 60). Claimants also refer, in this respect, to both the Minister of Tourism's written submission to the People's Assembly of September 10, 1977 (Cls. exh. 87) and to the content of the answers given by the said Minister to the interpellations before the People's Assembly on February 7, 1978 (Cls. exh. 74), which are as the Claimants explained, self telling evidence to the conclusion that the allegations presented by the Respondent before this Tribunal concerning irregular contacts are unfounded.

2. The Claimants also assert that a full review of SPP's financial and corporate history can only be that SPP before it arrived in Egypt, as well as after, was a successful tourism organization with a proven track record, headed by individuals skilled in corporate finance and with shareholders including some of the most important corporations involved in its line of business. In this vein, the Claimants pointed out that as regards the cash flows for the Egyptian operations, a sum of 20 million Dollars was estimated as the required initial funding for that program, and that SPP arranged the required financing through a 12 million treasury share issue to Triad Holding Corporation, and through the 8.75 million sale of some 25% of SPP (ME) to two members of the Saudi Royal Family.

I may point out in this respect that the record does not reveal the *raison sociale* of the above mentioned Triad holding, however, it seems that that company acted as intermediary in an armament deal to the Saudi Arabia as revealed by the case *Northrop Corp. Vs. Triad* brought before the Court of Appeals of California (1987) where the question of the legality of the commissions paid to Triad, on the occasion of that deal, was at the core of the case. (P. Mayer, *Loi Applicable et Respect des Lois de Police*, ICC Publication 480/2, p. 54).

d. The Tribunal's procedural order of February 13, 1991:

This honorable Tribunal, after consideration of the submitted documents and of the explanations and requests of the parties ordered that: "a- The Claimants shall submit to the Tribunal and to the Respondent, within one month, a document indicating the nature, date and amount of the above referenced development costs, including the names of the recipients of payments in excess of US Dollars 20,000 and a confirmation that these sums were legitimately and actually expended for the project and were directly connected with it. The document shall also contain an explanation of why these costs were not charged to or were not directly recovered from ETDC."

- The Claimants responded to the Tribunal's order and explained in a letter dated April 20, 1991 that in item B(4), of their final conclusions and prayer for relief of September 21, 1990, which relate to pre-cancellation development costs amounting to 2,254,000 US Dollars, and that "arises as a result of the expenditures by SPP (ME) pre-cancellation of 2,943,398 US Dollars of which it was reimbursed 689,377 US Dollars by ETDC leaving a balance of 2,254,000 US Dollars," and that the amount claimed in B(5) arises from "expenditures, post cancellation by SPP (ME) of 1,010,461 US Dollars with no reimbursement from ETDC (which honored no obligations post cancellation). Of this amount, Claimants claim 623,000 US Dollars under item B(5) having eliminated from this category legal fees in the amount of 387,015 US Dollars." The Claimants annexed to their letter the affidavit of Mr. Birchall in which he explained that certain accounting documents were lost, and that was due to the fact that before the incorporation of SPP (ME), most of the documents were spread between Fiji and Australia and that from 1976 the accounting for SPP (ME) was basically being carried out from the UK "so when the UK office was closed in 1979, what was considered non-essential was destroyed to avoid the high cost of transportation to Canada" (Affidavit p. 2, Emphasis added). However, Mr. Birchall stated that "certain records were found and permitted an extrapolation of expenses for those periods when no such information was available." (The above mentioned affidavit, Emphasis added).

- By a note dated June 20, 1991, the Respondent questioned the explanations given by the Claimants in response to the Tribunal's procedural order on the contention that they are: "insuffisantes," "contiennent de graves contradictions ou même contrevérités" and "inacceptables" (note p.3). The Respondent in the first place pointed out that the Claimants brought their case, for indemnification against the Respondent, before the ICC Court of Arbitration on December 19, 1978 (that is before the closure of the Claimants' London office which did not occur, as they stated, until 1979). The Respondent advances that it would have not escaped the Claimants to keep the necessary documents sup-

porting their claim. Respondent also advances that the testimonies before this Tribunal of Mr. McLellan and Mr. Blainey, from Coopers and Lybrand, obviously suggest that all documents concerning development costs were in existence at least till 1981. The Respondent also pointed out that the sum of 1,545,338 US Dollars to which Mr. Birchall declared that he failed to find any supporting documents represents, in fact, about half of the amount of the claim concerning Development Costs. The Respondent concluded that "dans ces conditions, et eu égard à toutes les autres considérations et motifs que la RAE a rappelé tant ci-dessus (par exemple paiement à Mr. Raouf) que dans ses écritures et explications orales précédentes concernant la corruption, la RAE ne peut qu'affirmer de plus fort que des éléments de preuves graves, précis et concordants existent quant à la corruption active de la part de SPP dans le cadre du projet objet du présent litige." (The above mentioned note p. 16, Emphasis reproduced).

- In my opinion, it is noteworthy to point out that the letter of Coopers and Lybrand, dated January 19, 1981, suggests that it was necessarily prepared upon supporting documents. The final explanation advanced by the Claimants, to the effect of the loss or destruction of supporting documents concerning development costs in 1979 of a sum exceeding 1.5 million dollars, raises at least one question: whether or not the letter by Coopers and Lybrand, prepared in January 1981, was supported by the necessary documentation then the documents would have been in existence at least until 1981 that is to say after the alleged loss or destruction of the documents in 1979. Moreover, it seems for the least hazardous to found any conclusions upon the contents of the affidavit of Mr. Birchall annexed to the Claimants' note dated April 20, 1991, since Mr. Birchall himself honestly stated that "I am furnishing this affidavit after having reviewed the books and records now available to me, and based on my knowledge and remembrance of those records to respond to paragraph 6 (a) of the Tribunal's procedural order of February 13, 1991." (Cl's. submission dated April 1991, Vol I, Emphasis added). In any event, no supporting documents were ever presented neither to this Tribunal nor to the Respondent for examination and/or eventual comment. The Respondent, in this respect, asked formally from this Tribunal that the supporting documents related to every and any amount of development costs be presented before this Tribunal for examination either by itself or by any expert it entrusts.

e. Without going through the legal aspects of the issue related to the development costs, I may point out that whether or not the explanations advanced by the Claimants are an appropriate and adequate response to the letter and spirit of the Tribunal's procedural order of February 13, 1991, the fact remains that the Respondent on the one hand maintains and stresses upon its allegations concerning corruption, considering that the Claimants failed to

present the supporting documents concerning at least an amount of 1.5 million dollars of the so-called development costs and on the other contends that in any case the Claimants have no standing to any part of the claim concerning development costs since they failed to present any conclusive supporting document. It is noteworthy to point out that the report dated June 19, 1991, prepared by Mr. Renshall, annexed to the Respondent's note dated June 20, 1991, indicates that the "total for which Claimants are unable to supply the names of recipients amounts to 1,545,338 US Dollars." The said report, however, adds that "the remainder of the expenses (excluding interest) which Mr. Birchall had identified by payee amounts to 1,719,144 US Dollars. *I have seen no document to support these payments and therefore no evidence that they were incurred for the benefit of the Pyramids Oasis Project.*" (The Report, p. 4, Emphasis added). Moreover, Mr. Renshall's report discusses various items shown in the schedules attached to Mr. Birchall's affidavit commenting upon various items i.e. upon the item denominated foreign exchange difference in the amount of 289,947 US Dollars which, as Mr. Renshall pointed out, lacks any explanation or necessary supporting information. Mr. Renshall's report also contained information that:

- The "letter from Coopers and Lybrand does not give a confirmation that the costs were actually incurred and directly connected with the Pyramids Oasis Project."

- that "the signing of an unqualified audit report does not mean, in itself that the confirmation required by the Tribunal that the costs were 'legitimately and actually expended for the project and were directly connected with it' has been given." (The Report, p. 6).

- and that "Mr. Birchall does not indicate what documents are available and in the absence of better information, I do not consider from an accounting point of view that the case has been made out that the payments were incurred wholly or mainly for the benefit of the Pyramids Oasis Project". (The Report, p. 9)

f. As regards the issue of the so-called development costs, it is worth noting, from the outset, that:

1. The issue in question raises two points of law; the one relating to the legal weight that should be accorded to the Claimants' explanation in response to the procedural order of February 13, 1991, as regards the allegations of corruption, and the other relates to the legal ground upon which an amount, if any, may be accorded to the Claimants in the light of their explanations in this regard, that is without the presentation and/or eventual examination of supporting documents, neither by this Honorable Tribunal nor by the Respondent. A question of law necessarily needs an answer concerning which party

should assume the fact of the loss or destruction of supporting documents to a claim?

In any event, it seems that nothing in the Respondent's explanations and the annexed report would justify an *a priori* dismissal of all Respondent's contentions even as regards the sums allegedly identified by payee. In this respect, I beg differ from the Majority Award which contains a statement to the effect that "the report also points out that the information filed by the Claimants in response to the Tribunal's procedural order of February 13, 1991, identified US\$ 1,719,000 of the claimed cost by payee, but that the recipients of an additional US\$1,545,000 of the claimed costs were not identified. In the Tribunal's view, it would not be appropriate to award development costs for which the Claimants are unable to identify the payee. Accordingly, the Tribunal has decided to award development costs only in the amount of US\$ 1,719,000." (The Majority Award, pp. 79-80 [p. 385 of this issue]). To my humble knowledge, all and any claimed sum should be supported by documents and that the burden of proof rests upon the claiming party. Was it then rather required from the Respondent to prove that "the remainder claimed sums" were not actually incurred nor directly connected to the benefit of the Pyramids Oasis Project? Moreover, how can a defendant party legally and logically argue about the authenticity of claimed sums in the absence of any supporting document to the claim? And finally, can the information contained in Mr. Birchall's affidavit to the effect that, at least in part, his presentation was based upon knowledge and remembrance be considered enough legal ground to accord payment of the contested amount?

2. That an impartial evaluation of the issue seems to necessitate recalling the sequences of the relationship that took place between the parties in the light of the proper relevance of the Claimants' final explanations as regards the question of the development costs. It seems of equal importance to establish, scrutinize and, hence, evaluate, not only WHAT did happen in fact, but also HOW it happened. It may be more relevant to the apprehension of the case to pay careful attention to how the change of site occurred, how the duration of the usufruct rights was extended, how Presidential Decree 475 for the year 1975 was issued, how come that the maps to that Decree were never published yet the usufruct rights were registered upon the identification and the responsibility of EGOIH, how the Claimants managed their activities through the joint venture, how they acted as regards the judicial claim that had been undertaken by their partner, EGOIH, and how they proceeded during the negotiations for an out of court settlement. And what finally was their attitude as regards the development costs before this Tribunal in view of the fact of the "loss" or "destruction" of supporting documents, the fact that was never

brought before the Tribunal's attention but in response to its procedural order of February 13, 1991, that is after the final oral hearings of September 1990.

3. That the competent authorities in Egypt, as far back as 1977, had more than suspicions about the Claimants' project and the conduct of Egyptian officials connected to it. In this vein, I may point out to the letter of the Head of the Central Auditing Authority to the Minister of Tourism asking him to proceed in the necessary investigations concerning the determination of the responsible or responsables for the violations committed in relation to the Claimants' project. (Resp. Annex F.63). That letter, as already explained, was based upon the conclusions of the competent departments of the said authority as regards the various aspects that vitiated the process of both the agreement with the Claimants and its implementation. In this respect, it is noteworthy to point out that the report of the Experts' Committee, constituted under the auspices of the People's Assembly, finalized in 1978, corroborated the conclusions contained in the Central Auditing Authority's report. These facts may be enough evidence in reply to the Claimants' allegation to the effect that the Respondent is presenting its argument about irregular contacts and corruption for the sole purpose of evading eventual condemnation for indemnification.

III. THE LAW

1. *The legal ground for the Tribunal's competence and the scope of the present dispute:*

I. In its request for arbitration dated August 20, 1984, SPP (ME) requested the Tribunal to:

a. Determine that ARE has undertaken obligations and incurred duties in respect to SPP (ME) both according to terms of Law No. 43 and according to the Heads of Agreement of September 1974 specifically entered into by a member of its government, as well as by a supplemental Agreement "approved, agreed and ratified" by the same Member of its Government.

b. Determine that ARE violated its obligations thereunder.

c. Adopt and incorporate as its own the pertinent findings of fact made by the ICC arbitrary Tribunal concerning SPP (ME)'s performance of its obligations under its agreements, the dismissal of EGOH's counter-claim therein, and the acts bringing about termination of the investment project.

d. Determine the liability of the ARE to compensate SPP (ME) for the termination of its investment agreements and to award the full measure of indemnification to SPP (ME) on account of the destruction of its investment, increased by the additional costs, including all direct and indirect costs of the

present proceedings, occasioned by ARE's wrongful refusal to honor the ICC award of February 16, 1983, or otherwise compensate SPP (ME), as well as interest at commercial rate.

II. In its preliminary decision upon jurisdiction of November 27, 1985, this Tribunal did not find it necessary to pronounce upon the objection raised by the Respondent to the effect that article (8) of law 1974 upon which the alleged jurisdiction of ICSID is based does not apply to the present case. The Respondent based its objection upon the fact that the language of Article (8) providing that "Investment disputes in respect of the implementation of the provisions of this law shall..." mandates to restrict its application to disputes concerning the non-performance of obligations under Law 43, as distinct from disputes involving non-performance of obligations under a contract. The Respondent, in this context referred to the Decision of the Paris Court of Appeals wherein the Court stated that Article (8) "... ne vise au surplus que les seules contestations ayant trait à l'investissement et concernant la mise en exécution des dispositions de la loi en cause, mais non celles de tel ou tel contract."

This Tribunal found, however, a *prima facie* ground for its competence since, as it stated, "the alleged breach by the Government of Egypt of contractual obligations emanating from the Heads of Agreement constitutes at the same time a breach of a legal provision enunciated in Article 7 of law No. 43" and the Tribunal stated that "In this respect, it is quite clear that expropriation, the legitimacy of which is not being contested, if not accompanied by fair compensation, amounts to confiscation which is prohibited by Law No. 43."

It results from that decision:

- That the Tribunal did not decide upon the Respondent's objection concerning the limited scope of article (8) to the effect that it does not cover disputes emanating from breach of contracts.

- That even at that early stage of the proceedings the Tribunal was convinced that the "legitimacy" of the measures taken by the Respondent were not contested.

III. In later stages of the proceedings, before this Tribunal, the Claimants radically changed their cause of action and explained in their final submission that the basis of the Respondent's liability resides in the provision of article (7) of Law 43 which reads as follows "Projects may not be nationalized or confiscated. The assets of such projects cannot be seized, blocked, confiscated or sequestrated except by judicial procedures." (Cls. Reply, p. 115). It results from that clear language that the present dispute is therefore based upon, and confined to, the scope of article (7) of Law 43 upon which this Tribunal already relied, in its findings concerning ICSID jurisdiction and its own competence. It may be noteworthy, in this respect, to point out that, while the Tribunal

decided that the basis of its competence rests upon the provisions of article (7) of law 43 that is to say that the present dispute arises from an administrative act of expropriation which amounted in the Tribunal's view to confiscation since not accompanied by compensation, the Majority Award nevertheless *inter alia* accorded to the Claimants an interest of 5% rather than 4% on the ground that "with respect to the rate of interest the Tribunal is of the view that it should be 5% rather than 4%. The argument that the Heads of Agreement was not a commercial contract is not conclusive because the present claim is not an action for a breach of that contract but rather one seeking compensation for the expropriation of the rights of a commercial enterprise for the development of tourism" (The Majority Award p. 87 [pp. 390-391 of this issue]). It seems to me however that any expropriation act is manifestly not of commercial nature and compensation due upon that act cannot be considered compensation related to commercial issue. Moreover, the Majority Award attributed the interest starting from May 28, 1978, of a 5% rate in reference to article (226) of the Civil Code of Egypt. In this respect, I may only refer to the language of the said article (226) which reads in pertinent parts as follows "if the subject of obligation constitutes a sum of money and such amount was defined at the time of the claim and the debtor delays the payment of the damages, he shall be bound to pay to the creditor by way of damages for the delay an interest of 4% in civil cases and 5% in commercial cases. These interests shall apply from the date they are claimed at court..." It is noteworthy that the Majority Award stated that it was according interests not as moratory but rather compensatory, however, it based its findings as regards the interest rate upon the provisions of article (226) of the Civil Code which rule the issue of moratory interests. In any event, it seems that the Majority Award did overlook the fact that if the alleged measures undertaken by the Respondent date back to May 28, 1978, upon which date it computed the compensatory interests together with the application of the mechanism for monetary adjustment for currency devaluation, the fact is that the Claimants did not bring their claim for compensation before ICSID's Jurisdiction until August 24, 1984. The Claimants sought compensation in the first place before the ICC Court of Arbitration in December 1978 and were apparently relying upon that court's competence over their claim since, in their request for arbitration before ICSID, they asked for indemnification *inter alia* for "ARE's wrongful refusal to honor the ICC award of February 16, 1983." The issue about the finality of that award was pending before the French Court of Appeals and subsequently before the French Court of Cassation which finally pronounced upon the invalidity of the ICC Award. This attitude was the determinant factor in this Tribunal's first preliminary decision upon jurisdiction where it decided to stay the proceedings before it till the issue of the validity of the ICC Award be finally settled. The proceedings before this

Tribunal did not resume until 1987. If it may be considered legitimate for the Claimants to seek compensation before a competent forum, their mis-identification of that forum and the time it took them to address the competent one while, at the same time, defending the validity of the ICC Award before other jurisdictions, however the consequences thereupon could not rest solely upon the Respondent. Moreover, it is evident from the record that the Claimants were reluctant, during the phase of negotiation for an out of court settlement with the Respondent starting from 1979, to produce supportive documents to their evaluation of compensation mainly concerning sums under the item of development costs.

IV. The correct legal construction of article (8) of law 43 is that it "does not purport to cover contractual disputes between different investing parties, but rather disputes between investors and a Government agency relating to the interpretation of the law itself." (M.H. Davis, *Business Law in Egypt*, p. 137). This interpretation is corroborated by the statement, contained in "the legal guide to investment in Egypt" (Cls. ex. 77, p. 39), which reads as follows "Article (8) does not apply to all controversies in which the investor may be a party; rather it applies only to investment disputes... the subject of the dispute must relate to the provision of the law, such as those relating to the interpretation of a tax exemption or approval issued by the authority, disputes which do not fall within the scope of article (8) are to be settled in the ordinary courts of law or in administrative courts." Therefore, this Tribunal should decide that the Counter-Claim presented by the Respondent falls beyond ICSID's jurisdiction and the Tribunal's competence. The Respondent based its counter-claim, as explained in its *Mémoires en Réplique* Vol II (pp. 155-157) upon alleged defaults imputed to the Claimants in execution, or rather non-execution of their obligations under the Heads of Agreements and subsequent contracts. The Counter-Claim being based upon alleged breach of contractual obligations, should be considered out of the scope of ICSID jurisdiction and this Tribunal's competence. In any event, since the Tribunal did not reject the objection to its competence raised by the Respondent as regards the scope of the said article (8), the Respondent would have been estopped from advancing in the same dispute and before the same Tribunal two different constructions for the same article (8) of law 43.

2. *The Parties to the present dispute and the receivability of SPP (ME)'s claim:*

I. It is to be recalled that the request for the present arbitration was presented by SPP (ME) by a letter to the Secretary General of ICSID dated August 20, 1984. The request contained information to the effect that the agreements entered into by SPP i.e., the Heads of Agreement and the Contract of December 1974 "were thus subsequently assigned by Southern Pacific Properties

Limited to SPP (ME).” (The request for arbitration, p.4) and that SPP (ME) informed the Minister of Tourism by a letter dated August 15, 1983, that it “intended to accept the opportunity of availing itself of the ICSID jurisdiction to which the ARE had consented.” Later, during the proceedings before this Tribunal, SPP had been joined, subject to Egypt’s reservation of jurisdictional defenses. In a dissenting opinion, joined to this Tribunal’s decision of April 14, 1988, I explained my point of view to the effect that the joinder of SPP did not satisfy the requirements of the Washington Convention as well as the rules of arbitration, and should be ruled, therefore, inadmissible.

II. The Respondent argues that SPP (ME) is not an “investor” in the framework of law 43, since the request for the approval of the GIA concerning the project was submitted to the GIA on behalf of SPP and EGOH, and that the subsequent approvals of the GIA were accorded to SPP. (Resp. Mémoire en Réponse, Vol II, p. 9-11). The Respondent explains that the language of article (1) of law 43 supports its argument since the said article reads as follows “The term ‘project’ in application of the provisions of this law shall mean any activity... and approved by the Board of Directors of the General Authority for Investment and Free Zones.”

The Respondent also points out the lack of proof to the effect that the GIA was ever informed of any assignment that would have occurred to the benefit of SPP (ME) or *a fortiori* that the GIA had ever examined SPP (ME)’s *statut juridique* or approved to convey to it the benefits of law 43. For their part, the Claimants draw the attention to the fact that SPP (ME) was the company that realized the investment, and that at least as early as December 1974, the Respondent was aware that SPP intended to carry out the foreign investment and to exercise its contractual rights and obligations, through an affiliated company, since the December 12, 1974 contract contained a provision which reads as follows “it is understood that SPP will be incorporating a holding company to own its shareholdings in ETDC and it is agreed that SPP shall have the right to assign its rights... duties and obligations under this agreement to this company...” The Claimants also explain that from and after that date the Respondent accepted performance by SPP (ME) and accepted its expenditures, loans and other activities for the benefit of the project. Moreover, as the Claimants point out, legal recognition of this state took the form of the contracts entered into by EGOH and SPP (ME), and finally by the Ministerial Decree No. 212 of 1975 (Cls. exh. 114) officially authorizing the formation of ETDC between SPP (ME) and EGOH. The Claimants conclude that SPP (ME) had been recognized in law and in fact as a foreign investor under law 43.

In my opinion, qualification, as investor, under law 43 necessitates two prerequisites: on the one hand, the reunion of the three main criteria relating

to the project activities, local participation and the nature of the capital invested, and on the other hand, the obtaining of the approval of the Board of Directors of the GIA. In the present dispute, the contract of December 1974 or any of its provisions cannot be, as such, evidence to the effect that any assignment is to be *ipso jure* opposite to the GIA since it was not a party to that contract nor did it approve its provisions. Moreover, it results from the clear language of Law No. 43 and its executive regulations that the approval of the Board of Directors of the GIA is based *inter alia* upon a subjective criterion relating to the applicant, his eventual partners and their experience and references, as well as detailed information about the capital to be invested in or contributed to the project (for example article 19 of the executive regulations of Law 43 which reads in pertinent parts as follows “An application... shall be submitted to the General Authority for Investment and free Zone on the form designated for this purpose *and shall contain basically* the following information: a) information about the applicant, the applicant’s partners... and their experiences and references, b) ... c) detailed information about the capital to be invested or contributed to the project...,” and article 24 which provides that “*projects approved by the Authority shall be implemented and conducted in accordance with the basic conditions and objectives set forth in their respective applications as approved...*”) Article 27 of Law 43 is conclusive, it reads in pertinent parts as follows “... *The Board of Directors of the Authority shall have the Authority to approve applications submitted for investment...*” (Emphasis added). Thereupon, the Board of Directors of the GIA is the sole competent authority to accord approvals for investment projects. Therefore, and under the provisions of law 43 and its executive regulations, any assignment or transfer of an approved project should be submitted and approved by the Board of Directors of the GIA which would have full discretion in this context. It is noteworthy that no assignment or transfer of rights did ever legally occur in favor of SPP (ME) by SPP. It was also brought to the attention of this Tribunal that the capital of SPP (ME) amounted to the equivalent of 200 U.S. Dollars (two hundred) the fact that was never proved to be brought to the knowledge of neither the Board of Directors of the GIA nor to EGOH, the Claimants’ Egyptian partner. Since no legal assignment of rights did ever occur between SPP and SPP (ME) it is inconceivable to allege that the Board of Directors of the GIA approved an assignment that never existed. Moreover, there is no evidence on the record that SPP (ME) ever applied to the GIA in due form as necessitated by law 43 and its executive regulations, referred to above. Even the memorandum prepared by the Vice President of the GIA for the issuance of the Decree No. 212 of the Minister of Economy refers explicitly to the approval of the Board of Directors of the GIA of July 20, 1975 which was accorded to SPP and not to SPP (ME). The approval of the Board of Directors of the GIA as regards the project and the in-

vestor is in fact and in law a fundamental legal requirement to the qualification under law 43. Any other act cannot, legally speaking, convey the qualification of investor under law 43, be it the act of the Minister of Economy himself or acts emanating from any GIA department. The fact that SPP (ME) invested or participated with an Egyptian party in any project does not, as such, convey to it the qualification of investor under the specific law 43.

It results from the above that SPP (ME) has no standing to avail itself of a *statut juridique* under law 43. Consequently, SPP (ME)'s claim should be considered out of the scope of ICSID jurisdiction. It is noteworthy to be recalled that the alleged consent of the Respondent to ICSID jurisdiction is presumably embodied in article (8) of law 43 which provides in pertinent part that "investment disputes in respect of the implementation of the provisions of this law shall be settled... or within the framework of the Convention for the Settlement of Investment Disputes..."

In case of a conclusion to the contrary, *par impossible*, it seems that an issue of law would have needed to be settled to wit; what would have been the outcome as regards this Tribunal's competence over the present dispute in the light of the provisions of article (25) of the Washington Convention concerning ICSID's scope of jurisdiction *rationae materiae* as well as under the provisions of law 43 which embody the alleged consent of the Host State, in consideration to the proper legal nature of Claimants' activities and whether or not they are to be considered investors in the framework of both the Washington Convention and the Egyptian law 43.

However, and for the sake of argument, it will be dealt, in the next two sections, with the issues related to the Applicable Law and the application of the law to the facts of the case.

3. *The applicable law :*

I. In my opinion, it is mandatory to decide upon the issue of whether or not the parties to the present dispute agreed upon the choice of the Applicable law. It seems however that the Majority Award was founded upon the assumption that there is no legal necessity to decide upon the fact of whether or not the parties had agreed upon the choice of the applicable law. The Majority Award stated that "in the Tribunal's view the parties disagreement as to the manner in which article (42) is to be applied has very little if any practical significance..." and that "finally even accepting the Respondent's view that the parties have implicitly agreed to apply Egyptian law such an agreement cannot entirely exclude the direct applicability of international law in certain situations. The law of ARE, like all municipal legal systems, is not complete or exhaustive, and where a *lacunae* occurs it cannot be said that there is agreement as to the application of a rule of law which, *ex hypothesi*, does not exist. In such case,

it must be said that there is absence of agreement and consequently the second sentence of article 42 (1) would come into play." (The Majority Award, pp. 30-31 [p. 351 of this issue]). As a consequence, to that statement, the Majority Award after stating that "... no provision of the Civil Code or other Legislation concerning the *dies a quo* applies to compensatory interest for a yet to be determined amount of compensation arising out of an act of expropriation" comes to the conclusion that "given this *lacunae* it is legitimate to apply the logical and moral principles usually applied in the case of expropriation, namely that the *dies a quo* is the date on which the dispossession effectively took place..." (The Majority Award, p. 90 [p. 393 of this issue]). From the outset that statement concerning a *lacunae* in "the Civil Code or other legislation" as regards the *dies a quo* seems to be enough indication to the fact that the Majority Award, opted for and effectively decided upon the issue of the choice of the applicable law in the sense that the parties to the present dispute did not agree upon that choice, however without indicating to my humble knowledge the arguments to its findings in this respect. Otherwise, the Majority Award, in case it was reached that there does not exist any legislative provision concerning the *dies a quo* for compensatory interests, would have had recourse to the application of the mechanism provided for, as will be later explained in some detail, in article (1) of the Civil Code which reads in pertinent parts as follows "... 2. A défaut d'une disposition législative applicable, le juge statura d'après la coutume, et à son défaut, d'après les principes du droit musulman. A défaut de ces principes, le juge aura recours au droit naturel et aux règles de l'équité." In view of the clear language of the said article (1) of the Civil Code, I honestly could not conceive the possibility of a *lacunae* in the Egyptian Legal System which would have led to *non liquet*. My understanding of the Majority Award in this respect is corroborated by the statement of the said award to the effect that "when municipal law contains a *lacunae*, or international law is violated by the exclusive application of municipal law, the Tribunal is bound in accordance with article (42) of the Washington Convention to apply directly the relevant principles and rules of international law." (The Majority Award, p. 32 [p. 352 of this issue]). Noteworthy, as will be explained later, that principles of international law should be construed, in the framework of article (42) of the Washington Convention, as meaning specific rules of international law. In any event, the plain language of article (42/1) first sentence, does not give room but to the exclusive application of the law that the parties have chosen as the applicable law to govern their relationship.

II. The issue of the applicable law is to be decided in the light of the provisions of article 42 of the Washington Convention, which provides in pertinent parts that "(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such

agreement, The Tribunal shall apply the law of the contracting State Party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. (2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.”

III. In the present case, the Claimants’ arguments consist in saying that:

(a) there does not exist an agreement between the parties as to the choice of the law applicable to the dispute,

(b) and that they are entitled to the application of certain rules of international law mainly concerning the principles and standards of indemnification due to SPP (ME) resulting from the respondent’s action in “ARE’s exercise of its sovereign powers, which destroyed its property rights (including its contract rights)” (Cls. reply p. 140).

However, the Claimants explain that “within its scope of application, law No. 43 is the specific statute providing a legal regime applicable to foreign investors” (Cls. Reply p. 140). It seems, therefore, obvious that the Claimants base their claim for compensation upon their status as foreign investors under law No. 43 of the year 1974. This legal status results necessarily from the application of that law, and hence is subject to, conditioned and determined by, the provisions of that law. A cursory review of the provisions of law No. 43 reveals the following:

(a) Article (2) of the promulgating law states that “Matters not covered by this law are subject to the applicable laws and regulations.” Laws and regulations referred to in this article, are uncontestedly, the Egyptian laws and regulations in force.

(b) Article (6) of the law stipulates, in pertinent parts, that “irrespective of the nationality or domicile of their owners, projects in the Arab Republic of Egypt approved under the provision of this law shall enjoy the guarantees and privileges set forth in this law.”

(c) Article (9) of the law reads as follows “*Companies enjoying the provisions of this law shall be deemed to belong to the private sector of economy, irrespective of the legal nature of the indigenous capital participating therein...*” (Emphasis Added). Moreover, investment brochures, emanating from the GIA, and relied upon by the claimants, especially in their pleadings concerning the issue of ICSID’s jurisdiction over the present dispute, contain reference to some selected Egyptian laws which may be directly or indirectly applicable to foreign investment (legal guide to investment in Egypt, 1977, p. 54. Cls. exh: 15).

IV. It results from the provisions of Law 43, that the status of an “investment,” of an “investor,” and of a “project” under that law is a legal status

defined by the law itself. This legal status consists on the one hand of the enjoyment of rights as well as the submission to obligations emanating from the provisions of law No. 43 to the extent established by their content, and on the other by the submission to all other rules in force in the land. The legal status of an “investor” and an “investment” under the provisions of law No. 43 is not to be considered as a separate, remote, and isolate status from the whole legal national system. This conclusion is, in my opinion, an inevitable direct legal consequence resulting from the provisions of article (2) of the decree enacting law No. 43 referred to above, and corroborated by the provisions of article (9) which specify that the “companies enjoying the provisions of this law shall be deemed to belong to the private sector of the economy...” and the provisions of article (10) which reads as follows “project enjoying the provisions of this law shall not be subject to law No. 73 of 1973.” Therefore, it seems evident that law No. 43 does but provide for certain rules to be applicable to approved projects. A review of the whole text of Law No. 43 confirms the conclusion that the approved projects make part of the national economy and are subjected to the applicable legal system, wherever law No. 43 does not provide for a specific treatment. This specific treatment is referred to, clearly in the text, as limited exceptions to the applicable laws of the land. All other matters not covered or governed, by an explicit provision of the law No. 43, are therefore governed by Egyptian laws and regulations in force. This aspect of law No. 43, as a limited exception to the laws and regulations is clearly explained in Egyptian jurisprudence. In fact the Supreme Administrative Court (The highest instance of the ‘Conseil d’Etat’) had, in many occasions, confirmed this legal nature of law No. 43, and hence concluded, in case of silence of Law No. 43, to the applicability of all other Egyptian laws and regulations to the “project.” (Decision of February the 1st, 1986 in the cases Nos. 1231 and 1235 of the judicial year No. 31). To assert, therefore that law No. 43 is by itself a declared intention of Egypt as to the law applicable to the investment in the framework of the said law, seems to be an evident, logical conclusion. Article (8) of law No. 43 which reads, in pertinent parts as follows “Investment disputes in respect of the implementation of the provisions of this law shall be settled *in a manner to be agreed upon...*” (emphasis added) mandates an interpretation to the effect that all that can be agreed upon is the manner of settlement, i.e., the forum qualified to adjudicate the dispute. This provision does not give room to a choice of the material rules governing a dispute. Noteworthy, in this respect, that provisions of treaties entered into by Egypt are considered part of the Egyptian law in appliance of the mechanism provided for in article (151) of the constitution which reads as follows: “They [the treaties] shall have the force of law after their conclusion, ratification and publication according to the established procedure.” The issue of the applicable law comes, therefore, to the

answer to the question whether or not the claimants agreed upon the choice of the law of the land as the applicable law to their contractual relationship and their legal status as investors under law No. 43.

The answer to this question, in my opinion, is in the affirmative since the Claimants expressed clearly their adherence and submission to the *statut légal* provided by Law No. 43. In fact, in the recital to the September Heads of Agreement, which constitutes an integral part of the agreement as provided for in article (1) of the said agreement, it is stated that "this agreement is issued in accordance with... and law No. 43 for the year 1974 relating to Arab and foreign funds invested in the A.R.E..." SPP also presented an application to the Board of Directors of the GIA, to the effect of its qualification as a foreign investor under the provisions of law No. 43. In the light of these *actes juridiques*, it seems obviously clear that, the claimants (SPP and subsequently its *de facto* assignee SPP (ME)) accepted to adhere to and benefit from the legal status provided for by the provisions of the Law No. 43, with the legal consequences that emanate from that adherence which is the acceptance of law No. 43 and consequently of all the laws and regulations of the land as the applicable law to govern their investment in Egypt. This acceptance reveals, in my opinion, a clear choice by the Claimants of the Egyptian Law as the applicable law in the meaning of article (42/1) of the Washington Convention. In this vein, I may refer to the explanation of Professor René David that "la soumission d'un état à l'arbitrage du CIRDI ne doit pas nécessairement résulter d'un contrat qui lie cet état à un investisseur étranger; elle peut résulter d'une loi de cet état qui régit le contrat, et conformément à laquelle certains types de différends seront ipso jure justiciable de l'arbitrage du CIRDI." (Pr. R. David, *L'Arbitrage dans le Commerce International*, 1981, pp. 223-224. Emphasis added).

In a dissenting opinion to this Tribunal's second preliminary decision upon jurisdiction, I explained the *nature juridique* of the mechanism provided for in Law 43 to the conclusion that the approval of an application for a project by the Board of Directors of the GIA is qualified in law as *un acte condition* which triggers the application of the whole status accorded to the approved project that is the application of Law 43 as regards matters specified by its provisions as well as the application of all the laws of the land to any other matter not covered by the provisions of that Law.

As a result to that conclusion, there can be no legal ground, in my opinion, to apply article (42/1) second sentence of the Washington Convention to any issue of the present dispute, most importantly there is no ground to have recourse, in order to justify application of other rules than those provided for under the law of Egypt, to a presumed *lacunae*, neither under the provisions of article (42/1) first sentence of the Convention nor under the provisions of article (1) of the Egyptian Civil Code enacted by law 131 of 1948 which provides

for a mandatory rule to be applied, that is "1. Legislative provisions are applicable to all issues which are covered by these provisions, in text and content. 2. In the absence of applicable legislative provisions the judge shall pronounce his sentence in accordance with usage. In the absence of usage his sentence shall be issued according to principles of Islamic Legislation. And in the absence of Islamic Legislative provisions applicable thereto the judge shall rule in accordance with natural law provisions and rules of justice."

V. However, and admitting *arguendo*, that there does not exist an agreement as to the choice of the applicable law by the parties to the present dispute, I may advance that the Tribunal, in conformity with article (42/1) second phrase, should have the obligation to determine:

a) How to apply international law rules (or principles as will be explained later), in compliance with the provisions of Article 42/1 second phrase of the Convention, and,

b) Which rules (or principles) of international law should be applied.

In this respect, the commentators to the convention present different views as regards the application of the rules of international law in the case of absence of agreement upon the applicable law. Mr. Delaume advances that "... l'énoncé de l'article 42 n'implique aucun ordre chronologique dans l'examen par le tribunal du droit matériel et des normes internationales applicables. Le tribunal peut procéder à cet examen de façon successive ou simultanée." (Delaume, *Le Centre International pour le Règlement des Différends relatifs aux investissements (CIRDI)*, Clunet, 1982, p. 829). To the contrary, Mr. Broches explains that "My submission as to the relationship between the law of the host state and the international law in the second sentence of article (42/1) is as follows: The tribunal will first look at the law of the host state and that law will in first instance be applied to the merits of the dispute. Then the result will be tested against international law..." (A. Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of other States*, *Recueil des Cours*, 1972, II, p. 392). The doctrinal controversy seems to have received answer, in a recent decision emanating from an *ad hoc* committee constituted under the auspices of ICSID (the decision dated the 3rd of May 1985 over the petition of Klöckner Industries), where it has been stated that the arbitrators can have recourse to "the principles of the international law only after having researched and established the contents of the law of the state party to the dispute... and after having applied the relevant rules of that law." However, the above mentioned decision explains that the provision of article (42/1) second phrase of the Convention endows the principles of international law with a double role: either complementary (in the case of a *lacuna* in the law of the state), or corrective (in the case where this law does not conform in all respects

to the principles of international law). As to the issue related to the identification of the international rules to be applied, *arguendo* in the present dispute, it should be noted that the parties to this dispute refer to the provisions of the Convention in the two authentic English and French versions. Article (42/1) of the Convention in its English version speaks about "rules" of the international law as may be applicable, while the French version treats of "*principes*" meaning principles of international law. Mr. Broches commenting the difference of language used in these two authentic versions explains that "it seems to me in any event that principles cannot have been intended or have the effect of excluding specific 'rules.'" (Broches, *opcit.*, p. 391)

VI. In any event, and in case *par impossible* that article 42/1 phrase two of the Convention is to be applied in the present dispute, it should be first proceeded, with the identification of pertinent rules of Egyptian law. Recourse to international rules (or principles), in the case they do not form part of Egyptian law by the effect of their integration in the legal Egyptian system in application to the provision of article 151 of the constitution referred to above, cannot be resorted to, or directly applied to the present case unless it is primarily proved that there does exist one or the other case permitting their application as already explained above i.e., in cases of a presumed *lacuna* in the national law and/or of non-conformity with imperative international rules.

Without going through a doctrinal debate about the question of *lacuna* in national laws, I may only point out that it should always be borne in mind to differentiate between law and legislative provisions. Under the Egyptian legal system, like the French system, the rules and principles of administrative law, for example, emanate mainly from the jurisprudence of the *Conseil D'Etat*. Moreover, the provisions of Article (1) of the Civil Code enacted by law No. 131 of 1948 provides for that "... 2. A défaut d'une disposition législative applicable, le juge statura d'après la coutume, et à son défaut, d'après les principes du droit Musulman. A défaut de ces principes, le juge aura recours au droit naturel et aux règles de l'équité." (Code Civil, extrait du Journal Officiel No. 108 du 29 juillet 1948). The legislative provisions are thus the main but not the only source of law in Egypt.

In any case, the mechanism provided for by Article 42/1 second phrase does not, in my opinion, give room to a subjective appreciation and evaluation as regards the content of a national law. Otherwise, the whole mechanism would result in a derogation to the letter and spirit of the Convention by draining the reference to, I may even say the predominance of, the application of the host state law enunciated in article 42/1 second phrase, off any significance.

4. *The Application of the Law: the juris dictio*

Before proceeding with the legal arguments, it is noteworthy to point out that a thorough apprehension of the intricate facts of the present dispute militates for an overall appreciation based upon a comprehensive survey of these facts and of the sequences of the whole relationship that developed, indeed always to the Respondent's disadvantage. To cut the facts of the whole relationship into separate and compartmented incidents seems, in my opinion, to be misleading to the determination of the pertinent *faits juridiques* the matter that would, as a consequence, necessarily result in the misidentification of the proper rule of law that should be applied. This consideration is meant to be both an apology and a justification for the lengthy review consacrated to the facts in this opinion.

On the other hand, this section consacrated to the application of the law is intended only to indicate, in brief, the basic legal arguments for the outcome of the present dispute and that, as may be recalled, in view of the fact explained above that I consider the whole case falling out of the scope of ICSID jurisdiction and hence of the present Tribunal's competence.

i. The Claimants base their claim for compensation upon the following:

a- That the Respondent violated its promise not to deprive SPP (ME) of its project rights.

b- That the legal consequences of the violation by the Respondent of its obligations not to take measures of or amounting to nationalization or confiscation are that the Respondent is liable for the loss resulting from the violation of its promises and subsidiarily, that the Respondent is obliged to pay to SPP (ME) the compensation that it would have to pay at the time of the "expropriation."

c- That the proper measure of compensation, in the present case, is the full, fair value of the SPP (ME)'s assets it had lost. The Claimants also explained that the indemnification include their rights as regards the Ras El Hekma project, hence upon the award of indemnification SPP (ME)'s partner is to be considered released from any obligation as regards that project.

II. The Respondent argues that the measures it took do not fall within the scope of article 7 of Law No. 43, since the issuance of the Decree No. 90 of 1978 of the Minister of Culture declaring the lands on the Pyramids Plateau of public utility "Antiquities," and the subsequent Presidential Decree repealing the Decree which allocated to EGOH the use of the land on the Plateau for touristic purposes, did not purport to nationalize or confiscate the Claimants Project.

III. In fact, after review of article (7) of Law No. 43 which reads as follows "Project may not be nationalized or confiscated. The assets of such project cannot be seized, blocked, confiscated or sequestrated except by judicial procedures," this Tribunal stated in its first Preliminary Decision of November 27, 1985 that "In this respect, it is quite clear that expropriation, the legitimacy of which is not being contested, if not accompanied by fair compensation, amounts to a confiscation which is prohibited by Law No. 43." That Decision reveals the Tribunal's conviction to the effect that beyond the technical legal *qualification juridique* of the act of the host State, expropriation for public utility should always be accompanied by compensation, otherwise it, in fact and in law, rejoins by its effect confiscation.

IV. Under Egyptian Law, private property is safeguarded by the provisions of the Constitution and the legislative provisions.

- Article (34) of the Constitution states that "Private ownership shall be safeguarded and may not be placed under sequestration except in the cases defined by law and in accordance with a judicial decision. It may not be expropriated except for the general good and against a fair compensation as defined by Law. The right of inheritance shall be guaranteed in it."

- Article (805) of the Civil Code provides that "Nul ne peut être privé de sa propriété que dans le cas et de la manière prévue par la loi, et moyennant une indemnité équitable," and article 985 of the said Code reads as follows: "1. Le droit d'usufruit peut être acquis par acte juridique, par préemption ou par prescription." (Code civil, J.O. du 29 juillet 1948).

- Law No. 577 of 1954 concerning expropriation for public utility, and its executive regulations issued by Decree No. 19398 of 1961, contain general rules considered *de droit commun*, as regards the procedures to be respected in case of expropriation for public utility which include the evaluation and the payment of compensation or *la mise à disposition* of the amount of compensation to the proprietors and concerned parties.

V. From the outset, in the present dispute, it is not alleged by the Respondent that it in fact proceeded vis-à-vis ETDC in compliance with the provisions of the above mentioned Law No. 577 of 1954 which requires *inter alia* the evaluation of the compensation by the administration itself, with the possibility accorded to the concerned parties to challenge this estimation before the Court. However, ETDC was recipient of the right of usufruct upon 4000 feddans from EGOH by a registered act dated January 5, 1977 (Cls. exh: 109).

At least at the time of the issuance of the expropriatory act by Decree of the Minister of Culture No. 90 of 1978, the Administration did not challenge

the legality of the act of registration. However, later, the legality of that act was challenged by the Respondent on the basis that the site subject to the registration was part of the public domain (Antiquities), and that under Egyptian Administrative Law, public domain cannot be alienated, and that in case the administration decides to accord individuals, the possibility of the use of part of that domain, the administration's act is qualified as a permit which necessarily is temporary and can be revoked whenever public interest calls for that. Moreover, the Respondent alleged that the registration of the right of usufruct to EGOH, which later transmitted this right to ETDC, took place without reference to the necessary supporting maps which supposedly were attached to the Presidential Decree No. 475 of 1975, concerning the allocation of the right of usufruct to EGOH for touristic use is vitiated and should be considered void. Nevertheless, it seems that the outcome of the present dispute does not necessitate a legal evaluation of the Respondent's arguments in this respect since the dispute receives sufficient legal answers upon the arguments and considerations explained below.

VI. If theoretically it is legally correct that the expropriation act was directed against ETDC, which would have had the quality and interest to be compensated, *the fact* that neither the Administration did respect the fundamental procedures in case of expropriation, nor did ETDC succeed in obtaining any compensation, neither in the framework of the rules governing expropriation nor *arguendo* those governing the case of an eventual annulment of an administrative permit fixing a certain duration for a beneficiary (it does not matter whether or not the Custodian had the quality and the capacity to act in this respect), mandates for the conclusion to the effect that the Claimants, as shareholders of ETDC, a joint venture presumably constituted in the framework of Law 43, are to be considered, in law, qualified to claim for compensation for the value of the eventual damage they suffered. This conclusion is confirmed by provisions of the Egyptian Law, in the first place, by the provisions of article 34 of the Constitution, since expropriation for public interest, unless accompanied by compensation as provided for in that article, constitutes a breach to the Constitution itself and therefore qualify any eventual concerned party to claim justice. (Court of Cassation, case 44 of the judicial year 35, of 27/3/69). In this vein, the arguments advanced by the Respondent to the effect that it offered compensation to the Claimants during the negotiations which took place starting from 1979, could not change the face of the fact that any eventual offer that would have been amicably presented, but yet not accepted, fall outside the framework of the provisions of Law No. 577 of 1954; moreover, there is no proof that any compensation was effectively paid neither to ETDC nor to the Claimants or had been *mise à disposition* of ETDC as the law requires.

VII. The Claimants explained that their present claim for compensation covers altogether their share in the joint venture ETDC which was to implement two projects; one at the Pyramids and the other at Ras El Hekma, on the basis that the expropriation act and the subsequent events that occurred, rendered further cooperation impossible. In fact, although the object of the alleged act of 'expropriation' was the only site on the Pyramids Plateau, nevertheless it affected the whole structure and economy of ETDC, the joint venture, since EGOH, the Egyptian partner was contributing in that Company only by the usufruct rights on the two sites. (4000 feddans for the Pyramids project and 1100 feddans for Ras El Hekma). For ETDC to continue with the participation of the Claimants it would have necessitated a new agreement to that effect.

VIII. Under Egyptian Law, the failure of the Administration to take the necessary procedures and measures for the evaluation of the compensation for expropriation as provided for by the provisions of Law No. 557 of 1954, results in that the judge is to be entrusted with this evaluation. (Court of Cassation, case 169 of the judicial year 47, 9/3/1978, and case 436 of the judicial year 49, 16/6/1982).

It seems noteworthy in this respect to point out that since the evaluation of compensation is to be effectuated by the Tribunal, the mechanism of article (226) of the Civil Code of Egypt, concerning moratory interests, in the case specified by that article, where the claim consists in a determined sum of money, running from the date of the claim before the Tribunal, this mechanism cannot come into play in the present dispute. The Egyptian Court of Cassation as far back as 1964 explained that under the provisions of article (226) which reads as follows: "*Lorsque l'objet de l'obligation consiste en une somme d'argent dont le montant est fixé au moment de la demande en justice...*" (Emphasis added), and since the judge has discretionary competence in the evaluation of the compensation in case of expropriation, any moratory interests could not be accorded but from the day of the judgment (Court of Cassation, Case 330 of the judicial year 29, 25/6/1964).

IX. Since, in the present case, the claim consists in the evaluation of the value of the Claimants' share in the joint venture, which represents the alleged damage they suffered, the issue comes to the answer of the question of what was the real value of the Claimants share at the time, the alleged measure of expropriation was taken.

A request for that the evaluation of compensation be based upon a claimant's "out of pocket" expenses seems, from the outset, in need of a legal ground.

In my opinion, to base the evaluation of compensation basically upon what the Claimants had incurred or allege to have incurred seems in need to

receive legal and/or factual justification. It seems to me that there does not exist a necessary legal or factual correlation between the value of a share in a company and the eventual amount the shareholder spent or alleges to have spent. However, it is worth noting that the Majority Award stated that "in a case such as the present one, where the measure of compensation is determined largely on the basis of the out of pocket expenses incurred by the Claimants..." (The Majority Award, Para 207, p.81 [p. 386 of this issue]) and that "there is no question that considerable amounts of time and money were spent on negotiating, planning, and implementing the project... In the Tribunal's opinion, these amounts must be reimbursed as part of the fair compensation to which the Claimants are entitled." (The Majority Award, p. 77 [p. 384 of this issue]).

X. A basic element for any eventual evaluation of compensation consists in the determination of the Claimants' legal situation under the Law. That is to say that before, and in order to effectuate any eventual evaluation of a *quantum* of compensation, it should first be properly established the *situation juridique* of the Claimants. To qualify for compensation, the concerned party should justify of rights, recognized under the Law and, hence, protected by it. Consequently and upon the findings in this respect, the quantum of compensation should necessarily be determined taking into consideration the *situation de fait* of the project.

XI. As regards the *situation juridique* and the *situation de fait* of the Claimants' project, a cursory review of the pertinent facts of the case indicates the following:

a- That the Claimants failed to produce justification, or supporting documents, for at least an amount of 1.5 million US\$ included in their claim for reimbursement of Development costs. As it was explained above, the Procedural Order of February 13, 1991, was issued in the framework of the Tribunal's Competence to direct the burden of proof, as regards the critical issue concerning allegations of corruption.

In this context, and without going through more ample developments, it seems to me that the justifications advanced by the Claimants seem not to be a satisfactory response to that procedural order. By the clear language of that Procedural Order, the Claimants were not asked to justify their claim for reimbursement but rather, and in the first place, to refute allegations concerning illegal practices. The Claimants' explanation that they "destroyed" some supporting documents and some others were lost in 1979 due to the closure of their office in London, seems however to be contradicted by the fact that there does exist enough proof that these documents were evidently, necessarily and logically in existence at least up to January 1981 when the firm Coopers and Lybrand prepared their letter concerning the development costs without any

mention or allusion to any missing document necessary for the preparation of their above mentioned letter. The existence of the above mentioned documents seems to be further corroborated by the Claimants' statements during the phase of negotiation as well as their testimonies before this Tribunal during the hearings held in Paris in September 1990, as already indicated. As a consequence, it seems inevitable that neither the Claimants could escape the consequences of their conduct in this respect, especially in view of all the facts that marked their relationship, nor could this Tribunal have the discretion to overlook the legal consequences thereupon, or retract the legal significance of its own Procedural Order of February 13, 1991.

b- Moreover, and in all events, it is evident that the Claimants' *situation juridique* was precarious as well as their *situation de fait* was hazardous.

b-1. As to their *situation juridique* under law 43, and without going through the arguments concerning the nature of the project and whether or not they were embarking in prohibited housing activities, the fact remains that they were under the obligation to conform with conditions and objectives set forth in their application to the GIA. Article (24) of the executive regulations to Law 43 provides for that "Projects approved by the Authority shall be implemented and conducted in accordance with the basic conditions and objectives set forth in their respective applications. Any failure of a project to abide by the conditions and objectives of its approval shall be submitted to the Board of Directors." (Emphasis added). It had already been explained that the application for approval presented by the Claimants to the Board of Directors of the GIA contained information about the "invested capital" and the stages of implementation of the project. (Resp. annex F.17). The invested capital which meant to be "imported in foreign currency," was of the amount of 22,500,000.- US dollars for the first year plus loans to the amount of 16 million. Also the stages of implementation of the project were explained as giving first priority to the construction of a hotel. In view of the facts of the case, the Claimants seem to have failed to comply with their engagements. Noteworthy to point out that, the minutes of the Board of Directors of ETDC reveal the difficulty the Claimants encountered to arrange finance for a single hotel, it does not matter, legally speaking, whether or not they had the financial capability (as they advance as a result to the transactions they effectuated to Triad and later to two members of the Royal family of Saudi Arabia) since the fact remains that they were seeking that finance and obviously failed to arrange it as clearly indicated on the record by their representatives at the meetings of the Board of Directors of the joint venture under their management. Moreover, the Claimants seem, in any case, to have failed to comply with their engagement as regards the "invested capital" to be transferred to Egypt. In these circumstances, their *situation ju-*

ridique as "investors" in the framework of Law 43 was precarious. Not to mention, the serious allegations about their contravention to the Law 43 as well as other laws of the land, explained in detail in both reports of the Central Auditing Authority and the Experts' Committee. These facts altogether indicate, if not confirm, the precarious nature of the Claimants' *situation juridique*. It is noteworthy to point out that the review of the facts does not fail to indicate that not only the Claimants opted for the site on the Pyramids Plateau in close vicinity to the Monuments themselves, a site which seems to have been considered most appealing and much easier for marketing than the sites proposed by the Egyptian Government around and below the Plateau, as shown on the attached maps to the September Heads of Agreement, the only agreement, to be reminded, entered into by a duly authorized representative of the Egyptian Government, but they also were cognizant of the risks, inherent in their option, due to the nature of the site and the high probability of discovery of Antiquities as well as the unquestionable legal must of preservation of the Monuments in existence. Their acceptance of the risk and their readiness to comply with the eventual consequences related to their risky option, may be demonstrated *inter alia* by the agreement they entered into with "representatives" of the Antiquities Authority in September 1977 which contained clear obligations upon the Claimants, and especially their unconditional acceptance to leave any area on the site, in case the works reveal the existence of immovable Antiquities, as well as their solemn obligation to first inform the Antiquities Authority before undertaking any works. The apparent significance of that agreement as well as its inherent logic seem to be relevant as regards the risks the Claimants were cognizant of, as well as of the consequences thereupon, in the implementation of the project on the Plateau Proper. As a legal consequence to that acceptance of the risk I may refer to principles of Egyptian Law resulting from the provisions of articles 446 and 447 of the Civil Code. Article 446 reads as follows: "1. Nonobstant toute clause de non-garantie, le vendeur demeure responsable de toute éviction provenant de son fait... 2. Il est également tenu, en cas d'éviction provenant du fait d'un tiers... à moins de prouver que l'acheteur connaissait, lors de la vente, la cause de l'éviction, ou qu'il avait acheté à ses risques et périls" (Emphasis added), Article 447 also provides in pertinent part for that "... 2. Toutefois, le vendeur ne répond pas des défauts dont l'acheteur a eu connaissance au moment de la vente ou dont il aurait pu s'apercevoir lui-même s'il avait examiné la chose comme l'aurait fait une personne de diligence moyenne..." (Code Civil J.O. No. 108 du 29 juillet 1948, Emphasis added). Apart from the discoveries of Antiquities on the site, Respondent presented technical studies confirming the high danger that would have affected the Monuments themselves (the Pyramids) due, *inter alia*, to the effect of the water drainage problems (The study upon "the Hydrological Study of the Area of Giza Pyramids Plateau," prepared by Consultant

Engineer Dr. Aly Sabry which concluded that ... "3. There is nothing that can ensure against leakage of water in the archaeological zones of Antiquities specially in the beatification zone..." (Resp. Annex F.23, p. 148, and annex F.32 concerning Engineering Hazards and Deleterious Effects of the Pyramids Oasis Project on the Existing Monuments, with special reference to p. 28, and the Cairo Pyramids Site: Anticipated Problems of the Site Construction from the Geological Point of View, Resp. Annex F.33, and also Ground Water and Seepage Conditions after the Erection of the Pyramids Oasis, Resp. Annex F.34). Needless to re-mention the proved encroachment by the Claimants in the implementation of their project upon the Monuments' zone itself.

All these facts should be taken into consideration in the appreciation of not only the legitimacy but also the necessity and urgency of the measures undertaken both in respect to the rules of Egyptian law and the obligation to the safeguard of the monuments site under international rules of law, specifically those codified in the UNESCO Convention concerning the World Heritage Properties.

In this respect, it is noteworthy to refer to the contents of two letters from the General Director of the UNESCO, the first one dated April 6, 1981, in which he expresses that "j'ai tenu à souligner par des déclarations officielles que j'ai faites en qualité de Directeur Général de l'UNESCO, que le plateau de Gizeh est un des hauts lieux d'une des civilisations les plus brillantes de l'Histoire. A ce titre, les Pyramides et tout le site qui les entoure constituent un élément essentiel de ce patrimoine universel de monuments historiques dont la sauvegarde incombe à la communauté internationale... En prenant la décision de respecter pleinement l'environnement des pyramides, les autorités égyptiennes me semblent avoir pris une mesure conforme aux critères de préservation et de mise en valeur qui sont aujourd'hui reconnues." (Resp. Annex, F.25). And the other letter, addressed to the Director of the newspaper *Le Monde*, the Director General of the UNESCO congratulated the above mentioned newspaper for its campaign against the Claimants' project on the Pyramids Plateau and pointed out that "En soutenant l'effort international visant à sauvegarder et à restaurer le patrimoine culturel de l'humanité la presse et les autres grands moyens d'information remplissent auprès de l'opinion publique une mission capitale." (Resp. Annex F.28)

b-2. As to the *de facto* situation of the Claimants, it seems evident that they stated on several occasions, during the time span of their activities in Egypt, before the Board of Directors of the joint venture that they encounter difficulties to arrange finance for the construction of a single hotel. Without going through the whole review of the conduct of the Claimants during their activities in Egypt, which was already mentioned in detail above, specifically by ref-

erence to the minutes of the Board of Directors of the joint venture, the Claimants clearly and unequivocally explained the *de facto* situation, in which they were, in their letter dated May 12, 1978 to the Prime Minister in which they expressed that "... the adverse worldwide publicity have now seriously impaired our effort to create the required credibility to attract the increasingly needed overseas finance for the project." (Resp. Annex F.38, p. 2, Emphasis added)

It was already explained that the "cause" of the serious damage to the "credibility" of the Claimants, as explained in their letter, falls beyond the power and capacity of the Administration. To regain this credibility seems to require matters, and especially a certain image of the Claimants, that have nothing to do with the administration which, all the way, seems to have up till the end, taken the defense of the Claimants, at least in public, as already mentioned. In these circumstances, would it not be factually correct and hence legally founded to conclude that the Claimants were in fact in a situation of *impossibilité matérielle d'exécution* of their project? Could they have been able to abide with their obligations specifically as regards "the imported capital" contained in their application to the Board of Directors of the GIA? These questions may best be answered in the light of what seems to be a fact that the Claimants were in sort of a "financial vehicle," or "intermediaries" between eventual investors in the international market and the host State. The capital of SPP (ME) to be recalled amounts to about 200 US\$ (two hundred), and their contribution in the capital of ETDC, up to the date of termination of the project, amounted to 1,310,000 US dollars, however the needed invested capital for the implementation of the project was estimated to be of 550,000,000 US dollars or even amounting to 770,000,000 US\$ on the faith of the information contained in the Claimants letter to the President of May 19, 1975, in support of their request for the extension of the duration of the usufruct rights from 50 years to 99 years. The Claimants "credibility" seems to be the determinant factor to continue activities in the implementation of their titanic project.

In the light of these facts, it seems be hazardous, in any event, to take into consideration in the evaluation of an eventual *quantum* of compensation the loss of chance to make profits and/or to take into consideration the presumed "revenues" from the sales of usufruct rights, upon bare lots of land, which were part of the joint venture's capital. Had the proper legal qualification of the Claimants, under the law, been that they were urban developers, the consideration of the so-called sales revenues might have been justified.

XII. In my opinion, as a consequence to all of the above mentioned considerations, especially but not exclusively those related to the explanations to the Tribunal's Procedural Order of February 13, 1991, and upon the provisions of article 216 of the Civil Code of Egypt which reads as follows: "The judge

may reduce the amount of damages, or he may rule that damages be not paid at all if the creditor, through his own mistake, took part in causing or increasing the damages," and upon the determination of the Claimants situation *de jure* and the review of their *de facto* situation, the claim for compensation should be rejected.

/s/

Mohamed Amin El Mahdi