

International Legal Materials
Judicial and Similar Proceedings
July, 2002

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID): WENA
HOTELS
LTD. v. ARAB REPUBLIC OF EGYPT (PROCEEDING ON THE MERITS)
December 8, 2000

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES Washington, D.C.
Wena Hotels Limited v. Arab Republic of Egypt Case No. ARB/98/4 AWARD

*897 CERTIFICATE Wena Hotels Limited v. Arab Republic of Egypt

(ICSID Case No. ARB/98/4)

I hereby certify that the attached is an additional true copy of the Award of the Arbitral Tribunal rendered in the above case, and of its accompanying Statement by Professor Don Wallace, Jr. Certified copies of the Award and of its accompanying Statement were first dispatched to the parties on December 8, 2000. The Award, is therefore deemed to have been rendered on December 8, 2000, in accordance with Article 49(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

/s/

Ko-Yung Tung
Secretary-General

*898 Washington, D.C., December 19, 2000

I. THE PROCEEDINGS

1. The present arbitration was initiated on July 10, 1998, when Claimant, Wena Hotels Limited ("Wena"), [FN1] filed a request for arbitration with the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID"). The request was filed against Respondent, the Arab Republic of Egypt ("Egypt"), and asserted that "[a]s a result of Egypt's expropriation of and failure to protect Wena's investment in Egypt, Wena has suffered enormous losses leading to the almost total collapse of its business." [FN2] Wena requested the following relief:

FN1. Wena Hotels Limited is a British company incorporated in 1982 under the laws of England and Wales. See Certificate of Incorporation on Change of Name of Wena Hotels Limited (April 22, 1982) [Annexes W1 & E-J2]. Note, in referencing the documentary annexes submitted by the parties, the notation "W" indicates a document submitted by Claimant, Wena Hotels Limited. The notation "E-J" indicates a document submitted by Respondent, the Arab Republic of Egypt as part of its briefing on jurisdiction; a notation of "E-M" indicates a document submitted by Egypt as part of its briefing on the merits.

FN2. Claimant's Request for Arbitration, at 1 (submitted on July 10, 1998).

End of Footnote(s).

- (a) a declaration that Egypt has breached its obligations to Wena by expropriating Wena's investments without providing prompt, adequate and effective compensation, and by failing to accord Wena's investments in Egypt fair and equitable treatment and full protection and security;
- (b) an order that Egypt pay Wena damages in respect of the loss it has suffered through Egypt's conduct described above, in an amount to be quantified precisely during this proceeding but, in any event, no less than USD 62,820,000; and
- (c) an order that Egypt pay Wena's costs occasioned by this arbitration, including the arbitrators' fees and administrative costs fixed by ICSID, the expenses of the arbitrators, the fees and expenses of any experts, and the legal costs incurred by the parties (including fees of counsel). [FN3]

FN3. Id., at 18.

End of Footnote(s).

The Acting Secretary-General registered the request for arbitration on July 31, 1998.

2. In accordance with Article 37(2)(a) of the Convention on the Settlement of Investment Disputes between States and nationals of Other States ("the ICSID Convention"), the parties agreed that the Tribunal was to consist of three arbitrators, one appointed by each party and the third, presiding, arbitrator, appointed by agreement of the parties or, in the absence of such agreement, by agreement of the two party-appointed arbitrators. Wena appointed Professor Ibrahim Fadlallah, a national of Lebanon, as an arbitrator. Egypt then appointed Hamzeh Ahmed Haddad, a national of Jordan, as an arbitrator. In accordance with Article 38 of the ICSID Convention, the Chairman of ICSID's Administrative Council was requested by Wena to appoint the third, presiding, arbitrator. The Center informed the parties that the Secretary-General of ICSID was planning to recommend Mr. Monroe Leigh, a United States national, for the Chairman's appointment. Having received no objection from either party, the Center informed the parties that the Chairman of the ICSID's Administrative Council had appointed Mr. Leigh as the arbitrator to be the President of the Arbitral Tribunal. Having received from each arbitrator the acceptance of his appointment, the Center informed the parties that the Tribunal was deemed to be constituted and the proceedings to have begun on December 18, 1998. The parties subsequently agreed that the Tribunal had been properly constituted under the provisions of the ICSID Convention.

3. The Tribunal held its first session, at the Permanent Court of Arbitration in The Hague, on February 11, 1999. During this first session, Egypt objected to the request for arbitration filed by Wena and expressed reservations as to the Tribunal's jurisdiction to hear the request.

4. The Tribunal, pursuant to Article 41(2) of the ICSID Convention, granted the parties an opportunity to brief the jurisdictional objections. The parties filed four sets of papers (including accompanying documentary annexes) with the Tribunal:

- *899 (1) Respondent's Memorial on its Objections to Jurisdiction (submitted on March 4, 1999);
- (2) Claimant's Response to Respondent's Objections on Jurisdiction (submitted on March 25, 1999);
- (3) Respondent's Reply on Jurisdiction (submitted on April 8, 1999); and
- (4) Claimant's Rejoinder on Jurisdiction (submitted on April 22, 1999).

In its briefing, Egypt raised four objections to jurisdiction. First, Egypt asserted that it had "not agreed to arbitrate with the Claimant as it is, by virtue of ownership, to be treated as an Egyptian company." [FN4] Second, Egypt argued that "[t]he Claimant has made no investment in Egypt." [FN5] Third, Egypt claimed that "[t]here is no legal dispute between the Claimant and the Respondent." [FN6] Finally, Egypt contended that "[t]he Claimant's consent to arbitration in the Request for Arbitration is insufficient and its Request premature." [FN7]

FN4. Respondent's Memorial on its Objections to Jurisdiction, at 1 (submitted on March 4, 1999)

("Respondent's Memorial on Jurisdiction").

FN5. Id.

FN6. Id., at 2.

FN7. Id.

End of Footnote(s).

5. The Tribunal heard oral argument on Respondent's objections to jurisdiction during a second session, at the offices of the World Bank in Paris, on May 25, 1999. During the session, Egypt withdrew two of its four objections. First, it noted that the "the papers that we have now been supplied as part of [Wena's briefing] do indicate at least a prima facie case that the Claimant has made an investment, that money was spent in the development and renovation of the hotels and that the money was paid for by the Claimant, rather than any other party." [FN8] Thus, "for the purpose of establishing jurisdiction only, the Respondent is willing to accept that an investment has been made." [FN9]

FN8. Tribunal's Decision on Jurisdiction, at 8-9 (released on June 29, 1999) (quoting Recordings from Tribunal's Session on Jurisdiction, Offices of the World Bank, Paris (on May 25, 1999)).

FN9. Id., at 9.

End of Footnote(s).

6. Second, Respondent also withdrew its procedural objections to Claimant's request for arbitration. As Egypt appropriately observed, even if the Tribunal had endorsed its objections, the alleged defects could have been easily rectified. Noting that "it is not our wish to raise argument simply for the purpose of being difficult or to delay," Egypt advised "that as far as that particular objection is concerned, we are prepared to forgo it." [FN10]

FN10. Id.

End of Footnote(s).

7. In its Decision on Jurisdiction dated June 29, 1999, the Tribunal concluded that Respondent's two remaining jurisdictional objections should be denied and that jurisdiction should be exercised over the dispute. Specifically, the Tribunal: (1) declined to adopt Egypt's contention that Wena should be treated as an Egyptian company for purposes of the Agreement for the Promotion and Protection of Investments between Egypt and the United Kingdom ("IPPA"), [FN11] and (2) found, without prejudice to the merits of the case, that Wena had at least alleged a prima facie legal dispute with Egypt. [FN12] The Tribunal proceeded to set a briefing schedule on the merits and proposed dates for oral argument.

FN11. Id., at 10-19.

FN12. Id., at 21-23.

End of Footnote(s).

8. On August 14, 1999, Professor Hamzeh Ahmed Haddad resigned from the Tribunal -- apologizing that, as a result of his new duties as Minister of Justice for Jordan, he would no longer be able to continue as a member of the Tribunal. The Tribunal was reconstituted on September 14, 1999 with the appointment by Egypt of Mr. Michael F. Hoellering as the replacement for Professor Haddad.

9. The parties filed four sets of papers (each including voluminous accompanying documentary annexes) with the Tribunal addressing the merits of the case:

- (1) Claimant's Memorial on the Merits (submitted on July 26, 1999);
- (2) Respondent's Memorial on the Merits (submitted on September 6, 1999);
- (3) Claimant's Reply on the Merits (submitted on September 27, 1999); and
- (4) Respondent's Rejoinder on the Merits (submitted on October 18, 1999).

*900 10. Regrettably, the session on the merits -- which had been scheduled for November 15-18, 1999 -- had to be postponed by the sudden hospitalization of Mr. Hoellering for a medical emergency. On November 15, 1999, Mr. Hoellering resigned from the Tribunal -- apologizing for the inconvenience "this unexpected turn of events" had caused.

11. The Tribunal was reconstituted on December 9, 1999, with the appointment by Egypt of Professor Don Wallace, Jr. as the replacement for Mr. Hoellering. The Tribunal subsequently fixed a new schedule for oral argument on the merits.

12. The Tribunal heard witnesses and oral argument on the merits during its third session, at the offices of the World Bank in Paris, on April 25-29, 2000. [FN13] In lieu of closing argument, the Tribunal permitted the parties to file post-hearing briefs. The Tribunal also requested that the parties submit proposed findings of fact, chronologies of events and statements of their attorney's fees and costs. In accordance with this schedule, the parties filed a final round of papers with the Tribunal:

FN13. Full, verbatim transcripts were made of the session and distributed to the parties and the Tribunal following each day of the hearing.

End of Footnote(s).

- (1) Claimant's Post-Hearing Brief (submitted on May 30, 2000);
- (2) Respondent's Post-Hearing Memorial (submitted on May 30, 2000);
- (3) Claimant's Post-Hearing Reply (submitted on June 15, 2000); and
- (4) Respondent's Post-Hearing Rebuttal Memorial (submitted on June 15, 2000).

13. On July 13, 2000, the Tribunal issued a Procedural Order concerning the introduction of certain documents into the proceeding subsequent to the hearing. As part of this Order, the Tribunal admitted into the record, without prejudice to their probative value, nine documents submitted by Wena with its Post-Hearing Reply brief [FN14] and a memorandum dated January 19, 1997 on the El-Nile Hotel prepared by Arthur Andersen & Co., which the Tribunal had received from the U.S. Agency for International Development. [FN15]

FN14. Annexes W179 & 187-194.

FN15. Annex W183. Wena had sought the Arthur Anderson report (which was prepared for the benefit of Egypt under a Contract with the U.S. Agency for International Development) from Egypt as early as August 30, 1999. Notwithstanding this request and the Tribunal's subsequent directions to search for this document, Egypt never produced a copy of the report. At the Tribunal's April 25, 2000 session on the merits (and, again, in the Respondent's Post-Hearing Memorial), Egypt's counsel explained what efforts the Egyptian State Lawsuit Authority had taken to obtain a copy of the report, without success. See Transcript of Tribunal's Session on the Merits ("TR") Day 1, at 80:27- 81:21; Respondent's Post-

Hearing Memorial, Appendix E (submitted on May 30, 2000). Shortly after the session, however, the ICSID Secretariat obtained a copy of the report from the U.S. Agency for International Development.

End of Footnote(s).

14. On November 1, 2000, the Secretary of the Tribunal issued a letter, advising the parties of the closure of the proceedings, pursuant to Arbitration Rule 38(1).

II. THE FACTS

15. This dispute arose out of long-term agreements to lease and develop two hotels located in Luxor and Cairo, Egypt. Having received voluminous submissions from the two parties and heard five days of oral testimony, the Tribunal hereby makes the following findings of fact:

A. U.K.-Egypt Agreement for the Promotion and Protection of Investments

16. On June 11, 1975, the United Kingdom and the Arab Republic of Egypt entered into an Agreement for the Promotion and Protection of Investments ("IPPA"). [FN16] Under Article 2(1) of the IPPA, Egypt and the United Kingdom promised to "encourage and create favorable conditions for nationals or companies of other Contracting Party to invest capital in its territory." They also guaranteed that "[i]nvestments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party." [FN17] Finally, Egypt and the United Kingdom agreed that "[i]nvestments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation ... in the territory of the other Contracting Party except for a public purpose related to the internal needs of the Party and against prompt, adequate and effective compensation." [FN18] As discussed in the Tribunal's previous Decision on Jurisdiction, Wena is a British company for purposes of the IPPA. [FN19]

FN16. Agreement for the Promotion and Protection of Investments, June 11, 1975, U.K.-Egypt ("IPPA") [Annexes W2 & E-J22].

FN17. *Id.*, art 2(2).

FN18. *Id.*, art. 5(1).

FN19. See Certificate of Incorporation on Change of Name of Wena Hotels Limited (April 22, 1982) [Annexes W1 & E-J2]. As discussed above, although Egypt never challenged the fact that Wena Hotels Limited was incorporated as a British company, it asserted as part of its objections to jurisdiction that Wena "by virtue of Mr. El-Faragy's ownership and his Egyptian nationality, [should] be treated as an Egyptian company pursuant to Article 8(1)" of the IPPA. Respondent's Reply on Jurisdiction, at 2 (submitted on April 8, 1999). The Tribunal, however, rejected Egypt's proposed construction of Article 8(1) of the IPPA and, thus, determined that Wena was an English company for purposes of the IPPA. See Decision on Jurisdiction, at 10-19.

End of Footnote(s).

*901 B. Luxor and Nile Hotel Agreements

17. On August 8, 1989, Wena and the Egyptian Hotels Company ("EHC"), "a company of the Egyptian Public Sector affiliated to the General Public Sector Authority for Tourism" [FN20] entered into a 21 year, 6 month "Lease and Development Agreement" for the Luxor Hotel in Luxor, Egypt. [FN21] Pursuant to the agreement, Wena was to "operate and manage the 'Hotel' exclusively for [its] account through the original or extended period of the 'Lease,' to develop and raise the operating efficiency and standard of the 'Hotel' to an upgraded four star hotel according to the specification of the Egyptian Ministry of Tourism or upgratly [sic] it to a five star hotel if [Wena] so elects...." [FN22] The agreement provided that EHC would not interfere "in the management and or/operation of the 'Hotel' or interfere with the enjoyment of the lease" by Wena and that disputes between the parties would be resolved through arbitration. [FN23] The lease was awarded to Wena in a competitive bid, after Wena agreed to pay a higher rent than another potential investor. [FN24]

FN20. See section II.G, *infra*, concerning the relationship between EHC and Egypt.

FN21. Luxor Hotel Lease and Development Agreement (August 8, 1989) [Annex W5]

FN22. *Id.*, art. III.

FN23. *Id.*, arts. I, XIII & XV(3).

FN24. Direct Examination of Mr. Yusseri Mahmud Hamid Hajjaj, TR Day 5, at 4:3- 11 ("Yusseri Direct Ex.").

End of Footnote(s).

18. On January 28, 1990, Wena and EHC entered into an almost identical, 25- year agreement for the El Nile Hotel in Cairo, Egypt. [FN25] Wena also entered into an October 1, 1989 Training Agreement with EHC and Egyptian Ministry of Tourism "to train in the United Kingdom ... Egyptian nationals in the skills of hotel management...." [FN26]

FN25. El Nile Hotel Lease and Development Agreement (January 28, 1990) [Annex W4].

FN26. An Agreement between His Excellency Fouad Sultan, Minster of Tourism for the Egyptian Government, jointly with Mr. Kamal Kandil of the Egyptian Hotels Company and Wena Hotels Limited (October 1, 1989) [Annex W6].

End of Footnote(s).

C. Events Leading up to the April 1, 1991 Seizures

19. Shortly after entering into the agreements, disputes arose between EHC and Wena concerning their respective obligations. Wena claims that it "found the condition of the Hotels to be far below that stipulated in the lease [and] withheld part of the rent, as the lease permitted." [FN27] In turn, Egypt claims that Wena "failed to pay rent due to EHC ... and EHC in turn liquidated the performance security posted by Claimant." [FN28] In the view which the Tribunal takes of this case it is not necessary at this time to determine the truth of these conflicting allegations. It is sufficient for this proceeding simply to acknowledge, as both parties agree, that there were serious disagreements between Wena and EHC about their respective obligations under the leases.

FN27. Claimant's Request for Arbitration, at 8.

FN28. Respondent's Memorial on Jurisdiction, at 4.

End of Footnote(s).

20. On May 3, 1990, Wena instituted arbitration proceedings in Egypt against EHC concerning their disputes over the Luxor Hotel. In an award dated November 14, 1990, the ad hoc arbitral tribunal ordered EHC to make repairs to the Luxor Hotel and ordered Wena to pay its outstanding rental obligations. [FN29] Wena subsequently brought an action in the South Cairo Court to have the arbitration set aside. [FN30]

FN29. Final Award in Wena Hotels Ltd. v. Egyptian Hotel Company (November 14, 1990) [Annex E-M17].

FN30. Declaration of Mr. Nael El-Faragy, ¶ 14, attached to Claimant's Memorial on the Merits (submitted on July 26, 1999) ("Faragy Declaration"). The Respondent's Memorial on Jurisdiction also reports that Wena brought "a nullity action (No. 18644 of 1990), which was refused by South Cairo Court on February 27, 1994." Respondent's Memorial on Jurisdiction, at 4. However, a copy of the South Cairo Court's decision was not provided to the Tribunal.

End of Footnote(s).

21. At about the same time, "toward the end of 1990," according to Wena's parliamentary consultant, Mr. Humfrey Malins, M.P., "rumour, I think, must have reached Mr. Faragy because he told me that there were rumours that there would be violence and the hotels would be violently seized back." [FN31] As a result, in December 1990, Mr. Malins traveled to Egypt to meet with the Egyptian Minister of Tourism, Minister Fouad Sultan, and the Egyptian Minister of the Interior, Minister Halim Moussa. [FN32] Mr. Malins recounted that "[b]oth Ministers gave me their separate, absolute assurances ... that no violence could or would take place." [FN33]

FN31. Direct Examination of Mr. Humfrey Malins, M.P., TR Day 4, at 174:26-29 ("Malins Direct Ex."). The Tribunal generally found Mr. Malins to be a reliable and convincing witness, with no apparent financial or personal stake in the outcome of the arbitration. See also Faragy Declaration, ¶¶ 17-19.

FN32. Malins Direct Ex., TR Day 4, at 175:1-4.

FN33. Id., at 175:25-29. See also Declaration of Mr. Humfrey Malins, M.P., ¶ 4, attached to Claimant's Memorial on the Merits ("Malins Declaration").

End of Footnote(s).

22. Nevertheless, disagreements between Wena and EHC continued. On February 11, 1991, Mr. Nael El-Faragy, Wena's founder, wrote to Minister Sultan, seeking his intervention to resolve these on-going disputes as well as to offset financial difficulties caused by the Gulf War. [FN34] In his letter, Mr. Faragy mentions that EHC had threatened to repossess the hotels through force:

FN34. Letter from Mr. Nael El-Faragy (Wena Hotels Ltd.) to Minister Fouad Sultan (Minister of

Tourism) (February 11, 1991) [Witness Statement of Minister Fouad Sultan, Attachment A, attached to Respondent's Memorial on the Merits (submitted on September 6, 1999) ("Sultan Statement"); also Annexes E-M21 & W127]. At the time of the events that are the subject of this dispute, Minister Sultan was the Minister for Tourism and Civil Aviation of Egypt. Minister Sultan held this position from 1985 to 1993. Sultan Statement, ¶ 3. Although Minister Sultan has now returned to the private sector (serving as Chairman and Managing Director of Alahly for Development and Investment S.A.E.), the Tribunal shall for convenience refer to the witness as Minister Sultan.

End of Footnote(s).

officials from the Egyptian Hotels Company threatened to storm the hotels and expel us, and this was after our Company had spent the sums previously outlined. The matter reached a point where [sic] the Chairman of the Board of Directors of the Egyptian Hotels Company issued a decision for his company to take possession of the Luxor Hotel without a legal ruling or any other measure [to support his decision]. [FN35]

FN35. Id. (emphasis added; brackets in original English translation) [Sultan Statement, Attachment A; also Annexes E-M21 & W127].

End of Footnote(s).

*902 23. In response to Mr. Farargy's request, on February 26, 1991, Minister Sultan convened a meeting in his offices to "discuss the differences between the Egyptian Hotels Company and Wena...." [FN36] The attendees at the meeting included the Minister, representatives of EHC (including EHC's Chairman, Mr. Kamal Kandil), and Wena's lawyer (Mr. Ahmad Al Khawaga). During the meeting, Minister Sultan declared that "[t]he Ministry took no pleasure from any misunderstandings with investors; however, at the same time it could not accept any excesses in respect of any of the Government's rights." [FN37] The Minister proposed a series of compromises between the parties. Wena, however, subsequently did not accept the Minister's proposals. [FN38]

FN36. Minutes of Meeting between Representatives of the Ministry of Tourism, EHC and Wena (February 26, 1991) [Sultan Statement, Attachment B; also Annexes E-M22 & W124].

FN37. Id.

FN38. Direct Examination of Mr. Nael El-Farargy, TR Day 1, at 147:17-25 ("Farargy Direct Ex."). See also Letter from Mr. Kamal Kandil (Chairman, EHC) to Mr. Ahmad Al-Khawaga (Attorney for Wena) (March 3, 1991) [Annexes W125 & E- M23]; Witness Statement of Mr. Munir Abdul Al-Aziz Gaballah Shalabi, ¶ 13, attached to Respondent's Rejoinder on the Merits (submitted on October 18, 1999) ("Munir Statement"). The Witness Statement of Mr. Munir should not be confused with the Summary of Evidence to be given by Mr. Munir Abdul Al-Aziz Gaballah Shalabi, attached to Respondent's Memorial on the Merits. because counsel for Egypt were unable to obtain a signed witness statement from Mr. Munir before submitting their Memorial on the Merits, counsel submitted a short Summary of Evidence instead -- providing the witness statement when it subsequently became available.

End of Footnote(s).

24. On March 21, 1991, Mr. Kandil wrote to Minister Sultan, noting that Wena had refused to accept

the Minister's proposals. [FN39] Mr. Kandil proposed to Minister Sultan:

FN39. Letter from Mr. Kamal Kandil (Chairman, EHC) to Minister Fouad Sultan (Minister of Tourism) (March 21, 1991) [Sultan Statement, Attachment D; also Annex W126].

End of Footnote(s).

that the following steps be taken:

(One) the Letter of Guarantee for the Nile Hotel be seized and the sum deducted from their debt;

(Two) the contractual relationship for the two hotels be terminated;

(Three) the two hotels be taken and the license withdrawn;

(Four) list all development work at the two hotels and deduct it from their debt; and,

(Five) in the even that the company is still in debt following these measures, proceedings should be taken to seize [the outstanding money] in the United Kingdom. [FN40]

FN40. Id. (emphasis added; brackets in original English translation).

End of Footnote(s).

Alternatively, Mr. Kandil suggested that Minister Sultan establish a 10-day grace period for Wena to "pay its debts," with the understanding, however, that "[i]n the event that the payment is not made, the license for the two hotels would be withdrawn and the Egyptian Hotels Company would take the measures that it view appropriate to preserve its rights." [FN41] Mr. Kandil closed the letter by advising Minister Sultan: "We leave the matter to you." [FN42]

FN41. Id.

FN42. Id. (emphasis added).

End of Footnote(s).

25. Marginalia on this March 21, 1991 letter (in Minister Sultan's handwriting), indicate that Minister Sultan telephoned the British Ambassador to Egypt, asking the Ambassador to ascertain Wena's response to the proposed compromises from the February 26, 1991 meeting. [FN43]

FN43. Id. (Arabic original). See also Cross examination of Minister Fouad Sultan, TR Day 3, at 235:23-237:27 ("Sultan Cross-Ex."); Sultan Statement, ¶ 17.

End of Footnote(s).

26. Contemporaneously, on March 25, 1991, Mr. Malins wrote to Minister Sultan asking for another meeting in mid-April or May to discuss the continued disputes between Wena and EHC. [FN44] Mr. Malins concluded his letter by requesting an understanding from the Minister that no actions would be taken until that meeting could occur: "please confirm what must surely be [sic] right, mainly that all matters be 'absolutely frozen,' with no detrimental action of whatever nature being taken pending our meeting...." [FN45]

FN44. Letter from Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) to Minister Fouad Sultan (Minister of Tourism) (March 25, 1991) [Annex W 128].

FN45. Id.

End of Footnote(s).

27. Minister Sultan personally did not reply to Mr. Malins' letter. Instead, although the letter had been sent to Minister Sultan and not EHC, on March 31, 1991, Mr. Kandil responded to Mr. Malins, referencing "your fax dated 25th March 1991, concerning your request for a meeting, -- in your capacity as the parliament advisor for Wena Ltd....." [FN46] Mr. Kandil mentioned the February 26, 1991 meeting and Wena's refusal to accept the proposed compromises. Mr. Kandil ended his letter by threatening that "the owning company will take all necessary measures to protect its rights which is considered a state ownership." [FN47]

FN46. Letter from Mr. Kamal Kandil (Chairman, EHC) to Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) (March 31, 1991) [Annexes W81 & W129]. During the session on the merits, Minister Sultan suggested that perhaps Mr. Malins' March 25, 1991 letter had been faxed to EHC, not the Minister of Tourism (thus, potentially explaining why Mr. Kandil, and not Minister Sultan, responded to the letter). See Sultan Cross-Ex., TR Day 4, at 47:9-10 & 48:29-49:1. However, both the attached fax cover sheet and confirmation sheet for Mr. Malins' letter show that the letter was faxed to number 2829771 in Egypt. See Annex W128. Subsequent inquiry by counsel for Wena "on May 29, 2000 to France Telecom's International Yellow Pages service" determined that the "same number (2829771) was given as the fax number listed for the Egyptian Ministry of Tourism." Claimant's Post-Hearing Brief, at 16 & n. 5 (submitted on May 30, 2000). In contrast, as reflected in EHC's contemporaneous letterhead, the fax number for EHC at that time was 3911322. See Annex W129.

FN47. Id.

End of Footnote(s).

D. Seizures of the Nile and Luxor Hotels (April 1, 1991)

1. Decision to Seize the Hotels

28. On March 27, 1991, EHC's Board of Directors met "to consider what action should be taken." [FN48] According to Mr. Munir Abdul Al-Aziz Gaballah Shalabi, of the Legal Affairs Division at EHC, the Board decided "to present *903 Wena with an ultimatum to implement" the proposed compromises from the February 26, 1991 meeting with Minister Sultan. [FN49] He further explained that "Wena having failed to meet the deadline, it was decided that EHC would take possession of the Nile Hotel." [FN50] Similarly, Mr. Yusseri Mahmud Hamid Hajjaj, EHC's Manager for the Upper Egypt Hotels Division at EHC, stated that "[faced] with [Wena's] breaches of contract, the board of directors of EHC had no choice but to issue its decision of March 27, 1991 to take over the Luxor Hotel and to place it under its own management with effect from April 1, 1991." [FN51]

FN48. Munir Statement, ¶ 14.

FN49. Id.

FN50. Id.

FN51. Witness Statement of Mr. Yusseri Mahmud Hamid Hajjaj, ¶ 8, attached to Respondent's Memorial on the Merits ("Yusseri Statement").

End of Footnote(s).

29. The decision to seize the hotels was "confirmed by a resolution of the Chairman of the Board No. 215 of 1991, dated March 30, 1991." [FN52] Although this resolution is mentioned by Mr. Munir in his witness statement and is referenced in at least two contemporaneous documents, [FN53] a copy of this resolution was not provided to the Tribunal.

FN52. Munir Statement, ¶ 14.

FN53. See, e.g., Kasr El-Nile Police Report, at 4 (April 1 & 2, 1991) [Annex E- M25]; Resolution Number [blank] for the Year 1991) [Annex E-M26].

End of Footnote(s).

30. EHC purported to notify Wena of its decision to terminate both the Nile and Luxor Leases and to reclaim the Hotels in a letter from Mr. Kandil to Mr. Farargy dated March 30, 1991. [FN54] In the letter, Mr. Kandil stated that:

FN54. Letter from Mr. Kamal Kandil (Chairman, EHC) to Mr. Nael El-Farargy (Wena Hotels Ltd.) (March 30, 1991) [Annexes W80 & W186].

End of Footnote(s).

the board of Directors of the [Egyptian Hotels] Company had decided:

a -- to terminate the two hotels Contracts.

b -- to receive the hotels and operate them with knowledge of the owning company starting form April 1, 1991.

c -- to complain to the courts and to the Public Prosecutor in order to recover [our] company's dues which amount to millions of Egyptian pounds and that are considered as public funds, either by legal or diplomatic ... means including freezing of your accounts receivable.

d -- to warn security services to be aware of your arrival from abroad in order to present you to courts to decide what you owe and to collect it. [FN55]

FN55. Id. (Brackets in original English translation); emphasis added by the Tribunal.

End of Footnote(s).

However, there is no evidence that this letter was received before the seizures on April 1, 1991. [FN56] Of the two copies of the March 30, 1991 letter provided to the Tribunal, one was sent by registered mail to Wena's Gatwick Hotel in England and does not appear to have been received until April 5, 1991. [FN57] The second copy bears a fax legend indicating that the letter had been faxed by EHC and received by Wena on April 14, 1991. [FN58] Although Mr. Munir testified that the second copy had been faxed to Wena's offices in England on March 30, 1991, no fax cover sheet or confirmation sheet has been submitted to support this claim. [FN59]

FN56. Mr. Munir also asserted that a copy of Resolution Number 215 concerning the seizures was "sent

to Wena in EHC's letter dated 30 March 1991 addressed to its head office in England." Munir Statement, ¶ 14. However, there is no evidence to confirm that a copy of this resolution was attached to the letter. See Annex W 80.

FN57. See registered mail receipt in Annex W80.

FN58. See fax legend in Annex W186.

FN59. Cross-examination of Mr. Munir Abdul Al-Aziz Gaballah Shalabi, TR Day 5, at 76:22-78:3 ("Munir Cross-Ex."). During the fifth day of the Tribunal's session on the merits, the absence of a confirmatory fax cover sheet (or a fax number of the letter) was noted. Both parties agreed that EHC should be asked to search its files for any record that could confirm that the document was faxed on March 30, 1991. TR Day 5, at 77:12-78:15.

End of Footnote(s).

31. In an Administrative Decision Number 216, dated March 31, 1991 and signed by Mr. Kandil, two EHC officials -- Messrs. Fakhri Hamid Al-Batuti and Atif Abd Al-Al -- were authorized to act on behalf of EHC "in respect of the Nile Hotel." [FN60] Mr. Yusseri was given the same authority concerning the Luxor Hotel. [FN61] EHC planned to evict Wena simultaneously from both hotels during the early evening on April 1, 1991 when they expected no resistance because "all the senior people of Wena would be taking the Ramadan breakfast at home...." [FN62]

FN60. Administrative Decision Number 216 (March 31, 1991) [Annex E-M28].

FN61. Id. See also Yusseri Statement, ¶ 9.

FN62. Munir Cross-Ex., TR Day 5, at 55:26-56:1. See also Munir Statement, ¶ 18. The Tribunal notes that this plan to seize the hotels surreptitiously, while Wena management were away from the hotels, contradicts Mr. Munir's claim that EHC had previously notified Wena of its intentions to repossess the hotels.

End of Footnote(s).

32. Egypt does not dispute "that the repossession by EHC of the Luxor and Nile Hotels and EHC's eviction of the Claimant from the Hotels on April 1, 1991 was wrong." [FN63]

FN63. Respondent's Memorial on Jurisdiction, at 4.

End of Footnote(s).

2. Seizure of the Nile Hotel

33. On April 1, 1991, at approximately 6:15 p.m., Mr. Simon Webster and Ms. Angela Jelcic, Wena's foreign managers, left the Nile Hotel to have dinner at the nearby Nile Hilton Hotel. [FN64] Short thereafter, several buses owned by EHC arrived at the Nile Hotel. [FN65]

FN64. Direct Examination of Mr. Simon Webster, TR Day 3, at 12:8-9 ("Webster Direct Ex."); Direct Examination of Ms. Angela Jelcic, TR Day 3, at 91:26-92:5 ("Jelcic Direct Ex.").

FN65. See, e.g., Police Statements, at 6, 9, 10 & 12 (July 6, 1991) [Annex W134]; Webster Direct Ex., TR Day 3, at 12:15-21; Jelcic Direct Ex., TR Day 3, at 95:13-19. Mr. Munir, however, testified that he arrived at the hotel in a single bus, with "approximately 35 accountants, receptions and other management staff required to run the hotel." Munir Statement, ¶ 17.

End of Footnote(s).

*904 34. According to a statement made that evening to the Kasr El-Nile Police by Mr. Muhammad Abdul Hameed Wakid, an attorney for Wena Hotels, "about one hundred and fifty persons, some of whom were carrying sticks and cudgels, assaulted the hotel against us immediately after Ramadan breakfast." [FN66] When he "tried to enquire of them who they were they stated that they had come to seize the hotel according to instructions from the Chairman of the Board of Directors of their company to do so." [FN67] According to Mr. Wakid, "[t]hey seized all the keys of the offices and safes in which the company's funds and hotel receipts from the guests are deposited [and] seized the hotel in full and they threatened any person who resisted them and attacked them...." [FN68]

FN66. Kasr El-Nile Police Reports, at 3 (April 1, 1991) [Annex E-M25]. See also id., at 2.

FN67. Id., at 3.

FN68. Id.

End of Footnote(s).

35. Similarly, Mr. Tamim Foda, Wena's resident manager at the Nile Hotel, stated in a subsequent police deposition:

At about 6:30 p.m., when it was time to take the fast breaking meal, I was reviewing some documents concerning my work ... I have been surprised by violent knocking on the door and its breaking, shouting in the hall of the hotel and I saw three persons bursting into my office. They attacked me, slapping my face and breaking my eye-glasses. They took possession of my office by force and everything inside it.... I was prevented from getting in touch with anybody outside the hotel and they told me that all the telephones were cut.... I was entrusted to three persons holding rods and cudgels who took me out of the hotel by force and while I was going out I saw more than one hundred men inside the hotel, holding rods and cudgels, some of them were taking out a number of cartons, belongings and implements of the hotel to vehicles parking in front of the door of the hotel. I waited outside the hotel until arrival of the police when I was taken inside for inspection under guard of the police. [FN69]

FN69. Police Statement of Mr. Tamim Foda, at 5-6 (July 5, 1991) [Annex W134].

End of Footnote(s).

36. Mr. Mostafa Ahmed Osman, Financial Manager for Wena, who was "taking my fast breaking meal at the restaurant on the ninth floor," reported being "surprised by strange and suspicious persons [who] took me downstairs by force holding my arms to the administrative offices on the mezzanine...." [FN70] According to Mr. Osman, one of the EHC employees "threatened me, saying that he holds a licensed weapon and that he is ready to use it if I resist. He informed me that all communications inside and outside the hotel have been cut." [FN71]

FN70. Police Statement of Mr. Mostafa Ahmed Osman, at 3 (July 6, 1991) [Annex W134].

FN71. Id., at 3-4.

End of Footnote(s).

37. A guest of the hotel restaurant, Mr. Sherif Ibrahim Mohamed Khalifa, who "was with my wife to take the fast breaking meal at the hotel as it is our favorite place," witnessed similar scenes. [FN72] In his statement to the police, Mr. Khalifa said that he "heard shoutings, sounds of breaking and crushing at the hotel." [FN73] When he went downstairs from the restaurant, he "found may [sic] person in the lobby, a state of absolute disorder, holding rods and some of them taking out carton cases and other things that I do not know, to vehicles parking in front of the hotel. These vehicles were bearing the badge of the Egyptian Hotels Co." [FN74] Afraid of "being attacked[,] I rushed out of the hotel with my wife." [FN75]

FN72. Police Statement of Mr. Sherif Ibrahim Mohamed Khalifa, at 8 (July 6, 1991) [Annex W134].

FN73. Id.

FN74. Id., at 9.

FN75. Id.

End of Footnote(s).

38. Another guest of the restaurant, Mr. Mohamed Sabry Ismail Emam, stated that he "heard shoutings and sounds of breaking coming from the side of the kitchen and somebody announcing in a loud voice that all the employees of the WENA HOTELS LTD have to go downstairs." [FN76] When he "tried to go downstairs escaping from this situation, one of the a/m took me downstairs and told me to go out quietly as the hotel had been seized by the Egyptian Hotels Co." and he noted several people "carrying carton cases and taking them to buses parking in front of the hotel, bearing the badge of the Egyptian Hotels Co." [FN77]

FN76. Police Statement of Mr. Mohamed Sabry Ismail Emam, at 10 (July 6, 1991) [Annex W134] (capital letters in original).

FN77. Id.

End of Footnote(s).

39. A Daily Telegraph article describing the seizure reported that "[o]ne British tourist said he was punched and gouged by 'semi-military types' who ordered him out of bed at 2 a.m." [FN78] The article also quoted a "British visitor" as saying:

FN78. "British Tourists are Beaten and Thrown Out of Egypt Hotels," Daily Telegraph (April 4, 1991) [Annex W7].

End of Footnote(s).

*905 The new managers said we could stay, but I did not feel safe. They told me they were repossessing the hotel on government orders because of an argument between Wena managers and the authorities. [FN79]

FN79. Id.

End of Footnote(s).

40. Mr. Hany Mohamed Hassan Mohamed Wahba, a security guard at the Nile Hotel, also stated in a subsequent deposition to the police:

While I was at the main entrance of the hotel, I saw a bus bearing the badge of the Egyptian Hotels Co. and numerous persons going into the hotel. They caught me and I was subject to personal searching. They were holding rods and cudgels and requested the key of the main door of the hotel. When I told them that I do not keep it and tried to inquire about the matter, as they were numerous, they tried to attack me and my colleagues. [FN80]

FN80. Police Statement of Mr. Hany Mohamed Hassan Mohamed Wahba, at 11-12 (July 6, 1991).

End of Footnote(s).

Mr. Wahba stated that he was taken "to the rear gate by force threatening me with the rods and cudgels." [FN81] As he was taken, Mr. Wahba "saw the guests of the hotel rushing out in a state of fear and terror caused by their bursting into the hotel in this savage way." [FN82] Mr. Wahba also reported seeing "a group of the a/m persons going upstairs and another group cutting the telephone wires, a third group burst into the reception and broke the cupboards containing the guests' registers." [FN83] Eventually, when he was released, Mr. Wahba "proceeded with a number of the employees of the WENA HOTELS LTD who were thrown out with me, to the Tourist Police where we informed verbally about the event. Then the Policeman came to the hotel." [FN84]

FN81. Id., at 12.

FN82. Id.

FN83. Id.

FN84. Id. (capital letters in original).

End of Footnote(s).

41. At approximately 8:45 p.m., Ms. Jelcic returned to the Nile hotel. She testified that she had just returned to her room when a group of men broke in, grabbed her and removed her from the hotel. [FN85] According to Ms. Jelcic, the men "had like Navy blue pants, dark pants, which is kind of unusual because they do not normally, you know, dress alike, so that gave me the illusion as if they were some sort of organization...." [FN86] Ms. Jelcic testified that she and other Wena employees (including Mr. Webster) then stood outside the hotel, looking into the lobby where she says she noticed "about four gentlemen or so that were standing in the lobby, towards the back of the lobby, and they were radically different from the other people that were in the lobby.... [t]hey were very well groomed, very well dressed...." [FN87] According to Ms. Jelcic, some of the Egyptian Wena staff "told me that they were Ministry of Tourism officials." [FN88] However, Ms. Jelcic admitted that she "personally did

not recognize them, no, but my staff, obviously the staff that were there saw the people come into the hotel on previous occasions, so I had no reason to doubt them." [FN89] Mr. Webster also testified that, although he did not personally recognize any officials from the Ministry of Tourism, two of his Egyptian staff "said to me that there were officials from the Ministry of Tourism in the lobby at the time." [FN90]

FN85. Jelcic Direct Ex., TR Day 3, at 92:17-93:24. See also Declaration of Ms. Angela Jelcic, ¶ 13, attached to Claimant's Memorial on the Merits ("Jelcic Declaration").

FN86. Jelcic Direct Ex., TR Day 3, at 94:11-16.

FN87. Jelcic Direct Ex., TR Day 3, at 97:1-5.

FN88. Jelcic Direct Ex., TR Day 3, at 97:7-8. See also Jelcic Declaration, ¶ 13 ("I recognized certain EHC executives and personnel, some of whom were standing with some other well-groomed men in suits. These men were identified as Ministry of Tourism officials by our staff who recognized them.").

FN89. Jelcic Direct Ex., TR Day 3, at 97:10-13.

FN90. Webster Direct Ex., TR Day 3, at 14:6-12. See also Webster Direct Ex., TR Day 3, at 14:25-15:6 & 16:9-12.

End of Footnote(s).

42. Further evidence of their contemporaneous impression that the Ministry of Tourism was involved in the seizure of the Nile Hotel is reflected in the police statements that Ms. Jelcic and Mr. Webster made to the Kasr El-Nile police. Ms. Jelcic's statement, for example, begins "I would like to make a complaint, charge and case against the Egyptian Hotels Company and the Ministry of Tourism of Egypt." [FN91] Similarly, Mr. Webster's statement, which is titled "Against the Egyptian Hotels Company/Ministry of Tourism," concludes "[w]e therefore place and hold the Egyptian Hotel Company and Ministry of Tourism responsible for items as listed below and not returned immediately." [FN92]

FN91. Statement of Ms. Angela Jelcic to Kasr El-Nile Police (April 2, 1991) [Annex W82]

FN92. Statement of Mr. Simon Webster to Kasr El-Nile Police (April 2, 1991) [Annex W83]. Similar contemporaneous evidence of Wena's impression that the Egyptian government was involved in the seizures is reflected in several of the newspaper articles describing the events. For example, an article in the *Caterer and Hotelkeeper* reported that "Mr. Farargy believed the attack ... was organised either by government elements or people who are fiercely opposed to foreign ownership in Egypt." "Wena Hotels Attacked by Crowds," *Caterer & Hotelkeeper* (April 18, 1991) [Annex W85]. Similarly, an article in the *Crawley Observer* quoted "Wena Managing Director Bernard Dührberg" as saying "[t]his is a legal dispute with the Egyptian government. We owe money to them and they owe money to us." "Mob Turn on Hotel Workers," *The Crawley Observer* (April 24, 1991) [Annex W86].

End of Footnote(s).

43. However, in his testimony, Minister Sultan adamantly rejected the suggestion that Ministry officials might have been present during the seizure: "I am sure that none of them have been there. I am sure of that, and, please, those who are accusing the Ministry should have come up with physical evidence

showing representatives of the Ministry were there." [FN93] Mr. Munir also testified that "[t]here was no official of the Ministry of Tourism" present during the seizure. [FN94]

FN93. Sultan Cross-Ex., TR Day 4, at 52:19-22.

FN94. Direct Examination of Mr. Munir Abdul Al-Aziz Gaballah Shalabi, TR Day 5, at 12:29 ("Munir Direct Ex.").

End of Footnote(s).

44. According to Ms. Jelcic and Mr. Webster, Wena staff went to both the nearby Kasr El-Nile police station and the Tourist police station seeking assistance. [FN95] Although both Ms. Jelcic and Mr. Webster testified that -- with the *906 exception of one, lone policeman who arrived two to three hours later -- both police forces refused to assist Wena, [FN96] there is evidence that officers from Kasr El-Nile police did begin an investigation at around 11:00 p.m. [FN97]

FN95. Jelcic Direct Ex., TR Day 3, at 97:23-98:13; Webster Direct Ex., TR Day 3, at 16:17-17:12 & 19:8-15; Jelcic Declaration, ¶ 14; Declaration of Mr. Simon Webster, ¶¶ 30-31, attached to Claimant's Memorial on the Merits ("Webster Declaration").

FN96. Id.

FN97. See Kasr El-Nile Police Report (April 1, 1991) [Annex E-M25]; Munir Cross-Ex., TR Day 5, at 101:11-12.

End of Footnote(s).

45. The report by the Kasr El-Nile Police records that they were "informed by the Director of the Security Department in the El-Nile Hotel," perhaps Mr. Wahba, "that the Management of the Egyptian Hotels Corporation had previously sent a number of its employees to seize the hotel in full...." [FN98] According to the report, four officers from the Kasr El-Nile police station went to investigate. When they arrived, they met with officials from EHC, who "presented to us a photocopy of the administrative order number 216 dated 31/3/1991 stamped and signed by Mr. Muhammad Kamal Qindeel, Chairman of the Board of Directors of the Egyptian Hotels Corporation." [FN99] During their investigation that evening, the Kasr El-Nile Police reported that "damage was noticed which resulted from the use of force to locks in the rooms of the secretaries, the resident manager and the administrative business and the room for [reception?] customers and the buffet and the room of the lawyer to the Wena Company who is resident in the hotel." [FN100]

FN98. Kasr El-Nile Police Report, at 1 (April 1, 1991) [Annex E-M25].

FN99. Id.

FN100. Kasr El-Nile Police Reports, at 9 (April 1, 1991) [Annex E-M25] (brackets in original English translation).

End of Footnote(s).

46. As previously indicated, at approximately 1:00 a.m., Ms. Jelcic, Mr. Webster, and several other

Wena employees went to the nearby Kasr El-Nile police station to file a complaint. [FN101] According to Ms. Jelcic and Mr. Webster, the police at first refused to let them make a statement, and then only would allow them to submit statements dealing with the loss of personal items, not the illegality of EHC's seizure. [FN102] Several other employees also prepared statements, reporting the loss of money, jewelry, watches, and other personal items. [FN103]

FN101. See Jelcic Direct Ex., TR Day 3, at 100:22-101:4; Webster Direct Ex., TR Day 3, at 20:2-8.

FN102. See Jelcic Direct Ex., TR Day 3, at 100:26-101:15; Webster Direct Ex., TR Day 3, at 21:20-22:1; Statement of Ms. Angela Jelcic to Kasr El-Nile Police (April 2, 1991) [Annex W82]; Statement of Mr. Simon Webster to Kasr El-Nile Police (April 2, 1991) [Annex W83].

FN103. See Kasr El-Nile Police Reports (April 2, 1991) [Annex E-M25]. The Tribunal also heard testimony from Mr. Tahir Al-Misiri Qasim (TR Day 4 at 223:8 et seq.) and Mr. Sameer Muhammad Khatir (TR Day 4 at 231:23 et seq.) to the effect that there was no violence at the time of the takeover. This testimony is inconsistent with the testimony of Webster and Jelcic and the other witnesses who testified consistently with Webster and Jelcic. Since the testimony of Mr. Qasim and Mr. Khatir has also been found inconsistent with the decision of the Southern Cairo Court of Appeal, which characterized the situation at the Nile Hotel on April 1, 1991 as including many acts of violence, the Tribunal has chosen not to rely on the testimony of these two witnesses.

End of Footnote(s).

3. Seizure of the Luxor Hotel

47. Also on April 1, 1991, at approximately 7:00 p.m., several EHC employees, led by Mr. Yusseri, took possession of the Luxor Hotel. [FN104]

FN104. Yusseri Statement, ¶¶ 9-11.

End of Footnote(s).

48. According to a subsequent statement to the Luxor police by Mr. Bahia El Din Abdel Hadi El Wakeel, a security guard at the Luxor Hotel, "more than 100 people from the EHC seized the Wena Hotel by force in spite myself and others responsible for the security and guards in the hotel presence at the time." [FN105] Mr. Wakeel also stated that "EHC forced their entry through by force ... which caused panic, fear, and hysteria for the guests and employees." [FN106] Two other guards, Messrs. Ismael Ahmed Hefni and Ahmed Hamza Mostafa, made short statements, agreeing with Mr. Wakeel's description of events. [FN107]

FN105. Police Statement Number 984, at 1 (April 2, 1991) [Annex W132].

FN106. Id.

FN107. Id., at 3.

End of Footnote(s).

49. Mr. Muhammad Nagib Al-Sayyid, Wena's General manager of the Luxor Hotel, also filed a police

statement, asserting that, at approximately 7:00 p.m., EHC personnel entered his office, seized the hotel's papers and ordered him to leave the hotel. [FN108] Mr. Nagib reported the incident to the Luxor Tourist Police, who accompanied Mr. Nagib back to the hotel and subsequently opened an investigation into the seizure. [FN109]

FN108. Police Statement Number 959, at 1 (April 1, 1991) [Annex E-J18].

FN109. Id.

End of Footnote(s).

50. These contemporaneous descriptions comport with the subsequent report by the Advocate General at the Office of the Assistant Attorney General for Upper Egypt, which concluded that EHC "broke into the Hotel ... entered by force into the management office, broke open the doors and Offices of the Hotels Ltd. [and] forced the personnel they found there to quit the Hotel." [FN110]

FN110. Memorandum from the Public Prosecutor's Office, at 3 (April 13, 1992) [Annex W133].

End of Footnote(s).

E. Events Following the Seizures of the Nile and Luxor Hotels

51. Minister Sultan testified that he first learned of the seizures by reading the newspaper the next morning. [FN111] Minister Sultan stated that he "requested one of my associates to investigate the issue and we found that he [Mr. Kandil] is mistaken by taking the law into his hands...." [FN112] Minister Sultan also testified that "we most probably discussed that with the Prime Minister...." [FN113]

FN111. Sultan Cross-Ex., TR Day 4, at 55:14-18. See also Sultan Statement, ¶ 20.

FN112. Sultan Cross-Ex., TR Day 4, at 55:21-23.

FN113. Sultan Cross-Ex., TR Day 4, at 56:2.

End of Footnote(s).

*907 52. Minister Sultan repeatedly stated that he "was furious" [FN114] at EHC's decision to seize the hotels, that EHC's actions were "wrong," [FN115] and that "[i]f I had the slightest idea about that incident, I would have immediately stopped it because during that time I was also involved in the SPP dispute...." [FN116] However, Minister Sultan also admitted that he did not take any action to return Wena to the hotels, to punish EHC or its officials, or to withdraw the hotels licenses so that EHC could not operate the hotels. [FN117] Minister Sultan explained that by reinstating Wena "I would be taking again of siding [sic] with someone, whereas the dispute should be settled through arbitration or a court." [FN118]

FN114. See, e.g., Direct Examination of Minister Fouad Sultan, TR Day 3, at 180:19-21 ("Sultan Direct Ex."); Sultan Cross-Ex., TR Day 4, at 58:12-13.

FN115. See, e.g., Sultan Direct Ex., TR Day 3, at 176:11-14 ("I fully agree that it is a wrong action

taken by the EHC, notwithstanding their rights, but they should not have taken that action. They should have gone to arbitration or to the court.").

FN116. Sultan Direct Ex., TR Day 3, at 175:9-11. Minister Sultan apparently was referring to the dispute between Southern Pacific Properties (Middle East) Limited ("SPP") and the Arab Republic of Egypt regarding the development of tourist complex in Egypt, which eventually resulted in a decision that Egypt had expropriated SPP's investment and an award in favor of SPP. See *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, 8 ICSID Review 328 (1993) [Annex W61].

FN117. See, e.g., Sultan Cross-Ex., TR Day 4 at 57:10-28 & 59:9-61:1.

FN118. Sultan Direct Ex., TR Day 4, at 176:25-28. See also Sultan Cross-Ex., TR Day 4, at 57:17-21 ("As I said, I will not take back again the law in my hand and take action with the police to evict him [Mr. Kandil] from the hotel. This is something which has to be settled according to our description [sic] laws by a court and not by an administrative decision.").

End of Footnote(s).

53. From April 1, 1991 through February 25, 1992, the Nile Hotel remained in the control of EHC. The Luxor Hotel remained in EHC's control until April 21, 1992. During this time, Wena made several efforts to recover possession of the hotels -- including seeking the assistance of officials in the United States and United Kingdom. [FN119] For example, on July 9, 1991, Mr. Farargy wrote to the Egyptian Ambassador to the United Kingdom, complaining about the apparent collapse of negotiations between Wena and a representative of the Egyptian government. [FN120] Apparently, also during this time, the Civil Defense Authority (which is responsible for fire safety) issued at least two reports -- on May 22, 1991 and November 12, 1991 -- about unsafe conditions at the Nile Hotel. [FN121]

FN119. See, e.g., Malins Declarations, ¶ 6.

FN120. See Letter from Mr. Nael El-Farargy (Wena Hotels Ltd.) to His Excellency, Ambassador Shaker (Egyptian Ambassador to the United Kingdom) (July 9, 1991) [Annex W50].

FN121. See Letter from the Director General of the Civil Defense Authority (January 4, 1992) [Annex E-M43].

End of Footnote(s).

54. On January 16, 1992, the Chief Prosecutor of Egypt ruled that the seizure of the Nile Hotel was illegal and that Wena was entitled to repossess the hotel. [FN122] However, the Nile Hotel was not immediately returned to Wena. On February 21, 1992, Mr. Webster wrote to the British Embassy in Cairo, complaining of Minister Sultan's "uncooperative stance" and the delays that Wena was experiencing in recovering the hotels: "if he [Minister Sultan] wishes to press settlement of account, then we too will press for settlement of monies outstanding to Wena." [FN123] Mr. Webster concluded his letter by saying that "[w]e are of the impression that the Minister is either poorly informed or part of the entire scheme." [FN124]

FN122. See Munir Direct Ex., TR Day 5, at 31:6-7; Munir Statement, ¶ 22.

FN123. Letter from Mr. Webster (Wena Hotels Ltd.) to Mr. Ceurvost (British Embassy, Egypt) (February 21, 1991) [Annex W130].

FN124. *Id.* See also Webster Direct Ex., TR Day 3, at 26:6-16.

End of Footnote(s).

55. On February 25, 1992, the Nile Hotel was returned to Wena's control. [FN125] Just two days before the hotel was returned, on February 23, 1992, the Ministry of Tourism withdrew the Nile Hotel's operating license because of fire safety violations and "the hotel was closed down." [FN126] According to Mr. Munir, these safety violations had pre-dated EHC's seizure of the hotel in April 1991. [FN127] In a contemporaneous report to the Kasr El-Nile police, an EHC official confirmed that on February 23, 1992, just before returning the Nile Hotel to Wena, EHC had issued "decree no. 148/92 to stop operations" in response to orders from the Ministries of Interior and Tourism. [FN128]

FN125. Munir Statement, ¶ 22.

FN126. Munir Direct Ex., TR Day 5, at 30:10-28. See also Munir Statement, ¶ 22- 23.

FN127. *Id.*

FN128. Police Report on Hand-over of the Nile Hotel (February 25, 1992) [Annex W137].

End of Footnote(s).

56. According to the witnesses produced by Wena, upon returning to control of the Nile Hotel, they found the hotel vandalized. [FN129] Although Mr. Munir denied that any such vandalism occurred, he confirmed that EHC had removed and auctioned much of the hotel's fixtures and furniture. [FN130] According to Wena's management, it never operated the Nile Hotel again. [FN131]

FN129. See, e.g., Malins Direct Ex., TR Day 4, at 179:1-20; Webster Direct Ex., TR Day 3, at 26:20-24; Jelcic Direct Ex., TR Day 3, at 109:3-8.

FN130. See Munir Cross-Ex., TR Day 5, at 89:3-11; Munir Statement, ¶ 24.

FN131. Jelcic Direct Ex., TR Day 3, at 110:23-25; Farargy Declaration, ¶ 27.

End of Footnote(s).

57. On April 21, 1992, the Chief Prosecutor of Egypt ruled that EHC's seizure of the Luxor Hotel was illegal and ordered that the hotel should be returned to Wena. [FN132] On April 28, 1992, Wena reentered the hotel. [FN133] According to Wena's witnesses, the Luxor Hotel had also been damaged, although not nearly as badly as the Nile Hotel. [FN134] The Ministry of Tourism denied Wena a permanent operating license for the Luxor Hotel; instead, it granted only a series of temporary licenses because of alleged defects in the drainage system and the fire safety system, which Wena complains prohibited it from properly operating the hotel. [FN135]

FN132. Yusseri Statement, ¶ 13.

FN133. Report on Hand-over of the Luxor Hotel (April 28, 1992) [Annex E-M30].

FN134. See, e.g., Malins Direct Ex., TR Day 4, at 179:1-20; Jelcic Direct Ex., TR Day 3 at 110:13-22.

FN135. See, e.g., Yusseri Direct Ex., TR Day 5, at 113:7-11; Jelcic Direct Ex., TR Day 3, at 113:15-20; Letter from Classic Edition Travel to Wena (March 16, 1995); Letter from Inter Air Travel Limited to Wena (April 11, 1995).

End of Footnote(s).

58. After the return of the hotels, Wena sought compensation from Egypt. [FN136] On November 11, 1992, Mr. Malins wrote to the Honorable Lee Hamilton, a senior member of the U.S. House of Representatives, complaining that "the Minister of Tourism, Dr. Fouad Sultan, will not consider our requests" and that "it is clear that subsequent to any perceived movement, Dr. Sultan personally intervenes to obstruct a solution." [FN137]

FN136. See, e.g., Malins Direct Ex., TR Day 4, at 180:23-181:23.

FN137. Letter from Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) to the Honorable Lee H. Hamilton (Chairman, Subcommittee on Europe & the Middle East, U.S. House of Representatives) (November 11, 1992) [Annex W131].

End of Footnote(s).

59. On April 10, 1993, the Kasr El-Nile court convicted several representatives of EHC -- including Messrs. Kandil and Munir -- under Article 369/1 of the Egyptian Criminal Code (dispossession by violence), holding *908 that unlawful force was used to expel Wena from the Nile Hotel. [FN138] These convictions were subsequently upheld by the Southern Cairo Court of Appeal, on January 16, 1994. [FN139] According to Mr. Munir, the decision is currently under appeal to the Court of Cassation. [FN140] Neither Mr. Kandil nor Mr. Munir was sentenced to serve any jail time; both were fined only 200 Egyptian pounds, which Mr. Munir stated that he had not paid. [FN141] Since then, Mr. Munir has been promoted to become the Head of the Legal Affairs division at EHC and is expecting a further promotion. [FN142] According to Ms. Jelcic, Mr. Kandil is currently an advisor to a senior member of the Egyptian parliament. [FN143]

FN138. See decision of the Southern Cairo Court of Appeal (January 16, 1994) [Annex W135].

FN139. Id.

FN140. See Munir Direct Ex., TR Day 5, at 32:11-17; Munir Cross-Ex., TR Day 5, at 91:11-92:12.

FN141. Decision of the Southern Cairo Court of Appeal (January 16, 1994) [Annex W135]; Munir Cross-Ex., TR Day 5, at 94:23.

FN142. Munir Cross-Ex., TR Day 5, at 93:20-94:26.

FN143. Redirect Examination of Ms. Angela Jelcic, TR Day 3, at 155:22-156:22 ("Jelcic Redirect Ex.").

End of Footnote(s).

60. On December 2, 1993, Wena initiated arbitration in Egypt against EHC for breaching the Nile Hotel lease. [FN144] Similar arbitration was initiated by Wena against EHC for breaching the Luxor Hotel lease on January 12, 1994. [FN145]

FN144. Nile Hotel Arbitration Award, at 1 (April 10, 1994) [Annex E-M19].

FN145. Luxor Hotel Arbitration Award, at 1 (September 29, 1994) [Annex E-J31].

End of Footnote(s).

61. On April 10, 1994, an arbitration award of EGP 1.5 million for damages from the invasion of the Nile Hotel was issued in favor of Wena. However, the award also required Wena to surrender the Nile Hotel to EHC's control. [FN146] On June 21, 1995, Wena was evicted from the Nile Hotel. [FN147] Nearly two years later, on June 9, 1997, Wena received the damages awarded by the Nile Hotel arbitration, less fees -- a total of EGP 1,477,498.30. [FN148]

FN146. Nile Hotel Arbitration Award (April 10, 1994) [Annex E-M19].

FN147. Annual Return and Financial Statements for Wena Hotels Limited (period ended December 31, 1995) [Annex E-J14]; Letter from Kevin Heath, Esq. (Lester Aldridge, Solicitors for Wena) to Mr. Nael El-Farargy (Wena Hotels Ltd.) (March 20, 1999) [Annex W16].

FN148. Check drawn in Wena's favor by the Egyptian Ministry of Justice [Annex W93].

End of Footnote(s).

62. The Luxor Hotel arbitration also found in favor of Wena, awarding the company, in a September 29, 1994 decision, EGP 9.06 million for damages from the seizure. [FN149] The award subsequently was nullified by the Cairo Appeal Court on December 20, 1995, on the basis, among other things, that the arbitrator appointed by EHC had not signed the final decision. [FN150] On August 14, 1997, Wena was evicted from the Luxor Hotel and, according to Mr. Yusseri, the hotel was turned over to a court-appointed receiver requested by EHC. [FN151]

FN149. Luxor Hotel Arbitration Award, at 1 (September 29, 1994) [Annex E-J31].

FN150. Cairo Court of Appeal's Judgement (December 20, 1995) [Annex E-J32].

FN151. Yusseri Direct Ex., TR Day 5, at 112:9-29; Annual Return and Financial Statements for Wena Hotels Limited (period ending December 31, 1996) [Annex E- J15].

End of Footnote(s).

F. Harassment

63. Wena has also alleged "a campaign of continual harassment" by Egypt since the seizure of the two hotels, including the following allegations: "in 1991 the Minister of Tourism made defamatory statement about Wena that were reproduced in the media; in 1992 Egypt revoked the Nile Hotel's

operating license without reason; in 1995 Egypt imposed an enormous, but fictitious, tax demand on Wena; in 1996 Egypt removed the Luxor Hotel's police book, effectively rendering it unable to accept guests; and, last but not least, in 1997 Egypt imposed a three-year prison sentence and a LE 200,000 bail bond on the Managing Director of Wena based on trumped-up charges." [FN152]

FN152. Claimant's Request for Arbitration, at 16.

End of Footnote(s).

64. The Tribunal has received some limited testimony and other evidence on these various allegations. However, because it finds, as discussed in section III, *infra*, that Egypt's actions concerning the April 1, 1991 seizures of the two hotels are sufficient to determine liability, the Tribunal does not find it necessary to make a finding on the veracity of these additional allegations.

G. Relationship between EHC and Egypt

65. From 1983 through September 1991, EHC was a "public sector" company, wholly owned by the Egyptian Government, and operating in accordance with law Number 97 of 1983 governing Public Sector Companies and Organizations. [FN153] In September 1991, Egypt enacted the Public Business Sector Companies Law, which reorganized the "314 State owned economic companies," pooling them into "16 (reduced later to 12) State owned holding companies supervised by the Minister for [the] public Sector." [FN154] However, at the time of the seizures of the Nile and Luxor Hotels, EHC was governed by Law Number 97 of 1983.

FN153. See Munir Statement, ¶ 3; Egyptian Law Number 97 of 1983 governing Public Sector Authorities and Affiliated Companies ("Law Number 97 of 1983") [Annex W65].

FN154. Sultan Statement, ¶ 4.

End of Footnote(s).

66. As explained by Minister Sultan during his testimony, under Law Number 97 of 1983, the sole shareholder of EHC was Egypt. [FN155] EHC's shareholder assembly was chaired by the Minister of Tourism and would be attended by several other government officials. [FN156] The Minister of Tourism also was responsible for the appointment of at least one half of the Board of Directors of EHC, and furthermore nominated EHC's Chairman. [FN157] Indeed, in May 1989, Mr. Kamal Kandil was appointed, at the nomination of Minister Sultan, Chairman and CEO of EHC by Egyptian *909 Prime Minister's Decree Number 539 of 1989. [FN158] According to Mr. Munir's statement "EHC's Directors were also appointed by the Ministry of Tourism and Civil Aviation." [FN159]

FN155. Sultan Cross-Ex., TR Day 3, at 227:26-28.

FN156. *Id.*, at 228:2-8

FN157. See Sultan Statement., ¶ 8; Sultan Cross-Ex., TR Day 3, at 211:26-212:2; Law Number 97 of 1983, art. 30 [Annex W65].

FN158. See Prime Minister's Decree No. 539 of 1989 [Annex E-M27]; Sultan Statement, ¶ 8; Sultan Cross-Ex., TR Day 3, at 211:17-23. Mr Kandil's appointment "by virtue of the Decree of the Prime

Minister No. 539/1989" was noted in both the Nile and Luxor agreements. See Luxor Hotel Lease and Development Agreement, at 1 [Annex W4]; El Nile Hotel Lease and Development Agreement, at 1 [Annex 5].

FN159. See Munir Statement, ¶ 4.

End of Footnote(s).

67. Of considerable relevance to this proceeding, the Minister of Tourism was also empowered to dismiss the Chairman and the members of the Board of EHC if "it appears that the continued presence of these persons would affect the proper functioning of the company." [FN160]

FN160. Law Number 97 of 1983, art. 37 [Annex W65]. See also Sultan Cross-Ex., TR Day 3, at 214:18-215:11; Munir Cross-Ex., TR Day 5, at 44:4-17.

End of Footnote(s).

68. Until at least the passage of the September 1991 Public Business Sector Companies Law, "EHC operated within broad policy guidelines laid down by the Egyptian Government." [FN161] As Minister Sultan explained during a parliamentary debate on July 14, 1992, at the time of the seizures, "the tourism sector with its companies" was "[s]ubordinated to the Minister of Tourism." [FN162] In a letter from February 1992, the Ministry of Tourism contrasted the relationship between EHC and the Egyptian Government before and after the passage of the September 1991 law, by explaining:

FN161. Munir Statement, ¶ 4.

FN162. Record of the Lower House Session No. 99, at 36 (July 14, 1992) [Annex W67] (Arabic original). See also Sultan Cross-Ex., TR Day 3, at 209:12-26.

End of Footnote(s).

After the issuance of the new law of the Business Sector and after its implementation starting from Oct. 1991, the Egyptian Hotels Company has full autonomy in all of its business dealings without intervention from the Ministry. [FN163]

FN163. Letter from Mr. Abdel-Moneim Rashad (Director General, Minister's Office -- Ministry of Tourism) to Ms. Angela Jelcic (Wena Hotels Ltd.) (February 20, 1992) [Annex W66].

End of Footnote(s).

69. The documents also reflect that EHC and the Ministry of Tourism considered EHC's money to be "public money" or "public funds," [FN164] and EHC's rights to be "a state ownership." [FN165] Indeed, during the February 26, 1991 meeting chaired by Minister Sultan, the Minister is recorded as saying that "[t]he Ministry took no pleasure from any misunderstandings with investors; however, at the same time it could not accept any excesses in respect of any of the Government's rights." [FN166] Similarly, in his April 1, 1991 statement to the Luxor police, Mr. Atitu Sirri Atitu, "Manager of the Legal Department at Egyptian Hotels Company for hotels in the Luxor area," explained that "the Egyptian Hotels Company, as a Government company, was compelled to preserve the public money by the means it viewed in as being in accordance with the public interest." [FN167]

FN164. See, e.g., Luxor Police State Report No. 959 of 1991, at 12 & 26 (April 1, 1991) [Annex E-M18]; Kasr El-Nile Police Report, at 6 (April 1, 1991) [Annex E-M25] ("The Egyptian Hotels Corporation is a public sector company and its funds are property of the state."); Letter from Mr. Kamal Kandil (Chairman, EHC) to Mr. Nael El-Farargy (Wena Hotels Ltd.) (March 30, 1991) [Annex W80]. See also Munir Cross-Ex., TR Day 5, at 47:10-11.

FN165. Letter from Mr. Kamal Kandil (Chairman, EHC) to Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) (March 31, 1991) [Annex W129].

FN166. Minutes of Meeting between Representatives of the Ministry of Tourism, EHC and Wena (February 26, 1991) (emphasis added) [Sultan Statement, Attachment B; also Annexes E-M22 & W124]. During testimony regarding the meaning of this statement, Minister Sultan explained that "I cannot give up entitlements or the rights of the State. If the right of the State is to collect rent I cannot give that right up." Sultan Cross-Ex., TR Day 3, at 230:2-4.

FN167. Luxor Police State Report No. 959 of 1991, at 8 (emphasis added) [Annex E-M18].

End of Footnote(s).

H. Consultancy Agreement between Wena Hotels Ltd. and Mr. Kamal Kandil

70. Egypt has contended that the "claimant improperly sought to influence the Chairman of EHC with respect to the award of the leases." [FN168] Both parties agree that, on or about August 20, 1989, Wena Hotels Ltd. entered into a consultancy agreement with Mr. Kamal Kandil. [FN169] The second paragraph of the agreement provides that Mr. Kandil's duties "shall be to give advice and assistance to the company as to the opportunities available to the company for developing its hotel business in Egypt." [FN170]

FN168. Respondent's Post-Hearing Memorial at 15.

FN169. See Consultancy Agreement between Mr. Kamal Kandil and Wena Hotels Limited [Annex W149].

FN170. Id.

End of Footnote(s).

71. On March 26, 1991, Wena (through its attorneys, Tuck & Mann) issued a Writ of Summons in England against Mr. Kandil, alleging that, under the agreement, Wena had made five payments to Mr. Kandil between August 18, 1989 and January 30, 1990. [FN171] The total of these payments, which Wena sought to reclaim, was GB£ 52,000.

FN171. Writ of Summons issued by Wena Hotels Limited against Mr. Mohamed Kamal Ali Mohamed Kandil (March 26, 1991) [Annex E-M7].

End of Footnote(s).

72. On August 19, 1991, Mr. Kandil responded to this Writ in a letter written to the Senior Master of

the Royal Court of Justice. [FN172] In his letter, Mr. Kandil objected to Wena's writ, claiming that "there was no Contract between the Claimant Company and myself," that there was only "a Draft Contract which is not a Contract because it was neither signed nor sealed between the Parties," and that "the signature which appears is not mine." [FN173] Mr. Kandil asserted that the "subject of the above-mentioned Draft Contract was to develop new hotels in Egypt, these hotels being the Ramses Village project in Abou Simbal and a Conference Center in Aswan City...." [FN174] Mr. Kandil also stated that "[i]n the Draft Contract I did not act in my quality of Chairman of the Egyptian Hotels Company nor did the Draft Contract concern either the Nile Hotel or the Luxor Hotel, instead I acted as Tourist Consultant for the Aswan Government and Chairman of the Board of Directors of Misr Aswan Tourist Co." [FN175]

FN172. Letter from Mr. Kamal Kandil to the Senior Master of the Royal Court of Justice (August 19, 1991) [Annex W150].

FN173. *Id.*, at 1.

FN174. *Id.*

FN175. *Id.*

End of Footnote(s).

*910 73. As corroborating evidence of Mr. Kandil's statements, Wena has submitted two letters it sent to the Governor of Aswan in December 1989 and January 1990 (including one letter on which Mr. Kandil was copied), concerning the Abou Simbal and Aswan City developments. [FN176]

FN176. See Facsimile from Mr. Dimopolous (Wena Hotels Ltd.) to Mr. Kamal Kandil (Chairman, EHC) (December 13, 1989), enclosing letter from Mr. Nael El-Faragy (Wena Hotels Ltd.) to His Excellency, the Governor of Aswan (December 11, 1989) [Annex W188]; letter from Mr. Nael El-Faragy (Wena Hotels Ltd.) to His Excellency, the Governor of Aswan (January 15, 1990) [Annex W189].

End of Footnote(s).

74. Mr. Faragy testified that the Egyptian government was aware of the consultancy agreement and that Mr. Kandil "offered his help and assistance officially above board with their knowledge." [FN177] According to Minister Sultan, however, he was not personally aware that "Mr. Kandil was an agent to Faragy" and that when he did learn about it, "I passed that to the prosecutor requesting a full fledged investigation...." [FN178] Both parties agree, however, that "the investigation appears ... to have bene closed" [FN179] and that "Mr. Kandil was never prosecuted in Egypt in connection with the Consultancy Agreement." [FN180] Unfortunately, other than this consensus that Mr. Kandil was never prosecuted, the Tribunal has been presented with no evidence of any investigation the Egyptian government might have undertaken in this matter.

FN177. Faragy Direct Ex., TR Day 1, at 142:27-28. See also Faragy Direct Ex., TR Day 1, at 142:26-143:6.

FN178. Sultan Direct Ex., TR Day 3, at 188:11-14.

FN179. Respondent's Post-Hearing Memorial, at 14.

FN180. Claimant's Post-Hearing Reply, at 16 (submitted on June 15, 2000).

End of Footnote(s).

III. LIABILITY

75. In its Memorial on the Merits, Wena claims that "Egypt violated the IPPA, Egyptian law and international law by expropriating Wena's investments without compensation." [FN181] Wena also argues that "Egypt violated the IPPA and other international norms by failing to protect and secure Wena's investments." [FN182]

FN181. Claimant's Memorial on the Merits, at 43-51.

FN182. Id., at 51-54.

End of Footnote(s).

76. Egypt denies Wena's claims, asserting that it has neither "violated the IPPA's prohibition on expropriation without compensation" [FN183] nor "breached any obligation under international law to protect and secure the claimant's investment." [FN184] In addition to its objections to the substance of Wena's claims, Egypt has also raised two affirmative defenses. First, Egypt asserts that "Claimant's claims in respect of the seizure of the hotels and acts of vandalism are time barred." [FN185] Second, Egypt contends that "Claimant improperly sought to influence the Chairman of EHC [Mr. Kamal Kandil] with respect to the award of the leases that are the subject of this arbitration" and, therefore, as a result of this alleged corruption, "Claimant cannot now properly appear before an international tribunal, constituted in accordance with the IPPA, and claim compensation for the alleged loss of leasehold interests that were improperly obtained in the first place." [FN186] The Tribunal has carefully considered all of these claims. The Tribunal devoted particular attention to the allegations of corruption raised by Egypt.

FN183. Respondent's Memorial on the Merits, at 8-40.

FN184. Id., at 40-42.

FN185. Id., at 42-44.

FN186. Respondent's Post-Hearing Memorial, at 15.

End of Footnote(s).

77. Despite the able representation of Egypt's counsel, the Tribunal concludes that Egypt did violate its obligations under the IPPA by failing to provide Wena's investments in Egypt "fair and equitable treatment" and "full protection and security" [FN187] and by failing to provide Wena with "prompt, adequate and effective compensation" following the expropriation of its investments. [FN188] The Tribunal also finds that Wena's claims are not time barred. Finally, although Egypt has raised serious allegations of misconduct and corruption, the Tribunal finds that Egypt (which bears the burden of proving such an affirmative defense) has failed to prove its allegations. The Tribunal's rationale is

discussed in more detail below.

FN187. IPPA, art. 2(2) [Annexes W2 & E-J22].

FN188. IPPA, art 5(1) [Annexes W2 & E-J22].

End of Footnote(s).

A. Law Applicable to this Arbitration

78. Before Disposing of the merits of this case, the Tribunal must consider the applicable law governing its deliberations. As both parties agree, "this case all turns on an alleged violation by the Arab Republic of Egypt of the agreement for the promotion and protection of investments that was entered into in 1976 between the United Kingdom and the Arab Republic of Egypt." [FN189] Thus, the Tribunal, like the parties (in both their submissions and oral advocacy), considers the IPPA to be the primary source of applicable law for this arbitration.

FN189. Respondent's Opening Statement, TR Day 1, at 29:24-28. See also Claimant's Opening Statement, TR Day 1, at 15:24-25 ("the basis of this action is the breach of [the] Bilateral Treaty by Egypt").

End of Footnote(s).

79. However, the IPPA is a fairly terse agreement of only seven pages containing thirteen articles. The parties in their arguments have not treated it as containing all the rules of law applicable to their dispute, and this is also the view of the Tribunal. In particular, Egypt has relied on Egyptian law, namely, the Egyptian Civil Code to raise its first *911 defense -- that Wena's claims are time barred. In its response to that defense, Wena has taken the position that both Egyptian law and international law are applicable to the dispute. [FN190] Under Article 42(1) of the ICSID Convention:

FN190. See, e.g., Claimant's Reply on the Merits, at 48-50. See also Claimant's Memorial on the Merits, at 42; Respondent's Memorial on the Merits, at 7-8 (referring, in regard to Respondent's second defense, to "practices condemned by both Egyptian and international law.").

End of Footnote(s).

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed upon 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 conflicts of laws) and such rules of international law as may be applicable.

The Tribunal finds that, beyond the provisions of the IPPA, there is no special agreement between the parties on the rules of law applicable to the dispute. Rather, the pleadings of both parties indicate that, aside from the provisions of the IPPA, the Tribunal should apply both Egyptian law (i.e., "the law of the Contracting State party to the dispute") and "such rules of international law as may be applicable." The Tribunal notes that the provisions of the IPPA would in any event be the first rules of law to be applied by the Tribunal, both on the basis of the agreement of the parties and as mandated by Egyptian law as well as international law.

B. The Issue of Egypt's Substantive Liability

1. Summary of Wena's Claims

80. As noted already, Wena raises two claims against Egypt. First, it contends that Egypt's actions constitute an unlawful expropriation without "prompt, adequate and effective" compensation in violation of Article 5 of the IPPA, as well as Egyptian law and other international law. [FN191] Second, Wena argues that Egypt violated Article 2(2) of the IPPA, and other international norms, by failing to accord Wena's investments "fair and equitable treatment" and "full protection and security." [FN192]

FN191. See, e.g., Claimant's Memorial on the Merits, at 43-51; Claimant's Reply on the Merits, at 29-38 (submitted on September 27, 1999); Claimant's Post- Hearing Brief, at 41-44.

FN192. Claimant's Memorial on the Merits, at 51-54; Claimant's Reply on the Merits, at 39-44; Claimant's Post-Hearing Brief, at 44-46.

End of Footnote(s).

81. Egypt disputes both allegations, contending, inter alia, "that the Claimant has no legitimate grievance against the Respondent, who neither authorized nor participated in the repossession of the Luxor and Nile Hotels on April 1, 1991 or most of the subsequent events of which the Claimant complains." [FN193]

FN193. Respondent's Post-Hearing Rebuttal Memorial, at 8 (submitted on June 15, 2000).

End of Footnote(s).

82. The Tribunal disagrees. There is substantial evidence that, even if Egyptian officials other than officials of EHC did not participate in the seizures of the hotels on April 1, 1991, 1) Egypt was aware of EHC's intentions to seize the hotels and did nothing to prevent those seizures, 2) the police, although responding to the seizures, did nothing to protect Wena's investments; 3) for almost one year, Egypt (despite its control over EHC both before and after April 1, 1991) did nothing to restore the hotels to Wena; 4) Egypt failed to prevent damage to the hotels before their return to Wena; 5) Egypt failed to impose any substantial sanctions on EHC (or its senior officials responsible for the seizures), suggesting its approval of EHC's actions; and 6) Egypt refused to compensate Wena for the losses it suffered.

83. The Tribunal shall consider each of Wena's claims, beginning with its assertion that Egypt violated its obligations under Article 2(2) of the IPPA to provide "full protection and security" to Wena's investments.

2. Article 2(2) of the IPPA: "Fair and Equitable Treatment" and "Full Protection and Security"

84. The Tribunal agrees with Wena that Egypt violated its obligation under Article 2(2) of the IPPA to accord Wena's investment "fair and equitable treatment" and "full protection and security." Although it is not clear that Egyptian officials other than officials of EHC directly participated in the April 1, 1991 seizures, there is substantial evidence that Egypt was aware of EHC's intentions to seize the hotels and took no actions to prevent EHC from doing so. Moreover, once the seizures occurred, both the police and the Ministry of Tourism took no immediate action to *912 restore the hotels promptly to Wena's control. Finally, Egypt never imposed substantial sanctions on EHC or its senior officials, suggesting

Egypt's approval of EHC's actions.

Article 2(2) of the IPPA provides:

Investments of nationals or companies of either Contracting Party shall at all time be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party is not in any way impaired by unreasonable or discriminatory measures. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting party. [FN194]

FN194. IPPA, art. 2(2) [Annex W2 & E-J22].

End of Footnote(s).

In interpreting a similar provision from the bilateral investment treaty between Zaïre and the United States, another ICSID panel has recently held that "the obligation incumbent on [the host state] is an obligation of vigilance, in the sense that [the host state] shall take all measures necessary to ensure the full enjoyment of protection and security of its [sic] investments and should not be permitted to invoke its own legislation to detract from any such obligation." [FN195] Of course, as still another ICSID panel has observed, a host state's promise to accord foreign investment such protection is not an "absolute obligation which guarantees that no damages will be suffered, in the sense that any violation thereof creates automatically a 'strict liability' on behalf of the host State." [FN196] A host state "is not an insurer or guarantor.... [i]t does not, and could hardly be asked to, accept an absolute responsibility for all injuries to foreigners." [FN197] Here, however, there is no question that Egypt violated its obligation to accord Wena's investments "fair and equitable treatment" and "full protection and security."

FN195. American Manufacturing and Trading, Inc. v. Republic of Zaïre, ICSID Case No. ARB/93/1, at 28 (1997) [Annex W115]. Article II(4) of the Zaïre- United States bilateral investment treaty, much like Article 2(2) of the IPPA, provides that "[i]nvestment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other party." *Id.*, at 28 [Annex W115].

FN196. AAPL v. Sri Lanka, ICSID Case No. ARB/87/3, at 545 (1990) [Annex W117; a digested version of the decision has also been provided at Annex E-M35] The wording of Article 2(2) of the bilateral investment treaty in that case (between Sri Lanka and the United Kingdom) is almost identical to that in the same article in the IPPA: "Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other Party." Agreement for the Promotion and Protection of Investments, February 13, 1980, U.K.-Sri Lanka [Annex W41].

FN197. AAPL v. Sri Lanka, at 546 (quoting Alwyn V. Freeman, Responsibility of States for Unlawful Acts of Their Armed Forces, 14 (1957)) [Annex W117; also Annex E-M35].

End of Footnote(s).

85. Even if Egypt did not instigate or participate in the seizure of the two hotels, as Wena claims, [FN198] there is sufficient evidence to find that Egypt was aware of EHC's intentions and took no actions to prevent the seizures or to immediately restore Wena's control over the hotels. As discussed in

section II.C, *supra*, in December 1990, Wena's parliamentary consultant, Mr. Malins, traveled to Egypt expressly to meet with minister Sultan and the Egyptian Minister of the Interior to express Wena's concerns about such a seizure. [FN199] Mr. Malins recounted that "[b]oth Ministers gave me their separate, absolute assurances ... that no violence could or would take place." [FN200] In February 1991, Wena wrote to Minister Sultan, mentioning that EHC was again threatening to repossess the hotels through force:

FN198. The evidence submitted by the parties does suggest a unity of interest between EHC and Egypt such that it is possible that Egypt might have authorized and participated in the seizures of the hotels. The repeated reference in contemporaneous documents to EHC as a "government company," to its money as "public money" and to its rights as "the Government's rights" or "state ownership" is particularly compelling in this regard. See, e.g., Luxor Police State Report No. 959 of 1991, at 8, 12 & 26 (April 1, 1991) [Annex E-M18]; Kasr El-Nile Police Report, at 6 (April 1, 1991) [Annex E-M25]; Letter from Mr. Kamal Kandil (Chairman, EHC) to Mr. Nael El-Faragy (Wena Hotels Ltd.) (March 30, 1991) [Annex W80]; Letter from Mr. Kamal Kandil (Chairman, EHC) to Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) (March 31, 1991) [Annex W129]; Minutes of Meeting between Representatives of the Ministry of Tourism, EHC, and Wena (February 26, 1991) [Sultan Statement, Attachment B; also Annexes E-M22 & W124]. Nevertheless, the Tribunal concludes that Wena has failed to satisfy its burden of proving that Egypt actually participated in the seizures of the two hotels. For example, although both Ms. Jelcic and Mr. Webster believe that Ministry of Tourism officials were present at the Nile Hotel, they both admit that they were, personally, unable to identify any such officials. See, e.g., Jelcic Direct Ex., TR Day 3, at 97:10-13; Webster Direct Ex., TR Day 3, at 14:6-12.

FN199. Malins Direct Ex., TR Day 4, at 175:1-4.

FN200. *Id.*, at 175:26-29. See also Malins Declaration, ¶ 4.

End of Footnote(s).

officials from the Egyptian Hotels Company threatened to storm the hotels and expel us, and this was after our Company had spent the sums previously outlined. The Matter reached a point where the Chairman of the Board of Directors of the Egyptian Hotels Company issued a decision for his company to take possession of the Luxor Hotel without a legal ruling or any other measure [to support his decision]. [FN201]

FN201. Letter from Mr. Nael El-Faragy (Wena Hotels Ltd.) to Minister Fouad Sultan (Minister of Tourism) (February 11, 1991) (emphasis added; brackets in original English translation) [Sultan Statement, Attachment A; also Annexes E- M21 & W127].

End of Footnote(s).

86. Then, on March 21, 1991 (only eleven days before the seizures), Mr. Kandil wrote to Minister Sultan, proposing that, among other things, "the two hotels be taken and the license withdrawn." [FN202] Mr. Kandil closed the letter by advising Minister Sultan: "We leave the matter to you." [FN203] Marginalia, in Minister Sultan's handwriting, confirm that the Minister received and reviewed the letter. [FN204]

FN202. Letter from Mr. Kamal Kandil (Chairman, EHC) to Minister Fouad Sultan (Minister of Tourism) (March 21, 1991) [Sultan Statement, Attachment D; also Annex W126].

FN203. Id.

FN204. Id. (Arabic original). See also Sultan Cross-Ex., TR Day 3, at 235:23- 237:27; Sultan Statement, ¶ 17.

End of Footnote(s).

87. Finally, on March 25, 1991 (only six days before the seizure), Mr. Malins wrote to Minister Sultan asking for another meeting and requesting an understanding from the Minister that no actions would be taken until that meeting could occur: "please confirm what must surely be [sic] right, mainly that all matters be 'absolutely frozen,' with no detrimental action of whatever nature being taken pending our meeting...." [FN205] As evidence of the close coordination between the Ministry of Tourism and EHC, Mr. Kandil (and not Minister Sultan) responded to this letter on March 31, 1991 (the day immediately before the seizures). [FN206] Mr. Kandil ended his letter by threatening that "the owning company will take all necessary measures to protect its rights which is considered a state ownership." [FN207]

FN205. Letter from Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) to Minister Fouad Sultan (Minister of Tourism) (March 25, 1991) [Annex W128].

FN206. Letter from Mr. Kamal Kandil (Chairman, EHC) to Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) (March 31, 1991) [Annex W128].

FN207. Id.

End of Footnote(s).

*913 88. Despite all these warnings, Egypt took no action to protect Wena's investment. Minister Sultan sought to defend Egypt's failure to prevent the seizure by explaining he was not aware that EHC planned to illegally seize the hotels, [FN208] and that "[i]f I had the slightest idea about that incident, I would have immediately stopped it..." [FN209] Even if the Tribunal were to accept this explanation for Egypt's failure to act before the seizures, it does not justify the fact that neither the police nor the Ministry of Tourism took any immediate action to protect Wena's investments after EHC had illegally seized the hotels.

FN208. Sultan Cross-Ex., TR Day 3, at 233:2-5.

FN209. Sultan Cross-Ex., TR Day 3, at 175:9-10.

End of Footnote(s).

89. For example, despite the convincing evidence that a large number of people forcibly seized the Nile Hotel at approximately 7:00 p.m., [FN210] it is undisputed that the Kasr El-Nile police (located only a few minutes away) did not begin an investigation until four hours later and it is not evident that the Ministry of Tourism police (also located nearby) ever responded to Wena's request for assistance. [FN211] Moreover, even after the Kasr El-Nile police began their investigation, they took no steps to remove EHC and restore Wena to control of the hotel. The Luxor police, although more prompt in their response, also declined to expel EHC and restore the Luxor hotel to Wena. [FN212]

FN210. See, e.g., Kasr El-Nile Police Reports (April 1-2, 1991) [Annex E-M25]; Police Statement of Mr. Tamim Foda (July 6, 1991) [Annex W134]; Police Statement of Mr. Mostafa Ahmed Osman (July 6, 1991) [Annex W134]; Police Statement of Mr. Sherif Ibrahim Mohamed Khalifa (July 6, 1991) [Annex W134]; Police Statement of Mr. Mohamed Sabry Ismail Emam (July 6, 1991) [Annex W134]; "British Tourists are Beaten and Thrown Out of Egypt Hotels," Daily Telegraph (April 4, 1991) [Annex W7].

FN211. See Jelcic Direct Ex., TR Day 3, at 97:23-98:13; Webster Direct Ex., TR Day 3, at 16:17-17:12 & 19:8-15; Jelcic Declaration, ¶ 14; Webster Declaration, ¶¶ 30-31; Kasr El-Nile Police Report (April 1, 1991) [Annex E-M25]; Munir Cross-Ex., TR Day 5, at 101:11-12.

FN212. See Police Statement Number 984 (April 2, 1991) [Annex W132]; Police Statement Number 959 (April 1, 1991) [Annex E-J18].

End of Footnote(s).

90. The Ministry of Tourism also failed to take any immediate action to protect Wena's investments. Although he testified that he "was furious" [FN213] at EHC's decision to seize the hotels and that EHC's actions were "wrong," [FN214] Minister Sultan also acknowledged that he did not take any action to return the hotels to Wena, to punish EHC or its officials, or to withdraw the hotel's licenses so that EHC could not operate the hotels. [FN215] Under Law Number 97 of 1983 governing Public Sector Companies and Organizations, Minister Sultan was empowered to dismiss the Chairman and the members of the Board of EHC if "it appears that the continued presence of these persons would affect the proper functioning of the company." [FN216] Also, given its power as the sole shareholder in EHC, [FN217] with several of its senior officials participating in and one of them chairing EHC's shareholder assembly, [FN218] and with "EHC operat[ing] within broad policy guidelines laid down by the Egyptian Government," [FN219] Egypt could have directed EHC to return the hotels to Wena's control and make reparations.

FN213. See, e.g., Sultan Direct Ex. TR Day 3, at 180:19-21 Sultan Cross-Ex., TR Day 4, at 58:12-13.

FN214. See, e.g., Sultan Direct Ex., TR Day 3, at 176:11-14 ("I fully agree that it is a wrong action taken by the EHC, notwithstanding their rights, but they should not have taken that action. They should have gone to arbitration or to the court.").

FN215. See, e.g., Sultan Cross-Ex., TR Day 4 at 57:10-28 & 59:9-61:1.

FN216. Law Number 97 of 1983, art. 37 [Annex W65]. See also Sultan Cross-Ex., TR Day 3, at 214:18-215:11; Munir Cross-Ex., TR Day 5, at 44:4-17.

FN217. Sultan Cross-Ex., TR Day 3, at 227:26-28.

FN218. Id., at 228:2-8.

FN219. Munir Statement, ¶ 4. See also Record of the Lower House Session No. 99, at 36 (July 14, 1992) [Annex W67]; Letter from Mr. Abdel-Moneim Rashad (Director General, Minister's Office -- Ministry of Tourism) to Ms. Angela Jelcic (Wena Hotels Ltd.) (February 20, 1992) [Annex W66].

End of Footnote(s).

91. Instead, neither hotel was restored to Wena until nearly a year later, after decisions by the Chief Prosecutor of Egypt, [FN220] which Wena asserts were only obtained as a result of diplomatic pressure on Egypt. [FN221] Even after the Chief Prosecutor's first decision (concerning the Nile Hotel) was issued on January 16, 1992, in which he found the seizures "illegal," the Ministry of Tourism delayed returning control of the Nile Hotel to Wena. For example, on February 21, 1992, Mr. Webster wrote to the British Embassy in Cairo, complaining of Minister Sultan's "uncooperative stance" and the delays that Wena was experiencing in recovering the hotels: "if he [Minister Sultan] wishes to press settlement of account, then we too will press for settlement of monies outstanding to Wena." [FN222] Mr. Webster concluded his letter by saying that "[w]e are of the impression that the Minister is either poorly informed or part of the entire scheme." [FN223]

FN220. See Munir Direct Ex., TR Day 5, at 31:6-7; Munir Statement, ¶ 22; Yusseri Statement, ¶ 13.

FN221. See, e.g., Farargy Declaration, ¶ 26.

FN222. Letter from Mr. Webster (Wena Hotels Ltd.) to Mr. Ceurvost (British Embassy, Egypt) (February 21, 1991) [Annex W130].

FN223. Id. See also Webster Direct Ex., TR Day 3, at 26:6-16.

End of Footnote(s).

92. Moreover, neither hotel was returned to Wena in the same operating condition that it had been in before the seizures. According to Wena's witnesses, both hotels had been vandalized. [FN224] Although Mr. Munir denied that any such vandalism occurred, he confirmed that EHC had removed and auctioned much of the Nile Hotel's fixtures and furniture. [FN225] Furthermore, neither hotel had a permanent operating license. In fact, just two days before the Nile Hotel was returned to Wena, the Ministry of Tourism withdrew that hotel's operating license because of alleged fire safety violations. [FN226] Although, as Mr. Munir noted, these safety violations had pre-dated EHC's seizure of the hotel in April 1991, [FN227] it is noteworthy that the Ministry of Tourism allowed EHC to operate the Nile Hotel from April 1991 through February 1992, despite these violations, and revoked the license only on February 23, 1992, just prior to restoring the hotel to Wena's control.

FN224. See, e.g., Malins Direct Ex., TR Day 4, at 179:1-20; Webster Direct Ex., TR Day 3, at 26:20-24; Jelcic Direct Ex., TR Day 3, at 109:3-8 & 110:13-22.

FN225. See Munir Cross-Ex., TR Day 5, at 89:3-11; Munir Statement, ¶ 24.

FN226. See Munir Direct Ex., TR Day 5, at 30:10-28; Munir Statement, ¶ 22-23; Police Report on Hand-over of the Nile Hotel (February 25, 1992) [Annex W137].

FN227. Munir Direct Ex., TR Day 5, at 30:10-28.

End of Footnote(s).

93. Egypt also refused to compensate Wena for the losses it had experienced. [FN228] On November 11, 1992, Mr. Malins wrote to the Honorable Lee Hamilton, a senior member of the U.S. House of Representatives, complaining that "the Minister of Tourism, Dr. Fouad Sultan, will not consider our

requests" and that "it is clear that subsequent to any perceived movement, Dr. Sultan personally intervenes to obstruct a solution." [FN229]

FN228. See, e.g., Malins Direct Ex., TR Day 4, at 180:23-181:23.

FN229. Letter from Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) to the Honorable Lee H. Hamilton (Chairman, Subcommittee on Europe & the Middle East, U.S. House of Representatives) (November 11, 1992) [Annex W131].

End of Footnote(s).

*914 94. Finally, neither EHC nor its senior officials were seriously punished for their actions in forcibly expelling Wena and illegally possessing the hotels for approximately a year. Although several representatives of EHC -- including Messrs. Kandil and Munir -- were convicted for their actions, neither Mr. Kandil nor Mr. Munir was sentenced to serve any jail time. Instead, both were fined only EGP 200, which Mr. Munir stated that he has never paid. [FN230] Also, neither official appears to have suffered any repercussions in their careers. As noted above, the Ministry of Tourism chose not to exercise its authority to remove Mr. Kandil as Chairman of ECH and, according to Ms. Jelcic, he currently is serving as an advisor to a senior member of the Egyptian parliament. [FN231] Since the seizures, Mr. Munir has been promoted to become the Head of the Legal Affairs Division at EHC and is expecting a further promotion in the near future. [FN232] This absence of any punishment of EHC and its officials suggest that Egypt condoned EHC's actions.

FN230. See Decision of the Southern Cairo Court of Appeal (January 16, 1994) [Annex W134]; Munir Cross-Ex., TR Day 5, at 94:23.

FN231. Jelcic Redirect Ex., TR Day 3, at 155:22-156:22.

FN232. Munir Cross-Ex., TR Day 5, at 93:20-94:26.

End of Footnote(s).

95. For all of these reasons, the Tribunal concludes that Egypt violated its obligation under Article 2(2) of the IPPA, by failing to accord Wena's investments "fair and equitable treatment" and "full protection and security."

3. Article 5 of the IPPA: Expropriation Without "Prompt, Adequate and Effective" Compensation

96. The Tribunal also agrees with Wena that Egypt's actions constitute an expropriation and one without "prompt, adequate and effective compensation," in violation of Article 5 of the IPPA. That article provides in relevant part that:

(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose related to the internal needs of the Party and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation itself or before there was an official Government announcement that expropriation would be effected in the future, whichever is the earlier, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right

under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of whether the expropriation is in conformity with domestic law and of the valuation of his or its investment in accordance with the principles set out in this paragraph. [FN233]

FN233. IPPA, art 5(1) [Annex W2 & E-J22].

End of Footnote(s).

97. Although, as Professor Ian Brownlie has commented, "the terminology of the subject is by no means settled," [FN234] the fundamental principles of what constitutes an expropriation are well established under international law. For example, as the ICSID tribunal in *Amco Asia v. Indonesia* noted, "it is generally accepted in International Law, that a case of expropriation exists not only when a state takes over private property, but also when the expropriating state transfers ownership to another legal or natural person. [FN235] The tribunal continued by observing that an expropriation "also exists merely by the state withdrawing the protection of its courts from the owner expropriated, and tacitly allowing a de facto possessor to remain in possession of the thing seized...." [FN236]

FN234. Ian Brownlie, *Principles of International Law*, 537 (4th Ed. 1990) [Annex W104]. Professor Brownlie also accurately observes that "in any case form should not take precedence over substance." *Id.*

FN235. *Amco Asia Corporation, et al. v. Republic of Indonesia, Award on the Merits, ICSID Case No. ARB/81/1*, at 62 (1984) [Annex W94].

FN236. *Id.*

End of Footnote(s).

98. It is also well established that an expropriation is not limited to tangible property rights. As the panel in *SPP v. Egypt* explained, "there is considerable authority for the proposition that Contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefore." [FN237] Similarly, Chamber Two of the Iran-U.S. Claims Tribunal observed in the *Tippets* case that "[a] deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected." [FN238] The chamber continued by noting:

FN237. *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3*, 8 ICSID Review 328, 375 (1993) [Annex W61]. See also G.C. Christie "What Constitutes a Taking of Property Under International Law," 38 *Brit. Y.B. Int'l L.* 308, 310-311 (1962) (citing *German Interests in Polish Upper Silesia, Judgement No. 7, PCIJ, Series A (1926)*) [Annex E-M11].

FN238. *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consenting Engineers of Iran et al., Iran-U.S. Claims Tribunal, Award No. 141-7-2*, at 225 (June 22, 1984) [Annex E-M12]. In some legal systems, a lease of land or a building is deemed real property.

End of Footnote(s).

[w]hile assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation *915 under international law, such a conclusion is warranted whenever events demonstrate that the owner has been deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. [FN239]

FN239. Id.

End of Footnote(s).

99. Here, the Tribunal has no difficulty finding that the actions previously described constitute such an expropriation. Whether or not it authorized or participated in the actual seizures of the hotels, Egypt deprived Wena of its "fundamental rights of ownership" by allowing EHC forcibly to seize the hotels, to possess them illegally for nearly a year, and to return the hotels stripped of much of their furniture and fixtures. [FN240] Egypt has suggested that this deprivation was merely "ephemeral" and therefore did not constitute an expropriation. [FN241] The Tribunal disagrees. Putting aside various other improper actions, allowing an entity (over which Egypt could exert effective control) to seize and illegally possess the hotels for nearly a year is more than an ephemeral interference "in the use of that property or with the enjoyment of its benefits." [FN242]

FN240. See generally discussion in section III.B.1, supra.

FN241. See, e.g., Respondent's Memorial on the Merits, at 10-11; Respondent's Rejoinder on the Merits, at 6-8.

FN242. Tippets, at 225 [Annex E-M12]. Such a deprivation easily qualifies as an expropriation within the meaning of Article 3(a) of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, 55 Amer. J. Int'l L. 545 (1961) ("A 'taking of property' includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference." ("as quoted in G.C. Christie "What Constitutes a Taking of Property Under International Law," 38 Brit. Y.B. Int'l L. 308, 330 (1962) [Annex E-M11]).

End of Footnote(s).

100. Moreover, even after the hotels were returned to Wena, Egypt failed to satisfy its obligation under the IPPA, and international norms generally, by refusing to offer Wena "prompt, adequate and effective compensation" for the losses it had suffered as result of Egypt's failure to act. [FN243] For example, as already noted, on November 11, 1992, Mr. Malins wrote to U.S. Congressman Lee Hamilton, complaining that "the Minister of Tourism, Dr. Fouad Sultan, will not consider our requests" and that "it is clear that subsequent to any perceived movement, Dr. Sultan personally intervenes to obstruct a solution." [FN244]

FN243. IPPA, art 5(1) [Annex W2 & E-J22]. See also Ian Brownlie, Principles of International Law, 537 (4th ed. 1990) ("Expropriation of particular items of property is unlawful unless there is provision for payment of effective compensation." [Annex W104].

FN244. Letter from Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) to the Honorable Lee

H. Hamilton (Chairman, Subcommittee on Europe & the Middle East, U.S. House of Representatives) (November 11, 1992) [Annex W131]. See also Malins Direct Ex., TR Day 4, at 180:23-181:23; Letter from Mr. Nael El-Faragy (Wena Hotels Ltd.) to His Excellency, Ambassador Shaker (Egyptian Ambassador to the United Kingdom) (July 9, 1991) (complaining about the apparent breakdown in negotiations between Egypt and Wena) [Annex W50].

End of Footnote(s).

101. For all these reasons, the Tribunal concludes that Egypt violated its obligation under Article 5 of the IPPA, by failing to provide Wena with "prompt, adequate and effective compensation" for the losses it suffered as a result of the seizures of the Luxor and Nile Hotel.

C. Whether Wena's Claims are Time Barred

102. In its Memorial on the Merits, Egypt argues that Wena's claims are time barred under Article 172 (i) of the Egyptian Civil Code. [FN245] This article provides that:

FN245. Respondent's Memorial on the Merits, at 42-44.

End of Footnote(s).

A case filed for damages claimed for an illegal act, shall fall by prescription by lapse of three years from the day the wronged person learns of the damage taking place and of the person who is responsible for it, in all events the case shall fall with the lapse of 15 years from the day the illegal act takes place. [FN246]

FN246. Translation of Article 172(I) of the Egyptian Civil Code (Annex E-M36].

End of Footnote(s).

Egypt also observes that "[e]ven if, contrary to the above, the Tribunal were to refuse to apply Article 172(i), it nevertheless would clearly still have the discretion to determine whether there has been unreasonable delay in the submission of the Claimant's claims to ICSID." [FN247] Finally, Egypt contends that "if Egyptian law is not applied, it would be reasonable ... to have regard to the principles of prescription that are common to both of the Contracting Parties to the IPPA, i.e., in this case, the United Kingdom," noting that the statute of limitation, under the English Limitation Act 1980, for breach of Contract or tortious behavior is six years. [FN248]

FN247. Respondent's Memorial on the Merits, at 43.

FN248. *Id.*, at 44.

End of Footnote(s).

103. Ironically, as Wena notes, Respondent did not previously raise this "time bar" claim in its objections to jurisdiction. [FN249] To the contrary, Respondent asserted, as part of its objections, that Wena's Request for Arbitration was "premature." [FN250]

FN249. Claimant's Reply on the Merits, at 49.

FN250. See, e.g., Respondent's Memorial on Jurisdiction, at 2.

End of Footnote(s).

104. Setting aside this apparent inconsistency, however, the Tribunal sees no legal or equitable reason to bar Wena's claim. First, contrary to Respondent's claim that "Claimant severely compromised the ability of the Respondent to defend itself in these proceedings," [FN251] the Tribunal agrees with Wena that, given the voluminous evidence produced by the parties as well as the extensive testimony provided by several witnesses (in particular, *916 EHC's counsel, Mr. Munir, who showed a remarkable recollection of the case), neither party seems to have been disadvantaged -- which, of course, is one of the equitable reasons for disallowing an untimely claim.

FN251. Respondent's Post-Hearing Memorial, at 25.

End of Footnote(s).

105. Another equitable principle is the notion of "repose" -- that a respondent who reasonably believes that a dispute has been abandoned or laid to rest long ago should not be surprised by its subsequent resurrection. [FN252] Here, however, the Tribunal finds that Wena has continued to be aggressive in prosecuting its claims and that Egypt has had ample notice of this on-going dispute. [FN253]

FN252. See, e.g., Gentini Case, Italy-Venezuela Mixed Claims Commission, X R.S.A. 551, 560-561, (1903) [Annex W147].

FN253. See, e.g., Letter from Mr. Nael Faragy (Wena Hotels Ltd.) to His Excellency Dr. Kamal El Ganzouri (Prime Minister of Egypt) (February 23, 1998) (complaining of Wena's "long and bitter disputes with the Egyptian State over direct foreign investment in Egypt.") [Annex W15].

End of Footnote(s).

106. Second, as Wena notes, municipal statutes of limitation do not necessarily bind a claim for a violation of an international treaty before an international tribunal. In *Alan Craig v. Ministry of Energy of Iran*, Chamber Three of the Iran-U.S. Claims Tribunal declined to apply an Iranian statute of limitation, despite the applicability of Iranian law. [FN254] The tribunal noted:

FN254. *Alan Craig v. Ministry of Energy of Iran*, 3 Iran-U.S. Claims Tribunal 280 (1984) [Annex W155]. See also George Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* 480-482 (1996) [Annex E-M47].

End of Footnote(s).

Municipal statutes of limitation have not been considered as binding on claims before an international tribunal, although such periods may be taken into account by such a tribunal when determining the effect of an unreasonable delay in pursuing a claim. [FN255]

FN255. *Id.*, at 287.

End of Footnote(s).

This general principle was recognized as long ago as 1903 by the Italy- Venezuela Mixed Claims Commission, which held in the Gentini case that, although local statutes of limitation cannot be invoked to defeat an international claim, international tribunals may consider equitable principles of prescription to reject untimely claims. [FN256] Indeed, in the Gentini case, the American Umpire dismissed a thirty-year old claim. As discussed above, however, the Tribunal sees no reason to exercise such discretion in this case, where Egypt has had ample notice of Wena's continued claims and where neither party appears to have been substantially harmed in its ability to bring its case.

FN256. Gentini Case, Italy-Venezuela Claims Commission, X R.S.A. 551 (1903) [Annex W147]

End of Footnote(s).

107. Egypt contends that Article 42(1) of the ICSID Convention mandates that the Tribunal must apply Article 172(i)'s three-year statute of limitation. The Tribunal does not agree. Article 42(1) of the ICSID Convention provides that a Tribunal shall apply domestic law "and such rules of international law as may be applicable." As Wena notes, the decision in the Amco Asia case advised that one situation where a tribunal should apply rules of international law is "to ensure the precedence of international law norms where the rules of the applicable domestic law are in collision with such norms." [FN257] Here, strict application of Article 172(i)'s three-year limit, even if applicable, would collide with the general, well-established international principle recognized since before the Gentini case: that municipal statutes of limitation do not bind claims before an international tribunal (although tribunals are entitled to consider such statutes as well as equitable principles of prescription when handling untimely claims).

FN257. Amco Asia Corporation, et al. v. Republic of Indonesia, ICSID Case No. ARB/81/1, International Arbitration Report 649, 654 (1986) [Annex W102].

End of Footnote(s).

108. Moreover, as discussed in Section III.A, supra, the principal source of substantive law in this case is the IPPA itself. The Tribunal notes that although the IPPA's concise provisions do not contain detailed procedures for bringing an arbitration, Article 8(1) does expressly provide that if a dispute "should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies, through conciliation or otherwise, then," and only then, may a party institute ICSID proceedings. [FN258] This provision suggests a greater concern that the parties not rush into arbitration than that the parties will delay the initiation of proceedings.

FN258. IPPA, art 8(1) [Annexes W2 & E-J22].

End of Footnote(s).

109. Finally, although not necessary to the Tribunal's decision, the Tribunal is not convinced by the interpretation of Egyptian law presented by Respondent. As Respondent's expert noted, normally "[a]ctions for liability for administrative acts are time-barred after fifteen years." [FN259] Article 172(i), to the contrary, is viewed as an "exception to the general principle concerning the statute of limitation [because] it relates to ... unlawful acts." [FN260] Dr. Elehwany reached the conclusion that the normal 15- year prescription did not apply and that the exceptional three-year period of Article 172(i) did, because "what was being attributed to Egypt is liability for the physical acts the police are alleged to

have committed on 1 April 1991 -- namely the storming Nile and Luxor Hotels, the forcible eviction of the hotel guests and staff, the theft of cash, the detention of employees, the wrecking of everything...." [FN261]

FN259. Legal opinion of Dr. Hossam Al' din Kamil Elehwany, at 23 (September 1999) [Annex E-M8].

FN260. Id.

FN261. Id., at 25 (emphasis added).

End of Footnote(s).

*917 110. Of course, as Egypt argued on the merits, and the Tribunal agrees, it has not been demonstrated that the police physically participated in the seizure of the hotels. As discussed in section III.B., supra, Egypt's liability does not arise from physical acts by the police, but from Egypt's failure to accord Wena's investments as required by IPPA, "full protection and security" -- by failing to prevent or immediately reverse EHC's physical acts. Such failure to provide legal protection would appear to constitute the typical administrative act for which the normal, fifteen-year prescription period applies. Thus, Egypt's response to the contention that it failed to provide "full protection and security" is inadequate.

D. Consultancy Agreement with Mr. Kandil

111. Finally, the Tribunal considers Egypt's contention that "Claimant improperly sought to influence the Chairman of EHC with respect to the award of the leases" for the Luxor and Nile hotels. [FN262] If true, these allegations are disturbing and ground for dismissal of this claim. As Egypt properly notes, international tribunals have often held that corruption of the type alleged by Egypt are contrary to international bones mores. [FN263] However, as Professor Lalive notes, "the delicate problems remains" for an arbitral tribunal "to determine precisely where the line should be drawn between legal and illegal contracts, between illegal bribery and legal 'commissions.'" [FN264]

FN262. Respondent's Post-Hearing Memorial, at 15.

FN263. See, e.g., Professor Ibrahim Fadlallah, *L'ordre public dans les sentences arbitrales*, Académie de Droit International, Recueil des Cours, 377 (1994-V); Professor Pierre Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," ICCA Congress Series, No. 3, 276-277 (1987) [Annex E-M10].

FN264. Lalive, at 277 [Annex E-M10].

End of Footnote(s).

112. As noted above in section II.H (paragraphs 70-74), it is undisputed that Wena and Mr. Kandil entered into an agreement in August 1989, that the purpose of the agreement was for Mr. Kandil "to give advice and assistance to the company as to opportunities available to the company for developing its hotel business in Egypt," [FN265] that between August 18, 1989 and January 30, 1990 Wena made a total of GB£ 52,000 in payments to Mr. Kandil, and that on March 26, 1991, Wena initiated a lawsuit against Mr. Kandil for allegedly breaching the agreement. [FN266]

FN265. Consultancy Agreement between Mr. Kamal Kandil and Wena Hotels Limited [Annex W149].

FN266. Writ of Summons issued by Wena Hotels Limited against Mr. Mohamed Kamal Ali Mohamed Kandil (March 26, 1991) [Annex E-M7].

End of Footnote(s).

113. Egypt notes that, coincidentally, the first payment (on August 18, 1989) was ten days after the execution of the Luxor Hotel lease and that the last payment (on January 30, 1990) was two days after the signing of the Nile Hotel lease. It also observes that the amount paid to Mr. Kandil exceeds that which would have been authorized under the consultancy agreement.

114. Wena, however, contends that the agreement did not concern the Nile and Luxor hotels, but was to help Wena pursue development opportunities in Misr Aswan, where Mr. Kandil was a tourist consultant. This assertion is supported by both Mr. Kandil's response to Wena's March 1991 lawsuit, [FN267] as well as the letters Wena has submitted from December 1989 and January 1990, evincing its interest in the Abou Simbal and Aswan City developments in Misr Aswan. [FN268]

FN267. Letter from Mr. Kamal Kandil to the Senior Master of the Royal Court of Justice (August 19, 1991) [Annex W150] (the "subject of the above-mentioned Draft Contract was to develop new hotels in Egypt, these hotels being the Ramses Village project in Abou Simbal and a Conference Center in Aswan city.... I did not act in my quality of Chairman of the Egyptian Hotels Company nor did the Draft Contract concern either the Nile Hotel or the Luxor Hotel, instead I acted as Tourist Consultant for the Aswan Government and Chairman of the Board of Directors of Misr Aswan Tourist Co.").

FN268. Facsimile from Mr. Dimopolous (Wena Hotels Ltd.) to Mr. Kamal Kandil (Chairman, EHC) (December 13, 1989), enclosing letter from Mr. Nael El-Faragy (Wena Hotels Ltd.) to his Excellency, the Governor of Aswan (December 11, 1989) [Annex W188]; letter from Mr. Nael El-Faragy (Wena Hotels Ltd.) to his Excellency, the Governor of Aswan (January 15, 1990) [Annex W189].

End of Footnote(s).

115. Wena also noted that according to Mr. Yusseri, the Luxor lease was awarded to Wena in a competitive bid with another investor, with Wena winning the lease because it agreed to pay a higher rent. [FN269] Finally, Mr. Faragy testified that the Egyptian government was aware of the agreement that Mr. Kandil "offered his help and assistance officially above board with their knowledge." [FN270]

FN269. Yusseri Direct Ex., at 4:3-11.

FN270. Faragy Direct Ex., TR Day 1, at 142:27-28. See also Faragy Direct Ex., TR Day 1, at 142:26-143:6.

End of Footnote(s).

116. Although the Tribunal believes Minister Sultan's testimony that he was not personally aware that "Mr. Kandil was an agent to Faragy" and that when he did learn about it, "I passed that to the prosecutor requesting a full fledged investigation," [FN271] it is undisputed that Mr. Kandil was never prosecuted in Egypt in connection with this agreement. [FN272] Regrettably, because Egypt has failed to present the Tribunal with any information about the investigation requested by Minister Sultan, the Tribunal does not know whether an investigation was conducted and, if so, whether the investigation

was closed because the prosecutor determined that Mr. Kandil was innocent, because of lack evidence, or because of complicity by other government officials. Nevertheless, given the fact that the Egyptian government was made aware of this agreement by Minister Sultan but decided (for whatever reasons) not to prosecute Mr. Kandil, the Tribunal is reluctant to immunize Egypt from liability in this arbitration because it now alleges that the agreement with Mr. Kandil was illegal under Egyptian law.

FN271. Sultan Direct Ex., TR Day 3, at 188:11-14.

FN272. See, e.g., Claimant's Post-Hearing Reply, at 16; Respondent's Post- Hearing Memorial, at 14.

End of Footnote(s).

*918 117. Moreover, with the exception of the coincidence in the timing of the payments and the signing of the Luxor and Nile hotels (and the apparent over-payment of Mr. Kandil), the Tribunal notes that Egypt -- which bears the burden of proving such an affirmative defense -- has failed to present any evidence that would refute Wena's evidence that the Contract was a legitimate agreement to help pursue development opportunities in Misr Aswan. Nor did either party offer to present live testimony from Mr. Kandil.

IV. DAMAGES

118. Article 5 of the IPPA between Egypt and the United Kingdom provides that in the event of an expropriation, the private investor shall be entitled to "prompt, adequate, and effective compensation" and "such compensation shall amount to the market value of the investment immediately before the expropriation." [FN273] The Tribunal shall apply this standard to the determination of damages.

FN273. IPPA, art. 5 [Annexes W2 & E-J22].

End of Footnote(s).

119. Altogether Wena claims damages of GB£ 20.4 million for lost profits, GB£ 22.8 million for lost opportunities and GB£ 2.5 million for reinstatement costs, making a total of GB£ 45.7 million. [FN274] In addition, it seek interest on the previous sum and makes a claim of US\$ 1,251,541 for counsel fees and costs of experts and witnesses incurred in pursuing its claim. [FN275]

FN274. Claimant's Post-Hearing Brief, at 67.

FN275. Id., at 68; Claimant's Statement of Fees and Expenses [Annex W194].

End of Footnote(s).

120. In the alternative, Wena claims US\$8,819,466.93 as the amount of its investment in the Egyptian hotel venture. [FN276]

FN276. Claimant's Post-Hearing Brief, at 67 & n. 64; Claimant's Post-Hearing Reply, at 36.

End of Footnote(s).

121. The Respondent disputes these requests, contending that the claims summarized in paragraphs

119-120 are inappropriate and greatly overstated. [FN277] In the alternative, the Respondent suggest that if anything were awarded for damages it should be the amount of Wena's investment in the Egyptian hotel venture, which, according to Respondent's expert, could not be more than GB£ 750,000. [FN278]

FN277. Respondent's Post-Hearing Memorial, at 25-42; Respondent's Post-Hearing Rebuttal Memorial, at 22-34.

FN278. Respondent's Post-Hearing Memorial, at 43; Respondent's Post-Hearing Rebuttal Memorial, at 34; Provisional Evaluation of Lost Investment and Review of Financial Information prepared by Pannell Kerr Forster, attached to Respondent's Rejoinder on the Merits; Direct Examination of Mr. Hugh Matthew Jones, TR Day 4, at 135:12-15.

End of Footnote(s).

122. Although experts presented by each party adopted variations of the well- known discounted cash flow ("DCF") method of calculating the amount of the damages sustained by Wena, the experts reached widely varying results from their calculations. [FN279] Since, however, the Tribunal is not persuaded that the DCF method is appropriate in this case, it deems it unnecessary to enter into a detailed discussion of the differences that the experts' calculations disclosed.

FN279. See Expert Report prepared by BDO Hospitality Consulting, attached to Claimant's Memorial on the Merits (calculating a profit of GB£ 4 million for the Luxor Hotel and a profit of GB£ 21.3 million for the Nile Hotel); Reports for El-Nile and Luxor Hotels prepared by Pannell Kerr Forster, attached to Respondent's Post-Hearing Memorial (calculating a profit of less than GB£ 10,000 for the Luxor Hotel and an actual loss for the Nile Hotel).

End of Footnote(s).

123. The Tribunal agrees with Egypt that, in this case, Wena's claims for lost profits (using a discounted cash flow analysis), lost opportunities and reinstatement costs are inappropriate--because an award based on such claims would be too speculative. As another ICSID panel recently noted in the Metalclad decision:

Normally, the fair market value of a going concern which has a history of profitable operation may be based on an estimate of future profits subject to a discounted cash flow analysis. However, where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value. [FN280]

FN280. Metalclad Corporation v. United Mexican States, ¶¶ 119-120, ICSID Case No. ARB(AF)/97/1 (2000) (internal citation omitted). The Metalclad award is publicly available from the U.S Securities Exchange Commission, Washington, D.C. 20549, and electronically at <http://www.edgar-online.com>, as an attachment to an 8-K filing of September 5, 2000 by Metalclad Corporation. See also Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, 8 ICSID Review 328, 381 (1993) [Annex W61] ("In the Tribunal's view, the DCF method is not appropriate for determining the fair compensation in this case because the project was not in existence for a sufficient period of time to generate the data necessary for a meaningful DCF calculation.").

End of Footnote(s).

Similarly, the ICC panel in the SPP (Middle East) v. Egypt arbitration case declined to accept a discounted cash flow projection because, inter alia, "by the date of cancellation the great majority of the work had still to be done," and "the calculation put forward by the Claimants produces a disparity between the amount of the investment made by the Claimants" and the "supposed value" of the investment as calculated by the DCF analysis. [FN281]

FN281. SPP (Middle East) Ltd. (Hong Kong), et al. v Arab Republic of Egypt, ¶ 65, Appendix IV of ICC Arbitration (1983) [Annex E-M38].

End of Footnote(s).

124. Like the Metalclad and SPP disputes, here, there is insufficiently "solid base on which to found any profit ... or for predicting growth or expansion of the investment made" by Wena. [FN282] Wena had operated the Luxor Hotel for less than eighteen months, and had not even completed its renovations on the Nile Hotel, before they were seized on April 1, 1991. In addition, there is some question whether Wena had sufficient finances to fund its renovation and *919 operation of the hotels. [FN283] Finally, the Tribunal is disinclined to grant Wena's request for lost profits and lost opportunities given the large disparity between the requested amount (GB£ 45.7 million) and Wena's stated investment in the two hotels (US\$8,819,466.93). [FN284]

FN282. American Manufacturing & Trading, Inc. v Republic of Zaïre, ICSID Case No. ARB/93/1, at 28 (1997) [Annex W115].

FN283. See, e.g., Review of Financial Information prepared by Pannell Kerr Forster, attached to Respondent's Rejoinder on the Merits.

FN284. Approximately GB£ 6 million at current exchange rates.

End of Footnote(s).

125. Rather, the Tribunal agrees with the parties that the proper calculation of "the market value of the investment expropriated immediately before the expropriation" [FN285] is best arrived at, in this case, by reference to Wena's actual investments in the two hotels. As noted above, Wena pleads in the alternative for award of at least the amount of Wena's proven investment in the Egyptian hotel venture. Similarly, Respondent pleads in the alternative that if any award were made it should not be more than the amount of Wena's proven investment.

FN285. IPPA, art. 5 [Annexes W2 & E-J22].

End of Footnote(s).

126. The Tribunal is not persuaded by the relevance of the Respondent's contention that much of the Egyptian investment came from affiliates of Wena rather than from Wena. Instead the panel takes the view that whether the investments were made by Wena or by one of its affiliates, as long as those investments went into the Egyptian hotel venture, they should be recognized as appropriate investments. The panel was persuaded from the testimony it received that it is a widely established practice for hotel enterprises to adopt allocation measures, which spread the profits from the group operations into various jurisdictions where there are tax advantages to the group as a whole.

127. On the basis of investment, Claimant states its loss as US \$8,819,466.93. However, the panel in pursuing an objection raised by the Respondent that there were certain elements of double counting, [FN286] decided that the gross figure should be diminished by US\$322,000.00 to eliminate probably double counting in certain instances. Beyond that, however, the panel was not persuaded by Respondent's evidence that there were significant other instances of double counting. Thus, the figure of US\$8,819,466.93 should be diminished by US\$322,000.00, leaving a total of US\$8,497,466.93, which the Tribunal judges to be the approximate total for Wena's investment. From this, the Tribunal agreed that \$435,570.38 should be deducted for the amount received already by Claimant as a result of the Egyptian arbitration award (the equivalent of EGP 1,477,498.30 at the exchange rate of \$1 = EGP 3.3921 on June 9, 1997, the date of payment of the Egyptian award). [FN287]

FN286. See Provisional Evaluation of Lost Investment, ¶¶ 2.2-2.3 & 2.8, attached to Respondent's Rejoinder on the Merits.

FN287. Check drawn in Wena' favor by the Egyptian Ministry of Justice [Annex W93].

End of Footnote(s).

128. To this should be added an appropriate sum for interest. Claimant has claimed interest but neither specified a rate nor whether interest should be compounded. [FN288] Moreover, the IPPA, the lease agreements, and the ICSID Convention and Rules are all silent on the subject of interest. The Panel is of the view that in this case interest should be awarded and that it would be appropriate to adopt a rate of 9%, to be compounded quarterly. [FN289]

FN288. Claimant's Post-Hearing Brief, at 68.

FN289. Report for El-Nile Hotel prepared by Pannell Kerr Forster, at 18, attached to Respondent's Post-Hearing Memorial ("Long-term government bonds in Egypt are currently yielding 10%....").

End of Footnote(s).

129. Like the distinguished panel in the recently-issued Metalclad decision, this Tribunal also has determined that compounded interest will best "restore the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place." [FN290] Although the Metalclad tribunal awarded compound interest without comment, this panel feels that a brief explanation of its decision is warranted. [FN291] This Tribunal believes that an award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations. As Professor Gotanda has observed "almost all financing and investment vehicles involve compound interest.... If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest." [FN292] For similar reasons, Professor Mann has "submitted that ... compound interest may be and, in absence of special circumstances, should be awarded to the claimant as damages by international tribunals." [FN293]

FN290. Metalclad Corporation v. United Mexican States, ¶ 128, ICSID Case No. ARB(AF)/97/1 (2000).

FN291. As several authorities have noted, "virtually all monetary judgements ... contain rulings on interest," and yet, this decision to award interest is often made without any discussion. See, e.g., J.

Gillis Wetter, Interest as an Element of Damages in Arbitral Process, 5 Int'l Fin. L. Rev. 20 (1986); F.A. Mann, Compound Interest as an Item of Damage in International Law, 21 Univ. of California, Davis L. J. 577, 578 (1988).

FN292. John Y. Gotanda, Awarding Interest in International Arbitration, 90 Amer. J. Int'l L. 40, 61 (1996).

FN293. F.A. Mann, Compound Interest as an Item of Damage in International Law, 21 Univ. of California, Davis L. J. 577, 586 (1988). See also *id.*, at 585 ("In this spirit it is necessary first to take account of modern economic conditions. It is a fact of universal experience that those who have a surplus of funds normally invest them to earn compound interest. On the other hand, many are compelled to borrow from banks and therefore must pay compound interest. This applies, in particular, to business people whose own funds are frequently invested in brick and mortar, machinery and equipment, and whose working capital is obtained by way of loans or overdrafts from banks."); *Starrett Housing Corp. v. Iran*, 16 Iran-U.S. Claims Tribunal 112, 251-254 (1987) (Holtzmann, concurring).

End of Footnote(s).

130. Thus, the total, with interest through December 1, 2000 (US \$11,431,386.88) is US\$19,493,283.43. To this figure there should be added an appropriate sum to reimburse Claimant for attorney's fees and related costs, as reparation for losses sufficiently related to its central claims and in keeping with common practice in international arbitration. It will be recalled that the Tribunal, in its Decision on Jurisdiction, rejected Wena's claims for costs incurred in rebutting Egypt's objections to jurisdiction. [FN294] Accordingly, the Tribunal shall only reimburse Claimant for that portion of its attorney's fees and costs incurred in presenting the merits of this arbitration. Wena has claimed *920 US\$1,107,703 for these expenses. [FN295] Thus, including the Claimant's attorney's fees and costs, the grand total to be awarded Claimant is US\$20,600,986.43. This award will be payable within 30 days from the date hereof. Thereafter, it will accumulate additional interest at 9% compounded quarterly until paid.

FN294. Tribunal's Decision on Jurisdiction, at 9 (released on June 29, 1999).

FN295. Claimant's Statement of Fees and Expenses as of June 13, 2000 (Annex W194); letter from Mr. John Savage (Counsel for Wena) to Mr. Alejandro Escobar (Secretary to the Tribunal) (November 21, 2000).

End of Footnote(s).

V. CONCLUSION

131. In sum, the Tribunal concludes that Egypt breached its obligations under Article 2(2) of the IPPA by failing to accord Wena's investments in Egypt "fair and equitable treatment" and "full protection and security." Even if the Egyptian Government did not authorize or participate in the attacks, its failure to prevent the seizures and subsequent failure to protect Wena's investments give rise to liability. The Tribunal also finds that Egypt's actions amounted to an expropriation -- transferring control of the hotels from Wena to EHC without "prompt, adequate and effective compensation" in violation of Article 5 of the IPPA.

132. The Tribunal also dismisses the two affirmative defenses raised by Egypt. First, the Tribunal does not agree with Egypt's contention that Wena's claims are time barred. Second, although Egypt has

raised some disturbing allegations regarding payments made to Mr. Kandil, the Tribunal finds that Egypt has failed to meet its evidentiary burden of proving that these payments were illegitimate.

VI. THE OPERATIVE PART

133. For these reasons

THE TRIBUNAL, unanimously,

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

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

and

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

/s/

Prof. Ibrahim Fadlallah

/s/

Prof. Don Wallace, Jr.

/s/

Monroe Leigh, Esq.

Statement of Professor Don Wallace, Jr.

Professor Wallace concurs in the Tribunal's entire award and is persuaded that compound interest should be awarded. However, he is not persuaded that compounding should be quarterly.

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