Award of 20 May 1992 in case no. ARB/84/3

Arbitrators: Dr. Eduardo Jiménez de Aréchaga (Uruguay), president; Dr. Mohamed Anim El Mahdi (Egypt), dissenting; Robert F. Pietrowski Jr. (US)

Parties: Claimants: Southern Pacific Properties (Middle East) Limited (Hong Kong) and Southern Pacific Properties Limited (Hong Kong); Respondent: The Arab Republic of Egypt

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Subject matters:
- applicable law
- status of claimants under Law No. 43 of 1974
- awfulness and legal nature of measures taken by Respondent to cancel the investment project
- quantum and basis for calculation of compensation

Facts

[...]

42. “On 23 September 1974, a contract entitled ‘Heads of Agreement’ was entered into by the Respondent (represented by the Minister of Tourism), the Egyptian General Organization for Tourism and Hotels (‘EGOTH’) and SPP, a company engaged in the development of tourist and resort facilities. EGOTH was at the time a public sector enterprise under the control of the Minister of Tourism, organized under Egyptian Law No. 60 of 1971.

43. “The Heads of Agreement by its terms was entered into in accordance with certain Egyptian laws, including Law No. 43 of 1974 Concerning the Investment of Arab and Foreign Funds and the Free Zones. In the Heads of Agreement, EGOTH and SPP undertook to incorporate an Egyptian joint venture company to develop tourist complexes at the Pyramids area near Cairo and at Ras El Hekma on the Mediterranean coast. These projects were to be developed
according to detailed 'master plans' which were to be prepared by SPP and approved by EGOHT. The Ministry of Tourism agreed to secure the title to property and the possession of land necessary for the development of the proposed projects. The Ministry and EGOHT undertook to transfer the right of usufruct for such property to the joint venture company as part of the capital investment. They also undertook to assist in obtaining all necessary local approval for the execution of the projects in accordance with the master plans. SPP, for its part, agreed to obtain the necessary financing for the projects and to provide or arrange for all technical expertise required for the design, construction, management and marketing of the projects.

(....)

46. "On 12 December 1974, a contract entitled 'Agreement for the Development of Two International Tourist Projects in Egypt' ('the December Agreement') was concluded between EGOHT and SPP .... Art. 1 of the December Agreement provided for the formation of a joint venture company - the Egyptian Tourist Development Company ('ETDC') -- to develop tourist complexes at the Pyramids and Ras El Hekma sites:....

47. "SPP agreed in Art. 3 of the December Agreement to arrange for the financing of the projects:....

48. "Art. 4 provided that the development and management of the projects would be undertaken by ETDC:

'within the general limits described in the maps attached to the Heads of Agreement, and in general accord with the Confidential Report, and as detailed in the Master Plans to be prepared ....'

49. "With respect to the rights of usufruct that were to represent EGOHT's "'capital contribution to the joint venture, Art. 5 of the December Agreement stipulated that EGOHT would:

'use its best efforts to secure all the necessary Government approvals to enable ETDC the immediate possession of the land in both sites, and to ensure the transfer of the rights of usufruct to ETDC for its duration ....'

and Art. 6 provided:

'EGOTH will pass irrevocably the right of usufruct to ETDC for its duration immediately EGOHT receives title. ETDC shall be free to assign its right of usufruct and to rent, lease, manage, promote or assign any site, construction, recreational, residential or commercial facilities in both local and foreign markets, provided that they are developed and utilized in accordance with approved plans, but excluding the monument areas and those which are designated for public use within the project sites.'

50. "The December Agreement also provided in Art. 17 that SPP would incorporate a holding company to own its shareholding in the joint venture .... [A]n assignment was subsequently made to SPP(ME), a wholly-owned subsidiary of SPP formed in 1974 to undertake the execution of the projects at the Pyramids and Ras El Hekma sites.

(....)

54. "By a letter dated 12 April 1975, the General Organization for Invest-

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ment of Arab Capital and Tax-Free Areas ('the GIA') notified SPP that the GIA's Board of Directors, by Decree No. 30/16-75, had approved the application for the establishment of a joint venture between EGOHT and SPP for the development of the tourist areas at the Pyramids and Ras El Hekma sites ....

55. "On 22 May 1975, the President of Egypt issued Decree No. 475 of 1975 which provided:
'The lands lying on each of the plateau of the pyramids and Ras-El-Hekma and whose features and dimensions are determined on the map and in the attached memorandum are assigned for the touristic utilization and the General Egyptian establishment for Tourism and Hotels itself or through one of its contributing companies will reconstruct and utilize these two areas.'

56. "On 19 October 1975, EGOTH as sole owner of the sites specified in Presidential Decree No. 475 transferred its right of usufruct for the sites 'irrevocably' and 'without restriction of any kind' to ETDC for the life of the joint venture.

57. "On 23 November 1975, EGOTH and SPP(ME) signed a contract entitled 'Preliminary Agreement of Incorporation' which provided for the incorporation of ETDC in conformity with Law No. 1 of 1973 Concerning Tourist Establishments and Law No. 43 of 1974. The incorporation of ETDC was subsequently authorized by Ministerial Decree No. 212 of 1975, issued by the Ministry of Economy and Economic Cooperation on 4 December 1975. This decree stated in its preamble that it was issued in conformity with *inter alia* 'the [GIA] Board of Directors' Resolution No. 50/15/1975 at the session of 20 July 1975; and the memorandum of the Deputy Chairman of the General Authority for Arab Investment dated 1 December 1975'.

58. "By a letter dated 1 April 1976, the Chairman of EGOTH notified the Chairman of ETDC of the 'formal approval of the MT [Ministry of Tourism] and EGOTH of the Pyramids Oasis Project as a whole ....'"

59. "On 19 October 1976, the Minister of Tourism wrote to the Chairman of ETDC, stating:

'I am writing to confirm my formal approval of the development and construction of your project pursuant to all terms of Law No. 2 of 1973.

This approval entitles you to proceed with your programme without the necessity of further reference to this Ministry.'

60. "On 1 June 1977, the Ministry of Tourism issued Decree No. 96 of 1977. Art. 1 of this decree provided:

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'The Ministry of Tourism approves the master planning for the tourist Pyramids Plateau Area, as well as the detailed planning of the first phase regarding the implementation of villages nos 1, 3 and 21 of the project of exploiting the tourist Giza Pyramids Plateau ....'

61. "Construction began at the Pyramids site in July of 1977. Roads were laid, water and sewage trunk mains were installed, excavation for artificial lakes and a golf course was undertaken, and work on the main water reservoir was nearly completed. Planning was completed for the Pyramids Oasis George V Hotel, as were the designs for the second hotel. In addition, ETDC Sold 386 lots on which villas and multi-family accommodations were to be built, for a total of US$ 10,211,000.

62. "In late 1977, the Pyramids Oasis Project began to encounter political opposition in Egypt and it became the subject of a parliamentary inquiry. Opponents of the project claimed that it posed a threat to undiscovered antiquities.

63. "In a decree issued on 27 May 1978, the Ministry of Information and Culture declared the Land surrounding the Pyramids to be 'public property (Antiquity)'. This decree was issued upon the recommendation of the Egyptian Antiquities Authority, which confirmed the presence of antiquities in the western Part of the A1 Giza Pyramids region.

64. "On 28 May 1978, the GIA withdrew its approval of the Pyramids Oasis Project by Resolution No. 1/51-78:

'As a result of the Decree of the Minister of Culture and Information dated 28/5/78, considering the Pyramids Plateau one of the monumental areas, and accordingly the nature of the land had changed to be a public domain owned by the State as public property, it is impossible legally to implement this project on this land.'
The Board of Directors of the General Investment Authority decided to drop its former issued agreement No. 50/19-75, dated 20 July 1975, concerning the Pyramids Plateau, for the impossibility of executing this project on the Plateau, thus, according to the decree of the Minister of Culture and Information.

65. “On 19 June 1978, Presidential Decree No. 267 was issued, cancelling Presidential Decree No. 475, which had declared that the Lands on the Pyramids Plateau would be used for ‘tourist utilization’. On 11 July 1978, the Prime Minister issued a decree declaring these same Lands d'utilité publique.

66. “At the request of EGO, ETDC was put under judicial trusteeship by a judgment of the Giza Court for Urgent Matters rendered on 19 June 1978. The Court appointed trustees who were put in charge of the management of the company's assets until a general meeting of the shareholders could take place.”

Excerpt

[...]

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[...]

The Quantum of Compensation

179. "... The Claimants have put forward three alternative claims for compensation. First, they claim the following amounts (‘the primary Claim’) as the value of their Investment in ETDC at the time the project was cancelled:

1. the value of the Investment in ETDC computed at US$ 41,000,000, or such other sum as the Tribunal may award, on the basis of (i) the DCF methodology and/or (ii) the share sales to the Saudi Princes; and

2. the amount of the loan to ETDC, amounting to US$ 1,650,000; and

3. post-cancellation costs for 1978 and 1979, amounting to US$ 623,000; and

4. post-cancellation, legal, audit and arbitration costs from 1980 to 1990, amounting to US$ 5,108,000;

... together with interest to 31 August 1990

(a) on the value of the Investment ((1) herein) at 12.6 percent compounded annually, amounting (on a value of US$ 41,000,000) to US$ 125,000,000; and

(b) on ((3) herein) at 12.6 percent compounded annually, amounting to US$ 1,874,000; and

(c) on the loan to ETDC ((2) herein) at the contractual rate, amounting to US$ 6,931,000,

... plus further interest to the date of the Award.
180. "Alternatively and subsidiarily, the Claimants submit that they should be awarded the following compensation (the alternative claim) for the value of their investment in ETDC at the time the project was cancelled:

(1) the amount of the loans to ETDC, amounting to US$ 1,650,000; and

(2) further monies lent at no interest to ETDC, amounting to US$ 408,000; and

(3) the capital invested, amounting to US$ 1,310,000; and

(4) development costs pre-cancellation, amounting to US$ 2,254,000; and

(5) post-cancellation costs for 1978 and 1979, amounting to US$ 623,000; and

(6) post-cancellation legal, audit and arbitration costs from 1980 to 1990, amounting to US$ 5,108,000; and

(7) such additional amount as shall be fixed by the Tribunal to compensate for the loss of the chance or opportunity of making a commercial success of the project;

... together with interest to 31 August 1990

a. on the loan to ETDC ((1) herein) at the contractual rate, amounting to US$ 6,931,000; and

b. on ((3) herein) at 12.6 percent, compounded annually, amounting to US$ 4,303,000; and

c. on ((4) herein) at 12.6 percent, compounded annually, amounting to US$ 7,404,000; and

d. on ((5) herein) at 12.6 percent, compounded annually, amounting to US$ 1,874,000,

plus further interest to the date of the Award.

181. "As a further alternative and subsidiary claim, the Claimants claim only their out-of-pocket expenses ('the further subsidiary claim'). This further subsidiary claim is identical to their alternative claim except that it does not request compensation for the loss of the opportunity to make a commercial success of the project.

182. ".... While the Claimants maintain that they are entitled to compensation for the 'repudiation and taking' of their contract rights, they do not claim damages for breach of contract. Rather, they characterize their claim as follows:

to it by the ARE's exercise of its sovereign powers, which destroyed its property rights (including its contract rights).'

(...)

(i) The DCF Approach
184. "The Claimants contend that the measure of compensation for taking of an ongoing enterprise should be equal to the value of the enterprise at the time of the taking, and that such value depends on the revenues that the enterprise would have generated had the taking not occurred. In quantifying this value, the Claimants rely primarily on the so-called 'discounted cash flow' (DCF) method. This method is intended to determine the present value of the future earnings expected to be generated by an investment. In applying the DCF method, the Claimants have just estimated the net revenue that would have been earned over the initial eighteen-years period of development, and then discounted that revenue flow to a present value, which, according to Claimants, represents the value of SPP (ME)'s rights as of 28 May 1978 - the date when the project was cancelled.

(....)

186. "The Respondent contests the applicability of the DCF method on the grounds that it leads to speculative results and takes no account of the real value of the expropriated assets. In particular, the Respondent contends that in the present case the project was not sufficiently developed to yield the data necessary for a meaningful DCF analysis.

187. "The Respondent has also submitted an expert opinion to the effect that the DCF method of valuation is unsuitable in this case because of the inherent uncertainties of the project and the fragility of a calculation which depends on forecasting cash flows almost twenty years into the future on the basis of revenues generated over a period of little more than a year. The Respondent has also cited the earlier ICC award in this case, where the tribunal refused to apply the DCF method on the ground that when the project was cancelled 'the great majority of the work had still to be done.' Finally, the Respondent argues that the DCF method would lead to unjust enrichment of the Claimants.

188. "In the Tribunals view, the DCF method is not appropriate for determining the fair compensation in this case because the project ... was in its infancy and there is very little history on which to base projected revenues.

189. "In these circumstances, the application of the DCF method would, in the Tribunals view, result in awarding 'possible but contingent and undeterminate [sic] damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account'. (Chorzow Factory case, Series A, No. 17 (1928) at p. 51). As the tribunal in the Amoco case observed:

‘One of the best settled rules of the law an international responsibility of States is that no reparation for speculative or uncertain damages can be awarded.’ (op. cit., para. 238.)

190. "Quite apart from the inadequacy of the underlying data, there is a second reason why the Claimants' DCF approach must be rejected in the present case: the Claimants' DCF approach would in effect award lucrums cessans through the year 1995 on the assumption that lot sales would have continued through that year. Yet lot sales in the areas registered with the World Heritage Committee under the UNESCO Convention would have been illegal under both international law and Egyptian law after 1979, when the registration was made....

191. ".... From that date forward,... any profits that might have resulted from such activities are consequently non-compensable."

(ii) The Share Transactions

192. "To confirm the value indicated by their DCF calculations, the Claimants rely on certain transactions in SPP(ME) shares. These transactions include: (1) the sale in 1976 of 12,500 shares (25 percent of SPP(ME)) to two members of the Saudi Arabian royal family at US$ 700 a share; (2) an offer by a third member of the Saudi Arabian royal family to purchase 7,500 shares at US$ 850 a share; and (3) the repurchase by SPP(ME) of certain of its shares at prices ranging from US$ 598 per share to US$ 630 per share."

197. "In the Tribunals view, the purchase and sale of an asset between a willing buyer and a willing seller should, in principle, be the best indication of the value of the asset. This is certainly true in the case of a perfectly competitive market having many buyers and sellers in which there are no external controls or internal monopolistic arrangements. In the present case, however, there was a very limited number of transactions and there was no market as such for the shares that were sold. The price at which the shares were sold was privately negotiated. In these circumstances, the Tribunal does not believe that the share transactions can be used to accurately measure the value of SPP(ME)'s investment in..."
(iii) The Fair Measure of Compensation

198. "The Tribunal will turn now to the Claimant's alternative claim for compensation, which is essentially a claim for 'out-of-pocket' expenses plus an amount to compensate the Claimants for what they have called 'the loss of the opportunity to make a commercial success of the project'. There is no question that considerable amounts of time and money were spent on negotiating, planning and implementing the project. SPP(ME) made capital contributions and loans to ETDC, the amounts of which are not disputed by the Respondent. In the Tribunal's opinion, these amounts must be reimbursed as part of the fair compensation to which the Claimants are entitled. In addition, the evidence shows that, when the project was cancelled, construction was under way and considerable marketing activity had been carried out. To the extent that the expenses associated with this activity have been proven, the Tribunal is of the view that reimbursement of such expenses is also part of the fair compensation to which the Claimants are entitled.

199. "The Capital Contributions and Loans. From the record it is evident that there is no dispute as to the amounts of the capital contributions and loans made by SPP(ME) to ETDC....

200. "Development Costs. The Claimants submit that they are entitled to be reimbursed for pre-cancellation development costs of US$ 2,254,000 and post-cancellation costs of US$ 623,000. These costs are disputed by the Respondent....

201. "It cannot be disputed that development costs were incurred by the Claimants. Indeed, the expert report received from the Respondent on 26 June 1991 stated with respect to the development costs reported by the Claimants' auditors that 'it is reasonable to accept that the costs were actually incurred'.

202. "The question that arises from the Information submitted by the Parties in response to the procedural order of 13 February 1991 concerns the extent to which the development costs that were allocated to SPP(ME) and not reimbursed by ETDC should be taken into account in fixing the compensation to be awarded to the Claimants. For the most part, the items in question involve the allocation of salaries and costs incurred by executives and employees of SPP.... These expenses were incurred in connection with the project and in order to implement it. If the project had materialized, these expenses would not have been chargeable to ETDC because the Claimants had agreed to provide all of the technical expertise required for the design, construction, management and marketing of the project. However, because the project was cancelled, the Claimants could not recoup these expenses with future profits, and the expenses thus became irrecoverable losses. The Tribunal finds that it is reasonable and legitimate to take these losses into account in determining the fair measure of compensation in this case.

203. "Not all of the costs claimed have been properly documented, however.... [T]he information filed by the Claimants identified US$ 1,719,000 of the claimed costs by payee, but... the recipients of an additional US$ 1,545,000 of claimed costs were not identified.... Accordingly, the Tribunal has decided to award development costs only in the amount of US$ 1,719,000.

204. "The Respondent also maintains that the information filed by the Claimants in response to the Tribunal's procedural order contains evidence of the Claimants' corruption. Specifically, the Respondent has drawn the Tribunal's attention to a payment of US$ 16,000 made in May of 1975 to a former employee of the Egyptian Government. It is claimed that, while this individual was employed by the London agency of the Egyptian Ministry of Tourism, he provided information concerning SPP's financial and technical capacity to the Egyptian authorities who were considering the proposed project and who ultimately approved it. After leaving the Government, this individual allegedly assisted SPP in securing agreements with Egyptian authorities relating to the Pyramids Oasis Project. The Tribunal notes, however, that the same document which shows the US$ 16,000 payment also shows that the total payments made by SPP to this individual after he left the Government amounted for the whole of the year 1975 to less than US$ 2,000 per month, a figure which does not suggest illicit payments to third parties. Accordingly, the Tribunal cannot accept the Respondent's contention that the information submitted by the Claimants in response to the Procedural Order contains evidence of the Claimants' corruption.

205. "Legal, Audit and Arbitration Costs. The Claimants seek reimbursement of US$ 5,108,000 of 'post cancellation legal,
audit and arbitration costs from 1980 to 1990’. They contend that all of the legal costs they have incurred in order to obtain compensation should be indemnified, including the legal costs resulting from the ICC arbitration and related court proceedings. They argue that all of the legal and related disbursements should be considered as an individual whole, since they were made necessary by the Respondent’s wrongful refusal to grant fair compensation. The Claimants add, as a further consideration, that a great deal of the research and preparation involved in the ICC arbitration obviated the need to undertake the same work in the ICSID proceedings.

206. "For its part, the Respondent states that the claim for indemnification of costs incurred in other proceedings is absurd from a legal point of view because it infringes the sanctity of res judicata, the awards and judgments in the other cases having already decided the question of costs incurred in those proceedings.

(...) 

208. "... Only those legal and accounting fees and expenses that were incurred for work that was relevant and useful to the present ICSID proceedings are to be included in the compensation. This Tribunal cannot award costs for work which was only relevant or useful to the proceedings before the ICC tribunal, whose decision was annulled, or proceedings before national Courts to defend the validity of the ICC award or obtain its enforcement.

(...)

210. "In response to the Tribunal's procedural Order, the Claimants have submitted a detailed list of all payments made for legal, audit and arbitration costs in connection with the ICC proceedings, related court proceedings and the ICSID proceedings. It shows that fees and expenses of US$ 4,242,000 were incurred solely in connection with the ICSID proceedings, and that further fees and expenses of US$ 1,701,000 were incurred in connection with the ICC arbitration and related court proceedings. However, it is evident from the information submitted by the Claimants that a substantial amount of the work product covered by the US$ 1,701,000 of fees and expenses was also utilized in the ICSID proceedings. On the basis of this information, the Tribunal estimates that approximately one-half of the US$ 1,701,000 was spent on work product that was utilized directly in the ICSID proceedings.

211. "In light of these considerations, the Tribunal concludes that the total costs to be reimbursed to the Claimants for legal and accounting work which has been relevant or useful to the present ICSID proceedings amounts to US$ 5,992,000. Undoubtedly, this is a high figure, but it is justified by the extraordinary length and complication of the proceedings in this case.

212. "Loss of Commercial Opportunity. The final element in the Claimants' alternative claim is:

'such additional amount as shall be fixed by the Tribunal to compensate for the loss of the chance or opportunity of making a commercial success of the project.'

... It is important to note that the alternative claim - like the primary claim which was based on the DCF method and the share transactions - is intended to recover the value of the Claimants' investment. This was made clear during the oral proceedings, and is also explicitly stated in the Claimants' Final Conclusions and Prayer for Relief:

'The Claimants claim secondarily, as an alternative ... the value of its investment in ETDC on the basis of its out-of-pocket expenses ... on the view that the project would necessarily have realized, at the very least, the amount invested in it, and an additional amount ... to compensate for loss of the chance or opportunity of making a commercial success of the project ....' (Emphasis added)
216. ".... As the Tribunal has already observed, the evidence shows that during the period February 1977 to May 1978, ETDC's actual sales of villa and multi-family sites amounted to US$ 10,211,000 ....

217. "The Tribunal will next consider what it took in the way of expenditures by the Claimants to generate the revenues imputed to the lot sales ....

218. "It is not disputed that SPP(ME) made capital contributions to ETDC of US$ 1,310,000 and the Tribunal has already determined that the Claimants' development costs were US$ 1,719,000 .... The portion of the revenues imputed to the lot sales corresponding to SPP(ME)'s shareholding in ETDC was 60 percent of US$ 10,211,000 or US$ 6,127,000. Thus, the portion of the sales revenues corresponding to SPP(ME)'s shareholding in ETDC would have exceeded the Claimants' non-reimbursable out-of-pocket expenses by US$ 3,098,000. In these circumstances, the Tribunal is of the view that the value of what the Claimants have called the 'opportunity of making a commercial success of the project' was not less than US$ 3,098,000. Stated differently, the value of the Claimants' investment in May of 1978 when the project was cancelled exceeded their out-of-pocket expenses by at least US$ 3,098,000.

219. "Interest. The Claimants maintain that it has long been accepted under international law that appropriate compensation carries with it interest from the date of the wrong, so as to compensate the injured party for not having had the use of the money between the date when it ought to have been paid and the date of the payment. In support of this contention the Claimants invoke decisions of the Permanent Court of International Justice and various international arbitration and claims tribunals. The Claimants further assert that the rate of interest should be a reasonable one, based on the amount that a successful claimant would have been in a position to have earned if it had had the funds available to invest. Accordingly, it claims a rate of 12.6 percent per annum, compounded annually from 28 May 1978 to the date of the Award, observing that this is the rate of interest agreed between SPP(ME) and ETDC in the loan agreement of 15 April 1976.

220. "For its part, the Respondent contends that, if compensation is to be awarded, the rate of interest requested by the Claimants, as well as the modalities for its computation, should be rejected as contrary to Egyptian law in accordance with Art. 42(1) of the Washington Convention. The Respondent calls attention to Art. 226 of the Civil Code of Egypt, which provides for a rate of four percent for civil debts (including administrative contracts) and five percent for commercial debts, and contends that this is a civil matter, since the Heads of Agreement, concluded by a Minister of the Government, could not be qualified as a commercial act. The Respondent also points out that Art. 232 of the Civil Code forbids compound interest, or interest on interest, and provides that the interest may in no event exceed the principal amount. As to the date at which interest begins to run, the Respondent contends that under Art. 226 it is the date of the initiation of proceedings in case of 'liquid debts', so that if the amount is fixed by the award it is only from the date of the award that interest begins to run.

221. "The Claimants, on the other hand, point out that the limitation in Egyptian law on the rate of interest applies only - according to the terms of Art. 226 of the Civil Code - 'when the object of an obligation is the payment of a sum of money of which the amount is known at the time when the claim is made', which, they maintain, is not the case here.

222. "In light of these various considerations, the Tribunal reaches the conclusion that, subject to the exception discussed below (paras. 225-231), Art. 42(1) of the Washington Convention requires that interest be determined according to Egyptian law because there is no rule of international law that would fix the rate of interest or proscribe the limitations imposed by Egyptian law.

223. "With respect to the rate of interest, the Tribunal is of the view that it should be five percent rather than four percent. The argument that the Heads of Agreement was not a commercial contract is not conclusive because the present claim is not an action for a breach of that contract, but rather one seeking compensation of the expropriation of the rights of a commercial enterprise for the development of tourism.

224. "The provisions of Egyptian law which prohibit compound interest and require that the interest not exceed the principal are also applicable.

225. "The provisions of Egyptian law concerning interest do not apply to the loan of US$ 1,650,000 from SPP(ME) to ETDC. The underlying loan agreement of 15 April 1976 by its terms is governed by English law.
227. "The term 'Interest Rate' is defined as:

the case may be) before each relevant Interest Date.'

228. "The loan agreement also provides that the interest shall be compounded if interest payments are not made on time ....

229. "Thus, the loan agreement establishes a higher rate of interest than that prescribed by Egyptian law and also provides for compound interest. Moreover, the interest on this loan now amounts to US$ 8,134,000 and thus exceeds the principal. However, since the loan agreement is governed by the laws of England, which allow compound interest and the accrual of interest in excess of the principal, the Egyptian limitations an interest do not apply. Under the loan agreement, SPP(ME) had a contractual right against ETDC to interest at the rate fixed by the loan agreement .... This contractual right was in effect expropriated. The Claimants do not ask the Tribunal to award interest on the principal amount as such, but rather to compensate them for the value of the contractual right taken. That value clearly includes the interest provided for in the loan agreement.

230. "The Respondent argues that it was not a party to the loan agreement and thus is not bound by the choice of English law. But the Claimants are not asking for damages for a breach of the loan agreement; they are seeking compensation an account of an expropriation:.... Thus, ETDC was prevented from repaying the loan and the interest that it had agreed to. Therefore, this loan is to be reimbursed to the Claimants with all of the interest stipulated in the loan agreement. This is the fall and uncontestable value of the expropriated credit.

232. "With respect to the date from which interest shall ran, the Respondent has invoked Art. 226 of the Civil Code of Egypt which provides:

'When the object of an obligation is the payment of the sum of money of which the amount is known at the time when the claim is made, the debtors shall be bound, in case of delay in payment, to pay to the creditor, as damages for the delay, interest at the rate of 4% in civil matters and 5% in commercial matters. Such interest shall ran from the date of the claim in Court, unless the contract or commercial usage fixes another date. This article shall apply, unless otherwise provided by law.'

233. "In the Tribunals opinion, the dies a quo established in Art. 226, 'the date of the claim in Court', only applies to 'such interest' which is to be paid 'in case of delay of payment', that is, to moratory interest or interest on the award. It does not apply to compensatory interest, that is, to interest which is part of the award. Also, Art. 226 refers to 'the payment of a sum of money of which the amount is known at the time when the claim is made', i.e., a liquidated claim. The present case involves neither moratory interest nor a liquidated claim. Consequently, no provision of the Civil Code or other legislation concerning the dies a quo applies to compensatory interest for a yet to be determined amount of compensation arising out of an act of expropriation.

234. "Given this lacunae, it is legitimate to apply the logical and normal principle usually applied in cases of expropriation, namely, that the dies a quo is the date on which the dispossession effectively took place, since it is from that date that the deprivation has been suffered. This principle is supported by the doctrine and the jurisprudence of international tribunals. Moreover, many constitutions and national laws concerning expropriation require that payment be made prior to or simultaneous with the dispossession, thus supporting the dies a quo from the date of the taking, in this case 28 May 1978 ....

235. "As to the dies ad quem for the running of interest, there is no Egyptian rule that has been called to the Tribunals attention. The prevailing jurisprudence an international arbitrations is to the effect that interest runs until the date of effective payment, and this conclusion is supported by doctrinal opinion. This conclusion also seems to result implicitly
from Art. 226 of the Civil Code of Egypt.

237. "Monetary Adjustment for Currency Devaluation. The five percent rate of interest which the Tribunal has determined to be applicable in this case does not fully compensate the Claimants for the losses which they incurred as a consequence of being deprived of money owed them between the time when the project was cancelled and the date of this Award. The reason that the five percent rate does not make the Claimants whole is that, since the project was cancelled in 1978, there has been a significant devaluation of the US dollar.

238. "Devaluation is a function of Inflation. If the Tribunal had determined that a 'commercial' rate of interest were applicable in this case, devaluation would be accounted for automatically because commercial interest rates add an adjustment for Inflation to the 'real' interest rate. The five percent rate which the Tribunal has determined to be applicable is not a commercial rate, however. The record shows that since June of 1978 rates for US dollar deposits quoted in the London Interbank Market averaged more than 12 percent. Since commercial interest rates are always higher (usually by 2-3 percentage points) than the clearing banks' base rate, it is evident that the five percent rate does not compensate the Claimants for the devaluation of the US dollar that has occurred since 1978.

239. "Accordingly, it is the opinion of the Tribunal that certain elements of the compensation based on the Claimants' out-of-pocket expenses should be adjusted upward to take into account the devaluation of the US dollar since 1978. This is required in order that the compensation awarded by the Tribunal give the Claimants the same purchasing power today that they would have had in 1978 with the dollars that they invested in ETDC. Such a correction is necessary if the compensation is to be fair. If it were otherwise, the Claimants would be seriously prejudiced as a consequence of the devaluation of currencies that has occurred during the period in which they have been seeking a remedy for the loss that they have sustained.

240. "In making an adjustment to take account of currency devaluation, the Tribunal has followed the approach adopted by the tribunal in the Aminoil case, which included an eminent Egyptian jurist. There, in awarding compensation for an expropriated investment, the tribunal stated that

'...the proportions assumed by world inflation must lead to appraisals that are more in line with economic realities, and the determination of an indemnification cannot be tied down to the inflexible consequences of a purely monetary designation.' (op. cit. at p. 213.)

The tribunal further said that

'...if it were thought necessary to arrive at the total figure of the capital invested by Aminoil in its undertaking it would be appropriate to do so without holding the dollars of 1977 to be equivalent to those of 1948.' (ibid.)

241. "The tribunal referred to 'the general principle of the preservation of the value of money' (para. 169), and then stated:

'The Tribunal has not overlooked the fact that there may be different ways of assessing the levels of inflation.... In the compensation to be paid to Aminoil it would be natural to take account of the progress of inflation generally....' (op. cit., at p. 214)

The tribunal then concluded:

'In order to establish what is due in 1982 account must be taken both of a reasonable rate of interest, which could be put at 7.5 per cent, and of a level of inflation which the Tribunal fixes at an overall rate of 10 per cent - that is to say a total annual increase of 17.5 per cent in the amount due, over the amount due for the preceding year.' (op. cit., at p. 216.)

242. "A monetary adjustment such as that utilized in the Aminoil award also finds support in Egyptian law. Decisions of the Egyptian Cour de Cassation and doctrinal opinions were called to the attention of the Tribunal.
These opinions and decisions concluded that 'due regard should be given to the increase or decrease of the currency price'. These decisions and authoritative opinions confirm that under Egyptian law consideration is given to changes occurring 'in the price of currency in which the compensation is to be estimated'. (Abdel-Rezzak Ahmed El-Sanhoury, Sources of Obligation, Sect. 649, at pp. 975-976.)

243. "In order to compensate the Claimants for the devaluation of the US dollar that has occurred since the Pyramids Oasis Project was cancelled in 1978, the Tribunal has adjusted certain of the out-of-pocket expenses incurred by the Claimants. These adjustments have been made using a 'deflator factor' derived from data published by the International Monetary Fund in International Financial Statistics. This factor is computed on the basis of the United States Consumer Price Index. For the period 31 May 1978 to 31 December 1991 - the most recent date for which the data necessary to calculate the deflator factor is available - the deflator factor was 2.2074. In other words, the purchasing power of 100 US dollars in May of 1978 was equivalent to the purchasing power of 220.74 US dollars in December of 1991.

244. "As to the elements of compensation to which the deflator factor is to be applied, the Tribunal is of the view that the invested capital of US$ 1,310,000, the development costs of US$ 1,719,000 and the interest-free loan of US$ 408,000 should be adjusted for monetary devaluation. No adjustment is required for the loan of US$ 1,650,000, since that loan carries commercial interest and thus takes account of inflation and the resulting currency devaluation. Nor, in the Tribunals view, is adjustment of the legal, audit and arbitration expenses necessary, since the bulk of these expenses was either incurred in - or imputed to proceedings that occurred in - the last several years. Finally, no adjustment of the opportunity cost element of the compensation will be made because of the nature of that particular cost and the method by which it was determined."

Mitigating Factors Invoked by the Respondent

245. "The Respondent has drawn the Tribunals attention to certain circumstances which, it is claimed, are mitigating factors that should be taken into account in the event that any compensation is awarded in this case. First, it is alleged that there has been no enrichment of the State, whereas there has been an enrichment of the Claimants as a result of the sale of shares to the members of the Saudi Arabian royal family.

(...)"

247. "...[A]lthough unjust enrichment has an infrequent occasion been used by international tribunals as a basis for awarding compensation, it is generally accepted that the measure of compensation should reflect the claimant's loss rather than the defendant's gain. The question of whether the Respondent was enriched by the cancellation of the Pyramids Oasis Project is not, in the Tribunals view, relevant to the amount of compensation to be awarded in the present case.

248. "As to the alleged enrichment of the Claimants as a result of the share transactions, the Tribunal first notes that it disregarded these transactions in fixing the amount of compensation...."

249. "Furthermore, the record shows that the proceeds from the share transactions were intended to finance the Pyramids Oasis Project. If some of those proceeds were not ultimately invested in the project, this was presumably due to the Respondent's cancellation of the project rather than to any act attributable to the Claimants.

250. "The next factor invoked by the Respondent to mitigate the amount of compensation in the present case is the fact that the reclassification of the land on the Pyramids Plateau was a lawful act. This factor, however, has already been taken into consideration in the Tribunals decision not to award compensation based on profits that might have accrued to the Claimants after the date on which areas on the Plateau were registered with the World Heritage Committee.

251. "Next, the Respondent contends that the project was located in an area where the Claimants should have known there was a risk that antiquities would be discovered. Again, this is a factor that is already reflected in the method used by the Tribunal to value the Claimants' loss, and particularly in the Tribunals decision not to base compensation on profits that might have been earned after the Plateau areas were registered with UNESCO."
252. "The Respondent also argues that the Claimants' rejection of the Sixth of October City site should be taken into account in fixing the amount of compensation to be awarded. The Tribunal cannot accept this argument. As explained above (para.172), the Claimants' rejection of the substitute site was entirely justified and is therefore irrelevant to the amount of compensation to be awarded the Claimants.

253. "Finally, the Respondent maintains that certain dangerous events which occurred in Egypt after 1978, adversely affecting tourism there, should be taken into account in fixing the amount of compensation. These events are also irrelevant, because the Tribunal has excluded any profits which might have been earned after 1978 from the compensation that it has determined to be appropriate."

[...]

Note General Editor. The analysis by Claimants' expert of these data indicated values for SPP(ME)'s share of ETDC ranging from US$ 33,000,000 to US$ 42,500,000. In Claimants' view these imputed values are, if anything, conservative. According to Respondent's expert the share transactions were not a valid means of estimating the value of SPP(ME)'s share in ETDC because the transactions concerned risk capital.

Referring Principles:

- VII.3.3 - Currency in which to assess damages
- VII.4 - Duty to mitigate
- VII.6 - Duty to pay interest
- XI.1 - Compensation for expropriation