INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/98/4

WENA HOTELS LIMITED V. ARAB REPUBLIC OF EGYPT

DECISION ON JURISDICTION

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29 June 1999

Tribunal:
Ibrahim Fadlallah (Appointed by the investor)
Monroe Leigh (President)
Hamzeh Ahmad Haddad (Appointed by the State)

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Decision on Jurisdiction

I. The Proceedings

[1]. The present arbitration was initiated on July 10, 1998 when Claimant, Wena Hotels Limited ("Wena"), 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." [1] Wena requested the following relief:

(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 investment in Egypt fair and equitable treatment and full protections 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 precisley 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 arbitration, the fees and expenses of any experts, and the legal costs incurred by the parties (including fees of counsel). [2]

[2]. In accordance with Article 36 of the ICSID Convention and Rule 6(1) of the ICSID Institution Rules, the Acting Secretary-General of ICSID registered the request for arbitration on July 31, 1998, and invited the parties to constitute an Arbitral Tribunal.

[3]. The Tribunal was constituted on December 18, 1998 and 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 raised objections as to the Tribunal's jurisdiction to hear the dispute.

[4]. The Tribunal, pursuant to Article 41(2) of the ICSID Convention, granted the parties an opportunity to brief the jurisdictional objections before proceeding to the merits of the dispute. The parties have filed four papers with the Tribunal:

(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);

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

[2] *Id., at* 18.

(3) Respondent's Reply on Jurisdiction (submitted on April 8, 1999); and

(4) Claimant's Rejoinder on Jurisdiction (submitted on April 22, 1999).

[5]. The Tribunal heard oral arguments on Respondent's objections to jurisdiction during a second session, at the offices of the World Bank in Paris, on May 25, 1999.

[6]. Both parties were ably represented by counsel and presented well-considered arguments, both in writing and orally. The Tribunal has been greatly assisted by the professional work of counsel for each party.

[7]. For the reasons discussed below, the Tribunal has concluded that Respondent's objections should be denied and jurisdiction exercised over the dispute. Accordingly, the Tribunal directs the parties to proceed to briefing the merits of the dispute, pursuant to the schedule discussed during the Tribunal's first session in The Hague:
Claimant's Memorial on the Merits July 26, 1999

Respondent's Count-Memorial on the Merits August 27, 1999

Claimant's Reply on the Merits September 10, 1999

Respondent's Rejoinder on the Merits September 24, 1999

[8]. The Tribunal proposes holding a session to hear the merits of the case during either the week of September 27, 1999 or the week of October 4, 1999. The Tribunal anticipates that the session would last two to three days. The Tribunal requests that the parties advise the Tribunal, by no later than July 12, 1999, of their availability during either of the two proposed weeks.

[9]. The Tribunal has noted that, during the second session, Respondent expressed concerns with its ability to prepare a counter-memorial within the original schedule of thirty days. If Respondent continues to believe that it will require additional time to prepare its brief, it should notify the Tribunal by no later than July 12, 1999. The Respondent also should submit a proposed, revised briefing schedule, however, the Tribunal's session on the merits will be postponed no later than the last two weeks of October *(i.e.,* the weeks of October 18, 1999 and October 25, 1999). If a modification of the original schedule is requested, the Tribunal is hopeful that the parties wold be able to agree on an acceptable alternative. If agreement were not possible, however, the Claimant should notify the Tribunal of any concerns it has with the Respondent's proposed schedule.

II. The Facts

[10]. This dispute arose out of agreements to develop and manage two hotels in Luxor and Cairo, Egypt. Without the benefit of the parties' briefs on the merits and without prejudging the facts of the case, the Tribunal will provide a brief summary of the major events concerning the hotels.

[11]. 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"[3] entered into a 21 year, 6 month "Lease and Development Agreement" for the Luxor Hotel in Luxor Egypt.[4] 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 specifications of the Egyptian Ministry of Tourism or upgratly [sic] it to a five star hotel if [Wena] so elects...." Wena also agreed to make certain "additions to and expansion of the 'Hotel,'" including "at least forty additional guest rooms, a coffee shop, fast food shops, a children's swimming pool, a recreation center" and other improvements.[5]

[12]. On January 28, 1990, Wena and EHC entered into a similar, 25-year agreement for the El Nile Hotel in Cairo, Egypt.[6] Wena also entered into an October 1, 1989 Training Agreement with EHC and the Egyptian Ministry of Tourism "to train in the United Kingdom... Egyptian Nationals in the skills of hotel management...."[7]

[13]. 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."[8] In turn, Egypt claims that Wena "failed to pay rent due to EHC on May 15 and August 15, 1990, and EHC in turn liquidated the performance security posted by Claimant."[9]

[14]. According to Egypt, Wena subsequently instituted arbitration proceedings in Egypt against EHC. The Tribunal has not seen copies of the resulting arbitration decision; however, Wena, so far, has not contested Egypt's summary of the award as requiring Wena "to pay rental due," but denying "EHC's request to revoke the Luxor Lease."[10]

[15]. On April 1, 1991, large crowds attacked the Luxor and Nile Hotels and the staff and guests were forcibly evicted. Both parties agree that EHC participated in these attacks and subsequently took control of the hotels. As Egypt notes, "[i]t has been recognized by the authorities in Egypt 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."[11] The Tribunal expects that both parties will present additional information about these attacks — and Egypt's role, if any — as part of their submissions on the merits.

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[3] As explained during oral argument, the Egyptian government holds all of the shares of EHC, but the company is considered a separate legal entity.

[4] Luxor Hotel Lease and Development Agreement (August 8, 1989) [Annex W5]. Note, in referencing the documentary annexes submitted by the parties, the notation "W" indicates a document submitted by Claimant, Wena Hotels Limited; the notation "ARE" indicates a document submitted by Respondent, the Arab Republic of Egypt.

[5] *Id.*, arts. III & VIII.

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

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

[8] Request, at 8.

[9] Respondent's Memorial on its Objections to Jurisdiction, at 4 (submitted March 4, 1999) ("Memorial")

[10] *Id.*

[11] *Id.*, at 9.

[16]. In January 1992, the Chief Prosecutor of Egypt ruled that the attack on the Nile Hotel was illegal and, on February 25, 1992, the hotel was returned to Wena's control.[12] Similarly, on April 28, 1992, the Chief Prosecutor of Egypt ruled that the attack on the Luxor Hotel was illegal and Wena resumed control of the hotel sometime thereafter.[13]

[17]. On November 24, 1993 EHC requested that a receiver be appointed for the Luxor Hotel because of Wena's alleged failure to pay rent.[14] Soon thereafter, on December 2, 1993, Wena initiated arbitration in Egypt against EHC for damages from Nile Hotel invasion.[15] Similar arbitration was initiated by Wena regarding the Luxor Hotel.

[18]. On April 10, 1994, an arbitration award of LE 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.[16] On June 21, 1995, Wena was evicted from the Nile Hotel.[17]

[19]. The Luxor Hotel arbitration panel also found in favor of Wena, awarding the company, in a September 29, 1994 decision, nearly LE 18 million for damages from the invasion.[18] However, this award subsequently was nullified by the Cairo Appeal Court on December 20, 1995.[19] On August 14, 1997, Wena was evicted from the Luxor Hotel and, according to Egypt, the hotel was turned over to a court-appointed receiver requested by EHC.[20] Again, the Tribunal expects that both parties will present additional information about Wena's eviction from the two hotels, and Egypt's responsibility, if any, for the evictions.

[20]. In addition to the disputes regarding the two hotels, Wena also has alleged a "campaign of continual harassment of Wena," including the following allegations: "in 1991 the Minister of Tourism made defamatory statements 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 guest; and, last but not least, in 1997 Egypt imposed a three-year prison sentence and a LE 2000,000 bail bond on the Managing Director of Wena based on trumped-up charges."[21] With the exception of the 1997 conviction of Mr. Nael El-Farargy, the Managing Director of Wena, the parties have discussed none of these allegations in detail before the Tribunal. The Tribunal looks forwards to the parties' elaboration on these issues.

III. Respondent's Jurisdictional Objections

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[12] Request, at 10.

[13] *Id.*,at 11.

[14] Memorial, at 6.

[15] *Id.*

[16] Translation of Nile Hotel Arbitration Award (April 10, 1994) [Annex ARE20]

[17] Request, at 12; Memorial, at 8; Annual Return and Financial Statements for Wena Hotels Limited (period ended December 31, 1995) [Annex ARE14]; Letter from Kevin Heath, Esq. to Mr. Nael El-Farargy (March 2, 1999) [Annex W16].

[18] Translation of Luxor Hotel Arbitration Award (September 29, 1994) [Annex ARE31]

[19] Translation of the Cairo Court of Appeal's Judgement (December 20, 1995) [Annex ARE32]. *See also* Request, at 12.

[20] Request, at 13; Memorial, at 6; Annual Return and Financial Statement for Wena Hotels Limited (period ending December 31, 1996) [Annex ARE15]

[21] Request, at 16.

[21]. In its Memorial Egypt raised four objections to jurisdiction before this Tribunal. First, Egypt asserted that it "has not agreed to arbitrate with the Claimant as it is, by virtue of ownership, to be treated as an Egyptian company." Second, Egypt argued that "the Claimant has made no investment in Egypt." Third, Egypt claimed that "there is no legal dispute between the Claimant and the Respondent." Finally, Egypt contended that "the Claimant's consent to arbitration in the Request for Arbitration is insufficient and its request premature." [22]

[22]. The first three objections reflected substantive challenges to the Tribunal's jurisdiction under Article 25 of the ICSID Convention and Article 8(1) of the Agreement between the Arab Republic of Egypt and the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments ("IPPA"). The fourth objection contained a pair of procedural challenges — arguing that Wena failed to comply with the three month waiting period requirement of Article 8(1) of the IPPA and that Wena's consent to jurisdiction and its request for arbitration should have been filed in two separate documents.

[23]. During the Tribunal's second session, Egypt withdrew two of its four objections. First, it noted that "the papers that we have now been supplied as part of the Rejoinder 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 by any other party." Thus, "for the purpose of establishing jurisdiction only, the Respondent is willing to accept that an investment has been made."

[24]. Similarly, Respondent also withdrew its procedural objections to Claimant's request for arbitration. As Egypt appropriately noted, even if the Tribunal endorsed its objections, the alleged defects could have been easily rectified. Noting that "it is not our wish to raise arguments 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."

[25]. In view of Respondent's decision to withdraw these two objections, the Tribunal, in its deliberations, has mainly considered Egypt's two remaining objections to jurisdiction — (1) that the consent to arbitrate it made in the IPPA does not apply to Wena because Wena "is, by virtue of ownership, to be treated as an Egyptian company," and (2) that there is no dispute between Wena and the Arab Republic of Egypt.

[26]. As noted above, the Tribunal, despite the strong presentation of Egypt's counsel on these two remaining issues, has concluded that Egypt's objections should be denied and jurisdiction exercised over this matter. The Tribunal's reasons for so deciding are set forth below.

[27]. At the same time, the Tribunal disagrees with Wena's contention that Egypt's objections were "wholly groundless." Accordingly, the Tribunal also denies Wena's request for "costs incurred in rebutting Egypt's unreasonable and unfounded objections to jurisdiction." [23]

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[22] Memorial, at 1.

[23] Claimant's Response to Respondent's Objections on Jurisdiction, at 40 (submitted on March 25, 1999) ("Response").

IV. Objection 1: "The Respondent Has Not Agreed To Arbitrate With The Claimant As It Is, By Virtue Of Ownership, To Be Treated As An Egyptian Company."

[28]. The Arab Republic of Egypt's principal object is that, "although the claimant is an English company, it is, by virtue of Mr. El-Farargy's ownership and his Egyptian nationality, to be treated as an Egyptian company pursuant to Article 8(1)." Accordingly, "[a]s the respondent has no consented under the IPPA, to arbitrate with companies, such as the claimant, that are to be treated as Egyptian thereunder, it therefore follows from the IPPA's express terms that the respondent has not consented to the present arbitration." [24]

[29]. Egypt's objection raised three potential issues for consideration by the Tribunal. The first issue concerned the proper construction of the second sentence of Article 8(1) of the IPPA. Did the sentence, as Egypt contends, exclude jurisdiction in cases where a company of the non-host State is controlled by nationals or companies of the host State? Or, did the sentence, as Wena contends, extend jurisdiction in cases where a company of the host State is controlled by nationals or companies of the non-host State?

[30]. If the Tribunal had agreed with Egypt's interpretation, it would have faced two underlying, largely factual questions. First, were a majority of Wena's shares owned by Mr. Farargy? Second, did Mr. Farargy — despite his adoption of British citizenship in 1987 — remain an Egyptian national? However, for the reasons discussed below, the Tribunal eventually rejected Egypt's proposed construction of Article 8(1) and, as a result, did not have to address these two questions.

A. Article 8(1) of the IPPA and Article 25 of the ICSID Convention

[31]. Consent of the parties is the "cornerstone of the jurisdiction of the Centre." [25] As Georges Delaume notes, "jurisdiction of the Centre rests upon a strictly voluntary basis.... Any Contracting State is entirely free to decide in the light of all relevant circumstance whether to consent to the submission of existing or future investment disputes to the jurisdiction of the Centre." [26]

[32]. In its deliberations, the Tribunal gave considerable attention to the instrument in which Egypt expressed its consent to ICSID arbitration — Article 8(1) of the IPPA between Egypt and the United

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[24] Respondent's Reply on Jurisdiction, at 2 (submitted on April 8, 1999) ("Reply").

[25] Report of the Executive Directors on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID Document No. 2 (March 18, 1965) [Annex ARE23, at 5]. *See also* C.F. Amerasinghe, *Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* 47 British Year Book of International Law (1976) [Annex W40, at 229]; Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* Académie de Droit International, Recueil des Cours 1972 II 136 [Annex W 37, at 352]; Aron Borches, *Bilateral Investment Protection Treaties and Arbitration of Investment Disputes,* in *The Art of Arbitration* edited by Jan C. Schultz (1982) [Annex W38, at 64]; Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties,* Martinus Nijhoff Publishers (1995) [Annex W39, at 131]; and Carolyn B. Lamm, *Jurisdiction of the International Centre for Settlement of Investment Disputes,* 6 ICSID Review - FILJ (1991) [Annex ARE30, at 46].

[26] Georges R. Delaume, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* 1 International Lawyer (1966) [Annex W32, at 67].

Kingdom. The first sentence of this article contains a general consent to arbitration between a contracting State to the IPPA and a juridical person of the other contracting State to the IPPA, the situation in this case:
Each Contracting Party hereby consents to submit to the International Centre for the [sic] Settlement of Investment Disputes... any legal dispute arising between that Contracting Party and a national or party of the other Contracting Party concerning an investment of the latter in the territory of the former.

[33]. Of considerable importance to this arbitration, however, is the second sentence of Article 8(1), which states that:
Such a company of one Contracting Party in which before such a dispute arises a majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.

[34]. Article 25(2)(b) of the ICSID Convention, which the second sentence expressly references, provides that, for purposes of jurisdiction under Article 25(1) of the Convention,[27] "'National of another Contracting State' means:"

(b) any juridical person which had the nationality of the Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person that had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

B. The Parties' Interpretation of Article 8(1)

[35]. Egypt contends that the second sentence of Article 8(1) of the IPPA "reverses the nationality of a company incorporated in the United Kingdom but majority owned by Egyptian nationals."[28] Thus, "a company such as the Claimant, in which the majority of shares are held by an Egyptian national, is to be treated as an Egyptian company, not a United Kingdom company."[29] Because the first sentence of Article 8(1), quoted above, requires diversity of nationality between the "Contracting Party" and the "national or party of the other Contracting Party," Egypt argues that the second sentence of Article 8(1) has the effect of "exclud[ing] jurisdiction in cases, such as this one, where a company is majority-owned by shareholders having the nationality of the State with which the company has a dispute."[30]

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[27] Article 25(1) of the ICSID Convention provides that "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

[28] Memorial, at 12.

[29] *Id.*, at 11.

[30] Reply, at 7.

[36]. In contrast, Wena argues that "Egypt has completely misconstrued the meaning of Article 8(1): it is a provision allowing companies incorporated in a state to sue *that* state where local companies are under foreign control; it does not prevent companies incorporated in that state from suing the *other* state." [31] In other words, "Wena's construction of this provision is that it applies not in every case, but only to a company which has the *'nationality of the Contracting State party to the dispute,'* in accordance with Article 25(2)(b) of the ICSID Convention... to which the second sentence of Article 8(1) cross-refers." [32] Thus, according to Wena, the "second sentence of Article 8(1)... does not apply to Wena, a company which does not have the nationality of Egypt, the Contracting State party to this dispute." [33]

C. The Tribunal's Analysis

[37]. Unfortunately, neither party has presented any direct evidence of the intent of the Arab Republic of Egypt and the United Kingdom in negotiating and drafting the IPPA. No documents, such as the *travaux preparatories,* that might assist in interpreting Article 8(1) are available. Accordingly, the Tribunal can only rely upon third party commentary and its own interpretation of the provision to determine the intent of the United Kingdom and Egypt in consenting to bring disputes under ICSID jurisdiction.

[38]. Both parties' interpretations of the second sentence of Article 8(1) are plausible on their face. Nevertheless, the Tribunal agrees with Wena's interpretation that the purpose of the sentence is to expand jurisdiction in cases where a company incorporated in the host State is controlled by nationals of the non-host State, "in accordance with Article 25(2)(b) of the [ICSID] Convention."

[39]. This interpretation is consistent with the extensive commentary cited by both parties. Egypt's proposed construction, in contrast, has never been suggested by any of the commentators — a striking omission considering the substantial analysis that has been devoted to Article 25(2)(b) and bilateral investment provisions nearly identical to Article 8(1) of the IPPA.

[40]. The literature rather convincingly demonstrates that Article 25(2)(b) of the ICSID Convention — and provisions like Article 8 of the United Kingdom's model bilateral investment treaty — are meant to expand ICSID jurisdiction by "permitting parties to a dispute to stipulate that a subsidiary of a 'national of another contracting state' which is incorporated in the *host* state (and therefore arguably a *'local* national ') will be treated as itself a 'national of another contracting state.'" [34] In the absence of any direct evidence of the intent of the Arab Republic of Egypt and the United Kingdom in negotiating Article 8(1), the Tribunal was strongly convinced by this common academic interpretation.

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[31] Response, at 25 (emphasis in original).

[32] Claimant's Rejoinder on Jurisdiction (submitted on April 22, 1999), at 21-22 (emphasis in original).

[33] *Id., at 22.*

[34] Aron Broches, *Bilateral Investment Protection Treaties and Arbitration of Investment Disputes,* in *The Art of Arbitration* edited by Jan C. Schultz (1982) [Annex W38, at 70] (emphasis added). *See also* Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* Académie de Droit International, Recueil des Cours 1972 II 136 [Annex W 37, at 359]; and Christoph Schreuer, *Commentary on the ICSID Convention,* 12 ICSID Review - FILJ (1997) [Annex ARE24, at 99] (such provisions "constitut[e] an exception to the general rule that a State cannot be brought before an international forum by its own nationals."

[41]. The purpose of Article25(2)(b) is "to account for the rather common situation in which a host government insists that foreign investors channel their investment through a *locally* incorporated company. In the absence of this qualification to the general rule, such a company could not resort to ICSID facilities...."[35] As every commentator cited by the parties explains, Article 25(2)(b) was specifically "designed to accommodate this problem by creating an exception to the diversity of nationality requirement. "[36] Thus, the article acts to expand the Convention's normal jurisdiction — allowing a "juridical person incorporated in the *host* State [to] be regarded as the national of another Contracting state if 'because of foreign control,' the parties have agreed that it should be treated as such for the purposes of the Convention."[37]

[42]. Numerous bilateral investment treaties have given effect to this article in what commentator refers to as "25(2)(b) clauses."[38] The purpose of these clauses is to "record the Contracting Parties' agreement in advance that companies incorporated in one Party but controlled by nationals of the other Contracting Party shall be considered as falling within the exception of Article 25(2)(b)...."[39] One of the "25(2)(b) clauses" most frequently cited in the literature is incorporated in Article 8 of the United Kingdom's investment agreements.[40] For example, Aron Broches notes that:

> The UK treaties and some other treaties following the UK model have taken account of this point, by providing expressly:[41]

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[35] Georges R. Delaume, *ICSID Arbitration: Practical Considerations,* Journal of International Arbitration, vol. 1 (1984) [Annex W33, at 112] (emphasis added). *See also* Aron Borches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* Académie de Droit International, Recueil des Cours 1972 II 136 [Annex W 37, at 358-359] ("It is quite usual for host States to require that foreign investors carry on their business within their territories through a company organized under the laws of the host country. If we admit, as the Convention does implicitly, that this makes the company technically a national of the host country, it becomes readily apparent that there is a need for an exception to the general principle that the Centre will not have jurisdiction over disputes between a Contracting State and its own nationals."); Christoph Schreuer, *Commentary on the ICSID Convention,* 12 ICSID Review — FILJ (1997) [Annex ARE24, at 93-94] ("... host States frequently require that investment operations are carried through companies organized under local law.... Incorporation in the host State makes the investor technically a national of that state. This would exclude all investors that operate through local companies from the ambit of the ICSID Convention.... The second clause of Art. 25(2)(b) is designed to accommodate this problem by creating an exception to the diversity of nationality requirement.").

[36] Christoph Schreuer, *Commentary on the ICSID Convention,* 12 ICSID Review — FILJ (1997) [Annex ARE24, at 94]. *See also* C.F. Amerasinghe, *Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* 47 British Year Book of International Law (1976) [Annex W40, at 255] ("Ultimately, the position that corporations which were nationals of the *host* States could have the required nationality, if the parties so agreed, because of foreign control, was incorporated in the final version."); Aron Broches, *Bilateral Investment Protection Treaties and Arbitration of Investment Disputes,* in *The Art of Arbitration* edited by Jan C. Schultz (1982) [Annex W38, at 70]; Georges R. Delaume, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* 1 International Lawyer (1966) [Annex W32, at 68]; Georges R. Delaume, *ICSID Arbitration: Practical Considerations,* Journal of International Arbitration, vol. 1 (1984) [Annex W33, at 113] ("Article 25(2)(b) makes an exception to the general rule that the Convention does not apply to disputes between a Contracting State and one of its nationals") (citing *Holiday Inns* ICSID case); and Carolyn B. Lamm, *Jurisdiction of the International Centre for Settlement of Investment Disputes,* 6 ICSID Review — FILJ (1991) [Annex ARE30, at 470].

[37] Georges R. Delaume, *ICSID Arbitration: Practical Considerations,* Journal of International Arbitration, vol. 1 (1984) [Annex W33, at 442] (emphasis added).

[38] Paul Peters, *Dispute Settlement Arrangements in Investment Treaties,* 22 Netherlands Yearbook of International Law 91 (1991) [Annex W60, at 144] (explaining that these clauses "specify when a company of the *host* country is to be treated as a foreign investor.") (emphasis added).

[39] Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties,* Martinus Nijhoff Publishers (1995) [Annex W39, at 142].

[40] *See, e.g.,* Aron Broches, *Bilateral Investment Protection Treaties Arbitration of Investment Disputes,* in *The Art of Arbitration* edited by Jan C. Schultz (1982) [Annex W38, at 70]; Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties,* Martinus Nijhoff Publishers (1995) [Annex W39, at 142]; Paul Peters, *Dispute Settlement Arrangements in Investment Treaties,* 22 Netherlands Yearbook of International Law (1991) [Annex W60, at 144]; and Christoph Schreuer, *Commentary on the ICSID Convention,* 12 ICSID Review — FILJ (1997) [Annex ARE24, at 110].

[41] Aron Broches, *Bilateral Investment Protection Treaties Arbitration of Investment Disputes,* in *The Art of Arbitration* edited by Jan C. Schultz (1982) [Annex W38, at 70].

A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals of companies of the other Contracting Party shall in accordance with article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.

Under treaties containing such a provision, proceedings may be instituted directly by the local subsidiary.

[43]. Similarly, Rudolf Dolzer and Margrete Stevens note that "[a] number of BITs of the U.K. and U.S. contain provisions that... in effect record the Contracting Parties' agreement in advance that companies incorporated in one Party but controlled by nationals of the other Contracting Party shall be considered as falling within the exception of Article 25(2)(b).... "[42] Finally, Christoph Schreuer notes that" [s]ome national investment laws providing for ICSID's jurisdiction extend access to *local* companies that are under foreign control."[43] Commenting on the same practice in bilateral investment treaties, Schreuer observes that:

A number of bilateral investment treaties provide that companies constituted in one State but controlled by nationals of the other State shall be treated as nationals of the other State for purpose of Art. 25(2)(b). For instance, Art. 8(2) of the United Kingdom Model Agreement runs as follows:

A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.[44]

D. Conclusion

[44]. Faced with two plausible constructions of Article 8(1) of the IPPA and no direct evidence of the intent of the United Kingdom and Egypt in drafting this provision the Tribunal gave considerable weight to this indirect evidence of the provision's purpose. Accordingly, the Tribunal agrees with Wena's interpretation (and that of most commentators) that the second sentence of Article 8(1) of the IPPA relates only to the situation in which an investment in Egypt or the United Kingdom is made through a *local* company, owned by companies or nationals of the other country. The provision does not reverse the consent given in the first sentence of Article 8(1) when a Contracting State is a party to a dispute with a juridical person of the other Contracting State.

[45]. Having Declined to endorse Respondent's interpretation of Article 8(1), the Tribunal did not have to consider the related factual issues of: (1) whether a majority of Wena's shares were owned by Mr. Farargy, and (2) whether Mr. Farargy, a British citizen, remained an Egyptian national.

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[42] Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties,* Martinus Nijhoff Publishers (1995) [Annex W39, at 142].

[43] Christoph Schreuer, *Commentary on the ICSID Convention,* 12 ICSID Review — FILJ (1997) [Annex ARE24, at 109] (emphasis added).

[44] *Id,* at 110.

V. Objection 2: "The Claimant Has Made No Investment In Egypt."

[46]. Egypt's second argument was that Wena Hotels Limited failed to make an "investment" in Egypt, with the meaning of that term under Article 25 of the ICSID Convention and Article 1(a) of the IPPA.

[47]. Article 25(1) of the ICSID Convention requires that a dispute must "arise directly out of an investment." However, the Convention does not define the term "investment." As the Executive Directors of the International Bank of Reconstruction and Development ("IBRD") reported on the final version of the ICSID Convention, this lack of a definition was intentional:

> No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which the Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre. [45]

[48]. As several commentators have noted, the import of this comment is to leave a "large measure of discretion to the parties" in defining what activities qualify as an "investment." [46]

[49]. Article 1(a) of the IPPA defined investment as meaning "every kind of asset." The term "asset," however, was not defined. Instead, Articlel(a) provided a non-exclusive list of assets that would qualify under the IPPA, including "movable and immovable property and any other rights such as mortgages, liens and pledges."

[50]. As noted above, during oral argument, Egypt's counsel concluded that "the papers that we have now been supplied as part of the Rejoinder 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." As Egypt noted, at least for purposes of jurisdiction, Wena has demonstrated possible investments in Egypt sufficient to invoke arbitration under the IPPA and the ICSID Convention. Accordingly, the Tribunal accepts Respondent's offer to withdraw this objection.

[51]. Of course, in conceding that "for the purpose of establishing jurisdiction only, the Respondent is willing to accept that an investment has been made," Egypt has not conceded the factual validity of Wena's claims. It is Wena's burden to prove during the merits phase of the arbitration that it suffered the damages it has alleged.

VI. Objection 3: "There Is No Legal Dispute Between The Claimant And The Respondent."

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[45] Report of the Executive Directors on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID Document No. 2 (March 18, 1965) [Annex ARE23, at 8].

[46] Aron Borches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* Académie de Droit International, Recueil des Cours 1972 II 136 [Annex W 37, at 362]. *See also* Moshe Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Dispute,* Martinus Nijhoff Publishers (1993) [Annex W34, at 59].

[52]. Egypt's third objection is that there is no "legal dispute" between Wena and Egypt.[47] Specifically, Egypt contends that Wena has attempted to "make a succession of disputes arising out of a series of private relations into something larger than the sum of its parts — a dispute with Respondent...."[48] According to Egypt, Wena's disputes actually are with the Egyptian Hotel Company ("EHC"), with whom Wena entered its original lease agreements and whose employees allegedly attacked the two hotels. As Egypt concluded, "Claimant has no demonstrated, and cannot, that there is any dispute between it and the Respondent."[49]

[53]. Wena, of course, disagrees. During the second session, Wena's counsel argued that Claimant actually has two separate disputes. One dispute, Wena acknowledges, is with EHC for violating its agreements with Wena. As the parties agree, this dispute with EHC has been the subject of at least four domestic arbitrations in Egypt. However, Wena also contends that it has a separate dispute with Respondent for "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."[50]

[54]. Egypt argues that Wena's assertions are insufficient and that the Tribunal must find evidence that Wena's claims against Egypt are valid.[51] The Tribunal declines to convert a preliminary, jurisdictional dispute into a determination of the merits. Egypt's contention that it is not responsible for the conduct Wena accuses it of performing "may be an effective defense on the merits," as Wena acknowledged during oral argument. Nevertheless, Respondent's objection is a defense that should be addressed on the merits, with the benefit of a full briefing by both parties of the facts of this case.

[55]. As the tribunal in *Amco Asia* noted, "in order for it to make a judgement at this time as to the substantial nature of the dispute before it, it must look firstly and only to the claim itself as presented to ICSID and the Tribunal in the Claimant's Request for Arbitration."[52] The tribunal continued by explaining that" [i]n other words, the Tribunal must not attempt at this stage to examined the claim itself in any detail, but the Tribunal must only be satisfied that *prima facie* the claim, as stated by the Claimants when initiating this arbitration, is within the jurisdictional mandate of ICSID arbitration...."[53]

[56]. From a jurisdictional perspective, the Tribunal believes that Wena has satisfied this burden. Wena has raised allegations against Egypt — of assisting in, or at least failing to prevent, the expropriation of Wena's assets — which, if proven, clearly satisfy the requirement of a "legal dispute" under Article 25(1) of the ICSID Convention. In addition, Wena has presented at least some evidence that suggests Egypt's possible culpability.[54]

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[47] Although Egypt's third objection concerns Article 25(1)'s requirement that there must be a "legal dispute arising directly out of an investment," Egypt does not contest the legality of any alleged dispute between Egypt and Wena. Instead, it simply claims that Wena is arbitrating against the wrong party. As it explained during oral argument, it is "not taking any point on the legality, on the legal nature of any dispute which does exist. What we are saying is that there does not exist a dispute of any sort between the Claimant and the Respondent."

[48] Memorial, at 26.

[49] *Id,* at 20.

[50] Request, at 18.

[51] Reply, at 25 ("Where, as here, the Claimant has misdescribed its claims and mischaracterized them as claims against the Contracting State, it is both permissible and, the Respondent submits, incumbent upon the Tribunal to look for credible evidence to support the proper characterization of those claims.").

[52] Award on jurisdiction in *Amco Asia Corporation, Pan America Development Limited and P. T. Amco Indonesia v. Republic of Indonesia* (Case n" ARB/81/1), 23 ILM 351 (1984) [Annex W43, at 375].

[53] *Id.,* at 376.

[57]. Of course, in determining that Wena has presented *a prima facie* dispute with Egypt sufficient to invoke jurisdiction under the IPPA and the ICSID Convention, the Tribunal makes no determination on the merits. It remains Wena's burden to prove that Egypt is, indeed, responsible for the conduct it has alleged.

VII. Objection 4: "The Claimant's Consent To Arbitration In The Request For Arbitration Is Insufficient And Its Request Premature."

[58]. Egypt's last objection constituted two procedural challenges to Wena's request for arbitration. Article 8(1) of the IPPA provides that:

> If any dispute should arise and agreement cannot be reached within three months between the parties of this dispute through pursuit of local remedies, through conciliation or otherwise, then, if the national or company affected also consents in writing to submit this dispute to the Centre... either party may institute proceedings by addressing a request to that effect to the Secretary General of the Centre as provided in Articles 28 and 36 of the Convention.

[59]. Egypt initially objected that Wena failed to satisfy two procedural prerequisites contained in this provision. First, Egypt asserted that Wena "has failed to comply with the three month waiting requirement." Second, it claimed that Wena's consent should have been "given prior to the commencement of proceedings, and not at the same time."[55]

[60]. However, as noted above, during oral argument at the Tribunal's second session, Respondent withdrew this objection. As Respondent appropriately noted, even if these procedural objections were granted, they could have been easily rectified and would have had little practical effect other than to delay the proceedings. Accordingly, the Tribunal accepts Respondent's offer to forgo these objections.

VIII. Conclusion

[61]. In sum, the Tribunal concludes that it has jurisdiction under the IPPA and the ICSID Convention for this matter to proceed to the merits of this case. First, although Egypt's interpretation of Article 8(1) of the IPPA is plausible, the Tribunal declines to endorse its interpretation. Instead, the Tribunal agrees with Claimant (and the extensive commentary cited by bother parties) that the purpose of the second sentence of Article 8(1) is to incorporate the specific situation — contemplated in the second part of Article 25(2)(b) — where a *local* company *(i.e.,* a company incorporated in the host State) is controlled by nationals of the non-host State and, hence, treated as a foreign national for purposes of ICSID arbitration.

[62]. Second, Wena has alleged a dispute with Egypt, which (assuming it can make its case on the facts) would entitle it to damages. Although Egypt has suggested a plausible defense to Wena's allegations

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[54] *See, e.g.,* "British tourists are beaten and thrown out of Egypt hotels," Daily Telegraph (April 4, 1991) [Annex W7].

[55] Memorial, at 28.

— that EHC actually is liable for the conduct Wena accuses Egypt of doing — this defense is a defense on the merits, which should be addressed by the Tribunal only with the benefit of lull briefing and explanation by the parties of the facts of the case.

IX. The Operative Part

[63]. For these reasons,
THE TRIBUNAL, unanimously,

DENIES the Objections to Jurisdiction filed by Respondent, the Arab Republic of Egypt;

DENIES Claimant's request, as set forth in its Response to Respondent's Objections to Jurisdiction, for costs incurred in rebutting Respondent's objections;

DIRECTS the parties to brief the merits of the dispute, pursuant to the following schedule:

Claimant's Memorial on the Merits July 26, 1999

Respondent's Counter-Memorial on the Merits August 27, 1999

Claimant's Reply on the Merits September 10, 1999

Respondent's Rejoinder on the Merits September 24, 1999

DIRECTS the parties to advise the Tribunal by no later than July 12, 1999 of their availability for a session on the merits during either the week of September 27, 1999 or the week of October 4, 1999;

and

DIRECTS Respondent to advise the Tribunal by no later than July 12, 1999 of whether it will require additional time to prepare its counter-memorial on the merits and to suggest a proposed, revised briefing schedule (although the session on the merits must not be postponed any later than the weeks of October 18, 1999 and October 25, 1999).