

## AWARD

In the Arbitration ARB/99/6

International Centre for Settlement of Investment Disputes (ICSID)

Middle East Cement Shipping and Handling Co. S.A.  
Claimant

represented by:

Mr. Nicolaos Georgilis  
Mr. Sarwat A. Shahid  
Mr. Ashraf Yehia

vs.

Arab Republic of Egypt  
Respondent

represented by:

Counsellor Ibrahim M. Refaat, President  
Counsellor Hussein M. Fathi, Vice-President  
Counsellor Osama A. Mahmoud, Vice-President  
Egyptian State Lawsuits Authority  
Dr. Aktham El Kholy, Counsel

by the Arbitral Tribunal  
consisting of

Prof. Dr. Karl-Heinz Böckstiegel, President  
Prof. Piero Bernardini, Arbitrator  
Prof. Don Wallace, Jr., Arbitrator

Date of Dispatch to the Parties: April 12, 2002

## Table of Contents

<u>Abbreviations used</u>	<u>Page 3</u>
	<u>Paragraph</u>
<u>A. The Parties</u>	1
<u>B. Procedure</u>	3
B.1. Procedure leading to the Decision of Jurisdiction	4
B.2. Procedure leading to the Award on the Merits	51
B.3. Procedural Objections by Respondent	63
3.1. Higher Claims raised by Claimant	64
3.2. English translations of certain documents	66
3.3. Locus Standi of Claimant	68
3.4. Has Claimant waived the right to contest the auction?	70
3.5. Request for deletion of accusation	74
B.4. Declaration of Closure of Proceedings (Rule 38)	76
<u>C. Relief Sought</u>	79
<u>D. Summary of Facts and Contentions</u>	81
<u>E. Legal Scope of Decision on Merits, Applicable Law</u>	85
<u>F. Preliminary Issues</u>	
F.1. Burden of Proof	88
F.2. Rules of Evidence	92
<u>G. Consideration of the Claims Raised</u>	95
G.1. Claims resulting from the alleged "De Facto Revocation of the License"	97
G.2. Claims for "Incurred Damages"	130
G.2.1. The ship M/V Poseidon 8	131
G.2.2. Damages incurred due to Bank Loan, Foreign employees' compensation, Liquidation expenses	152
G.3. Claims for Misinterpretation of the Investment Law	157
G.4. Claim based on alleged illegal Confiscation of the Letter of Guarantee	163
G.5. Mitigation of Damages	166
G.6. Conclusion	172
G.7. Interest	173
G.8. Arbitration Costs	176
<u>H. Decisions</u>	178

Abbreviations used

For the many references made in this Award to the file of the case for convenience and shortness, the Tribunal will use the following abbreviations:

BIT           Bilateral Investment Treaty between Egypt and Greece of 1993

CI            Claimant's Request for Arbitration of March 29, 1999

CII           "        Memorial of January 15, 2001

CIII          "        Reply Memorial of March 29, 2001

CIV          "        Submission of August 14, 2001

CV           "        Post-Hearing Brief of October 2, 2001

C1 *et seq.* Exhibits submitted by Claimant on the Merits

RI           Respondent's Preliminary Memo of June 1, 1999

RII          "        Counter-Memorial of February 28, 2001

RIII         "        Rejoinder of May 8, 2001

RIV         "        Submission of August 14, 2001

RV          "        Post-Hearing Brief of October 2, 2001

R1 *et seq.* Exhibits submitted by Respondent on the Merits

Tr.          Transcript of Hearing on the Merits

## A. The Parties

1. The Claimant is:  
Middle East Cement Shipping and Handling Co. S.A., a corporation having its seat at 163, Michalacopoulou St., 115 27 Athens, Greece.
2. The Respondent is:  
the Arab Republic of Egypt, duly represented by the Egyptian State Lawsuits Authority, Mogamaa Building, 10<sup>th</sup> Floor, El Tahreer Sq., Cairo, Egypt.

## B. Procedure

3. In view of the fact that this arbitration had separate stages on jurisdiction and on the merits, these stages are shortly described hereafter insofar as considered relevant.

### B.1. Procedure leading to the Decision on Jurisdiction

4. On November 19, 1999, the International Centre for Settlement of Investment Disputes (ICSID) registered a request for arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), submitted by Middle East Cement Shipping and Handling Co. S.A., a company organized under the laws of the Hellenic Republic (Greece), against the Arab Republic of Egypt (Egypt).
5. The request for arbitration was submitted in regard to a dispute concerning Egypt's alleged expropriation of Middle East Cement's interests in a business concession located in Egypt and Egypt's alleged failure to ensure the re-exportation of Middle East Cement's assets. The request invokes the dispute settlement provisions of the 1993 Agreement for the Promotion and Reciprocal Protection of Investments between Greece and Egypt (the BIT).
6. On December 23, 1999, the parties agreed that the Tribunal in this case was to consist of three arbitrators, one arbitrator to be appointed by the Claimant, another arbitrator to be appointed by the Respondent within thirty days of having been notified by the Centre of the name and curriculum vitae of the arbitrator appointed by the

Claimant, and the third arbitrator, who shall be the President of the Tribunal, to be appointed by agreement of the first two appointed arbitrators, within fifteen days from the appointment of an arbitrator by the Respondent.

7. In accordance with such agreement, the Claimant appointed as an arbitrator in this proceeding Professor Piero Bernardini. The Respondent appointed Professor Don Wallace, Jr. Thereafter, ICSID was notified by Professor Bernardini and Professor Wallace that they had agreed to appoint Professor Dr. Karl-Heinz Böckstiegel as the President of the Tribunal. Pursuant to ICSID Arbitration Rule 5(2), the three arbitrators accepted the appointment.

8. By letter of January 28, 2000, ICSID informed the Parties of the constitution of the Tribunal and that the proceeding was deemed to have begun on that date, and also that, according to ICSID Arbitration Rule 13(1) the sixty-day period for holding the First Session would expire on March 28, 2000, and that Ms. Eloï se Obadia, Counsel of ICSID, would serve as Secretary of the Tribunal.

9. By letter of February 3, 2000, ICSID informed the Parties that, after consultation between the members of the Tribunal and ICSID, it was proposed to hold the First Session at the seat of ICSID in Washington, D.C. on February 23 or 24, 2000.

10. By letter of February 7, 2000 to the Parties, ICSID sent a provisional agenda approved by the Tribunal for the First Session and, as the Claimant had already agreed to the proposed dates, asked the Respondent to respond regarding the proposed dates as well.

11. By letter of February 10, 2000, the Respondent suggested the last week of March 2000 for the Session.

12. By letter of February 15, 2000, ICSID informed the Parties that the Tribunal had endeavored to re-schedule the date of the First Session to the end of March but had found that impossible due to unavailability of the members of the Tribunal in late March and in April 2000. Under these circumstances, the Tribunal maintained the date of February 24, 2000 for the First Session in Washington, D.C. In this context the Tribunal reminded the Parties that this First Session was limited to preliminary procedural matters listed in the provisional agenda circulated to them. If a represen-

tative felt he could not decide on any issue, the respective Party could submit its comments in writing after the meeting. The Session should not last more than half a day. The Tribunal therefore expressed the hope that the Respondent could make the necessary arrangements to send at least one representative to the Session either from staff it had available in Washington, D.C. or from its other staff available for such a short and limited meeting in Washington, D.C.

13. By letter of February 18, 2000, the Tribunal invited the Parties to present preliminary comments on the items listed in the provisional agenda circulated before. At the same time, the Respondent was notified that, if no representative of the Respondent was able to attend in person the Session on February 24, 2000, ICSID could arrange to have a telephone conference with a representative of Egypt during the session.

14. By letter of February 20, 2000, the Respondent requested to postpone the First Session, but by letter of February 20, 2000 the Tribunal informed the Parties that it did not consider it appropriate to cancel the First Session of February 24, 2000 at this late stage, as this would result in a delay of several months. In view of the difficulties indicated by Respondent's Counsellor Osama Mahmoud to attend the Session, the Tribunal indicated that it did not consider these to give sufficient cause to have to cancel the Session. The Tribunal reiterated its indication that, in view of the limited procedural purpose of the First Session, another representative, either from Cairo or from the staff available in Washington, D.C., could attend the session and that that representative could be assisted by a direct telephone link to Cairo during the Session and, as the items of the agenda had already been communicated to the Parties on February 7, 2000, written comments on these items could be sent to the Tribunal before the Session, and written instructions could be given to the representative attending the Session.

15. By letter of February 23, 2000, the Respondent submitted written comments on the items on the provisional agenda. Further written comments on certain items were submitted by letter of February 24, 2000 by the Respondent.

16. The First Session was held in Washington, D.C. on February 24, 2000. Personally present were the three representatives of the Claimant, the members of the Tribunal, and Ms. Margrete Stevens as Acting Secretary of the Tribunal from the

ICSID Secretariat. The Respondent was represented via telephone link to Cairo by Counsellor Hussein M. Fathi and Counsellor Osama A. Mahmoud during the entire First Session.

17. The Session considered matters listed on the agenda circulated before. The representatives of both Parties participated actively in the discussion. As announced at the beginning of the Session, sound recordings were made of the Session. At the end of the Session, the President observed and the co-arbitrators confirmed that the co-arbitrators had agreed with the steps taken in the proceeding to convene the First Session. The President noted that it had been the wish of the Respondent to be present at the First Session, but that in the absence of actual presence in Washington, D.C., the Respondent's communications of February 23 and 24, 2000 as well as its participation in the Session via telephone link had effectively ensured that its views on all matters on the agenda for the First Session had been heard and taken into consideration by the Tribunal. But as a further precaution, the Minutes of the First Session would first be circulated in draft form for comments by the Parties and only be issued thereafter.

18. As to the contents of the discussion during the First Session, the following is relevant in the context of the Decision on Jurisdiction:

19. It was agreed that subsequent Hearings of the Tribunal with the Parties would take place in Paris, The Hague, or Washington, D.C., or any other place to which the Parties and the Tribunal might agree (Minutes para. 6).

20. With regard to this First Session, it was confirmed that a complete sound recording would be made and that the Secretary of the Tribunal would keep Minutes in summary form. Upon the approval of the text by the President of the Tribunal, a draft of the Minutes would no later than March 13, 2000 be distributed to the Parties for their comments. Any comments on such Draft Minutes that the Parties might wish to provide to the Tribunal should be communicated to ICSID no later than March 30, 2000. Upon receipt of comments, the Minutes would be finalized by the Tribunal and formally issued to the Parties.

21. The President noted that a number of procedural items on the agenda regarding the scheduling of further steps in the proceeding would depend on the manner in

which the Respondent's objection to jurisdiction would be dealt with. The objection had been raised by the Respondent in its June 1, 1999 letter and confirmed in its communication to ICSID of February 23, 2000. The President noted in this regard, that the proceedings on the merits were suspended in accordance with Arbitration Rule 41(3), and on behalf of the Tribunal and with the agreement of the Parties, proceeded to fix the following time limits:

22. The Respondent to file, no later than March 30, 2000, its written objections to jurisdiction, including all documentation and written statements of all witnesses proposed to be relied upon in this respect.

23. The Claimant to file, no later than April 27, 2000, its written observations on the objections to jurisdiction, including all documentation and written statements of all witnesses proposed to be relied upon in this respect.

24. The Respondent to file, no later than May 15, 2000, its reply, if any, to the Claimant's observations on the objections to jurisdiction.

25. The Claimant to file, no later than June 1, 2000, its rejoinder, if any.

26. The Oral Hearing on jurisdiction would take place in Paris on Wednesday and Thursday, July 12-13, 2000.

27. All this is expressly mentioned in paragraph 14 of the Minutes.

28. By letter of March 6, 2000, ICSID, with the approval of the Tribunal, sent to the Parties a copy of the Draft Minutes of the First Session of February 24, 2000 as well as a copy of the sound recording made of that Session. As agreed during the Session, the Parties were requested to submit to ICSID any comments they might have on the Draft Minutes no later than March 30, 2000.

29. By letter of March 23, 2000, the Claimant suggested as the only change in the Draft Minutes the addition of Mr. Ashraf Yehia as its further representative.



30. By letter of March 28, 2000, the Respondent submitted its Memorandum on Objection to Jurisdiction, but no comments were received from the Respondent regarding any changes in the Draft Minutes of the First Session.
31. By letter of April 12, 2000, ICSID sent to the Parties certified copies of the finalized Minutes of the First Session signed by Ms. Margrete Stevens as Acting Secretary of the Tribunal and by the President of the Tribunal.
32. By letter of April 26, 2000, ICSID circulated the Claimant's "Memorandum on Jurisdiction" received under cover letter of the same day.
33. By letter of May 18, 2000, ICSID circulated the Respondent's reply to the Claimant's observations on objections to jurisdiction dated May 14, 2000.
34. By letter of May 30, 2000, ICSID circulated a copy of the Claimant's "Rejoinder on Jurisdiction" received under cover letter of the same day.
35. On June 12, 2000, ICSID received a letter from the Respondent asking the Tribunal to suspend the procedure in view of alleged diplomatic negotiations with the Government of Greece regarding the interpretation of Article 8 of the BIT. A Verbal Note from the Embassy of the Arab Republic of Egypt in Athens to the Ministry of Foreign Affairs of Greece dated March 28, 2000, and a memorandum from the Egyptian Ministry of Foreign Affairs to the Hellenic Embassy in Cairo, dated April 17, 2002, were attached to the Respondent's letter.
36. By letter of June 14, 2000, the Claimant objected to this request submitting a Verbal Note from the Ministry of Foreign Affairs of the Hellenic Republic to the Egyptian Embassy in Athens dated May 17, 2000 indicating that the Greek Government was not aware of the existence of a dispute between Egypt and Greece concerning the interpretation of Article 8.
37. By letter of June 19, 2000, the Respondent reiterated its request that the Tribunal suspend the procedure and attached to its letter the same Verbal Note of May 17, 2000 in support of its request.

38. By letter of June 26, 2000, ICSID informed the Parties that the Tribunal had reviewed their various submissions. The Tribunal indicated that it did not consider the exchange of Verbal Notes between the Embassy of the Arab Republic of Egypt in Athens and the Ministry of Foreign Affairs in the Hellenic Republic of Greece as representing the submission of a dispute between Egypt and Greece concerning the interpretation or application of the 1993 Agreement between Egypt and Greece for the Promotion and Reciprocal Protection of Investments to the procedure set forth in Article 9 of that Agreement. Therefore, the Tribunal saw no reason to suspend the present arbitral proceeding. At the same time, the Tribunal reminded the Parties that the Oral Hearing on jurisdiction would take place in Paris on July 12 and 13, 2000, and indicated further details regarding the conduct of that Hearing. Further details regarding the logistics of the Hearing in Paris were communicated to the Parties by ICSID's letter of June 29, 2000.

39. By letter of July 3, 2000, the Respondent requested a postponement of the Hearing to the first week of October. The Respondent argued that ICSID's letter dated June 26, 2000 for the first time specified Paris as the Hearing place and that its representatives were not able to organize "at this very late stage" to come to Paris due to difficulties in getting a visa to France, getting bookings for hotels, booking aviation tickets, and getting the approval for travel from the Egyptian Government.

40. By letter of July 4, 2000, the Claimant objected to the Respondent's request and asked the Tribunal either to maintain the Hearing dates of July 12 and 13, 2000, or to issue a Decision on Jurisdiction only in light of the written submissions from the Parties.

41. By letter of July 4, 2000, ICSID communicated to the Parties the Tribunal's decision as follows:

"The Arbitral Tribunal has reviewed the Respondent's letter of July 3, 2000.

The Arbitral Tribunal wishes to remind the parties that it was agreed at the first session, held on February 24, 2000, that the hearing on the objections to jurisdiction would take place in Paris on July 12 and 13, 2000. This was recorded in paragraph 14 of the Minutes of the First Session. The draft Minutes, as well as the sound recording made of the First Session, were sent to

the parties on March 6, 2000. Certified copies of the signed Minutes of the First Session were sent to the parties, by courier, on April 12, 2000.

Under these circumstances, the Arbitral Tribunal feels that it must maintain the dates of July 12 and 13, 2000 for the hearing on the objections to jurisdiction in Paris. Therefore, the hearing shall take place as indicated in the earlier communications, particularly in our letter of June 26, 2000. The Tribunal hopes that the Arab Republic of Egypt could make the necessary arrangements to send at least one representative to the session."

42. In a further letter of July 6, 2000, ICSID offered its help to get a visa for the representatives of the Respondent and also, if a representative of the Respondent was not able to attend the Hearing in Paris, to hold a video conference between the Paris office of the World Bank and an appropriate facility in Cairo.

43. By letter of July 11, 2000, the Respondent indicated that no system for a video conference was available to it, that it still requested to adjourn the Hearing on jurisdiction, and that it did not accept the proposal of the Claimant to have the Tribunal render its Decision on Jurisdiction on the basis of the written submissions only.

44. The Hearing on jurisdiction was started on Wednesday July 12, 2000 at the announced time and place, i.e., the offices of the World Bank in Paris. The Claimant was represented in person by its three representatives. The Respondent was not represented. The Tribunal was assisted by Mr. Alejandro Escobar as Acting Secretary of the Tribunal. As announced before, a sound recording and a verbatim transcript of the Hearing was made. After the Hearing was started at 9.30 hrs. in the morning, it was suspended for five minutes and resumed at 9.35 hrs. at which time the President indicated that the Tribunal had decided that the Hearing would now proceed in the absence of representatives from the Respondent. After the President had put on record relevant procedural details, the Claimant made a presentation on the issues of jurisdiction and the arbitrators asked questions in this respect which were answered by the Claimant. At the end of the Hearing, later the same morning, the President indicated that the transcript of the Hearing would be sent to the Parties to give them an opportunity to submit comments on this transcript by August 15, 2000.

45. By letter of July 19, 2000, ICSID sent the transcript to the Parties indicating that they could submit comments at the latest by August 15, 2000 both regarding the procedure and the issues of jurisdiction discussed at the Hearing.

46. By a further letter of August 1, 2000, ICSID provided the Parties and the Tribunal with copies of the sound recording of the Hearing in Paris.

47. By letter of August 10, 2000, the Claimant submitted some brief comments.

48. By letter of August 14, 2000, the Respondent also submitted comments, both regarding the procedure and issues of jurisdiction.

49. Thereafter, the members of the Tribunal deliberated by various means of communication, including a meeting for deliberations in Washington, D.C. on November 9, 2000, leading to the Decision on Jurisdiction.

50. The Decision, dated November 27, 2000, was issued and certified by ICSID on November 28, 2000. Its operative part reads:

"Decision

1. The Tribunal has jurisdiction over the present dispute on the basis of the 1993 Bilateral Investment Treaty between Egypt and Greece.

2. After consultation with both Parties, a Procedural Order will be issued regarding the further procedure."

B.2. Procedure leading to the Award on the Merits

51. On November 28, 2000, the Tribunal issued a Procedural Order regarding the Procedure to be followed on the Merits and gave the Parties an opportunity to submit any comments by December 8, 2000, indicating that it would examine thereafter whether any changes of the Order would seem appropriate.

52. No comments were received from the Parties by December 8, 2000. Thus the time table established by the Procedural Order remained in place for the submissions on the Merits by the Parties.
53. Accordingly, Claimant submitted a Memorial of January 15, 2001.
54. By letter of February 3, 2001, the Respondent informed the Tribunal that Dr. Aktham El Kholy had been appointed to represent the Respondent in the proceeding.
55. On February 28, 2001, the Respondent submitted a Counter-Memorial.
56. On March 29, 2001, the Claimant submitted a Reply Memorial.
57. After the Tribunal had granted a requested extension, the Respondent submitted a Rejoinder on May 8, 2001.
58. By letter of April 17, 2001, the Tribunal informed the Parties that it intended to hold the Hearing on the Merits in Paris on July 17 and 18, 2001.
59. By letter of June 19, 2001, the Tribunal informed the Parties regarding the details of how it intended to conduct the Hearing.
60. The Hearing on the Merits was held in Paris on July 17 and 18, 2001. It included, in particular, two Rounds of Presentations by both Parties, discussion of certain procedural objections raised by Respondent, questions by the Arbitrators to the Parties, and Rulings given by the Tribunal regarding the further Procedure. For the details of the Hearing, reference is made to the Minutes signed by the Chairman and the Secretary of the Tribunal and issued to the Parties on July 31, 2001.
61. As provided in the Rulings of the Tribunal, the Parties submitted thereafter:
- On August 14, 2001, submissions regarding certain questions raised by the Tribunal in the Hearing.
  - On October 2, 2001, Post-Hearing Briefs.
62. Thereafter, the Tribunal entered into deliberations, in a meeting in Cologne, Germany, on October 9, 2001, and by various means of other communication. These

deliberations were temporarily suspended, as the advance deposits paid by the parties did not cover the expected costs of arbitration. When ICSID invited the Parties to pay equal shares of a further advance deposit, the Claimant paid its share while the Respondent did not. The Claimant paid, in accordance with Administrative and Financial Regulation 14 (3) (d), the Respondent's portion of the requested advance; the Tribunal then continued its elaboration of the Final Award.

### B.3. Procedural Objections by Respondent

63. Before it continues on the Merits, the Tribunal has to rule on four procedural objections raised by the Respondent.

#### B.3.1. Higher Claims raised by Claimant

64. During the Hearing (Tr. I 65), Respondent objected against the higher claims raised by Claimant in its Reply of March 29, 2001, page 20 (US\$ approximately 42 million plus compound interest), compared with the claims requested in the Memorial of January 15, 2001, page 31 (US\$ approximately 34 million plus interest).

65. The Tribunal notes that ICSID Arbitration Rule 40 permits additional claims "not later than in the reply." The Procedural Order of the Tribunal of November 28, 2000, did not indicate any limitation regarding the content of the Reply which Claimant was to submit by March 29, 2001. As the additional claims were, indeed, raised in that Reply Memorial, they are admissible.

#### B.3.2. English Translations of Certain Documents

66. Also at the Hearing (Tr. I 66), the Respondent objected regarding the English translations of certain documents in Greek submitted by the Claimant.

67. The Tribunal notes that it is the practice in international arbitration to accept translations of documents supplied by a Party, unless the other Party shows or the Tribunal sees any reasons why the correctness of such translations should be in doubt. As no such reason was shown by the Respondent, and as the Tribunal does not see any such reason with regard to the documents in question, the Tribunal accepts them as admissible.

### B.3.3. Locus Standi of Claimant

68. Also at the Hearing (Tr. I 67), the Respondent raised objections regarding the *locus standi* of the Claimant. These objections are also dealt with in written submissions by the Parties (particularly: RII 3, CIII 4; RIII 3 to 5; RV 4 to 5).

69. The Tribunal notes that, indeed, the name of the Claimant is used, in various documents and communications in the file, with some alterations. However, taking into account the entire picture of the documents in file as well as the explanations provided by the Parties, the Tribunal concludes that the *locus standi* of the Claimant is not in doubt in this arbitral procedure.

### B.3.4. Has Claimant waived the right to contest the auction?

70. Furthermore, the Respondent argues (particularly in RIV 2 and RV 19) that the Claimant has waived its right to contest the procedure and validity of the auctioning of the ship Poseidon by resorting to the Egyptian State Courts alleging the nullity of the auction. Claimant has objected to this argument (CV 2 to 3).

71. The Tribunal notes that Art. 10.2 of the BIT provides that the investor may submit the investment dispute "either to the competent court of the Contracting Party, or to an international arbitration tribunal." However, this refers to "such disputes" as are specified in paragraph 1 of Art. 10, i.e., disputes "between an investor of a Contracting Party and the Other Contracting Party concerning an obligation of the latter under this Agreement." The case brought by the Claimant before the Egyptian Courts regarding the alleged nullity of the auction, was not and could not be "concerning" Egypt's obligations under the BIT, but could only be concerning the validity of the auction under national Egyptian law. Therefore, Art. 10.2 of the BIT does not exclude the admissibility of Claimant's objections to the auction of the ship.

72. Furthermore, the conduct of the Claimant during this arbitral procedure in this regard, also cannot be considered as a waiver under Art. 10.2.

73. Though, therefore, there is no waiver excluding the admissibility of the respective objections by the Claimant, this does not prejudice any relevance of the procedure

and validity of the auction for the merits of this case, which will be examined by the Tribunal later in this Award.

#### B.3.5. Request for Deletion of Accusation

74. Finally, by letter of October 9, 2001, the Respondent requests the deletion of what it considered an "unacceptable accusation" in the Claimant's Post-Hearing Brief (CV 3) where Claimant refers to "any untrue document to falsely evidence that the notification [i.e., of the auction of the ship Poseidon] ha[d]s been duly made." The Claimant in its letter of October 18, 2001, indicated that its wording should not be read as offensive, but that, on the other hand, Respondent itself submitted certain offending accusations against Claimant.

75. The Tribunal does not have to decide 1) whether this submission of October 9, 2001 by Respondent is admissible though, the Post-Hearing Briefs were ruled to be the last submissions by the Parties, and 2) whether there is reason to delete the respective wording in the Claimant's Post-Hearing Brief. According to ICSID Rule 34, the Tribunal shall be the judge of the admissibility and probative value of the documents submitted by the Respondent and the Tribunal is not in any way bound by the evaluations given by the Claimant and the Respondent.

#### B.4. Declaration of Closure of Proceedings (Rule 38)

76. ICSID Arbitration Rule 38 requires that, when the presentation of the case by the Parties is completed, the proceeding shall be declared closed.

77. After reviewing the presentations by the Parties up to and including the Post-Hearing Briefs, the Tribunal came to the conclusion that there is no request by a Party nor any reason to reopen the proceeding, as is possible under paragraph (2) of Rule 38.

78. Therefore, after sufficient advance deposit payments from the Parties were received to cover the expected costs of arbitration, by Order dated February 14, 2002, the proceeding was declared closed according to paragraph (1) of Rule 38.

#### C. Relief Sought



79. Based on its Memorial of January 15, 2001 (CII 31) as updated in its Reply Memorial of March 29, 2001 (CIII 20), the Claimant seeks the following Relief in this case:

1. A total payment of US\$ 42,240.000.00.
2. Compound interest from the time of taking of the investment.
3. Any other relief as the Tribunal may deem appropriate.
4. Reimbursement of all costs and expenses incurred by Claimant in connection with these proceedings.

80. Based on its Counter-Memorial of February 28, 2001 (RII 34), as maintained in its Rejoinder of May 8, 2001 (RIII 29) and updated by its Post-Hearing Brief of October 2, 2001 (RV 23), the Respondent seeks the following Relief in this case:

1. Rejection of all claims raised by Claimant.
2. Reimbursement of its full cost of this arbitration.

#### D. Summary of Facts and Contentions

81. Hereafter, the Tribunal will give a short summary of major facts and contentions in this case insofar as it is considered appropriate in the context of the decision given in this Award. Regarding further details, reference is made to the many written briefs and documents submitted by the Parties as well as to the oral presentations by the Parties, as recorded in the minutes, sound recording and transcript of the final Hearing. Further details will be taken up in the later Section "Consideration of the Claims Raised" in this Award.

82. The Claimant alleges the basic facts of its claim as follows in its Request for Arbitration of March 29, 1999 (CI 2 to 5):

"...2. By virtue of the Resolution No. 512/82 of July 4<sup>th</sup>, 1982 of the Egyptian General Authority for Investment and Free Zones (Exh. 3), a Branch of the Claimant under the name of "*Badr Cement Terminal*" was established in Suez, for the import and storage of bulk cement in depot ship, docked at the Quay close to Adabiyea port in Suez, at Badr dock, and for packing and dispatch of same within Egypt to both the private and public sectors. The above resolution mentioned at para. 5 that, for the above purpose, an investment in US Dollars would be made. Further, at para. 9 the decision mentioned that the duration of the project was for a period not exceeding 10 years.

3. In harmony with the above resolution as well as with Egyptian law No. 43 of 1974 as amended by law No. 32 of 1977, and with the decree No. 375 of 1977 of the Egyptian Minister of Economy and Economic Cooperation, and following consent by the Minister of Investment and International Cooperation dated 11<sup>th</sup> Dec. 1982, the decree No. 13 of 1983 was promulgated on 19<sup>th</sup> January 1983, and published in the Egyptian Government Gazette (Exh. 4).

By virtue of same, the "*Branch of the Middle East Cement Co. Greek Company*", was licensed to exercise the activity described above, at the Badr Anchorage at kilometer 17 of the Suez - Adabia (Adabiyea) Road, with boundaries specified in the decree, which also comprises all the details concerning the operation and activities of "Badr Cement Terminal", the Claimant's Branch. Article 9 of the decree precised that the investment was protected for a duration guaranteed for ten (10) years i.e. till 19<sup>th</sup> January 1993. To the Claimant's request for extension of the investment duration, the Egyptian General Authority for Investment and Free Zones answered, by its letter No. 427 of 25<sup>th</sup> Jan. 1993, that the project duration was ten years (Exh. 5 $\alpha$ ). That was the final and unambiguous confirmation by the Egyptian authorities of the ten-year duration of our investment.

4. As a result of the above Egyptian decree No. 13 of 1983, and with the firm belief that Claimant was thus granted the protection of Egyptian law and Egyptian Government Claimant proceeded with an investment as follows:

a) On shore installations: US \$ 6,784,429

b) Floating silo: Us (sic) \$ 6,532,049

With the approval of the General Authority for Investment and Free Zones, and in accordance with the investment law 43 of the year 1974, the M/v Poseidon was time-chartered by Claimant to its Egyptian branch to serve the investment exclusively.

5. The Claimant had been operating, through its branch in Egypt, import, storage of bulk cement at the floating silo (depot ship), docking, packing, and dispatching cement within Egypt, to both the private and public sectors, when, suddenly, on 25<sup>th</sup> May 1989 i.e. three (3) years and eight (8) months before the end of the duration of the guarantee and privileges granted to our investment, the Ministry of Construction of the Arab Republic of Egypt issued Decree No. 195 of 1989 (Exh.5) prohibiting import of all kinds of Portland Cement either through the Public or Government sector, or through the private sector, with the exception of cement imports under Egypt's Border Agreement and those covered by existing contracts of the Egyptian Cement Office, thus condemning Claimant's Egyptian branch to paralysis as, according to that decree, Claimant was not allowed to continue the steady flow of its sales to the Egyptian market and to properly honour its commitments both to its suppliers and to its customers. What is worse, the approval to re-export Claimant's (remaining) assets was withheld until December 1995, in spite of explicit provisions of Egyptian investment law.

6. At that time (December 1995), Claimant had exerted all efforts to re-export its remaining assets, including the floating silo. However, the local au-

thorities had opposed the re-export of assets, by mere administrative measures and not by Court orders, thus violating all express provisions of the applicable Investment Law. Till this date (March 1999), this dispute in relation to re-exporting the remaining assets is still pending. Consequently, Claimant's investment is still pending due not only to Decree No. 195 of 1989 but also from problems continuously created by the Egyptian Authorities far beyond 6<sup>th</sup> April 1995, date of entry into force of the actual bilateral Investment Agreement between Egypt and Greece.

7. It is worth noting that the cement import prohibition decree has been revoked in 1992 and the Free Zone Authority had then informed us about that (Exh.6). The revocation shows how arbitrary and unjustified was the prohibition Decree No. 195 of 1989. But the damage Claimant had sustained was a mortal blow to its investment. Furthermore Claimant could not start again from the beginning, as it felt it was not sure that a new prohibitive intervention would not take place again.

8. The damage Claimant sustained, as a result of that premature intervention, is US \$ 12,946,137.-; its breaking down will follow at the end of this request."

83. The Respondent, in its Post-Hearing Brief of October 2, 2001 (RV 22) summarizes its conclusions as follows:

"Claimant is an investor who conducted its investment in Egypt in an unprofessional and irresponsible manner, with clear disdain for the Egyptian law and for third parties rights, including State authorities such as the Red Sea Ports Authority and the Suez Canal Authority. Such irresponsible and unprofessional attitude of Claimant led to the auction of his ship, whose price remained insufficient to pay all Claimant's debts.

The total volume of Claimant's investment did not exceed, at best, US\$ 4 million. When the prohibition to import grey Portland cement was decided in 1989, the remaining period of Claimant's investment license did not exceed 4 months. Claimant's invocation of Halkis's contract with the ECO dated 1.8.85 is of no help to Claimant because it is a Halkis contract governed by a different arbitration than ICSID and also because the performance of that contract should have been completed already in 1986. Instead, only 25% of the contractual quantity under that contract has been delivered, and that was followed since 1989 by big and prolonged disputes, which led to the repeated extension of Halkis's performance bond only because of those disputes. It makes no doubt that Claimant's investment license came to its contractual end in September 1989 since there was no supply of cement to the public sector after that date.

For the remaining four months of the license's period, Claimant's losses according to Claimant's own figures, did not exceed US\$ 30,000. Quite irresponsibly, the Claimant claims more than 40 million Dollars, without any basis for any such claims.

Claimant was not discriminated against by any Egyptian authority in any way or form. Claimant declined to resume its activity when that was offered to it. Only because of Claimant's poor and irresponsible management, its ship

was duly attached by court order up to 1996 and thereafter was subjected to administrative attachment and auction in 1989. Claimant's strategy throughout was to exert its best efforts to build a case with a view to extort as much money as possible from the Arab Republic of Egypt."

84. The above citations may suffice to identify the core of the dispute between the Parties. In their other submissions on the merits (CI to CV and RI to RV), and by reference to a great number of documents filed with these submissions, the Parties have provided many further details regarding facts, which are partly uncontested and partly contested, as well as legal evaluations and arguments. To avoid repetition in this Award, such details will be taken up by the Tribunal, insofar as considered relevant, later in this Award when the respective issues are considered and decided.

#### E. Legal Scope of Decision on Merits, Applicable Law

85. Before the Tribunal can enter into evaluating the facts and contentions of the Parties in this case for its decision on the merits, it seems appropriate to identify the legal framework within which the factual aspects can and must be considered.

86. An important limitation of this framework is that, in its Decision on Jurisdiction of November 28, 2000, the Tribunal found that it only had jurisdiction on the basis of the Bilateral Investment Treaty of 1993 between Egypt and Greece. Art. 11 of this BIT provides that, in addition to the rules of the BIT, obligations for a more favorable treatment stemming from the national law of the Contracting Parties or existing under international law between the Contracting Parties shall prevail. But there are no such additional obligations relevant for this case. Therefore, the Tribunal can only consider and accept claims of the investor under this BIT.

87. In doing so, the Tribunal shall decide in accordance with Art. 42 of the ICSID Convention. The first sentence of Art. 42 (1) requires the application of rules of law agreed by the Parties. The above-mentioned Art. 11 of the BIT provides such an agreement and thus has to be respected. While that provision requires the application of additional provisions of the national law if more favorable for the investor – which the Tribunal does not find to exist in this case –, by *argumentum a contrario* it does not permit application of provisions of national law limiting any claims found by

the Tribunal to exist under the BIT. As expressly mentioned in the beginning of the 2<sup>nd</sup> sentence of Art. 42 (1) of the ICSID Convention, only “in the absence of such an agreement” regarding the rules of law to be applied, that 2<sup>nd</sup> sentence provides that “the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.” While, thus, this Tribunal takes into account the law of Egypt where appropriate, consistent with its decision to consider and accept only claims under the BIT, the Tribunal shall apply the substantive provisions of the BIT for all matters regulated by the Treaty and cannot apply any provisions of national Egyptian law limiting claims found to exist under the BIT. Thus, Egyptian law will be taken into account by the Tribunal when it is not overridden by the application of provisions of the BIT. On the other hand, both according to the 1<sup>st</sup> sentence of Art. 42 (1) as the rules of law chosen by the Parties in Art. 11 of the BIT and according to the 2<sup>nd</sup> sentence of Art. 42 (1) of the ICSID Convention as “rules of international law as may be applicable,” the reference to and application of the BIT implies that the Tribunal may have recourse to the rules of general international law to supplement those of the BIT. (See: Parra, Antonio R., *Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties*, News from ICSID 17 (2000) No. 2, p. 8).

## F. Preliminary Issues

### F.1. Burden of Proof

88. As many factual aspects of the Case are disputed between the Parties, the Tribunal at the outset has to establish who has the burden of proof, i.e., who has to show the elements required as conditions for a claim, and - insofar as they are disputed - has to prove them to the satisfaction of the Tribunal.

89. In order to accept a claim under the BIT, a breach of its provisions by the Respondent must be found leading to a claim, as for example under Art. 4 (Expropriation). The respective provisions of the BIT confirm what can be considered as a general principle of international procedure - and probably also of virtually all national procedural laws - namely that it is the Claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim.

90. In the ICSID Case No. Arb/87/3, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka* (published in 6 ICSID Review - Foreign Investment Law Journal (1991), p. 527 *et seq.*) the Tribunal considered this to be one of the "established international law rules" (at p. 549), relying on Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge 1987, p. 327, and further sources. Relying also on Bin Cheng (p. 329-331, with quotations from further supporting authorities), the Tribunal also considered as an established international law rule that "...[a] Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof" (at p. 549).

91. Thus, taking these considerations into account, this Tribunal concludes that the Claimant has the burden of proof, in the above sense, for the conditions required in the BIT to establish its claims.

## F.2. Rules of Evidence

92. After having established which Party, in principle, has the burden of proof, the Tribunal must now clarify the rules of evidence applicable in this case in order to establish the procedural framework within which it has to decide whether or not a disputed fact has, indeed, been proved.

93. Primarily, the rules on evidence in this case are established by Rules 33 to 37 of the ICSID Arbitration Rules. Particularly relevant is Rule 34 (1):  
"The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."

94. In evaluating the evidence before it under Rule 34 (1), the Tribunal is aware of certain principles accepted in earlier international cases which have some relevance here. While it does not seem necessary to go into much detail in this regard in this section of the Award, at least the following principles cited, with supporting sources, in the Final Award of ICSID Case Arb/87/3 (*op. cit.* at pages 549 and 550) may be mentioned:

"... Rule (J) - The international responsibility of the State is not to be presumed. The party alleging a violation of international law giving rise to international responsibility has the burden of proving the assertion.

Rule (K) - International tribunals are not bound to adhere to strict judicial rules of evidence. As a general principle the probative force of the evidence presented is for the Tribunal to determine ...

Rule (L) - In exercising the free evaluation of evidence provided for under the previous Rule, the international tribunals decided the case on the strength of the evidence produced by both parties, and in a case a party adduces some evidence which *prima facie* supports his allegation, the burden of proof shifts to his opponent."

#### G. Consideration of the Claims raised

95. The Tribunal now turns to the merits of the claims raised by Claimant. This consideration will follow the order of the claims as presented in Claimant's Memorial of January 15, 2001 (CII).

96. When considering these claims, the Tribunal has fully taken into account the many and extensive submissions by the Parties (see Section B.2 above) to which the Tribunal refers hereby. As it does not seem necessary to repeat all factual and legal arguments by the Parties in these submissions regarding the various claims, for the purposes of this Award, the Tribunal will only expressly refer to those arguments which it concludes to be decisive regarding its rulings on the relief sought by the claims raised.

#### G.I. Claims resulting from the alleged "De Facto Revocation of the License"

97. The first group of claims is identified by Claimant under the title "The consequences of the De Facto Revocation of the License" (CII 2 and 15 *et seq.*). They are

considered hereafter as amended in Claimant's Reply Memorial of March 29, 2001 (CIII 20), because the additional claims in that Memorial have been found by the Tribunal to be admissible (see Section B.3.1 above).

98. The "License" (C3) was granted by Decree No. 13 of January 19, 1983 by the Egyptian General Authority for Investment and Free Zones (GAFI). It licensed Claimant the following activity as a Free Zone project under the name of "Badr Cement Terminal":

"Importation and storage of cement in bulk in floating silos erected in the private free zones on the Badr quay close to El-Adabia Port in Suez, and its being packed and dispatched within the country for the Public and Private Sectors."

99. In its introductory part, the License expressly referred to the Egyptian Investment Law No. 43 of 1974 (C7) as amended by the Law No. 32 of 1977, and to the Ministerial Decree No. 375 of 1977 (C8) providing Executive Regulations for "Arab and Foreign Investment," particularly with regard to the granting of licenses for projects in the Free Zone (Art. 52 *et seq.*).

100. The BIT, in its Art. 1 "Definitions," expressly mentions that "Investment means every kind of asset and in particular, though not exclusively, includes: .....d) business concessions conferred by law or under contract, ....."

101. In the light of the above, there can be no doubt that the "License" qualifies as an "Investment" under the BIT.

102. Similarly, as according to Art. 1.3.b of the BIT "Investor shall comprise ... legal persons constituted in accordance with the law of that Contracting Party," the Claimant qualifies as an "Investor" in Egypt under the BIT. (See this Tribunal's Decision on Jurisdiction, paragraph 98.)

103. The Claimant alleges that a "de facto revocation of the License" by the Respondent occurred by the Ministerial Decree No. 195 of May 28, 1989 (C6) and the Respondent's conduct thereafter. Respondent alleges that the Decree affected the License only for 4 months till the end of September 1989 when the License would have come to its contractually provided end in any case.



104. To be a basis for the Claimant's claims, Decree No. 195 and/ or Respondent's conduct would have to qualify as an "Expropriation" under Art. 4 of the BIT which has the following wording:

"Art. 4

Expropriation

Investments by investors of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except under the following conditions:

- a) the measures are taken in the public interest and under due process of law,
- b) the measures are clear and not discriminatory, and
- c) the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investments affected immediately before the measures referred to above in this paragraph occurred or became public knowledge and it shall be freely transferable in convertible currencies from the Contracting Party, at the bank rate of exchange applicable on the date used for the determination of value. The compensation shall be transferable without delay and shall include interest until the date of payment."

105. The Tribunal thus has to examine whether, and if so, with what effect and consequences, the Respondent's Decree No. 195 and conduct thereafter is a "measure the effects of which would be tantamount to expropriation." For convenience and shortness, in conformity with the discussion of expropriation measures in international jurisprudence and writings, the Tribunal will use the term "taking" in the context of this examination.

106. Decree No. 195 of May 28, 1989 (C6) provides the following relevant wording (in English translation):

"Arab Republic of Egypt

Ministry of Construction

The Minister's Office

Ministerial Decree

No. 195 of 1989

in respect of the Import of Grey Portland Cement

..... RESOLVED

Article 1: To prohibit the import of all kinds of Grey Portland Cement either through the Public of the Governmental Sector or the Private Sector.

Article 2: This resolution does not affect the remainder of the existing contracts relating to the Egyptian Cement Sale Office for the Balanced Transactions and Protocols.

Article 3: This resolution does not affect the Thermal and White Portland Cement.

Article 4: This resolution is effective from the date of its issuance and be published in the Egyptian Gazette.

Issued on 28/5/1989

Minister of Construction

(Signature)

New Societies, Housing & Utilities

Signature

(Eng. Hassaballah Mohamed El-Kafrawy)"

107. As also Respondent concedes that, at least for a period of 4 months, Claimant was deprived, by the Decree, of rights it had been granted under the License, there is no dispute between the Parties that, in principle, a taking did take place. When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a "creeping" or "indirect" expropriation or, as in the BIT, as measures "the effect of which is tantamount to expropriation." As a matter of fact, the investor is deprived by such measures of parts of the value of his investment. This is the case here, and, therefore, it is the Tribunal's view that such a taking amounted to an expropriation within the meaning of Art. 4 of the BIT and that, accordingly, Respondent is liable to pay compensation therefor. In order to determine the amount of such compensation, the Tribunal has to determine the "market value" of the investment affected. (BIT Art. 4.c); see *supra* paragraph 104).

108. In this section of the Award dealing with the Claims regarding the License, the first step is to determine the duration of the License. Indeed, the License granted Claimant the right to import cement and the Decree No. 195 prohibits such import for Grey Portland Cement. However, it is disputed between the Parties whether, as Respondent alleges, the taking affected only 4 remaining months of the License resulting in losses not exceeding US\$ 30,000.00 (RV 22), or whether, as Claimant alleges, the taking affected the License till an expiry date of January 19, 1993 and the conduct of the Respondent till November 28, 1999 resulting in much higher losses (CII 15 - 20, 31 and CIII 20).

109. Art. (9) of the License has the following in the English translation submitted as Exhibit C3 by Claimant:

"The period of this license is the period of supply of the quantities contracted for with the Egyptian Cement Sale Office on condition that the duration of the project does not exceed ten years."

However, during the Hearing (Tr I 89, 90), the Parties agreed that (as already indicated in RII 4 and accepted in CV 8) a correct translation of the authentic wording in Arabic should be corrected to the effect that

the term "contracted" must be replaced by the words "which may be contracted."

110. Respondent argues that the License only lasted for the duration of the contract to supply cement to the Egyptian Cement Office (ECO), i.e., the Contract between the Claimant and Petra Navigation and International Trading Co., LTD, Amman, Jordan (Petra) (C37) of September 20, 1988 for 12 months, that is till September 20, 1989.

111. The Tribunal is not persuaded by that argument. The last sentence of Art. (1) of the License expressly permits importation of cement "dispatched within the country for the Public and Private Sectors." Under the above mentioned agreed correct English translation of Art. (9), the fact that the actual contract concluded in September 1988 lasted only till September 20, 1989, does not limit the period of the License to that date as well, because it does not exclude that further quantities "may be contracted" with ECO for up to 10 years. For the same reason, neither the conclusion nor the performance of such other contracts must take place before September 20,

1989. The reference to ECO in Art. (9) can, therefore, not be understood to mean that other contracts, particularly with the Private Sector, should be excluded. Taking into account the agreed corrected translation of Art. (9), that provision must be interpreted to the effect that also supplies which may be contracted for the Private Sector fall under the License and its duration as long as supplies to both the Public and Private Sectors do not exceed ten years, i.e., till January 18, 1993.

112. To find out the extent of the taking by Decree No. 195, the Tribunal, therefore, has to examine which supplies, either to the Public or the Private Sector, Claimant may have contracted for during that 10 year period and which profits were lost from those contracts due to the taking. This examination will have to be done on the basis of the evidence submitted to the Tribunal and taking into account, as this is disputed by Respondent, that Claimant has the burden of proof in this respect.

113. Three agreements for cement supply have been filed by Claimant in this proceeding:

- a. the above mentioned agreement signed by Claimant on September 20, 1988 (C37) with Petra granting Claimant the right to handle the quantity of 750.000 m. tons of cement for the account of Petra, to be delivered to ECO during the period of 12 months from October 1, 1988, providing for a handling fee of US\$ 2.55 per m. ton and a guaranteed (by Petra) minimum supply of 50.000 m. tons per month from December 1988 which have to be paid by Petra even if not taken by it ("First Petra Contract");
- b. an agreement signed by Claimant on February 12, 1989 (C 45) with Petra granting Claimant the right to handle the minimum quantity of 30.000 m. tons per month from June 1989 until December 31, 1989 (i.e., a total of 210.000 m. tons) to private customers in Egypt, providing for a handling fee of US\$ 4.25 per m. ton (or US\$ 3.05 for each m. ton in excess of 210.000 m. tons during the currency of the agreement) ("Second Petra Contract");
- c. a cement supply agreement dated August 1, 1985 (C 80) between the Ministry of Housing and Utilities of Egypt on behalf of ECO and Halkis Cement International S.A., a Greek Company ("Halkis"), providing for the supply by Halkis of 600.000 m. tons (at the rate of approximately 3.000 m. tons per working day), for a price of US\$ 3.00 per m. ton ("Halkis Agreement").

114. According to Claimant, the minimum amount of the monthly handling fee guaranteed under the First Petra Contract, equal to US\$ 127,500 (50.000 m. tons x US\$ 2.55), covered its monthly operating expenses without any profit margin (C II 15, 16, 19). Out of this sum, US\$ 4,839 equal to US\$ 0.10 per m. ton, corresponded to the monthly variable costs (petrol, lubricants, etc.) for a production of 750.000 m. tons (C II 17).

115. Claimant calculates its lost net profits from the First and Second Petra Contract on the basis of the minimum production capacity to which it has committed itself (120.000 m. tons) per month (C II 18) multiplied for each contract by the relevant handling fee, after deducting from the resulting product the monthly operating costs (fixed and variable) equal to US\$ 1.25 per m. ton, thus reaching an amount of lost profits equal to US\$ 9,438,000 (C II 19) for the whole period until the expiry of the 10 year duration of the License (i.e., until January 18, 1993).

116. The same data are applied by Claimant for calculating its lost profits for the period subsequent to the expiry of the License until the date of the re-exportation of its on-shore installations (December 1995), reaching the additional figure of US\$ 7,507,500 (C II 19, 20).

117. Profits lost for the last period (until the sale of the Poseidon 8 on November 28, 1999) are calculated by Claimant on the basis of the time chartering rate of the vessel, resulting in the amount of US\$ 4,230,000 (C II 20).

118. The total amount of lost profits claimed by Claimant is equal therefore to US\$ 21,175,500 (C II 20).

119. In its Reply Memorial Claimant has requested, in addition to the foregoing, the amount of profits lost under the Halkis Agreement, totaling US\$ 42,240,000 (C III 20).

120. Respondent has objected to the lost profits claim by alleging that the First Petra Contract could have continued to be performed even after Decree No. 195 and that only a minimum amount of lost profits would have resulted from Claimant's own calculation under the Second Petra Contract (R III 18, 19). Regarding the claim pursuant to the Halkis Agreement, apart from contending its inadmissibility (an issue already

determined by the Tribunal: *supra*, paragraph 65), Respondent has objected that this contract, being signed by Halkis, is outside the scope of this arbitration, that the disputes thereunder are purely commercial and subject to *ad hoc* arbitration and that the claim is based on entirely false calculations (RV 12).

121. The Tribunal has determined (*supra*, paragraph 111) that the expiry date of the License is after ten years (i.e., until January 18, 1993). The Tribunal holds further that Claimant's lost profits are to be calculated on the basis of the minimum quantities guaranteed by Petra under the First and Second Petra Contract rather than on the basis of the higher quantities corresponding to Claimant's available capacity, as contended by Claimant.

122. In addition, profits lost under the Halkis Agreement are to be taken into account. As a matter of fact, Claimant was involved in the performance of such Agreement considering that its terminal had to be used for the cement deliveries thereunder, as shown by Article 1 (referring to deliveries at "*Sellers Terminal at Badr Anchorage near the Abadiya Port, Suez*") and that Claimant provided the guarantee which had to be issued by Seller under Article 2 (referring to Sellers presentation of a letter of guarantee in favor of the Buyer, which was provided by Claimant: C 80). Further documents in the file evidence that Claimant purchased quantities of Ordinary Portland Cement for resale to the Ministry of Housing and Utilities of Egypt during the currency of the Halkis Agreement (C 99).

123. Claimant has calculated the amount of its operating costs (fixed and variable), based on a production capacity of 120.000 m. tons per month under the First and Second Petra Contract, as being equal to US\$ 1.25 per m. ton (C II 18, para. 86 where the figures for fixed and variable costs appear to be inverted). The Tribunal is of the view that such calculation should be rather based on the aggregate of the minimum monthly quantities under both Contracts, equal to 80.000 m. tons, resulting in a figure of operating costs of US\$ 1.63 per m. ton.

124. The resulting calculation of Claimant's lost profits is to be based on the following principles :

a) The First Petra Contract being allowed to continue notwithstanding the ban of Decree No. 195 of May 28, 1989, no lost profits claimed thereunder are justified con-

sidering also that the same was performed within the limit of the guaranteed minimum quantity of 50.000 m. tons per month (C II 19).

b) Under the Second Petra Contract, which was never implemented since it would have become operative on June 1, 1989 (i.e., following Decree No. 195 of May 28, 1989), Claimant's expected profits would have been equal to  $210.000 \times \text{US\$ } 2.62$  ( $\text{US\$ } 4.25 - \text{US\$ } 1.63$ ) =  $\text{US\$ } 550,200$  (where the amount of  $\text{US\$ } 4.25$  is the handling fee and the amount of  $\text{US\$ } 1.63$  corresponds to the operating costs).

c) Under the Halkis Agreement, a quantity of 443.707 m. tons was still to be delivered at the time of the Decree No. 195 of May 28, 1989 (C II 30); the Tribunal notes (in reply to an argument raised by Respondent) that deciding whether compensation is due to Claimant based on this Agreement has nothing to do with disputes arising thereunder to be settled by *ad hoc* arbitration. The Tribunal further notes that the price differential of  $\text{US\$ } 8.00$  per m. ton claimed by Claimant refers only to the limited quantity of 14.921 m. tons sold in November 1985. Taking into account the use of Claimant's terminal for the performance of the Halkis Agreement, the Tribunal considers reasonable to accept for the undelivered quantities the same profit margin yielded by the Second Petra Contract ( $\text{US\$ } 2.62$  per metric ton) and determines therefore the lost profits under the Halkis Agreement in the amount of  $\text{US\$ } 1,162,512$ .

125. The total amount of lost profits under the three cement supply agreements still in force on the date of Decree No. 195 of May 28, 1989 is therefore determined to be equal to  $\text{US\$ } 1,712,712$ .

126. It remains to be seen whether in reply to Claimant's lost profits claim spreading the duration of the three cement supply agreements over 44 months (i.e., the License remaining duration) the Tribunal has to consider, in addition to the total amount of lost profits recognized above, a further compensation for the loss of Claimant's opportunity to earn future profits entailed by the Decree No. 195 of May 28, 1989.

127. The License being the "expropriated" investment, its earning capacity during the remainder of its life may well come into consideration for assessing its "market value" under the BIT. Nothing would have prevented Claimant from concluding other cement supply contracts or contracts providing for the use of its terminal facilities. The circumstance that some of the cement supply contracts take into consideration possible

increases in quantities and/ or extension of duration lends support to the conclusion that the License had not exhausted its potentiality of yielding further profits to Claimant's benefit and that, accordingly, Claimant had a legitimate expectation that it could have earned additional profits under the License.

128. However, in order to add such expectations to the "market value" of the investment (Art.4.c) of the BIT), it would have been necessary for the Claimant to provide proof of concrete contracts missed and of the profit lost from them. The Tribunal concludes that the Claimant has not fulfilled that burden of proof and that, therefore, no additional compensation is due in this regard.

129. The same applies to the lost profit claimed by the Claimant (see paragraph 115 *supra*) for non – use of its onshore installations and of the Poseidon. Therefore, no additional compensation is due in this regard as well. However, this is without prejudice to any compensation due for the taking of the Poseidon itself which will be examined hereafter.

## G.2. Claims for "Incurred Damages"

130. A second group of claims is raised by Claimant under the heading "Incurred Damages" (CII 2, 21 - 26).

### G.2.1. The ship M/V Poseidon 8

131. The first, and most important, claim in this context requests "Refund of expenses related to the M/V Poseidon 8, as well as its value at the date of its being expropriated in November 1999" (CII 2, 21).

132. It is undisputed that the ship Poseidon was subjected to an administrative seizure by the Red Sea Port Authority on October 13, 1999 and then auctioned on November 28, 1999 for a price, paid by one of the two bidders, of Egyptian Pounds (EP) 301,000.00 as recorded in the auction minutes (C60). The Claimant alleges that the seizure and auction were illegal, it was not notified thereof, and that the price paid in the auction was for scrap value of the Poseidon while the actual value of the ship was at least US\$ 5 million (CII 21). The Respondent considers the auction as valid.



133. Again, the Tribunal first has to examine the applicability of the BIT. It has already found that the Claimant qualifies as an "Investor" under Art. 1.3 of the BIT.

134. The Respondent argues that the Poseidon was not an "investment" by the Claimant, particularly because the ship was not included in the Claimant's assets covered by the License and the Investment Law's umbrella (RII 6 *et seq.*). Respondent points out that under the Egyptian Investment Laws the investment must be owned by the investor and that the ship was owned by the Greek mother company of the Claimant, but not by Claimant itself (RIII 9 *et seq.*).

135. According to Art. 1.1 of the BIT "movable and immovable property" qualifies as "investment." The Tribunal notes that GAFI, in its letter of April 22, 1991 to the Suez Court (C30), expressly refers to "the Vessel owned by Middle East Cement Co (under liquidation), one of the Free Zone projects pursuant to Investment Law No. 43/ 1974 and Law No. 230/ 1989." And still the Minutes of Lodging of the Suez Court of First Instance of January 18, 2000, for a claim of the General Authority for Ports of the Red Sea, identify the lodged amount as "this amount being the remainder of the outcome collected from the sale of M.Vessel/ Poseidon 8 - which is the amount lodged in favor of Owners of the M.Vessel, i.e., Middle East Cement Co." (R12). If an authority and the courts of the Respondent treat Claimant as the owner of the Poseidon when collecting the auction price, they are barred from disputing its ownership under the BIT.

136. The Tribunal also notes that, as "Investment," Art. 1.1 of the BIT, in addition to "property" under section a), also includes under section e) "goods that under a leasing agreement are placed at the disposal of a lessee in the territory of a Contracting Party in conformity with its laws and regulations." Therefore, even if the Poseidon was owned by the Claimant's mother company, as mentioned in section 5) of the letter of April 22, 1991 (C30) and the Claimant had only leased (or "chartered" as mentioned in R II p. 24) the ship, it can still qualify as the Claimant's "investment." There is no evidence indicating that such lease was not in conformity with Egyptian laws and regulations (as further discussed in the following paragraph), and the same section 5) of the letter expressly confirms that "the Vessel was used in Suez by the branch as a floating silo only."

137. Finally, the Poseidon did not require a registration under Art. 14 of the Executive Regulations of the Investment Law No. 43 of 1974 (C8) to qualify as an "investment." The BIT itself does not require such a registration for an "investment" although it assumes that, in order to be admitted, the investment is made in accordance with the host State's legislation (Art. 2, 1<sup>st</sup> al.). But, anyhow, Art. 14 of the Executive Regulations is not applicable, as it is part of the Part 2 of the law titled "Inland Investment," while the Poseidon was part of a project in the Free Zone for which Part 3 of the law titled "Free Zones" is applicable (Art. 51 *et seq.*) where no registration is required.

138. Therefore, the Tribunal concludes that the Poseidon qualifies as an "investment" under the BIT and its protection.

139. Next, it has to be examined whether there was a taking of the Poseidon, though, normally, a seizure and auction ordered by the national courts do not qualify as a taking, they can be a "measure the effects of which would be tantamount to expropriation" if they are not taken "under due process of law" (Art. 4.a) of the BIT).

140. There had been an attachment before, in favor of Suez Mechanical Stevedoring Company ("SMS") (see C II 13, R II 11, C 31). The disputed second procedure was an administrative seizure of October 13, 1999 in favor of the Red Sea Ports Authority which claimed dues amounting to EP 103,033.97 (C59), followed by the auction of November 28, 1999 (C60). While the Respondent considers this procedure as valid, the Claimant argues that it was illegal. The dispute concerns particularly whether sufficient notification was supplied to the Claimant.

141. The relevant legal basis for the procedure was "Law No. 308 of 1955 concerning Administrative Distraint" (R7 to R14). The notification requirements are found in Art. 7 of the Law which provides:

1. "..... A copy of each of the notice, warning and distraint report shall be handed to the Debtor, or the person signing for him, and another copy to the sequester.
2. A copy of the distraint report shall be put on the door of the police post, ... in whose circle the distraint is levied. ....

3. If the Debtor or the person deputising for him are absent, this absence shall be recorded in the distraint report, and a copy thereof shall be handed to the superintendant of the Police Section .... Another copy shall be put at the locations set forth in the previous clause. Such procedures shall stand for the notice itself."

142. It seems that, regarding the Poseidon, the procedure under the 3<sup>rd</sup> paragraph of Art. 7 was applied: according to the Respondent, on November 15, 1999, the attachment order and notice for an auction on November 28, 1999 were applied by a lawyer of the Authority on board of the Poseidon (R9) having not found the debtor or his representative (RIV 3), notified to the chief of the Suez port's Police (R10), and published in the newspaper Al Safeer of November 22, 1999 (RII 23).

143. The Tribunal notes that the procedures under the 3<sup>rd</sup> paragraph of Art. 7 of the Law only apply "if the Debtor or the person deputising for him are absent." While the minutes of the attachment show that the Claimant was not represented on the Poseidon on November 15, 1999, it seems doubtful whether this already justified the "absent" procedure. As the activities on the Poseidon had stopped some time before due to the discontinuance of the import activities, it could not be expected that there was always somebody on the ship. The address of the Claimant and his attorney in Egypt were well known to the Authority from its many contacts with the Claimant as can be seen from the letter of the Chairman of the Authority of March 31, 1996 (C93). Art. 2.2 of the BIT requires that "Investments by investors of a Contracting Party shall, at all times, be accorded fair and equitable treatment and shall enjoy full protection and security, in the territory of the other Contracting Party." This BIT provision must be given particular relevance in view of the special protection granted by Art. 4 against measures "tantamount to expropriation," and in the requirement for "due process of law" in Art.4.a). Therefore, a matter as important as the seizure and auctioning of a ship of the Claimant should have been notified by a direct communication for which the law No. 308 provided under the 1<sup>st</sup> paragraph of Art. 7, irrespective of whether there was a legal duty or practice to do so by registered mail with return receipt requested as argued by Claimant (CV 4). The Tribunal finds that the procedure in fact applied here does not fulfill the requirements of Art. 2.2 and 4 of the BIT.

144. Thus, the Tribunal concludes that the Poseidon was taken by a "measure the effects of which would be tantamount to expropriation" and that the Claimant is entitled to a compensation as provided for under Art. 4. c) of the BIT.

145. Regarding the quantum of the claim arising therefrom, there is again a dispute between the Parties. The Respondent considers the price paid by the winning bidder in the auction, i.e., EP 301,000.00 as a clear indication of the value of the Poseidon (C60). The Claimant alleges that the value was at least US\$ 5 million (CII 21).

146. Art. 4. c) of the BIT provides that the compensation for a taking "shall amount to the market value of the investment affected immediately before the measures referred to above in this paragraph occurred or became public knowledge."

147. The Tribunal has found above the auction procedure applied here to have not been "under due process of law" (Art. 4. a) of the BIT) and specifically the notification procedure to have not been sufficient. Furthermore, as Claimant has pointed out (CV 2 *et seq.*), both the attachment minutes (R9) and the short newspaper notice on the auction (R 11) gave a negative description of the Poseidon ("covered by rust" ... "not having winches and non-operating in its present condition") and, on the other hand, such minutes failed to provide certain information relevant for the evaluation of the ship such as the name of the debtor and the existence of cranes and other equipment on the ship though such existence at an earlier date is shown by GAFI's letter of December 8, 1997 (R2) and no evidence shows that such equipment was removed thereafter. Taking all this into account, the Tribunal cannot consider the auction price as an indication of the market value of the Poseidon.

148. In support of the alleged value of US\$ 5 million of the Poseidon, Claimant has submitted the insurance certificate for the ship of December 13, 1989 giving a "Sum Insured = US\$ 5,000,000.00," and its renewal for 1992 (both C48). Claimant also has submitted evidence showing negotiations, correspondence and draft contracts with both Mubarak Shipping Co. and Transbulk Shipping S.A. (C49 to C58) though a sale of the Poseidon was not finalized because, as Claimant alleges, GAFI blocked the sale (CII 21 *et seq.* and C56). The Memorandum of Agreement of June 26, 1990 (C54) shows that Transbulk had agreed to pay a price of US\$ 1,324,000.00 for the ship (as a net price after deduction of anticipated costs for the repair of one of the two cranes on board), and respective payments were actually made to the Claimant (C55), though they were later returned. On that basis, Claimant seeks in this arbitration (CII 23) US\$ 1,324,000.00 plus US\$ 27,000.00 which Transbulk had been ready to pay for additional expenses (C54 Appendix p.4).

149. In its Post-Hearing Brief (CV 5), Claimant additionally has pointed out that the Poseidon had a certified weight of 6175 tons (C50) and that the scrap price for bulkers as published by the Lloyd's Shipping Economist, January 2000 edition, was US\$ 140 per ton which would lead to a scrap value of the Poseidon, without the value of cranes and equipment, of US\$ 864,500.00

150. Using the discretion it has under ICSID Rule 34 regarding evidence, the Tribunal holds that - even if it were possible - it would be too time consuming and costly, related to the amount in dispute, to seek some independent expert opinion on the value of the Poseidon at the time of the auction, and that it is thus the best procedural method, under the circumstances, to reach an estimate of the value of the Poseidon from the evidence available in the file. Taking into account that the Respondent alleges the auction price as the correct value, i.e., EP 301,000.00, which was equivalent to US\$ 90,936.00 at the contemporaneous rate of 3.31 used by both Parties (C I 26 and R II 26) at that time, and that the Claimant has shown the scrap value to be US\$ 864,500.00, the Tribunal concludes that at least the average between these amounts, i.e., US\$ 477,718.00 can be taken as the market value due under Art. 4. c) of the BIT.

151. Therefore, the Tribunal concludes that, for the taking of the ship Poseidon, Respondent has to pay US\$ 477,718.00 to the Claimant.

G.2.2. Damages incurred due to Bank Loan, Foreign employees' compensation, Liquidation expenses

152. Under three further submissions, Claimant seeks also "incurred damages" allegedly arising out of a bank loan, foreign employees' compensation, and liquidation expenses (CII 2, 23 - 27). Respondent denies such damages (RII 25 - 28 and RIII 26, 27). These claims can be considered together, because the essential arguments relevant for the Tribunal's conclusion are identical.

153. To accept a claim in this regard under the BIT, the Tribunal would have to find a "measure the effects of which would be tantamount to expropriation" (Art. 4). The provision, thus, does not cover any losses occurring to an investor due to commercial risks or due to procedures of the State authorities and courts as long as they are un-

der due process of law and are not discriminatory (Art. 4. a) and b)). The Claimant has the burden to prove such deficiencies.

154. The costs related to the Bank Loan from the Arab Bank Athens (CII 23) are normal commercial risks for the Claimant. They could only be claimed, if it were shown that they were caused by conduct of the Respondent which was in breach of the BIT. In the view of the Tribunal, Claimant has not shown that. In particular, the conduct of the Respondent during the liquidation of the investment cannot be considered as such a breach, as will be seen hereafter.

155. The foreign employees' compensation (CII 24) and the liquidation expenses (CII 25) could only be claimed if the Claimant could prove that Respondent abused the liquidation procedures in breach of the BIT. Though the Claimant so alleges, the Tribunal cannot find, from the evidence supplied, that the length of the liquidation process or the requirements raised in that context from the side of the Respondent and its respective authorities, were either discriminatory or abusive. Investors have to accept, and do accept by investing in a country, that the local procedures may be different, complicated, bureaucratic and lengthy. The Tribunal is not persuaded by the evidence in the file that the difficulties encountered by the Claimant went beyond such acceptable difficulties.

156. Therefore, the Tribunal concludes that Claimant has not discharged its burden of proof to show any conduct of the Respondent leading to the "incurred damages" claimed.

### G.3. Claims for Misinterpretation of the Investment Law

157. Under the heading "Misinterpretation of the Investment Law by GAFI and other Governmental Bodies," Claimant (CII 2, 27 CIII 17, CV 10 - 11, 13) raises claims which it identifies as follows:

- " 1. Damages due to the Employment Contracts.
2. El Menia Shipping Agency Account.
3. Monetary violation.
4. Contribution to the Housing Fund."

158. The Respondent considers all these claims as not justified (RII 12 - 13, 28 - 31, RV 13 - 17).

159. Again, for the Tribunal, the test is whether these claims can be based on the BIT, in particular its Art. 4 as measures "the effect of which would be tantamount to expropriation." Under the jurisdiction provided by Art. 10 of the BIT, which the Tribunal accepted in its Decision on Jurisdiction, this Tribunal can only decide on disputes between Claimant as investor and Respondent as a Contracting Party to the BIT "concerning an obligation of the latter under this Agreement," i.e., the BIT. Therefore, the Tribunal cannot assume the function as an appeal body regarding the application of local Egyptian laws and, particularly, the Investment Law.

160. Claimant bases these claims essentially on the following: a non-application of Art. 110 of the Executive Regulations of the Investment Law leading to the need to pay its employees longer in the liquidation process; GAFI's requirement that Claimant had to receive provisions and supplies through the El Menia Shipping Agency while other projects in Alexandria were not subject to that requirement; an allegedly wrong application by GAFI of the Investment Law regarding transfer and credits between US Dollars and Egyptian Pounds; a mandatory contribution of EP 1.0 per m. ton to the Ministry Housing Fund not refunded by GAFI or ECO.

161. The Tribunal does not find in the documentation supplied sufficient evidence that these alleged misinterpretations of the law, even if they were accepted as misinterpretations, constituted an abuse tantamount to expropriation or were discriminatory. Therefore, the Tribunal concludes that Claimant has not complied with its burden of proof regarding the claims under this heading.

162. The claims under the heading "Misinterpretation of the Investment Law" are therefore denied.

#### G.4. Claim based on alleged Illegal Confiscation of the Letter of Guarantee

163. Claimant raises a further claim under the heading "Illegal Confiscation of the Letter of Guarantee" (CII 2, 30; CIII 19; CV 4). It alleges that the Ministry of Housing (MOH) should have returned a Letter of Guarantee provided as a performance bond by the Claimant in view of undelivered portions of a supply contract and not have liqui-

dated the Letter of Guarantee (C81). Respondent again objects to this claim (RII 32, RIII 27).

164. Again, the test of the Tribunal must be whether a claim based on the BIT has been shown. The Tribunal notes that, *prima vista*, the liquidation of a Letter of Guarantee is a commercial matter. The Ministry, in its letter of December 14, 2000 to the Claimant (C82), provided a justification for the liquidation and suggested to Claimant to revert to judicial means if it considered the liquidation as unjustified. The Tribunal does not have to enter into the examination of this justification under local Egyptian law. In any case, it does not find that Claimant has fulfilled its burden of proof to show that the conduct of the Ministry was a measure the effects of which were tantamount to expropriation or were discriminatory.

165. Therefore, the claim raised by Claimant under the heading "Illegal Confiscation of the Letter of Guarantee" is denied.

#### G.5. Mitigation of Damages

166. Respondent argues that, even insofar as they might be justified, the claims raised by Claimant have to be reduced, because Claimant did not comply with its duty to mitigate damages (RII 13; RIII 12 - 13; RV 17 - 19). Claimant argues that there is no factual or legal reason for such a reduction (CIII 11; CV 12 - 13). The Tribunal needs only to examine this issue insofar as it has accepted the claims in its considerations above, i.e., regarding the taking of the License and of the ship Poseidon.

167. The duty to mitigate damages is not expressly mentioned in the BIT. However, this duty can be considered to be part of the General Principles of Law which, in turn, are part of the rules of international law which are applicable in this dispute according to Art. 42 of the ICSID Convention. The duty to mitigate is also contained in Art. 221 of the Egyptian Civil Code.

168. Respondent alleges that Claimant could have continued the supply of cement insofar as it was not prohibited by Decree No. 195. In this regard, the Tribunal accepts the Claimant's explanation that both the supplying of Thermal and White Portland cement in Egypt and the exportation of cement from Egypt to other countries, for both of which no evidence has been presented by the Respondent or can be found in



the file, were not economically feasible alternatives to the supply of Grey Portland cement barred by the Decree.

169. As to the Respondent's argument that Claimant could have resumed its activities after the lifting of the ban in 1992, the Tribunal does not consider this to be persuasive. An investor who has been subjected to a revocation of the essential license for its investment activity, three years earlier, has good reason to decide that, after that experience, it shall not continue with the investment activity, after the activity is again permitted.

170. Regarding the question whether the Claimant could have obtained the permission to take the ship Poseidon out of the Free Zone by fulfilling the requirements set by GAFI and by paying the alleged debts leading to the attachment and auction of the ship, the Tribunal finds the explanations given by Claimant at least plausible. That is sufficient to deny a duty to mitigate, as the Respondent has the burden of proof for the facts establishing such a duty and the failure of Claimant to carry it out.

171. Therefore, the Tribunal concludes that the claims accepted in its considerations above do not have to be reduced due to a duty to mitigate.

#### G.6. Conclusion

172. In conclusion of its consideration of the claims raised, the Tribunal thus finds the following compensations are due to be paid by the Respondent to the Claimant:

1.	Lost profits from cement supply agreements ( <i>supra</i> § 125)	US\$ 1,712,712.00
2.	Compensation for the taking of the Poseidon ( <i>supra</i> § 151)	<u>US\$ 477,718.00</u>
	Total amount to be paid	US\$ 2,190,430.00

#### G.7. Interest

173. Claimant seeks compound interest from the time of taking of its investments (CIII 20). Respondent argues that only simple interest of not more than 4% *per annum* running from the date of the Award should be granted (RV 21).

174. The Tribunal considers that the provision in Egyptian law on which Respondent relies is not applicable to claims based on the BIT, i.e., public international law. The BIT provides (Art. 4.c)) that the compensation in case of expropriation "shall include interest until the date of payment." Regarding such claims for expropriation, international jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation due after the award and that compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law in such expropriation cases.

See the distinguished ICSID Tribunals in *Wena v. Egypt* (Award of December 8, 2000, paragraphs 128 to 136);<sup>1</sup> *Metalclad v. Mexico* (Award of 30 August 30, 2000, paragraphs 128 to 129);<sup>2</sup> *Santa Elena v. Costa Rica* (Award of February 17, 2000, paragraphs 96 to 107),<sup>3</sup> all with further references.

175. This Tribunal sees no reason to repeat the detailed reasoning of or depart from this practice. In particular, the Tribunal concludes that, to make the compensation "adequate and effective" pursuant to Art. 4. c) of the BIT, it is appropriate that the interest pursuant to the last sentence of Art. 4. c) of the BIT be awarded as compound interest. As to the question regarding the rate and frequency of compounding of the interest, on which some disagreement is seen in the above jurisprudence, this Tribunal concludes that in this case annually compounded interest and, in view of the rates in financial markets during the relevant period, a rate of 6% p.a. is appropriate. Regarding the starting of the interest period, the Tribunal takes January 1, 1990 as the

---

<sup>1</sup> The award rendered on December 8, 2000 in the *Wena Hotels Ltd. v. Arab Republic of Egypt* case (ICSID Case No. ARB/98/4), is available as Exhibit A to the Declaration of Henry Weisburg attached to the pending case of *Wena Hotels, Ltd. v. The Arab Republic of Egypt*, No. M-19-42, Southern District of New York, filed on January 10, 2001.

<sup>2</sup> The award of August 30, 2000 in the *Metalclad Corporation v. United Mexican States* case (ICSID Case No. ARB(AF)/97/1), was published in 16 *ICSID Rev. FILJ* 168 *et seq.* (2001).

average time of taking for the 2<sup>nd</sup> Petra and Halkis contracts by the Decree of May 28, 1989 for the amount of US\$ 1,712,712.00. As the Poseidon was taken on November 28, 1999, from January 1, 2000, the interest is calculated for the total amounts of compensation due. Accordingly, up to the payment date (30 days after the date of this Award), the Tribunal determines that an amount of US\$ 1,558,970.00 shall be added to the compensation due. Thereafter, the same interest shall be paid until the Award is paid.

#### G.8. Arbitration Costs

176. Taking into account that Claimant succeeded partially with certain of its claims and that Respondent succeeded partially with objecting to the claims, in accordance with ICSID Rule 47 (i) (j), the Tribunal decides that each Party should bear any legal fees and costs occurred to it in connection with the proceeding, and that the costs occurring for ICSID and the arbitrators shall be borne in equal portions of 50% by each Party.

177. As, on the last request by ICSID, the Respondent did not pay its share of the advance deposit due and the Claimant paid the share of US\$ 60,000.00 for the Respondent, any refund of unused amounts deposited shall be effected by ICSID in such a way that both Parties have paid equal shares. Insofar as there still remains an amount of the deposit which Claimant has paid more than Respondent, the Respondent shall pay such an amount that, as a consequence, both parties have paid 50% of the total arbitration costs.

#### H. Decisions

178. In conclusion, the Tribunal, taking into account the Relief Sought by the Parties, decides as follows:

1. The Respondent breached its obligations under the Bilateral Investment Treaty with Greece of July 16, 1993, particularly by taking measures tantamount to expropriation against the Claimant without prompt, adequate and effective compensation (Art. 4 of the BIT).

---

<sup>3</sup> The award of February 17, 2000 in the *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* case (ICSID Case No. ARB/96/1), was published in 15 *ICSID*

2. The Respondent shall pay to Claimant a total amount of US\$ 2,190,430.00 within 30 days from the date of this Award.
3. As a total amount for compound interest up to the date the payment of this Award is due, Respondent shall pay to Claimant an additional amount of US\$ 1,558,970.00 within 30 days from the date of this Award.
4. Thereafter, in addition, interest of 6% shall be paid compounded annually until the amounts under 2. and 3. *supra* are paid.
5. The costs occurring for ICSID and the Tribunal shall be borne in equal portions of 50% by each Party.

---

Prof. Piero Bernardini  
Co-Arbitrator  
date of signature:

---

Prof. Don Wallace, Jr.  
Co-Arbitrator  
date of signature:

---

Prof. Dr. Karl-Heinz Böckstiegel  
President of the Tribunal  
date of signature: