

**International Centre for Settlement of Investment Disputes**

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**CERTIFICATE**

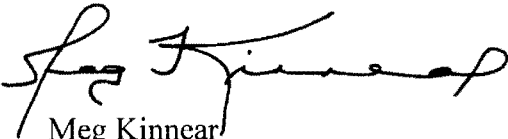
**MALICORP LIMITED**

**v.**

**ARAB REPUBLIC OF EGYPT**

**(ICSID Case No. ARB/08/18)**

I hereby certify that the attached are true copies of the English and French versions of the Award of the Arbitral Tribunal, dated February 7, 2011.



Meg Kinnear  
Secretary-General

Washington, D.C., February 7, 2011

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**MALICORP LIMITED**

Claimant

v.

**THE ARAB REPUBLIC OF EGYPT**

Respondent

**ICSID Case No. ARB/08/18**

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**Award**

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Members of the Tribunal:  
Professor Pierre Tercier, President  
Professor Luiz Olavo Baptista, Arbitrator  
Maître Pierre-Yves Tschanz, Arbitrator

Secretary of the Tribunal:  
Ms Aurélia Antonietti

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Maître Sylvie MOREL  
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Date of Dispatch to the Parties: 7 February 2011

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## I. THE FACTS

The following presentation is intentionally summary in nature. To the extent necessary for resolving the dispute, the major issues of fact will be discussed in greater detail in the Part entitled “The Law”<sup>1</sup>.

### 1. The Parties

1. **The Claimant**, Malicorp Limited (hereinafter the “Claimant,” the “Concessionaire” or “Malicorp”), is a company incorporated on 6 August 1997 and registered with Companies House in the United Kingdom of Great Britain and Northern Ireland under no. 3415415. Its registered office is at 72 Watling Street, Radlett, Hertfordshire WD7 7NP, United Kingdom. According to the Memorandum and Articles of Association of Malicorp Limited of 30 July 1997 (Article 5), its share capital was 1,000 pounds sterling divided into 1,000 shares of one pound sterling each (Exhibit R-1, pp. 2 *et seq.* = R-2, p. 20).
2. **The Respondent** is the Arab Republic of Egypt (hereinafter the “Respondent,” the “Grantor” or the “Republic”).

### 2. General chronology of events

#### 2.1. From the call for tenders to the signing of the Contract

3. On 21 June 1999, the Respondent announced its intention to build the Ras Sudr International Airport; it set the conditions that future investors had to satisfy (Exhibit R-2, pp. 28 *et seq.*).
4. In August 1999, the Egyptian Directorate General of Civil Aviation, acting on behalf of the Republic, launched **a call for tenders** for the building of the Ras Sudr Airport

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<sup>1</sup> The following abbreviations are used for the submissions and exhibits:

Claim. 21.10.2008:	“Request for Arbitration” of 21 October 2008
Respond. 01.07.2009:	“Submission of the Government of the Arab Republic of Egypt on preliminary jurisdictional objections” of 1 July 2009
Claim. 23.07.2009:	Malicorp’s “ <i>Mémoire en réponse à la soumission du Gouvernement de la République Arabe d’Egypte sur les Objections préliminaires juridictionnelles</i> ” of 23 July 2009
Claim. 23.10.2009:	Malicorp’s “ <i>Mémoire sur le fond et contre-mémoire en réponse à la soumission du Gouvernement de la République Arabe d’Egypte sur les objections préliminaires juridictionnelles</i> ” of 23 October 2009
Respond. 08.01.2010:	“Reply Submission of the Government of the Arab Republic of Egypt and initial submission on the merits” of 8 January 2010
Claim. 05.02.2010:	Malicorp’s “ <i>Mémoire en réponse sur le fond et mémoire en réplique sur la compétence</i> ” of 5 February 2010
Respond. 05.03.2010:	“Reply Submission of the Arab Republic of Egypt on the merits” of 5 March 2010
Exhibit C-[...]:	Exhibit in support of the Claimant’s position
Exhibit R-[...]:	Exhibit in support of the Respondent’s position
Minutes of 31.07.2009:	Minutes of the first session of 31 July 2009
Minutes of 29.03.2010:	Minutes of the conference call of 29 March 2010
Transcript of 19/20.04.2010:	Record of the hearing of 19 and 20 April 2010 (F= French; E= English).

on the basis of a “Build, Operate, Transfer” type concession contract (hereinafter “B.O.T.,” Exhibit R-2, pp. 28 *et seq.*; Claim. 23.07.2009, no. III-1.1, p. 6; Claim. 23.10.2009, no. III-1.1, p. 8).

5. In the weeks that followed, Malicorp alleges that it took various measures enabling it to reply to this call for tenders (Claim. 23.07.2009, no. III-1.1, p. 7; Claim. 23.10.2009, no. III-1.1, p. 8). More particularly, it claims to have established contacts with three companies:
  - a) *Nordic Engineering Resources Group A.S.* (hereinafter “NERG”), a Norwegian company active in the civil aviation sector and a specialist in equipping and managing airports, incorporated on 25 February 1999 in Oslo. This company is a subsidiary of the Nordic Aviation Resources Group (hereinafter “NAR”) (Exhibit C-44 = R-2, pp. 49 *et seq.*);
  - b) *Joannou & Paraskevaid, (Overseas)* (hereinafter “J&P”), a company active in airport construction, incorporated in Guernsey in the United Kingdom under no. 560 (Exhibit C-45 = R-2, pp. 52 *et seq.*); and
  - c) *General Mediterranean Holding* (hereinafter “GMH”), the holding company of an international investment group based in the Grand Duchy of Luxembourg, registered on 16 January 1997 under no. B16453 (Claim. 23.07.2009, no. III-1.2, p. 7; Claim. 23.10.2009, no. III-1.2, p. 9). This group has five main divisions: banking and finance, real estate and construction, hotels and leisure, retail and pharmacy, as well as communications, information technology and aviation.
6. On 15 September 1999, the Claimant amended the Memorandum and Articles of Association of Malicorp Limited, which amendments were registered with Companies House of the United Kingdom of Great Britain and Northern Ireland. According to that document, the share capital of Malicorp was increased to 100 million pounds sterling, divided into one million shares of 100 pounds (Exhibit R-1, p. 17 (21)).
7. On 1 October 1999, Malicorp submitted *a bid* in reply to the call for tenders by the Egyptian General Directorate of Civil Aviation (Exhibit C-17 = R-2, pp. 66 *et seq.*; Claim. 23.07.2009, no. III-1.3, p. 7; Claim. 23.10.2009, no. III-1-3, p. 9; Respond. 01.07.2009, no. 16; Respond. 08.01.2010, no. 73). That bid stated that it was Malicorp's intention to enlist the technical and financial support of NERG, J&P, and GMH (Claim. 23.10.2009, no. III-1.2, p. 9; Claim. 23.10.2009, no. V-2.1, p. 37).

The following companies were also mentioned in the bid: ASMA Company for Trade and General Contracting, of Egypt, as well as Digitel Telecom Company for Contracting and Technical and Electronic Establishment, of Egypt (Respond. 08.01.2010, no. 77).

The bid submitted by Malicorp was accompanied by a *first demand guarantee* for one million Egyptian pounds (i.e., at 1999/2000 rates [1 Egyptian pound = 0.2923 dollars], approximately 292,300 US dollars (hereinafter “dollar”)) issued by Banque Misr of Cairo (Exhibit R-2, p. 65; Claim. 23.07.2009, no. III-1.3, p. 7; Claim. 23.10.2009, no. III-1.3, p. 10).

8. On 3 January 2000, Malicorp's representatives were called to a meeting with representatives of the Government of the Republic in order to clarify certain aspects of the bid, in particular the company's structure and capital (Exhibit R-2, p. 82; Respond. 08.01.2010, no. 82).

The Parties differ as to what financial information was provided on that occasion:

- According to the Respondent, Malicorp held itself out as a company with capital of 100 million pounds sterling on that occasion it allegedly furnished a certificate mentioning that figure (Exhibit R-1, p. 16/21). The Respondent relies on the minutes of that meeting (Exhibit R-1, p. 47/48), which indicate that Malicorp's representatives spoke of 100 million pounds sterling, referring to an extract from the Companies Register. It should be pointed out that the content of the exhibits produced differs: the extract of 6 August 2007 (Exhibit C-5) mentions capital of 1,000 pounds sterling; the report of 24 October 2008 (Exhibit R-2, p. 641) gives no indication; the extract pursuant to the Companies Act, apparently drawn up on 15 September 1999 (Exhibit R-2, p. 91/94), shows a capital of 100 million pounds sterling).
- According to the Claimant, Malicorp submitted the extract from the Companies Register one time only; it was provided to the General Authority for Investment (hereinafter "GAFI"). It maintains that, on that occasion, the extract, which was authenticated by the British and Egyptian authorities, showed a capital of 1,000 pounds sterling (Claim. 23.07.2009, no. III-2, p. 10).

As to the amount of the company's capital, the Claimant asserts that there is a major difference between *issued* or *subscribed* capital, which constitutes the actual capital, and the *authorised* capital, which is the amount up to which the Board of directors may increase the capital without having to call an extraordinary general meeting (Claim. 23.10.2009, no. II-1, pp. 4 *et seq.*).

The Arbitral Tribunal will discuss in greater detail the facts relating to that meeting and the information provided on that occasion (see below, no. 134).

9. On 9 February 2000, the Republic, represented by its Minister of Transport and the Egyptian Civil Aviation Authority (hereinafter "ECAA"), informed Malicorp by letter that *its bid had been selected* as being the best (Exhibit C-18 = R-2, p. 105; Respond. 08.01.2010, no. 94; see, also, letter from the ECAA of 2 February 2000 to the Minister, pointing out that Malicorp's offer was the best since it was wholly financed by foreign capital, Exhibit R-2, pp. 101 *et seq.*). In its letter, the ECAA asked Malicorp to send one of its representatives to carry out the formalities required to conclude the contract (Exhibit C-18 = R-2, p. 105; Claim. 23.07.2009, no. III-1.3, p. 8; Claim. 23.10.2009, no. III-1.3, p. 10; Respond. 08.01.2010, no. 96).
10. On 18 February 2000, Malicorp received a letter from Swiss Re, informing it of its interest in a possible collaboration between the two companies for the purpose of financing the airport (Exhibit R-2, p. 107; Respond. 08.01.2010, no. 98).
11. On 22 March 2000, Malicorp's board decided to cancel the resolution to increase the share capital to 100 million pounds sterling and to replace it by a value of 1,000 pounds (Respond. 08.01.2010, no. 32; Exhibit R-2, pp. 108 *et seq.*).

12. In May 2000, the Egyptian General Security Agency sent a letter to the Egyptian General Security Authority for Civil Aviation informing it that it had no objection to approving the Malicorp project, provided that what the Respondent called the “Authority” took charge of all security measures (Exhibit R-2, p. 111; Respond. 08.01.2010, no. 101).

The Parties differ as to the interpretation to be given to those phrases:

- According to the Claimant, this amounted to approval of the project with respect to all security issues (Respond. 08.01.2010, no. 101).
  - According to the Respondent, the Egyptian General Security Agency did not give any consent whatsoever by that communication (Respond. 08.01.2010, no. 100).
13. On 28 May 2000, the ECAA and Malicorp entered into a **Preliminary Contract** to put in place the concession for the Ras Sudr Airport (Exhibit C-19 = R-1, pp. 49 *et seq.* = R-2, pp. 113 *et seq.*; Claim. 21.10.2008, no. 3.1.1, p. 6; Claim. 23.07.2009, no. III-1.3 p.8; Claim. 23.10.2009, no. III-1.3, p. 11; Respond. 01.07.2009, no. 17; Respond. 08.01.2010, no. 103).
14. On 29 October 2000, Malicorp informed its contracting partner (the ECAA) that the cost of the project would be 232 million dollars (Respond. 08.01.2010, no. 104).
15. On 4 November 2000, Malicorp, on the one hand, represented by Dr. Abbe Mercer, and the Government of the Republic, on the other, represented by Pilot Abdelfaatah Mohamed Kato, acting on behalf of the Republic, itself represented by the ECAA, entered into the **final Concession Contract** (hereinafter the “Contract”) according to the B.O.T. system, for the construction, management, operation and transfer of the Ras Sudr International Airport (Claim. 21.10.2008, no. 3.1.1, p. 6; Respond. 01.07.2009, no. 18; Claim. 23.07.2009, no. III-1.3, p. 8; Claim. 23.10.2009, no. III-1.3, p. 11; Respond. 08.01.2010, no. 106).

That Contract was signed in the offices of the Egyptian Minister of Transport, who at the time was responsible for civil aviation, in the presence of the Ambassador of Great Britain and the Ambassador of Norway serving in Cairo, the latter having been officially invited by the Egyptian Minister (Exhibit C-20 = R-2, p. 122; Exhibit C-21 = R-2, p. 120: invitations. Exhibit C-22 = R-2, pp. 214 *et seq.*: photographs of the signing ceremony) (Claim. 23.07.2009, no. III-1.3, p. 9; Claim. 23.10.2009, no. III-1.3, p. 11).

The Contract allocated a site to Malicorp for the construction and management of the Ras Sudr Airport, as well as an “annexed site” consisting of land with full property rights, on which Malicorp would have acquired the right to develop other projects under its sole management (Claim. 21.10.2008, no. 3.1.1, p. 6).

Under the Contract Malicorp was obliged to furnish a series of guarantees. Section 23.1.7 of the Contract indeed provided that the Claimant would furnish a guarantee of 2 million Egyptian pounds (i.e., at the 1999/2000 rate [1 Egyptian pound = 0.2923

dollars] approximately 584,600 dollars) (Exhibit C-4, p. 72 = R-2, p. 194; Respond. 01.07.2009, no. 19; Respond. 08.01.2010, no. 106 (6)).

Section 23.1.6 of the Contract provided that the Concessionaire would set up a company limited by shares, under Egyptian law, the purpose of which would be to construct, manage and operate the Ras Sudr Airport (Exhibit C-4, p. 72 = R-2, p. 194; Claim. 23.07.2009, no. III-2, p. 9; Claim. 23.10.2009, no. III-2, p. 12; Respond. 01.07.2009, no. 19). According to that same section, the incorporation documents were to be made available to the Republic not later than 90 days following the signing of the Contract (Respond. 08.01.2010, no. 106 (5)).

16. The Arbitral Tribunal will describe and discuss later those clauses in the Contract that are important to the resolution of the dispute (see below, no. 96).

## **2.2. From the signing of the Contract to its rescission**

17. Under the Contract, Malicorp had to take a number of measures quickly, in particular setting up an Egyptian company. According to the Contract, it was to be a limited company with an authorised capital of 100 million Egyptian pounds (i.e., at the 1999/2000 rate [1 Egyptian pound = 0.2923 dollars], approximately 29,230,000 dollars), of which 10 million Egyptian pounds were to be subscribed immediately (Claim. 23.07.2009, no. III-2, p. 9; Claim. 23.10.2009, no. III-2, p. 12).

For this purpose, but at a date which has not been communicated, Malicorp instructed the firm of Mustapha Shawki, a major Egyptian firm of chartered accountants and auditors (hereinafter the “founders’ agent”), and entrusted it with taking the necessary steps for setting up the company (Claim. 23.07.2009, no. III-2, p. 9; Claim. 23.10.2009, no. III-2, p. 12). That firm submitted the necessary documents, duly legally authenticated, as well as the draft articles of association, to the Investment Authority, the department with competence to register investment companies in accordance with Egyptian Law no. 8 of 1997 on investment incentives.

The Claimant’s position concerning the obtaining by the Shawki firm of the approvals necessary for setting up the company from the competent authorities centralised around the GAFI is not clear. In its submission of 23 July 2009, it states that it obtained them, whereas in its submission of 23 October 2009 it states that those approvals were refused in a letter of 22 July 2001 (Exhibit C-52; Claim. 23.07.2009, no. III-2, p. 10; Claim. 23.10.2009, no. III-2, p. 12).

18. On 11 December 2000, the ECAA sent Malicorp a first notice concerning the non-performance of the Contract, notably the obligation to provide a bank guarantee (Respond. 08.01.2010, no. 111).
19. On 4 January 2001, Mr. Shaker, a representative of Malicorp who was an Egyptian national, submitted a land allocation request to establish a tourist centre on behalf of “Malicorp Misr Company for construction of Ras-Sudr International Airport” (Exhibit R-2, p. 223). The names mentioned in that request do not correspond either to those on the Certificate of Establishment of 1 October 2009 (Exhibit R-2, p. 79), or to those on the application dated 12 March 2001 (Exhibit R-2, p. 231, 286, 330; Respond. 08.01.2010, no. 110).



20. On 20 January 2001, the ECAA notified Malicorp that it had not complied with its contractual obligations, to wit, Sections 23.1.6 concerning the establishment of an Egyptian company and 23.1.7 concerning increasing the bank guarantee to two million Egyptian pounds (Exhibit R-2, p. 225; Respond. 08.01.2010, nos. 111-112).
21. On 4 February 2001, the 90-day time limit granted to Malicorp to set up the company under the terms of the Contract (Exhibit R-2, p. 194) expired without the Egyptian company having been incorporated (Respond. 08.01.2010, no. 118).
22. On 18 February 2001, the ECAA sent Malicorp a “Third and Last Notice,” threatening to take measures to end the Contract by the end of February 2001 if Malicorp did not comply with its contractual obligations (Exhibit R-2, p. 227; Respond. 08.01.2010, no. 114).
23. On 12 March 2001, the founders’ agent filed an application for approval of the Egyptian company. The application mentioned the names of three founders: Malicorp, Mibo Gawli and Sayed Hanafy Mahmoud (Respond. 08.01.2010, no. 120).
24. On 12 May 2001, Mr. El Ela, one of Malicorp's founders, informed the Government of the Republic of certain problems concerning the Malicorp company and the information furnished by it (Exhibit R-1, pp. 59-61).

The Parties differ as to his position in relation to Malicorp. According to the Claimant, he was a former founder (Claim. 05.02.2010, no. I-6, p. 15 with reference to Exhibit R-2, p. 338); according to the Respondent, he was a shareholder and representative of the company (Respond. 08.01.2010, no. 124).

The record shows that Mr. El Ela used Malicorp's letterhead for his letter and signed it stating that he was one of Malicorp’s founders (Exhibit R-1, p. 61).

25. On 30 May 2001, following a letter from Dr. Shawki dated 27 May 2001 and a letter from Dr. Abbe Mercer dated 28 May 2001, the Government of the Republic, through Pilot Kato, invited Malicorp to provide it with complete and correct copies of various documents by 30 June 2001 (Exhibit R-1, p. 63; Respond. 08.01.2010, no. 126).
26. On 19 June 2001, the shareholders of the Egyptian company in the process of being established deposited 10% of the issued capital with Banque Misr, namely one million Egyptian pounds (i.e., at the 1999/2000 rate [1 Egyptian pound = 0.2923 dollars] approximately 292,300 dollars), which was to remain blocked until registration of the company with the Commercial Register (Exhibit C-23; Respond. 23.07.2009, no. III-2, p. 10; Claim. 23.10.2009, no. III-2, p. 12).

Following the deposit of the said amount with Banque Misr, Malicorp waited several months during which the founders’ agent contacted the various authorities concerned or their key staff in order to obtain a clear reply concerning the incorporation and registration in the Commercial Register of Malicorp’s Egyptian subsidiary (Exhibit C-25, Exhibit C-26; Claim. 23.07.2009, no. III-2, p. 11, Claim. 23.10.2009, no. III-2, p. 13).

27. On 30 June 2001 the time limit for Malicorp to provide the information required in the letter from the Republic expired. According to the Claimant, the Commission received

the information on 25 June 2001 (Malicorp letter of 13 August 2001 produced by the Respondent under Exhibit R-2, p. 399); according to the Respondent, that information never reached it (Respond. 08.01.2010, no. 127; Respond. 01.07.2009, no. 23).

28. On 1 July 2001, the Minister of Transport sent a letter to the General Commission for Investments, approving the incorporation of the Egyptian company following review of the documents received and confirmation by the Norwegian Embassy, the British Embassy and the Egyptian Embassy in Norway of the company's capability to carry out the project (Malicorp letter of 13 August 2001 produced by the Respondent under Exhibit R-2, pp. 399-400).

Afterwards, Malicorp began to receive formal notices of breach of its contractual obligation to set up an Egyptian company (Claim. 23.07.2009, no. III-2, p. 11; Claim. 23.10.2009, no. III-2, p. 13). Malicorp objected that this delay had been caused by the failure of those same Egyptian authorities to register the last formalities for the setting up of the Egyptian company (Claim. 23.07.2009, no. III-2, p. 11; Claim. 23.10.2009, no. III-2, p. 13).

29. On 21 July 2001, a meeting of the Egyptian Special Commission for the Ras Sudr Airport was held to discuss the problems concerning the Contract and the setting up of the local company (Respond. 08.01.2010, no. 128; Respond. 01.07.2009, no. 24). The official minutes of this meeting held at the Cabinet of the Minister of Transport show that the decision to refuse incorporation of the Egyptian company was made on that day; fourteen agencies of the Government of the Republic took part (Exhibit R-1, pp. 64 *et seq.*; Exhibit C-6; Claim. 23.07.2009, no. III-2 p. 12; Claim. 23.10.2009, no. III-2, p. 14).

The Arbitral Tribunal will revert later to the circumstances in which that decision was taken and the reasons on which it was based (see below, no. 128).

30. On 22 July 2001, a letter was sent to the Shawki firm, informing it that the competent security authorities had decided to refuse to approve the incorporation of the company (Exhibit C-27; Claim. 23.07.2009, no. III-2, p. 11; Claim. 23.10.2009, no. III-2, pp. 13-14).
31. On 23 July 2001, Malicorp wrote to the Egyptian Prime Minister (Claim. 23.07.2009, no. III-2, p. 12; Claim. 23.10.2009, no. III-2, p. 15; Respond. 01.07.2009, no. 25). In its letter it mentioned two former generals who had allegedly had links to the company and used unlawful methods in order to divert Malicorp from its objective, including by means of racketeering, extortion and threats: *“There were among the company personnel two retired generals Adel Darwish and Sayed Aboul Alaa who were layed off for reasons related to their behavior towards the company which was concretized by threats, extortion and racketeer confirming their grip and proving that they were capable of some acts which were thereafter withdrawn or cancelled without anyhow forcing the company to abide by their extortion [...]. The above-mentioned retired generals threatened the company of cancelling the contract and not letting the company continue in Egypt [...]. The Company refused such cheap blackmail [...].”* (Exhibit C-28; Exhibit R-1, p. 69).

Malicorp requested the support of the Prime Minister to resolve this matter: *“We hope from your Excellency after studying and reviewing this short presentation to take the*

*steps you deem appropriate in support of the investment and development,”* (Exhibit C-28, Exhibit R-1, p. 69).

32. On 28 July 2001, Malicorp wrote to the President of the Republic asking him to personally intercede on its behalf with the persons who were preventing performance of the Contract (Exhibit C-26; Claim. 23.07.2009, no. III-2, p. 12; Claim. 23.10.2009, no. III-2, p. 15). The Claimant once again described the practices of which it accused the two generals (cf. above, no. 31):

*The company had sought the assistance of the retired generals Sayed Aboul Alaa and Adel Darwish to help in some matters. The first was put aside from the first day for having fought with persons in charge at the Aviation Authority and the proof of his lack of competence and his failure in carrying out his assignment. The second was also put aside for having adopted the style of arrangement, extortion, racketeering, death threats and thereafter pretending that he was a relative to the Head of the Aviation Authority [...].* (Exhibit C-26, no. 3).

In that letter, Malicorp complained, among other things, of the methods allegedly used by General Kato, the President of Civil Aviation, who had allegedly sent a letter to the British Embassy containing insults and attacks against the representatives of Malicorp:

*General Abdel Fattah Kato sent a letter to the British Embassy to which was attached a document in Arabic containing insults and attacks against the parties [...].* (Exhibit C-26, no. 6).

He had also allegedly written to the Norwegian Embassy in order to obtain information concerning the Claimant, though the Claimant was an English company (Exhibit C-26, no. 7).

In the same letter to the President, Malicorp raised questions about Dr Al Ghamrawy. He was alleged to have promised to assist in resolving the problem, which he had not done, but had even promised General Adel Darwish, previously accused of extortion, racketeering and threats, that he would prevent the Egyptian company from being incorporated:

*Also during that conference Claimant’s representative met with Doctor Al Ghamrawy who promised to terminate the subject matter of the Company upon his return to Cairo and that he was ready to meet with the representatives of the Company in Cairo to settle the problem”* (Exhibit C-26, no. 10).

*Doctor Al Ghamrawy refused to meet with the representatives of the company or to answer to the numerous letters sent to the Investment Authority [...].*

*General Adel Darwish ascertained that Doctor Al Ghamrawy promised him not to have the company formed.* (Exhibit C-26, nos. 11 and 12).

33. On 12 August 2001, the “Ministry of Transportation; Egyptian Holding Company for Aviation; A Joint partnership of Business Sector” notified Malicorp of the **termination of the Contract** (Exhibit R-1, p. 73; Claim. 21.10.2008, no. 3.1.1, p. 7; Respond. 08.01.2010, no. 132; Respond. 01.07.2009, no. 26).

The Parties differ with respect to the reasons for termination:

- According to the Claimant, the Contract was terminated for reasons connected to national security (Claim. 23.07.2009, no. III-2, p. 12; Claim. 23.10.2009, no. III-2, p. 15; Respond. 08.01.2010, no. 133). That being so, such termination entitled it to compensation for the damage caused by unfair treatment and the expropriation of its investment (Respond. 08.01.2010, no. 151; Respond. 01.07.2009, no. 27).
- According to the Respondent, the Contract was terminated for a reason contained in the Contract itself. Malicorp had allegedly produced false documents, had not fulfilled its obligation to set up an Egyptian company, had failed to provide the necessary guarantees and had failed to properly perform the Concession Contract (Respond. 08.01.2010, no. 133; Respond. 01.07.2009, no. 27).

The Arbitral Tribunal will revert to these matters later (see below, no. 128).

### **2.3. Events subsequent to the rescission**

34. On 13 August 2001, in reaction to the termination of the Contract, Malicorp wrote to the ECAA (Exhibit R-2, pp. 397 *et seq.*, setting out a list of fourteen arguments why the rescission was void; Respond. 08.01.2010, no. 134).
35. On 1 September 2001, the Egyptian Ministry of Transport notified the British Embassy that the Contract with Malicorp had been “nullified” (Exhibit R-2, p. 410; Respond. 08.01.2010, no. 137).
36. On 4 September 2001, the Egyptian Ministry of Transport confirmed the “cancellation” of the Contract by the Egyptian Aviation Holding Company (Exhibit C-34 = R-2, p. 411; Respond. 08.01.2010, no. 138).
37. On 12 December 2001, the First Under Secretary of the Minister of Transport wrote to Mrs. Jacqui Mullen, Head of the Commercial Sector of the British Embassy in Cairo, informing her that Malicorp could contact the Investment Authority and follow the formal procedure in order to establish the Egyptian company (Exhibit C-30 = R-2, p. 415).
38. On 3 January 2002, Malicorp wrote to the Minister of Transport (Exhibit C-29 = R-2, p. 416; Claim. 23.07.2009, no. III-2, p. 12; Respond. 23.10.2009, no. III-2, p. 15). In that letter it asked the Minister to write to the General Commission for Investments informing it that the Contract was going forward, and requesting its authorisation for the establishment of the Egyptian company as provided in the Contract.
39. On 23 January 2002, by letter to the Minister of Transport, Malicorp requested authorisation from the Investment Authority to establish the Egyptian company. That attempt nevertheless failed, as the President of the Civil Aviation Holding Company of the Ministry of Transport replied on 27 February 2002 confirming that National Security had renewed its refusal (Exhibit C-10 = R-2, p. 420; Claim. 23.07.2009, no. III-2, p. 13; Claim. 23.10.2009, no. III-2, p.15).

40. Thereafter, the matter was also raised via diplomatic channels; the British and Norwegian Embassies expressed their surprise and Mr. Jack Straw, who was then the British Minister of Foreign Affairs, discussed the matter with the President of the Republic, Mr. Mubarak, in the course of an official visit to Egypt (Claim. 23.07.2009, no. III-2, p. 12; Claim. 23.10.2009, no. III-2, p. 15).
41. On 7 October 2002, the Minister of Civil Aviation confirmed to the Ambassador of Great Britain in Cairo that the project had been cancelled (Exhibit C-8 = R-2, p. 422). By that time the ECAA had already liquidated and cashed the bank guarantee deposited by Malicorp with Banque Misr (Claim. 23.10.2009, no. III-2, p. 15).
42. On 15 January 2003, Baroness Symons, British Minister of State for International Commerce and Investment, wrote to Mr. Paul Towey, the representative of Malicorp, confirming that the Embassy in Cairo was continuing to press Malicorp's case and that the Ambassador was trying to arrange a meeting with Air Marshal Shafik, Minister of Civil Aviation (Exhibit C-31 = R-2, p. 424). In her letter, Baroness Symons also stated her intention to obtain a meeting with the Minister of Civil Aviation during her next trip to Egypt (Claim. 23.07.2009, no. III-2, p. 13; Claim. 23.10.2009, no. III-2, p. 16).
43. In the period prior to the commencement of the arbitration proceedings before the Cairo Centre (see below, no. 44), the ECAA was replaced by several holding companies, each managing a part of Egypt's civil aviation service (Claim. 23.07.2009, no. III-4.1.2, p. 17; Claim. 23.10.2009, no. III-4.1.2, p. 20).

### **3. The other proceedings brought by the Parties**

#### **3.1. The arbitration proceedings before the CRCICA**

##### ***3.1.1. The arbitration proceedings***

44. On 20 April 2004, Malicorp filed a request for arbitration with the Cairo Regional Centre for International Commercial Arbitration (hereinafter "CRCICA") (reference in Exhibit C-37, p. 24; Claim. 23.07.2009, no. III-2, p. 13; Claim. 23.10.2009, no. III-2, p. 16). This request was registered on 28 April 2004 under no. 382/2004 based on the arbitration clause contained in the Contract (Claim. 23.07.2009, no. III-4.1, p. 16; Claim. 23.10.2009, no. III-4.1, p. 19; Respond. 08.01.2010, nos. 140, 148).

The CRCICA proceedings were between Malicorp as claimant and three respondents, namely the Arab Republic of Egypt, the Egyptian Holding Company for Aviation and the Egyptian Airport Company (Claim. 23.07.2009, no. III-4.1, p. 17; Claim. 23.10.2009, no. III-4.1, p. 19; Respond. 08.01.2010, no. 148); for simplicity's sake, the Arbitral Tribunal will, in what follows, refer only to the Republic.

The present Arbitral Tribunal has received only incomplete information on those proceedings, which is summarised here.

45. On 31 May 2004, the arbitral tribunal set up under the aegis of the CRCICA (hereinafter the "CRCICA Arbitral Tribunal") was constituted. It was made up of Dr. El Ahdab, co-arbitrator appointed by the Claimant, Mr. Gabr, co-arbitrator jointly

appointed by the respondents and Maître Bernardo Cremades, as Chairman of the Arbitral Tribunal appointed by the two co-arbitrators (Respond. 08.01.2010, no. 149; Claim. 23.07.2009, no. III-4.1, p. 17; Claim. 23.10.2009, no. III-4.1, p. 19).

46. On 15 July 2004, the Minister of Civil Aviation applied for a stay of the arbitration proceeding as a criminal complaint had been lodged with the Egyptian courts. The Minister complained of fraudulent practices by the claimant and by civil servants with the Egyptian Directorate General of Civil Aviation (Exhibit C-37, p. 9). On 19 September 2004, the CRCICA Arbitral Tribunal refused to stay the proceedings and decided to continue with its examination of the case (reference in Exhibit C-37, p. 9; Claim. 23.07.2009, no. III-4.1.4, p. 19; Claim. 23.10.2009, no. III-4.1.4, p. 22).
47. On 19 December 2004 the first hearing in the CRCICA arbitration proceedings was held (Respond. 08.01.2010, no. 150). The CRCICA Arbitral Tribunal set the timetable for the proceedings in an order, which it modified on 3 February 2005.
48. On 19 February 2005, Malicorp filed its Statement of claim (reference in Exhibit C-37, p. 24). It alleged that the respondents had wrongfully terminated the Contract thereby entitling Malicorp to claim damages for the losses sustained (Respond. 08.01.2010, no. 152).
49. On 21 May 2005, the respondents filed their Statement of Defence. In it they asserted that Malicorp had breached its contractual obligations, that it had acted in bad faith and that the Contract was null and void due to the production of a falsified extract from the Companies Register (Respond. 08.01.2010, no. 153).
50. On 26 July 2005, Malicorp filed its Reply (“Claimant’s Reply regarding the claim,” reference in Exhibit C-37, p. 24), reiterating its submissions and arguments with respect to the liability of the respondents for the damage sustained (Respond. 08.01.2010, no. 154).
51. On 21 September 2005, the respondents filed their Rejoinder (“Rejoinder in Counter Evidence of the Republic to the Claimant concerning the Claim;” reference in Exhibit C-37, p. 10).
52. On 11 and 12 February 2006, the parties submitted their post-hearing submissions (reference in Exhibit C-37, p. 10).
53. On 19 February 2006, the Council of State Administrative Court of Cairo held that the arbitration clause contained in the Contract was void and ordered the CRCICA Arbitral Tribunal to suspend the arbitration proceedings (reference in Exhibit C-37, p. 12; Respond. 08.01.2010, no. 156). That decision followed the filing by the Arab Republic of Egypt of a claim for the arbitration clause to be ruled null and void (Claim. 23.07.2009, no. III-4.1.1, p. 18; Claim. 23.10.2009, no. III-4.1.3, p. 21).
54. On 15, 16 and 17 November 2005, the CRCICA Arbitral Tribunal held a hearing with the parties (reference in Exhibit C-37, p. 11).
55. On 25 February 2006, Malicorp filed its Post-Hearing Rejoinder (Respond. 08.01.2010, no. 157); the respondents filed theirs on 25 and 27 February 2006 (Respond. 08.01.2010, no. 157).

56. On 27 February 2006, Mr. Gabr, one of the co-arbitrators, gave notice by letter to Mr. Mohamed Aboul Einein, Director of the CRCICA, that he had decided to suspend his participation in the CRCICA proceedings because of the decision of the Council of State Administrative Court of Cairo finding the arbitration clause null and void (cf. above, no. 53; Respond. 08.01.2010, no. 158).
57. Notwithstanding that resignation, the CRCICA Arbitral Tribunal went ahead with the proceedings; it stated that it was doing so in reliance on (Egyptian) Arbitration Law no. 27/1994 (Claim. 23.07.2009, no. III-4.1.3, p. 19; Claim. 23.10.2009, no. III-4.1.3, p. 21).
58. On 7 March 2006, the CRCICA Arbitral Tribunal issued an arbitral award (Respond. 08.01.2010, no. 163; R-2, p. 474). It held first of all that the arbitration agreement in the Contract was binding on the Republic (Exhibit C-37, Section 59). It went on to hold that the Republic had been the victim of a fundamental error in signing the Contract in that it had wrongly believed that the capital registered and paid by Malicorp was 100 million pounds sterling and that for this reason the Contract was void. It therefore dismissed the submissions of the Claimant claiming damages for the loss caused by the termination of the Contract.

It nevertheless decided to order the respondents to reimburse Malicorp for costs, invoices and the salaries of its employees. In this regard, it ordered the respondents to pay Malicorp the sum of 14,773,497 dollars, with interest (Respond. 08.01.2010, no. 164; Exhibit C-37, sections 84 *et seq.*; Claim. 23.07.2009, no. III-4.1, p. 17; Claim. 23.10.2009, no. III-4.1, p. 20). According to the Respondent, in doing so it relied on a provision of the Egyptian Civil Code to which the parties had made no reference during the proceedings (Respond. 08.01.2010, no. 164).

59. The respondents have applied to have the CRCICA arbitral award set aside (Respond. 08.01.2010, no. 166). The Claimant has not applied for review and has not joined in the application for review filed by the respondents. This Arbitral Tribunal has not been informed of the outcome of this application to set aside, which appears to be still pending.

### **3.1.2. *The attachment and enforcement proceedings***

60. On 9 August 2006, one of the Vice-Presidents of the Paris *Tribunal de Grande Instance* issued an *ex parte* order for the exequatur of the CRCICA arbitral award on the application of Malicorp (Claim. 23.07.2009, no. III-4.2.1, p. 21; Claim. 23.10.2009, no. III-4.2.1, p. 23; Respond. 08.01.2010, no. 167). On 9 October 2006, the French enforcement order was served on the Respondent's Embassy in Paris (Claim. 23.07.2009, no. III-4.2.1, p. 21; Claim. 23.10.2009, no. III-4.2.1, p. 23; Respond. 08.01.2010, no. 169).
61. On 10, 12 and 13 October 2006, assets of the Republic in the possession of Banque Misr, UBAF and LCL were attached on the application of Malicorp (Claim. 23.07.2009, no. III-4.2.2, p. 21; Claim. 23.10.2009, no. III-4.2.2, p. 23; Respond. 08.01.2010, no. 168).

62. On 16 October 2006, the Republic appealed against the enforcement order issued on 9 August 2006 (Claim. 23.07.2009, no. III-4.2.1, p. 21; Claim. 23.10.2009, no. III-4.2.1, p. 23; Respond. 08.01.2010, no. 170).
63. On 20 October 2006, the Republic applied to the enforcement judge of the Paris *Tribunal de Grande Instance* to lift the attachment orders; it principally argued State immunity from execution and the absence of risk with respect to its solvency (Claim. 23.07.2009, no. III-4.2.2, p. 21; Claim. 23.10.2009, no. III-4.2.2, pp. 23-24).
64. On 31 October 2007, the enforcement judge of the Paris *Tribunal de Grande Instance* held a hearing. The Republic through its various agencies and bodies proposed a compromise solution to Malicorp: the delivery of a surety bond by Banque Misr in exchange for Malicorp's agreement to lift the attachment orders and its undertaking not to take any steps to enforce the CRCICA arbitral award (either in France or abroad) (Claim. 23.07.2009, no. III-4.2.2, p. 21; Claim. 23.10.2009, no. III-4.2.2, p. 24).
65. The agreement initiated at the hearing of 31 October 2007 was finalised on 16 November 2007 after Banque Misr proposed and delivered the original of the surety bond on behalf of the Republic in favour of Malicorp. Malicorp thereafter went before the enforcement judge to have the contested attachments lifted (Claim. 23.07.2009, no. III-4.2.2, p. 21; Claim. 23.10.2009, no. III-4.2.2, p. 24).
66. On 19 June 2008, the Paris Court of Appeal granted the appeal filed by the Republic against the decision of the enforcement judge and dismissed the application for exequatur (Claim. 23.07.2009, no. III-4.4, p. 24; Claim. 23.10.2009, no. III-4.4, p. 27). It based its decision on one of the four arguments of the Respondent: it ruled that the issuing of an arbitral award by an arbitral tribunal on the basis of a provision that had not been previously submitted to the parties amounted to a denial of justice. It accordingly found that it was superfluous to examine the other arguments (Respond. 08.01.2010, no. 171).
67. On 22 August 2008, Malicorp lodged its first *pourvoi en cassation* against the decision of the Paris Court of Appeal, arguing the lack of sufficient reasons for the decision of 19 June 2008 (Respond. 08.01.2010, no. 172).
68. On 16 September 2008, the Respondent attempted to serve the judgment of the Paris Court of Appeal at the address in England that Malicorp is and was using, but the English authorities allegedly stated that it was not possible to do so at that address (Respond. 08.01.2010, no. 173). According to the Respondent, this attempted service amounted to valid service. The Claimant disputes this (*ibidem*).
69. On 11 March 2009, the two Parties were informed that Malicorp's first *pourvoi* had been held inadmissible because it was procedurally flawed (Respond. 08.01.2010, no. 174); Malicorp had, indeed, omitted to append to its *pourvoi* a copy of the judgment appealed against (Respond. 08.01.2010, no. 172).
70. On 13 March 2009, Malicorp lodged a second *pourvoi en cassation* (Respond. 08.01.2010, no. 174). Following the main hearing held by the present Arbitral Tribunal, it was informed by the Parties (see letters from Maître Yassin of 3 July 2010 and Maître Webster of 12 July 2010) that the *Cour de cassation* had dismissed the



*pourvois* in a decision of 23 June 2010; it considered that the CRCICA Arbitral Tribunal had violated the adversarial principle by basing its decision on provisions of the Egyptian Civil Code that had not been pleaded by the parties. It found, accordingly, “*que la sentence ne pouvait être reconnue ni exécutée en France.*”

### **3.2. The criminal proceedings before the Cairo Court of Assizes<sup>2</sup>**

71. In parallel to the CRCICA arbitration proceedings, criminal proceedings were instituted against individuals directly or indirectly connected with Malicorp. The information in the possession of this Arbitral Tribunal is based essentially on statements made in the written and oral pleadings. Here, too, such information has only an indirect bearing on these arbitration proceedings
72. On 17 August 2005, the Public Prosecutor's office issued an order remanding the case to the Cairo Court of Assizes (reference in Exhibit C-37, p. 25). The order referred to various unlawful and fraudulent acts committed by individuals connected with the Claimant, as well as certain Egyptian civil servants involved in examining the bid that the Claimant had submitted (reference in Exhibit C-37, p. 25).

A total of ten individuals were remanded for trial (Respond. 08.01.2010, no. 141): five Egyptian civil servants, in particular, were charged with unlawful taking of interest and various unlawful acts in connection with the conclusion of the Contract. Five shareholders or alleged shareholders of Malicorp were charged, in particular, with having falsified the Companies Register with respect to Malicorp: they were Messrs. Mahmoud Chaker Ibrahim, Azmi Mahmoud Al-Taraï, Assaed Mohamad About Ela, Adel Hamid Adel Malek and Abdel Khaqled Mersal.

The Cairo Court of Assizes also tried the five accused on charges of forgery of private documents (Article 215 of the Egyptian Penal Code) since that offence was connected to the offences before the Court in the principal case, although the normal procedure would have been to remand the matter to the Criminal Court (Claim. 23.07.2009, no. III-4.1.4, p. 19; Claim. 23.10.2009, no. III-4.1.4, p. 22).

73. On 2 September 2006, the Cairo Court of Assizes rendered its verdict: Messrs. Chabli and Mercer were found guilty of forgery and fraud and sentenced principally to three years' imprisonment (Exhibit R-1, pp. 85-88, Exhibit C-40; Respond. 01.07.2009, no. 30; Respond. 08.01.2010, no. 144). They appealed but were unsuccessful (Respond. 01.07.2009, no. 32.).

### **4. The arbitration proceedings**

74. On 21 October 2008, the Claimant, Malicorp, represented at the time by Maître Jean-Pierre Coutard, filed a Request for Arbitration in French (“*Requête d’arbitrage*”) against the Government of the Arab Republic of Egypt with the Secretariat of the International Centre for Settlement of Investment Disputes (hereinafter “ICSID”).

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2 In this document the Arbitral Tribunal will use the term “the Cairo Court of Assizes,” also used by the Parties, in spite of the use by the CRCICA Arbitral Tribunal of the term “the Court for Crimes of High Treason” (Exhibit C-37).

It essentially alleges therein that the Republic violated its obligations under the Agreement of 11 June 1975 between the United Kingdom and Egypt for the promotion and protection of investments (hereinafter the “Agreement;” see below, no. 91); it relies on Article 5 in particular, and consequently requests that the Respondent be ordered to pay compensation covering, above all, the losses and lost earnings resulting from termination of the Contract.

The Claimant supplemented its Request by three letters of 12, 19 and 25 November 2008.

That Request was received by the ICSID Secretariat on 27 October 2008 and registered on 16 December 2008 under ICSID Case No. ARB/08/18.

75. The proceedings have been conducted in accordance with the rules of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the “ICSID Convention”) as well as with the Rules of Procedure for Arbitration Proceedings (Arbitration Rules) (hereinafter the “ICSID Rules”), in force since 2006.

76. The Parties agreed to apply Article 37(2)(b) of the ICSID Convention with respect to the constitution of the Arbitral Tribunal, by virtue of which each party appoints an arbitrator and the third, the President of the Tribunal, is appointed by agreement of the Parties. By letter of 13 March 2009, the Claimant appointed Prof. Luiz Olavo Baptista, a national of Brazil, as co-arbitrator, who accepted his appointment. By letter of 24 March 2009 to the ICSID Secretariat, the Respondent appointed Maître Pierre-Yves Tschanz, a national of Switzerland, as co-arbitrator, who accepted his appointment

The Parties gave the co-arbitrators the power to appoint the President of the Tribunal. By letter of 25 May 2009 to the ICSID Secretariat, the arbitrators proposed Prof. Pierre Tercier, a national of Switzerland, who accepted his appointment.

77. On 2 June 2009, the Parties were informed that the Arbitral Tribunal had been constituted and that the proceedings were deemed to have begun on that date.

78. On 1 July 2009, without having been invited to do so, the Respondent filed a submission in English in reaction to the Request (“**Submission of the Government of the Arab Republic of Egypt on preliminary jurisdictional objections**”). It essentially alleges that the Contract was entered into as a result of fraud and that the Arbitral Tribunal has no jurisdiction to rule, as Egypt’s consent to give the protection offered by the Agreement does not extend to fraud.

79. On 23 July 2009, the Claimant, henceforth represented by Maître Christian Brémond and Maître Sylvie Morel, submitted, in French, its “*Mémoire en réponse à la soumission du Gouvernement de la République Arabe d’Egypte sur les objections préliminaires juridictionnelles.*” Replying to the objections raised, it invites the Arbitral Tribunal to find that the action is admissible and to grant it leave to prepare a memorial on the merits.

80. On 31 July 2009, the Arbitral Tribunal held its first session in Paris with the representatives of the Parties. Minutes were drawn up following the hearing (see the Minutes of the first session of the Arbitral Tribunal). In addition to the usual

procedural matters, which did not give rise to any discussion, two issues in particular were discussed and settled on that occasion, after the Parties had been given the opportunity to express their views thereon:

- a) Concerning the language of the arbitration (see Minutes of 31.07.2009, no. 7):

*Il est convenu entre les parties et le Tribunal que:*

*Chaque partie pourra rédiger ses écritures et plaider en langue française ou anglaise sans qu'il soit besoin de procéder à une traduction.*

*Tout document soumis en français ou en anglais ne sera pas assorti d'une traduction. Les documents originellement rédigés en une autre langue que le français ou l'anglais devront être traduits en français ou anglais.*

*Les témoins et/ou experts pourront s'exprimer en français ou en anglais lors de leurs auditions.*

*Les transcriptions verbatim des audiences seront faites en français et en anglais.*

*Les ordonnances de procédure et la décision et/ou sentence seront rendues en français et en anglais. Les parties ont laissé le soin au Tribunal de décider quelle langue fera foi. Après délibération, le Tribunal indique que la langue qui fera foi sera la langue française. Il est précisé que le Tribunal pourra dans sa décision et/ou sentence se référer à la position des parties exposée en français ou en anglais et aux textes juridiques en anglais sans qu'une traduction dans l'autre langue soit nécessaire.*

*Les correspondances du Centre seront rédigées en français sans traduction.*

*Les parties acceptent que le procès-verbal de la session soit rendu en français uniquement.*

- b) Concerning the rest of the proceedings, following the objections to jurisdiction raised by the Respondent (Minutes of 31.07.2009, no. 14, paragraph 4):

*Après avoir entendu les parties et après en avoir délibéré, le Tribunal décide de traiter les questions de la compétence et de la responsabilité ensemble dans la mesure où il apparaît que les éléments factuels sont similaires et que cela ne rallongerait pas considérablement le calendrier procédural. Par contre, le Tribunal souhaite exclure à ce stade la question du quantum, qui sera traitée dans un deuxième temps si nécessaire selon un calendrier qui sera convenu avec les parties.*

The Arbitral Tribunal consequently set a timetable for the proceedings.

81. On 23 October 2009, the Claimant submitted its “**Mémoire sur le Fond et son Contre-Mémoire en réponse à la soumission du Gouvernement de la République Arabe d’Egypte sur les objections préliminaires juridictionnelles.**” It reiterates therein its arguments concerning admissibility of the Request, and asks the Arbitral Tribunal to find that the Respondent breached Article 5 of the Agreement and must consequently be ordered to pay compensation that “*sera fixée à la valeur de marché de l’investissement exproprié correspondant à la valeur des droits concédés à la société*”

*Malicorp Limited par le contrat annulé du 4 novembre 2000;*” it furthermore requests that it be granted leave in the next phase “à justifier du montant de cette compensation conformément au programme fixé lors de la séance du Tribunal Arbitral du 31 juillet 2009.”

82. On 8 January 2010, the Respondent submitted its “**Reply Submission of the Government of the Arab Republic of Egypt and initial submission on the merits.**” It makes the following submission therein (Respond. 08.01.2010, no. 468): “*Malicorp’s case should be dismissed with costs.*” An expert’s report from Professor Dr. Ahmed El-Kosheri was annexed to it.
83. On 5 February 2010, the Claimant submitted its “*Mémoire en réponse sur le fond et Mémoire en Réplique sur la compétence.*” It reiterates its previous submissions, supplementing them on one point by invoking a breach of Article 2(2) of the Agreement.
84. On 5 March 2010, the Respondent submitted its “**Reply Submission on the Merits.**” It makes the following submission (Respond. 05.03.2010, no. 155): “*The Respondent respectfully submits that Malicorp’s claim should be rejected, promptly as an improper attempt to use BIT rights to profit from its own fraud and negligence and its own failure to perform the Concession Contract.*”
85. On 19 and 20 April 2010, the Arbitral Tribunal held a **hearing** in Paris.
  - a) After hearing the opening statements of each Party, the Arbitral Tribunal heard Mr. El Torei, whom the Respondent had asked to cross-examine.
  - b) Counsel for the Parties then had the opportunity to plead.
  - c) Counsel for the Respondent had prepared a Powerpoint presentation for this purpose. Deeming its content to go beyond the framework of the oral pleadings, the Arbitral Tribunal invited Counsel for the Respondent to prepare a version adapted to the content of the oral pleadings (Letter to the Parties of 22 April 2010 via ICSID) and to submit the text thereof to the President for verification before forwarding it to the co-arbitrators. The document, forwarded by Maître Webster following corrections, was found admissible by the President and forwarded to the co-arbitrators. This decision was subsequently confirmed by letter of 18 May 2010, after a request from Maître Brémont for it to be reconsidered.
  - d) A verbatim transcript was made following that hearing, in French and English, depending on the language used in the oral pleadings. On 25 May 2010, Maître Yassin, Counsel for the Claimant, submitted comments concerning Egyptian law, as reported in the verbatim transcript. By letter of 1 June 2010, Counsel for the Respondent asked the Arbitral Tribunal to reject Maître Yassin’s letter. By decision of 17 June 2010, the Arbitral Tribunal admitted Maître Yassin’s submission, but gave Counsel for the Respondent the opportunity to reply, which he did on 28 June 2010.
86. Throughout these proceedings, the Parties have had ample opportunity to put forward their arguments, both in writing and orally. Following the hearing of 19 and 20 April

2010, they confirmed that they had no objection to raise with regard to the procedure that had been followed (see Transcript F 19/20.04.2010, pp. 82 l. 6 *et seq.* and 29 *et seq.*).

87. On 13 July 2010, Mr. Chabli, acting on behalf of Malicorp, sent a letter to the President of the Arbitral Tribunal, in which he asked, in particular, for information concerning contacts that a member of the Arbitral Tribunal was alleged to have had with one of the Respondent's counsel. On 29 July 2010, the Parties were informed, in reply, that the information to which he had alluded was erroneous, and that no such contacts had taken place. No further request was made in this regard.
88. On 24 September 2010, each of the Parties forwarded to the Arbitral Tribunal details of the costs and expenses incurred in representing their respective interests ("Submission on costs"), in response to the request made by the Arbitral Tribunal on 20 August 2010.
89. The issuance of this award constitutes the closure of the proceedings.

## II. THE LAW

### A. IN GENERAL

#### 1. The basis of the arbitration

90. The Claimant bases its submissions on the Agreement between the United Kingdom and Egypt and on Article 25 of the ICSID Convention. It contends (1) that the Respondent wrongfully terminated the Contract, (2) that in so doing it breached its obligations under the Agreement, and that (3), consequently, the Claimant is entitled to an award against the Respondent of compensation for the losses it has suffered, from an Arbitral Tribunal acting under the aegis of ICSID.

A brief overview is necessary of the three instruments on which the Claimant relies:

91. a) The Bilateral Investment Treaty. On 11 June 1975, the United Kingdom of Great Britain and Northern Ireland, on the one hand, and Egypt, on the other, signed a bilateral investment treaty. The authentic version is the English version, entitled “Agreement for the Promotion and Protection of Investments” (Exhibit C-2 = Exhibit R-2, p. 3), but there is a French translation entitled “*Accord tendant à encourager et protéger les investissements*” (Exhibit C-2 = Exhibit R-2, p. 11). In this award, the Arbitral Tribunal shall use the (official) English version of the Agreement. This instrument entered into force for both States on 24 February 1976 (Respond. 01.07.2009, no. 10).

This Agreement, which followed the classic model of treaties of that generation, begins with a statement of the objectives sought by the Contracting Parties (preamble), and definitions of the principal terms used (Article 1); the Arbitral Tribunal will revert to these as necessary, later in the award. Thereafter, it enumerates the principal obligations each State agrees to undertake: the promotion and protection of investments (Article 2), a most-favoured nation clause (Article 3), compensation for losses (Article 4), expropriation (Article 5), repatriation of investments (Article 6), and exceptions (Article 7). There follow two provisions for dispute resolution; one by a reference to ICSID (Article 8), which will be discussed later (see below, no. 100), the other a special clause for resolution of disputes between the Contracting Parties (Article 9). The Agreement ends with special provisions concerning the scope of its application in terms of persons (subrogation: Article 10), territory (Article 11) and time (Articles 12 and 13).

92. b) The ICSID Convention. Article 8 of the Agreement makes express reference to the ICSID Convention. Both States have ratified it: the United Kingdom of Great Britain and Northern Ireland on 19 December 1966 and Egypt on 3 March 1972. This text is sufficiently well known to need no introduction here. The Arbitral Tribunal will return later to the issues this case raises as to the interpretation of Article 25 (see below, no. 101).

93. c) The Contract. The dispute between the Parties arises from the Contract for the Ras Sudr airport project (cf. above, no. 15; Exhibit C-4 = Exhibit R-2 pp. 123 *et seq.*). The text is in the English language only. A brief description is given here of certain clauses having potential significance for the reasoning that follows:

- *The parties*: The Contract was entered into between “[t]he Government of the Arab Republic of Egypt,” on the one hand, and “Malicorp Ltd., a British registered Company (hereinafter called ‘the Concessionaire’), Address – 6 Alders Lodge St. – London, SW6 – 6 NP, represented by Dr. Abbe Mercer, Company Director,” on the other. The cover page describes the Concessionaire more fully, stating that it is “Malicorp Ltd (and to be formed hereafter) Ras Sudr International Airport Ltd.” (emphasis by the Arbitral Tribunal).
- *The preamble and general part*. These two passages describe the objectives sought, primarily the construction of an airport as part of the general policy of developing and extending airports, with a view to developing the neighbouring tourist region. The Concessionaire is called upon to contribute thereto and is to receive additional land so as to enhance the attractiveness of the region and therefore of the airport.
- *The type of Contract*. The Contract is based on the B.O.T. model, which means, in practical terms, that the Concessionaire undertakes “to construct and operate the airport for a specific contract term, after which the airport is to be transferred to the State [free of charge].”
- *The content of the concession*. The rights and obligations arising from the Concession are described in Article 2, which grants the Concessionaire the exclusive right to operate the Concession (Article 2.1), imposes on it the obligation to carry out the project “at its own cost and risk” (Article 2.2:), sets the term, in principle, at forty-one years from Contract signature, subject to early termination or extension (Article 2.3) and specifies the payments to be made by the Concessionaire (Article 2.6). The undertakings of the Concessionaire (Article 3: “*Concessionaire Covenants*”) include, primarily, the obligation to maintain an office in Egypt with a representative throughout the entire lifetime of the Contract (Article 3.1), to set up a company whose sole purpose is performance of the Contract, which must be mentioned in the Memorandum of Association of the Concessionaire (Article 3.4), and, on the financial level, to prevent any situation of indebtedness arising without the consent of the Grantor (Article 3.5).
- *The transfer of the land for the airport and the site* (Article 7: “*Delivery of Airport and the Site*”). The Grantor undertakes to transfer the land for the airport within two months following the date of signature of the Contract and following delivery of the Performance Bond (Article 7.1); special measures are provided in the event of delay in the handing over of the land (Article 7.2).
- *Performance of the project and construction works* (Article 8: “*Design and Construction Works*”). The Concessionaire must carry out the construction work or have it performed (Article 8.1), and do so within a time limit set out in a schedule. For that purpose, it must enter into “*Associated Agreements*” for all

the services (including loan agreements) necessary for the performance of the work (Article 8.4).

- *Modifications to the Contract.* Events that might influence the progress of the work or the operation are specially dealt with (Article 17: “*Material Adverse Governmental Action*,” Article 18: “*Force Majeure*”). There is also provision for early termination of the Contract (Article 19).
- *Applicable law and dispute resolution clause.* As to the applicable law, Article 21.1 (“*Governing Law*”) provides as follows: “*This Concession Contract is deemed to be a civil law contract and governed by the civil laws of the Republic of Egypt.*” Article 21.3 deals with the resolution of disputes and notably contains an arbitration clause submitting the proceedings to the Rules of the “*Cairo Regional Arbitration Center*” (Articles 21.3.3 *et seq.*): this was the basis for the proceedings before the CRCICA Arbitral Tribunal (see above, no. 44 *et seq.*).
- *Miscellaneous provisions.* The Contract ends with a series of “*Miscellaneous Provisions.*” Among those covering “*Representations and Warranties by the Concessionaire*,” the Arbitral Tribunal notes Article 23.1.6, which concerns the obligation to set up an Egyptian company (see below, no. 140).
- *The signatures.* The Contract is signed on behalf of the Egyptian Civil Aviation Authority by Pilot Abdelfaatah Mohamed Kato, its President, and on behalf of Malicorp Ltd. by Dr. Abbe Mercer, its Managing Director.

## 2. The Parties’ submissions

94. The most recent submissions of the Parties are the following:

a) **On jurisdiction**

- For the Respondent (see Respond. 01.07.09, no. 106):

*In holding that investments marked by fraud were not entitled to such protection [the benefit or the relevant treaties, (n° 105)] as a matter of jurisdiction, the Tribunals in Inceysa, Fraport and Phoenix Action were not developing new theories. Those Tribunals were applying well-known, accepted principles to interpret jurisdictional issues regarding investment arbitrations. The principles are so well known and obvious and no one would seek to ignore them in a normal civil case or arbitration. What is perhaps more novel is that Tribunals are increasingly applying these principles of judicial common sense to deal with issues of jurisdiction at the outset of investment arbitrations. The Respondent respectfully submits that that is the course of action that this Tribunal should adopt.* (Emphasis added).

- For the Claimant (see Claim. 05.02.2010, p. 23):



*Déclarer recevable la société Malicorp Ltd en son action, et dire que le litige soumis par la société Malicorp contre la République Arabe d’Egypte entre dans la compétence du CIRDI et du Tribunal arbitral.*

**b) On the merits**

- For the Claimant (see Claim. 05.02.2010, p. 23):

*Au fond,*

*Constater la violation par la République Arabe d’Egypte de ses obligations selon les articles 2(2) et 5 du Traité TBI du 11 juin 1975 au préjudice de la société Malicorp Ltd,*

*Dire la société Malicorp Ltd bien fondée en sa demande de compensation aux termes des articles 1, 2 et 5 du Traité TBI du 11 juin 1975 à l’encontre de la République Arabe d’Egypte,*

*Dire que cette compensation sera au moins fixée à la valeur du marché et de l’investissement exproprié correspondant à la valeur des droits concédés à la société Malicorp Ltd par le contrat annulé du 4 novembre 2000,*

*Autoriser la société Malicorp Ltd à justifier du montant de cette compensation conformément au programme fixé lors de la séance du Tribunal Arbitral du 31 juillet 2009,*

*En tout état de cause,*

*Dire que la République Arabe d’Egypte sera condamnée dans la sentence finale aux entiers frais de procédure en ce compris le remboursement des avances, ainsi qu’au remboursement des dépenses engagées par la société Malicorp Ltd conformément aux articles 28 et 47 du Règlement d’Arbitrage.*

- For the Respondent (see Respond. 05.03.2010, no. 155):

*The Respondent respectfully submits that Malicorp’s claim should be rejected, promptly as an improper attempt to use BIT rights to profit from its own fraud and negligence and its own failure to perform the Concession Contract.*

**3. The structure of the Award**

95. For the Arbitral Tribunal, these submissions require it to examine the issues in the following order:
- The jurisdiction of the Arbitral Tribunal (B below); and if it finds it has jurisdiction,
  - The alleged breaches of the Agreement (C below); and in any event,
  - The determination and allocation of the costs and expenses of the arbitration (D below).

## **B. THE JURISDICTION OF THE ARBITRAL TRIBUNAL**

### **1. The issue**

96. According to the Respondent, the Arbitral Tribunal has no jurisdiction to decide this case, but the Claimant disputes that.

97. To this end, the Respondent argues (see also above, no. 94):

*The Respondent respectfully submits that that [denial of jurisdiction by virtue of the principle of good faith] is the course of action that this Tribunal should adopt.*

The Claimant, in turn, requests the Arbitral Tribunal to

*Déclarer recevable la société Malicorp Ltd en son action, et dire que le litige soumis par la société Malicorp contre la République Arabe d’Egypte entre dans la compétence du CIRDI [...].*

In order to decide this issue, the Arbitral Tribunal will analyse the conditions required for the jurisdiction of the Arbitral Tribunal in general, and in particular whether this is a dispute about a protected investment, a point on which the Parties' positions differ.

### **2. The decision of the Arbitral Tribunal**

98. It is not disputed that an arbitral tribunal seised of an objection to jurisdiction not only has the right but the obligation to rule on its own jurisdiction (the “*Competenz-Competenz*”). This is expressly confirmed in Article 41(1) of the ICSID Convention, which provides that: “*The Tribunal shall be the judge of its own competence.*”

In this respect, the Parties, and the Respondent in particular, have centred all their arguments around the issue of the alleged fraud and its influence on the jurisdiction of the Arbitral Tribunal, without really discussing the other conditions on which such jurisdiction depends. The Arbitral Tribunal must nevertheless satisfy itself that all the conditions are in fact fulfilled.

That jurisdiction depends on the instruments on which it is based, making it necessary to begin with a presentation of these.

#### **2.1. The bases of the Tribunal’s jurisdiction**

99. The Claimant bases its claim on two instruments: Article 8 of the Agreement and Article 25 of the ICSID Convention.

It is true that the Contract also contains a special provision dealing with dispute resolution (Article 21.3: “*Resolution of Disputes*,” see above, no. 93). This, however, covers only arbitration under private international law to resolve strictly contractual actions. The Claimant relied on this clause in order to bring an action under the auspices of the CRCICA before the CRCICA Arbitral Tribunal (see above, no. 44 *et*

seq.). It is not directly in point here since that system does not apply to these proceedings.

100. a) Article 8 of the Agreement. It is entitled “*Reference to International Centre for Settlement of International Disputes.*” In the present context, only the first paragraph is relevant. It is worded as follows:

*Article 8. REFERENCE TO INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES*

*1.) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as “the Centre”) for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former. Such a company of one Contracting Party in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25 (2) (b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party. If any such dispute should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies, through conciliation or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose.*

*Article 8. RENVOI DEVANT LE CENTRE INTERNATIONAL POUR LE RÈGLEMENT DES DIFFÉRENDS RELATIFS AUX INVESTISSEMENTS*

*1) Chaque Partie contractante accepte de soumettre au Centre international pour le règlement des différends relatifs aux investissements (ci-après dénommé « le Centre ») pour le règlement par voie de conciliation ou d'arbitrage en vertu de la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, ouverte à la signature à Washington le 18 mars 1965 tout différend de caractère juridique opposant cette Partie contractante à un ressortissant ou à une société de l'autre Partie contractante au sujet d'un investissement de ce ressortissant ou de cette société sur le territoire de la première Partie contractante. Une société de l'une des Parties contractantes dans laquelle avant qu'un tel différend ne se produise des ressortissants ou des sociétés de l'autre Etat contractant détenaient la majorité des actions sera conformément à l'alinéa b du paragraphe 2 de l'article 25 de la Convention assimilée aux fins de la Convention à une société de l'autre Partie contractante. Dans le cas où un tel différend se produit et ne peut être réglé d'un commun accord dans un délai de trois mois par les Parties au différend par les voies de recours internes, par la conciliation ou tout autre moyen, si le ressortissant ou la société en cause*

*consent également par écrit à soumettre le différend au Centre international pour le règlement des différends relatifs aux investissements à une conciliation ou à un arbitrage en application de la Convention, chaque Partie peut engager une action en adressant une requête à cet effet au Secrétaire général du Centre comme le prévoient les articles 28 et 36 de la Convention. En cas de désaccord au sujet de la question de savoir si la conciliation ou l'arbitrage constitue la procédure la plus appropriée, le ressortissant ou la société en cause aura le droit de trancher.*

101. b) Article 25 of the ICSID Convention. Article 8(1) of the Agreement expressly makes reference to the procedure established by the ICSID Convention for the resolution of disputes concerning investments. The relevant provision is Article 25(1), which is worded as follows:

*Article 25*

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

102. These two texts, which are clearly related, make the jurisdiction of an arbitral tribunal subject to a certain number of conditions, most of which - with the exception of one that will be discussed later - are not in dispute in the present case:

- a) *The consent of the other Contracting State.* The respondent State must have consented in writing to submit the dispute to the Centre. By the first sentence of Article 8 of the Agreement, Egypt expressly and validly gave its consent to be subject to such an arbitration proceeding.
- b) *The consent of the investor.* The investor intending to take the action must also have consented in writing. Malicorp gave its consent, at the latest, by instituting this proceeding.
- c) *The nationality of the investor.* The investor must be a “national of the other Contracting State.” Malicorp is a company incorporated “under the law in force in [a] part of the United Kingdom” (Article 1(d) of the Agreement) and therefore a company of the other Contracting Party.
- d) *A legal dispute.* The dispute must be one that is legal and not political or other. This point is not in issue.
- e) *Relating to an investment.* This point is not discussed by the Parties as such, but only from the standpoint of its relationship to the requirements of good faith. The Arbitral Tribunal will return to this later.
- e) *In the territory of the other Contracting State.* The investment alleged to have been made by the party bringing the action must have been made in the territory of the other Contracting State. This is the case here with respect to the

investments Malicorp claims to have made, since they were intended for the construction and operation of the Ras Sudr Airport in Egypt.

- f) *An alleged violation of the Treaty.* The party bringing the action must allege that it was the victim of a violation of the underlying Treaty. In the present case, Malicorp alleges that Egypt breached the obligations prescribed in Articles 2 (“*Promotion and protection of investments*”) and 5 (“*Expropriation*”) of the Agreement (Claim. 21.10.2008, pp. 8 *et seq.*; Claim. 23.10.2009, pp. 28 *et seq.*), an allegation that cannot at this stage be rejected out of hand, subject to what will be said later with regard to the investment.

103. As to this, the Arbitral Tribunal nevertheless wishes to point out that the question might seriously have been asked (1) whether this was not *a purely contractual action*, not eligible for the special protection arising from the Agreement and above all, (2) whether the decision given on that basis by the CRCICA Arbitral Tribunal is not an obstacle to these proceedings.

- a) *The basis for the claims* that the Claimant raises in these proceedings rests solely, in the final analysis, on a breach of the Contract, which the Claimant alleges the Respondent rescinded without cause. Although entered into with the State, that Contract purports to be a purely civil law contract (Article 21.1. “[...] *is deemed to be a civil law contract*,” see above, no. 93); it is subject to Egyptian civil law (“[...] *governed by the civil laws of the Republic of Egypt*,” see above, no. 93) and contains an arbitration clause (above, nos. 93 and 99). It was, indeed, on that basis that the Claimant took action against Egypt by instituting the CRCICA arbitration proceedings as provided in the Contract (above, no. 44 *et seq.*) and it was on that basis that the CRCICA Arbitral Tribunal decided the case.

The claims raised by the Claimant in both proceedings are the same since, in both cases, although for different reasons, it relies on what in its opinion constitutes an unjustified rescission of the Contract. The reasons given by the Respondent for deciding to rescind the Contract do not alter the fact that, for the Claimant, even in such a case, there would be a breach of contract.

Throughout the hearings, Counsel for the Claimant furthermore expressly stated that the amounts that it might obtain under the CRCICA Arbitral Tribunal award would be deducted from those it was aiming to obtain in the present proceedings (Transcript 19/20.04.10, p. 68/8-15).

- b) *The commercial arbitration proceeding*, in other words under private international law, was completed by the CRCICA Arbitral Tribunal; the Claimant partially succeeded since the Republic was ordered, jointly with the two other official bodies sued, to pay it compensation of approximately 14 million dollars (see above, no. 58). By contrast with the Respondent, it did not appeal that award, nor join in the appeal filed by the Republic (see above, no. 59). It follows that, for the Claimant, that award was final. It moreover undertook the necessary steps to have it enforced in at least one country

The authority as *res judicata* of a decision given by another competent jurisdiction between the same parties, concerning the same claims and based on

the same factual and legal bases, prohibits a party from reintroducing a new action that is similar on all points.

- c) *The protection afforded by investment treaties does not necessarily cover purely contractual claims where the parties to the contract have agreed on another clause granting jurisdiction, provided the parties are the same (SGS Société Générale de Surveillance SA v. Philippines (ICSID Case No. ARB/02/6, Decision of the Arbitral Tribunal on Jurisdictional Objections of 29 January 2004 in 8 ICSID Rep. 518 (2005)); Joy Mining Machinery Ltd. v. Egypt (ICSID Case No. ARB/03/11, Award of 6 August 2004 in 132 Journal du droit international 163 (2005)); LESI S.p.A and Astaldi S.p.A v. Algeria (ICSID Case No. ARB/05/03, Award of 12 July 2006 published on www.icsid.worldbank.org)). In principle, it is up to the party claiming to have been injured by the breach of a contract to pursue its contracting partner using the avenues laid down for this purpose. So long as a procedure of this type exists for protecting investment, it is not possible to resort to the special methods provided for by treaty if the commercial route, be it arbitration or the local courts, enables all submissions and arguments to be exhausted. It is hard to see how an investment treaty would be breached by the mere fact of a breach of contract, as long as the control mechanisms put in place by that contract are functioning normally. Investment arbitration was not set up to provide a substitute for contracting partners who refrain from following the ordinary procedure by which they have agreed to be bound, nor as a means of appeal for those who have failed to obtain satisfaction (or full satisfaction) by using that procedure. In order for a breach of contract to serve as the basis for jurisdiction of a tribunal in an investment arbitration, such breach must at the same time, and for reasons inherent in the investment protection treaty itself, amount to a violation of that treaty, one that could not be resolved by using the ordinary procedure. Among the matters falling within the scope of the jurisdiction *ratione materiae* of an arbitral tribunal in an investment case are acts by the host State in the exercise of its public powers (“*actes de puissance publique*”) that deprive the foreign investor of its rights in violation of the guarantees offered by the Agreement. For example, a decision of the host State to which a commercial arbitral tribunal is bound to give effect, or a rule enacted by the host State which that tribunal must apply, can be brought before a tribunal in an investment arbitration as violating the substantive guarantees offered by the investment treaty.*

It is true that this statement must be qualified:

- The parties to a BIT may agree that all the disputes an investor might raise against the host State must be submitted to the tribunal (the “umbrella clause”). Here, again, the claimant must make its choice at the outset; it cannot first attempt a contractual procedure only to resort to the special procedure if it is not satisfied with the result, which is precisely the situation that has arisen in the present case.

In order to come within the jurisdiction of this Arbitral Tribunal, the claims the Claimant intends to derive from a breach of the Contract must be based on the provisions of the Agreement. If and to the extent that such claims are based on breach of the contractual obligations to

which the host State agreed within the meaning of the umbrella clause, such claims cannot invalidate the operative conclusions of the CRCICA award (in particular as to the voiding of the Contract). That Award decided the contractual claims of the parties to the Contract, including the claims of and against the host State to the extent that it was acting in its capacity as party to the Contract. By virtue of the principle whereby a party may not contradict itself, and the authority of *res judicata*, the Claimant cannot at the same time both invoke a breach of the Contract on the basis of the Agreement and seek enforcement of the commercial award on the basis of the arbitration clause.

- The reasoning would also be different if the investor pursued the host State on grounds based not on breach of contract, but on other acts: refusal by the State party to the contract to submit to the contractual procedure, the conditions under which the commercial proceedings were conducted, or obstacles placed by the host State in the way of enforcement of the commercial decision. No such acts have been alleged by the Claimant in the present case.

d) The question might have been one for serious discussion in the present case, but the Arbitral Tribunal refrains from doing so for the following reasons:

- At no time has the Republic availed itself of this objection. Moreover, in the CRCICA arbitration proceedings it firmly opposed arbitration as provided for in the Contract, a procedure whose validity it disputed; it appealed the decision of the CRCICA Arbitral Tribunal finding it had jurisdiction and won the case before the Egyptian state courts on first appeal, though that is the subject of a review currently (apparently) still pending before the Supreme Court (see above, no. 59).

The inevitable conclusion, therefore, is that by such attitude the Respondent has rejected recourse to the avenues provided for in the Contract. For the Arbitral Tribunal, this raises a degree of uncertainty concerning the outcome of the commercial procedure, which makes it acceptable for the party claiming to have been injured to use the remedies afforded by the Agreement. There can be no question, on the other hand, of reopening the commercial proceedings.

- It is not for this Arbitral Tribunal to rule on the validity of the CRCICA arbitration award; it has not been asked to do so, and nor could the Respondent be held liable for a decision made by an autonomous tribunal. The Claimant has raised no such argument. It has waived any attempt to have the award set aside, but has accepted its conclusions and is seeking to have it compulsorily enforced. The fact that, to date, it has not been successful before a national court does nothing to change that.

Nevertheless, to take account of the fact that the CRCICA award has been criticised by the Respondent, this Tribunal shall later re-examine, in the context of the claim based on the umbrella clause, the conclusions reached by the CRCICA Arbitral Tribunal in its award.

104. Nor has the Respondent raised any objection concerning the procedure that was followed, in particular in relation to the requirement in Article 8 of the Agreement for a preliminary process of informal settlement. In the light of the proceedings that have taken place, it is moreover hard to imagine that such a measure would have produced a solution.
105. From this standpoint the only issues to be examined – but they are central – concern the notion of an investment dispute (below, 2.2) and above all, the objection based on breach of the principle of good faith (below, 2.3).

## 2.2. Is there a dispute arising out of an investment?

106. The question whether there is an investment protected by the Agreement is one, in principle, for the examination of the merits of the case. However, in order to determine the scope of the jurisdiction *ratione materiae* of the Arbitral Tribunal, a determination must be made as to whether the dispute, in particular as delimited by the Claimant's submissions, relates to such an investment. The first question therefore depends on the definition given to the “*investment*” that must be the subject of the dispute.
107. Even though the point is not undisputed, in order for a proceeding based on breach of a treaty to be admissible, the investment to which the dispute relates must pass a double test (also known as the “double keyhole approach” or “double-barrelled test;” see in this regard C. Schreuer, *The ICSID Convention, A Commentary*, 2nd Ed., 2009, at Article 25 nos. 122 *et seq.* and the references). It must in practice correspond:
- on the one hand, to the meaning given to the term by the treaty, which defines the framework of the consent given by the State, and also
  - on the other, to the meaning given in the ICSID Convention, which determines the jurisdiction of the Centre and the arbitral tribunals acting under its auspices.
108. a) Article 1(a) of the Agreement gives the following definition of an investment:

*‘Investment’ means every kind of asset and in particular, though not exclusively, includes:*

- i) movable and immovable property and any other property rights such as mortgages, liens or pledges;*
- ii) shares, stock and debentures of companies or interests in the property of such companies;*
- iii) claims to money or to any performance under contract having a financial value;*
- iv) intellectual property rights and goodwill;*
- v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.*

This definition broadly corresponds to those found in numerous bilateral agreements, in particular Article 1 of the United Kingdom's Model Agreement (cf. Schreuer, *op. cit.*, no. 141).



This definition does not so much stress the contributions made by the party acting, as the rights and assets that such contributions have generated for it. In reality, the wording of other provisions of the Agreement clearly presupposes that there have been contributions, in particular Article 2(1), which makes it an obligation for each Party (to the Agreement) to “[encourage] *and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory* [...]” The definition given by Article 1 seems directly related to the measures a State can take to jeopardise them, in particular by expropriation.

109. b) Article 25 of the ICSID Convention, on the other hand, contains no definition of the notion. The drafters intentionally refrained from doing so in order to leave the maximum freedom for its application in practice (see Schreuer, *op. cit.*, nos. 113 *et seq.*).

A number of arbitral tribunals have suggested definitions, by reference, in particular, to the criteria enumerated in the *Salini v. Morocco* decision (ICSID Case No. ARB/00/4, *Décision sur la compétence*, 23 July 2011, para. 3 in 129 *Journal du droit international* 196 (2002); see, *eg.*, Schreuer, *op. cit.*, nos. 152 *et seq.*). Consequently, in its widest, albeit disputed, meaning, there must be (i) a contribution, (ii) of a certain duration, (iii) of a nature such as to generate returns, (iv) presenting a particular risk, and (v) such as to promote the economic development of the host country. Such criteria are not at all absolute and must be regarded as attempts to pin down the notion.

110. At first blush, the two definitions do not overlap since they come from different perspectives. In the opinion of the Arbitral Tribunal these two aspects are in reality complementary. Indeed, the notion of investment must be understood from the perspective of the objectives sought by the Agreement and the ICSID Convention. They are there to “*promote*” investments, that is to say, to create the conditions that will encourage foreign nationals to make contributions and provide services in the host country, but also, and to that end, to “*protect*” the fruits of such contributions and services. These objectives come from the Preamble to the ICSID Convention, which acknowledges, on the one hand, “*the role [...] of international private investments*” in “*international cooperation for economic development*,” but which in parallel enshrines the need to develop appropriate mechanisms for dispute resolution. The objective of the Agreement is also to pursue “*the encouragement and reciprocal protection [...] of such investments*” for the “*stimulation of business initiative*” and to “*increase prosperity in both States*” (preamble). The two aspects are thus complementary. There must be “*active*” economic contributions, as is confirmed by the etymology of the word “*invest*,” but such contributions must “*passively*” have generated the economic assets the instruments are designed to protect.

Both aspects are reflected in the two underlying texts, but in a complementary manner. Clearly Article 1(a) of the Agreement emphasises the fruits and assets resulting from the investment, which must be protected, whereas the definitions generally used in relation to Article 25 of the ICSID Convention lay stress on the contributions that have created such fruits and assets. It can be inferred from this that assets cannot be protected unless they result from contributions, and contributions will not be protected unless they have actually produced the assets of which the investor claims to have been deprived.

111. In the present case, both aspects exist, but in differing proportions:

- It is not disputed that under the Contract the Claimant benefited from a long-term concession that could have generated significant returns, just as it is undisputed that the Grantor prematurely ended that Contract, thereby depriving the Claimant of the revenues it could have made. This is not the place to discuss whether that contract was valid or whether the termination was justified; the Arbitral Tribunal will return to that later. For the Claimant, the loss allegedly represented tens or even hundreds of millions of dollars.
- It is also not disputed that the relations of the Parties ended very rapidly without the Concessionaire having actually made any significant contributions. Undoubtedly it incurred expenses in preparing its bid and negotiating the Contract; it is also possible that it took other steps thereafter. Neither the file nor the pleadings mention this, but the decision of the CRCICA Arbitral Tribunal takes it into account. Nevertheless, there is nothing *per se* to prevent the view that the long-term contractual commitment of a party to thereafter perform services fulfilling traditional criteria also amounts to a contribution. It was envisaged that the construction alone would entail costs in excess of 200 million dollars, that the work and most of all the operation of the airport would continue for several years, that the investor would reap profits from it that it estimates in these proceedings at several hundred million dollars, that the project involved risk and that by its nature and size it would contribute to the development of the region's tourism and economy.

In other words, if proved, the expropriation concerns the expectations from a contract which, although signed, had not yet been performed in any way but which contained a basic commitment.

112. If one keeps to the definition given in Article 1 of the Agreement, it appears that the conditions of that definition are fulfilled. According to its statements, the Claimant is indeed claiming “*assets*,” in particular “*claims*” or “*any performance under contract having a financial value*” (iii), as well as asserting to have been deprived of a business concession conferred on it by law or under contract and which would have contributed to Egypt's economic development (v).

From that standpoint, the necessary inference is that the condition is fulfilled, in spite of the fact that no mention is made of the underlying contributions.

113. The contribution aspect is, however, regularly mentioned in the definitions suggested in relation to Article 25 of the ICSID Convention. There has to have been a contribution. The requirement appears reasonable since the basic objective is, indeed, to encourage the foreign national to take the risk of performing services in the host country. It is true that the protection will thereafter extend to the assets thus created by the contribution in the form of property, rights or claims. It will be admitted, therefore, that the host State also intended to commit to arbitrate disputes involving the type of contribution it wanted to encourage by entering into the Agreement.

In the case of a contract, it has been rightly held that the costs incurred during negotiations with a view to concluding a contract do not constitute an investment if in the end the State finally refuses to sign it (cf. Schreuer, *op. cit.*, Article 25, nos. 175 *et*

*seq.*). The situation in the present case is different since the Contract was indeed signed (see in support *PSEG v. Turkey*, ICSID Case No. ARB/02/5, Award of 19 January 2007, para. 304, published on <http://icsid.worldbank.org>; and Schreuer, *op. cit.*, *ad. Article 25*, no. 179). It is true that Malicorp does not appear to have performed many services in connection with it. Nonetheless, the fact of being bound by that Contract implied an obligation to make major contributions in the future. That commitment constitutes the investment; it entails the promise to make contributions in the future for the performance of which that party is henceforth contractually bound. In other words, the protection here extends to deprivation of the revenue the investor had a right to expect in consideration for contributions that it had not yet made, but which it had contractually committed to make subsequently.

114. For these reasons, the Arbitral Tribunal accepts that the dispute arises out of an investment. Thus, at the stage of deciding on jurisdiction, there is no need to examine whether the Contract that constitutes the investment was validly rescinded, with the result that there was, ultimately, no actual investment; that issue belongs specifically to the merits of the case.

### **2.3. The question of the alleged breach of the principle of good faith**

115. The second issue in this context is linked, in part, to the statement just made. It consists of verifying whether the Arbitral Tribunal would still have jurisdiction in the event the investor were seeking protection in a manner that was contrary to the principle of good faith.

The crux of the arguments put forward by the Respondent rests on this aspect. According to the Respondent, compliance with good faith is an essential principle of international law, which principle extends to the investment protection regime. It infers from this that such protection excludes the protection of investments made in violation of this principle. In the present case, it argues, the Respondent entered into the Contract on the basis of a forgery. In support of its thesis it cites two recent decisions (Respond. 01.01.09, nos. 71 *et seq.*, referring to *Inceysa v. El Salvador*, reference in Exhibit R-Lex, pp. 10-11 and to *Phoenix Action v. Czech Republic*, reference in Exhibit R-Lex, pp. 20-21). The Claimant for its part mainly contests the facts alleged, in particular that the Contract was obtained on the basis of a forgery.

116. It is indisputable, and this Arbitral Tribunal can do no more than confirm it, that the safeguarding of good faith is one of the fundamental principles of international law and the law of investments. As in domestic law, the principle fulfils a complementary function; it allows for lacunae in the applicable laws to be filled, and for that law to be clarified by the specific application of existing principles.

For the Arbitral Tribunal, this can occur in at least two contexts:

- Where protection is requested *in conditions* that are contrary to the principle of good faith. It does not seem to be open to challenge that the protection afforded by investment treaties does not extend to cases in which an investor has created the conditions therefor in a manner contrary to the principle of good faith, in particular by resorting to a veritable abuse of the law: for example, when one party, usually aware of the restrictive measures that a State can take, has artificially created the conditions for protection, alone or with the complicity of

third parties. This would be the case where a party uses stratagems to give the impression that it has acquired or is acquiring the nationality of a contracting country, with the sole aim of benefiting from the protection afforded by a treaty (see *Cementownia v. Turkey*, ICSID Case ARB(AF)/06/2, Award of 17 September 2009; *Phoenix Action v. Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009 published on <http://icsid.worldbank.org>). In such hypotheses the defect not only undermines the rights of the investor on the merits, but also, *a priori*, his right to an arbitration of the related dispute. There is no need to examine these cases further in the present context, since the situation here does not fall within those hypotheses.

- Where protection is requested *for an investment* alleged to have been made under conditions contrary to the principle of good faith. This is the case when the “investment” is the result of corruption, or has been obtained by deception or fraud. In such cases, the defect undermines not only the right to invoke the protection of an agreement, but also the investment alleged to have been made by the party seeking protection. The hypothesis central to the present decision falls within this context.
117. With respect to this latter hypothesis, arbitral tribunals that have had occasion to examine issues of this nature have addressed them from different angles. To simplify, they have mainly opted for one of the two following approaches (see Abby Cohen-Smutny and Petr Polasek, “*Unlawful or Bad Faith Conduct as a Bar to Claims in Investment Arbitration*” in *A Liber Amicorum: Thomas Wälde* (2009)):
- Some have addressed the issue at the outset of the case, *from the standpoint of jurisdiction*. In order for the jurisdiction of an ICSID arbitral tribunal to be established, the State against which proceedings are brought must have validly given its consent. In such proceedings this presupposes that the party bringing the claim has made an investment that meets the requirements the State may have laid down, as well as the general conditions of validity (*Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award of 14 July 2010, paragraph 108; denying however that good faith constitutes a precondition for jurisdiction, see paragraph 112). That is why questions of the possible application of the principle of good faith are approached from the standpoint of Article 25 of the ICSID Convention, as part of the examination of jurisdiction (in particular, *Phoenix Action v. Czech Republic, op. cit.*).
  - Other tribunals have examined the issue at the second stage, *from the standpoint of the merits*, in relation to the validity of the investment. In order for an ICSID arbitral tribunal to be able to render an award against a State for breach of obligations concerning the protection of an investment, such investment must be valid. That is why the issue of the possible application of the principle of good faith is then considered as part of the issues on the merits.
118. The distinction between the two approaches is not of merely theoretical significance, if only because of the remedies available against the decision. Undoubtedly there are good reasons for choosing one or the other approach, and it is possible that the circumstances in which the issue arises can justify different solutions. It is not the intention of this Arbitral Tribunal to provide a general answer to the question.

119. In the present case, there are strong arguments in favour of the second solution, which consists in examining the issue of the validity of the investment at the merits stage.

a) The solution derives, first, from the *principle of autonomy of the arbitration agreement*, a principle so fundamental that it also has its place in investment arbitration. According to that principle, defects undermining the validity of the substantive legal relationship, which is the subject of the dispute on the merits, do not automatically undermine the validity of the arbitration agreement. Thus, an arbitral tribunal is competent to decide on the merits even if the main contract was entered into as a result of misrepresentation or corruption. Only defects that go to the consent to arbitrate itself can deprive the tribunal of jurisdiction. In the present case, there is nothing to indicate that the consent to arbitrate, as distinct from the consent to the substantive guarantees in the bilateral Agreement, was obtained by misrepresentation or corruption or even by mistake. The allegations of the Respondent relate to the granting of the Concession. However, it is not the Contract that provides the basis for the right to arbitrate, but the State's offer to arbitrate contained in the Agreement and the investor's acceptance of that offer. The offer to arbitrate thereby covers all disputes that might arise in relation to that investment, including its validity.

b) *The hypotheses described* relate, in a general sense, to the possible grounds for invalidity of an investment. But such grounds are extremely numerous and varied: it is hard to find a basis for drawing distinctions between them in order to determine how and at what point they must be examined. All of them could be encompassed, *per se*, by the notion that the consent of the State applies only to valid investments. Undoubtedly certain grounds, in particular those that might be inferred from breach of the principle of good faith with regard to the investment, have a particular value but that does not justify creating a special category calling for priority treatment. There is even less justification in that, in the jurisdictional phase, it is often difficult to determine whether the ground derives from an act contrary to good faith, in relation to the conclusion of a contract, for example, from a threat or misrepresentation, or another related cause not involving bad faith, for example mistake. In those circumstances, it seems more appropriate to defer the examination until the merits phase.

This is surely so in the present case, where the Parties' opinions differ on whether or not the Contract was entered into as the result of fraud, misrepresentation or mistake.

c) *The factual analyses of these hypotheses* most often requires an in-depth examination, which is difficult to separate out as the facts may be closely interwoven. The existence, nature and value of the investment are in large part verified through the same process of inquiry, thus it is preferable to examine and deal with all aspects simultaneously. It was, moreover, for these reasons that, at the start of the proceedings, this Arbitral Tribunal rejected the Respondent's request to deal separately with issues of jurisdiction (see above, no. 80 b)) and that its examination of the case has also covered the merits

## 2.4. First conclusion

120. On the basis of the foregoing reasoning, it shall be decided that:

(1) *The Arbitral Tribunal has jurisdiction to rule on the claims of the Claimant.*

## C. THE ALLEGED BREACHES OF THE AGREEMENT

### 1. The issue

121. On the question of the Respondent's breaches of its obligations to the Claimant, the two Parties also make opposing submissions:

In this regard, the Claimant submits as follows:

*“Constater la violation par la République Arabe d’Egypte de ses obligations selon les articles 2(2) et 5 du Traité TBI du 11 juin 1975 au préjudice de la société Malicorp Ltd.”*

While the Respondent submits as follows:

*“The Respondent respectfully submits that Malicorp’s claim should be rejected, promptly as an improper attempt to use BIT rights to profit from its own fraud and negligence and its own failure to perform the Concession Contract.”*

It will be recalled (see above, no. 80 b)) that the Arbitral Tribunal has decided in this phase of the proceedings to decide only the question whether there was a violation of the obligations under the Agreement, and, if it finds in the affirmative, to examine at a later stage the amount to which the Claimant might be entitled as a result.

122. The starting point must be an examination of the bases for the Claimant's claim (below, 2.), followed by an analysis of the reasons relied upon by the Respondent in support of its decision to end the Contract, as they relate to the conclusion of the Contract, on the one hand (below, 3.) and its performance, on the other (below, 4.).

### 2. The bases of the claim

123. The Claimant relies on Article 2 and Article 5 of the Agreement (Claim. 21.10.08, p. 10; Claim. 05.02.10, p. 23).

a) Article 2 of the Agreement is entitled *“Promotion and protection of investment.”* The first paragraph deals with promotion; the second, the only one of interest to us in this context, is worded as follows (for the sake of clarity, the Arbitral Tribunal has added the references in brackets):

[sentence 1] *Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.*  
[sentence 2] *Each Contracting Party shall ensure that the management,*

*maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party is not in any way impaired by unreasonable or discriminatory measures. [sentence 3] Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.*

- b) Article 5 of the Agreement is entitled “*Expropriation.*” The second paragraph is not relevant to the present situation; the first is worded as follows (for the sake of clarity, the Arbitral Tribunal has added the references in brackets):

*[sentence 1] Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as ‘expropriation’) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party and against prompt, adequate and effective compensation. [sentence 2] Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation itself or before there was an official government announcement that expropriation would be effected in the future, whichever is the earlier, shall be made without delay, be effectively realisable and be freely transferable. [sentence 3] The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of whether the expropriation is in conformity with domestic law and of the valuation of his or its investment in accordance with the principles set out in this paragraph.*

124. The Claimant takes the view that in the present case the Respondent breached each of the two provisions concurrently.

The Arbitral Tribunal accepts that there is no reason *per se* why a State cannot both breach the prohibitions enumerated in Article 2 and take expropriatory measures within the meaning of Article 5. Nevertheless, when an investor bases its action principally on the fact that it has been the victim of an expropriation, that measure necessarily implies treatment that was, precisely, neither fair nor equitable. In order to rely on both provisions, the investor must be able to establish that it has also been the victim of other measures, different from expropriation.

This condition has not been fulfilled in the present case since the Claimant's sole but essential complaint concerns the rescission of the Contract. Nowhere in its pleadings does it explain in what way it was also the victim of unfair or inequitable treatment, giving rise to additional consequences.

125. For the Claimant, the Republic breached these obligations by unilaterally deciding to rescind or terminate the Concession Contract without compensation, for reasons it says were connected to public security; in so doing, it breached its contractual obligations and took a measure formally amounting to an expropriation (Claim. 23.10.2009, p. 29). In this regard, the Claimant refers, among others, to the case of *Waguih Elie George Siag and Clorinda Vecchi v. Egypt* (Claim. 23.10.2009, pp. 32 *et seq.*).

The signature of the Contract conferred on the Claimant the right to operate the airport to be built for 41 years, to use the 30 square kilometres of allocated lands around the construction, and benefit from the transfer, free of charge, of ownership of 300 square kilometres of land around the area under concession (Claim. 23.10.2009, p. 32). By ending the Contract without just cause, the Defendant is consequently said to have breached Article 5 of the Agreement (*ibidem*).

The Respondent, for its part, considers that it was entitled to rescind the Contract, and that therefore there was no breach of its obligations or, consequently, any measure of expropriation. In order to benefit from Article 5 of the Agreement, an investment must be made in good faith and must be within the scope of application of the Agreement (Respond. 01.07.09, no. 97).

126. The first question, therefore, is whether the Republic had the right to discharge itself from the Contract pursuant to the private law rules governing it (see above, no. 93). If that is the case, it is unnecessary to examine whether the Respondent also took a measure under its public powers (“*measures de puissance publique*”), not as a party to the Contract but as a State, the effectiveness and conformity with the Agreement of which would have to be examined. Indeed, the rescission of the Contract would not leave any subsisting breach of the umbrella clause nor, moreover, in the absence of a protected investment, of other clauses of the Agreement.
127. In order to decide whether the Contract was validly rescinded by the Respondent, the Arbitral Tribunal must first turn to the letter that the Ministry of Transport sent to the Respondent on 12 August 2001 (Exhibit C-33 = R-2, pp. 393 and 396), by which the Respondent discharged itself from the Concession Contract. That letter, sent in Arabic in its original version and in English, is worded as follows (the Arbitral Tribunal has added the numbers in brackets for ease of reference):

*Gentlemen,*

*With reference to the concluded contract with your company for the construction, operation and transfer of the Ras Sudr Airport (BOT concession) and regardless of the repeated warnings to you on the dates of December 2000, January 2001 and the ultimatum on 18/2/2001 to complete the establishment papers of the Egyptian company according to law no. 8 for 1997 and to send the project's plan of work and amendment of the letters of guarantee to be final then giving you another grace period until 28/2/2001, nothing has been accomplished;*

[1] *And whereas the company has submitted to the Authority doubtful papers, a matter that forced the Authority to send you a letter on 30/5/2001 asking you to bring the authentic and real documents and gave you a grace period until 30/6/2002 then extended to 31/7/2001;*

[2] *And whereas the company submitted invalid papers to the security departments about the names of the partners in the English company 'Malicorp Ltd.';*

[3] *And whereas the company has forsaken in establishing and founding the Egyptian company according to the Egyptian law and whose date according to*



*the contracting was fixed until 3/2/2001 and in addition to other breaches committed by the company;*

*[4] And whereas it has been proven that you are not serious in executing the contracting provisions which has been concluded on 4/11/2001 and until this very date which led to non starting of the project until this very date and has not exceeded nine months;*

*THEREUPON the above mentioned it has been decided to terminate the contract signed with your company and to confiscate the amount of the letter of guarantee, with preserving the right to revert to you by the indemnification for the resulting damages which are borne by our company and the Egyptian Government due to the non-starting of the execution of one of the vital and important projects included in the State's plan for economic development.*

*Very truly yours,*

*The Chairman of the board of directors  
Abdel Fattah M. Kato.*

128. It will be seen from reading the letter that the Respondent invokes two types of grounds, which the Arbitral Tribunal will examine in turn:

- The first (numbers 1 and 2) are based on reasons having to do with the *conclusion of the Contract*, above all the fact that the Respondent allegedly submitted “*doubtful papers*” and “*invalid papers about [...] the English company.*” This goes to the validity of the Contract itself.
- The others (numbers 3 and 4) relate to the fact that after signature of the Concession Contract, the Claimant *breached certain of its obligations*, primarily the provision of certain required documents, its slowness in setting up a company under Egyptian law, its lack of commitment and failure to carry out the first steps as expected. This goes to the performance of the Contract.

129. It is true that the Claimant takes the view that these grounds are mere pretexts, and that the real reason lies in a change of government policy concerning the development of the airports network. Evidence of that, allegedly, is that no other airport has been built since, and that another project suffered the same fate as that of Ras Sudr, with the Arab Republic of Egypt agreeing in that case to indemnify the Concessionaire (Transcript 19/20.04.10, p. 39/25-40).

It is possible that the Government did later modify its policy. It was entitled to do that, but, in so doing, it breached obligations it had validly undertaken: it was bound to respect them or, if it did not, to fully indemnify the other party. That still presupposes, however, that those obligations were valid. A contracting party cannot be prohibited from discharging itself from a contract where it has legitimate reasons for doing so, even if, indirectly, the measure suits its convenience and enables it to go back on choices made earlier. Put another way, the first question to ask is whether the reasons given by the Respondent in its letter of termination justify the termination.

### 3. The reasons relating to the conclusion of the Contract

130. The first question with respect to the first two grounds is whether the Contract was validly entered into, whether it was void from the outset because the circumstances in which it was concluded contravened the principle of good faith, or whether it was capable of being rescinded because of a defect in consent, namely misrepresentation or mistake. The answer depends, in the first place, on the rules applicable to it, in this case Egyptian civil law.

As has been seen (see above, no. 44 *et seq.*), these issues have already been examined and decided in the CRCICA arbitration proceedings instituted by the Claimant pursuant to the arbitration clause in the Contract. In its award of 7 March 2006, the CRCICA Arbitral Tribunal held, in particular, that there was no proof of forgery or fraud, but that it had, on the other hand, been established that the Respondent had entered into the Contract while labouring under a mistake, and that, therefore, it had the right to discharge itself from it. That said, since it bore part of the responsibility for that mistake, it was only fair that it should be made to bear part of the costs incurred by the Claimant.

Having decided not to re-examine that decision, this Arbitral Tribunal could have limited itself to basing its ruling on the said decision. However, as has been seen (see above, no. 59) the Respondent refuses to submit to that decision or to accept its conclusions. The uncertainty that persists, therefore, justifies the Arbitral Tribunal in verifying, as a matter ancillary to the guarantees offered by the Agreement, that, even if that award were to be set aside, the conclusions arrived at by this Arbitral Tribunal would be no different from those of the CRCICA Arbitral Tribunal. The fact is that, if the only conclusion to be drawn is that there were sufficient grounds for rescinding the Contract, there would be nothing left to protect.

131. The first reason given by the Respondent for discharging itself from the Contract was that it had allegedly been misled by the submission of inaccurate documents concerning the Claimant's financial capacities.
132. a) *In the call for tender documents* (see above, no. 4), the Respondent had clearly indicated the importance it attached to the financial capacities of the company to be selected, as under a B.O.T. contract, that company would have to bear all the costs of construction (Exhibit R-2, p. 46, item 2: “*Investor must bear all the costs of studies, design, construction and preparations of all the constituent to operation, services, security requirements and others under the supervision of the Authority*”). That was why each bidder was obliged to clarify, in its bid, the legal form of the company that would be responsible for performing the Contract, and in particular “*its own and its company's financial capability and the sources of financing*” (Exhibit R-2, p. 48, item 11). That was the reason for the specific requirement that documents be included stating the “*qualitative of finance and the issued capital*” (Exhibit R-2, p. 48, item 15; emphasis by the Arbitral Tribunal).

That requirement is easy to understand, because this was not a straightforward construction contract, financed by the project owner, but a B.O.T. contract in which it was the contracting partner who, initially, bore the entire burden of financing.

133. b) *In its bid*, the Claimant submitted its Memorandum of Association, which showed that it had a capital of 1000 pounds sterling divided into 1,000 shares of one pound sterling each (see above, no. 7; Exhibit R-2, p. 23, no. 5: “*The Company’s share capital is £ 1000 divided into 1000 shares of £ 1 each*”). It is true that Malicorp decided on 15 September 1999 to increase its capital to 100 million pounds sterling, but that was not subscribed capital, but authorised capital (see above, no. 6). The difference is substantial, because in the first case there are shareholders who have made a firm commitment to pay it, while in the second, there is only a power given to the company’s organs to decide when they will look for shareholders willing to commit.

The bid apparently contained agreements entered into with three companies which had expressed an interest, in principle, in being part of the project, but none of them clearly stated that they agreed to be responsible for all or part of the financing (Exhibit R-2, p. 49 *et seq.*). What is clear, on the other hand, from the Claimant’s statements is that the estimated cost of the construction according to J&P was 232,000,000 dollars.

Briefly put, this meant that Malicorp had to be in a position to finance at least that amount itself, or to secure financing; furthermore, that sum covered only the construction, but not the first years of operation, which no one could sensibly expect to be profitable from the start. However, in the light of the evidence on the record, none of the founding members of Malicorp could produce such large sums of money, either from their own resources or from partners prepared to take a risk of that magnitude.

134. c) At a date that is not established, the representatives of Malicorp were *summoned to a meeting* with the representatives of the Respondent (see above, no. 8). According to the invitation (Exhibit R-2, p. 82), the purpose was to answer certain questions and provide certain clarifications. The first (see above, no. 1) specifically concerned “*the details of the capital (issued and licensed)*.” As can be seen, this did not refer merely to the authorised capital, but also the issued and paid-up capital.

The meeting took place on 3 January 2000 (see above, no. 8). Those attending on the Claimant’s side were: Messrs. El Sayed Mohamed Abu El Ela, Mahmoud Shakir Ibraim, Azmi Mohamed El Teraee and Kateen Beshara. A minute was drawn up, which states that Mr. Mahmoud Shakir Ibraim began by producing written authority from Malicorp to answer questions at that meeting. That written authority (or “*assignment*”) was annexed to the minutes of the committee. On the question concerning Malicorp’s capital, the minutes state the following:

*“Upon their question [that of the Respondent’s representatives] concerning the first point details of the capital he responded by the following ‘The Original Company with which the contracting shall be concluded and which submitted the offer is the British Company **Malicorp Ltd**, a company established under the British law and its residence is in London with its capital of one hundred million Sterling pounds according to the attached commercial register which was reviewed by the Committee’s members.’”*

The statement would have been correct if it had made it clear that it referred not to the issued and paid-up capital as stated in the question, but to the authorised capital, which is obviously meaningless as long as the sources of financing of this capital are not given. Given its decisive importance, it would have been consistent with the principle

of good faith and the reasonable expectations of the contracting partner for Malicorp's representatives to make that clear. In practice, it could be said that in business dealings, the mention of "capital" refers at the least to capital that is subscribed if not paid-up, and not merely to authorised capital, this being only a measure prior to subscription.

135. d) *Annexed to the minutes of the meeting* was an official statement concerning Malicorp Ltd. This was allegedly an extract made on 15 September 1999 of the "Register of companies for England and Wales," certifying that the company had been incorporated on 6 August 1997 (Exhibit R-2, p. 90 *et seq.*). The item numbered 5 in that document states: "The Company's share capital is £100 million divided into one million shares of £100 each" (Exhibit R-2, p. 94). Nowhere does the text make it clear which type of capital this is.

This is the document that lies at the root of most of the proceedings and disputes that have taken place:

- The Cairo Court of Assizes took the view, based among other things on the pre-hearing interrogatories, that this was in fact a forgery. It nonetheless finally acquitted most of those charged with that offence, with the exception of two persons tried in their absence, against whom the judgment appears not to be final.
  - The CRCICA Arbitral Tribunal left undecided the question whether or not it was a forgery; it deemed it sufficient to find that the Respondent had been led to enter into the Contract while labouring under an essential mistake, since the civil law consequences of an inaccurate and fraudulent statement under the Egyptian Civil Code are the same as those for a mistake.
  - The pleadings before the present Arbitral Tribunal have not enabled it to reach a clear conclusion, especially since it was not possible for the Respondent to produce the original of the suspect document, but only a photocopy taken from a fax. Even though serious indications do exist, they are not enough to support a clear conclusion on a matter of such capital importance.
136. It is neither the intention of the present Arbitral Tribunal, nor within its terms of reference, to conduct a detailed investigation into the authenticity of the suspect document. It suffices to find that the nature and content of the information supplied to the Respondent by Malicorp's representatives was such as to give rise to an essential mistake; for a project as monumental as that of the Ras Sudr airport, knowing whether the company awarded the project is an empty shell or a company with exceptional resources is obviously fundamental, and any error on that point justifies calling the Contract into question. That, moreover, as has been seen (see above, no. 58), is the conclusion reached by the CRCICA Arbitral Tribunal.
137. In these circumstances, the present Arbitral Tribunal concludes that the principal reason given by the Respondent in its letter rescinding the Contract was sufficiently well founded, and gave the Respondent the right to withdraw from the Contract. It follows that the rescission of the Contract cannot be considered as a form of expropriation under international law.

That same letter alludes, moreover, to other circumstances surrounding the conclusion of the Contract, notably in relation to the composition of the company. Without wishing, or needing, to enter into a detailed discussion, the Arbitral Tribunal notes that, in fact, the entire legal, financial and even technical set-up leaves a sense of insecurity and vagueness, incompatible with the dimensions of the project at stake. In this regard it is enough to point to the existence and content of the letter from Mr. El Ala (Exhibit R-2, p. 336 *et seq.*); whatever the veracity of the accusations it contains, it is evidence in itself of a pernicious climate among the people who were to bear responsibility for the project. This can only be an aggravating factor.

#### **4. The reasons relating to performance of the Contract**

138. Quite different is the question whether, as the Respondent has contended, Malicorp failed, after signature of the Contract, to comply with the obligations it had agreed to carry out at once, namely the steps necessary to put the project into practice. Even if the answer to the previous question is enough in itself to enable it to rule on the submissions before it, the Arbitral Tribunal deems it appropriate, out of an excess of caution, to briefly review these.
139. It seems in fact that, very shortly after the signing of the Contract, the Respondent issued a formal notice to the Claimant to comply with its obligations. It seems doubtful to the Arbitral Tribunal whether, just a few weeks after signing a contract of such magnitude, the Egyptian authorities would have been able to set in motion a process designed to free themselves from the Contract for reasons that had nothing to do with the project – unless it accepts that in the space of just a few weeks there was a radical turnaround in security policy, though there is nothing in the record to support that theory. After that, several other formal notices were issued (see above, nos. 18, 20, 22).
140. The first obligation concerned the setting up of the Egyptian company. It is not disputed that the incorporation did not take place in the time allowed. One primary reason is that the Claimant delayed in taking the necessary steps to set it up. Admittedly, for the Respondent, the incorporation of that company was critical. First, because the Contract had also been entered into in the name of the company to be formed (see above, no. 15); next, and most of all, because it had to show sufficient financial capacity to guarantee the solidity and reliability of the operation. The capital was subscribed by Malicorp, which, however, had not yet significantly increased its own capital. It is possible that the application was delayed by the Respondent's own procrastination, but that situation, while clearly the case, arose only later during the process of termination, by which time the project was already faltering.

The Claimant has criticised the Respondent for not having made available to it the additional land promised in the Contract for its own use. That criticism is correct, but bears no direct relation to the breach of the obligation to set up the company, unless, as has been suggested, that land could have served as security for the company's founders to obtain loans for funds they did not have.

141. The second criticism set out in the letter of rescission relates to the performance of the Contract. True, the Arbitral Tribunal has indeed decided that the issue of damages and thus, indirectly, of lost investments would be dealt with in a second phase, in the event

it found initially in the Claimant's favour. The fact remains, though, that at no time has the Claimant attempted to persuade the Arbitral Tribunal that it actually did, at the outset, take the significant legal, financial and most of all technical steps required to launch such a project. The delays in taking the first steps and the absence of any practical progress, especially where the potential partners were concerned, could well have added to the doubts and concerns of the Egyptian authorities. At no time, in fact, has the Claimant attempted to show that this last criticism was unfounded. Such a situation could have been explained by internal problems and the dissent that surfaced within the group of promoters, as is shown by the letter from Mr. El Ala, among other things. Briefly put, the project never got off the ground, or if it did, it got off to a bad start.

The Arbitral Tribunal cannot simply disregard this criticism. While it is true, as it has accepted (see above, no. 114), that the mere conclusion of a contract of the same type as the one that was signed can of itself amount to an investment, there must still be a realistic prospect that its beneficiary can perform it. The conditions surrounding the initial performance of this Contract give rise to serious doubts.

142. It follows that, to the Arbitral Tribunal, the criticisms levelled by the Respondent in its letter of rescission concerning the performance of the Contract appear sufficiently plausible for it to reject the complaint that they were merely a pretext designed to conceal a purely expropriatory measure.

## **5. Second conclusion**

143. It follows from the foregoing analysis that, to the Arbitral Tribunal, the reasons on which the Respondent relied in order to bring the Contract to an end appear serious and adequate; the termination, justified in fact and in law, could not be interpreted as an expropriatory measure.

Consequently, the Arbitral Tribunal will decide that

- (2) *The Claimant's submissions based on the principle of compensation for expropriation are rejected.*

This conclusion calls for an additional comment. The CRCICA Arbitral Tribunal decided (see above, no. 58) that, even though it was entitled to discharge itself from the Contract, the Respondent must bear part of the costs and damages its decision generated for the Claimant. In so doing, it accepted that the representatives of the Arab Republic of Egypt were indeed mistaken, but that they bore some share of the responsibility, in that they had not made adequate inquiries into the position. Even if that argument does not seem unreasonable, it is outside the scope of these proceedings, as the Claimant has not formally made any additional submissions on the subject.

## **D. DETERMINATION AND ALLOCATION OF THE COSTS AND EXPENSES OF THE ARBITRATION**

### **1. The Parties' submissions**

144. Each of the Parties has submitted that the other should be ordered to bear all the costs of the arbitration and reimburse the amounts incurred for its representation in this case.
145. When invited by the Arbitral Tribunal to submit a list of their expenses (see above, no. 88):
- The Claimant submitted that it had expended a total of 239,734.14 euro;
  - The Respondent submitted that it had expended 489,773.60 dollars.

The Arbitral Tribunal must make a final determination, since the claim is dismissed.

### **2. The Arbitral Tribunal's position**

146. *The principle* is that the Arbitral Tribunal has broad discretion in this regard.
147. *The outcome of the proceedings* is undoubtedly the first factor the Arbitral Tribunal can and must take into account. In the present case, the outcome is shared, since the Respondent's objection to jurisdiction is rejected, but the Claimant's claim is dismissed on the merits. There are good reasons, therefore, to decide that the costs and expenses should be shared.
148. *The decision on the merits* seems to support this conclusion, in the light of the facts. True, the Claimant's attitude in the way it presented, and later embarked on, the project has carried particular weight in the outcome of the proceedings. Nonetheless – and in this respect it concurs with the assessment of the CRCICA Arbitral Tribunal – this Arbitral Tribunal considers that the Respondent was not itself completely beyond reproach in the phase leading to the conclusion of the Contract.

### **3. Third and fourth conclusions**

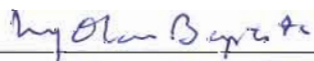
In the light of the foregoing arguments, the Tribunal will decide that

- (3) *Each Party shall bear one half of the costs of the arbitration proceedings, including the fees and expenses of the members of the Tribunal and the fees of ICSID, as subsequently determined and notified to the Parties by the Centre;*
- (4) *Each Party shall bear its own costs and legal fees and expenses of representation incurred in the present proceedings.*

### III. DECISION

For these reasons, it is decided that:

1. *The Arbitral Tribunal has jurisdiction to rule on the claims of the Claimant;*
2. *The prayer for relief of the Claimant aimed at the principle of a compensation for expropriation is rejected;*
3. *The costs of the arbitration, including the fees and expenses of the members of the Tribunal and the costs of ICSID, as subsequently determined and notified to the Parties by the Centre, shall be borne by both Parties in equal shares;*
4. *Each Party shall bear its own costs and legal fees and expenses of representation incurred in the present proceedings;*
5. *All other submissions made by the Parties are rejected.*



Jan 31 2011  
Professor Luiz Olavo Baptista



Jan 26, 2011  
Maître Pierre-Yves Tschanz



Professor Pierre Tercier

25 Feb. 2011