IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENTS BETWEEN THE GOVERNMENT OF THE REPUBLIC OF FINLAND AND THE GOVERNMENT OF THE ARAB REPUBLIC OF EGYPT ON THE PROMOTION AND PROTECTION OF INVESTMENTS RESPECTIVELY DATED 5 MAY 1980 AND 3 MARCH 2004 AND THE UNCITRAL ARBITRATION RULES 1976

- between -

MOHAMED ABDEL RAOUF BAHGAT

- and -

THE ARAB REPUBLIC OF EGYPT

DECISION ON JURISDICTION

Arbitral Tribunal
Professor Rüdiger Wolfrum (Presiding Arbitrator)
Professor W. Michael Reisman
Professor Francisco Orrego Vicuña

Registry:
Permanent Court of Arbitration

Secretary to the Tribunal:
Judith Levine

30 November 2017

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TABLE OF ABBREVIATIONS

1 September 1997 Meeting	Meeting between the Egyptian Minister of Industry and Claimant on 1 September 1997, after which Claimant submitted an application to PENA to regain his Egyptian nationality
1968 Nationality Act	Finnish Nationality Act (401/1968)
1971 Presidential Decree	Decree issued on 12 February 1971 by the President of Finland, granting Finnish nationality to Claimant
1980 BIT	Agreement Between the Government of the Republic of Finland and the Government of the Arab Republic of Egypt on the Promotion and Protection of investments, dated 5 May 1980 and entered into force on 22 January 1982
2003 Nationality Act	Finnish Nationality Act (359/2003)
2004 BIT	Agreement Between the Government of the Republic of Finland and the Government of the Arab Republic of Egypt on the Promotion and Protection of investments, dated 3 March 2004 and entered into force on 5 February 2005
ADEMCO	Aswan Development and Mining Company
AISCO	Aswan Iron and Steel Company
Application for Interim Measures	Claimant's Application for Interim Measures, dated 19 September 2012
Awad WS 1	Mr Younes Awad's First Witness Statement, dated 16 July 2012
Bahgat WS 1	Mr Bahgat's First Witness Statement, dated 19 September 2012
Bahgat WS 2	Mr Bahgat's Second Witness Statement, dated 9 November 2012
Bahgat WS 3	Mr Bahgat's Third Witness Statement, dated 27 August 2013
CLA	Claimant's Legal Authority
Claimant	Mr Mohamed Abdel Raouf Bahgat
Claimant's Counter-Memorial on Jurisdiction	Claimant's Counter-Memorial on Jurisdiction dated 30 August 2013
Claimant's Rejoinder	Claimant's Rejoinder on Jurisdiction, dated 25 May 2017
Claimant's Statement of Claim	Claimant's Statement of Claim, dated 10 November 2012

Claimant's Supplementary Counter-Memorial on Jurisdiction	Claimant's Supplementary Counter-Memorial on Jurisdiction dated 14 December 2016
Commitment Agreement	Commitment Agreement that accompanied Law No. 166 on 14 June 1998, which was enacted by the Egyptian Parliament and signed by then President Hosni Mubarak, and which granted ADEMCO its mining license
Committee	A committee formed by GAFI and chaired by Mr Salah El-deen Mandour
Companies	AISCO and ADEMCO
Court File Documents	The submissions, the exhibits to the submissions, and all other documents associated with the SAC Judgment
ESLA	Egyptian State Lawsuits Authority
Egypt	The Arab Republic of Egypt
Egyptian Investment Law	Egyptian Law No. 8 of 1997, Law of Investment Guarantees and Incentives
El Ashri 1	Mr Mohamed El Ashri's First Witness Statement, dated 31 October 2011
FIS	Finnish Immigration Service
Freezing Order	Order passed on 5 February 2000 freezing the assets of the Companies and the Claimant
GAFI	General Authority for Investment and Free Zones in Egypt
Hearing on Jurisdiction	Hearing on jurisdiction held at the Peace Palace, The Hague, on 19-20 June 2017
ICJ	International Court of Justice
Interim Measures Hearing	Hearing on interim measures that took place on 1 December 2012
Law No. 166	Law No. 166 on 14 June 1998
Mr Abulmagd's Third Expert Opinion	Mr Abulmagd's Third Expert Opinion, dated 26 August 2013
New Objections	Three allegedly new objections raised in Respondent's Reply Memorial on Jurisdiction
Notice of Arbitration	Claimant's Notice of Arbitration dated 3 November 2011
Parties	Claimant and Respondent
PCA	Permanent Court of Arbitration

PENA	Egyptian Passports, Emigration, and Nationality Administration
Procedural Order No. 1	Procedural Order No. 1, dated 19 September 2012
Procedural Order No. 2	Procedural Order No. 2, dated 21 December 2012
Procedural Order No. 3	Procedural Order No. 3, dated 25 September 2013
Procedural Order No. 4	Procedural Order No. 4, dated 8 March 2017
Procedural Order No. 5	Procedural Order No. 5, dated 17 May 2017
Project	Project involving the mining and exploitation of iron ore in a designated sector in Aswan, and manufacturing of steel from these resources
Respondent	The Arab Republic of Egypt
Respondent's Answer to the Request for Interim Measures	Respondent's Answer to the Request for Interim Measures, dated 17 October 2012
Respondent's Interim Measures Rejoinder	Respondent's Interim Measures Rejoinder, dated 21 November 2012
Respondent's Memorial on Jurisdiction	Respondent's Memorial on Jurisdiction, dated 15 July 2013
Respondent's Reply Memorial on Jurisdiction	Respondent's Reply Memorial on Jurisdiction, dated 23 March 2017
Respondent's Request for Bifurcation	Respondent's Request for Bifurcation dated 26 January 2013
SAC	Finnish Supreme Administrative Court
SAC Judgment	Decision of the Finnish Supreme Administrative Court on the question of Claimant's Finnish Nationality, dated 15 November 2016
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law, 15 December 1976
VCLT	Vienna Convention on the Law of Treaties

I. INTRODUCTION

A. THE PARTIES

1. The claimant in the present arbitration is Mr Mohamed Abdel Raouf Bahgat ("**Claimant**"), a businessman who was born in Egypt and later acquired Finnish nationality. Questions concerning his nationality are at issue in the present phase of the dispute.

2. Claimant is represented by Mr Stephen Fietta, Mr Jiries Saadeh, Ms Laura Rees-Evans, Ms Zsófia Young, and Ms Fanny Sarnel of Fietta LLP, London; Professor Andrew Newcombe of the University of Victoria; and Mr Samuel Wordsworth QC and Mr Peter Webster of Essex Court Chambers. Previously, Claimant was also represented by Mr Subir Karmakar of Saunders Law Ltd.

3. The respondent in the present arbitration is the Arab Republic of Egypt, a sovereign state ("**Egypt**" or "**Respondent**", and together with Claimant, the "**Parties**").

4. Respondent is represented by H.E. Counselor Hussein Khalil Hamza, President, Counselor Mahmoud El Khrashy, Counselor Mohamed Khalaf, Counselor Amr Arafa, Counselor Fatma Khalifa, Counselor Lela Kassem, and Counselor Nada El Kashef of the Egyptian State Lawsuits Authority; and Mr Louis Christophe Delanoy, Mr Raed Fathallah, Mr Tim Portwood, and Ms Veronika Korom of Bredin Prat, Paris.

B. THE DISPUTE

5. The present dispute is an arbitration initiated by Claimant against Respondent under the Agreements between the Government of the Republic of Finland and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments, respectively dated 5 May 1980 ("**1980 BIT**") and 3 March 2004 ("**2004 BIT**", collectively referred to as the "**BITs**"), and the Arbitration Rules of the United Nations Commission on International Trade Law 1976 ("**UNCITRAL Rules**").

6. Claimant is the founder of and principal investor in the Aswan Development and Mining Company ("**ADEMCO**") and the Aswan Steel and Mining Company ("**AISCO**", and together with ADEMCO, the "**Companies**"). He founded the Companies after he was selected by Respondent to develop the iron ore resources located near Aswan, Egypt (the "**Project**") and to build a facility to develop the Project. ADEMCO was granted a thirty-year mining concession and AISCO was created in order to run the steel operations. According to Claimant, he invested up to USD 40 million of his own funds in the Project.

7. Developments in the Project were underway when, on 5 February 2000, the police arrested Claimant. Claimant's personal assets as well as the assets of the Companies were frozen pursuant to an order of the Public Prosecutor that was confirmed by the Cairo Criminal Court on 20 March 2000 (the "**Freezing Order**"). The police raided the offices of Claimant and the Companies, and shut down and took over the Project site. Claimant was incarcerated for over three years. The freezing order over the Companies' assets was lifted by a court in October 2006.

8. Claimant contends that the actions taken by Respondent with respect to the Project are in violation of the investor protections contained in the BITs; specifically, that Respondent's actions amounted to an unlawful expropriation, unfair and inequitable treatment, and a failure to accord full and constant protection and security.

9. Respondent argues in the first instance that the Tribunal does not have jurisdiction over the present claim. According to Respondent, the Tribunal lacks jurisdiction *ratione personae* and *ratione temporis*.

II. PROCEDURAL HISTORY

A. COMMENCEMENT OF THE ARBITRATION

10. On 3 November 2011, Claimant initiated arbitration proceedings against Respondent for breach of the BITs, through a Notice of Arbitration pursuant to Article 9(2)(d) of the 2004 BIT. In addition, and/or in the alternative, Claimant brings claims against Respondent for violations of the 1980 BIT, under Article 7(2) of that treaty.[1]

B. CONSTITUTION OF THE TRIBUNAL

11. In its Notice of Arbitration, Claimant appointed Professor W. Michael Reisman, a national of the United States of America, as the first arbitrator. Professor Reisman's address is Yale Law School, P.O. Box 208215, New Haven, CT 06520-8215, United States of America.

12. On 6 February 2012, Respondent appointed Professor Francisco Orrego Vicuña, a national of Chile, as the second arbitrator. Professor Orrego Vicuña's address is Avenida El Golf 40, Piso 6, Santiago 7550107, Chile.

13. On 2 April 2012, the two party-appointed arbitrators appointed Professor Rüdiger Wolfrum as the Presiding Arbitrator. Professor Wolfrum's address is Max Planck Institute for Comparative

[1] Notice of Arbitration, dated 3 November 2011, paras. 11-14.

Public Law and International Law, Im Neuenheimer Feld 535, 69120 Heidelberg, Germany.

C. INITIAL PROCEDURAL STEPS

14. On 22 June 2012, the Tribunal directed the Parties to establish an initial deposit of EUR 150,000 pursuant to Article 41 of the UNCITRAL Rules.

15. On 27 June 2012, the Tribunal and the Parties signed the Terms of Appointment, thereby agreeing that the Permanent Court of Arbitration ("**PCA**") will act as registry in the proceedings.

16. On 18 July 2012, Respondent informed the Tribunal that it was temporarily not able to pay the deposit since the Egyptian Parliament, whose approval is required to make such payment, was dissolved at that time.

17. Claimant made payment of EUR 75,000, representing his share of the initial deposit, on 25 July 2012. Since no payment was received from Respondent, the Tribunal requested Claimant to make a substitute payment *in lieu* of Respondent pursuant to Article 41(4) of the UNCITRAL Rules, which Claimant did on 24 August 2012.

D. PRELIMINARY PROCEDURAL HEARING

18. On 29 August 2012, the Tribunal and the Parties held a preliminary procedural hearing by telephone conference.

19. On 19 September 2012, the Tribunal issued Procedural Order No. 1 ("**Procedural Order No. 1**"), setting out the procedural timetable with regard to the interim measures phase, a potential bifurcation phase, as well as the jurisdiction phase. Under paragraph 3.1 of Procedural Order No. 1, the Parties and the Tribunal may use, as additional guidelines, the IBA Rules on the Taking of Evidence in International Arbitration (2010).

E. APPLICATION FOR INTERIM MEASURES

20. On 19 September 2012, Claimant filed an Application for Interim Measures requesting the Tribunal to order Respondent (i) to return certain documents that, according to Claimant, had been seized by Respondent from Claimant's offices and private residence in Egypt in February 2000 and were necessary for him to prepare his case, and (ii) to pay Claimant an amount equal to Respondent's share of the deposit that had been paid by Claimant on 24 August 2012.

21. On 17 October 2012, Respondent filed its Answer to the Request for Provisional Measures, to which Claimant filed his Reply on 31 October 2012.

22. On 10 November 2012, Claimant filed his Statement of Claim together with accompanying materials ("**Claimant's Statement of Claim**").

23. On 21 November 2012, Respondent filed its Interim Measures Rejoinder.

24. A hearing on interim measures was held by telephone conference on 1 December 2012 ("**Interim Measures Hearing**").

25. On 7 and 17 December 2012, the Parties made costs submissions related to the applications heard on 1 December 2012.

26. On 21 December 2012, the Tribunal issued Procedural Order No. 2, addressing Claimant's Application for Interim Measures ("**Procedural Order No. 2**"). With regard to Claimant's request for the return of certain documents, the Tribunal took note of the fact that Respondent neither denied that the documents were in its possession nor objected to producing them in the course of the arbitration, but merely stated that the documents were dispersed among various State agencies in Egypt and that they were difficult to locate due to the passing of time. The Tribunal accepted Respondent's undertaking to locate the documents and directed Respondent (i) to exercise its best efforts in this undertaking; (ii) to inform Claimant and the Tribunal of the status of the documents as soon as possible; and (iii) to provide the documents to Claimant by 15 January 2013. In respect of Claimant's request that Respondent pay him an amount equal to the share of the deposit, which Claimant had paid *in lieu* of Respondent, the Tribunal referred to the political and financial circumstances in Egypt, and directed Respondent to monitor its financial situation on a continuous basis and to comply with its deposit obligations under the UNCITRAL Rules as soon as practicably possible.

27. On 11 January 2013, Respondent informed the Tribunal that it had managed to gather the seized documents referred to in Procedural Order No. 2 and filed copies of them with the PCA on 15 January 2013.

F. TELEPHONE CALLS TO MR MOHAMED EL ASHRI AND REQUEST FOR BIFURCATION

28. On 16 January 2013, Claimant wrote to the Tribunal with regard to telephone calls which one of Claimant's witnesses, Mr Mohamed El Ashri, had received in December 2012. According to Claimant, the caller claimed to be Mr Sadiq Azmi from Respondent's Ministry of Petroleum. The caller allegedly urged Mr El Ashri to alter the testimony he had previously given in his affidavit dated 31 October 2011.

29. Claimant expressed his concerns regarding the purported attempt to induce Mr El Ashri to give false evidence and requested that Respondent disclose the identity of the caller, the identity of the person directing or guiding the call, and whether any other calls or contacts had been made to any other of Claimant's witnesses. Claimant attached a Second Affidavit of Mr El Ashri dated 15 January 2013, which reported in more detail on the incident.

30. On 26 January 2013, Respondent filed a Request for Bifurcation in accordance with the procedural timetable in Procedural Order No. 1 ("**Respondent's Request for Bifurcation**").

31. On 8 February 2013, Respondent replied to Claimant's letter of 16 January 2013, stating that the Ministry of Petroleum and the Egyptian Mineral Resource Authority had confirmed that Mr Sadiq Azmi was not a current or former employee of either department. Respondent strongly rejected the idea that it was trying to exert pressure on Mr El Ashri and requested the Tribunal to (i) strike Mr El Ashri's Second Affidavit from the arbitral record; and (ii) draw adverse inferences from Claimant's "blatant attempt at trying to mislead the Tribunal".

32. On 15 February 2013, Claimant commented on Respondent's letter dated 8 February 2013, rejecting the contention that Mr El Ashri's Second Affidavit was fabricated in order to mislead the Tribunal.

33. On 18 February 2013, the Presiding Arbitrator informed the Parties that Mr El Ashri's Second Affidavit would remain on the record and that the weight to be given to it as well as any other documents submitted with regard to the alleged December 2012 incident would be evaluated in light of the Parties' further submissions.

34. On 26 February 2013, Claimant replied to Respondent's Request for Bifurcation stating that, in order to reduce avoidable costs and expenses, Claimant did "not oppose the Respondent's application for bifurcation" and proposed to proceed in line with the bifurcated jurisdiction timetable envisaged in Procedural Order No. 1. On 6 March 2013, Respondent agreed with the course of action suggested by Claimant. On 8 March 2013, the Presiding Arbitrator confirmed that the arbitration would proceed in accordance with the procedural timetable established for the jurisdictional phase in Procedural Order No. 1.

G. SUBMISSIONS ON JURISDICTION

35. On 25 March 2013, Respondent informed the Tribunal about the political unrest that had persisted in Egypt since 25 January 2013, which impacted the office of the Egyptian State Lawsuits Authority ("**ESLA**") in such a way that Egypt foresaw that if the situation in Egypt

did not improve significantly, it might be compelled to request an extension of the deadlines.

36. On 15 July 2013, Respondent submitted its Memorial on Jurisdiction in accordance with Procedural Order No. 1 ("**Respondent's Memorial on Jurisdiction**"). Respondent noted that, because Claimant had agreed to bifurcate the proceedings, he had not yet addressed any of Respondent's objections on jurisdiction already raised in Respondent's Request for Bifurcation. As a consequence, Respondent referred the Tribunal back "to Sections II and III of its Request for Bifurcation, which present the relevant facts of the case and Respondent's objections on jurisdiction."

37. On 30 August 2013, Claimant filed his Counter-Memorial on Jurisdiction with accompanying materials ("**Claimant's Counter-Memorial on Jurisdiction**"). He further informed the Tribunal that the Finnish Immigration Service ("**FIS**") had issued a decision on 23 April 2013 in which it decided that Claimant had lost his Finnish nationality when he obtained Egyptian nationality on 28 September 1997.[2] Claimant indicated that he had challenged this decision before the Helsinki Administrative Court, that the proceedings were currently pending, and that no date for a hearing on the matter had been fixed so far. Claimant announced that he might request an amendment to the procedural schedule for the jurisdictional phase depending on the timing of the court proceedings.

H. SECOND DEPOSIT REQUEST AND SUSPENSION OF PROCEEDINGS

38. On 13 September 2013, in view of the hearing on jurisdiction, the Tribunal requested that the Parties deposit an additional EUR 200,000 (i.e. EUR 100,000 from each Party) pursuant to Article 7(2) of the Terms of Appointment and Article 41(2) of the UNCITRAL Rules.

39. On 24 September 2013, Claimant informed the Tribunal that the Parties had agreed to postpone the hearing on jurisdiction scheduled for 18 and 19 November 2013 until further decision by the Helsinki Administrative Court on Claimant's challenge referred to in paragraph 37 above. The Parties jointly requested the Tribunal to amend the relevant parts of Procedural Order No. 1 accordingly.

40. On 25 September 2013, the Tribunal issued Procedural Order No. 3 regarding Suspension of the Proceedings ("**Procedural Order No. 3**"), which postponed the hearing on jurisdiction and ordered Claimant to inform the Tribunal of the final outcome and/or resolution of the Claimant's challenge before the Finnish administrative courts, and set out a schedule for

[2] Claimant's Counter-Memorial on Jurisdiction, paras. 3.35-37.

Claimant to "file a Supplementary Counter-Memorial on Jurisdiction limited to covering issues that may arise from any final decision made by the Finnish Administrative Courts" and Respondent to file "its Reply Memorial on Jurisdiction but only in rebuttal to the Claimant's Counter-Memorial" and Claimant to file "its Rejoinder on Jurisdiction only in rebuttal to the Respondent's Reply Memorial on Jurisdiction . . . ."

41. Following a request for clarification from Claimant, on 2 October 2013, the Tribunal requested the Parties to pay a reduced additional deposit of EUR 50,000 instead of the EUR 200,000 previously requested. On 17 October 2013, Claimant paid his share of the additional deposit requested. Because no payment was received from Respondent, the Tribunal requested Claimant to make a substitute payment pursuant to Article 41(4) of the UNCITRAL Rules.

42. On 1 November 2013, Claimant requested the Tribunal to direct Respondent to report on its latest financial situation and to explain why it was unable to comply with the Tribunal's direction to make the deposits.

43. On 12 November 2013, Respondent submitted that its economy remained unstable and that it did not have the public finances available to pay arbitration fees. Respondent suggested that the Tribunal direct that Claimant pay Respondent's share of the additional deposit if he wished to continue with the arbitration, as provided for in the UNCITRAL Rules.

44. On 13 November 2013, the Tribunal directed Claimant to make a substitute payment on behalf of Respondent, which Claimant paid on 2 December 2013.

45. On 10 August 2015, the Tribunal requested an update on the challenge against the FIS decision in the Finnish administrative courts and the expected next steps in those proceedings. On 12 August 2015, Claimant informed the Tribunal that the matter was still pending before the Supreme Administrative Court in Helsinki ("**SAC**").

46. On 13 August 2015, Respondent informed the Tribunal that the Helsinki Administrative Court had on 26 January 2015 upheld the determination of the FIS that Mr Bahgat had lost his Finnish nationality when he took up Egyptian nationality on 28 September 1997. Respondent clarified that the case pending before the SAC was an appeal against the decision of the Helsinki Administrative Court and it informed that it was Mr Bahgat's final legal recourse in that regard. Respondent enclosed the decision of the Helsinki Administrative Court and predicted that the decision of the SAC could be expected from summer 2016.

I. REVIVAL OF PROCEEDINGS

47. On 25 August 2016, the Tribunal requested an update as to the status of the proceedings pending before the SAC. On 23 September 2016, Claimant notified the Tribunal that he was still awaiting a decision from the SAC on the question of his nationality.

48. On 15 November 2016, Claimant informed the Tribunal that he had prevailed on appeal before the SAC and that the decisions of the Helsinki Administrative Court and FIS had been revoked. Claimant provided the Tribunal with a copy of the judgment of the SAC dated 15 November 2016 ("**SAC Judgment**") in Finnish.

49. On 1 December 2016, the Tribunal informed the Parties of a new timeline for their submissions. On 14 December 2016, Claimant submitted to the Tribunal its Supplementary Counter-Memorial on Jurisdiction ("**Claimant's Supplementary Counter-Memorial on Jurisdiction**"), including an English translation of the SAC Judgment.

50. On 28 December 2016, Claimant notified the Tribunal that Mr Subir Karmakar had ceased to represent him and that the law firm Fietta was counsel of record for Claimant. Mr Samuel Wordsworth QC and Professor Andrew Newcombe would continue as counsel for Claimant.

J. REQUEST FOR DISCLOSURE OF THE COURT FILE DOCUMENTS

51. On 11 January 2017, Respondent requested the Tribunal to "order Claimant to disclose the submissions, the exhibits to the submissions and all other documents" that were submitted to the SAC in connection with the SAC Judgment ("**the Court File Documents**"). Respondent argued that (i) the Court File Documents are directly relevant to the dispute and material to its outcome, specifically, to Respondent's *ratione personae* objection; (ii) the Court File Documents must be disclosed in order to protect Respondent's due process rights; (iii) the disclosure of the Court File Documents would have no adverse effect on Claimant; and (iv) it had taken all possible steps to obtain the Court File Documents. Respondent noted that the SAC Judgment is not binding on the Tribunal and that the Tribunal is duty-bound to decide the question of nationality for itself.

52. On 16 January 2017, Claimant responded, noting that Respondent had not demonstrated the relevance of the Court File Documents to this arbitration and that the SAC Judgment was decisive of Claimant's nationality. Claimant noted that the Court File Documents are public and could be accessed by Respondent through the Finnish Act on the Openness of Government Activities (Law No. 621/1999). The Tribunal invited Respondent to comment on Claimant's

letter and to respond to the assertion that "all of the documents requested are publicly available in Finland and easily accessible by the Respondent."

53. On 2 February 2017, Respondent withdrew its request, stating that it had filed a disclosure request under the relevant Finnish legislation. Respondent reiterated the relevance of the Court File Documents and reserved its right to request an extension of the deadline for the filing of its Reply Memorial on Jurisdiction based on when Respondent received the Court File Documents.

K. THIRD DEPOSIT REQUEST AND THIRD PARTY FUNDING

54. The Tribunal confirmed on 3 February 2017 that a two-day hearing on jurisdiction would be held on 19 and 20 June 2017, at the Peace Palace in The Hague ("**Hearing on Jurisdiction**"), in light of the Parties' preference to hold a Hearing on Jurisdiction.

55. On 6 February 2017, Claimant, recalling Procedural Order No. 2 wherein the Tribunal directed Respondent "to arrange, as soon as practicably possible, for restitution to the Claimant of the share of the deposit that he paid in lieu of the Respondent" and invited Respondent to make arrangements for restitution to Claimant of the EUR 100,000 that he had paid *in lieu* of Respondent to that date.

56. On 10 February 2017, Respondent stated that it "cannot commit to the payment of its share of the requested supplementary deposit due to the difficult financial circumstances that the Arab Republic of Egypt continues to face to date." Respondent noted that although the political situation in Egypt had improved, the financial situation had not. Respondent confirmed that it would continue to monitor its financial situation and report to the Tribunal as soon as it was in a position to pay its share of the supplementary deposit and to restitute Claimant.

57. On 10 February 2017, Claimant argued that Respondent should pay its share of the requested deposit as economic indicators suggested Egypt's economic situation had improved and Egypt could afford to engage expensive legal counsel to defend it in investment arbitrations. Claimant contended that in any event, Respondent should at least apply to the PCA's Financial Assistance Fund. Claimant requested that the Tribunal make an order with the "same legal effect as an interim award":

> directing the Respondent to comply with its 'legal obligation to pay its share of the deposit', as confirmed by the Tribunal in [Procedural Order No. 2], by: (a) repaying to the Claimant the two deposits (totalling EUR 100,000) that he has already paid *in lieu* of the Respondent; (b) paying its share of the additional deposit requested on 3 February; and (c) paying forthwith its share of any future deposits that may from time to time be requested by the Tribunal.

58. On 17 February 2017, Respondent submitted that the Tribunal had no power to make an order requiring Respondent to satisfy the deposit payment, that Claimant's request for an order requiring Respondent to make payment of costs was already considered and rejected in Procedural Order No. 2, and that "Respondent does not refuse to pay, it cannot pay." Respondent confirmed that it had retained external counsel on a limited basis only and that its inability to pay its share of the deposit did not in any way threaten the proceedings. Respondent noted that it would be happy to continue monitoring the situation and that it would pay costs once they were finally adjudicated in the costs phase.

59. Respondent also recalled that Claimant had agreed during the Interim Measures Hearing to disclose its third party funding arrangements and sought an order directing Claimant to disclose (i) whether third party funding arrangements have been entered into in respect of this arbitration; (ii) the identity of the funder; (iii) the terms of the funding; (iv) whether the claims have been assigned to a third party; and (v) the terms of any assignment arrangements.

60. On 8 March 2017, the Tribunal issued Procedural Order No. 4 ("**Procedural Order No. 4**"). The Tribunal noted that neither Claimant nor Respondent had paid its shares of the supplementary deposit by the prescribed deadline of 6 March 2017. The Tribunal noted that the required course of action for a party's failure to make a deposit payment was in Article 41(4) of the UNCITRAL Rules. The Tribunal considered that delivering an award at this stage "with the same legal effect as an interim award" (as Claimant had requested) might not be appropriate in a case where jurisdiction had not yet been determined.

61. Accordingly, the Tribunal directed Claimant to make payment of EUR 175,000, representing its own share of the supplementary deposit requested on 3 February 2017. In light of Respondent's statements that it would not pay its share of the deposit, Claimant was directed to deposit EUR 175,000 as substitute payment pursuant to Article 41(4) of the UNCITRAL Rules. The Tribunal confirmed that consideration of the question of the allocation of the costs associated with the deposit payments in this arbitration would be deferred until the final award or, in any event, until after the jurisdiction of the Tribunal is determined.

62. The Tribunal recalled that Respondent remains under a legal obligation to pay its share of the deposit, and to monitor and report on its own financial and political situation.

63. Finally, the Tribunal noted that Claimant's third party funding arrangements had been notified to the Tribunal on 3 December 2012. Claimant was invited to update the Tribunal regarding (i) the identity of its third party funder; (ii) the nature or type of the third party funding; and

(iii) whether the third party funder has a charge or lien on the proceeds of this claim and/or if the third party funder in any other way exercises control over the present arbitration.

64. On 14 March 2017, Claimant confirmed that he had no current third party funding in place. He recalled notifying the Tribunal on 3 December 2012 that his then funder, Buttonwood Legal Capital Ltd., had no charge or lien over any proceeds of the present claim. Claimant noted that he was arranging to pay his share of the supplementary deposit as well as Respondent's share of the supplementary deposit by 8 April 2017.

65. On 23 March 2017, Respondent submitted its Reply Memorial on Jurisdiction ("**Respondent's Reply Memorial on Jurisdiction**").

66. On 11 April 2017, the Tribunal granted the Claimant's request for an extension on the payment of the supplementary deposit.

67. By letter dated 14 April 2017, Claimant alleged that Respondent's Reply Memorial on Jurisdiction contained three substantive new objections to jurisdiction ("**New Objections**"). These concerned: (i) new alternative jurisdiction *ratione personae* objections set out in Section I.C of Respondent's Reply Memorial on Jurisdiction concerning Claimant's dual nationality; (ii) Claimant's alleged failure to comply with the exhaustion of local remedies requirements under Article 8 of the 1980 BIT; and (iii) the inability of Article 7 of the 1980 BIT to confer jurisdiction to a Tribunal in an arbitration under the UNCITRAL Rules administered by the PCA. Claimant requested that the Tribunal dismiss these New Objections on the basis that Article 21(3) of the UNCITRAL Rules precludes Respondent from raising the New Objections belatedly. Additionally, Claimant submitted that Respondent should be estopped from advancing the dual nationality objection, and the objection concerning applicable rules and the administration of this arbitration.

68. On 26 April 2017, Respondent replied that its objections were not new, that Claimant's request should be rejected, and that Claimant should be directed to respond to Respondent's arguments made in its Rejoinder on Jurisdiction and during the Hearing on Jurisdiction.

69. A further extension for payment of the supplementary deposit was granted on 11 May 2017.

70. On 17 May 2017, the Tribunal issued Procedural Order No. 5 on Claimant's Request to Rule as Inadmissible Respondent's New Jurisdictional Objections ("**Procedural Order No. 5**"). The Tribunal dismissed with reasons the three objections that Claimant identified as being raised out of time. The Tribunal clarified that it did not expect Claimant to respond to these objections

in its Rejoinder on Jurisdiction and Respondent was directed not to raise these arguments at the Hearing on Jurisdiction.

71. On 26 May 2017, the PCA acknowledged receipt of EUR 350,000 from Claimant representing payment of the Parties' supplementary deposit.

72. On 26 May 2017, the Claimant submitted its Rejoinder on Jurisdiction ("**Claimant's Rejoinder**").

73. The Hearing on Jurisdiction was held on 19 and 20 June 2017. The following people attended:

Arbitral Tribunal
Professor Rüdiger Wolfrum
Professor W. Michael Reisman
Professor Francisco Orrego Vicuña

Claimant
Mr Stephen Fietta
Ms Laura Rees-Evans
Ms Zsófia Young
Ms Fanny Sarnel
(Fietta)

Mr Sam Wordsworth QC
Mr Peter Webster
(Essex Court Chambers)

Mr Mohamed Abdel Raouf Bahgat

Respondent
Mr Louis Christophe Delanoy
Mr Tim Portwood
Ms Veronika Korom
(Bredin Prat)

Mr Mahmoud Mohamed Abdel Wahab Ibrahim Elkhrashy
Mr Mohamed Mahmoud Khalaf Nasr
Ms Lela Kassem
Ms Nada Mohamed Magdy Youssef Mohamed Elkashef
Ms Sarah Mohamed Ahmed Abulkassem
(ESLA)

PCA
Ms Judith Levine
Ms Ashwita Ambast
Mr João Pereira Saraiva Gil Antunes

Court reporters
Ms Susan McIntyre
Ms Audrey Shirley

74. Oral submissions on behalf of Respondent were made by Mr Delanoy and Mr Portwood. Oral submissions on behalf of Claimant were made by Mr Fietta and Mr Wordsworth.

75. The Parties agreed that no post-hearing briefs were necessary and that costs submissions would be deferred until after the Tribunal's decision on jurisdiction.

III. RELIEF REQUESTED BY THE PARTIES

76. Claimant requests the following relief:[3]

(a) a declaration that the Respondent has breached Articles 2 and 3 of the 1980 [BIT], Articles 2, 3, 5 and 12 of the 2004 BIT and the Egyptian Investment Law;

(b) an order that the Respondent return to the Claimant all the Claimant's Documents in its possession;

(c) an order that the Respondent pay the Claimant compensation as set out in Chapter 5 of this Statement of Claim, plus interest at 12 month US$ LIBOR rates, compounded annually from the date of the final award in these proceedings;

(d) an order that Egypt pay the costs of these arbitration proceedings, including the PCA's administration costs, the costs of the Tribunal and the legal and other costs incurred by the Claimant, on a full indemnity basis, with interest at 12 month US$ LIBOR rates, compounded annually, from the date of the final award in these proceedings; and

(e) grant such other relief as the Tribunal may consider appropriate.

77. Respondent requests the Tribunal to:[4]

i. Declare that it has no jurisdiction over the Claimant's claims;

ii. Dismiss by way of an award all claims brought by the Claimant against the Respondent; and;

iii. Order Claimant to bear all the costs and expenses (with interests) of this arbitration, including but not limited to, the fees and expenses of the Tribunal, the fees and expenses of Respondent's experts and the fees and expenses of Respondent's legal representation in respect of this arbitration.

78. With respect to Respondent's jurisdictional objections, Claimant requests that the Tribunal:[5]

i. Reject in their entirety the Respondent's jurisdictional objections *ratione personae* and *ratione temporis* in its Memorial on Jurisdiction and Request for Bifurcation;

ii. Declare that it has jurisdiction over the Claimant's claims;

iii. In accordance with paragraph 2.18 of Procedural Order No. 1, after consultation with the parties, fix the procedural schedule for the arbitral proceedings on the merits;

iv. Order that the Respondent pay all costs related to its jurisdictional objection in these arbitration proceedings, including the PCA's administration costs, the costs of the Tribunal and the legal and other costs incurred by the Claimant, on a full indemnity basis, with interest at 12 month US$ LIBOR rates, compounded annually, from the date of the final award in these proceedings; and

v. grant such other relief as the Tribunal may consider appropriate.

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3 Claimant's Statement of Claim, p. 50.
4 Respondent's Memorial on Jurisdiction, para. 4; Respondent's Reply Memorial on Jurisdiction, para. 225.
5 Claimant's Counter-Memorial on Jurisdiction, para. 5; Claimant's Rejoinder, para. 261.

IV. THE TRIBUNAL'S JURISDICTION *RATIONE PERSONAE*

A. INTRODUCTION

79. Respondent contends that the Tribunal lacks jurisdiction *ratione personae* because Claimant held Egyptian nationality at all relevant times and was not a Finnish national during the relevant period.[6] Therefore, Claimant could not be considered a "national" within the meaning of Article 7 of the 1980 BIT or, respectively, an "investor" within the meaning of Article 9 of the 2004 BIT. Respondent argues that the SAC Judgment does not bind the Tribunal and that the Tribunal must make its own determination of Claimant's nationality. Further, Respondent contends that in any event, the SAC Judgment did not find that Claimant held Finnish nationality at the relevant times. Respondent claims that notwithstanding the SAC Judgment, under Finnish nationality legislation, Claimant automatically lost Finnish nationality upon acquiring Egyptian nationality in 1997. Respondent denies any allegations that Claimant was coerced into acquiring Egyptian nationality in 1997.

80. It is Claimant's position that the Tribunal has jurisdiction *ratione personae* under Article 7 of the 1980 BIT and Article 9 of the 2004 BIT.[7] Claimant argues that the SAC Judgment is determinative of Claimant's continuing Finnish nationality since 1971 and, therefore, Claimant was entitled to investment protection under the BITs at all relevant times. Claimant further contends that this Tribunal may only revisit the SAC determination under exceptional circumstances, which are not made out in the present case. Claimant suggests that, under Finnish law, Claimant did not automatically lose his Finnish nationality upon the acquisition of Egyptian nationality in 1997. Claimant submits that, in any event, the provisions on loss of Finnish nationality did not apply to him because he did not 'acquire' Egyptian nationality and as Finland did not officially recognise Claimant's Egyptian nationality. Claimant suggests that Finland could not have recognised his Egyptian nationality because it took place under circumstances of coercion.

B. RELEVANT FACTUAL BACKGROUND

1. Claimant's nationality until 1980

81. Claimant was born on 1 May 1940 in Cairo, Egypt, to Egyptian parents, thereby acquiring

6 Respondent's Request for Bifurcation, paras. 2(i), 35.
7 Claimant's Counter-Memorial on Jurisdiction, Section 3; Claimant's Rejoinder, Section II.

Egyptian nationality by birth.[8]

82. In 1963, Claimant moved to Germany where he continued his studies and qualified as an Electrical Engineer in 1966.[9] Claimant participated in demonstrations in Germany after the Six-Day War in 1967 to express his discomfort with the policies of the then President of Egypt. Since then, Claimant felt at risk of being apprehended by Egyptian Government agents in Germany and so Claimant relocated to Finland in October 1967 where he started to work.[10] Respondent notes that Claimant's nationality status during the time span from his birth in 1940 to 1980 is of limited relevance in this arbitration.[11]

83. Claimant states that his Egyptian passport expired in 1970 and that the Egyptian Embassy in Helsinki refused to renew his passport in 1970 on the basis that he would have to return to Egypt "if [he] wanted to remain an Egyptian national."[12] According to Claimant, he consciously decided not to return to Egypt due to the risk of being apprehended by the Egyptian regime.[13] Claimant testifies that he consulted with the Chief of the Foreign Police Section in Helsinki, and that he was told to apply for Finnish nationality and to remain in Finland.[14]

84. Claimant applied for Finnish nationality in 1970.[15] Claimant became a Finnish national on 12 February 1971 by a decree issued by the President of Finland ("**1971 Presidential Decree**").[16] The 1971 Presidential Decree stated that "in case you do not automatically lose your former nationality after applying for the Finnish nationality, and now that you are being granted it, you can be treated, in accordance with international regulations, in your former home country as a national of only that country."[17] Claimant alleges that in early 1971 he informed the Egyptian Embassy in Helsinki of his intention to give up his Egyptian nationality.[18] According to Claimant, the Embassy personnel asked him to return his Egyptian passport and told him that "the subject is now closed."[19] Claimant notes that the Finnish population information system suggests that he was residing in Finland between 1 January 1973

8 Mr Bahgat's Second Witness Statement ("**Bahgat WS 2**"), para. 2; Respondent's Request for Bifurcation, para. 9; Jurisdiction Hearing, Day 1, p. 121:21-24.
9 Bahgat WS 2, para. 2.
10 Bahgat WS 2, para. 3; Jurisdiction Hearing, Day 1, pp. 121:21-122:22.
11 Respondent's Request for Bifurcation, para. 10.
12 Bahgat WS 2, para. 4.
13 Bahgat WS 2, para. 5.
14 Bahgat WS 2, para. 4.
15 Respondent's Request for Bifurcation, para. 9.
16 Claimant's Counter-Memorial on Jurisdiction, para. 2.3, *citing* President's Decree dated 12 February 1971, **Exhibit C-0062**.
17 President's Decree dated 12 February 1971, **Exhibit C-0062** [quoting certified translation].
18 Bahgat WS 2, para. 5; Claimant's Counter-Memorial on Jurisdiction, para. 2.5.
19 Bahgat WS 2, para. 5.

and 20 November 2003.[20] Claimant also notes that between 1976 and 2000, he was "still domiciled and resident in Finland during this time" and he continued to pay "taxes from income earned in Egypt and elsewhere to the Finnish revenue authorities in Finland."[21]

85. In 1971, Claimant set up his own company in Finland called "Export & Import Centre", which exported Finnish wood products to countries such as Egypt, Iraq, and Saudi Arabia.[22] Claimant states that his business ran successfully between 1972 and 1995.[23] Between 1977 and 1981, Claimant participated in construction projects in the Middle East by arranging the funding for the projects, which were undertaken by a Finnish company called Hartela Contractors, and was compensated based on the turnkey sum of the projects.[24] Claimant also earned substantial income from his companies M. Bahgat KY and Ravintola Olarius, which managed restaurants. Claimant sold M. Bahgat KY and Ravintola Olarius in 1981.[25]

86. Around 1976, Claimant felt that the Egyptian Government had become more democratic and liberal, and so he expanded his export business to Egypt.[26] Claimant states that he visited Egypt as a Finnish citizen in 1976 with an entry visa from the Egyptian consulate in Helsinki.[27] In 1980, Claimant established a representative office of his company, Export Import & Centre, in Cairo and personally took charge of its business.[28]

87. Claimant states that as his business in Egypt grew, it became necessary for him to be present in Egypt.[29] When Claimant applied for an Egyptian residence permit and visa in 1980 the authorities informed him that he was an Egyptian national and did not require permission to work in Egypt.[30] Claimant recalls that he learned in 1980 that Respondent's authorities in Egypt did not know that Claimant had renounced his Egyptian nationality in 1971 and that they

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20 Bahgat WS 2, para. 6, *citing* Copy of an Extract from the population information system in Finland, dated 22 September 2009, **Exhibit C-0014**.
21 Bahgat WS 2, para. 19.
22 Bahgat WS 2, para. 9; Mr Mohamed El Ashri's First Witness Statement ("**El Ashri WS 1**"), para. 5; Mr Younes Awad's First Witness Statement ("**Awad WS 1**"), para. 3; Jurisdiction Hearing, Day 1, pp. 122:23-123:3.
23 Bahgat WS 2, para. 10, *citing* Copy of an article published in a Finnish magazine "Suomen Kuvalehti" on 26 April 1985 together with an English translation, **Exhibit C-0016**.
24 Bahgat WS 2, para. 11, *citing* Copy of an article published in a Finnish magazine "Suomen Kuvalehti" on 26 April 1985 together with an English translation, **Exhibit C-0016.**
25 Bahgat WS 2, para. 12.
26 Mr Bahgat's First Witness Statement ("**Bahgat WS 1**"), para. 3.
27 Bahgat WS 2, para. 13.
28 Bahgat WS 2, paras. 13-14.
29 Bahgat WS 2, para. 14.
30 Bahgat WS 2, para. 15.

requested Claimant to declare the renunciation again.[31] Claimant recalls that he told Respondent's authorities that he had returned his passport to the Egyptian Embassy in Helsinki in 1971 and that he was informed that this was all that was needed in order to renounce his Egyptian citizenship.[32] Claimant pointed out that since then, he had been travelling to Egypt on visit visas.[33]

88. On 29 September 1980, Claimant submitted an application to the Egyptian Passports, Emigration and Nationality Administration ("**PENA**") to renounce his Egyptian nationality.[34] On 6 November 1980, the Egyptian Minister of the Interior by Decision Number 1896/1980 authorized Claimant to acquire Finnish nationality while not retaining Egyptian nationality.[35] By letter of the same day, the Egyptian Directorate for Travel, Migration, and Nationality Documents informed Claimant about its decision and stated the following:

> Kindly note and provide us with the date of your acquisition of this [Finnish] nationality and provide us with any Egyptian travel documents you have so that we can take the necessary action.[36]

89. On 6 December 1980, Claimant appeared before PENA and declared that he had acquired Finnish nationality.[37] Claimant also produces other evidence indicating that he was a Finnish citizen residing in Egypt in the form of work permit cards and certificates issued by the Egyptian Ministry of Interior and dated between 1981 and 1995.[38]

90. Respondent submits that the evidence submitted by Claimant does not sufficiently prove that he acquired Finnish nationality in 1971.[39] Also, according to Respondent, under Egyptian law, Claimant was considered to have lost his Egyptian nationality on 6 November 1980, which

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31 Bahgat WS 2, paras. 15-16.
32 Bahgat WS 2, para. 15.
33 Bahgat WS 2, para. 15.
34 Bahgat WS 2, para. 16; Respondent's Request for Bifurcation, para. 17; Jurisdiction Hearing, Day 1, p. 122:4-8.
35 Bahgat WS 2, para. 16; Respondent's Answer to the Request for Interim Measures, dated 17 October 2012 ("**Respondent's Answer to the Request for Interim Measures**"), para. 19; Respondent's Request for Bifurcation, para. 18, *citing* Letter from the Ministry of Interior, the Egyptian Passports, immigration and Nationality Administration, dated 7 August 2012, **Exhibit R-0002.**
36 Letter from Nationality Department of the Egyptian Government dated 6 November 1980 with English Translation, **Exhibit C-0017.**
37 Letter from the Ministry of Interior, the Egyptian Passports, Immigration and Nationality Administration, dated 7 August 2012, **Exhibit R-0002.**
38 Bahgat WS 2, para. 17, *citing* Letter from the Egyptian Embassy in Finland dated 4 January 1981 with English translation, **Exhibit C-0017.1**.
39 Respondent's Request for Bifurcation, para. 10.

Respondent considers was Claimant's first renunciation of Egyptian nationality.[40]

91. Respondent contests Claimant's submission that he renounced his Egyptian passport in 1971 and argues that Claimant still held a valid Egyptian passport in 1980.[41] Respondent submits that Claimant's request to PENA on 29 September 1980 to authorise the renunciation of his Egyptian nationality in order to acquire Finnish nationality makes reference to the existence of Claimant's Egyptian passport issued on 21 September 1977.[42] Claimant denies Respondent's allegation about ever having held or used that passport.[43] Claimant alleges that he was advised by an official of the Egyptian Ministry of Interior to insert information about that passport in order to avoid delays in the processing of his application to renounce Egyptian nationality.[44]

92. Furthermore, Respondent suggests that Claimant filed an application to preserve his Egyptian nationality in 1974. Respondent refers to a letter from the Egyptian Embassy in Helsinki to Claimant dated 25 March 1974 that states:

> Kindly be informed that your request filed on January 02, 1974 to acquire the Finnish nationality and preserve the Egyptian one is granted by virtue of the Ministry of Interior's letter, Passports, Emigration & Nationality Administration, file no. 23/56/7865 in its correspondence no. 1884 sent on March 12, 1974.[45]

93. Claimant denies ever filing a request to preserve his Egyptian nationality after 1971. Claimant denies receiving that letter dated 25 March 1974 and contests its authenticity.[46]

94. In summary, Respondent submits that Claimant appears to have held only Finnish nationality from 1981 onwards and not from 1971 onwards as Claimant suggests.[47] Respondent argues that the earliest dated evidence of Claimant's Finnish nationality is Claimant's Finnish passport issued by the Finnish Embassy in Cairo on 14 May 1980.[48]

2. Claimant's nationality up to 1997, the Project, and 1 September 1997 Meeting

95. In 1997, Claimant learned about an iron ore reserve in the south-east of the Aswan region of

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40 Respondent's Request for Bifurcation, paras. 17-18.
41 Respondent's Request for Bifurcation, para. 13.
42 Respondent's Request for Bifurcation, para. 13, *citing* Request to regain the Egyptian nationality filed by Mr Abdel Raouf Bahgat on September 1st, 1997, **Exhibit R-0001**.
43 Claimant's Counter-Memorial on Jurisdiction, para. 2.7.
44 Claimant's Counter-Memorial on Jurisdiction, para. 2.7.
45 Respondent's Request for Bifurcation, para. 11, *citing* Nationality File submitted by Claimant during the criminal proceedings, **Exhibit R-0006**.
46 Claimant's Counter-Memorial on Jurisdiction, para. 2.6; Mr Bahgat's Third Witness Statement ("**Bahgat WS 3**"), para. 9(iv).
47 Respondent's Request for Bifurcation, para. 16.
48 Respondent's Request for Bifurcation, para. 12.

Egypt.[49] With the knowledge that the Egyptian government was seeking private-sector assistance to develop these mines,[50] Claimant contacted the Egyptian Ministry of Industry to inquire about the possibilities of establishing a private mining complex in the area.[51] Claimant states that in early June 1997, the Egyptian Minister of Industry organised a meeting with all parties interested in the Aswan mines and requested those present to submit proposals to develop the iron ore reserves.[52] After site visits with expert geologists and studying the reports produced by the experts on the existence of iron ore at the Aswan site, Claimant decided to participate in the bidding process for the Project.[53]

96. According to Claimant, the Egyptian Minister of Industry, Mr Soliman Reda, suggested that Claimant collaborate with Arbed S.A., a company based in Luxembourg that was also interested in utilising the iron ore at Aswan.[54] According to Claimant, after visiting Arbed S.A., he wrote a letter to Mr Reda confirming that Claimant planned to build a steel plant in Aswan using an old steel plant that he would purchase from Arbed S.A.[55] Claimant states that Mr Reda confirmed in the second half of August 1997 that Claimant had been awarded the contract to mine iron ore in the Aswan region.[56] Claimant states that after being awarded the contract, he began to work on the implementation of the Project.[57]

97. Claimant suggests that on 1 September 1997 Mr Reda invited Claimant to his office (the "**1 September 1997 Meeting**"). The 1 September 1997 Meeting was also attended by Mr Mokhtar Al El Ashri, a potential investor in the Project, who was in a meeting with Claimant when Claimant received the phone call from Mr Reda.[58]

98. According to Claimant, at the 1 September 1997 Meeting, Mr Reda confirmed that Claimant would be the Chairman of the company that would run the Project.[59] Mr Reda allegedly stated that he intended to grant the bid to Claimant if the following three pre-conditions were met. First, Claimant would need to re-acquire his Egyptian nationality. Claimant states that Mr Reda made it clear that if Claimant did not take on Egyptian nationality, the government would look

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49 Bahgat WS 2, para. 21, *citing* Reports dated 1st, 4th and 7th April 1997, **Exhibit C-0019**; Jurisdiction Hearing, Day 1, p. 123:9-16.
50 Bahgat WS 1, para. 4.
51 Bahgat WS 2, para. 22.
52 Bahgat WS 2, para. 22.
53 Bahgat WS 1, para. 4; Bahgat WS 2, para. 23; Jurisdiction Hearing, Day 1, pp. 123:17-124:8.
54 Bahgat WS 2, para. 24, *citing* Letter to Arbed S.A. on 31 July 1997, **Exhibit C-0020**.
55 Bahgat WS 2, para. 25.
56 Bahgat WS 2, para. 26; Jurisdiction Hearing, Day 1, p. 124:9-12.
57 Bahgat WS 2, para. 27; Jurisdiction Hearing, Day 1, p. 124:17-23.
58 Bahgat WS 2, paras. 27-29; El Ashri WS 1, paras. 9-10.
59 Bahgat WS 2, para. 27-29; El Ashri WS 1, para. 11.

for someone else to run the Project and the money and time invested by Claimant in the Project would be lost.[60] Claimant states that Mr Reda indicated that Claimant would be "out of this project and from any other project in Egypt."[61] Second, Claimant would have to allocate 5% of the shares in that company each to the Bank Misr and to the Al Sharq Insurance Company.[62] Third, Claimant would have to assign to each of Bank Misr and the Al Sharq Insurance Company the right to appoint one Board member of Claimant's company.[63]

99. Claimant testifies that he pointed out to Mr Reda that he had renounced Egyptian nationality and that being a national of Egypt was not a prerequisite for participation in the Project.[64] Claimant says that he indicated that he would be willing to accept Egyptian nationality if he could, at the same time, retain Finnish nationality.[65] Claimant alleges that Mr Reda confirmed that there was no obstacle to having dual nationality.[66]

100. Claimant describes that he accepted Mr Reda's demands, seeing no other method of preserving his investment in the Project and fearing the possibility of being put in jail if he refused the demands.[67]

101. Claimant alleges that Mr Reda handed him an application form to regain Egyptian nationality which was addressed to PENA and demanded its immediate completion.[68] Claimant completed the form immediately in the presence of Mr El Ashri.[69] This form was submitted to PENA on the same day.[70]

102. On 28 September 1997, the Egyptian Ministry of the Interior issued Decision Number 10815/1997, which restored Claimant's Egyptian nationality pursuant to Article 18 of the Nationality Law No. 26 of 1975.[71] Claimant was notified of his new nationality status by letter

60 Bahgat WS 2, para. 32; El Ashri WS 1, para. 12; Claimant's Counter-Memorial on Jurisdiction, para. 2.10(vi).
61 Claimant's Counter-Memorial on Jurisdiction, para. 2.10(iv).
62 Bahgat WS 2, para. 34.
63 Bahgat WS 2, paras. 26, 34; El Ashri WS 1, para. 14.
64 Bahgat WS 2, para. 32.
65 El Ashri WS 1, para. 13.
66 Bahgat WS 2, para. 35.
67 Bahgat WS 2, para. 36.
68 El Ashri WS 1, para. 16.
69 Claimant's Counter-Memorial on Jurisdiction, para. 2.10(viii).
70 Claimant's Request to Regain Egyptian Nationality, dated 1 September 1997, **Exhibit R-0001**; Respondent's Request for Bifurcation, para. 20; Bahgat WS 2, para. 37.
71 Respondent's Request for Bifurcation, para. 20, *citing* Letter from the Ministry of Interior, the Egyptian Passports, Immigration and Nationality Administration, dated 7 August 2012, **Exhibit R-0002**; Nationality File submitted by Claimant during the criminal proceedings, **Exhibit R-0006**.

dated 30 September 1997.[72]

103. Claimant clarifies that he did not personally appear before PENA to file this application,[73] contrary to Respondent's claim.[74] Claimant does not accept as accurate the English translation of Claimant's application for Egyptian nationality that was submitted by Respondent.[75] Claimant submits that, contrary to what Respondent's translation of his application for Egyptian nationality indicates, no official from PENA signed the application acknowledging that Claimant had filled the form in the official's presence.[76]

104. Respondent points out that Claimant stated in his application to restore Egyptian nationality that the date he adopted Finnish nationality was 1975, not 1971.[77] However, Claimant explains that this error speaks to the particular stress that Claimant was under at the time he completed the application.[78]

105. On 24 December 1997, Claimant established ADEMCO with the authorization of the Chairman of the General Authority for Investment and Free Zones in Egypt ("**GAFI**") to carry out the exploitation and mining of iron ore.[79] ADEMCO's thirty-year mining license was confirmed by Law No. 166 on 14 June 1998, which was enacted by the Egyptian Parliament and signed by then President Hosni Mubarak ("**Law No. 166**"). Law No. 166 was accompanied by a commitment agreement between ADEMCO and the Ministry of Industry (the "**Commitment Agreement**").[80]

106. On 21 July 1998, AISCO was established by a decision of ADEMCO's shareholders. With the authorization of GAFI, AISCO was incorporated in September 1998 and was registered as a corporate entity on 10 September 1998.[81]

3. Claimant's nationality from 1997-present; Claimant's arrest and the Freezing Order; and the Finnish Decisions

107. Claimant notes that following the change in government in October 1999, newly instated Prime

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72 Letter by the Ministry of the Interior, Directorate for Travel, Migration and Nationality Documents, dated 30 September 1997, **Exhibit C-0021**; Respondent's Answer to the Request for Interim Measures, para. 21.
73 Claimant's Counter-Memorial on Jurisdiction, para. 2.11(i).
74 Respondent's Request for Bifurcation, para. 20.
75 Claimant's Counter-Memorial on Jurisdiction, para. 2.11(ii).
76 Bahgat WS 3, para. 18(i).
77 Respondent's Request for Bifurcation, para. 14, *citing* Claimant's Request to Regain Egyptian Nationality, dated 1 September 1997, **Exhibit R-0001.**
78 Claimant's Counter-Memorial on Jurisdiction, para. 2.11(iii).
79 Bahgat WS 2, para. 44; Respondent's Answer to the Request for Interim Measures, para. 23.
80 Bahgat WS 2, paras. 72-74; Respondent's Answer to the Request for Interim Measures, para. 25; Law No. 166 dated 14 June 1998, **Exhibit C-0036**; Jurisdiction Hearing, Day 1, p. 124:12-16.
81 Bahgat WS 2, paras. 82-85; Respondent's Answer to the Request for Interim Measures, para. 24.

Minister Dr Atef Ebied allegedly took measures to reverse the legacy of former Prime Minister Dr Ganzouri.[82] Claimant exhibits newspaper reports suggesting that the new government had a negative approach to the Project and to Claimant.[83] Claimant alleges that the Egyptian government falsely claimed that Claimant was wanted in Finland in connection with a commercial fraud case.[84]

108. In January 2000, the accounting books of ADEMCO and AISCO were scrutinised by a committee formed by GAFI and chaired by Mr Salah El-deen Mandour ("**Committee**"). A report by the Committee issued on 6 February 2000 prompted criminal charges against Claimant and his companies for misappropriation of funds.[85]

109. On 5 February 2000 – one day before the Committee report was submitted to GAFI – Claimant was arrested by the Egyptian police in connection with ADEMCO's alleged failure to make payment of 54 million Deutsche marks to Mannesman Demag, in relation to constructing a steel mill for the Project at the site in Aswan.[86] A travel ban was imposed on Claimant, and Egypt's Public Prosecution Service and police searched Claimant's residence and offices, removing documents, computers, records, and files. By order of the Egyptian Public Prosecutor, confirmed by the Cairo Criminal Court on 20 February 2000, Claimant's assets as well as the assets of ADEMCO and AISCO, Claimant's family and his deputy, Mr Shimi, were made subject to the Freezing Order.[87]

110. According to Claimant, the Finnish Embassy in Cairo attempted to provide consular assistance after the arrest, but the Egyptian Government refused any access on the basis that Claimant was also Egyptian.[88] The Finnish Embassy circulated a memorandum stating that "Mr. Bahgat obtained his Finnish citizenship on the 12th of February, 1971 and did not lose his Egyptian nationality, so he is both an Egyptian and a Finnish national."[89]

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82 Bahgat WS 2, para. 112; Jurisdiction Hearing, Day 1, p. 125:1-12.

83 Bahgat WS 2, para. 117, *citing* Article from Middle East Economic Digest dated 25 February 2000, **Exhibit C-0055**.

84 Bahgat WS 2, para. 117.

85 Bahgat WS 2, paras. 119-120; Claimant's Statement of Claim, para. 3.10; Report by prosecution – financial investigation dated February 2000 with English translation, **Exhibit C-0052**.

86 Bahgat WS 2, paras. 120, 123; Claimant's Statement of Claim, para. 3.8; Jurisdiction Hearing, Day 1, p. 125:13-24.

87 Bahgat WS 2, para. 122, *citing* Copy of an order made by the Cairo Criminal Court, dated 20 February 2000, **Exhibit C-0056**. *See also* Claimant's Statement of Claim, para. 3.8.

88 Claimant's Counter-Memorial on Jurisdiction, para. 2.14.

89 Claimant's Counter-Memorial on Jurisdiction, para. 2.13, *citing* Correspondence between the Finnish authorities regarding Mr Bahgat's arrest, 15 March 2000 to 24 June 2002, **Exhibit C-0065**.

111. Claimant was under arrest between 5 February 2000 and March 2003,[90] and was released following the dismissal of criminal allegations against him.[91] After his release from prison, Claimant visited the Finnish Ambassador who issued him a Finnish identity card for his protection. According to Claimant, the Egyptian government did not allow him to leave the country for the next two years. On 23 June 2005, after his travel ban was lifted, Claimant returned to Finland.[92] Claimant has "not travelled back to Egypt again in fear of [his] life."[93]

112. Claimant notes that the Finnish population information system reflects that he was not resident in Finland between 21 November 2003 and 21 July 2005, as he was in Egypt and was banned from travelling abroad.[94] Claimant points out that from 22 July 2005 onwards he is recorded as being resident in Finland.[95] Furthermore, Claimant relies on his Finnish passports and Finnish identity cards to establish his nationality.[96] Claimant notes that he has always travelled abroad as a Finnish national and travelled to Egypt under Egyptian visas issued by the Egyptian Embassy in Finland.[97]

113. Respondent states that Claimant took advantage of his Egyptian nationality by using his passport at Cairo Airport in November 1997, September 1998, December 1998, and July 1999.[98] Respondent also contends that Claimant was "happy to look Egyptian in Egypt" and that Claimant used his time as an Egypt resident to augment his financial and social status.[99] Respondent submits that Claimant has accepted (if not requested) an Egyptian passport with validity between 13 October 2004 and 12 October 2011.[100] Respondent notes that Claimant relied on his Egyptian nationality in order to modify his daughters' birth certificates on 8 November 1997; subsequently, PENA issued a letter to the Manager of the German School in Cairo dated 10 November 1997 confirming that Claimant's daughters had regained Egyptian

90 Bahgat WS 2, para. 123.
91 Bahgat WS 2, para. 126; Jurisdiction Hearing, Day 1, p. 126:1-7.
92 Bahgat WS 2, para. 123, 126-127, 130; Respondent's Answer to the Request for Interim Measures, para. 32; Jurisdiction Hearing, Day 1, p. 126:8-19.
93 Bahgat WS 1, para. 14.
94 Bahgat WS 2, para. 6, *citing* Copy of an Extract from the population information system in Finland dated 22 September 2009, **Exhibit C-0014**.
95 Bahgat WS 2, para. 6, *citing* Copy of an Extract from the population information system in Finland dated 22 September 2009, **Exhibit C-0014**.
96 Claimant's Counter-Memorial on Jurisdiction, para. 2.12.
97 Bahgat WS 2, para. 8.
98 Respondent's Request for Bifurcation, para. 21, *citing* Cairo Airport Records, **Exhibit R-0007**.
99 Jurisdiction Hearing, Day 1, pp. 66:3-70:2.
100 Respondent's Request for Bifurcation, para. 22, *citing* Egyptian passport with a validity period between 13 October 2004 and 12 October 2011, **Exhibit R-0008.**

citizenship on 28 September 1997 when Claimant regained his.[101]

114. Furthermore, Respondent argues that on 26 March 2002, PENA wrote to Claimant indicating that Claimant had been treated as an Egyptian citizen since 28 September 1997.[102] Claimant denies ever receiving such a letter and notes that on 21 October 2002, the Egyptian Ministry of Foreign Affairs wrote to the Finnish Embassy in Cairo admitting that Claimant was a Finnish national.[103]

115. On 26 December 2012, Egyptian authorities sent a note of enquiry about Claimant's nationality to the Finnish Embassy in Cairo, which stated that: "[Claimant] has been treated as an Egyptian citizen in all aspects whereas the Finnish citizenship law that was in effect then when Egyptian citizenship was restored banned dual citizenship."[104] The note further stated that: "The Immigration Service is not aware that [Claimant] at a later stage possibly gave up his Egyptian nationality and again regained it."[105]

116. On 23 April 2013, during the pendency of this arbitration, the FIS issued a decision ruling that Claimant lost his Finnish nationality when be obtained Egyptian nationality on 28 September 1997. Claimant challenged the decision of the FIS before the Helsinki Administrative Court.[106] The Helsinki Administrative Court delivered its decision no. 15/0033/5 on 26 January 2015 in which it rejected Claimant's complaint regarding the decision of the FIS.[107] Claimant appealed the decision of the Helsinki Administrative Court before the SAC.

117. The SAC Judgment in proceeding no. 807/3/15 *Appeal Concerning Nationality: Mohamed Abdel Raouf Bahgat* was delivered on 15 November 2016. The court nullified the prior decisions of the FIS and Helsinki Administrative Court and held that Claimant's status as a Finnish citizen had not changed from the time of his receiving Finnish citizenship in 1971 up to the decision of

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101 Respondent's Request for Bifurcation, para. 23, *citing* Letter from PENA to the Manager of the German School in Cairo dated 10 November 1997, **Exhibit R-0010.**

102 Respondent's Request for Bifurcation, para. 20, *citing* Nationality File submitted by Claimant during the criminal proceedings, **Exhibit R-0006.**

103 Claimant's Counter-Memorial on Jurisdiction, para. 2.15.

104 Correspondence between Egypt and Finland regarding the nationality and status of Mr Bahgat, **Exhibit C-0071**, p. 1.

105 Correspondence between Egypt and Finland regarding the nationality and status of Mr Bahgat, **Exhibit C-0071**, pp. 3-4.

106 Claimant's Supplementary Counter-Memorial on Jurisdiction, para. 11.

107 Judgment of the SAC dated 15 November 2016 together with a legally certified English translation of the judgment, **Exhibit C-0070**, p. 1.

the Finnish Immigration Service rendered on 23 April 2013.[108]

C. LEGAL FRAMEWORK

118. Article 7 of the 1980 BIT provides:

> 1. Any dispute which may arise between a national or a company of one Contracting State and the other Contracting State in connection with an investment on the territory of that other Contracting State or between the Contracting States with respect to the interpretation or application of this Agreement shall be subject to negotiations between the parties in dispute.
>
> 2. If the dispute cannot be resolved in accordance with the provisions of the preceeding [sic] paragraph, any of the parties concerned may demand that the dispute be submitted to arbitration . . . .

119. According to Article 1(2) of the 1980 BIT,

> [t]he term "national" means:
>
> a) In respect of Finland, an individual who is a citizen of Finland according to Finnish law,
>
> b) In respect of Egypt, an individual who is a citizen of Egypt according to Egyptian law.

120. Article 9 of the 2004 BIT states that:

> 1. Any dispute arising directly from an investment between one Contracting Party and an investor of the other Contracting Party should be settled amicably between the two parties concerned
>
> 2. If the dispute has not been settled within three (3) months from the date on which it was raised in writing, the dispute may, at the choice of the investor, be submitted:
>
> . . .
>
> (d) to any ad hoc arbitration tribunal which unless otherwise agreed on by the parties to the dispute, is to be established under the Arbitration Rules of the United Commission on International Trade Law (UNCITRAL).

121. Under Article 1(3) of the 2004 BIT,

> The term "investor" means, for either Contracting Party, the following subjects who invest in the territory of the other Contracting Party in accordance with the laws of the latter Contracting Party and the provisions of this Agreement:
>
> (a) any natural person who is a national of either Contracting Party in accordance with its laws . . . .

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[108] Judgment of the SAC dated 15 November 2016 together with a legally certified English translation of the judgment, **Exhibit C-0070**, p. 9.

D. THE PARTIES' ARGUMENTS ON JURISDICTION *RATIONE PERSONAE*

1. Whether the Tribunal should depart from the SAC's finding on Claimant's nationality

Respondent's Position

122. Respondent's position is that, as a matter of Finnish law, Mr Bahgat was not a Finnish national at the relevant times for purposes of bringing this arbitration because he was at the same time an Egyptian national. Respondent acknowledges that the SAC Judgment reaches a different conclusion with respect to certain relevant periods but submits that this Tribunal is not in principle bound by the SAC Judgment. In any event, it argues that the SAC Judgment should not be followed because of its unusual and irregular reasoning.

123. Respondent argues that it is the Tribunal that determines Claimant's nationality for the purposes of this arbitration.[109] Respondent relies on *Soufraki v. UAE* for the statement that "when, in international arbitral or judicial proceedings, the nationality of a person is challenged, the international tribunal is competent to pass upon that challenge . . . the international tribunal is empowered, indeed bound, to decide that issue."[110]

124. Respondent notes that a tribunal must not defer to the State's application of its laws on nationality: when the investor's nationality is in dispute, that dispute cannot be decided exclusively in accordance with the nationality law of the State in question, the State's official declaration of claimant's nationality, or official *indicia* of or a State's recognition of an individual's nationality.[111] Foreign nationality must be established by the objective criteria of the treaties involved.[112] Respondent further states that it is well-established that certificates of

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109 Respondent's Reply Memorial on Jurisdiction, para. 15; Jurisdiction Hearing, Day 1, p. 18:1-4.

110 Respondent's Request for Bifurcation, paras. 43-44, *citing Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, **Exhibit RLA-0015**, para. 55. Respondent notes that this principle was upheld by the *ad hoc* committee constituted in the same case, in its Decision on Annulment: Respondent's Request for Bifurcation, para. 45, *citing* Decision on Annulment in ICSID Case No. ARB/02/7 *Hussein Nuaman Soufraki v. The United Arab Emirates* of 5 June 2007, **Exhibit RLA-0016**, para. 60; *see also* Respondent's Reply Memorial on Jurisdiction, para. 15; Jurisdiction Hearing, Day 1, p. 18:12-21.

111 Respondent's Reply Memorial on Jurisdiction, para. 16, *citing Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2007, **Exhibit RLA-0030**, paras. 91-97; Jurisdiction Hearing, Day 1, p. 19:13–20:6.

112 Respondent's Reply Memorial on Jurisdiction, paras. 11-12. Respondent also cites to *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, **Exhibit RLA-0031**, paras. 148, 192, where the tribunal held that "[b]oth Egyptian law and the practice of international tribunals is that the documents referred to by the Respondent evidencing the nationality of the Claimants are *prima facie* evidence only."; Jurisdiction Hearing, Day 1, p. 21:5-22.

nationality only constitute *prima facie* evidence of nationality.[113] At the Hearing of Jurisdiction, Respondent stated that the Tribunal need not disregard what the national authorities have decided, but that international tribunals are free to assess their jurisdiction for themselves by applying national laws: "You cannot invent Finnish nationality law; you have to apply it, not to redo it."[114] Respondent reminds the Tribunal that in *Soufraki v. UAE*, the tribunal undertook an independent examination of Mr Soufraki's nationality despite being provided certificates of nationality and passports issued by Italian authorities, and found that Mr Soufraki had lost his Italian nationality.[115] That tribunal's decision was upheld by an *ad hoc* committee.[116]

125. Respondent states that there are "ample reasons as to why the Tribunal should depart from the SAC's nationality determination" and find that, under applicable Finnish nationality laws, Claimant was not a Finnish national at the relevant times.[117]

126. First, Respondent argues that the SAC Judgment is unprecedented and departs from well-established case law. Respondent argues that the SAC Judgment is influenced by non-legal considerations of fairness and morality are beyond the scope of investigation of a court in nationality matters.[118]

127. Second, Respondent recalls that on 23 April 2013, the FIS determined through a reasoned order that Claimant was to be regarded as an Egyptian national. The FIS stated that the nationality documents produced by Claimant establishing his Finnish nationality were defective because Claimant had failed to inform the Finnish authorities of his voluntary reacquisition of Egyptian nationality in 1997.[119] Respondent points out that the Helsinki Administrative Court, in confirming the decision of the FIS, held that the evidence of Finnish nationality produced by Claimant had no legal significance and could not generate any legitimate expectation of Finnish nationality for Claimant because the relevant authorities were not aware of Claimant's Egyptian nationality.[120] Respondent notes that the SAC Judgment did not state that the FIS and the

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113 Respondent's Request for Bifurcation, paras. 114-116, *citing* C. Schreuer, The ICSID Convention: A Commentary, **Exhibit RLA-0018**, p. 268; *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, **Exhibit RLA-0015**, pp. 62-63.

114 Jurisdiction Hearing, Day 1, p. 23:21-22.

115 Respondent's Reply Memorial on Jurisdiction, para. 18.

116 Respondent's Reply Memorial on Jurisdiction, para. 19.

117 Respondent's Reply Memorial on Jurisdiction, paras. 21, 32.

118 Respondent's Reply Memorial on Jurisdiction, para. 33, *citing* Second Expert Opinion of Prof. Scheinin, paras. 10, 15; Jurisdiction Hearing, Day 1, p. 18:6-12.

119 Respondent's Reply Memorial on Jurisdiction, para. 35, *citing* Judgment of the SAC dated 15 November 2016, **Exhibit R-0025**, p. 8.

120 Respondent's Reply Memorial on Jurisdiction, para. 35, *citing* Decision of the Helsinki Administrative Court, Case no. 15/0033/5, 26 January 2015, **Exhibit R-0014**, p. 6.

Helsinki Administrative Court's determinations regarding Claimant's nationality were erroneous, but, in fact, found that the FIS had applied the law correctly.[121] Respondent contends that the SAC did not provide an interpretation of Finnish nationality law contrary to that provided by the FIS and Helsinki Administrative Court, but annulled the FIS decision on a different ground (explained below in paragraph 128).[122] Therefore, the Tribunal should bear in mind the decisions of the FIS and the Helsinki Administrative Court in adjudicating Claimant's nationality. Respondent notes that while it is unaware of any investment tribunal ever departing from the finding of the highest national court, there is no rule prohibiting that outcome.[123]

128. Third, Respondent argues that, in making its decision, the SAC did not apply Finnish law.[124] The SAC held that the decisions of the lower courts were substantively correct, but, using a "balancing approach" of the consequences of the FIS decision for Finland and Claimant, based on Claimant's legitimate expectations, the court held that it was unfair to apply the law against Claimant.[125] In Respondent's view, the "balancing approach" was neither anticipated by the experts and the Parties in this arbitration, nor by the lower Finnish courts. Respondent suggests that this is because the balancing approach based on legitimate expectations is not provided for in the 1968 or 2003 Nationality Acts and because the principle of legitimate expectations is foreign to the Finnish legal system, having been imported only around 2000.[126] Prior decisions of the SAC in the cases of Mrs. B and Mrs. C confirm that the principle of legitimate expectations is alien to Finnish Law. Respondent argues that in those cases, the FIS and Helsinki Administrative Court had found that Mrs. B and Mrs. C had automatically lost their Finnish nationality in the 1970s, as a result of consenting to and applying for naturalisation in another country, respectively. These findings were confirmed by the SAC, without making any reference to legitimate expectations.[127]

129. The SAC Judgment, according to Respondent, is surprising because it is one of the first cases to apply the doctrine of legitimate expectations before the entry into force of the Administrative

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121 Respondent's Reply Memorial on Jurisdiction, para. 34, *citing* Judgment of the SAC dated 15 November 2016, **Exhibit R-0025**, pp. 15-16; Jurisdiction Hearing, Day 1, p. 25:13-21; Jurisdiction Hearing, Day 2, pp. 222:25-223:4; 230:21-231:3; 233:3-6.

122 Jurisdiction Hearing, Day 1, p. 26:7-12, pp. 32:19-33:5.

123 Jurisdiction Hearing, Day 2, pp. 231:21-232:4.

124 Jurisdiction Hearing, Day 2, p. 233:9-25. Respondent notes that the SAC agreed with the analysis of Prof. Scheinin, Respondent's expert, on nationality law.

125 Jurisdiction Hearing, Day 1, p. 34:6-15.

126 Respondent's Reply Memorial on Jurisdiction, paras. 38-40, *citing* Second Expert Report of Professor Scheinin, paras. 10-21. Respondent notes that Article 6 of the Administrative Procedure Act of 2003, which entered into force on 1 January 2004, introduced the principle of legitimate expectations in Finnish law.

127 Respondent's Reply Memorial on Jurisdiction, para. 41.

Procedures Act in 2003 which codified the principle of legitimate expectations. The only time the SAC previously relied on the Administrative Procedures Act was in respect of facts that occurred after the legislation entered into force,[128] or in cases that did not concern nationality.[129] In general, Respondent finds it surprising that the SAC concluded that Claimant had a legitimate expectation of Finnish nationality when the Claimant himself had failed to inform Finnish authorities of his acquisition of Egyptian nationality.[130] This is because a pre-requisite for the application of legitimate expectations is the good faith of the individual seeking to avail itself of the principle.[131] Respondent maintains that Claimant had no legitimate expectation of being treated as a Finnish national when he himself led the Finnish administration to error.[132] Respondent argues that in order for expectations to be legitimate, "the individual must have disclosed to the administration the relevant facts on which the administration should rely to take a position."[133]

130. Respondent agrees that as of 15 March 2000, the Finnish authorities were under the impression that Claimant was an Egyptian-Finnish dual national. However, with respect to the restoration of his Egyptian nationality in 1997, Respondent states that Claimant did not act in good faith because he has taken contradictory stances on whether he informed Finnish authorities about his Egyptian nationality. Mr Bahgat's early witness statements indicate that he never informed Finnish authorities of the restoration of his Egyptian nationality in 1997. Mr Bahgat's explanation in his fourth witness statement that he indeed did inform the Finnish Embassy in Egypt about his re-acquired Egyptian nationality[134] is contradicted by statements in Claimant's Rejoinder which indicate that the Finnish authorities should have inferred that Claimant had acquired Egyptian nationality.[135] Respondent states that Claimant was obligated to inform Finnish authorities about his Egyptian nationality.[136] Respondent further submits that even if Claimant's Finnish identity card was authentic, it would not prove Claimant's Egyptian

128 Respondent's Reply Memorial on Jurisdiction, para. 42.
129 Jurisdiction Hearing, Day 2, p. 234: 3-18.
130 Respondent's Reply Memorial on Jurisdiction, para. 43; Jurisdiction Hearing, Day 1, p. 41:4-7. Respondent stated that the SAC "defeated the outcome of the principle of legality, that is the 1968 Nationality act–by applying the principle of legitimate expectations." (Jurisdiction Hearing, Day 1, p. 54:3-7).
131 Jurisdiction Hearing, Day 2, p. 231:14-20.
132 Jurisdiction Hearing, Day 1, p. 37:4-7; p. 39:5-7; pp. 50:24-51:12.
133 Jurisdiction Hearing, Day 1, pp. 40:20-41:1.
134 Jurisdiction Hearing, Day 1, p. 45:5-13. Respondent observes that Claimant mentioned that he called the Finnish authorities regarding the restoration of his Finnish citizenship in 1997 only in his fourth witness statement, just ahead of the Hearing on Jurisdiction and not in his previous statements.
135 Jurisdiction Hearing, Day 1, pp. 48:24-49:4.
136 Respondent cites to: (i) Section 39 of the 2003 Nationality Act which imposes a good faith duty of disclosure in matters of determination of citizenship status; (ii) Section 50(2) of the Administrative Procedure Act, which states that a decision detrimental to a person might be taken where the person's own conduct had resulted in an error; and (iii) the basic good faith requirement of the principle of legitimate expectations. (Jurisdiction Hearing, Day 1, p. 52:16-53:13).

nationality.[137] For similar reasons, Respondent argues information on the Finnish population information system is not proof of Claimant's Finnish nationality.[138]

131. Respondent also argues that the SAC was incorrect in stating that, on balance, the FIS determination of Claimant's nationality brings limited benefit to Finland because Claimant could immediately become Finnish again by application in 2008. Respondent maintains that the benefit to Finland of the FIS decision was that the FIS correctly applied Finnish nationality law: "a State would have no benefit to see its Nationality Act misapplied."[139] Respondent contends that if Claimant believed that the restoration of his Egyptian nationality in 1997 was a nullity, Claimant should have informed the Finnish population information system in 2007 that he was not, as they had considered, a dual Egyptian-Finnish national. If the restoration was valid, then Claimant would have lost his Finnish nationality. Respondent notes that even if Claimant applied for restoration of his Finnish nationality in 2008, this would not be retroactive and he would not be a Finnish national between 1997 and 2008 (the time of the alleged breaches of the BITs by Egypt).[140] Respondent concludes that the SAC, by its balancing approach, could only have meant that the harm to Claimant in upholding the FIS decision is significant as he would be unable to bring this arbitration.[141]

132. Fourth, Respondent contends that the Court File Documents show that Claimant submitted extensive pleadings that are the subject matter of this arbitration, indicating that the SAC was motivated by a desire to allow Claimant to pursue this pending arbitration against Egypt.[142] "[T]he present claim and the present proceedings were at the heart of the decision of the SAC".[143] On this basis, Respondent stresses the need for this Tribunal to forge its independent opinion on Claimant's nationality.[144] Respondent alleges that the SAC's balancing approach was employed to keep this arbitration alive and argues that it would be entirely inappropriate for the Tribunal to adopt a similar balancing approach here.[145]

133. Fifth, Respondent argues that the SAC Judgment was likely influenced by the decision in the

137 Respondent's Request for Bifurcation, para. 106.
138 Respondent's Request for Bifurcation, para. 109.
139 Jurisdiction Hearing, Day 1, pp. 35:20-36:1.
140 Jurisdiction Hearing, Day 1, pp. 56:13-57:9.
141 Jurisdiction Hearing, Day 1, p. 57:10-19.
142 Respondent's Reply Memorial on Jurisdiction, paras. 44-45; Jurisdiction Hearing, Day 1, pp. 27:12-29:12; *see also* Jurisdiction Hearing, Day 1, p. 30:5-7 (stating that "the present claim and the present proceedings were at the heart of the decision of the SAC").
143 Jurisdiction Hearing, Day 1, p. 30:5-7.
144 Respondent's Reply Memorial on Jurisdiction, para. 45.
145 Jurisdiction Hearing, Day 1, p. 54:17, pp. 57:19-58:7.

case of Ms A that was delivered on the same day. Ms A was born in 1986 to Mrs C who was thought to be a Finnish national and was entered into the Finnish population register as a Finnish-Israeli. However, in 2010, it was discovered that Mrs. C lost her Finnish nationality in 1979, just before her daughter was born, by voluntarily acquiring Israeli nationality. The FIS found on 15 June 2012 that Ms A was not a Finnish national. However, the SAC noted that Ms A had been treated as a Finnish national since birth and, therefore, held that the Finnish authorities had created a legitimate expectation of Ms A's Finnish nationality. Respondent argues that it was wrong for Mr Bahgat's case to be influenced by Ms A's case: Ms A had no method of regaining Finnish nationality but for the SAC's decision. By contrast, Claimant could have applied for Finnish nationality under the 2003 Nationality Act.[146]

134. Respondent denies Claimant's suggestion that the SAC Judgment is consistent with the record of this arbitration and denies that the record of this arbitration shows that Claimant was treated as a Finnish national by Finnish and Egyptian authorities. Respondent questions the authenticity of the Finnish identity card issued by the Finnish Embassy in Cairo on 3 November 2003 that was produced by Claimant because it does not contain information in Finnish and Swedish, the two official languages of Finland, and it does not resemble identity cards generally issued by Finland.[147] Respondent contends that Claimant's Finnish passports are not determinative of his Finnish nationality.[148] Respondent clarifies that the statement by the Finnish Ministry of Foreign Affairs on 15 March 2000 was not a determination of Claimant's nationality, unlike the FIS determination of April 2013, but merely a transmission of information.[149] Respondent states that the Tribunal cannot rely on Claimant's testimony regarding Mr Reda's promise made in the 1 September 1997 Meeting that he would remain a dual citizen because Mr Reda could not make promises on behalf of Finnish authorities.[150]

135. Moreover, Respondent contends that the note from the Egyptian authorities to the Finnish authorities in 2002 confirming that Claimant had acquired Finnish and Egyptian citizenship does not record the reinstatement of Claimant's Egyptian nationality in 1997. The Egyptian authorities likely base their view on their limited awareness that Claimant had acquired Finnish nationality in 1971. Respondent states that Claimant might have notified the Egyptian Embassy of his loss of Egyptian nationality in 1980, but the embassy staff might have changed, resulting

146 Respondent's Reply Memorial on Jurisdiction, para. 46.
147 Respondent's Request for Bifurcation, paras. 102-104, *citing* Letter from the Egyptian Ministry of Foreign Affairs dated 3 December 2012, **Exhibit R-0011**.
148 Jurisdiction Hearing, Day 2, p. 226:3-21.
149 Jurisdiction Hearing, Day 2, pp. 226:22-227:11.
150 Jurisdiction Hearing, Day 2, p. 228:4-21.

in inaccuracy of records.[151]

136. Respondent notes that it is not dispositive that the Finnish Population Register updated Claimant's nationality status following the SAC Judgment. According to Respondent, this only places Claimant in the situation before the annulment of the FIS determination of April 2013, when the Finnish authorities knew nothing of Claimant's nationality status.[152]

Claimant's Position

137. Claimant rejects Respondent's challenge to the Tribunal's jurisdiction *ratione personae*.[153] Claimant argues that the SAC Judgment on his nationality is final and should be followed by this Tribunal. The Tribunal may only depart from the SAC Judgment in exceptional circumstances, and such circumstances are not made out in this case.

138. Claimant observes that the Parties agree that in order to establish the Tribunal's jurisdiction *ratione personae*, it must be established that Claimant was a Finnish national according to Finnish law at the time of breach of the BITs (from February 2000, when Claimant was incarcerated) and on the date of consent to the arbitration (3 November 2011).[154] Claimant emphasizes that the SAC has unanimously upheld Claimant's challenge against the decision of the FIS, and held that Claimant was at all relevant times, and continuously since 1971, a Finnish national.[155] Claimant argues that the SAC Judgment supports his position, and that taken by his experts,[156] that Claimant did not automatically lose his Finnish nationality in 1997 and that Claimant has remained a Finnish citizen from 1971 until 2013.[157] Claimant notes that, in arriving at the SAC Judgment, the SAC relied upon the declaration by the FIS of 22 January 2013 that Claimant was a dual national of Egypt and Finland.[158] Accordingly, it is the responsibility of Respondent to establish that, contrary to the finding of the SAC, Claimant "somehow lost his Finnish nationality by the time of his mistreatment by Egypt in 2000 and by

151 Jurisdiction Hearing, Day 2, pp. 228:22-230:7.
152 Jurisdiction Hearing, Day 2, p. 225:12-18.
153 Claimant's Supplementary Counter-Memorial on Jurisdiction, para. 22.
154 Jurisdiction Hearing, Day 1, p. 136:4-15.
155 Claimant's Supplementary Counter-Memorial on Jurisdiction, para. 12; Claimant's Rejoinder, para. 8, *citing* Judgment of the SAC dated 15 November 2016 together with a legally certified English translation of the judgment, **Exhibit C-0070**, pp. 8-9; Jurisdiction Hearing, Day 1, pp. 133:2-16, 137:9-12.
156 *See e.g.*, Mr Peter Backström's Expert Report dated 30 October 2012, Ms Inga Paavola's Expert Report dated 30 October 2012, Mr Aulis Aarnio's First Expert Report dated 27 August 2013, and Mr Tuomas Ojanen's First Expert Opinion dated 21 August 2013.
157 Claimant's Supplementary Counter-Memorial on Jurisdiction, para. 15.
158 Claimant's Supplementary Counter-Memorial on Jurisdiction, para. 17.

the time of his imprisonment."[159]

139. In the first instance, Claimant notes that "[t]he Supreme Administrative Court's Judgment is final and binding as a matter of Finnish law (*res judicata*) and the Judgment provides a final and unequivocal determination that the Claimant has been Finnish since 1971 under Finnish law."[160] There is no appeal available from a decision of the SAC.[161] Claimant points out that Respondent's expert concedes that there exist extraordinary remedies against a decision of the SAC such as a procedural complaint; however, Respondent's expert does not state that the SAC Judgment can be appealed.[162] Claimant states that this is because: (i) the SAC Judgment is free from defects and was hence executed by the FIS immediately;[163] and (ii) the deadline for applying for extraordinary remedies was 15 May 2017, which passed.[164] Claimant points out that Respondent had sought an order for document production of the Court File Documents, but even after obtaining these documents independently. However, Respondent was unable to identify any basis on which to challenge the SAC Judgment and ultimately has not cited the Court File Documents in its submissions.[165]

140. Claimant reiterates the sovereign right of every State to determine the identity of its own nationals.[166] In particular, Claimant submits that "a binding interpretation of a provision by the highest court forms part of domestic law," and that the SAC Judgment itself constitutes "final and binding" Finnish law for the purposes of the determination of this Tribunal.[167]

141. Claimant submits that "there is serial recognition in international law that international tribunals should give deference to the decisions of the highest courts of domestic jurisdictions in the

159 Jurisdiction Hearing, Day 1, p. 133:21-24.
160 Claimant's Supplementary Counter-Memorial on Jurisdiction, para. 21; Claimant's Rejoinder, para. 37. Claimant notes that Respondent's experts agree that the SAC Judgment is final as a matter of Finnish law (Jurisdiction Hearing, Day 1, p. 138:14-17, *citing* Second Expert Opinion of Prof. Scheinin, para. 9).
161 Claimant's Rejoinder, para. 36.
162 Claimant's Rejoinder, para. 38, *citing* Section 59(1)(3) Finnish Administrative Judicial Procedure Act [568/2008, amendments up to 435/2003], Ministry of Justice Unofficial Translation, **Exhibit CLA-0049**, which states that procedural complaints might be available where a "decision is so unclear or defective that it does not indicate how the matter has been resolved".
163 Claimant's Rejoinder, para. 40, *citing* Email from Ms Karoliina Korte to Mr Petteri Snell dated 15 November 2016, **Exhibit C-0080**; Jurisdiction Hearing, Day 1, p. 139:5-11, *citing* Extract from the Finnish population information system for M. Bahgat, **Exhibit C-0085**.
164 Claimant's Rejoinder, para. 41, *citing* Section 60(2) Finnish Administrative Judicial Procedure Act [568/2008, amendments up to 435/2003], Ministry of Justice Unofficial Translation, **Exhibit CLA-0049**.
165 Jurisdiction Hearing, Day 1, pp. 130:11-131:15.
166 Claimant's Rejoinder, para. 45.
167 Jurisdiction Hearing, Day 1, p. 158:13-20.

interpretation and application of domestic law."[168] Claimant reiterates that modern arbitral jurisprudence confirms that the tribunal should only in exceptional circumstances depart from a State's nationality determination[169] and that no modern investment tribunal has contemplated departing from that determination of a State's highest court.[170] Claimant relies *inter alia* on the following statement of the *Soufraki Ad Hoc Committee*:

> [W]hen applying national law, an international tribunal must strive to apply the legal provisions as interpreted by the competent judicial authorities and as informed by the State's 'interpretative authorities.'[171]

142. Claimant concedes that international tribunals are not bound by certificates of nationality. However, international tribunals have set a high bar of review of nationality certificates, with the result that a respondent bears a heavy burden of proof in showing decisive evidence of fraud or material error in the production of the nationality certificate in question.[172] Claimant states that Respondent has conceded this standard in the past.[173]

143. Claimant accepts Respondent's submission that *prima facie* evidence of nationality can be overridden in cases of fraud, deception, and material error, or if it is necessary to protect a claimant against whom a host State has imposed its nationality; but highlights that these

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168 Jurisdiction Hearing, Day 1, p. 159:7-13, *citing Case concerning the payment of various Serbian loans issued in France*, Permanent Court of International Justice, 12 July 1929, PCIJ Reports, Ser. A., No. 20, 1929, pp. 36, 46-47, **Exhibit CLA-0056**; *Case concerning the payment in gold of Brazilian federal loans contracted in France*, Permanent Court of International Justice, 12 July 1929, PCIJ Reports, Ser. A., No. 21, 1929, pp. 27-28, **Exhibit CLA-0057**.

169 Claimant's Rejoinder, para. 50, *citing Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, **Exhibit RLA-0016**, para. 28; *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, **Exhibit RLA-0032**, para. 318; *Jan Oostergertel et al. v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, **Exhibit CLA-0055,** para. 133; Jurisdiction Hearing, Day 1, pp. 161:16-162:13.

170 Claimant's Rejoinder, para. 50; Jurisdiction Hearing, Day 1, p. 164: 16-17.

171 Claimant's Rejoinder, para. 52, *citing Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, **Exhibit RLA-0016**, para. 96. Claimant also relies on *Case concerning the payment of various Serbian loans issued in France*, Permanent Court of International Justice, 12 July 1929, PCIJ Reports, Ser. A., No. 20, 1929, **Exhibit CLA-0056**, pp. 36 and 46-47; *Case concerning the payment in gold of Brazilian federal loans contracted in France*, Permanent Court of International Justice, 12 July 1929, PCIJ Reports, Ser. A., No. 21, 1929, **Exhibit CLA-0057**, pp. 27-28; *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, **Exhibit RLA-0032**, para. 318; Jurisdiction Hearing, Day 1, p. 158:8-12.

172 Claimant's Rejoinder, paras. 56-59, *citing Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, **Exhibit RLA-0031**, para. 201; *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, **Exhibit RLA-0033**, paras. 158-159; *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, **Exhibit RLA-0030**, para. 95; Jurisdiction Hearing, Day 1, p. 157:13-16.

173 Claimant's Rejoinder, para. 60, *citing* Respondent's Letter to the Tribunal, 11 January 2017; Jurisdiction Hearing, Day 1, pp. 163:25-164:3.

circumstances are not made out in relation to the SAC Judgment.[174] The existence of such allegations, according to Claimant, distinguishes cases relied upon by Respondent to discredit the SAC Judgment.[175]

144. Claimant then argues that, even if the Tribunal considers that it is faced only with *prima facie* evidence of Claimant's nationality, Respondent has identified no exceptional circumstances that justify a departure from the SAC Judgment.[176]

145. First, Claimant denies that the SAC Judgment is "unprecedented". With reference to reports from its Finnish law experts,[177] Claimant states that the structure and reasoning of the SAC Judgment is characteristic, particularly the placement of a legal provision in its wider context which is a well-established principle of Finnish law.[178] Claimant states that the principle of legitimate expectations has existed in the Finnish legal system since at least the mid-1990s and has been applied in prior cases.[179] The Administrative Procedure Act merely gave the principle a formal status.[180] According to Claimant, the Tribunal would reach the same conclusions as SAC if the Tribunal were to decide whether Claimant was a Finnish national in 2000, because the principle of legitimate expectations existed then like it does today.[181] Claimant contends that the 2003 Nationality Act was not a central consideration in the SAC's analysis. Claimant maintains that the SAC Judgment is not unduly influenced by considerations of fairness and morality, or by sympathy for Claimant.[182] Claimant argues that Respondent's expert, Professor Scheinin's testimony must be rejected because his argument that legitimate expectations did not exist in Finnish law before 2004 is wrong.[183]

146. Second, Claimant states that the Tribunal need not bear in mind the decisions of the FIS and the Helsinki Administrative Court. Claimant notes that these prior decisions were heavily criticised

174 Claimant's Rejoinder, para. 47; Jurisdiction Hearing, Day 1, p. 162:18-24.
175 Claimant's Rejoinder, para. 48, *citing* Respondent's Reply, footnote 12, which references *Salem Case (Egypt v. USA)*, UN Reports of International Arbitral Awards, Vol. 2, 8 June 1932, **Exhibit RLA-0029**; *Case of Cristano Medina & Sons v. Costa Rica*, Decision of the Umpire, Commander Bertinatti (USA v. Costa Rica), U.N. Rep., Vol. XXIX, 31 December 1862, **Exhibit RLA-0078**; *Flutie cases (United States v. Venezuela)*, 1903-1905, U.N. Rep., Vol. IX, pp. 148-155, **Exhibit RLA-0076**.
176 Jurisdiction Hearing, Day 1, p. 161:3-8.
177 Mr Ojanen Second Expert Opinion, para. 31.
178 Claimant's Rejoinder, para. 64.
179 Claimant's Rejoinder, para. 65; Claimant argues that Finland became a part of the EU in 1995 and that it is undisputed that legitimate expectations was an element of EU law in 1995 (Jurisdiction Hearing, Day 1, pp. 178:7-179:3).
180 Claimant's Rejoinder, para. 66.
181 Jurisdiction Hearing, Day 1, pp. 176:14-177:8.
182 Claimant's Rejoinder, paras. 68-69.
183 Jurisdiction Hearing, Day 1, p. 176:14-19.

by the SAC and there is no basis to conclude as Respondent does that the earlier decisions were substantively correct.[184] Claimant points out that the SAC Judgment annuls as a matter of Finnish law the decisions of the Helsinki Administrative Court and the FIS, which calls into question Respondent's reliance on the reasoning of these lower courts.[185] The SAC noted that there has been an "error of authority" because the FIS had failed to provide the necessary reasoning for its decision and failed to evaluate the circumstances surrounding the reinstatement of Claimant's Egyptian nationality.[186] The SAC does not state as Respondent alleges that Claimant lost his Finnish nationality pursuant to Section 8 of the 1968 Nationality Act.[187] Claimant states that Respondent contradicts itself by arguing on the one hand that the SAC Judgment supports its position on the law, and on the other hand that the SAC Judgment did not rule on Claimant's nationality between 1997 and 2015.[188] Claimant points out that the SAC also criticizes the FIS' decision to initiate proceedings against Mr Bahgat upon the referral of a request from Egypt.[189]

147. Third, Claimant contends that the contextual approach used by the SAC, which is based on the Finnish law principle of the protection of legitimate expectations[190] and compatibility with fundamental rights under the Finnish constitution, is neither novel nor contradictory to the SAC's prior case law. The SAC has adopted the contextual approach in prior cases,[191] and this approach was adopted by Claimant's experts in this arbitration as well as in Claimant's submissions to the SAC.[192] Furthermore, Claimant clarifies that the SAC Judgment is not contrary to the rulings in the cases concerning Mrs B and Mrs C.[193] The facts of the present arbitration can be distinguished from Mrs B and Mrs C[194] because Mr Bahgat was explicitly granted Finnish nationality by the President of Finland on the basis that Mr Bahgat would remain a dual national.[195] Claimant notes that the decision in Mrs B's case was not published

184 Claimant's Rejoinder, para. 70, *citing* Judgment of the SAC dated 15 November 2016 together with a legally certified English translation of the judgment, **Exhibit C-0070**, p. 15.
185 Jurisdiction Hearing, Day 1, p. 140:11-141:9.
186 Claimant's Rejoinder, para. 72, *citing* Judgment of the SAC dated 15 November 2016 together with a legally certified English translation of the judgment, **Exhibit C-0070**, p. 14; Jurisdiction Hearing, Day 2, pp. 267:20-268:11.
187 Jurisdiction Hearing, Day 2, p. 265:1-20.
188 Jurisdiction Hearing, Day 2, pp. 263:15-264:14, *citing* Jurisdiction Hearing, Day 1, p. 17:19-22; Respondent's Reply, paras. 49-54.
189 Claimant's Rejoinder, para. 75.
190 Jurisdiction Hearing, Day 2, p. 269:16-24. Claimant notes that only the Finnish law concept of legitimate expectations is relevant because Claimant's nationality must be determined as per Finnish Law.
191 Claimant's Rejoinder, para. 79.
192 Claimant's Rejoinder, para. 79.
193 Claimant's Rejoinder, para. 84.
194 Jurisdiction Hearing, Day 1, p. 180:1-7.
195 Claimant's Rejoinder, para. 85.

and had become moot.[196]

148. Claimant contends that, even if correct, it was irrelevant to the SAC Judgment whether Claimant informed the FIS of the reinstatement of his Egyptian nationality.[197] It is Claimant's view that even if the Finnish authorities did not know until 2012 that Egypt had reinstated the Claimant's Egyptian nationality, this is irrelevant to his Finnish nationality because of the consistent practice of Finnish authorities of recognizing Mr Bahgat as a Finnish national and because there was no obligation upon Mr Bahgat to inform Finnish authorities that he re-acquired Egyptian nationality.[198] Claimant notes that in any event, Finnish authorities continued to state that Mr Bahgat was registered in their databases even though he informed them about the reinstatement of his Egyptian nationality in 1997.[199] He notes that the Finnish Embassy was made aware of Mr Bahgat's Egyptian nationality at various points in time and Mr Bahgat cannot be penalized for the Finnish Embassy's failure to communicate this information to the relevant authorities.[200] Claimant maintains that, in any event, the SAC was fully aware of all the facts associated with Claimant's acquisition of Egyptian citizenship and still held that he had not lost his Finnish nationality.[201]

149. Fourth, Claimant argues that it is absurd for Respondent to suggest that the SAC Judgment was designed to allow Claimant to bring this arbitration.[202] Claimant states that this argument is unsupported and surprising given that it was Egypt that prompted the FIS to investigate Claimant's nationality.[203]

150. Fifth, Claimant notes that Respondent is speculating when it suggests that the SAC Judgment was influenced by the case of Ms A. This allegation, according to Claimant, is unsupported by the text or summary of the SAC Judgment.[204]

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196 Claimant's Rejoinder, para. 86.
197 Claimant's Rejoinder, para. 73.
198 Claimant's Rejoinder, paras. 86-90.
199 Claimant's Rejoinder, para. 92. Claimant points out that the Finnish authorities were made aware of Claimant's Egyptian nationality at various points in the future but continued to register him as a Finnish national. Claimant's Rejoinder, paras. 93-94, *citing* residence permit for Egypt between 1997 and 1999 in Current Finnish identity card, **Exhibit C-0015**, p. 65(76); Letter from the Egyptian Ministry of Foreign Affairs to the Finnish Embassy in Cairo, 21 October 2002, **Exhibit C-0068**, p. 5; Publication of the Minister of Interior Resolution No. 10815 year 1997 re restoration of Egyptian nationality in the Egyptian Official Gazette dated 2 November 1997, **Exhibit C-0076**).
200 Claimant's Rejoinder, para. 95.
201 Jurisdiction Hearing, Day 1, p. 170:1-5.
202 Jurisdiction Hearing, Day 2, pp. 268:20-269:7.
203 Claimant's Rejoinder, paras. 97-98.
204 Claimant's Rejoinder, para. 99.

151. At the Hearing on Jurisdiction, Claimant concluded that the record shows that Finland consistently treated Claimant as a Finnish national since 5 February 1971. Claimant notes that express declarations and admissions by diplomatic representatives concerning an individual's nationality might result in estoppel.[205] Claimant particularly relies on the 1971 Presidential Decree, the Claimant's Finnish passports, certifications by the Finnish Embassy in Cairo confirming Mr Bahgat's Finnish nationality in 1982, and the confirmation by the Finnish Immigration Office of Mr Bahgat's Finnish nationality in March 2000.[206] Claimant notes that at the outset, Mr Reda confirmed at the time of the reinstatement of Claimant's Egyptian nationality that Claimant would retain his Finnish nationality.[207] Claimant frequently visited the Finnish Embassy in Cairo, which extended the validity of his Finnish passports despite being aware of the fact that Claimant had regained Egyptian nationality in 1997.[208] Claimant submits that both Finnish and Egyptian authorities were well aware of his dual nationality,[209] and notes that he personally informed the Finnish Embassy in Cairo of his re-acquired Egyptian nationality and called the Finnish Population Register to confirm his dual nationality.[210] Claimant points out that the restoration of his Egyptian nationality was published in the Official Gazette, which was distributed including to the Finnish Embassy in Cairo.[211] According to Claimant, the Finnish Ministry of Foreign Affairs was notified of his dual nationality by the Directorate of Immigration around 15 March 2000,[212] and Respondent acknowledged this in a letter to the Finnish Embassy in Cairo dated 21 October 2002.[213] The Finnish Ministry of Foreign Affairs on 15 March 2000 advised as follows:

> The Nationalities Unit of Immigration Office has informed that:
>
> Mr Bahgat obtained his Finnish citizenship on the 12th of February 1971 and did not lose his Egyptian nationality, so he is both an Egyptian and a Finnish national.[214]

152. Moreover, the Finnish Foreign Ministry instructed the Finnish Embassy in Cairo that "since

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205 Claimant's Rejoinder, para. 170, *citing* Extract from J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed., (OUP 2012), **Exhibit CLA-0062**, pp. 520-521.

206 Jurisdiction Hearing, Day 1, p. 142:1-20, *citing* Certificates from the Embassy of Finland in Cairo regarding Mr Bahgat's sole Finnish nationality, **Exhibit C-0063**; Correspondence between the Finnish authorities regarding Mr Bahgat's arrest, 15 March 2000 to 24 June 2002, **Exhibit C-0065**, pp. 1, 7.

207 Claimant's Rejoinder, para. 165.

208 Claimant's Counter-Memorial on Jurisdiction, para. 2.12.

209 Jurisdiction Hearing, Day 1, p. 153:7-11.

210 Jurisdiction Hearing, Day 1, p. 153:12-21.

211 Jurisdiction Hearing, Day 1, p. 154:1-8, *citing* Publication of the Minister of Interior Resolution No. 10815 year 1997 re restoration of Egyptian nationality in the Egyptian Official Gazette dated 2 November 1997, **Exhibit C-0076**.

212 Claimant's Counter-Memorial on Jurisdiction, para. 3.7.

213 Claimant's Counter-Memorial on Jurisdiction, para. 3.9.

214 Claimant's Counter-Memorial on Jurisdiction, para. 2.13, *citing* Bahgat WS 3, para. 37.

Mr Bahgat is also a Finnish citizen, please [. . .] try to find out whether he would possibly want to meet with somebody from the Embassy, and then please send a report of such a meeting in the normal manner to the Ministry."[215] Claimant argues that the Finnish Embassy in Cairo continued to enquire after Mr Bahgat from Mr Bahgat's arrest at least until 24 June 2002.[216]

153. Claimant further notes that in diplomatic correspondence in 2002, the Egyptian Ministry of Foreign Affairs acknowledged that:

> After examining the case it was found out that the correct name of the above mentioned is Mohamed Abdel Rauf Bahgat Aydoush ([. . .] He has acquired the Finnish citizenship in addition to the Egyptian nationality).[217]

154. Claimant states that he was registered as Finnish resident, travelled regularly to Finland, and owned property and paid taxes in Finland. Claimant points out that the Finnish Population Register and Finnish Commercial Register confirmed that he was registered as having both Egyptian and Finnish nationality.[218] Claimant also mentions that on 3 November 2003, the Finnish Embassy in Cairo issued him a Finnish identity card and, approximately two weeks later, a Finnish passport.[219] He holds that these documents commonly serve as proof of Finnish nationality and can only be issued to Finnish nationals.[220]

155. Claimant submits that the SAC Judgment is not surprising as it was delivered in the background of this record.[221] Moreover, Claimant points out that Respondent's expert Professor Scheinin has conceded that possession of a passport creates a presumption of citizenship.[222] Claimant stated that Professor Scheinin has not responded to these determinations of Claimant's Finnish nationality in his reports.[223] In the background of the documents cited above, Claimant contests any allegation by Respondent that Claimant had not kept the Finnish authorities informed about

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215 Claimant's Rejoinder, para. 167, *citing* Correspondence between the Finnish authorities regarding Mr Bahgat's arrest, 15 March 2000 to 24 June 2002, **Exhibit C-0065**, p. 7.

216 Claimant's Rejoinder, para. 168.

217 Claimant's Rejoinder, para. 166, *citing*, Letter from the Egyptian Ministry of Foreign Affairs to the Finnish Embassy in Cairo, 21 October 2002, **Exhibit C-0068**, p. 55; Jurisdiction Hearing, Day 1, pp. 154:9-19; 156:12-17.

218 Claimant's Statement of Claim, para. 2.20; Bahgat WS 3; Claimant's Rejoinder, para. 169.

219 Claimant's Counter-Memorial on Jurisdiction, para. 2.18.

220 Claimant's Counter-Memorial on Jurisdiction, para. 2.18.

221 Jurisdiction Hearing, Day 1, p. 141:14-25.

222 Jurisdiction Hearing, Day 1, p. 145:9-23.

223 Jurisdiction Hearing, Day 1, p. 147:13-25. Claimant argues in general that Prof. Scheinin has not referred to key evidence on the record, such as the 1971 Presidential Decree and attached explanatory note and the determination of the FIS regarding Claimant's Finnish nationality following his arrest in March 2000. Prof. Scheinin therefore wrongly came to the view that Finnish authorities had made no determination of Claimant's nationality status between September 1997 and April 2013. Jurisdiction Hearing, Day 1, p. 172:8-19, *citing* Second Opinion of Prof. Scheinin, para. 9.

his renunciation of Egyptian nationality in 1980 and the restoration of his Egyptian nationality in 1997.[224]

Tribunal's Analysis

156. It is well-established that as a matter of international law, it is the law of the state whose nationality is claimed that will govern whether an individual is a national of that state. The International Commission in the *Flegenheimer* case referred to the "unquestionable principle of international law according to which every State is sovereign in establishing the legal conditions which must be fulfilled by an individual in order that he may be considered to be vested with its nationality."[225]

157. This principle is reflected in both BITs underlying the present arbitration. The 1980 BIT seeks to "maintain fair and equitable treatment of investments of nationals and companies of one Contracting State in the territory of the other Contracting State".[226] The term "national" is defined under the 1980 BIT as "[i]n respect of Finland, an individual who is a citizen of Finland according to Finnish law"; and "[i]n respect of Egypt, an individual who is a citizen of Egypt according to Egyptian law."[227] The Preamble of the 2004 BIT recognizes the "need to protect investments of the investors of one Contracting Party in the territory of the other Contracting Party on a non-discriminatory basis".[228] Article 1 of the 2004 BIT provides[229]

> 3. The term "investor" means, for either Contracting Party, the following subjects who invest in the territory of the other Contracting Party in accordance with the laws of the latter Contracting Party and the provisions of this Agreement: (a) any natural person who is a national of either Contracting Party in accordance with its laws;

158. The Tribunal recalls the statement of the Permanent Court of International Justice in the *Serbian Loans Case* that "[f]or the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting

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224 Jurisdiction Hearing, Day 1, p. 149:4-23, *citing* Bahgat WS 2, para. 11, Current Finnish identity card, **Exhibit C-0015** (Claimant argues that these contain copies of his Finnish passports and Egyptian work permits which indicate that Finland was aware that Mr Bahgat had renounced Egyptian nationality). Claimant, in response to questions raised by the Tribunal, notes that under the BITs, claims can be brought by dual Finnish-Egyptian nationals as there is no prohibition against this in the BITs. (Jurisdiction Hearing, Day 2, p. 272:4-23). Claimant states that the only exception to this rule is where the claimant has engaged in an abuse of rights using a "flag of convenience". This is not the case with Claimant. Claimant maintains that any questions on the admissibility of claims of dual nationals was dismissed in Procedural Order No. 5. (Jurisdiction Hearing, Day 2, pp. 273:15-274:23)

225 *Flegenheimer Case* (1958) 14 RIAA 327, 337 para. 24, 20 September 1958, **Exhibit CLA-0052**, p. 97.

226 1980 BIT, **Exhibit CLA-0001**, Preamble.

227 *Ibid*. art. 1(2) (emphasis added).

228 2004 BIT, **Exhibit CLA-0002**, Preamble.

229 *Ibid*, Article 1(3)(a) [emphasis added].

the construction which has been placed on such law by the highest national tribunal . . . would not be in conformity with the task for which the Court has been established . . . ."[230] The Tribunal notes that the SAC, Finland's highest administrative court, has made a clear determination regarding the nationality of Claimant in the SAC Judgment. The SAC Judgment holds that

> The [SAC] determines that [Claimant], when the [FIS] made its decision under appeal, has had to be considered in Finland as an Egyptian, as well as Finnish citizen. [Claimant's] citizenship status as a Finnish citizen has not changed from the time of receiving Finnish citizenship in 1971, up to the decision of the [FIS].[231]

159. Therefore, a determination of Claimant's Finnish nationality pursuant to Finnish law has already been made by the highest administrative court in Finland. There are very limited circumstances under which a determination of this nature should be questioned by an arbitral tribunal. These circumstances are set out in *Soufraki v. UAE*, a case that has been discussed extensively by both Parties.

160. *Soufraki v. UAE* concerned a dispute about a concession agreement for the Al Hamriya port. The claimant allegedly signed these contracts as a Canadian citizen. Later, claiming Italian nationality, he brought proceedings for breach of the Italy-UAE investment treaty. The UAE objected to the tribunal's jurisdiction on the basis that Mr Soufraki had lost his Italian nationality around 1991 upon becoming a national of Canada.[232] Mr Soufraki submitted that he never intended to relinquish his Italian nationality when he took up residence in Canada.[233] Mr Soufraki relied on, as conclusive evidence of his nationality, certificates issued by Italian authorities, copies of his Italian passports, and a letter from the Italian Ministry of Foreign Affairs.[234] The UAE contended that certificates of nationality issued by Italy at best constituted *prima facie* evidence of nationality and that the tribunal had the power to determine issues of

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230 *Case concerning the payment of various Serbian loans issued in France, Permanent Court of International Justice*, 12 July 1929, PCIJ Reports, Ser. A., No. 20, 1929, **Exhibit CLA-0056**, p. 36 para. [105]; *See also Case concerning the payment in gold of Brazilian federal loans contracted in France*, Permanent Court of International Justice, 12 July 1929, PCIJ Reports, Ser. A., No. 21, 1929, **Exhibit CLA-0057**, pp. 27-28.

231 Judgment of the SAC dated 15 November 2016 together with a legally certified English translation of the judgment, **Exhibit CLA-0070**, pp. 8-9.

232 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, **Exhibit RLA-0015**, para. 26.

233 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, **Exhibit RLA-0015**, para. 26.

234 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, **Exhibit RLA-0015**, paras. 14, 38.

disputed nationality.[235] The UAE submitted that the certificate of nationality issued by the Italian Consulate General in Istanbul could not be relied on because it was issued by the Italian authorities without knowledge of all the relevant facts, particularly that Mr Soufraki had become a Canadian citizen in 1991.[236] The *Soufraki* tribunal held that it was competent to determine whether claimant was a national of Italy for the purposes of international law,[237] noting that "[i]t is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality."[238] The tribunal further stated:

> But it is no less accepted that when, in international arbitral or judicial proceedings, the nationality of a person is challenged, the international tribunal is competent to pass upon that challenge. It will accord great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities. But it will in the end decide for itself whether, on the facts and law before it, the person whose nationality is at issue was or was not a national of the State in question and when, and what follows from the finding.[239]

161. The *Soufraki* tribunal accepted certificates of nationality only as "*prima facie*" evidence of claimant's Italian nationality. It found that there was no evidence that any Italian official who issued the nationality documents in the case had undertaken any inquiry regarding whether Mr Soufraki had established his residence in Italy.[240] Accordingly, the tribunal accepted the UAE's jurisdictional objection. The tribunal made this decision despite the fact that Mr Soufraki might not have been aware of the loss (and could not have informed the

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235 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, **Exhibit RLA-0015**, para. 34.

236 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, **Exhibit RLA-0015**, paras. 35, 39.

237 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, **Exhibit RLA-0015**, para. 21.

238 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, para. 55. *See also Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, **Exhibit RLA-0031**, paras. 151-153, 192-193 ("The Tribunal must determine the nationality of the Claimants. Application of international law principles requires an application of the Egyptian nationality laws with reference to international law as may be appropriate in the circumstances. Both Egyptian law and the practice of international tribunals is that the documents referred to by the Respondent evidencing the nationality of the Claimants are *prima facie* evidence only. While such documents are relevant they do not alleviate the requirement on the Tribunal to apply the Egyptian nationality law, which is the only means of determining Egyptian nationality."); *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic* (UNCITRAL) Decision on Jurisdiction, 30 April 2010, **Exhibit CLA-0055**, para. 119 ("Indeed, it is a well-established principle of international law that each State is entitled to determine the body of its nationals in accordance with its national law.").

239 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, para. 55.

240 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, **Exhibit RLA-0015**, paras. 66, 68.

authorities) of his Italian nationality.[241]

162. Pursuant to Article 52 of the ICSID Convention, Mr Soufraki submitted a request for annulment, which was decided on 5 June 2007.[242] Recalling the principle of *competence-competence*,[243] the *Soufraki* annulment committee held that a state does not have the last word on nationality when a jurisdictional question is raised before an international tribunal concerning the interpretation of national law.[244] The annulment committee opined that official government nationality documents "constitute *prima facie* – not conclusive – evidence, and are subject to rebuttal."[245] The power to investigate nationality, even in the presence of such documents, extends not only to cases of fraud, but also to cases of mistake.[246] The annulment committee rejected the idea that a tribunal should "accept a nationality based on a patently (or facially) erroneous application of national law by the national official issuing a nationality certificate, for international purposes;"[247] *albeit* noting that it is only "in exceptional cases – like the case under scrutiny – that ICSID tribunals have to review nationality documentation issued by state officials."[248]

163. In *Micula v. Romania*, in order to establish the claimants' Swedish citizenship and the tribunal's jurisdiction *ratione personae*, the claimants submitted certificates of naturalization for the Micula brothers.[249] The claimants informed the tribunal that the Swedish Migration Board had confirmed the Swedish citizenship of the Micula brothers in a letter.[250] The *Micula*

241 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, **Exhibit RLA-0016**, para. 17; *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, **Exhibit RLA-0015**, paras. 51-52, 67.

242 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, **Exhibit RLA-0016**.

243 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, **Exhibit RLA-0016**, para. 50.

244 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, **Exhibit RLA-0016**, paras. 59, 64.

245 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, **Exhibit RLA-0016**, para. 76.

246 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, **Exhibit RLA-0016**, para. 70.

247 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, **Exhibit RLA-0016**, para. 61.

248 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, **Exhibit RLA-0016**, para. 28; *See also Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, **Exhibit RLA-0032**, para. 318.

249 *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, **Exhibit RLA-0030**, para. 76.

250 *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, **Exhibit RLA-0030**, para. 77.

tribunal held that "there exists a presumption in favour of the validity of a State's conferment of nationality. The threshold to overcome this presumption is high."[251] The tribunal ruled that it would only interfere in the decision of Swedish authorities if there were "reasons of real importance to doubt the accuracy and thoroughness of the enquiry that was made by the Swedish authorities at the time,"[252] "if there was convincing and decisive evidence that Viorel Micula [the claimant]'s acquisition of Swedish nationality was fraudulent or at least resulted from a material error."[253] It was the responsibility of the respondent to "make such showing", not merely cast doubts on decisions taken by the domestic authorities.[254]

164. In summary, it is within the powers of and incumbent upon an international tribunal being a judge of its own competence to examine independently issues of nationality for the purposes of international law. However, at the same time, domestic determinations of nationality constitute *prima facie* evidence that generates a presumption of nationality that must be rebutted.[255] Neither Party has identified a case in the realm of investment arbitration in which the decision of the highest court of a State on a question relevant to the arbitration has been disregarded by an investment tribunal.[256] Claimant has cited decisions of international courts that have deferred to the determination of a State's highest court.[257]

165. The task of the Tribunal is to determine whether Claimant was a Finnish national according to Finnish law from the time of the alleged breaches of the BITs occurred until the initiation of these arbitral proceedings. The Tribunal finds that there is *prima facie* evidence that Claimant was a Finnish national from the time of the 1971 Presidential Decree until the determination of the FIS in 2013, as held in the SAC Judgment.

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251 *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, **Exhibit RLA-0030**, para. 87.

252 *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, **Exhibit RLA-0030**, para. 94.

253 *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, **Exhibit RLA-0030**, para. 95.

254 *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, **Exhibit RLA-0030**, para. 95.

255 *Nottebohm Case* (*Liechtenstein v. Guatemala*); Second Phase, International Court of Justice, 6 April 1955, p. 20: "it does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection…it is international law which determines whether a State is entitled to exercise protection and to seize the Court"; Christopher Dugan, *et. al.*, Investor-State Arbitration (2008) p. 298.

256 Jurisdiction Hearing, Day 2, pp. 231:21-232:4 (Respondent); Claimant's Rejoinder, para. 50.

257 *Case concerning the payment of various Serbian loans issued in France*, Permanent Court of International Justice, 12 July 1929, PCIJ Reports, Ser. A., No. 20, 1929, **Exhibit CLA-0056**; *Case concerning the payment in gold of Brazilian federal loans contracted in France*, Permanent Court of International Justice, 12 July 1929, PCIJ Reports, Ser. A., No. 21, 1929, **Exhibit CLA-0057**.

166. Respondent contends that the absence of precedent should not bar a tribunal from departing from the findings of a State's highest court where there exist valid reasons for doing so. The Tribunal agrees and might depart from the *prima facie* presumption of nationality set out above if there were reasons to do so. The Tribunal notes that the arbitral jurisprudence set out above has set a high bar for departing from the conclusions of a national authority on a claimant's nationality, a showing of fraud, or material error. Below, the Tribunal considers whether such circumstances are made out with respect to the SAC Judgment.

167. As to the relevance of the holdings in *Soufraki* and *Micula*, the respective tribunals in those cases were called on to identify national law by reviewing interpretations of executive decisions interpreting and applying national law. Such executive decisions, in general, are not final but open for judicial review under the laws of the State concerned. By contrast, in the instant case, this Tribunal is called upon to identify national law by reference to the judgment of the highest judicial branch whose decisions are final under Finnish law. In *Brazilian Federal Loans*, the Permanent Court of International Justice ruled that:

> Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.
>
> It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied; this would seem to be contrary to the whole theory on which the application of municipal law is based.[258]

168. *A fortiori*, when the decision of the national court is at the highest instance and, rather than making a single decision, is clearly laying down the law for the domestic institutions subject to its jurisdiction.

169. Respondent makes no allegation of fraud, but rather points to several alleged irregularities in the SAC Judgment. First, Respondent suggests that the SAC Judgment departs from well-established case law and is influenced by non-legal considerations. Second, Respondent argues that the decisions of the FIS and Helsinki Administrative Court should be followed because the SAC did not criticise those decisions. Third, Respondent also contends that the SAC Judgment

258 *Case concerning the payment in gold of Brazilian federal loans contracted in France*, Permanent Court of International Justice, 12 July 1929, PCIJ Reports, Ser. A., No. 21, 1929, **Exhibit CLA-0057**, paras. [80-81] (emphasis added).

did not consider Finnish law and incorrectly employed a balancing approach engaging the legitimate expectations of Claimant, even though Claimant had failed to inform Finnish authorities of his Egyptian nationality. Fourth, Respondent contends that the decision of the SAC was influenced by a desire to keep this arbitration alive. Fifth, Respondent alleges that the SAC was unduly influenced by the decision in Ms A's case.

170. The Tribunal finds that the SAC's 20-page decision is a reasoned order that provides a cogent interpretation of Finnish nationality law as it applies to Claimant's circumstances. The SAC Judgment refers to various provisions of the 2003 Nationality Act and 1968 Nationality Act, and clearly determines that the requirements of Section 8 of the 1968 Nationality Act were not met because Claimant had not taken on Egyptian nationality of his own free will.[259] Therefore, it cannot be said that the SAC Judgment is not based on Finnish law. The Tribunal accepts the submission made by Claimant and Claimant's experts that the principle of legitimate expectations existed as a principle in Finnish law before 2004. There is nothing on the face of the SAC Judgment or elsewhere in the record that supports an inference that the court was unduly influenced by non-legal principles, any particular domestic proceedings, or by the existence of this arbitration.

171. The Tribunal notes that the SAC Judgment is final and binding as a matter of Finnish law and cannot be appealed. Moreover, the SAC is the proper court of appeal from the Helsinki Administrative Court and the FIS. Having considered the applicable law and the history of the case, the SAC has "repealed" the prior decisions of the Helsinki Administrative Court and FIS.[260] The Finnish population information system has been updated to reflect the findings of the SAC Judgment.[261] Accordingly, the Tribunal sees no reason to rely upon the analysis of Claimant's nationality conducted by the FIS and Helsinki Administrative Court.

172. The Tribunal is of the view that Respondent's criticisms of the SAC Judgment do not identify exceptional circumstances that rise to the level of fraud or material error and justify departing from the SAC Judgment. The Tribunal notes that Respondent has cited to a number of cases in support of its position that the findings of the SAC Judgment should not be followed and that the conclusions of the SAC should be further examined by this Tribunal. However, the cases relied upon by Respondent in which tribunals have further examined certificates of nationality

259 Judgment of the Supreme Administrative Court dated 15 November 2016 together with a legally certified English translation of the judgment, **Exhibit C-0070**, p. 6.

260 Judgment of the Supreme Administrative Court dated 15 November 2016 together with a legally certified English translation of the judgment, **Exhibit C-0070**, p. 8.

261 Extract from the population information system for Mr Bahgat dated 18 November 2016, **Exhibit C-0085**.

have to be distinguished because they involved allegations of fraud in the acquisition of claimant's nationality[262] or falsity of certificates of nationality.[263] Such allegations have not been raised in the present arbitration.

173. Finally, the Tribunal would like to point out that it is not its mandate to act as a review court vis-à-vis the highest Finnish administrative court. This precludes the Tribunal from scrutinizing the SAC Judgment from the point of view of Finnish national law, unless there have been allegations such as fraud.

174. Accordingly, the Tribunal determines that it will follow the findings of the SAC Judgment concerning Claimant's Finnish nationality. The Tribunal determines that for the purposes of this arbitration, Claimant was a Finnish national from 1971 until 2013 (as held in the SAC Judgment).

2. If the Tribunal accepts the findings of the SAC Judgment, whether the SAC Judgment establishes that Claimant had Finnish nationality at all relevant times for this Tribunal to have jurisdiction *ratione personae*

Respondent's Position

175. Respondent maintains that, even if the Tribunal were to accept the SAC Judgment, the SAC Judgment does not establish that Claimant was a Finnish national at the time of the alleged breaches of the BIT or at the time of the Notice of Arbitration.[264]

176. Respondent states that, although the BITs do not state when the investor must satisfy their conditions *ratione personae*, it is well established that nationality requirements of the BIT must be met both on the date of the consent to arbitration as well as at the time of the alleged breaches of the treaty concerned.[265] Respondent notes that some tribunals have even endorsed a "continuous nationality" requirement, which requires an investor to have continuous national

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262 *Salem Case (Egypt/USA)*, 8 June 1932, UN Reports of International Arbitral Awards, Vol. 2, **Exhibit RLA-0029**, p. 1185 ("The judgment of a national court may be indispensable to engender the legal effects of such a fraud under national law, but nevertheless in a litigation between States regarding the nationality of a person the right of one State to contest, as acquired by fraud, the nationality claimed by the other State cannot depend on the decision of the national courts of this State.").

263 *Case of Crisanto Medina & Sons v. Costa Rica, decision of the Umpire, Commander Bertinatti (USA v Costa Rica)*, 31 December 1862, U.N. Rep., Vol. XXIX, pp.75- 78, **Exhibit RLA-0078**, p. 76; *Flutie cases*, 1903-1905, U.N. Rep., Vol. IX pp.148-155, **Exhibit RLA-0076**, pp. 154-155.

264 Respondent's Reply Memorial on Jurisdiction, para. 28.

265 Respondent's Reply Memorial on Jurisdiction, para. 22, *citing* Z. Douglas, The International Law of Investment Claims (2009), **Exhibit RLA-0034**, p. 295; *Victor Pey Casado* et. al. *v. the Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, **Exhibit RLA-0014**; *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, Partial Dissenting Opinion of Prof. Orrego Vicuña, 11 April 2007, **Exhibit RLA-0031**, pp. 65-66.

identity from the date of events giving rise to the claim until the date the claim is resolved.[266] Respondent therefore maintains that Claimant must establish that he was a Finnish national at the time he initiated this arbitration (i.e. 8 July 2011, when the Notice of Arbitration was filed), as well as on the date of the alleged breaches of the BITs (i.e. 9 February 2000).[267]

177. First, Respondent argues that the SAC Judgment only determines Claimant's Finnish nationality as of 23 April 2013, but not between 1997 and 2013.[268] Respondent emphasises that the SAC did not take a position on when the legitimate expectation of Claimant's Finnish nationality commenced.[269] Further, Respondent distinguishes 'nationality' under Finnish nationality law, which describes whether a person is a Finnish national, from 'nationality status', which refers to a decision of the FIS and which has a constitutive effect on a person's nationality.[270] Respondent argues that the SAC Judgment's dictum that refers to the nationality status of the Claimant is to be understood as a judicial affirmation that the determination of Claimant's nationality status as a Finnish national by the FIS had not changed between 1997 and 2013 because the FIS was not called upon to re-determine Claimant's nationality status in the meantime. Moreover, the SAC did not make any determinations as to the nationality status of the Claimant between September 1997 and April 2013.[271] Respondent contests Claimant's allegations that it does not refer to the dispositive parts of the SAC Judgment and maintains that Respondent has extensively analysed the SAC's reasoning.[272]

178. Second, on the question of Claimant's nationality between 1997 and 2013, Respondent states that Claimant's legitimate expectations as to his Finnish nationality could only have arisen in 2012 or 2013. Respondent notes that the SAC decided two similar cases to that of the Claimant's in 2012, both of which confirmed the automatic loss of Finnish nationality under the 1968 Nationality Act. In Mrs B's case, she was considered a Finnish national only in 2011 after her application for re-acquisition of Finnish nationality under the 2003 Nationality Act. Respondent states that accordingly, Claimant could not invoke the doctrine of legitimate expectations prior to 2012-2013 and thus could not have reacquired Finnish nationality by

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266 Respondent's Reply Memorial on Jurisdiction, para. 25, *citing Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, **Exhibit RLA-0038**, para. 225.

267 Respondent's Reply Memorial on Jurisdiction, para. 26.

268 Respondent's Reply Memorial on Jurisdiction, para. 51, *citing* Judgment of the SAC dated 15 November 2016, **Exhibit R-0025**, p. 9.

269 Respondent's Reply Memorial on Jurisdiction, para. 52.

270 Respondent's Reply Memorial on Jurisdiction, para. 53.

271 Respondent's Reply Memorial on Jurisdiction, paras. 53-54.

272 Jurisdiction Hearing, Day 2, pp. 223:25-224:12; 263:15-18.

operation of this principle earlier than 2012-2013.[273] Alternatively, Respondent argues that the earliest point at which Claimant's legitimate expectation of Finnish nationality could have arisen is in 2004, as the doctrine of legitimate expectations was only introduced in the Finnish legal system by Section 6 of the Administrative Procedure Act, which came into force on 1 January 2004.[274] The SAC could not have delivered a decision based on Claimant's legitimate expectations before 2004.[275] Moreover, Respondent suggests that the 2003 Nationality Act allowing for the re-acquisition of Finnish nationality only entered into force on 1 July 2003 and, therefore, Claimant could not have had a legitimate expectation of Finnish nationality before its re-acquisition was permitted by law.[276]

Claimant's Position

179. Claimant agrees that, in order to bring this arbitration, he must have been a Finnish national on the date of consent to arbitration and on the date of the breach of the 1980 and 2004 BITs. Claimant notes that he was indeed a Finnish national from February 2000 (the earliest date of Respondent's breaches of the BITs) and on 3 November 2011 (when the Claimant filed his Notice of Arbitration).[277]

180. Claimant observes that it is common ground between the Parties that the 1980 and 2004 BITs determine who is a 'national' or 'investor' based on the law of the relevant contracting Party. Therefore, Mr Bahgat's Finnish nationality is a matter of Finnish law.[278] Claimant contends that in plain language, the SAC clearly and unambiguously determined that Claimant was in fact a Finnish national between 1997 and 2013.[279] Claimant submits that:

> Mr Bahgat was a Finnish citizen upon being granted Finnish citizenship by presidential decree in 1971; he continued to be a Finnish citizen when he formally renounced Egyptian nationality in 1980; he continued to be a Finnish citizen when Egypt purportedly reinstated his Egyptian nationality in 1997; and he continued to be a Finnish citizen in April 2013.[280]

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273 Respondent's Reply Memorial on Jurisdiction, paras. 57, 60.
274 Respondent's Reply Memorial on Jurisdiction, paras. 61-62.
275 Respondent's Reply Memorial on Jurisdiction, para. 63.
276 Respondent's Reply Memorial on Jurisdiction, para. 65.
277 Claimant's Rejoinder, para. 15.
278 Claimant's Rejoinder, paras. 16-18, *citing* Article 1.2(a), 1980 BIT, **CLA-0001**; Article 1.3(a), 2004 BIT, **CLA-0002**. Claimant also relies on Respondent's Request for Bifurcation dated 26 January 2013, paras. 36-41 and 76; Respondent's Answer to the Request for Provisional Measures, para. 61.
279 Claimant's Rejoinder, para. 20, *citing* Judgment of the SAC dated 15 November 2016 together with a legally certified English translation of the judgment, **Exhibit C-0070**, pp. 8-9; Letter from Respondent to the Tribunal dated 11 January 2017, p. 1 ("the Claimant has been a Finnish national since 1971").
280 Claimant's Rejoinder, para. 21, *citing* Front page of the electronic version of the SAC Judgment – KHO:2016:178, **Exhibit C-0077**.

181. Claimant contests Respondent's allegations that the SAC Judgment provides no view on whether Claimant was a Finnish national between 1997 and 2013.

182. First, Claimant contends that the Directorate of Immigration (the predecessor of the FIS) confirmed Mr Bahgat's Finnish nationality in March 2000.[281] Claimant submits that a Finnish court in 2010 would likely have arrived at the same conclusion.[282]

183. Second, Claimant argues that Respondent's distinction between 'nationality' and 'nationality status' is artificial; there cannot be nationality without nationality status and vice versa.[283] Claimant submits that in making this argument, Respondent's expert does not engage seriously with the dispositive portions of the SAC Judgment.[284] Claimant objects to Respondent's expert referring to the operative part of the SAC Judgment as "dicta": dicta does not exist as a concept in Finnish law and in any event, the operative part of the decision would not constitute dicta.[285]

184. Third, Claimant suggests that if the Tribunal adopts Respondent's reading of the SAC Judgment, the Tribunal would have to speculate as to what a Finnish court seized with the question of Mr Bahgat's nationality at the date of the breach of the BITs may have decided based on Mr Bahgat's legitimate expectations at that time.[286] This would leave the judgment open to endless challenges. Therefore, Respondent's reading of the SAC Judgment cannot be adopted.

Tribunal's Analysis

185. The Parties agree that in order for Claimant to bring a claim under the BITs, he must have been a Finnish national at the time of the alleged violation of the BITs in 2000 as well as in 2011 when the Notice of Arbitration was filed.

186. The Tribunal has determined in paragraph 174 above that it will follow the determination of the SAC concerning Claimant's nationality. The operative portion of the SAC Judgment in Claimant's translation states that "Claimant's citizenship status as a Finnish citizen has not changed from the time of receiving Finnish citizenship in 1971, up to the decision of the [FIS]".[287] The same section of the SAC Judgment in Respondent's translation reads:

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281 Claimant's Rejoinder, para. 29, *citing* Correspondence between the Finnish authorities regarding Mr Bahgat's arrest, 15 March 2000 to 24 June 2002, **Exhibit C-0065**, p. 1.
282 Claimant's Rejoinder, para. 34.
283 Claimant's Rejoinder, para. 30.
284 Jurisdiction Hearing, Day 1, p. 175:24-25.
285 Jurisdiction Hearing, Day 1, p. 180:7-20.
286 Claimant's Rejoinder, para. 33.
287 Judgment of the SAC dated 15 November 2016 together with a legally certified English translation of the judgment, **Exhibit C-0070**, p. 9.

"[Claimant's] nationality status as a Finnish citizen has not changed since he obtained Finnish citizenship in 1971 by the time of the decision of the [FIS]."[288] The FIS decided on 23 April 2013 that Claimant was an Egyptian national.

187. The Tribunal considers that the SAC Judgment is clear that Claimant was a Finnish national from 1971 until 2013 when the FIS made its determination regarding Claimant's nationality. Under Finnish law, as authoritatively held and applied by the SAC, Claimant was a Finnish national from the time that the alleged violations of the BITs occurred up to the moment that the Notice of Arbitration was filed.

3. Whether Claimant automatically lost his Finnish nationality by operation of Finnish Law

Respondent's Position

188. Respondent contends that Claimant automatically lost his Finnish nationality under Finnish law on acquiring Egyptian nationality in 1997. Finnish law did not permit multiple nationality. Therefore, he was not a Finnish national or a Finnish-Egyptian dual national at the relevant times and cannot claim investment protection under the BITs.

189. Respondent explains that the 1968 Nationality Act took a hostile attitude towards multiple nationalities.[289] For one, a foreigner acquiring Finnish nationality was required to renounce previous nationalities.[290] Second, Section 8 of the 1968 Nationality Act provided that a Finnish national who acquired a foreign nationality would *ipso jure* lose his or her Finnish nationality upon receipt of the foreign nationality.[291] Respondent asserts that Section 8 of the 1968 Nationality Act can only be translated as: "A person shall lose his Finnish citizenship: . . . if he acquires the citizenship of another country by application or declaration, or if he has consented to it of his own free will . . . ."[292] Respondent states that Claimant's argument, that loss of Finnish nationality under Section 8 of the 1968 Nationality Act was only conditional and not absolute, is based on a translation of Section 8 which is incorrect.[293] Respondent emphasises that its translation of Section 8 was acquired from an authorised English-Finnish translator,[294]

288 Judgment of the SAC dated 15 November 2016, **Exhibit R-0025**, p. 9.
289 Respondent's Request for Bifurcation, para. 49.
290 Respondent's Request for Bifurcation, para. 50.
291 Respondent's Request for Bifurcation, paras. 51, 52, 57; Jurisdiction Hearing, Day 2, p. 222:17-24.
292 Respondent's Request for Bifurcation, paras. 84-89; Law No. 401 for the year 1968 concerning the old Finnish Nationality Act amended by 584 for the year 1984, **Exhibit RLA-0003**.
293 Respondent's Request for Bifurcation, paras. 85-86.
294 Respondent's Request for Bifurcation, para. 87, *citing* Certified Translation of Sections 8 and 9 of the 1968 Finnish Nationality Act (401/1968), **Exhibit RLA-0017**.

whilst Claimant's translation was acquired from a Dutch translation agency.[295] Respondent draws further support from a translation of the legislation that is available on the website of the French Ministry of Culture, which was not prepared for the purposes of this arbitration.[296]

190. Although Respondent acknowledges that the 1968 Nationality Act admitted multiple nationalities under certain limited circumstances, it submits that these circumstances are absent from Claimant's case.[297] Respondent argues that the 1971 Presidential Decree does not create an exception to the application of the Nationality Act as Claimant contends, but that the 1971 Presidential Decree has to "apply and defer to the law."[298]

191. Respondent states that Finnish nationality law began permitting multiple nationalities in 2003 when the 2003 Nationality Act replaced the 1968 Nationality Act.[299] The 2003 Nationality Act afforded persons that lost their Finnish nationality pursuant to Section 8 of the 1968 Nationality Act the possibility of reacquiring Finnish nationality by way of a simple declaration.[300] Section 60 of the 2003 Nationality Act provided in relevant part:

> Section 60 (Declaration for the acquisition of citizenship to be made within a fixed period of time)
>
> (1) A former Finnish citizen will acquire Finnish citizenship by declaration if he or she has lost Finnish citizenship before the entry into force of this Act under:
>
> . . .
>
> 3) section 8 of the Nationality Act (401/1968);
>
> . . . .

192. The declaration procedure under Section 60 of the 2003 Nationality Act was initially limited in time until 2008, but after 2011 it became permanently available.[301] Claimant could have theoretically held dual nationality by making use of the declaration procedure between 2003 and 2008 and any time after 2011. However, Respondent submits that Claimant did not avail himself of such option.[302]

193. Respondent contends that governmental authorities and scholars confirm that the loss of

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295 Respondent's Request for Bifurcation, para. 89.
296 Respondent's Request for Bifurcation, para. 88, *citing* Law No. 401 for the year 1968 concerning the old Finnish Nationality Act amended by 584 for the year 1984, **Exhibit RLA-0003**.
297 Respondent's Request for Bifurcation, para. 65.
298 Jurisdiction Hearing, Day 1, p. 33:7-16.
299 Respondent's Request for Bifurcation, para. 67.
300 Section 60(1) of the 2003 Nationality Act.
301 Respondent's Request for Bifurcation, para. 70.
302 Respondent's Request for Bifurcation, para. 78.

nationality under Section 8 takes place by operation of law and neither required an act of renunciation by the individual concerned nor a decision by Finnish authorities.[303] Therefore, Finnish authorities were not necessarily always aware when a Finnish national had lost Finnish nationality.[304] Respondent relies on the case of Mrs B, a Finnish national who had acquired British nationality in 1974 but was able to renew her Finnish passport because her acquisition of British nationality was not noted by the Finnish authorities. In 2009, Finnish authorities became aware that Mrs B had acquired British nationality. The Finnish authorities decided that Mrs B lost her Finnish nationality in 1974, a view that was upheld by the SAC.[305]

194. Separate from Section 8, Respondent contends that Section 9 of the 1968 Nationality Act allows for an individual to be released from Finnish nationality by application.[306] Respondent takes the view that the existence of Section 9 did not imply that Finnish nationality could not be lost automatically on the basis of Section 8.[307] Because Claimant satisfied the conditions of Section 8, no separate application under Section 9 was required.[308] Respondent suggests that Claimant confused separate concepts of Finnish nationality law: loss of nationality and release from nationality, by alleging that a separate application under Section 9 of the 1968 Nationality Act was required in order for a Finnish national to lose nationality.[309] Respondent maintains that Section 9 exists because some nations require that the applicant withdraw his or her current nationality as a precondition to granting nationality.[310]

195. Respondent submits that by acquiring Egyptian nationality on 28 September 1997, Claimant lost his Finnish nationality by operation of Section 8 of the 1968 Nationality Act.[311] On the basis that Finnish nationality law did not allow for dual nationality at the time that Claimant acquired Egyptian nationality, it was legally impossible for Claimant to have been a Finnish national as well as an Egyptian national from 1997 onwards.

196. Respondent argues that it is undisputed that Claimant himself applied for the reacquisition of his Egyptian nationality on 1 September 1997[312] and disputes any suggestion that Claimant was

303 Respondent's Request for Bifurcation, paras. 52, 53, 90-94.
304 Respondent's Request for Bifurcation, para. 56.
305 Respondent's Request for Bifurcation, para. 59, *citing* Scheinin Expert Report, para. 37.
306 Respondent's Request for Bifurcation, para. 63.
307 Respondent's Request for Bifurcation, para. 90.
308 Respondent's Request for Bifurcation, para. 93.
309 Respondent's Request for Bifurcation, para. 95.
310 Respondent's Request for Bifurcation, para. 97.
311 Respondent's Request for Bifurcation, paras. 72-75.
312 Respondent's Request for Bifurcation, para. 20.

coerced into regaining his Egyptian nationality.[313] Respondent points out that this has been confirmed by the Helsinki Administrative Court and the SAC did not find otherwise.[314]

197. In addition, Respondent argues that an act of coercion would presuppose that Claimant was put under duress. Article 127 of the Egyptian Civil Code describes duress as a situation in which "the person who invokes it has been led to believe, in view of the circumstances, that a serious and imminent danger to life, limb, honour or property threatened him or others."[315] In Respondent's submission, Claimant did not face such a situation of severe threat. He rather followed all the administrative steps for the acquisition of his Egyptian nationality voluntarily, *inter alia*, submitting his father's as well as his own birth certificate to the Egyptian authorities. Respondent contends that Claimant's explanation of the 1 September 1997 Meeting only shows that Claimant chose to take on Egyptian nationality based on Mr Reda's proposals: "this is not duress, this is not enough to be duress."[316] Respondent notes that no case of economic duress can be made out because Claimant had invested USD 25,000 in the Project, which was not a significant sum for a businessman of his stature.[317] Respondent also points out that Claimant could have challenged any illegitimate behaviour on the part of the Minister of Industry after his application to reacquire Egyptian nationality, but he refrained from doing so.[318] Respondent alleges that Claimant's description of the events during the 1 September 1997 Meeting have evolved to fit the requirements of Article 127 of the Egyptian Civil Code;[319] observing that several of Mr Reda's alleged threats were not mentioned in Claimant's first witness statement.[320] Moreover, Respondent contends that the reacquisition of Claimant's Egyptian nationality was not a prerequisite for awarding the bid to ADEMCO and that Claimant could have renounced his Egyptian nationality after the Project was awarded to ADEMCO, but he did not do so.[321] To the contrary, Claimant continued to reside and work in Egypt and benefit from his Egyptian nationality.[322]

313 Jurisdiction Hearing, Day 1, p. 59:4-6.
314 Jurisdiction Hearing, Day 1, p. 59:7-9; p. 61:3. Respondent reiterated at the hearing that the Tribunal is not bound by the determination of Finnish courts regarding whether Claimant was coerced to re-acquire Egyptian nationality. Jurisdiction Hearing, Day 1, p. 61:13-15.
315 Respondent's Request for Bifurcation, paras. 127-128, *citing* Mr. Badran Expert Report dated 23 January 2013, paras. 42, 46, 52(5), and 52(8)
316 Jurisdiction Hearing, Day 1, p. 71:12-13.
317 Jurisdiction Hearing, Day 1, p. 71:17-22.
318 Respondent's Request for Bifurcation, para. 128(i)-(ii); Jurisdiction Hearing, Day 1, p. 50:18-24.
319 Jurisdiction Hearing, Day 1, p. 74:5-7.
320 Jurisdiction Hearing, Day 1, p. 74:17-22.
321 Respondent's Request for Bifurcation, para. 128(iii)-(iv).
322 Jurisdiction Hearing, Day 1, p. 74:4-8.

198. According to Respondent, any allegation of coercion by Claimant is disproved by the fact that Claimant made repeated use of his Egyptian nationality after 1997.[323] Respondent mentions, for example, that Claimant used his Egyptian passport for travel purposes; that Claimant applied for the modification of his daughters' birth certificates to reflect they had reacquired Egyptian nationality; and that Claimant was referred to as an Egyptian national in certain articles published by the Middle East Economic Digest.[324] According to Respondent, Claimant even requested the issuance of an Egyptian passport to be valid between 13 October 2004 and 12 October 2011.[325] Further, Respondent notes that although Claimant depicts Egypt as being a totalitarian regime, Claimant's witness statements indicate that he settled there, built a successful business, family life and social circle there,[326] and was reportedly content, for business purposes, to "look Egyptian in Egypt".[327]

199. Respondent reiterates that since 1997, Claimant never mentioned that duress was inflicted on him, not even during his criminal prosecution or imprisonment in Egypt, and that Claimant even relied on his Egyptian nationality during the said criminal proceedings.[328] Consequently, Respondent argues that Claimant "waived any right to argue he was coerced to regain his Egyptian nationality" by his own subsequent conduct.[329] In any event, according to Respondent's Egyptian law expert, there is a limitation period on obtaining the annulment of an act contracted under duress, of three years from the time when the duress ceased.[330] Even assuming that Claimant felt he was under duress as late as June 2005 when he returned to Finland, Claimant's objection is out of time.[331]

200. Respondent contends that the alleged procedural defects in Claimant's application to restore Egyptian nationality do not give Claimant standing to request annulment of the application because, in order to apply for annulment of an administrative action, an applicant must show that the challenged decision harms his or her personal interests. Respondent states that Claimant

323 Respondent's Request for Bifurcation, paras. 23, 126.
324 Respondent's Request for Bifurcation, paras. 20-23, 129, *citing* Cairo's airport records, **Exhibit R-0007**, Application filed by Claimant to have his daughters' birth certificates modified, dated 8 November 1997, **Exhibit R-0009**, and MEED "Aswan Project Marks Mining Milestone", dated 9 October 1998, **Exhibit C-0050.5**.
325 Respondent's Request for Bifurcation, para. 22, *citing* Egyptian passport with a validity period between 13 October 2004 and 12 October 2011, **Exhibit R-0008**.
326 Jurisdiction Hearing, Day 1, p. 70:2-7.
327 Jurisdiction Hearing, Day 1, p. 68:12-13.
328 Respondent's Request for Bifurcation, para. 128(v).
329 Respondent's Request for Bifurcation, para. 130.
330 Jurisdiction Hearing, Day 1, p. 77:7-12, *citing* Mr Badran Expert Report dated 23 January 2013, paras. 42, 52.
331 Jurisdiction Hearing, Day 1, pp. 77:12-78:7.

has not established such harm.[332]

201. Respondent submits that there is no legal basis for Claimant to argue that he cannot be "in a worse position than the one in which he would be if he had not renounced his Egyptian nationality in 1980 . . . ."[333] Claimant freely renounced his Egyptian nationality in 1980 and was not forced to restore his Egyptian nationality in 1997. This does not provide Claimant a legitimate expectation of Finnish nationality.[334]

202. Respondent further argues that Claimant's experts are unreliable and under-qualified, stating that neither Ms Paavola nor Mr Backstrom are recognised in the field of Finnish nationality law or international law. Respondent suggests that Ms Paavola's primary field of research is not relevant to this arbitration and that Mr Backstrom, having known Mr Bahgat since the 1980s, might have been retained because of personal affiliations.[335] Further, Respondent notes that Claimant's experts do not refer to sources of Finnish nationality law outside the Nationality Act and the Nationality Decree.[336]

Claimant's Position

203. Citing the SAC Judgment, Claimant states that it was possible for him to have retained his Finnish nationality upon acquisition of Egyptian nationality in September 1997.[337] Independent of the SAC Judgment, based on Finnish law, Claimant states that he retained his Finnish nationality after September 1997 because (i) the 1968/1984 Nationality Act did not provide for the automatic loss of Finnish nationality upon the acquisition of another nationality and Mr Bahgat's case was a permitted exception to any prohibition on dual nationality;[338] and (ii) the specific requirements of Section 8 were not made out in Claimant's case.

204. Claimant contends that Section 8 of the 1968 Nationality Act may be translated as "[a] person *can* lose his Finnish citizenship" when such person "acquires the citizenship of a foreign country either by application or after giving his/her actual consent to it . . . ."[339] Moreover, Claimant suggests that any loss of Finnish nationality would have to be recognised by a valid

332 Jurisdiction Hearing, Day 1, pp. 79:16-80:3.
333 Jurisdiction Hearing, Day 2, pp. 234:20-24.
334 Jurisdiction Hearing, Day 2, pp. 234:19-235:24.
335 Respondent's Request for Bifurcation, para. 119.
336 Respondent's Request for Bifurcation, para. 120, 123, *citing* Backstrom Expert Report 2, p. 12; Paavola Expert Report 1, p. 4.
337 Respondent's Request for Bifurcation, para. 77; Claimant's Rejoinder, para. 104.
338 Claimant's Counter-Memorial on Jurisdiction, paras. 3.4-3.6, 3.10-3.11; Claimant's Rejoinder, para. 105.
339 Code of Statutes of Finland, **Exhibit C-0007**, section 8.

official act of Finland. According to Claimant's expert Mr Ojanen,[340] Section 8 of the 1968 Nationality Act does not stipulate an automatic loss of Claimant's Finnish nationality because the acquisition of the foreign nationality must occur voluntarily and the competent Finnish authorities are under an obligation to establish that the individual consented to the acquisition of foreign nationality.[341] Further, Mr Ojanen notes that Section 8 of the 1968 Nationality Act has to be read together with Section 9 of the 1968 Nationality Act, which provides a system by which a Finnish dual or multiple national can be released from his or her Finnish nationality.[342] Claimant relies on the text of Section 9 which refers to a Finnish national being "released from his Finnish nationality," text that would be rendered redundant if Finish authorities were not required to recognise the loss of an individual's Finnish nationality.[343] Therefore, Section 8 of the 1968 Finnish Nationality Act did not stipulate the automatic loss of Finnish nationality.

205. Moreover, Claimant notes that exceptional cases of dual nationality were *de facto* accepted in Finland before 2003.[344] The 1971 Presidential Decree that granted Claimant Finnish nationality expressly recognised his continuing Egyptian nationality and did not make the grant of Finnish nationality conditional upon Mr Bahgat's renunciation of Egyptian nationality:[345] "this decree and cover note confirm that [Claimant] was granted Finnish nationality in 1971 with the right to retain his Egyptian nationality; in other words as a dual national."[346] According to Claimant and his experts, this constituted an exception to the restrictive approach to multiple nationality taken by the 1968 Nationality Act.[347]

206. Claimant's expert, Professor Aarnio, notes that Sections 8 and 9 of the 1968 Nationality Act are at best legally ambiguous regarding loss of nationality and, therefore, they cannot be read as

340 At the Hearing on Jurisdiction, Claimant maintained that the testimony of its experts should be preferred because Claimant's experts are more senior. Professor Ojanen is based in Helsinki while Respondent's expert is based in Italy and has limited experience in addressing nationality issues. Jurisdiction Hearing, Day 1, p. 171:10-23.

341 Claimant's Counter-Memorial on Jurisdiction, para. 3.14, *citing* Mr Ojanen First Expert Opinion, at 24; Claimant's Rejoinder, para. 113; Claimant's Rejoinder, para. 113, *citing* Mr Ojanen Second Expert Opinion, para. 22; Claimant's Rejoinder, para. 158.

342 Claimant's Counter-Memorial on Jurisdiction, para. 3.14, *citing* Mr Ojanen First Expert Opinion, at 24; Claimant's Rejoinder, para. 113; Claimant's Rejoinder, para. 113, *citing* Mr Ojanen Second Expert Opinion, para. 22.

343 Claimant's Rejoinder, para. 161, *citing* Section 9, Nationality Act 1968/1984; English translation provided in Ojanen First Expert Opinion, para. 56.

344 Claimant's Counter-Memorial on Jurisdiction, para. 3.11; *see also* Claimant's Rejoinder, para. 106, *citing* "Number of Finns holding dual citizenship has multiplied threefold in ten years", *Helsingin Sanomat – International Edition*, accessed 11 February 2013, **Exhibit C-0069**; Jurisdiction Hearing, Day 1, p. 129:9-20.

345 Claimant's Rejoinder, para. 100, *citing* President's Decree dated 12 February 1971, **Exhibit C-0062**, p. 1; Jurisdiction Hearing, Day 1, p. 130:2-6.

346 Jurisdiction Hearing, Day 1, pp. 144:20-145:1.

347 Claimant's Rejoinder, para. 111, *citing* Mr Ojanen Second Expert Opinion, para. 19.

permitting a conclusion as absolute as that a Finnish citizen would automatically lose Finnish citizenship upon application for foreign citizenship.[348] Claimant relies on a decision of the Finnish Parliamentary Ombudsman which states that competent Finnish authorities must clarify the circumstances of the acquisition of nationality of another country and that, in unclear circumstances, Finnish authorities should decide the matter to the advantage of the individual.[349] Claimant argues that Respondent's expert, Professor Scheinin contradicts himself on whether Finnish law allowed dual nationality, stating first that the 1968 Nationality Act rejected dual nationality and later that it allowed for dual nationality in limited circumstances.[350]

207. In any event, Claimant argues that Section 8 of the 1968/1985 Finnish Nationality Act did not apply to him because (i) in 1997, he did not 'acquire' Egyptian nationality as required by Section 8; and (ii) Mr Bahgat did not validly consent to the reinstatement of his Egyptian nationality.[351]

208. Claimant states that he did not "'acquire' or 'consent' to Egyptian nationality as matter of Egyptian law in 1997, but rather 'reinstated' that nationality thereby returning to the *status quo ante* of his dual nationality" that existed between 1971 and 1980.[352] Egyptian law distinguishes between acquisition and restoration of Egyptian nationality. The concept of restoration is alien to Finnish law and does not amount to an acquisition of nationality for the purposes of Section 8, which states that "[a] person loses Finnish nationality . . . if he acquires the nationality of a foreign country . . . ."[353] Claimant states that Finnish authorities accordingly regarded Mr Bahgat as a dual national, irrespective of whether he had lost or regained that status since 1971, and Mr Bahgat also continued to confirm his Finnish nationality after 1997.[354] Claimant suggests that Respondent's assertion that Claimant automatically lost his Finnish nationality on 28 September 1997 when Egypt reinstated Claimant's nationality would effectively penalise

348 Claimant's Counter-Memorial on Jurisdiction, para. 3.15; *citing* Mr Aarnio First Expert Report, pp. 36-37.
349 Claimant's Counter-Memorial on Jurisdiction, para. 3.31, *citing* Mr Ojanen First Expert Opinion, paras. 46-54.
350 Jurisdiction Hearing, Day 1, pp. 174:1-175:13, *citing* Prof. Scheinin First Expert Report, paras. 21, 31, 35, Prof. Scheinin Second Expert Report, para. 3.
351 Claimant's Rejoinder, paras. 119-120.
352 Claimant's Rejoinder, paras. 117, 121.
353 Claimant's Rejoinder, paras. 118-120, *citing* Certified Translation of Sections 8 and 9 of the 1968 Finnish Nationality Act (401/1968), **Exhibit RLA-0017** (emphasis added).
354 Claimant's Rejoinder, para. 123. Claimant argues that the SAC Judgment supports this approach: Claimant's Rejoinder, para. 124, *citing* Decision of the Helsinki Administrative Court, Case no. 15/0033/5, 26 January 2015, **Exhibit R-0014**, p. 6. Claimant notes that the SAC proceeds to conclude that Mr Bahgat "thus" lost Finnish nationality, apparently contradicting its immediately preceding finding.

Claimant for having renounced his Egyptian nationality in 1980. It cannot be correct that if Claimant had never renounced and regained his Egyptian nationality, he would be Finnish for the purposes of the BIT.[355]

209. Second, for Section 8 to operate, Claimant submits that it is critical to determine whether Claimant made an application seeking Egyptian nationality and whether such application was made voluntarily. Claimant states that these conditions were not met.[356]

210. First and foremost, Claimant contends that Egyptian nationality was bestowed on him as a result of Mr Reda coercing him into completing the application form.[357] The alleged coercion exerted on Claimant has already been set out in paragraphs 97-101 above. As a result of the above, Claimant argues that his acceptance of the Egyptian nationality should be regarded as null and of no effect.[358] Claimant states that the evidence adduced by the Respondent to suggest that Egyptian government has never coerced citizenship upon anyone is self-serving and does nothing to specifically rebut Mr Bahgat and Mr El Ashri's testimony.[359]

211. In response to Respondent's argument that Claimant's application for restoration was made after Claimant's project was selected and therefore that there was no imminent danger, one of Claimant's experts states that Claimant had sufficient basis to believe that he was under serious and imminent danger and that he would have suffered severe adverse consequences threatening his freedom, dignity, and wealth if he decided to renounce his Egyptian nationality.[360] Similarly, Claimant contends that a subsequent challenge of any illegitimate behaviour on the part of the Minister of Industry would likely have led to Claimant's unjustified imprisonment.[361]

212. Second, Claimant submits that Mr Reda forced Egyptian citizenship on him even though there was no basis under Egyptian law to require Claimant to hold Egyptian nationality in order to make his investment.[362]

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355 Claimant's Rejoinder, para. 126.
356 Claimant's Rejoinder, para. 114.
357 Claimant's Counter-Memorial on Jurisdiction, paras. 2.9-2.10, 3.18.
358 Claimant's Statement of Claim, para. 2.5; Claimant's Counter-Memorial on Jurisdiction, para. 3.26.
359 Claimant's Rejoinder, para. 132, *citing* Letter from the Egyptian Minister of Trade and Industry to ESLA, 19/20 March 2017, **Exhibit R-0024**, p. 1.
360 Mr Abulmagd's Third Expert Opinion, dated 26 August 2013 ("**Mr Abulmagd's Third Expert Opinion**"), para. 96.
361 Claimant's Counter-Memorial on Jurisdiction, para. 3.33(ii).
362 Claimant's Rejoinder, para. 133.

213. Third, Claimant argues that Mr Bahgat's nationality was restored only to ensure that the Government could interfere in the Project. Accordingly, Mr Reda had no objection to Mr Bahgat retaining his dual nationality. Claimant contends that he continued to use his Finnish nationality to travel for the purposes of the Project.[363] Further to Respondent's allegation that Claimant used his Egyptian passport on a number of occasions after 1997 while travelling, Claimant explains that he had to because of the continuing duress exerted by Respondent.[364] Claimant contends that Respondent had stopped issuing residence visas on his Finnish passport. Claimant believes that, if he had tried to leave Egypt with his Finnish passport, he would have run the risk of the airport police detaining him as an over stayer or illegal immigrant. Therefore, he claims to have had no other option but to use his Egyptian passport for travelling abroad. He emphasises, however, that once he was out of Egypt he used to travel on his Finnish passport.[365]

214. Fourth, Claimant states that Decision Number 10815/1997 must be deemed null and void under Egyptian law because there were several formal defects in the application handed to the Minister of Industry on 1 September 1997. On the one hand, the application lacked certain documents, such as criminal records that are in Claimant's view mandatory under Egyptian law for applying to restore Egyptian nationality.[366] Claimant confirms that he did not submit these at a later date.[367] On the other hand, Claimant asserts that the application was processed by the Minister of Industry who was not authorised to do so under Egyptian law,[368] that his application was not personally signed before a competent authority,[369] and was not signed by PENA.[370] Claimant's expert states that it was unprecedented for an application seeking restoration of Egyptian nationality to be submitted (i) to a person unauthorised to receive such an application; and (ii) without enclosing mandatory supporting documentation.[371] Claimant further submits that "[t]he speed with which the Egyptian Minister of Industries and the Egyptian Ministry of Interior worked together to facilitate the [issuance of Decision Number 10815/1997 within less than four weeks after the receipt of the application], and the procedural irregularities, show that this was by no means a normal application for such a restoration, and provide further evidence

363 Claimant's Rejoinder, para. 137.
364 Claimant's Counter-Memorial on Jurisdiction, para. 3.33(iv); Bahgat WS 3, paras. 21-26.
365 Bahgat WS 3, para. 22.
366 Claimant's Statement of Claim, para. 3.20; Claimant's Rejoinder, para. 149.
367 Claimant's Rejoinder, para. 150.
368 Claimant's Statement of Claim, para. 3.18; Claimant's Rejoinder, para. 147.
369 Claimant's Rejoinder, para. 147.
370 Claimant's Rejoinder, para. 148.
371 Claimant's Counter-Memorial on Jurisdiction, para. 3.21; Jurisdiction Hearing, Day 1, pp. 166:19-167:18.

in support of Claimant's case on coercion."[372] Most crucially, Claimant states that the coercion exercised against him in the reinstatement of his Egyptian nationality constitutes "stress of justifiable fears" and, therefore, meets the test for duress under Section 127 of the Egyptian Civil Code.[373]

215. Claimant invites the Tribunal to undertake its own assessment regarding the validity of the restoration of his Egyptian nationality in 1997, in particular whether the application was voluntary, as the Tribunal has been presented with a *prima facie* case for Claimant's Egyptian nationality, which is fraught with errors constituting extraordinary circumstances, warranting review.[374] Claimant emphasises that the *Pey Casado* tribunal found that an arbitral tribunal can question a State's recognition of a claimant's nationality if it is alleged that the nationality was involuntarily imposed.[375] At the Hearing on Jurisdiction, Claimant pointed out that it would be "bizarre" for the Tribunal to find that Claimant should be denied Finnish nationality because this would leave the Claimant "in a worse position than had he never revoked [his Egyptian nationality in 1980] in the first place."[376] Claimant notes that had he not renounced Egyptian nationality in 1980, he would be a dual national as permitted in the 1971 Presidential Decree.[377] In response to Respondent's allegations that there are inconsistencies in Claimant's witness statements regarding whether he had kept the Finnish authorities informed of his Egyptian nationality, Claimant submits that "the Finnish authorities were kept fully apprised of the situation as regards Mr Bahgat's Egyptian nationality."[378] Claimant points out that Respondent chose not to cross-examine Mr Bahgat during the Hearing on Jurisdiction.[379]

Tribunal's Analysis

a) Claimant's Finnish Nationality

216. First, the Tribunal must determine the existence of Claimant's Finnish nationality at the time of

372 Claimant's Counter-Memorial on Jurisdiction, paras. 3.23; *see also* Claimant's Rejoinder, para. 151; Jurisdiction Hearing, Day 1, p. 166:7-19.

373 Claimant's Counter-Memorial on Jurisdiction, para. 3.19, *citing* Aboulmagd's Third Expert Opinion, para. 74; Claimant's Rejoinder, para. 143. Article 127 of the Egyptian Civil Code states that: "[A] contract is voidable as a result of duress, if one of the parties has contracted under the stress of justifiable fear unlawfully instilled in him by the other party. Fear is deemed to be justified when the party who invokes it has been led to believe, based on the circumstances, that serious and imminent danger threatens his or others life, body, dignity, or property."

374 Claimant's Rejoinder, para. 153.

375 Claimant's Rejoinder, para. 155, *citing Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, **Exhibit RLA-0014**, paras. 320-321.

376 Jurisdiction Hearing, Day 1, p. 168:15-19.

377 Jurisdiction Hearing, Day 1, pp. 168:1-169:3.

378 Jurisdiction Hearing, Day 1, p. 150:1-3.

379 Jurisdiction Hearing, Day 1, p. 149:17-23.

the alleged breaches of the BITs in the 2000s as well as in 2011 when the Notice of Arbitration was filed. The record indicates that Claimant was born in Egypt[380] and the Parties agree that he was born an Egyptian national.[381] He was granted Finnish nationality in 1971 by way of the 1971 Presidential Decree.[382] Claimant renounced his Egyptian nationality in 1980.[383] In 1997, Claimant allegedly reacquired Egyptian nationality. Respondent maintains that Claimant was not a Finnish national at the relevant times and therefore cannot bring this arbitration. According to Respondent, on the basis of the applicable Finnish law, particularly Sections 8 and 9 of the 1968 Nationality Law, Claimant necessarily lost his Finnish nationality upon acquiring Egyptian nationality in 1997. Claimant considers that he was granted nationality by the 1971 Presidential Decree, which constituted an exception to any restrictive approach to multiple nationality that might be taken under prevailing Finnish nationality legislation. In any case, Claimant argues that the 1968 Nationality Act does not stipulate an automatic loss of Finnish nationality upon the acquisition of another nationality; Finnish authorities are under an obligation to establish that the other nationality was voluntarily acquired by the individual in question. The Tribunal recognises that the SAC has, having considered the applicable Finnish law, held that Claimant was a dual Finnish-Egyptian national at the time that the FIS made its decision regarding Claimant's nationality in 2013. As discussed above in paragraph 174, the Tribunal will defer to the views of the SAC on Claimant's Finnish nationality.

217. The Parties have made submissions concerning the impact that Claimant's potential dual Egyptian-Finnish nationality might have on this Tribunal's jurisdiction *ratione personae*. Therefore, the Tribunal considers below whether Claimant acquired Egyptian nationality in 1997 (and thus, if he was, in fact, a dual Egyptian-Finnish national), and whether there is a bar on dual Egyptian-Finnish nationals bringing claims under the BITs.

b) Claimant's Egyptian Nationality

218. The Parties disagree on whether Claimant validly reacquired Egyptian nationality in 1997. The Tribunal, in particular, takes note of the alleged procedural defects associated with Claimant's re-acquisition of Egyptian nationality in 1997. Claimant has submitted that: (i) Mr Reda, the Minister of Industry, received Claimant's nationality application although his office did not have the power to do so; (ii) his application lacked required supporting documentation, such as

380 Extract from the Finnish Population Information System for M. Bahgat dated 18 November 2016, **Exhibit C-0085**.
381 Bahgat WS 2, para. 2.
382 President's Decree dated 12 February 1971, **Exhibit C-0062**.
383 Letter from Nationality Department of the Egyptian Government dated 6 November 1980 with English translation, **Exhibit C-0017**.

his prior criminal records; (iii) his application was not signed before a competent legal authority as required by Egyptian law; and (iv) his application was not signed by PENA as required by Egyptian law.[384]

219. Claimant's expert Professor Aboulmagd states that "[t]he prime factor in determining the proper reinstatement of nationality would depend on whether such reinstatement was made following an absolute compliance with the applicable laws and regulations," including whether the application is made on a Ministry of Interior template application form and accompanied by (i) evidence of acquisition of foreign nationality; (ii) a birth certificates; and (iii) criminal records.[385] He states that the governing laws did not permit any ministerial discretion to waive the legal requirements to submit necessary documents.[386] He also notes that the Minister of Industry was not the competent authority to receive the application.[387] This factor, in conjunction with the application not being signed in front of a PENA officer and lack of supporting documents should have led to the rejection of the application for restoration.[388] The Tribunal notes that Respondent has not contested the procedural irregularities with the application, which call into question the propriety of the restoration of Claimant's Egyptian nationality.

c) Applicable Rules Governing Dual Nationals' Claims

220. Notwithstanding the observations set out above, the Tribunal considers that Claimant can bring this arbitration even if his Egyptian nationality were validly acquired in 1997 and, thus, even if he was a dual Finnish-Egyptian national from 1997 onwards. The criteria for determining an investor's nationality, for purposes of treaty claims such as the present, are supplied by the investment agreements in question.

221. The Tribunal notes that some investment treaties prohibit individuals who hold the nationality of both contracting parties from bringing claims under the treaty. For example, the Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments defines an investor in the case of Canada, as "any natural person possessing the citizenship of Canada in accordance with its laws . . . who makes the investment in the territory of Venezuela and who does not possess the citizenship of

384 *See* above a summary of Claimant's arguments at paragraph 214.
385 Prof. Aboulmagd Third Expert Report, paras. 17, 30.
386 Prof. Aboulmagd Third Expert Report, para. 19.
387 Prof. Aboulmagd Third Expert Report, paras. 20-21.
388 Prof. Aboulmagd Third Expert Report, paras. 19-22.

Venezuela."[389]

222. Significantly, neither of the BITs under which this arbitration has been brought contains a comparable prohibition on claims by dual nationals. Article 1(3) of the 2004 BIT defines "investor" as "any natural person who is a national of either Contracting Party in accordance with its laws . . . ."[390] Article 1(2) of the 1980 BIT states that the term "national" means "[i]n respect of Finland, an individual who is a citizen of Finland according to Finnish law . . . ."[391] The plain text of the BITs only imposes the positive requirement that an individual claimant be a national of the other contracting party, not the negative requirement that the individual claimant is also not a national of the host state.

223. Whether a dual national is able to bring a claim under a treaty is also dependent on the legal framework governing the arbitral forum, to which the Tribunal will now turn. For instance, the ICSID framework contains clear directions in this respect. Article 25(2)(a) of the ICSID Convention states that a "National of another Contracting State . . . does not include any person who on either date also had the nationality of the Contracting State party to the dispute . . . ."[392] According to the commentary on the ICSID Convention:

> The ineligibility of an investor who also possesses the host State's nationality applies irrespective of which of the several nationalities is the effective one. . . . This bar would also apply if consent is based on a treaty. If an investor possesses the nationalities of both States parties to a bilateral investment treaty (BIT), he or she may enjoy the benefits of the BIT for other purposes. But the dual national would be disqualified from invoking the ICSID clause in the BIT.[393]

224. In contrast to the ICSID Convention, the UNCITRAL Rules that govern this arbitration do not contain any prohibition on claims being brought by dual nationals. Therefore, the determination of Claimant's nationality must be made solely in accordance with the 1980 BIT and 2004 BIT.[394] As the applicable BITs do not state that a Finnish national for the purposes of the treaties cannot also be an Egyptian national, in order to establish jurisdiction *ratione personae*, Claimant need only prove Finnish nationality.[395] Claimant's Finnish nationality at relevant points of time has been clearly established in the SAC Judgment which, as stated already

389 Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, signed 25 June 1982, art. I(g).
390 Article 1(3), 2004 BIT, **Exhibit CLA-0002**.
391 Article 1(2), 1980 BIT, **Exhibit CLA-0001**.
392 ICSID Convention, Article 25(2)(a).
393 C. Schreuer *et al.*, The ICSID Convention: A Commentary (2010), section 668 p. 272.
394 *See, e.g.*, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, **Exhibit CLA-0055**, para. 119 (stating that the claimant's nationality needed to be assessed according to the applicable Dutch-Slovak BIT and Dutch law, considering that the claimant asserted that it had Dutch nationality).
395 Jurisdiction Hearing, Day 2, p. 272:4-20.

above, was not successfully challenged by the Respondent.

225. The position set out above (paragraph 224) finds support in existing arbitral jurisprudence. In *Serafín García Armas and Karina García Gruber v. Venezuela*, a case brought under the Spain-Venezuela BIT, where both claimants were dual-nationals of Spain and Venezuela, the applicable investment treaty imposed only a positive requirement of nationality of one or the other contracting state, but not the negative requirement that the individual not simultaneously hold the nationality of the other contracting state.[396] The tribunal held that the latter requirement cannot be read into the text of the investment treaty where there was no text to that effect.[397] Similarly, in the *Pey Casado v. Chile* arbitration under the Spain-Chile BIT that was governed by ICSID Rules, the tribunal explained the difference between the requirements of nationality provided for in the ICSID Convention and those provided for in the underlying BITs in that case. The tribunal found that it was sufficient for the purposes of the applicable BIT for it to be proven that the investor was a national of the other contracting party.[398] There is no requirement for a tribunal to enter into the question of the effective nationality of an investor of dual Spanish-Chilean nationality, as the applicable BIT did not require this and only required that the investor be a national of the other contracting state.[399] The tribunal took the view that a requirement that dual nationals be prohibited from bringing claims cannot be read into the text.[400] Accordingly, Mr Pey Casado only had to demonstrate that he possessed Spanish nationality at the time of accepting the jurisdiction of the tribunal in order to benefit from the protections of the applicable BIT.[401]

226. This trend in decisions finds further support in a recent judgment of the Paris Court of Appeal of 25 April 2017 (numéro d'inscription au répertoire general 15/01040 in the case *République Bolivarienne du Venezuela c. M. Serafin Garcia Armas and Mme Karina Garcia Gruber* (annulment procedure)) where it is stated that under UNCITRAL Rules the fact of dual

396 *Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela*, UNCITRAL, PCA Case No. 2013-3, Decision on Jurisdiction, 15 December 2014, **Exhibit RLA-0049**, para. 119.

397 *Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela*, UNCITRAL, PCA Case No. 2013-3, Decision on Jurisdiction, 15 December 2014, **Exhibit RLA-0049**, paras. 201, 206.

398 *Víctor Pey Casado y Fundación Presidente Allende v. Chile*, Award, 8 May 2008, ICSID Case No. ARB/98/2, **Exhibit RLA-0014**, para. 415.

399 *Víctor Pey Casado y Fundación Presidente Allende v. Chile*, Award, 8 May 2008, ICSID Case No. ARB/98/2, **Exhibit-RLA-0014**, para. 415.

400 *Víctor Pey Casado y Fundación Presidente Allende v. Chile*, Award, 8 May 2008, ICSID Case No. ARB/98/2, **Exhibit-RLA-0014**, para. 415.

401 *Víctor Pey Casado y Fundación Presidente Allende v. Chile*, Award, 8 May 2008, ICSID Case No. ARB/98/2, **Exhibit-RLA-0014**, para. 416.

nationality is not a bar to the jurisdiction of an arbitral tribunal *ratione personae.*[402]

227. Accordingly, the Tribunal finds that it is sufficient for the establishment of this Tribunal's jurisdiction *ratione personae* that Claimant was a Finnish national at the relevant points in time, and this has been established in the SAC Judgment. The Tribunal need not make an additional determination that he was simultaneously not Egyptian at the relevant points in time. In the following section, the Tribunal will establish whether considerations based upon general principles of international law suggest the reconsideration of the result reached upon on the basis of the applicable BITs.

d) Principles of International law Governing Dual Nationals' Claims and Procedural Considerations

228. Customary international law was once deemed to preclude a State's espousal of its national's injury caused by another State if its national was also the national of the latter State. Article 4 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws[403] states that "[a] State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."[404] This position, which was explicitly concerned with *diplomatic espousal* has gradually given way to the principle, in international tribunals, of effective nationality, whereby the exercise of jurisdiction over a dual national is admissible if the dominant nationality of the individual is not that of the respondent State.

229. When the International Court of Justice ("**ICJ**") dismissed Liechtenstein's claim on behalf of Mr Friedrich Nottebohm against Guatemala, it noted that "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties;" and upheld a requirement for "real and effective nationality . . . based on stronger factual ties between the person concerned and one of the States whose nationality is involved."[405] This was *obiter dictum,* as the *Nottebohm* case did not concern a claim brought by an individual against his/her state of nationality. In

402 Cour d'appel de Paris, Pôle 1 – Chambre 1, 25 avril 2017, no. 15/01040, *République Bolivarienne du Venezuela c. M. Serafin Garcia Armas and Mme Karina Garcia Gruber* (annulment proceeding), p. 7.

403 Convention on Certain Questions relating to the Conflict of Nationality Laws, 12 April 1930.

404 Convention on Certain Questions relating to the Conflict of Nationality Laws, 12 April 1930, art. 4.

405 *Nottebohm Case (Liechtenstein v. Guatemala),* 1955 I.C.J. 4 (Judgment of 6 April 1955), pp. 22-23 (the real and effective nationality was *obiter dictum* because the *Nottebohm* case did not concern a claim brought by an individual against their state of nationality); *see also Merge Case (United States v. Italy),* Italy-United States Conciliation Commission, 14 R.I.A.A. 236 (1955), p. 247 (holding that the diplomatic protection principle "based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State").

Case A/18, by contrast, the Iran-US Claims Tribunal considered the admissibility of claims against Iran brought by naturalized American citizens who were Iranian nationals by birth, and found that it had jurisdiction over claims brought by dual Iranian-United States nationals where the dominant and effective nationality during the relevant period was that of the United States. The tribunal noted that Article 4 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws does not express an unambiguous, current rule: "Not only is [the rule] more than 50 years old and found in a treaty to which only 20 States are parties, but great changes have occurred since then in the concept of diplomatic protection, which concept has been expanded." The tribunal noted that while the principle of non-responsibility might apply to diplomatic protection (where a State is asserting its own rights by espousing a case of a national), it might not apply to a case where a private party has brought a claim against a State.[406]

230. The Tribunal cannot discern from relevant jurisprudence any clear, applicable general principle of international law that would prohibit a dual national in his or her private capacity from bringing a claim against a State of his or her nationality pursuant to an investment treaty.

231. Some academic writing indicates that where an underlying BIT does not clarify whether dual nationals might bring claims, principles of international law on effective nationality might be considered by a tribunal in order to determine its jurisdiction based on the dominant nationality of the claimant-investor.[407] However, any developments in international law must yield to the *lex specialis* of the investment treaty.[408] Therefore, an analysis of the applicable BITs, as set out above, should be dispositive of the issue of whether a dual Egyptian-Finnish national may bring claims under the BITs. Even if international law principles of effective nationality were to be considered in determining this Tribunal's jurisdiction, the Tribunal is satisfied that the record of this case, unlike those of prior cases, does not cast doubt upon the strength of that Claimant's ties to Finland or lead one to believe that Claimant is only asserting his Finnish nationality in order to bring this claim.[409] Claimant acquired Finnish nationality in 1971, long before this

406 *Iran-United States Claims Tribunal: Decision in Case No. A/18 Concerning the Question of Jurisdiction Over Claims Of Persons With Dual Nationality*, 5 Iran-U.S. Cl. Trib. Rep. 251 (1984), 75 I.L.R. 175, 23 I.L.M. 489 (1984), Section IV.

407 Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press (2012) p. 321; L.F. Reed, J.E. Davis, III. Ratione Personae, Who is a protected investor?, in International Investment Law, CH Beck, 2015, **Exhibit RLA-0045**, p. 625.

408 *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Decision on Jurisdiction, ICSID Case No. ARB/05/15, **Exhibit RLA-0031**, para. 198; *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003, **Exhibit RLA-0039**, p. 288.

409 *Cf. Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Partial Dissenting Opinion of Professor Francisco Orrego Vicuña, ICSID Case No. ARB/05/15, **Exhibit RLA-0031**, pp. 65-66 ("Such considerations reinforce my concern that Waguih is not a rightful claimant as far as

arbitration was brought, indeed even before he made any investments in the Project. Moreover, the record reflects a long history of Claimant's residence in Finland and consistent recognition by Finland of Claimant's residence in the nation.[410] Finland considered Claimant to be a Finnish citizen while he was imprisoned in Egypt and although it knew that Respondent also considered him to be Egyptian. Upon the lifting of his travel ban from Egypt, Claimant relocated to Finland. Furthermore, that Claimant considered his ties to Finland genuine is evident in the fact that Claimant continued to pay taxes in Finland.

232. On the basis of the considerations above (paragraphs 228 to 230), the Tribunal comes to the conclusion that general international law principles concerning the consequences of dual nationality in respect of jurisdiction *ratione personae* do not trump the explicit language of the BITs, according to the Tribunal's finding as set out above at paragraph 227.

233. A final procedural consideration is relevant. As noted above at paragraph 70, in Procedural Order No. 5, this Tribunal dismissed as belated Respondent's new jurisdiction *ratione personae* objection on dual nationality raised in its Reply (concerning whether international law and the BITs allow a dual national to claim against his or her state of nationality). Thus, procedurally, irrespective of the propriety of dual nationals' claims under international law, the Tribunal need not adjudicate the issue, which it directed the Parties not to address in their submissions.

V. THE TRIBUNAL'S JURISDICTION *RATIONE TEMPORIS*

234. Respondent maintains that the Tribunal lacks jurisdiction *ratione temporis* because the alleged Treaty breaches do not fall within the temporal scope of either of the BITs invoked by Claimant.[411] Respondent pleads that the Tribunal lacks jurisdiction *ratione temporis* with respect to the 2004 BIT because the 2004 BIT is limited in its temporal application to disputes which arose after the entry into force of the 2004 BIT on 5 February 2005. According to Respondent, the claims in this arbitration arose in 2000 or, at the very latest, before 2005, and therefore cannot be governed by the 2004 BIT. Respondent maintains that this Tribunal does not have jurisdiction under the 1980 BIT. Claimant cannot invoke the sunset clause in Article 9(3) of the 1980 BIT because the 1980 BIT has expired and been replaced. The 1980 BIT, therefore, does not cover Respondent's pre-2005 conduct.

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jurisdiction is concerned because of the effectiveness of the connections he had with Egypt at all relevant times. Neither Italian nor Lebanese nationalities play any meaningful role in Waguih's life. Moreover, there are elements in the record that allow being skeptical about the other nationalities that come into play in this case.").

410 Claimant's Opening Slides, pp. 13-16; Current Finnish Identity Card, **Exhibit C-0015.**

411 Respondent's Memorial on Jurisdiction, para. 3.

235. Claimant submits, on the contrary, that the present dispute only arose after the 2004 BIT came into force and that the Tribunal has jurisdiction *ratione temporis* over these disputes even if the investment was made before the 2004 BIT came into force. Claimant notes that: "Events that occurred before 5 February 2005 are governed by the 1980 BIT; events that occurred on or after that date are governed by the 2004 BIT."[412] Therefore, the Tribunal must apply the substantive standards of the 2004 BIT to events that took place after the 2004 BIT was in force and the substantive standards of the 1980 BIT to events that took place when the 1980 BIT was in force. Claimant notes that Respondent's position places Claimant's allegations in an unusual temporal gap between the BITs such that he would have no recourse to bring his claims. Claimant argues that if the dispute did arise before the 2004 BIT entered into force, it should be governed by the 1980 BIT.[413]

A. RELEVANT BACKGROUND AND LEGAL FRAMEWORK

236. The 1980 BIT was signed by Egypt and Finland on 5 May 1980, and entered into force on 22 January 1982 for 20 years, with tacit renewal thereafter.[414]

237. Respondent argues that the 1980 BIT was "substitute[d] and replace[d]" pursuant to Article 17(2) of the 2004 BIT upon the 2004 BIT entering into force on 5 February 2005.[415] Respondent observes that the offer to arbitrate contained in Article 7 of the 1980 BIT was replaced by the offer to arbitrate contained in Article 9 of the 2004 BIT.[416]

238. Claimant sent a Notice of Arbitration on 3 November 2011 stating that it accepted "Egypt's standing offer to arbitrate" under both BITs.[417]

239. Article 9(3) of the 1980 BIT sets forth that:

> In respect of investments made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles 1 to 8 shall remain in force for a further period of twenty years from that date.

240. Article 13 of the 2004 BIT provides that:

> This Agreement shall apply to all investments made by investors of either Contracting Party, in the territory of the other Contracting Party, whether made before or after the entry

412 Claimant's Counter-Memorial on Jurisdiction, para. 4.1.
413 Jurisdiction Hearing, Day 2, p. 251:18-23.
414 Respondent's Request for Bifurcation, para. 26.
415 Respondent's Request for Bifurcation, paras. 29; 31.
416 Respondent's Request for Bifurcation, para. 138.
417 Claimant's Statement of Claim, para. 2.23; Jurisdiction Hearing, Day 1, p. 183:14-18, *citing* Terms of Appointment, para. 2.

> into force of this Agreement, but shall not apply to any dispute concerning an investment which arose or any claim which was settled before its entry into force.

241. Article 17(2) of the 2004 BIT provides that:

> Upon its entry into force, the present Agreement substitutes and replaces the Agreement between the Government of the Republic of Finland and the Government of the Arab Republic of Egypt on the Mutual Protection of Investments done at Helsinki on 5 May 1980.

242. Pursuant to Article 7 of the Egyptian Investment Law:

> Investment disputes relating to implementation of the provisions of this Law may be settled by the method agreed with the investor. Agreement may be reached between the parties concerned for settlement of such disputes within the framework of current agreements between the Arab Republic of Egypt and the state of the investor . . . .

B. THE PARTIES' ARGUMENTS ON JURISDICTION *RATIONE TEMPORIS*

Respondent's Position

a) Jurisdiction under the 2004 BIT

243. Respondent submits that the 2004 BIT is limited in its application to disputes that arose after its entry into force on 5 February 2005, which is not the case here. Respondent states that Claimant's own description of the facts indicates that the dispute arose in 2000, if not earlier.[418] Thus, the Tribunal lacks jurisdiction *ratione temporis* with respect to the 2004 BIT.[419]

244. Article 13 of the 2004 BIT provides that:

> This Agreement shall apply to all investments made by investors of either Contracting Party, in the territory of the other Contracting Party, whether made before or after the entry into force of this Agreement, but shall not apply to any dispute concerning an investment which arose or any claim which was settled before its entry into force.

245. Respondent notes that although the agreement applies to investments "whether made before or after" the 2004 BIT entered into force,[420] Article 13 provides that the treaty "shall not apply to any dispute concerning an investment which arose or any claim which was settled before its entry into force."[421] According to Respondent, the use of the past tense of the term "arose" indicates that the agreement carves out disputes concerning investments that arose before the

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418 Respondent's Request for Bifurcation, para. 143, *citing* Claimant's Statement of Claim, paras. 1.3, 4.5, 4.15, 4.18.

419 Jurisdiction Hearing, Day 1, p. 99:1-3.

420 Jurisdiction Hearing, Day 1, p. 84:8-11.

421 Respondent's Request for Bifurcation, para. 140, *citing* Article 13, 2004 BIT; Respondent's Reply Memorial on Jurisdiction, paras. 193, 197.

2004 BIT entered into force.[422] Respondent describes as "tautological" Claimant's attempt to rely on Article 13 to prove that the 1980 BIT somehow continued to apply after the 2004 BIT came into force. Respondent explains that that Claimant's argument is "tautological" because if the 2004 BIT does not apply to a dispute, it must follow that Article 13 itself cannot apply.[423] Respondent states that Article 13 cannot be rendered a nullity: it excludes the application of the "substantive and jurisdiction provisions of the [2004 BIT]" to pre-2005 disputes.[424]

246. Further, Respondent argues that Article 9 of the 2004 BIT limits Egypt's offer to arbitrate under the treaty to disputes "arising" after its entry into force, i.e., 5 February 2005.[425] The use of the word "arising" in Article 9 indicates that the 2004 BIT does not cover disputes that arose before the 2004 BIT entered into force. If such disputes were intended to be covered by the 2004 BIT, contracting parties would have employed terms such as "has arisen" or "arose".[426] Respondent thus submits that "with disputes there is no overlap" under the BITs.[427]

247. Respondent recalls that a "dispute" has been defined as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[428] A dispute would not only crystallize when one party formally notifies the other party of its claims but rather when the parties "confront their positions".[429] Respondent notes that according to Claimant's submissions, the dispute in this case arises out of Egypt's unjustified imprisonment of Claimant (on 5 February 2000), the closure of the business of AISCO and ADEMCO (in February 2000), and the seizure of AISCO and ADEMCO's assets (by 9 February 2000).[430] Thus, the events giving rise to the dispute arose in 2000.[431] Notably, the judgment of the Egyptian Supreme State Security Court that dismissed charges against Claimant is dated 11 June 2001, indicating that the dispute must have crystallised before 11 June 2001.[432]

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422 Jurisdiction Hearing, Day 1, p. 84:18-22.
423 Jurisdiction Hearing, Day 2, pp. 237:1-238:6.
424 Jurisdiction Hearing, Day 2, p. 238:10-14.
425 Jurisdiction Hearing, Day 1, p. 99:21-24.
426 Respondent's Reply Memorial on Jurisdiction, paras. 198-199.
427 Jurisdiction Hearing, Day 1, p. 86:1-3.
428 Respondent's Reply Memorial on Jurisdiction, para. 200, *citing Case of the Mavrommatis Palestine Concessions*, (1924) PCIJ Rep Series A, No. 2, **Exhibit RLA-0065**.
429 Respondent's Request for Bifurcation, para. 144, *citing* C. Schreuer, The ICSID Convention: a Commentary, **Exhibit RLA-0021**, p. 225.
430 Respondent's Reply Memorial on Jurisdiction, para. 201; Respondent's Request for Bifurcation, para. 144; Jurisdiction Hearing, Day 1, p. 100:2-13.
431 Respondent's Reply Memorial on Jurisdiction, paras. 202-203; Jurisdiction Hearing, Day 1, p. 106:6-8; Jurisdiction Hearing, Day 2, p. 241:4-12.
432 Respondent's Reply Memorial on Jurisdiction, para. 204.

248. Respondent states that Claimant confuses the term "investments" with the term "disputes". According to Respondent:

> We know that investments are covered both before and after the entry into force of the BIT; that's not in issue. The point is was there a dispute concerning an investment already in existence at the time the second BIT came into force?[433]

249. Respondent states that the *Ping An v. Belgium* tribunal made it clear that what was relevant was not when the investment was made, but when the dispute had arisen, and the tribunal stated as follows: "that the 2009 BIT applies to all investments, made before or after its entry into force, does not assist in any way on the question of the effect of a dispute arising before entry into force."[434]

250. Respondent also states that Claimant, by contending that the dispute in the present case arose when Claimant on 8 July 2011 notified Respondent of the dispute, conflates "claim" and "dispute" and bases himself on too restrictive an interpretation of the term "dispute".[435] Respondent maintains that the natural understanding of the term "dispute" is a dispute concerning the investment, not a dispute under the BIT.[436]

251. Respondent states that, in any event, in the alternative, it is clear that the dispute in this arbitration arose before 2005, as it is effectively a continuation of the domestic proceedings involving Claimant. The subject matter of the dispute before the Egyptian courts does not differ from that in the present arbitration; rather, it is the outcome of the dispute in the Egyptian court that gave rise to the present arbitration.[437]

252. Respondent argues that the present case, is one, as in *Lucchetti v. Peru*, in which facts that gave rise to an earlier dispute continued to be central to the later dispute.[438] Respondent notes that, to be considered the same, the prior dispute need not have the same expression as the later

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433 Jurisdiction Hearing, Day 1, p. 100:20-25.

434 Jurisdiction Hearing, Day 1, p. 101:1-14, *citing Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015, **Exhibit RLA-0056**, para. 226.

435 Respondent's Request for Bifurcation, para. 144; Respondent's Reply Memorial on Jurisdiction, para. 204.

436 Jurisdiction Hearing, Day 1, p. 102:13-24, p. 108:2-23, *citing Jan de Nul and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, **Exhibit RLA-0069**, paras. 119, 127, 128.

437 Respondent's Reply Memorial on Jurisdiction, para. 206; Jurisdiction Hearing, Day 2, p. 244:10-25.

438 Respondent's Reply Memorial on Jurisdiction, para. 205, *citing Empress Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, **Exhibit RLA-0067**, para. 50; Jurisdiction Hearing, Day 1, pp. 104:14-105:4, p. 107:2-23.

dispute.[439] The fact that a dispute "becomes later a BIT dispute does not mean that we do not have the same dispute."[440]

253. Respondent relies on the tribunal in *Vieira v. Chile* which, in assessing when the dispute arose, found that the parties' earlier dispute relating to the claimant's fishing rights "continued to occupy a central position in respect of the claims presented by [the claimant] . . . ."[441] Thus, Respondent maintains that the present arbitration has arisen from the Parties' prior dispute concerning the compensation and damages resulting from Claimant's imprisonment in 2000.[442] Respondent considers the cases relied upon by Claimant to be irrelevant to the present arbitration because they only concerned whether there had been notification of the dispute under the applicable arbitration clause, and the wording in the applicable treaties was not similar to Article 13 of the 2004 BIT.[443]

254. Respondent emphasizes that, contrary to Claimant's view, there is no requirement in the 2004 BIT that, in order for a dispute to have arisen, it must have been raised in writing.[444] Respondent argues that Article 9(2) of the 2004 BIT, which states that a dispute may be referred to arbitration if it has not been settled within three months of it being raised in writing, is only a prerequisite for the commencement of arbitration, not a constitutive element giving rise to the dispute itself.[445] Thus, Claimant cannot sustain the argument that the Parties' dispute only arose when he sent his Notice of Arbitration to Respondent.[446] Further, Respondent notes Claimant's argument that a dispute requires communication between parties. Respondent states that there was discussion regarding the dispute in Claimant's appeal against his criminal conviction in Egyptian domestic courts.[447]

255. Further, Respondent argues that the Tribunal does not have jurisdiction to determine any breaches of the substantive obligations contained in the 2004 BIT as those obligations cannot be retroactively applied to conduct pre-dating 2005. Relying on Article 28 of the Vienna

439 Jurisdiction Hearing, Day 2, p. 241:13-18, *citing Empress Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, **Exhibit RLA-0067**, para. 59.

440 Jurisdiction Hearing, Day 2, pp. 243:22-244:1.

441 Respondent's Reply Memorial on Jurisdiction, paras. 207-210, *citing Sociedad Anónima Eduardo Vieira v. República de Chile*, ICSID Case No. ARB/04/7, Award, 21 August 2007, **Exhibit RLA-0079**, para. 295; Jurisdiction Hearing, Day 1, pp. 107:24-108:2.

442 Respondent's Reply Memorial on Jurisdiction, paras. 210-211.

443 Jurisdiction Hearing, Day 1, p. 105:5-22 (distinguishing *Murphy v. Ecuador* and *Burlington v. Ecuador*).

444 Respondent's Reply Memorial on Jurisdiction, para. 212, *citing Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015, **Exhibit RLA-0056**, para. 222.

445 Respondent's Reply Memorial on Jurisdiction, para. 212.

446 Respondent's Reply Memorial on Jurisdiction, para. 212.

447 Jurisdiction Hearing, Day 2, p. 245:6-9.

Convention on the Law of Treaties ("**VCLT**") and prior arbitral awards, Respondent underlines the general principle that a State can only be responsible for a breach of treaty obligation if the obligation existed at the time of the alleged breach.[448] Respondent argues that this principle of non-retroactivity is enshrined in Article 13 of the 2004 BIT. Accordingly, the 2004 BIT cannot be applied to breaches allegedly committed by Egypt in 2000, and there exists no real event arising after 5 February 2005 that could violate the provisions of the 2004 BIT.[449] Respondent cites to *Ping An v. Belgium* to argue that that tribunal "pointed out the possible effects of a limited interpretation of provisions such as Article 13 of [the 2004 BIT], opening the broader protection of the subsequent BIT to prior disputes and they said that this is something that the state parties had clearly not intended . . . ."[450]

256. Respondent concedes that Claimant might be able to argue that a new dispute exists before this Tribunal, if new facts or events had arisen giving rise to a new dispute.[451] Respondent submits that this is not the case in the present arbitration; the case before this Tribunal is the same as that pled before the Egyptian courts, which resulted in the judgment of the Egyptian Supreme State Security Court dated 11 June 2001.[452] Respondent argues that Claimant wrongly conflates the continuing character of a breach and the continuing effect of the breach. Relying on commentary to the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Respondent states that an act does not have a continuing character merely because its effects continue to extend in time.[453] Particularly, Respondent argues that an expropriation is complete when the transfer of title is carried out by legal process.[454] Respondent states that the Freezing Order was lifted and Mr Bahgat was acquitted in 2006, but these are not a continuous part of the acts complained of, as required by Article 14 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts. Rather, the

448 Respondent's Reply Memorial on Jurisdiction, para. 216, *citing Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015, **Exhibit RLA-0056**, para. 172; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, **Exhibit RLA-0071**, para. 68; Jurisdiction Hearing, Day 1, pp. 110:14-111:5.

449 Respondent's Reply Memorial on Jurisdiction, para. 217.

450 Jurisdiction Hearing, Day 1, pp. 108:24-109:9, *citing Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015, **Exhibit RLA-0056**, paras. 229-31.

451 Respondent's Reply Memorial on Jurisdiction, para. 211, *citing Jan de Nul and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, **Exhibit RLA-0069**, paras. 119-121, 128.

452 Respondent's Reply Memorial on Jurisdiction, para. 211.

453 Respondent's Reply Memorial on Jurisdiction, para. 218, *citing* ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, **Exhibit RLA-0070**.

454 Respondent's Reply Memorial on Jurisdiction, para. 219, *citing* ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, **Exhibit RLA-0070**.

lifting of the Freezing Order and acquittal are effects of the acts complained of.[455] Respondent states that none of the claims in the present case arise out of continuous breaches and, therefore, they are outside the temporal scope of the 2004 BIT.

257. Accordingly, Respondent concludes that the present dispute arose before the entry into force of the 2004 BIT on 5 February 2005 and that, pursuant to Article 13 of the 2004 BIT, the Tribunal lacks jurisdiction *ratione temporis*.[456]

258. Respondent stated during the Hearing on Jurisdiction that "there may be an arbitration gap if that is the result of the proper meaning of the 2004 BIT," but Claimant is not without remedy as it is open to Claimant to claim pursuant to an agreed dispute resolution method before the Egyptian courts.[457] Respondent points to the dispute resolution clause in the agreement between ADEMCO and Respondent and states that there might be recourse under this clause, which refers disputes to Egyptian courts.[458] Respondent states that the Tribunal does not have jurisdiction to adjudicate questions concerning the Egyptian Investment Law because the legislation does not apply to physical persons.[459] Further, the Egyptian Investment Law does not constitute part of the acceptance of Egypt's offer to arbitrate.[460] Under Article 9(2) of the 2004 BIT, the Tribunal only has jurisdiction to adjudicate claims arising out of the 2004 BIT, not the Egyptian Investment Law.[461] Moreover, Article 7 of Egyptian Investment Law requires a separate agreement between Claimant and Egypt regarding the method by which investment disputes will be adjudicated and Claimant has not established any such agreement.[462] Respondent points out that in *Khan Resources v. Mongolia*, the relevant domestic investment law did not contain an independent basis for jurisdiction and therefore a claimant had to claim through a separate investment treaty. This is not the case, according to Respondent, with the Egyptian Investment Law.[463]

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455 Jurisdiction Hearing, Day 1, pp. 111:18-112:25.
456 Respondent's Request for Bifurcation, paras. 144-145.
457 Jurisdiction Hearing, Day 1, pp. 117:1-5, 117:24-118:7; Jurisdiction Hearing, Day 2, p. 246:18.
458 Jurisdiction Hearing, Day 2, p. 246:2-18.
459 Jurisdiction Hearing, Day 1, p. 114:21-24; Jurisdiction Hearing, Day 2, pp. 245:23-246:1.
460 Jurisdiction Hearing, Day 1, p. 115:4-13, *citing* Notice of Arbitration, Terms of Appointment.
461 Respondent's Reply Memorial on Jurisdiction, para. 222, *citing Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, **Exhibit RLA-0072**, para. 61.
462 Respondent's Reply Memorial on Jurisdiction, para. 221; Jurisdiction Hearing, Day 1, pp. 115:14-116:4; Jurisdiction Hearing, Day 2, p. 245:16-19.
463 Jurisdiction Hearing, Day 1, p. 116:9-18, *citing Khan Resources Inc. Khan Resources B.V. CAUC Holding Company Ltd. v. The Government of Mongolia and MonAtom LLC*, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, **Exhibit CLA-0076**, para. 3.

b) Jurisdiction under the 1980 BIT

259. Respondent recalls that the 1980 BIT was signed on 5 May 1980 and would be in force for 20 years.[464] The 2004 BIT (which entered into force on 5 February 2005) "substitutes and replaces" the 1980 BIT,[465] and the 1980 BIT has since been deprived of any legal force or continuing legal effect.[466] At the Hearing on Jurisdiction, Respondent invoked a sporting analogy: if a player is substituted with another, the substituted player leaves the field and is not allowed to play again.[467] Respondent takes the view that the contracting parties in the present case did not intend to terminate the 1980 BIT but to substitute and replace it with the 2004 BIT and, thus,[468] the offer to arbitrate contained in Article 7 of the 1980 BIT (framed in present tense) was replaced by the offer to arbitrate in Article 9 of the 2004 BIT.[469] Respondent contends that the 1980 BIT only covers disputes that arose between 1982 and 2005, i.e., when the 1980 BIT was in force, but could apply to investments made before or after the entry into force of the 1980 BIT.[470] Referring to the fact that Claimant's Notice of Arbitration is dated 3 November 2011 and that the claims in this arbitration took place before the entry into force of the 2004 BIT, Respondent concludes that Claimant is prevented from invoking Article 7 of the 1980 BIT as a basis for the Tribunal's jurisdiction.[471]

260. Respondent relies on the minutes of the meeting of the Egyptian Committee for Treaties Revisions and International Loans from 2002 which notes that the 2004 BIT was necessary as the 1980 BIT had "lapsed".[472] Further, Respondent cites a statement by the Egyptian Minister of Foreign Affairs in which he states that the 2004 BIT "replaces the agreement of 1980, because more than twenty years have passed on the agreement of 1980 [. . .] the current agreement will replace the agreement of 1980."[473] Respondent also relies on the proposal made by the Finnish government to the parliament to accept the 2004 BIT, according to which "[. . .]

464 Respondent's Reply Memorial on Jurisdiction, para. 157; Article 9(2), 1980 BIT, **Exhibit CLA-0001**.
465 Article 17(2), 2004 BIT, **Exhibit CLA-0002**.
466 Respondent's Reply Memorial on Jurisdiction, paras. 158-159; Jurisdiction Hearing, Day 2, p. 239:4-14.
467 Jurisdiction Hearing, Day 1, p. 85:15-17.
468 Respondent's Request for Bifurcation, paras 134-137.
469 Respondent's Request for Bifurcation, paras. 134-38; Jurisdiction Hearing, Day 1, p. 83:2-4.
470 Jurisdiction Hearing, Day 1, p. 82:15-25; p. 83:14-16.
471 Respondent's Request for Bifurcation, para. 139; Jurisdiction Hearing, Day 1, p. 90:6-11, p. 95:6-9.
472 Respondent's Reply Memorial on Jurisdiction, para. 160, *citing* Minutes of the Meeting, Committee for Treaties Revision and International Lawns No. 700, 9 June 2002, **Exhibit R-0028**; Jurisdiction Hearing, Day 1, p. 89:3-9.
473 Respondent's Reply Memorial on Jurisdiction, para. 161, *citing* Preparatory Work on the 2004 Egypt-Finland BIT, **Exhibit RLA-0019**; Jurisdiction Hearing, Day 1, p. 89:9-13.

the treaty in question will replace the treaty signed in 1980 when entered into force."[474]

261. Further, Respondent argues that Claimant circumvents the replacement of Article 7 of the 1980 BIT by making reference to Article 9(3) of the 1980 BIT,[475] which provides for the legal consequences resulting from the termination of the 1980 BIT. Respondent argues that the replacement of the 1980 BIT did not trigger the survival clause contained in the 1980 BIT. Under Article 9(2) of the 1980 BIT, termination is a unilateral act taken by one of the contracting parties. Respondent submitted at the Hearing on Jurisdiction that unilateral termination, unlike any other method of treaty termination, warrants the application of a survival clause:

> If one state unilaterally terminates the BIT, then it will be depriving the investors already who have invested in its state from the other contracting state of protection, the protection that they had expected to continue when they made their investment. Hence, one can understand why, in a case of unilateral termination, there would be a survival clause.[476]

262. Thus, according to Respondent, the 20 year survival clause contained in Article 9(3) is only triggered if the 1980 BIT was terminated pursuant to Article 9(2). Respondent notes that it is not disputed that the 1980 BIT has not been terminated by way of a unilateral declaration of termination under Article 9(2). Rather it is common ground that the 1980 BIT was terminated by mutual consent, as provided for in Article 17(2) of the 2004 BIT and in Article 54 of the VCLT, which states that treaties can be terminated "at any time by consent of all the parties".[477] Respondent argues that it is generally accepted that, where state parties have terminated a treaty by mutual consent, that agreement neutralises any residual protections that might have been available under the original treaty's survival clause.[478] Respondent cites to Article 70 of the VCLT which states that "the termination of a treaty [. . .] in accordance with the present Convention [. . .] releases the parties from any obligation further to perform the treaty."[479] Respondent takes the view, referring to Article 59 of the VCLT, that the 1980 BIT was, in fact, terminated as a result of the 2004 BIT, and, therefore, the contracting parties were released

474 Jurisdiction Hearing, Day 1, pp. 88:25-89:2, *citing* Finnish Government proposal regarding approval of 2004 BIT, 4 June 2004, **Exhibit C-0084**.
475 Respondent's Request for Bifurcation, para. 135.
476 Jurisdiction Hearing, Day 1, p. 91:4-12.
477 Respondent's Reply Memorial on Jurisdiction, paras. 168-170, *citing* Article 54, Vienna Convention on the Law of Treaties, 23 May 1969, **Exhibit RLA-0063**; Jurisdiction Hearing, Day 1, p. 92:3-4.
478 Respondent's Reply Memorial on Jurisdiction, para. 169.
479 Respondent's Reply Memorial on Jurisdiction, para. 163, *citing* Article 70(1)(a), Vienna Convention on the Law of Treaties, 23 May 1969, **Exhibit RLA-0063**.

from the obligation to further perform the 1980 BIT.[480] Respondent notes that the 2004 BIT does not explicitly provide for the subsistence of the Article 9 survival clause of the 1980 BIT: therefore, the survival clause was terminated along with the rest of the 1980 BIT upon the entry into force of the 2004 BIT.[481] Respondent clarifies that there was no need for a "protection period" following the 1980 BIT, as referred to by the Finnish parliament, because the new 2004 BIT had entered into force.[482]

263. Respondent suggests that were the Tribunal to have jurisdiction under the 1980 BIT:

> [. . .] the two subsequent or consecutive BITs could give rise to parallel proceedings, with parallel jurisdictions and obviously, therefore, the risk of different decisions on exactly the same subject matter. That cannot be what Finland and Egypt intended.[483]

264. Respondent refers to *ABCI Investments v. Tunisia* which concerned two investment treaties entered into by the Netherlands and Tunisia, in 1963 and 1998. That tribunal held that the disputes which arose prior to the entry into force of the later BIT continued to be governed by the earlier BIT because Article 12(5) of the later BIT specifically provided that disputes arising before the entry into force of the later BIT would continue to be governed by the earlier BIT.[484] Respondent also refers to *Ping An v. Belgium*, where the applicable investment treaty explicitly provided that the old BIT would continue to operate for disputes that had already reached arbitration or judicial proceedings before the entry into force of the new BIT.[485] Respondent states that Egypt and Finland did not choose to include similar provisions in the 2004 BIT. Therefore, in the absence of such provisions, the protections in the 1980 BIT cannot be invoked by Claimant for conduct that took place before 2005.[486]

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480 Respondent's Reply Memorial on Jurisdiction, paras. 162, 164; Jurisdiction Hearing, Day 1, p. 92:11-16; Jurisdiction Hearing, Day 2, pp. 239:15-240:2.

481 Jurisdiction Hearing, Day 1, pp. 92:18-93:12, *citing* Claimant's Rejoinder on Jurisdiction, para. 240; Jurisdiction Hearing, Day 1, p. 94:14-23; Jurisdiction Hearing, Day 2, pp. 238:22-239:3.

482 Jurisdiction Hearing, Day 1, p. 94:4-12, *citing* Finnish Government proposal regarding approval of 2004 BIT, 4 June 2004, **Exhibit C-0084**.

483 Jurisdiction Hearing, Day 1, p. 95:13-19; Jurisdiction Hearing, Day 2, p. 240:3-13.

484 Respondent's Reply Memorial on Jurisdiction, paras. 185-187, *citing ABCI Investment v. Republic of Tunisia*, ICSID Case No. ARB/04/12, Decision on Jurisdiction, 18 February 2011, **Exhibit RLA-0057**, para. 162; Jurisdiction Hearing, Day 1, p. 98:1-10.

485 Jurisdiction Hearing, Day 1, p. 97:8-14, *citing Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015, **Exhibit RLA-0056**.

486 Respondent's Reply Memorial on Jurisdiction, paras 185-187, *citing ABCI Investment v. Republic of Tunisia*, ICSID Case No. ARB/04/12, Decision on Jurisdiction, 18 February 2011, **Exhibit RLA-0057**, para. 162; Jurisdiction Hearing, Day 1, p. 97:8-14, *citing Ping An Life Insurance Company of China Limited & Ping An Insurance (Group) Company of China Limited v. Kingdom of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015.

265. Respondent contends that the substantive provisions of the 1980 BIT have, similarly, been substituted and replaced by equivalent provisions in the 2004 BIT.[487]

266. Respondent denies that its interpretation of the BIT creates a "temporal hole" in the system. Claimant could and should have raised its claim for violations of the 1980 BIT when they occurred, and in any event, before 2 February 2005, when the 1980 BIT expired. Respondent states that, in fact, had Claimant not waited 10 years to bring his claim, he could have accepted Egypt's offer to arbitrate in the 1980 BIT before the 2004 BIT came to be.[488]

Claimant's Position

a) Jurisdiction under the 2004 BIT

267. Claimant argues that the Tribunal has jurisdiction *ratione temporis* under Article 9 of the 2004 BIT.[489]

268. Claimant submits that upon an ordinary and natural reading of Article 13 "the 2004 BIT in its entirety does not apply with respect to pre-existing disputes".[490] Claimant rejects Respondent's argument that the dispute crystallised at the time of the criminal proceedings and, hence, arose in February 2000, or earlier. In the first instance, Claimant argues that Respondent's approach conflates "disputes" and "claims".[491] According to Claimant, there may be an existing or future investment claim under the 1980 BIT that has not yet crystallised into a dispute. Should a dispute out of such a claim arise after the entry into force of the 2004 BIT, it would become subject to the dispute settlement mechanism of the 2004 BIT. Put differently, Claimant argues that Article 13 of the 2004 BIT leads all investment disputes arising after the entry into force of the 2004 BIT (whether based on the 2004 BIT, 1980 BIT or otherwise) to be adjudicated in accordance with the 2004 BIT, irrespective of when the investment was made.[492] Additionally, Claimant argues that Respondent's position ignores the text of Article 13 of the 2004 BIT, which affirms that the 2004 BIT is applicable regardless of the date that the investor made the investment, to ensure the continuity of investment protection. According to Claimant, it is clear that the intention of the drafters was to ensure that all investment disputes would be covered by one or the other BIT.[493] Claimant objects to Respondent's submission that Article 17 must be

487 Jurisdiction Hearing, Day 1, pp. 97:15-23, 113:15-20.
488 Respondent's Reply Memorial on Jurisdiction, paras. 189-190; Jurisdiction Hearing, Day 1, pp. 95:20-96:5.
489 Claimant's Counter-Memorial on Jurisdiction, para. 4.9.
490 Jurisdiction Hearing, Day 1, p. 190:15-17.
491 Claimant's Counter-Memorial on Jurisdiction, paras. 4.12-4.13, 4.22.
492 Claimant's Counter-Memorial on Jurisdiction, para. 4.14; Jurisdiction Hearing, Day 2, p. 250:3-12.
493 Claimant's Rejoinder, para. 216.

read to eliminate the 1980 BIT for all purposes, including for pre-existing disputes. Claimant notes that there is nothing in the 1980 BIT or 2004 BIT to support such a reading.[494]

269. Claimant disagrees with Respondent that the carve-out for prior disputes that was present in *Ping An v. Belgium* is missing from the BITs in the present case. Claimant submits that the equivalent carve-out for prior disputes is found in Article 13.[495] Claimant denies that its reading of Article 13 is "tautological". Claimant notes that by Respondent's logic, any carve-out provision in a later treaty would fail because the treaty would not apply to prior disputes in the first place.[496]

270. With regard to the question of when the investment dispute arose, Claimant points out that the "time of the dispute is not the same as the time of the events leading to the dispute. [. . .] The mere fact that some of the events giving rise to the dispute occurred before the 2004 BIT came into force is not relevant to the Tribunal's jurisdiction under the 2004 BIT".[497] Relying on the tribunal's findings in *Maffezini v. Spain*, Claimant argues that a dispute presupposes a sequence of events beginning with a statement of difference of views, followed by the formulation of legal claims and their discussion between the parties.[498] Claimant submits that the legal test used by tribunals for whether a dispute has arisen has been that a dispute arises when parties assert their conflicting claims regarding their rights and obligations.[499]

271. Applying this formulation to the present case, Claimant submits that he first raised the dispute with Respondent in writing on 8 July 2011.[500] On 3 November 2011, he submitted his Notice of Arbitration thereby, in his view, accepting Respondent's offer to arbitrate any dispute arising directly from an investment as set forth in Article 9 of the 2004 BIT.[501] Claimant concedes that many events leading to the present dispute began in 2000, but the dispute did not crystallise at that time.[502] According to Claimant, nothing on the record suggests that the dispute crystallised

494 Jurisdiction Hearing, Day 1, pp. 191:20-192:13.
495 Jurisdiction Hearing, Day 1, p. 194:4-13.
496 Jurisdiction Hearing, Day 2, p. 249:7-25.
497 Claimant's Counter-Memorial on Jurisdiction, para. 4.21; Jurisdiction Hearing, Day 1, p. 203:9-20.
498 Claimant's Counter-Memorial on Jurisdiction, paras. 4.19, 4.22, *citing Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. 97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, **Exhibit CLA-0047**, para. 37; Jurisdiction Hearing, Day 1, p. 202:7-16, *citing Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. 97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, **Exhibit CLA-0047**, para. 96.
499 Jurisdiction Hearing, Day 2, p. 253:2-12.
500 Claimant's Statement of Claim, para. 2.28(i).
501 Claimant's Counter-Memorial on Jurisdiction, para. 4.24.
502 Claimant's Rejoinder, para. 194; Jurisdiction Hearing, Day 2, pp. 253:13-254:9.

in 2001.[503] At the same time, Claimant clarifies that nothing that happened before the filing of the Notice of Arbitration in 2011 by the Claimant can be considered as constituting an investment dispute, as envisaged under Article 7(1) of the 1980 BIT or Article 9(1) of the 2004 BIT.[504] Claimant relies on *Jan de Nul v. Egypt*, where the tribunal emphasised the "separate and distinct" nature of the alleged conduct at issue in the domestic dispute from that in the BIT dispute.[505] Similarly, Claimant states that the subject matter of the present arbitration, is distinct from the domestic criminal proceedings: the latter concerned alleged misappropriation of funds and fictitious payments, while the former deals with international legal obligations.[506] Claimant notes that the criminal proceedings concerned acts that took place between February 1998 and the end of 1999, unlike the claims in this arbitration which span across a different period.[507] The criminal proceedings dealt with allegations of embezzlement of public property by Mr Bahgat, unlike this arbitration, which deals with alleged expropriation of his property by Respondent.[508] Claimant submits that there is no record of Claimant having alleged expropriation or some domestic equivalent in the domestic proceedings.[509] Overall, facts and considerations that gave rise to the domestic criminal proceedings are not central to this arbitration.[510]

272. Further, Claimant submits that it is well-established by international tribunals that a dispute only arises, for the purposes of international law, on the identification of a breach of a treaty and a clear articulation of a claim.[511] Claimant states that there was no communication between the Parties concerning the investment dispute (as distinct from the criminal proceedings) until the submission of the Notice of Arbitration in 2011.[512] Claimant submits that his appeal against his criminal conviction cannot, contrary to Respondent's submissions, constitute a dispute for the purposes of the applicable BITs.[513]

273. To determine whether, under the 2004 BIT, the jurisdiction of the Tribunal is excluded because of Article 13, Claimant states that the Tribunal should assess whether or not there is (i) a

503 Jurisdiction Hearing, Day 1, p. 198:3-7.
504 Claimant's Rejoinder, para. 195.
505 Claimant's Rejoinder, para. 197, *citing Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, **Exhibit RLA-0069**, para. 119.
506 Claimant's Rejoinder, para. 197; Jurisdiction Hearing, Day 1, p. 198:11-14; Jurisdiction Hearing, Day 2, p. 254:13-24; 256:14-23.
507 Jurisdiction Hearing, Day 1, p. 199:4-15.
508 Jurisdiction Hearing, Day 1, pp. 199:18-201:11.
509 Jurisdiction Hearing, Day 1, p. 202:17-24.
510 Jurisdiction Hearing, Day 2, p. 255:8-24.
511 Claimant's Rejoinder, paras. 198-201; Jurisdiction Hearing, Day 1, p. 204:9-12.
512 Claimant's Rejoinder, para. 203.
513 Jurisdiction Hearing, Day 2, p. 254:9-13.

dispute concerning an investment; which (ii) arose prior to the entry into force of the 2004 BIT on 5 February 2005.[514]

274. Claimant notes that the present arbitration is a new and separate dispute, not a continuation of the criminal proceedings that took place between 2000 and 2006.[515] According to Claimant, the situation prior to 5 February 2005 cannot be characterised as "a dispute concerning an investment" within the meaning of Article 13 of the 2004 BIT because the conflict between the Parties surrounded solely criminal charges against Claimant, which did not concern the closure of AISCO and ADEMCO, or the taking of Claimant's investment in the Project.[516]

275. Claimant distinguishes *Vieira v. Chile* from the present arbitration, stating that in the former case, the domestic dispute and the ICSID arbitration were brought by the claimant in order to protect his fishing rights. However, in the present arbitration, Claimant was prosecuted by Respondent in domestic criminal proceedings where Claimant only presented his defence, and Claimant then brought this arbitration to protect his investments. Therefore, the breach of Respondent's international legal obligations did not occupy a central position in the criminal proceedings.[517] Claimant distinguishes *Lucchetti v. Peru*, which dealt with a single long running dispute, from the present dispute, which Claimant states involves the bringing of a later claim that is fundamentally different from the prior claim.[518] Claimant also distinguishes *Helnan International Hotels v. Egypt* stating that it concerns the meaning of "divergence" and that the Claimant cannot meet the threshold of divergence or dispute on the present facts as Respondent has been unable to point to evidence in the pre-February 2005 record that the Parties were mutually aware of their differences.[519]

276. Claimant argues that Article 9 of the 2004 BIT provides broad subject matter jurisdiction to the Tribunal over "[a]ny dispute arising directly from an investment between one Contracting Party and an investor of the other Contracting Party [. . .]", unlike other investment protection treaties, that might only establish jurisdiction with respect to breaches of the treaty in question. Thus, Claimant is of the view that, pursuant to Article 9 of the 2004 BIT, the Tribunal has jurisdiction

514 Claimant's Counter-Memorial on Jurisdiction, para. 4.17.
515 Claimant's Counter-Memorial on Jurisdiction, para. 4.18(ii); Claimant's Rejoinder, para. 206.
516 Claimant's Counter-Memorial on Jurisdiction, paras. 4.18(ii), (iii). Apart from that, Claimant argues that the controversy at the heart of the criminal proceedings was finally resolved in his favour by the Court of Cassation in 2006.
517 Claimant's Rejoinder, para. 207.
518 Jurisdiction Hearing, Day 1, pp. 206:8-207:4; Jurisdiction Hearing, Day 2, p. 256:3-13.
519 Jurisdiction Hearing, Day 1, pp. 207:10-208:14.

to determine breach of the substantive obligations under the 1980 BIT,[520] arising out of Respondent's conduct before the 2004 BIT came into force. Claimant explains that the 2004 BIT provides this Tribunal with jurisdiction to adjudicate any violation of the substantive rules applicable to the events that started in 2000 and which led to the destruction of Claimant's investment.[521]

277. Claimant objects to Respondent's reliance on *Feldman v. Mexico*, arguing that this case concerned Article 1117(1)(a) of NAFTA which states that it is limited to claims arising out of breach of Section A, Chapter 11 of NAFTA. No similar limitation exists in Article 9 of the 2004 BIT.[522] Instead, Claimant presents authority for the proposition that investment tribunals have adjudicated on questions of domestic investment law, particularly where the treaty's dispute resolution clause does not contain any explicit limitations on the tribunal's jurisdiction.[523]

278. Claimant states that the effect of the termination of the 1980 BIT is not that Respondent ceased to be bound by the substantive provisions of the 1980 BIT when the treaty subsisted, but that the terms of the 1980 BIT continued to cover activities until 5 February 2005 when it was in force.[524] For the sake of clarity, Claimant notes that he does not ask the Tribunal to retroactively apply the 2004 BIT. He contends that his submissions are entirely consistent with the inter-temporal rule since he seeks to have Respondent's conduct assessed in light of its existing international obligations at the time of the conduct at issue: the Tribunal must apply the substantive provisions of the 1980 BIT to Respondent's conduct until the 2004 BIT came into force.[525] Claimant notes that the *Jan de Nul v. Egypt* tribunal supports its position: it applied substantive protections of an earlier BIT to conduct that took place before a later BIT came into force to adhere to the principle of non-retroactivity.[526] According to Claimant this is not inconsistent with *Ping An v. Belgium* which states that provisions of a BIT may not be relied on for acts occurring before its entry into force; or the ruling in *Mondev v. USA* that a state can

520 Claimant's Statement of Claim, paras. 2.26, 2.29.
521 Claimant's Rejoinder, para. 213.
522 Claimant's Rejoinder, para. 255.
523 Claimant's Rejoinder, paras. 258-259, *citing Khan Resources Inc. Khan Resources B.V. CAUC Holding Company Ltd. v. The Government of Mongolia and MonAtom LLC*, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, **Exhibit CLA-0076**, para. 438.
524 Claimant's Rejoinder, para. 214.
525 Claimant's Counter-Memorial on Jurisdiction, para. 4.23; Claimant's Rejoinder, para. 217; Jurisdiction Hearing, Day 1, p. 187:16-23.
526 Claimant's Rejoinder, para. 219, *citing Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, **Exhibit CLA-0068**, paras. 135, 140.

only be responsible for treaty breaches if the obligation is in force at the time of the alleged breach.[527]

279. In response to Respondent's suggestion that Claimant should have raised this dispute before 2 February 2005 when the 1980 BIT was replaced, Claimant states that he was incarcerated between February 2000 and March 2003 and subject to a travel ban until June 2005. Accepting Respondent's argument would allow it to benefit from its own misconduct and penalise Claimant for prioritising his well-being and safety.[528] Claimant reiterates that he was under no obligation to seek local remedies, and in any case, denies that any such remedies existed.[529]

280. Claimant also contends that this Tribunal has jurisdiction under the 2004 BIT to determine any breaches of the substantive obligations under the 2004 BIT arising out of the Respondent's conduct after the 2004 BIT entered into force. Respondent, in Claimant's view, incorrectly suggests that there are no events capable of constituting unlawful conduct that arose after 5 February 2005. Claimant identifies the following breaches that persisted after the entry into force of the 2004 BIT: (i) Respondent's imposition of a travel ban on Claimant until June 2005; (ii) Respondent's failure to comply with the court order requiring the Freezing Order to be lifted and Claimant to be given access to the company sites and bank accounts; and (iii) Respondent's refusal to release the Aswan mines to AISCO and ADEMCO, despite ADEMCO's sole mining rights in the region; and (iv) Respondent's failure to protect the movable and immovable properties on the site.[530] Claimant contests Respondent's characterisation of these events as effects or consequences of prior breaches, but rather considers them to be continuing breaches.[531]

281. Claimant submits that this Tribunal has jurisdiction to adjudicate disputes under the Egyptian Investment Law.[532] Claimant explains that Article 7 of the Egyptian Investment Law states that disputes under the legislation may be settled by the method agreed with the investor and provides four methods by which such agreement might be reached. The first method states that:

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527 Claimant's Rejoinder, paras. 217-218, *citing Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015, **Exhibit RLA-0056**, para. 172; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, **Exhibit RLA-0071**, para. 68.

528 Claimant's Rejoinder, para. 222; Jurisdiction Hearing, Day 1, pp. 186:22-187:13.

529 Claimant's Rejoinder, para. 223.

530 Claimant's Rejoinder, para. 225; Jurisdiction Hearing, Day 1, p. 209:12-23.

531 Claimant's Rejoinder, para. 227; Jurisdiction Hearing, Day 1, p. 211:12-17.

532 Jurisdiction Hearing, Day 2, p. 260:7-21.

> Agreement may be reached between the parties concerned for settlement of such disputes within the framework of current agreements between the Arab Republic of Egypt and the state of the investor.[533]

282. Claimant argues that this provision covers bilateral investment treaties in force.[534] Claimant argues that Claimant has no recourse under the Egyptian Investment Law for the protection of his investment.[535] Claimant acknowledges Respondent's point that the Egyptian Investment Law is only available to companies, and clarifies that Claimant has invoked the legislation for the protection of his investments in the Companies.[536] Claimant also notes that the Egyptian Investment Law, in Articles 7, 53, and 54 does accord rights to investors as distinct from companies.[537] Claimant points out that Respondent's interpretation of the Egyptian Investment Law is merely assertion, unsupported by expert reports or case law.[538] In this context, Claimant invites the Tribunal to apply Articles 12(1) and (2) of the 2004 BIT which allow for the application of sources of law that are more favourable to an investor.[539]

b) Jurisdiction under the 1980 BIT

283. According to Claimant, the Tribunal also retains jurisdiction *ratione temporis* under the 1980 BIT. Claimant submits that the 1980 BIT and 2004 BIT provide seamless protection to qualifying Finnish investors in Egypt.[540] Article 9(3) of the 1980 BIT contains a survival clause stating that the 1980 BIT stays in force for a further period of twenty years from the date of termination of the 1980 BIT. Thus, even if the treaty dispute crystallised before 5 February 2005, as Respondent contends and Claimant denies (see paragraphs 268 onwards), Article 9(3) preserves Claimant's right to bring this arbitration.

284. Claimant disagrees with Respondent's argument that the sunset clause in Article 9(3) is only applicable for unilateral acts of termination. Article 9(3) contains no reference to unilateral termination[541] and it makes no sense to Claimant to interpret "substitution and replacement" as having an even more severe effect on the protection of investments than the termination of the

533 Claimant's Rejoinder, para. 249, *citing* Law No. 8 of 1997 (Law of Investment Guarantees and Incentives), **Exhibit CLA-0033,** p. 11; Jurisdiction Hearing, Day 1, p. 210:6-19.
534 Claimant's Rejoinder, para. 250.
535 Jurisdiction Hearing, Day 2, p. 257:2-18.
536 Jurisdiction Hearing, Day 2, pp. 257:19-258:17.
537 Jurisdiction Hearing, Day 2, p. 258:18-25.
538 Jurisdiction Hearing, Day 2, p. 259:1-20.
539 Jurisdiction Hearing, Day 2, pp. 259:21-260:6.
540 Claimant's Rejoinder, para. 178.
541 Jurisdiction Hearing, Day 1, p. 195:6-9.

treaty.[542] Claimant agrees with Respondent that the Article 9(3) sunset clause should apply to an investor who should not see their treaty coverage defeated by unilateral termination of a BIT by one contracting party. Claimant argues that an investor should be able to benefit from Article 9(3) *also* in case of mutual termination as "[i]t makes no difference whatsoever to the investor whether or not the termination was mutual or unilateral."[543]

285. Moreover, Claimant argues that a unilateral act is not the only way by which the 1980 BIT could have been terminated as Article 9(2) of the 1980 BIT does not purport to set out an exclusive list of termination events.[544] Article 54 of the VCLT states that a treaty might either be terminated by its own terms or after consultation with the other contracting states. Further, Article 59 of the VCLT states that a treaty is considered terminated if all the parties to it conclude a later treaty concerning the same subject matter. On the basis of these provisions of the VCLT, Claimant states that it is clear that the 2004 BIT terminated, rather than substituted and replaced, the 1980 BIT.[545] This is reinforced by the fact that the VCLT does not recognise the replacement of treaties.[546] Claimant submits that the sunset clause in Article 9(3) will apply irrespective of whether the 1980 BIT was terminated by unilateral action as under Article 9(2) or otherwise, in so far as the result is the termination of the 1980 BIT.[547]

286. Claimant questions the relevance of the Czech and Indonesian practice relied on by Respondent and notes that the Czech and Indonesian practice demonstrates use of an explicit revocation of a survival clause. Absent such explicit revocation, a survival clause shall continue to apply.[548]

287. In Claimant's view, Respondent's position that the survival clause of the 1980 BIT is not applicable and is inconsistent with the object and purpose of the 2004 BIT, namely the promotion and protection of investments and economic cooperation and the creation of a stable investment framework.[549] Claimant submits that the 2004 BIT was intended to continue,

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542 Claimant's Counter-Memorial on Jurisdiction, para. 4.7.
543 Jurisdiction Hearing, Day 1, p.195:10-25.
544 Claimant's Rejoinder, para. 233.
545 Claimant's Rejoinder, paras. 236-237; Jurisdiction Hearing, Day 2, p. 250:13-22.
546 Claimant's Rejoinder, para. 240.
547 Claimant's Rejoinder, para. 242.
548 Claimant's Rejoinder, paras. 245-246, *citing* T. Voon, A.D. Mitchell, Denunciation, Termination and Survival : The Interplay of Treaty Law and International Investment Law, ICSID Review, Vol. 31, No. 2, 2016, **Exhibit RLA-0081**; L.E. Peterson, Czech Republic terminated investment treaties in such a way as to cast doubt on residual legal protection for existing investments, IA Reporter, 1 February 2011, **Exhibit RLA-0080**.
549 Claimant's Rejoinder, paras. 179-181, *citing* Article 31(1), Vienna Convention on the Law of Treaties, 23 May 1969, **Exhibit RLA-0063** (which states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."); Jurisdiction Hearing, Day 2, p. 248:3-8.

strengthen, and update the investment protection regime originally established in the 1980 BIT.[550] Claimant cites a proposal submitted to the Finnish parliament regarding the approval of the 2004 BIT which states that the treaty aimed to expand the protections available to investors and to "decrease the potential risks of foreign investments". It was moreover stated that the 2004 BIT "shall apply to all future investments and existing investments made by investors of either Contracting party in the territory of the other Contracting country".[551] Claimant notes that this interpretation is consistent with that of the Egyptian government, because it agreed to the dispute resolution clause in Article 9 of the 2004 BIT without insisting on any changes to the legal framework.[552]

288. Claimant states that the contracting parties to the 2004 BIT could have explicitly clarified that all protections relating to the 1980 BIT were to be terminated, but this was not done in the 2004 BIT, and therefore must not be the case.[553] It is Claimant's view that it could not have been the intention of the contracting parties to the 2004 BIT at the same time to replace the 1980 BIT with more expansive protections, and to "establish a large temporal hole in [terms of Treaty] protection"[554] depriving a class of investors, whose investments were destroyed before 2004 but who did not commence arbitration until after 2004, of protection.[555]

289. Claimant denies that its submission will result in possible parallel proceedings, as suggested by Respondent. Claimant argues that if the sunset clause were to be applied, it would only apply to pre-existing disputes: "it establishes a bifurcated regime, where the dispute that crystallized prior to 5 February 2005 is resolved under the 1980 regime, and the dispute that crystallises post 5 February 2005 is resolved under the new treaty regime."[556]

290. Therefore, Claimant concludes that the Tribunal has jurisdiction *ratione temporis* under Article 7 of the 1980 BIT to adjudicate all claims regarding any alleged treaty breaches that occurred after the 1980 BIT came into force on 22 January 1982, when the "dispute" arose, up

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550 Claimant's Counter-Memorial on Jurisdiction, para. 4.7, *citing* Respondent's Request for Bifurcation, para. 137; Claimant's Rejoinder, para. 183, *citing* Respondent's Reply Memorial on Jurisdiction, para. 190.

551 Claimant's Rejoinder, para. 187, *citing* Finnish Government proposal regarding approval of 2004 BIT, 4 June 2004, **Exhibit C-0084**.

552 Claimant's Rejoinder, para. 189.

553 Jurisdiction Hearing, Day 1, p. 196:1-12.

554 Claimant's Counter-Memorial on Jurisdiction, para. 4.7, *citing* Respondent's Request for Bifurcation, para. 137; Claimant's Rejoinder, para. 183, *citing* Respondent's Reply Memorial on Jurisdiction, para. 190.

555 Claimant's Rejoinder, paras. 185, 190; Jurisdiction Hearing, Day 1, pp. 184:13-185:1, *citing* Preamble, 2004 BIT, **Exhibit CLA-0002**; Jurisdiction Hearing, Day 2, pp. 248:21-249:6.

556 Jurisdiction Hearing, Day 1, pp. 193:19-25; 196:18-23.

until 4 February 2005, the day before the 2004 BIT came into force.[557]

C. TRIBUNAL'S ANALYSIS

a) The "dispute" in this arbitration

291. The Tribunal first considers its temporal jurisdiction under the 2004 BIT. The 2004 BIT was signed on 3 March 2004 and entered into force on 5 February 2005. Article 13 of the 2004 BIT states that it applies "to all investments made . . . before or after [its] entry into force," but "shall not apply to any dispute concerning an investment which arose or any claim which was settled before its entry into force."[558] Respondent maintains that the Tribunal lacks jurisdiction under the 2004 BIT because the dispute in this case arose before the 2004 BIT entered into force and is a continuation of the proceedings that have already taken place in Egypt. By contrast, Claimant argues that the present arbitration concerns a new dispute that arose when he raised his treaty claims in the Notice of Dispute on 8 July 2011, well after the 2004 BIT entered into force.

292. In order to establish its temporal jurisdiction, the Tribunal must consider the meaning of the term "dispute" and determine when a "dispute" arose in this case. The Parties are divided on the meaning of "dispute". The Parties also disagree about whether the domestic criminal proceedings in Egypt, resulting in Claimant's incarceration and eventual release, are part of the same dispute as the present arbitration.

293. The questions of what constitutes a dispute under an investment treaty and whether a dispute is new have been considered by tribunals in the past.

294. In *Maffezini v. Spain*, the underlying events began in 1989. Spain argued that the tribunal did not have temporal jurisdiction under the applicable investment treaties (which entered into force on 28 September 1992, at the earliest). Invoking the International Court of Justice definition of a dispute as "a disagreement on a point of law or fact, a conflict of legal views or interests between parties," the tribunal in *Maffezini v. Spain* stated that a "dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim."[559] The tribunal found that a dispute begins with "the expression of a disagreement and the statement of a difference of views . . . . The conflict of legal views and interests will only be

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557 Claimant's Counter-Memorial on Jurisdiction, para. 4.3.

558 Article 13, 2004 BIT, **Exhibit CLA-0002** (Emphasis added).

559 *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, **Exhibit CLA-0047**, para. 94, *citing Case concerning East Timor, ICJ Reports 1995, 90*, para. 22.

present in the latter stage, even though the underlying facts predate them."[560] The tribunal upheld jurisdiction because even though the underlying facts may have arisen from 1989, the dispute began to take shape only in 1994, after the applicable BITs were in force.[561]

295. Similar issues arose in *Helnan International Hotels v. Egypt*, which was brought under the 1999 Denmark-Egypt BIT that entered into force on 29 January 2000. The respondent contended that the tribunal lacked jurisdiction because divergences between parties began in 1993 and disputes and divergences that arose before the entry into force of the treaty were excluded. The claimant maintained that a "divergence" required an opposition or conflict of views between parties, which only arose in 2004.[562] The tribunal held that "in the case of a divergence, the parties hold different views but without necessarily pursuing the difference in an active manner . . . . [I]n case of a dispute, the difference of views forms the subject of an active exchange between the parties under circumstances which indicate that the parties wish to resolve the difference . . . ."[563] The tribunal found that the divergences between parties only crystallised after the entry into force of the applicable investment treaty and therefore dismissed the *ratione temporis* jurisdictional objection.[564]

296. In *Vieira v. Chile*, Vieira argued that Chile had breached investment treaty protections under the Spain-Chile BIT (which came into force on 29 March 1994) in the context of fishing rights. Chile challenged jurisdiction on the basis that the dispute arose at the very latest when claimant's company was denied the right to fish in external waters, on 12 September 1990, which was before the investment treaty came into force.[565] The claimant alleged that the dispute arose after 29 March 1994, giving the tribunal jurisdiction under the Spain-Chile BIT.[566]

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560 *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, **Exhibit CLA-0047**, para. 96.

561 *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, **Exhibit CLA-0047**, para. 98.

562 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006, **Exhibit RLA-0068**, paras. 37, 46.

563 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006, **Exhibit RLA-0068**, para. 52.

564 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006, **Exhibit RLA-0068**, paras. 56-57.

565 *Sociedad Anonima Eduardo Vieira c. Republica de Chile*, Award, ICSID Case No. ARB/04/7, **Exhibit RLA-0079**, para. 106 (unofficial translation).

566 *Sociedad Anonima Eduardo Vieira c. Republica de Chile*, Award, ICSID Case No. ARB/04/7, **Exhibit RLA-0079**, para. 124 (unofficial translation).

297. The tribunal defined a dispute as:

> a) a disagreement which implies a minimum of communication between the parties.
>
> b) in order to characterize a dispute, one of the parties involved shall raise the issue to the other, and the latter shall stand in opposition, either directly or indirectly, with the other party. The dispute shall entail that one of the parties stands positively in opposition with the other.
>
> c) the disagreement shall be in connection with a matter of fact or law, resulting in a concrete conflict of interest between parties.
>
> d) the disagreement shall entail a discussion resulting in a situation where parties have clearly opposite positions with respect to the issue (of fact or law).
>
> e) the disagreement shall comprise a claim, either made orally or in writing, or, depending on the case, the disagreement shall appear when the claim is presented.
>
> f) the disagreement shall refer to issues clearly identified between the parties, shall not be merely theoretical and shall be likely to be presented within a concrete claim.[567]

298. The tribunal found that a dispute had arisen between the parties "before the Treaty came into force . . . . [B]oth Chile and CONCAR had presented [written] evidence which indicated a clear disagreement and different interests and points of view with respect to CONCAR's right to fish within external waters."[568] The tribunal determined that the dispute giving rise to the arbitration was a continuation of an earlier dispute. The tribunal declined jurisdiction.[569]

299. In *Lucchetti v. Peru*, the underlying BIT entered into force on 3 August 2001. Peru argued that the dispute between the claimants and the Peruvian authorities began in 1997-1998 and, therefore, the tribunal had no jurisdiction.[570] The tribunal accepted that a "dispute" had arisen between the claimants and the authorities because each side had expressed conflicting views regarding their respective rights and obligations.[571] However, the tribunal held that the dispute was not a new one and therefore the tribunal lacked jurisdiction. In reaching that conclusion, the tribunal found that the subject matter and facts giving rise to the earlier dispute were the

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567 *Sociedad Anonima Eduardo Vieira c. Republica de Chile*, Award, ICSID Case No. ARB/04/7, **Exhibit RLA-0079**, para. 249 (unofficial translation).

568 *Sociedad Anonima Eduardo Vieira c. Republica de Chile*, Award, ICSID Case No. ARB/04/7, **Exhibit RLA-0079**, paras. 262, 264 (unofficial translation).

569 *Sociedad Anonima Eduardo Vieira c. Republica de Chile*, Award, ICSID Case No. ARB/04/7, **Exhibit RLA-0079**, para. 303 (unofficial translation).

570 *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, **Exhibit RLA-0067**, para. 25.

571 *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, **Exhibit RLA-0067**, para. 49.

same as those giving rise to the investment dispute before it.[572]

300. The Tribunal concludes, based its evaluation of the Parties' arguments and informed by their discussions of the jurisprudence discussed above, that a "dispute" entails a disagreement on facts and/or law that has been communicated by one party to the other. Claimant submitted at the Hearing on Jurisdiction that the pre-February 2005 record of this case reflects that the Parties were not mutually aware of their disagreements with respect to the investment dispute that lies at the centre of this arbitration.[573] The Tribunal agrees. Unlike the circumstances in *Vieira v. Chile*, the Tribunal finds that the pre-February 2005 record of this case does not reflect that the Parties had exchanged communications regarding their positions on the violation of investment protection obligations by Egypt. This dispute was first raised in writing by Claimant on 8 July 2011.[574] Respondent has not presented any evidence or communications before 2011 showing opposing positions with respect to its treatment of Claimant's investment. The conditions set out in paragraph 297 above were not satisfied at any time before 8 July 2011. The Tribunal is thus satisfied that in this case, the dispute in its legal sense arose after the 2004 BIT entered into force.

301. The Tribunal has considered Respondent's argument that this dispute is not new, but is substantially similar to, and effectively a continuation of, the domestic Egyptian criminal proceedings involving Mr Bahgat. The May 2006 judgment of the Egyptian Court of Cassation lifting the Freezing Order details the nature of the allegations against Mr Bahgat before the Egyptian courts.[575] The Court explains that Mr Bahgat was accused of "embezzling for the purpose of expropriation the sum of fifteen million pounds which was owned by the aforesaid company they worked for" and obtaining a profit from this activity.[576] Mr Bahgat was also accused of "forgery of a document of a company in which public funds were invested";[577] and "caus[ing] deliberate damage to the property and interests of the aforesaid company where they worked."[578] As pointed out by counsel for Claimant, the domestic litigation was a case about

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572 *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, **Exhibit RLA-0067**, para. 50.

573 Jurisdiction Hearing, Day 1, p. 208:5-13.

574 Letter from Claimant to Respondent, dated 8 November 2011 (annexed to Notice of Arbitration).

575 Copy of Judgment of the Court of Cassation dated 16 May 2006 with English translation lifting freezing order, **Exhibit C-0058**.

576 Copy of Judgment of the Court of Cassation dated 16 May 2006 with English translation lifting freezing order, **Exhibit C-0058**, p. 2.

577 Copy of Judgment of the Court of Cassation dated 16 May 2006 with English translation lifting freezing order, **Exhibit C-0058**, p. 2.

578 Copy of Judgment of the Court of Cassation dated 16 May 2006 with English translation lifting freezing order, **Exhibit C-0058**, p. 2.

alleged wrongdoing by Mr Bahgat, not alleged wrongdoing by Egypt.[579] By contrast, in this arbitration, Claimant is invoking substantive protections for his investment in the Project under the BITs, which is a distinct dispute from that before the Egyptian courts. The first time Claimant communicated that he was doing so was in the Notice of Dispute dated 8 July 2011 and the first time Egypt stated an opposing position evincing a disagreement with respect to the treatment of his investments was 6 February 2012.[580] The present arbitration thus concerns a different subject matter and different facts than those before the Egyptian courts.

302. This arbitration can be distinguished from *Lucchetti v. Peru* and *Vieira v. Chile*. In *Lucchetti v. Peru*, a long-running dispute about a license for a pasta factory was at the heart of both the domestic proceedings and the international arbitration. Similarly, the domestic proceedings in *Vieira v. Chile* and the arbitration concerned the same subject matter and facts concerning the grant of the fishing licenses. Unlike these cases, in the present case, the domestic criminal proceedings in Egypt did not concern the same subject matter and facts as those raised in the arbitration. The two proceedings concern complaints about the actions of different actors in relation to different legal obligations and different events.

303. Therefore, the Tribunal is satisfied that in this case, the dispute in its legal sense arose after the 2004 BIT entered into force and that this dispute is not the continuation of the dispute that had been decided by the Egyptian criminal courts. The Tribunal therefore finds that it has jurisdiction under the 2004 BIT to determine Claimant's claims. Respondent's objection to the Tribunal's jurisdiction *ratione temporis* under the 2004 BIT is accordingly dismissed. The Tribunal notes that Article 13 of the 2004 BIT confirms that it applies to "investments made by investors of either Contracting Party in the territory of the other Contracting Party, whether made before or after the entry into force of this Agreement."[581] Therefore, this Tribunal can take jurisdiction under Article 9(2) of the 2004 BIT with respect to Claimant's investments in Egypt that were made in 1997, before the 2004 BIT came into force.

579 Jurisdiction Hearing, Day 1, pp. 200:7-201:10.
580 Letter from Respondent to the PCA, dated 6 February 2012.
581 *See also* Respondent's Opening Slides, p. 15.

b) The applicable substantive law and interaction between 1980 and 2004 BITs

304. This arbitration has been brought under the 1980 BIT and, "[i]n addition, and in the alternative," under the 2004 BIT.[582] It is a well-established principle of international law, and common ground between Parties, that treaties cannot have retroactive effect.[583] Bearing this principle in mind, the Tribunal now considers the law applicable to this dispute and the interaction between the substantive protections contained in the 2004 BIT and the 1980 BIT.

305. In this respect, the Parties have referred the Tribunal to a number of relevant decisions of other investment tribunals. *Impregilo v. Pakistan* involved a claim under the 2001 Italy-Pakistan BIT that came into force on 22 June 2001.[584] Pakistan invited the tribunal to hold, based on the principle of non-retroactivity, that it had no jurisdiction save with respect to acts that occurred after 22 June 2001. The tribunal found that it had jurisdiction *ratione temporis* but noted that the substantive provisions of the 2001 Italy-Pakistan BIT did not bind Pakistan in relation to its pre-22 June 2001 actions. It held that "Impregilo complains of a number of acts for which Pakistan is said to be responsible. The legality of such acts must be determined, in each case, according to the law applicable at the time of their performance. The BIT entered into force on 22 June 2001. Accordingly, only the acts effected after that date had to conform to its provisions."[585] This can be contrasted with cases involving an earlier BIT and a subsequent BIT.

306. In *Jan de Nul v. Egypt*, which was brought under the provisions of both the 1977 and 2002 Egypt-Belgium/Luxembourg BITs, the tribunal found that it had jurisdiction under the 2002 treaty and held with regard to the applicable substantive law that:

> The Tribunal must apply the provisions of the 2002 BIT with regard to the acts of the Ismaïlia Court in relation to its judgment [dated 22 May 2003] and the provisions of the 1977 BIT with regard to conduct that took place prior to the entry into force of the 2002 BIT . . . . As a result, the substantive provisions of both treaties will apply, while, as it

582 Notice of Arbitration, paras. 5-6: ("We advised you that if Egypt failed to settle Mr Bahgat's claims within three months Mr Bahgat would invoke investor-state arbitration under Art 9(2)(d) of [the 2004 BIT] for violations of both [the 1980 BIT] and [the 2004 BIT]. In addition, and in the alternative, we said that Mr Bahgat would also invoke investor-state arbitration under Art. 7 of [the 1980 BIT] in respect of violations of [the 1980 BIT]").

583 Article 28, Vienna Convention on the Law of Treaties, **Exhibit RLA-0063**; Jurisdiction Hearing, Day 1, p. 113:6-8; Claimant's Rejoinder, para. 209.

584 *Impregilo S.p.A v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, **Exhibit CLA-0070**, para. 1.

585 *Impregilo S.p.A v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, **Exhibit CLA-0070**, para. 311.

> follows from the Decision on Jurisdiction, the jurisdiction over the dispute is based on the 2002 BIT only.[586]

307. In the light of the Parties' arguments and informed by the case law set out above, the Tribunal, having taken jurisdiction under the 2004 BIT, will apply the substantive provisions of the 1980 BIT to acts before 5 February 2005 (when the 2004 BIT came into force) and the 2004 BIT to acts after 5 February 2005.

308. The tribunal in *Jan de Nul v. Egypt* noted that the dispute resolution clause of the treaty under which jurisdiction was taken contained no restriction with respect to the applicable law and that the acts at issue fell within the scope of application of the earlier treaty.[587] This Tribunal considers that the 2004 BIT likewise imposes no limitations. The offer to arbitrate in Article 9(1) and (2) of the 2004 BIT does not restrict the contracting parties' consent to arbitrate only to disputes that involve the application of the 2004 BIT.[588]

309. Respondent argues that Claimant cannot benefit from the substantive protections under the 1980 BIT as the 2004 BIT states that "[u]pon its entry into force, the present Agreement substitutes and replaces the [1980 BIT]."[589] Respondent maintains that all provisions of the 1980 BIT, including its substantive provisions, ceased to apply in any manner to disputes that arise after the entry into force of the 2004 BIT.[590] The Tribunal notes that at the same time, Respondent concedes that the principle of non-retroactivity would not allow this Tribunal to apply the substantive protections of the 2004 BIT to pre-existing investments.[591] Respondent's argument would create a situation where the Tribunal has jurisdiction over pre-existing investments under Article 13 of the 2004 BIT, but is prevented from applying either the substantive provisions of the 2004 BIT or the 1980 BIT to the investments. This could not have been the intention of the contracting parties. Therefore, the Tribunal considers that Article 17 of the 2004 BIT does not prevent it from applying the substantive provisions of the 1980 BIT to the events that took place before 5 February 2005.

310. Respondent contends that if the contracting parties to the BITs had intended for the substantive provisions of the 1980 BIT to apply after the entry into force of the 2004 BIT, they would have

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586 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, **Exhibit CLA-0068**, paras. 134-135.

587 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, **Exhibit CLA-0068**, para. 136; *See also*, R. Dolzer, C. Schreuer, Principles of International Investment Law, 2nd ed., (OUP 2012), p. 37, **Exhibit CLA-0067**.

588 Article 9(1), (2), 2004 BIT, **Exhibit CLA-0002**.

589 Article 17, 2004 BIT, **Exhibit CLA-0002**.

590 Jurisdiction Hearing, Day 1, pp. 85:3-86:3.

591 Respondent's Reply, paras. 214-216.

specifically so provided in the 2004 BIT, as has been done in other investment treaties.

311. Respondent refers to *Ping An v. Belgium*, which was brought under the 2009 China-Belgium/Luxembourg BIT. Article 10(2) of the 2009 China-Belgium/Luxembourg BIT states that it "substitutes and replaces" the 1986 China-Belgium/Luxembourg BIT, and that the 2004 China-Belgium/Luxembourg BIT "shall not apply to any dispute or any claim concerning an investment which was already under judicial or arbitral process before its entry into force. Such disputes and claims shall continue to be settled according to the [1986 China-Belgium/Luxembourg BIT]."[592] The claimant in *Ping An v. Belgium* relied on the 2009 China-Belgium/Luxembourg BIT for jurisdiction, but on the 1986 China-Belgium/Luxembourg BIT for the substance of the disputed obligations (as the events forming the basis of the claim and the crystallisation of the dispute took place while the earlier BIT was in force).[593] The tribunal found that it did not have jurisdiction *ratione temporis* to adjudicate the claims that were based on facts that took place and a dispute that arose before the 2009 China-Belgium/Luxembourg BIT was in force.[594] Unlike *Ping An v. Belgium*, in this arbitration, Claimant's reliance on the 2004 BIT is not merely procedural. Claimant makes submissions based on events that took place before and after the 2004 BIT and also proposes the application of its substantive provisions. Importantly, unlike *Ping An v. Belgium*, the dispute in the present arbitration crystallised *after* the 2004 BIT was in force.[595] *Ping An v. Belgium* does not assist Respondent as the tribunal did not adjudicate whether the substantive provisions of an earlier treaty can be applied to the facts of a dispute that had crystallised during the pendency of a *later* treaty.

312. Respondent also refers to the 1998 Dutch-Tunisian BIT, under which *ABCI Investments v. Tunisia* was brought, Article 12(5) of which states that "[o]n the entry into force of the present agreement, the [1963 Dutch-Tunisian BIT] shall be terminated and shall be replaced by the present Agreement. Disputes arisen before the entry into force of the present Agreement shall continue to be ruled by the agreement of May 23, 1963".[596] Respondent argues that unlike

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592 *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015, **Exhibit RLA-0056**, para. 49.

593 *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015, **Exhibit RLA-0056**, para. 130.

594 *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015, **Exhibit RLA-0056**, paras. 231-233.

595 *See* paragraph 303.

596 *ABCI Investment v. Republic of Tunisia*, ICSID Case No. ARB/04/12, Decision on Jurisdiction, 18 February 2011, **Exhibit RLA-0057**, para. 162.

Article 12(5) above, the 2004 BIT "does not contain any provision to the effect that the substantive provisions of the 1980 BIT would continue to be applicable to disputes which arose prior to 2 February 2005".[597] However, Article 12(5) is inapposite to Respondent's case in light of the Tribunal's finding above that the present dispute arose when the 2004 BIT was in force. Article 12(5) does not state that the substantive law in the 1963 Dutch-Tunisian BIT will continue to apply to *investments* that were made before the later BIT that were connected to a dispute arising under the 1998 Dutch-Tunisian BIT. It only states that the 1963 Dutch-Tunisian BIT would continue to apply to pre-existing *disputes*.

313. In any event, the Tribunal finds that Claimant benefits from the application of the survival clause contained in Article 9 of the 1980 BIT. Article 9(3) of the 1980 BIT states that for investments made prior to the date on which the 1980 BIT is terminated, Articles 1-5 of the 1980 BIT will continue to remain in force for a further period of 20 years from the date of termination. The Tribunal is unconvinced by Respondent's argument that the survival clause in Article 9(3) will only apply in circumstances where the 1980 BIT has been unilaterally terminated according to the terms of Article 9(2) and not in the event of the substitution and replacement of the 1980 BIT, as is the case with the 2004 BIT. Respondent states that investors have a legitimate expectation of the continuation of investment protections through a survival clause *only* following the unilateral termination of a bilateral investment treaty: the Tribunal considers that the text of Article 9(3) provides that investors, following any kind of termination of investment protections, should benefit from a survival clause.

314. The general principle is that a treaty must be interpreted according to its terms, in its context, in accordance with its object and purpose.[598] The Tribunal notes the text of the Preamble to the 1980 BIT "[d]esiring to maintain fair and equitable treatment of investments of nationals and companies of one Contracting State in the territory of the other Contracting State [. . .]" The Tribunal notes the wording of the Preamble to the 2004 BIT, which states: "[r]ecognizing the need to protect investments of the investors of one Contracting Party in the territory of another Contracting Party [. . .]"; "[a]greeing that a stable framework for investment will contribute to maximizing the effective utilization of economic resources and improve living standards". The BITs strongly indicate that the intention of the contracting parties was to provide continuous investment protection to investors of the other contracting state. A gap in protection afforded to investments under international investment treaties would be contrary to that intention. The Tribunal notes that at the Hearing on Jurisdiction, Respondent conceded that there is no

597 Respondent's Reply, para. 186.
598 Article 31(1), Vienna Convention on the Law of Treaties, **Exhibit RLA-0063**.

recourse available to Mr. Bahgat in local courts pursuant to the Egyptian Investment Law as the provisions of the law only apply to companies.[599] The Tribunal cannot accept Respondent's interpretation of Article 9(3) as this would generate a gap in the protection available to Finnish investors. The Tribunal, thus, confirms Claimant's reading that, on account of the survival clause in Article 9(3) of the 1980 BIT, the substantive investor protections contained in Articles 1-8 of the 1980 BIT can be applied in respect of Respondent's actions that took place while the 1980 BIT was in force.

315. In conclusion, the Tribunal determines that it has jurisdiction in this arbitration under Article 9(2) of the 2004 BIT. In line with the principle against non-retroactivity, the substantive provisions of the 1980 BIT will be applied to actions that took place before 5 February 2005 and the substantive provisions of the 2004 BIT will apply to all actions that took place after that date. As a practical matter, the Tribunal observes that the application of different treaties in this case should not be a hindrance to the conduct of this arbitration as the substantive protections that are provided under the 1980 BIT and under the 2004 BIT are near identical.[600] The Tribunal considers that its approach is consistent with the intention of the contracting parties to the BITs to ensure that there is no gap in investment protection.

c) Breaches of Egyptian Investment Law

316. A further issue relevant to the law applicable to the dispute is that of the relevance of Egyptian Investment Law. Respondent contends that the Tribunal does not have jurisdiction to deal with breaches of the Egyptian Investment Law as there is no agreement between the Parties to this effect, as required by Article 7 of the Egyptian Investment Law. Claimant maintains that this Tribunal has jurisdiction to apply Egyptian Investment Law as Article 7 of the Egyptian Investment Law allows Parties to agree to settle disputes related to the Egyptian Investment

599 Jurisdiction Hearing, Day 2, pp. 245:16-246:1.

600 *See* provisions in the Treaties on expropriation (Article 3(1), 1980 BIT, **Exhibit CLA-0001** and Article 5(1), 2004 BIT, **Exhibit CLA-0002**); fair and equitable treatment (Article 2(1), 1980 BIT, **Exhibit CLA-0001**, and Article 2(2), 2004 BIT, **Exhibit CLA-0002**); full and constant protection and security (the most favoured nation clause contained in Article 2(3), 1980 BIT, **Exhibit CLA-0001** read with Article 3(1) of the 1996 Egypt-Netherlands BIT, and Article 2(2), 2004 BIT, **Exhibit CLA-0002**); protection against arbitrary measures (the most favoured nation clause contained in Article 2(3), 1980 BIT, **Exhibit CLA-0001** read with Article 3(1) of the 1996 Egypt-Netherlands BIT, and Article 2(3), 2004 BIT, **Exhibit CLA-0002**); national treatment (the most favoured nation clause contained in Article 2(3), 1980 BIT, **Exhibit CLA-0001** read with Article 3(2) of the 1996 Egypt-Netherlands BIT, and Article 2(1), 2004 BIT, **Exhibit CLA-0002**); and failure to observe obligations in relation to an investment (the most favoured nation clause contained in Article 2(3), 1980 BIT, **Exhibit CLA-0001** read with Article 3(4) of the 1996 Egypt-Netherlands BIT, and Article 12(2), 2004 BIT, **Exhibit CLA-0002**). *See also Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, **Exhibit CLA-0068**, para. 134.

Law "within the framework of current agreements between the Arab Republic of Egypt and the state of the investor". The Tribunal finds the Claimant's reading of Article 7 convincing and determines that there is agreement between the Parties for this Tribunal to apply the Egyptian Investment Law.

317. Further, the Tribunal notes that the authorities cited by Respondent for the proposition that tribunals cannot apply provisions of domestic law in international proceedings are inapposite. The tribunal in *Feldman v. Mexico* found that the tribunal could not apply general international law or Mexican law because the underlying treaty, Article 1117(1)(a) of NAFTA, did not permit it to do so.[601] Article 9 of the 2004 BIT refers to the resolution of "dispute arising directly from an investment".[602] On its face, it does not limit this Tribunal's jurisdiction to apply the Egyptian Investment Law for the adjudication of this dispute.

318. Therefore, the Tribunal determines that it has jurisdiction to hear claims arising out of alleged breaches of the Egyptian Investment Law.

VI. DECISION

319. Based on the foregoing considerations, the Tribunal:

A. Dismisses the jurisdiction *ratione personae* objections advanced by Respondent.

B. Dismisses the jurisdiction *ratione temporis* objections advanced by Respondent.

C. Decides that it has jurisdiction over the dispute.

D. Reserves all questions concerning the merits, costs, fees and expenses for subsequent determination; and

E. Invites the Parties to confer regarding the procedural calendar for the merits phase of the arbitration, and to report to the Tribunal in this respect within six (6) weeks of receipt of this Decision.

601 *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, **Exhibit RLA-0072**, para. 61.

602 Article 9, 2004 BIT, **Exhibit CLA-0002**.

Place of Arbitration: The Hague

Signed, this 30 day of NOVEMBER 2017,

Professor W. Michael Reisman

Professor Francisco Orrego Vicuña
(with a separate opinion for certain portions)

Professor Rüdiger Wolfrum
Presiding Arbitrator