INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN:

WAGUIH ELIE GEORGE SIAG AND CLORINDA VECCHI
(CLAIMANTS)

AND

THE ARAB REPUBLIC OF EGYPT
(RESPONDENT)

(ICSID Case No. ARB/05/15)

AWARD

Members of the Tribunal
Mr David A R Williams QC, *President*
Prof Michael Pryles, *Arbitrator*
Prof Francisco Orrego Vicuña, *Arbitrator*

Secretary of the Tribunal
Ms Milanka Kostadinova

Representing the Claimants

Mr Reginald R Smith
Mr Craig S Miles
Mr Kenneth R Fleuriet
King & Spalding LLP

Representing the Respondent

Dr Ahmed Kamal Aboulmagd
Mr Hazim A Rizkana
Helmy, Hamza & Partners
Baker & McKenzie International – Cairo

Mr Lawrence W Newman
Baker & McKenzie LLP – New York

H E Counsellor Milad Sidhom Boutros
Mr Hussein M F Mostafa
Mr Asser M A Harb
State Law Suites Authority, Egypt

Date of Dispatch to the Parties: June 1, 2009

TABLE OF CONTENTS

	Page
I. INTRODUCTION – THE NATURE OF THE CLAIM	1
The Italy – Egypt BIT	2
Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention")	3
Egyptian Nationality Law	4
II. SUMMARY OF FACTS	5
Mr Waguih Elie George Siag – Background	5
Mrs Clorinda Vecchi – Background	6
The Property and the Project	6
The First Threat of Seizure by Egypt	7
Egypt's Expropriation of the Property by Ministerial Decree	8
The First Court Decision	10
The Second Seizure of the Property by Egypt	11
The Second Court Decision	11
The Supreme Administrative Court's Decision on the Merits	12
The Minister of Tourism's New Resolution and the Administrative Court's Decision	13
Egypt's Unsuccessful Appeal to the Supreme Administrative Court	15
Seizures of the Property by the President and Prime Minister of Egypt and the Transfer of the Property to Al-Sharq Gas Company	16
A New Decision of the Administrative Court	16
Prime Ministerial Resolution No 799	17
The Sinai Litigation	17
III. PROCEDURAL HISTORY UP TO SEPTEMBER 2007 INCLUDING THE DECISION ON JURISDICTION OF 11 APRIL 2007	17
Registration of the Request for Arbitration	17
Constitution of the Arbitral Tribunal and Commencement of the	18

	Page
Proceeding	
Written and Oral Procedure	19
Egypt's Application for Bifurcation of the Merits Phase by First Hearing Egypt's Estoppel Arguments	21
IV. EGYPT'S SEPTEMBER 2007 OBJECTION TO JURISDICTION BASED ON MR SIAG'S ALLEGED BANKRUPTCY	23
The Parties' Submissions on Egypt's Bankruptcy Application	23
Egypt's Initial Application	23
Claimants' Response	24
Egypt's Further Submissions	25
Claimants' Further Submissions	25
Procedural Order No. 5	25
Egypt's Formal Application	27
Claimants' Answer	28
Egypt's Reply	29
Claimants' Rejoinder	31
Claimants' Reply on the Merits (as to the Bankruptcy Application)	33
Egypt's Rejoinder on the Merits (as to the Bankruptcy Application)	34
Procedural Order No. 6	34
Egypt's Further Submissions	35
Claimants' Further Submissions	36
Egypt's Further Submissions on the eve of the Hearing and Claimants' Motion to Strike	36
The Hearing on 10 March 2008 Pursuant to Procedural Order No. 6	37
Egypt's Oral Submissions as to Bankruptcy (on 10 March 2008)	37
Claimants' Oral Submissions as to Bankruptcy (on 10 March 2008)	38
Procedural Order No. 7	39
Procedural Order No. 8	40

	Page
Egypt's Post-Hearing Submissions (as to Bankruptcy)	40
Claimants' Post-Hearing Submissions (as to Bankruptcy)	41
Discussion of Egypt's Bankruptcy Application	41
Did (and Could) Egypt Contravene ICSID Rule 41?	41
What Sanctions Are Appropriate for Egypt's Breach of Rule 41(1)?	48
The Merits of Egypt's Bankruptcy Application	50
Is (or Was) Mr Siag Bankrupt?	50
V. EGYPT'S OCTOBER 2007 OBJECTION TO JURISDICTION BASED ON MR SIAG'S LEBANESE NATIONALITY	53
The Parties' Submissions on Egypt's "Lebanese Nationality" Application	53
Egypt's Application	53
Egypt's Counter-Memorial on the Merits (as to the Lebanese Nationality Application)	54
Claimants' Answer (in Respect of Bankruptcy)	55
Claimants' Response	55
Egypt's Further Submissions Following Egypt's "Further Enquiries"	56
Egypt's Rejoinder on the Merits (as to the Lebanese Nationality Issue)	58
Procedural Order No. 6 (as to Application No. 2 – the Lebanese Nationality Issue)	59
Claimants' Rejoinder	59
Egypt's Further Submissions	61
Egypt's Second Application to Bifurcate the Merits Phase	61
Claimants' Response to the Second Application for Bifurcation	62
Claimants' Further Submissions of 29 February 2008 as to Egypt's "Bankruptcy" and "Lebanese Nationality" Objections	62
The Tribunal's Ruling on Egypt's Second Application for Bifurcation	66
Egypt's Further Submissions on its Applications (in Breach of Procedural Order No. 6)	66
Further Evidence and Submissions on Egypt's Further Jurisdictional Objections	67

	Page
at the Hearing on 10 March 2008	
Egypt's Oral Submissions on Lebanese Nationality	67
Claimants' Oral Submissions on Lebanese Nationality	68
Procedural Order No. 7	70
Egypt's Application to Add an Exhibit	71
Egypt's Oral Closing Submissions	71
Procedural Order No. 8	72
Egypt's Post-Hearing Submissions	72
Claimants' Post-Hearing Submissions	73
Discussion of Egypt's Lebanese Nationality Application	73
Was Egypt's Application Capable of Being Waived?	73
Has Egypt Waived its Objection?	74
i) Egypt's Alleged Lack of Access to Official Lebanese Files	75
ii) Egypt Only Made Enquiries in Lebanon in Preparation for the Merits Phase	77
iii) Egypt's Post-Hearing Submissions	79
iv) The Tribunal's Decision on Waiver in Respect of the Lebanese Nationality Issue	80
The Merits of Egypt's "Lebanese Nationality" Application	81
The Burden of Proof	81
What Does Egypt Have to Prove?	82
The Standard of Proof	85
Did Mr Siag Obtain Lebanese Nationality by Fraud?	86
i) Lack of Signatures on Mr Siag's Individual Record	87
ii) No Record of Mr Siag in Lebanon	88
iii) Mr Siag's Intention Was to Avoid Military Service	93
iv) Mr Siag paid $5,000 to Mr Khouly to Help Obtain Lebanese Nationality	94
v) Mr Siag's Individual Record Bears the False Inscription "Lebanese for More	95

	Page
Than 10 Years"	
The Tribunal's Decision on Fraud and the Lebanese Nationality Objection	96
Summary of the Tribunal's Determinations on Jurisdiction	97
Why the Tribunal Did Not Suspend Proceedings	97
VI. LIABILITY	100
The Parties' Submissions on Liability	100
Claimants' Memorial on the Merits	100
Egypt's Counter-Memorial on the Merits	103
Claimants' Reply Memorial on the Merits	106
Egypt's Rejoinder on the Merits	109
Claimants' Oral Submissions on Liability at the Merits Hearing	112
Egypt's Oral Submissions on Liability	113
Claimants' Post-Hearing Submissions	114
Egypt's Post-Hearing Submissions	115
Discussion on Liability	116
Expropriation	116
i) Public Purpose in the National Interest of the State	117
ii) Adequate and Fair Compensation	118
iii) According to Legal Principles	119
iv) A Non-Discriminatory Basis	120
v) Due Process of Law	120
Failure to Provide Full Protection	122
Fair and Equitable Treatment	123
i) Lack of Due Process / Denial of Justice	124
Unreasonable or Discriminatory Measures	125
Most Favoured Nation Treatment	126

	Page
Summary of Findings on Liability	127
Defences to Liability	127
Claimants Do Not Have Genuine Links to Italy	128
Claimants May Not Oppose Their Italian Nationality to Egypt	130
Estoppel	132
Claimants Illegally Owned Land in Taba	134
Summary of Tribunal's Findings on Egypt's Defences	135
VII. EGYPT'S CHALLENGE TO MRS VECCHI'S CLAIM	135
The Parties' Early Submissions Regarding Mrs Vecchi's Claim	135
Egypt's Application for Discontinuance of Ms Vecchi's Claim (in its Rejoinder on the Merits)	136
Procedural Order No. 6	136
Further Submissions of the Parties and the Decision of the Tribunal on Egypt's Request for the Discontinuance of Mrs Vecchi's Claim	136
The Parties' Post-Hearing Submissions in Respect of Mrs Vecchi's Claim	139
Findings of the Tribunal in Respect of Mrs Vecchi's Claim	139
VIII. DAMAGES	139
Introduction	139
The Investment	140
The Parties' Submissions on Damages	142
Claimants	142
Egypt	144
Principles Relevant to an Award of Compensation	146
The Basis to be Adopted by the Tribunal	148
The Expert Evidence on Quantum	150
The Evidence for the Claimants	150
Egypt's Criticisms of the Claimants' Calculation of Damages	151

	Page
Discussion	153
Discrete Damages – Construction Costs	159
Salaries and Benefits	160
Bank Loans	160
Legal Expenses	161
Interest	161
IX. COSTS	163
The Tribunal's Directions as to Costs	163
The Claimants' Submissions on Costs	164
Egypt's Submissions on Costs	166
Relevant Principles as to Costs	168
Discussion	170
X. THE AWARD	172
Appendix 1: Chronology of the Primary Facts	177
Dissenting Opinion of Professor Francisco Orrego Vicuña	(Separate pagination)

I. INTRODUCTION – THE NATURE OF THE CLAIM

1. This case involves an investment dispute between Claimants, Mr Waguih Elie George Siag and Mrs Clorinda Vecchi, and Respondent, the Arab Republic of Egypt ("Egypt"). Mr Siag and his mother Ms Vecchi are natural citizens of Italy. As Claimants they bring this case under the ICSID Convention and the Agreement for the Promotion and Protection of Investments between the Republic of Italy and the Arab Republic of Egypt dated March 2, 1989 (hereinafter the "Italy – Egypt BIT" or "BIT"). Mrs Vecchi died on 16 October 2007. Her claim is now advanced by the executors of her estate.[1]

2. The Claimants are the principal investors in Touristic Investments and Hotels Management Company (SIAG) S.A.E. and Siag Taba Company (together "Siag"), companies incorporated under the laws of Egypt. In 1989, the Government of Egypt (the "Government" or "GOE"), acting through its Ministry of Tourism, sold a large parcel of oceanfront land on the Gulf of Aqaba on the Red Sea (the "Property") to Touristic Investments and Hotels Management Company (SIAG) for the purpose of developing a tourist resort (the "Project"). SIAG subsequently transferred a portion of the Property to Siag Taba Company. The Claimants allege that through a series of acts and omissions commencing in 1995, Egypt expropriated their investment, consisting of the Property owned by Claimants and the Project, and thus destroyed the value of Claimants' investments. In support of these allegations, they point to the indisputable fact that the Courts of Egypt on several occasions passed orders declaring the taking of the property by Egypt to be invalid and granting declaratory and injunctive relief but to no avail since the Court orders were never complied with.

3. The Claimants contend that their treatment, and that of their investment, consisting of the Property and the Project, violates the most basic notions of proper governmental conduct and respect for the rule of law. They say the case involves "undisguised bigotry and religious zealotry, governmental conduct based on contrivances, perjury by government attorneys in domestic court proceedings, blatant disrespect for the judicial branch of government and the finality of its rulings, extra-judicial seizures by brute force, the failure of the police to provide the most minimal levels of assistance or protection, governmental harassment and intimidation on multiple fronts, and corruption at the highest levels of the Government."[2] Claimants further argue that Egypt has not seriously contested its liability in this case, and has not adduced a

[1] The claim by the executors is discussed at paras. 489-503.
[2] Claimants' Memorial on the Merits, p. 1.

single witness of fact. It is the Claimants' argument that Egypt's failure to challenge Claimants' recitation of the facts of this case essentially establishes Egypt's liability, and leaves to the Tribunal the task of fixing compensation.

4. The Claimants seek a declaration that Egypt violated numerous provisions of the BIT, as well as international law and Egyptian law. They also claim compensation for all damages suffered, costs, and an award of compound interest.

5. Egypt advanced a number of defences, particularly but not exclusively in relation to Mr Siag. The central plank of Egypt's case is that Mr Siag was at all relevant times a national of Egypt, thus precluding him from succeeding in a claim against Egypt under the Italy – Egypt BIT. This contention was rejected in the Tribunal's Decision on Jurisdiction of 11 April 2007. Nevertheless Egypt later reformulated this contention and vigorously pursued it before the Tribunal. Egypt also contended that the expropriation had been lawful. It contended that the Claimants' claim to damages was vastly exaggerated and said if liability was established, which was strongly resisted, the damages should be nominal only.

The Italy – Egypt BIT

6. The stated objective of the BIT is to create favourable conditions for greater economic cooperation between Italy and Egypt, particularly for investments by one contracting state in the territory of the other.[3] The BIT recognises that the encouragement and reciprocal protection under international agreements of such investments will be conducive to the stimulation of business initiative and will increase prosperity in both contracting states.[4] The BIT provides a number of guarantees and protections to investors including: (1) fair and equitable treatment of investments;[5] (2) a prohibition against unreasonable or discriminatory measures;[6] (3) most favoured nation treatment of investments;[7] (4) most favoured nation treatment of activity in connection with investments;[8] (5) full protection;[9] (6) a prohibition against measures that limit the right of ownership, possession, control, or enjoyment of investments;[10] and (7) a prohibition against direct or indirect nationalization or expropriation, or measures having an equivalent effect, except for a public purpose in

[3] Italy – Egyt BIT, para. 1.
[4] Ibid., para. 2.
[5] Ibid., Article 2(2).
[6] Ibid.
[7] Ibid., Article 3(1).
[8] Ibid., Article 3(2).
[9] Ibid., Article 4(1).
[10] Ibid., Article 5(1)(i).

the national interest and against payment of adequate and fair compensation calculated at market value.[11]

7. Article 9 of the BIT is devoted to dispute resolution and follows the usual pattern of BITs. Thus Article 9(1) provides for the right of Investors to have recourse to arbitration pursuant to the ICSID Convention. It reads as follows:

> (1) All kinds of disputes or differences, including disputes over the amount of compensation for expropriation, nationalizations or similar measures, between one Contracting State and an investor of the other Contracting State concerning an investment of that investor in the territory and maritime zones of the former Contracting State shall, if possible, be settled amicably. [Underlining added.]

8. If such disputes or differences cannot be settled within six months from the date of request for settlement, the investor concerned may submit the dispute to the competent court of the Contracting State for decision or initiate an ICSID arbitration or, if such is not applicable, proceed to arbitration under the 1976 UNCITRAL Arbitration Rules.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention")

9. Italy ratified the ICSID Convention on 29 March 1971. Egypt did so on 3 May 1972.

10. Articles 25(1) and 25(2)(a) of the ICSID Convention provides as follows:

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) "National of another Contracting State" means:
>
> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute. [Underlining added.]

[11] Ibid., Article 5(1)(ii).

Egyptian Nationality Law

11. A central plank of Egypt's defence in respect of Mr Siag's claim remains that he was at all material times a national of Egypt. It is therefore appropriate to refer to the relevant provisions of the Egyptian Nationality Law No. 26 of 1975 ("the Nationality Law").[12]

> **Article 1**
>
> Egyptian citizens fall under the following categories:
>
> […]
>
> **Second**
>
> Those who were Egyptian citizens as of 22 February 1958 under the provisions of Law No. 391 of 1956 concerned with Egyptian Nationality.
>
> **Article 10**
>
> "An Egyptian may not gain a foreign nationality except after being permitted by virtue of a decree from the Minister of Interior; otherwise such person shall still be considered an Egyptian in every respect and under all circumstances, unless the Cabinet decides to withdraw his nationality under the provision of Article 16 of this Law.
>
> In the event an Egyptian is permitted to gain a foreign nationality, then this shall lead to the withdrawal of the Egyptian nationality.
>
> However, permission to acquire a foreign nationality may allow the person for whom such permission is given, his wife and minor children to retain the Egyptian nationality, provided he notifies his wish to take advantage of such benefit within a period not exceeding one year from the date of gaining the foreign nationality, and in such case they may retain the Egyptian nationality despite having gained a foreign nationality."[13]
>
> **Article 20**
>
> Declarations, notifications, documents and applications stipulated under this Law shall be addressed to the Minister of Interior or whomever he delegates in this regard, and issued on the forms determined by virtue of a decree from the Minister of Interior.
>
> [Underlining added in Article 10.]

[12] These English translations are from Egypt's Exhibit 5. These provisions were examined at length in the Decision of this Tribunal as to Jurisdiction of 11 April 2007. However, in view of Egypt's subsequent invocation of further jurisdictional arguments it is necessary to set out the provisions again.

[13] There was a slight difference between the translations submitted by Egypt in its Memorial on Jurisdiction, para. 28, and Legal Authorities, Exhibit 5. *See* hearing on jurisdiction T1: 51. It was agreed that these differences were not material. However, it was agreed that the Tribunal should refer to Egypt's Exhibit E5.

II. SUMMARY OF FACTS

12. There was no real dispute as to the primary facts and the sequence of events relevant to the dispute as opposed to the inferences and legal conclusions to be drawn from those facts. It may be noted that Egypt did not submit a statement from any witness to counter the narrative of events from the Claimants and their witnesses relating to the Property and the Project.

13. Based on facts which have been explicitly alleged by the Claimants and not disputed by Egypt, and the Tribunal's overall consideration of the evidence, both oral and documentary, the Tribunal makes the following findings of fact.[14]

Mr Waguih Elie George Siag - Background

14. Mr Siag was born in Egypt on 12 March 1962 to Egyptian parents. He was, therefore, an Egyptian national from birth. On 19 December 1989 Mr Siag submitted an application for permission to acquire Lebanese nationality under Article 10 of the Nationality Law. Prior to submitting his application Mr Siag received a nationality certificate from the Lebanese Ministry of Interior on 15 December 1989 and a letter from the Lebanese Consulate in Cairo that he was "of Lebanese nationality and recorded in the registers of this mission." On 5 March 1990 the Egyptian Minister of Interior issued his Decree No. 1353 of 1990 acknowledging Mr Siag's prior acquisition of Lebanese nationality and granting him permission to maintain his Egyptian nationality. On 8 March 1990 the Nationality Authority issued a letter to the Military Conscription Department to exempt Mr Siag from performing compulsory military service on the basis of his having dual-nationality. Mr Siag obtained a Lebanese passport on 14 June 1990. Mr Siag acquired Italian nationality on 3 May 1993 by decree of the Italian Minister of Interior. This was obtained on the basis of his marriage to an Italian citizen and the provisions of Article 5 of the Italian nationality law Number 91 of 1992. Mr Siag was issued with an Italian passport on 12 July 1995 and remains a citizen of Italy at the present time.

15. In his application for permission to acquire Lebanese nationality Mr Siag sought permission to maintain his Egyptian nationality pursuant to the third paragraph of Article 10 of the Nationality Law. As discussed at length in the Tribunal's Decision on Jurisdiction, the third paragraph of Article 10 contains an additional requirement, once permission to maintain Egyptian nationality is granted, to further notify the

[14] A chronology of the primary facts can be found in Appendix 1 to this Award.

Egyptian Interior Ministry within the period of one year of the desire to retain Egyptian nationality. Mr Siag did not so notify the Ministry with the consequence, as found in the Decision on Jurisdiction, that he lost his Egyptian nationality.

Mrs Clorinda Vecchi - Background

16. Mrs Clorinda Vecchi is the mother of Mr Siag. Mrs Vecchi was born in 1937 of parents who were Italian citizens and Mr Vecchi acquired Italian citizenship at birth. In 1954 Mrs Vecchi married Mr Elie George Siag, the father of Mr Siag. On 19 April 1955 Mrs Vecchi informed the Egyptian Interior Ministry that she wished to acquire the Egyptian citizenship of her husband. The Egyptian Minister of the Interior did not issue any decree preventing Mrs Vecchi from acquiring Egyptian nationality and Mrs Vecchi acquired Egyptian nationality on 19 April 1957. It appears that she then lost her Italian nationality.

17. Mrs Vecchi's marriage came to an end in 1987 upon the death of her husband, Mr Elie George Siag. Mrs Vecchi reacquired her Italian citizenship on 14 September 1993 by making a declaration under article 17 of the Italian Nationality Law No. 91 of 1992 which accords former Italian citizens the right to reacquire Italian nationality. Ms Vecchi's Italian nationality is not in dispute.

The Property and the Project

18. On 4 January 1989, Egypt, through its Ministry of Tourism, sold the Property to Touristic Investments and Hotels Management Company (SIAG) S.A.E. (“Siag Touristic”). The Property is located on the Sinai Peninsula at the extreme northern end of the Gulf of Aqaba on the Red Sea, 6 kilometres south of the Egyptian town of Taba and the border with Israel. It is 650,000 square metres (161 acres) in size and comprises approximately 1500 metres of coastline.

19. Siag Touristic is a limited liability company incorporated under the laws of Egypt.

20. On 18 July 1992, Siag Touristic and its shareholders formed Siag Taba, a limited partnership under Egyptian law. Siag Touristic owns 75% of Siag Taba and each of the individual shareholders owns 5%. Siag Touristic transferred 150,000 square metres of the 650,000 square metre Property to Siag Taba as part of its share purchase.

21. In March and April of 1995, Mr Siag increased his ownership interest in Siag Touristic to 88.15% and Mrs Vecchi decreased her ownership interest to 10.5%. Mona Siag and the three children of Mr Siag hold the remaining 1.35% interest in Siag Touristic.

22. Through his shareholdings in Siag Touristic and Siag Taba, Mr Siag owns 84.22% of the Property. Mrs Vecchi owns 11.05% of the Property through her ownership interests in the two companies. Together, Claimants own 95.27% of the Property.

23. The Project which Claimants planned to implement on the Property was to consist of a resort with a capacity for 1,560 persons and certain related items of infrastructure, which were to be built in three phases following the grant of the necessary governmental approvals. Through their individual interests in Siag Touristic, Mr Siag and Mrs Vecchi respectively owned 88.15% and 10.5% of the Project. Together, Claimants therefore owned 98.65% of the Project.

24. During the 1990 – 1994 period, Siag Touristic commenced basic construction work on the Property, including building a wall along the perimeter of the Property and installing a CalTex service station.

25. On 23 August 1994, Siag Touristic entered into an agreement ("the Lumir Agreement"), with an Israeli Company, Lumir Holdings Ltd to secure financing for a portion of the first phase of the Project.

26. On 28 March 1995, Mr Siag wrote to the Chairman of the Touristic Development Agency ("TDA"), a division of the Egyptian Ministry of Tourism, to inform him about the financing which Siag had secured through the Lumir Agreement. Mr Siag's letter specifically stated that the Siag family "owns the project with all its stock and has not and will not relinquish any shares to any person whether Egyptian or foreign."[15]

The First Threat of Seizure by Egypt

27. Implementation of the Project suffered a number of delays.

28. In late 1994, the Nuweibaa City Council, a local governmental authority in the Taba area, issued a resolution to stop work on the Project, notwithstanding the fact that the Project site was outside the town's boundaries and not subject to local building approvals. On 16 February 1995, the Nuweibaa police attempted to implement the halt work order issued by the City Council by arresting Siag's workers. The matter

[15] Letter from Mr Siag to the Chairman of the TDA, dated 28 March 1995, Claimants' Exhibit 23.

was only resolved over one month later when the TDA write to the General in charge of Nuweibaa to instruct him to enable the Project to continue.[16]

29. On 29 May 1995, the Chairman of the TDA, with the explicit approval of the Minister of Tourism, sent a notice to Mr Siag purporting to cancel the sale contract and ordering the return of the Property to the Government of Egypt. The reason behind this notice was Egypt's opposition to Siag's business relationship with the Israeli company Lumir. At a subsequent meeting with the Minister, Mr Siag was told the reason for the notice was Egypt's opposition to Siag's business relationship with the Israeli company Lumir.

30. Faced with losing the Property and thus the Project if he did not terminate the Lumir Agreement, Mr Siag sent a letter to the Minister of Tourism ("the Minister") on 7 June 1995, confirming that he did not object to terminating the Lumir Agreement.

31. One week later, the Minister instructed the Chairman of the TDA to defer its seizure of the Property for one month, indicating that Mr Siag had "submitted a written acknowledgment to cancel the contract with Lumir company."[17]

32. The Lumir Agreement was terminated on 26 June 1995 and Mr Siag informed the Minister on 28 June 1995. Following these steps, the TDA did not seek to execute its May 1995 notice of seizure and in fact supported Mr Siag's application to the Arab Real Estate Bank for a loan.[18]

Egypt's Expropriation of the Property by Ministerial Decree

33. Siag began construction of the buildings for phase one of the Project in the late Spring of 1995 and continued for approximately one year. Between May 1995 and May 1996, 8 apartment buildings with 288 individual apartments were constructed on the Property, with a capacity of 520 persons. The buildings were complete in terms of structure, electrical wiring and plumbing and most of the paintwork on the walls and ceilings had also been completed. Some of the finishing works on the buildings, such as the installation of windows, doors, marble and furnishings, remained to be completed. Infrastructural items such as water and sewage piping beyond the buildings also remained to be built. Landscaping had been commenced as well as pre-foundation work for roads.

[16] Claimants' Exhibit 27.
[17] Claimants' Exhibit 31.
[18] Claimants' Exhibit 34.

34. During the same period, work was also begun on the construction of buildings for phase two of the Project. The foundations for two more apartment buildings had been laid and the construction of 12 luxury villas was well underway.

35. On 23 April 1996, the TDA sent Mr Siag a letter claiming that a March 1996 inspection had revealed a lack of progress on the Project. The letter further informed Mr Siag that the TDA would terminate the contract if the Project was not "opened" by the end of 1996.[19] In reply, Mr Siag sent a letter to the TDA dated 9 May 1996 confirming that Siag would complete phase one of the Project by the end of 1996.

36. On 23 May 1996, the Egyptian Minister of Tourism issued Ministerial Resolution Number 83 for the Year 1996, cancelling the Contract and redeeming "all the land, subject of this contract with all the structures thereon…" The Resolution relied in particular on a report submitted by the Chairman of the executive body of the General Authority for Touristic Development concerning Siag's "failure…to honour its commitments stipulated in the mentioned contract on time."

37. Notwithstanding the express provisions contained in Article 1 of the said Ministerial Resolution, which stated that all interested parties would be informed, the decree was never notified to Mr Siag by Egypt. Instead, Mr Siag learned that Egypt was expropriating the Property from the Chairman of the Arab Real Estate Bank, which immediately halted its financing of the Project.

38. Three days after Resolution n° 83 had been issued and in apparent contradiction of the Resolution, the TDA engineers in charge of overseeing implementation of the Project sent a letter to Mr Siag informing him that they would be carrying out a site inspection at the Property on 2 June 1996 to monitor progress on the Project. In that same letter, the TDA further assured Mr Siag "that the Authority for Touristic Development has pledged all its resources to serving the project in order to fulfil its desired objectives."

39. On 2 June 1996, Mr Siag was informed by the Brigadier in charge of the Nuweibaa police precinct south of Taba that the police were preparing to execute Resolution n° 83 by seizing the Property and all materials on the site.

40. Upon his arrival at the Nuweibaa police headquarters on 2 June 1996, Mr Siag, who was accompanied by several senior advisors, met with the police officer in charge of the matter, Captain Abou Zeid Mohamed. In the course of discussions, Dr Abou Zeid,

[19] Claimants' Exhibit 37.

Mr Siag's attorney, specifically requested the protection of the police and the district attorney in safeguarding Siag's rights.

41. At the end of the meeting, Captain Mohamed asked Mr Siag whether he would agree to or oppose the execution of Resolution n° 83. Mr Siag stated that he would oppose it, and was immediately arrested by Captain Mohamed. It was initially ordered that Mr Siag spend the night in jail and be transported to the District Attorney's office in El Tor, some 300 kilometres away, the following morning. However, Mr Siag was later released, although still under arrest, and required to report in person to the District Attorney's office the next day.

42. Following a meeting at the District Attorney's office on 4 June 1996, Mr Siag was released from custody.

The First Court Decision

43. On 10 June 1996, Siag filed suit against the Minister of Tourism's decree in the Administrative Court in Cairo (Contracts and Compensations circuit), seeking an immediate injection against Resolution n° 83 and a ruling on the merits that the decree was invalid and unenforceable under Egyptian law.

44. On 20 June 1996, 4 days after the preliminary court hearing and 3 days before the second hearing, a governmental force seized the Property, which was handed over to the TDA.

45. On 21 July 1996, the Cairo Administrative Court found as follows:

> "[the] Resolution is illegal for being issued before the expiration of the deadline set for the completion of the first phase of the project according to the contract concluded between the Ministry and the plaintiff company…. In addition the decree included taking the land together with all constructions thereupon, which are valued at millions of Egyptian pounds… Consequently, this decision involved confiscation of the plaintiff company's money,… and this is in violation of the provisions of Article 36 of the Constitution, which stipulates "Public confiscation of money is prohibited, and the private confiscation is permissible only by virtue of a judicial ruling."[20]

[20] Claimants' Exhibit 45.

46. On 18 August 1996, the Administrative Court, having learned that the Government had challenged the injunction in a civil court in Cairo, enjoined the civil court action and ordered that its own July decision be executed.

The Second Seizure of the Property by Egypt

47. Siag returned to the Property on 19 August 1996 and took possession of the site.

48. This situation lasted for 36 hours only. On 21 August 1996, Government security forces and the TDA forcibly seized the Property for the second time. During the second seizure operations, the police severely beat one of Mr Siag's employees, Mr Mostafa Mohamed Sayed Ahmed, who subsequently required hospital care. Three of the lawyers who had executed the Administrative Court's injunction in favour of Siag were also arrested.

The Second Court Decision

49. In September 1996, the Government of Egypt appealed the Administrative Court's injunction to the Supreme Administrative Court of the State Council ("the Supreme Administrative Court").

50. It may be noted in passing that in their pleadings, the Government's lawyers submitted that the Government had been forced to cancel the Contract and seize the Property because Mr Siag "had sold the project, almost completely, to the Israelis."[21]

51. The Government further contended that Mr Siag has "ignored all patriotic considerations…and violated the trust given to him by the state and contracted with an Israeli company, unaware of the seriousness of the violation by contracting with an Israeli foreign company to share with him in implementing the project, or rather to swallow almost the whole project…."[22]

52. On 16 October 1996, the Supreme Administrative Court rejected the Government's request to halt execution of the lower court's injunction.[23]

53. On 5 February 1997, the Supreme Administrative Court also unanimously dismissed the Government's appeal and affirmed the injunction issued by the Administrative Court.

[21] Claimants' Exhibit 46.
[22] Ibid.
[23] Claimants' Exhibit 48.

54. Despite these two decisions, no steps were taken by Egypt to return the Property or the Project to Mr Siag.

The Supreme Administrative Court's Decision on the Merits

55. The judicial proceedings then shifted to the merits of the claim brought by Siag.

56. On 31 May 1998, the Administrative Court requested the Dean of the Engineering Faculty at Cairo University to appoint an impartial panel of engineering experts to assist the Court in analyzing the merits of the case.

57. In a report delivered to the Administrative Court in October 1998, the expert panel concluded that between 1990 and 1995, the Project had been delayed by several significant events of *force majeure* (the First Gulf War, flooding and terrorism), lack of coordination among governmental entities and serious delays by the authorities responsible for approving the environmental study and the engineering plans for the first phase.

58. The panel also found that the deadline for completion of phase one of the Project was the end of 1996 and that Siag could have finished the first phase of the Project by that date.

59. On 7 September 1999, the Court, composed of different judges from those who had originally enjoined the Minister of Tourism's decree, found in favour of the Government, ignoring the expert panel's report.

60. Siag appealed this judgment to the Supreme Administrative Court, requesting an immediate stay of execution and that the decision be overturned on the merits.

61. On 21 June 2000, the Supreme Administrative Court issued a unanimous ruling that stayed the lower court's decision.[24]

62. On 7 August 2001, the Supreme Administrative Court reversed the lower court's decision on the merits, holding that Resolution n° 83 was illegal and cancelling it. The Supreme Administrative Court also found that the Contract was valid, binding and effective and should not have been repudiated by the Government.

63. The dispositive section of the Judgment provided as follows:

[24] Claimants' Exhibit 50.

> "The court rules as follows:
>
> To accept the appeal in form; and, on the merits, to cancel the lower court's ruling and to cancel the challenged resolution of the Minister of Tourism number 83 for the year 1996, with the resulting effects, including considering the contract entered into with the appellant on January 4, 1989 as valid and effective. The administrative entity is committed to pay the expenses relating to both Court judgments.
>
> The concerned Ministers and heads of departments shall assist in implementing [this ruling] by force if requested to."[25]

64. When taken in conjunction with its two earlier affirmations of the injunction against the execution of Resolution n° 83 and its stay of the lower court's ruling on the merits, the August 2001 judgment was the fourth ruling is Siag's favour by Egypt's Supreme Administrative Court.

The Minister of Tourism's New Resolution and the Administrative Court's Decision

65. Egypt ignored the decision issued by its highest administrative jurisdiction.

66. On 8 September 2001, one month after the abovementioned ruling, The Minister of Tourism promulgated another decree, Resolution Number 279 for the Year 2001, cancelling the Contract with Siag.

67. On 31 October 2001, Mr Siag filed another lawsuit against the Government in the Administrative Court in Cairo to enjoin this new decree and have it overturned on the merits.

68. The Government's defence once again was based on Siag's relationship with Lumir and stated, as elements of fact, the following:

> "Those who believe that Israel is a disaster that has struck upon the Palestinian people only, and that Israel's premeditated aggression and expansion do not exceed Palestine, are not aware of the Zionist movement and its aims and broader plans. In fact, the Israeli danger threatens the historical and cultural entity of the Arab Nation. Israel

[25] Ibid.

represents a material danger that threatens all neighbouring countries with invasion, aggression and occupation in all its types.

Perhaps, the researcher of the historical roots of the expansionist Zionist aspirations and the ideological and planning framework of Israeli aggression, and the motives behind the formation of the Zionist idea and its growth, is able to expose the expansionist aims of Israel, so that Arabs are aware of the Zionist intentions and work toward protecting their countries from the Israeli invasion.

In the Name of God, the Most Benign, the Merciful

"You will surely find the people most severe to those who believe are the Jews and those who associate other gods with God"

True are the words of God" [emphasis in original].[26]

69. The Government's pleadings then presented a series of arguments the general tenor of which can be illustrated by the following excerpt:

> "Taba, the pure part of Egypt that has been returned back to its motherland after three military, legal and diplomatic wars. The claimant of the present case intended to sell this land "Taba" to the Zionistic entity and bring the Jews back to stain it again, and he had received Millions of Dollars in return for this. But Egypt – represented in the Ministry of Tourism and the public Authority for Touristic Development – has doomed all his intentions, and disappointed the claimant and his far from patriotic purposes…."[27]

70. On 28 March 2002, the Court rejected Egypt's contentions and granted Siag's request to enjoin execution of Resolution n° 279, ruling that the decree had been illegally issued (Claimants' exhibit 53). The Court also held that the degree of urgency required for injunctive relief was present, since the Minister had already expropriated the Project five years earlier by his Resolution n° 83 that was "finally cancelled by a final ruling."

[26] Claimants' Exhibit 52.
[27] Ibid.

71. The TDA contested this decision and requested a stay of the Court's judgment, but this was in turn rejected on 6 June 2002.[28]

Egypt's Unsuccessful Appeal to the Supreme Administrative Court

72. The TDA and the Ministry of Tourism then appealed the Administrative Court's decision enjoining Resolution n° 279 to the Supreme Administrative Court.

73. In its Appeal, the Government once again argued that any damages suffered by Mr Siag paled in comparison to those that Egypt would have suffered had it not seized the Property:

> "There is no doubt that protecting the lands of our country from the filth of the Jews and the greed of the Zionist movement and Israel's expansionist dreams, and publicly disclosing the objectives of the Appellee and preventing him from selling the land subject matter of the contract, and other political, historical and legal considerations, make the position of the administrative authority in the best interest of the country and its security, and render the damages that may be suffered by the Appellee worthless when compared to the resolution's great promotion of the public interest."[29]

74. On 24 May 2005, the Supreme Administrative Court rejected the Appeal and ruled in favour of Siag for the fifth time. The Court found that Siag "did not sell or assign any part of the land to the Israeli company" as claimed by Egypt and it held that the TDA's interpretation of the Lumir Agreement was "contrary to [the] apparent and clear meaning" of the Agreement's text. The Court further noted that Siag had terminated the Lumir Agreement in 1995 and that the Government had not provided any evidence to the contrary. The Court therefore dismissed the Appeal on the grounds that it was not "legitimate" and "lack(ed] any legal or factual support."[30]

75. As was the case with all of the preceding judgments, Egypt failed to comply with the May 2005 ruling of the Supreme Administrative Court and took no steps to return the Property to Siag or to recognise the Contract.

[28] Claimants' Exhibit 54.
[29] Claimants' Exhibit 55.
[30] Claimants' Exhibit 56.

Seizures of the Property by the President and Prime Minister of Egypt and the Transfer of the Property to Al-Sharq Gas Company

76. On 15 July 2002, less than four months after the Administrative Court's decision dated 28 March 2002, the President of Egypt issued a decree to expropriate the Property. This Presidential decree n° 205 of 2002 purported to allocate the Property "to public benefit" and provided that the Property could only be used as instructed by the Prime Minister.

77. Mr Siag challenged this decree in another lawsuit filed with the Administrative Court in Cairo. However, on 24 February 2003, before the case could be heard, the Prime Minister issued another governmental decree to expropriate the Property.

78. Prime Ministerial Resolution n° 315 classified the project of constructing a land natural gas line Areesh/Taba and the beginning of a maritime natural gas line Taba/Aqaba as "a public benefit work." As such, it assigned to Al-Sharq Gas Company the piece of land "concerning which the presidential resolution number 205 for the year 2002 was issued."

79. As was the case with the presidential decree n° 205, Resolution n° 315 made no mention whatsoever of Siag, the Contract or the Project and did not mention any of the decisions rendered by the Administrative Courts and the Supreme Administrative Court.

80. On 16 March 2003, the TDA handed over the entire site, including the Property, the buildings constructed by Siag, the petrol station and all of Siag's equipment, to Al-Sharq Gas Company.

A New Decision of the Administrative Court

81. On 27 April 2003, following Siag's challenges to both Presidential Decree n° 205 and the Prime Minister's Resolution n° 315, the Administrative Court held that by virtue of its sale to Siag, the Property had "moved out of the scope of State property" and had become the personal property of Siag. It further found that the two Resolutions had been issued and executed "in violation of Article 5 of Law n° 07/1991."

82. Again, Egypt took no steps to comply with the Court's judgment and Al-Sharq Gas Company retained possession of the Property and proceeded to construct a pipeline and associated facilities.

Prime Ministerial Resolution n° 799

83. Three weeks after the Administrative Court's decision, the Prime Minister issued yet another decree to expropriate the Property (Resolution n° 799), containing almost identical provisions to those which had already been judged illegal by the Court.

84. This new decree was challenged by Siag in the Administrative Court in Cairo. This time, Mr Siag's suit was unsuccessful but a request for reconsideration and an appeal were filed.

The Sinai Litigation

85. The "Sinai Litigation" originated with the Suez Attorney-General's Order to return the property to Siag. This Order was made on the basis of an investigation following Mr Siag's testimony at the District Attorney's Office in El Tor on 4 June 1996.[31] That investigation concluded that Siag was indeed the rightful owner of the Property and, accordingly, on 24 August 1999, the Chancellor and Attorney General of Suez and South Sinai issued an order to return the Property to Siag.

86. Egypt then filed a lawsuit against the Order and, on 28 May 2000, the El Tor Summary Court of South Sinai ruled in favour of the Government. Mr Siag appealed that Judgment which was overturned by the Civil Appeals Circuit Court on 24 March 2002.[32]

87. Egypt did not comply with this new Judgment. Instead it filed three separate challenges. These were all rejected by the courts. However, Egypt did not thereafter recognise the decision of the Civil Appeals Circuit Court and acted without regard to the fact that its challenges had failed.

III. PROCEDURAL HISTORY UP TO SEPTEMBER 2007 INCLUDING THE DECISION ON JURISDICTION OF 11 APRIL 2007

Registration of the Request for Arbitration

88. On 26 May 2005, Mr Siag and Ms Vecchi filed with the International Centre for Settlement of Investment Disputes ("ICSID") a Request for Arbitration ("the Request") directed against Egypt. The Request invoked Article 9 of the BIT, which imported the ICSID arbitration provisions. The Claimants argued in the Request that Egypt had

[31] *See* para. 41 above.
[32] Claimants' Exhibit 64.

consented to ICSID arbitration of disputes such as the Claimants' dispute as to their investment in Siag Touristic by virtue of signing and ratifying the BIT.

89. On 2 June 2005 ICSID, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "ICSID Rules"), acknowledged receipt of the Request and on the same day transmitted a copy to Egypt and to the Egyptian embassy in Washington, D.C.

90. By a letter to ICSID dated 29 June 2005, Egypt objected to the registration of the Request on the grounds that the dispute was outside the jurisdiction of ICSID. The Claimants responded by letter of 8 July 2005, stating that the objections raised by Egypt were without merit. ICSID received further correspondence on this issue from Egypt dated 1 August 2005 and from the Claimants dated 4 August 2005.

91. The Request was registered by the Centre on 5 August 2005, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention"). On the same day the Acting Secretary-General, in accordance with ICSID Institution Rule 7, notified the parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

Constitution of the Arbitral Tribunal and Commencement of the Proceeding

92. The Tribunal was established under the ICSID Convention as follows. Following the registration of the Request by the Centre, the parties agreed on a three-member Tribunal. The parties agreed that each would appoint an arbitrator and that the third arbitrator, who would be the president of the Tribunal, would be appointed by agreement of the two party appointed arbitrators.

93. The Claimants appointed Professor Michael Pryles, a national of Australia, of Level 18, 333 Collins Street, Melbourne, Australia and Egypt appointed Professor Francisco Orrego Vicuña, a national of Chile, of Abenida El Golf 40, Piso 6, Santiago, Chile.

94. Professor Pryles and Professor Orrego Vicuña together appointed as President of the Tribunal Mr David A R Williams QC, a national of New Zealand, of Bankside Chambers, Level 22, 88 Shortland Street, Auckland, New Zealand.

95. All three arbitrators having accepted their appointments, the Centre by a letter of 10 January 2006 informed the parties of the constitution of the Tribunal, and that the

proceeding was deemed to have commenced on that day, pursuant to Rule 6(1) of the ICSID Rules.

Written and Oral Procedure

96. After consulting with the parties and the Centre the Tribunal scheduled a first session in Paris for 24 March 2006, in accordance with ICSID Rule 13(1).

97. At the first session of the Tribunal the procedural issues were discussed and agreed. All conclusions reached were reflected in the written minutes of the session. It was agreed that Egypt's objections to jurisdiction would be treated as preliminary questions. A schedule for the filing of memorials and for the holding of a hearing on jurisdiction in Paris on 8-9 August 2006 was agreed.

98. It was agreed at the first session that the Claimants would file their Memorial on the Merits in advance of any objections to jurisdiction Egypt wished to file.

99. Pursuant to the agreed schedule the Claimants filed their Memorial on the Merits on 12 May 2006 along with the Witness Statements of Waguih Elie George Siag dated 8 May 2006 and Dr Mustafa Abou Zeid Fahmy dated 2 May 2006.

100. The parties then made submissions on Egypt's objections to jurisdiction, as summarised below.[33]

101. Egypt filed a Memorial on Jurisdiction on 12 June 2006, along with the Expert Opinion of Dr Hafiza El Haddad and the Joint Expert Opinion of Professor Dr Mohamed El-Said El-Dakkak and Professor Dr Okasha Mohamed Abdel Aal.

102. The Claimants submitted a Counter-Memorial on Jurisdiction on12 July 2006 supported by the Expert Opinion of Professor Fouad A Riad dated 10 July 2006 and the Expert Opinion of Professor W Michael Reisman dated 12 July 2006.

103. Egypt filed a Reply on Jurisdiction on 24 July 2006 together with a Supplementary Expert Opinion of Dr Hafiza El Haddad dated 24 July 2006.

104. The Claimants filed a Rejoinder on Jurisdiction on 4 August 2006 along with a second Expert Opinion of Professor Fouad A Riad dated 1 August 2006 and a second Expert Opinion of Professor W Michael Reisman dated 31 July 2006.

[33] The parties' submissions on jurisdiction were summarised in the Decision on Jurisdiction of 11 April 2007.

105. A hearing on jurisdiction was held in Paris on 8-9 August 2006. Attending for the Claimants were Mr Reginald Smith, Mr Kenneth Fleuriet and Mr R Doak Bishop, all of the law firm King & Spalding. Attending on behalf of Egypt were Counsellor Milad Sidhom Boutros, President of the Egyptian State Lawsuits Authority ("ESLA"), Counsellor Hussein Mustafa Fathi of ESLA, Mr Asser Harb of ESLA, Counsellor Ahmed Amin Hassan and Mr Mohamed Abel Aal from the Egyptian Ministry of Tourism, and Professor Dr Kamal Aboulmagd, Mr Hazem Abdel Ghafar Rezkana and Mr Hatem Zien Aldien Darwish from the law firm Helmy, Hamza & Partners/Baker & McKenzie. Mr Smith, Mr Fleuriet and Mr Bishop each addressed the Tribunal on behalf of the Claimants, and Dr Aboulmagd and Mr Rezkana addressed the Tribunal on behalf of Egypt.[34] No witnesses were called for cross-examination. Counsel for both parties presented oral submissions and answered questions from members of the Tribunal.

106. On 29 August 2006 Egypt filed its Post-Hearing Submission on jurisdiction. The Claimants submitted their Post-Hearing submission on 11 September 2006.

107. The Tribunal issued its Decision on Jurisdiction dated 11 April 2007, accompanied by the partial dissenting opinion of Professor Orrego Vicuña (in respect of the conclusions reached in respect of Mr. Siag). The Tribunal, having examined the parties' respective submissions on jurisdiction, decided that the dispute was within the jurisdiction of the Centre and the competence of the Tribunal and should proceed to the merits. The essence of the Tribunal's ruling was that both Claimants were Italian nationals and were not Egyptian nationals, and that both thereby satisfied the positive and negative nationality requirements of Article 25 of the ICSID Convention. The Tribunal found that the estoppel arguments raised by Egypt as objections to jurisdiction were more properly matters for the merits of the dispute. The Tribunal held that the costs of the proceeding, including the fees and expenses of the Tribunal and the ICSID Secretariat, were reserved for further consideration and subsequent determination.

108. The Decision on Jurisdiction is hereby incorporated into the present Award and made an integral part of it. Egypt's subsequent jurisdictional objections, which were first raised almost five months after the Tribunal issued its aforementioned Decision, are addressed below.

[34] Mr Lawrence Newman, Mr Scott Hutchins and Mr Joshua Schopf of Baker & McKenzie, LLP, New York, were not part of Egypt's legal team at this stage.

109. On 5 June 2007 the Tribunal issued Procedural Order No.1, setting out a timetable for further submissions on the merits (in addition to Claimants' Memorial which had already been filed) and on damages, culminating in a hearing on the merits in Paris in March 2008.

110. Around that time Mr Lawrence Newman, Mr Scott Hutchins and Mr Joshua Schopf of Baker & McKenzie joined the team of lawyers representing Egypt.

111. Thereafter there developed a pattern of applications by Egypt under which it sought to raise further jurisdictional objections. Since ICSID Rule 41(1) provides that jurisdictional objections must be made as early as possible, and since Claimants vigorously challenged Egypt's right to mount these further jurisdictional objections, it is necessary to record in detail the timing and the content of those further challenges.

112. In addition to the parties' scheduled submissions on the merits and quantum several further applications were made by Egypt. These were: an application to bifurcate the merits phase, two further objections to the jurisdiction of the Tribunal, and an application to discontinue the claim of Mrs Vecchi. Egypt's application to bifurcate the merits phase has been determined by the Tribunal, as outlined below. Egypt's further objections to jurisdiction, and the case on the merits, have not yet been determined and are the subject of this Award.

Egypt's Application for Bifurcation of the Merits Phase by First Hearing Egypt's Estoppel Arguments

113. On 25 June 2007, as part of its Reply to Claimants' Response to Egypt's request for documents, Egypt stated that it intended to show, in the merits phase of the arbitration, that both Claimants were estopped from denying their respective Egyptian nationalities.[35] Egypt submitted that it made sense to hear and determine its case on estoppel before the remainder of the merits were considered, and asked the Tribunal to "divide the forthcoming merits phase of this case into two sub-phases, the first of them being the estoppel arguments of Egypt."[36] Egypt noted that it had obtained expert reports from Professors Hans Smit and Ivan Shearer in support of its arguments on estoppel.

114. The Claimants responded to Egypt's request for bifurcation on 3 July 2007, submitting that Egypt's request was an attempt to re-argue previously determined

[35] Egypt's "Reply to Claimants' Response on Egypt's Discovery Request," p. 2.
[36] Ibid.

jurisdictional issues (particularly the issue of effective nationality) under the guise of estoppel, and should be rejected. Claimants stated that their Italian nationalities, and their loss of Egyptian nationalities, were both *res judicata*.[37] Claimants further submitted that Egypt had not articulated a legitimate issue of estoppel but that if it intended to do so it would have ample opportunity in its Counter-Memorial and Rejoinder, at the hearing, and in its Post-hearing Memorial.[38] Claimants asked that Egypt's request for bifurcation be rejected.

115. Egypt replied to Claimants' submissions on bifurcation on 8 July 2007. Egypt noted that while it would abide by the Tribunal's decision on jurisdiction, it nevertheless retained the right to fully argue its case on estoppel, which remained an issue separable from the question of jurisdiction.[39] Egypt repeated its request that the Tribunal "address the question of "estoppel" in the first stage of the second phase of the proceedings."[40]

116. On 21 August 2007 the Tribunal issued its decision on Egypt's request for bifurcation of the merits phase of the arbitration.[41] The salient sections of the Order were as follows:

> 13 "It was agreed at the first session of the Tribunal that jurisdiction would be determined as a preliminary question, before the merits were considered. It was not suggested that the arbitration be bifurcated between issues of liability and damages. The Tribunal considers that it was clearly implicit that the arbitration would only be split between jurisdiction as a preliminary issue and 'all merits and damages issues' thereafter.
>
> 14 The Tribunal therefore considers that Egypt's request that estoppel be determined separately from the balance of the merits issues is a new proposal. It runs counter to the earlier submissions by the parties, to the agreement reached at the first session, to Egypt's originally proposed timetable for the hearing on the merits and to the timetable directed by Procedural Order no.1 for a single determination of merits-related issues.
>
> 15 Egypt is correct in stating that it should be afforded the opportunity to fully present its case on estoppel, however that opportunity need not be given effect through the bifurcation of the merits phase. The Claimants' submission that Egypt will have full opportunity to run its estoppel argument as part of the wider merits phase is convincing.
>
> 16 It should also be noted as a matter of practical concern that the members of the Tribunal would not in any case be in a position to offer a hearing on estoppel prior to the hearing on the merits in March 2008.

[37] Claimants' letter of 3 July 2007, p. 2.
[38] Ibid., p. 3.
[39] Respondent's "Response to Claimants' Letter Dated July 3, 2007," p. 2.
[40] Ibid.
[41] Procedural Order No. 3.

17 The ICSID Arbitration Rules do not expressly preclude the bifurcation of the merits phase of an ICSID arbitration. It is not however the usual practice of ICSID Tribunals to do so. The Tribunal considers that it would require compelling reasons to order such a bifurcation, particularly when, as is the case here, it was previously agreed that the merits phase would be heard as a whole, and a timetable had been directed to give effect to that agreement. The Tribunal does not consider that such compelling reasons are present in this case.

18 Egypt's request that its arguments on estoppel be heard as a separate and preliminary issue to the remainder of the issues on merits and damages is accordingly refused. Arguments on estoppel will be considered as part of the general merits phase, pursuant to the timetable set down in Procedural Order no.1."

IV. EGYPT'S SEPTEMBER 2007 OBJECTION TO JURISDICTION BASED ON MR SIAG'S ALLEGED BANKRUPTCY

The Parties' Submissions on Egypt's Bankruptcy Application

Egypt's Initial Application

117. On 6 September 2007, almost five months after the Tribunal's Decision on Jurisdiction, Egypt filed a "Notification and Application Concerning Objection to the Centre Subject Matter Jurisdiction over This Proceeding." Egypt's application claimed that it had recently discovered that Waguih Siag had been declared bankrupt on 16 January 1999, with retroactive effect from 20 August 1994,[42] as a result of a debt of 23,545.16 Egyptian Pounds owed to Mr Alaa El Din Abdel Rahman Sayed Youssef. Mr Siag's bankruptcy had not been discharged.[43] A court-appointed trustee, Mr Mohamed Ismail Mohamed, was invested on 16 January 1999 with the control of the bankrupt estate, including the personal assets of Mr Siag. Egypt affixed to its application a decision of the Cairo Court of Appeal dated 16 January 1999 stating that "a bankruptcy ruling must be issued" and "declaring Siag Pyramids Hotel Company as well as the two joint partners Waguih George Siag and Ramy George Siag as bankrupt." Egypt also adduced a certificate from the Giza Court of First Instance dated 15 August 2007 to the effect that "the procedures of the Claim shall continue to be deliberated during the hearing session of 1 November 2007…."

118. Egypt contended that, under Egyptian bankruptcy law Mr Siag, from the date he became bankrupt in 1999, could no longer validly agree to arbitrate any dispute relating to any asset forming part of the bankruptcy estate.[44] Egypt argued that at the time the Request for Arbitration was lodged in 2005 Mr Siag therefore lacked the

[42] This being the date upon which the Court considered that Mr Siag (as a "joint partner" of the Siag Pyramids Hotel) had ceased to pay his debts.
[43] Respondent's application of 6 September 2007, p. 2.
[44] Ibid., pp. 2 – 3.

capacity to arbitrate the dispute.[45] Mr Siag also lacked capacity to maintain the present arbitration.[46] Egypt therefore objected to the jurisdiction of the Tribunal and asked that the proceedings be suspended while Egypt's objections were determined as preliminary questions.[47]

Claimants' Response

119. Claimants responded to Egypt's application on 11 September 2007, submitting that the Tribunal had already determined matters of jurisdiction in its Decision on Jurisdiction of 11 April 2007. Claimants argued that Egypt had no right to seek to re-suspend the merits phase of the case in order to further argue jurisdictional issues. Egypt would have ample opportunity to make its submissions on bankruptcy as part of its arguments on the merits.48 Claimants submitted that the Tribunal should accordingly reject Egypt's application to suspend the merits phase of the arbitration.

120. Claimants further submitted that the claim that Egypt had only recently discovered the bankruptcy order was particularly dubious. The Egyptian courts were part of the Egyptian state under international law and Egypt had therefore been fully aware of the alleged bankruptcy since January 1999.[49] Further, the Egyptian State Lawsuits Authority ("ESLA") had argued the same bankruptcy issue on behalf of the Egyptian Government before the Cairo Administrative Court when Siag Touristic and Siag Taba challenged the first expropriation decree. Egypt accordingly had not only constructive but actual knowledge of the bankruptcy issue at a much earlier stage.[50]

121. It was also submitted by Claimants that, in any event, "Egypt's allegation that the "bankruptcy order" has not been discharged as to this date…is false."[51] According to Claimants, the debt that occasioned Mr Siag's bankruptcy had since been repaid, and the bankruptcy proceedings had been closed on 24 June 1999.[52] Claimants attached to their submission an Order of the Giza Court dated 24 June 1999 noting that Mr Siag had been declared bankrupt on 16 January 1999, but that the debt had since been repaid, and that the Court "…decides to close the bankruptcy proceedings."

[45] Egypt's application of 6 September 2007, p. 3.
[46] Ibid.
[47] Ibid., p. 5.
[48] Claimants' submissions of 11 September 2007, pp. 2-3.
[49] Ibid., p. 3.
[50] Ibid., p. 3 n 2.
[51] Ibid., p. 3.
[52] Ibid.

Egypt's Further Submissions

122. Egypt wrote to the Tribunal on 13 September 2007, stating for the first time that, contrary to Claimants' assertion, Mr Siag had not been discharged because the bankruptcy had been "re-opened" in 2003. Egypt stated that it would shortly provide evidence in support of these contentions.

123. Egypt made further submissions on 24 September 2007, arguing that the bankruptcy proceedings against Mr Siag "are still pending and are not closed…." Although Egypt accepted that the proceedings had been closed on 24 June 1999, it contended that they had been re-opened in 2003 when further debts, due to the Arab African International Bank ("AAIB"), Cairo Airport Authority, and El Shams Company were submitted.[53] The bankruptcy proceedings had been ongoing since they were re-opened in 2003. Mr Siag had not been discharged from the bankruptcy proceedings since that time.[54] Accordingly Mr Siag's lack of capacity to initiate arbitration proceedings could not be denied.[55] The Tribunal ought to reconsider the legality of Mr Siag's standing.

Claimants' Further Submissions

124. Claimants made further submissions on 26 September 2007, arguing that the issues raised by Egypt in relation to Mr Siag's capacity were governed exclusively by international law, and were unaffected by Egypt's domestic laws. If the domestic laws of any country were relevant it would be the laws of Italy, as it was as a national of that country that Mr Siag brought his dispute to ICSID.[56] Only one ICSID Tribunal in the Claimants' knowledge had re-suspended the merits phase of an arbitration following a decision on jurisdiction, and that was in exceptional circumstances.[57]

Procedural Order No. 5

125. On 27 September 2007 the Tribunal issued its Procedural Order No. 5 in respect of Egypt's application. The text of that Order is reproduced below.

> 1. "The Tribunal has received and perused the letters and submissions relating to the Respondent's application for a stay of proceedings, comprising Egypt's application of 6 September 2007, Claimants' response of 11

[53] Egypt's submissions of 24 September 2007, p. 1 and annexures.
[54] Ibid., p. 2.
[55] Ibid., p. 3.
[56] Claimants' submissions of 26 September 2007, p. 2.
[57] Ibid.

September, Egypt's reply of 13 September, Egypt's further submissions of 24 September, and Claimants' further submissions of 26 September.

2. The Tribunal now issues the following directions:

A. The Respondent shall file a formal application for a suspension/stay of the proceedings. In that Application:

(1) It must state the precise orders it seeks and against which of the Claimants;

(2) It may annex to its application the letters already sent to the Tribunal in relation to its stay application;

(3) It may provide further evidence or submissions in support of its application;

(4) It must provide appropriate reference to the relevant bankruptcy laws of Egypt;

(5) It must explain the late pursuit of this application and also address the question of whether or not the matters it relies upon were reasonably discoverable at an earlier stage of these arbitral proceedings, and in particular during the jurisdictional phase which concluded with the delivery of the Tribunal's Award on jurisdiction;

(6) It must lodge the Application no later than 14 days from the date of receipt of this Procedural Order.

B. No later than 14 days after receipt of the Respondent's Application and supporting materials under A the Claimants shall file an answer in opposition to the Application. In the Answer:

(1) Claimants must state the precise orders they seek;

(2) They may annex to their application the letters already sent to the Tribunal;

(3) They may provide further evidence or submissions in support of their Answer;

(4) They must make appropriate reference to the relevant bankruptcy laws of Egypt.

C. Thereafter the Respondent may file a brief rejoinder within 7 days of receipt of Claimants' Answer.

3. After considering the foregoing materials the Tribunal will decide:

(a) whether or not to suspend the proceedings in whole or in part; and/or

(b) what other procedural rulings, if any, are appropriate in the circumstances.

4. FOR THE AVOIDANCE OF DOUBT, NOTHING IN THIS ORDER AFFECTS IN ANY WAY THE CURRENT PROCEDURAL TIMETABLE WHICH MUST CONTINUE TO BE OBSERVED IN ALL RESPECTS."

126. On 5 October 2007 the Tribunal through its Secretary notified the parties that Egypt's formal application on the issue of Mr Siag's alleged bankruptcy was now due on 18 October 2007, with Claimants' Reply due by 1 November 2007 and Egypt's Rejoinder by 8 November 2007.

Egypt's Formal Application

127. Egypt subsequently filed its Application for Suspension of the Merits and Objection to Jurisdiction dated 18 October 2007, together with exhibits. Egypt repeated its earlier submissions on the issue of bankruptcy, as well as making additional submissions.

128. Egypt's additional submissions began by arguing that ICSID Rule 41(3)[58] provided that "upon the formal raising of an objection relating to the dispute, the proceeding on the merits shall be suspended." Egypt accordingly requested that the merits phase of the case be suspended pending the outcome of its application.[59] Egypt further submitted that there was no central bankruptcy register in Egypt and as a result Egypt had no knowledge of Mr Siag's bankruptcy at the time of the jurisdictional phase of the arbitration. Egypt therefore could not have addressed the issue at that time. The knowledge of the Egyptian courts could not be attributed to Egypt under the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("The ILC Articles") because the judgment declaring Mr Siag bankrupt was not an internationally wrongful act, to which the scope of the ILC Articles was limited.[60] Egypt was under no duty to second-guess Mr Siag's statements as to his capacity, and it could not be held responsible for not becoming aware of the situation sooner.[61]

129. Egypt submitted that international law deferred to domestic law on questions of capacity. This was because the ICSID Convention and the BIT were both silent as to capacity, which was the issue at hand. Nor were there any established rules of international law governing capacity generally or capacity to conclude arbitration agreements in particular. Where international law contains no clear rule reference is made to national law.[62] Egypt cited the International Court of Justice in *Barcelona Traction*[63] in support of its proposition. Egyptian national law was applicable as it governed the bankruptcy proceedings in issue.[64]

130. Egypt requested the Tribunal to declare either that Mr Siag lacked capacity to accept Egypt's offer under the BIT to arbitrate disputes under the Convention, and accordingly that there was no consent under Article 25 of the ICSID Convention, and to dismiss Mr Siag's claims on grounds of lack of jurisdiction under Article 25 of the

[58] The Rules relating to this application are those of January 2003.
[59] Egypt's application of 18 October 2007, p. 2.
[60] Ibid., p. 3.
[61] Ibid., pp. 3 – 4.
[62] Ibid., p. 6.
[63] *Case concerning the Barcelona Traction, Light and Power Company Limited,* ICJ Reports (1970), p. 3.
[64] Egypt's application of 18 October 2007, pp. 7 – 10.

ICSID Convention; or that Mr Siag lacked standing to initiate or maintain his claims and to dismiss those claims for lack of standing. Mr Siag should pay the full costs of the application.[65]

Claimants' Answer

131. Following a one-week extension due to the death of Ms Vecchi, the Claimants filed their Answer to Egypt's bankruptcy application on 8 November 2007, together with a further expert opinion by Professor Reisman dated 7 November 2007 and a second witness statement from Dr Abou Zeid Fahmy, dated 6 November 2007.

132. In addition to arguments previously made, the Claimants submitted that ICSID Rule 41(1) required any objection to jurisdiction to be made "as early as possible." In order for its claim to be heard Egypt would have to demonstrate that it could not reasonably have learned of the bankruptcy issue in time to raise it during the jurisdictional phase of the proceedings. Egypt could not do so: it had actual knowledge of the bankruptcy proceedings well before the jurisdiction phase of the arbitration, and had accordingly failed to satisfy ICSID Rule 41(1).[66]

133. Claimants further submitted that the re-opening of the bankruptcy proceedings had not resulted in the re-bankruptcy of Mr Siag. The proceedings remained "pending" and had not resulted in a judgment declaring Mr Siag bankrupt.[67]

134. In respect of standing, Claimants argued that domestic Egyptian law could not possibly dictate Mr Siag's standing before an ICSID Tribunal, which was governed exclusively by international law, namely Article 25 of the ICSID Convention, and the Italy – Egypt BIT.[68] At most Egyptian law could curtail Mr Siag's ability to litigate before Egyptian courts.[69] If any state's domestic laws were relevant to Mr Siag's standing (which Claimants denied) it was the laws of Italy. Egypt had taken no steps to have the bankruptcy litigation recognised by Italy.[70] Further, the re-opening of the bankruptcy proceedings violated many fundamental requirements of Egyptian law. Therefore even under Egyptian law, which was not relevant, Egypt's application must fail.[71]

[65] Ibid., p. 14.
[66] Claimants' Answer of 8 November 2007, pp. 1 – 2, 19 – 20.
[67] Ibid., pp. 3 – 4.
[68] Ibid., pp. 24 – 29.
[69] Ibid., p. 3.
[70] Ibid., pp. 4, 29 – 30.
[71] Ibid., pp. 4, 30 – 37.

135. Claimants submitted that the ILC Articles set out a general principle of international law, which was not limited to the responsibility of states for internationally wrongful acts.[72] At international law Egypt's courts are the Egyptian state and accordingly the 1999 and 2003 bankruptcy proceedings must be regarded as having been conducted by Egypt.[73]

136. Claimants also argued that Egypt's application ought to be deemed to have been waived. ICSID Rule 26(3) provided that any step taken by a party after the expiration of an applicable time limit "shall be disregarded" by the Tribunal in the absence of special circumstances. Egypt's bankruptcy application was filed six months after the decision on jurisdiction and fourteen months after the deadline for the submission of memorials on jurisdiction. Egypt had adduced no special circumstances to rebut the *prima facie* rule that the application ought to be disregarded by the Tribunal.[74] ICSID Rule 27 stated that a failure to raise objections promptly meant that those objections must be deemed to have been waived. Egypt was aware of the bankruptcy proceedings involving Mr Siag prior to the jurisdictional phase of the arbitration yet failed to raise its concerns until after a decision on jurisdiction had been rendered. Egypt should therefore be held to have waived its objections pursuant to ICSID Rule 27.[75] Claimants cited examples of previous ICSID Tribunals deciding that objections raised late in the day should be deemed to have been waived.[76]

137. In respect of costs, Claimants submitted that the Tribunal should award the Claimants the full measure of costs in relation to Egypt's application, and in so doing should consider the manner in which the application had been made.[77]

Egypt's Reply

138. Egypt filed its Reply to Claimants' Answer on 29 November 2007, supported by the second opinion of Professor Hans Smit dated 23 November 2007 and a large number of exhibits. In addition to those arguments already made Egypt submitted that, under ICSID Rule 41(1), a party may object to jurisdiction on the basis of a fact previously unknown to it. Egypt had no knowledge of the re-opening of the bankruptcy

[72] Ibid., p. 13.
[73] Ibid., p. 14.
[74] Ibid., pp. 20 – 21.
[75] Ibid., pp. 21 – 24.
[76] *Generation Ukraine Inc v Ukraine,* ICSID Case ARB/00/9, Award of 16 September 2003; *Azurix Corp v The Argentine Republic,* ICSID Case ARB/01/12.
[77] Claimants' Answer of 8 November 2007, p. 39.

proceedings at the time that jurisdiction was first under consideration, and brought the matter to the Tribunal's attention as soon as Egypt became aware of it.[78]

139. Egypt accepted that under international law it was responsible for the wrongful acts of its judiciary. However, that was not the same thing as saying that the State had knowledge of every order or decision made by its courts.[79]

140. In response to Claimant's waiver argument Egypt submitted that it could not waive its objection to jurisdiction based on Mr Siag's bankruptcy because only those for whose benefit the underlying right or limitation was conferred may waive the right to object. In this case the beneficiaries were Mr Siag's creditors, and only they (acting collectively) could waive the right to object to Mr Siag's capacity to deal with the bankrupt estate.[80]

141. Egypt claimed that Mr Siag had entered an appearance in an appeal brought by AAIB and decided in 2006 finding him (along with members of his family) not liable to AAIB pursuant to a settlement agreement. One of the respondents to that appeal was Mr Mohamed Ismail Mohamed, the trustee of Mr Siag's bankruptcy estate, acting in that capacity. That was irrefutable proof that Mr Siag was bankrupt until at least 26 April 2006.[81] Further, Mr Siag was at all material times aware of his bankruptcy and withheld that information from Egypt and from the Tribunal. That constituted bad faith on the part of Mr Siag, who was accordingly estopped from pleading waiver on the part of Egypt.[82]

142. Should the Tribunal find that Egypt had waived its right to object to the Tribunal's jurisdiction, Egypt submitted that the Tribunal ought to review its jurisdiction of its own initiative, as it was empowered to do by ICSID Rule 41(2).[83] The Tribunal should follow this course of action as part of its duty to render an enforceable award.[84] A failure by the Tribunal to recognise Mr Siag's lack of capacity would amount to a manifest excess of power capable of sanction under Article 52(1)(b) of the ICSID Convention.[85] Claimants had received the opportunity to present their case on the

[78] Egypt's Reply of 29 November 2007, p. 3.
[79] Ibid., pp. 3 – 4.
[80] Ibid., p. 4.
[81] Ibid., p. 5.
[82] Ibid.
[83] Ibid.
[84] Ibid., p. 6.
[85] Ibid.

bankruptcy issue and would therefore suffer no prejudice were the Tribunal to exercise its discretion and review its jurisdiction *sue sponte.*[86]

143. Egypt submitted that it was untenable to argue as Claimants did that Article 25 of the ICSID Convention was the sole determinant of a party's ability to be engaged in an ICSID arbitration. If that were the case a minor or insane person could initiate ICSID proceedings, which could not have been the intention of the Convention.[87]

144. Egypt further submitted that its domestic courts did not act improperly in either the 1999 or 2003 bankruptcy proceedings.[88] However, the Tribunal could not in any case review bankruptcy decisions made by domestic Egyptian courts. Such issues were non-arbitrable.[89]

145. In Egypt's submission, the 1999 bankruptcy was "closed" but it did not "end". Under the old Commercial Code of Egyptian law a bankrupt could only be discharged upon the conclusion of a settlement agreement with his creditors or upon the "unification of creditors," *i.e.*, the sale and distribution of the bankrupt's assets. Neither of those events had occurred in this case.[90] Nor had there been the third method of discharge, introduced by the new Commercial Code, of satisfaction of all creditors.[91] The re-opening of the bankruptcy proceedings in 2003 re-instated Mr Siag's status as a bankrupt. Closed proceedings did not end, and re-opened proceedings were not new proceedings, they merely resumed the formerly closed proceedings.[92] The Tribunal should not give credence to the contrary statements of Dr Fahmy, who was Mr Siag's own lawyer.[93] For the avoidance of doubt, Egypt made clear that some of the grounds of its objection to the Tribunal's jurisdiction were the 2003 re-opening of bankruptcy proceedings, rather than the original proceedings of 1999.[94]

Claimants' Rejoinder

146. Claimants submitted their Rejoinder to Egypt's Reply on bankruptcy on 17 December 2007. Claimants maintained their previous arguments and further submitted that Egypt had completely failed to respond to Claimants' submission that "Egypt's counsel in this case, the Egyptian State Lawsuits Authority made the very same

[86] Egypt's Reply of 29 November 2007.
[87] Ibid., p. 8.
[88] Ibid., pp. 9 – 15.
[89] Ibid., pp. 8 – 9.
[90] Ibid., p. 13.
[91] Ibid., p. 14.
[92] Ibid., pp. 15 – 16.
[93] Ibid., p. 16.
[94] Ibid.

bankruptcy argument (unsuccessfully) in domestic litigation involving the Taba property in 1999."[95] Claimants contended that the only conclusion that could be drawn from that fact was that Egypt's Egyptian counsel, which had "actively participated in the jurisdictional phase of this case"[96] had deliberately elected to withhold the bankruptcy objection during the jurisdiction phase of the arbitration.[97] As regards Egypt's knowledge of the bankruptcy proceedings, it was not a question of the Tribunal having to impute such knowledge to Egypt because under international law the actions of the Egyptian judiciary were the actions of the Egyptian state. Therefore, Egypt's knowledge was actual knowledge.[98]

147. Claimants argued that Egypt had confused this ICSID arbitration and the ICSID Rules with Egyptian law and a domestic Egyptian proceeding. Under the ICSID Rules, Egypt certainly could waive its jurisdictional objections; it was not the case that the only ones who could do so were Mr Siag's creditors in bankruptcy.[99]

148. In addition Claimants submitted that there had been no bad faith on Mr Siag's part. He was not a bankrupt when he brought this arbitration and thus had nothing to disclose. Further, Mr Siag could not have misled Egypt about a matter of which Egypt had full knowledge.[100]

149. Egypt's suggestions that failure by the Tribunal to consider Egypt's application might constitute grounds for an annulment of the Award eventually rendered were baseless.[101]

150. Contrary to Egypt's assertion, Claimants would suffer great prejudice if the Tribunal were to consider Egypt's out-of-time application. Such would add further delay to an already long-running battle by Claimants to have their case heard on the merits.[102]

151. Claimants submitted that Egypt had confused domestic and international law as regards a party's capacity. What Egypt referred to was capacity to enter a contract, to which domestic law was indeed applicable. This case, however, concerned Mr Siag's

[95] Claimants' Rejoinder of 17 December 2007, p. 1.
[96] Ibid.
[97] Ibid.
[98] Ibid., p. 4.
[99] Ibid., pp. 4 – 5.
[100] Ibid., p. 5.
[101] Ibid., p. 6.
[102] Ibid., p. 7.

standing to conduct an international arbitration under applicable international rules, *i.e.*, those set out in Article 25 of the ICSID Convention, and the Italy – Egypt BIT.[103]

152. Whatever may be true in a commercial arbitration, an ICSID Tribunal was certainly entitled to consider whether a bankruptcy adduced to support the dismissal of a party's claim was in fact in place.[104] In the present case there was no bankruptcy. The rule set down by the Egyptian Commercial Code, Articles 550(2) and 594, was that bankruptcy only occurred upon judgment thereof.[105] The mere re-opening of the 1999 proceedings did not render Mr Siag bankrupt.[106]

Claimants' Reply on the Merits (as to the Bankruptcy Issue)

153. Claimants filed their Reply on the Merits on 21 December 2007. Included with that Reply was the fourth opinion of Professor Reisman dated 18 December 2007, and the third witness statement of Dr Fahmy dated 18 December 2007, both of which dealt *inter alia* with Egypt's application in respect of the claimed bankruptcy.

154. In addition to previously made submissions, Professor Reisman and Dr Fahmy stated that Egypt had grossly misrepresented the nature of the decision of the Cairo Court of Appeal closing the bankruptcy proceedings on 24 June 1999. That decision re-instated Mr Siag to full capacity following settlement of the US$7,000 debt, and prevented a re-opening of the proceedings.[107] Reference to the bankruptcy receiver in the decision of the Cairo Court of Appeal of 22 April 2006 did not prove that Mr Siag was bankrupt. The receiver was joined to the case by the AAIB in 1999, but did not take part in the procedure. Indeed the receiver was referred to in 2002, which was a time when Egypt agreed Mr Siag was not bankrupt. Further, the 2006 decision confirmed that Mr Siag was a defendant in his personal capacity and that he had not been substituted by the bankruptcy receiver.[108]

155. In respect of waiver, Claimants submitted that Egypt's assertion that its objections to jurisdiction could not be waived relied on the assumption that Mr Siag's alleged bankruptcy would deprive the Tribunal of jurisdiction. That was not the case: as the Tribunal held in its Decision on Jurisdiction, Article 25 of the ICSID Convention contained a complete procedure for the determination of jurisdictional issues. An ICSID Tribunal would retain jurisdiction over a party notwithstanding his bankruptcy

[103] Ibid., p. 9.
[104] Ibid., p. 14.
[105] Ibid., pp. 14 – 15.
[106] Ibid., p. 15.
[107] Expert Opinion of Dr Abou Zeid Fahmy of 18 December 2007, p. 1.
[108] Ibid., p. 2.

under the host state's municipal law.[109] Egypt's assertions amounted to a claim that its municipal law could unilaterally divest the Tribunal of jurisdiction by declaring that Mr Siag was bankrupt, and that the Tribunal lacked jurisdiction to inquire into the truth of that allegation.[110]

156. Lastly, Claimants submitted that whether the Tribunal's potential award may in the future be subject to municipal bankruptcy proceedings was not the Tribunal's concern.[111]

Egypt's Rejoinder on the Merits (as to the Bankruptcy Issue)

157. Egypt briefly touched on its bankruptcy application in its Rejoinder on the Merits dated 12 February 2008. Therein Egypt noted that the bankruptcy proceedings involving Mr Siag were ongoing in the Egyptian courts. Egypt also stated that a bank (unnamed) had "put Mr Siag into bankruptcy" and a trustee was now in control of Mr Siag's assets.[112] Egypt included with its Rejoinder a 3rd opinion by Professor Smit, dated 11 February 2008, which also referred to the bankruptcy issue.

Procedural Order No. 6

158. On 15 February 2008 the Tribunal issued its sixth Procedural Order, which dealt with procedural matters in relation to both of Egypt's applications. In respect of Egypt's application based on Mr Siag's alleged bankruptcy, the Tribunal stated as follows:

> "5.2 The Tribunal does not consider that a case for suspension of the merits phase has been made out on the materials submitted to date in respect of Applications 1 [bankruptcy] and 2, and to the extent that the Applications call for immediate suspension they are not granted.
>
> 5.3 The Tribunal does not however consider that it is in a position to make a final determination on Applications 1 and 2 without hearing oral argument and receiving further evidence. The Tribunal notes that, understandably, there has been no affidavit or witness statement filed by Mr Siag to date as part of the merits phase of the arbitration on Applications 1 and 2 and considers that he should have the opportunity to adduce further evidence. […]
>
> 5.5 The Tribunal is of the view that oral argument on the Respondent's three applications should be heard at the start of the period set down for the merits hearing in March. The Tribunal will then decide whether to proceed with the merits hearing or to suspend the proceeding. The parties must come to the hearing on the basis that they must proceed to present their cases on the merits if ordered to do so.

[109] Expert Opinion of Prof Reisman of 18 December 2007, p. 38.
[110] Ibid.
[111] Ibid., p. 39.
[112] Egypt's Rejoinder on the Merits, pp. 11 – 12.

DIRECTIONS

Directions as to the hearing of Applications 1, 2 and 3 on March 10, 2008

6.1 Taking into account its views set out in Section 5 above that a case for suspension has yet to be made out in respect of applications 1 and 2 and noting that the Claimants have not yet had an opportunity to respond to Application 3, the Tribunal directs that applications 1, 2 and 3 be set down for hearing at 10 am on Monday 10 March 2008 in Paris.

6.2 Either party may file supplementary witness statements, affidavits, or documents in relation to applications 1, 2 and 3. If either party elects to do so the following timetable will be followed:

(i) Any further documents witness statements or affidavits from Respondent to be lodged and served no later than 25 February 2008;

(ii) Any further documents, witness statements or affidavits (whether additional or supplemental or by way of reply to those filed under (a)) to be lodged and served by the Claimants on or before 29 February 2008.

6.3 Without derogating from the generality of the directions in 6.1 above, and without intending to convey in any way any preliminary views one way or the other on applications 1 and 2, the Tribunal considers that it may be assisted in its deliberations by the production of further documentary evidence, if such is available, from each party in respect of applications 1 and 2, namely:

(i) from the Respondent, a certificate or similar notification from an Egyptian court that states that Mr Siag has been declared bankrupt; […]

(ii) from the Claimants, […] (b) evidence in relation to the claim made in its Rejoinder and referred to in paragraph 4.15 (i) above [the claim that Egypt's counsel had previously raised the bankruptcy proceedings in domestic litigation in Egypt]

If a party is unable to obtain such documents they are requested to so advise the Tribunal in writing before the commencement of the hearing on March 10, 2008 and indicate why it was unable to obtain the requested documents. Nothing in this direction is to be regarded as preventing a party from proving or establishing such matters by means of other documentary or oral evidence."

Egypt's Further Submissions

159. In response to the Tribunal's directions in Procedural Order No.6, Egypt filed on 25 February 2008 a witness statement of that date from Mr Asser Harb, a State Attorney at the Egyptian State Lawsuits Authority.[113] Mr Harb exhibited to his statement a certificate from the Giza Court of First Instance dated 19 February 2008 which Egypt submitted showed that Mr Siag "continues to be in bankruptcy" and that the next hearing concerning the implementation of the bankruptcy procedures would be on 8

[113] Mr Harb had also attended the jurisdictional hearing in August 2006.

March 2008.[114] Egypt submitted that there was little question as to whether Mr Siag was in fact in bankruptcy.

Claimants' Further Submissions

160. Claimants filed their further submissions on 29 February 2008, together with the fourth witness statement of Mr Siag, dated 29 February 2008 and a witness statement also dated 29 February 2008 from Mr Samir Abillama. Those submissions dealt primarily with what was by that stage known as "application number 2" – based on Mr Siag's Lebanese nationality – but also touched on "application number 1", the bankruptcy application. Claimants submitted that not only did ESLA raise Mr Siag's bankruptcy proceedings during domestic litigation concerning the Taba project, but ESLA also ran at that time the same lack of capacity argument it was now running on the basis of those bankruptcy proceedings. Indeed, Mr Harb had now conceded that fact.[115] Claimants further submitted that, contrary to Egypt's claims, Mr Siag had not been declared bankrupt. Egypt's contention that the mere re-opening of bankruptcy proceedings rendered Mr Siag "re-bankrupt" were implausible and contrary to the Egyptian Commercial Code. The certificate provided by Egypt on 25 February 2008 fell far short of declaring that Mr Siag was in fact bankrupt.[116]

Egypt's Further Submissions on the Eve of the Hearing and Claimants' Motion to Strike

161. On 4 March 2008, in breach of the timetable set out in Procedural order No. 6, Egypt purported to file further submissions on its applications, principally applications 2 and 3 (application 3 relating to Ms Vecchi's heirs) but also in relation to application 1. Egypt also purported to file a second witness statement from Mr Nadim Souhaid, dated 3 March 2008. On 5 March 2008 Claimants applied to have these submissions struck out as being out of time. On 6 March 2008 the Tribunal directed Egypt to formally apply for leave if it wished to have the submissions admitted to the record and advised that any such application would be determined at the hearing on 10 March 2008. By email of 9 March 2008 Egypt advised that it had decided not to seek leave on this point. The Tribunal therefore did not pursue the matter further and the

[114] Egypt's letter of 25 February 2008, p. 3.
[115] Claimants' submissions of 29 February 2008, pp. 61 – 64.
[116] Ibid., pp. 64 - 65.

Chairman informed the parties of Egypt's decision in that respect on the first day of the hearing.[117]

The Hearing on 10 March 2008 Pursuant to Procedural Order No. 6

162. The hearing of Egypt's applications took place in Paris on 10 March 2008. Mr Reginald Smith, Mr Ken Fleuriet, Mr Craig Miles, Ms Heloise Hervé, and Ms McGinnis, all of the law firm King & Spalding, attended for the Claimants. Attending the hearing for Egypt were Mr Lawrence Newman, Ms Gamila Kassem, Mr Mahmoud Sabry Youssef, Mr Joseph Schopf, Mr Scott Hutchins, and Ms Caroline Derache, all from the law firm Baker & McKenzie, together with Professor Dr Ahmed Kamal Aboulmagd and Mr Hazem Rizkana of the law firm Helmy, Hamza & Partners, Dr Karim Hafez and Ms Amani Khalifa of Hafez Law Firm, Mr Milad Sidhom Boutros, Mr Asser Harb, Mr Hussein Mustafa, Mr Wahid Awad of the Egyptian State Lawsuits Authority, Mr Ahemed Hassan from the Egyptian Ministry of Tourism, Mr Nadim Souhaid and Mr Hafiz Ghalayini from Lebanon, and Mr Mohamed Abdel Aal of the legal department at the Tourism Development Authority. Mr Smith, Mr Miles and Mr Fleuriet addressed the Tribunal and examined witnesses on behalf of the Claimants. Dr Aboulmagd, Mr Newman and Mr Hafez did the same on behalf of Egypt. Mr Siag, Professor Reisman (by video-link) and Mr Abillama gave oral testimony for the Claimants, and were cross-examined on Egypt's jurisdictional objections.[118]

Egypt's Oral Submissions as to Bankruptcy (on 10 March 2008)

163. Egypt made its oral submissions first. In relation to the bankruptcy application those began with the submission that, although Egypt could be held responsible for the acts of its judiciary, that was a different thing to attributing to Egypt the knowledge of every decision rendered by its courts. Such a contention was unsupported by authority and stretched the legal fiction of state unity.[119] Egypt contended that Mr Harb's evidence had confirmed that ESLA had no knowledge of the re-opening of the bankruptcy proceedings at the time of the jurisdictional phase of the arbitration.[120] Egypt had no reason to assume at an earlier stage that Mr Siag was bankrupt. He had put himself forward as a *bona fide* claimant and Egypt took him at his word.[121] Egypt accused Mr Siag of fraudulently concealing from Egypt and the Tribunal the re-opening of his bankruptcy and submitted that he could not now claim that Egypt had waived its

[117] T1:4.
[118] Mr Siag and Professor Reisman later gave evidence on the merits.
[119] T1: 60 – 61.
[120] T1:61 – 62.
[121] T1:62 – 63.

objections based on that re-opening: equity demanded that he who came to equity came with clean hands.[122]

164. Egypt submitted that the re-opening of the bankruptcy proceedings had re-instated Mr Siag as a bankrupt. If that were not the case there would be no difference between re-opening proceedings and issuing fresh proceedings.[123] The decision of the Cairo Court of Appeal against "the trustee of the bankruptcy estate of Siag Pyramids Hotel and its two partners, Waguih Elie Siag and Rami Elie Siag" on 26 April 2006 demonstrated conclusively that Mr Siag was still bankrupt in 2006.[124] It was not open to the Tribunal to review the actions of the Egyptian courts in re-opening the bankruptcy proceedings. Mr Siag must at the least be held to have waived his right to have that decision reconsidered in an international forum.[125] If Mr Siag were bankrupt, he did not have the capacity to initiate or maintain this arbitration. Article 5 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") stated that municipal courts could refuse to recognise and enforce an award where the party resisting enforcement showed that a party or parties were "under the law applicable to them under some incapacity." That demonstrated that international law deferred to national law on matters of capacity.[126] Egyptian law, as the *lex concursus*, should determine Mr Siag's capacity. However, even under Italian law, which the Claimants had submitted was the relevant law, a bankrupt does not have the capacity to agree, initiate or maintain an arbitration.[127]

Claimants' Oral Submissions as to Bankruptcy (on 10 March 2008)

165. The Claimants' began by noting that the re-suspension of the merits phase following a decision on jurisdiction, as Egypt had requested, had only happened once in 135 concluded ICSID cases,[128] in which the facts were exceptional. ICSID Rule 41 dictated that only if Egypt's objections were not known or reasonably knowable at the time of the jurisdiction phase could they be raised at a later stage.[129] In this case Egypt had been aware of the bankruptcy proceedings since the commencement of the arbitration, both because the Egyptian judiciary were considered at international law to be an organ of the Egyptian state and because ESLA, Egypt's counsel in this

[122] T1:66.
[123] T1:67 – 68.
[124] T1:68 – 69.
[125] T1:70 – 71.
[126] T1:71 – 73.
[127] T1:73 – 74.
[128] *Ceskoslovenska Obchodni Banka, a.s v The Slovak Republic,* ICSID Case ARB/97/4.
[129] T1: 77 – 78.

arbitration, had raised the same objections during earlier domestic litigation.[130] Either ICSID Rule 26 or 27 could be applied to Egypt's objection should the Tribunal determine that the requirements of ICSID Rule 41 (as to timing of jurisdictional objections) had not been satisfied.[131] The Tribunal ought to consider whether Egypt's response on the issue of timeliness was credible.[132]

166. Claimants further submitted that Mr Siag had no reason to mention the re-opened bankruptcy proceedings, because they had not resulted in his bankruptcy and were not relevant in any case. Mr Siag was accordingly not estopped from pleading waiver on Egypt's part.[133] Mr Siag was not bankrupt on the date of consent in May 2005 and he was not bankrupt today.[134] Although Egypt referred to him being in a "bankrupt status" Egypt had never said that there had been a judgment or a ruling in the re-opened proceedings that declared Mr Siag bankrupt.[135]

167. Mr Siag's capacity to commence this arbitration was a matter governed exclusively by international law, namely the ICSID Convention and the BIT, as the Tribunal had held in its Decision on Jurisdiction.[136] Egypt's municipal laws on capacity were irrelevant.[137] If any domestic law were relevant it would be the law of Italy for it was as a national of Italy that Mr Siag had commenced his claim.[138] This was not an international commercial arbitration, and the New York Convention was not relevant to the mechanisms set out in the ICSID Convention.[139] In addition, and although the Tribunal should not get to this point, even under Egyptian law Mr Siag had the requisite capacity to initiate and maintain these proceedings.[140]

Procedural Order No. 7

168. At the start of the Hearing, on 11 March 2008,[141] the Tribunal issued its Procedural Order No. 7, which dealt with Egypt's applications as discussed at the previous day's hearing. In respect of application number 1, the bankruptcy application, the Tribunal directed as follows:

[130] T1:79, 90.
[131] T1:81.
[132] T1: 84.
[133] T1: 85.
[134] T1: 88, 91.
[135] T1: 92.
[136] T1: 88 – 89.
[137] T1: 95 – 96.
[138] T1: 97.
[139] T1: 95.
[140] T1: 97 – 99.
[141] T2: 1.

> "6. The Tribunal considers that the decisions on the Applications should be resolved as part of the Award on the merits. Although the Tribunal has already received extensive written submissions and yesterday heard oral submissions and the examination of witnesses, the issues are not straightforward. The Tribunal wishes to reflect on the submissions and evidence and take more time for deliberations.
>
> 7. Accordingly the decisions on the Further Objections to Jurisdiction involved in Applications 1 and 2 will be given at the same time as the decision on the merits. In short, although the Tribunal has received extensive observations in this regard in the form of written and oral submissions and evidence, the Tribunal has resolved to join the Further Objections to Jurisdiction to the merits. Participation by the respondent in the merits hearing will not of course constitute a waiver of any kind of their Further Objections to Jurisdiction.
>
> 8. There is no need for the parties to submit any further evidence or written arguments on Applications No.1 and No.2 and no party shall do so without leave being granted by the Tribunal. Leave may be appropriate in respect of developments concerning bankruptcy and any responses from the Lebanese government concerning nationality."

Procedural Order No. 8

169. On 18 March 2008 the Tribunal issued its Procedural Order No. 8. In relation to the bankruptcy application that Order stated:

> "5. […] Now that the hearing has concluded, no further evidence relating to bankruptcy…may be submitted whether by leave or otherwise."

Egypt's Post-Hearing Submissions (as to Bankruptcy)

170. The parties each submitted post-hearing submissions on all issues, including Mr Siag's bankruptcy, on 24 April 2008. Egypt's submissions on the issue of bankruptcy were that Mr Siag was currently bankrupt. The Claimants had not seriously challenged this fact.[142]

171. In addition, Egypt contended that Article 4 of the ILC Articles applied only to the responsibility of a state for the acts of its organs. It did not attribute to the state the knowledge of every decision rendered by its courts.[143] Egypt had no knowledge of the re-opening of the bankruptcy proceedings until it raised its concerns with the Tribunal.[144]

172. Egypt further submitted that Article 25 of the ICSID Convention was silent on questions of capacity. Mr Siag's capacity to sue must therefore be determined by the law applicable to him, *i.e.*, Egyptian law.[145]

[142] Egypt's post-hearing submissions, p. 18 – 19.
[143] Ibid., p. 19.
[144] Ibid.
[145] Ibid., p. 20.

173. Lastly, Egypt submitted that it could not waive its objections grounded in Mr Siag's bankruptcy because the rights of others would be affected.[146]

Claimants' Post-Hearing Submissions (as to Bankruptcy)

174. Claimants' post-hearing submissions were principally to repeat that ICSID Rule 41 required jurisdictional objections to be made as early as possible. Untimely objections could only be made if they were unknown, and not reasonably knowable, during the time limits set by the Tribunal for jurisdictional objections. Egypt's bankruptcy application was predicated on facts fully known or reasonably knowable to Egypt during the jurisdictional phase, and was impermissible under Rule 41.[147] ICSID Rules 26 and 27 set forth the sanction for a party's failure to raise its objections to jurisdiction as early as possible. Both were applicable to Egypt in this case.[148]

Discussion of Egypt's Bankruptcy Application

Did (and Could) Egypt Contravene ICSID Rule 41?

175. The proper starting point in assessing Egypt's bankruptcy application is in the Tribunal's view the Claimants' submission that Egypt brought its application too late and that it should accordingly be disregarded by the Tribunal pursuant to ICSID Rule 26 and/or held waived pursuant to ICSID Rule 27.

176. The Claimants' case on this point flows from ICSID Rule 41(1). If Egypt is held not to have satisfied Rule 41, submitted the Claimants, then the sanctions provided by Rules 26 and 27 can be applied. ICSID Rule 41(1) reads as follows:

> "Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time." (Underlining added.)

177. Professor Reisman for Claimants submitted the following on ICSID Rule 41: the phrase "shall be made as early as possible" is mandatory, not precatory. The phrase was not entirely clear and its precise meaning and application must therefore be sought in general international law, including principles of treaty interpretation, customary international law, and general principles of law.[149] Professor Reisman

[146] Ibid.
[147] Claimants' post-hearing submissions p. 1, 3.
[148] Ibid., pp. 1 – 2.
[149] Expert Opinion of Prof Reisman of 7 November 2007, pp. 8 – 9.

cited Article 31 of the Vienna Convention on the Law of Treaties ("the Vienna Convention"), to which he noted Egypt and Italy were party.

178. Applying Article 31 of the Vienna Convention, ICSID Rule 41 should be construed in accordance with the ordinary meaning of its words, and also in accordance with its context, which included related instruments. Of those related instruments the ICSID Convention was most illustrative of the meaning of the phrase "shall be made as early as possible." Article 51 of the ICSID Convention provided in relevant part that either party may request the revision of an Award on the ground of discovery of a fact that was, at the time of the award, "unknown to the Tribunal and to the applicant and that the applicant's ignorance of the fact was not due to negligence."[150]

179. While Article 51 did not apply to this case, Professor Reisman submitted that it was nevertheless useful in clarifying the meaning of Rule 41(1), which similarly contemplated a situation wherein facts were previously unknown to the party raising them.[151] Reading Rule 41(1) in light of Article 51 of the ICSID Convention, the effect of the phrase "shall be made as soon as possible" was that an objection to jurisdiction must be made: (1) within the time limits set by the Tribunal; unless (2) the objection relies on a factual predicate genuinely unknown to the objecting party; and (3) provided that the ignorance of the party raising the objection could not be attributed to negligence, wilful blindness or illicit tactical considerations.[152]

180. Egypt did not challenge Claimants' submissions as to the meaning of Article 41(1) or the phrase "shall be made as soon as possible." Professor Smit for Egypt noted that it was a "commonly accepted notion" that a defendant should not delay the interposition of a preliminary objection lest the objection be deemed to have been waived.[153] Egypt denied that it had breached Rule 41(1). However, it did not do so on grounds that the Rule intended something other than was submitted by Claimants.[154] The Tribunal accepts the interpretation of Rule 41(1) offered by Professor Reisman. Rule 41(1)'s application to the facts of the case will now be examined.

181. Egypt submitted that only Mr Siag's bankruptcy creditors, acting collectively, could waive the objection to Mr Siag's capacity based on his bankruptcy. Professor Smit stated as follows:

[150] Ibid., pp. 10 – 11.
[151] Ibid., p. 11.
[152] Ibid., p. 17.
[153] Expert Opinion of Prof Smit of 23 November 2007, p. 8.
[154] Egypt instead denied that it had knowledge of the facts predicating its bankruptcy objection at an earlier stage, and denied that it had the ability to waive its objections. *See, e.g.,* Egypt's Reply dated 29 November 2007 and the Expert Opinion of Prof Smit of 23 November 2007.

> 20. "…a rule of this kind applies only if the defense is in law waivable. For example, defenses that raise lack of subject matter jurisdiction cannot be waived, for the parties cannot by implicit or explicit agreement bestow upon a tribunal competence that the law withholds from it.
>
> 21. The bankruptcy defense appears to be of that nature. Bankruptcy protects all creditors against the bankrupt's disposing of any of the bankrupt estate's assets. This basic protection would be subverted if any of the debtors (like, in this case, Egypt) could waive application of the rule that bankruptcy protects all creditors by enabling the bankrupt to recover personally assets that belong to the bankrupt estate. It cannot reasonably be assumed that a procedural rule, like Rule 41, would enable a bankrupt so to avoid the reach of his bankruptcy."[155]

182. Egypt further submitted that any money that may be awarded to Mr Siag must be placed in the bankrupt estate and therefore that it may be determined by the Egyptian courts that Mr Siag has no right to proceed on behalf of his creditors.[156]

183. Claimants stated in response that Egypt had confused domestic proceedings with international proceedings under the ICSID Rules, and that the issue for the Tribunal was simply whether the ICSID Rules permitted the Tribunal to make a finding of waiver in this case.[157]

184. The Tribunal accepts the Claimants' submissions on this point. It considers that the question as to whether or not Egypt may waive its objections is dictated by the ICSID Rules governing this arbitration. No authority was cited by Egypt to the contrary. Turning to the application of the ICSID Rules, the Tribunal notes that previous ICSID Tribunals, for example those relied upon by the Claimants: *Generation Ukraine Inc v Ukraine*[158] and *Azurix Corp v The Argentine Republic,*[159] have dismissed objections brought outside applicable deadlines.

185. In the early stages of the *Azurix* arbitration, on 29 November 2004, the Respondent challenged the appointment of the President of the Arbitral Tribunal. The President, Dr Andres Rigo Sureda, sent his two co-arbitrators a letter of explanation as to the situation which had given rise to the challenge. The Tribunal, via the ICSID Secretariat, thereafter invited the parties to submit their comments on that letter no later than 30 December 2004. New facts were brought to the attention of the Tribunal on 28 January 2008 and, in a letter of 1 February 2008, the Respondent contended that those new facts strengthened its challenge. The Tribunal found that the Respondent knew or should have known of the grounds on which it based its

[155] Expert Opinion of Prof Smit of 23 November 2007, p. 9.
[156] Egypt's Rejoinder on the Merits, p. 12.
[157] Claimants' Rejoinder of 17 December 2007, pp. 4 – 5.
[158] ICSID Case ARB/00/9, Award of 16 September 2003.
[159] ICSID Case ARB/01/12, Decision of 25 February 2005 (Claimants' Exhibit 154).

challenge as early as 30 March 2004. It therefore ruled, in light of Rule 27 of the ICSID Rules, that "by any reasonable standard, it cannot be said in the present case that the party putting forward its Proposal [for Disqualification] has acted promptly." The Tribunal concluded by stating "that Argentina is deemed to have waived its right to request the disqualification of Dr Rigo, on the ground that it has not reacted with the promptness required by Rules 9 [Disqualification of Arbitrators] and 27 [Waiver] of the ICSID Arbitration Rules, after having been made aware of the facts upon which it bases its Proposal for disqualification"[160]

186. In the *Generation Ukraine v Ukraine* case, the Respondent had raised a jurisdictional objection in the course of the final hearing, alleging a deficiency in the formal appointment of the Claimant's counsel. This objection, based on a document filed with the Notice of Claim, was dismissed by the Tribunal which recalled the express terms of Rule 41(1) of the ICSID Rules and found that the objection had been raised late.[161]

187. Moreover, Professor Schreuer, in his authoritative text "The ICSID Convention: A Commentary", expresses the view that Rule 41(1) contains a time limit. He further states that if facts which could give rise to a jurisdictional objection are discovered after the expiration of the time limit fixed in Rule 41(1), any such objection must be "raised immediately when the relevant facts come to light."[162] It follows from Professor Schreuer's analysis that submissions filed after expiration of either the time limit contained in Rule 41(1) or time limits set by the Tribunal pursuant to Rule 26(1) and which are not raised immediately upon discovery of the relevant facts, would not be considered as having been filed "as early as possible" and may thus be both disregarded, under Rule 26(3), and considered to be waived, under Rule 27.

188. The Tribunal does not find anything in Egypt's submissions to warrant a departure from the approach to Rules 26, 27 and 41 as manifested in the *Azurix* and *Generation Ukraine* cases and confirmed by the analysis of Professor Schreuer. In particular the Tribunal rejects Egypt's submission that it was not able to waive its objections to jurisdiction because such could only be done by Mr Siag's alleged bankruptcy creditors. ICSID Rule 41(1) confers upon "a party" the right to object to jurisdiction. Egypt has utilised that right. There was no suggestion by Egypt that the right to object to jurisdiction could, let alone, could only, be utilised by Mr Siag's

[160] Ibid., pp. 7-8.
[161] *See* p. 48 of the Award.
[162] Christoph H Schreuer, The ICSID Convention: A Commentary (2001), at p. 553.

purported bankruptcy creditors. The Tribunal considers that it would be unusual if a party were permitted to utilise a right but prevented from waiving that right. If that were the case the right in question would become an immutable obligation. Egypt has not claimed that it was obliged to bring its bankruptcy objections and, of course, that is not the case under ICSID Rule 41. A natural extension to this proposition is that a party may be held to have waived a right granted to it, if it fails to properly address that right, as Claimants submit is the case here.

189. The Tribunal accordingly considers that Egypt was able to waive its objections to jurisdiction based on Mr Siag's claimed bankruptcy. The next question for the Tribunal is of course whether Egypt did in fact waive its objections.

190. Egypt first raised its bankruptcy objection on 6 September 2007, although the Tribunal notes that at that stage Egypt's application was specifically based on the 1999 bankruptcy proceedings rather than the 2003 re-opening. Egypt first referred to the 2003 re-opening on 13 September 2007. The last date allowed by the Tribunal for submissions on jurisdiction by Egypt was 24 July 2006. Egypt's application was made more than 13 months after that date, and was made more than 5 months after the Tribunal had issued its Decision on Jurisdiction, dated 11 April 2007.

191. Egypt has not denied that its objections were not made within the time limits established by the Tribunal for the filing of arguments on jurisdiction. Egypt asserts, however, that the basis of its objection, namely the re-opening of Mr Siag's bankruptcy in 2003, was not known to Egypt at that time, and further, was not reasonably knowable.

192. Claimants' primary ground for resisting Egypt's assertion is that under international law the acts of Egypt's courts are regarded as the acts of the Egyptian state. Egypt's courts made the rulings closing and re-opening Mr Siag's bankruptcy and Egypt cannot deny knowledge of its own acts.

193. Article 4 of the ILC Articles states as follows:

> "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State."

194. Egypt submitted that Article 4 holds a State responsible only for the acts of its organs; it does not expect a State to have knowledge of every act carried out by

those organs.[163] In other words, Egypt claimed that, while it could be held responsible for the wrongful acts of its judiciary, it could not be expected to be aware of all the non-wrongful acts of its organs.[164] The Claimants asserted that Article 4 was a general principle of international law, which was not limited to the wrongful acts of a state organ.[165]

195. The Tribunal prefers the arguments of the Claimants on this issue. In taking that view, the Tribunal notes the provisions of Article 7 of the ILC Articles, which states that: "The conduct of an organ of a State…shall be considered an act of the State under international law…*even if it exceeds its authority*" [emphasis added]. Dolzer and Schreuer state that under Article 4 of the ILC Articles, "[a]cts of a state's organs will be attributed to that state *even if they are contrary to law* …"[166] [emphasis added]. The clear corollary of that statement is that acts of a State's organs that are not contrary to law or in excess of authority will be applied *a fortiori* to the State. Accordingly the non-wrongful acts of Egypt's judiciary are the acts of the Egyptian State. As Claimants have submitted, Egypt cannot deny knowledge of its own acts.

196. The Tribunal also notes the Award of the Tribunal in *Robert Azinian v Mexico*,[167] in which it was stated:

> "Although independent of the Government, the judiciary is not independent of the State: the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive."[168]

The Tribunal also draws support from the Decision on Jurisdiction in *Saipem v Bangladesh* which stated that "…the courts are 'part of the State' and, thus, their actions are attributable to Bangladesh."[169]

197. Professor Reisman stated that Article 4 of the ILC Articles was not based on an attribution of wrongful conduct but rather a general principle of international law.[170] Egypt offered no authority in contradiction. Professor Smit simply stated that the

[163] Egypt's post-hearing submissions, p. 19.
[164] T1: 61.
[165] *See, e.g.,* Expert Opinon of Prof Reisman of 7 November 2007, pp. 19, 22.
[166] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2008), p. 196 (citing Article 7 of the ILC Articles).
[167] *Azinian, Davitian, & Baca v. Mexico,* ICSID Case ARB (AF)/97/2, Award of 1 November 1999, (Claimants' legal authority 151).
[168] Ibid., para. 98.
[169] *Saipem SpA v The People's Republic of Bangladesh,* ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (Claimants' legal authority 150), para. 143.
[170] Expert Opinion of Prof Reisman of 7 November 2007, p. 19.

extension of a state's liability to its knowledge would "appear extremely unfair and inappropriate."[171] The Tribunal accepts the Claimants' arguments on this point.

198. Claimants further submitted that Egypt's knowledge was demonstrated by the fact that ESLA ran the same lack of capacity argument in domestic Egyptian litigation prior to the jurisdictional phase of this arbitration. On Egypt's behalf Mr Harb, while accepting that ESLA was aware of the 1999 proceedings,[172] categorically denied that it was aware of the 2003 re-opening.[173] Mr Harb stated that ESLA handled around two million cases per year and could not maintain a regular database of those cases. Accordingly, it was not reasonable to suggest that ESLA ought to have been aware of the 2003 re-opening.

199. The Tribunal prefers and accepts the Claimants' arguments concerning ESLA. The Tribunal considers that Egypt has over-stated the difficulty inherent ascertaining the fact of the 2003 re-opening. The Claimants informed the Tribunal and Egypt on 11 September 2007 that the 1999 bankruptcy proceedings had in fact been closed. On 13 September 2007 Egypt replied that the proceedings had been re-opened in 2003. Plainly it did not take Egypt long to ascertain that the proceedings had been re-opened once informed that they had previously been closed.

200. In the Tribunal's consideration there are further insuperable difficulties for Egypt in asserting that it did not have, or could not reasonably have had, knowledge of the 2003 re-opening. As noted above, Egypt's initial application for suspension dated 6 September 2007 was predicated on the 1999 proceedings declaring Mr Siag bankrupt. At the time of its original application Egypt stated the following: "We have recently learned that Mr Siag had a bankruptcy order entered against him by the Cairo Court of Appeal on 16 January 1999."[174] A copy of the 16 January 1999 decision was annexed to Egypt's application. Egypt subsequently informed the Tribunal that its application was based on the 2003 re-opening. However, it is clear that Egypt's original application was based on the January 1999 proceedings.

201. Mr Harb accepted that ESLA had appeared and argued at Mr Siag's bankruptcy hearing before the Court of Administrative Judiciary in Cairo in 1999. He also stated that his department at ESLA became aware of the 1999 proceedings when asked to

[171] Expert Opinion of Prof Smit of 23 November 2007, p. 10.
[172] Witness statement of Mr Asser Harb, p. 4.
[173] Ibid., p. 5.
[174] Egypt's application of 6 September 2007, p. 2.

handle the matter of Mr Siag and Ms Vecchi in or about March 2005.[175] The Tribunal considers that ESLA's knowledge of the 1999 proceedings was apparent from 1999. However, even if the Tribunal were to take the March 2005 date proffered by Mr Harb as determinative, the fact remains that both dates were well before the jurisdictional phase of this case, submissions on which did not commence until June 2006. The question then is this: as Egypt had knowledge of the 1999 proceedings from at least March 2005 why did it not raise its jurisdictional objection, based on those proceedings, during the jurisdictional phase of the arbitration? If it had done so it would no doubt have received notice from Claimants that the 1999 proceedings had been closed, which would have led Egypt to ascertain that the proceedings had then been re-opened. Given the short space of time within which that exchange occurred once Egypt had made its application in September 2007, the Tribunal has no doubt that Egypt would have become aware of the re-opening comfortably within the time limits allowed by the Tribunal for filing submissions in the jurisdiction phase. Egypt's failure to raise its objections at that time, in light of its accepted knowledge of the 1999 proceedings, can only be seen as a negligent omission.

202. Egypt also submitted that it did not have a central bankruptcy register and accordingly could not reasonably be expected to have learned of the re-opening at an earlier stage. The Tribunal is not persuaded by this submission. As stated above, it took Egypt two days at most from learning that the bankruptcy proceedings had been closed to discovering their re-opening.

203. For the reasons set out above the Tribunal considers that Egypt had both actual and constructive knowledge of the 2003 re-opening of the bankruptcy proceedings involving Mr Siag. Egypt was bound by ICSID Rule 41(1) to raise its objection based on these proceedings as early as possible but did not do so. The Tribunal accordingly finds that Egypt has contravened ICSID Rule 41(1).

What Sanctions Are Appropriate for Egypt's Breach of Rule 41(1)?

204. Claimants have submitted that relief is available under both ICSID Rule 26 and ICSID Rule 27, and that either would be appropriate.[176] The Tribunal accepts that

[175] Witness statement of Mr Asser Harb, p. 4.
[176] T1:81. Rule 26(3) states that "any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise." Rule 27 states that "a party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed – subject to Article 45 of the Convention – to have waived its right to object."

submission. In terms of Rule 26, Egypt took a step, in this case filing its objection to jurisdiction on the grounds of bankruptcy, after the expiration of the time limits set by the Tribunal for the filing of submissions on jurisdiction. Egypt did not expressly state that its lack of knowledge constituted a "special circumstance" such as to offset Rule 26. However, even on the assumption that that submission was intended, it is rejected for the reasons set out above. In terms of Rule 27, Egypt knew or should have known that, in its submission, Article 25 of the ICSID Convention had not been complied with. It should be noted that – as part of its objection to jurisdiction based on Mr Siag's Lebanese nationality – Egypt made the claim that a breach of Article 25 did not come within the purview of ICSID Rule 27 because the ICSID Convention was not one of the sets of rules or regulation to which Rule 27 applied.[177] Although that claim was not made in respect of the bankruptcy-related objection, the Tribunal considers that Egypt's assertion applies equally to the bankruptcy application, and will address it in that respect. The Tribunal does not uphold the submission that Rule 27 does not apply to an objection flowing from a breach of Article 25. In the Tribunal's view the ICSID Convention clearly constitutes a set of "other rules…applicable to the proceeding" for the purposes of Rule 27. The Tribunal accepts the submissions of Professor Reisman that the ICSID Convention and ICSID Rules are to be read together as part of an ensemble of instruments governing the conduct of ICSID arbitrations.[178] Egypt failed to "state promptly" its objections to jurisdiction, as is required by Rule 27.

205. A final matter for determination in respect of ICSID Rule 27 is Egypt's claim that Mr Siag is estopped from pleading waiver because he acted in bad faith by not revealing his bankrupt status at an earlier stage.[179] As will be discussed in detail below, the Tribunal finds that Egypt has not demonstrated that Mr Siag was in fact bankrupt at times material to the Tribunal's jurisdiction. If Mr Siag were not bankrupt at times material to this arbitration he, of course, had nothing to divulge. However, even if Mr Siag were bankrupt at material times, the Tribunal accepts Mr Siag's testimony that he was not aware of that fact. On day one of the hearing in Paris (10 March 2008), Mr Siag stated that, since the closing of the bankruptcy proceedings in 1999: "I have never heard in any court of law the Government of Egypt saying that I don't have a stance, never."[180] The Tribunal accepts this evidence as truthful. Both Claimants[181]

[177] Egypt's submissions (on the Lebanese nationality objection) of 31 January 2008, p. 4.
[178] Expert Opinion of Prof Reisman of 7 November 2007, pp. 8, 10.
[179] Egypt's Reply of 29 November 2007, p. 5.
[180] T1: 219 – 220.
[181] Expert Opinion of Prof Reisman of 18 December 2007, p. 31 (and citations).

and Egypt[182] referred to the requirement and/or presence of bad faith in relation to estoppel. The Tribunal does not consider there was any bad faith on the part of Mr Siag in this respect. Accordingly Egypt's claim of estoppel is dismissed.

206. The Tribunal therefore considers that both ICSID Rules 26 and 27 apply, and determines that: (1) Egypt's jurisdictional bankruptcy objection was out of time and thus shall be disregarded, pursuant to ICSID Rule 26, and (2) that Egypt has waived by its conduct its objections based on Mr Siag's alleged bankruptcy, pursuant to ICSID Rule 27.

207. Nevertheless, in the interests of completeness the Tribunal will examine and decide Egypt's bankruptcy objection as if it had been presented timeously and there had been no waiver. This course of action is appropriate for another reason, namely that, following Procedural Order No. 7 of 11 March 2008, Egypt pursued this argument at the merits phase of the arbitration, albeit as a subsidiary defence.[183]

The Merits of Egypt's Bankruptcy Application

Is (or Was) Mr Siag Bankrupt?

208. The Tribunal considers that the appropriate starting point for an assessment of the merits of Egypt's application is an examination of whether Mr Siag is or was in fact bankrupt. Egypt claimed categorically that Mr Siag was bankrupt after the bankruptcy proceedings were re-opened in 2003, that he was bankrupt in 2006 and that he is bankrupt today.[184] Claimants contended that Mr Siag was not bankrupt on the date he consented to ICSID arbitration (26 May 2005) and nor has he since been adjudged bankrupt.[185]

209. The Tribunal finds that Egypt has not demonstrated that Mr Siag was bankrupt at times relevant to the jurisdiction of the Tribunal under the ICSID Convention. The detailed reasons for that decision follow.

210. The Tribunal anticipated that the resolution of this question would be unproblematic – if Mr Siag had been "re-bankrupted" in 2003 it could be expected that there would be a judgment or order of an Egyptian court declaring him bankrupt. It was for that

[182] Egypt's Reply of 29 November 2007, p. 5 (stating that Mr Siag had acted in bad faith, had "misled everyone" and had committed a "wrong") and Prof Smit's Expert Opinion of 23 November 2007, pp. 10 – 11, which employs terms such as "fraud" and "deceit."
[183] *See* Egypt's post-hearing submissions, at pp. 3-4, 18-20.
[184] Ibid., p. 19.
[185] T1: 88.

reason the Tribunal sought from Egypt, in Procedural Order No. 6 dated 15 February 2008, "a certificate or similar notification from an Egyptian court that states that Mr Siag has been declared bankrupt."[186]

211. The Certificate from the Giza Court of First Instance dated 19 February 2008, which was annexed to Mr Harb's witness statement of 25 February 2008, stated that Mr Siag was bankrupted on 16 January 1999 and that "post-bankruptcy procedures are to be conducted on 8 March 2008." Mr Harb stated that this document "confirm[ed] the fact that Mr Siag is in fact in bankruptcy."[187] The Tribunal does not consider the certificate to be conclusive of Mr Siag's alleged bankruptcy. The Claimants did not deny that Mr Siag was declared bankrupt in January 1999.[188] Instead, the Claimants emphasised that the bankruptcy had been closed following payment of the debt. However, Egypt made clear that its application was based on the 2003 re-opening of the bankruptcy proceedings.[189] The dispute between the parties is whether the re-opened proceedings "re-instated" Mr Siag to a status of bankruptcy in 2003, not whether Mr Siag was originally bankrupted in 1999. The Tribunal therefore expected a certificate or similar stating that Mr Siag had been effectively 're-bankrupted' at the time of the re-opening in 2003. Such has not been provided.

212. Egypt cited in its application a 2003 decision of its Court of Cassation, which stated *inter alia* that it was established that a bankruptcy judgment in Egypt removed the capacity of the bankrupt to litigate.[190] That does not appear to have been the case with Mr Siag. Mr Siag stated at the hearing that he had initiated domestic court proceedings in Egypt in his personal capacity without any indication that he lacked capacity.[191] The following exchange between Mr Smith and Mr Siag is indicative:

> "Q: Have you had occasion in your personal capacity as Waguih Siag to bring actions in the Egyptian courts since 1999?
>
> A: Yes, several cases…
>
> Q: And did anyone claim in connection with any of those personal proceedings that you lacked capacity as a bankrupt to pursue claims on your own behalf?
>
> A: The only time I heard that I did not have standing, it was in 1996 in the administrative court. Never, ever have I heard anybody in Egypt saying that I don't have a standing in any place relating to the bankruptcy."[192]

[186] Para. 6.2(i).
[187] Witness statement of Mr Asser Harb, p. 6.
[188] *See*, *e.g.,* Claimants' Answer of 8 November 2007, p. 5.
[189] Egypt's Reply of 29 November 2007, p. 16.
[190] Egypt's application of 18 October 2007, Exhibit 2.
[191] T1: 217, 222 – 223.
[192] T1: 222 – 223.

213. Egypt also cited Articles 216 of the old Egyptian Commercial Code and 592 of the new Code to the effect that a bankrupt is "divested of his right to manage and dispose of assets owned by him on the date he is declared bankrupt."[193] The Tribunal would accordingly expect Mr Siag, were he in fact bankrupt, to have lost control of his assets. That does not appear to be the case. The following exchange between Professor Pryles and Mr Siag in respect of the 22 April 2006 judgment of the Cairo Court of Appeal took place at the hearing on 10 March 2008:

> Q: This judgment says that Mr Mohamed Ismail Mohamed is the bankruptcy receiver, Siag Pyramids Tourism Company. Does he also have control over your personal assets?
>
> A: No, your Honour, he doesn't have control on anything. I have never seen him in my life…
>
> Q: So are you able to deal with your own property by yourself?
>
> A: Of course, I manage my day-to-day operation.[194]

214. Mr Siag impressed the Tribunal as an honest and credible witness. The Tribunal accepts the evidence of Mr Siag on this point. The Tribunal also accepts the evidence of Dr Fahmy who stated that reference to the bankruptcy receiver in the decision of the Cairo Court of Appeal of 22 April 2006 did not prove that Mr Siag was bankrupt, and that the 2006 decision confirmed that Mr Siag was a defendant in his personal capacity and had not been substituted by the bankruptcy receiver.

215. For the reasons set out above the Tribunal finds affirmatively on the evidence that Mr Siag is not now bankrupt and also was not bankrupt at those times set out by Article 25(2)(a) of the ICSID Convention as being relevant to the jurisdiction of the Tribunal, namely the time Mr Siag consented to this arbitration and the date on which the arbitration was registered.

216. In summary, the Tribunal finds on the facts that (1) Mr Siag was declared bankrupt in January 1999; (2) that on 24 June 1999, by the closing of bankruptcy proceedings following the payment of the debt, Mr Siag was discharged from bankruptcy; (3) that bankruptcy proceedings were re-opened in 2003; (4) that Mr Siag has not again been declared bankrupt; (5) that Mr Siag was not bankrupt on the relevant dates for the purposes of jurisdiction in this case, *i.e*. 26 May 2005 when the Claimants filed their Request for Arbitration and thus accepted the offer of consent contained in the BIT, and 5 August 2005 when the Request was registered.

[193] Egypt's Reply of 29 November 2007, p. 7.
[194] T1: 217.

217. Given the Tribunal's findings it is not necessary to address Egypt's argument that if Mr Siag was bankrupt he had no standing under Egyptian law to conclude an arbitration agreement.

218. It follows that the Tribunal does not accede, on the basis of the bankruptcy application, to Egypt's request that the Decision on Jurisdiction be "withdrawn" and it finds that Egypt's bankruptcy defence fails on the merits and is dismissed.

V. EGYPT'S OCTOBER 2007 OBJECTION TO JURISDICTION BASED ON MR SIAG'S LEBANESE NATIONALITY

The Parties' Submissions on Egypt's "Lebanese Nationality" Application

Egypt's Application

219. On 9 October 2007, almost six months after the Tribunal's Decision on Jurisdiction, Egypt wrote to the Tribunal in respect of facts from which it claimed "the inescapable inference must be drawn that Mr Siag has deceived the Tribunal with respect to him having been a Lebanese national." Egypt contended that the Ministry of Interior of the Lebanese Republic had certified to Egypt that Mr Siag was not, and had never been, a Lebanese national.[195] Egypt annexed to its application a letter from Ms Nada Ramez Al Kasty of the Lebanese Ministry of Interior to Mr Abdul Hafiz El Ghalayini dated 3 October 2007, which stated that "…we advise you that upon reviewing the Personal Affairs Records of El Saray District, Sayda, No. 37, we did not find any registration for Mr Wagih Elie Siag."[196]

220. Egypt contended that it could reasonably be inferred from that letter that Mr Siag had presented a forged nationality certificate to the Lebanese embassy in Cairo as part of his application that Egypt recognise his Lebanese nationality.[197] Egypt noted that the Tribunal had found in its Decision on Jurisdiction that, pursuant to Article 10(3) of the Egyptian nationality law, Mr Siag had been required to state his intention to retain his Egyptian nationality within one year of gaining permission from Egypt to obtain Lebanese nationality. As Mr Siag did not state such an intention within the relevant time, the Tribunal held that he had lost his Egyptian nationality.[198]

[195] Egypt's application 9 October 2007, p. 1.
[196] Ibid., Exhibit (1).
[197] Ibid., pp. 1 and 2.
[198] Decision on Jurisdiction, p. 49.

221. Based on the new information it had presented, namely the letter from Ms Al Kasty, Egypt argued that, as Mr Siag's Lebanese nationality was never properly acquired, he had no valid basis on which to ask Egypt to recognise that nationality, and he was under no obligation to indicate an intention to retain his Egyptian nationality. Therefore, Mr Siag remained an Egyptian national and accordingly failed the negative nationality requirement of Article 25(2)(a) of the ICSID Convention. The Tribunal was therefore without jurisdiction.[199] Egypt contended that Mr Siag's fraud was directly responsible for Egypt's lack of knowledge on this matter and its resultant inability to raise the matter at an earlier stage in the proceedings. Egypt became aware of Mr Siag's status only after making enquiries of the Lebanese Ministry of Interior in an attempt to learn the date of Mr Siag's Lebanese naturalisation.[200] Egypt requested that the Tribunal suspend the proceedings on the merits pending the outcome of its application, and establish a schedule for receiving submissions thereon.[201]

Egypt's Counter-Memorial on the Merits (as to the Lebanese Nationality Issue)

222. Egypt filed its Counter-Memorial on the merits on 12 October 2007. In addition to addressing matters relevant to the merits portion of the arbitration, Egypt's Counter-Memorial, together with the expert opinion of Professor Smit dated 11 October 2007 which accompanied it, also addressed Egypt's Lebanese nationality objection. Egypt submitted that Professor Smit's opinion made it clear that Mr Siag had never properly shed his Egyptian nationality when he "supposedly took on Lebanese nationality."[202] Egypt argued that the only explanation for the issuance of Mr Siag's Lebanese citizenship document was that Mr Siag was Lebanese at birth, and that the only evidence supporting the conclusion that Mr Siag was Lebanese through naturalisation was false and likely fabricated.[203] Being Lebanese by birth, Mr Siag had never had the opportunity to shed his Egyptian nationality by operation of Egyptian law because the provisions of Egyptian law permitted a person to do so only on the occasion of him or her acquiring a new nationality.[204] Egypt argued that the Tribunal should carefully reconsider its decision that the Claimants lost their Egyptian nationality. Egypt suggested the Tribunal could do so because a final Award had not been issued on the matter and contended that failure to listen to further presentations regarding the Claimants' Egyptian nationality would afford Egypt an opportunity to

[199] Egypt's application 9 October 2007, p. 1.
[200] Ibid., p. 2.
[201] Ibid.
[202] Egypt's Counter-Memorial on the Merits, p. 49.
[203] Ibid.
[204] Ibid.

challenge the Award "through a nullification application based on unfairness or other inadequacy in the way the proceedings were conducted in this important and fundamental respect."[205]

Claimants' Answer (in Respect of Bankruptcy)

223. As noted above, on 8 November 2007 the Claimants submitted their Answer to Egypt's application on the grounds of Mr Siag's bankruptcy. An opinion from Professor Reisman was submitted in support of Claimants' position. Although dealing primarily with the bankruptcy application, Professor Reisman also touched briefly on Egypt's "Lebanese nationality" application. Professor Reisman did not speak to the merits of the Lebanese nationality application but stated that the application must be deemed to have been waived.[206]

Claimants' Response

224. The Claimants responded in greater detail to Egypt's application on 16 November 2007. The Claimants submitted that no Lebanese official had stated that Mr Siag's Individual Record was illegitimate or that his Lebanese nationality was invalid.[207] The only fact attested to by the Lebanese Ministry of Interior was that it was unable to locate a registration record for Mr Siag in the district of Sayda.[208] The inferences drawn by Egypt from this submission were unwarranted.[209] The most likely explanation for the failure to locate a registration record for Mr Siag was that the record had been lost, misplaced, discarded or moved at some point over the past 18 years. That was entirely plausible given the turmoil experienced in Lebanon over that period.[210]

225. Claimants further argued that Egypt's contention that there had been forgery on the part of Mr Siag was highly implausible, and was contradicted by contemporaneous evidence. Mr Siag's Individual Record bore the seals and marks of the Lebanese government and the signature of Lebanon's then counsel to Egypt, Mr Nicola Khawaja. In addition, Mr Siag had received a "to whom it may concern letter" from the Lebanese Embassy in Cairo in 1989, and had been issued with a Lebanese passport on 14 June 1990. For Egypt's premise to be correct Mr Siag would either had to have forged these official Lebanese government documents, duped the Lebanese

[205] Ibid., p. 48.
[206] Expert Opinion of Prof Reisman of 7 November 2007, p. 29, n 49.
[207] Claimants' submissions 16 November 2007, pp. 1 – 2.
[208] Ibid., p. 2.
[209] Ibid.
[210] Ibid.

government officials or somehow acted wrongfully in concert with them. There was nothing to suggest that Mr Siag was involved in any such conduct.[211]

226. Claimants argued that, in any event and as foreshadowed by Professor Reisman's opinion of 7 November 2007, Egypt's right to file such an objection must be regarded as having been waived. The objection was made six months after the Tribunal's Decision on Jurisdiction, and 18 months after the deadline imposed by the Tribunal for submissions on Jurisdiction. Accordingly, as was the case with Egypt's objection in respect of Mr Siag's alleged bankruptcy, the Lebanese nationality objection was not brought "as early as possible" as was required by ICSID Rule 41, and was waived pursuant to ICSID Rules 26 and 27.[212] The Claimants noted that the parties had argued at some length over Mr Siag's Individual Record in their respective memorials on jurisdiction. During that time Egypt had made contact with the Lebanese Embassy in Cairo in respect of Mr Siag's Lebanese nationality. Egypt accordingly could and should have raised its present objection during the jurisdictional phase of this case.[213]

227. For all those reasons Claimants requested that the Tribunal reject Egypt's request for a stay and rule that Egypt had waived its application. Claimants asked that the Tribunal consider Egypt's many unfounded jurisdictional objections when making its order as to costs at the end of the proceeding.[214]

Egypt's Further Submissions Following Egypt's "Further Enquiries"

228. On 21 December 2007, over a month after Claimants had filed their Response, Egypt informed the Tribunal that it had made yet further enquiries in Lebanon, which had resulted in the discovery of additional evidence which proved that Mr Siag's Lebanese nationality documents were false. Egypt noted that the new evidence would soon be provided to the Tribunal.

229. Yet another month elapsed before Egypt filed further submissions, dated 31 January 2008, containing the new evidence it had alluded to on 21 December 2007. Egypt also filed at that time a witness statement from Abdul Hafiz Ghalayini, a partner at Houri & Ghalayini, a law firm in Beirut dated 31 January 2008. Mr Ghalayini had been instructed by the Egyptian Embassy in Beirut to obtain information in respect of Mr Siag's Lebanese nationality and Individual Record.

[211] Ibid., pp. 2 – 3.
[212] Ibid., pp. 3 – 4.
[213] Ibid., pp. 4 – 5.
[214] Ibid., p. 5.

230. Egypt's submissions of 31 January 2008 were that it had obtained three further important pieces of evidence that proved that Mr Siag's claim to Lebanese nationality was false: a letter from the Lebanese Ministry of Foreign Affairs and Immigrants dated 26 November 2007 stating that no record of Mr Siag had been found in any register in Sayda; a certificate from the General Directorate for Personal Affairs of the Lebanese Ministry of Interior and Municipalities dated 8 December 2007 stating that Mr Siag's Individual Record had been "taken from a bogus document"; and a document received on 29 January 2007 from the General Directorate for Public Security of the Lebanese Ministry of Interior and Municipalities attesting that Mr Siag's two Lebanese passports were not genuine.[215]

231. Egypt claimed that this new evidence demonstrated that the documents Mr Siag had proffered in support of his Lebanese nationality were fraudulent and probably also forged,[216] and that it was more than sufficient to prove that Mr Siag had made false claims as to his Lebanese nationality.[217] Egypt noted that Mr Siag had claimed that he lost his Egyptian nationality as a result of obtaining Lebanese nationality and failing to apply within one year to retain Egyptian nationality. If Mr Siag had not in fact obtained Lebanese nationality, he was under no obligation to declare an intention to retain Egyptian nationality. If Mr Siag had therefore not lost his Egyptian nationality, and remained Egyptian, Egypt submitted that he failed the negative nationality requirement of Article 25 of the ICSID Convention and was barred from bringing a claim by the applicable ICSID Rules.[218] Egypt argued that the requirements of Article 25 of the ICSID Convention (that an investor not be a national of the host state) were tantamount to subject-matter jurisdiction, and could not be waived.[219]

232. Egypt submitted that even if the requirements of Article 25 could be waived, they had not been waived in this case. Mr Siag had withheld information concerning his fraudulent representation as to his Lebanese nationality. The applicable standard was whether Egypt "should have known" about Mr Siag's fraud. It was "hard to fathom" how Egypt should have known.[220] The Egyptian government could not be said in any sense to have access to the files or records of the Lebanese government, upon whom Mr Siag's fraud was initially perpetrated.[221] Egypt only became aware of the possibility that the identity register document evidencing Mr Siag's Lebanese

[215] Egypt's submissions of 31 January 2008, pp. 1 – 2.
[216] Ibid., p. 3.
[217] Ibid., p. 2.
[218] Ibid., pp. 3, 5.
[219] Ibid., pp. 3 – 4.
[220] Ibid., p. 4.
[221] Ibid.

nationality may have been fraudulent after the Decision on Jurisdiction in these proceedings, at which time Egypt's legal team[222] looked closely at the document.[223] Mr Siag had failed to come forward with documentation proving that he had been naturalised as Lebanese, which he could have been expected to do had such documentation existed.[224]

233. In addition Egypt contended that ICSID Rule 27 applied only to breaches of the ICSID Rules, the ICSID Administrative and Financial Regulations, other rules or agreements applicable to the proceeding, or an order of the Tribunal. It did not apply to a breach of the ICSID Convention itself.[225]

234. Egypt lastly submitted that, if the Tribunal ignored Egypt's clear evidence, there was little question that the Award rendered would be seen by an *ad hoc* committee as a contravention of Article 52 of the ICSID Convention.[226]

Egypt's Rejoinder on the Merits (as to the Lebanese Nationality Issue)

235. Egypt filed its Rejoinder on the Merits on 12 February 2008. The Rejoinder, and the third opinion of Professor Smit (dated 11 February 2008), that was filed in support thereof, both touch on Egypt's "Lebanese nationality" application. Many of Egypt's earlier submissions were re-iterated in Egypt's Rejoinder. In addition, Egypt submitted that it was apparent from the timing of Mr Siag's application for permission to acquire Lebanese nationality that he so applied in order to obtain dual Egyptian/Lebanese nationality and in so doing avoid compulsory Egyptian military service.[227] Egypt said that Claimants could not argue that Egypt ought to have raised its objection at an earlier stage – the burden of proof rested on Mr Siag to show that he had been naturalised as Lebanese. Egypt had no knowledge that his claims were false. If anyone was to blame for the late raising of this application it was Mr Siag.[228]

236. Egypt submitted that, as Mr Siag had presented false evidence to the Tribunal, which formed the basis of the Tribunal's Decision on Jurisdiction, that Decision should be

[222] As noted earlier, Egypt had added further Baker & McKenzie lawyers to its legal team after the Decision on Jurisdiction.
[223] Egypt's submissions of 31 January 2008, p. 4.
[224] Ibid.
[225] Ibid.
[226] Ibid., p. 5.
[227] Egypt's Rejoinder on the Merits, p. 6.
[228] Expert Opinion of Professor Smit of 11 February 2008, pp. 11 – 12.

withdrawn in the face of the new evidence presented by Egypt, and an Award issued dismissing Mr Siag's claim as outside the jurisdiction of the BIT.[229]

Procedural Order No. 6 (as to Application No. 2 - the Lebanese Nationality Issue)

237. As noted above, the Tribunal issued its sixth Procedural Order on 15 February 2008. In respect of what was termed "application no. 2" – Egypt's application based on Mr Siag's Lebanese nationality – the Order stated as follows:

> "6.3 Without derogating from the generality of the directions in 6.1 above, and without intending to convey in any way any preliminary views one way or the other on applications 1 and 2, the Tribunal considers that it may be assisted in its deliberations by the production of further documentary evidence, if such is available, from each party in respect of applications 1 and 2, namely:
>
> (ii) from the Claimants, (a) certification from the Lebanese Ministry of the Interior that Mr Siag is a Lebanese national, and the date and place of his registration;
>
> If a party is unable to obtain such documents they are requested to so advise the Tribunal in writing before the commencement of the hearing on March 10, 2008 and indicate why it was unable to obtain the requested documents. Nothing in this direction is to be regarded as preventing a party from proving or establishing such matters by means of other documentary or oral evidence."

Claimants' Rejoinder

238. On 19 February 2008 the Claimants submitted a Brief Rejoinder to Egypt's "Lebanese Nationality" Allegations. Claimants' Rejoinder argued that the "new evidence" submitted by Egypt on 31 January 2008 was a contrivance apparently the product of Egyptian diplomatic pressure on Lebanese officials.[230] Mr Siag's Individual Record and two passports dated from 1989, 1990 and 1992 and showed that Mr Siag had travelled into and out of Lebanon on his Lebanese passports many times.[231] The validity of Mr Siag's Lebanese documents had not previously been questioned, either by Lebanon or by Egypt, and it was curious that these documents were now being queried five weeks before the hearing on the merits.[232] Mr Siag emphatically denied any wrongdoing in connection with his acquisition of Lebanese nationality, and specifically denied that he had been involved in fraud or forgery.[233]

[229] Egypt's Rejoinder on the Merits, p. 83.
[230] Claimants' Rejoinder of 19 February 2008, pp. 1 – 2.
[231] Ibid., p. 3.
[232] Ibid., pp. 1 – 2.
[233] Ibid., p. 2.

239. Claimants submitted that Egypt had in the past raised many jurisdictional objections based on supposed "new evidence" that could and should have been raised during the jurisdictional phase of the arbitration. Given Egypt's behaviour the Tribunal ought to view Egypt's latest evidence, which responded too clearly to the concerns raised by Claimants on 16 November 2007, with an extraordinary degree of scepticism.[234]

240. Claimants noted that they would attempt to provide to the Tribunal further evidence of Mr Siag's Lebanese nationality, as requested by Procedural Order No. 6. However, given the short time Claimants had to achieve that task, and given Claimants' lack of diplomatic influence commensurate with that enjoyed by Egypt, Claimants were highly unlikely to be able to make the same showing as Egypt was able to with time and diplomatic channels on its side.[235] The Tribunal might well be forced to decide between Claimants' contemporaneous evidence and Egypt's new evidence.[236]

241. Claimants argued that Egypt could and should have raised its objection during the jurisdictional phase. Each of Mr Siag's documents had been a matter of record since the outset of these proceedings. Indeed Mr Siag's Individual Record and Nationality Certificate had been submitted by Egypt (as part of its Memorial on Jurisdiction of 12 June 2006) and were debated at length in the parties' respective submissions on jurisdiction.[237] It was difficult to treat seriously Egypt's claim that it only recently examined the Individual Record closely.[238] The fact that Egypt had itself presented Mr Siag's Individual Record and Nationality Certificate meant that Egypt's claim that it did not have access to the files or records of the Lebanese government was also not borne out.[239] Claimants submitted that Egypt had made direct enquiries of Lebanese government officials in both the jurisdictional phase and thereafter, and had received prompt responses on each occasion.[240]

242. Claimants concluded that Egypt's application was a further attempt to avoid the merits phase of the arbitration and should be dismissed.[241]

[234] Ibid., pp. 2 – 3.
[235] Ibid., pp. 3 – 4.
[236] Ibid., p. 4.
[237] Ibid., pp. 4 – 5.
[238] Ibid., p. 5.
[239] Ibid., pp. 4 – 5.
[240] Ibid., p. 5.
[241] Ibid., p. 6.

Egypt's Further Submissions

243. As noted above, Egypt presented further material on its applications on 25 February 2008. Egypt asserted that Mr Nadim Souhaid, a Lebanese lawyer, had been contacted by Baker & McKenzie in August 2007 and asked for assistance in obtaining evidence of Mr Siag's alleged Lebanese nationality. Mr Souhaid's brief was to ascertain whether Mr Siag was Lebanese by birth or by naturalisation. His enquiries led to the conclusion that Mr Siag did not possess Lebanese nationality at all. That in turn led to enquiries of the Lebanese courts which resulted in an official statement that there was no record of Mr Siag having Lebanese nationality.[242] An additional effort had been made by Baker & McKenzie through a different law firm in Beirut, which resulted in the issuance of the statements annexed to the witness statement of Mr Ghalayini (noted above).[243] Baker & McKenzie, and not ESLA, had undertaken the investigations into Mr Siag's Lebanese nationality. There was accordingly no substance to Claimants' suggestion that the documents received as a result of those investigations had been obtained as a result of diplomatic pressure.[244]

Egypt's Second Application to Bifurcate the Merits Phase

244. By way of separate correspondence of 25 February 2008 Egypt applied again to bifurcate the upcoming merits hearing by concentrating in the first instance on matters other than damages. At the outset of its application Egypt stated that, on February 19 2008, "the veil came off the Claimants' defense to Application No.2 and the reality emerged that Siag's Lebanese nationality documents have indeed been falsified."[245]

245. Egypt further submitted that the Claimants had been invited by the Tribunal to present evidence of Mr Siag's Lebanese nationality and had offered nothing.[246] Why, Egypt asked, did Mr Siag not produce his own copy of his naturalisation certificate? Such would have been the obvious response to Egypt's application yet nothing had been forthcoming.[247] Egypt stated that it had the difficult task of proving a negative in relation to Mr Siag's nationality. It should be much simpler for Mr Siag to positively establish his status.[248]

[242] Egypt's submissions of 25 February 2008, pp. 1 – 2.
[243] Ibid., p. 2.
[244] Ibid.
[245] Ibid., p. 1.
[246] Ibid., p. 2.
[247] Ibid., pp. 2, 4.
[248] Ibid., p. 3.

246. Egypt noted that it did not seek to have the proceedings on the merits suspended at this time. It recognised that there had to be a hearing on its applications. Instead Egypt sought an alteration to the merits phase, by not, at least initially, hearing argument on damages.[249]

Claimants' Response to the Second Application for Bifurcation

247. Claimants responded to Egypt's request on 27 February 2008. In common with Egypt, Claimants made various submissions in respect of the "Lebanese nationality" issue. Claimants submitted that Egypt's claim that Mr Siag and his counsel had presented false evidence to the Tribunal was slanderous on its face, entirely without merit, and should be seen as a further attempt by Egypt to avoid the merits phase of the arbitration.[250] Claimants noted that their further submissions on Egypt's applications, due on 29 February, would address Egypt's claims in more detail, and would include evidence from Mr Siag, who had not yet been heard on the matter.[251]

248. In Claimants' submission, Mr Siag had provided extensive *prima facie* evidence of his Lebanese nationality and the burden of proof had therefore shifted to Egypt to prove its claims of forgery by clear and convincing evidence.[252]

249. Claimants also contended that, in any event, Egypt's claims were ultimately irrelevant to Mr Siag's loss of Egyptian nationality under Egyptian law, which was the only relevant jurisdictional issue for the Tribunal.[253]

Claimants' Further Submissions of 29 February 2008 as to Egypt's "Bankruptcy" and "Lebanese Nationality" Objections

250. As noted above, on 29 February 2008 the Claimants presented their further submissions on both Egypt's "bankruptcy" and "Lebanese nationality" objections. As to the "Lebanese nationality" issue Claimants submitted that Egypt's application was an attempt to collaterally attack the Tribunal's Decision on Jurisdiction and manufacture a basis for an eventual annulment application.[254]

251. Claimants argued that, as was the case with its "bankruptcy" objection, Egypt could and should have raised its "Lebanese nationality" objection during the scheduled

[249] Ibid., p. 5.
[250] Claimants' submissions of 27 February 2008, p. 1.
[251] Ibid., p. 2.
[252] Ibid.
[253] Ibid.
[254] Ibid., p. 1.

jurisdictional phase of the arbitration. Mr Siag's acquisition of Lebanese nationality and the documents that underpinned that acquisition, were hotly debated between the parties in their submissions on jurisdiction and in the hearing on jurisdiction in August 2006.[255] Pursuant to ICSID Rule 41 Egypt's application should have been made as early as possible. According to the Claimants, the sanction for Egypt's failure to adhere to Rule 41 was waiver under ICSID Rules 26 and 27.[256] Egypt's claim that it only recently made a close examination of Mr Siag's documents was not an excuse.[257] Egypt had devoted little time to the issue of waiver, and those arguments it had raised should be rejected. First, Egypt's contention that Mr Siag's nationality was an issue of subject-matter jurisdiction under Article 25 of the ICSID Convention and therefore could not be waived assumed that the Tribunal was bound by United States law, which was not the case. Even if the Tribunal were to adopt United States law, jurisdiction over Mr Siag was a matter of personal, not subject-matter, jurisdiction.[258] Secondly, ICSID Rule 27 clearly encompassed Article 25 of the ICSID Convention as a "rule or agreement" applicable to the proceeding. In addition, the ICSID Rules and ICSID Convention were to be considered together under the rules of interpretation set forth in the Vienna Convention.[259] In any event, Egypt made no such attack on ICSID Rule 26, upon which Rule Claimants also relied.[260]

252. If the Tribunal were to consider the merits of Egypt's Lebanese nationality objection, Claimants argued that Egypt should be held to a heightened burden of proof. Egypt bore the burden of proof to begin with, as it was their application under consideration.[261] The usual 'preponderance of the evidence' standard of proof was not however appropriate given the following: first, Egypt had raised its latest objection to jurisdiction well after a Decision on Jurisdiction had been rendered;[262] secondly, Egypt sought to challenge the plethora of *prima facie* evidence that Mr Siag's Lebanese nationality was properly obtained;[263] finally, allegations of fraud and forgery as had been made by Egypt were typically held to a higher standard of proof.[264] Although the terminology used differed, the United States formulation of "clear and convincing evidence" best described the standard typically applied.[265] In Claimants'

[255] Ibid., pp. 2, 9.
[256] Ibid., p. 6.
[257] Ibid., p. 9.
[258] Ibid., p. 6.
[259] Ibid., p. 7.
[260] Ibid., pp. 7 – 8.
[261] Ibid., p. 10.
[262] Ibid.
[263] Ibid., pp. 10 – 11.
[264] Ibid., p. 11.
[265] Ibid., pp. 11, 15.

submission the evidence adduced by Egypt fell well short of the standard required. Egypt had submitted two conclusory, two-line letters about Mr Siag's Individual Record and passports, which jumped to the conclusion that the documents were "bogus" or "not genuine" without further review or explanation. That evidence failed to satisfy even the "preponderance of the evidence" standard, let alone the heightened standard that should be applied.[266]

253. Claimants submitted that Egypt's protestations over Mr Siag's failure to provide a certificate of his naturalisation were misplaced: There was in fact such a certificate – Mr Siag's nationality certificate – which Egypt itself had submitted into evidence during the jurisdictional phase, and which Mr Siag had re-presented.[267]

254. It was further submitted by Claimants that whether or not Mr Siag was Lebanese was irrelevant to the question of whether or not he lost Egyptian nationality under Article 10 of Egypt's nationality law.[268] The Tribunal had accepted in its Decision on Jurisdiction that Article 10 was "blind" to the operation of Lebanese nationality law.[269] Accordingly, any acts taken by an Egyptian national to acquire a foreign nationality prior to the Egyptian Interior Minister's grant of permission to do so were irrelevant as a matter of Egyptian law. The only act that mattered was the first formal expression of the acquired foreign nationality after the issuance of the Minister's authorisation.[270] Further, Egyptian law did not require a robust investigation into the acquisition by one of its nationals of foreign nationality. A foreign passport was routinely accepted as proof thereof.[271] In reality there was only one document of any significance to the application of Article 10 of Egypt's nationality law: Mr Siag's first Lebanese passport, which was the first "formal expression" by Lebanon of Mr Siag's Lebanese nationality after the date on which Mr Siag received Egyptian authorisation to acquire Lebanese nationality. That act alone was sufficient for Mr Siag to lose his Egyptian nationality once he had failed to make the requisite declaration of intent under Article 10. Mr Siag's Individual Record and his second Lebanese passport were therefore irrelevant.[272]

255. Claimants argued that Egypt's allegations of fraud and forgery on the part of Mr Siag were not plausible. There was absolutely no reason for Mr Siag to take the risks

[266] Ibid., p. 16.
[267] Ibid., p. 17.
[268] Ibid.
[269] Ibid., p. 18.
[270] Ibid., p. 19.
[271] Ibid.
[272] Ibid., pp. 20 – 21.

inherent in such activities when he could simply have become Italian and avoided Egyptian military service that way. The reason Mr Siag chose Lebanese nationality over Italian was his strong ancestral and personal connection to Lebanon. It was true that one of Mr Siag's motivating factors was a desire not to undergo military service. However, there was no reason for him to engage in fraud or forgery to achieve that end.[273] Further, if his sole motivation in gaining Lebanese nationality was to avoid military service, and he was successfully exempted from such in 1990, Claimants asked why Mr Siag would have obtained a second Lebanese passport in 1992, then added his children to that passport in 1993, and renewed it in 1998, when the objective had been achieved.[274]

256. Claimants noted that four documents contemporaneous with Mr Siag's acquisition of Lebanese nationality had been considered and relied upon by the parties: Mr Siag's Individual Record, the nationality certificate issued by the Lebanese Embassy in Cairo, Mr Siag's 1990 Lebanese passport, and Mr Siag's 1992 Lebanese passport.[275] Egypt had questioned the authenticity of each of these documents bar the nationality certificate.[276] It was notable that Egypt had not queried validity of the nationality certificate, as that document represented a contemporaneous declaration by a senior Lebanese official that Mr Siag had properly acquired Lebanese nationality.[277] Each of the four documents bore a mixture of official Lebanese seals, stamps, and signatures of Lebanese government officials, up to and including the Lebanese Ambassador. It would have been almost impossible for Mr Siag to fabricate or obtain these indicia by illegitimate means, were he even motivated to do so.[278] In respect of Mr Siag's Individual Record, Claimants noted that Mr Siag's copy contained a back page which was not submitted into evidence by Egypt. That page carried signatures that, although illegible, gave lie to Mr Souhaid's claim that one reason to doubt the Individual Record was that it "contained no signatures."[279] Further, the fact that Lebanese officials could not locate Mr Siag's Individual Record 19 years after its creation offered little support to Egypt's application when the state of Lebanon's civil registry was taken into account. Lebanon's registry was plagued with difficulties, suffered from "chronic structural, procedural and material deficiencies,"[280] wherein no

[273] Ibid., pp. 21 – 27.
[274] Ibid., p. 60.
[275] Ibid., p. 27.
[276] Ibid.
[277] Ibid., pp. 27, 44.
[278] Ibid., pp. 27 – 28 (generally), and pp. 28 – 60 (in detail).
[279] Ibid., p. 32 (citing Witness Statement of Mr Nadim Souhaid, at para. 3(e)).
[280] Ibid., p. 36 (citing the European Union Election Observation Mission, Parliamentary Elections, Lebanon 2005, Final Report, p. 45 (Claimants' Exhibit 131)).

central register was held and the size of the population had been uncertain for 50 years, as even the former Lebanese Minister of the Interior attested.[281] In respect of Mr Siag's Lebanese passports Claimants noted that, in spite of Egypt's assertion that Baker and McKenzie ran the investigation in Lebanon, Mr Ghalayini's statement contained references to working with the Egyptian Embassy. That strongly suggested that Egypt's new evidence was the result of diplomatic pressure exerted by Egypt on certain Lebanese officials.[282]

The Tribunal's Ruling on Egypt's Second Application for Bifurcation

257. The Tribunal issued its Ruling on Egypt's application to bifurcate the merits phase on 3 March 2008. As far as it is relevant to the "Lebanese nationality" application that Ruling read as follows:

> "8.2 (iii) As stated at paragraphs 5.3 and 5.5 of Procedural Order No.6, the Tribunal wishes to hear further argument and evidence on Egypt's Application No.2 before making a final determination thereon. The Tribunal does not consider that it should order the bifurcation of the upcoming hearing on the implied assumption that Application No.2 is certain to be decided in favour of the Respondent."

Egypt's Further Submissions on its Applications (in breach of Procedural Order No. 6)

258. As noted above, on 4 March 2008, shortly before the start of the hearing and in breach of Procedural Order No. 6, Egypt purported to file further submissions on each of its applications, followed on 5 March 2008 by a second witness statement from Mr Nadim Souhaid, dated 3 March 2008. Later on 5 March 2008 the Claimants filed a motion to strike out these two documents on the basis that they were unsolicited and introduced (in Mr Souhaid's statement) evidence previously not canvassed in these proceedings, namely evidence of Lebanese law. Egypt responded by email on 6 March 2008. On 6 March 2008 the Tribunal directed Egypt to formally apply for leave if it wished to have the submissions and witness statement admitted to the record. The Tribunal indicated that any such application would be determined at the hearing on 10 March 2008. By email of 9 March 2008 Egypt confirmed that it had decided not to seek leave to have the statement of Mr Souhaid and the submissions of 4 March 2008 added to the record. The Tribunal has therefore disregarded those materials.

[281] Ibid., p. 39 (citing Rania Maktabi, "The Lebanese census of 1932 revisited: Who are the Lebanese?", British Journal of Middle Eastern Studies (1999), 219, p. 221, n 6 (Claimants' Exhibit 138)).
[282] Ibid., p. 48.

Further Evidence and Submissions on Egypt's Further Jurisdictional Objections at the Hearing on 10 March 2008

259. As noted above, the hearing of both of Egypt's applications took place in Paris on 10 March 2008.[283]

Egypt's Oral Submissions on Lebanese Nationality[284]

260. Egypt's oral submissions on the Lebanese nationality objection were that the central fact in the Tribunal's analysis had to be the failure of Mr Siag to produce the documentary evidence requested by the Tribunal.[285] Egypt contended that it was telling that Mr Siag had not produced a more recent Individual Record than the 1989 document already in evidence.[286] Egypt submitted that Mr Siag obtained his Individual Record in order to avoid military service.[287] From the Individual Record came the nationality certificate and the application for recognition by Egypt of Mr Siag's Lebanese nationality.[288]

261. Egypt noted that, in line with the *Soufraki* case,[289] the documentary trappings of nationality, such as Mr Siag's Lebanese documents, were no more than *prima facie* evidence of nationality.[290] Egypt on the other hand had adduced the unchallenged statements of two Lebanese lawyers, plus the exhibits annexed to those statements, attesting that there was no record of Mr Siag in Saida.[291] Egypt had therefore proved a negative – the non-existence of the reality of Lebanese nationality on Mr Siag's part – and as a result the burden had shifted and it was up to Claimants to prove nationality, which they had failed to do.[292] Egypt did not believe it had to prove fraud; instead the Claimants had to prove nationality.[293]

---

[283] *See* para. 162 above.

[284] Before the parties made their submissions on Egypt's Lebanese nationality objection, Claimants noted that counsel for Egypt had indicated an intention to adduce evidence of Lebanese nationality law - as appended to the second witness statement of Mr Nadim Souhaid - which had not been accepted into evidence (T1: 5). Claimants opposed such a proposal as issues of Lebanese law had not previously been tabled and Claimants had had no time to prepare a case thereon (T1: 5 – 8). Claimants submitted that the only ground offered by Egypt in support of its Lebanese nationality application to that point had been that Mr Siag had fraudulently obtained evidence of his Lebanese nationality (T1: 5 – 7). The Tribunal directed that evidence as to Lebanese law not be submitted until the Tribunal had had time to consider the matter (T1: 34).

[285] T1: 31.
[286] T1: 34.
[287] T1: 35, 58.
[288] T1: 35.
[289] *Hussein Nuaman Soufraki v United Arab Emirates,* ICSID Case ARB/02/7, Award of 7 July 2004.
[290] T1: 36 – 37.
[291] T1:37 – 38.
[292] T1: 38 - 40
[293] T1: 41.

262. It was Egypt's submission that Claimants' evidence as to the state of the Lebanese civil registry did not show that Mr Siag's records had "fallen through the cracks." Mr Ghalayini's uncontested evidence was that all original records had been saved and maintained.[294]

263. Egypt argued that it was under no obligation to uncover a fraud made against it. It was not required to scrutinise every document for authenticity. Egypt could not be said to have waived its objection because it was insufficiently diligent in discovering Mr Siag's fraud.[295] The catalyst for Egypt making enquiries of the Lebanese Ministry of the Interior in or around August 2007 was that Egypt was by that stage preparing for the merits phase of the case. Egypt had not received from Claimants the documentation it required to support its effective nationality/estoppel arguments, which at the Tribunal's direction Egypt was going to run in the merits phase of the arbitration, and accordingly Egypt made its own enquiries in Lebanon.[296] Baker & McKenzie, not ESLA, had run the investigation into Mr Siag's Lebanese nationality. Claimants' accusations that diplomatic pressure had been applied to Lebanese officials were reckless and without substance.[297]

Claimants' Oral Submissions on Lebanese Nationality

264. Claimants submitted four responses to Egypt's objection in respect of Mr Siag's Lebanese nationality: first, Egypt had waived its objection; secondly, whether or not Mr Siag attained Lebanese nationality was irrelevant to the question for the Tribunal, which was whether Mr Siag lost his Egyptian nationality under Egyptian law; thirdly, Egypt's claim of fraud was not credible; and finally, Egypt had offered no basis to second-guess the contemporaneous documents evidencing Mr Siag's Lebanese nationality.[298]

265. Claimants noted that the Lebanese nationality documents in issue were all in evidence during the jurisdictional phase of the arbitration. Mr Siag's acquisition of Lebanese nationality was debated extensively at that time, indeed Egypt made direct contact with the Lebanese embassy in Cairo on this matter.[299] Egypt accordingly knew, or should have known, of its objection during the jurisdictional phase and did not raise its objection "as early as possible" as was required by ICSID Rule 41. ICSID

[294] T1: 42.
[295] T1: 44 – 45, 54 – 55.
[296] T1: 46 – 52.
[297] T1: 56.
[298] T1: 101.
[299] T1: 79 – 80, 101 – 103.

Rules 26 and 27 could both be appropriately applied to sanction Egypt's conduct.[300] The Tribunal should consider very carefully whether Egypt had made a credible response to the waiver argument.[301] Claimants submitted that the ambit of ICSID Rule 27 included the ICSID Convention, which was part of an ensemble of instruments that must be considered together under the Vienna Convention.[302]

266. In Claimant's submission, Egypt's statement that it only looked "carefully" at Mr Siag's Individual Record some time after the Decision on Jurisdiction was not a defence but an admission of negligence.[303]

267. Contrary to Egypt's contention, Mr Siag had adduced documentation to prove that he had acquired Lebanese nationality. Egypt had itself produced a Lebanese nationality certificate for Mr Siag.[304]

268. Claimants further submitted that Egypt's claim that it did not have access to the files or records of the Lebanese Government was simply untrue, as its conduct in the proceeding had demonstrated.[305] Egypt or its agents had made several requests of Lebanese government officials, both before and after the jurisdictional phase of the arbitration, and had received a prompt response on each occasion.[306]

269. It was also submitted by Claimants that Mr Siag's acquisition of Lebanese nationality was a question of personal rather than subject-matter jurisdiction. Egypt's assertion that it was an issue of subject-matter jurisdiction was a position of convenience and was contrary to the position Egypt had taken during the jurisdictional phase.[307]

270. In addition, Claimants argued that whether or not Mr Siag had ever obtained Lebanese nationality was irrelevant. All the Tribunal needed to assess for the purposes of negative nationality jurisdiction was whether or not Mr Siag had lost his Egyptian nationality. That assessment was, as determined by the Tribunal in its Decision on Jurisdiction, to be made according to Egyptian nationality law, in particular Article 10 thereof. Under Egyptian law Mr Siag had lost his Egyptian

[300] T1: 81.
[301] T1: 84.
[302] T1: 86.
[303] T1: pp. 86 – 87, 104, 110.
[304] T1: 87.
[305] T1: 87, 105 – 108.
[306] T1: 106 – 108.
[307] T1: 109 – 110.

nationality after there had been a formal expression of his Lebanese nationality and he had failed within a year thereafter to apply to retain his Egyptian nationality.[308]

271. Claimants submitted that Egypt's allegations of fraud were simply not credible. Mr Siag could have become an Italian national in order to avoid military service; there was no reason for him to engage in fraud.[309] The addition of Mr Siag's children to his Lebanese passport, his travel into and out of Lebanon on his Lebanese passport, and his renewal of his Lebanese passport, all after he had already been exempted from military service, were the actions of an innocent man who fully believed he was Lebanese.[310] Egypt had offered no rebuttal to these assertions.[311] Contemporaneous documents were typically seen in legal proceedings as the highest and best evidence. The contemporaneous documents evidencing Mr Siag's Lebanese nationality should be regarded as the best evidence of his nationality as they were untainted by the dispute and the passage of time.[312]

272. Lastly Claimants submitted that it was customary in cases involving serious allegations such as fraud and forgery for the party making those allegations to be held to a heightened standard of proof.[313] Egypt had failed to meet that standard. Egypt offered two bases for its allegations: the first, that Mr Siag's Individual Record bore no signatures, had been shown to be false – there were signatures on the back page of the Record. The second, that there was no record of Mr Siag in Sayda, was countered by Claimants' evidence as to the lack of structure in the Lebanese civil registry. Mr Ghalayini was not qualified to counter this evidence.[314] It was extraordinary that the Tribunal was being asked to find fraud due simply to the absence of a record in a country with a poor record-keeping system.[315]

Procedural Order No. 7

273. As noted above the Tribunal issued Procedural Order No. 7 at the start of the day's proceedings on 11 March 2008. The terms of that Order have been summarised at paragraph 168 above.

[308] T1: 112 – 120.
[309] T1: 122 – 123.
[310] T1: 124.
[311] T1: 125.
[312] T1: 129 – 130.
[313] T1: 145.
[314] T1: 146 – 147.
[315] T1: 148.

Egypt's Application to Add an Exhibit

274. On 14 March 2008 Egypt applied for leave to add to the record a document from the Lebanese Embassy in Cairo regarding Mr Siag's nationality. Claimants opposed Egypt's request on 16 March 2008, submitting that the letter in issue had been "custom-made" to support Egypt's application, was the result of further diplomatic pressure on the Lebanese government by Egypt, had no relevance, and carried no evidentiary weight. The Tribunal made a Procedural Direction at the end of the day's hearing on 17 March 2008, allowing the addition of the exhibit.[316] The exhibit was duly submitted on 17 March 2008. It was a letter from the Lebanese Embassy in Cairo dated 13 March 2008, stating that "it was impossible to prove that there is any entry in the Lebanese Civil Registers for Mr Siag. Moreover, the documents he is carrying cannot be considered to prove that he holds the Lebanese nationality; therefore he cannot be considered Lebanese."

Egypt's Oral Closing Submissions

275. Egypt made further submissions on its Lebanese nationality application as part of its closing submissions on 18 March 2008. Egypt noted that Claimants' lawyers had stated that the only relevant question for the Tribunal was whether Mr Siag lost his Egyptian nationality by operation of Article 10 of the Egyptian nationality law. Egypt submitted that no law based on reason and fairness and justice, including the laws of Egypt, could be said to accept spurious or fictitious evidence of foreign nationality if in fact a fraud had been committed. Neither Egyptian law nor the Tribunal could allow fraudulently obtained documents to stand as a basis for the Tribunal's jurisdiction.[317]

276. Egypt conceded that it had not submitted evidence that any document had been forged. Any previous use of the word "forgery" could therefore be disregarded.[318] Mr Siag's passports were valid, they were not forged. However, they were based on a document – Mr Siag's Individual Record – that was not genuine.[319] The same applied to Mr Siag's nationality certificate – it was based on a spurious Individual Record.[320]

277. Egypt concluded that the Tribunal could not continue to assert jurisdiction over Mr Siag's claim in the face of overwhelming evidence of fraud.[321]

[316] T7: 144.
[317] T8: 44 – 45.
[318] T8: 45 – 46.
[319] T8: 46 – 47.
[320] T8: 47 – 48.
[321] T8: 48.

Procedural Order No. 8

278. The hearing concluded on 18 March 2008. As noted above, the Tribunal issued its Procedural Order No. 8 that day. The Order directed that no further submissions on the Lebanese nationality objection could be made, with leave or otherwise.

Egypt's Post-hearing Submissions

279. The parties presented their respective post-hearing submissions on 24 April 2008. In large part the parties maintained their previous positions on the Lebanese nationality application. Accordingly their submissions will be only briefly mentioned.

280. Egypt submitted that it was clear beyond a shadow of a doubt that Mr Siag had never obtained Lebanese nationality. Therefore, he had not lost his Egyptian nationality, and could not recover in this proceeding.[322] Egypt then submitted that Mr Siag had set about obtaining Lebanese nationality to avoid Egyptian military service.[323]

281. It was also argued by Egypt that Mr Siag's Individual Record was false, and that the documents that came after the Individual Record were therefore based on a false document.[324] In Egypt's submission it was easier for Mr Siag to buy a fraudulent Lebanese document than to obtain Italian nationality.[325] The burden of proof was on Mr Siag to prove his Lebanese nationality. Egypt was not culpable for not discovering Mr Siag's fraud earlier.[326]

282. Egypt submitted that the Tribunal could give recognition to Mr Siag's lack of Lebanese nationality either by revisiting the Decision on Jurisdiction or as part of the merits.[327]

283. Lastly, Egypt contended that the principle of continuous nationality – which stated that a claimant must retain the requisite nationality up to the time of the Award – supported Egypt's case.[328]

[322] Egypt's post-hearing submissions, p 9.
[323] Ibid., p. 10.
[324] Ibid., pp. 10 – 11.
[325] Ibid., p. 11.
[326] Ibid., p. 12.
[327] Ibid., p. 13.
[328] Ibid., p. 14.

Claimants' Post-hearing Submissions

284. In their post-hearing submissions on the Lebanese nationality issue the Claimants re-iterated that Egypt could easily have raised its objection during the jurisdictional phase. It did not do so and the application should accordingly be dismissed under ICSID Rules 26 and 27.[329]

285. Claimants submitted that, although Egypt had re-cast its objection, by abandoning its claim of forgery and by attacking only Mr Siag's Individual Record, the re-cast objection remained groundless. Further, the profound alteration of Egypt's objection spoke volumes about its credibility.[330]

286. It was again emphasised by Claimants that Mr Siag's Lebanese nationality was not relevant to his loss of Egyptian nationality,[331] and that Egypt's allegation of fraud was highly implausible and was not supported by the evidence.[332]

Discussion of Egypt's "Lebanese Nationality" Application

Was Egypt's Objection Capable of Being Waived?

287. The appropriate starting point in respect of Egypt's objection is Claimants' submission that the objection has been waived. Within that assessment the obvious first issue is Egypt's counter-submission that its objection could not be waived because it was a matter of subject-matter jurisdiction.[333] The basis of Egypt's assertion is that Article 25 of the ICSID Convention does not extend jurisdiction to disputes where a party has the nationality of both contracting states.[334]

288. The Tribunal agrees that Article 25 does not confer jurisdiction over dual nationals. However, it does not accept the conclusions Egypt has drawn from that fact. The Tribunal does not consider that it is Article 25 that is properly under discussion as having been waived; it is ICSID Rule 41. It is that Rule which grants the right to a party to object to the jurisdiction of the Centre, and it is the right granted by Rule 41 which the Claimants assert has been waived as a result of a failure to invoke that right "as early as possible." The alternative, which is a logical extension of Egypt's argument, is that a party could never waive an objection to jurisdiction no matter how

[329] Claimants' post-hearing submissions, p. 5.
[330] Ibid., p. 9.
[331] Ibid., pp. 10 – 12.
[332] Ibid., pp. 12 – 18.
[333] Egypt's submissions of 31 January 2008, pp. 3 -4; and Rejoinder on the Merits, p. 8.
[334] Ibid., p. 3.

dilatory had been that party's conduct, because the right to object to jurisdiction at any time was protected by Article 25 of the ICSID Convention. The Tribunal does not accept that proposition.

289. In any event, the Tribunal upholds the Claimants' submission that the issue of Mr Siag's nationality is a matter of personal, not subject-matter, jurisdiction. That was the position taken by Egypt in the jurisdictional phase, and was the basis of the examination made by the Tribunal at the hearing on jurisdiction. The Tribunal sees no reason to depart from that position now, and it does not do so. Egypt's claim that its objection cannot be waived is therefore dismissed.

Has Egypt waived its objection?

290. ICSID Rule 41 states that an objection to jurisdiction "shall be made as early as possible." Claimants' submissions as to waiver in respect of Egypt's Lebanese nationality objection largely mirror those made in respect of Egypt's bankruptcy-based objection. Professor Reisman noted that each of his arguments as to why Egypt's bankruptcy objection should be deemed waived "would apply with equal force" to the Lebanese nationality objection.[335] Claimants' submissions as to the requirements of ICSID Rule 41 are set out above and need not be repeated. The Tribunal notes that Egypt has not contested Claimants' submissions as to the meaning of Article 41(1) or the phrase "shall be made as soon as possible."

291. The basis of Egypt's present objection to jurisdiction is the contention that Mr Siag never legitimately acquired Lebanese nationality and thus never shed his Egyptian nationality. Claimants submitted that the information used by Egypt to found its objection was known, or should have been known, to Egypt during the jurisdictional phase of the arbitration. Egypt, submit the Claimants, failed to raise its objection as early as possible and was therefore in contravention of ICSID Rules 26 and 27 (the substance of both of which is discussed above).

292. It is not contested that Egypt's objection, first raised on 9 October 2007, was made after the close of time for the parties to make submissions on jurisdiction. Nor has Egypt disputed Claimants' submission[336] that the threshold for liability under Rules 26 and 27 is whether a party knew or reasonably should have known of, and raised, its objection at an earlier stage. Egypt submitted however that it neither knew, nor could

[335] Expert Opinion of Prof Reisman of 7 November 2007, p. 29, n 49.
[336] *See, e.g.,* T1: 82.

reasonably be expected to have known, about the bases of its objection during the jurisdictional phase, because they were occluded by Mr Siag's fraud.

293. The Tribunal accepts Egypt's base premise, namely that Egypt could not be expected to assume there had been fraudulent activity on the part of Mr Siag, but the Tribunal does not consider that to be the central issue. The pertinent question in the Tribunal's view is whether Egypt knew or should have known of the bases of its objection without having to assume fraud. In other words, did Egypt know, or ought it reasonably to have known, that Mr Siag had not acquired Lebanese nationality, without the need to assume fraud?

294. Egypt's fraud allegations centred on the alleged invalidity of Mr Siag's Individual Record. Egypt accepted that Mr Siag's Lebanese nationality certificate and two passports were genuine, in the sense that they were not forgeries, but submitted that they were all issued on the basis on an invalid Individual Record, and were accordingly also obtained by fraud.[337] It is not in doubt that the Individual Record, as well as the three subsequent documents, were in evidence in these proceedings during the jurisdictional phase. Claimants submitted that Egypt therefore possessed during the jurisdictional phase all the information it now used to support its application, and as a result could, and should, have raised its objection at that time.

295. Egypt has offered several reasons as to why it did not, and could not have, raised its objection during the jurisdictional phase. Egypt's primary claim, that the issues were concealed by Mr Siag's fraud, has been discussed. As noted, the Tribunal intends to assess whether Egypt could or should have known of Mr Siag's alleged lack of Lebanese nationality without having to assume fraud. Each of Egypt's submissions as to why it could not have done so will now be examined.

i) Egypt's Alleged Lack of Access to Official Lebanese Files

296. Egypt submitted that it did not have access to the files and records of the Lebanese Government, and that, as the allegedly invalid documents were Lebanese, it could not have uncovered Mr Siag's fraud any sooner than it did.[338] Egypt further contended that the possibility of fraud on the part of Mr Siag "only came to light" after Egypt's legal team had "looked carefully" at Mr Siag's Individual Record some time after the Decision on Jurisdiction had been rendered.[339] Upon examination of the

[337] T8: 46 – 48.
[338] Egypt's submissions of 31 January 2008, p. 4.
[339] Ibid. As noted below, this is in itself a damaging concession.

Individual Record Egypt considered that "the way in which it was written in Arabic, its lack of signature, lack of date and general tenor" were suspicious.[340] Thereafter enquiries were made of the relevant Lebanese institutions.

297. As noted above, Egypt had been in possession of Mr Siag's Individual Record throughout the jurisdictional phase; indeed Egypt had submitted the document into evidence itself.[341] The Individual Record, along with the other documents pertinent to Mr Siag's status as a Lebanese national, was subject to considerable scrutiny in the lead up to, and at, the hearing on jurisdiction on 8 – 9 August 2006.[342] If the catalyst for Egypt's further enquiries as to Mr Siag's Lebanese nationality was simply an inspection of Mr Siag's Individual Record, then the Tribunal does not see why that inspection, and the ensuing enquiries, could not have taken place during the jurisdiction phase. A diligent party in a hotly-contested case would surely have done so.

298. By way of counter Egypt stated that it was under no obligation to inspect documents for lack of authenticity.[343] Egypt, however, offered no reason as to why the "careful" inspection of the Individual Record was made at the time it was but was not made during the jurisdiction phase. In a telling concession Egypt's counsel stated simply that "someone finally took a careful look."[344] The Individual Record is a very brief document. The Tribunal is not persuaded by the suggestion that suspicious indicia in a 2-3 page document could not and should not have been picked up during the jurisdiction phase, particularly when the document in question was in Egypt's possession and was under heavy scrutiny at that time. The Tribunal considers that if the inspection was worth doing in October 2007 it was no less worth doing during the jurisdictional phase, and that such could easily have been accomplished.[345]

299. It seems that, having made enquiries of Lebanese officials as part of its application, Egypt received a response without undue delay.[346] Nothing has been submitted by

[340] Ibid.
[341] As Exhibit 22 to its Memorial on Jurisdiction.
[342] *See, e.g.,* Egypt's Memorial on Jurisdiction para. 46, Egypt's Reply Memorial on jurisdiction, para. 21. Although the text in these documents refers to the "nationality certificate" rather than the Individual Record, it can be *see*n from Egypt's Exhibit 22 that the document in issue is in fact the Individual Record.
[343] T1: 44 – 45.
[344] T1: 44.
[345] In addition, Peter V. Tytell, speaking at the ICCA 2002 Congress in London on the subject of "The Detection of Forgery and Fraud," expressed the view that "the attorney first reviewing the documents must constantly doubt and must constantly question the documents presented…it certainly falls to the attorney's perception of the meaning of due diligence as to the degree of care with which documents from his/her own side will be vetted, as well as the level of trust that will be placed in the documents received from an adversary" (*International Commercial Arbitration: Important Contemporary Questions*, ICCA Congress, London, 2002, p. 316).
[346] Claimants' submissions of 29 February 2008, p. 9.

Egypt to suggest that, had those enquiries been made during the jurisdictional phase, the response would have been any less prompt.

300. The Tribunal does not consider that Egypt suffered from a lack of access to Lebanese files sufficient to explain the delay in filing its application. The Tribunal further considers that Egypt cannot avoid a finding of waiver by offering as a defence its own failure to inspect carefully a short document that had been in its possession during the jurisdictional phase, during which time that document was under considerable scrutiny.

ii) Egypt Only Made Enquiries in Lebanon in Preparation for the Merits Phase

301. Mr Hafez and Mr Rizkana submitted at the hearing on 10 March 2008 that the reason Egypt made enquiries of the Lebanese Ministry of the Interior as to Mr Siag's status was that those enquiries were needed in preparation for the merits phase of the arbitration,[347] during which Egypt intended to make an "altogether difference argument" to those run in the jurisdictional phase.[348] That argument was said by Mr Rizkana to be estoppel,[349] although that description was later amended by Mr Hafez to "opposability."[350] Whichever term is used, Egypt made clear that the focus of its new argument was the doctrine of "effective nationality."[351] Mr Hafez stated that opposability was "fundamentally premised on notions of effective nationality."[352] This was a topic Egypt had pursued during the jurisdiction phase as is shown by the fact that it was the subject of Professor Vicuña's partial dissent.

302. The thrust of Egypt's submission appears to be is that it had no reason to make the enquiries it did at an earlier stage because those enquiries related only to the merits phase. In Egypt's submission, it could not reasonably have been expected to have made those enquiries any earlier than it did. Mr Hafez submitted that, as Egypt had not received the documents it sought from the Claimants in relation to its effective nationality argument, it made direct enquiries of the Lebanese Government.[353] Those enquiries resulted in the letter from the Lebanese Ministry of the Interior to the effect that Mr Siag was not a Lebanese national.[354]

[347] T1: 46 – 47.
[348] T1: 51.
[349] Ibid.
[350] T1: 53.
[351] T1: 51, 53.
[352] T1: 53.
[353] T1: 47 – 48.
[354] T1: 46.

303. The submissions made by Egypt at the March hearing are not easily reconciled with those made in its written submissions of 31 January 2008, which have been discussed. Egypt stated on 31 January 2008 that it made enquiries of Lebanon because Mr Siag's Individual Record appeared suspicious. That submission appears to be supported by Mr Newman, who stated at the hearing that "something" called Mr Rizkana's attention to the inauthenticity of Mr Siag's Individual Record, at which point Mr Souhaid was instructed to make further enquiries.[355] Mr Souhaid stated that he was provided with a copy of Mr Siag's Individual Record by Baker & McKenzie, and was instructed to obtain information from the Lebanese government as to its validity.[356] However, Mr Hafez submitted that the reason Egypt made enquiries in Lebanon was that it had not received from Claimants the documentation it sought in respect of its effective nationality argument.[357] Clearly Mr Siag's Individual Record was not a document that Egypt had to seek from either Claimants or Lebanon, as the Individual Record was already in Egypt's possession.

304. Even assuming for the sake of argument that Egypt's submission that it made enquiries in Lebanon because Mr Siag's Individual Record appeared suspicious was incorrectly made, and that the submission of Mr Hafez in respect of document production is to be preferred, the Tribunal remains of the view that Egypt ought to have made its enquiries of the Lebanese authorities during the jurisdictional phase. Mr Siag's nationality was squarely in issue at that time, and that would have been the appropriate juncture for Egypt to have made any enquiries seeking to challenge his national status.

305. Mr Hafez stated that Egypt was preparing for an "altogether different argument" by that stage. However, the doctrine of effective nationality had been argued and ruled on at the hearing on jurisdiction.[358] Indeed the Tribunal's rejection of the doctrine in its Decision on Jurisdiction has been queried by Egypt in later submissions.[359] The Tribunal does not therefore accept that effective nationality can be considered an "altogether different argument" to anything submitted as part of the jurisdictional phase.

[355] T1: 52.
[356] Witness statement of Mr Nadim Souhaid, p. 1.
[357] T1: 47 – 48.
[358] *See* Egypt's Reply on Jurisdiction, pp. 2 – 3.
[359] *See, e.g.,* Expert Opinion of Prof Smit of 11 October 2007, pp. 24 *et seq.*

306. Mr Souhaid gave evidence that he was asked to make enquiries of Lebanese officials as to whether Mr Siag was born Lebanese or was naturalised.[360] That issue was the subject of Egypt's letter to the Lebanese Ministry of Foreign Affairs in May 2006[361] and was also debated during the jurisdictional phase. In the Tribunal's view it also does not constitute an "entirely different argument" to those presented for consideration during the jurisdictional stage.

307. The Tribunal does not consider that the arguments presented by Egypt as being "entirely different" were in fact far removed from arguments already made in the jurisdictional period. The Tribunal is therefore clearly of the view, having considered all relevant facts and circumstances, that Egypt should have made its enquiries of Lebanese officials during the jurisdictional stage.

iii) Egypt's Post-hearing Submissions

308. A final ground upon which Egypt opposed Claimants' waiver argument is found in Egypt's post-hearing submissions, wherein Egypt stated: "There is no question, of course, that Egypt did object to the jurisdiction of the Tribunal. Therefore, it cannot be argued…that Egypt waived its objection to jurisdiction under Rule 41(1) or Rule 27."[362]

309. Egypt's meaning here is unclear. Undoubtedly, Egypt did object to the Tribunal's jurisdiction at the outset of these proceedings. That does not mean however that Egypt can make further jurisdictional objections after the jurisdiction phase has been closed without having to adhere to the requirements of the ICSID Rules, in particular Rule 41. Egypt's 2006 objections to jurisdiction plainly were not waived; they were received and determined. Egypt's subsequent objections are not, however, protected from the application of Rules 41, 27 and 26 simply because their predecessors were filed in a timely manner.

310. It does not seem likely, but if Egypt in fact meant that it could not have waived its bankruptcy and Lebanese nationality objections because it had already made those objections by way of its challenges to jurisdiction, the Tribunal considers that that submission is without merit.

[360] Witness statement of Mr Nadim Souhaid, p. 4.
[361] Letter 23 May 2006 from the Egyptian Ministry of Foreign Affairs to its Lebanese counterpart (Claimants' Exhibit 72).
[362] Egypt's post-hearing submissions, p. 12, n 32.

iv) The Tribunal's Decision on Waiver in Respect of the Lebanese Nationality issue

311. The Tribunal upholds Claimants' submission that Egypt could and should have made its objection during the jurisdiction phase and that its failure to do so was in contravention of the requirement laid down by ICSID Rule 41(1), that objections to jurisdiction "shall be made as early as possible."

312. The appropriate sanction must now be determined. Egypt argued, as it had done in respect of bankruptcy, that ICSID Rule 27 did not apply to the present facts because "none of the documents referred to in Rule 27 is the Convention itself and none of the documents referred to contains a provision the same or substantially the same as Article 25 of the Convention. Thus, Article 25 is not one of the provisions that can be waived."[363] As the Tribunal has ruled, it is not Article 25 that has potentially been waived, it is the right conveyed by ICSID Rule 41 to object to the Centre's jurisdiction (based on a breach of Article 25). Non-compliance with Article 25 can be objected to pursuant to ICSID Rule 41. Failure to state said objection to jurisdiction promptly will render the objection waived, if the party raising the objection knew or should have known of the alleged breach of Article 25 at an earlier stage. It will be apparent from the above that the Tribunal considers that ICSID Rule 27 is applicable in this case. In addition the Tribunal notes that Egypt has raised no issue with the potential application of ICSID Rule 26, upon which the Claimants also base their claim of waiver.

313. For the foregoing reasons the Tribunal finds that Egypt's objection to jurisdiction on the grounds of Mr Siag's alleged lack of Lebanese nationality shall be disregarded, pursuant to ICSID Rule 26, and has been waived pursuant to ICSID Rule 27.

314. However, for the sake of completeness the Tribunal will nevertheless examine the merits of Egypt's contentions. As with the bankruptcy objection, this course of action is appropriate for another reason namely that, following Procedural order No. 7 and as already discussed, Egypt pursued this argument at the merits hearing and in its post-hearing submissions as one of its key objections/defences. Due process will be accorded to Egypt by considering the merits of its Lebanese nationality objection.

[363] Egypt's submissions of 31 January 2008, p. 4.

The Merits of Egypt's "Lebanese Nationality" Application

The Burden of Proof

315. As to the burden of proof, the general rule, well established in international arbitrations, is that the Claimant bears the burden of proof with respect to the facts it alleges and the Respondent carries the burden of proof with respect to its defences.[364]

316. Thus, while it is clear that the burden of proof in respect of all jurisdictional objections lies with Egypt, at the merits phase Mr Siag must first prove on the balance of probabilities that he acquired Lebanese nationality, assuming that his acquisition of Lebanese nationality is a relevant factor.[365] The Tribunal finds that as at 27 February 2008, even before the merits hearing and before Mr Siag had given oral evidence and defences, Mr Siag had provided extensive *prima facie* evidence of his Lebanese nationality. This evidence has been summarised in paragraph 255 above. The four contemporaneous documents including the Lebanese passports issued in 1990 and 1992 were issued and authenticated by different high ranking Lebanese officials nearly 20 years ago and more than 15 years before the ICSID arbitration, more than adequately satisfy the initial evidentiary burden of the Claimant. This, coupled with the evidence referred to in the Decision on Jurisdiction, the additional evidence of Mr Siag at the merits hearing, and the submissions made on his behalf at the hearing, lead the Tribunal to find affirmatively on all the evidence that Mr Siag acquired Lebanese nationality. The question therefore is whether Egypt can nevertheless establish that fraud, forgery or other misconduct vitiates the acquisition of Lebanese nationality.

317. As noted earlier,[366] on 27 February 2008 Claimants stated that Mr Siag had provided extensive *prima facie* evidence of his Lebanese nationality, and that accordingly "the burden of proof is now on Egypt."[367] The Tribunal agrees with this contention. On 29 February 2008 Claimants stated: "As an initial matter, of course, Egypt bears the burden of proof with respect to each of its jurisdictional objections. It is not Claimants' burden to disprove jurisdictional objections made by Egypt."[368] For its part, Egypt asserted that it had proved Mr Siag's non-Lebanese nationality and that accordingly

[364] *See* Rosell and Prager, *Illicit Commission and Question of Proof*, 15 Arbitration International 329, 335 (1999) (citing ICC Award 6653 (1993), *reprinted in* 1993 JDI 1053; and also Article 24 UNCITRAL Arbitration Rules).
[365] The Tribunal considers the Claimants' submission of irrelevance (*see* para. 270 above) to be correct, but for completeness it nevertheless addresses Egypt's arguments.
[366] *See* para. 248 above.
[367] Claimants' submissions of 27 February 2008, p. 2.
[368] Ibid., p. 10.

"the burden has shifted."[369] The Tribunal does not accept this latter submission. Because negative evidence is very often more difficult to assert than positive evidence, the reversal of the burden of proof may make it almost impossible for the allegedly fraudulent party to defend itself, thus violating due process standards. It is for this reason that Tribunals have rarely shifted the burden of proof.[370] There are no special circumstances or good reasons for doing so in this case.

318. The Tribunal considers that the burden of proof in respect of all jurisdictional objections and substantive defences lies with Egypt. The Tribunal concurs with the opinion of Professor Reisman, that it is a widely-accepted principle of law that the party advancing a claim or defence bears the burden of establishing that claim or defence.[371] That was the determination of the Tribunal in the Decision on Jurisdiction, wherein it held that Egypt bore the burden of proving its objections to jurisdiction.[372] The present objection to jurisdiction has also been made by Egypt. The Tribunal considers that the burden of proof therefore rests again with Egypt. That conclusion is strengthened by the ruling of the Tribunal in its Decision on Jurisdiction, that Mr Siag was not an Egyptian national at those times relevant to Article 25 of the ICSID Convention.[373] Egypt's Lebanese nationality objection seeks to change that ruling. In the Tribunal's view it is for Egypt to sustain its further objection.

What Does Egypt Have to Prove?

319. The Claimants submitted that Egypt had to prove fraud, because that was the basis of its present objection. Egypt stated at the March 2008 hearing that it did not think it had to prove fraud.[374] This statement may have simply reflected Egypt's (correct) view that the burden was on Mr Siag to prove his Lebanese nationality, rather than a submission on Egypt's part that fraud was not an integral element of its case. Indeed, counsel for Egypt expressed a belief that Egypt could prove fraud[375] (assuming of course that it had to).

320. The Tribunal considers that the burden of proof in respect of this objection/defence lies with Egypt. The Tribunal further considers that Egypt must prove fraud, deception, or other dishonest behaviour to succeed in its objection. That may in fact

[369] T1: 38.
[370] *See* Matthieu de Boisséson, *Due process and the specific example of allegations of fraud or corruption notably in the context of investment treaty arbitration*, Paper given at IBA Arbitration Day, Dubai, 16 February 2009.
[371] Expert Opinion of Prof Reisman (on jurisdiction) of 31 July 2006, pp. 2 – 4.
[372] Decision on Jurisdiction, 11 April 2007, pp. 38 – 39.
[373] Ibid., p. 49.
[374] T1: 41.
[375] Ibid.

not be disputed. However, the Tribunal nevertheless offers its reasons why such is the case.

321. First and most obviously, Egypt's submissions, almost without exception, state that there has been fraud. They do not do so in passing, but place great emphasis on the fact. As examples, Egypt has submitted that "…the issue before the Tribunal is not the procedural one as to whether there has been a waiver or not. Rather, the far more important question is whether this Tribunal has been deceived by the principal claimant before it as to his basis for presenting a claim…."[376] Professor Smit stated that: "The conclusion that Mr Siag perpetrated a fraud on the Tribunal therefore appears inescapable. Surely, the Tribunal should not give any consequence to the perpetration of this fraud."[377] At the hearing Egypt's counsel submitted that "This Tribunal…cannot allow itself to continue to assert its jurisdiction over Mr Siag's claim in the face of overwhelming evidence of fraud."[378] It is clear from these submissions that Egypt sees fraud as a key ingredient of its objection.

322. Secondly, in order for Egypt's objection to prosper, Egypt must prove that Mr Siag did not lose his Egyptian nationality, and thus that he fails the negative nationality requirement of Article 25 of the ICSID Convention. As was noted in the Tribunal's Decision on Jurisdiction, it is well-established that the domestic laws of each Contracting State determine nationality, augmented where appropriate by international law. Both parties accepted and adopted this principle in their submissions on jurisdiction and at the jurisdictional hearing in 2006.[379] While Egypt made detailed submissions as to why Mr Siag did not validly acquire Lebanese nationality, it submitted little as to why that fact, if proven, would necessarily mean that Mr Siag did not lose his Egyptian nationality under Egyptian law. Egypt's submissions appear to assume that one follows the other. However, very little evidence or argument has been adduced in support of that proposition. Those of Egypt's submissions that do deal with the loss of Mr Siag's Egyptian nationality under Egyptian law as a result of his acquisition of Lebanese nationality do so almost exclusively on the basis of fraud. For instance, on the final day of the hearing, 18 March 2008, Mr Newman submitted for Egypt that:

> "The argument has been made by Mr Siag's lawyers that the only relevant question is whether Mr Siag lost his Egyptian nationality under Article 10, and they say that Egyptian law is blind to the application of

[376] Egypt's submissions of 31 January 2008, p. 5; Egypt's Rejoinder on the Merits, p. 11.
[377] Expert Opinion of Prof Smit of 11 February 2008, p. 6.
[378] T8: 48.
[379] Decision on Jurisdiction 11 April 2007, pp. 40 – 43.

> foreign nationality law, it only looks to the fact of whether there is evidence of some sort of foreign nationality.
>
> I submit to you that neither Egyptian law, nor any other law that claims to be a law based on reason and fairness and justice, can be rationally said to accept spurious or fictitious supposed evidence of foreign nationality, *if in fact a fraud was committed*. Neither Egyptian law nor this Tribunal can stand back and allow *fraudulently obtained* and spurious documents to constitute a foundation for the Tribunal's jurisdiction."[380] [emphasis added]

In its post-hearing submissions Egypt stated that *prima facie* evidence of nationality (such as Mr Siag's Lebanese passports) was not regarded by Egypt as authentic once shown to be false.[381] Egypt cited Article 27 of the Egyptian Nationality Law of 1975, which states that "whoever gives a false statement or submits untrue documents to the competent authorities for proving or denying nationality for oneself or others shall be subject to an imprisonment…."[382]

323. Egypt did submit as to a further reason (other than fraud) why Mr Siag's acquisition of Lebanese nationality did not cause him to lose Egyptian nationality under Egyptian law. Professor Smit stated that, if Mr Siag had obtained Lebanese nationality at birth, as opposed to through naturalisation, Article 10 of the Egyptian nationality law would not be applicable, as Article 10 applied only when a person gained foreign nationality through a voluntary act.[383] Egypt submitted that the fact that Mr Siag was Lebanese by birth meant he had not shed his Egyptian nationality under Egyptian law, which in turn necessitated the Tribunal "revisiting" its finding (in its Decision on Jurisdiction) that Mr Siag had lost his Egyptian nationality.[384] That submission, based on the contention that Mr Siag was Lebanese by birth, was made by Egypt in the jurisdiction phase and was ruled on by the Tribunal at that time. The Tribunal accepted at that time the statement of Professor Riad, one of the drafters of the Egyptian nationality law, that the Egyptian nationality law did not differentiate between voluntary and involuntary acquisition of foreign nationality.[385] According to Professor Riad, and as accepted by the Tribunal, Mr Siag would have lost his Egyptian nationality under Article 10 of the Egyptian nationality law whether he was born Lebanese or was naturalised. The Tribunal sees no reason to depart from that decision. No fresh evidence has been adduced by Egypt to call into question the statements of

[380] T8: 44 – 45.
[381] Egypt's post-hearing submissions, pp. 15 – 16.
[382] Ibid., p. 16, n 41.
[383] Expert Opinion of Prof Smit of 11 October 2007, p. 17.
[384] Egypt's Counter-Memorial on the Merits, pp. 48 – 49.
[385] Decision on Jurisdiction, p. 44.

Professor Riad. The Tribunal confirms that the position it took on this issue in its Decision on Jurisdiction is maintained and adopted as part of this Award.

324. The Tribunal must now return to the issue of fraud or other dishonest behaviour. The Tribunal considers that whether or not Mr Siag's Egyptian nationality would have been affected had he committed fraud in the acquisition of his Lebanese nationality is in effect a secondary question. By that the Tribunal does not refer to the importance of that question, but to the fact that it need not be determined unless and until it has been demonstrated by Egypt that a fraud had in fact occurred. If it is shown that a fraud took place, the consequences of that fraud will fall for examination.

The Standard of Proof

325. For reasons summarised above, the Claimants have submitted that Egypt must prove its Lebanese nationality objection to a heightened standard of proof. Chief among the reasons cited by Claimants is that Egypt's Lebanese nationality application rests upon allegations of fraud, and that claims of such nature are typically held to a heavy standard of proof.[386] The standard suggested by the Claimants was the American standard of "clear and convincing evidence," that being somewhere between the traditional civil standard of "preponderance of the evidence" (otherwise known as the "balance of probabilities"), and the criminal standard of "beyond reasonable doubt."

326. The Tribunal accepts the Claimants' submission. It is common in most legal systems for serious allegations such as fraud to be held to a high standard of proof. The same is the case in international proceedings, as can be seen in the cases cited by Claimants, among them the Award of the ICSID Tribunal in *Wena Hotels*.[387] Egypt's principal submission was that the burden of proof was on Mr Siag, a submission which the Tribunal has rejected so far as the proof of fraud or other serious misconduct is concerned.[388] Egypt did not submit that, if it were required to prove fraud, it should be held to a lesser standard than that argued by the Claimants. The Tribunal accepts that the applicable standard of proof is greater that the balance of probabilities but less than beyond reasonable doubt. The term favoured by Claimants is "clear and convincing evidence."[389] The Tribunal agrees with that test.

[386] Claimants' submissions of 29 February 2008, pp. 10 – 16; T1: 145 – 146.
[387] *Wena Hotels Ltd v Arab Republic of Egypt,* ICSID Case ARB/98/4, Award of 8 December 2000.
[388] *See* paras. 316 - 318 above.
[389] An alternative term with the same meaning is that employed in CAS anti-doping arbitrations, namely proof to the "comfortable satisfaction" of the Tribunal. *See*, *e.g.,* Article 3.1 of the World Anti-Doping Authority Code.

Did Mr Siag Obtain Lebanese Nationality by Fraud?

327. Egypt has offered several grounds which, it is submitted, demonstrate unequivocally that Mr Siag's Lebanese nationality was obtained through fraud. Mr Siag denies any wrongdoing. Mr Siag stated that he "had no part in forging any document as part of the process that was undertaken to obtain my Lebanese nationality, nor in authorizing anyone to take such action on my behalf…I would have stood to lose a great deal by pursuing any "fraudulent" course of action."[390] Mr Siag also stated that he "never had any reason whatsoever to doubt the validity of the documents evidencing my Lebanese nationality"[391] and that he absolutely denied any criminal activity.[392] At the March 2008 hearing, when asked by Mr Newman whether Mr Khouly, the man Mr Siag asked for assistance in obtaining Lebanese nationality, told Mr Siag that he was going to obtain Mr Siag's Individual Record by bribery Mr Siag responded "Of course not, sir…I will never accept it, we had no reason to do this, and I absolutely deny anything like this."[393] As noted earlier the Tribunal found Mr Siag to be an honest and credible witness and it accepts his denials as truthful, but it is nevertheless appropriate to examine each example presented by Egypt as evidencing fraud or other dishonest behaviour.

328. Before doing so it is appropriate to note that on the last day of the hearing, in response to direct questioning from the President, Egypt abandoned its earlier allegation that Mr Siag had "forged" the contemporaneous documents of his Lebanese nationality.[394] Egypt's earlier submissions had consistently accused Mr Siag of forging his nationality documents.

329. Egypt's challenge therefore was obliged to proceed on the basis of accepting that Lebanese officials had issued each of the four contemporaneous documents evidencing Mr Siag's acquisition of Lebanese nationality and had authenticated each document, and that each contained the various officials features (stamps, seals, letterhead, emblems and holograms) common to documents of this kind.

330. Having abandoned its "forgery" theory, the argument Egypt pursued as that Mr Siag had procured the four contemporaneous documents by fraud. This contention appeared to involve the suggestion that Mr Siag or an agent had been able to bribe

[390] Witness Statement of Mr Waguih Siag of 29 February 2008, p. 1.
[391] Ibid., p. 7.
[392] T1: 181.
[393] Ibid.
[394] T8: 45:24-46: 11.

multiple high-ranking officials at the Lebanese Embassy in Cairo, up to and including the Lebanese Ambassador, over a span of years.

331. It is also worthy of note that in its submission of 31 January 2008, Egypt alleged that Mr Siag's Lebanese passports were not authentic. Egypt submitted a letter from Brigadier General Wahab of Lebanon, General Director of Public Security, stating that Mr Siag's two Lebanese passports were "not genuine." However, as demonstrated in the Claimants' submissions of 29 February 2008, everything about Mr Siag's Lebanese passports was authentic including the fact that he had used the second passport to travel into and out of Lebanon. Furthermore, Mr El Sohi, Lebanon's former Ambassador to Egypt, had confirmed his signature on the two passports, their authenticity and his recollection that Mr Siag was a prominent member of the Lebanese community in Cairo.

332. It therefore became difficult for Egypt to pursue its alternative theory that the four contemporaneous documents had been procured by "fraud." In closing argument, Egypt's counsel altered Egypt's position again. Egypt's final position was that only Mr Siag's Individual Record was procured by fraud, but not forgery, after which it was verified and authenticated by a careless official at the Lebanese Embassy who did not bother to check that it was genuine. Egypt's argument further required the Tribunal to accept that the three other contemporaneous documents, the Lebanese nationality certificate and the two passports, were all exclusively based on the allegedly fraudulent Individual Record. The other three documents, while neither fraudulent nor forged, were to be characterised as mistakes issues by careless officials at the Lebanese Embassy in Cairo. It is against this background that the Tribunal passes to consider Egypt's contentions.

i) Lack of Signatures on Mr Siag's Individual Record

333. This ground may be dealt with swiftly. It was stated by Mr Souhaid for Egypt that the Clerk of the Personal Affairs Department in Sayda informed him orally that Mr Siag's Individual Record was "not genuine" because, *inter alia*, it bore no signatures.[395] Mr Souhaid passed this information to Mr Rizkana, one of Egypt's counsel.[396] Claimants submitted that, contrary to Mr Souhaid's claim, the Individual Record had in fact been signed, both on the first page and on a back page apparently not viewed by Mr

[395] Witness statement of Mr Nadim Souhaid, p. 2.
[396] Ibid., Exhibit B.

Souhaid.[397] Claimants exhibited copies of Mr Siag's Individual Record which showed that the document had been signed.[398] Quite apart from the hearsay element in his evidence, the Tribunal considers that Mr Souhaid was mistaken in his assertion. To its credit Egypt has not pursued this ground, which plainly offers no evidence of fraud.

ii) No record of Mr Siag in Lebanon

334. This is perhaps Egypt's primary argument on the issue of fraud. It was the first example put forward by Egypt as constituting fraud and has been the most vigorously argued. Four documents obtained by Egypt from Lebanese officials were submitted as evidence of Mr Siag's fraud.

335. The first document submitted by Egypt was a letter from Ms Nada Ramez Al Kasty, the head of the Lebanese General Directorate for Personal Affairs ("GDPA"), dated 3 October 2007.[399] This letter was sent to Egypt's witness Mr Ghalayini, and stated that "upon reviewing the Personal Affairs Records of El Saray District, Sayda No. 37, we did not find any registration for Mr Waguih Elie Siag." Egypt submitted that "the inference was warranted that Mr Siag obtained the certification from the Lebanese Consulate in Cairo in September 1989 through improper means…."[400] Mr Ghalayini stated that the import of Ms Al Kasty's letter was that Mr Siag's Individual Record was "bogus."[401] Mr Ghalayini also stated that Mr Siag's Individual Record was "manifestly fake" because the number attributed to the Individual Record had not yet been reached,[402] and that the registries in Sayda had not yet reached Registry No. 37.[403]

336. The second document submitted by Egypt was a letter dated 26 November 2007, sent from the Lebanese Ministry of Foreign Affairs and Immigrants to the Egyptian Embassy in Beirut.[404] This document was submitted by Egypt on 31 January 2008. It refers to information received from the Civil Affairs Office in Sayda "in which it appears that the record subject of enquiry was not found in any of the sectarian registers in Sayda." The letter does not refer to Mr Siag by name.

[397] Claimants' submissions of 29 February 2008, pp. 32 – 33.
[398] Ibid., pp. 34 – 35.
[399] Witness statement of Mr Abdul Hafiz Ghalayini, Exhibit D.
[400] Egypt's submissions of 9 October 2007, p. 2.
[401] Letter of Mr Ghalayini to Mr Hesham Sha'eer of 3 October 2007 (Egypt's submissions of 9 October 2007, Exhibit 4).
[402] Witness statement of Mr Abdul Hafiz Ghalayini, p. 3.
[403] Ibid.
[404] Exhibit A to Egypt's submissions of 31 January 2008.

337. The third document upon which Egypt relied is a second letter from Ms Al Kasty, dated 8 December 2007 and sent in response to a request for clarification made by Mr Ghalayini.[405] This letter states that "no record was found for Waguih Elie Siag in Register No 37, El Saray District, Sayda, and no mention was made in the said Register about transfer or deletion of the record which means that it was never recorded in the said register. Therefore, based on the foregoing; The individual record…was taken from a bogus document."[406]

338. The fourth and final document adduced by Egypt was a letter from the Lebanese General Directorate for Public Security, which is undated but was received by Egypt on 29 January 2008. While the first three letters adduced by Egypt focussed primarily on Mr Siag's Individual record, this letter discussed Mr Siag's Lebanese passports. The letter states that no records had been found for Mr Siag in the Archives Department of the Lebanese Passports Authority, and concluded that those passports were therefore "not genuine."[407]

339. Egypt submitted that the letters of 26 November 2007, 8 December 2007 and January 2008 were "more than sufficient to prove that Mr Siag has falsely claimed to this Tribunal that he has Lebanese nationality."[408]

340. Claimants strongly objected to Egypt's submission that the absence of records for Mr Siag was evidence of fraud. Claimants submitted that the four documents evidencing Mr Siag's Lebanese nationality (the Individual Record, nationality certificate and two passports) were contemporaneous documents, the validity of which had never before been questioned, and that those documents should be accorded greater weight than Egypt's evidence, which was "purposefully produced for use in ongoing litigation."[409]

341. Claimants further submitted that the civil registry in Lebanon was "widely regarded as incomplete and plagued by a number of serious problems"[410] and that the absence of a 19-year-old record was not proof of anything, let alone fraud. Claimants cited reports from several institutions to support this contention, among them the European Union's 2005 Final Report on the Lebanese parliamentary elections, which stated that "Lebanon has no centralized civil registration system…It suffers from chronic

[405] Witness statement of Mr Abdul Hafiz Ghalayini, p. 4.
[406] Ibid., Exhibit H.
[407] Egypt's submissions of 31 January 2008, Exhibit C.
[408] Ibid., p. 2.
[409] Claimants' submissions of 19 February 2008, p. 4.
[410] Claimants' submissions of 29 February 2008, p. 36.

structural, procedural and material deficiencies."[411] Statements were provided from other organisations and individuals to similar effect, such as the United Nations, the World Health Organisation and Lebanon's former Minister of the Interior.[412] Claimants concluded that "quite literally anything" could have happened to Mr Siag's Individual Record in the 19 years since its creation and that no reliable conclusion could be drawn from its absence from the register.[413]

342. When questioned at the March 2008 hearing Mr Siag responded as follows:

> Mr Newman: When you heard that there were no records of your being registered as a Lebanese national in Saida, were you surprised?
>
> Mr Siag: Yes, very much surprised.
>
> Q: And why were you surprised?
>
> A: The whole issue is a surprise to me. The entire subject that you are talking now today, about the Lebanese nationality, is a surprise to me. There is no doubt in my mind that I am Lebanese. There is no doubt – nobody has ever contested my Lebanese nationality in Egypt and in Lebanon. [414]

343. In respect of the reliability of the Lebanese registration system, Mr Souhaid for Egypt stated that he "confirm[ed] the accuracy of the records in Lebanon" and that all original records in Sayda were regularly saved on microfilm.[415] Mr Ghalayini stated that "no original registration records have been destroyed" and that there was accordingly "no possibility" that Mr Siag could be registered without his registration being saved to government files.[416] Mr Newman submitted for Egypt at the merits hearing that the documentation adduced by Claimants in respect of the state of Lebanon's civil registry system was of no value, and noted that the UN report proffered by Claimants also stated that records of birth and death in Lebanon were likely to be complete.[417]

344. The Tribunal will first examine the letter most recent in time, namely that received by Egypt on 29 January 2008 which deals with Mr Siag's Lebanese passports. The statement in that letter that Mr Siag's passports are "not genuine" is in contrast to the submissions of Egypt's counsel at the 10 March 2008 hearing. Dr Aboulmagd submitted at the hearing that: "What we have here very clearly are two things: a document that was not genuine, on the basis of which everybody was misled to

[411] Claimants' submissions of 29 February 2008, p. 36.
[412] Ibid., pp. 37 – 42.
[413] Ibid., p. 43.
[414] T1: 174 – 175.
[415] Witness statement of Mr Nadim Souhaid, p. 3.
[416] Witness statement of Mr Abdul Hafiz Ghalayini, p. 3.
[417] T1: 41 – 42.

believe that the passports are genuine. They are not forged. The Lebanese Embassy in Egypt was misled by a document that is not genuine…so if we talk about forgery in the physical sense, no, the passports were valid, I mean they were not forged; but they were based absolutely and exclusively on a document that is not genuine…."[418] Dr Aboulmagd's submission must be taken to mean that Mr Siag's passports were genuine, in the sense that they were not forged, but that they were nonetheless invalid because their issue flowed directly from an invalid document, namely Mr Siag's Individual Record.

345. One would assume therefore that there would be a record of Mr Siag's passports in the appropriate Lebanese authority. Such is suggested by the letter from the Lebanese Embassy in Cairo to the Egyptian Ministry of Foreign Affairs of 1 June 2006, which states that following a review of Mr Siag's files, "Mr Siag is the holder of Lebanese passport No. ..."[419] The Tribunal considers that the letter of 29 January 2008 stating that Mr Siag's passports were not genuine must be viewed in light of Egypt's most recent submissions, which do not appear to support its content, and in light of the letter from the Lebanese Embassy of 1 June 2006. The Tribunal does not consider that the 29 January 2008 letter supports the allegation of fraud or misconduct.

346. The letters dated 3 October 2007, 26 November 2007 and 8 December 2007 each relate to Mr Siag's Individual Record. Although the wording is stronger in the 8 December letter than in the others, the thrust of the three letters is the same: that there is no record of Mr Siag in Sayda. Egypt contends that this provides clear evidence of fraud. The Tribunal does not accept that submission. There are many possible explanations for the apparent absence of a record of Mr Siag in Sayda. The Tribunal considers that the Claimants' evidence as to the reliability of the Lebanese civil register is compelling. Claimants have adduced numerous reports from respected institutions attesting to the difficulties inherent in the Lebanese registration system. These reports provide, in the Tribunal's view, an entirely plausible alternative explanation as to the absence of Mr Siag's records. The Tribunal attaches little weight to the statements of Mr Souhaid and Mr Ghalayini[420] attesting to the reliability of the Lebanese registration system. No substantiating evidence is offered by Mr Souhaid or Mr Ghalayini. Neither witness was presented as, or held themselves out to be, an expert in Lebanese registration systems, or even as people with broad

[418] T8: 46 – 47.
[419] Claimants' Exhibit 73.
[420] Lebanese lawyers and witnesses for Egypt (*see* paras. 229 and 243).

experience thereof. While Mr Souhaid and Mr Ghalayini may well hold the views they have expressed, the Tribunal prefers Claimants' strong evidence to the contrary on this matter. The Tribunal considers that, even viewed alone, the letters adduced by Egypt do not amount to evidence of fraud or misconduct of any kind. In the face of Claimants' evidence, both as to Mr Siag's Lebanese nationality and as to the state of Lebanon's civil registry, Egypt's evidence falls well short of the required standard. It follows that the Tribunal does not consider that the letters of 3 October 2007, 16 November 2007 and January 2008 are proof of fraud, viewed either individually or collectively.

347. Mr Souhaid offered an alternative reason to question the validity of Mr Siag's Individual Record: that the Sayda registry did not extend to No.37[421] (37 being the registry number recorded on Mr Siag's Individual Record). Mr Souhaid's evidence was that he was informed by the Registrar in Sayda that there was no register number 37 in Sayda.[422] Mr Ghalayini similarly stated that the Sayda registries had not yet reached No. 37.[423] The Tribunal is not persuaded that this hearsay evidence provides any evidence of fraud. No evidence is offered to support the statements of Mr Souhaid and Mr Ghalayini. Egypt has submitted that it presented "statements by officials of the Lebanese government – directly and not as reported by anyone else – that all three documents presented by Mr Siag – the Individual Record and two passports – were false and fraudulent in that they bear numbers that are non-existent in the records of the Lebanese government…."[424] That is not the case. The letters exhibited to Mr Ghalayini's statement offer, if anything, evidence to the contrary. The letter from Ms Al Kasty dated 3 October 2007 states "…upon reviewing the Personal Affairs Records of El Saray District, Sayda, No. 37, we did not find any registration for Mr Waguih Elie Siag."[425] Ms Kasty's letter of 8 December 2007 states that "no record was found for Waguih Elie Siag in Register No. 37, El Saray District, Sayda, and no mention was made in said register about transfer or deletion of the record…."[426] Both letters refer to searches having been made of Register No. 37; neither states that such a register does not exist.

348. A further contention by Mr Ghalayini was that "the number of the Individual Record provided by Mr Siag simply does not exist, since the documents on which the

[421] Witness statement of Mr Nadim Souhaid, p. 2.
[422] Ibid.
[423] Witness statement of Mr Abdul Hafiz Ghalayini, p. 3.
[424] Egypt's Rejoinder on the Merits, p. 7.
[425] Witness statement of Mr Abdul Hafiz Ghalayini, Exhibit D.
[426] Ibid., Exhibit H.

document is supposedly based have not yet reached that number."[427] The aim of this statement is not fully clear. If by it Mr Ghalayini was merely referring to the registry number, then that submission has been discussed. If Mr Ghalayini's intended message was that the number of Mr Siag's Individual Record had not been reached, that message falls far short of evidencing fraud. It is unsupported and has not been developed by Egypt.

iii) Mr Siag's Intention Was to Avoid Military Service

349. Mr Siag does not deny that he did not wish to undergo compulsory military service and that his acquisition of Lebanese nationality helped him avoid such.[428] Where the parties differ is that Egypt submits that that was Mr Siag's only reason (or certainly his primary reason) for desiring Lebanese nationality,[429] whereas Mr Siag states that the main reason he acquired Lebanese nationality was that he had always regarded himself as Lebanese.[430]

350. As discussed, it is the task of Egypt to prove that Mr Siag acquired Lebanese nationality through fraud. Even if Mr Siag's sole motivation in acquiring Lebanese nationality was to avoid military service, the Tribunal considers that it would require a large leap of logic to infer from those facts that Mr Siag would commit fraud in order to achieve that end. Without further proof that is exactly what Egypt has asked the Tribunal to do: to infer that Mr Siag's desire to avoid military service was so overwhelming that it would prompt him to take the risky step of attempting to defraud or mislead the Lebanese Government. The Tribunal does not make that inference. It accepts as truthful Mr Siag's detailed evidence as to his personal and emotional ties to Lebanon,[431] and that those ties were at least as great a driving force in his acquisition of Lebanese nationality as was the desire to avoid military service.[432] The Tribunal also accepts Claimants' submission that it is highly unlikely that Mr Siag would have perpetrated a fraud on the Lebanese government in order to avoid military service when it was not disputed that he could have attained the same end by acquiring Italian nationality.[433] The Tribunal considers that this latter submission has great force. Egypt's submissions that "It was easier to buy a fraudulent document that

[427] Ibid., p. 3.
[428] Witness statement of Mr Waguih Siag of 29 February 2008, p. 17; and T1: 159.
[429] Egypt's post-hearing submissions, p. 10; and T1: 35.
[430] T1: 158 – 159.
[431] Witness statement of Mr Waguih Siag 29 February 2008, pp. 1 – 6.
[432] Ibid, and T1: 160.
[433] Claimants' post-hearing submissions, p. 15.

did the trick"[434] and that "since Mr Siag only satisfied the requirement of marriage to an Italian in September of 1988, it can be inferred that he was concerned about how much time would pass before the Italian bureaucracy permitted him to obtain Italian nationality"[435] are speculative, unsubstantiated, and unpersuasive. For those reasons the Tribunal does not consider that Mr Siag's desire to avoid military service provides any evidence that he committed fraud to do so.

iv) Mr Siag Paid $5,000 to Mr Khouly to Help Obtain Lebanese Nationality

351. That Mr Siag paid US$5,000 to Mr Khouly for his work in assisting Mr Siag's Lebanese nationality application was freely acknowledged. Egypt contended that $5,000 was an unduly large sum for the work that was carried out. Egypt submitted the following: "…it involved the payment of what seems to be a very large amount of money to obtain this document, $5,000, to an individual whose name is not recalled but who was or evidently represented himself to be a Lebanese lawyer"[436]… what was done in order to get out of military service in terms of documentation was done. It was important, it cost a lot of money, more than you would think would have to be paid for somebody to get an extract of what the documents say in Sayda."[437] Counsel for Egypt then enquired of Mr Siag: "Did [Mr Khouly] tell you in words or in substance that he was going to bribe anyone in Lebanon to get this document?"[438] Egypt's clear inference is that Mr Siag would not have paid Mr Khouly such a large sum were there not more going on than has been admitted to.

352. As an initial point the Tribunal is not persuaded that there is anything unusual, let alone suspicious, in hiring someone to assist with immigration and nationality applications. Immigration consultants all over the world routinely carry out similar tasks. While the Tribunal accepts that US$5,000 may be a large amount of money in Egypt, it is not convinced that it is so large a sum when it is taken into account that Mr Khouly's travel and accommodation costs were included.[439] In any event the payment made to Mr Khouly was certainly not so great as to justify the inference that it would only have been paid in consideration of fraudulent activity. The suggested inference that this payment evidences fraud is rejected.

[434] Egypt's post-hearing submissions, p 11.
[435] Ibid., p. 12, n 31.
[436] T1: 35.
[437] T1: 38.
[438] T1: 181.
[439] T1: 154.

v) Mr Siag's Individual Record Bears the False Inscription "Lebanese for more than 10 years"

353. Although there was some initial doubt over the translation, it is not in doubt that Mr Siag's Individual Record bears this inscription or one to similar effect. Egypt submits that this proclamation is in clear contrast to Mr Siag's evidence that he became Lebanese in 1989. Egypt submitted that "…it became evident that this was in fact a fraud."[440] Claimants submit that this phrase merely indicates that the individual concerned had Lebanese origins and did not have to wait ten years following the acquisition of Lebanese nationality to be allowed to participate in certain aspects of Lebanese public life, such as holding public office.[441]

354. The Tribunal prefers the submissions and evidence of the Claimants on this matter. The meaning of the phrase in question was debated at length during the jurisdictional phase, as part of the issue as to whether Mr Siag was Lebanese by birth. Claimants at that time made the same submission they are making now, that "more than 10 years" simply refers to Mr Siag's Lebanese origins.[442] Claimants adduced Lebanese authority to substantiate its claims during the jurisdictional phase.[443] Egypt did not at that time challenge Claimants' evidence. The Tribunal accepts Claimants' evidence as to the meaning of the phrase "Lebanese for more than 10 years" in the present context.

355. Given the Tribunal's acceptance of Claimants' proffered meaning of the phrase in issue, it follows that there is in the Tribunal's view no discrepancy between the inscription on Mr Siag's Individual Record and Mr Siag's claim that he acquired Lebanese nationality in 1989. The two are not mutually exclusive. The Tribunal accordingly finds no clear and convincing evidence of fraud under this head. This finding is strengthened by the oral evidence of Mr Siag, which as has been noted was impressive. Mr Siag testified that "…the meaning of it – if you are from Lebanese origin you don't have to wait ten years to practice your Lebanese rights. Even if you are naturalised Lebanese only six months ago they will still write the same sentence, "Lebanese for over ten years" because you are from Lebanese origin."[444] He stated that he had only learned of the exact operation of this phrase a year or so ago,[445] and that at the time he obtained his Individual Record, "I did not look at the document the

[440] T1: 54.
[441] Claimants' post-hearing submissions, p 13.
[442] Claimants' Rejoinder on jurisdiction, pp. 26 – 27.
[443] Claimants' post-hearing submissions, p. 14.
[444] T1: 166.
[445] T1: 166 – 167.

same way that I'm looking at it today…It's not that I took the document and started looking at it like this, word by word, and asked: what is this and what is that? I took the document and we continued the meeting."[446] The Tribunal considers that Mr Siag's evidence was truthful and honestly given.

The Tribunal's Decision on Fraud and the Lebanese Nationality Objection

356. For all the foregoing reasons the Tribunal finds that insufficient evidence has been adduced by Egypt to prove fraud, forgery, deception or other serious misconduct on the part of Mr Siag. The items of evidence relied upon by Egypt, whether taken individually or collectively, fall far short of satisfying the necessary evidential burden. Indeed the Tribunal, having heard and assessed the evidence and observed the demeanour of Mr Siag, totally rejects the allegations made against him. Egypt has made very serious allegations against Mr Siag but has clearly failed to prove them. Its rhetorical references to "unequivocal" and "inescapable" evidence of fraud were a massive overstatement.

357. As Egypt has failed to prove that Mr Siag attained his Lebanese nationality fraudulently, it follows that Egypt has not demonstrated that Mr Siag's loss of Egyptian nationality was, or could be argued to have been, invalid, even if that was a relevant consideration. This situation is clearly distinguishable from that in the *Soufraki* case cited by Egypt,[447] in that Mr Soufraki lost his Italian nationality because it was proved conclusively that his nationality documents had been issued by Italian authorities without full knowledge of the relevant facts. Moreover, in that instance Mr Soufraki was unable to prove that he remained an Italian citizen. In the present case, Egypt bears the burden of proof and has been unable to demonstrate that the strong evidence of Lebanese nationality advanced by Mr Siag should be disregarded by the Tribunal. Egypt has therefore not succeeded in convincing the Tribunal that it ought to reverse its earlier carefully considered decision that Mr Siag was not an Egyptian national at those times material to Article 25 of the ICSID Convention. In any event, even had there been fraud, the Tribunal has accepted in its Decision on Jurisdiction that Article 10 of Egypt's Nationality Law is "blind" to the operation of Lebanese nationality law. As a consequence, under Egyptian law, the first issuing of a Lebanese passport to Mr Siag was sufficient for him to lose his Egyptian nationality, in the absence of the requisite declaration of intent to keep Egyptian nationality pursuant to Article 10.

[446] T1: 164.
[447] *See* para. 261 (and n. 289) above.

358. The Tribunal finds that Mr Siag was not an Egyptian national at those times relevant to Article 25 of the ICSID Convention. Egypt's objection to jurisdiction/defence based on a breach of the negative nationality requirement of Article 25 therefore fails once again and is dismissed.

359. It necessarily follows that the Tribunal does not find the new evidence adduced by Egypt to be sufficient to warrant the "withdrawal" or revisiting of the Decision on Jurisdiction, as requested by Egypt. As recorded above, the Tribunal confirms and adopts its Decision on Jurisdiction as part of this Award.

Summary of the Tribunal's Determinations on Jurisdiction

360. The Tribunal considers that Egypt's objections to jurisdiction on the grounds of Mr Siag's alleged bankruptcy and claimed lack of Lebanese nationality were not brought "as early as possible" and have been waived. Even had Egypt's objections not been waived the Tribunal considers that they fail on their merits.

Why the Tribunal Did Not Suspend the Proceedings

361. It will be apparent from this lengthy examination of Egypt's late jurisdictional objections that the Tribunal did not accede at any point to Egypt's request that the proceedings be suspended when it raised those objections after the Decision on Jurisdiction. This matter was considered by the Tribunal. Its view was that it would be inappropriate and unfair to the Claimants to allow intermittent further jurisdictional objections, made after the Decision on Jurisdiction and for the most part connected to the issues determined in that Award, to impede the orderly progress and resolution of the arbitration according to an established timetable for the hearing on the merits. Bearing in mind the powerful objections of the Claimants to these post-jurisdictional decision objections, particularly that they were not made "as early as possible" in terms of ICSID Rule 41(1) and that they had been waived pursuant to ICSID Rules 26 and/or 27, it was considered preferable to establish a concurrent timetable to consider these additional objections. This was especially so since it was also argued by Claimants that the objections were largely the same as had already been considered in the jurisdictional decision.

362. The applicable ICSID Rule 41(3)[448] provides as follows:

[448] January 2003 version.

> "Upon the formal raising of an objection relating to the dispute, the proceeding on the merits shall be suspended. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection."

This may be contrasted with the current provision, which states that:

> "Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time within which the parties may file observations on the objection."

363. The difficulty with Article 41 as previously worded, which was the article applicable in this case, was that on its face it appeared to be mandatory provision requiring suspension on the mere raising of a jurisdictional objection. However, that provision is obviously intended to deal with the usual situation where there has been no decision on jurisdiction at the time the objection to jurisdiction was raised. As the Claimants pointed out,[449] there has been only one other instance in the lengthy history of ICSID arbitration where there has been a suspension after a decision on jurisdiction.[450]

364. However, it is not the case that the apparently mandatory wording of Article 41(3) must trump all other provisions of the ICSID Rules. If applied automatically to every jurisdictional objection which is raised after a decision on jurisdiction had been rendered, it would be possible, in theory, for a party, by seeking to raise insubstantial variations or supplementations to its earlier arguments, to prevent the Tribunal from ever reaching the merits. A party's episodic and sequential manufacturing of new jurisdictional arguments could eventually destroy the right of an individual Claimant to its "day in Court" because such conduct could easily exhaust the limited resources of such a Claimant and render him or her unable to continue.

365. To be specific, even though there was nothing to prevent Egypt from raising further jurisdictional objections after the decision on jurisdiction, it could not, by means of either subsequent reiteration of earlier objections or the development of new objections, insist upon suspension if such would imperil the Tribunal's status, legitimacy or effectiveness. The Tribunal has an overriding duty to preserve the integrity of the proceedings and ensure fairness to both parties. It would be most unfair if a Respondent could impede the fair resolution of the proceedings by raising a series of additional objections to jurisdiction after a decision on jurisdiction had been issued, especially if those objections were no more than variations of objections

[449] *See e.g.,* Claimants' submissions 26 September 2007, p. 2.
[450] *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic,* ICSID Case ARB/97/4.

already taken, or points which through greater diligence could have been discovered earlier.

366. A Tribunal has inherent power to take measures to preserve the integrity of the proceedings.[451] In part that inherent power finds as a textual foot-hold Article 44 of the Convention, which authorises the Tribunal to decide "any question of procedure, not expressly dealt with in the Convention, the ICSID arbitration rules, or any rule agreed by the parties."[452] ICSID Rule 41 does not specifically provide for a situation where there are new challenges to jurisdiction after the issuing of an award on jurisdiction. More broadly, there is an inherent power of an international tribunal to deal with any issues necessary for the conduct of matters falling within its jurisdiction. That power exists independently of any statutory reference.[453] In the specific circumstances of the present case it was, in the Tribunal's view, both necessary and appropriate to take action under its inherent power to ensure the continuity and

---

[451] *See* Scheurer, *supra* note 162, at p. 683, where the learned author states:

> "An ICSID tribunal's power to close gaps in the rules of procedure is declaratory of the inherent power of any tribunal to resolve procedural questions in the event of *lacunae*. In exercising this power, the tribunal may not go beyond the framework of the Convention, the Arbitration Rules and the parties' procedural agreements but must, first of all, attempt to close any apparent gaps through the established methods of interpretation for treaties and other legal documents. But the tribunal is free of the constraints of procedural law in any national legal system of law, including that of the tribunal's seat (*see* also paras. 3, 20 *supra*).
>
> ICSID tribunals have exercised their procedural discretion by formulating general rules for the proceedings before them or by making specific decisions. They have done this earlier in the form of procedural orders or informally. The Arbitration Rules provide in this context:
>
> **Rule 19**
> Procedural Orders
> The Tribunal shall make the orders required for the conduct of the proceeding."

The doctrine of inherent, i.e. non-statutory, powers has been applied by the International Court of Justice and other international tribunals in a number of different contexts. Notably, inherent powers have been invoked in order summarily to dismiss proceedings lacking even a prima facie jurisdictional foundation, suspend proceedings in certain cases of parallel related litigation, and refuse to hear vexatious claims. *See* C. Brown, *The Inherent Powers of International Courts and Tribunals*, 76 B.Y.I.L 195 (2005) (in particular, pp. 231-232 and the references).

[452] Examples of the use of Article 44 include *Aguas Provinciales de Santa Fe S.A v The Argentine Republic* ICSID Case No. ARB/03/17 (order accepting *amicus* submissions of March 17, 2006); *Aguas Argentina S.A Suez and Vivendi Universal S.A v The Argentine Republic*, ICSID Case No ARB/03/19 (order allowing withdrawal of one party from an arbitration that is to continue thereafter of April 14 2006); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No ARB/02/06, Decision on Objections to Jurisdiction, January 29, 2004, paras. 173 *et seq*. (and Order to Stay Proceedings).

[453] *Prosecutor v. Beqa Beqaj*, Case No. IT-03-66-T-R77, Judgment on Contempt Allegations (27 May 2005), paras. 10 and 9. *Beqaj* was one of the recent cases on charges of contempt in the International Tribunal for the former Yugoslavia (ICTY). It is established ICTY jurisprudence that the power to punish contempt is part of "an inherent jurisdiction, deriving from [ICTY's] judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by [its] Statute is not frustrated and that its basic judicial functions are safeguarded": *Prosecutor v. Duško Tadic*, Case No. IT-94-I-A-R77, Judgment on Allegations of Contempt against Prior Counsel (31 January 2000), para. 13 (citation omitted). The specific power to deal with contempt has since been codified in Rule 77(A)(iv) of ICTY's Rules of Procedure and Evidence.

fairness of the proceedings. It was for these reasons that it was felt that the best way forward was to allow Egypt's additional jurisdictional objections to be considered and determined in the way that has been described above, without automatically suspending the proceedings.

367. For all the reasons contained in Sections IV and V the Tribunal confirms that Mr Siag's claim is within the jurisdiction of the Centre. The Claimants' case as to liability will now be examined.

VI. LIABILITY

The Parties' Submissions on Liability

Claimants' Memorial on the Merits

368. The Claimants filed their Memorial on the Merits on 12 May 2006, together with the Witness Statements of Waguih Elie George Siag, dated 8 May 2006, and Dr Mustafa Abou Zeid Fahmy, dated 2 May 2006.

369. Claimants began by setting out the background to the dispute in some detail. It was submitted that Egypt had ignored numerous rulings of its own courts in favour of Claimants. In particular these rulings were: the 21 July 1996 decision of the Cairo Administrative Court enjoining the execution of Resolution 83 purporting to cancel the contract[454]; the affirmation of the Cairo Administrative Court's injunction by the Supreme Administrative Court on 5 February 1996[455]; the 7 August 2001 ruling of the supreme Administrative Court reversing the 7 September 1999 ruling in favour of Egypt from the Cairo Administrative Court (sitting with different judges to those who had originally enjoined Resolution 83) and cancellation of Resolution 83[456]; the 28 March 2002 decision of the Cairo Administrative Court enjoining Resolution 279, which had again purported to cancel the contract[457]; The decision of the Cairo Administrative Court of 6 June 2002 refusing to stay the injunction of Resolution 279[458]; the ruling of the Supreme Administrative Court of 24 May 2005 dismissing Egypt's appeal against the injunction of Resolution 279.[459]

[454] Claimants' Memorial on the Merits, p. 36.
[455] Ibid., p. 44.
[456] Ibid., pp. 46 – 47.
[457] Ibid., p. 51.
[458] Ibid., p. 52.
[459] Ibid., p. 53.

370. Claimants submitted that Egypt had seized Claimants' property with five separate decrees (Ministerial, Prime Ministerial and Presidential), and had seized physical control of the property on two occasions. In Claimants' submission Egypt's actions amounted to a direct expropriation of Claimants' property, and were in violation of Article 5(1)(ii) of the BIT.[460] Further, although the Tribunal need not get this far, Egypt's actions also constituted indirect expropriation.[461]

371. Claimants argued that Article 5(1)(ii) of the BIT prohibited expropriation except when five cumulative factors were present. To be legal an expropriation must have been made for a public purpose in the interest of the expropriating state; it must have been made according to legal procedures; it must have been made on a non-discriminatory basis; it must have been made in accordance with due process of law; and it must have been accompanied by adequate and fair compensation. In Claimants' submission Egypt's actions did not satisfy any of these requirements.[462] As a failure to meet any one of the requirements for legal expropriation rendered an expropriation illegal, Egypt's seizures of Claimants' land were clearly illegal.[463]

372. It was further submitted by Claimants that Article 5(1)(i) of the BIT provided an even stricter standard of protection from expropriation than did Article 5(1)(ii). Article 5(1)(i) precluded even temporary limitation of an investor's right to ownership, possession, control or enjoyment of his or her investment. The terms of Article 5(1)(i) made clear that Egypt and Italy had agreed to prevent limits on ownership, possession, control or enjoyment that fell short of "traditional expropriation."[464] There was no need for the Tribunal to reach the "quasi-expropriation" standard of Article 5(1)(i), as there was no doubt that an illegal expropriation had been carried out, but in the unlikely event that the Tribunal disagreed, Article 5(1)(i) had clearly been violated.[465]

373. Claimants contended that they had explicitly sought the protection of the Egyptian authorities in relation to their property. Multiple pleas for protection by Mr Siag and Dr Abou Zeid had been officially recorded. Despite these pleas Egypt had failed to provide the full protection sought, and guaranteed by Article 4(1) of the BIT, and was accordingly liable to the Claimants.[466]

[460] Ibid., pp. 67, 73.
[461] Ibid., pp. 68, 75.
[462] Ibid., pp. 68, 75 - 85
[463] Ibid., pp. 69, 78.
[464] Ibid., p. 86.
[465] Ibid., p. 86.
[466] Ibid., pp. 87 – 96.

374. In addition, it was submitted, Egypt had failed to treat Claimants' investment fairly and equitably, as required by Article 2(2) of the BIT. The "fair and equitable" standard of protection was today composed of several distinct "strands," including "due process," transparency, an investor's legitimate expectation, discrimination, harassment or coercion, and bad faith. A remarkable feature of this case was that Egypt had violated every component of the fair and equitable standard recognised to date.[467]

375. Article 2(2) of the BIT also precluded unreasonable or discriminatory measures being taken against investments. Claimants submitted that, while the use of the disjunctive "or" made clear that either "unreasonable" or "discriminatory" measures were precluded, in the present case the measures taken by Egypt in confiscating Claimants' property were both unreasonable and discriminatory.[468] Article 2(2) applied not only to situations where an investment was "impaired by" unreasonable or discriminatory measures, but also to situations where the investment was "subjected to" unreasonable or discriminatory measures. "Subjected to" offered a higher standard of protection to investors, but Egypt's behaviour violated both standards. [469]

376. In Claimants' submission Egypt had also breached the most favoured nation provisions enshrined in Articles 3, 4 and 6 of the BIT. Egypt had concluded and ratified at least eight BIT's that required it to observe any obligation that it had entered into with regard to an investment (an "umbrella clause").[470] The Italy-Egypt BIT did not contain an umbrella clause. Consequently, Egypt had accorded investors under other BIT's more favoured treatment than it had offered Italian investors such as the Claimants.[471] Claimants invoked the most favoured nation provisions in Article 3 of the Italy-Egypt BIT in order to benefit from the treatment accorded by Egypt to investors under those BITs that contained umbrella clauses.[472] Claimants stated that, once imported, the umbrella clause offered protection to Claimants for breaches of obligations not covered by the BIT. In the present case Egypt had violated three varieties of obligation protected by the umbrella clause: it had violated various obligations owed to Claimants under Egyptian law; it had violated its obligation to respect the rulings of its judiciary in cases between the Claimants and the Government; and it had violated its obligations under the contract for the sale of the

[467] Ibid., pp. 96 – 121.
[468] Ibid., pp. 121 – 126.
[469] Ibid., p. 121.
[470] Ibid., pp. 127 – 128.
[471] Ibid., p. 128.
[472] Ibid.

property in Taba.[473] The third violation was beyond dispute as Egypt's courts had already ruled that Egypt's termination of the contract was illegal.[474]

377. Claimants summarised their submissions on the merits thus: Egypt's conduct had been deplorable, and violated every one of the principal protections offered to foreign investors other than the guarantee of national treatment, any one of which was sufficient to render Egypt liable to Claimants.[475] Moreover, it was submitted that Egypt had on at least two occasions admitted its liability to Claimants.[476] The first such admission came in Egypt's letters to Mr Siag in or around October 2003 stating that the Ministry of Tourism would "assume the settlement of the company's [Siag's] rights and compensating it." The second claimed admission of Egypt's liability was provided by the State Commissioning Authority in the context of Siag's lawsuit against Presidential Decree No. 205 and Prime Ministerial Resolution No. 315. The Authority advised that the Property did not belong to the State having been sold to Siag in 1989. It further advised the Court to annul the Presidential and Prime Ministerial Decrees and noted that Egypt had, in one of its court pleadings, acknowledged that Mr Siag had a right to the Property.

Egypt's Counter-Memorial on the Merits

378. Egypt's Counter-Memorial on the merits was presented on 12 October 2007. Included with the Counter-Memorial were the expert opinions on liability of Professor Hans Smit dated 11 October 2007, and Professor Ivan Shearer dated 15 June 2007 (with an addendum dated 20 June 2007).

379. Egypt first contended that ownership of the land at Taba was only to be transferred to Siag Touristic once all phases of the project had been carried out. [477] It appeared that Siag Touristic was never serious about completing the project because, at the time the first decision to cancel the project was made, only 7% to 11% had been completed, with only six months remaining to complete phases I and II of the project.[478]

380. Secondly Egypt submitted that Siag Touristic had been taking the wrong steps to market the project in Taba, with the likely result that a security issue would have developed. This was because Siag Touristic had entered into a contract with Lumir

[473] Ibid., p. 130.
[474] Ibid.
[475] Ibid., pp. 130 – 131.
[476] Ibid., p. 62.
[477] Egypt's Counter-Memorial on the Merits, p. 5.
[478] Ibid., p. 6.

Holding,[479] an Israeli entity,[480] under which Lumir would have been granted certain rights in the project without the consent of the Administrative Authority.[481] It was these failures that led the Minister of Tourism to issue a decree cancelling the contract in May 1995.[482] Once Siag Touristic had declared that it would change its strategy the decree was revoked and a grace period granted.[483] However, Siag Touristic failed to cease its violations, which caused the Minister of Tourism to issue Decree No. 83 cancelling the contract for non-fulfilment of contractual commitments.[484]

381. Egypt next submitted that, following the decision of the Egyptian Supreme Administrative Court which ruled that the Minister of Tourism did not have jurisdiction to issue Decree No. 83, the Tourism Development Authority ("TDA"), which was bound to protect the interest of the investments in the area, issued Resolution No. 279 in 2001, again cancelling the contract. The TDA was bound to issue the Resolution because Siag Touristic was still dealing with Lumir Holdings, which raised issues of national security.[485] The TDA, as an administrative authority, was bound to protect the interests of the public domain, and as such the TDA could not be judged in the same way as if it were one of two private contracting parties.[486]

382. Egypt contended that the expropriation of Claimants' land pursuant to Prime Ministerial Decree No. 799 and Presidential Decree No. 315 was for a public purpose, that being the exportation of natural gas. It was for this reason that ownership of the land was transferred to the Al-Sharq Gas Company.[487]

383. As to compensation Egypt submitted that the Explanatory Memorandum to Prime Ministerial Decree No. 799 specifically mentioned that adequate compensation would be paid to the rightful owners of the land. Accordingly this could not be classed as a case of confiscation.[488] The TDA invited Siag Touristic to meet and discuss the level of compensation that would be paid. However, Siag Touristic's demands were

[479] Alternatively spelt as "Lumair."
[480] It is an Israeli company.
[481] Egypt's Counter-Memorial on the Merits, p. 6.
[482] Ibid.
[483] Ibid.
[484] Ibid., pp. 6 – 7.
[485] Ibid., p. 7.
[486] Ibid., pp. 7 – 8.
[487] Ibid., pp. 8 – 9.
[488] Ibid., p. 9.

unrealistically high, and bore no relationship to the price paid, the amount of the investment, or Siag Touristic's earlier claims.[489]

384. Egypt next submitted that Siag Touristic had purported to transfer 150,000 m^2 of the property at Taba to Siag Taba. If such transfer had actually occurred, it was in violation of Article 10 of the contract, which stated that Siag Touristic could not transfer all or part of the property to a third party other than with Egypt's consent, and with 50% of the value going to Egypt.[490]

385. Egypt then referred to the matter of the nationality of the investors. The buyer of the land at Taba was Siag Touristic. In 1995 Mr Siag increased his shareholding in Siag Touristic to 88.15%. The Tribunal held in its Decision on Jurisdiction that the Claimants had lost their respective Egyptian nationalities in 1991 and 1993. Accordingly Siag Touristic was, from the time Mr Siag increased his shareholding, a majority foreign-owned company.[491] A legal entity was foreign where the majority of share capital is held by foreigners.[492] Article 1 of Law No. 15 of 1963 and Desert Land Law No. 143 of 1981 prohibited foreigners from owning "desert lands" (which included the land purchased by Siag Touristic).[493] In addition, Law 230/96 provided that real property could not be owned by foreigners except for the purpose of residence or for performing approved objectives under the investment law.[494] Therefore Siag Touristic, as a foreign entity, was prohibited from owning or leasing the land at Taba.[495]

386. Egypt contracted with Siag Touristic on the basis of the Egyptian nationality of its owners. If and when the Claimants lost their respective Egyptian nationalities, it became legally impossible for Egypt to transfer title over the property to Claimants.[496] Although Claimants (and therefore Siag Touristic) did satisfy the Egyptian nationality requirement at the time the contract for sale was made, they no longer satisfied that requirement from the moment they lost Egyptian nationality.[497] As the title to the land in Taba could not be transferred to Claimants by Egypt (and therefore could not be registered), Claimants had no rights of ownership to assert against Egypt.[498] Further, as it was legally impossible (due to the actions of the Claimants) for Egypt to

[489] Ibid., pp. 9 – 10.
[490] Ibid., p. 10.
[491] Ibid., pp. 13.
[492] Ibid., pp. 12 – 13.
[493] Ibid., p. 12.
[494] Ibid., p. 15.
[495] Ibid., p. 14.
[496] Ibid., p. 16.
[497] Ibid., p. 17.
[498] Ibid., pp. 16 – 17.

complete the contract, Egypt had been released from any obligation it had to transfer title to the Claimants, and the contract had been rescinded *ipso facto.*[499]

387. On the subject of nationality Egypt submitted that, If the Tribunal should uphold its earlier decision that the Claimants were not Egyptian nationals, the Claimants should nevertheless be estopped from denying their Egyptian nationality in these proceedings.[500] Claimants had grossly misled the Egyptian Government by unequivocally stating that they were Egyptian, both when attaining the right to purchase and develop land in Taba and when acquiring their Egyptian passports.[501] Estoppel was well-recognised in international law and was based on equity and good faith. Claimants had attained far too much on the basis of their being Egyptian to now state that they were not Egyptian.[502]

Claimants' Reply Memorial on the Merits

388. Claimants filed their Reply Memorial on 21 December 2007, together with a further expert opinion of Professor Reisman and a further witness statement of Dr Abou Zeid Fahmy, both of which addressed the merits of the case.[503]

389. In addition to arguments already made, Claimants submitted that Egypt had not seriously contested its liability in this case. Indeed it had not adduced a single witness of fact.[504] The bulk of Egypt's Counter-Memorial and accompanying witness statements were directed at Claimants' submissions on damages. The remainder of Egypt's experts merely re-urged Egypt's jurisdictional arguments under the rubric of estoppel/opposability.[505] It was said that Egypt's silence had effectively conceded almost all those facts set forth in Claimants' Memorial on the Merits, submissions on damages and witness statements.[506] The unchallenged facts of the case essentially established Egypt's liability *per se* and left to the Tribunal the principal task of fixing compensation.[507] In particular, Egypt had failed to respond to Claimants' assertions that Egypt had twice seized the Taba property by force,[508] its claims that the Claimants had asked for and not received full protection,[509] and its claims that Egypt

[499] Ibid., p. 18.
[500] Ibid., p. 50.
[501] Ibid.
[502] Ibid., p. 51.
[503] Further expert opinions and witness statements were adduced in respect of damages.
[504] Claimants' Reply, p. 3.
[505] Ibid., p. 1.
[506] Ibid., p. 4.
[507] Ibid., p. 1.
[508] Ibid., p. 15.
[509] Ibid., p. 18.

had repeatedly ignored rulings of its own courts (and had accordingly violated the fair and equitable treatment and impairment clauses of the BIT).[510]

390. Claimants asserted that Egypt had admitted it had coerced Siag Touristic into cancelling its contract with Lumir. Egypt's claim that the Lumir contract created a "security issue" had not been explained and was not worthy of a response.[511]

391. As to Egypt's claim that it had expropriated the Taba property because Siag Touristic was behind schedule, this was difficult to take seriously, for three reasons: first, Egypt's assertion was contrary to the large amount of unrebutted evidence adduced by Claimants demonstrating the progress made by Siag Touristic and the delays caused by Egypt.[512] Siag Touristic had in fact completed much of Phase One and had commenced work on Phase Two ahead of schedule.[513] At the time of the expropriation in May 1996 Siag Touristic still had seven months to complete Phase One.[514] Secondly, Egypt's claim ran counter to the explanations Egypt's lawyers had given in domestic Egyptian litigation, at which time the reason for the expropriation was stated to be Siag Touristic's arrangement with Lumir, an Israeli company.[515] Egypt's domestic submissions in respect of Lumir hardened over time, and were an admission that Egypt's seizure of Claimants' land was the result of bigotry and religious zealotry.[516] Thirdly, Egypt's submissions were at odds with the rulings of Egypt's own courts, which had ruled at the highest level that the purported cancellation of the contract before the deadline for completion of Phase One had been reached was invalid.[517]

392. In respect of the "public use" suggestion, Claimants argued that the transfer of the Taba property to the Al-Sharq Gas Company ("Al Sharq") was not made to give effect to such a use. The property had been expropriated in 1996 but the first suggestion that the land would be put to public use was in 2002, and the transfer to Al Sharq not until 2003. The property had lain idle for seven years, without it ever being claimed that it would be put to public use.[518] There was no reason that Al Sharq had to use the Claimants' property for its gas pipeline when it had land of its own immediately to

[510] Ibid., pp. 18, 21.
[511] Ibid., p. 5.
[512] Ibid., p. 6.
[513] Ibid., pp. 6 – 7.
[514] Ibid., p. 8.
[515] Ibid.
[516] Ibid., pp. 9 – 10.
[517] Ibid., pp. 10 – 13.
[518] Ibid., p. 22.

the south, and in any event only a small sliver of the property was used by Al Sharq.[519]

393. It was then submitted that Egypt's argument that Siag Touristic could not legally own the Taba property because the Claimants had lost their Egyptian nationalities was flawed in several ways: first, Egyptian law was irrelevant to the dispute, which was governed by the BIT and international law;[520] secondly, the BIT did not restrict the right of Italian nationals to own land in Egypt, indeed the BIT ensured that Italian investors would receive national treatment;[521] thirdly, even if Egyptian law were relevant, and the BIT did not confer national treatment upon the Claimants, Siag Touristic was nevertheless permitted to own land under Egyptian Investment Law, which prevailed over Egyptian land ownership laws;[522] fourthly, the TDA was able to permit foreigners to own desert lands for touristic purposes;[523] fifthly, Egyptian law afforded the right to own property to Arab nationals, including Mr Siag, who was a Lebanese national at all relevant times;[524] and lastly, Egypt had not purported to cancel the contract due to alleged land-ownership restrictions, and could not now excuse its prior unlawful behaviour by stating that the same end could have been achieved legally.[525]

394. Claimants submitted that Egypt's estoppel and opposability arguments were exactly the same arguments that had Egypt run and failed within the jurisdictional phase, albeit dressed up in terms that made the arguments sound appropriate for the merits phase. They did not present any new issue related to the merits and simply sought a "do over" on issues of jurisdiction already decided; in particular the issues of effective nationality and "genuine link."[526] It was further submitted that there was no basis for the Tribunal to reconsider its Decision on Jurisdiction. The doctrine of *res judicata* called for presumptive finality in respect of the Tribunal's prior decisions.[527]

395. In respect of estoppel Claimants contended that, in order to succeed in its claim, Egypt had to show that Claimants had wilfully misrepresented themselves as Egyptian to the Egyptian authorities.[528] Egypt could not do this; it had made the same argument during the jurisdictional phase but had not substantiated its claim. As

[519] Ibid.
[520] Ibid., pp. 25 – 36.
[521] Ibid., pp. 26, 36 – 39.
[522] Ibid., p. 40.
[523] Ibid., pp. 40 – 41.
[524] Ibid., pp. 26, 42.
[525] Ibid., p. 26.
[526] Ibid., pp. 43 – 45.
[527] Ibid., p. 45.
[528] Ibid., p. 46.

Claimants had demonstrated during the jurisdictional phase, they had mistakenly believed that they were Egyptian, because that is what they were told by Egyptian officials.[529] Further, Egypt's contention that it had been misled by Claimants bordered on the ludicrous – Egypt must be charged with being able to understand and properly apply its own laws.[530]

396. Moreover, Egypt could not show that it had relied on the Claimants' representations to its detriment. Being made a respondent in these proceedings did not qualify as a detriment to Egypt.[531] Nor could Egypt claim successfully that it had relied on Claimants' statements as to their nationality, as Claimants' loss of Egyptian nationality under Egyptian law was readily discernable by the Government.[532]

Egypt's Rejoinder on the Merits

397. Egypt's Rejoinder on the merits was filed on 12 February 2008, together with the further expert opinions of Professors Smit, dated 11 February 2008, and Shearer, dated 21 January 2008. Egypt's submissions may be summarised as follows:

398. First, the Claimants were estopped from denying their Egyptian nationality. Claimants had mis-stated the requirements of the doctrine of estoppel; it was not necessary for Claimants to have wilfully misrepresented their status as Egyptian nationals; it was sufficient that Egypt relied on Claimants' representations or that Claimants gained an advantage from those representations.[533] In this case, it was clear that Egypt had relied on Claimants' representations to its detriment, both by remaining in business with the Claimants and by having to defend the present claims.[534]

399. Egypt accepted that it was aware that the Tribunal had considered the *Nottebohm* case on this matter in the jurisdictional phase.[535] However, Article 25 of the ICSID Convention did not exclude the *Nottebohm* doctrine, which may operate to give context to the *lex specialis*.[536] *Nottebohm* was authority for the fundamental concept that, as a matter of international law, a tribunal should not hear cases where its jurisdiction is based on trivial contacts between the claimant and the nation that affords him access to the tribunal.[537] Only claimants with *bona fide* links with their

[529] Ibid., p. 47.
[530] Ibid.
[531] Ibid., p. 48.
[532] Ibid., p. 49.
[533] Ibid., pp. 15 – 16.
[534] Ibid., p. 16.
[535] Ibid.
[536] Egypt's Rejoinder, p. 17.
[537] Ibid., pp. 17, 19.

state of nationality should be permitted to take advantage of the protections afforded by the BIT.[538]

400. Egypt next submitted that the doctrine of *res judicata* did not apply to preclude Egypt's estoppel and opposability arguments. The Tribunal had expressly allowed Egypt to present its evidence on estoppel during the merits phase, and Egypt was now doing so.[539] An obvious reason for the Tribunal to revisit its Decision on Jurisdiction was that that Decision relied on false and fraudulent evidence in respect of Mr Siag's Lebanese nationality.[540] In any event, *res judicata* only applied to fully litigated and finally decided proceedings, not cases such as this where the proceedings continued.[541]

401. It was then argued that the BIT and international law did not govern every aspect of this dispute.[542] Municipal Egyptian law played an important role, as it established the status of the Claimants and the legal position of what they had invested in.[543] In other words, while the BIT and international law determined how an investment may be treated, it was Egyptian law that determined whether the investment was able to be protected at all.[544] In this case, Egyptian law said that Siag Touristic was not lawfully able to own the land in Taba as it was majority-owned by foreigners.[545]

402. Egypt submitted that it could not be blamed for failing to raise at an earlier stage the objection that Siag Touristic was not lawfully permitted to own the Taba land. Mr Siag had for years pretended to be Egyptian and could not now argue that Egypt was at fault for taking so long to "catch him".[546] It must follow that, if there was no property owned, there were no damages other than what the Claimants had put into the project, which is what Siag Touristic had been offered in settlement by Egypt.[547]

403. It was also contended that the doctrine of national treatment did not apply in this case. Article 3 of the BIT applied only to investments after they were made, not before they were made.[548]

---

[538] Ibid., p. 19.
[539] Ibid., p. 20.
[540] Ibid.
[541] Ibid., pp. 20 – 21.
[542] Ibid., pp. 25 – 28.
[543] Ibid., pp. 22 – 23.
[544] Ibid., p. 25.
[545] Ibid.
[546] Ibid., p. 28.
[547] Ibid., p. 29.
[548] Ibid., pp. 29 – 31.

404. Egypt then argued that, in addition to being desert land, Taba was within a national security area, wherein foreign ownership was prohibited without authorisation.[549] The French company Accor had recently been refused permission to buy into land in Taba, on national security grounds.[550] The ability of non-Egyptian Arabs to own land required a Presidential Decree following the approval of Cabinet. Further, the example cited by Claimants related to a different geographical area and was not relevant to Taba.[551]

405. Egypt argued that the Investment Law cited by Claimants was also inapplicable, because the Investment Law applied only to companies established under its auspices. Siag Touristic was not formed under the Investment Law but under the Companies Law, which did not offer the same privileges as those granted to Investment Law companies.[552]

406. Egypt's next submission was that the transfer of title from Siag Touristic to Siag Taba had been invalid as it had not received the approval of the TDA, as required by Article 10 of the contract governing the sale of the Taba land.[553] Egypt requested that the Claimants supply evidence of their compliance with the conditions set out in Article 10, failing which those assets transferred to Siag Taba should be excluded.[554]

407. Egypt asserted that the delays in the Taba project were not caused by the Egyptian authorities but were of Siag Touristic's own doing.[555] Egypt had offered compensation to Claimants for the expropriation, in accordance with the BIT and applicable Egyptian law. That was clear evidence that the expropriation was lawful[556] and it was naïve to suggest that the land at Taba had been seized so it could be given to friends of the Egyptian President. The Property had been retaken in 1996 yet the Al Sharq Gas Company had not been formed until 2000. Clearly there cannot have been a link between the retaking of the land for lack of performance in 1996 and the transfer to the Al Sharq Gas Company.[557]

[549] Ibid., pp. 32 – 33.
[550] Ibid., p. 33.
[551] Ibid., pp. 33 – 35.
[552] Ibid., pp. 35 – 36.
[553] Ibid., p. 39.
[554] Ibid., pp. 39 – 40.
[555] Ibid., pp. 40 – 44.
[556] Ibid., pp. 44 – 50, 55 – 56.
[557] Ibid., p. 54.

Claimants' Oral Submissions on Liability at the Merits Hearing[558]

408. In Claimants' oral submissions it was first contended that, contrary to Egypt's claims, the Claimants had made substantial progress in preparing and developing the Project, as had been independently confirmed by a panel of professors from Cairo University.[559] Egypt had not cancelled the contract due to delay; the real reason that the contract was cancelled was that the Claimants were dealing with Lumir, which as an Israeli company, was undesirable in Egypt's eyes.[560] This had been made clear in the submissions of Egypt in domestic litigation against the Claimants.[561]

409. Mr Siag and Dr Abou Zeid Fahmy (who was lead counsel for Mr Siag, Siag Touristic, and Siag Taba) had each made requests of the Egyptian police for the protection of the Claimants' investment. Those requests went unheeded. Egypt had accordingly breached Article 4.1 of the BIT, which guaranteed full protection to investments.[562]

410. Claimants also submitted that Egypt had failed to honour repeated rulings of its courts in favour of Claimants, including rulings of the highest court in Egypt, in clear breach of the fair and equitable treatment standards of the BIT. [563] That had not been contested by Egypt.[564]

411. Claimants argued that the expropriated Siag Touristic Property had laid fallow for seven years before mention was even made that it would be put to public use.[565] It was then gifted to the private Al Sharq Gas Company, a company majority owned by a close friend of President Mubarak. That company proceeded to install a pipeline that could have been installed on land already owned by Al Sharq ten to twenty feet away. It was clear that this was not a public purpose.[566]

412. In Claimants' submission there had been at least seven clear acts of illegal expropriation by Egypt, in clear violation of the BIT and international law,[567] and other than in respect of expropriation Egypt had failed to offer any response on any of the

[558] As noted, the first day of the hearing, 10 March 2008, was set aside to hear oral argument and evidence on Respondent's "bankruptcy" and "Lebanese nationality" applications. The remainder of the hearing was given over to issues of liability and quantum. The same legal teams were in attendance for each party. In respect of the merits, Waguih Siag and Professor Reisman (by video link) gave testimony and were cross-examined.

[559] T2: 13 – 19.
[560] T2: 21 – 23, 66.
[561] T2: 23, 39.
[562] T2: 25 – 27, 45 – 46; T8: 6 – 7.
[563] T2: 27 – 34, 37 – 38, 41; T8: 5 – 6.
[564] T2: 30, 40.
[565] T2: 34.
[566] T2: 35 – 36, 38; T8: 3.
[567] T2: 40; T8: 1, 3.

standards of protection of the BIT.[568] Egypt's silence was telling as to its lack of defence on these issues.[569] Egypt had failed to respond on the issue of fair and equitable treatment[570] and in Claimants' submission had effectively conceded that it was liable to Claimants for breach of the full protection standard of the BIT.[571] Nor had Egypt offered a defence to Claimants' assertions of breach of the impairment clause of the BIT.[572] Egypt had essentially conceded liability.[573]

413. Finally, Claimants argued that Egypt's submission that the provisions of its domestic land laws meant that there could not have been an illegal expropriation was incorrect. It was a fundamental principle of international law that a party could not invoke its domestic laws to excuse its failure to perform a treaty.[574] Egypt had never before raised this defence during 12 years of litigation. Egypt could not now say that it could have achieved its ends legally although it did not do so.[575] Further, Egypt knew or should have known that the Claimants lost Egyptian nationality in 1990 and 1993 by operation of Egypt's own nationality law.[576] Egypt's courts had made repeated rulings affirming the Claimants as rightful owners of the Taba property after the Claimants had lost Egyptian nationality.[577]

Egypt's Oral Submissions on Liability

414. Egypt's submissions on liability were, first, that Mr Siag, as the Tribunal had held, was not an Egyptian national. He therefore was not permitted to be the major shareholder (as he was) in the Taba Project, as the land in question could not, under Egyptian law, be owned by foreigners.[578]

415. Egypt then asserted that the Taba project had been behind schedule, and the likelihood of it being completed on time was very slim.[579] The delay in progress was caused by poor management, not Egyptian authorities.[580]

[568] T2: 30, 44; T8: 8.
[569] T2: 44.
[570] Ibid.
[571] T2: 45 – 46.
[572] T2: 46.
[573] T2: 65; T8: 7.
[574] T2: 46 – 48; T8: 8 – 12.
[575] T8: 12.
[576] T8: 10 – 11.
[577] T8: 13 – 14.
[578] T2: 75 – 77; T8: 49.
[579] T2: 76, 81.
[580] T2: 81.

416. Contrary to Dr Abou Zeid Fahmy's written submission, Egyptian Investment laws did not prevail over Egypt's foreign ownership laws. Egypt's foreign ownership laws could not be subordinated.[581]

417. Egypt submitted that its taking of the land was lawful. There was no evidence that it was discriminatory, and compensation was being determined.[582] In addition, the land was now being used for a major gas pipeline. There was no question but that that was a public purpose. Al Sharq was a publicly owned company.[583]

418. The *Nottebohm* doctrine was applicable to, and would be run in, the merits phase.[584] Mr Siag had no genuine link with Italy, his State of nationality.[585] Whether he knew he was Egyptian or not Mr Siag was estopped from denying his Egyptian nationality because he had used that nationality to obtain his Egyptian passport and to conclude contracts with Egyptian officials.[586]

Claimants' Post-hearing Submissions

419. The parties presented their respective post-hearing submissions on 24 April 2008. To a large degree the parties re-iterated their previous submissions on liability.

420. The Claimants emphasised their submission that Egypt understood that its liability was a foregone conclusion. It had not presented a single fact witness or challenged any of the main events of the dispute.[587] Egypt had carried out seven illegal acts of expropriation.[588] The reality was that the first of these, Resolution No. 83, was the effective expropriation as Claimants had not regained ownership of the property or project since then.[589]

421. Claimants also emphasised that Egypt had failed to provide full protection to Claimants' investment,[590] had failed to treat Claimants' investments fairly and equitably,[591] and had breached the BIT's fair and equitable treatment provision in many ways.[592]

---

[581] T2: 78.
[582] T2: 84, 86 – 87.
[583] T2: 84 – 86.
[584] T2: 87; T8: 54.
[585] T8: 54.
[586] T2: 87 – 88; T8: 51 – 52.
[587] Claimants' post-hearing submissions, p. 21.
[588] Ibid., pp. 22 – 24.
[589] Ibid., p. 25.
[590] Ibid., pp. 25 – 27.
[591] Ibid., pp. 27 – 28,
[592] Ibid., p. 28.

422. Claimants asserted that Egypt could not excuse its unlawful actions by claiming that it could have acted legally by invoking its domestic land laws.[593] Egypt had cited no principle of international law that would retroactively excuse a state's unlawful conduct.[594] In the present case Egypt's claim was even less persuasive, as it was asking the Tribunal to excuse its misconduct because it overlooked its own laws. If Egypt had wanted to argue that Siag was not entitled to own the Property it had every opportunity to do so when the issue was being litigated in the Egyptian courts.[595] Moreover, Egypt could not use its domestic law to excuse its liability for a breach of international law.[596]

423. Lastly, it was submitted that, despite the new labels of "estoppel" and "opposability", Egypt was in fact asking the Tribunal to reconsider its ruling on effective nationality. That issue had already been determined by the Tribunal.[597] Further, Egypt's submissions that the Claimants lacked genuine links to Italy were incorrect, as the Tribunal had confirmed.[598] Claimants did not intentionally misrepresent themselves as being Egyptian; that was their honest belief.[599] Egypt could not claim estoppel based on ignorance of its own municipal law,[600] and in no meaningful sense did Egypt suffer detriment by reason of these proceedings.[601]

Egypt's Post-hearing Submissions

424. Egypt's post-hearing submissions re-iterated its earlier submissions. In particular Egypt emphasised that Mr Siag had relied on his Egyptian nationality to obtain Egyptian passports and to conclude, on preferential terms, contracts with Egyptian authorities. He was estopped from now denying his Egyptian nationality.[602] Even if Mr Siag believed himself to be Egyptian at the times when he held himself out to be so, such subjective good faith was irrelevant to estoppel. What was required was objective good faith – fairness in the situation.[603]

425. Egypt also emphasised its submission that, under the *Nottebohm* rule, Egypt need not recognise Mr Siag's claim. Mr Siag could not rely on his Italian nationality when

[593] Ibid., p. 29.
[594] Ibid., p. 30.
[595] Ibid., p. 32.
[596] Ibid., pp. 30 – 32.
[597] Ibid., p. 33.
[598] Ibid., pp. 33 – 34.
[599] Ibid., p. 34.
[600] Ibid.
[601] Ibid., p. 35.
[602] Egypt's post-hearing submissions, pp. 2 – 5.
[603] Ibid., p. 5.

he had no genuine link with Italy.[604] Nor could Claimants oppose their Italian nationality against Egypt, with which they did possess genuine links.[605] Egypt's invocation of the *Nottebohm* doctrine was not precluded by Article 25 of the ICSID Convention, because *Nottebohm* was a matter for consideration in the merits phase.[606]

426. Egypt argued that it had done nothing in violation of international law. Rather, Siag Touristic had missed many deadlines and was behind in completion of the first phase of construction.[607]

Discussion on Liability

Expropriation

427. That the Claimants' investment was expropriated does not appear to be contested. Egypt itself refers to the taking as "expropriation".[608] The Claimants submit that the expropriation was both direct and indirect. That submission has not been disputed by Egypt. Direct expropriation occurs when the title of the owner is affected by the measure in question.[609] In the present case Egypt, commencing with Resolution No. 83, formally transferred ownership of the land in Taba from Siag Touristic (and hence the Claimants) to the Government. Indirect expropriation occurs when a party's utilisation of its investment is removed without title being affected.[610] The Tribunal finds that Claimants' investment was directly expropriated by Egypt.

428. However, expropriation in and of itself is not an illegitimate act. It is well-accepted that a State has the right to expropriate foreign-owned property.[611] It is equally well accepted, however, that an expropriation is only lawful if certain conditions are met. Several of these requirements have become part of customary international law.[612] They are also included to varying degrees in most treaties, including the BIT governing this arbitration. Article 5(1) of the Italy-Egypt BIT states as follows:

"NATIONALIZATION OR EXPROPRIATION

[604] Ibid., pp. 6 – 7.
[605] Ibid., p. 7.
[606] Ibid., p. 6.
[607] Ibid., p. 21.
[608] Egypt's Counter Memorial on the Merits, p. 8; Egypt's Rejoinder, p. 44; Egypt's post-hearing submissions, p. 42.
[609] Dolzer & Schreuer, *supra*, note 166, p. 92.
[610] Ibid.
[611] Ibid., p. 89; *See also*, Shaw, International Law (5th ed., 2003), p. 738.
[612] Dolzer & Schreuer, *supra* note 166, p. 91.

> (ii) Investments of either Contracting State or any of its natural or juridical persons shall not be directly or indirectly nationalized, expropriated, or subjected to measures having effect equivalent to nationalization or expropriation, in the territory and maritime zones of [*sic*] either Contracting State, except for a public purpose in the national interest of that State, for adequate and fair compensation, according to legal procedures and on condition that such measures are taken on a non-discriminatory basis and in accordance with due process of law."

The plain effect of Article 5(1)(ii) of the BIT is that an expropriation is unlawful unless the qualifying conditions are satisfied. Dolzer & Schreuer state that the preconditions of a legal expropriation "must be fulfilled cumulatively."[613] Claimants submit in the particular case of the Italy-Egypt BIT that "The terms of Article 5(1)(ii) plainly require each of the listed requirements to be complied with in order for an expropriation to be deemed legal." [emphasis in original][614] The Tribunal shares that view; the clear wording of Article 5(1)(ii) is that all conditions must be met lest an expropriation be deemed unlawful. The Tribunal will now examine whether all the conditions have been satisfied.

i) Public Purpose in the National Interest of the State

429. Egypt has submitted that, as the Al Sharq Gas Company, which now has ownership of the land in Taba, had used the land to construct a major pipeline to transport gas to Jordan, "there can't be any question but that this is a public purpose, what the land is being used for."[615] Claimants submit that the pipeline could as easily have been built on nearby land already owned by Al Sharq, and that the pipeline used but a fraction of what was Claimants' land.[616]

430. In the Tribunal's view, the fact that the pipeline could have been built elsewhere does not of itself demonstrate that Claimants' land was not expropriated for a public use. There were conflicting views as to whether Al Sharq was a private or public company and no direct evidence was presented, which places the Tribunal in a position of some difficulty. The Tribunal accepts the assurance of Mr Newman, counsel for Egypt (in response to direct questioning) that Al Sharq is a publicly owned company.[617]

431. That assurance is not sufficient to satisfy the requirement of Article 5 of the BIT that the expropriation is "for a public purpose". The wording of Article 5 requires that the public purpose was the reason the investment was expropriated. The Tribunal does

[613] Ibid.
[614] Claimants' Memorial on the Merits, p. 76.
[615] T2: 84 – 85.
[616] Claimants' Reply, p. 22.
[617] T2: 85.

not consider such to be the case. The Claimants' investment was expropriated in 1996 by Ministerial Resolution No. 83. The reason for the expropriation was stated therein to be "the failure of the Touristic Investment and Hotel Management Company "Siag" to honor its commitments stipulated in the mentioned contract on time."[618] No mention was made of the land being needed for, or the intention to use it for, a public purpose. Ministerial Resolution No. 279 of 2001 similarly failed to note a public use motivation for cancelling the contract.[619] Nor was mention of a public use made by Egypt's lawyers in any of the numerous court appearances in respect of the taking of Claimants' land. It was not until Presidential Decree No. 205 was passed down in 2002 that Egypt stated that the land would be allocated for the public benefit.[620]

432. The Tribunal does not accept that because an investment was eventually put to public use, the expropriation of that investment must necessarily be said to have been "for" a public purpose. In the present case it is clear that the Claimants' land was not expropriated for particular assignation to Al Sharq, because the expropriation took place in 1996 and Al Sharq was not constituted until 2000.[621] That does not, of course, mean that the land could not in theory have been taken for another, or an as-yet-unnamed, public purpose. However, there is no evidence to support that proposition. Nor indeed is that thesis advanced by Egypt, which focussed on Al Sharq as evidencing public use. Claimants' land lay unused between 1996 and 2003. There were six years between expropriation and the first indication that a public use was intended. The Tribunal finds on the evidence that in the present circumstances, Claimants' land was not expropriated "for a public purpose."

433. Egypt has therefore failed to satisfy the "public purpose" limb of Article 5 of the BIT. As the conditions of expropriation set out in Article 5 are cumulative, failure on one is failure overall. For the sake of completeness the Tribunal will nevertheless examine the remaining conditions of Article 5.

ii) Adequate and Fair Compensation

434. Claimants submitted,[622] and Egypt did not contest, that no compensation has been paid to Claimants to date. However, Egypt noted that the Explanatory Memorandum to Prime Ministerial Decree No. 799 explicitly stated that adequate compensation would be paid to Claimants. Egypt at the hearing further noted that the issue of

[618] Claimants' Exhibit 39.
[619] Claimants' Exhibit 51.
[620] Claimants' Exhibit 57.
[621] Egypt's Rejoinder p. 54.
[622] Claimants' Memorial on the Merits, pp. 83 – 85.

compensation was currently before the Egyptian courts and would be resolved.[623] Claimants have not denied that the matter is before the Egyptian courts, but of course they are not pursuing the matter in that forum. They have elected to pursue their Treaty claim as they are entitled to do under the BIT. It must also be noted that Claimants' investment was expropriated in 1996, some 12 years ago. Dolzer and Schreuer state that under customary international law and "most treaties", compensation must not only be adequate, it must also be promptly paid.[624] Although the Italy – Egypt BIT does not expressly employ the word "prompt" (simply stating that compensation paid must be "adequate and fair"), the Tribunal considers that the absence of that word ought not to be seen to permit Egypt to refrain from paying compensation indefinitely.

435. Even the most charitable of impartial observers would not, in the Tribunal's view, contend that a 12-year delay (at the least) was "prompt." The Tribunal finds on all the evidence that Egypt has not paid "adequate and fair" compensation to the Claimants.

iii) According to Legal Procedures

436. In a technical sense it could perhaps be said that Resolution 83 effecting the 1996 expropriation was a "legal procedure", but Resolution No. 83 was subsequently enjoined by both the Cairo and Supreme Administrative Courts,[625] and was cancelled by the Supreme Administrative Court in 2001.[626] Despite the enjoining and subsequent cancellation of Resolution 83 the Property was not returned to Claimants, save for one 36-hour period. The Tribunal finds that the effective expropriation of 1996 (in the sense that the Claimants have not since possessed the land at Taba) was not carried out according to legal procedures.

437. One could possibly argue that Prime Ministerial Resolution No. 799, not having been cancelled, was a legitimate legal procedure, but in context that argument fails to appeal since the many resolutions and decrees overturned prior to Resolution No. 799, without return to the Claimants of their investment, provides convincing evidence that Egypt has not followed proper legal procedures in expropriating Claimants' investment.

[623] T2: 84.
[624] Dolzer & Schreuer, *supra* n 166, p. 91.
[625] Claimants' Exhibits 45 and 49.
[626] Claimants' Exhibit 50.

iv) A Non-discriminatory Basis

438. Egypt has submitted that there is no evidence that the expropriation was discriminatory.[627] Claimants respond that other foreign-owned hotels in the Taba area such as the Hilton, Sofitel, Marriott, and Hyatt, have not been expropriated.[628]

439. There is a scarcity of evidence on both sides of this issue. The Tribunal notes that Ministerial Resolution No. 279[629] purported to cancel the contracts entered into with both Siag Touristic (dated 2 January 1989) and the "Nile Valley Hotel Company" (dated 4 January 1989). However, very little if any evidence was offered in elucidation of Nile Valley's circumstances. The Tribunal is not aware, for instance, whether the Nile Valley Hotel Company was a foreign or local investment. Of course, even assuming that the Nile Valley was foreign owned, the expropriation of two foreign-owned investments may constitute discrimination as much as the expropriation of a single investment. It depends on the specific circumstances, of which there is little in the way of evidence. As to discriminatory intent, the Tribunal first notes that there is some difference of opinion as to whether such intent is necessary to show discrimination, or whether a discriminatory effect will suffice.[630] In any event it is clear that a discriminatory effect must be shown, and the Tribunal does not consider that it has sufficient evidence before it to determine that issue.

v) Due Process of Law

440. The Tribunal accepts Claimants' submission, citing *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*,[631] that due process may be denied both substantively and procedurally. Egypt has not submitted to the contrary.

441. In terms of substantive abuse, Claimants submit that Resolution No. 83 expropriated Claimants' investment on the stated grounds that Siag Touristic had failed to meet its contractual obligations. That view is supported by the wording of Resolution No. 83, which refers to a failure by Siag Touristic to honour commitments "on time," and by Egypt's submission that the land was retaken "for lack of performance in 1996."[632] Claimants' alleged failure to meet their contractual commitments, namely falling behind the agreed schedule for completion of the project, was the explanation for the

[627] T2: 84.
[628] Claimants' Memorial on the Merits, p. 125.
[629] Claimants' Exhibit 51.
[630] Dolzer & Schreuer, *supra* note 166, p. 177.
[631] ICSID Case ARB/97/3, Award of 21 November 2000.
[632] Egypt's Rejoinder, p. 54.

taking of the land argued most vigorously by Egypt in this arbitration. In discussing the way in which he land was taken Egypt submitted that "the rate at which the project was being implemented was so slow that it could not possibly have been completed by the end of 1996."[633] Claimants for their part submit that the project was on track and would have been completed on time.[634] The Tribunal accepts that there were delays to the Project, but it does not accept that those delays provided a valid reason to cancel the contract and expropriate the Claimants' investment. It is not in dispute that Siag Touristic had until the end of 2006 to complete "Phase One" of the project. Resolution No. 83 was passed on 23 May 2006, some seven months before deadline. The Tribunal does not consider that the Claimants were afforded due process by Egypt's early cancellation. It is important to note that the Supreme Administrative Court of Egypt held the same view. It ruled that the decision to issue Resolution No. 83 before the specified date was "without any legal basis, in all respects."[635] The Tribunal finds that Claimants accordingly suffered a denial of substantive due process.

442. In respect of procedural abuse, Claimants base their submissions on the fact that Resolution No. 83 was passed without prior notice to Claimants.[636] Egypt has not contested this submission. The Tribunal accepts Claimants' submission and finds that, as occupiers of the land the subject of Resolution No. 83 and as Italian investors protected by the BIT they ought to have received notice that the TDA was considering expropriating the investment. Claimants received no such notice and were not afforded the opportunity, until after the fact, to be heard on the matter. The Tribunal finds that the failure by Egypt to provide such notice constitutes a denial of due process in terms of Article 5 of the BIT.

443. In summary, the Tribunal finds that the evidence is overwhelming that Egypt has failed to meet the five cumulative conditions required for lawful expropriation set down by Article 5(1)(ii) of the BIT. Egypt's expropriation of Claimants' investment is held to have been in contravention of Article 5(1)(ii).

[633] T2: 81.
[634] T2: 13 – 19.
[635] Judgment of 7 August 2001 (Claimants' Exhibit 50).
[636] Claimants' Memorial on the Merits, pp. 25 – 26, 83.

444. The Tribunal further accepts Claimants' submission[637] that, as the Tribunal has found that a breach of Article 5(1)(ii) has taken place, it need not examine the auxiliary claim that Egypt also breached the terms of Article 5(1)(i) of the BIT.

Failure to Provide Full Protection

445. Article 4(1) of the BIT provides that: "Investments by nationals or companies of either Contracting Party shall enjoy full protection in the territory of the other Contracting Party."

446. Claimants have provided detailed submissions and evidence that, upon learning that Resolution No. 83 was about to be implemented and Claimants' investment seized, both Mr Siag and Dr Abou Zeid Fahmy made explicit requests of the Nuweibaa Police that Claimants' investment be protected. By way of example, Mr Siag gave evidence that: "Dr Abou Zeid and I specifically requested the protection of the police to safeguard my rights and to keep the Property and the Project in Siag's possession."[638] Dr Abou Zeid stated that "I specifically demanded the protection of the police and of the General Prosecutor in order to safeguard Siag's rights…."[639] The requests for protection of Mr Siag and Dr Abou Zeid are recorded in verbatim transcripts made by the Nuweibaa Police and the El Tor district attorney's office on June 3 – 4 1996. Egypt has not denied that the asserted requests for protection were made. Indeed Egypt, as Claimants noted, has not addressed Claimants' evidence in this regard at all. Absent any evidence to the contrary the Tribunal accepts without reservation Claimants' evidence and finds that these requests for protection occurred.

447. The standard of protection expected of a host state is not absolute. It has been stated that a host state must exercise "due diligence" in preventing harm to an investment.[640] In the present case Claimants investment was expropriated by force and in opposition to explicit pleas for protection. The Egyptian courts on several subsequent occasions cancelled the Resolutions or decrees that purported to give legitimacy to the expropriation, yet Claimants' investment has not been returned to them in the 12 years following expropriation. The Tribunal notes in this respect the decision in the *Wena Hotels*[641] case, wherein the seized investments were returned

[637] Claimants' Memorial on the Merits, p. 86.
[638] Witness statement of Waguih Siag of 8 May 2006.
[639] Witness statement of Dr Mustafa Abou Zeid Fahmy of 2 May 2006.
[640] Dolzer & Schreuer, *supra* note 166, pp. 149 – 150.
[641] *Wena Hotels Ltd. v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Award of 8 December 2000.

to Claimants after a year, yet the Tribunal in that case ruled that the full protection clause of the relevant BIT had been breached.

448. The Tribunal is of the view that the conduct of Egypt fell well below the standard of protection that the Claimants could reasonably have expected, both in allowing the expropriation to occur and in subsequently failing to take steps to return the investment to Claimants following repeated rulings of Egypt's own courts that the expropriation was illegal. This is indeed the most egregious element in the whole affair. Accordingly the Tribunal finds that Egypt has contravened Article 4(1) of the Italy-Egypt BIT.

Fair and Equitable Treatment

449. This standard of protection is set out in Article 2(2) of the BIT, which reads: "Each Contracting State shall at all times ensure fair and equitable treatment to the investments of investors of the other Contracting State."

450. The fair and equitable treatment ("FET") standard is broad requirement, the application of which depends on the particular facts of each case. It is however widely recognised that the principle of good faith underlies fair and equitable treatment.[642] Numerous arbitral tribunals have held that, in international investment arbitration, the host State's duty to respect the investor's legitimate expectations arises from its more general duty to act in good faith towards foreigners.[643] The general, if not cardinal, principle of customary international law that States must act in good faith is thus a useful yardstick by which to measure the Fair and Equitable standard. While its precise ambit is not easily articulated, a number of categories of frequent application may be observed from past cases. These include such notions as transparency, protection of legitimate expectations, due process, freedom from discrimination and freedom from coercion and harassment.[644] Claimants submit that Egypt has violated each of the generally recognised "strands" of the fair and equitable treatment doctrine and the Tribunal upholds this contention.[645]

[642] *Siemens A.G. v. the Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007; *Tecnicas Medioambientales Tecmed S.A. v. the United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003; *Azurix Corp v. the Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006.
[643] Ibid.; *Metalclad Corporation v. the United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000.
[644] Dolzer & Schreuer, *supra* note 166, pp. 133 – 147.
[645] Claimants' Memorial on the Merits, p. 97.

i) Lack of Due Process/Denial of Justice

451. This is the application of the FET standard most forcefully pursued by Claimants as having been breached. While maintaining that Egypt had also breached the FET standard in several other ways, it is the contended lack of due process and ensuing denial of justice that is relied on most strongly by Claimants.[646]

452. The concepts of "due process" and "denial of justice" are closely linked. A failure to allow a party due process will often result in a denial of justice. The United States Model BIT of 2004 states that FET includes "the obligation not to deny justice…in accordance with the principles of due process…."[647] The Claimants have addressed the two concepts simultaneously in their submissions.[648]

453. The Tribunal has determined, in examining Egypt's expropriation of Claimants' investment, that the manner of Egypt's expropriation did not satisfy the requirement of due process. Claimants, in their post-hearing submissions, submit that Egypt's failure to respect the numerous rulings of its courts in favour of Claimants constituted an "extraordinary violation of the rule of law" and "a twelve-year denial of justice," which provided further evidence that the FET standard of the BIT had not been met.[649] In contrast, Egypt submitted that the fact it had made an offer of compensation to Siag Touristic was "clear evidence that Egypt respected the court judgments that recognised that Siag Touristic has certain rights in the project."[650]

454. The Tribunal agrees with the Claimants' characterisation of Egypt's conduct and rejects Egypt's submission, for two principal reasons. First, while it is not in dispute that Egypt offered the Claimants compensation for the loss of their investment, or at least that compensation was discussed by the parties, those discussions took place in November 2003,[651] some seven-and-a-half years after the issuance of Resolution 83 and the expropriation of Claimants' investment. There were many judicial rulings in Claimants' favour in the intervening period, commencing with the Cairo Administrative Court's enjoining of Resolution No. 83 on 21 July 1996.[652] Claimants' evidence, which is a matter of public record and which has not been contested, is that there were no fewer than eight rulings in Claimants' favour between the date that Resolution No. 83 was issued and the date that the parties met, at Egypt's invitation,

[646] *See* Claimants' post-hearing submissions, pp. 27 – 28.
[647] US Model BIT of 2004, Article 5(2)(a).
[648] Claimants' Memorial on the Merits, pp. 103 – 105.
[649] Claimants' post-hearing submissions, p. 28.
[650] Egypt's Rejoinder, p. 45.
[651] Ibid. p. 50.
[652] Claimants' Exhibit 45.

to discuss compensation.[653] The Tribunal does not see that the failure to comply with numerous judicial rulings can be ameliorated by the inconclusive discussion of compensation for expropriation some seven years after the expropriation took place. Secondly, the rulings of the Egyptian courts in Claimants' favour did not legitimise the seizure of Claimants' investment or the documents that purportedly authorised that seizure. Nor, plainly, did those rulings require compensation to be paid in return for the expropriation. To the contrary, the rulings flatly rejected Resolution No. 83 and its successors, and ordered that the contract be respected. Among the rulings in Claimants' favour was that of the South Sinai Civil Appeals Circuit Court ordering the return of the Property to Siag Touristic.[654] The Tribunal considers that Egypt's submission that it respected the rulings of its courts is wholly unsupported by the evidence.

455. The Tribunal accordingly finds that Egypt's actions failed to afford the Claimants due process of law. The Tribunal further considers that the failure to provide due process constituted an egregious denial of justice to Claimants, and a contravention of Article 2(2) of the BIT, in that Egypt failed to ensure the fair and equitable treatment of Claimants' investment.

456. Having determined that there has been a breach of Article 2(2) of the BIT on the grounds discussed above the Tribunal need not consider the further grounds submitted by Claimants.

Unreasonable or Discriminatory Measures

457. This standard of protection is also set out in Article 2(2) of the BIT, which provides that: "Each Contracting State shall ensure that the management, maintenance, use, enjoyment or disposal of investments in its territory and maritime zones of investors of the other Contracting State shall not be in any way subjected to, or impaired by, unreasonable or discriminatory measures." Claimants submit that this provision of Article 2(2) is disjunctive, in that measures that are unreasonable or discriminatory will found a claim that the Article has been contravened. That proposition has not been disputed by Egypt and is accepted by the Tribunal. It accords with the clear wording of Article 2(2).

458. It cannot be denied that the "management, maintenance, use, enjoyment or disposal" of Claimants' investment has been affected by Egypt's expropriation. Claimants no

[653] Claimants' post-hearing submissions, pp. 27 – 28.
[654] Claimants' Exhibit 64.

longer have possession of, or access to, the land upon which they were developing their project. That of course does not constitute a breach of Article 2(2) of the BIT unless it was precipitated by unreasonable or discriminatory measures.

459. Claimants submit that the measures taken by Egypt were both unreasonable and discriminatory. The Tribunal has already discussed Claimants' allegations of discrimination,[655] and determined that the evidence on record is insufficient to prove discrimination. However, the Tribunal upholds Claimants' submission that the measures employed by Egypt during this dispute were unreasonable. The Tribunal has no hesitation in finding that many of the measures taken by Egypt in the course of this dispute were unreasonable in the ordinary meaning of that term. By way of non-exhaustive example, Egypt expropriated Claimants' investment in May 1996 on the purported grounds that Siag Touristic had not met its construction deadlines when those deadlines had in fact not arrived; in June 1996 Egypt seized control of Claimants' investment on the back of Resolution No. 83 at a time when Claimants' application to enjoin Resolution No. 83 was pending; it re-took Claimants' investment in August 1996 despite the fact that Resolution No. 83 had been enjoined by the Cairo Administrative Court; and it failed to comply with the several judicial rulings invalidating Resolution No. 83 and its successor. Any one of those actions would constitute unreasonable behaviour; viewed *in toto* the matter is beyond question.

460. The Tribunal accordingly finds that Egypt has breached Article 2(2) of the Italy – Egypt BIT by subjecting or impairing Claimants' investment to unreasonable measures.

Most Favoured Nation Treatment

461. Most favoured nation treatment is accorded to Italian and Egyptian investors by operation of Article 3 of the BIT. In this case, Claimants invoke the provisions of Article 3 in order to import from the BIT concluded between Egypt and Greece a so-called "umbrella clause," i.e. an obligation on Egypt to "observe any other obligation it may have entered into, with regard to investments of the other Contracting Party."[656]

462. Claimants submit that the obligations breached by Egypt were: those imposed by municipal Egyptian law, namely Articles 34 and 36 of the Egyptian Constitution, Law

[655] *See* paras. 438 – 439 above.
[656] Claimants' Memorial on the Merits, pp. 127 – 128 (citing Article 2(5) of the Egypt – Greece BIT).

No. 10 of 1990 and Law No. 230 of 1989; the obligation to respect the rulings of the Egyptian judiciary; and the wrongful termination of the contract.[657]

463. The Tribunal considers that the obligations referred to by Claimants are adequately protected by the BIT. The municipal laws referenced prohibit nationalisation or expropriation other than on terms not dissimilar (although perhaps less strict) to Article 5(1)(ii) of the BIT. For instance Article 34 of the Egyptian Constitution prohibits expropriation "except for the general good and against a fair compensation as defined by law."[658] The obligation to respect the rulings of the Egyptian judiciary has been discussed and applied in relation to the Fair and Equitable Treatment and "unreasonable measures" standards protected by Article 2(2) of the BIT. Egypt's wrongful termination of the contract has been discussed and ruled upon in both the expropriation and Fair and Equitable Treatment contexts.

464. Given the Tribunal's rulings in Claimants' favour on both expropriation and fair and equitable treatment, the Tribunal considers that nothing would be added to Claimants' claim by the invocation of the most favoured nation doctrine and the "umbrella clause" of the Egypt – Greece BIT.

Summary of Findings on Liability

465. The Tribunal finds that the evidence clearly establishes that Egypt has unlawfully expropriated Claimants' investment, in breach of Article 5(1)(ii) of the BIT; that Egypt failed to provide full protection to Claimants' investment, in breach of Article 4(1) of the BIT; that Egypt failed to ensure the fair and equitable treatment of Claimants' investment, in breach of Article 2(2) of the BIT; and that Egypt allowed Claimants' investment to be subjected to unreasonable measures, in breach of Article 2(2) of the BIT.

466. Egypt is accordingly *prima facie* liable to the Claimants for each of Egypt's breaches of the BIT. The Tribunal now considers Egypt's defences to liability.

Defences to Liability

467. Egypt's proffered defences to Claimants' case were: first, that Egypt need not recognise Claimants' Italian nationalities because Claimants did not possess genuine links to Italy; secondly, that Claimants may not "oppose" their Italian nationalities to

[657] Ibid. p. 130.
[658] Cited in witness statement of Dr Abou Zeid Fahmy of 2 May 2006, p. 13; available at http://www.egypt.gov.eg/english/laws/Constitution/chp_two/part_two.asp

Egypt; thirdly, that Claimants are estopped from denying their Egyptian nationalities; and fourthly, that Claimants, as foreign nationals, were not permitted to own land in Taba. Each will now be examined.

Claimants Do Not Have Genuine Links to Italy

468. This argument was promulgated most vigorously by Professor Smit. He stated in his October 2007 opinion that the Tribunal, in its Decision on Jurisdiction, had improperly disregarded the *Nottebohm*[659] doctrine, the application of which entitled Egypt not to recognise Claimants' Italian nationalities due to the lack of connections Claimants had with Italy.[660] Professor Smit in effect stated that, had the Tribunal paid proper regard to *Nottebohm*, it would (or should) have ruled that it had no jurisdiction.[661] Professor Smit asserted that, as the Tribunal's Decision on Jurisdiction had been shown to be erroneous, the Tribunal could and should correct that decision, which, as an interlocutory ruling, could be revisited.[662] Reflecting the opinion of Professor Smit, Egypt submitted that it was not too late for the Tribunal to revisit its decision on jurisdiction, given the Tribunal's error in not dealing with "the clear import" of *Nottebohm*.[663]

469. It is clear from the above that Egypt was, at that fairly late stage of the proceedings, urging the Tribunal to revisit jurisdiction through what Egypt deemed a proper application of *Nottebohm*. It is unclear whether Egypt maintained that submission. Certainly Egypt remained true to its admonition that the Tribunal should revisit jurisdiction on the grounds that Mr Siag's Lebanese nationality was invalid. That issue has been ruled on. It is less clear whether Egypt continued to urge a revision of the jurisdiction decision under *Nottebohm* on lack of recognition grounds. In its post-hearing submissions Egypt stated categorically that *Nottebohm* "embodies substantial international law. It does not seek to affect the nationality of a party under national law. Rather, it stands for the proposition that the nationality under which a claimant brings his claim cannot be opposed to the state with which the claimant has real and genuine links."[664]

470. The Tribunal is not clear how, if *Nottebohm* does not affect a party's nationality under national law, it can be claimed that any application of *Nottebohm* would affect

[659] *Liechtenstein v Guatemala,* [1955] ICJ 4.
[660] Expert Opinion of Prof Smit of 11 October 2007, pp. 11, 24 – 25.
[661] Ibid., p. 21.
[662] Ibid., p. 32.
[663] Egypt's Counter-Memorial on the Merits, p. 48.
[664] Egypt's post-hearing submissions, p. 7.

jurisdiction and require the re-opening of the Tribunal's decision thereon. Plainly the *Nottebohm* doctrine, as relied upon by Egypt, does not relate to any of the other requirements of Article 25 of the ICSID Convention, such as consent in writing or consent by a constituent subdivision. If *Nottebohm* applied to jurisdiction in any sense the Tribunal considers that it would be in relation to Article 25(2). However, Egypt has strongly submitted that that is not the case and that *Nottebohm* is for the merits.

471. In the circumstances it would appear that Egypt's request that the Tribunal revisit its Decision on Jurisdiction on *Nottebohm* grounds may have been implicitly abandoned in favour of examination as part of the merits of the case. That view accords with Professor Smit's statement that "At this stage, it suffices if the Tribunal properly applies [*Nottebohm*] to the merits."[665] However, as Egypt has not explicitly withdrawn its request in respect of jurisdiction, the Tribunal will examine *Nottebohm* as it applies to both jurisdiction and to the merits.

472. Professor Smit stated that *Nottebohm* was authority for the proposition that "a state is free to disregard a nationality bestowed on a person on an internationally inadequate ground."[666] He further stated that Egypt need not recognise Claimants' Italian nationalities because the Claimants had insufficient links to Italy.[667]

473. The Tribunal will first examine Egypt's submissions in the jurisdictional context. The Tribunal found in its April 2007 Decision on Jurisdiction that there was no room in ICSID proceedings for a test of effective nationality in an assessment of jurisdiction, such being exclusively governed by provisions of Article 25 of the ICSID Convention.[668] The Tribunal further found that, in any event, the Claimants possessed genuine links to Italy.[669] Egypt now urges the reconsideration of those findings. In the Tribunal's view, the only valid reason to revisit its determination on jurisdiction would be if new evidence had been presented by Egypt that conclusively demonstrated a lack of connection between the Claimants and Italy, or presented a principled basis upon which to incorporate a test of effective nationality into an ICSID jurisdiction enquiry. The Tribunal does not consider that such has been adduced by Egypt. In the Tribunal's view, Egypt is asking the Tribunal to alter its finding on jurisdiction on substantially the same evidence as was earlier rejected. The Tribunal refuses to uphold that request. The Tribunal finds that it did not err in ruling that there

[665] Expert Opinion of Prof Smit of11 February 2008, p. 15.
[666] Expert Opinion of Prof Smit of 11 October 2007, p. 11.
[667] Ibid., pp. 24 – 25.
[668] Decision on Jurisdiction, pp. 55 – 56.
[669] Ibid., p. 57.

was no room for a test of effective nationality in terms of ICSID jurisdiction, or in ruling that Claimants possessed genuine links to Italy. The Tribunal affirms its determination of 11 April 2007. Egypt's claim to the contrary is rejected.

474. The disposition of this matter in the merits context is subject to considerations similar to those relevant in the jurisdictional context. Although presented in the merits phase of the arbitration, Egypt's claim remains premised upon an alleged lack of genuine link between the Claimants and Italy. The question asked of the Tribunal is the same as was asked in the jurisdictional phase. It would be wrong in the Tribunal's view to find that the answer to a question posed in the jurisdictional phase did not apply to the very same question simply because the question was now being asked in the merits phase. The opinion of Professor Reisman, that "[i]n substance, the Tribunal has already ruled on this precise objection"[670] is shared by the Tribunal. Indeed Professor Shearer, an international law expert called by Egypt, appears to take a similar view. He stated that the "genuine link" approach to *Nottebohm* had led to a "close scrutiny of the claimants' links with Italy" and that "attention should turn now to the links of the applicants with Egypt, and away from challenging their Italian nationality."[671] The Tribunal confirms its finding that the Claimants possess genuine links to Italy. Accordingly the Tribunal does not consider that Egypt can refuse to recognise Claimants' Italian nationality on the basis of the asserted lack of genuine link to Italy. This defence, as it applies to the merits, is rejected.

Claimants May Not Oppose Their Italian Nationality to Egypt

475. This ground of defence was put forward principally by Professor Shearer. Unlike those of Egypt's claims that were expressed as being based on a lack of genuine link between the Claimants and Italy, the "opposability" claim was stated from the outset to be applicable to the merits phase. Professor Shearer stated that opposability and admissibility, upon which his argument was predicated, were "unaffected by the Tribunal's Decision on Jurisdiction."[672] Professor Reisman accepted that the ruling of the ICJ in *Nottebohm* was, strictly speaking, one of admissibility rather than jurisdiction.[673]

476. Although it is also based on *Nottebohm*, Professor Shearer's argument is said by Egypt to be distinct from the argument that Egypt need not recognise Claimants'

[670] Expert Opinion of Prof Reisman of 18 December 2007, p. 27.
[671] Expert Opinion of Prof Shearer of 15 June 2007, p. 2.
[672] Ibid., p. 1.
[673] Expert Opinion of Prof Reisman of 18 December 2007, p. 27.

Italian nationality because Claimants lacked a genuine link to Italy. In contrast to the latter argument, Professor Shearer stated that his method of applying *Nottebohm* did not rely on proving a lack of genuine link between the Claimants and Italy. Indeed Professor Shearer described the view that *Nottebohm* laid down a requirement of effective nationality as "superficial".[674] Instead Professor Shearer opined that "attention should now turn to the reality of the links of the applicants with Egypt and away from challenging their Italian nationality."[675]

477. The thrust of Professor Shearer's argument was that *Nottebohm* did not so much state that Mr Nottebohm's Liechtenstein nationality was ineffective, but that Mr Nottebohm could not "oppose" his Liechtenstein nationality to Guatemala, with which he had particularly strong ties. Put another way, Guatemala, but only Guatemala, was entitled not to recognise Mr Nottebohm's Liechtenstein nationality. Professor Shearer submitted that the same should apply in this case: Claimants' Italian nationality ought not to be attacked, but Claimants' strong ties to Egypt should entitle Egypt, and Egypt alone, not to recognise Claimants' Italian nationalities, valid though they may be.

478. Professor Reisman submitted that, despite the re-characterisation of the *Nottebohm* doctrine as one of opposability, "the substance of the genuine link doctrine remains the same."[676] The Tribunal shares that view. Professor Shearer's proposition, while purporting to eschew the "genuine link" requirement, would nevertheless require the Tribunal to make a value judgment as to Claimants' Italian nationality. Professor Shearer's view could not be sustained solely by looking to Claimants' ties to Egypt; those ties must be compared to something, which in this case would be Claimants' ties to Italy. The Tribunal considers that that was the case in *Nottebohm*; it was not simply Mr Nottebohm's strong ties to Guatemala that "cost him", it was the "extremely tenuous"[677] ties he had with Liechtenstein. In the present case, while Claimants' ties to Egypt are not in dispute, the Tribunal has determined, and affirmed, that Claimants also have legitimate ties to Italy. Professor Shearer does not seek to challenge that finding.

479. In contrast, Mr Nottebohm had no ties to Liechtenstein save a resident brother whom he occasionally visited. Mr Nottebohm acquired the nationality of Liechtenstein purely to avoid the repercussions of being German in an Allied nation during the Second

[674] Expert Opinion of Prof Shearer of 15 June 2007, p. 2.
[675] Ibid.
[676] Expert Opinion of Prof Reisman of 18 December 2007, p. 28.
[677] *Nottebohm, supra* note 659, p. 25.

World War and "with the sole aim of thus coming within the protection of Liechtenstein."[678] The same cannot be said of the Claimants in this case. Both have familial ties to Italy, not only of domicile but of blood, and both acquired Italian nationality well before these proceedings were initiated. As the Tribunal found in its Decision on Jurisdiction, the Claimants, unlike Mr Nottebohm with Liechtenstein nationality, did not acquire Italian nationality as a mere expedient.[679]

480. The Tribunal therefore finds that the *Nottebohm* case can be distinguished on its facts from this case. Mr Siag was married to an Italian citizen and the genuine nature of this union was implicitly recognised by way of the decree granting Mr Siag Italian nationality, issued by the Italian Minister of Interior on 3 May 1993. Mr Siag's mother, Mrs Vecchi, was born of Italian parents and thus acquired Italian nationality at birth. She subsequently lost that nationality (according to Egypt's law on nationality) after acquiring her husband's Egyptian citizenship. After the death of her husband, Mrs Vecchi reacquired her Italian nationality in 1993 by making the requisite declaration under article 17 of the Italian Nationality Law No. 91 of 1992. The evidence therefore shows that both Mr Siag's maternal grandparents were Italian, that his mother was Italian, that he was married to an Italian citizen and that he subsequently acquired Italian citizenship himself. The Tribunal therefore reiterates its finding in its Decision on Jurisdiction that Italian nationality was acquired for recognised reasons and holds that the Claimants' links with Italy are genuine and sufficiently strong to allow Claimants to oppose their Italian nationality to Egypt in this dispute. The Tribunal finds that the Claimants' claims are admissible in these proceedings.

Estoppel

481. Egypt submitted that both Claimants were estopped from denying their Egyptian nationalities because both had relied on, and indeed had confirmed, such nationality on numerous occasions in the past in order to acquire and use Egyptian passports, and to conclude business deals.[680] Claimants did not contest Egypt's submission that they had asserted Egyptian nationality to obtain Egyptian passports, nor that they had presented Siag Touristic as an Egyptian company. Claimants denied that their behaviour provided grounds for estoppel.

[678] Ibid., p. 26.
[679] Decision on Jurisdiction, p. 57.
[680] Egypt's Counter-Memorial on the Merits, pp. 50 – 51. As noted above, this argument was mounted in the jurisdictional phase, where the Tribunal decided (at p. 60 of the Decision) that it was more properly a matter for the merits.

482. There is a difference between the parties as to what must be proved in order to make out an estoppel defence, principally as to whether bad faith is required to be shown on the part of the party making the representation, in this case the Claimants. Claimants cited Sir Hersch Lauterpacht, who described estoppel as the situation: "Where one by his word or conduct wilfully causes another to believe in the existence of a certain state of things…."[681] Egypt on the other hand asserted that "it is not necessary for Claimants to have wilfully misrepresented their status as Egyptian nationals for purposes of estoppel."[682]

483. The Tribunal prefers Claimants' submissions in this regard. As a creation of equity, estoppel is grounded in the notion that a person ought not to benefit from his or her wrongs. Brownlie, in his text *Principles of Public International Law*[683] notes that "[a] considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency." Sir Hersch Lauterpacht, in addition to the statement cited above, offered the view that "[a] State cannot be allowed to avail itself of the advantages of the treaty when it suits it to do so and repudiate it when its performance becomes onerous. It is of little consequence whether that rule is based on what in English law is known as the principle of estoppels or the more generally conceived requirement of good faith. The former is probably not more than one of the aspects of the latter."[684] The Tribunal does not consider that Mr Siag or Mrs Vecchi acted other than in good faith in asserting their Egyptian nationality. When cross-examined Mr Siag was candid about the fact that he presented himself as Egyptian when developing the Taba project.[685] The Tribunal finds as a fact that the Claimants genuinely believed they were Egyptian nationals at the times when they represented themselves as such. As a matter of Egyptian law Claimants had in fact lost Egyptian nationality, but they were not aware of that fact until much later. The Tribunal accepts the submission of Professor Reisman that Claimants'[686] conduct by way of acquiring Egyptian passports, doing business in Egypt, and creating companies was "fully consistent with a good faith belief that he retained his Egyptian nationality." It was not done with the intention of misleading Egypt. Indeed, as Professor Reisman submitted, Egypt, as the state by whose law the Claimants lost Egyptian nationality, knew or ought to have known that Claimants

[681] Claimants' Reply, p 46; Expert Opinion of Prof Reisman of 18 December 2007, p. 31.
[682] Egypt's Rejoinder, p. 16.
[683] Brownlie, *Principles of Public International Law* (6th ed., 2003), p. 616.
[684] *Report on the Law of Treaties*, UN Document A/CN.4/63, 24 March 1953, p.157.
[685] T3: 42.
[686] Professor Reisman refers only to Mr Siag; however, the Tribunal considers that the proposition applies equally to Mrs Vecchi.

had lost Egyptian nationality.[687] The Tribunal finds that the Claimants acted in good faith in obtaining their Egyptian passports and in their subsequent business and other dealings with Egypt. As to the latter, Claimants did not know at that point, nor as lay persons could they reasonably be expected to have known, that in law they had lost their Egyptian nationality. Thus the Claimants are not estopped from now denying their Egyptian nationality.

Claimants Illegally Owned Land in Taba

484. Egypt submitted that, once the Claimants had lost Egyptian nationality and Mr Siag had increased his holding in Siag Touristic, Siag Touristic (and therefore the Claimants) was no longer allowed to own land in Taba. Egypt argued that Claimants may not recover for the loss of an investment they were legally prohibited from making.[688] Claimants replied that it was an undisputed principle of international law that a state may not invoke its municipal law to avoid its international obligations.[689] Egypt does not appear to have challenged Claimants' submission in this regard. It stated that: "Egypt is not saying that Egyptian law should be applied to alter the bases for relief afforded under the BIT or international law. What it is saying is that the BIT and international law do not banish principles of Egyptian law to the realm of irrelevance when they are in fact crucially relevant – as they already are when a determination must be made as to whether, as a foreign investor, Siag did in fact have ownership in a company that had a lawful right to the property in question."[690]

485. The Tribunal prefers the Claimants' arguments on this point. As Brownlie states, "[t]he law in this respect is well settled. A state cannot plead provisions of its own law...in answer to a claim against it for an alleged breach of its obligations under international law."[691] Egypt's obligations to the Claimants under international law and pursuant to the BIT cannot be avoided by recourse to Egypt's domestic law.

486. The Tribunal also finds that the fact that the laws in question were in place before the expropriation has no effect on the fact that there was an illegal expropriation. That fact does not negate or ameliorate the expropriation, and it does not make the expropriation lawful. The Tribunal is in no doubt that an illegal expropriation occurred, and it accepts Claimants' submissions that Egypt may not invoke its municipal law to avoid liability for the unlawful expropriation.

[687] Expert Opinion of Prof Reisman of 18 December 2008, p. 34.
[688] Egypt's post-hearing submissions, p. 22.
[689] Expert Opinion of Prof Reisman of 18 December 2007, p. 39.
[690] Egypt's Rejoinder, p. 25.
[691] Brownlie, *supra* note 683, p. 34.

Summary of Tribunal's Findings on Egypt's Defences

487. The Tribunal dismisses each of Egypt's defences to liability. The Tribunal finds that Claimants have genuine links to Italy and Egypt must accordingly recognise Claimants' Italian nationality; that Claimants are entitled to oppose their Italian nationalities to Egypt; that Claimants are not estopped from denying Egyptian nationality; and that, an illegal expropriation was carried out by Egypt, which may not be remedied by reference to Egyptian municipal law.

488. Having dismissed Egypt's defences, the Tribunal finds that Egypt is liable to Claimants for unlawfully expropriating Claimants' investment, in breach of Article 5(1)(ii) of the BIT; and for failing to provide full protection to Claimants' investment, in breach of Article 4(1) of the BIT; and for failing to ensure the fair and equitable treatment of Claimants' investment, in breach of Article 2(2) of the BIT; and for allowing Claimants' investment to be subjected to unreasonable measures, in breach of Article 2(2) of the BIT.

VII. EGYPT'S CHALLENGE TO MRS VECCHI'S CLAIM

The Parties' Early Submissions Regarding Mrs Vecchi's Claim

489. Egypt's challenge to Mrs Vecchi's claim was foreshadowed by Professor Smit's opinion of 23 November 2007, which was filed as part of Egypt's reply on bankruptcy. Professor Smit stated that the Tribunal had to determine, by reference to Egyptian law, who, if anyone, had succeeded to Mrs Vecchi's claims. If Mrs Vecchi's heirs were Egyptian they could not claim under the BIT or ICSID requirements.[692]

490. Claimants submitted in reply that the statements made by Professor Smit were unsubstantiated and incorrect. In Claimants' submission the only dates relevant to a jurisdictional inquiry into a party's nationality were the dates of consent and registration.[693] Events that took place after those dates, including Mrs Vecchi's death, did not affect jurisdiction.[694] Even if that were not the case, the nationality of Mrs Vecchi's heirs was irrelevant.[695]

[692] Expert Opinion of Prof Smit of 23 November 2007, pp. 6 – 7.
[693] Claimants' Reply, p. 50.
[694] Ibid., pp. 51, 53.
[695] Ibid., p. 50.

Egypt's Application for Discontinuance of Mrs Vecchi's Claim (in its Rejoinder on the Merits)

491. Egypt submitted in its Rejoinder on the merits dated 12 February 2008 that, unless and until a properly authenticated mandate was received permitting Claimants' lawyers to represent the interests of the late Mrs Vecchi, her claim should not be the subject of any further proceedings. Egypt requested that the Tribunal order the discontinuance of Mrs Vecchi's claim pursuant to ICSID Rule 44.[696] Professor Smit submitted, citing *Loewen v United States*[697] as authority, that international law imposed a requirement of continuous nationality on a claimant, and thus a claim by Mrs Vecchi's Egyptian heirs could not be adjudicated by the Tribunal.[698]

Procedural Order No. 6

492. This Order, of 15 February 2008, has been discussed above in respect of Egypt's "bankruptcy" and "Lebanese nationality" objections to jurisdiction. It also addressed Egypt's request that Mrs Vecchi's claim be discontinued. In that respect the Order stated the following:

> 5.4 The Tribunal also sees the need for clarification of the position with respect to Mrs Vecchi's Estate before it can rule on the Application for Discontinuance.
>
> 5.5 The Tribunal is of the view that oral argument on the Respondent's three applications should be heard at the start of the period set down for the merits hearing in March. The Tribunal will then decide whether to proceed with the merits hearing or to suspend the proceeding. The parties must come to the hearing on the basis that they must proceed to present their cases on the merits if ordered to do so.

Further Submissions of the Parties, and the Decision of the Tribunal on Egypt's Request for the Discontinuance of Mrs Vecchi's Claim

493. Claimants opposed Egypt's request for the discontinuance of Mrs Vecchi's claim on 29 February 2008, asking that the Tribunal retain jurisdiction over her claim, the proceeds of which would be divisible among her heirs. Claimants took particular exception to the claim by Professor Smit that Mrs Vecchi's heirs were excluded from recovery by the doctrine of continuous nationality as espoused in *Loewen*, which Claimants submitted was a much-criticised and, at best, controversial authority.[699]

[696] Egypt's Rejoinder on the Merits, pp. 14 – 15.
[697] *Loewen Group Inc and Raymond L Loewen v United Statesof America,* ICSID Case ARB(AF)/98/3.
[698] Expert Opinion of Prof Smit of 11 February 2008, p. 8.
[699] Claimants' submissions of 29 February 2008, pp. 4 – 7.

494. On 4 March 2008, Egypt reiterated its request that Mrs Vecchi's claim be discontinued, submitting that it was not appropriate for the Tribunal to continue to hear her claim at the present time.

495. On the first day of the hearing, 10 March 2008, the Tribunal directed that, as the Claimants had opposed Egypt's request for discontinuance, the application would be refused, in compliance with the strict terms of ICSID Rule 44.

496. On 11 March 2007, Procedural Order No. 7 was issued, confirming that the application to discontinue Mrs Vecchi's claim had been dismissed, with costs reserved. The Tribunal stated in Procedural Order No. 7 that its provisional view was, subject to the provision of further evidence as to the precise identity of Mrs Vecchi's heirs and their legal position under French Law (Mrs Vecchi was residing in France at the time of her death), that there was no valid jurisdictional objection to her claim.

497. The Tribunal stated that it would give reasons for its dismissal of this application in the final Award. The Tribunal's primary reason is the mandatory language of ICSID Rule 44. However, in any event the Tribunal does not accept that the doctrine of continuous nationality is applicable or appropriate to this case. As Claimants have submitted, the doctrine as espoused in *Loewen* has been highly controversial. *Loewen* turned on the question of jurisdiction arising from (a) the NAFTA requirement of diversity of nationality as between a claimant and a government respondent and (b) the assignment by the Loewen Group of its NAFTA claims to a Canadian corporation owned and controlled by a United States Corporation. In its examination of this question, the Tribunal asserted that "in international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem.*"[700] The Tribunal therefore considered that continuous nationality was a rule of customary international law and dismissed the Claimant's argument that it had the requisite nationality at the time the claim arose and that it was of no consequence that the ultimate beneficiary of the claim was an American citizen.

498. The *Loewen* decision has been the subject of intense scrutiny and criticism by international law scholars and investment arbitration practitioners. In particular, criticism has been levelled at the *Loewen* Tribunal's cursory treatment of customary international law on a subject where prior influential decisions have held that "it may

[700] ICSID Case No. ARB(AF)/98/3, para. 225.

well be doubted that the alleged rule [of continuous nationality] has received such universal recognition as to justify the broad suggestion that it is an established rule of international law."[701] Commentators have also stigmatised the Tribunal's application of a rule developed in one particular context (diplomatic protection) to another area (investment treaty claims). It is indeed telling that the *Loewen* Tribunal did not cite a single authority in support of any of its propositions with regard to continuous nationality. Finally, academics and practitioners have questioned the relevance of the *Loewen* Tribunal's conclusions in light of the International Law Commission's (ILC) subsequent explicit admission that it "was not prepared to follow the *Loewen* Tribunal in adopting a blanket rule that nationality must be maintained to the date of resolution of the claim" and its preference for the "the date of official presentation of the claim as the *dies ad quem.*"[702]

499. The Tribunal will not repeat the authorities cited by the Claimants, which further support the critiques mentioned above, but will add its view that the ICSID Convention does not require a party to hold constant nationality until the date an award is rendered. The only dates of relevance to Article 25 of the ICSID Convention are those of consent and registration. In addition, Dolzer and Schreuer note that, in its 2006 Draft Articles on Diplomatic Protection, the International Law Commission considered that the doctrine of continuous nationality was inappropriate in the case of an individual claim.[703] The Tribunal shares that view.

500. As noted, Procedural Order No. 7 made reference to the provision of further evidence from Claimants as to the precise identity of Mrs Vecchi's heirs and their legal position under French Law. Procedural Order No. 8 directed that such further information be provided by Claimants by 7 April 2008. On 7 April 2008, pursuant to Procedural Order No. 8, Claimants supplied an updated and notarised Power of Attorney executed by Mrs Vecchi's heirs supplying authority to Mrs Vecchi's lawyers, King & Spalding LLP, to continue to prosecute the claim. In the view of the Tribunal, this supplies the necessary authority or mandate permitting the Claimants' lawyers to represent Mrs Vecchi.

[701] *United States v Germany*, 31 October 1924, VII Reports of International Arbitral Awards 119, at 140 (Edwin B. Parker, Umpire).
[702] ILC Draft Articles on Diplomatic Protection with Commentaries (2006), pp. 37-38.
[703] Dolzer & Schreuer, *supra* note 166, p. 47.

The Parties' Post-hearing Submissions in Respect of Mrs Vecchi's Claim

501. Claimants submitted that they had provided all required proof as to the identity of Mrs Vecchi's heirs and as to the continuing authority of Mrs Vecchi's former lawyers to pursue her claim.[704] Nothing further was relevant to the Tribunal's jurisdiction over Mrs Vecchi's claim.[705]

502. Egypt submitted that no attempt had been made to substitute Mrs Vecchi's heirs as parties to her claim.[706] Further, as all Mrs Vecchi's heirs, with the possible exception of Waguih Siag, were Egyptian, they were each prevented by the doctrine of continuous nationality from taking up her claim.[707]

Findings of the Tribunal in Respect of Mrs Vecchi's Claim

503. The Tribunal has no hesitation in finding that Mrs Vecchi's claim under the BIT survived her death, with the result that any sums payable to her are now payable to her estate. The ultimate destination of those funds would be irrelevant if Mrs Vecchi were still alive and it is similarly irrelevant now that she has passed away. The doctrine of continuous nationality does not apply in this case. No doubt the estate will distribute the funds as it sees fit and in accordance with any applicable domestic laws.

VIII. DAMAGES

Introduction

504. The Claimants advanced their claim for damages under four heads, as follows:

- The main claim for the loss of the Property and the Project following the expropriation in May 1996, in a sum just under USD 200 million;
- A claim for discrete damages of more than USD 30 million, the bulk of which comprise construction costs and financing costs, but which also includes costs expended in domestic legal proceedings consequent upon the expropriation;
- A claim for compound interest at an unspecified rate; and

[704] Claimants' post-hearing submissions, pp. 19 – 20.
[705] Ibid., p. 21.
[706] Egypt's post-hearing submissions, p. 16.
[707] Ibid., p. 17.

- A claim for all the costs and expenses, including attorney's fees, associated with these proceedings.

505. The Claimants have not sought an award of punitive damages but have submitted that Egypt's conduct in this case entitles the Claimants to "enhanced damages."[708] Whilst disowning any claim for a separate lump sum award of punitive damages, the Claimants urged the Tribunal to "indulge all reasonable inferences in favour of the Claimants" and, in taking that approach, to impose a measure of damages which provides "full reparation" for the Claimants.[709]

The Investment

506. The loss suffered by the Claimants relates to their investment in Siag Touristic. It is necessary to begin therefore by considering precisely what it was that Siag Touristic had bought or acquired and what it was that was wrongfully expropriated, either directly or indirectly.

507. The key document is the agreement dated 4 January 1989 between Egypt's Ministry of Tourism and Siag Touristic (the "Sale Contract"). There is a difference between the parties in terms of the true legal effect of the Sale Contract. The Claimants contended that pursuant to the Sale Contract, Siag Touristic became owner of the Property. Egypt contended that the rights obtained pursuant to the Sale Contract fell short of ownership of the land in question. According to Egypt, the rights conferred under the Sale Contract were merely for Siag Touristic to take possession of the land and develop it, and only later to register itself as owner of the land provided that all obligations under the Sale Contract had been properly satisfied.[710]

508. The Tribunal has carefully reviewed the Sale Contract in light of these opposing submissions. The document is headed "Sale Contract of Land in a Touristic Area" and expresses itself in the language of sale in several important early articles.[711] The Sale Contract provided for payment of the contract price in several instalments, the last of which would become payable only 9 years after the date of the agreement, but there is nothing particularly unusual in that. Certainly it cannot be argued that payment by instalments following possession is inconsistent with ownership. In view of the financing arrangements which Siag Touristic was able to obtain in respect of

[708] Claimants' post-hearing submissions, p. 36.
[709] Ibid., p. 39.
[710] Egypt's post-hearing submissions, para. 55.
[711] Article 2 ("*The first party sold to the second party* … "); Article 3 ("*This sale is executed for a total price* … "); and Article 5 ("… *transfer of ownership of this sold piece of land* … ").

the project, the Tribunal finds it very likely that payment of the purchase price instalments would not have been a significant hurdle for the company. Indeed, those payments would have been trivial compared to the other sums which were required to be expended to complete the Project.

509. The Tribunal does not consider that the position is altered by the provisions in the Sale Contract to the effect that registration of Siag Touristic's ownership of the land would not occur until after the Project had been implemented. Having interfered with and absolutely prevented the due completion of that implementation by Siag Touristic, it is not competent for Egypt now to contend, because registration had not occurred, that Siag Touristic should not be regarded as the owner of the land.

510. The Tribunal accordingly finds that following execution of the Sale Contract, Siag Touristic was the owner of the Property.

511. However, it must be borne in mind that the Claimants do not own all of Siag Touristic and further, while Siag Touristic owned all of the Project, it did not own all of the Property at the time of the expropriation. 150,000m² of the land in question had been transferred to Siag Taba in or around 1993. Siag Taba is 75% owned by Siag Touristic, with remaining shares owned by members of the Siag family including 5% each by the Claimants. The evidence from the Claimants, which was not challenged by Egypt and is accepted by the Tribunal, was that the relevant ownership interests at the time of the expropriation were set out at paragraph 5 of this Award. For convenience those details are re-iterated here:

- Mr Siag through his interests in Siag Touristic and Siag Taba, owned 84.22% of the Property.
- Mrs Vecchi through her interests in Siag Touristic and Siag Taba, owned 11.05% of the Property.
- Mr Siag owned 88.15% of Siag Touristic, and therefore 88.15% of the Project.
- Mrs Vecchi owned 10.5% of Siag Touristic, and therefore 10.5% of the Project.
- Together, the Claimants owned 95.27% of the Property and 98.65% of the Project.

512. Accordingly, it is *prima facie* the case that any award made in favour of the Claimants should represent no more than 95.27% of the total loss suffered by Siag Touristic and Siag Taba in respect of the Property, and 98.65% of the loss suffered by Siag Touristic in respect of the Project.

513. Egypt's concerns over the entitlement of Ms Vecchi's estate to any award made in her favour have been decided. Any sums payable to Ms Vecchi will now be payable to her estate.

514. As noted above, the Sale Contract provided payment of the purchase price by way of instalments (together with simple interest of 5%) extending over a number of years. As at 23 May 1996 the purchase price had been paid in full.[712]

The Parties' Submissions on Damages

Claimants

515. The Claimants' case in respect of damages was developed in their Submission on Damages dated 30 July 2007. The Claimants submitted that compensation was to be determined in the first instance by any *lex specialis* in the Italy-Egypt BIT, and in the absence of any *lex specialis*, by the rules of customary international law. The Claimants argued that the only *lex specialis* to be found in the BIT was in Article 5 which set out the conditions pursuant to which expropriation was permitted, and the terms on which compensation was to be given for such permissible expropriation.

516. The Claimants submitted that Egypt's expropriation of the Property and Project in this case was unlawful, and that accordingly Article 5 (and in particular its provisions relating to compensation) did not apply.

517. Relying on *Chorzów Factory*[713] and the subsequent case law and commentary drawing on that case, the Claimants submitted that they were entitled to be compensated by (i) restitution or its monetary equivalent measured as the higher of (a) the market value of the asset at the time of the expropriation plus compound interest or (b) the current value of the asset; plus (ii) damages for losses not covered by restitution in kind or its monetary equivalent. The combination of measures (i) and

[712] Witness statement of Mr Waguih Siag of 19 December 2007, para. 5.
[713] *Case Concerning Factory at Chorzów* (Germany v. Poland), Judgment , 13 Sept. 1928 (1928 PCIJ, Series A. No. 17).

(ii) was expressed to be necessary to place the Claimants in the same position which they would have been in but for the expropriation of their investment.[714]

518. By way of alternative formulation, the Claimants submitted that even if the Tribunal were to conclude that the expropriation was not unlawful, and that it was governed by Article 5 of the BIT, the Claimants remained entitled to "adequate and fair" compensation in accordance with Article 5(1)(ii). Further, that it was apparent from the inter-relationship between subsections (ii) and (iii) of Article 5 that "adequate and fair compensation" for a lawful expropriation satisfying all the conditions set out in Article 5(ii) meant the market value of the investment, provided it could be readily ascertained. Thus, it was submitted, the Claimants were on any view entitled to damages in a sum representing the market value of the Property and Project as at the date of the unlawful expropriation.

519. Although they submitted that they were entitled to choose to value the investment at any point in time following the expropriation, the Claimants chose to present evidence detailing or establishing the market value of the investment as of the date of the expropriation.[715] That evidence was based on three distinct methodologies, to be discussed further below. The three methodologies, and the values which were derived by them, were as follows:

- Comparable Sales Valuation – USD 181,350,000
- Residual Land Valuation - USD 191,357,357[716]
- Lost Business Opportunity (Discontinued Cash Flow) – USD 195,800,000[717]

520. On the question of the further discrete damages to which the Claimants might be entitled, it was submitted that the Claimants were entitled to receive compensation for alleged losses in relation to sums expended for construction costs, costs associated with the cancellation of the Lumir Agreement, financing costs, legal expenses and

[714] Claimants' Submission on Damages, dated 30 July 2007, para. 82.
[715] Ibid., para. 101.
[716] To which sum the Claimants' expert (Mr Fleetwood-Bird of CBRE) would add the replacement value of the Caltex Filling Station and the partially-completed works at a total value of USD 9,325,104. However, the "residual land valuation" approach, which was initially one of two methodologies presented by CBRE, was no longer enthusiastically pursued by the time of the hearing – refer para. 93 of the Claimants' post-hearing submissions.
[717] This sum took into account the fact that the Claimants had less than a 100% interest in the Property/Project.

various other sundry costs. In all, the value of this aspect of the claim was stated to be USD 30,911,000.[718]

521. The Claimants also sought compound interest at a minimum rate of approximately 5.4%, being the then current (*i.e*., July 2007) LIBOR rate referred to in Article 5(iv) of the BIT. The Claimants also referred to the interest rate of 9% awarded in *Wena Hotels Ltd v Arab Republic of Egypt*[719] and urged the Tribunal to award a higher rate of interest (*i.e*., higher than LIBOR) "so as to deter similar unlawful State conduct in the future."[720] During closing submissions on the final day of the merits hearing, counsel for the Claimants also raised, as possible candidates for an appropriate rate of interest, the estimated cost of equity for the Project as adopted by the Claimants' damages expert LECG of 14.03%, or the rate of interest (16%) payable on one of the commercial loans obtained by Siag Touristic in 1996.[721]

522. The Claimants submitted that interest should be compounded semi-annually through until the date of payment.[722]

Egypt

523. As originally presented, Egypt's opposition to the Claimants' compensation claims was based on the submission that any compensation should be calculated in accordance with Egyptian law.[723] In advancing this argument, Egypt claimed that there are still two cases pending before the Courts in Egypt which will determine the amount of compensation due to Siag Touristic, and that accordingly the Claimants were entitled to no further recovery under the BIT.

524. In subsequent written submissions, Egypt refined this position somewhat and argued that the expropriation had been a lawful expropriation carried out in accordance with Article 5 of the BIT. In taking this position, Egypt directly challenged the Claimants' position that the expropriation was unlawful and therefore governed by international customary law. According to Egypt, any compensation payable to the Claimants should be calculated solely in accordance with the provisions of the BIT.

525. Egypt focussed on Article 5(iii) of the BIT and the meaning of the provision requiring that compensation should be calculated on the basis of "the market value applicable

[718] Witness statement of Mr Waguih Siag of 19 December 2007, para. 43.
[719] ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002).
[720] Claimants' Submission on Damages, dated 30 July 2007, para. 140.
[721] T 8: 33-34.
[722] Claimants' Submission on Damages, dated 30 July 2007, para. 141.
[723] Egypt's Counter-Memorial on the Merits, para. 62.

to the investment" immediately prior to the expropriation. In its treatment of this issue, Egypt placed particular emphasis on the implied requirement in Article 5(iii) that such market value should be capable of being "readily ascertained."

526. Egypt submitted that there were two transactions which occurred near in time to the expropriation which between them provided a "readily ascertained" market value for the investment. The first was the acquisition in 1995 by Mr Siag of an increased shareholding in Siag Touristic, through the purchase of shares from his siblings and Mrs Vecchi. Egypt submitted that the value of those share sales implied a total value for Siag Touristic of USD 3 million.[724]

527. The second transaction relied upon by Egypt arose from the Lumir Agreement of August 1994 discussed above in paragraph 25. Following the cancellation of the Lumir Agreement in June 1995 Lumir commenced arbitration proceedings. These were settled in October 1999 by an agreement which obliged Siag Touristic to repay USD 803,000 previously advanced by Lumir, and to pay to Lumir a further lump sum of USD 1,397,000.[725] Egypt submitted that the settlement agreement thus implied a total value for the Project (excluding the Hotels and the Casino, which were not part of the Lumir Agreement) of approximately USD 2,800,000.[726]

528. Egypt's position was that these two transactions, which straddled the expropriation, were the best or only evidence of a market value which was "readily ascertainable." Egypt further submitted that 50% of any assessed market value of the Property ought to be deducted from the compensation payable to the Claimants by reason of the operation of Article 10 of the Sale Contract.[727]

529. On the question of the claim for discrete damages, Egypt submitted that these had not been foreseen by the parties at the time of entering the Sale Contract and were therefore not recoverable. The only damages conceded by Egypt to be recoverable were the price actually part-paid for the land by Siag Touristic up to the time of expropriation, the value of structures and premises constructed and the equipment on the site at the time of expropriation, and the costs of studies undertaken pertaining to the Project.[728]

[724] Egypt's post-hearing submissions, paras. 61-64.
[725] Exhibit D to witness statement of Mr Yechezkel Elani of 29 July 2007.
[726] Egypt's post-hearing submissions, paras. 65-67.
[727] Article 10 of the Sale Contract provided that Siag Touristic could not sell the land to third parties until after the Project was finished, and that when it did it would be obliged to pay Egypt "50% of the value of the land sale in accordance with the prices prevailing in the area at the time of sale."
[728] Egypt's Counter-Memorial on the Merits, para. 88.

530. Egypt submitted that compound interest should not be awarded, and that the rate of simple interest should be 4% in accordance with domestic Egyptian law.[729]

531. At the merits hearing and in its Post-Hearing Submission dated 24 April 2008, Egypt focussed its challenge on the methodology of the expert evidence presented for the Claimants, and in particular the evidence concerning the lost business opportunity. This will be discussed further in section E below.

Principles Relevant to an Award of Compensation

532. The Tribunal has concluded[730] that Egypt violated the provisions of Articles 2 (fair and equitable treatment), 4 (full protection) and 5 (expropriation) of the Italy-Egypt BIT.

533. The most serious of these violations, and the one which most directly caused the Claimants' loss, is the expropriation which occurred on 23 May 1996 and was either repeated or reiterated on a number of subsequent occasions. The Tribunal proceeds on the basis that the relevant expropriation, for which the Claimants are entitled to relief under the BIT, occurred on 23 May 1996. The Tribunal accepts the Claimants' submission that they never regained legal ownership of the Property or the Project after that point.[731]

534. The Tribunal further accepts that restitution of the Claimants' investment is not possible. The Property was conveyed to a third party in 2003. In those circumstances, the only relief that is practically available is an award of damages.

535. There is a clear dispute between the parties as to the basis upon which such damages should be calculated and awarded. The Claimants submitted that this was an unlawful expropriation for which they were entitled to "full reparation" under customary international law.[732]

536. Egypt contended that the expropriation in this case was a taking as contemplated in Article 5 of the BIT. Accordingly, Egypt contended that the assessment of compensation was to be dealt with pursuant to the provisions of Article 5(iii) of the BIT, and in particular the provision that:

[729] Ibid., paras. 89-92. Notwithstanding the submission in para. 92 that "general commercial principles" should apply, Egypt submitted in paras. 89 and 91 that the civil rate of 4% should apply, and not the higher rate of 5% apparently applicable to commercial matters.
[730] *See* above, pp. 116 – 127.
[731] Claimants' post-hearing submissions, para. 66.
[732] Ibid, para. 102.

> "Where the market value [of the investment] cannot be readily ascertained, the compensation shall be determined on equitable principles taking into account, inter alia, the capital invested, depreciation, capital already repatriated, replacement value, goodwill and other relevant factors."

537. The Claimants contended that Article 5(iii) of the BIT was not relevant in this case because it applied only to so-called lawful expropriations. The relevance of the distinction, particularly as developed by Egypt in its submissions,[733] is that the emphasis in Article 5(iii) on capital invested would result in a recovery for the Claimants in this case significantly below the level for which they contended. It would *prima facie* be restricted to a recovery of the sums expended in the purchase of the Property together with sums expended on construction and the like for which the Claimants, as a result of the expropriation, have received no benefit.

538. The Tribunal notes that even if Article 5(iii) is applicable to the measure of damages in a case such as this one, consideration is first required to be given to the market value of the investment which has been taken. The clause begins by providing that compensation shall be computed "… on the basis of the market value applicable to the investment ..." at the time the expropriation was announced or became publicly known. For reasons which will be set out below, the Tribunal does not accept Egypt's submission that the market value of the land cannot be readily ascertained within the meaning of Article 5(iii). The result is that the second part of Article 5(iii) concerning the determination of compensation based on "equitable principles" is not brought into play.

539. In any event, the Tribunal is satisfied that the compensation provisions within Article 5 of the BIT are not applicable for present purposes except as to the guidance it may provide on the appropriate interest rate[734] Reading Article 5 of the BIT as a whole, it is plain that subclause (iii) is concerned with lawful expropriation, which is to say expropriation permitted in terms of subclause (ii). Pursuant to Article 5(ii), investments may not be nationalised or expropriated except on the specific terms stated. Those terms include that the expropriation must be "… for a public purpose in the national interest of [the] State, for adequate and fair compensation ... and in accordance with due process of law." For the reasons given in paragraphs 427 to 443 above, the Tribunal is strongly of the view that the expropriation in this case did not satisfy those conditions, and that accordingly it was not a lawful expropriation to which Article 5 of the BIT applied.

[733] *See* Egypt's Post-Hearing Submission dated 24 April 2008, paras. 68-71.
[734] *See* para. 597 below.

540. The BIT mandates, through Article 5(iii), that compensation for a lawful expropriation is to be based on the actual market value applicable to the investment immediately at the time of expropriation, and further that interest shall be paid from the date of dispossession through until the date of payment. However, it does not purport to establish a *lex specialis* governing the standards of compensation for wrongful or unlawful expropriations. In adopting this analysis the Tribunal notes that it was also the approach followed by the ICSID tribunal in *Vivendi v Argentine Republic*.[735]

541. It is worth observing, however, that in the present case the distinction between compensation for a lawful expropriation and compensation for an unlawful expropriation may not make a significant practical difference. In the *Vivendi* case, the difference was relevant because it went to the question of whether the Claimants were entitled to recover for lost profits. Lost profits did not immediately appear recoverable under the compensation provisions of the relevant BIT, whereas they were arguably recoverable pursuant to the more generous damages regime applicable under customary international law. In the instant case, the Claimants' do not advance a loss of profits claim *per se*. The recourse to a discounted cash flow analysis for expected future revenue/profit of the project is aimed at ascertaining a present market value for the Property and Project in 1996, and the calculation produces a result not materially different from the alternative basis upon which compensation was calculated, namely an assessment of the market value of the land at the time of the expropriation.

The Basis to be Adopted by the Tribunal

542. The basis on which the Tribunal intends to compensate the Claimants is by ascertaining, to the extent possible, the value of the expropriated asset in the Claimants' hands immediately prior to the expropriation. The Tribunal has no hesitation in concluding that this value far exceeded the sum which was paid by Siag Touristic under the Sale Contract and the sums which had been expended on construction by 23 May 1996 and on other work undertaken in relation to developing and progressing the Project. The Tribunal is persuaded that the opportunity which was identified by Mr Siag was a very promising one and that the Project appeared to be moving forward successfully, albeit that it was still at an early stage.

[735] *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3 (Resubmission Proceeding), Award, 20 August 2007.

543. The Tribunal does not accept Egypt's submission that the Project was doomed to fail. Such a conclusion is itself susceptible to one of the criticisms levelled by Egypt at the Claimants' expert evidence, namely that it was too early to tell how this Project would fare. That said, there were undoubtedly considerable risks associated with the further investment required to bring the Project to fruition and to realise the potential which the Property and the Project seemed to hold, and it is trite to observe that success in business ventures can never be assured. The Tribunal bears these risks in mind in reaching the final level of compensation which is set out further below.

544. The Tribunal rejects the Claimants' request for punitive damages, whether that would be by way of a discrete sum (although noting that the Claimants expressly disavow an entitlement to such a discrete sum) or whether, as submitted by the Claimants in their post-hearing submissions, a punitive element should be introduced into the overall compensation by "erring in favour of the Claimants." There is no provision in the BIT which could be said to give rise to a right for punitive damages or for a treatment of compensation which introduces a punitive element.

545. The question whether punitive damages are available is logically distinct from the question whether recovery for an unlawful expropriation should proceed on a different (more generous) basis from recovery for a lawful expropriation. The latter issue almost always concerns an argument over whether certain measures of compensation provided for in the applicable BIT should or should not act as a ceiling to recovery. Punitive damages, by their very nature, are not compensatory. It is worth observing that in the oft-cited *Chorzów Factory* case, the principle derived from that case is that even in the case of an unlawful taking, the relief to be given to the claimant is still purely compensatory. The potential availability of punitive damages, or a punitive "enhancement" of compensatory damages, is a matter of some controversy in international law, as indeed the Claimants acknowledged.[736] The Tribunal notes that the prevailing view of the Iran-United States Claims Tribunal appears to have been that punitive damages are not available[737] and it appears that the recovery of punitive or moral damages is reserved for extreme cases of egregious behaviour[738].

546. Further, in attempting to identify precedents for the award of punitive damages, it is necessary to distinguish cases in which the harm suffered by the claimant was not

[736] Claimants' post-hearing submissions, para. 103.
[737] Charles N. Brower & Jason D. Brueschke, The Iran-United States Claims Tribunal 477 (1998) .
[738] *See*, *e.g.*, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008.

essentially financial in nature, or cases in which what was really being addressed was the level at which compensatory damages should be measured. It was to this latter point that the Claimants ultimately focussed their "punitive damages" submissions, acknowledging that their damages must be demonstrated with reasonable certainty and must not be unduly speculative, but urging the Tribunal to register its disapproval of Egypt's unlawful conduct by " … [indulging] all reasonable inferences in favour of the Claimants."[739]

547. As to the latter, the Tribunal is not prepared to draw any inferences other than those justified by the evidence. The burden upon the Claimant is to prove that its loss was caused by the wrongful act of Egypt and to prove to the satisfaction of the Tribunal the quantum of such loss.

548. As will become apparent below, the evidence (Comparable Sales Valuation) which underpins the main award of damages in this case was largely unchallenged by Egypt. Notwithstanding the absence of a serious forensic challenge to that evidence, the Tribunal has taken care to satisfy itself that the evidence in question does bear the weight which the Claimants seek to place on it.

The Expert Evidence on Quantum

The Evidence for the Claimants

549. The Claimants presented evidence of their loss calculated pursuant to three different methodologies, prepared by LECG, LLC ("LECG") and by CB Richard Ellis ("CBRE"), the latter firm producing two distinct calculations. LECG produced a lost business opportunity valuation based on a discounted cashflow analysis ("DCF"). That analysis resolved the Project into three main components or businesses, namely the timeshare apartments, the two hotels, and the casino. For each of those three businesses LECG worked up expected revenue streams and the income which would be derived from those revenues over the period from 1996 through until 2008. Those cashflows were then discounted back to May 1996, using a weighted average cost of capital of 12.8%, to arrive at a value for the business as at the date of the expropriation.

550. In LECG's original report dated 30 July 2007, the total value of the Project as a business opportunity in the hands of the Claimants[740] was calculated to be USD

[739] Claimants' post-hearing submissions, para. 105.
[740] That is to say, taking into account that the Claimants owned less than 100% of the Project.

204.7 million. LECG subsequently prepared a supplemental report dated 20 December 2007 which, by adding further revenue streams which had not been included in the original report, re-valued the Claimant's interest in the business as USD 223.8 million. Finally, at the hearing, that figure was again revised, this time down to USD 195.8 million.[741]

551. CB Richard Ellis ("CBRE") submitted a report prepared by Mr Fleetwood-Bird which presented two distinct valuations – a "Comparable Sales Valuation" and a Residual Land Valuation as at May 1996. The Comparable Sales Valuation was based on the straightforward premise of assessing the value of the Property by reference to sales (or other evidence – for example offers) of comparable land in the region. For reasons associated with the uniqueness of the Property and its relative isolation at the time of the expropriation, evidence was also included of sales which were not contemporaneous, with adjustments being made to account for changes in value over time.

552. The Residual Land Valuation was a hybrid method based in part on LECG's work and in part on comparable sales. The process underlying this valuation method was to begin with the values calculated by LECG for the Hotel, Casino and Timeshares, deduct from those values the construction and development costs, and then add in a value for the reserve land which remained (on which nothing had been constructed, and for which a value was "borrowed" from the Comparable Sales method. The obvious difference between the methods was that the Residual Land Valuation method attempted in part to attribute value to the specific Project which the Claimants were developing. For that reason, and perhaps unsurprisingly, it produced a valuation higher than that obtained by the Comparable Sales Valuation method.

553. The response by Egypt was essentially to the effect that all of these methods were too speculative. The LECG Lost Business Opportunity calculation was challenged particularly strongly.

Egypt's criticisms of the Claimants' calculation of damages

554. In addressing the quantum evidence presented for the Claimants by CBRE and LECG, Egypt marshalled its arguments around two main themes: first, that the Project was over-ambitious and doomed to fail, and second, that the Claimants' experts had proceeded upon assumptions which were too optimistic and in any event

[741] On day 7 of the merits hearing, at the beginning of the evidence given by Mr Manuel Abdala.

unsupported by reliable empirical evidence. The latter submission was based in large part on the fact that the Project was still only in the early stages of construction and accordingly there was no trading history available for analysis.

555. On the question of whether the Project would have succeeded at all, Egypt submitted that the Project was "grossly oversized and inappropriate for the market for which it was intended."[742] Further, Egypt contended that the costs of both building and operating the resort would have far exceeded the Claimants' estimate.

556. With respect to the timeshare aspect of the resort, Egypt criticised the size of the resort and the number of timeshare intervals which would need to be sold, the basis on which the resort was to be marketed for sale (with reduced emphasis or reliance upon on-site sales), the expectations regarding the likely identity of the market, the intended or assumed pricing of the timeshare intervals, and the phasing of availability of the units for sale.

557. Regarding the two hotels, Egypt similarly criticised the Claimants' analysis of value from this aspect of the planned resort as being based on an underestimate of construction costs, and an overstatement of likely hotel revenues.[743] The planned resort was also criticised for not incorporating a golf course.[744]

558. Egypt made a comprehensive challenge to the planned casino and its likely profitability. Factors criticised included the size of the casino which Egypt said would have been the largest in the Middle East and one of the largest in Europe, and yet no feasibility study had been undertaken to determine whether a market existed for a casino of such size (or any size) in that location.[745] Egypt criticised the assumptions made on behalf of the Claimants as to the total revenue which the casino might have generated, the availability and willingness of a suitable investor/operator to participate on terms favourable to the Claimants, and the long-term viability of the area as an up-market tourist destination in light of previous and subsequent terrorist acts in the region.[746]

559. Most of these criticisms were reiterated and amplified in Egypt's Rejoinder on the Merits dated 12 February 2008. That Rejoinder did not contain much specific criticism of the CBRE analyses, although it must be the case that any criticism of the LECG

[742] Egypt's Counter-Memorial on the Merits, para. 95.
[743] Ibid., paras. 106-109.
[744] Ibid., para. 110.
[745] Ibid., paras. 114-116.
[746] Ibid, paras. 123-125.

methodology and calculation is a criticism which also goes to CBRE's Residual Land Valuation.

560. In relation specifically to the Comparable Sales Valuation, Egypt drew attention to the disparity between the sum paid for the Property by Siag Touristic and the value ascribed to it as at several years later by CBRE.[747] Egypt criticised the reliance by CBRE on information which was not derived from completed sales, and further criticised some of the sales data which was relied upon as being insufficiently comparable, and of doubtful relevance in light of the numerous adjustments required to made to arrive at a 1996 "Taba" value.[748]

561. In relation to the claim for discrete reliance damages, Egypt submitted that the Claimants had presented little or no evidence of expenditure said to have been incurred under the various heads.[749]

Discussion

562. The Tribunal proceeds on the basis that the burden of proving and measuring a loss rests at all times with the Claimants.

563. In general terms, the Tribunal finds on the evidence that the Claimants have been permanently deprived of a valuable investment, and that the value of that investment exceeds by a considerable margin the sums actually expended by the Claimants. The Tribunal does not accept the submission by Egypt that the Project was doomed to fail for being too big and poorly located. While this is by no means the sole reason for such conclusion, Egypt's submissions in that regard were undermined by the discovery that a company owned and controlled by Egypt has recently launched the Riviera Centre project in Taba, which is to be located only some 20 km south of the Property and will be several times larger than the Project was planned to be.

564. The Tribunal rejects Egypt's submission that the 1995 sale of shares in Siag Touristic between members of the Siag family provides useful guidance as to the value of the Property and Project. A transaction such as that is self-evidently unlikely to be a reliable proxy for an open-market transaction conducted at arms length on normal commercial terms. There are simply too many (obvious) non-commercial factors which might affect the price at which the transaction is concluded.

[747] Egypt's Rejoinder on the Merits, para. 176.
[748] Ibid., paras. 178-180.
[749] Ibid., paras. 187, 188.

565. For similar reasons, the Tribunal holds that the Lumir Agreement, and in particular the settlement of the dispute which arose following its cancellation, does not provide reliable evidence of the value of the Claimants' investment. Apart from the obligation to repay USD 803,000 there was no evidence available as to the basis on which the settlement sum was calculated.

566. However, while the Tribunal is satisfied that the Claimants' investment was a substantial one, and one considerably more valuable than portrayed by Egypt, the Tribunal is not satisfied that it was an investment which lends itself to a robust DCF analysis.

567. At the end of his evidence, Mr Abdala of LECG was asked by the Tribunal a question concerning the differences in valuing the future profits of a business which has been operating for several years, as compared to a "business opportunity" which is still in the development phase. Mr Abdala very candidly acknowledged that there is one particular difference and this is that "… in the [case] that you have a track record of profitability you could say that you have a higher degree of certainty as to what to expect of the performance of the business in the future."[750] He further offered that " … in both cases, whether you're valuing new business or [existing] business, you will still have a certain degree of uncertainty as to projecting revenues moving forward, and profits moving forward."[751]

568. This point is perhaps obvious, but it is nonetheless significant. Of equal importance are the numerous "moving parts" which contribute to a DCF analysis, whether at the front end in terms of building up the model of revenue and operating costs and capital expenditure, or in terms of the Weighted Average Cost of Capital ("WACC") used to discount future cash flows back to a present value. On the question of capital expenditure, the Tribunal notes that in accounting for construction costs, LECG relied on information provided to it by Mr Fleetwood-Bird of CBRE, which information Mr Fleetwood-Bird explained he had obtained from a discussion with an architect in Cairo.[752] It was necessarily a sketch or rough estimate of what such costs might be.

569. Similarly, on the question of WACC, it is self-evident from the nature of a DCF analysis that a small change in the WACC can produce very considerable changes in the absolute value of a business. In the present case, LECG adopted a WACC of

[750] T7: 131. This difficulty had also been acknowledged and discussed in LECG's original report – refer para. 48.
[751] Ibid.
[752] T4:85-87. It is evident from LECG's supplemental report that they (erroneously) believed these figures had been provided by the Project's architect. Refer para. 127 of LECG's supplemental report, dated 20 December 2007.

12.79%. The experts who presented evidence for Egypt presented alternative scenarios in which the WACC would be more like 20% or higher. It is not necessary to attempt the impossible exercise of determining which figure is "right" to realise that the DCF analysis in such a case is attended by considerable uncertainty.

570. Points such as those just mentioned tend to reinforce the wisdom in the established reluctance of tribunals such as this one to utilise DCF analyses for "young" businesses lacking a long track record of established trading. In all probability that reluctance ought to be even more pronounced in cases such as the present where the business is still in its relatively early development phase and has no trading history at all. The Tribunal accepts Egypt's submission[753] that the authorities are generally against the use of a DCF analysis in circumstances such as the present, and further that the DCF analysis presented by LECG is an insufficiently certain basis upon which to calculate damages in the present case.

571. That conclusion in itself is sufficient to dispose also of the Residual Land Value calculation, given that it was dependent in significant part upon values borrowed from LECG's report on the measure of the Lost Business Opportunity. In any event, by the time of closing submissions it was apparent that the Claimants were focussing their efforts on the Comparable Sales Valuation in preference to the Residual Land Valuation.[754]

572. As to the Comparable Sales Valuation, the Tribunal was very impressed by Mr Fleetwood-Bird and the evidence he gave. His initial report (27 July 2007) was appropriately qualified by the acknowledgement that in his view, he did not have sufficient data at that point to arrive at an independent valuation based on the comparable sales approach, although he did offer a range of USD 141,275,000 to USD 183,525,000. His supplemental report (21 December 2007) outlined the further inquiries that had been made and the extra data that had been obtained, all of which enabled him to provide a firm valuation. That report stated a value for the Property of USD 183,300,000 which was subsequently corrected slightly during the hearing to USD 181,350,000.[755]

573. Mr Fleetwood-Bird's credentials and experience are excellent. The inquiries made by him were wide-ranging. Further, the Tribunal found him to be a very thoughtful, professional and fair-minded person whose opinion on matters within his area of

[753] Egypt's post-hearing submissions, para. 74.
[754] Claimants' post-hearing submissions, para. 93.
[755] He made certain revisions to his report. (*See* T4: 12-14).

expertise could be relied upon. While Egypt made a wide ranging challenge to the viability of the project, it did not adduce evidence of a property valuation such as the one carried out by Mr Fleetwood-Bird.

574. It has already been noted above that Egypt itself has recently commenced construction of a very substantial resort development in roughly the same location known as "the Riviera Centre."[756] The desirability of the Property's location, and its suitability as a site for resort development by Siag, was emphasised by Mr Fleetwood-Bird in his original report:

> "The quality of the Property compares with the best resort sites in Sharm El Sheik, Hurghada and elsewhere in the Sinai and Red Sea areas and this, coupled with the unique character of the Property close to Eilat in Israel and Aqaba in Jordan would have ensured that had resort development been permitted, the Property would have become a central feature of a major coastal resort."[757]

It is precisely this desirability of the Property, confirmed as it is by the development of the Riviera Centre, which supports the substantial valuation accorded to the Property by Mr Fleetwood-Bird.

575. At the end of his cross-examination Mr Fleetwood-Bird was asked by the Tribunal what margin of error he would apply to his Comparable Sales Valuation. His response was that ordinarily he would hope to be within 5% either side of an exact or precise figure. However, in view of the uniqueness of this Property and the difficulties which he acknowledged were attendant upon conducting this particular valuation, he stated that in the present case: "I believe that percentage should be wider, and it could be <u>at least</u> 10% on either side of my figure."[758] (Emphasis added.)

576. In all the circumstances, the Tribunal increases that margin to 20% and will apply that discount to the value of the Property as assessed by Mr Fleetwood-Bird (USD 181,350,000). That produces a value of USD 145,080,000. It is to be borne in mind that this is the value of the entire Property as at 23 May 1996. The Claimants' total interest in the Property at that time was 95.27%.

577. In addition to recognising that the Claimants had less than a 100% interest in the Property, it is important to bear in mind also the terms upon which that interest was

[756] Para. 563 above.
[757] CBRE Report of 27 July 2007, p. 34.
[758] T4: 121-122.

held as at the date of expropriation. The Tribunal has in mind the provisions of Article 10 of the Sale Contract, which provided as follows:

> "[Siag Touristic] may not dispose of all or part of the piece of land, subject of this contract, to third parties except after the approval of [Egypt], subject to finishing the project. In such a case [Egypt] shall get 50% of the value of land sale in accordance with the prices prevailing in the area at the time of sale."

578. Egypt expressly relied upon Article 10, submitting that "pursuant to Article 10 of the Contract, any transfer of title of the Property will entitle the TDA to receive 50% of the sale value according to the prevailing price in the area, an amount that needs to be deducted from any assessed market value in order to reach the due compensation to Siag Touristic, if any."[759] It also contended that "it was only after finishing the project that Siag Touristic would have been permitted to sell the land to third parties, and, when it did, it would be obliged to pay to the Egyptian government 50% of the value of the land sale…."[760] The Tribunal does not accept Egypt's further submission that this contractual term had an "obvious effect" on the value of the land,[761] but the Tribunal does accept that it had an effect on the value of the asset in the Claimants' hands.

579. Article 10 is not without its difficulties – in particular there may be uncertainty over the correct construction of the words "subject to finishing the project." The clause could mean that prior to finishing the Project, Siag Touristic could only sell the land with the consent of Egypt, and would be required to account to Egypt for half the value of the transferred land. Or it could mean that prior to completion of the Project there was a complete bar on any transfer of the land, but that following completion a transfer could be made with consent of Egypt, and again with the requirement to account for 50% of the value. In the present case, it is an undisputed fact that Egypt's expropriation of the Property made it impossible for Siag to finish the Project. The Tribunal considers therefore that a reading of Article 10 which would require Siag to have finished the Project before being able to dispose of the Property cannot be relied on by Egypt to disqualify the Claimants from recovery of the loss suffered, since the Claimants' incapacity to respect that particular condition was a direct result of Egypt's own illegal conduct. It would appear, however, that regardless of which interpretation is correct, the most that Siag Touristic could have hoped to retain from a sale of the land was 50% of the net proceeds.

[759] Egypt's Counter-Memorial on the Merits, para. 73.
[760] Egypt's Post-Hearing Submissions, para. 55.
[761] Ibid., where the implication appears to be that the existence of this clause reduced the overall value of the land in some objective sense.

580. That is particularly relevant in circumstances where the Tribunal is valuing the expropriated asset on the basis primarily of its underlying land value, and awarding compensation accordingly.

581. The Tribunal has given careful consideration to the argument that the act of expropriation was a repudiation of the Sale Contract, and that in a sense therefore Egypt is seeking to enforce a provision in a contract which it repudiated. However, the Tribunal is concerned to compensate the Claimants for what has been taken, and the effect of Article 10 was that immediately prior to the expropriation, Siag Touristic's beneficial interest in the Property was only 50%. Article 10 was no doubt included for good commercial reasons (relating to the price for which the Property was offered to Siag Touristic, and the desirability from Egypt's point of view in having the Project completed) and it was a provision which was willingly accepted by the Claimants through Siag Touristic.

582. The Tribunal considers that an award of damages should, as far as possible, put the injured party in the position he or she would have been in had there been no expropriation. In the calculation of such damages, regard would have to be had to the fact that, but for the expropriation, the Claimants would only have been able to dispose of the Property under the conditions fixed in Article 10 of the Contract. Thus, in the event of a sale of the Property, the Claimants would have received 50% of the sale value. Faced with this objective measure of the Claimants' beneficial interest in the Property, the Tribunal finds that it cannot disregard the express stipulations of Article 10 and simply assume that the Contract would have continued until completion of the Project.

583. Therefore, in circumstances where the Claimants themselves were content to bind themselves to an entitlement of only 50% of the value of the land in the event of any sale of the Property or part of it (a factor which would undoubtedly also have affected other transactions such as borrowings secured against the Property), the Tribunal considers it would be surprising if the expropriation would result in payment to the Claimants of a sum representing the whole value of the Property. It may have been the case that the Project could have been structured, and even sold down in subsequent years, in such a way as to avoid any need to sell the underlying land,[762] but the Tribunal prefers to apply a simple analysis to what is on its face a fairly simple contractual term. This is more so given the rejection of the DCF analysis and the

[762] A point made by Mr Abdala of LECG during cross examination (*see* T7: 90).

focus on the underlying land value of the Property. Plainly, it was land value with which Article 10 was concerned.

584. The result is that the value of USD 145,080,000 (calculated by applying a 20% discount to Mr Fleetwood-Bird's Comparable Sales Valuation of USD 181,350,000) should then be reduced by 50% to USD 72,540,000. For the purposes of compensation, that sum must be further reduced by recognising that the Claimants' total interest in the Property was not 100% but 95.27%. That yields a figure for compensation purposes of USD 69,108,858.

Discrete Damages – Construction Costs

585. Turning to discrete damages, the single biggest item claimed was USD 15,643,000 for construction costs. The Tribunal must be careful to avoid any double counting. It is apparent from Mr Fleetwood-Bird's original report that his final valuation figures included the Gross Replacement Cost of the buildings and other site works (including the service station) which were on the Property at the time of the expropriation.[763] Mr Fleetwood-Bird's assessment of that cost was USD 9,325,000. Insofar as that figure differs (and differs substantially) from the figure provided by Mr Siag, the Tribunal prefers the evidence of Mr Fleetwood-Bird.

586. The question then is whether the revised figure of USD 181,350,000 already includes the value of construction work carried out prior to the expropriation. The Tribunal finds that it does not. CBRE's supplemental report concludes by stating explicitly that "… the fair market value of the Property using the Comparable Sales methodology, excluding the improvements thereon, in 1996 was US$282 per sq m or US$183,300,000[764] for the 650,000 sq m."[765] (Emphasis added.) Accordingly, the Tribunal considers that there is no double compensation in awarding damages for both the value of the expropriated Property (which excludes any value added by the buildings and other site works) and the construction costs.

587. The Tribunal finds that it is appropriate to apply the same method of calculation of the Claimants' interest in the construction costs as that adopted in the calculation of the damages awarded for the loss of the Property. It is most likely that, had a sale of the Property taken place in 1996, such a sale would have included any constructions on the land itself. Thus, under article 10 of the Sale Contract, the Claimants would only

[763] CBRE Report, 30 July 2007, p. 39.
[764] As previously noted, this figure was corrected during the hearing to USD 181,350,000.
[765] CBRE Supplemental Report, 21 December 2007, p. 21.

have been entitled to their 95.27% interest in 50% of the value added by those constructions. In light of the preceding considerations, the Tribunal therefore awards the sum of USD 4,441,936.75 in respect of the construction costs sought by the Claimants.

Salaries and Benefits

588. The Claimants seek USD 730,000 for "salaries and benefits" and a further USD 138,000 for "rents and utility bills". In both cases these relate to sums allegedly expended after the expropriation. There has been no reliable evidence presented relating to either of these claims. No award is made in respect of them.

589. The Claimants seek USD 500,000 for "travels and fairs". The Tribunal has already noted that Egypt has conceded that damages are payable for, inter alia, "the costs of studies undertaken pertaining to the Project." Notwithstanding that concession, it is impossible to ascertain what is actually comprised under this head of damages, and to what extent any of it can be characterised as "studies pertaining to the Project" or similar. Further, and ultimately this is a greater difficulty for the Claimants, there is no reliable evidence of sums actually expended. The Tribunal declines to make award in respect of this head of damages.

590. A sum of USD 2,650,000 (together with compound interest) is sought in relation to the cancellation of the Lumir Agreement and its subsequent settlement. This claim cannot succeed. The Lumir Agreement was terminated by Siag Touristic in June 1995, nearly a year before the expropriation. If there had been no expropriation there would still have been a dispute with Lumir, and there would still have been costs incurred in settling that dispute.

Bank Loans

591. The second largest head of discrete damages is for a sum of USD 8,750,000 relating to "Bank Loans." This arises from a loan obtained by Siag Touristic in May 1995 from the Egyptian Arab Land Bank. Prior to the account being frozen following the expropriation, the total drawdown had been LE7,979,845. By reason of the application of penalty interest, that debt had grown by 30 November 2005 to be LE34,947,079, and was continuing to incur interest at 16% plus a further 2% penalty. By the end of 2007 the total sum owing was estimated to be LE48,000,000 or USD 8,750,000.

592. The first difficulty with this claim is that it is a debt of Siag Touristic. On the face of it, there being no evidence of personal guarantees or other personal liability for the Claimants, neither Mr Siag nor Mrs Vecchi have suffered a loss. Secondly, the assessment of damages is made as at May 1996. If the Property had not been expropriated and had been sold at that point this loan would have had to be repaid out of the proceeds of sale. To the extent that penalty interest has since been accruing, it is counterbalanced by the inclusion of interest on the sum to be awarded as damages.

Legal Expenses

593. Finally, the Claimants seek the sum of USD 2,500,000 for the legal expenses incurred in bringing their claims before the domestic courts over a period of more than 7 years.[766] No invoices, receipts or other accounting material was produced in support of this claim. However, there is no doubt that the Claimants had to employ Egyptian lawyers as well as in-house lawyers during the long period of litigation. Mr Siag in the Third Witness Statement of December 19, 2007 explained at some length that he needed to retain various lawyers to argue the cases. He also spelt out the extensive number of hearings and all of the meetings with the lawyers which were necessary to prepare for the hearings. In paragraph 40 he said that there had been employed seven different lawyers over the period of the litigation who were in turn assisted by an in-house junior lawyer from Siag Touristic. In paragraph 41 of his evidence he stated that he believed he had "spent over US$750,000 on case administration ie, transportation and accommodation, copying, telephone and fax, Court fees, experts reports etc. This represents approximately US$70,000 per year. For the case our lawyers and I had to travel to Sinai to the Police Station in Nuweibaa, the District Attorney's Office in El Tor, the El Tor Courts, and the Appeal Court in Suez." He conservatively estimated his total legal costs for the proceedings in Egypt for the past eleven years to be in excess of USD 2,500,000. After giving this matter careful consideration the Tribunal considers it appropriate that USD 1,000,000 in respect of this aspect of the claim.

Interest

594. Claimants sought interest on all damages "at the highest appropriate rate"[767] and further sought that it be compounded at six month intervals.[768] Egypt countered that

[766] Paras. 43-87 above.
[767] Claimants' Reply Memorial on the Merits, para. 240.

interest should be simple interest only, and that it should be at the rate of just 4% as permitted by domestic Egyptian law in respect of civil matters.[769]

595. The Tribunal has no hesitation in ruling that interest should run from the date of the expropriation, and that it should be compounded. The Claimants submitted that since 2000, no less than 15 out of 16 BIT tribunals have awarded compound interest on damages in investment disputes.[770] Whether or not that statistic is correct, the Tribunal is certain that in recent times compound interest has indeed been awarded more often than not, and is becoming widely accepted as an appropriate and necessary component of compensation for expropriation.[771] There is nothing in the present case to suggest that an award of compound interest would be inappropriate, nor any reason to believe that simple interest would provide adequate compensation for the deprivation of an asset for more than 12 years. Further, the Claimants' request that interest be compounded only at half-yearly intervals is a modest and appropriate request.

596. The Tribunal has found the question of the rate of interest to be more difficult. The higher rates suggested by the Claimants were based on cost of financing but it will be readily observed that the bulk of the damages awarded to the Claimants derive not from costs which have been borne and are only now being recovered, but from an asset which has been taken. In those circumstances, interest should expressly be tied to the loss of opportunity to invest, and not to the cost of servicing debt. The Tribunal will award interest on an investment basis.

597. Some guidance is available from the BIT. Article 5, which sets out the basis on which so-called "lawful" expropriation may occur, provides at sub-clause (iv) that "compensation for any such expropriation should include interest at the current six month LIBOR rate of interest from the date of nationalisation or expropriation until the date of payment." The Tribunal has already observed that in the present case there may be no practical difference between compensation for a lawful or unlawful expropriation.[772] In the same way, it can be said that if LIBOR rates were thought to compensate adequately for delay in payment of compensation for a lawful expropriation, there is no reason not to hold that they are similarly adequate to

---

[768] Claimants' Submissions on Damages, dated 30 July 2007, para. 141.
[769] Egypt's Counter-Memorial on the Merits, paras. 89-92.
[770] Claimants' Reply Memorial on the Merits, para. 242.
[771] *See*, *e.g.*, the discussions *in* The Oxford Handbook of International Investment Law (Muchlinski, Ortino & Schreur eds. 2007), at p. 1107; and *in* McLachlan, Shore & Weiniger, International Investment Arbitration 343-346 (2007).
[772] *See* para. 541 above.

compensate in case of delayed payment of compensation for an unlawful expropriation.

598. In the circumstances, the Tribunal orders that interest should be paid on all sums of damages awarded hereunder, at the six month LIBOR rates applicable from time to time since 23 May 1996 through until the date of payment, with such interest being compounded six-monthly.

IX. COSTS

599. As an initial point it must be noted that the costs of not only the merits phase of the proceedings[773] but also the original jurisdiction phase, which culminated in the Tribunal's Decision on Jurisdiction dated 11 April 2007, fall to be determined. As recorded above, the Decision on Jurisdiction reserved the issue of costs related to that phase of the arbitration.

The Tribunal's directions as to costs

600. On 9 December 2008, the members of the Tribunal conveyed to the parties the following:

> "The Tribunal has made considerable progress with the drafting of its Award. Before the closing of proceedings, the Tribunal is however obliged to consider any claims for legal costs and expenses made by the parties.
>
> As to the Claimants, it will be recalled that the total amount sought by the Claimants is US$8,411,491.72, of which US$6,071,978.08 is for attorney's fees. The nest largest component of the costs claim is US$1,035,814.00 for the fees of LECG along with US$135,591.00 in relation to CBRE fees.
>
> In an email to the Tribunal, dated 8 May 2008, Egypt submitted that the Tribunal should not accept the schedule of costs annexed to the Claimants' post-hearing memorial until the Claimants had adduced documentation in support of the claim for costs and Egypt had had the opportunity to comment thereon. In its response dated 13 May 2008, Claimants said they would provide supporting documentation if the Tribunal so requested.
>
> The Tribunal now does so request.

[773] Which, for ease of reference, is taken to include Egypt's jurisdictional objections raised subsequent to the Decision on Jurisdiction.

> As to the Respondent, in its post-hearing submissions dated 24 April 2008 it also sought costs in this proceeding, including experts' and attorney's fees. Egypt further requested the Tribunal's guidance as to the submission of its claim in this respect.
>
> The Respondent is therefore requested to submit documentation in respect of its claim for costs.
>
> To ensure an orderly procedure, the following will be the sequence:
>
> 1. Claimants, as promised earlier, are requested to submit further documentation is support of their costs claims no later than 19 December 2008.
>
> 2. Egypt is requested to submit to the Tribunal a combined statement of (a) its own costs reasonably incurred or borne by it in the proceeding and (b) its comments on the details of the Claimants' costs claim no later than 16 January 2009 (the longer period for filing takes into account the year-end holiday period)."

601. On 19 December 2008, the Claimants provided further documentation in support of their claim for costs. By letters dated 11 and 16 January 2009, Egypt contended that the Claimants had still not provided adequate substantiation of their claim for costs and requested that the Tribunal direct the Claimants to produce further documentation in this respect.

602. On 6 March 2009 the Tribunal advised the parties that it considered that the submissions and documentation provided by the parties were sufficient to enable it to make an award on costs without the need for further documentation.

The Claimants' Submissions on Costs

603. In section G of the Claimants' post-hearing submissions,[774] the Claimants requested the Tribunal to award them all costs and expenses associated with this arbitration, including attorney's fees. The Claimants noted that "in addressing similarly inexcusable conduct by the Egyptian Government, the Tribunal in *Wena Hotels Ltd v. Arab Republic of Egypt*[775] awarded the claimant its costs and fees associated with presenting its case on the merits." The Claimants contend that the Tribunal in this case should do likewise.

[774] 24 April 2008, at para. 137.
[775] ICSID Case No. ARB/98/4.

604. The Claimants further submitted that although Egypt's conduct throughout the underlying dispute with Mr Siag was ample reason to award the Claimants their full costs, the Tribunal should also consider Egypt's procedural misconduct in this proceeding. They contended that Egypt had repeatedly defied the Tribunal's Decision on Jurisdiction and "has subjected the Claimants to frivolous requests for a 'special estoppel sub-phase', an 'effective nationality' discovery request, extensive 'effective nationality' arguments in its Counter Memorial and Rejoinder under the guise of 'estoppel' and opposability, a belated 'bankruptcy' jurisdictional objection based on a matter emerging from its own Courts and slanderous allegations of 'forgery and fraud' that are now largely retracted and that never had a sound evidentiary basis." The Claimants concluded by contending that Egypt's misconduct in this proceeding had substantially increased the time and effort required for the Claimants to prosecute their claims and should be meaningfully sanctioned by the Tribunal in its award on Costs. The total amount of Claimants' claim for its costs and expenses was USD 8,411,491.72. Of that amount, the value of time incurred by the Claimants' counsel from the inception of this matter until 31 March 2008, at their normal billing rates, was said to be USD 6,071,978.08. Because of the Claimants' financial circumstances they had asked, and the Claimants' counsel had agreed, that the Claimants will pay attorney's fees only on a successful recovery in this matter. It was argued that since the Claimants were contractually obligated to pay such fees, they should be entitled to an award of fees equal to the value of the time worked by their counsel.

605. The following is a summary of the Claimants' fees and expenses :

Summary of Claimants' Fees and Expenses	Combined Total (USD)
Attorney's Fees and Expenses	
King & Spalding – Value of Time	$6,071,978.08
Transcription Costs	$29,779.07
Duplication and Binding Costs	$85,147.94
Travel costs	$232,047.01
Document Delivery Costs	$36,979.88
Translation Costs	$18,106.80
Telephone/TeleConference/Telecopy Costs	$10,124.39
On-Line Computer and Other Research Costs	$7,692.54
Testifying Experts' Fees and Expenses	
CBRE	$135,591.29
Abillama	$26,250.00
LECG	$1,035,814.02
Reisman	$132,500.00
Riad	$25,000.00
Rubinstein	$120,979.80

Consulting Experts' Fees and Expenses	
Abbadi	$2,001.57
Glencer	$36,057.33
Margolis	$14,434.50
Zarntsky	$14,437.50
Sacerdoti	$11,570.00
ICSID Advances Paid	$365,000.00
TOTAL	$8,411,491.72

606. On 8 May 2008, counsel for Egypt questioned the adequacy of the submissions on costs in the Claimants' Post-hearing Memorial and alleged that the compensation of the Claimants' experts may be contingent upon the Claimants' recovery in this case. In a subsequent letter dated 13 May 2008, the Claimants pointed out that this was not the case and confirmed that LECG and the Claimants' other experts had all been paid in full for their services rendered.

Egypt's Submissions on Costs

607. On 16 January 2009, Egypt submitted a combined statement of (a) its own costs reasonably incurred or borne by it in the proceeding and (b) its comments on the details of the Claimants' costs claim.

608. In its letter of 16 January 2009, Egypt referred to the general practice of ICSID Tribunals as to awarding costs and made the following submissions:

> "The starting principle is that the Tribunal may in the sound exercise of its discretion award claims for legal costs and expenses to the extent that it deems it appropriate to make such an award, provided that the costs awarded are reasonable. Thus, Rule 28(b) of the ICSID Convention requires that each party submit to the Tribunal "a statement of the costs ***reasonably*** incurred or borne by it in the proceeding…" Article 61(2) of the ICSID Convention allows an ICSID Tribunal to "***assess*** the expenses incurred by the parties in connection with the proceedings…" (Emphasis added).
>
> The great majority of tribunals in ICSID arbitrations have exercised their discretion in this regard by ordering that the parties bear their own legal costs regardless of the outcome of the arbitration. See, e.g., Malaysian Historical Salvors SDN, BHD v Malaysia, ICSID Case No. ARB/05/10, 17 May 2007 (stating "it is common ICSID practice for each party to bear its own legal costs and for the arbitration costs to be divided equally

> regardless of the outcome of the arbitration"); W. Ben Hamida, *Cost Issue in Investor-State Arbitration Decisions Rendered Against the Investor: a Synthetic Table*, 5(5) Transnational Dispute Management (Nov. 2005) (concluding, after an exhaustive study of investor-state arbitration decisions that "the majority of arbitral tribunals decided that each party shall bear the expenses incurred by it in connection with the arbitration…").
>
> The only exception to this general practice has been where one party has presented spurious claims or engaged in bad-faith litigation. See, e.g., Matthew Weiniger & Matthew Page, *Treaty Arbitration and Investment Disputes: Adding up the Costs*, 3 Glob. Arb. Rev. 44 (2006). Committing a fraud on both the Egyptian Government as well as this Tribunal is clearly an example of bad-faith litigation. Thus, if the Tribunal should determine that Waguih Siag acted with fraudulent intent when he presented a spurious Lebanese government document to both the Egyptian government and this Tribunal for the purposes of falsely representing his status as a supposed Lebanese national, then not only should Claimants'' requests for payment of their legal fees and costs be rejected but Respondent should be awarded all of its legal fees and costs, including the administrative costs paid by it to ICSID. Had Mr Siag not engaged in such a fraud, he never would have had a basis for claiming that he had lost his Egyptian nationality and therefore would not have been able to initiate this proceeding."

609. Egypt contended that, should the Tribunal rule in favour of the Claimants and give consideration to deviating from a general practice concerning the award of costs, it should take into account in determining reasonableness the Claimants' failure to provide substantiation of their legal fees. It submitted that their failure to submit proof of legal fees beyond a mere summary spreadsheet should by itself, regardless of the outcome of the case, prevent them from receiving reimbursement of such purported expenditures.

610. Egypt also submitted that the amounts claimed were far higher than could be justified. It argued that the amount of USD1,035,814 for the fees of LECG were grossly excessive especially when "Claimants' counsel knew full well that they were advancing a reckless over-extensive DCF analysis to a set of facts for which it was not manifestly suited."

611. As to the legal fees, Egypt submitted that they were unreasonable on the basis of the test of proportionality. It pointed out the total cost that Egypt's counsel sought was less than one-half of the USD 8,411,491.72 sought by the Claimants' counsel.

612. Turning to Egypt's own claim for costs: it claimed USD 4,112,673.24, which was made up as follows :

APPENDIX No.	Summary of Respondent's Fees and Expenses	Total (USD)
1	**Attorney's Fees and Expenses**	
	A. Baker & McKenzie "Cairo Office" Helmy Hamza & Partners	
	Value of time	$642,110.63
	Other costs	$75,421.39
	B. Baker & McKenzie "New York Office"	
	Value of time	$1,335,550.20
	Other costs	$86,174.56
	C. Dr. Ahmed Kamal Aboulmagd	
	Value of time	$90,000
	Other costs	$15,150.8
	D. Egyptian State Lawsuit Authority	
	Value of time	$9,846.46
	Other costs	4,949.7
2	**Experts Fees and Expenses**	
	Dr. Hafiza El Hadad	$15000
	Dr. Saeed El Dakak	$7500
	Dr. Okasha Abd Elaal	$7500
3	Nadeem Souhaid	$17,975
4	Straight Line Hospitality Corporation	$159,651.77
5	Abd El Hafiz Ghalyini	$22,533
6	Hans Smit	$108,509.55
7	Ivan Shearer	$11,200
8	EMA Office	$8,855
9	Karim Hafez	$125,408.12
10	KPMG L.L.P	$529,763.57
11	KPMG Egypt	$87,041.94
12	Euro-Asia Consulting	$97,694.26
13	Trevor McGowan	$5,614.05
14	**Travel Costs and Expenses**	$149,223.24
	ICSID Advances Paid	$500,000
	Total	$4,112,673.24

Relevant principles as to costs

613. The relevant legal provisions which provide the basis for the Tribunal's consideration of the issues related to costs in these proceedings are Article 61(2) of the ICSID Convention and Rule 28(1)(b) of the ICSID Rules.

614. Article 61(2) of the ICSID Convention provides as follows:

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those

> expenses, the fees and expenses on the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."

615. Rule 28(1) of the ICSID Rules provides:

> "(1) Without prejudice to the final decision on the payment of the costs of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:
>
> (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
>
> (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties."

616. As to the apportionment of costs, the Tribunal has drawn useful guidance from the *travaux préparatoires* of the ICSID Convention, which indicate that the wording chosen for Article 61(2) was specifically designed to allow the Tribunal to make the decision on the assessment of costs (as opposed to the wording which had initially been included in the Preliminary Draft and the First Draft, which embodied the principle that each party to arbitration should bear its own expenses and that the charges of the Centre as well as the fees of the tribunal should be borne equally by the parties).[776] The Tribunal also notes Professor Schreuer's comment that "neither the Convention nor the attendant Rules and Regulations offer substantive criteria for the tribunals' decision on which party should bear the costs. Possible principles are the equal sharing of costs, the "loser pays" maxim, or the use of costs as a sanction for procedural misconduct."[777]

617. In coming to its decision on costs, the Tribunal has also taken due note of the decisions made by previous ICSID Tribunals, in light of which it appears that the practice of such Tribunals has not been uniform and that the present Tribunal therefore has a broad discretion to apportion costs.[778] In this respect, the Tribunal

[776] Schreuer, *supra* note 162, p. 1224**.**
[777] Ibid.
[778] *See, e.g., SPP v Egypt*, Award and Dissenting Opinion of 20 May 1992, 3 ICSID Reports 189; *MINE v Guinea*, Award of 6 January 1988, 4 ICSID Reports 61; *Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Award of 27 June 1990; *Wena Hotel Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000.

has derived assistance from the method adopted by the Arbitral Tribunal in *Plama Consortium Limited v Republic of Bulgaria.*[779]

618. In the *Plama* case, the Tribunal held that:

> "Article 61 of the ICSID Convention gives the Arbitral Tribunal the discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the parties as it deems appropriate. In the exercise of this discretion, the Arbitral Tribunal will apply the principle that "costs follow the event," by a weighing of relative success or failure, that is to say, the loser pays costs including reasonable legal and other costs of the prevailing party; or costs are allocated proportionally to the outcome of the case…."

619. Further, in *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, the Tribunal stated on the issue of costs:

> "… the Tribunal can find no reason to depart from the starting point that the successful party should receive reimbursement from the unsuccessful party. This was a complex, difficult, important and lengthy arbitration which clearly justified experienced and expert legal representation as well as the engagement of top quality experts on quantum. The Tribunal is not surprised at the total of the costs incurred by the Claimants. Members of the Tribunal have considerable experience of substantial ICSID cases as well as commercial cases and the amount expended is certainly within the expected range. Were the Claimants not to be reimbursed their costs in justifying what they alleged to be egregious conduct on the part of Hungary it could not be said that they were being made whole."[780]

Discussion

620. The Tribunal has carefully considered all submissions as to costs made by the parties including Egypt's contentions that the Claimants had not provided adequate substantiation of their actual legal fees and that their costs application was "unjustified and excessive."

621. Having considered all of this material the Tribunal finds that it is appropriate in this case for the losing party to bear the reasonable costs of the successful party in these proceedings. The Claimants have succeeded on the merits and Egypt's objections to the jurisdiction of the Tribunal were rejected in their totality, both at the jurisdictional

[779] ICSID Case No. ARB/03/24, Award of 27 August 2008.
[780] ICSID Case No. ARB/03/16, Award of 2 October 2006, p. 101.

phase and during the Tribunal's consideration of the merits. All of Egypt's defences on the merits have been dismissed. Moreover, in view of the repeated and belated re-formulated jurisdictional arguments advanced by Egypt, all of which have failed, the Tribunal is of the opinion that Egypt was responsible for greatly increasing the costs of these proceedings.

622. The Tribunal is therefore satisfied that the Claimants should be compensated for their reasonable legal fees and related expenses in respect of both the original jurisdictional phase and subsequent phases.

623. It now falls to the Tribunal to determine the reasonableness of the amount of Claimants' legal fees and related expenses.

624. As a preliminary point, this Tribunal agrees with the observation made in the *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary* case, where the Tribunal rejected the submission "that the reasonableness of the quantum of the Claimants' claim for costs should be judged by the amount expended by the Respondent." This Tribunal further agrees that "it is not unusual for claimants to spend more on costs than respondents given, among other things, the burden of proof."[781]

625. As regards the legal costs sought by the Claimants, the Tribunal is satisfied that the amount sought by the Claimants for its legal costs is in line with the level of fees normally charged by a major international law firm in a case of this kind involving many complex issues and a number of procedural phases. These costs are not, therefore, unreasonable. The fact that the attorney's fees presented by Egypt are significantly less than those sought by the Claimants does not of itself demonstrate that the fees charged by counsel for the Claimants are unreasonable.

626. With regard to the costs of the Claimant's experts, the Tribunal recalls that it has accepted Egypt's submission that the DCF analysis presented by the Claimants' expert, LECG, was an insufficiently certain basis upon which to calculate damages in the present case. As such, the Tribunal does not consider it appropriate to grant any recovery of LECG's fees, particularly in light of the Claimants' pursuit of its alternative approach to the quantum of damages which has been upheld by the Tribunal. Moreover, it is reasonable to assume that some of the legal fees would have been expended in briefing the LECG witness. In making this ruling, the Tribunal intends no

[781] Ibid., at p. 102.

disrespect to LECG since the relative paucity of baseline information made its task a difficult one.

627. However, as regards the Claimants' other experts, the Tribunal finds that the costs sought are reasonable. In its consideration of this issue, the Tribunal has taken into account the well known observations of Judge Holtzmann:

> "Nor should the Tribunal neglect to consider the reality that legal bills are usually first submitted to businessmen. The pragmatic fact that a businessman has agreed to pay a bill, not knowing whether or not the Tribunal would reimburse the expenses, is a strong indication that the amount billed was considered reasonable by a reasonable man spending his own money, or the money of the corporation he serves. That is a classic test of reasonableness."[782]

628. The Claimants have confirmed that the fees of their experts have been paid in full. In light of the foregoing reasons and having given due weight to the complexity of the issues on which expert evidence was required, the Tribunal is of the view that the experts' fees were reasonably incurred and also reasonable as to the amount.

629. Finally, in coming to its decision on the allocation of costs, the Tribunal has also noted that Egypt has made a number of unsuccessful jurisdictional objections, some of which were filed late in the course of proceedings and which represented in modified form issues which had already been decided by the Tribunal.

630. In consideration of the above and taking into account all the circumstances of the present case, the Tribunal concludes that it would be appropriate, in the exercise of its discretion, to order Egypt to pay the Claimants the sum of USD 6,000,000 as a reasonable contribution towards their reasonable costs and expenses in this arbitration. This figure starts with the total amount claimed and deducts the LECG fee and a sum which reflects an approximation of the legal costs likely to have been incurred in briefing LECG.

X. THE AWARD

631. For all the foregoing reasons and rejecting all submissions to the contrary the Tribunal hereby FINDS, DECLARES, AWARDS and ORDERS as follows:

[782] Separate opinion of Judge Holtzmann, at p. 7; reported in Iranian Assets Litigation Reporter 10, 860, 10, 863; 8 Iran-US C.T.R. 329, 332-333.

(I) JURISDICTION

For the reasons set forth in the Tribunal's Decision on Jurisdiction dated 11 April 2008 (which it incorporates by reference) and in the present Award, the Tribunal finds that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal. In particular it;

(a) Finds and declares that at all relevant times Mr Siag was not an Egyptian national;

(b) Finds and declares that Egypt's objection to jurisdiction based on Mr Siag's alleged Egyptian nationality and all of its related contentions about his alleged disqualifying dual nationality fail and are hereby dismissed;[783]

(c) Finds and declares that Egypt's objection to jurisdiction concerning Mr Siag's alleged fraud or other misconduct in relation to his acquisition of Lebanese nationality fails and is hereby dismissed.[784]

(d) Finds and declares that Egypt's objection to jurisdiction based on Mr Siag's alleged bankruptcy fails and is hereby dismissed;[785]

(II) LIABILITY

The Tribunal finds and declares that:

(a) The Claimants have established all the necessary elements of their claims;

(b) Egypt is liable to Claimants for unlawfully expropriating Claimants' investment, consisting of the Property and the Project, in breach of Article 5(1)(ii) of the BIT;[786]

(c) Egypt is liable to Claimants for failing to provide full protection to Claimants' investment, consisting of the Property and the Project, in breach of Article 4(1) of the BIT;[787]

[783] *See* Decision on Jurisdiction dated 11 April 2008.
[784] *See* above pp. 73 – 97.
[785] *See* above pp. 41 – 53.
[786] *See* above pp. 116 – 121.
[787] *See* above pp. 122 – 123.

(d) Egypt is liable to Claimants for failing to ensure the fair and equitable treatment of Claimants' investment, consisting of the Property and the Project, in breach of Article 2(2) of the BIT;[788]

(e) Egypt is liable to Claimants for allowing Claimants' investment, consisting of the Property and the Project, to be subjected to unreasonable measures, in breach of Article 2(2) of the BIT.[789]

(III) EGYPT'S DEFENCES

The Tribunal finds and declares that:

(a) Egypt's defence that the Claimants may not oppose their Italian nationalities to Egypt fails and is dismissed;

(b) Egypt's defence based on Mr Siag's alleged bankruptcy fails and is hereby dismissed;

(c) Egypt's defence that the Claimants are estopped from denying their Egyptian nationality fails and is dismissed;

(d) Egypt's defence challenging the standing of Mrs Vecchi's estate fails and is dismissed.

(IV) DAMAGES

The Tribunal finds, declares and orders that:

(a) The Claimants are entitled to recover from Egypt the total sum of USD 74,550,794.75 in compensation for its actions in breach of the BIT as set out in paragraph 631 (II) (b)-(e) above, comprising the following:

(i) the sum of USD 69,108,858 for the loss of the Claimants' investment, comprising the Property and the Project;

(ii) the sum of USD 4,441,936.75 as part of the value of construction work carried out by the Claimants;

(iii) the sum of USD 1,000,000 toward the Claimants' legal expenses incurred in litigation before Egypt's domestic courts.

[788] *See* above pp. 123 – 125.
[789] *See* above pp. 125 – 126.

(b) The Respondent shall pay the total sum of USD 74,550,794.75 awarded in paragraph 631 (IV) (a) above within 30 days of the date of this Award together with interest thereon calculated pursuant to paragraph 631 (VI) (a) below.

(V) COSTS AND EXPENSES

The Tribunal finds, declares and orders that:

(a) The Claimants are entitled to recover from Egypt the sum of USD 6,000,000 in respect of their legal costs, expert witness expenses and other expenses together with interest thereon calculated pursuant to paragraph 631 (VI) (b) below;

(b) The Respondent shall pay the total sum of USD 6,000,000 awarded in paragraph 631 (V) (a) above within 30 days of the date of this Award;

(c) The Parties should each bear fifty per cent of the Tribunal's fees and expenses and ICSID's charges, as separately notified by ICSID.

(VI) INTEREST

The Tribunal finds, declares and orders that:

(a) The Claimants are entitled to recover interest from Egypt and Egypt is ordered to pay interest on all sums of damages awarded under paragraph 631 (IV) above, at the six month LIBOR rates applicable from time to time since 23 May 1996 through until the date of payment, with such interest being compounded six-monthly;

(b) The Claimants are entitled to recover interest from Egypt and Egypt is ordered to pay interest on all sums of costs and expenses awarded under paragraph 631 (V) above, from the 30th day following the date of this Award, at the applicable six month LIBOR rate through until the date of payment, with such interest being compounded six-monthly.

(VII) GENERAL

The Tribunal finds and declares that:

(a) All other claims and requests by the parties are dismissed.

632. The Tribunal wishes to make clear that it has read and taken into account all of the voluminous material submitted to it in this arbitration even if not every point has been replicated herein.

/signed/

_____

Mr David A R Williams QC

President of the Tribunal

Date: [4 May 2009]

/signed/

_____

Prof. Michael Pryles

Arbitrator

Date: [1 May 2009]

/signed/

_____

Prof. Francisco Orrego Vicuña

Arbitrator

Date: [11 May 2009]

(Signed subject to the attached dissenting opinion)

APPENDIX 1 : CHRONOLOGY OF THE PRIMARY FACTS

The following is a chronological summary of the primary facts as found by the Tribunal:

- 30 January 1937: Clorinda Vecchi born in Egypt to Italian nationals
- 19 April 1955: Clorinda Vecchi informs Egyptian Interior Ministry of her wish to acquire the Egyptian citizenship of her husband
- 19 April 1957: Clorinda Vecchi acquires Egyptian citizenship and loses her Italian citizenship
- 12 March 1962: Waguih Siag born in Egypt
- 4 January 1989: Egyptian Government and Siag Touristic execute contract for sale of 650,000 square metre property at Taba to Siag Touristic.
- 2 March 1989: Egypt – Italy BIT signed. BIT entered into force on 1 May 1994.
- 1 December 1989: Mr Siag's Individual Record is issued
- 19 December 1989: Mr Siag is issued a Lebanese nationality certificate
- 5 March 1990: Egyptian Interior Minister issues an Article 10 Decree granting Mr Siag permission to acquire Lebanese nationality and to maintain Egyptian nationality if desired and if declaration made within 1 year
- 14 June 1990: Mr Siag's first Lebanese passport is issued
- 5 March 1991 or 14 June 1991: Mr Siag does not make a formal declaration that he intends to retain Egyptian nationality
- 3 May 1993: Mr Siag obtains Italian nationality
- 14 September 1993: Ms Vecchi reacquires Italian nationality and loses Egyptian nationality
- 23 August 1994: Siag Touristic enters into an agreement with Lumir Holdings Ltd
- 29 May 1995: Egyptian Minister of Tourism announces the cancellation of the contract between Egypt and Siag Touristic and seizes the property

- 13 June 1995: Minister of Tourism re-instates the contract
- 26 June 1995: Contract between Siag Touristic and Lumir is cancelled
- 23 April and 9 May 1996: Egypt and Siag Touristic agree that the completion date for phase one of construction will be 31 December 1996
- 23 May 1996: Resolution 83 issued, taking land at Taba from Siag Touristic
- 10 June 1996: Siag applies to Cairo Administrative Court to enjoin Resolution 83
- 16 June 1996: Cairo Administrative Court holds preliminary hearing on Siag's application and order second hearing on 23 June 1996
- 20 June 1996: Resolution 83 is enforced by the taking of control of the Taba property
- 21 July 1996: Cairo Administrative Court enjoins Resolution 83
- 19 August 1996: Siag re-takes possession of Taba property
- 21 August 1996: Egyptian Government re-takes property
- 16 October 1996: Supreme Administrative Court rejects Egypt's request to stay enforcement of the injunction against Resolution 83
- 5 February 1997: Supreme Administrative Court affirms injunction of Resolution 83
- 16 January 1999: Cairo Court of Appeal declares Siag Pyramids Hotel, along with Mr Siag, bankrupt
- June 1999: Siag Pyramids Hotel pays $7,000 debt
- 24 June 1999: Giza Court of First Instance ends bankruptcy proceeding
- 24 August 1999: Suez Attorney General determines that Siag is the rightful owner of the property in Taba and finds that the property should be returned to Siag
- 7 September 1999: Cairo Administrative Court rejects the Egyptian State Lawsuits Authority's objection that Mr Siag lacks capacity because he is bankrupt

- 28 May 2000: El Tor Court of First Instance cancels the 24 August 1999 decision of the Suez Attorney General allowing Siag to occupy the property
- 7 August 2001: Supreme Administrative Court cancels Resolution 83 and rules that contract between Siag Touristic and Egypt is valid
- 8 September 2001: Egyptian Minister of Tourism issues Resolution 279, taking the Taba property
- 24 March 2002: South Sinai Civil Appeals Circuit Court confirms the 24 August 1999 decision of the Suez Attorney General that the Taba property should be returned to Siag
- 28 March 2002: Cairo Administrative Court enjoins enforcement of Resolution 279
- 6 June 2002: Cairo Administrative Court denies Egypt's application for a stay of injunction over Resolution 279
- 15 July 2002: President Mubarak issues Presidential Decree 205, taking the land at Taba and allocating it for public benefit
- 24 February 2003: Prime Ministerial Resolution 315 issued, taking the Taba property
- 16 March 2003: Taba property assigned by Egypt to the Al Sharq Gas Company for the construction of a gas pipeline
- 19 March 2003: Giza Court of First Instance re-opens the 1999 bankruptcy proceedings
- 27 April 2003: Cairo Administrative Court enjoins enforcement of Presidential Decree 205 and Prime Ministerial Resolution 315
- 17 May 2003: Prime Ministerial Resolution 799 issued, taking the Taba property
- 13 October 2004: Claimants invoke the Egypt – Italy BIT and notify Egypt of the dispute
- 24 May 2005: Supreme Administrative Court affirms the injunction against Resolution 279

26 May 2005: Claimants file their Request for Arbitration.

Dissenting Opinion of Professor Francisco Orrego Vicuña

Like with the dissent of this arbitrator in respect of the Decision on Jurisdiction, I very much regret not to be able to share some views and conclusions that my learned colleagues have reached in the Award on the merits which is now issued by the Tribunal. Once again I do so with great respect and admiration for the work that has been undertaken in the preparation of this Award. While I agree with many of the conclusions reached, I have felt that it is my duty to point out such differences where questions of special significance are involved. In a case so abundant on evidence and arguments, it is only natural that the record might be interpreted or assessed differently, which is a legitimate exercise for arbitrators and counsel alike. In this context I must express my appreciation to the distinguished counsel that have represented both parties in this arbitration, with some of whom I have had the pleasure of working on prior occasions.

The first such difference concerns yet again the question of one of the Claimants' nationality. This time, however, the issue has arisen not only in connection with the interpretation of the applicable legislation and principles, particularly insofar Egypt's legislation on nationality and the operation of the *Nottebohm* principle of effective nationality are concerned, which were the thrust of the dissent on jurisdiction, but also in connection with a far more delicate matter. This is the question whether the certificate of registration concerning the relevant Lebanese nationality claimed by that Claimant was obtained by improper means and does not accordingly reflect the actual situation as no such registration was found in the official records of Lebanon.

This arbitrator of course willingly accepts that the interpretation of the facts brought before the Tribunal is open to different readings, but I have been persuaded and ultimately convinced that the evidence provided by the Respondent is enough to establish such impropriety. Whether this could be considered a case of fraud, corruption, traffic of influence or some other form of impropriety, the fact is that money appears to have changed hands with a view to obtain an untrue certification.

This conclusion in no way reflects adversely on any of the distinguished counsel that have represented the Claimants in these proceedings, nor on my colleagues in the Tribunal, as none would be willing to condone such practices. The difference of opinions is not concerned with the principle but only with a different assessment of the evidence and whether it is sufficient to establish such impropriety. In the view of counsel for the Claimants and the Award the evidence has not so established, while in

my opinion it has. An examination of the main facts is therefore important to explain the reasons of this dissent.

It has been explained by counsel for the Respondent that in the course of preparing the argument on *estoppel* that the Tribunal ordered in the Decision on Jurisdiction to be examined in conjunction with the merits, doubts arose as to certain characteristics of the certificates attesting to the registration of the Claimant concerned as a national of Lebanon. The case for *estoppel*, as argued by Egypt, was that the Claimant had relied on its Egyptian nationality to conduct its business and obtain certain benefits available to nationals of that country and accordingly could not rely now on the purported loss of Egyptian nationality because of having obtained that of Lebanon. It was accordingly necessary and appropriate to examine again the relevant evidence on Lebanese nationality.

In the light of such doubts, the question was brought to the attention of the Lebanese authorities concerned with public records, most notably the Ministry of the Interior, with a view to finding out the precise record of the Claimant's registration. After various inquiries it was concluded that such registration did not exist. The certificate attesting to that registration, it was argued, was thus false, forged or tainted by some other irregularity that did not reflect the actual truth. It was also argued that the documents based on that certification issued by the Lebanese Embassy in Cairo, including two passports in the name of the Claimant, were thus equally untrue.

While the issue of whether forgery, fraud, deception or some other misconduct characterized the documents in question gave place to lengthy discussions, the matter became crystal clear at the closing of the hearing on the merits. Following a question from the Chairman about whether the claim of forgery was to be disregarded, it was so confirmed by counsel for Egypt, with the clarification that two aspects were involved in this discussion: "…a document that was not genuine, on the basis of which everybody was misled to believe that the passports are genuine. They are not forged. The Lebanese Embassy in Egypt was misled by a document that is not genuine" [Transcript, 18 March 2008, at 46-47].

In my examination of the evidence, the latter statement is the one that convincingly explains what actually had been the real situation. Four different documents were subject to close scrutiny. The first was the certificate of registration. This was the document giving rise to doubts about its genuineness and the ultimate certification by the Lebanese authorities about the fact that no record of registration for the Claimant existed. Whether the certificate bore official seals and marks, or even signatures, that were illegible, does not alter the fact that it attested to a non-existent

registration. Impropriety in obtaining the certificate was therefore the necessary implication of such situation.

On the basis of that certificate, the Lebanese Embassy in Cairo issued first a certificate on Claimant's Lebanese nationality and its registration in the records of the mission. Such document does not mean that the individual record on which it was based was genuine, as the Lebanese consular office is not the authority in charge of public records of that country. The Embassy later issued the two passports noted, which were also based on the false information provided. It follows that neither these passports constitute proof that the Claimant was indeed a Lebanese national. Few countries will require that embassies check for the genuineness of documents submitted unless something awkward is apparent from them.

It has been admitted in the proceedings that the Claimant concerned paid US $5,000 to a Lebanese lawyer in connection with obtaining the certificate of registration, as it has been also admitted that this was done in order to avoid military service in Egypt. That particular gentleman seems to have vanished from earth as his first name, address or other relevant information about him have been conveniently forgotten by the Claimant concerned [Transcript, March 10, 2008, at 153 et seq.] While it could be thought that the amount involved is not beyond the ordinary for professional services of the kind, it must not be forgotten that these events were contemporaneous with the most dramatic moments of civil war in Lebanon, a context in which such amount becomes significant and can go a very long way.

Because such events were surrounded by none too clear circumstances, the Tribunal rightly directed the Claimant concerned to submit documentary evidence in terms of a "certification from the Lebanese Ministry of the Interior that Mr. Siag is a Lebanese national, and the date and place of his registration" or if not to explain why it was unable to obtain the requested documents (Procedural Order No. 6, para. 6.3). No such document was produced as none existed. While many explanations were offered about the state of public records in Lebanon, none is in my view convincing. Lebanon has a long tradition of public service which in spite of many difficulties has continued to function, just as its diplomatic service has.

The burden of proof is, in my understanding, still on the Claimant who has to prove that it holds the nationality it claims to have and this it has failed to do in spite of having been directed by the Tribunal to supply the appropriate certification. The Award has taken a different view on this matter in the belief that it is for Egypt to prove fraud, deception or other dishonest behaviour, a proof that would not have been met. While I do not disagree with the need to so prove, I respectfully disagree in respect of the

conclusion that this did not happen. I believe that Egypt has so proven by providing ample official documentation on the matter.

In this context I also disagree about the applicable standard of proof. While the Award has chosen the United States standard of clear and convincing evidence, it is my view that arbitration tribunals, particularly those deciding under international law, are free to choose the most relevant rules in accordance with the circumstances of the case and the nature of the facts involved, as it has been increasingly recognized (Abdulhay Sayed, Corruption in International Trade and Commercial Arbitration (2004), at pp. 89-92). The facts of this case, difficult as they are to establish with absolute certainty, could be best judged under a standard of proof allowing the Tribunal "discretion in inferring from a collection of concordant circumstantial evidence (*faisceau d'indices*) the facts at which the various indices are directed" [Ibid., at 93-94].

In the end, it must be decided whether the information provided by the Lebanese authorities, a country which is not a party to these proceedings, or that supplied by the Claimant, who is the party most involved in the arbitration and with specific interests in its outcome, is to be relied upon. This arbitrator has not the slightest doubt that the former is to prevail. The only other choice would have been to request the intervention of Interpol in support of the Tribunal's task to establish the true facts, which was not asked for nor in my view appeared necessary in view of the evidence on record.

The legal implications of the facts noted above are serious indeed. It is not just a question concerning jurisdiction. In spite of jurisdiction having been affirmed by the Tribunal, a party is not prevented from submitting additional jurisdictional objections if they are based on events not known at the time of the pleadings on jurisdiction, which in this case neither could they have been known as the doubts about genuineness arose later. This is why I respectfully dissent from the Award's finding about the claim on this count having been untimely and waived.

Irrespective of jurisdiction, however, the most serious consequences relate to the merits of the case. I am convinced that money changed hands improperly so as to obtain a certificate of a non-existent registration, a situation which was not uncommon at the time as a consequence of the civil war. While the goal pursued by the original certification was to avoid Egyptian military service, a goal which is bad enough, and this was done some years before the actual dispute was submitted to arbitration, the fact is that the same certification has now been used in support of a multi-million dollar claim.

Whether the principle of *ex turpi causa non oritur actio*, the doctrine of unclean hands or the policy of eliminating corruption domestically and internationally are relied

upon, the result is that an arbitration tribunal cannot find for a claim that is tainted by such practices. As the Tribunal in *World Duty Free* held in this respect:

> "In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal" [World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7, Award of 4 October 2006, para. 157].

If one substitutes certificates of registration of nationality for contracts arrives exactly, in my respectful view, to the same conclusion. Accordingly, I believe that the claim in the instant case should be dismissed on the merits.

I regrettably must also dissent on some other points of law or fact relating to different matters. One such matter concerns the repossession of the land under the Sale contract and its later expropriation. It is an established fact the project suffered a number of delays. How influential these delays were in completing the project on time is a question open to discussion. The Award accepts the argument that the project was close to completion at the time the land was repossessed and the contract terminated. In spite of technical studies and courts decisions that would so establish, I am not quite convinced that this was the case. The photographic evidence does not seem to show such timely completion. In any event, what the Respondent did in this respect was to exercise a right under the provisions of the contract.

It is a fact, however, that expropriation of the land was later undertaken, a point which is not disputed. The question of the appropriate compensation, however, has been much disputed and is now decided in the Award. My dissent from the reasoning of the Award on this other matter is that I am not persuaded that the Treaty allows for a standard of compensation different from fair market value at the time of expropriation. There are of course situations where that standard might be inadequate in the light of the circumstances of the case, but in the instant case the application of Article 5 (iii) of the Treaty becomes compelling as the project had not actually began to operate, generate profits or provide any other element that would allow the Tribunal to consider that compensation should aim at a long-term view of the effects of expropriation. Such long-term view is what has led some tribunals and writers to suggest the existence of a different standard of compensation for unlawful expropriation, largely based on customary international law. This might well be justified in some cases, but this one

does not appear to qualify for that still exceptional treatment under international law. On this point I accordingly also dissent from the Award.

This has also implications for the amount of compensation decided. First, I am not quite in agreement about relying for such purpose on the exclusive view of experts invited by the Claimants, however distinguished they are. But more importantly, I believe that in this case the starting point should have been different from the comparative view taken by the experts and accepted by the Award in relation to other existing and ongoing projects, a number of which are unrelated to the Taba area.

I believe it would have been more appropriate to start from the award of discreet damages and costs, to be supplemented by such other factors as might be related to the fair market value of the property at the time of the expropriation and subject to the payment of an interest that would adequately take care of time and value. I also believe that it might have been appropriate to take into account eventual breaches of fair and equitable treatment and compensate them accordingly. In my view, the end figure of compensation should not have been above US$ 30 million. It must also be kept in mind that the capital contribution made by the Claimants to the project was minimal, that is 25% of a total capital of approximately US$ 3 million, in respect of which there are still important outstanding debts with the original partners and Egyptian banks.

A last point of this dissent relates to the award of costs. First, I do not believe that costs relating to stages of litigation that took place before this arbitration began should be awarded at all. In respect of the costs of this arbitration I believe that a more adequate approach would be to require each party to pay one half of such costs, particularly taking into account the fact that the Claimant agreed to pay attorney's fees only on a successful recovery. While there is nothing unusual in such arrangement, it entails the acceptance of the Claimant of a degree of risk that should not be entirely shifted to the Respondent, particularly in view of the amounts involved.

Respectfully submitted,

/signed/

Francisco Orrego Vicuña

Date: [11 May 2009]