

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON, D.C.**

**In the Arbitration Proceedings between:**

**NATIONAL GAS S.A.E.**

*Claimant*

- and -

**ARAB REPUBLIC OF EGYPT**

*Respondent*

**ICSID Case No. ARB/11/7**

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**AWARD**

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***The Tribunal:***

Mr. V. V. Veeder QC, President  
The Honourable L. Yves Fortier CC, OQ, QC  
Professor Brigitte Stern

*The Tribunal's Secretary*  
Mr. Paul-Jean Le Cannu

*Date of dispatch to the Parties: 3 April 2014*

## REPRESENTATION OF THE PARTIES

Representing National Gas S.A.E.:

c/o Dr. Khaled El Shalakany  
Mr. Adam Khaled El Shalakany  
Mr. Sherif Morsy  
Shalakany Law Office  
12, El Maraashly St.  
Zamalek 11211  
Cairo, Egypt

Representing Arab Republic of Egypt:

c/o Mr. Ezzat Ouda, President  
Mr. Mahmoud Elkhrahy, Counselor  
Mr. Amr Arafa, Counselor  
Ms. Fatma Khalifa, Counselor  
Ms. Rime Hendy, Counselor  
Ms. Lela Kassem, Counselor  
Egyptian State Lawsuits Authority (ESLA)  
10th Floor, Mogamaa Building  
Tahrir Square  
Cairo, Egypt  
and  
Mr. Louis-Christophe Delanoy  
Mr. Raéd Fathallah  
Ms. Liliane Djahangir  
Bredin Prat  
130, rue du Faubourg Saint-Honoré  
75008 Paris, France

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## GLOSSARY

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Treaty	Treaty between the Government of the Arab Republic of Egypt and the Government of the United Arab Emirates on the Encouragement, Protection and Guarantee of Investments signed on 11 May 1997
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Claimant or National Gas	National Gas S.A.E.
Respondent or Egypt	Arab Republic of Egypt
T. [page:line]	Transcript of the hearing on bifurcated jurisdictional issues on 27 June 2013

## LIST OF LEGAL MATERIALS

- AAPL* Award dated 27 June 1990 in Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/87/3) (Tribunal: Ahmed Sadek El-Kosheri, Samuel K.B. Asante, Berthold Goldman).
- ADC v. Hungary* Award dated 2 October 2006 in ADC Affiliate Limited & others v. Hungary (ICSID Case No. ARB/03/16) (Tribunal: Neil Kaplan, Charles Brower, Albert Jan van den Berg).
- Aguas del Tunari* Decision on Respondent's Objections to Jurisdiction dated 21 October 2005 in Aguas del Tunari, S.A. v. Republic of Bolivia (ICSID Case No. ARB/02/3) (Tribunal: David Caron, José Luis Alberro-Semerena, Henri C. Alvarez).
- Amco* Decision on Jurisdiction dated 25 September 1983 in Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1) (Tribunal: Berthold Goldman, Isi Foighel, Edward W. Rubin).
- Autopista* Decision on Jurisdiction dated 27 September 2001 in Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/00/5) (Tribunal: Gabrielle Kaufmann-Kohler, Karl-Heinz Böckstiegel, Bernardo M. Cremades).
- Bosnia and Herzegovina v. Yugoslavia* Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) (Provisional Measures, Order of 13 September 1993), 1993 ICJ Rep. at 325.
- Burimi* Award dated 29 May 2013 in Burimi & Eagle Games v Albania (ICSID Case No ARB/11/18) (Tribunal: Daniel M. Price, Bernardo M. Cremades, Ibrahim Fadlallah).

<i>Fireman's Fund</i>	Decision on the Preliminary Question dated 17 July 2003 in <i>Fireman's Fund Insurance Company v. United Mexican States</i> (ICSID Case No. ARB(AF)/02/1) (Tribunal: Albert Jan van den Berg, Andreas F. Lowenfeld, Alberto Guillermo Saavedra Olavarrieta).
<i>2006 ILC Articles</i>	International Law Commission's Articles on Diplomatic Protection, adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10).
<i>LETCO</i>	Decision on Jurisdiction dated 24 October 1984 in <i>Liberian Eastern Timber Corporation v. Republic of Liberia</i> (ICSID Case No. ARB/83/2) (Tribunal: Bernardo M. Cremades, Jorge Gonçalves Pereira, D.A. Redfern).
<i>Loewen</i>	Award dated 26 June 2003 in <i>The Loewen Group, Inc. and Raymond L. Loewen v. United States of America</i> (ICSID Case No. ARB(AF)/98/3) (Tribunal: Anthony Mason, Abner J. Mikva, Michael Mustill).
<i>Manciaux</i>	Sébastien Manciaux, <i>Investissements étrangers et arbitrage entre Etats et ressortissants d'autres Etats</i> (2004) 179.
<i>MHS</i>	Decision on the Application for Annulment dated 16 April 2009 in <i>Malaysian Historic Salvors SDN BHD v Government of Malaysia</i> (ICSID Case No. ARB/ /05/10) (Ad Hoc Committee: Judge Schwebel, Judge Shahabuddeen and Judge Tomka).
<i>Rompetrol</i>	Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility dated 18 April 2008 in <i>The Rompetrol Group N.V. v. Romania</i> (ICSID Case No. ARB/06/3) (Tribunal: Franklin Berman, Donald Donovan, Marc Lalonde).
<i>Schreuer</i>	Christoph Schreuer et al, <i>The ICSID Convention: A Commentary</i> (CUP, 2nd ed).
<i>SOABI</i>	Award dated 25 February 1988 in <i>Société Ouest Africaine des Bétons Industriels v. Senegal</i> (ICSID Case No. ARB/82/1)

	(Tribunal: Aron Broches, Kéba Mbaye, J.C. Schultz).
<i>Tokios Tokelès</i>	Decision on Jurisdiction dated 29 April 2004 in <i>Tokios Tokelès v. Ukraine</i> (ICSID Case No. ARB/02/18) (Tribunal: Prosper Weil, Daniel M. Price, Piero Bernardini).
<i>TSA Spectrum</i>	Award dated 19 December 2008 in <i>TSA Spectrum de Argentina, S.A. v. Argentine Republic</i> (ICSID Case No. ARB/05/5) (Tribunal: Hans Danelius, Georges Abi-Saab, Grant D. Aldonas).
<i>TSA Spectrum</i> Gaillard commentary	Emmanuel Gaillard, “Chronique des sentences arbitrales”, <i>Journal du droit international</i> (Clunet) n° 1, January 2009, p. 368.
<i>Vacuum Salt</i>	Award dated 16 February 1994 in <i>Vacuum Salt Products Ltd. v. Republic of Ghana</i> (ICSID Case No. ARB/92/1) (Tribunal: Robert Y. Jennings, Charles N. Brower, Kamal Hossain).
<i>Vacuum Salt</i> Gaillard commentary	Emmanuel Gaillard, “Chronique des sentences arbitrales”, <i>Journal du droit international</i> (Clunet) n° 1, January-March 1995, p. 181.
<i>VCLT</i>	The Vienna Convention on the Law of Treaties 1155 UNTS 331, 8 ILM 679 (1969), in force from 27 January 1980.
<i>Wena</i>	Decision on Jurisdiction dated 29 June 1999 in <i>Wena Hotels Limited v. Arab Republic of Egypt</i> (ICSID Case No. ARB/98/4) (Tribunal: Monroe Leigh, Ibrahim Fadlallah, Don Wallace, Jr.).

## ***PART I: THE ARBITRATION***

1. *The Parties' Dispute:* This arbitration concerns a claim submitted by the Claimant to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of (i) the Treaty between the Arab Republic of Egypt and the United Arab Emirates (“the UAE”) on the Encouragement, Protection and Guarantee of Investments signed on 11 May 1997 (the “Treaty”), which entered into force on 11 January 1999, and (ii) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”), which entered into force on 14 October 1966.
2. The claim relates to the alleged expropriation “through denial of justice and abuse of process”<sup>1</sup> of (i) the Claimant’s right to arbitrate and (ii) the award rendered under the auspices of the Cairo Regional Centre for International Commercial Arbitration (“CRCICA”) in relation to a contractual dispute between the Claimant and the Egyptian General Petroleum Corporation (“EGPC”) arising out of the Concession Agreement entered into by the Claimant and EGPC on 6 January 1999.
3. *The Parties:* The Claimant is National Gas S.A.E. (“National Gas” or the “Claimant”). National Gas is a private joint stock company incorporated under the laws of the Arab Republic of Egypt.<sup>2</sup>
4. The Respondent is the Arab Republic of Egypt (“Egypt” or the “Respondent”).
5. The Claimant’s and the Respondent’s respective representatives and their addresses are listed above.
6. Both Egypt and the United Arab Emirates (“UAE”) are Contracting States to the ICSID Convention, the former since 1972 and the latter since 1982. The UAE is not a party to this arbitration.

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<sup>1</sup> Claimant’s Request for Arbitration dated 9 February 2011, Section V.1; *see also* Claimant’s Memorial on the Merits dated 31 May 2012, para. 23.

<sup>2</sup> *See* Claimant’s Request for Arbitration dated 9 February 2011, para. 21; Claimant’s Memorial on the Merits dated 31 May 2012, para. 27.



7. CTIP Oil & Gas International Limited (“CTIP”) is a juridical person incorporated under the laws of the UAE in the Jebel Ali free zone of Dubai, UAE. From 2006 onwards, CTIP has owned 90% of the shares in the Claimant. CTIP was and remains wholly owned by another juridical person incorporated under the laws of the UAE in the Jebel Ali free zone of Dubai, UAE, known in this arbitration as “REGI”. REGI was and remains wholly owned by Mr. Reda Ginena. CTIP, REGI and Mr. Ginena are not parties to this arbitration.
8. *Procedure:* On 14 February 2011, ICSID received a request for arbitration dated 9 February 2011, from National Gas as the Claimant against Egypt as the Respondent (the “Request”).
9. On 22 March 2011, the Secretary-General of ICSID registered the Request, as supplemented by the Claimant’s letter of 20 March 2011, in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute a Tribunal as soon as possible in accordance with Rule 7(d) of the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
10. Following an extensive exchange of correspondence between the Parties and the Centre,<sup>3</sup> the Parties’ agreement on the method of constituting the Tribunal was confirmed on 14 November 2011 in the following terms, in accordance with Article 37(2)(a) of the ICSID Convention: “The Tribunal shall consist of three arbitrators, one appointed by each Party and the third, who shall be President of the Tribunal, appointed by agreement of the Parties by November 30, 2011”.<sup>4</sup>

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<sup>3</sup> See letter from the Respondent dated 6 April 2011; letter from the Respondent dated 24 May 2011; letter from the Centre dated 24 May 2011; letter from the Claimant dated 12 June 2011; letter from the Respondent dated 13 June 2011; letter from the Centre dated 13 June 2011; letter from the Claimant dated 22 September 2011; letter from the Centre dated 22 September 2011; letter from the Respondent dated 26 September 2011; letter from the Centre dated 26 September 2011; letter from the Claimant dated 4 October 2011; letter from the Centre dated 4 October 2011; letter from the Respondent dated 25 October 2011; letter from the Claimant dated 9 November 2011; letter from the Centre dated 9 November 2011; letter from the Respondent dated 10 November 2011; and letter from the Claimant dated 13 November 2011.

<sup>4</sup> Letter from the Centre dated 14 November 2013.

11. By letter of 18 November 2011, the Centre informed the Parties that Professor Brigitte Stern, a national of France, had accepted her appointment by the Respondent as an arbitrator.<sup>5</sup>
12. By letter of 21 November 2011, the Centre informed the Parties that Mr. L. Yves Fortier CC, OQ, QC, a national of Canada, had accepted his appointment by the Claimant as an arbitrator.<sup>6</sup>
13. By letter of 27 November 2011, the Respondent proposed that Mr. V.V. Veeder QC, a national of the United Kingdom, be appointed President of the Tribunal and invited the Claimant to accept this proposal. The Respondent further proposed that in the event that the Claimant were not to accept the proposed appointment, the Parties agree to extend the deadline for them to agree on the appointment of the President until 14 December 2011.
14. By letters of 12 December 2011, the Claimant informed the Respondent and the Centre that it accepted the appointment of Mr. Veeder as President of the Tribunal and confirmed that “both Parties [were] now in agreement regarding the appointment of the President of the Tribunal”.
15. Mr. Veeder accepted his appointment on 15 December 2011. On the same date, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”) notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Mr. Paul-Jean Le Cannu, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
16. On 27 February 2012, the Tribunal held a first session with the Parties by telephone. The Parties confirmed that the Tribunal had been properly constituted and that they had no current objection to the appointment of any Member of the Tribunal. It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English and that the place of the proceeding would be

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<sup>5</sup> The Respondent informed the Centre that it appointed Professor Stern by letter of 26 September 2011.

<sup>6</sup> The Claimant appointed Mr. Fortier CC, OQ, QC in its Request for Arbitration (*see* RFA, para. 87).

Paris, France. The agreement of the Parties was embodied in the Minutes of the First Session signed by the President and the Secretary of the Tribunal and subsequently issued to the Parties.<sup>7</sup>

17. The items upon which the Parties failed to agree at the first session were addressed by the Tribunal in Procedural Order No. 1 dated 12 March 2012, which provided in relevant part (by reference to the first session's agenda items) that:

*1.3. The items on which the Tribunal was required to decide were as follows:*

*(1) Schedule for Submission of Pleadings (Paragraph 13 of the Minutes of the First Session);*

*(2) Document Production (Paragraph 14); and*

*(3) Hearings (Paragraph 16).*

[...]

*2.1. Having heard the respective positions of the Parties and deliberated, the Tribunal decides as follows:*

***(Items 1 & 3) Schedule for Submission of Pleadings and Hearings***

*2.1.1. The schedule for written submissions shall be as follows:*

- The Claimant shall file a Memorial on Jurisdiction and the Merits by no later than 31 May 2012. The Claimant shall limit its submissions on the merits to issues of liability, with issues of quantum to be addressed (if relevant) in a subsequent phase of the proceedings;*
- The Respondent shall file a Memorial containing all its Objections to Jurisdiction and Request for Bifurcation as soon as possible thereafter but in any event no later than 11 September 2012;*
- The Claimant shall file its Response to the Respondent's Request for Bifurcation as soon as possible thereafter but in any event no later than 18 September 2012.*

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<sup>7</sup> Further to the instructions of the Tribunal, the Centre circulated draft minutes for the Parties' comment on 12 March 2012 and final signed minutes on 6 April 2012.

2.1.2. *The Tribunal shall hold an in-person hearing on bifurcation and related procedures and time-table in Paris beginning at 14.30 hours on 20 September 2012.*

**(Item 2) Document Production**

2.1.3. *These issues will be re-addressed at the hearing in Paris on 20 September 2012 in further consultation with the Parties, with the Tribunal making no order for the time being regarding any document production but retaining in full all its powers to do so.*

18. By letter of 13 March 2012, the Claimant informed the Tribunal that it understood paragraph 2.1.1. of Procedural Order No. 1 to mean that “the Respondent shall file a Memorial on Jurisdiction and the Merits (submissions on the merits to be limited to issues of liability) containing all its objections on jurisdiction and request for bifurcation as soon as possible thereafter but in any event no later than 11 September 2012”.

19. By letter of the Centre dated 14 March 2012, the Tribunal confirmed that:

*[...] the Respondent shall file a Memorial containing all its Objections to Jurisdiction and Request for Bifurcation as soon as possible after the filing of the Claimant’s Memorial on Jurisdiction and the Merits but in any event no later than 11 September 2012. The Respondent is not expected to include submissions on the merits in this Memorial.*

20. By email of 19 March 2012, the Claimant requested that it be granted at least three weeks to prepare its Response to the Respondent’s Request for Bifurcation. It also requested that the Tribunal clarify when and how the Claimant would have to respond to the Respondent’s jurisdictional objections if the Tribunal were to decide not to bifurcate the proceedings.

21. By letter of 22 March 2012, the Claimant stated that while it had initially objected to bifurcation, it had reconsidered its position in light of Procedural Order No. 1 and now accepted the Respondent’s Request for Bifurcation. The Claimant further proposed “that the Hearing scheduled in Paris for next September [2012] now be dedicated to

Respondent's intended jurisdictional challenge and that the coming months be used for exchanges of written memorials on jurisdiction".

22. By letter of 25 March 2012, the Respondent informed the Tribunal that while it "agrees on the Claimant's acceptance of bifurcation, it does not approve any change to the schedule of submissions, already set by the Tribunal's procedural Order [...]". The Respondent also proposed a further schedule for written submissions on jurisdiction.
  23. By letter of 5 April 2012, the Claimant suggested that the deadlines proposed by the Respondent for written submissions on jurisdiction should be shorter.
  24. On 6 April 2012, the Tribunal issued Procedural Order No. 2, in which the following decisions were recorded:
    - (i) *The Tribunal decides, for the time being, not to confirm the Parties' joint proposal for bifurcation, albeit subject to different conditions. That joint proposal, if maintained by both Parties, shall be reviewed at the Paris meeting in further consultation with the Parties;*
    - (ii) *The Tribunal decides to maintain unchanged the timetable for the Claimant's Memorial on the Merits and the Respondent's Jurisdiction Memorial, as established in Procedural Order No.1;*
    - (iii) *The Tribunal decides that, on 18 September 2012, the Claimant may but is not required to submit a brief, initial written response to the Respondent's Jurisdiction Memorial, limited to the issue of bifurcation and/or future procedural timetable; and*
    - (iv) *The agenda for the Paris meeting shall be limited to deciding only procedural matters (including bifurcation) and shall not include any issue of substance, whether relating to merits or jurisdiction.*
12. *Given the several decisions above, in addition to limiting expressly the Paris meeting's agenda as indicated above for the purpose of clarifying Paragraphs 2.1.2 & 2.1.3 of Procedural Order No. 1, the Tribunal amends Paragraph 2.1.1 to provide as follows:*

“2.1.1. *The schedule for written submissions shall be as follows:*

*The Claimant shall file a Memorial on Jurisdiction and the Merits by no later than 31 May 2012. The Claimant shall limit its submissions on the merits to issues of liability, with issues of quantum to be addressed (if relevant) in a subsequent phase of the proceedings;*

*The Respondent shall file a Memorial containing all its Objections to Jurisdiction and Request for Bifurcation as soon as possible thereafter but in any event no later than 11 September 2012;*

*The Claimant may (but shall not be required) file a brief, initial written response to the Respondent’s Jurisdiction Memorial, limited to the issue of bifurcation and/or future procedural timetable on 18 September 2012.”*

25. By letter of 10 April 2012, the Claimant thanked the Tribunal for clarifying certain aspects of Procedural Order No. 1 and for introducing the minor procedural amendment provided by Procedural Order No. 2.
26. On 31 May 2012, the Claimant filed its Memorial on the Merits.
27. By letter of 27 July 2012, the Respondent informed the Tribunal and the Claimant that it would now be jointly represented by the Egyptian State Lawsuits Authority, Foreign Disputes Department (“ESLA”) and Messrs. Louis-Christophe Delanoy, Tim Portwood and Raëd Fathallah of Bredin Pratt, Paris, France.
28. By letter of 30 July 2012, the Respondent offered to file a memorial on jurisdiction and the merits provided that it be granted a three-month extension of the deadline to submit its memorial (i.e. until Monday 10 December 2012). It also confirmed its availability to attend an in-person meeting on procedural issues in Paris on 20 September 2012.
29. By letter of 5 August 2012, the Claimant informed the Tribunal that it would have no objection to a three-month extension for the Respondent to submit a memorial on jurisdiction and the merits. The Claimant further submitted that “in view of the

Respondent's failure to present any submission on the jurisdictional challenge, despite the ample opportunity provided in the time schedule (which the Claimant strictly adhered to), [...] the request for bifurcation [should] be denied, and that issue[s] of jurisdiction and liability [should] be addressed together in a first phase of this Arbitration". The Claimant finally indicated that a procedural hearing in Paris on 20 September 2012 "would be extremely useful".

30. By letter of the Centre dated 6 September 2012, the Tribunal informed the Parties that the Respondent was not obliged to submit its Memorial containing all its Objections on Jurisdiction and Request for Bifurcation on 11 September 2012 and that its application for more time would be an item on the agenda and addressed at the procedural meeting of 20 September 2012 in Paris.
31. The procedural meeting was held on 20 September 2012 at the World Bank's offices in Paris, France.<sup>8</sup> In addition to the Tribunal and its Secretary, the following were present at the meeting:

*For the Claimant:* Dr. Khaled El Shalakany, Shalakany Law Office; Mr. Adam Khaled El Shalakany, Shalakany Law Office; Ms. Sara Ezzat, Shalakany Law Office; Mr. Sherif Morsy, Shalakany Law Office; and Mr. Reda Ginena, National Gas; and

*For the Respondent:* Mr. Mahmoud Mohamed Abdel Wahab Elkhrahy, Counselor, Egyptian State Lawsuits Authority, Foreign Disputes Department (ESLA); Mr. Mohamed Mahmoud Khalaf Nasr, Counselor, ESLA; Mr. Louis-Christophe Delanoy, Bredin Prat; Mr. Raëd Fathallah, Bredin Prat; Mr. Suhaib Al-Ali, Bredin Prat; and Ms. Liliane Djahangir, Bredin Prat.

32. At this meeting, the Tribunal also established the following two-track procedural timetable following consultation with the Parties:

*2.1. The Respondent shall file a Counter-Memorial on the Merits (limited to issues of liability) as well as all its*

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<sup>8</sup> The Minutes of the Procedural Meeting of 20 September 2012 were circulated to the Parties in draft form for comment on 1 October 2012. The Parties having submitted no comment, the final signed version of the Minutes was issued on 20 December 2012.

*Objections to Jurisdiction and its Request for Bifurcation of the proceeding into jurisdiction and merits phases by 10 December 2012.*

- 2.2. *Should the Respondent file Objections to Jurisdiction and a Request for Bifurcation, the Claimant shall reply to the Request for Bifurcation by 31 January 2013.*
- 2.3. *The Tribunal shall hold a hearing on the issue of bifurcation with the Parties by telephone on 11 February 2013 at 4:00 pm CET; the Tribunal shall render its decision on the Respondent's Request for Bifurcation then or shortly thereafter.*
- 2.4. *If the Tribunal decides to bifurcate ("Track 1"), the schedule shall be as follows:*
  - 2.4.1. *The Claimant shall file a Counter-Memorial on Jurisdiction by 18 March 2013;*
  - 2.4.2. *The Respondent shall file a Reply on Jurisdiction by 29 April 2013; and*
  - 2.4.3. *The Claimant shall file a Rejoinder on Jurisdiction by 27 May 2013; and*
  - 2.4.4. *The Tribunal shall hold an organisational pre-hearing conference by telephone at a date to be determined; and*
  - 2.4.5. *The Hearing on Jurisdiction shall be held in Paris either on 27 June or 3 July 2013.*
- 2.5. *If the Tribunal decides not to bifurcate and to join the objections to jurisdiction to the merits ("Track 2"), the schedule shall be as follows:*
  - 2.5.1. *The Claimant shall make its requests for production of documents (if any) in the form of a Redfern Schedule by 31 January 2012 [sic: 2013];*
  - 2.5.2. *The Respondent shall produce the requested documentation or, if not, state its objections to any request for production by 11 March 2013;*
  - 2.5.3. *The Claimant shall respond to these objections by 25 March 2013;*



- 2.5.4. *The Tribunal shall make its best efforts to rule on these objections shortly thereafter;*
- 2.5.5. *The Claimant shall file a Reply on the Merits (limited to issues of liability) and Counter-Memorial on Jurisdiction by 27 May 2013;*
- 2.5.6. *The Respondent shall file a Rejoinder on the Merits (limited to issues of liability) and Reply on Jurisdiction by 19 August 2013;*
- 2.5.7. *The Claimant shall file a Rejoinder on Jurisdiction by 19 September 2013;*
- 2.5.8. *The Tribunal shall hold an organisational pre-hearing conference by telephone at a date to be determined; and*
- 2.5.9. *The Hearing on Jurisdiction and the Merits (limited to issues of liability) shall be held in Paris from 14 to 18 October 2013.<sup>9</sup>*

- 33. On 10 December 2012, the Respondent filed a Counter-Memorial on the Merits, its Objections to Jurisdiction, and its Request for Bifurcation. It also submitted a power of attorney dated 21 November 2012 (as agreed at the meeting of 20 September 2012).
- 34. On 31 January 2013, the Claimant filed its Reply to the Respondent's Request for Bifurcation. The Claimant submitted that "Track 2" should be adopted and that, if the deadline for the submission of its requests for production of documents was confirmed to be 31 January 2013 (and not 2012 as inadvertently indicated in Procedural Order No. 2), it requested a three-week extension of that deadline to 21 February 2013, with a corresponding adjustment of the subsequent deadlines of the document production phase. The deadline for the filing of the Claimant's Reply on the Merits (limited to issues of liability) and Counter-Memorial on Jurisdiction under "Track 2" would remain unchanged.
- 35. By letter of 1 February 2013, the Tribunal informed the Parties as follows:

*The Tribunal hereby confirms that the date set for the filing of the Claimant's document production requests was 31 January 2013*

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<sup>9</sup> Minutes of the Procedural Meeting of 20 September 2012, paras. 2.1-2.5.

*(See audio recording of the Procedural Meeting, 2nd audio file, 14' to 16'10"). However, in light of the circumstances and in particular the limited impact of the requested extension on the procedural time-table as a whole, the Tribunal hereby extends the deadline for the Claimant to file its document production requests to 21 February 2013, pursuant to article 26(2) of the ICSID Arbitration Rules and paragraph 6 of the Minutes of the First Session. Similarly, the deadline for the Respondent to produce the requested documentation or, if not, state its objections to any request for production is extended to 1 April 2013. The deadline for the Claimant to respond to these objections is extended to 15 April 2013.*

36. In addition, the Tribunal confirmed that in the event that the proceedings were to be bifurcated in accordance with “Track 1” of the procedural time-table, the Hearing on Jurisdiction would be held in Paris on 27 June 2013.
37. On 11 February 2013, the Tribunal held a meeting on the Respondent’s Request for Bifurcation by telephone. In addition to the Members of the Tribunal and its Secretary, the following took part in this meeting:

*For the Claimant:* Dr. Khaled El Shalakany, Shalakany Law Office; Mr. Adam Khaled El Shalakany, Shalakany Law Office; Ms. Marie-Louise Morcos, Shalakany Law Office; Ms. Sara Ezzat, Shalakany Law Office; Mr. Sherif Morsy, Shalakany Law Office; and Mr. Khaled Sherif, Shalakany Law Office.

*For the Respondent:* Mr. Mahmoud Mohamed Abdel Wahab Elkhrahy, Counselor, Egyptian State Lawsuits Authority, Foreign Disputes Department (ESLA); Mr. Mohamed Mahmoud Khalaf Nasr, Counselor, ESLA; Mr. Amr Arafa, Counselor, ESLA; Ms. Fatma Khalifa, Counselor, ESLA; Ms. Reem Hendy, Counselor, ESLA; Mr. Louis-Christophe Delanoy, Bredin Prat; Mr. Raëd Fathallah, Bredin Prat; Mr. Suhaib Al-Ali, Bredin Prat; and Ms. Liliane Djahangir, Bredin Prat.

38. On 18 February 2013, the Tribunal issued Procedural Order No. 3 recording its decision on the Respondent's Request for Bifurcation, disputed by the Claimant, in regard to the four objections to jurisdiction made by the Respondent, namely:

- (1) *“Nationality/Control”*: The Respondent submits that the Tribunal lacks jurisdiction *ratione personae* under Article 25(2)(b) of the ICSID Convention and Article 10(4) of the Treaty: see paragraphs 9(i) and 154 to 217 of the Respondent's Counter-Memorial (pp 5 & 42-63);
- (2) *“Timing of the Measures and of the Dispute”*: The Respondent submits that the Tribunal lacks jurisdiction *ratione temporis* under the Treaty: see paragraphs 9(iii) and 218-226 of the Respondent's Counter-Memorial (pp 5 & 63-65);
- (3) *“Exhaustion of Local Remedies”*: The Respondent submits that the Tribunal lacks jurisdiction *ratione materiae* under Article 26 of the ICSID Convention and Article 10(3) of the Treaty or alternatively that the Claimant's claims are inadmissible: see paragraphs 9(ii)(i) and 227-237 of the Respondent's Counter-Memorial (pp 5 & 65-67); and
- (4) *“Umbrella Clause and Sovereign Powers”*: The Respondent submits that the Tribunal lacks jurisdiction because the Respondent has not undertaken any commitment to the Claimant under the Treaty's umbrella clause and further, in any event, the contractual breaches alleged by the Claimant do not involve the exercise of the Respondent's sovereign powers: see paragraphs 9(ii)(ii) and 238 to 257 of the Respondent's Counter-Memorial (pp 5 & 67-74).<sup>10</sup>

39. For the reasons set out in Procedural Order No. 3, the Tribunal decided to bifurcate the Respondent's first and second objections, for which “Track 1” would apply.<sup>11</sup> As regards the Respondent's third and fourth objections, the Tribunal decided that there would be no bifurcation; and it joined these two objections to the merits, deciding that “Track 2” would apply without any suspension,<sup>12</sup> subject to the following matters: (i) given the risk that the costs might be wasted (should the Tribunal find that it had no jurisdiction), the Tribunal

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<sup>10</sup> See Procedural Order No. 3, para. 10.

<sup>11</sup> See Procedural Order No. 3, para. 17.

<sup>12</sup> See Procedural Order No. 3, para. 18.

confirmed that it would be minded to apply in this case the ‘loser pays’ principle in allocating costs to reflect that event under Article 61 of the ICSID Convention and ICSID Arbitration Rule 47;<sup>13</sup> and (ii) because the time-table under “Track 2” allowed for little slippage time, the Tribunal suggested that it might be safer to re-fix the October 2013 hearing to later dates.

40. By letter of 28 February 2013, the Respondent informed the Tribunal that while it appreciated “the Tribunal’s suggestion of applying the ‘loser pays’ principle to the instant proceedings [...]”, it was “also mindful that the parallel schedule would undermine the other underlying principles of a bifurcation such as saving time and efficiency”. The Respondent thus suggested not to proceed simultaneously with “Track 1” and “Track 2” and to amend “Track 2” by postponing by two months the deadline for the filing of the Respondent’s Rejoinder on the Merits and Reply on Jurisdiction and the Claimant’s Rejoinder on Jurisdiction, and holding the hearing three weeks after the filing of the Claimant’s Rejoinder.
41. By letter of 4 March 2013, the Claimant recalled that it had accepted to work under the pressure of a dual track time-table for the purpose of preserving the dates set aside for the October hearing. In the event that the Tribunal were inclined to amend “Track 2” as requested by the Respondent, the Claimant proposed alternative changes to both “Track 1” and “Track 2”.
42. By letter of 15 March 2013, the Respondent made further proposals for both Tracks.
43. By letter of 17 March 2013, the Claimant informed the Tribunal that it accepted the Respondent’s proposal of 15 March 2013.

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<sup>13</sup> See Procedural Order No. 3, para. 21.

44. On 27 March 2013, the Tribunal issued Procedural Order No. 4,<sup>14</sup> which fixed the following amended time-table:

A. *The Amended Schedule for “Track 1” shall now be as follows:*

- (i) *The Claimant to file its Counter-Memorial on Jurisdiction (on bifurcated jurisdictional issues) by 2 April 2013 (instead of 18 March 2013);*
- (ii) *The Respondent to file its Reply on Jurisdiction (on bifurcated jurisdictional issues) by 14 May 2013 (instead of 29 April 2013);*
- (iii) *The Claimant to file its Rejoinder on Jurisdiction (on bifurcated jurisdictional issues) by 12 June 2013 (instead of 27 May 2013); and*
- (iv) *The one-day Jurisdictional Hearing in Paris (on bifurcated jurisdictional issues) is maintained for 27 June 2013.*

B. *The Amended Schedule for “Track 2” is now as follows:*

- (i) *The Claimant to file its Reply on the Merits (limited to issues of liability, not quantum) and its Counter-Memorial on Jurisdiction (on non-bifurcated jurisdictional issues) by 1 September 2013 (instead of 27 May 2013);*
- (ii) *The Respondent to file its Rejoinder on the Merits (limited to issues of liability, not quantum) and its Reply on Jurisdiction (on non-bifurcated jurisdictional issues) by 8 November 2013 (instead of 19 August 2013);*
- (iii) *The Claimant to file its Rejoinder on Jurisdiction (on non-bifurcated jurisdictional issues) by 10 January 2014 (instead of 19 September 2013); and*
- (iv) *An oral hearing on Jurisdiction (on non-bifurcated jurisdictional issues) and the Merits (limited to issues of liability, not quantum) shall be held at dates still to be fixed by the Tribunal from*

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<sup>14</sup> A draft Procedural Order No. 4 was circulated to the Parties for comment on 19 March 2013.

*January/February 2014 onwards, depending on the availability of the Tribunal and of the Parties.*

45. On 2 April 2013, the Claimant filed its Defence on Bifurcated Jurisdictional Issues.
46. On 14 May 2013, the Respondent filed its Reply on Bifurcated Jurisdictional Issues.
47. On 12 June 2013, the Claimant filed its Rejoinder on Bifurcated Jurisdictional Issues.
48. On 27 June 2013, the Tribunal held an oral hearing on the two bifurcated jurisdictional issues at the World Bank's offices, 66 avenue d'Iéna, Paris 75116, France. In addition to the Tribunal and its Secretary (with the assistants to Mr. Fortier<sup>15</sup> and Professor Stern<sup>16</sup>), the following were present at this hearing:

*For the Claimant:* Dr. Khaled El Shalakany, Shalakany Law Office; Mr. Adam Khaled El Shalakany, Shalakany Law Office; and Mr. Sherif Morsy, Shalakany Law Office.

*For the Respondent:* Mr. Mahmoud Mohamed Abdel Wahab Elkhrahy, Counselor, Egyptian State Lawsuits Authority, Foreign Disputes Department (ESLA); Ms. Fatma Khalifa, Counselor, ESLA; Ms. Reem Hendy, Counselor, ESLA; Mr. Louis-Christophe Delanoy, Bredin Prat; Mr. Raëd Fathallah, Bredin Prat; Ms. Liliane Djahangir, Bredin Prat; and Ms. Alia El Sadda, Bredin Prat.
49. During this hearing, the Parties respectively made oral submissions on the two bifurcated jurisdictional issues, as recorded in the verbatim transcript: Mr. Delanoy for the Respondent; and Dr. El Shalakany for the Claimant. Neither Party adduced any oral evidence at the hearing.
50. At the end of the hearing, the Tribunal re-stated the amended schedule for "Track 2", which the Parties confirmed.<sup>17</sup> The Tribunal also informed the Parties of the dates on which it would be available to hold an oral hearing on the non-bifurcated jurisdictional issues and the merits in the event that none of the bifurcated jurisdictional issues were

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<sup>15</sup> Ms. Annie Lespérance.

<sup>16</sup> Mr. Fabian Hincker.

<sup>17</sup> See T. 177-178.

upheld.<sup>18</sup> The Tribunal invited the Parties to revert to that matter once they had had an opportunity to consider its proposal.<sup>19</sup>

51. By letter of 1 July 2013, the Tribunal invited the Claimant to make an additional written submission to clarify an argument made at the hearing with regard to Mr. Ginena's Canadian nationality, with the Respondent being afforded an opportunity to respond in writing to this further submission. The Tribunal was also "conscious that the timing of its decision may affect the current twin-track procedural timetable" and was mindful of "possible difficulties for the Parties over the proposed conditional hearing on the bifurcated jurisdictional issues and merits, all of which it [was] minded to address separately in the near future".
52. On 15 July 2013, the Claimant filed its Clarification of a Jurisdictional Issue. On 29 July 2013, the Respondent submitted its Response to Claimant's Clarification.
53. On 31 July 2013, the Claimant applied for permission to file a brief reply to the Respondent's submission of 29 July 2013 by close of business the next day. On 1 August 2013, the Tribunal informed the Parties that permission to file a brief reply was granted by the Tribunal *de bene esse*.
54. On 2 August 2013, the Claimant filed its Reply on the Clarification. On 3 August 2013, the Respondent sought permission to file a short Rejoinder to the Claimant's Reply of 2 August 2013. On 4 August 2013, the Tribunal informed the Parties that permission to file a brief rejoinder was granted by the Tribunal *de bene esse*.
55. On 5 August 2013, the Respondent filed its Rejoinder on Claimant's Clarification.
56. By letter of 6 August 2013, the Tribunal informed the Parties that the Claimant's Reply on the Clarification and Respondent's Rejoinder on Claimant's Clarification, initially admitted into the file *de bene esse*, were now both admitted unconditionally. The Tribunal also confirmed that, for the time being, no further written submissions from either Party were required by the Tribunal.

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<sup>18</sup> See T. 178.

<sup>19</sup> *Id.*

57. By letter of 4 September 2013, the Claimant applied for a six-week extension to file its Reply on the Merits (limited to issues of liability, not quantum) and its Counter-Memorial on Jurisdiction (on non-bifurcated jurisdictional issues), which it was unable to submit by 1 September 2013 owing to the political and social situation in Egypt.
58. By email of 13 September 2013, the Claimant inquired as to whether there had been a response to its request of 4 September 2013. By email of the same date, the Tribunal invited the Respondent to submit its comments on the Claimant's letter of 4 September 2013 as soon as practicable and in any event by 19 September 2013.
59. By letter of 16 September 2013, the Respondent informed the Tribunal that it was "unfortunately not in a position to comment on the Claimant's request before the Tribunal has ruled on the bifurcated objections to its jurisdiction". The Respondent "reserve[d] the right to return to this issue upon the ruling of the Tribunal on its jurisdiction".
60. By letter dated 13 October 2013, the Claimant submitted its Reply Memorial (also called "Memorial in Rejoinder"). The Claimant also requested a modification to "Track 2" to allow for further document production by the Respondent.
61. On 16 October 2013, the Tribunal issued Procedural Order No. 5, in which the following decision was recorded:

*In the current circumstances and considering that the Tribunal is still deliberating and actively determining the bifurcated jurisdictional issues, the Tribunal hereby issues this order suspending these arbitration proceedings until such determination or further procedural order.*

*The Tribunal will of course revert to the Parties in due course to inform them as to when it completes its determination of the bifurcated jurisdictional issues.*

62. *Relief:* As to the formal relief on the two bifurcated jurisdictional objections, the Respondent requests the Tribunal to:

(i) *DECLARE that the Tribunal has no jurisdiction over the Claimant's claims;*



- (ii) *DISMISS by way of an award on jurisdiction all claims brought by the Claimant against the Respondent; and*
- (iii) *ORDER the Claimant to pay all of the costs and expenses (with interest) of this arbitration, including the fees and expenses of the Tribunal, the fees and expenses of any experts appointed by the Tribunal or Respondent, and the fees and expenses of Respondent's legal representation in respect of this arbitration.*<sup>20</sup>

63. As to such formal relief, the Claimant requests “that the Tribunal issue an Award dismissing Respondent’s *ratione personae* and *ratione temporis* jurisdictional challenges, and award Claimant the costs that it has incurred in resisting these challenges (including legal fees), with interest from the date of Award until payment in full”.<sup>21</sup>
64. The proceeding was formally closed on the date of this Award’s dispatch to the Parties pursuant to Rule 38(1) of the Arbitration Rules.

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<sup>20</sup> Respondent’s Reply on Bifurcated Jurisdictional Issues dated 14 May 2013, para. 73.

<sup>21</sup> Claimant’s Rejoinder on Bifurcated Jurisdictional Issues dated 12 June 2013, para. 75. *See also* Claimant’s Defence on Bifurcated Jurisdictional Issues, para. 71.

## **PART II: EXTRACTS FROM RELEVANT TEXTS**

### ***The Treaty (in English translation from Arabic)***

65. Article 1(3) of the Treaty defines the term “investor” as: “[...] any of its natural or juristic persons that are investing in the territory of the other Contracting State”.

66. Article 10(3) of the Treaty provides:

*In the event that it becomes difficult to reach a satisfactory resolution through local courts, each Contracting State agrees to the submission of the dispute which arises between it and an investor from the other Contracting State to the International Centre for Settlement of Investment Disputes (referred to hereinafter as the “Centre”) to be settled through conciliation or arbitration by virtue of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which was presented in Washington on 18 March 1965 to be signed (referred to hereinafter as the “Convention”), with respect to the following [...].<sup>22</sup>*

67. Article 10(4) of the Treaty provides:

*In case of the existence of a juridical person that has been registered or established in accordance with the law in force in a region [territory] [“iqlim” in Arabic, meaning a province or like territory] following a Contracting State [“tabai” in Arabic, meaning linked to or subject to a Contracting State], and an investor from the other Contracting State owns the majority of the shares of that juridical person before the dispute arises, then such a juridical person shall, for the purposes of the Convention, be treated as an investor of the other Contracting State, in accordance with Article 25(2)(B) of the Convention.<sup>23</sup>*

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<sup>22</sup> Claimant’s English translation of the Treaty between the Government of the Arab Republic of Egypt and the Government of the United Arab Emirates on the Encouragement, Protection and Guarantee of Investments signed on May 11, 1997 (the “Treaty”), Exhibit C1 to the Claimant’s Request for Arbitration.

<sup>23</sup> *Id.*

68. The Tribunal experienced difficulties with the original English translation of Article 10(4) submitted by the Claimant. At the hearing, these difficulties were resolved jointly by the Parties with the addition of the square-bracketed wording inserted above.<sup>24</sup>

***The ICSID Convention (English version)***

69. Article 25 of the ICSID Convention provides (in the English version) 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; and*

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

*(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State*

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<sup>24</sup> See T. 103:4 – 108:5; T. 150:8-13.

*unless that State notifies the Centre that no such approval is required.*

- (4) *Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).*

70. In the French version of the ICSID Convention, the sequence of the words is different in the second part of Article 25(2)(b). It provides for ICSID arbitration if “les parties sont convenues, aux fins de la présente Convention, de considérer [une personne morale qui possède la nationalité de l’Etat contractant partie au différend] comme ressortissant d’un autre Etat contractant en raison du contrôle exercé sur elle par des intérêts étrangers”. In the Spanish version, the same passage ends with the words: “por estar sometidas a control extranjero”.
71. The Tribunal notes that the English, French and Spanish language versions of the ICSID Convention are equally authentic by reason of the ICSID Convention’s last paragraph. However, despite the different wording and word order between the English version and the French and Spanish versions of the second part of Article 25(2)(b), the Tribunal considers such differences to be immaterial for present purposes, applying Article 33(2) and 33(4) of the Vienna Convention on the Law of Treaties. (The Tribunal has also noted the scholarly commentary to such effect by Sébastien Mancaux, *Investissements étrangers et arbitrage entre Etats et ressortissants d’autres Etats* (2004) 179, cited by the Parties.)

### ***PART III: JURISDICTION RATIONE PERSONAE***

#### ***Introduction***

73. It is appropriate to address separately the two bifurcated jurisdictional objections made by the Respondent and disputed by the Claimant, beginning with the first objection *ratione personae*.
74. The Tribunal begins by summarising the Parties' principal submissions on this jurisdictional objection *ratione personae*. It has taken into account all their written and oral submissions on this objection, including the written pleadings submitted before the hearing (namely, the Respondent's Objections to Jurisdiction of 10 December 2012, the Claimant's Defence on Bifurcated Jurisdictional Issues of 2 April 2013, the Respondent's Reply of 14 May 2013 and the Claimant's Rejoinder of 12 June 2013), the oral submissions made at the hearing of 27 June 2013 and the subsequent written submissions of 15 July, 29 July, 2 August and 5 August 2013. The Tribunal emphasises that what follows are only brief summaries of the Parties' principal arguments.

#### ***The Respondent's Case***

75. In summary, the Respondent submits that the Claimant (National Gas) is an Egyptian company under Egyptian (not foreign) control; and that the Claimant cannot therefore commence an ICSID arbitration against the Respondent under the Treaty and the ICSID Convention.
76. *Legal Principles:* The Respondent refers to Article 25(1) of the ICSID Convention, whereby the jurisdiction of the Centre (ICSID) shall extend "to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State [...]". The Respondent contends that there can be no jurisdiction over a dispute between a Contracting State and a national of that same Contracting State under the ICSID Convention. Moreover, so the Respondent emphasises, even dual nationals cannot establish jurisdiction under the ICSID Convention for a claim against one of the States of which they have nationality.

77. The Respondent submits that such ineligibility is absolute under Article 25 of the ICSID Convention; and it cannot be cured by any consent of the parties, including consent by the Contracting State responding to the claim. The Respondent refers to the Report of the Executive Directors: “This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent”.<sup>25</sup>
78. The Respondent refers to the award rendered in *Burimi*, where a tribunal decided under the ICSID Convention that an Albanian company controlled by a dual national of Albania and Italy could not establish jurisdiction against Albania on the ground that such a dual national could not claim against Albania either directly or indirectly through the Albanian company.<sup>26</sup> Accordingly, the Respondent submits that a dual Egyptian-Canadian national, such as Mr. Ginena (being the owner and manager of National Gas) cannot establish jurisdiction against the Respondent even if Egypt had consented to such jurisdiction under the ICSID Convention (which is denied by the Respondent in any event).
79. The Respondent acknowledges the exception provided by Article 25(2)(b) of the ICSID Convention, concerning “any juridical person which had the nationality of the Contracting State other than the State party to the dispute [...] and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention”. In the Respondent’s submission, this limited exception applies only if two conditions are both met by a claimant. The first condition is objective: the juridical person (the local company) must be under “foreign control”. The second condition is subjective: because of this pre-existing foreign control, the parties must have agreed to treat the local company as a national of the Contracting State. Here, the parties’ agreement to submit the dispute to arbitration under the ICSID Convention is necessary, but it cannot be effective unless the local company is under “foreign control”.
80. The Respondent submits that the Claimant’s argument to the contrary effectively re-writes Article 25 of the ICSID Convention, requiring several words of the ICSID Convention to

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<sup>25</sup> Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “Report of the Executive Directors”), para. 29

<sup>26</sup> *Burimi & Eagle Games v. Albania*, ICSID Case No ARB/11/18, Award dated 29 May 2013 (“*Burimi*”). See T. 8:14 – 9:9.

be deleted. According to the Respondent, this was not the drafters' intention; it is an impermissible interpretation; and the Claimant's argument violates the cardinal principle of "effectiveness", as decided long ago by the ICSID award of 27 June 1990 in *AAPL*.<sup>27</sup> The Respondent further submits that for the past twenty years, many ICSID tribunals and scholars have confirmed that the parties' consent is worthless without also satisfying the objective requirement of "foreign control" under Article 25(2)(b) of the ICSID Convention.

81. In 1994, according to the Respondent, the tribunal in *Vacuum Salt* expressed this requirement as follows:

*[T]he parties' agreement to treat Claimant as a foreign national 'because of foreign control' does not ipso jure confer jurisdiction. The reference in Article 25(2)(b) to 'foreign control' necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so.*<sup>28</sup>

82. Professor Emmanuel Gaillard expressed scholarly approval of this award:

*La solution retenue par le Tribunal arbitral dans l'affaire Vacuum Salt doit être approuvée. A tort ou à raison, les rédacteurs de la Convention de Washington ont estimé que, pour justifier le recours à cette forme supranationale d'arbitrage qui puise sa source dans une convention internationale, le consentement des parties n'était pas une condition suffisante. Les tribunaux arbitraux constitués sous l'égide du Centre ne pouvaient que respecter cette volonté [...].*<sup>29</sup>

83. In 2008, according to the Respondent, the tribunal in *TSA Spectrum* adopted the same approach to Article 25(2)(b):

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<sup>27</sup> *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award dated 27 June 1990 ("AAPL"), para. 40, Rule (E).

<sup>28</sup> *Vacuum Salt Products Ltd. v. Republic of Ghana*, ICSID Case No. ARB/92/1, Award dated 16 February 1994 ("Vacuum Salt"), para. 36.

<sup>29</sup> Emmanuel Gaillard, "Chronique des sentences arbitrales", *Journal du droit international (Clunet)* n° 1, January-March 1995, p. 181 (the "Vacuum Salt Gaillard commentary"), Exhibit RL-75.

*The ratio legis of this exception is the wording “because of foreign control”. Foreign control is thus the objective factor on which turns the applicability of this provision [...] The provisions of the BIT cannot provide ICSID jurisdiction unless the conditions of Article 25(2)(b) of the ICSID Convention are satisfied.*<sup>30</sup>

84. Professor Gaillard similarly approved this decision:

*[I]l résulte du texte même de la convention de Washington que c’est le critère du contrôle qu’il y a lieu de mettre en œuvre. Ce contrôle doit donc être réellement exercé par des ressortissants étrangers et il ne suffirait pas de démontrer que la société de droit local est détenue par une société constituée dans un autre Etat contractant pour bénéficier de ce texte, si cette société est elle-même contrôlée par des ressortissants de l’Etat d’accueil. [...] On ne peut donc qu’approuver le Tribunal ayant statué dans l’affaire TSA d’avoir décliné sa compétence pour connaître d’une demande formée contre l’Argentine par une société de droit local formellement contrôlée par une société néerlandaise mais indirectement et ultimement contrôlée par un ressortissant argentin.*<sup>31</sup>

85. The Respondent also cites Schreuer’s Commentary on the ICSID Convention, which confirms that the words “because of foreign control” indicate a causal connection between control and the agreement and suggest that “control” is an objective requirement that cannot be replaced by an agreement between the disputing parties.<sup>32</sup> The Respondent cites further scholarly writings to similar effect: it is unnecessary to list them here, being recited in the Respondent’s Reply of 14 May 2013, at paragraphs 10ff.

86. The Respondent notes that a contrary approach may be indicated in the decision in *Autopista v. Venezuela*.<sup>33</sup> The ICSID tribunal there decided that a US company (Icatech) controlled a Venezuelan company (Aucoven) as long as Icatech owned a majority of

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<sup>30</sup> *TSA Spectrum de Argentina, S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award dated 19 December 2008 (“*TSA Spectrum*”), paras. 139, 156, Exhibit RL-14.

<sup>31</sup> Emmanuel Gaillard, “Chronique des sentences arbitrales”, *Journal du droit international (Clunet)* n° 1, January 2009, p. 368 (the “*TSA Spectrum* Gaillard commentary”), Exhibit RL-17.

<sup>32</sup> Christoph Schreuer et al, *The ICSID Convention: A Commentary* (CUP, 2nd ed.) (“Schreuer”), p 312, Exhibit RL-15.

<sup>33</sup> *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction dated 27 September 2001 (“*Autopista*”), Exhibit RL-27.



Aucoven's shares – despite the fact that Icatech was wholly-owned and managed by a Mexican company (ICA Holding). Under the relevant contract, the parties had characterised “control” as the ownership of a majority of Aucoven's shares. For the purpose of Article 25 of the ICSID Convention, the tribunal decided that this agreement was effective as regards “control”.

87. The Respondent submits that this ‘subjectivist’ approach is erroneous because the reality of Mexican control was ignored by the tribunal in order to favour the claimant investor with ICSID jurisdiction. The Respondent also submits that this approach is not consistent with the letter and spirit of Article 25(2)(b) of the ICSID Convention; and that the ICSID Convention, in providing for an exception to the general limitation that ICSID will not entertain claims between a national of a State and that same State, requires a real foreign control by nationals of another Contracting State. Accordingly, so the Respondent submits, this Tribunal should not follow the approach in *Autopista* because it is wrongly decided, inconsistent with long established and more recent awards and has been subjected to scholarly criticism.
88. In any event, the Respondent submits that the *Autopista* tribunal observed, significantly, that the USA was not considered “a tax or regulatory heaven [sic: haven]”.<sup>34</sup> According to the Respondent, this factor distinguishes *Autopista* from the present case. It submits that the involvement of CTIP in the UAE was a matter of mere fiscal convenience: (i) CTIP was established in 2004, well after the conclusion of the Concession Agreement (on 6 January 1999); (ii) CTIP acquired its shares in National Gas (the Claimant) in full knowledge of the absence of compensation to the Claimant; (iii) REGI was established in 2010, two months after the Claimant served the Respondent with its notice of intention to refer the present dispute to ICSID and eight months before the Claimant filed its Request for Arbitration; (iv) neither REGI nor CTIP have any employees or any substantial activities in the UAE; and (v) offshore companies in the Jebel Ali free zone are not subject to taxation on profits or income.<sup>35</sup> The Respondent submits, accordingly, that both CTIP

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<sup>34</sup> *Autopista*, para. 123; Respondent's Reply on Bifurcated Jurisdictional Issues dated 14 May 2013, para. 34.

<sup>35</sup> *See*, especially, the Respondent's Counter-Memorial dated 10 December 2012, para. 196.

and REGI operate as “companies of mere convenience”;<sup>36</sup> and that *Autopista* is, therefore, immaterial to the present case.

89. The Respondent next submits that, unsurprisingly, there is no definition of the term “control” in Article 25(2)(b) of the ICSID Convention. Whereas terms such as ‘nationality’ or ‘citizenship’ raise legal issues, the notion of “control” is much more a factual issue which is not easily reduced to a standard definition. As Schreuer comments: “foreign control is a complex question requiring the examination of several factors such as equity participation, voting rights and management. In order to obtain a reliable picture, all these aspects must be looked at in conjunction. There is no simple mathematical formula based on shareholding or votes alone”.<sup>37</sup>
90. The Respondent submits that controlling a company certainly implies the possibility to decide freely (subject to external constraints such as applicable laws and regulations, the economic environment, etc.) how this company should conduct its business, what strategy it should pursue, in other words the possibility to “steer the fortunes” of such company.<sup>38</sup> This control may be achieved with much less than the majority of the shares. For example, when equity is scattered among a great number of unrelated shareholders, the owner of 20% of the shares might well determine the company’s policy, i.e. “control” it. Conversely, this may not be achieved with 100% of the shares if the direct shareholder has no autonomous will and is merely following the instructions of a third party, such as its own shareholder.
91. The Respondent also submits that it is acceptable to pierce the corporate veil of the local company’s direct shareholder to locate this company’s controller: this is what the tribunal decided in *TSA Spectrum*,<sup>39</sup> declining jurisdiction because the local company was controlled not by its direct shareholder, but by an Argentinean national. This is also what

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<sup>36</sup> Respondent’s Counter-Memorial dated 10 December 2012, para. 198.

<sup>37</sup> Schreuer, *supra* footnote 32, p. 327, Exhibit RL-18; Respondent’s Counter-Memorial dated 10 December 2012, para. 170.

<sup>38</sup> *Vacuum Salt*, *supra* footnote 28, para. 53.

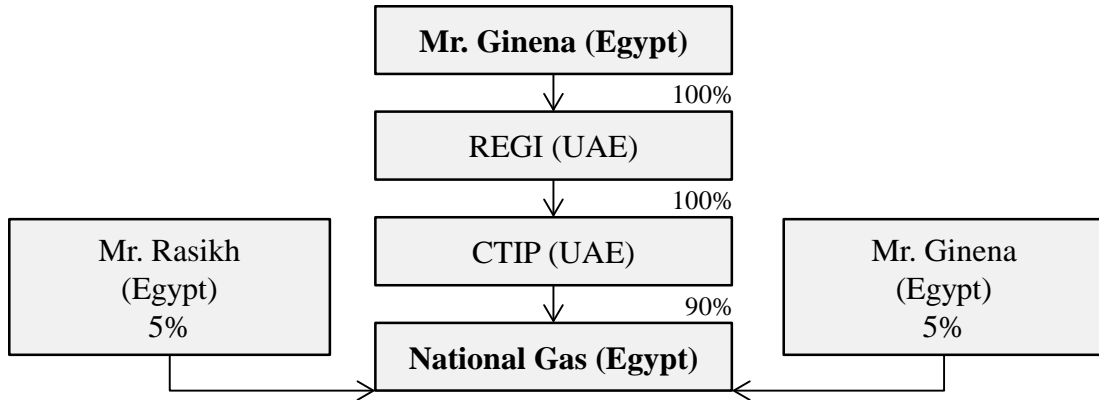
<sup>39</sup> *TSA Spectrum*, *see supra* footnote 30.

the tribunal decided in *SOABI*, retaining jurisdiction.<sup>40</sup> In any event, the tribunal must locate the controller, i.e. it must find the person who is in a position freely to decide how the company should conduct its business and then to retain or decline jurisdiction on the basis of the nationality of that controller. There is no reason to pierce the corporate veil when it can confer jurisdiction upon ICSID but to refuse to do so when it can lead to the opposite result.

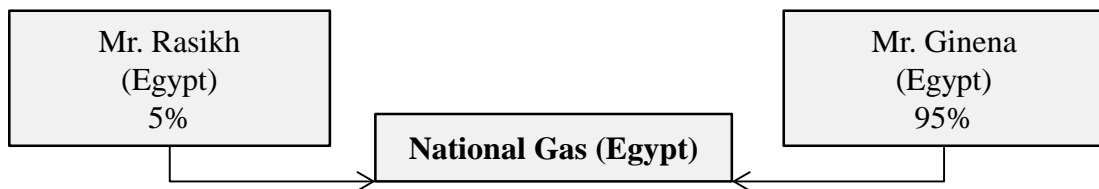
92. As regards Article 10(4) of the Treaty invoked by the Claimant, the Respondent first submits that no consent between the parties could be effective under the ICSID Convention as regards “foreign control”; and, second, that Article 10(4) does not provide for the consent invoked by the Claimant. The agreement of the parties to the Treaty concerning the treatment of local companies is expressly stated to be “in accordance” with Article 25(2)(b) of the Convention; and therefore it does not and could not modify Article 25(2)(b) of the ICSID Convention.
93. As to the facts, the Respondent submits that the evidence establishes that the Claimant is an Egyptian juridical person controlled by Mr. Reda Ginena, who is an Egyptian national; that Mr. Ginena was a co-founder of the Claimant; that Mr. Ginena is the Claimant’s manager; and that Mr. Ginena owns and controls both CTIP and REGI and thus the Claimant also, as shown by the following charts (the first taken from the Respondent’s Counter-Memorial, paragraph 159 and the second from its opening submissions at the hearing):

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<sup>40</sup> *Société Ouest Africaine des Bétons Industriels v. Sénégal*, ICSID Case No. ARB/82/1, Award dated 25 February 1988 (“*SOABI*”).



94. The Respondent submits that there would be no material difference (apart from possible adverse tax consequences) if the chart were simplified as follows:



95. Accordingly, the Respondent contends that CTIP and REGI add nothing: they have no influence or will of their own; they are transparent; and they cannot hide Mr. Ginena. Moreover, according to the Respondent, CTIP and REGI have no activity in the UAE, no personnel and no office; and they are registered only at the address of the law firm of Bayat & Motei. The Respondent submits that both companies were incorporated for purely fiscal reasons and do not in fact control or manage the Claimant (National Gas) independently from Mr. Ginena.

96. As a result, so the Respondent submits, National Gas is controlled by Mr. Ginena, an Egyptian national. Mr. Ginena himself could bring no claim against the Respondent under the ICSID Convention. There is therefore no “foreign control” within the meaning of Article 25(2)(b) of the ICSID Convention and, therefore, no jurisdiction *ratione personae* for the Claimant’s claims.

97. Finally, the Respondent dismisses as baseless the alternative argument that the Claimant raised at the hearing and subsequently developed in its post-hearing submissions. According to the Respondent, the Claimant cannot rely on the geographical origin of the assets invested (rather than the nationality of the claimant investor) in order to fall within the scope of the Treaty and the ICSID Convention. In addition, the Respondent submits that the Claimant's belated reliance on the Canada–Egypt BIT is misplaced, because Mr. Ginena is a dual national (Egyptian and Canadian) and Canada was not a party to the ICSID Convention.
98. In conclusion, the Respondent submits that, on the facts of this case, the correct application of Article 25(2)(b) of the ICSID Convention (with the Treaty) can only lead to a decision rejecting jurisdiction over the Claimant's claim.

### *The Claimant's Case*

99. In summary, the Claimant submits that the element of “foreign control” in Article 25(2)(b) of the ICSID Convention is not left hanging in the air as an abstract concept because it is inexorably linked with the parties' consent under Article 25(1) of the ICSID Convention and, here, Articles 1(3) and 10(4) of the Treaty. Accordingly, the element of “foreign control” under Article 25(2)(b) is primarily to be determined under the overriding umbrella of the parties' agreement as to what is “foreign control” and not by some independent non-consensual concept.
100. Article 1(3) of the Treaty defines an “investor” as including any juridical (or “juristic”) persons that are investing in the territory of the other Contracting State; and Article 10(4) of the Treaty provides that where an investor from the other Contracting State owns the majority of the shares in such juridical person, before the dispute arises, that juridical person “shall, for the purposes of the Convention, be treated as an investor of the other Contracting State in accordance with Article 25(2)(B) of the Convention”. Accordingly, the Claimant submits that the test is two-fold: (i) the nationality of the “investor” and (ii) “majority share ownership”; and that once these two elements are met,

the reference in the Treaty to Article 25(2)(b) of the ICSID Convention establishes “foreign control” exhaustively, without any further requirement under Article 25(2)(b).

101. The Claimant stresses that Article 1(3) of the Treaty refers to “any” juristic person. There is no reference to an additional factor relating to the person or persons who control that juristic person that is a national of the other Contracting State. Thus, according to the Claimant, once it is established that the Claimant is an “investor” protected under the terms of the Treaty, there is no need to add any further test to determine ICSID jurisdiction. Given the Treaty’s express and comprehensive wording, both Egypt and the UAE have agreed that the element of nationality under Article 25(1), including foreign control in Article 25(2)(b), is satisfied once the twofold test in Article 10(4) of the BIT is met. The Claimant contends that any other interpretation would be erroneous, because it would contradict the express will, consent and intention of these two Contracting States to the Treaty, to which the Claimant subscribed with its Request for Arbitration.
102. The Claimant contends that the overwhelming and prevailing jurisprudence confirms that the agreement of Contracting States should be given effect; and that where there is no restrictive or exclusionary provision agreed otherwise, the nationality of the foreign person owning the majority of the shares is sufficient in itself to establish the relevant element of nationality (inclusive of foreign control) for the purposes of Articles 25(1) and 25(2)(b) of the ICSID Convention. The Claimant further contends that there is no need to pierce the corporate veil and determine who in turn owns or controls that foreign person.
103. The Claimant refers to the decision in *Tokios Tokelès* where the majority of the tribunal decided in favour of jurisdiction.<sup>41</sup> In accepting the parties’ consent in the Ukraine–Lithuania BIT as the ruling factor, the tribunal noted the need for predictability in international investment. Accordingly, the tribunal excluded the control test and adopted the classical approach for determining the foreign nationality of the claimant.

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<sup>41</sup> *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction dated 29 April 2004 (“*Tokios Tokelès*”).

104. The Claimant also refers to the subsequent decision in *Rompetrol* where ICSID jurisdiction was based on the Netherlands–Romania BIT.<sup>42</sup> Similarly to the present case, according to the Claimant, there was there a two-level foreign ownership structure, whereby 84.6% of Rompetrol S.A. shares were held by a Dutch company (TRG N.V.) which was in turn owned 100% by a Swiss company (Rompetrol) which in turn was held 100% by two nationals of Romania. The tribunal rejected Romania’s jurisdictional objections, again applying the principle of the parties’ consent for determining the nationality of the claimant.
105. The Claimant next refers to the award issued in *ADC v. Hungary* under the Cyprus–Hungary BIT.<sup>43</sup> The Claimant submits that this award reconfirms the nationality principles adopted by international investment tribunals, where Cypriot companies fully owned and controlled by Canadians could properly be considered as Cypriot investors for the purposes of the BIT.
106. Conversely, the Claimant rejects the Respondent’s reliance on the decision in *TSA Spectrum Argentina* on the ground that it is clearly distinguishable.<sup>44</sup> According to the Claimant, the Netherlands–Argentina BIT contained a definition of “investor” different from the definition in the Treaty in the present case: Article 1(b) of that BIT expressly included concepts of effective management and ultimate control. The Claimant also refers to Mr. Aldonas’s dissenting opinion where he expressed the view that Article 25(2)(b) makes the determination of which juridical persons may gain access to ICSID jurisdiction by virtue of their “foreign control” expressly dependent on an agreement between “the parties”, and not some putative “objective” test.<sup>45</sup>
107. The Claimant also rejects the Respondent’s reliance on the decision in *SOABI*.<sup>46</sup> It submits that this decision has been overtaken by more recent decisions relied upon by Claimant

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<sup>42</sup> *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility dated 18 April 2008 (“*Rompetrol*”).

<sup>43</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, ICSID Case No. ARB/03/16, Award dated 2 October 2006 (“*ADC v. Hungary*”).

<sup>44</sup> *TSA Spectrum*, see *supra* footnote 30.

<sup>45</sup> *TSA Spectrum*, Dissenting Opinion of Mr. Grant D. Aldonas of 19 December 2008, para. 8, Exhibit C-64.

<sup>46</sup> *SOABI*, see *supra* footnote 40.

(including *Tokios Tokelès*, *Rompétrol* and *ADC*); and that it is also distinguishable because there was no BIT between Belgium and Senegal: the tribunal there confirmed its jurisdiction under an arbitration clause in the agreement concluded between SOABI and the Government of Senegal.

108. The Claimant likewise disputes the Respondent’s reliance on the decisions in *Vacuum Salt Products Limited v. Ghana*<sup>47</sup> and *Liberian Eastern Timber Company (LETCO) v. Liberia*.<sup>48</sup> In *Vacuum Salt*, there was no BIT; and there was also no BIT in *LETCO*. According to the Claimant, the Respondent’s reliance on *Aguas del Tunari*<sup>49</sup> and *Autopista*<sup>50</sup> is equally misplaced. The Claimant argues that *Aguas* should be distinguished because the Bolivia–Netherlands BIT clearly refers to control as a condition for the State’s consent.
109. The Claimant also distinguishes *Autopista* on the basis that the relevant instrument of consent, a concession agreement, contained an express requirement of “foreign control” that limited Venezuela’s consent to ICSID arbitration. The Claimant further emphasizes that the *Autopista* tribunal ruled that the parties in that case had defined foreign control on the basis of a reasonable criterion, namely direct majority shareholding by a national of another Contracting State. The Claimant concludes that *Autopista* supports its position that a State has “the right to include within its consent under Article 25(1) the elements of foreign control that it deems appropriate to satisfy Article 25(2)(b)”.<sup>51</sup> According to the Claimant, “direct shareholding by a company with the nationality of a foreign country” would be “a reasonable condition”<sup>52</sup> that would satisfy the test under Article 25(2)(b) of the ICSID Convention.

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<sup>47</sup> *Vacuum Salt*, see *supra* footnote 28.

<sup>48</sup> *Liberian Eastern Timber Corporation v. Republic of Liberia*, ICSID Case No. ARB/83/2, Decision on Jurisdiction dated 24 October 1984 (“*LETCO*”), Exhibit RL-20.

<sup>49</sup> *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction dated 21 October 2005 (“*Aguas del Tunari*”), Exhibit RL-78.

<sup>50</sup> *Autopista*, see *supra* footnote 33.

<sup>51</sup> Claimant’s Rejoinder on Bifurcated Jurisdictional Issues dated 12 June 2013, para. 49.17.

<sup>52</sup> *Id.*



110. In *Autopista*, the ICSID tribunal decided that it had jurisdiction over the parties' dispute.<sup>53</sup> In its reasons, according to the Claimant, this tribunal carefully analysed the two requirements of Article 25(2)(b) of the ICSID Convention. Albeit somewhat lengthy, given the critical significance which the Claimant attaches to such reasoning (as does, later, this Tribunal below), it is appropriate to set out verbatim much of that reasoning here in its full context, as follows (where the tribunal refers to these two requirements also as "prongs"):

*94. Article 25(1) of the ICSID Convention requires the Parties' consent to submit a dispute to ICSID Jurisdiction. No proceedings can take place under the Centre's auspices unless the parties to the dispute have given their consent in writing. More specifically, the system of the Convention is premised on two levels of consent. At the first level, one finds the consent expressed by the Contracting States which agreed to be bound by the Convention. At the second level, one finds the consent given by the host State and the investor by means of an agreement to ICSID arbitration [citation here omitted].*

*95. According to ICSID Tribunals and the commentaries on the ICSID Convention, great weight must be placed on the fact that the parties consented to ICSID's jurisdiction, consent often being described as the cornerstone of the jurisdiction of the Centre [citation and quote here omitted].*

*96. However essential, consent in and of itself is not sufficient to ensure access to the Centre. Indeed, Article 25 of the ICSID Convention provides for additional objective requirements which must be met in addition to consent. These objective requirements of the following:*

- *The dispute between the parties must be a "legal dispute";*
- *The dispute must arise directly out of an "investment"; and,*
- *In the event that the investor is a corporation registered under the laws of the host State, the parties must agree to treat the locally incorporated company, because of "foreign control", as a "national" of another Contracting State for the purposes of the Convention.*

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<sup>53</sup> See *Autopista*, *supra* footnote 33, para. 144a.

97. *The Convention does not contain any definition of these objective requirements. The drafters of the Convention deliberately chose not to define the terms “legal dispute”, “investment”, “nationality” and “foreign control”. In reliance on the consensual nature of the Convention, they preferred giving the parties the greatest latitude to define these terms themselves, provided that the criteria agreed upon by the parties are reasonable and not totally inconsistent with the purposes of the Convention.*

[...]

99. *As a result, to determine whether these objective requirements are met in a given case, one needs to refer to the parties’ own understanding or definition. As long as the criteria chosen by the parties to define these requirements are reasonable, i.e. as long as the requirements are not deprived of their objective significance, there is no reason to discard the parties’ choice.*

[...]

102. *Article 25(2)(b) creates an exception to the rule that a national cannot initiate ICSID proceedings against its own State. This exception is justified by the fact that host states may require foreign investors to operate by way of a locally incorporated company, without intending to prevent such investor from acceding to ICSID arbitration.*

103. *Article 25(2)(b) (second prong) defines “national of another Contracting State” as any juridical person which had the nationality of the Contracting State party to the dispute, and which because of foreign control, the parties have agreed should be treated as a national of another contracting state for the purposes of this Convention.*

104. *Hence, locally incorporated companies may agree to ICSID arbitration subject to two requirements:*

- *The parties have agreed to treat the said company as a national of another Contracting State for the purposes of this Convention; and*
- *The said company is subject to foreign control.*

[...]

105. *The Convention does not require any specific form for the agreement to treat a juridical person incorporated in the host state*

*as a national of another Contracting State because of foreign control.*

*106. Further, Article 25(2)(b) does not define nationality. As reflected in the Travaux préparatoires, the drafters intentionally gave up inserting into the ICSID Convention a definition of nationality [citation here omitted].*

*107. According to international law and practice, there are different possible criteria to determine a juridical person's nationality. The most widely used is the place of incorporation or registered office. Alternatively the place of the central administration or effective seat may also be taken into consideration [citations and quotations from SOABI and Amco here omitted].*

[...]

*109. However, as stated by Aron Broches, the purpose of Article 25(2)(b) being to indicate “the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre”, the parties should be given “the widest possible latitude” to agree on the meaning of nationality. Any definition of nationality based on “a reasonable criterion” should be accepted [citation to Dr. Broches' Hague lectures here omitted].*

[...]

*110. Like the other objective requirements of Article 25 of the ICSID Convention, foreign control is not defined. Article 25(2)(b) does not specify the nature, direct, indirect, ultimate or effective [sic: effect], of the foreign control.*

*111. In different decisions on jurisdiction, arbitral tribunals have discussed how far a tribunal should go in searching for foreign control. In Amco the tribunal considered that it should go one step behind the nationality of the host State; in SOABI the tribunal searched for real control and went one step further to second-tier control, i.e. to the majority shareholders of the company holding the share of the locally incorporated entity.*

*112. According to Venezuela [i.e. the respondent], foreign control in the meaning of Article 25(2)(b) means effective control. However, this interpretation lacks convincing support. Indeed, the term “effective control” is not found in the ICSID Convention. In addition, there is no indication in the Travaux préparatoires and in the commentaries on Article 25(2)(b) that “effective control” should be viewed as a threshold that has to be reached before the*

*parties may agree to treat a local corporation as a foreign national in the meaning of Article 25(2)(b).*

*113. The review of the Travaux préparatoires shows that, given the criticism drawn by attempts to define foreign control, the drafters considered that the enterprise of defining foreign control (like nationality, investment or legal dispute) was impracticable. Moreover definitions of these terms will be difficult to apply in practice and would often lead to protracted investigation of the ownership of shares, nominees, trusts, voting arrangements, etc. Hence, the drafters decided to give the parties wide discretion to determine under what circumstances a company could be treated as a national of another Contracting State because of foreign control. The concept of foreign control being flexible and broad, different criteria may be taken into consideration, such as shareholding, voting rights, etc. [citation to Dr. Broches' Hague lectures here omitted].*

*114. Given the autonomy granted to the parties by the ICSID Convention, **an Arbitral Tribunal may not adopt a more restrictive definition of foreign control, unless the parties have exercised their discretion in a way inconsistent with the purposes of the convention** [citations here omitted; emphasis added].*

*115. Some commentators even consider that an Arbitral Tribunal should be less stringent in assessing the level of control and the reasonableness of the criterion or criteria chosen by the parties when there is an express agreement in this respect [citations here omitted].*

*116. **On the basis of the foregoing developments, it is the task of the Tribunal to determine whether the parties have exercised their autonomy within the limits of the ICSID Convention, i.e. whether they have defined foreign control on the basis of reasonable criteria. For this purpose, the Tribunal has to review the concrete circumstances of the case without being limited by formalities. However, as long as the definition of foreign control chosen by the parties is reasonable and the purposes of the Convention have not been abused (for example in cases of fraud or misrepresentation), the Arbitral Tribunal must enforce the parties' choice.** [emphasis added]*

111. Accordingly, the Claimant submits that the provisions of the Treaty between Egypt and the UAE, with their agreement to grant protection to Egyptian companies whose majority shares are owned by UAE companies, is reasonable and should be given effect, thus

granting jurisdiction to the Tribunal under the express, clear and comprehensive wording of the Treaty and the prevailing jurisprudence of ICSID arbitration tribunals. Under that jurisprudence, a classical approach in determining nationality for the purposes of protection (based on the place of incorporation) is preferred, thus enhancing predictability in international investment; and moreover Article 25(2)(b) of the ICSID Convention is intended to expand jurisdiction and not to restrict it unreasonably – all of which supports the Claimant’s case on jurisdiction *ratione personae*. In addition to *Autopista* and other legal materials, the Claimant also cites the Decision on Jurisdiction in *Wena* in support of that general proposition.<sup>54</sup>

112. In conclusion, as to the facts, the Claimant submits that CTIP is a juristic person of the UAE; that CTIP owns 90% of the Claimant’s shares, as acknowledged by the Respondent in paragraph 159 of its Counter-Memorial (as reproduced above, in paragraph 93 of the Award); and that CTIP controls the Claimant.
113. During and after the hearing, the Claimant presented an alternative argument: in the event that the Tribunal should decide for any reason to apply an ‘ultimate’ ‘indirect’ and/or ‘effective’ control test under Article 25(2)(b) of the ICSID Convention, the Tribunal should find that: “[...] economic investments in Claimant represent both UAE and Canadian foreign investment interests under the [ICSID] Convention because Egypt in its domestic laws recognizes CTIP as a UAE investor and thus its investments in Egypt are ‘foreign’ investments and also recognizes Mr. Reda Ginena as a Canadian investor and thus his investments in Egypt are ‘foreign’ investments, the Canada–Egypt BIT being part of Egyptian law”.<sup>55</sup>
114. Accordingly, so the Claimant submits, the Claimant is an “investor” protected under the Treaty; the requirements of Articles 25(1) and 25(2)(b) of the ICSID Convention are satisfied; and this Tribunal has jurisdiction to decide the Claimant’s claim in this arbitration.

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<sup>54</sup> *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction dated 29 June 1999 (“*Wena*”), Exhibit C-65.

<sup>55</sup> Claimant’s Clarification of a Jurisdictional Issue dated 15 July 2013, para. 3.

### *The Tribunal's Analyses and Decisions*

115. *Introduction:* It is necessary at the outset to describe the Tribunal's general approach to this bifurcated jurisdictional issue under Article 25(2)(b) of the ICSID Convention. The Tribunal does not understand such approach to be materially disputed between the Parties.
116. Under the Treaty and the ICSID Convention, the Respondent offered to consent, on conditional terms, to arbitral jurisdiction for claims by non-States against the Respondent. A claimant seeking to accept that offer must meet the requirements imposed by such terms; and a failure to do so must necessarily mean that no arbitral jurisdiction exists, because there would be no consent by the Respondent to arbitral jurisdiction.
117. Consent always is the essential condition precedent to arbitration and, indeed, to any form of consensual adjudication. As was decided by the International Court of Justice in *Bosnia-Herzegovina v Yugoslavia*,<sup>56</sup> there must be an “‘unequivocal indication’ of a ‘voluntary and indisputable’ acceptance” of consent; and, as was also decided by a NAFTA arbitration tribunal, in the case *Fireman's Fund v. Mexico*,<sup>57</sup> a claimant “is not entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement”.
118. For present purposes, this approach means that the burden of establishing jurisdiction, including consent, lies primarily upon the Claimant. Although it is the Respondent which has here raised specific jurisdictional objections, it is not for the Respondent to disprove this Tribunal's jurisdiction. Under international law, as a matter of legal logic and the application of the principle traditionally expressed by the Latin maxim “*actori incumbit probatio*”, it is for the Claimant to discharge the burden of proving all essential facts required to establish jurisdiction for its claims. Such jurisdictional facts are not here subject to any “prima facie” evidential test; and, in any event, that test would be inapplicable at

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<sup>56</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) (Provisional Measures, Order of 13 September 1993)*, 1993 ICJ Rep. at 325, 342.

<sup>57</sup> *Fireman's Fund Insurance Company v United Mexican States*, ICSID Case No ARB(AF) 02/01, Decision on the Preliminary Question dated 17 July 2003 (“*Fireman's Fund*”), para. 64.

this stage of the arbitration proceedings where the Claimant (as with the Respondent) had sufficient opportunity to adduce evidence in support of its case on the bifurcated jurisdictional issues and for the Tribunal to make final decisions on all relevant disputed facts.<sup>58</sup>

119. Conversely, the Tribunal does not here apply a restrictive interpretation of consent in favour of the Respondent. As was decided in *Amco*, the consent of a sovereign to investment arbitration should not be construed restrictively as being a limitation of its sovereignty. The tribunal there decided:

*[...] [L]ike any other conventions, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle pacta sunt servanda, a principle common, indeed, to all systems of internal law and international law.*

*Moreover – and this is again a general principle of law – any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged.*<sup>59</sup>

120. However, from the text of the ICSID Convention, it is clear that the parties' consent, even if otherwise established, may not suffice to establish jurisdiction before an ICSID tribunal. As was noted by the Report of the Executive Directors: "While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties to it".<sup>60</sup>

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<sup>58</sup> Accordingly, the well-known dictum in the opinion of Judge Higgins in the *Oil Platforms Case* is here doubly irrelevant.

<sup>59</sup> *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction dated 25 September 1983, para. 14(i), Exhibit RL-25 (emphasis in the original).

<sup>60</sup> Report of the Executive Directors, para. 25.

121. As to limitations by reference to the nature of the dispute, Article 25(1) of the ICSID Convention extends jurisdiction only to legal disputes “arising directly out of an investment”. The recurring controversies before ICSID tribunals as to the meaning of “investment” demonstrate that consent as to the existence of an investment in another instrument may not suffice. As stated by Schreuer: “[...] if a BIT’s definition of investment goes beyond the requirements of the ICSID Convention there will be no jurisdiction”.<sup>61</sup> The Tribunal also notes the unresolved consequences, amongst arbitrators, legal practitioners and scholars, of the Decision on the Application for Annulment of 16 April 2009 made by the *Ad Hoc* Committee in *MHS*,<sup>62</sup> including the Dissenting Opinion of Judge Mohammed Shahabuddeen.<sup>63</sup> Fortunately, these difficulties do not require the decision of the Tribunal in this arbitration; and, for present purposes, their resolution can be set aside.
122. As to limitations by reference to the parties, Article 25(1) of the ICSID Convention contains another general limitation on consent. Its text limits jurisdiction to a qualifying dispute between a Contracting State and “a national of another Contracting State”. The latter term is defined in Article 25(2)(b) as including “any juridical person which had the nationality of a Contracting State other than the State Party to the dispute [...]”. Subject to the further wording (considered below), the plain meaning of this text precludes any consent by parties to ICSID jurisdiction where the claimant party has the nationality of the respondent Contracting State.
123. The effect of this wording in Article 25(2)(b) replicates the general limitation regarding natural persons in Article 25(2)(a) of the ICSID Convention. As already indicated above, this general limitation is interpreted to apply not only to nationals of the respondent Contracting State, but also to dual nationals of the respondent Contracting State and of another State. Moreover, these same limitations have long been established for diplomatic protection under international law: Article 4 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws declared: “A State may not afford

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<sup>61</sup> Schreuer, *supra* footnote 32, p. 124.

<sup>62</sup> *Malaysian Historic Salvors SDN BHD v Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment dated 16 April 2009 (“*MHS*”).

<sup>63</sup> *Malaysian Historic Salvors SDN BHD v Government of Malaysia*, ICSID Case No. ARB/05/10, Dissenting Opinion of Judge Shahabuddeen dated 16 April 2009.



diplomatic protection to one of its nationals against a State whose nationality such person also possesses”; and see now Articles 5-7 of the 2006 ILC Articles on Diplomatic Protection. Accordingly, the ILC’s Commentary on Article 5 approved the result of the *Loewen* award rejecting jurisdiction over the corporate claimant’s claim against the USA under NAFTA, on the ground that, with its newly acquired US nationality, that claimant’s claim could require the USA to pay compensation to its own national.

124. In the present case, the crucial difference between the Claimant and the Respondent turns, however, on the further wording in Article 25(2)(b), operating as an exception to the general limitation: “[...] and any juridical person which had the nationality of the Contracting State party to the dispute [...] and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention”. The Parties have both assumed in the present case that such an agreement can be made in a treaty between Contracting States (to which a claimant would not be a party) and not only an agreement between the disputing parties (including a claimant). In the circumstances, the Tribunal is content to proceed on that assumption.
125. In the Request for Arbitration dated 9 February 2011, the Claimant rightly acknowledged that both the Respondent and the UAE were Contracting States to the ICSID Convention and that the Claimant was a juridical person of Egyptian nationality. Under Article 25(1) and the first part of Article 25(2)(b), it would follow that, thus far, there could be no ICSID jurisdiction over the Claimant’s claim. The basis on which the Claimant asserted jurisdiction under the exception contained in the second part of Article 25(2)(b), as required by Rule 2(1)(d)(iii) of the ICSID Institution Rules, merits reciting verbatim:

*The Claimant is 90% owned by the UAE company CTIP Oil and Gas International Limited (“CTIP”) and, under Article 10(4) of the BIT is to be treated as a national of the UAE for the purposes of the Convention. [Article 10(4) is here quoted]. Since CTIP acquired 90% of the shares in the Claimant in 2006, the Claimant shall, **for the purposes of the Convention**, be treated as an investor of the UAE in accordance with Clause (b) of Article 25(2) of the Convention.*<sup>64</sup>

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<sup>64</sup> Claimant’s Request for Arbitration dated 9 February 2011, para. 28 (emphasis in the original).

126. The Tribunal notes the identification of the UAE as the other Contracting State under the second part of Article 25(2)(b) of the Convention, together with the Treaty.
127. In the Tribunal’s view, two principal questions arise in this case under this second part of Article 25(2)(b): (i) what is the meaning and effect of the phrase “[...] which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State”; and (ii) has that requirement been satisfied, with or without Article 10(4) of the Treaty? The meaning of Article 25 is of course subject to the legal rules of interpretation codified in the Vienna Convention on the Law of Treaties (as is also, of course, the Treaty); but it is appropriate first to consider two arbitral decisions on Article 25(2)(b), applying those rules.
128. These decisions are *Vacuum Salt Products Limited v. Government of the Republic of Ghana*, with the award of 16 February 1994 (ICSID Case No. ARB/92/1); and *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, with the decision on jurisdiction of 27 September 2001 (ICSID Case No. ARB/00/5). It is necessary to consider these two decisions in some detail. In the Tribunal’s view, these highly significant decisions are materially consistent with each other.
129. In *Vacuum Salt*, the tribunal (Robert Jennings, Charles Brower and Kamal Hossain), decided upon jurisdiction as follows:

36. [...] [T]he parties’ agreement to treat Claimant as a foreign national “because of foreign control” does not ipso jure confer jurisdiction. The reference in Article 25(2)(b) to “foreign control” necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so [citations omitted]. In addressing the present claim of jurisdiction grounded on the second clause of Article 25(2)(b) it is the task of the Tribunal thus to determine whether or not the Convention limit has been exceeded.

37. [...] As the consent of the parties is in broad principle the “cornerstone of the jurisdiction of the Centre” [citation omitted], it is accorded considerable respect and is not lightly to be found to have been ineffective. Thus the acknowledged authority on the

*Convention states in specific regard to Article 25 (2)(b) that “any stipulation... based on a reasonable criterion should be accepted” and that jurisdiction should be declined “only if... to do so would permit parties to use the Convention for purposes for which it was clearly not intended” [citation to Broches omitted]. In like vein it has been stated that the agreement of the parties “on a foreign nationality based on foreign control would raise a strong presumption that there was adequate foreign control on which to predicate a foreign nationality.” [citation to Amerasinghe omitted] Then it is “only... where such foreign control cannot be postulated on the facts on the basis of the application of any reasonable criterion that a tribunal... would not [accept jurisdiction], because in such a case the parties would purport to use the Convention for purposes it was not intended.” [citation to Amerasinghe omitted]*

*38. Nevertheless the words “because of foreign control” have to be given some meaning and effect. These words are clearly intended to qualify an agreement to arbitrate and the parties are not at liberty to agree to treat any company of the host State as a foreign national: They may only do so “because of foreign control.” The Tribunal concludes that the existence of consent to an arbitration clause [...] in circumstances such that jurisdiction could be premised only on the second clause of Article 25 (2)(b) raises a rebuttable presumption that the “foreign control” criterion of the second clause of Article 25(2)(b) has been satisfied on the date of consent.<sup>65</sup>*

130. In *Autopista*, as recited more fully above, the tribunal (Gabrielle Kaufmann-Kohler, Karl-Heinz Böckstiegel and Bernardo Cremades), approached the jurisdictional issue as follows:

*103. Article 25(2)(b) (second prong) defines “national of another Contracting State” as any juridical person which had the nationality of the Contracting State party to the dispute, and which because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of the Convention.*

*104. Hence, locally incorporated companies may agree to ICSID arbitration subject to two requirements:*

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<sup>65</sup> *Vacuum Salt*, *supra* footnote 28, paras. 36-38.

- *The parties have agreed to treat the said company as a national of another Contracting State for the purposes of this Convention; and*
- *The said company is subject to foreign control.*<sup>66</sup>

The Tribunal notes here this same formulation of two separate “requirements”.

131. Accordingly, despite its text as one uninterrupted sentence, Article 25(2)(b) of the ICSID Convention separately establishes a subjective test and an objective test. That is clear from the ordinary meaning of the wording of Article 25(2)(b), as well as the reasoning in the decisions in both *Vacuum Salt, Autopista* and in scholarly commentaries. Both tests must be met by the Claimant to establish jurisdiction in the present case. Albeit differing in its application, this approach is common ground between the Parties. As the Claimant rightly acknowledged at the hearing: “consent is not enough and consent is not the only thing [...]”.<sup>67</sup>
132. The subjective test is raised by the words “the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention”. In the Tribunal’s view, this subjective test is met by Article 10(4) of the Treaty by treating the Claimant as a national of the UAE, the latter being a Contracting State to the ICSID Convention. Article 10(4) refers expressly to Article 25(2)(b) of the Convention; the Claimant is a juridical person registered or established in accordance with the laws of Egypt; and CTIP owns a majority of the Claimant’s shares.
133. The objective test is raised by the words “because of foreign control”; and it is not met simply by meeting the subjective test: these two tests are not the same. As was decided in *Vacuum Salt*, “[...] the parties’ agreement to treat Claimant as a foreign national ‘because of foreign control’ does not *ipso jure* confer jurisdiction. The reference in Article 25(2)(b) to ‘foreign control’ necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how

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<sup>66</sup> *Autopista*, *supra* footnote 33, paras. 103-104.

<sup>67</sup> T. 64:14-15.

devoutly they may have desired to do so [...]”.<sup>68</sup> As was likewise decided in *Autopista*: “[...] locally incorporated companies may agree to ICSID arbitration subject to two requirements: “[t]he parties have agreed to treat the said company as a national of another Contracting State for the purposes of this Convention; and [t]he said company is subject to foreign control”.<sup>69</sup> Accordingly, the Tribunal decides that this objective test is not satisfied by mere agreement of the Parties in this case: “foreign control” must be established objectively.

134. The Tribunal acknowledges that, even as an objective test, the requirement of Article 25(2)(b) as to foreign control may take into account the express agreement of both the disputing parties and the Contracting Parties to the ICSID Convention. In the words of *Vacuum Salt*, such agreement may operate as “a rebuttable presumption”,<sup>70</sup> and, as expressed in *Autopista*, agreement based on “reasonable criteria”,<sup>71</sup> without formalities, would ordinarily suffice. Yet both approaches impose limitations to such agreements. In *Vacuum Salt*, citing Dr. Broches, an agreement could not permit parties to use the ICSID Convention “for purposes for which it was clearly not intended”.<sup>72</sup> In *Autopista*, again citing Dr. Broches, an agreement must keep within “the outer limits within which disputes may be submitted to [...] arbitration under the auspices of the Centre”;<sup>73</sup> and also “the purposes of the Convention have not been abused”.<sup>74</sup>
135. As to the application of this objective test, Professor Schreuer and his editorial colleagues suggest that “the better approach would appear to be a realistic look at the true controllers thereby blocking access to the Centre for juridical persons that are controlled directly or indirectly by nationals of non-Contracting States or nationals of the host State”.<sup>75</sup> Professor Gaillard, in the commentary cited by the Respondent, suggests that “control” must actually be exercised by foreign nationals; and that it would not suffice to show that the local

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<sup>68</sup> *Vacuum Salt*, *supra* footnote 28, para. 36.

<sup>69</sup> *Autopista*, *supra* footnote 33, para. 104 (emphasis added).

<sup>70</sup> *Vacuum Salt*, *supra* footnote 28, para. 38.

<sup>71</sup> *Autopista*, *supra* footnote 33, para. 116.

<sup>72</sup> *Vacuum Salt*, *supra* footnote 28, para. 37.

<sup>73</sup> *Autopista*, *supra* footnote 33, para. 109.

<sup>74</sup> *Id.*, para. 116; *see also* para. 114.

<sup>75</sup> Schreuer, *supra* footnote 32, p. 323.

company is owned by another company incorporated in another Contracting State to benefit from this test, if that company is itself controlled by nationals of the host State.<sup>76</sup>

136. In the Tribunal's view, there is a significant difference under Article 25(2)(b) between (i) control exercised by a national of the Contracting State against which the Claimant asserts its claim and (ii) control by a national of another Contracting State. The latter situation violates no principle of international law and is consistent with the text of the ICSID Convention. On the other hand, the former situation violates the general limitation in Article 25(1) and the first part of Article 25(2)(b) of the ICSID Convention in regard to both Contracting States and nationals (including dual nationals). In other words, the latter is consistent with the object and purpose of the ICSID Convention; but the former is inconsistent: it would permit the use of the ICSID Convention for a purpose for which it was clearly not intended and it would breach its outer limits. As already noted above, Article 25(2)(b) operates only as a qualified exception to the general limitation to ICSID jurisdiction in Article 25: a sardine cannot swallow a whale.
137. Hence, it is not surprising to see tribunals (and scholarly commentators) apply the control test favouring jurisdiction in the latter case. Conversely, it is not surprising to see its application rejecting jurisdiction in the former case. In *TSA Spectrum*, the tribunal decided against a "strict literal interpretation that may go against common sense in some circumstances, especially when the formal nationality covers a corporate entity controlled directly or indirectly by persons of the same nationality as the host State".<sup>77</sup> As also suggested by Schreuer: "If the immediate controller is a national of a Contracting State which is, in turn, controlled by nationals of non-Contracting States or even by nationals of the host State? Realism would militate against jurisdiction in such a case".<sup>78</sup> The Tribunal therefore concludes that it has no jurisdiction over the Claimant, as the latter is not under foreign control, but under Egyptian control. This conclusion is not modified by the allegation that Mr. Ginena is a dual national, being Egyptian and Canadian.

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<sup>76</sup> See *TSA Spectrum* Gaillard commentary, *supra* footnote 31.

<sup>77</sup> *TSA Spectrum*, *supra* footnote 30, para. 145.

<sup>78</sup> Schreuer, *supra* footnote 32, p. 321.

138. In *Burimi & Eagle Games v. Albania* (ICSID Case No ARB/11/18), the tribunal (Daniel Price, Bernardo Cremades and Ibrahim Fadlallah) decided in its award of 29 May 2013 rejecting jurisdiction under Article 25(2)(b), as follows:

*118. Accordingly, the Tribunal finds that Mr. Ilir Burimi, a dual national of Italy and Albania, is the majority shareholder of Eagle Games [an Albanian company] and therefore the relevant party for determining whether Eagle Games can be treated as a national of a Contracting State other than the State party to the dispute because it is under “foreign control.”*

*119. While Claimants did not make this argument in its written submissions, the conclusion that Mr. Ilir Burimi – a dual national of Italy and Albania – is the majority shareholder of Eagle Games raises an important question about whether a dual national may rely on his “foreign” nationality – that is, the nationality other than the nationality of the Contracting State party to the dispute – for the purposes of establishing “foreign control” over a company bringing a claim before ICSID.*

*120. The ICSID Convention makes it very clear that a dual national may not invoke one of his two nationalities to establish jurisdiction over a claim brought in his own name under Article 25(2)(a). [citation here omitted] Indeed, it is for this very reason that Mr. Ilir Burimi was required to withdraw as a Requesting Party from the Request for Arbitration dated June 16, 2011.*

*121. While neither the ICSID Convention nor relevant precedents address the potential for a dual national invoking one of his two nationalities to establish jurisdiction over a claim brought in the name of a juridical person under the second clause of Article 25(2)(b), it strikes the Tribunal as anomalous that the principle against use of dual nationality in [Article] 25(2)(a) would not transfer to the potential use of dual nationality in [Article] 25(2)(b). Otherwise, any dual national who is a national of the Contracting State to a dispute could circumvent the bar on claims in Article 25(2)(a) by establishing a company in that state and asserting foreign control of that company by virtue of his second (foreign) nationality. Accordingly, the Tribunal finds that for the purposes of considering whether Eagle Games could be treated as a national of another Contracting State (i.e., Italy) because of “foreign control,” Mr. Ilir Burimi cannot invoke his*

*Italian nationality to establish “foreign control” of Eagle Games.*<sup>79</sup>

139. The Tribunal notes that Italy was and remains a Contracting State to the ICSID Convention, whereas in the present case Canada was not a Contracting State at the time of the Claimant’s Request. Further, the Tribunal does not read the tribunal’s phrase “circumvent the bar” quoted in paragraph 121 above as necessarily indicating a requirement for forum shopping, but rather as a way of illustrating (as an example) the consequence of mis-matching the second part of Article 25(2)(b) with the remainder of Article 25 of the ICSID Convention. In *Autopista*, the tribunal had likewise cited cases of fraud and misrepresentation as “examples”: see the passage quoted from paragraph 116 of the decision above, in paragraph 110 of the Award.
140. The Tribunal accepts these analyses in *Vacuum Salt*, *Autopista* and *Burimi*: they are based on established principles with a clear dividing-line, making for legal predictability and certainty. Albeit eventually resulting in different jurisdictional decisions, the Tribunal considers that these three decisions are consistent as a matter of principle. In *Autopista*, the tribunal found there was a controller who was not a dual national but was a national of another Contracting State; and accordingly there could be no violation of international law or Article 25’s general limitation. If the facts were the same in the present case, this Tribunal would arrive at the same result as the tribunal in *Autopista* and assume jurisdiction. Conversely, this Tribunal would understand the *Autopista* tribunal to reject jurisdiction if the facts in this case had been present in that case.
141. The Tribunal distinguishes the several other cases invoked by the Claimant where the named claimant is *not* a national of the respondent Contracting State (as in the present case). These included the decisions and awards in *Tokios Tokelès*,<sup>80</sup> *ADC v. Hungary*,<sup>81</sup> *Rompetrol*<sup>82</sup> and *Wena*.<sup>83</sup> None of these cases, given the particular claimant’s foreign

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<sup>79</sup> *Burimi*, *supra* footnote 26, paras. 118-121.

<sup>80</sup> For *Tokios Tokelès*, *see supra* footnote 41.

<sup>81</sup> For *ADC v Hungary*, *see supra* footnote 43.

<sup>82</sup> For *Rompetrol*, *see supra* footnote 42.

<sup>83</sup> For *Wena*, *see supra* footnote 54.



nationality, arose under the second part of Article 25(2)(b). The issue was there directed at the nationality of the named foreign claimant and not at the “foreign control” of a local claimant. In the Tribunal’s view, the present case, with the Claimant being an Egyptian national, is materially different. There is no issue over the Claimant’s nationality in the present case: it is an Egyptian company.

142. In his witness statement, as to the facts, Mr. Ginena testified as to the origins of the Claimant’s shareholding:

*19. In 2006, the shareholders of National Gas were Mr. Mohamed Magdy Hussien Rasikh, holding 30000 of the shares [5%], Mr. Reda Ahmed Ginena, Egyptian holding 30000 of the shares [5%] and CTIP Oil & Gas International Limited, free zone Jebel Ali - United Arab Emirates (hereinafter referred to as “CTIP UAE”), holding 540000 of the shares [90%].*

*20. CTIP UAE was incorporated on 2004 [sic] under the Off-shore Companies Regulations of Jebel Ali free zone of 2003.*

*21. Since 2006, our shareholders have not changed. CTIP UAE still owns 90% of the Shares in National Gas.<sup>84</sup>*

143. The Tribunal accepts Mr. Ginena’s evidence. The Tribunal was also informed by the Claimant that, prior to 2006, the majority of the Claimant’s shares (55%) were held by Oil & Gas Limited, a British company, which could have benefited of the jurisdiction of an ICSID tribunal, as a covered investor under the United Kingdom–Egypt BIT of 1975 and the ICSID Convention, without any like jurisdictional issues raised by the Respondent in this case.

144. The Tribunal decides that the factual evidence shows unequivocally that CTIP is a shell company of UAE nationality wholly owned by REGI, which is also a shell company of UAE nationality wholly owned by Mr. Reda Ginena, an Egyptian national (who is also a Canadian national). Share ownership is not, of course, conclusive proof of control; but, in this case, it is clear that in fact the controller of both CTIP and REGI is Mr. Ginena, with these two UAE companies acting as holding companies for Mr. Ginena’s 90% indirect

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<sup>84</sup> Witness Statement of Mr. Reda Ginena, paras. 19-21.

interest in the Claimant, which have to be added to the 5% direct interest of Mr. Ginena, which were not held through these companies. Indeed, the Claimant agrees that Mr. Ginena controls CTIP and that CTIP controls the Claimant, as was confirmed at the hearing.<sup>85</sup> Each of these two UAE companies exists independently from Mr. Ginena in juridical theory, but not in practice. Indeed, REGI is clearly named after Mr. *Reda Ginena*. In commercial reality, as a fact, Mr. Ginena controls the Claimant.

145. Moreover, it matters little whether Mr. Ginena exercises sole control over the Claimant (with his direct and indirect 95% interest) or if he shares such control with Mr. Rasikh (with his 5% direct interest) because Mr. Rasikh is also an Egyptian national. There is no cogent evidence of any other control over the Claimant. Hence, the Claimant is ‘controlled’ by Mr. Ginena within the meaning of Article 25(2)(b) of the ICSID Convention; or, in the French version of the ICSID Convention, Mr. Ginena is at least the principal ‘interest’ controlling the Claimant. If Mr. Ginena (with or without Mr. Rasikh) is not the Claimant’s controller, it would mean that no-one is.
146. These factual findings imply no criticism of Mr. Ginena: the Tribunal recognises that his choice of corporate structure was made in good faith for legitimate fiscal reasons; it was not designed as an exercise in forum shopping under the Treaty; and whilst CTIP and REGI are both shell companies, neither are sham entities.
147. The Tribunal has noted the Claimant’s submission that Mr. Ginena is said to be “deemed” a Canadian investor under the Egypt–Canada BIT and not an Egyptian national, particularly as advanced in the Claimant’s two written submissions made after the hearing. This factor, not pleaded in the Claimant’s Request for Arbitration formally invoking ICSID’s jurisdiction, cannot change the Tribunal’s decision.
148. At the relevant time, when the Claimant submitted its Request for Arbitration to ICSID, Canada was not a Contracting State to the ICSID Convention; and Mr. Ginena was and is not a party to this arbitration. Moreover, a bilateral treaty between two States, even if that treaty is incorporated into their national laws, cannot modify the text of a multilateral

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<sup>85</sup> See T. 156:6 – 157:12; T. 166.

treaty, such as the ICSID Convention. Hence, Mr. Ginena's deemed Canadian nationality cannot be a factor under Article 25(2)(b) the ICSID Convention; and for that purpose, he was and remains a dual national of Egypt and Canada. In any event, Mr. Ginena is not the Claimant (nor Mr. Rasikh); the Claimant advances its claim under the Treaty between Egypt and the UAE (not the Egypt–Canada BIT); and the Tribunal cannot therefore derive any part of its jurisdiction in the present case from the Egypt–Canada BIT. However, the Tribunal refrains from expressing any view as to whether Mr. Ginena could advance any claim against Egypt under the Egypt–Canada BIT.

149. For these reasons, the Tribunal decides that the Claimant has not satisfied the objective test in the second part of Article 25(2)(b) of the ICSID Convention; and, accordingly, the Tribunal decides that it has no jurisdiction over the Claimant's claim in this arbitration.

## ***PART IV: JURISDICTION RATIONE TEMPORIS***

### ***Introduction***

150. It is common ground between the Parties and confirmed by the Tribunal that, in the event that the Respondent's first objection *ratione personae* were upheld by the Tribunal, the Tribunal could have no jurisdiction to decide the Claimant's claim in this arbitration, whatever its decisions might or might not be in regard to the Claimant's second objection *ratione temporis* (or, indeed, any of the non-bifurcated jurisdictional objections).
151. Accordingly, the first objection, *ratione personae*, raises a threshold issue for the Claimant's claim. This is not so as regards this second objection, *ratione temporis*. As the Respondent confirmed at the hearing, this objection relates only to the Claimant's claim regarding the "Egyptian pound floatation dispute".<sup>86</sup>

### ***The Tribunal's Analysis***

152. In circumstances where the Tribunal has upheld the Respondent's objection *ratione personae* by its decision in Part III above, with the result that this Tribunal has no jurisdiction over the Claimant's claim, it is both unnecessary and inappropriate for the Tribunal now to decide the Claimant's objection *ratione temporis*. Accordingly, the Tribunal does not decide this second objection here, one way or the other.

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<sup>86</sup> T. 5:21-24; *see also* T. 40:20-25 – 41:1-7.

## ***PART V: COSTS***

153. Article 61(2) of the ICSID Convention and Rule 47(1)(j) of the Arbitration Rules govern the issue of costs in these proceedings, i.e. both (i) the expenses incurred by the Parties and (ii) the fees and expenses of the Tribunal and the charges of the Centre. Given the wording of these provisions, ICSID tribunals exercise a large measure of discretion on deciding how and by which party such costs shall be paid.
154. In this case, it is clear that the Claimant is the unsuccessful party and the Respondent is the successful party. The first jurisdictional issue raised by the Respondent, being a threshold issue, means that the Claimant's claim cannot move to the merits. Accordingly, applying the 'loser pays principle', the Tribunal considers that the Claimant should bear in full, without any recourse to the Respondent, the fees and expenses of the Tribunal and the charges of the Centre, namely those costs identified under (ii) above.
155. As regard the expenses incurred by the Parties, namely those costs identified under (i) above, the Tribunal takes into account other factors. First, this first jurisdictional issue was a relatively novel point; and both sides conducted their respective cases with great professional courtesy and efficiency notwithstanding grave difficulties in Egypt. Second, the Parties generously co-operated with each other procedurally, particularly over the question of bifurcating and not bifurcating the Respondent's jurisdictional issues under the twin-track time-table described above. Under that time-table (as later amended) and previous time-tables as regards the merits, the Claimant filed a Memorial, the Respondent filed a Counter-Memorial and, after the jurisdictional hearing, the Claimant filed a Reply Memorial on 13 October 2013. With this Award, this Tribunal can of course never address the merits of the Parties' dispute.
156. In the circumstances, the Tribunal considers that it would be appropriate in this case for the Parties to bear their own expenses, without recourse to the other. The Tribunal, of course, has borne in mind the terms of its Procedural Order No 3 of 18 February 2013.<sup>87</sup> It nonetheless considers that its tentative indication is sufficiently met by its decision on the

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<sup>87</sup> See *supra* paras. 38-39.

costs identified under (ii) above and, further, that the Claimant was put to unequal expenses as regards pleading the merits, particularly with its Reply Memorial. As the overall unsuccessful party, the Claimant must of course bear those costs without recourse to the Respondent. However, just as it may on occasion be right for a tribunal to penalise a recalcitrant party as to costs, the Tribunal considers it here appropriate to do the opposite given that the Claimant's co-operation was made in good faith to ensure, overall, a more efficient procedure for this arbitration beneficial to both Parties. Accordingly, the Tribunal does not think right to order the Claimant to pay for the Respondent's own expenses.

157. In conclusion, for these reasons, the Tribunal decides that the Claimant and the Respondent shall bear their own expenses; and that the Claimant shall bear all the fees and expenses of the Tribunal and the charges of the Centre.<sup>88</sup>

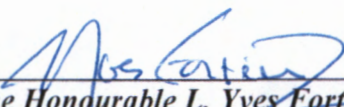
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<sup>88</sup> The ICSID Secretariat will provide the Parties with a detailed financial statement of the case account as soon as the account has been finalised.


***PART VI: THE OPERATIVE PART***

158. For the reasons set out above, the Tribunal decides and awards:

- (i) To uphold the jurisdictional objection *ratione personae* made by the Respondent;
- (ii) Not to determine, one way or the other, the jurisdictional objection *ratione temporis* made by the Respondent;
- (iii) To declare that both the Centre (ICSID) and the Tribunal have no jurisdiction over the Claimant's claim in this arbitration by virtue of Articles 25(1) and 25(2)(b) of the ICSID Convention;
- (iv) That the Claimant shall bear all the costs of these proceedings comprising the fees and expenses of the Members of the Tribunal and the expenses and charges of the Secretariat, the exact amount of which shall be subsequently notified by the Centre; and
- (v) That each Party shall bear its own expenses.

  
The Honourable L. Yves Fortier CC, OQ, QC  
Arbitrator  
Date: 27 March 2014

  
Professor Brigitte Stern  
Arbitrator  
Date: 31 March 2014

  
Mr. V. V. Veeder QC  
President  
Date: 24. iii. 2014