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

IN THE PROCEEDING BETWEEN

H&H Enterprises Investments, Inc.
(Claimant)

and

Arab Republic of Egypt
(Respondent)

ICSID Case No. ARB/09/15

The Tribunal's Decision on Respondent's Objections to Jurisdiction

Members of the Tribunal:
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Date of Dispatch to the Parties: June 5, 2012

I. THE DISPUTE

1. In 1987 a series of meetings were held between Mr Hesham Alashmawy, a dual citizen of the United States and Egypt, who is Claimant's President, and senior officials of Grand Hotels of Egypt ("**GHE**"), a company owned by the Government of Egypt, which at that time owned and managed certain of the country's hotels as well as with the Egyptian Ministry of Tourism. Following these meetings, Mr Alashmawy was invited to inspect existing hotel properties in which the Egyptian Government was seeking foreign investment and various tracts of land that the Government had designated for tourism development or sale.

2. In February 1988, Claimant was incorporated in the State of California, and in February 1989, Mr Alashmawy formed the Egyptian American Company for Development and Tourism – H&H Enterprises ("**H&H Egypt**"). On 10 April 1989, Mr. Alashmawy made a proposal to GHE for the purchase of the Ain El Sokhna hotel and adjoining land. The proposal, which Claimant alleges was accepted by GHE, and which Claimant therefore says granted it an option to buy the Resort (the "**Option to Buy**"), took the form of a one-page letter addressed to the then chairman of GHE.

3. On 27 April 1989, Claimant and GHE signed a Management and Operation Contract (the "**MOC**"), followed, on 20 November 1989, by an addendum agreed to form an integral part of the MOC.

4. On 1 January 1990, Mr. Alashmawy, together with two other individuals, formed an Egyptian partnership – HA&H for Tourism & Resorts ("**HA&H**"). In June 1990, Claimant was suspended by the US tax authorities, for failure to pay taxes.

5. On 14 October 1993, GHE commenced arbitration against Claimant, in Cairo, under the MOC, seeking, *inter alia*, termination of that agreement for breach. Claimant subsequently filed a series of claims before the local courts. On 22 December 2001, Claimant was evicted from the Resort. On 10 April 2008,

eighteen years following its corporate suspension, and eight years after vacating the Resort, Claimant applied to the California Franchise Tax Board for a Certificate of Revivor, enclosing backdated tax returns and cheques covering taxes for the years 1989 to 2007. On 1 May 2008, the California Tax Board granted Claimant a Certificate of Revivor.

6. On 17 July 2009, Claimant filed the present ICSID proceedings.

II. THE PROCEDURAL HISTORY

7. Pursuant to Procedural Order No. 1 and following Respondent's request to extend the time limit to file its Jurisdictional Objections and Request for Bifurcation, Respondent filed its Jurisdictional Objections and Request for Bifurcation on 6 June 2011.

8. Claimant filed its Response to Respondent's Jurisdictional Objections and Request for Bifurcation on 9 September 2011.

9. On 15 November 2011, a hearing on bifurcation only was held between the Tribunal and the Parties. Further to the Parties' agreement at the hearing, the Tribunal issued Procedural Order No. 3 on 22 November 2011, by which it confirmed the Parties' agreement to bifurcate the proceedings into a preliminary jurisdictional phase to be decided by the Tribunal before moving finally to the merits phase. The Tribunal also set forth the remaining procedural steps in the jurisdiction phase.

10. Pursuant to Procedural Order No. 3, Respondent filed its Reply on Jurisdiction on 19 January 2012. Claimant filed its Rejoinder on Jurisdiction on 15 March 2012. A hearing on preliminary jurisdictional issues was held between the Tribunal and the Parties on 23, 24 and 25 March 2012.

III. RATIONE MATERIAE

A. RESPONDENT'S POSITION

1. THE OPTION TO BUY DOES NOT EXIST UNDER EGYPTIAN LAW

(a) The 1989 Option to Buy does not exist under Egyptian Law

11. Respondent submits that the 1989 exchange of letters does not constitute a valid and binding contract under Egyptian law. Respondent argues that to be validly concluded, a contract requires the parties' consent. Egyptian law requires a firm acceptance without alteration of the terms of the offer. Article 89 of the Egyptian Civil Code provides:

    "A contract is created when two parties exchange exact matching wills, subject to any special formalities that may be required by law for its conclusion".

12. According to Respondent, the correspondence on record does not evidence the Parties' *"matching will"*. Respondent also states that Claimant cannot rely on Article 95 of the Egyptian Civil Code, since the essential elements of the alleged Option to Buy, *i.e.*, land and price, were not agreed upon or specified in the Parties' exchange of letters.

13. Moreover, Respondent submits that the MOC which was entered into between the Parties on 27 April 1989, provides that the MOC is the full agreement between the Parties and any negotiations, correspondence, agreements preceding the conclusion of the MOC should be invalid. Respondent also submits that Article 16.1[1] of the MOC evidences that the Parties did not consider the purported Option to Buy – allegedly created by the exchange of letters in 1989 and confirmed by the 10 April 1989 letter – to be a valid contract.

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[1] Article 16.1 of the MOC provides:

"This Contract, along with the attached enclosures and any documents that must be signed and delivered thereunder, shall represent the full agreement between the Proprietor and the Manages with respect to the management and operation of the hotel, and any negotiations, correspondence, documents or agreements thereon that precede this Contract shall be invalid".

(b) Alternatively, the Parties mutually rescinded the Option to Buy

14. Respondent submits that even if the Option to Buy was validly concluded, it was subsequently rescinded by the Parties' conduct following the conclusion of the MOC on 27 April 1989. Respondent further states that in an exchange of letters between April and June 1991, the Parties negotiated the sale of the Resort without mention of any previously concluded Option to Buy. Respondent submits that negotiating the sale of the Resort outside of the purported Option to Buy clearly amounts to an offer to rescind the Option to Buy.

(c) The conditions precedent to exercise the Option to Buy were not satisfied

15. Respondent submits that the exercise of the Option to Buy was conditional upon the incorporation of a local company with Claimant and Grand Hotels of Egypt ("**GHE**") as shareholders, and the exercise of the Option within five years of the incorporation of this company, which was provided for in Claimant's letter of 10 April 1989. According to Respondent these conditions were never met. Respondent further submits that, according to Claimant's own draft of the clause that it suggested be inserted in the MOC, the five-year period would start to run "after satisfying the required legal form." This legal form was never satisfied therefore the conditions could not have been met at the closing.

(d) The opinion of the minister's state council legal advisor is non-binding on public entities and state courts

16. Respondent states that in order to establish the existence of the Option to Buy, Claimant relies on the opinion issued by the State Council Advisor. Respondent submits that this opinion has no legal effect under Egyptian law and Claimant cannot now rely on it to establish the existence of the purported Option to Buy. Under Egyptian law, advice given to public entities is non-binding. Article 58.1 of the State Council Law allows public entities to seek State Council advice on any matter it deems appropriate. Respondent submits that neither GHE nor the Egyptian courts were bound to follow State Council advice on the Option to

Buy. Respondent submits that it cannot now be held liable for the alleged failure to implement an opinion that it was not, in the first place, obliged to follow.

2. THE OPTION TO BUY DOES NOT QUALIFY AS AN INVESTMENT UNDER THE BIT OR THE ICSID CONVENTION

(a) Both the BIT and the ICSID Convention should apply

17. Respondent submits that the Option to Buy is neither an investment under the BIT nor under the ICSID Convention, and submits that Claimant cannot rely on the BIT alone and exclude the application of the ICSID Convention to determine the existence of an investment. Respondent further submits that the Tribunal in the present case must apply a dual test to determine whether the purported investment qualifies for protection under the US-Egypt BIT (the "**BIT**"). Respondent submits that the purported Option to Buy fails to meet the Treaty definition of "investment" in Article 1(c) as it does not exist under Egyptian law and is not a valid and binding contract.

(b) The Option to Buy does not satisfy the criteria of the ICSID Convention

18. Respondent submits that the objective test for the existence of an investment under Article 25(1) of the ICSID Convention requires that the activity in question fulfil the following requirements: certain duration, regularity of profit and return, an assumption of risk, a substantial commitment, and significance for the host State's development.

(i) An Option has no duration

19. Respondent submits that the Option to Buy does not have "certain duration", instead, if exercised it is no more than a one-off transaction. Respondent further submits that a duration between two and five years is considered a minimal requirement by doctrinal authorities and awards for an activity to be qualified as investment under the ICSID Convention. Respondent submits that the purported Option to Buy does not satisfy the duration requirement.

(ii) The Option to Buy does not entail an investment risk

20. Respondent submits that the Option to Buy lacks the element of risk required for the activity to qualify as an investment under Article 25 of the ICSID Convention. The Option to Buy does not entail an investment risk. The only possible risk is the commercial risk of non-performance or termination.

(iii) The Option to Buy does not generate regular profit or return

21. Respondent submits that the purported Option to Buy lacks regularity of profit and return. The Option to Buy is not a revenue-generating activity. Instead, if exercised, it can be characterised more as a one-time lump sum payment agreement with no prospect of regular profit or return.

(iv) There is no substantial contribution

22. Respondent submits that no financial contribution was made by Claimant in respect to the Option to Buy. The price to be paid (had the Option to Buy been exercised) does not amount to a contribution, but merely a lump sum payment.

(v) There is no contribution to the host State's development

23. Respondent submits that an Option to Buy, exercised at Claimant's discretion and involving a one-time lump-sum payment, without any transfer to know-how, technology or equipment to the host State, does not constitute a significant contribution to Egypt's economic development.

(c) The Option to Buy if exercised, is a purchase contract not an investment

24. According to Respondent ordinary sale contracts do not constitute investments as they lack two fundamental interrelated elements: assumption of risk and regularity of profit and return. The absence of an expected profit leads to the absence of risk. The operation should thus be qualified as "sale" rather than "investment".

(d) The Option to Buy is not an investment according to the Doctrine of the Unity of Investment

25. Respondent submits that the MOC, which is the act considered as the basis of the investment, is indivisible with the Option to Buy. Respondent further submits that for the unity of investment doctrine to apply, the secondary act must have had as purpose the accomplishment of an aspect of this investment and represent a close link to it. Respondent submits that the alleged Option to Buy cannot be a secondary act to the MOC. The Option to Buy has no influence on the management and the operation of the resort. According to Respondent, this is confirmed by the fact that an option to acquire property may or may not be exercised. Respondent further submits that Claimant itself has recognised that the alleged Option to Buy and the MOC are separate and unrelated agreements.

B. CLAIMANT'S POSITION

1. THE PARTIES CONCLUDED A VALID OPTION TO BUY THE RESORT PURSUANT TO EGYPTIAN LAW

(a) The Option to Buy is a binding contract under Egyptian Law

26. Claimant submits that the 1989 exchange of letters constituted a valid contract under Egyptian law. Claimant states that under Egyptian law, there are three conditions that must be satisfied for an option to buy to come into effect:

    (i) Determination of the asset to be sold;
    (ii) Determination of the price; and
    (iii) Identification of the period of time within which the party may exercise the option.

27. Claimant submits that the exchange of letters in January 1989 between Respondent and Claimant constitutes the expression of the two parties' "matching wills" regarding Claimant's right to purchase the Resort and the terms under which such purchase could be exercised. All elements required for the formation of a binding Option to Buy were present: the identification of the

asset to be sold, the Ain Sokhna Resort; the price, 18 million Egyptian pounds (or USD 7.4 million as of April 1989); and the period of time during which Claimant could exercise the Option to Buy, *i.e.,* within five years of the commencement of commercial operations. As of 23 January 1989, then, Claimant had an Option to Buy the Resort that was valid and binding under Egyptian law.

28. Furthermore, Claimant submits that both parties were aware that the MOC could only be negotiated and finalized once the Option to Buy had been concluded, as Claimant had always made it clear that the purchase of the Resort was its ultimate goal. The reference to the conclusion of a contract subsequent to Claimant's acceptance of GHE's offer therefore concerns the MOC; that was the only agreement remaining to be finalized once the Option to Buy had been concluded. Had there been no agreement on the terms of Claimant's option rights, there would have been no MOC.

(b) The Parties did not mutually rescind the Option to Buy

29. Claimant submits that while it did entertain the possibility of buying the Resort prematurely, before all the conditions precedent for exercising the Option to Buy had been met, it always insisted on the agreed-upon purchase price of USD 7.4 million, or the equivalent of 19 million Egyptian pounds. The various methods of payment that it suggested in its letters to GHE in the spring of 1991 concerned only the timing of payment and the form of payment, not the amount. Claimant submits that when it became clear that GHE wanted to sell the Resort for substantially more money, Claimant reminded GHE of its contractual commitments, sending it a copy of the 10 April 1989 letter in which it had expressly confirmed those commitments. Claimant further insisted on its Option to Buy rights in letters to GHE in October and November 1991, when GHE began to advertise the Resort for sale to third parties. Claimant states that this is hardly the conduct of a company that had decided to rescind its Option to Buy the Resort.

30. Claimant submits that under Egyptian law, rescission cannot be implied from conduct that is in any way ambiguous, much less conduct that points toward precisely the opposite conclusion. On the contrary, there must be concrete evidence that leaves no doubt as to the intention of the parties to rescind their contract. According to Claimant there is no inherent contradiction between the Option to Buy and the MOC – which was not a lease contract in any case, but a management and operation contract. Claimant submits that there is no support in fact or law for Respondent's argument that the parties agreed to mutually rescind the Option to Buy.

(c) The conditions precedent to exercise the Option to Buy were satisfied

31. Claimant submits that it formed a local affiliate, H&H Egypt, in 1989 for the express purpose of acquiring the Resort; all Respondent had to do was to acquire the requisite percentage of shares in H&H Egypt as part of the sale of the Resort to Claimant via H&H Egypt. Claimant submits that this transaction never took place, not because the conditions for exercising the Option to Buy were not met, but because Respondent breached its obligations under the Treaty.

2. THE OPTION TO BUY DOES QUALIFY AS AN INVESTMENT UNDER THE BIT AND THE ICSID CONVENTION

(a) The Salini Criteria Are Not a Jurisdictional Requirement of the ICSID Convention

32. Claimant submits that it is self-evident that the determination of another arbitral tribunal such as the one in *Salini* does not bind the present Arbitral Tribunal to adopt the same interpretation of ICSID Article 25(1). It is the Convention itself that is authoritative as to its meaning, not the interpretation of it taken by a subset of tribunals considering it. This is particularly so when the interpretation is as ill-defined and controversial as is the so-called *Salini* test.

(b) The Option Qualifies As an Investment Even If the *Salini* Criteria Are Considered

33. According to Claimant, it could not exercise the Option to Buy until the Resort was fully renovated and operational. This primary precondition to the exercise of the Option to Buy itself required a multi-million-dollar investment and several years of sustained effort on Claimant's part. It also meant that the exercise of the Option to Buy was the purchase of a going concern. Further, had Claimant not been prevented from exercising the Option to Buy, it would have bought and operated the Resort for an unlimited duration. Claimant also states that Respondent ignored that the economic reality of Claimant's investment, which was in the Resort, and that the investment in the Option to Buy was only part of a larger whole.

34. With respect to substantial contribution, Claimant submits that its commitment was substantial. Claimant states that in order to exercise its Option to Buy, Claimant first had to demonstrate its ability to manage and operate the Resort. This required a substantial commitment of money and effort to renovate and make successful a war-damaged property. Its commitment in these areas allowed Claimant to operate the Resort with a sufficient return so as to make the purchase of the property feasible. Claimant was also to pay USD 7.4 million to acquire the Resort. At the same time, it had committed to sharing the expected profits from the Resort with GHE. All of these represent a substantial contribution by Claimant in terms of finances and know-how, a commitment that would have been renewed and deepened had Claimant been allowed to exercise its Option to Buy.

35. Finally, with respect to contribution to host state development, Claimant states that Egypt has long recognized tourism as a critical industry for its continued development. Minister Sultan, in particular, favored expanding and strengthening the tourism industry through privatization as a means of furthering Egypt's larger development goals. Claimant's investment in the Resort, including the Option to Buy, clearly meets this criterion.

36. Claimant further submits that, according to Respondent's own authorities and the facts of this case, Claimant's Option to Buy constitutes an "investment" under the standard urged on this Tribunal by Respondent.

(c) The Option Is Manifestly Not a Mere "Purchase Contract," But an Investment in a Going Concern

37. Claimant submits that far from being a mere "purchase contract," the Option to Buy instead represented a crucial feature of the endeavour in which Claimant was engaged in Egypt - namely, the operation, management, development, and eventual purchase of the Resort.

38. Claimant also states that Respondent's position that this was a mere *"purchase contract"* not within the scope of the definition of *"investment"* is also at odds with the clear language of the BIT, and with decisions of other tribunals finding that contractual rights do represent qualifying investments. The BIT states that *"investment"* means *"every kind of asset"* including *"any right conferred by law or contract…"*. Claimant states that this broad definition surely includes the right conferred by a contract to purchase an active hotel resort and its assets at the purchaser's option. Other tribunals have similarly confirmed that rights conferred by contract do amount to *"investments"* under both the ICSID Convention and the relevant instrument of consent.

39. Claimant further states that the Option to Buy did not put Claimant in the position of a seller of industrial plant or equipment, seeking a one-time remuneration in the form of the purchase. It rather would have put Claimant in the position of a buyer, seeking remuneration in the form of future expected profits generated from the ongoing operation and improvement of the property.

(d) The MOC and the Option to Buy Formed a Single Investment in the Resort

40. Claimant submits that the MOC and the Option to Buy were highly interrelated contracts which could never have garnered the assent of both parties were they not inextricably linked. Claimant also states that these two elements of its

investment were inextricably linked during the negotiation; they remained inextricably linked once agreed and memorialized into contracts.

C. THE TRIBUNAL'S DECISION

41. Respondent does not object to the Tribunal's jurisdiction *ratione materiae* as a whole, but rather Respondent argues that the Tribunal's jurisdiction *ratione materiae* is limited to the MOC. Respondent submits that (i) the Option to Buy does not exist under Egyptian law, and (ii) even if it existed, it does not qualify as an investment under the BIT or the ICSID Convention.

42. The Tribunal is of the view that for purposes of determining whether there is an investment, the Tribunal must look at the contractual arrangements as a whole and not just at certain aspects of these arrangements. The Tribunal considers that in practice, an investment may be composed of several contracts, and different types of assets, which together form the "venture" that constitutes the investment. In the Tribunal's view, determining whether there is an investment is a matter of substance and not form. In the present case, the MOC and the alleged Option to Buy together formed such a venture. The question of whether the Option to Buy constitutes an investment is a matter that cannot be viewed in isolation from the MOC.

43. The Tribunal therefore concludes that it has jurisdiction *ratione materiae* as there was clearly an investment made by Claimant, and not contested by Respondent. The Tribunal, however, decides to join the question of the validity of the Option to Buy to the merits as the matter may require an overall assessment of the merits of the dispute.

IV. RATIONE TEMPORIS

A. RESPONDENT'S POSITION

44. Respondent submits that the Tribunal lacks jurisdiction *ratione temporis*, since Respondent did not consent to arbitrate disputes with respect to investments that fall outside of the temporal scope of the BIT.

45. Respondent submits that Claimant's investment allegedly made in 1989 was not accepted by Respondent under the then prevailing investment legislation – Law 43 of 1974 on Arab and Foreign Capital Investment and Free Zones (**"Law 43"**). Respondent states that the BIT subject of this arbitration came into force in 1992, and according to Respondent, Claimant's purported investment was therefore made prior to the entry into force of the BIT. Respondent further submits that the BIT applies to investments made after its entry into force as well as to pre-existing investments accepted in accordance with the legislation of either Contracting State.

46. Respondent also states that Paragraph 2 of the Letter of Submittal dated 20 May 1986, which the U.S. Secretary of State sent to President Regan, along with the BIT and Supplementary Protocol dated 2 June 1986, and which President Regan subsequently transmitted to the Senate for ratification, explains what is meant by *"accepted in accordance with the respective legislation"* at Article II2 (b) of the BIT. Respondent states that to benefit from the protection under the BIT, existing investments must have been accepted in accordance with Egypt's Law 43. Furthermore, Respondent submits that Law 43 requires (i) that qualifying foreign capital be invested in a qualifying project, and that such capital be registered with the Authority; and (ii) that the project be accepted according to the procedures mandate by Law 43 and its Executives Regulations. According to Respondent, Claimant did not meet either of these conditions.

B. CLAIMANT'S POSITION

1. Respondent Fundamentally Misconstrues the Relevant Language of the Treaty

47. Claimant submits that there is nothing in Article II (2)(b) of the BIT's reference to investments *"accepted in accordance with the prevailing legislation of either party"* that suggests that this language means anything other than a prohibition on treaty protection for investments that are contrary to the law of either party. Claimant also states that as is the case in interpreting any treaty, Article II(2)(b) must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." A "special meaning" may be given to a term only if "it is established that the parties so intended".

48. Furthermore, Claimant submits that the language of Article II(2)(b), when interpreted in context and in light of the Treaty's object and purpose, is clear and straightforward, and that is to promote economic development and cooperation between Egypt and the United States, thus, the object and purpose of the Treaty is to ensure the reciprocal encouragement and protection of a very broad range of investments, both tangible and intangible, for the specific purpose of furthering certain international policy goals of the two parties.

49. Concerning the Submittal Letter, Claimant submits that a plain reading of the text confirms that the Secretary's concern in this portion of the Letter had absolutely nothing to do with whether or not U.S. nationals' existing investments in Egypt would or would not fall within the scope of the BIT. In other words, the Secretary was alerting the Senate to the possibility that the BIT might give rise to claims of U.S. nationals with existing investments in Egypt registered under Law 43, a fact the Senate might wish to take into consideration in determining whether or not to give its advice and consent to the President to ratify the Treaty. Indeed, the fact that the Secretary was concerned about the possible inconsistency of registered foreign investments with the Treaty suggests that the extension of Treaty protections to such investments may have been more tenuous than for investments that were not registered under Law 43.

2. Respondent Misinterprets the Scope of Law 43

50. Claimant submits that foreign investments never had to be registered pursuant to Law 43 in order to be "accepted" under Egyptian law, *i.e.*, to be legal. The purpose of Law 43 was simply to provide the protections of the investment law regime to foreign investments. Claimant states that foreign investments not registered under Law 43 were by no means illegal. They simply did not benefit from the special protections of the investment law. According to Claimant, the fact that Claimant never sought to register its investment pursuant to Law 43 does not mean that the investment was not "accepted" under Egyptian law. In fact, foreign investment could and did frequently take place outside the scope of Law 43. Thus, the fact that Claimant never sought registration pursuant to Law 43 did not mean that its investment was illegal only that it would not benefit from the privileges conferred by Law 43.

3. Respondent accepted Claimant's investment by conduct

51. Claimant submits that even if Respondent was correct that Claimant's investment was required to be registered under Law 43 in order to be "accepted" within the meaning of the Treaty, Respondent is nonetheless estopped from raising this as a defense by virtue of its own conduct. Claimant states that Respondent actively solicited, and accepted, Claimant's investment in the Resort as a foreign investment. The Minister of Tourism himself personally encouraged Claimant to make the investment, and took the lead on negotiating both the Option to Buy and the MOC. Claimant further submits that in the years that followed, Respondent accepted Claimant's renovation, improvement, and management of the Resort, including Claimant's regular profit-sharing payments – up until its continued refusal to grant Claimant an operating license led Claimant to suspend those payments in mid-1993. Moreover, there is no evidence that Respondent ever requested Claimant to register under Law 43, although it could certainly have done so either when the Option to Buy and MOC were concluded in early 1989, or later that same year, when the

Addendum to the MOC was concluded. Specifically, the MOC was accepted by the Ministry of Tourism and by GHE, pursuant to the relevant laws.

C. THE TRIBUNAL'S DECISION

52. Respondent submits that Claimant's investment is not covered by the BIT, which allegedly excludes investments prior to its entry into force, unless they were specifically "accepted" under the Egyptian Investment Law 43. Furthermore, Respondent relies on the *travaux préparatoires* of the BIT, in particular the Submittal Letter of the U.S. Secretary of State, which refers to Law 43 and which Respondent argues confirms that the BIT only intended to cover investments of U.S. nationals in Egypt that had been specifically "accepted" pursuant to Law 43.

53. The Tribunal is of the view that nothing in Law 43 or its associated decree 375 of 1977 suggests that it sets the exclusive procedures for the acceptance of foreign investments at the time. Moreover, the Tribunal considers that the evidence provided by the Parties, including the signature of the MOC by GHE, the issuance of the corresponding permits, the incorporation of a Claimant's affiliate in Egypt, and the endorsement of the project at the highest level of the State, proves that Claimant's investment was accepted by Respondent in a manner that meets the acceptance requirement of Article II(2)(b) of the BIT.

54. The Tribunal also considers that, assuming for the sake of argument that the BIT referred to Law 43 expressly and that Law 43 contained exclusive procedures for the acceptance of foreign investments, the same evidence provided by the Parties demonstrates that Respondent accepted the investment and waived such acceptance procedure under Law 43. This is reinforced by the fact that Respondent did not demonstrate that the State officials in charge of accepting investments pursuant to Law 43 were of superior hierarchy and/or had greater attributions of authority than those that approved Claimant's investment.

55. Furthermore, the Submittal Letter uses the term "covered" and not "exclusively covered". The following lines of the letter seem to suggest that Law 43 was

discussed principally to address the question of consistency of the possible arrangements granted under the previous legislation of the US-Egypt BIT, rather than to record the need for investments made prior to the entry into force of the BIT to have been exclusively accepted by the procedures contemplated.

56. Based on the above, the Tribunal concludes that it has jurisdiction *ratione temporis*.

V. RATIONE PERSONAE

A. RESPONDENT'S POSITION

57. Respondent submits that Article 1 of the BIT provides that Claimant must "own or control" the asset that comprises the protected investment. Respondent submits that neither of these requirements is met in the present case, and that the Tribunal, therefore, lacks jurisdiction over all of Claimant's claims in the present arbitration.

1. California Law Deprives a Suspended Corporation of all Rights, Powers & Privileges

58. Respondent submits that Claimant was suspended under the law of its place of incorporation for failure to pay its taxes. Claimant remained suspended for the following 18 years, and was revived in 2008 solely for purposes of bringing this ICSID arbitration. On 2 April 2008, Claimant filed financial statements for the prior 18 years, and applied for a Certificate of Revivor, which the California Tax Board granted on 1 May 2008. Respondent further submits that companies suspended in the State of California, then, cannot exercise rights enjoyed by companies in good standing.

2. Claimant Did Not Control the Purported Investment

59. Respondent submits that, at the time of the alleged breach, namely in the years 1993 to 2001, Claimant, a suspended body corporate shorn of all rights, powers and privileges, could not have exercised control over the purported investment.

Respondent states that if during the 18 years it remained suspended Claimant could not, under the law applicable to it, exercise corporate will, it could not exercise rights under the MOC or the Option to Buy, directly or indirectly.

3. Claimant Did Not Own the Purported Investment

60. Respondent also submits that Claimant did not "own" its purported investment at the time of the alleged breaches attributed to Respondent. Claimant claims that its investment is comprised of its contractual rights under the MOC and the Option to Buy. However, Respondent submits that unlike other forms of tangible assets, a contractual right does not exist independently of the right-holder's ability to tender and to exact contractual performance from its counterparty – neither of which, according to Respondent, Claimant could do, directly or otherwise, in the 18 years during which it remained suspended.

4. Mr. Alashmawy – a dual national of the contracting Parties – controlled the investment at all relevant times

61. Respondent submits that the present dispute is an appropriate case for the Tribunal to pierce the corporate veil in order to identify the true Claimant and *de facto* investor in these proceedings – Mr Alashmawy – and to find that it has no jurisdiction over the claim by reason that Mr Alshmawy, a dual citizen of both contracting parties to the BIT, does not qualify as a foreign investor for purposes of Article 25(2)(a) of the ICSID Convention.

B. CLAIMANT'S POSITION

62. Claimant submits that none of the criteria for jurisdiction *ratione personae* set out in the ICSID Convention justify an inquiry into control at the time of the alleged breach. Claimant also submits that the relevant time for determining Claimant's conformity with the criteria for jurisdiction *ratione personae* is the time at which it submitted the Request for Arbitration.

1. Claimant's rights did not cease to exist as a result of its tax suspension in California

63. Claimant submits that there is nothing in the Egyptian law, which is the applicable law to this case, stipulating that contracts are automatically terminated as soon as either party is unable to "*tender or exact contractual performance*". Claimant further submits that the Egyptian Civil Code provides that contracts do not terminate by reason of non-performance unless the parties have reached a specific agreement to that effect. Claimant submits that in the present case the Parties did not agree that either the MOC or the Option to Buy would automatically terminate in the event that Claimant was unable to perform any of its obligations.

2. Claimant owned and controlled the investment at all times

64. Claimant submits that it has at all times wholly owned its investment in Egypt, including at all times relevant to this dispute. Claimant asserts that this is sufficient to establish that it meets the requirements for jurisdiction under the BIT, and also – to the extent relevant – demonstrates that it controlled its investments for purposes of international law.

3. There is no basis for the Tribunal to "pierce the veil" in this case

65. Claimant submits that the authorities upon which Respondent relies do not support the existence of a rule of veil-piercing that could be applied by the Tribunal in the manner suggested by Respondent. Claimant submits that the existence of a veil-piercing doctrine in international law is dubious, and its application in the present dispute would be unprecedented. Claimant also submits that even if such a doctrine exists and could be applied by the Tribunal as a basis to decline its jurisdiction, the circumstances of the present case do not justify its application.

C. THE TRIBUNAL'S DECISION

66. Respondent submits that Claimant did not own or control the investment, since Claimant was suspended pursuant to the laws of the State of California.

67. The Tribunal notes that Claimant's suspension was revived with retroactive effect when it paid its dues in April 2008, prior to filing the present arbitration. The Tribunal also considers that even assuming this were the case, it appears that the relevant law in the State of California does not purport to apply extraterritorially and therefore would not affect the validity of transactions and performance of contracts abroad, in this case Egypt.

68. Furthermore, the Tribunal considers that Claimant is a legal entity incorporated in the State of California, and thus fulfils the objective criteria for *ratione personae* provided for in Article 25(2)(b) of the ICSID Convention and Article I(1)(b) of the BIT. Respondent has not provided the Tribunal with any evidence or a legal basis that would justify piercing the corporate veil or otherwise disregarding Claimant's nationality.

VI. THE CONDITIONS FOR REFERRING THE DISPUTE TO ICSID ARE NOT SATISFIED (FORK IN THE ROAD)

69. Respondent submits that Article VII (3)(a)(ii) of the BIT has been triggered by reasons that Claimant has already brought in the present dispute before the local courts in Egypt. Respondent also submits that, with the exception of Claimant's denial of justice claim, all of Claimant's treaty claims are barred by application of the fork-in-the-road provision.

1. The Triple Identity test deprives the fork-in-the-road provision of genuine meaning and practical effect

70. Respondent submits that if strict identity of parties and cause of action are held to be essential conditions for the operation of fork-in-the-road provisions in BITs, then these provisions will be of no practical significance. Instead, in accordance with Article 31(1) of the Vienna Convention and the principle of

effet utile, Respondent submits that the fork-in-the-road provision must be interpreted to give it genuine meaning and effect.

2. The fork-in-the-road provision is triggered where: (a) the treaty claim has the same fundamental basis as the claim submitted to the local courts; (b) the factual components of a treaty cause of action have already been brought before the local courts; and (c) the treaty claim does not truly have an autonomous existence outside the contract.

71. Respondent submits that the present dispute is the same as the disputes submitted to the Cairo Arbitral Tribunal and to the local courts. Respondent further submits that:

(i) The factual components of the treaty cause of action claim have already been brought before the Cairo Arbitral Tribunal and to the local courts;

(ii) The fundamental basis of the claims are the same – the alleged interference by GHE and Claimant's rights under the MOC and the denial of the existence of the purported Option to Buy; and

(iii) The treaty claims do not have an autonomous existence outside the contract. These include:

1. the Expropriation Claim.
2. the Fair and Equitable Treatment Claim.
3. the Full Protection and Security Claim.
4. the Observation of Obligations Claim.
5. the Minimum Standard of Treatment Claim.

3. The MFN Provision cannot be used to bypass a fork-in-the-road provision

72. Respondent submits that the Contracting Parties did not intend for the MFN clause in the BIT to apply to dispute resolution provision, which Respondent submits was specifically negotiated with a view of resolving disputes under the treaty. Respondent also submits that the MFN clause does not expressly refer to dispute resolution, nor does it expressly refer to "all matters" or "all rights".

B. CLAIMANT'S POSITION

1. The Current Treaty Dispute has never been submitted to Egyptian Courts

73. Claimant submits that even though some of the facts underpinning these claims related to a contract between Claimant and GHE, the current dispute is nonetheless not a contract dispute, but rather a dispute relating to alleged breaches of the BIT. Claimant submits that the relevant question in the present dispute is whether the dispute over an alleged breach of the Treaty rights has ever been submitted to domestic dispute resolution. According to Claimant, Respondent has never shown, or even argued, that any Treaty claims or any rights protected by the Treaty were submitted to local dispute resolution. Claimant submits that the local proceedings related only to Claimant's attempts to enforce the MOC and the Option to Buy, and did not involve any discussion or a decision of any alleged Treaty breaches. Such matters, according to Claimant, would have been outside the jurisdiction of the Tribunal.

2. All of Claimant's claims are fundamentally treaty claims, therefore not barred by the fork-in-the-road clause

74. Claimant submits that because contract claims are distinct from treaty claims, a tribunal retains jurisdiction over the treaty claims even where contract claims related to the same facts have been submitted to domestic dispute resolution. Claimant submits that in this particular case, each of Claimant's claims is not only based on treaty, rather than contract law, but also involves facts not at issue in the local proceedings. Claimant further submits that Claimant's claims could not have been brought in the local proceedings, because they involve issues that fall outside the jurisdiction of the local bodies.

3. The factual basis of the current claims and the relief sought in this arbitration are distinct from those in the domestic proceedings

75. Claimant submits that the legal foundation of Claimant's claims is distinct from contract claims, and that each of the claims involves a variety of facts never put at issue in the local proceedings. Claimant further submits that the relief sought

in the domestic proceedings is to enforce the MOC and the Option to Buy – *i.e.*, specific performance with interim compensation for certain breaches as a secondary aim. Whereas, in the present dispute Claimant seeks only to be compensated for Respondent's various Treaty breaches, which according to Claimant have deprived it from the expected return of its investment.

4. Claimant is entitled to more favourable provisions from treaties under the MFN Clause

76. Claimant argues that even if the fork-in-the-road clause in the BIT would preclude any of Claimant's claims in this case, the MFN clause should entitle Claimant to the more favourable provisions in other BITs concluded in Egypt, such as the Germany-Egypt BIT, which do not contain a fork-in-the-road clause.

C. THE TRIBUNAL'S DECISION

77. Respondent submits that the fork-in-the-road clause was triggered when Claimant filed a counterclaim in the Cairo arbitration commenced by GHE and when it filed its case in the local courts of Egypt.

78. Claimant submits that the fork-in-the-road clause has not been triggered, because Claimant's claims pursued in the local fora, on the one hand, and the claims pursued in the present arbitration on the other hand do not meet the triple identity test, that in the view of Claimant should be applied. Claimant submits that even though the local proceedings and this arbitration involve the same parties, the causes of action are not the same, as the present arbitration involves treaty claims and not contract claims. The relief sought is also different.

79. The Tribunal is of the view that the allegations related to the fork-in-the-road clause are closely related to the merits of the case. The Tribunal considers that ruling on this matter requires a more thorough analysis of the claims and the merits of the dispute.

80. Therefore, the Tribunal decides to join its decision on the fork-in-the-road objection to the merits.

VII. EQUITABLE PRINCIPLES OF PRESCRIPTION

A. RESPONDENT'S POSITION

81. Respondent submits that seven years since the last alleged breach is an unreasonable delay on the part of Claimant to present its claim. Respondent states that this delay compromises Respondent's ability to defend on an equal footing to Claimant in the present proceedings. Respondent further submits that the conditions for prescription apply in the present case. Namely, Respondent submits that (i) there has been an unreasonable delay by Claimant in presenting its claim (seven years since the last alleged breach of treaty and eighteen years from the first alleged breach of treaty), (ii) with the passage of time material facts are lost, obscured, or reasonably in doubt and potential witnesses have now retired or passed away, and inevitably, the passage of time – twenty two years since the signing of the MOC – will result in faded memories for those witnesses that may be available to testify, which causes prejudice to Respondent, and (iii) Claimant's delay in presenting its claim prejudices Respondent's ability to defend itself on equal footing to Claimant in these proceedings.

82. Moreover, Respondent submits that it was only notified of the resent dispute when the present proceedings before ICSID were filed by Claimant in *"2008* [sic]*"*. Respondent submits that the Cairo Arbitration (commenced by GHE in 1993) and the local court proceedings (commenced by Claimant in 1995) do not constitute notice of this present ICSID dispute, some thirteen years later. Nor can Claimant claim that Respondent has been on notice of the present proceedings for the past *"seven years"* since the last alleged breach of treaty (its eviction from the Resort in 2001). Respondent submits that during this time Claimant neither attempted to recover any compensation from Respondent, nor did it notify Respondent of any claim.

B. CLAIMANT'S POSITION

83. Claimant submits that a delay of seven years is not sufficient to raise a presumption of negligence with claims brought against Respondent – *i.e.,* the

delay is not unreasonable – given that claims based on the same facts could still be presented under Egyptian law for full further eight years.

84. Claimant further submits that it had produced five comprehensive witness statements and no fewer than 257 factual exhibits in support of its claims, therefore, completely undermining Respondent's assertion that material facts were lost. Claimant also submits that the majority of Claimant's contemporaneous business records were seized by Respondent in 2001, forcing Claimant to rely on the documentary record produced during the local arbitration, which Claimant states is equally available to Respondent. In relation to the witnesses, Claimant submits that Respondent failed to identify a single example of a relevant witness that it will be unable to call for its defence in the present arbitration.

85. Finally, Claimant submits that the critical inquiry for determining whether a respondent has been prejudiced by delay is not whether the respondent is unable to gather facts relevant to its defence at the time it must undertake that defense, but rather whether it had sufficient notice and opportunity to do so at the time of the underlying events.

C. THE TRIBUNAL'S DECISION

86. Respondent submits that Claimant's claims are overdue as they were filed several years after they allegedly arose.

87. The Tribunal is of the view that the burden of proof rests on Respondent to establish the existence of a prescription rule. Respondent has not demonstrated the existence of a prescription rule under the ICSID rules or the BIT. The Tribunal contends that references to other systems such as NAFTA are neither relevant nor demonstrative of a trend or so persuasive that the Tribunal should consider them.

88. Therefore, the Tribunal decides to reject Respondent's objection based on equitable principles of prescription.

VIII. THE DECISION OF THE TRIBUNAL

89. Based on the above, the Tribunal rules as follows:

1. The Tribunal rejects Respondent's jurisdictional objection based on *ratione materiae* and joins the question of the validity of the option to buy to the merits.

2. The Tribunal rejects Respondent's jurisdictional objection based on *ratione temporis*.

3. The Tribunal rejects Respondent's jurisdictional objection based on *ratione personae*.

4. The Tribunal joins Respondent's jurisdictional objection based on the fork-in-the-road clause to the merits.

5. The Tribunal rejects Respondent's jurisdictional objection based on equitable prescription.

Date: 5 June 2012

Bernardo M. Cremades

Hamid G. Gharavi

Veijo Heiskanen