

Date of Dispatch: October 27, 2006

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

**IN THE MATTER**

**CHAMPION TRADING COMPANY  
AMERITRADE INTERNATIONAL, INC.**

**(HEREAFTER “THE CLAIMANTS”)**

**AGAINST**

**ARAB REPUBLIC OF EGYPT**

**(HEREAFTER “THE RESPONDENT”)**

**CASE No. ARB/02/9**

**AWARD**

**MEMBERS OF THE TRIBUNAL**

**MR. ROBERT BRINER, CHAIRMAN**

**MR. L. YVES FORTIER, Q.C., ARBITRATOR**

**PROFESSOR LAURENT AYNÈS, ARBITRATOR**

**SECRETARY OF THE TRIBUNAL**

**MRS. MARTINA POLASEK**

COUNSEL

FOR THE CLAIMANTS

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FOR THE RESPONDENT

MESSRS. ROBERT SAINT-ESTEBEN,  
TIM PORTWOOD AND MATTHIEU POUCHEPADASS  
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FRANCE

## 1 PROCEDURAL HISTORY

- 1 On May 29, 2002, the shareholders of National Cotton Company (“NCC”) – Champion Trading Company, a Delaware (USA) incorporated company, Ameritrade International, Inc., another Delaware (USA) incorporated company, together with James T. Wahba, John B. Wahba and Timothy T. Wahba – submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) a Request for Arbitration directed against the Arab Republic of Egypt.
- 2 ICSID registered the Request on August 8, 2002.
- 3 The Claimants designated Mr. L. Yves Fortier, Q.C., as Arbitrator, and the Respondent designated Professor Laurent Aynès as Arbitrator. With the agreement of the Parties, the Secretary-General of the Centre appointed Mr. Robert Briner as the President of the Arbitral Tribunal, and by letter of January 31, 2003, the Centre noted that, in accordance with Rule 6(1) of the Arbitration Rules of the Centre, the Arbitral Tribunal was deemed to have been constituted and the proceedings to have begun on January 30, 2003. Mrs. Martina Polasek, Counsel, ICSID, was designated by ICSID as Secretary of the Tribunal.
- 4 A first session of the Arbitral Tribunal was held on March 7, 2003, at the World Bank offices in Paris in the presence of representatives of the Parties, President Robert Briner, Arbitrator Professor Laurent Aynès, and Mrs. Martina Polasek. Arbitrator Mr. L. Yves Fortier, Q.C., participated through video conferencing.
- 5 Among other matters, it was agreed that the place of the proceeding would be Paris, that the procedural language would be English, which is the working language of the Arbitral Tribunal, and that pleadings and other documents could be submitted in either English or French. It was also agreed that any documents submitted in a language other than English or French would be translated into either of those languages.
- 6 Before the first session of the Arbitral Tribunal, by letter of March 5, 2003, the Respondent remitted a “Note préliminaire sur la compétence” in which the Respondent stated that the Arbitral Tribunal lacked jurisdiction with respect to the claims by the

physical persons as well as those of the corporate Claimants. At the first session, the Arbitral Tribunal informed the Parties that it had decided to first deal with the issue of its jurisdiction, and a timetable for the further procedure was agreed upon.

- 7 In accordance with this timetable, the Respondent submitted on April 18, 2003, its "Mémoire sur la compétence".
- 8 The Claimants submitted on May 30, 2003, their Counter-Memorial on Jurisdiction.
- 9 The Respondent on June 19, 2003, submitted "Observations complémentaires sur la compétence".
- 10 On June 27, 2003, a hearing of the Arbitral Tribunal on jurisdiction was held at the World Bank offices in Paris. A sound recording and a transcript were made of these proceedings.

The following persons were present:

The Arbitral Tribunal	Mr. Robert Briner (President) Mr. L. Yves Fortier, Q.C. Professor Laurent Aynès
The Secretary of the Arbitral Tribunal	Mrs. Martina Polasek
On behalf of the Claimants	Mr. Emmanuel Gaillard, Shearman & Sterling Ms. Yas Banifatemi, Shearman & Sterling Mr. Merwan Lomri, Shearman & Sterling Mr. Dany Khayat, Counsel for Claimants Mr. Arif Ali, Counsel for Claimants Mr. James Wahba, Claimant Mr. John Wahba, Claimant Mr. Timothy Wahba, Claimant Mrs. Susanne Wahba, Guardian of Mr. T. Wahba Dr. Mahmoud Wahba, Officer of the Corporate Claimants
Witness and Expert on behalf of the Claimants	Mrs. Eglal El-Waqeel Professor Hisham Sadek
On behalf of the Respondent	Counsellor Iskandar Ghattas, Undersecretary of the State for the Ministry of Justice

Counsellor Hossam Abdel Azim,  
President of the State Lawsuits  
Authority

Counsellor Osama Mahmoud,  
Vice-President of the  
State Lawsuits Authority

Mr. Mostafa Abdel Ghaffar,  
Member of the Directorate General  
for International and Cultural  
Cooperation of the Ministry of Justice

Mr. Robert Saint-Esteben,  
Bredin Prat

Mr. Louis-Christophe Delanoy,  
Bredin Prat

Mr. Tim Portwood, Bredin Prat

Mr. Denis Bensaude, Bredin Prat

Mr. Matthieu Pouchepadass,  
Bredin Prat

Witness and Expert on behalf of the Respondent Major General Hamdy Hafez  
Professor Hossam El Ehwany

- 11 At the end of the examination of the witnesses and experts, counsel for both Parties summed up their respective positions and the Arbitral Tribunal accepted to receive, after the hearing, the “Dossier de plaidoirie” which had been used by counsel for the Respondent during their pleadings. At the end of the hearing, the Parties and the Arbitrators stated that they had no further issues to discuss, and the Parties confirmed that they were in agreement with the procedure as conducted by the Arbitral Tribunal up to that time. On July 15, 2003, the Parties submitted their respective statements of costs in regard to the proceeding on jurisdiction.
- 12 On October 21, 2003, the Arbitral Tribunal issued its Decision on Jurisdiction. The Arbitral Tribunal declared that it did have jurisdiction over the claims of the corporate Claimants – Champion Trading Company and Ameritrade International, Inc. – but did not have jurisdiction over the individual Claimants – James B. Wahba, John T. Wahba and Timothy T. Wahba. This Decision is annexed to this Award and constitutes a part thereof.
- 13 On October 27, 2003, the Centre was informed that the corporate Claimants had appointed new counsel, the law firm Jones Day. On March 16, 2004, Jones Day informed the Centre that Mr. Peter E. Kirby and Ms. René Cadieux of the law firm Fasken Martineau DuMoulin LLP would act as co-counsel in the proceeding.

Subsequently, as of September 1, 2004, Jones Day no longer acted as co-counsel for the Claimants and Prof. Todd Weiler became co-counsel.

- 14 On April 30, 2004, the corporate Claimants submitted a limited Memorial on the Merits to be completed with supporting documentation and statements. Certain supporting documentation to the Memorial was filed on June 1, 2004.
- 15 On June 7, 2004, the corporate Claimants submitted a motion for permission to conduct limited discovery and for the production of documents. On July 9, 2004, the Respondent submitted a response to the motion, and on August 9, 2004, the Claimants filed a reply to the response by the Respondent. By letter of August 16, 2004, the Parties were informed of the Arbitral Tribunal's instructions that the Respondent produce one or several witnesses in regard to questions concerning the Egyptian cotton sector. The Parties subsequently agreed on the hearing of two witnesses: Mr. Samir Anis, Executive Director for Internal Cotton Trade Committee and Secretary-General of Cotton and International Trade Holding Company, and Mr. Mahmoud Karem, Member of the Cabinet of the Ministry of Finance of the Arab Republic of Egypt.
- 16 The hearing of the two witnesses took place in Paris on December 13, 2004.

The following persons were present:

The Arbitral Tribunal	Mr. Robert Briner (President) Mr. L. Yves Fortier, Q.C. Professor Laurent Aynès
The Secretary of the Arbitral Tribunal	Mrs. Eloïse Obadia
On behalf of the Claimants	Mr. Peter Kirby, Fasken Martineau DuMoulin LLP Mr. Hilal Al Ayoubi, Fasken Martineau DuMoulin LLP Professor Todd Weiler, Dr. Mahmoud Wahba, Officer of the Corporate Claimants
On behalf of the Respondent	Counsellor Iskandar Ghattas, Undersecretary of the State for the Ministry of Justice Counsellor Hossam Abdel Azim, President of the State Lawsuits Authority Counsellor Osama Mahmoud, Vice-President of the State Lawsuits Authority

Mr. Mostafa Abdel Ghaffar,  
Member of the Directorate General  
for International and Cultural  
Cooperation of the Ministry of Justice  
Mr. Robert Saint-Esteben,  
Bredin Prat  
Mr. Tim Portwood, Bredin Prat  
Mr. Matthieu Pouchepadass,  
Bredin Prat  
Ms. Jennifer Downing

Witnesses

Mr. Mahmoud Karem  
Mr. Samir Anis

- 17 At the end of the witness examinations, counsel for the Claimants announced their intention to submit by January 14, 2005, a request for production of documents. The Arbitral Tribunal accepted and agreed with the Parties on a time frame to answer the request, as well as a time frame to submit a completion of the memorial by the Claimants and a counter-memorial by the Respondent. At the end of the hearing, the Parties and the Arbitrators stated that they had no further issues to raise, and the Parties confirmed that they were in agreement with the procedure as conducted by the Arbitral Tribunal up to that time.
- 18 According to the agreed schedule, the Claimants submitted on January 14, 2005, a Request for production of documents.
- 19 On March 1, 2005, the Respondent submitted its Response to the Request for production of documents, along with certain documents.
- 20 On March 3, 2005, the Arbitral Tribunal issued an Order for the Parties to file their complete memorials within the time frame agreed upon during the December 13, 2004, hearing.
- 21 On March 25, 2005, the Respondent produced additional documents.
- 22 On April 6, 2005, the Claimants filed a Reply to the Respondent's Response of March 1, 2005, together with a submission regarding the production of further documents.
- 23 The Respondent, by letter of April 13, 2005, objected to the further request for production of documents by the Claimants.

- 24 On April 14, 2005, the Arbitral Tribunal issued an Order maintaining the March 3, 2005, Order and extending the time limit for the Claimants to file the Memorial until May 30, 2005.
- 25 On May 30, 2005, the Claimants submitted their Memorial on the Merits.
- 26 On September 30, 2005, the Respondent submitted its Counter-Memorial.
- 27 On October 30, 2005, the Claimants submitted their Reply.
- 28 The Respondent submitted its Rejoinder on November 30, 2005.
- 29 On June 5 and 6, 2006, a hearing on the merits was held at the World Bank Offices in Paris. A sound recording and a transcript were made of the hearing. The following persons were present :

The Arbitral Tribunal	Mr. Robert Briner (President) Mr. L. Yves Fortier, Q.C. Professor Laurent Aynès
The Secretary of the Arbitral Tribunal	Mrs. Martina Polasek
On behalf of the Claimants	Mr. Peter Kirby, Fasken Martineau DuMoulin LLP Mr. Hilal Al Ayoubi, Fasken Martineau DuMoulin LLP Professor Todd Weiler, Mr. Andrew Price, Fulbright Jaworski
Witness and Experts on behalf of the Claimants	Dr. Mahmoud Wahba Mr. Howard Rosen Dr. Dean Ethridge
On behalf of the Respondent	Mr. Robert Saint-Esteben, Bredin Prat Mr. Tim Portwood, Bredin Prat Mr. Matthieu Pouchepadass, Bredin Prat Mr. Raed Fathallah, Bredin Prat Counsellor Iskandar Ghattas, Undersecretary of the State for the Ministry of Justice Counsellor Hossam Abdel Azim, President of the State Lawsuits Authority Mr. Mostafa Abdel Ghaffar, Member of the Directorate General

for International and Cultural  
Cooperation of the Ministry of Justice

- 30 On the second day of the hearing, counsel for both Parties summed up their respective positions and answered questions posed by the Arbitrators. At the end, the Parties and the Arbitrators stated that they had no further issues to raise, and the Parties confirmed that they were in agreement with the procedure as conducted by the Arbitral Tribunal up to that time.
- 31 Further to the Arbitral Tribunal's directions at the hearing on the merits, the Parties submitted statements of costs on July 10, 2006 (the Claimants submitted a revised statement on July 17, 2006), and reply statements of costs on July 24, 2006.
- 32 In accordance with ICSID Arbitration Rule 38, the proceedings were closed on September 26, 2006.

## 2 THE CLAIMS

- 33 In their original Request for Arbitration of May 29, 2002, the original Claimants sought the following relief :

*An award:*

*(a) declaring that Egypt unlawfully expropriated the Claimants' investments in Egypt without providing prompt, adequate and effective compensation, and discriminated against and unlawfully failed to accord those investments the requisite protection and security;*

*(b) ordering that Egypt compensate the Claimants in respect of the losses they have suffered through Egypt's unlawful conduct, described above, in an amount to be quantified precisely during this proceeding, but in no event in an amount less than USD 100 million;*

*(c) ordering that Egypt pay the Claimants' costs occasioned by this arbitration including, without limitation, arbitrators' fees, administrative costs fixed by ICSID, the expenses of the arbitrators, the fees and expenses of any experts, and the legal costs incurred by the parties (including fees of counsel);*

*(d) ordering that Egypt pay interest on all sums awarded at a rate of 10% compounded quarterly, such interest to run from the date losses were incurred until the date of effective payment of the sums awarded; and*

(e) *granting the Claimants any other relief the Tribunal deems appropriate.*

34 In their last submissions, the final position of the Claimants was that they are

*"seeking damages on their own behalf and on behalf of their respective investment the National Cotton Company (NCC) from Egypt for violations of the "Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments". (Claimants' Reply of October 30, 2005, paragraph 3)*

*"In particular, the Claimants allege that Egypt violated its obligations to provide non-discriminatory treatment under Article II(2)(a) of the Treaty and to provide treatment in accordance with international law including full protection and security and fair and equitable treatment under Article II(4) of the Treaty." (Claimants' Reply of October 30, 2005, paragraph 4).*

35 The Claimants furthermore stated :

*In its Memorial II, the Claimants also explain how Egypt violated its obligation under Article II(4) of the Treaty by failing to provide fair and equitable treatment and full protection and security in accordance with the minimum standard of treatment required under international law. In particular, Egypt's treatment of NCC – both in terms of the arbitrary removal of its ability to conduct its business and in terms of the secretive and non-transparent manner in which it intervened to compensate a limited group of select companies – fell below the minimum standard of treatment, constituting an abuse of right under customary international law and violated the international law principle of transparency." (Claimants' Reply of October 30, 2005, paragraph 8).*

36 With respect to the alleged violation of "*fair and equitable treatment*" the Claimants, in their Reply of October 30, 2005, made the following statement:

*"In its Memorial II, the Claimants made a claim based on an abuse of rights argument relating, in large part, to the treatment NCC received as a result of the cooperation between the NBE and the Socialist Prosecutor, resulting in what Egypt refers to as the "1997 Moratorium."*

*As mentioned earlier, the entire circumstances surrounding the restructuring agreements with the NBE is the subject of litigation in U.S. Courts. Therefore, on the basis of comity and out of and respect for both this Tribunal's jurisdiction and that of the U.S. Courts, the Claimants are hereby withdrawing all claims based on the cooperation between the NBE and the Socialist Prosecutor and the resulting agreements with NBE." (paragraphs 142 and 143).*

37 The conclusion of the Claimants' position is stated in Chapter 6 of their Reply of October 30, 2005:

*“At the end of this round of pleadings, the Tribunal can now discern a fairly clear picture of what transpired in the Egyptian cotton industry after liberalization and privatization in 1994. NCC entered the market at the express request of Egyptian officials and proceeded to engage in buying and selling cotton in accordance with the privatization and liberalization laws. Almost immediately the privatization and liberalization program was derailed by actions taken by Egyptian officials. Those actions resulted [sic] massive losses to the Egyptian cotton industry leading to a liquidity crisis in mid-1996.*

*Egypt acted to resolve that liquidity crisis by engaging in a massive scheme of compensation to selected companies. While the Egyptian Cabinet approved the payment in a general way, Egyptian officials granted compensation in an overtly discriminatory fashion.*

*The first Settlement in 1997 was followed by at least four other Settlements, totalling well over EGP 7 billion. All of the payments were made in a selective and discriminatory fashion and NCC was systematically excluded from the program.*

*The Claimants invested in NCC in April 1997 and would have benefited from any payments made to NCC in August 1997 and in later years. It is entirely plausible to assume that had NCC received its fair and non-discriminatory share of compensation in 1997 that it would have continued in business as a major Egyptian cotton company. All of the companies that received payments in the first settlement are still continuing in business in Egypt to this day.*

*No legislative scheme was enacted at any time to support the payment scheme and the payments were made completely outside of any documented program. Egypt has attempted but has failed at every turn to demonstrate the existence of any agricultural price support system operating through compensation payments. Egypt has provided no legislative scheme for such payments. Documents that have been provided are internally inconsistent and demonstrate nothing more than the fact that payments were made in the five Settlements on a wholly selective and discriminatory basis.*

*Egypt has confirmed that there were no rules and regulations surrounding the payments. That the payments were effected in a “top-down” fashion, without the beneficiary companies being subjected to requirements of application and proof of claims, or entitlement. The whole scheme operated in a thoroughly non-transparent fashion and its existence was known only to a few Egyptian officials and favoured members of the cotton industry.*

*In view of the facts and arguments made above, may it please this Tribunal to declare and adjudge the following:*

*Order the Arab Republic of Egypt to pay to the Claimant, Champion Trading Company, the amount of US\$73,034,224 plus the appropriate interest on that amount from September 30, 2005 until full payment.*

*Order the Arab Republic of Egypt to pay to the Claimant, Ameritrade International Inc., the amount of US\$292,136,897 plus the appropriate interest on that amount from September 30, 2005 until full payment.*

*The Arab Republic of Egypt be hereby ordered to pay to the Claimants, Champion Trading Company and Ameritrade International Inc. the costs in this arbitration including:*

- (i) the full cost of the Arbitration Tribunal;*
- (ii) the professional fees and disbursements of professionals used by the Claimants to prepare and prosecute this claim; and*
- (iii) appropriate pre and post-judgement interest on such amounts at commercial rates.” (paragraphs 153 through 159).*

38 In its final submission, the Rejoinder of November 30, 2005, the Respondent submitted the following request :

*"- Dire et juger que les sociétés AMERITRADE INTERNATIONAL INC. Et CHAMPION TRADING COMPANY sont mal fondées en toutes leurs prétentions; en conséquence*

*- Débouter purement et simplement les sociétés AMERITRADE INTERNATIONAL INC. Et CHAMPION TRADING COMPANY de l'intégralité de leurs demandes; et*

*- Condamner solidairement les sociétés AMERITRADE INTERNATIONAL INC. Et CHAMPION TRADING COMPANY, ainsi que Messieurs John, James et Timothy WAHBA à l'indemniser de l'intégralité des préjudices moral et matériel que lui aura causé la présente procédure, le préjudice matériel comprenant notamment l'intégralité des frais, dont les frais d'arbitrage et de conseil, qu'elle aura exposés pour faire face à cette action.”*

39 The Tribunal will therefore in the following Chapters examine the various allegations regarding the alleged actions of Egyptian authorities which the Claimants state violate the provisions of the Bilateral Investment Treaty between the United States of America and the Arab Republic of Egypt.

### 3 FACTUAL BACKGROUND

#### 3.1. The Treaty between The United States of America and The Arab Republic of Egypt

40 This dispute is about whether Egypt has violated its duties under the “*Treaty between The United States of America and The Arab Republic of Egypt Concerning the*

*Reciprocal Encouragement and Protection of Investments*” signed on September 29, 1982 and in force as of June 27, 1992 (the “BIT”)<sup>1</sup> and/or under other applicable international legal rules.

Article II (2)(a) of the BIT provides:

*“Each Party shall accord investments in its territory, and associated activities in connection with these investments of nationals or companies of the other Party, treatment no less favorable than that accorded in like situations to investments and associated activities of its own nationals and companies, or nationals and companies of any third country, whichever is the most favourable.”*

Article II (4) of the BIT provides:

*“The treatment, protection and security of investments shall never be less than that required by international Law and national legislation.”*

### 3.2 The cotton industry and the market status before 1994

- 41 Cotton is one of Egypt’s principal industries. The cotton industry involves a complex manufacturing process starting with seed cotton and ending with textile fibre or garments<sup>2</sup>.
- 42 After harvest of the cotton crop, the farmers – or producers – sell the seed cotton to cotton ginners who process it by separating the cotton lint from the cotton seeds and remove all foreign matter. A cotton gin is a manufacturing facility made up of a processing plant, where the seed cotton is processed in huge ginning machines and warehouse space for the storage of seed cotton, cotton lint, cotton seeds and waste cotton. The ginned cotton lint is sold to spinning mills to be spun into cotton fibre. The cotton seeds are sold to edible oil plants to have their oil extracted and their waste used as animal feed. Finally, cotton waste is sold to specialty manufacturers for use in gauze<sup>3</sup>.
- 43 The Parties are in agreement that the pre-1994 situation was that of a classical State-controlled economy where the Government controlled all the production, purchasing, and distribution of cotton. There were no privately-owned cotton companies. The Government was also closely monitoring the banking system.

<sup>1</sup> Request for Arbitration, Annex C-5.

<sup>2</sup> Memorial of the Claimants, p. 2.

<sup>3</sup> Memorial of the Claimants, p. 2-3.

- 44 According to the Law No. 88/1962<sup>4</sup>, the cotton crop was to be sold to the Egyptian Cotton Committee at a price fixed each season by a Decree of the Ministry of the Economy, which also determined the conditions, circumstances and date of delivery of the cotton to the Committee<sup>5</sup>. For example, for the season 1985/1986, the purchase price was fixed by Ministerial Resolution No. 297/1985<sup>6</sup>.
- 45 The Egyptian Cotton Committee sold the cotton for local consumption or export under the conditions of and at the prices declared by the Committee, after approval by the Ministry of the Economy<sup>7</sup>. For example, for the season 1985/1986, the sale price for local consumption was fixed by Ministerial Resolution No. 221/1986<sup>8</sup>.
- 46 Finally, no cotton was to be exported or sold to local spinning mills except through direct purchase from the stock of the Committee<sup>9</sup>.
- 47 This mechanism resulted in the setting of a fixed price at which the farmers could sell their cotton, as well as a price at which the cotton would be sold to local mills or for export. The Government thereby guaranteed the price to the producers and supported the growing of cotton, since this industry is considered to occupy an economically strategic position for the country<sup>10</sup>.
- 48 Moreover, by establishing the Egyptian Cotton Committee as the sole seller of cotton, the Government was able to monitor the cotton trade, could avoid speculations regarding the crop, and could maintain price stability<sup>11</sup>.
- 49 Since all cotton purchases were made on behalf of the Government, these purchases were financed through bank loans to the cotton companies, which were reimbursed once the cotton was resold by the cotton companies<sup>12</sup>.
- 50 When the cotton resale price was higher than the fixed purchase price, the cotton company would make a profit. When the cotton resale price fixed by Decree was lower than the fixed purchase price, a negative balance would result for the cotton companies.

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<sup>4</sup> Exhibit D-115.

<sup>5</sup> Law No. 88/1962, Art. 1, in Exhibit D-115.

<sup>6</sup> Exhibit D-116.

<sup>7</sup> Law No. 88/1962, Art. 2, in Exhibit D-115.

<sup>8</sup> Exhibit D-124.

<sup>9</sup> Law No. 88/1962, Art. 2, in Exhibit D-115.

<sup>10</sup> Explanatory note to the Law No. 88/1962, p. 3, in Exhibit D-115.

<sup>11</sup> *Id.* p. 4, in Exhibit D-115.

<sup>12</sup> Reply of the Respondent, p. 24.

This balance would ultimately be paid by Governmental funds, according to the Law No. 88/1962<sup>13</sup> and similar later Laws and Decrees, since all cotton trading was done on behalf on the Government and according to its instructions<sup>14</sup>.

51 From the 1985/1986 season until the 1993/1994 season, the continuous increases in the purchase prices from the farmers in comparison to the sale prices led to a regular increase of the debt of the cotton trading companies towards the banks<sup>15</sup>.

52 As of August 31, 1996, the cotton companies' negative balance – and ultimately the Government's – amounted to EGP 3,975.94 million, pursuant to the audit report of the Central Audit Agency<sup>16</sup>.

### 3.3 The liberalization of 1994 and the incorporation of NCC

53 In 1994, the Egyptian Parliament passed a series of laws with the objective to liberalize the Egyptian cotton industry and open it to private sector participation as follows<sup>17</sup>:

#### Law No. 141/1994 Authorizing the Establishment of the Cotton Spot Exchange<sup>18</sup>:

54 This Law established a Spot Cotton Exchange through which the cotton would be purchased and sold, and also recognized the possibility for cotton to be purchased and sold outside the Spot Cotton Exchange.

55 Consequently, any cotton company had the option of purchasing and selling cotton through the Exchange or outside. However, to participate in the dealing of cotton through the Exchange, the company had to be recorded as a member of the Exchange, after having fulfilled certain requirements and having filed an application<sup>19</sup>.

56 A Cotton Exchange Committee was appointed to supervise the Exchange, in particular, to establish the internal regulations and rules of the exchange and its organization and to prepare an annual report to the General Assembly of the Exchange<sup>20</sup>. A Technical

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<sup>13</sup> Exhibit D-115.

<sup>14</sup> Letter of May 30, 1999, from the Ministry of Public Business Sector to the Ministry of Finance, in Exhibit D-125.

<sup>15</sup> Exhibit D-125.

<sup>16</sup> Exhibit D-125.

<sup>17</sup> Exhibits D-52, D-53 and D-54.

<sup>18</sup> Exhibit D-52.

<sup>19</sup> Art. 1 to 5, in Exhibit D-52.

<sup>20</sup> Art. 8, in Exhibit D-52.

Committee was also created to determine the average prices of the different types of cotton and to announce them<sup>21</sup>.

Law No. 210/1994 Organizing Domestic Cotton Trade<sup>22</sup>:

57 This Law allowed cotton traders to freely purchase and sell cotton on the domestic market, outside the Spot Cotton Exchange, as previously established by the Law No. 141/1994.

58 The conditions and procedures of this optional purchase and sale mechanism were defined in the By-Laws<sup>23</sup> to be issued by the Minister of Economy and Foreign Trade<sup>24</sup>.

59 Any cotton company which wished to participate in this purchase and sale mechanism had to file an application in order to be registered<sup>25</sup>.

Law No. 211/1994 called the “Cotton Exporters Union Act”<sup>26</sup>:

60 According to this Law, cotton companies had to be registered in order to export cotton<sup>27</sup>. A Management Committee was established to issue the rules and regulations of the Export Union<sup>28</sup>.

61 The Parties are in agreement that although these Laws allowed the private sector to fully participate in all aspects of the cotton industry, they did not afford companies the complete freedom to trade cotton. Thus, according to the Law No. 210/1994<sup>29</sup>, the producers could, during a transitional period, optionally sell their cotton to the Collection Centres – *i.e.*, the Spot Cotton Exchange as established by Law No. 141/1994 – where minimum prices were guaranteed by the Government<sup>30</sup>. Between 1994 and 2000, a Decree was enacted at the beginning of each season to organize the functioning of the Collection Centres<sup>31</sup>.

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<sup>21</sup> Art. 31, in Exhibit D-52.

<sup>22</sup> Exhibit D-53.

<sup>23</sup> Art. 1, in Exhibit D-53.

<sup>24</sup> Art. 3 of the Preamble, in Exhibit D-53; Ministerial Decree No. 389/1994 promulgating the executive regulations of the Law organizing cotton trade internally, in Exhibit D-91, Art. 46 of the Law, in Exhibit D-53.

<sup>25</sup> Art. 3 to 8, in Exhibit D-53.

<sup>26</sup> Exhibit D-54.

<sup>27</sup> Art. 3 to 7, in Exhibit D-54.

<sup>28</sup> Art. 17, in Exhibit D-54.

<sup>29</sup> Art. 4 of the Preamble, in Exhibit D-53.

<sup>30</sup> Exhibits D-92 to D-95.

<sup>31</sup> Reply of the Respondent, p. 28; Exhibits D-98 to D-104.

- 62 If, on the one hand, these Laws liberalized and opened the cotton industry to new participants, and in particular to non-State-owned companies, they established, on the other hand, the legal basis for the Government to take regulatory measures from time to time<sup>32</sup>.
- 63 On August 17, 1994, the National Cotton Company (“NCC”), a privately-owned cotton company, was incorporated.
- 64 According to the Claimants, NCC’s incorporation was made with the active encouragement of senior Egyptian officials as a joint investment between the National Bank of Egypt (“NBE”) and the Pension Fund of the employees of the NBE, holding together 25% of the shares, and some members of the Wahba family, holding 75% of the shares.
- 65 NCC was the first privately-owned cotton ginning and trading company in Egypt combining both production and sales activities. NCC was as well the largest company in terms of the number of employees<sup>33</sup>.
- 66 Other privately- or publicly-owned companies were operating in the market at the same time as NCC<sup>34</sup>. Pursuant to the Law No. 210/1994, NCC was registered like any other cotton company which wished to trade on the domestic market outside the Collection Centres.

#### 3.4. The 1994/1995 season

- 67 Pursuant to the new liberalization laws, Ministerial Resolution No. 364/1994 was passed in August 1994 whereby the Government undertook to guarantee fixed minimum prices for seed cotton during the season 1994/1995 to the farmers who optionally chose to supply their cotton to the Collection Centres<sup>35</sup>.
- 68 During that season, production of cotton was lower than average due to bad meteorological conditions. Low production and high international market prices resulted in higher overall market prices. This increase in prices led the farmers to sell their

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<sup>32</sup> Reply of the Respondent, p. 6.

<sup>33</sup> Memorial of the Claimants, p. 3-4; Exhibit C-1, p. 2-3.

<sup>34</sup> Exhibit D-111.

<sup>35</sup> Ministerial resolution No. 364/1994 in connexion with fixing the minimum prices of seed cotton, Exhibit D-92.

cotton directly to cotton companies in order to get a higher price, instead of selling at the lower fixed price to Collection Centres.

- 69 According to the Respondent, only 15% of the harvest – produced either by farmers who did not find any purchaser due to the small amount of crop offered or by farmers who did not want to expend resources in search of a buyer – was sold through the Collection Centres, since the prices were lower than the market prices. Consequently, due to these specific market conditions and the small amount of cotton sold through the Collection Centres, the Government did not undertake to reimburse any price differentials the way it did during the pre-1994 period<sup>36</sup>.
- 70 During that season, NCC purchased directly from the free market, outside the Collection Centres, approximately 18% of the national production of raw cotton.
- 71 A company wishing to export or import cotton was required to apply for a permit from the Union of Cotton Exporters in order to be registered, pursuant to Law No. 211/1994. Import and export permits were granted in advance for the 1994/1995 season. Consequently, only state-owned companies were in possession of these permits<sup>37</sup>, and, therefore, NCC could not benefit from such permits for the ongoing season and could neither import nor export cotton.

### 3.5. The 1995/1996 season

- 72 In August 1995, Ministerial Resolution No. 549/1995 was passed whereby the Government would guarantee the fixed minimum prices of the seed cotton for the season 1995/1996 for the producers who optionally chose to supply their cotton to the Collection Centres<sup>38</sup>.
- 73 During that season, NCC purchased approximately 12% of the national production of raw cotton. The market conditions were identical to those of the previous season, and the market prices were high. Again, the increase in the market prices led the farmers to sell their cotton directly to cotton companies in order to get a higher price, instead of selling at a lower fixed price to the Collection Centres.

<sup>36</sup> Counter-memorial of the Respondent, p. 30-31; Exhibit D-98.

<sup>37</sup> Exhibit C-1, p. 5; Exhibit C-CMW-6.

<sup>38</sup> Ministerial Resolution No. 549/1995 in connexion with fixing the minimum prices of seed cotton, Exhibit D-93, Exhibit C-CMW-16.

- 74 On February 1, 1996, the Government passed Decree No. 34/1996 authorizing the export of cotton for the ongoing season<sup>39</sup>. Thus, NCC was granted an export permit during 8 days, until the Government decided again to prohibit the export of cotton<sup>40</sup>.
- 75 The Government then passed Ministerial Decree No. 457/1995<sup>41</sup> for the 1995/1996 season, ordering the dealers of cotton not to store any ginned cotton for more than 30 days.
- 76 By the end of the 1995/1996 season, NCC had ceased to purchase cotton.

### 3.6 The 1996/1997 season and the transfer of shares to the Claimants

- 77 In April 1996, the Government passed Ministerial Act No. 133/1996 guaranteeing the minimum prices of seed cotton for the season 1996/1997<sup>42</sup>.
- 78 During this season, production of cotton was higher than average and market prices therefore decreased, making it more advantageous to sell and purchase through Government Centres instead of buying directly from farmers, since prices were fixed.
- 79 In view of the market conditions (i.e. the low prices), the Government introduced by Decree No 908/1996<sup>43</sup> the reimbursement of the price differential resulting from a higher resale price, in comparison with the purchase price from the farmers, for all companies which participated in purchasing and selling cotton through the Collection Centres. Four privately owned companies – Modern Nile Cotton Company, Arab Cotton Ginning and Trade Company, Arab Investment Cotton Company, and the partially privatized Nile Ginning Company – participated in the system of purchasing and selling through the Collection Centres.
- 80 On April 1, 1997, the Claimants acquired the shares held by the NBE and the Pension Fund; Ameritrade replaced the NBE, acquiring its 40,000 shares, and Champion acquired the Pension Fund's 10,000 shares, for a total amount of EGP 3.75 million<sup>44</sup>.

<sup>39</sup> Exhibit C-CMW-8.

<sup>40</sup> Exhibit C-1, p. 5-6.

<sup>41</sup> Exhibit C-CMW-14.

<sup>42</sup> Ministerial Act No. 133/1996 determining minimum prices of seed cotton, Exhibit D-94, Exhibit CMW-22.

<sup>43</sup> Exhibit D-100.

<sup>44</sup> Counter-memorial of the Respondent, p. 14.

### 3.7 The 1997/1998 season and the subsequent seasons

- 81 The market conditions of the 1997/1998 season were identical to the conditions of the 1996/1997 season, resulting in low overall market prices. Again, the decrease in the market prices led the farmers to sell their cotton through the collection centres, rather than directly to companies, in order to get a better price.
- 82 The Government introduced by Decree No. 931/1997<sup>45</sup> a reimbursement mechanism of the price differential resulting from a higher resale price, in comparison with the purchase price from the farmers, for the companies which participated in purchasing and selling cotton through the Collection Centres.
- 83 In 1998, the Government modified the price supporting scheme. For the 1998/1999 and 1999/2000 seasons, the minimum price was determined by a new formula. However, the mechanism allowing the cotton companies to choose whether or not to participate in the trade through the Collection Centres remained identical, according to Decrees No. 1048/1998<sup>46</sup> and No. 1014/1999<sup>47</sup>.

### 3.8 The Settlements

- 84 The Government of Egypt has executed five series of payments to several cotton companies, namely a Settlement of September 15, 1997, and four other Settlements, those of June 29, 1998, of July 1, 2000, of November 5, 2002, and of December 12, 2003.
- 85 The 1997 Settlement provided for a payment by the Government of EGP 3.975 billion in favour of six publicly-owned companies<sup>48</sup>.
- 86 According to the Respondent, these companies had submitted to the Government the documents that proved that they had purchased cotton through the Governmental system, and the price differences were recorded by the Government as a debt owed to these companies, since the Ministry of Finance had declared that the Government would bear the costs resulting from the price differential<sup>49</sup>.

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<sup>45</sup> Decree No. 931/1997, in Exhibit D-101.

<sup>46</sup> Exhibit D-102.

<sup>47</sup> Exhibit D-103.

<sup>48</sup> Exhibit C-3.

<sup>49</sup> Transcript of the hearing held on December 13, 2004, p. 54-55.

- 87 This payment was the consequence of an accumulation of dues (debts) of the Government for the benefit of the cotton companies since the mid-1980s. This debt increase had led to a liquidity crisis in the banks – since the banks financed these Governmental debts – and therefore became a serious problem for the Government<sup>50</sup>. The Settlement represented a benefit for both the companies and the banks<sup>51</sup>.
- 88 The four subsequent Settlements were paid to publicly-owned companies as well as to private companies<sup>52</sup>. Those Settlements were paid in the respective amounts of: EGP 443 million on June 26, 1998, for the 1996/1997 season; EGP 3.3 billion on July 1, 2000, for the 1997/1998 season; EGP 400 million on November 5, 2002; EGP 107 million on December 18, 2003. The Settlements in the years 2002 and 2003 dealt with price differences for the 2000/2001 season as well as interests and leftovers from previous seasons.
- 89 According to the Respondent, as in the previous Settlement, the companies receiving payments from these Settlements had submitted to the Government the documents that proved that they had purchased cotton through the Governmental system, and the price differences were recorded by the Government as a debt owed to these companies, since the Ministry of Finance had declared that the Government would bear the costs<sup>53</sup>.

## 4 DISCUSSION

### 4.1 Position of the Claimants

- 90 The Claimants allege that the Respondent has violated its obligations to provide non-discriminatory treatment under Article II (2)(a) of the BIT (*i.e.*, discrimination/national treatment claim, cf. *infra* 4.1.1) and to provide treatment in accordance with international law including full protection and security and fair and equitable treatment under Article II (4) of the BIT (*i.e.*, denial of fair and equitable treatment/full protection and security claim, cf. *infra* 4.1.2).

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<sup>50</sup> *Id.* p. 112.

<sup>51</sup> *Id.* p. 116-117.

<sup>52</sup> Exhibit CMW-29.

<sup>53</sup> Transcript of the hearing held on December 13, 2004, p. 54-55.

#### 4.1.1. Discrimination claim

- 91 The Claimants argue that the series of the five Settlements executed in 1997, 1998, 2000, 2002 and 2003 were in violation of the non-discrimination obligations owed by Egypt under the BIT. According to the Claimants, when Egyptian officials decided in August 1997 to take action to relieve the crisis facing the cotton industry – a crisis the Claimants assert was created by the officials themselves – Egypt had an obligation under the BIT to ensure that the action was taken on a non-discriminatory basis. Their decision to implement a compensation program – which by design, implementation and impact, benefited only certain enterprises to the exclusion of NCC – was a violation of Egypt’s obligation to provide NCC with national treatment according to Article II (2)(a)<sup>54</sup>.
- 92 In order to honour its obligations to provide national treatment under the BIT, the Government of Egypt could not choose to pay only selected companies without also compensating NCC. NCC could have continued in business if it had not been denied access to the Settlements on the same terms as its competitors<sup>55</sup>.
- 93 The Claimants rely on the *Pope & Talbot* standard as the test to be applied, according to which: “*the critical test for national treatment in the investment Treaty context, as demonstrated by the Pope & Talbot Tribunal, is whether differences in treatment have a reasonable nexus to rational government policies that (i) do not distinguish, on their face, or de facto, between foreign-owned and domestic companies, and (ii) do not otherwise unduly undermine the investment-liberalizing objectives of the Treaty [...] The rationale for this approach is the acknowledgement that it is almost always impossible to provide positive evidence of discriminatory governmental intent. However, by examining the proffered government policy rationale for the action and determining whether the action in question discriminates de jure or de facto against foreign-owned investments that are in like circumstances to the benefited local investments one can quite reasonably arrive at a conclusion with respect to the government action*”<sup>56</sup>.
- 94 According to the Claimants, once a difference in treatment has been established, the

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<sup>54</sup> Reply of the Claimants, p. 1.

<sup>55</sup> *Id.* p. 1.

<sup>56</sup> *Id.* p. 25.

burden shifts to the other party to demonstrate that a reasonable, non-discriminatory policy justification exists which would explain the differences in treatment received by the foreign-owned investment. In the present case, the Claimants alleged that having established *prima facie* the existence of a discriminatory Governmental action, the Respondent had to provide evidence that the Settlements were based on reasonable and non-discriminatory underlying grounds, which Egypt failed to do<sup>57</sup>.

95 The Claimants refer to a set of events that allegedly led to violation of the non-discrimination clause by Egypt. On August 7, 1995, a Coordination Committee was established by Decree to supervise the cotton operations of the affiliated companies and of the private companies who chose to supply their cotton to the collection centres<sup>58</sup>. The Committee also drafted and adopted a Uniform Contract to govern the transactions between buyers and sellers<sup>59</sup>. According to the Claimants, NCC sought to negotiate concessions and special terms with the Coordinating Committee. Its requests were unsuccessful and, according to Mahmoud Wahba, NCC was ordered, by letter of March 11, 1996, from the Coordinating Committee, to deliver a certain quantity of cotton to certain spinning mills<sup>60</sup>.

96 During the 1995/1996 season, NCC made several requests to the Government to receive an export authorization; all of the requests were unsuccessful<sup>61</sup>.

97 In 1996, NCC was forced to sell its stocks within a short period of time in order to comply with the regulations of the Ministerial Decree<sup>62</sup>. In August 1996, NCC was left with huge amounts of cotton because of the export prohibition and needed to sell its stocks urgently<sup>63</sup>, before the beginning of the new season<sup>64</sup>. NCC was finally able to sell its cotton in September 1996, at the time when the new crop for the 1996/1997 season was introduced. The price paid for NCC's stocks by the Government-owned mills being very low<sup>65</sup>, NCC sustained losses. By the end of the 1995/1996 season, NCC had lost huge amounts of money as a result of Government actions designed to reverse the 1994 privatisation Laws.

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<sup>57</sup> *Id.* p. 26-27.

<sup>58</sup> Ministerial Decree No. 338/1995, Exhibit C-CMW-17.

<sup>59</sup> Exhibit C-1, p. 8; Template of the Unified Contract, Exhibit C-CMW-18.

<sup>60</sup> Exhibit C-1, p. 9; Exhibit C-CMW-19.

<sup>61</sup> Exhibits C-CMW-11 to C-CMW-13.

<sup>62</sup> Exhibit C-1, p. 7-8.

<sup>63</sup> *Id.* p. 7 No. 33.

<sup>64</sup> Meeting of the board of directors of August, 19, 1996, Exhibit C-CMW-20.

<sup>65</sup> Exhibit C-1, p. 9 No. 47-48; Meeting of the board of directors of August, 19, 1996, Exhibit C-CMW-20.

- 98 On August 14, 1997, the Government issued a Decree establishing minimum seed cotton prices for farmers. As a result of the minimum prices, cotton companies sustained losses and Egypt launched a scheme to compensate them for these losses. At the end of 1996/1997 season, Egypt implemented this program to compensate the cotton industry participants for the losses resulting from its actions in the market.
- 99 During the subsequent seasons, although NCC had stopped purchasing cotton, the company remained active in the cotton industry. NCC was selling cotton left over from the 1995/1996 season, in particular cotton waste, which is used by the industry in stuffed articles and to make gauze. In addition, NCC was trying during this period to collect its accounts receivable<sup>66</sup>.
- 100 The Claimants allege that, in executing the Settlements, the Government of Egypt violated its obligations under the BIT<sup>67</sup>. NCC – as well as the entire private sector – was excluded from participating in this scheme on the grounds that: “(i) *the minimum price was only available to those farmers who delivered their cotton to Government approved distribution centres; (ii) compensation was only available to companies operating State-approved distribution centres; and (iii) the State-owned companies controlled the allocation and operation of distribution centres and none were allocated to the private sector*”<sup>68</sup>.
- 101 As a result, the Claimants claim that these series of payments made by Egypt to some companies operating in the cotton industry in the post-1996 period were discriminatory. A select group of national companies operating in the cotton sector were provided with substantial sums of money while NCC, a company owned by Americans, received nothing. According to the Claimants, by making payments to other company and failing to make similar payments to NCC, Egypt discriminated against NCC and failed to provide NCC with national treatment, an action in violation of Egypt’s obligation under the BIT.
- 102 The Claimants allege that the Respondent has failed to provide any evidence that would support the conclusion that the scheme described by Egypt operated prior to 1994, or in the years 1996/1997, 1997/1998, 2000/2001 and subsequent years. Egypt has produced

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<sup>66</sup> Exhibit C-1, p. 15.

<sup>67</sup> Memorial of the Claimants, p. 9-10.

<sup>68</sup> *Id.* p. 10-11.

no laws, no regulations, no ministerial decrees, no demonstration of the various companies booking their entitlements to various payments, and no demonstration of the Egyptian government booking its corresponding liability to make those payments<sup>69</sup>.

4.1.2. Lack of transparency claim (originally: Fair and equitable treatment/full protection and security claim)

103 The Claimants claim that Egypt violated its obligations under Art. II (4) of the BIT by failing to provide fair and equitable treatment and full protection and security in accordance with the minimum standard of treatment required under international law.

104 In particular, the Claimants allege that Egypt's treatment of NCC – both in terms of the arbitrary removal of NCC's ability to conduct its business and in terms of the secretive and non-transparent manner in which Egypt intervened to compensate a limited group of select companies – fell below the minimum standard of treatment, constituting an abuse of rights under customary international law and violating the international law principle of transparency<sup>70</sup>.

105 Initially<sup>71</sup>, the Claimants claimed that the Claimants' major shareholder, Mr. Wahba, was compelled, under threats by the Government, to agree to the sale to the Claimants of the shares in NCC held by the NBE and the Pension Fund. As a consequence, the Claimants claim, the agreement relating to the purchase of the shares by the Claimants was made under duress<sup>72</sup>. In the Claimants' Reply, the Claimants withdrew all claims based on the relationship between the NBE and the Socialist Prosecutor and the resulting agreements with the NBE, since these issues are currently pending in U.S. courts<sup>73</sup>.

106 However, the Claimants maintained their claim regarding the lack of transparency of the Settlements.

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<sup>69</sup> Reply of the Claimants, p. 27.

<sup>70</sup> *Id.* p. 2.

<sup>71</sup> *Cf.* Memorial of the Claimants.

<sup>72</sup> Memorial of the Claimants, p. 26.

<sup>73</sup> Reply of the Claimants, p. 27-28.

107 According to the Claimants, the applicable standard that determines the obligations of Egypt in this context are the doctrine of abuse of rights and the principle of transparency<sup>74</sup>.

108 The Claimants allege that the terms of the Settlements were not publicly known. They were neither incorporated in a Decree or a Law nor published. Moreover, payments were made in favour of companies without any prior application, and without any objective criteria. As a consequence, by funding selected members of the cotton industry in a clandestine fashion, the Respondent violated the transparency principle under the BIT<sup>75</sup>.

#### 4.2 Position of the Respondent

109 The Respondent rejects all claims of the Claimants.

110 The Respondent contests that it pursued any discriminatory actions. The Respondent also maintains there has been no violation of the fair and equitable treatment/full protection and security obligations and no violation of the transparency principle.

##### 4.2.1 Discrimination claim

111 According to the Respondent, the five Settlements that resulted in payments by the Government to cotton companies are the materialization of Government undertakings to bear the costs of price differentials by compensating the cotton trade companies for the price differences that occurred between the minimum purchase price from the producers and the fixed sale price to customers. These five Settlements included a Settlement of September 15, 1997, and other Settlements of June 26, 1998, of July 1, 2000, of November 5, 2002, and of December 18, 2003.

112 The Settlement of September 15, 1997, concerns the reimbursement of price differentials regarding trade operations that occurred before 1994, *i.e.*, before the liberalization of the Egyptian cotton market and before the creation of NCC<sup>76</sup>.

113 The other Settlements – those of June 26, 1998; July 1, 2000; November 5, 2002; and December 18, 2003 – concern the reimbursement of price differentials resulting from

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<sup>74</sup> Memorial of the Claimants, p. 59.

<sup>75</sup> Reply of the Claimants, p. 28.

<sup>76</sup> Counter-memorial of the Respondent, p. 52.

the optional collective system of cotton commercialization that was established during the liberalized years of the cotton industry, and in particular from the 1996/1997 season onwards<sup>77</sup>.

114 NCC chose not to participate in the optional collective system of cotton commercialization and chose not to buy its cotton from the Collection Centres. Since NCC was not in the same situation as the companies that had purchased their cotton through the Collection Centres, NCC did not benefit from the Settlements. Therefore, the Settlements were not discriminating against NCC in comparison with the cotton companies which had used the Collection Centres<sup>78</sup>.

115 The purpose of the Settlements was to reimburse the Government's debts resulting from price differences on an objective basis established by the liberalization Laws and their applications Decrees. Egypt never owed any debt to NCC regarding price differences<sup>79</sup>.

116 The Respondent contests that there should be a shift in the burden of proof, as alleged by the Claimants<sup>80</sup>. However, should the Respondent have to provide the necessary proof of a non-discriminatory policy, the Respondent claims that it has provided enough positive evidence that the difference of treatment was justified by objective circumstances, independent from any consideration linked to nationality<sup>81</sup>.

117 The Central Agency drafted an audit report in 1997<sup>82</sup> regarding the price differences, the purpose of which was to examine and check the amount of debt owed by the Ministry of Finance to the trading cotton companies<sup>83</sup>.

118 The four Settlements from June 29, 1998, to December 12, 2003, did not concern the activities pertaining to the 1994/95 and 1995/96 seasons. All Settlements were based on governmental Decrees<sup>84</sup>. It has not been disputed that both publicly-owned and private companies were the beneficiaries of these Settlements. The Claimants could not show that NCC would in any way have been prohibited from continuing to participate in the Egyptian cotton market. The only reason advanced by the Claimants was their economic

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<sup>77</sup> *Id.* p. 52-53.

<sup>78</sup> *Id.* p. 53.

<sup>79</sup> *Id.* p. 54.

<sup>80</sup> Rejoinder of the Respondent, p. 16.

<sup>81</sup> *Id.* p. 4.

<sup>82</sup> Exhibit D-152.

<sup>83</sup> Rejoinder of the Respondent, p. 25.

<sup>84</sup> Exhibits D-98 to D-104.

impossibility to continue their activity in view of the heavy losses which they had incurred during the two seasons in which they did participate. This Tribunal has not been asked to examine the reasons for the losses incurred by NCC resulting, according to the Claimants, from acts and omissions of the Egyptian authorities. All these alleged acts and omissions are the object of a lawsuit commenced by NCC against the Egyptian Government before the Egyptian Administrative Courts. In any case, the acts and omissions occurred before the investment of the two corporate Claimants in NCC and would therefore be outside the jurisdiction of this Tribunal based on the Bilateral Investment Treaty between Egypt and the USA.

119 The Respondent states that it has provided enough evidence that the litigious payments pertained to a support program for cotton producers and, as NCC did not participate in this support program, the Claimants could not claim any payment<sup>85</sup>.

#### 4.2.2 Lack of transparency claim

120 According to recent case law, the fair and equitable standard must be assessed in light of all the facts and circumstances of the case, including the behaviour of the Claimants<sup>86</sup>.

121 The Government's acts and the measures taken were reasonable and objectively justified. The Socialist Prosecutor's acts were also legitimate and based on the Law. The magistrates working for the Socialist Prosecutor and for the Court of Ethics are independent from the Government and from the NBE<sup>87</sup>. Thus, the NBE required the Social Prosecutor to take action against Mr. Wahba only after the failure of the negotiations relating to an agreement with Mr. Wahba concerning his debts, according to regular judicial proceedings, and not in an arbitrary manner<sup>88</sup>.

122 Regarding the full protection and security standard, the acts of the Government, the NBE, and the Socialist Prosecutor against Mr. Wahba were lawfully taken in order to protect public funds, according to Egyptian Law and Article X (1) of the BIT<sup>89</sup>.

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<sup>85</sup> Rejoinder of the Claimants, p. 5.

<sup>86</sup> Reply of the Respondent, p. 57-58.

<sup>87</sup> *Id.* p. 62.

<sup>88</sup> Counter-memorial of the Claimants, p. 64.

<sup>89</sup> *Id.* p. 68.

123 Regarding the transparency claim, the Respondent states that the BIT contains no such obligation. However, should such obligation exist, the Settlements were made public, as they were taken in the form of published Laws and Decrees<sup>90</sup>.

#### 4.3 Findings of the Arbitral Tribunal

124 The Arbitral Tribunal will first examine the discrimination claim and then the transparency claim.

##### 4.3.1. Claim under Art. II (2) (a) – non-discrimination principle of the BIT

125 The non-discrimination principle is found in Art. II (2)(a) of the BIT, which prohibits discrimination based on nationality and requires the State to treat equally investments that are in like situations.

126 The purpose of Art. II (2)(a) is to promote foreign investment and to guarantee the foreign investor that his investment will not because of his foreign nationality be accorded a treatment less favourable than that accorded to others in like situations.

127 The Parties are in agreement that the application of this clause requires that a foreign company make an investment and/or any associated activity in connection with this investment, in the territory of a Contracting State.

128 To comply with the non-discrimination provision, the following requirements need to be met: there shall be no treatment less favourable – *i.e.*, no discrimination – between foreign and national investments when they are in like situations. This standard requires the Arbitral Tribunal to first determine whether the parties involved – NCC and the companies who received payments from the Government under the various Settlements – were in like situations, and then to compare the treatment being received by foreign investments with the treatment received by local investors to determine whether there was a violation of the provision.

129 Were the parties involved – NCC and the companies who received payments from the Government – in like situations?

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<sup>90</sup> *Id.* p. 65.

- 130 The national treatment obligation does not generally prohibit a State from adopting measures that constitute a difference in treatment. The obligation only prohibits a State from taking measures resulting in different treatment in like circumstances<sup>91</sup>. A like situation has been defined as a similar situation that should be assessed within the same business or economic sector<sup>92</sup>.
- 131 In the present case, the Parties agree that NCC and the other publicly – or privately – owned cotton trading companies were *prima facie* in similar situations: both purchased cotton from farmers, and both ginned their cotton and sold it.
- 132 According to the Respondent, the payments made by the Government to some cotton trade companies were based on objective criteria: the payments aimed either to reimburse debts for pre-1994 operations or to reimburse price differentials for operations post-1995/96 in which NCC did not participate<sup>93</sup>. Therefore, the payments did not violate the national treatment obligation.
- 133 According to the Claimants, the payments made by the Government did discriminate. An analysis of the intent of the Government of Egypt is irrelevant. Because the Claimants did demonstrate a *prima facie* difference in treatment, the burden had shifted to the Respondent to demonstrate that a reasonable non-discriminatory policy justification existed that would explain the differences in treatment received by NCC and the other cotton companies<sup>94</sup>.
- 134 Under Art. II (2)(a) of the BIT, the Government of Egypt should not treat differently NCC and other cotton trading companies on the grounds of their different nationality, if they were in like situations. The question would remain whether a difference of treatment in like situations could be permissible based on other objective grounds. It is, however, not necessary for the Arbitral Tribunal to answer this question since the Arbitral Tribunal, as shown hereafter, finds that NCC and the companies which received the payments were not in a like situation.

<sup>91</sup> A. Goetz and others v. Burundi (ICSID Case No. ARB/95/3), para. 121, in Exhibit D-134: “une discrimination suppose un traitement différencié appliqué à des personnes se trouvant dans une situation semblable”.

<sup>92</sup> Pope & Talbot v. Canada, Award of April 10, 2001, para. 78, available at [http://www.dfait-maeci.gc.ca/tna-nac/documents/Award\\_Merits-e.pdf](http://www.dfait-maeci.gc.ca/tna-nac/documents/Award_Merits-e.pdf).

<sup>93</sup> Counter-memorial of the Claimants, p. 53.

<sup>94</sup> Reply of the Claimants, p. 25-26.

The 1997 Settlement:

- 135 According to the Respondent, the Settlement relates to reimbursement of price differentials regarding trade operations that occurred before 1994.
- 136 Under the Law No. 88/1962<sup>95</sup>, all cotton produced was to be delivered to the Egyptian Cotton Committee at a price which would be fixed prior to the beginning of each season by decision of the Minister of Economy<sup>96</sup>. The Egyptian Cotton Committee was to sell the cotton locally or for export at a price fixed also by the Minister of Economy<sup>97</sup>. Before the 1994 liberalization, it was prohibited for spinning mills to purchase cotton except through direct purchase from the established Committee.
- 137 According to the Law, the Minister of Economy fixed the purchase prices paid by the cotton export companies for the cotton bought from the producers (on behalf of the Government), from the 1985/1986 season until the 1993/1994 season<sup>98</sup>. The sale prices from cotton companies to local consumers were also fixed by ministerial resolution<sup>99</sup>.
- 138 The mechanism was explained in a letter from the Minister of Public Sector to the Minister of Finance<sup>100</sup> and during the December 13, 2004, hearing in Paris. The cotton company bought cotton from the producer at a fixed price on behalf of the Government and sold it to local mills or for export.
- 139 The differences between the prices are debited or credited on the account of the public treasury. Over the years the purchase price from the producers increased, so that the balance of the debt of the Ministry of Finance amounted to EGP 3,975.94 million as of August 31, 1996, pursuant to the audit of the cotton accounts control department at the Central Audit Agency. On September 15, 1997, the Ministry of Finance paid its debt by issuing notes on the public treasury for a one-year period with interest of 8%. Other amounts, especially interest on the outstanding amounts, were, however, still due<sup>101</sup>.

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<sup>95</sup> Exhibit D-115.

<sup>96</sup> Art. 1, in Exhibit D-115.

<sup>97</sup> Art. 2, in Exhibit D-115.

<sup>98</sup> Exhibits D-116 to D-123.

<sup>99</sup> Exhibit D-124.

<sup>100</sup> Letter of May 30, 1999, in Exhibit D-125.

<sup>101</sup> Exhibit D-125.

- 140 An auditing report was made for the Cotton Trade & Export Company<sup>102</sup>, in which the agency mentioned the price differences and the debts of the Ministry of Finance for the price differences, the repurchase differences, the marketing expenses differences and the financing burdens of these amounts<sup>103</sup>.
- 141 The marketing expenses represent all the costs involved in every activity between the acquisition of raw cotton and the sale of ginned cotton. The company engaging in these activities gets paid for these production or transformation costs<sup>104</sup>.
- 142 Auditing reports were also made for the Misr Cotton Export Company<sup>105</sup> and for the Port Said Cotton Export Company<sup>106</sup>.
- 143 To conclude, regarding the 1997 Settlement, the documents presented to the Arbitral Tribunal evidence that the reason for the payments was to extinguish the debts recorded for the period before 1994. Therefore, since NCC was not incorporated at the time these debts were incurred, the Arbitral Tribunal finds that the payments of the 1997 Settlements were not discriminatory.

#### The Subsequent Settlements:

- 144 Regarding the other Settlements – those of June 26, 1998; July 1, 2000; November 5, 2002; and December 18, 2003 – they concern, according to the Respondent, the reimbursement of price differentials that occurred, for the 1996/1997 season and the seasons thereafter, in relation with the liberalized optional collective system of cotton commercialization.
- 145 As previously exposed, after 1994 the cotton companies had the option of buying cotton either from the Collection Centres – organized at the beginning of each year by a ministerial Decree – or directly from the producers. The producers, like the cotton companies, also had the option of selling their cotton either to the Centres or to the companies. At the Collection Centres, a minimum price, fixed by the Government<sup>107</sup>, was guaranteed to the producers.

<sup>102</sup> Report of the Central Audit Agency of June 30, 1993, in Exhibit D-128.

<sup>103</sup> *Id.* p. 3.

<sup>104</sup> Transcript of the hearing held on December 13, 2004, p. 150-152.

<sup>105</sup> Exhibit D-129.

<sup>106</sup> Exhibit D-130.

<sup>107</sup> Exhibits D- 92 to D-95.

- 146 For the 1994/1995 and 1995/1996 seasons, the Government did not have to make any payments to cotton companies, since, due to the higher resale price of cotton, the companies did not sustain any losses during these seasons. The support system was therefore not used.
- 147 If NCC possibly incurred losses in the 1995/1996 season (see above §§95–97) these, according to the Claimants, were not caused by price differentials but by administrative acts like the impossibility to freely export cotton or the problems associated with the stocks of cotton held by NCC. The Claimants, however, do not, or at least no longer, base their claim on these acts of the Egyptian authorities which are (or at least were) the object of a law suit commenced by NCC against the Egyptian Government before the Egyptian Administrative Courts.
- 148 During the 1996/1997 and 1997/1998 seasons, however, the market prices were very low, and therefore most of the production was sold through the Collection Centres. The difference between the price paid by the private or public companies which had purchased cotton from the Collection Centres and the resale price was reimbursed by the Government to these companies.
- 149 The letter of May 30, 1999<sup>108</sup>, also states that the Ministry of Finance would bear the differences between the minimum prices for producers and the sale prices for the 1996/1997 season. As of June 30, 1997, the debt amounted to EGP 443 million and payment was made by issuance of notes.
- 150 For the 1997/1998 season, the Ministry of Finance also stated that it would bear the price if the export prices dropped below the minimum guaranteed.
- 151 Every year, the Central Audit Agency would audit the accounts of the State-owned companies, including the account used to record the price differences due by the Ministry of Finance<sup>109</sup>.
- 152 A company's participation in purchasing cotton through the Collection Centres was a prerequisite for that company to receive a reimbursement.

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<sup>108</sup> Exhibit D-129.

<sup>109</sup> Exhibits D-126 and D-127.

- 153 NCC was not part of the companies that could potentially receive a reimbursement for the 1996/1997 and 1997/1998 seasons, since NCC did not participate in buying any cotton during these seasons. Moreover, according to the Respondent, Egypt did not violate the national treatment obligation which prohibits discrimination (between foreign and domestic nationals) on the grounds of nationality.
- 154 Although both kinds of companies operate in the same industry and are subject to same kind of rules, there is a significant difference between a company which opts to buy cotton from the Collection Centres at fixed prices and a company which opts to trade on the free market, whether or not the company is privately-owned or State-owned or whether the company is national or foreign.
- 155 The first requirement to be fulfilled in order to receive compensation payments from the Government is the participation in the trading of cotton through the Collection Centres. The Parties are in agreement that NCC did not participate in this system. Therefore, NCC cannot be compared with other cotton trading companies regarding the Settlements.
- 156 Since the Arbitral Tribunal came to the conclusion that the companies were not in a like situation, it does not need to analyze the other requirements which prohibit discrimination on the grounds of nationality.

#### 4.3.2. Claim under Art. II (4) – Lack of transparency claim

- 157 The non-discrimination principle can also be found more generally in Art. II (4) of the BIT, which provides for a general non-discrimination principle, as required by international law and national legislation.
- 158 Because the Claimants withdrew their claim based on the alleged violation of the fair and equitable treatment and the full protection and security obligations, the Arbitral Tribunal will not further analyze this facet of the claim.
- 159 However, the Claimants maintained their claim based on the lack of transparency of the Settlements, pursuant to Art. II (4) of the BIT, which will be analyzed hereunder.
- 160 According to the Claimants, the Settlements were implemented and executed in violation of the transparency principle in international law, since they were secretly

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made to selected members of the cotton industry<sup>110</sup>.

- 161 The transparency principle was developed by the Claimants<sup>111</sup> by reference to the principle of transparency as it has been addressed by the WTO Appellate Body, and recalled the U.S.-Underwear case in which the Appellate Body described how the principle of transparency finds expression in the GATT agreement: “[...] *The essential implication is that Members and other persons affected, or likely to be affected, by Governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and, accordingly, to protect and adjust their activities, or alternatively to seek modification of such measures*”<sup>112</sup>.
- 162 The Claimants<sup>113</sup> also mentioned how the principle of transparency was clarified in the ICSID case *Técnicas Medioambientales*, which holds: “[...] *The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved hereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor’s ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State*”

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<sup>110</sup> Reply of the Claimants, p. 28.

<sup>111</sup> *Id.* p. 66.

<sup>112</sup> United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear, (WT/DS24/AB/R), February 10, 1997, p. 21.

<sup>113</sup> Reply of the Claimants, p. 68.

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*conform to the fair and equitable treatment principle.*<sup>114</sup> (Emphasis added by the Claimants).

- 163 According to the Respondent, the payments were known, public and transparent. The payments were published and the reimbursements were decided on the grounds of a report drafted by the independent Central Audit Agency. Evidence was produced by the Respondent to this effect.
- 164 The parties are in agreement that each Party has the burden to prove the facts on which it relies to support its claims and defenses. It was therefore the obligation of the Claimants to prove that the Settlements were not made in a transparent manner. The Tribunal notes that the Laws and Decrees regarding the organization of the cotton trading structures, the prices and the Government Centres' purchase and sale mechanism were public, available, or have been published or produced by the Respondent upon the request of the Claimants. The Claimants were in a position to know beforehand all rules and regulations that would govern their investments for the respective season to come. The Claimants have not produced any evidence or even pertinent arguments that Egypt violated the principle of transparency under international law and this claim therefore also has to be denied.

## 5 COSTS

- 165 The Parties submitted statements of their costs on July 15, 2003, with respect to the jurisdictional phase and on July 10, 2006, regarding the merit phase and the overall costs of the proceeding. The original Statement of the Claimants of July 10, 2006, was resubmitted in its final revised form on July 17, 2006.
- 166 Each party has paid an amount of USD 225,000 to ICSID as advance payments for the fees and expenses of the Arbitral Tribunal and to cover the expenses and administrative fee of ICSID. In the following cost computations these amounts are not included.
- 167 For the jurisdictional phase the Claimants claimed a total of USD 283,121.71, and the Respondent claimed the sums of USD 170,000; EGP 236,021.11; and EUR 9,738.30<sup>115</sup>.

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<sup>114</sup> *Técnicas Medioambientales TECMED S.A. v. Mexico*, (ICSID Case No. ARB(AF)/00/2), May 29, 2003, at para. 354, available at <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>.

<sup>115</sup> The abbreviation USD signifies United States Dollars, EGP signifies Egyptian Pounds, and EUR signifies Euros.

- 168 For the merits phase the Claimants put forward a claim for USD 1,089,158. The Respondent claims the sum of USD 548,075; EGP 152,679.88; and EUR 19,791.48.
- 169 Therefore, the Claimants claim for the total arbitration an amount of USD 1,375,279, and the Respondent claims the sums of USD 668,075; EGP 388,700.99; and EUR 29,529.78.
- 170 In their submission of July 24, 2006, the Claimants state that they “have no reply statement to make on the costs presented by [the] Arab Republic of Egypt.”
- 171 In its statement of July 24, 2006, the Respondent indicated that it has no comments regarding the statements of the Claimants but draws the attention of the Arbitral Tribunal to the important difference between the cost statements with respect to the jurisdictional phase and the merits phase.
- 172 Each Party has requested that its costs be assumed by the other Party.
- 173 Neither the ICSID Convention nor the ICSID Rules of Procedure for Arbitration Proceedings contain any provisions how the costs are to be apportioned between the Parties. Article 61 of the ICSID Convention provides that, except as the parties otherwise agree, which is not the case in this Arbitration, the Arbitral Tribunal shall assess the expenses incurred by the Parties in connection with the proceedings, and shall decide how and by whom these expenses, the fees and expenses of the members of the Arbitral Tribunal and the charges for the use of the facilities of the Centre shall be paid.
- 174 The Tribunal notes that the Claimants in the Decision on Jurisdiction were successful with respect to the two corporate Claimants which represent 25% of the share capital of NCC but that the claims of the three individual Claimants representing 37.5% of NCC were denied.
- 175 In this Award, the Arbitral Tribunal comes to the conclusion that the claims of the remaining Claimants are without any merit. The Tribunal notes that the Respondent produced a great number of documents based on repeated production requests by the Claimants after having already produced two witnesses for the hearing in Paris on December 13, 2004.

- 176 The Tribunal is of the opinion that it is appropriate in this case that basically the costs follow the event. Taking all factors into consideration, especially the fact that the claim was denied, the Arbitral Tribunal comes to the conclusion that the Claimants shall assume the total amount of the fees and expenses of the Arbitral Tribunal and of ICSID. They are therefore ordered to pay an amount of USD 225,000 to the Respondent.
- 177 With respect to the costs of the Parties, the Arbitral Tribunal holds that the Claimants have to carry their own costs and expenses as their claims were denied. Especially in view of the fact that the Respondent contested the jurisdiction of the Tribunal and as the Tribunal did allow the claims of the two Corporate Claimants to go forward, it would seem appropriate that the Claimants pay to the Respondent one half its expenses. The amounts claimed by the Respondent (at the September 2006 rates of exchange approximately USD 775,000) seem reasonable also when compared to the total costs claim of the Claimants. The Claimants shall therefore pay to the Respondent the amount of USD 334,037.50; EGP 194,350; and Euro 14,765.
- 178 In its Decision on Jurisdiction the Arbitral Tribunal held that it did not have jurisdiction to hear the claim of the three individuals, James T. Wahba, John B. Wahba and Timothy T. Wahba. It has never been disputed that the Arbitral Tribunal is competent to order these three original claimants to carry the appropriate costs of the jurisdictional phase of this procedure. These three individual claimants hold 37.5% of the share capital of NCC, compared to the 25% held by the two corporate Claimants. The question of costs and arbitration fees was reserved in the Decision on Jurisdiction. It is not possible to identify precisely the fees and costs which are attributable to the jurisdiction phase and those attributable to the merits. Based on the information available to the Arbitral Tribunal it would seem that approximately 20% of the overall activity of the Arbitral Tribunal and of the Parties, their counsel, and their witnesses were devoted to the Decision on Jurisdiction. The Arbitral Tribunal therefore holds that the three original claimants, James T. Wahba, John B. Wahba and Timothy T. Wahba, are jointly and severably liable to the Respondent for 20% of the total amount the Claimants owe to the Respondent, therefore the sum of USD 66,807.50; EGP 38,870; and EUR 2,953 (accounting for 20% of the Claimants' share of Respondent's expenses), plus USD 45,000 (accounting for 20% of the advance made by the Respondent to cover the fees and expenses of the Arbitral Tribunal and of ICSID). The total owed by the three

original Claimants to the Respondent is, therefore, the sum of USD 111,807.50; EGP 38,870; and EUR 2,953.

NOW THEREFORE, the Arbitral Tribunal

**DECIDES AND AWARDS AS FOLLOWS:**

1. The claims of the Claimants are denied.
2. a) The Claimants shall carry the fees and expenses of the members of the Arbitral Tribunal and the charges for the use of the facilities of the International Centre for Settlement of Investment Disputes of United States Dollars 450,000.  
  
b) The Claimants shall therefore pay to the Respondent the amount originally paid by it to the Centre of United States Dollars 225,000.
3. The Claimants shall carry the expenses incurred by them in connection with these proceedings and shall pay to the Respondent one half of the expenses incurred by it, therefore: United States Dollars 334,037.50; Egyptian Pounds 194,350; Euros 14,765.
4. The original individual claimants:  
Mr. James T. Wahba;  
Mr. John B. Wahba; and  
Mr. Timothy T. Wahba  
are jointly and severally liable together with the Claimants to the Respondent for the payment of the Respondent's expenses up to the following amounts  
United States Dollars 111,807.50  
Egyptian Pounds 38,870  
Euros 2,953

*signed*

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Mr. Robert Briner  
October 23, 2006

*signed*

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Mr. L. Yves Fortier  
October 20, 2006

*signed*

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Professor Laurent Aynès  
October 19, 2006