

**IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE UNITED
NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 1976**

and

**PURSUANT TO THE AGREEMENT BETWEEN
THE GOVERNMENT OF THE REPUBLIC OF FINLAND AND THE GOVERNMENT OF
THE ARAB REPUBLIC OF EGYPT ON THE MUTUAL PROTECTION OF INVESTMENTS
DATED 5 MAY 1980**

and

**THE AGREEMENT BETWEEN
THE GOVERNMENT OF THE REPUBLIC OF FINLAND AND THE GOVERNMENT OF
THE ARAB REPUBLIC OF EGYPT ON THE PROMOTION AND PROTECTION OF
INVESTMENTS DATED 3 MARCH 2004**

- between -

MOHAMED ABDEL RAOUF BAHGAT

- and -

THE ARAB REPUBLIC OF EGYPT

PCA Case No. 2012-07

FINAL AWARD

Tribunal

Professor Rüdiger Wolfrum (Presiding Arbitrator)
Professor W. Michael Reisman
Mr Laurent Lévy

Registry

Permanent Court of Arbitration

23 December 2019

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TABLE OF ABBREVIATIONS

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|-------------------------------------|---|
| 1 September 1997 Meeting | Meeting between the Egyptian Minister of Industry and Claimant on 1 September 1997, after which Claimant submitted an application to PENA to regain his Egyptian nationality |
| 1980 BIT | Agreement Between the Government of the Republic of Finland and the Government of the Arab Republic of Egypt on the Mutual Protection of Investments, dated 5 May 1980 and entered into force on 22 January 1982 |
| 2004 BIT | Agreement Between the Government of the Republic of Finland and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments, dated 3 March 2004 and entered into force on 5 February 2005 |
| 2018 Merits Hearing | Merits hearing held at the Peace Palace, The Hague on 12-14 December 2018 |
| 2019 Merits Hearing | Merits hearing held at the Peace Palace, The Hague on 24-27 April 2019 |
| ADEMCO | Aswan Development and Mining Company |
| ADEMCO-Arbed Contract | Sale and purchase contract between ADEMCO and ProfilArbed for the second hand iron ore preparation plant, dated 29 January 1998 |
| ADEMCO Shareholder Agreement | Shareholder Agreement entered into between Claimant and the Project Partners, dated 9 July 1998 |
| AISCO | Aswan Iron and Steel Company |
| April 1998 MD Report | Information memorandum between Mannesmann Demag and Tradecon regarding iron ore deposits in the Aswan region, dated April 1998 |
| Arbitration Costs | The costs of the arbitration under Article 38(a), (b), (c), (d), and (f) of the UNCITRAL Rules |
| Awad WS 1 | Mr Younes Awad's First Witness Statement, dated 16 July 2012 |
| Bahgat WS 1 | Mr Bahgat's First Witness Statement, dated 19 September 2012 |
| Bahgat WS 2 | Mr Bahgat's Second Witness Statement, dated 9 November 2012 |
| Bahgat WS 3 | Mr Bahgat's Third Witness Statement, dated 27 August 2013 |
| Bahgat WS 5 | Mr Bahgat's Fifth Witness Statement, dated 9 October 2018 |

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| BITs | The 1980 BIT and the 2004 BIT |
| Buttonwood | Buttonwood Legal Capital Limited, Hong Kong |
| Claimant | Mr Mohamed Abdel Raouf Bahgat |
| Claimant’s Counter-Memorial on Jurisdiction | Claimant’s Counter-Memorial on Jurisdiction, dated 30 August 2013 |
| Claimant’s Costs Reply | Claimant’s Costs Reply, dated 9 July 2019 |
| Claimant’s Rejoinder on Jurisdiction | Claimant’s Rejoinder on Jurisdiction, dated 25 May 2017 |
| Claimant’s Reply | Claimant’s Reply, dated 9 October 2018 |
| Claimant’s Statement of Claim | Claimant’s Statement of Claim, dated 10 November 2012 |
| Claimant’s Statement of Costs | Claimant’s Statement of Costs, dated 9 June 2019 |
| Claimant’s Supplementary Counter-Memorial on Jurisdiction | Claimant’s Supplementary Counter-Memorial on Jurisdiction, dated 14 December 2016 |
| CMA | Egyptian Capital Market Authority |
| CMRDI | Central Metallurgical Research and Development Institute |
| Commitment Agreement | Commitment Agreement that accompanied Law No. 166 on 14 June 1998, which was enacted by the Egyptian Parliament and signed by then President Hosni Mubarak, and which granted ADEMCO its mining license |
| Committee | A committee formed by GAFI and chaired by Mr Salah El-deen Mandour |
| Companies | AISCO and ADEMCO |
| Concession | ADEMCO’s 30-year mining license was confirmed by Law No. 166 on 14 June 1998, which was enacted by the Egyptian Parliament and signed by then President Hosni Mubarak |
| CRM | Centre de Recherche minérale |
| DCF | Discounted Cash Flow |
| DEM | German marks |
| EGP | Egyptian pound |
| EGSMA | Egyptian Geological Survey and Mining Authority |
| Egypt | The Arab Republic of Egypt |

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| Egyptian Investment Law | Egyptian Law No. 8 of 1997, Law of Investment Guarantees and Incentives |
| El Ashri WS 1 | Mr Mokhtar Ali Mohamed El Ashri's First Witness Statement, dated 31 October 2011 |
| FET | Fair and equitable treatment |
| First ADEMCO-MD Contract | Contract between ADEMCO and Mannesmann Demag A.G. for the dismantlement, transport, and re-erection of the used steel factory and installation of new secondary equipment, dated 6 February 1998 |
| First BDO Report | Expert Report submitted by Mr Gervase MacGregor, submitted with Respondent's Statement of Defense, dated 6 July 2018 |
| First SRK Report | Expert Report of Dr Mike Armitage and Mr Nick Fox, submitted with Respondent's Statement of Defense, dated 6 July 2018 |
| Freezing Order | Order passed on 20 February 2000 freezing the assets of the Companies and Claimant |
| GAFI | General Authority for Investment and Free Zones in Egypt |
| GBP | Pound Sterling |
| HSBC | HSBC Investment Bank PLC |
| Inglis Report | Expert Report of Mr William Inglis submitted with Claimant's Statement of Claim, dated 7 November 2012 |
| Investment Objection | Respondent's argument that the 1980 BIT does not apply beyond Claimant's shares and capital contributions to the Companies |
| Jurisdiction Decision | Tribunal's Decision on Jurisdiction, dated 30 November 2017 |
| Jurisdiction Hearing | Hearing on jurisdiction held at the Peace Palace, The Hague, on 19-20 June 2017 |
| Korea-Egypt BIT | Agreement on the Promotion and Protection of Investments between the Government of the Republic of Korea and the Government of the Arab Republic of Egypt, dated 19 August 1997 and entered into force on 12 January 2000 |
| Law No. 166 | Law No. 166 on 14 June 1998 |
| LE | Egyptian pound |
| Legal Costs | Costs of legal representation and assistance of the successful party under Article 38(e) of the UNCITRAL Rules |
| LIBOR | The London Inter-bank Offered Rate |

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| LIBR | Lux International Business Relations |
| LOI | Letter of intent for the purchase of a used steel factory in Luxembourg between Tradecon and ProfilArbed, dated 19 November 1997 |
| Matthews Report | Expert Report of Mr Noel Matthews submitted with Claimant's Reply, dated 9 October 2018 |
| Merits Hearing | Hearing on the merits in this arbitration |
| Met-Chem Report | Report published by Met-Chem regarding iron ore deposits at Project site, dated November 1999 |
| MD | Mannesmann Demag A.G. |
| MFN | Most-favoured nation treatment |
| Netherlands-Egypt BIT | Agreement on Encouragement and Reciprocal Protection of Investments between the Arab Republic of Egypt and the Kingdom of the Netherlands, dated 17 January 1996 and entered into force on 1 March 1998 |
| Notice of Arbitration | Claimant's Notice of Arbitration, dated 3 November 2011 |
| Parties | Claimant and Respondent |
| PCA | Permanent Court of Arbitration |
| Personal Injury Objection | Respondent's claim that the 1980 BIT does not apply to any acts directed against Claimant |
| Procedural Order No. 1 | Procedural Order No. 1, dated 19 September 2012 |
| Procedural Order No. 2 | Procedural Order No. 2, dated 21 December 2012 |
| Procedural Order No. 3 | Procedural Order No. 3, dated 25 September 2013 |
| Procedural Order No. 4 | Procedural Order No. 4, dated 8 March 2017 |
| Procedural Order No. 5 | Procedural Order No. 5, dated 17 May 2017 |
| Procedural Order No. 6 | Procedural Order No. 6, dated 2 February 2018 |
| Procedural Order No. 7 | Procedural Order No. 7, dated 12 March 2018 |
| Procedural Order No. 8 | Procedural Order No. 8, dated 10 May 2018 |
| Procedural Order No. 9 | Procedural Order No. 9, dated 17 July 2018 |
| Procedural Order No. 10 | Procedural Order No. 10, dated 20 August 2018 |
| Procedural Order No. 11 | Procedural Order No. 11, dated 18 November 2018 |
| Procedural Order No. 12 | Procedural Order No. 12, dated 8 December 2018 |

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| Procedural Order No. 13 | Procedural Order No. 13, dated 14 January 2019 |
| Procedural Order No. 14 | Procedural Order No. 14, dated 4 March 2019 |
| Procedural Order No. 15 | Procedural Order No. 15, dated 29 March 2019 |
| Procedural Order No. 16 | Procedural Order No. 16, dated 3 April 2019 |
| Project | Project involving the mining and exploitation of iron ore in a designated sector in Aswan, and manufacturing of steel from these resources |
| Project Partners | MD, Cegelec, US Steel and Pomini |
| Respondent | The Arab Republic of Egypt |
| Respondent's Costs Reply | Respondent's Costs Reply, dated 9 July 2019 |
| Respondent's Memorial on Jurisdiction | Respondent's Memorial on Jurisdiction, dated 15 July 2013 |
| Respondent's Request for Bifurcation | Respondent's Request for Bifurcation, dated 26 January 2013 |
| Respondent's Reply Memorial on Jurisdiction | Respondent's Reply Memorial on Jurisdiction, dated 23 March 2017 |
| Respondent's Rejoinder | Respondent's Rejoinder on the Merits, dated 6 December 2018 |
| Respondent's Statement of Defense | Respondent's Rejoinder on the Merits, dated 6 July 2018 |
| Respondent's Statement of Costs | Respondent's Statement of Costs, dated 25 June 2019 |
| SAC Judgment | Decision of the Finnish Supreme Administrative Court on the question of Claimant's Finnish Nationality, dated 15 November 2016 |
| Second ADEMCO-MD Contract | Contract between ADEMCO and MD for USD 585 million, dated 6 February 1998 |
| Second BDO Report | Second Expert Report submitted by Mr Gervase MacGregor, submitted with Respondent's Rejoinder, dated 28 November 2018 |
| Second SRK Report | Second Expert Report of Dr Mike Armitage and Mr Nick Fox, submitted with Respondent's Rejoinder, dated 28 November 2018 |
| SGA | Studiengesellschaft für Eisenerzaufbereitung |
| Share Consolidation Report | Claimants' share consolidation report, dated 24 July 2005 |

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| UEC Study | Feasibility Study Integrated Steel Producing Facilities Aswan Iron and Ore Steel Company by UEC USX Engineers and Consultants, Inc., dated January 1999 |
| UNCITRAL Rules | Arbitration Rules of the United Nations Commission on International Trade Law, dated 15 December 1976 |
| Vannin | Vannin Capital PCC, Claimant's third-party funder |
| Verdier WS 1 | Mr Richard Verdier First Witness Statement, dated 2 November 2012 |

I. INTRODUCTION

A. THE PARTIES

1. The claimant in the present arbitration is Mr Mohamed Abdel Raouf Bahgat (“**Claimant**”), a businessman born in Egypt and who later acquired Finnish nationality. His address is Aleksis Kiven Katu 11 Ab36, 00510 Helsinki, Finland.
2. Claimant is represented by Mr Stephen Fietta QC, Mr Jiries Saadeh, Ms Laura Rees-Evans, Ms Oonagh Sands, and Ms Fanny Sarnel of Fietta LLP, London; Professor Andrew Newcombe of the University of Victoria; and Mr Samuel Wordsworth QC and Mr Peter Webster of Essex Court Chambers. Previously, Claimant was also represented by Mr Subir Karmakar of Saunders Law Ltd.
3. The respondent in the present arbitration is the Arab Republic of Egypt, a sovereign state (“**Egypt**” or “**Respondent**”, and together with Claimant, the “**Parties**”). Respondent’s address is Egyptian State Lawsuits Authority, 42 Gameat El Dowal El Arabiya St., Mohandeseen, Giza, Egypt.
4. Respondent is represented by H.E. Counselor Abou Baker El-Sedik Ameer, Counselor Abdel Hamid Nagashy, Counselor Fatma Khalifa, Counselor Razan Abou Zaid, Counselor Lela Kassem, Counselor Ahmed Sayed, Counselor Nada El-Kashef, Counselor Yasmine Shamekh, and Counselor Yousra Mohamed of the Egyptian State Lawsuits Authority; and Mr Louis Christophe Delanoy, Mr Tim Portwood, Mr Raed Fathallah, Mr Suhaib Al Ali, Ms Laura Fadlallah, and Ms Khrystyna Kostiuskko of Bredin Prat.

B. THE DISPUTE

5. The present dispute is an arbitration initiated by Claimant against Respondent under the Agreement between the Government of the Republic of Finland and the Government of the Arab Republic of Egypt on the Mutual Protection of Investments, dated 5 May 1980 (“**1980 BIT**”) and the Agreement Between the Government of the Republic of Finland and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments dated 3 March 2004 (“**2004 BIT**”, collectively with the 1980 BIT referred to as the “**BITs**”), and the Arbitration Rules of the United Nations Commission on International Trade Law 1976 (“**UNCITRAL Rules**”).
6. Claimant is the founder of and investor in the Aswan Development and Mining Company

(“**ADEMCO**”) and the Aswan Iron & Steel Company (“**AISCO**”, and together with ADEMCO, the “**Companies**”). He founded the Companies after he was selected by Respondent to develop the iron ore resources located near Aswan, Egypt (the “**Project**”) and to build a facility to develop the Project. ADEMCO was granted a 30-year mining concession and AISCO was created in order to run the steel operations.

7. Developments in the Project were underway when, on 5 February 2000, the police arrested Claimant. Claimant’s personal assets as well as the assets of the Companies were frozen pursuant to an order of the Public Prosecutor that was confirmed by the Cairo Criminal Court on 20 February 2000 (the “**Freezing Order**”). The police raided the offices of Claimant and the Companies, and shut down and took over the Project site. Claimant was incarcerated for over three years. The Freezing Order over the Companies’ assets was lifted by a court in October 2006. Claimant argues that the Project site has been destroyed and he still had not been provided access to the Companies’ bank accounts.
8. Claimant contends that the actions taken by Respondent with respect to the Project are in violation of the investor protections contained in the BITs; specifically, that Respondent’s actions amounted to an unlawful expropriation, unfair and inequitable treatment, and a failure to accord full and constant protection and security.
9. Respondent initially argued that the Tribunal lacked jurisdiction *ratione personae* and *ratione temporis* over the present claim. Respondent’s jurisdictional objections were dismissed in the Tribunal’s Decision on Jurisdiction of 30 November 2017 (the “**Jurisdiction Decision**”). In its Jurisdiction Decision, the Tribunal decided that it has jurisdiction over the dispute, and reserved all questions concerning the merits, costs, fees, and expenses for subsequent determination. In the present phase of the proceedings, Respondent describes Claimant’s investment as one that was doomed to failure due to the poor quality of the iron ore, and that lack of profit was not caused by any ‘political vendetta’ or conduct of the Egyptian Government. Respondent maintains that it has not breached the BITs and submits that Claimant has failed to plead or prove causation or actual damages. Accordingly, Respondent seeks dismissal of the claim and the reimbursement of its costs.
10. This Final Award recalls the procedural history of the merits phase of this arbitration (**Part II**) and the relief sought by the Parties (**Part III**). It sets out the relevant factual background of the claim (**Part IV**). The Tribunal deals with the Parties’ jurisdictional and merits arguments relating to breach of the 1980 BIT (**Part V**), the 2004 BIT (**Part VI**) and the Egyptian Law No. 8 of 1997, Law of Investment Guarantees and Incentives (the “**Egyptian**

Investment Law”) (**Part VII**). Issues of quantum are covered in **Part VIII**, followed by consideration of interest (**Part IX**) and both Parties’ contentions with respect to Costs (**Part X**). The Tribunal’s decisions are set out in **Part XI**.

II. PROCEDURAL HISTORY

11. In Part II of its Jurisdiction Decision, the Tribunal set out in detail the procedural steps starting from the initiation of the arbitration on 3 November 2011, through the suspension of the arbitration pending resolution of issues relating to Claimant's nationality in the Finnish court system, the resumption of proceedings, the issuance of five procedural orders, the hearing on jurisdiction, and the issuance of the Tribunal's Jurisdiction Decision on 30 November 2017.
12. In this section of the Final Award, the Tribunal recalls only key procedural developments from the first phase of the case and details the procedural steps taken since the Jurisdiction Decision.

A. COMMENCEMENT OF THE ARBITRATION

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

B. CONSTITUTION OF THE TRIBUNAL

14. The Tribunal is composed of (i) Professor W. Michael Reisman, a national of the United States of America, who was appointed by Claimant, and whose address is Yale Law School, P.O. Box 208215, New Haven, CT 06520-8215, United States of America, (ii) Mr Laurent Lévy, a national of Switzerland and Brazil, whose address is Lévy Kaufmann-Kohler, 3-5 rue du Conseil-Général, P.O. Box 552, CH-1211 Geneva 4, Switzerland, who was appointed by Respondent on 30 October 2018 following the death on 2 October 2018 of Respondent's original appointee, Professor Francisco Orrego Vicuña, and (iii) Professor Rüdiger Wolfrum, a German national appointed by the two original co-arbitrators as the Presiding Arbitrator, and whose address is Max Planck Institute for Comparative Public Law and International Law, Im Neuenheimer Feld 535, 69120 Heidelberg, Germany.

C. THE JURISDICTIONAL PHASE

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

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

proceedings.

16. On 8 March 2013, following agreement of the Parties, the Tribunal confirmed that the proceedings would be bifurcated into a jurisdictional phase and a subsequent phase to deal with the merits.
17. Throughout the course of the jurisdictional phase, the Tribunal issued the following procedural orders:
 - Procedural Order No. 1 on 19 September 2012, setting a timetable, and noting the Tribunal may use, as additional guidelines, the IBA Rules on the Taking of Evidence in International Arbitration (2010) (“**Procedural Order No. 1**”);
 - Procedural Order No. 2 on 21 December 2012, addressing an application by Claimant for Interim Measures (“**Procedural Order No. 2**”);
 - Procedural Order No. 3 on 25 September 2013, suspending the proceedings pending resolution of Claimant’s challenge before the Finnish administrative courts (“**Procedural Order No. 3**”);
 - Procedural Order No. 4 on 8 March 2017, noting the obligation on both Parties to pay their shares of the supplementary deposit, and inviting updated information from Claimant on his third-party funding arrangements (“**Procedural Order No. 4**”); and
 - Procedural Order No. 5 on 17 May 2017, dismissing with reasons three objections of Respondent that Claimant had identified as being raised out of time (“**Procedural Order No. 5**”).
18. On 10 November 2012, Claimant filed his Statement of Claim together with accompanying materials (“**Claimant’s Statement of Claim**”). The accompanying materials included seven witness statements, six expert reports, exhibits C-0001 to C-0043, and legal authorities CLA-1 to CLA-44.
19. During the jurisdictional phase, the Parties exchanged the following written submissions:
 - Respondent’s Memorial on Jurisdiction dated 15 July 2013 (**Respondent’s Memorial on Jurisdiction**);
 - Claimant’s Counter-Memorial on Jurisdiction dated 30 August 2013 (“**Claimant’s**

Counter-Memorial on Jurisdiction”);

- Claimant’s Supplementary Counter-Memorial on Jurisdiction dated 14 December 2016 (“**Claimant’s Supplementary Counter-Memorial on Jurisdiction**”) (which included an English translation of the Finnish Supreme Administrative Court Judgment of 15 November 2016, in which Claimant had prevailed);
 - Respondent’s Reply Memorial on Jurisdiction dated 23 March 2017 (“**Respondent’s Reply Memorial on Jurisdiction**”); and
 - Claimant’s Rejoinder on Jurisdiction dated 25 May 2017 (“**Claimant’s Rejoinder on Jurisdiction**”).
20. A hearing on jurisdiction was held on 19 and 20 June 2017 (“**Jurisdiction Hearing**”) and the Parties agreed that no post-hearing briefs were necessary and that costs submissions would be deferred until after the Jurisdiction Decision.
21. The Tribunal issued its Jurisdiction Decision on 30 November 2017, which contained the following decisions at Paragraph 319:
- Based on the foregoing considerations, the Tribunal:
- A. Dismisses the jurisdiction *ratione personae* objections advanced by Respondent.
 - B. Dismisses the jurisdiction *ratione temporis* objections advanced by Respondent.
 - C. Decides that it has jurisdiction over the dispute.
 - D. Reserves all questions concerning the merits, costs, fees and expenses for subsequent determination; and
 - E. Invites the Parties to confer regarding the procedural calendar for the merits phase of the arbitration, and to report to the Tribunal in this respect within six (6) weeks of receipt of this Decision.
22. All three arbitrators signed the Jurisdiction Decision and Professor Orrego Vicuña additionally appended a separate opinion.

D. PROCEDURAL HISTORY OF THE MERITS PHASE

23. By letter dated 11 December 2017, Claimant renewed its request that the Tribunal make an order, with the same legal effect as an interim award, promptly directing Respondent to comply with its legal obligation to pay its share of the deposit by (a) repaying Claimant the three deposits he had already paid in lieu of Respondent and (b) paying forthwith its share of any future deposits that may from time to time be requested by the Tribunal.

24. On 13 December 2017, the Tribunal invited Respondent to comment on Claimant's request, and also invited both Parties to advise if they consented to publish the Jurisdiction Decision. On 3 January 2018, Claimant did provide consent to publish, but Respondent indicated that it did not consent. The Tribunal noted on 5 January 2018 that "[i]n the absence of consent to publication of both the Parties, as required by Article 32(5) of the UNCITRAL Rules 1976, the [Jurisdiction] Decision and the Separate Opinion of Professor Orrego Vicuña will remain confidential."
25. By letters dated 10 and 12 January 2018, the Parties shared their proposals on the procedural timetable for the merits phase of the case pursuant to Paragraph 319.E of the Jurisdiction Decision.
26. On 11 January 2018, Respondent informed the Tribunal that it was "willing to pay its share of any future deposits that may from time to time be requested" however stated that it was "not prepared to retribute to Claimant any deposits that he has already paid *in lieu* of Respondent, unless ordered to do so by the Tribunal in its Final Award, if at all." Respondent reiterated its position that "the Tribunal does not have the authority under the UNCITRAL Rules to issue an interim award ordering a party to pay its share of the deposits." Both Parties filed further comments on these issues. Among other things, on 23 January 2018, Claimant corrected Respondent's assertion that there was "certain instability" to Claimant's funding and confirmed that he had in place a third party non-recourse funding agreement with Vannin Capital PCC ("**Vannin**").
27. The Tribunal issued Procedural Order No. 6 on 2 February 2018, dealing with the procedural calendar for the merits phase and payment of the deposit ("**Procedural Order No. 6**"). With respect to the deposit, the Tribunal recalled the history of payment of the deposits in the arbitration to date. It further recalled that in Procedural Order No. 4, the Tribunal had (i) determined that "Respondent remains under a legal obligation to pay its share of the deposit and to continuously monitor its own financial and political situation"; (ii) directed Respondent to "report to the Tribunal immediately when it is in a position to pay its share of the deposit and to arrange as soon as practicably possible for restitution to Claimant of the share of the deposit that he paid *in lieu* of Respondent"; and (iii) deferred making an order on costs "until the final award, or in any event, until after the jurisdiction of the Tribunal has been determined." In Procedural Order No. 6, the Tribunal noted that Respondent had confirmed its ability to satisfy all future requests for deposit payments and was therefore in a position to pay its share of the deposit. Without prejudice to the final allocation by the

Tribunal of costs, and any interest thereon, at a later stage in this arbitration, the Tribunal directed Respondent “to make payment of EUR 275,000, representing the deposit payments that Claimant has made *in lieu* of Respondent in this arbitration thus far, to Claimant within 45 days of receipt of this Order.”

28. On 7 February 2018, the Tribunal requested a supplementary deposit from both Parties.
29. Claimant paid its portion of the supplementary deposit on 23 February 2018.
30. Following a further exchange of correspondence among the Parties and the Tribunal regarding hearing dates, the Tribunal issued Procedural Order No. 7 on 12 March 2018 (“**Procedural Order No. 7**”), containing an adjusted schedule, with the week of 10 December 2018 set for the hearing on the merits (the “**Merits Hearing**”).
31. On 22 March 2018, Respondent confirmed that it had initiated processes to pay its portion of the supplementary deposit. It also reiterated that “while it is willing to pay its share of *future* advances on costs, it cannot make any payment to Claimant as reimbursement of *past* payments.” In response to that communication, Claimant expressed the view that Respondent’s position was inexplicable, and ignored Procedural Order No. 6. Claimant “appreciate[d] that there is little that the Tribunal can do at this stage to address Respondent’s disregard of its procedural orders”, but “nevertheless request[ed] that the Tribunal note Respondent’s conduct” and “reserve[d] his rights in that regard, including as to costs and his right to claim interest on the unpaid amount as from 19 March 2018.” The Tribunal noted the contents of both Parties’ communications on 26 March 2018.
32. The Tribunal issued Procedural Order No. 8 on 10 May 2018, which set out a revised procedural calendar agreed by the Parties, but retained the dates for the Merits Hearing in the week of 10 December 2018 (“**Procedural Order No. 8**”). The Tribunal confirmed on 29 May 2018 that the Merits Hearing would be held in The Hague.
33. Respondent’s portion of the supplementary deposit was received on 15 June 2018.
34. On 3 July 2018, following an extension request and explanation from Respondent, the Tribunal granted Respondent until 6 July 2018 to file its Statement of Defense, noting Respondent’s undertaking to file even if missing elements had not then been received by counsel. The Tribunal indicated that it would issue a further revised procedural calendar, which was done in the form of Procedural Order No. 9, issued on 17 July 2018 (“**Procedural Order No. 9**”).

35. Respondent filed its Statement of Defense, with accompanying materials, on 6 July 2018 (the “**Respondent’s Statement of Defense**”). The accompanying materials included two expert reports, exhibits R-0033 to R-0063, and legal authorities RLA-0086 to RLA-0117.
36. In July and August 2018, in accordance with Procedural Order No. 9, the Parties exchanged document production requests, replies and objections to such requests, and on 10 August 2018, both Parties applied to the Tribunal for document production orders. On 20 August 2018, the Tribunal issued Procedural Order No. 10 on document production (“**Procedural Order No. 10**”).
37. On 30 September 2018, the PCA advised the Parties that it had been informed by Professor Orrego Vicuña’s family that for health reasons he was no longer able to serve as arbitrator. Respondent was invited to appoint a replacement. On 3 October 2018, the PCA conveyed to the Parties the news that Professor Orrego Vicuña had passed away.
38. On 9 October 2018, Claimant filed its Reply (the “**Claimant’s Reply**”), accompanied by 3 witness statements, 5 expert reports, exhibits C-0086 to C-0158, and legal authorities CLA-77 to CLA-130.
39. On 30 October 2018, Respondent appointed Mr Laurent Lévy to replace Professor Orrego Vicuña. In the same correspondence, Respondent requested that the Merits Hearing be postponed to the week of 18 February 2019 to allow Mr Lévy sufficient time to prepare.
40. On 30 October 2018, the PCA circulated to the Parties a list of case documents that it proposed to send to Mr Lévy. Claimant provided its comments on this list on 31 October 2018, to which Respondent agreed on 1 November 2018.
41. On 1 November 2018, the PCA circulated to the Parties Mr Lévy’s Statement of Acceptance and Independence under the UNCITRAL Rules, his *curriculum vitae*, and Mr Lévy’s disclosures pursuant to Article 9 of the UNCITRAL Rules. The PCA informed the Parties that the only period in which the Tribunal would be available for the Merits Hearing in the first half of 2019 would be 22 to 26 April 2019.
42. On 3 November 2018, Claimant requested the Tribunal to maintain the 10 December 2018 Merits Hearing dates. By letter dated 5 November 2018, Respondent maintained its request to postpone the Merits Hearing.
43. On 5 November 2018, the PCA asked Claimant to indicate his availability for the Merits

Hearing the week of 22 April 2018. On 6 November 2018, Claimant indicated that he was not available to attend the Merits Hearing the week of 22 April 2018 due to commitments of Claimant's lead counsel in another matter for the three weeks prior. Claimant reiterated his request that the original hearing dates be maintained.

44. On 7 November 2018, Respondent informed the PCA and the Tribunal that it would be unable to file its Rejoinder by 15 November 2018 because some of its experts were unable to finalise their reports in time, with one expert being unavailable between the end of November and 15 December 2018. This was followed by Respondent's formal request for an extension until 6 December 2018 for the filing of its Rejoinder.
45. On 8 November 2018, Claimant objected to any postponement of the Merits Hearing due to the unavailability of Respondent's experts, *inter alia* citing Paragraph 6.2 of Procedural Order No. 1 that makes each Party responsible for the attendance of its experts at a hearing. Claimant noted, referring to Paragraph 6.7 of Procedural Order No. 1, that the Tribunal may refuse to admit the expert report or draw any other appropriate inferences, should Respondent fail to produce an expert that Claimant has called for cross-examination.
46. On 8 November 2018, Claimant requested Mr Lévy to supplement his disclosures pursuant to Article 9 of the UNCITRAL Rules with respect to any relationship he may have had with Claimant's third-party funder Vannin. On 12 November 2018, Mr Lévy confirmed that, to the best of his knowledge, Vannin was not funding a party appearing before him. Claimant supplemented its submission by letter dated 12 November 2018, in which it *inter alia* agreed to a one-week extension until 22 November 2018 for the filing of the Rejoinder, subject to preservation of the 10 December 2018 Merits Hearing dates.
47. On 12 November 2018, the Tribunal proposed that a hearing limited to opening statements and fact witness testimony take place in December 2018, followed by a hearing on the expert witness testimony and closing submissions in late April 2019. The Tribunal noted that this structure would accommodate Claimant's concern to preserve the December hearing dates at the same time as Respondent's concerns as to the preparation of its experts and Mr Lévy's capacity to prepare for the hearing. Such a split in the hearing would (i) reduce both the length of the December hearing and the material covered, (ii) allow Claimant to provide testimony this year, addressing points as to his advanced age and the time it has taken to have his claims heard, (iii) allow Respondent to complete expert reports of the new expert who was unavailable in December, and (iv) allow time for Party-appointed experts to confer and produce potentially constructive joint expert reports. The later start date of 24 April 2019 for

the second part of the hearing, along with the reduced scope of that portion of the hearing and five months lead time, would adjust the availability of Claimant's lead counsel. The Tribunal noted that "in the circumstances there is no perfect solution" but considered the proposal "to be consistent with its general duties under the UNCITRAL Rules to conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

48. On 14 November 2018, the Parties provided their comments on the Tribunal's proposal. Respondent reiterated its preference to organise a hearing over a single week in 2019 but stated that if the Tribunal were to reject that option, Respondent "will follow the Tribunal's suggestion and make itself available in December 2018 for the opening statements and the cross-examination of the factual witnesses and in April 2019 for the cross-examination of the experts and the closing statements." Claimant however reiterated concerns as to his advanced age, the time he has already spent in the case, and explained that the arrangement with his new funder will increase the costs entailed for him if the dispute is not resolved by 31 December 2019. Claimant also stated that splitting the hearing would provide a procedural advantage to Respondent as it would have four months to work on further responses to the fact evidence and is not presenting any fact witnesses. Claimant repeated its preference to maintain the hearing commencing 10 December 2018 and stated it would be "amenable to the Respondent receiving a one-week extension for filing its Rejoinder (but not otherwise)." Claimant also stated that, although sub-optimal, "if one of the Respondent's technical experts is in fact unavailable to attend at any point during the December hearing, there may be scope of holding the evidence of that expert over to be heard at the earliest convenient date after the December hearing, whether in person or by video conference."
49. On 18 November 2018, the Tribunal issued Procedural Order No. 11 addressing the scheduling of the merits phase ("**Procedural Order No. 11**"). In line with Article 15 of the UNCITRAL Rules, the Tribunal reiterated its concerns to conduct the proceedings in such a manner so as to ensure equality of treatment amongst the parties while providing them a full opportunity to present their respective cases. The Tribunal took note of the fact that Claimant commenced proceedings over seven years earlier and that circumstances beyond his control caused delays in having his claims on the merits heard. It recalled that at the request of Respondent, Claimant on several occasions agreed to postpone steps within the procedural calendar. Notwithstanding the difficulty in finding a convenient hearing date for both Parties and Tribunal members, the Tribunal noted that the case was almost fully briefed and it did not

wish to lose the momentum of proceedings. The Tribunal factored in the availability of Mr Lévy and the size of the files to be reviewed for this portion of the proceedings. Acknowledging some overlap between factual and expert witness testimony to be presented, the Tribunal nevertheless considered it feasible to split the hearings, beginning with opening statements and examination of fact witnesses December 2018 and the expert witnesses and closing statements in April 2019.

50. The Tribunal noted Claimant's concerns as to its funding arrangements, and stated it would "use every best effort to issue a final award in the eight months between the close of the merits hearing and 31 December 2019, assuming the Parties likewise adhere to scheduled dates." As to whether fact and expert evidence may be cleanly split, the Tribunal found that save for the testimony of Mr Richard Hills Verdier, Claimant's witness statements do not touch on issues of a technical nature and can effectively be treated separately in December. Regarding Mr Verdier's testimony, the Tribunal decided to hear his testimony as to his first statement of 2 November 2012 in the December phase of the hearing, as it discusses facts not of a technical nature. Mr Verdier may then be recalled in the April phase of the hearing to testify as to his second statement of 7 October 2018 which addresses technical details. As such, the Tribunal decided that the hearing on the merits will take place at the Peace Palace in The Hague from 12-13 December 2018 and, if necessary, the morning of 14 December 2018 ("**2018 Merits Hearing**"). Expert testimony and Mr Verdier's examination on his second statement, and closing submissions, would then be in The Hague from 24-26 April 2019 ("**2019 Merits Hearing**").
51. Also in Procedural Order No. 11, the Tribunal granted Respondent until 23 November 2018 to file its Rejoinder. The Tribunal noted that Respondent has "had ample notice of the date for the filing of its Rejoinder" and that despite the need to find a replacement arbitrator, the Tribunal was not convinced that Claimant's Reply necessitates extra time for filing given the extensions already proffered to Respondent. Respondent was extended an invitation until 6 December 2018 to apply for leave if it needed to supplement its Rejoinder with an additional expert report that it is not able to finalise until a later date. The Tribunal also reminded Respondent that as per Procedural Order No. 6, it was directed to make payment of EUR 275,000 by 19 March 2018 to Claimant as reimbursement for payments Claimant made *in lieu* of Respondent.
52. A further and final extension request for the Rejoinder was granted by the Tribunal on 23 November 2018, and on 28 November 2018, Respondent filed its Rejoinder, together with

three expert reports, exhibits R-0064 to R-0086, and legal authorities RLA-0118 to RLA-0160.

53. On 6 December 2018, Respondent filed an updated rejoinder, accompanied by the expert report of Dr Jürgen Cappel.

E. THE 2018 MERITS HEARING

54. On 29 November 2018, Respondent notified that it wished to cross-examine Mr Bahgat and Mr Verdier at the December hearing, and reserved its right to recall Mr Verdier at the 2019 Merits Hearing. Claimant observed that, as Respondent had proffered no fact witnesses, there were no fact witnesses for it to cross-examine in December, and reserved its right to cross-examine the expert witnesses at the 2019 Merits Hearing.
55. On 3 December 2018, the Parties submitted chronological lists of exhibits.
56. On 4 December 2018, the Parties, Presiding Arbitrator, and Registry participated in a pre-hearing teleconference to deal with administrative and procedural aspects of the 2018 Merits Hearing. This was followed by the issuance of Procedural Order No. 12 on 8 December 2018, which set out arrangements for the 2018 Merits Hearing (“**Procedural Order No. 12**”).
57. From 12-14 December 2018, the 2018 Merits Hearing was held at the Peace Palace in The Hague. In attendance were the following:

Tribunal

Professor Rüdiger Wolfrum
Professor W. Michael Reisman
Mr Laurent Lévy

Claimant

Mr Stephen Fietta
Mr Jiries Saadeh
Ms Oonagh Sands
Ms Zsófia Young
Ms Fanny Sarnel
Ms Jane Byrne
(*Fietta LLP*)

Mr Samuel Wordsworth QC
Mr Peter Webster
(*Essex Court Chambers*)

Mr Mohamed Abdel Raouf Bahgat
(*Claimant, fact witness*)

Mr Richard Verdier
(*fact witness*)

Respondent

Mr Louis Christophe Delanoy
Mr Tim Portwood
Ms Laura Fadlallah
Ms Khrystyna Kostiusenko
(*Bredin Prat*)

Counselor Amr Arafa Hasaan
Counselor Ahmed Sayed Abdelrahman
Counselor Yasmin Shamekh
(*Egyptian State Lawsuits Authority*)

PCA

Ms Judith Levine
Ms Ashwita Ambast
Ms Mariam Chauhan

Court reporter

Trevor McGowan

58. Oral submissions were presented by Mr Fietta and Mr Wordsworth for Claimant and Mr Delanoy, Mr Portwood, and Ms Fadlallah for Respondent. Fact testimony was heard from Mr Bahgat, who was cross-examined on his five witness statements by Respondent, and Mr Verdier, former technical director of ADEMCO and AISCO, who was cross-examined by Respondent on his first witness statement of 2 November 2012 relating to the events leading to the closure of the Project.
59. At the close of the hearing, the Parties and Tribunal discussed next steps for the 2019 Merits Hearing and a possible schedule for joint expert reports.
60. By letter dated 18 December 2018, the Tribunal confirmed the dates of the 2019 Merits Hearing to be Wednesday, 24 April 2019, Thursday 25 April 2019, and Friday, 26 April 2019 with Saturday, 27 April 2019 held in reserve should extra time be needed. The Tribunal also stated that in accordance with Paragraphs 2.32 and 7.2 of Procedural Order No. 1 and subsequent Procedural Orders, the Parties are requested to confer with one another and their respective experts to set a schedule for filing joint expert reports by 10 January 2019. The Tribunal also invited the parties to confirm by 10 January 2019 any corrections to the transcripts of the 2018 Merits Hearing, and the dates for when witnesses/experts would be called for examination, when a pre-hearing teleconference with the Presiding Arbitration would be held, and when the core bundle would be delivered to the Tribunal and Registry.
61. On 14 January 2019, the Tribunal issued Procedural Order No. 13, which confirmed the dates

for the 2019 Merits Hearing (“**Procedural Order No. 13**”). The Tribunal also requested notification of which witnesses/experts would be called for examination by 31 January 2019, submission of joint expert reports by 1 March 2019, a pre-hearing teleconference with the Presiding Arbitrator on 28 March 2019, and delivery of an index and electronic version of a core bundle by 8 April 2019.

62. On 31 January 2019, Claimant notified the Tribunal that he wished to call for cross-examination Respondent’s experts Dr Mike Armitage, Dr John Willis, Dr Jürgen Cappel, and Mr Gervase MacGregor. Respondent notified the Tribunal that in addition to Mr Richard Verdier, it would call Claimant’s experts Mr Noel Matthews, Dr Kadri Dagdelen, Dr Erik Spiller, and Dr Joseph Poveromo.
63. On 4 March 2019, the Tribunal issued Procedural Order No. 14, approving the Parties’ agreement to amend the “schedule for the submission of joint expert reports” (“**Procedural Order No. 14**”).
64. On 28 March 2019, Respondent consented to Claimant’s request to introduce into the record two publicly-available reports from Egypt’s Department of Industry and Mineral Resources, as well as an updated version of Annex 1 to the First ADEMCO-MD Contract, which Mr Verdier had recently found in his possession. Respondent also requested leave to introduce to the record the decision of the Supreme Security Council of 15 January 2001, and informed the Tribunal that it had requested Claimant to produce a full version of the November 1999 Met-Chem Report (Exhibit C-0049).
65. On 28 March 2019, following exchanges amongst the Parties and Tribunal on procedural questions, the Presiding Arbitrator, the Parties, and the PCA participated in the pre-hearing conference call in which they discussed outstanding logistical arrangements for the 2019 Merits Hearing.
66. On 29 March 2019, the Tribunal issued Procedural Order No. 15 in which it *inter alia*, extended the deadline for the submission of the Parties’ joint expert reports on beneficiation, mining, and steel, confirmed the hearing schedule and other arrangements for the hearing, and requested a written update from Respondent on the payment of EUR 275,000 to Claimant (representing the deposit payments made by Claimant *in lieu* of Respondent) (“**Procedural Order No. 15**”).
67. On 29 March 2019, Claimant, with the consent of Respondent, submitted copies of: (i)

National Council for Production and Economic Affairs of the Presidency of the Republic, Department of Industry and Mineral Resources, “Egypt’s Mineral Resources and their role in supporting the national economy”, April 2009 (Exhibit C-0164); (ii) National Council for Production and Economic Affairs of the Presidency of the Republic, Department of Industry and Mineral Resources, “Iron Ores in Egypt – The Current Situation and the Outlook for the Future”, November 2012 (Exhibit C-0165); and (iii) Annex 1 to the Mannesmann Contract and partially negotiated Annexes 2, 3, and 4 (Exhibit C-0166).

68. On 1 April 2019, Claimant objected to Respondent’s request to introduce into the record the decision of the Supreme Security Council of 15 January 2001. He further noted that he was not in possession of the full version of the November 1999 Met-Chem Report and that he also wished to produce the decision of the Court of Cassation of 18 October 2001 quashing the decision of the Supreme Security Council.
69. On 3 April 2019, the Tribunal issued Procedural Order No. 16 in which it *inter alia* granted Respondent leave to introduce into the record the decision of the Supreme Security Council of 15 January 2001 and directed Respondent to produce the decision of the Court of Cassation of 18 October 2001 quashing that decision (“**Procedural Order No. 16**”). Respondent produced both documents on 4 April 2019 (Exhibit R-0088 and Exhibit R-0089).
70. On 5 April 2019, the Parties submitted their joint expert reports on beneficiation along with two new exhibits, (i) Bo Arvidson, “Continuous High Gradient Magnetic Separation, Pilot Plant: Machine Description and Mineral Processing Results”, 1976 (Exhibit ES-5), and (ii) L. Paul Staples, Jan E. Nasset, “An Evaluation of a High Gradient Magnetic Separation Pilot Plant at Brunswick Mining and Smelting”, Canadian Institute of Mining, Metallurgy and Petroleum, 1 January 1996 (Exhibit ES-6).
71. On 5 April 2019, pursuant to the direction contained in Procedural Order No. 15, Respondent provided the Tribunal with an update regarding the payment of EUR 275,000 to Claimant.
72. On 7 April 2019, the Parties submitted their joint expert report on steel.
73. On 15 April 2019, Respondent submitted an updated version of Exhibit R-0089.
74. On 20 April 2019, the PCA acknowledged receipt of EUR 275,000 from Respondent, representing the amount to be reimbursed to Claimant for the three substitute deposit payments he had made *in lieu* of Respondent.

F. THE 2019 MERITS HEARING

75. The 2019 Merits Hearing was held from 24-27 April 2019 at the Peace Palace in The Hague.

In attendance were the following:

Tribunal

Professor Rüdiger Wolfrum
Professor W. Michael Reisman
Mr Laurent Lévy

Claimant

Mr Stephen Fietta QC
Mr Jiries Saadeh
Ms Oonagh Sands
Ms Zsófia Young
Ms Fanny Sarnel
Ms Jane Byrne
Ms Sylvia Yanzu
(*Fietta LLP*)

Mr Samuel Wordsworth QC
Peter Webster
(*Essex Court Chambers*)

Mr Mohamed Abdel Raouf Bahgat
(*Claimant*)

Mr Richard Verdier
(*Witness*)

Dr Kadri Dagdelen
(*OptiTech Engineering Solutions, Technical Expert*)

Professor Erik Spiller
(*Spiller Consultants, Beneficiation Expert*)

Dr Joseph J. Poveromo
(*Metal Strategies, Steelmaking Expert*)

Mr Noel Matthews
Ms Leona Josifidis
(*FTI Consulting, Quantum Experts*)

Respondent

Mr Louis Christophe Delanoy
Mr Tim Portwood
Ms Laura Fadlallah
Ms Khrystyna Kostiushko
(*Bredin Prat*)

Counselor Mohamed Mahmoud Khalaf
Counselor Ahmed Sayed Abdelrahman
Counselor Nada Mohamed Magdy Youssef Mohamed Elkashef
(*Egyptian State Lawsuits Authority*)

Mr Mike Armitage

(Technical Expert)

Mr Nick Fox

(Technical Expert)

Mr John Willis

(Beneficiation Expert)

(SRK Consulting)

Mr Jürgen Cappel

(Cappel Stahl Consulting, Steelmaking Expert)

Mr Gervase MacGregor

Mr Andrew Maclay

Mr Andrew Fingerett

(BDO, Quantum Experts)

PCA

Ms Judith Levine

Ms Ashwita Ambast

Ms Mariam Chauhan

Court Reporter

Mr Trevor McGowan

76. Oral submissions were presented by Mr Fietta, Mr Saadeh, and Mr Wordsworth for Claimant and Mr Delanoy, Mr Portwood, and Ms Fadlallah for Respondent. Expert testimony was heard from Mr Verdier, Dr Kadri Dagdelen, Dr Mike Armitrage, Dr Erik Spiller, Dr John Willis, Dr Joseph J Poveromo, Dr Jürgen Cappel, Mr Noel Matthews, and Mr Gervase MacGregor.
77. On 26 April 2019, Claimant submitted six new legal authorities, Exhibits CLA-0144 to 0149.

G. POST-HEARING PROCEEDINGS

78. By letter dated 29 April 2019, the Tribunal noted *inter alia* that each Party had confirmed at the close of the 2019 Merits Hearing that they have had a full opportunity to present their case and that there were no additional matters to raise.
79. On 22 May 2019, the Parties shared their agreed corrections to the transcript of the 2019 Merits Hearing.
80. On 5 June 2019, as anticipated by the Presiding Arbitrator at the end of the hearing, the Tribunal requested the Parties to pay a supplementary deposit.
81. On 7 June 2019, Claimant submitted his Statement of Costs. On the same day, Respondent requested an extension until 10 June 2019, to submit its Statement of Costs, which extension the Tribunal granted on 9 June 2019.

82. On 9 June 2019, Claimant filed a corrected version of his Statement of Costs (“**Claimant’s Statement of Costs**”).
83. On 10 June 2019, Respondent requested a further extension to file its Statement of Costs to finalise its figures and requested the opportunity to file comments on Claimant’s Statement of Costs one week after the filing of Respondent’s Statement of Costs. Claimant objected to these requests.
84. On 11 June 2019, the Tribunal directed Respondent to file its Statement of Costs by no later than 25 June 2019 and noted that this submission should not contain any consideration of Claimant’s Statement of Costs. The Tribunal noted that each Party would be invited to comment on the other Party’s Statement of Costs within two weeks from the date on which Respondent’s Statement of Costs would be submitted. The Tribunal invited Respondent, by 12 June 2019, to explain the delay in the submission of its Statement of Costs and to send to the Tribunal Secretary a copy of its submission as it stood.
85. On 12 June 2019, Respondent provided an explanation for its delay in submitting its Statement of Costs. On the same day, the Tribunal Secretary acknowledged receipt from Respondent of its Statement of Costs as it then stood.
86. On 25 June 2019, Respondent submitted its Statement of Costs (“**Respondent’s Statement of Costs**”).
87. On 9 July 2019, each Party submitted its comments on the other Party’s Statement of Costs (“**Claimant’s Costs Reply**” and “**Respondent’s Costs Reply**”).

III. RELIEF REQUESTED BY THE PARTIES

88. Claimant requests that the Tribunal render an award:
 - a. rejecting the Respondent’s new objections to jurisdiction as untimely or, alternatively, without merit;
 - b. declaring that the Respondent has breached Articles 2 and 3 of the 1980 BIT;
 - c. declaring that the Respondent has breached Articles 2, 3, 5 and 12 of the 2004 BIT;
 - d. declaring that the Respondent has breached Articles 8, 9 and 12 of the Respondent’s Investment Law;
 - e. ordering that the Respondent pay damages to the Claimant in the amount of not less than USD 103.5 million;

- f. ordering that the Respondent pay USD 5 million to the Claimant by way of moral damages;
- g. ordering the Respondent to pay compound interest of LIBOR + 4 percent compounded annually on any amount awarded to the Claimant, such compound interest to run from the date of the expropriation until the date upon which payment is made;
- h. ordering the Respondent to pay all the costs of the arbitration, including all the fees and expenses of the PCA and the Tribunal, all the legal costs, funding costs and expenses incurred by the Claimant, with interest calculated in accordance with paragraph (g) above; and
- i. ordering such other and further relief as the Tribunal deems appropriate.²

89. In his Statement of Costs, Claimant claims his total costs and expenses in relation to the arbitration in the sum of EUR 787,316.50, USD 1,000,000, and GBP 6,844,800.53, plus funding costs (in excess of USD 25 million) and post-award interest on such costs.

90. Respondent requests the Tribunal:

DECLARE that Claimant's claims relating to the alleged treatment by Egypt of Mr Bahgat's and the Project Companies are not covered by the 1980 and 2004 BITs between Finland and Egypt or by the Egyptian Investment Law;

Therefore,
DISMISS all of Claimant's claims;

In the alternative,

DECLARE that Egypt has not breached the 1980 and 2004 BITs between Finland and Egypt and the Egyptian Investment Law;

Therefore,
DISMISS all of Claimant's claims;

In the further alternative,

DECLARE that Claimant has not pleaded or proven causation between the alleged breaches and the alleged damages;

Therefore,

² Claimant's Reply, para. 394; Merits Hearing, Day 6, p. 94:20-22; see also, Claimant's Statement of Claim, p. 50, seeking: "(a) a declaration that the Respondent has breached Articles 2 and 3 of the 1980 [BIT], Articles 2, 3, 5 and 12 of the 2004 BIT and the Egyptian Investment Law; (b) an order that the Respondent return to the Claimant all the Claimant's Documents in its possession; (c) an order that the Respondent pay the Claimant compensation as set out in Chapter 5 of this Statement of Claim, plus interest at 12 month US\$ LIBOR rates, compounded annually from the date of the final award in these proceedings; (d) an order that Egypt pay the costs of these arbitration proceedings, including the PCA's administration costs, the costs of the Tribunal and the legal and other costs incurred by the Claimant, on a full indemnity basis, with interest at 12 month US\$ LIBOR rates, compounded annually, from the date of the final award in these proceedings; and (e) grant such other relief as the Tribunal may consider appropriate."

DISMISS all of Claimant's claims;

In the further alternative,

DECLARE that Claimant has not pleaded or proven his actual damages;

Therefore,

DISMISS all of Claimant's claims;

In the ultimate alternative,

DECLARE that Claimant's damages are nil;

In any case,

ORDER that Claimant reimburse all of Egypt's costs in this arbitration, including its expert and attorney fees.³

91. In its Statement of Costs, Respondent claims its total costs and expenses in relation to the arbitration in the sum of EUR 1,742,803.42 and EGP 168,400.54.

IV. RELEVANT BACKGROUND

A. INTRODUCTION

92. Claimant argues that Respondent has not contested the main facts underlying Claimant's case,⁴ including the grant of the mining concession to Claimant, the initiation of criminal proceedings against Claimant, the search of Claimant's and Mr Mohamed Ali Shimi's offices, and the arrest and imposition of sanctions against Claimant and the Companies.⁵
93. Respondent argues that this case is an attempt by Claimant to "recoup [...] an investment that was doomed to failure" because the quality of the iron ore was too poor to manufacture steel.⁶ Respondent denies the existence of any political vendetta against Claimant and submits that

³ Respondent's Rejoinder, paras. 256-57; Merits Hearing, Day 6, p. 203:3-9; Respondent's Memorial on Jurisdiction, para. 4; Respondent reserves "the right to submit such additional defences, evidence and arguments (in addition to the expert report to be submitted by 6 December 2018 in accordance with Procedural Order No. 11) as it may deem appropriate to supplement or augment this Rejoinder." *See also* Statement of Defence, para. 220; Respondent's Reply Memorial on Jurisdiction, para. 225, requesting the Tribunal "(i) Declare that it has no jurisdiction over the Claimant's claims; (ii) Dismiss by way of an award all claims brought by [the Claimant] against [the Respondent] and; (iii) Order Claimant to bear all the costs and expenses (with interests) of this arbitration, including but not limited to, the fees and expenses of the Tribunal, the fees and expenses of Respondent's experts and the fees and expenses of Respondent's legal representation in respect of this arbitration."

⁴ Claimant's Reply, para. 31.

⁵ Claimant's Reply, paras. 34-35.

⁶ Respondent's Statement of Defense, para. 2.

there were no issues with the working of the Egyptian court system.⁷

1. The development of the Project

94. Claimant is a businessman who established several business ventures across the world in the 1970s and 1980s.⁸ Around 1976, Claimant felt that the Egyptian Government had become more democratic and liberal, and so he expanded his export business to Egypt.⁹ Claimant was born an Egyptian national,¹⁰ but became a Finnish national by Presidential Decree on 12 February 1971.¹¹ On 6 November 1980, the Egyptian Minister of the Interior by Decision Number 1896/1980 authorised Claimant to acquire Finnish nationality while not retaining Egyptian nationality.¹²
95. In 1997, Claimant learned about an iron ore reserve in the south east of the Aswan region of Egypt.¹³ Claimant highlights that Respondent's geological and mining authority, the Egyptian Geological Survey and Mining Authority ("EGSMA") discovered the iron ore deposits in this region, publicised these deposits in the state-controlled press, and invited private investors to participate in the development of this region.¹⁴ EGSMA published a very positive report in 1997 on the future of iron ore mining in Egypt which "engaged the Claimant's interest."¹⁵ Claimant states that then President Mubarak first visited the Aswan region in 1997 and lauded the prospective investment, "expressing hope that a large investment project would be established in the Aswan area, which is a relatively undeveloped and poor area of Egypt."¹⁶ These statements prompted Claimant to meet with the Egyptian Minister of Industry,

⁷ Respondent's Statement of Defense, para. 3.

⁸ Mr Bahgat's Second Witness Statement, 9 November 2012, ("**Bahgat WS 2**"), paras. 9-12, *citing* Copy of an article published in a Finnish magazine "Suomen Kuvalehti" on 26 April 1985 together with an English translation, **Exhibit C-0016**; Mr Mokhtar Ali Mohamed El Ashri's First Witness Statement ("**El Ashri WS 1**"), para. 5; Mr Younes Awad's First Witness Statement ("**Awad WS 1**"), para. 3; Jurisdiction Hearing, Day 1, pp. 122:23-123:3.

⁹ Mr Bahgat's First Witness Statement, 19 September 2012 ("**Bahgat WS 1**"), para. 3.

¹⁰ Bahgat WS 2, para. 2.

¹¹ President's Decree, 12 February 1971, **Exhibit C-0062**; *see generally*, Jurisdiction Decision.

¹² Letter from the Ministry of Interior, the Egyptian Passports, immigration and Nationality Administration, 7 August 2012, **Exhibit R-0002**.

¹³ Bahgat WS 2, para. 21, *citing* Reports, 1, 4 and 7 April 1997, **Exhibit C-0019**; Jurisdiction Hearing, Day 1, p. 123:9-16.

¹⁴ Claimant's Reply, para. 32 *citing* Bahgat WS 2, para 21; Mr Bahgat's Fifth Witness Statement, 9 October 2018, ("**Bahgat WS 5**"), para. 11; Letter from Minister of Industries Soleman Reda to the Minister of Cabinet Affairs, 21 January 1998, **Exhibit C-0022**, p. 2, point 1; Extract from Dr Kamal El Ghanzouri, *Egypt and the Development*, **Exhibit C-0089**, p. 155; Reports, 1, 4, and 7 April 1997, **Exhibit C-0019.1**; Report published in the Middle East Business Intelligence (MEED, 16 May 1997, **Exhibit C-0019.1**; EGSMA Geological Survey, Iron Exploration Project (IEP), Phase III Report 1993-1997, **Exhibit C-0099**, p. 5.

¹⁵ 2018 Merits Hearing, Day 1, p. 10:8-18.

¹⁶ 2018 Merits Hearing, Day 1, pp. 9:20-10:3.

Mr Soliman Reda.¹⁷

96. Respondent maintains that in the 1990s, the Egyptian government discovered “potentially promising” iron ore deposits in south east Aswan, although the Aswan area was generally “less attractive due to (i) its location and (ii) the limited quantity and quality of its ore.”¹⁸ Respondent notes that Egyptian Steel, which initially received its iron ore directly from the Aswan region in the 1970s, switched to receiving resources from the Bahariya Oasis region in the 1980s because the latter had “larger and better quality reserves.”¹⁹ Respondent states that Mr Ganzouri, the then Prime Minister of Egypt “strongly encouraged Claimant and his investment.”²⁰
97. According to Claimant, Mr Reda suggested in a letter dated 31 July 1997 that Claimant collaborate with Arbed SA, a company based in Luxembourg and that owned a used steel facility.²¹ Claimant argues that after visiting Arbed SA, he wrote a letter to Mr Reda confirming that Claimant planned to build a steel plant in Aswan using an old steel plant that he would purchase from Arbed SA.²²
98. In July 1997, Lux International Business Relations (“**LIBR**”), a Luxembourg based company, began to establish an integrated steel production facility in Aswan by purchasing an old steel factory in Luxembourg from ProfilArbed (a 100% subsidiary of Arbed SA) and repurposing this.²³ LIBR acted as an intermediary for the sale of the used factory between ProfilArbed and Tradecon (an Egyptian company represented by Claimant).²⁴ Respondent notes that the repurposing of an old factory was approved by its authorities even though “the details of the project were unclear.”²⁵
99. Claimant states that Mr Reda confirmed in the second half of August 1997 that Claimant had

¹⁷ 2018 Merits Hearing, Day 1, p. 10:14-18.

¹⁸ Respondent’s Statement of Defense, para. 8.

¹⁹ Respondent’s Statement of Defense, para. 7 *citing* EGSM, *Iron Ore Assessment*, East UM Hebal Area, Southeast Aswan, October 1998, **Exhibit R-0034**, p. 2; 2018 Merits Hearing, Day 1, pp. 138:5-139:12.

²⁰ 2018 Merits Hearing, Day 1, p. 7:1-5.

²¹ Bahgat WS 2, para. 24, *citing* Letter to Arbed SA, 31 July 1997, **Exhibit C-0020**; 2018 Merits Hearing, Day 1, pp. 11:2-14, 14:7-20; 2019 Merits Hearing, Day 6, pp. 3:13-4:4.

²² Bahgat WS 2, para. 25; *see also* Claimant’s Reply, para. 23.

²³ Respondent’s Statement of Defense, para. 9 *citing* Letter from Lux international Business Relations SARL to the Egyptian Minister of Industry and Mineral Wealth, 23 July 1997, **Exhibit R-0035**; Letter from ARBED to the Egyptian Minister of Industry and Mineral Wealth, 8 August 1997, **Exhibit R-0036**.

²⁴ Respondent’s Statement of Defense, para. 9 *citing* Agreement between ProfilARBED, Lux International, Tradecon and ADEMCO, 29 January 1998, **Exhibit R-0037**, Preamble, (B).

²⁵ Respondent’s Statement of Defense, para. 9 *citing* Letter to ARBED SA, 31 July 1997, **Exhibit C-0020**.

been awarded the contract to mine iron ore in the Aswan region.²⁶ Claimant states that after being awarded the contract, he began work on its implementation.²⁷

100. Claimant alleges that on 1 September 1997, Mr Reda invited Claimant to his office (the “**1 September 1997 Meeting**”). This meeting was also said to have been attended by Mr Mokhtar Ali Mohamed El Ashri, a potential investor in the Project, who has submitted four witness statements in this arbitration dated 31 October 2011, 15 January 2013, 7 February 2013, and 27 August 2013.²⁸ According to Claimant, at the 1 September 1997 Meeting, Mr Reda confirmed that Claimant would be the chairman of the company that would run the Project subject to certain conditions.²⁹ First, Claimant was told he would need to re-acquire his Egyptian nationality. Claimant states that Mr Reda made it clear that if Claimant did not take on Egyptian nationality, the government would look for someone else to run the Project and the money and time invested by Claimant in the Project would be lost.³⁰ Claimant states that Mr Reda indicated that Claimant would be “out of this project and from any other project in Egypt.”³¹ Second, Claimant would have to allocate 5% of the shares in that company each to the Bank Misr and to the Al Sharq Insurance Company.³² Third, Claimant would have to assign to each of Bank Misr and the Al Sharq Insurance Company the right to appoint one board member of Claimant’s company.³³
101. Claimant describes that he accepted Mr Reda’s demands, seeing no other method of preserving his investment in the Project and fearing the possibility of being put in jail if he refused the demands.³⁴ Claimant alleges that Mr Reda handed him an application to regain Egyptian nationality, which Claimant completed immediately.³⁵ On 28 September 1997, the Egyptian Ministry of the Interior issued Decision Number 10815/1997, which restored Claimant’s Egyptian nationality pursuant to Article 18 of the Nationality Law No. 26 of

²⁶ Bahgat WS 2, para. 26; Jurisdiction Hearing, Day 1, p. 124:9-12.

²⁷ Bahgat WS 2, para. 27; Jurisdiction Hearing, Day 1, p. 124:17-23.

²⁸ Bahgat WS 2, paras. 28-29; El Ashri WS 1, paras. 9-10.

²⁹ Bahgat WS 2, paras. 29-30; El Ashri WS 1, para. 11.

³⁰ Bahgat WS 2, paras. 31-32; El Ashri WS 1, para. 12; Claimant’s Counter-Memorial on Jurisdiction, para. 2.10(vi).

³¹ Claimant’s Counter-Memorial on Jurisdiction, para. 2.10(iv).

³² Bahgat WS 2, para. 34.

³³ Bahgat WS 2, paras. 26, 34; El Ashri WS 1, para. 14.

³⁴ Bahgat WS 2, paras. 36-37; Mr Bahgat’s Third Witness Statement, 27 August 2013, (“**Bahgat WS 3**”) para. 16.

³⁵ Claimant’s Counter-Memorial on Jurisdiction, para. 2.10(viii).

1975.³⁶

102. On 19 November 1997, Tradecon and ProfilArbed signed a letter of intent (the “**LOI**”) for the purchase of a used steel factory in Luxembourg.³⁷
103. On 22 December 1997, USD 5 million was transferred to ProfilArbed, pursuant to the LOI, as “[a]dvance payment for second hand equipment.”³⁸ It is contested whether Claimant was the source of these funds.
104. On 24 December 1997, Claimant established ADEMCO with the authorization of the Chairman of the General Authority for Investment and Free Zones in Egypt (“**GAFI**”), to carry out the exploitation and mining of iron ore.³⁹ On its establishment, Claimant held 7% of ADEMCO’s shares.⁴⁰ According to Claimant, there was no need for a written agreement of a loan between himself and ADEMCO because he was the chairman and main shareholder of ADEMCO.⁴¹ He preferred to keep his shareholding “as low as possible” because of Egyptian inheritance laws that would require his shares to be passed on to his stepfamily whom he does not wish to have control over his assets.⁴²
105. On 3 January 1998, ADEMCO was registered as a corporate entity under Egyptian law.⁴³
106. On 29 January 1998, ADEMCO signed a sale and purchase contract with ProfilArbed for the second hand iron ore preparation plant (the “**ADEMCO-Arbed Contract**”) for USD 21,621,000, 51% of which was to be paid within 60 days of the signing of the contract.⁴⁴ On 29 January 1998, ProfilArbed and ADEMCO also entered into a side letter to the ADEMCO-Arbed Contract, in which ADEMCO confirmed its knowledge that the used factory had been in operation for over 20 years and had “suffered a wear and tear

³⁶ Letter from the Ministry of Interior, the Egyptian Passports, Immigration and Nationality Administration, 7 August 2012, **Exhibit R-0002**; Nationality File submitted by Claimant during the criminal proceedings, 26 March 2002, **Exhibit R-0006**.

³⁷ Letter of Intent No. A between Tradecon and ProfilARBED, 19 November 1997, **Exhibit R-0038**; Letter of Intent No. B between Tradecon and ProfilARBED, 19 November 1997, **Exhibit R-0039**; Letter of Intent No. C between Tradecon and ProfilARBED, 8 December 1997, **Exhibit R-0040**.

³⁸ Respondent’s Statement of Defense, para. 11 *citing* Union Bank of Switzerland, Substitute Payment Slip, 17 December 1997, **Exhibit R-0042**.

³⁹ Copy of the permission given by GAFI, Preliminary Contract for the Company and the Articles of Association of ADEMCO, 24 December 1997, **Exhibit C-0023**.

⁴⁰ Respondent’s Statement of Defense, para. 13; Claimant’s Reply, para. 58.

⁴¹ 2018 Merits Hearing, Day 2, pp. 32:16-33:11.

⁴² 2018 Merits Hearing, Day 2, pp. 33:12-36:5.

⁴³ Claimant’s Statement of Claim, para. 3.3.

⁴⁴ Sales and Purchase Contract between ProfilARBED and ADEMCO, the Second Hand Iron Ore Preparation Plant, the Sinter Plant No. S2, the Blast furnace B and the LDAC Steelshop, 29 January 1998, **Exhibit R-0043**, paras. 2.1, 2.3a.

corresponding to these number of years.”⁴⁵

107. On 6 February 1998, ADEMCO and Mannesmann Demag A.G. (“**MD**”), a German company, entered into a contract (the “**First ADEMCO-MD Contract**”) for USD 450 million for the dismantlement, transport, and re-erection of the used steel factory and the installation of the new secondary equipment.⁴⁶ The First ADEMCO-MD Contract reflects that the Project would utilise a used steel plant from ProfilArbed.⁴⁷ 7.2% of the total price of the First ADEMCO-MD Contract was to be paid to MD between the beginning of February 1998 and early March 1998.⁴⁸
108. Respondent notes that the ADEMCO-Arbed Contract and the First ADEMCO-MD Contract were signed before Claimant had been granted any concession and before the existence of minable resources had been confirmed in south east Aswan.⁴⁹ Claimant denies that the signature of the ADEMCO-Arbed Contract and the First ADEMCO-MD Contract were premature.⁵⁰ Claimant argues that at the time, Egypt had granted Claimant the concessions, there was proof of minable resources and that the Project, given its scale, required Claimant to evaluate development possibilities at an early stage.⁵¹ Claimant further argues that Respondent, at the time, promoted the viability of the Project and despite being aware of Claimant’s business dealings, did not object to Claimant’s actions.⁵² Claimant notes that Respondent encouraged Claimant to negotiate with Arbed.⁵³
109. On 10 March 1998, the Egyptian General Organization for Industrialization “referring to the study which was carried out by Tradecon Company in co-operation with Mannesmann – Demag Co concerning the exploitation of the Aswan Iron Ores, certif[ied] that “the technical

⁴⁵ Side Letter to the Sales and Purchase Contract between ProfilARBED and ADEMCO, The Second Hand Iron Ore Preparation Plant, the Sinter Plant No. S2, the Blast furnace B and the LDAC Steelshop, 29 January 1998, **Exhibit R-0044**.

⁴⁶ Respondent’s Statement of Defense, para. 15 *citing* First ADEMCO-MD Contract, 6 February 1998, **Exhibit R-0045**; 2019 Merits Hearing, Day 6, p. 4:5-7.

⁴⁷ First ADEMCO-MD Contract, Preamble; Claimant’s Reply, para. 23.

⁴⁸ First ADEMCO-MD Contract, 6 February 1998, **Exhibit R-0045**, Article 5.2.1; Copy of the checks paid to Mannesmann, 26 February 1998 and 3 March 1998, **Exhibit R-0046**; Copy of Mannesman’s invoice, 16 February 1998, **Exhibit C-0025.1**; Copy of Mannesman’s written confirmation, 11 March 1998, **Exhibit C-0025.2**; Copy of receipt confirmation by Mannesman’s agents Swissal, 24 March 1998, **Exhibit C-0025.2**; 2019 Merits Hearing, Day 6, p. 4:12-20.

⁴⁹ Respondent’s Statement of Defense, para. 14.

⁵⁰ Claimant’s Reply, paras. 25-26.

⁵¹ Claimant’s Reply, para. 26; *see* 2018 Merits Hearing, Day 1, pp. 14:7-17:11.

⁵² Claimant’s Reply, para. 27 *citing* Letter from Minister Reda to Prime Minister Ganzouri, 1 August 1998, **Exhibit C-0098**; Bahgat WS 5, para. 19.

⁵³ Claimant’s Reply, para. 27 *citing* Bahgat WS 2, para. 25; *see also* Letter from Minister of Industries Soliman Reda to the Minister of Cabinet Affairs, 21 January 1998, **Exhibit C-0022**, p. 2, points 9 and 10.

information in this study has been carefully prepared and on local assumptions.”⁵⁴

110. On 12 April 1998, GAFI authorised the increase in ADEMCO’s share capital from EGP 10 million to EGP 100 million.⁵⁵ Respondent argues that Claimant’s shareholding in ADEMCO remained at 7%.⁵⁶ Claimant contends that upon Mr Shimi’s contribution of EGP 42 million to ADEMCO, Mr Shimi’s shareholding in ADEMCO increased to 42.03% and Claimant’s shareholding in ADEMCO was 54.3%.⁵⁷ Claimant maintains that he invested EGP 2.5 million at the time ADEMCO was incorporated, then at a later stage, this was increased to EGP 7.5 million by way of a credit balance through the MD payment, to reach EGP 10 million, and then further increased to reach EGP 100 million.⁵⁸
111. In April 1998, a decision was made to purchase new equipment for the Project rather than utilise the used factory: the weight of the assets of the used factory were greater than expected (which resulted in increased prices for dismantlement, transport, and re-erection) and the capacity of the old factory was more limited than expected.⁵⁹ On 12 April 1998, a meeting was held between representatives of ADEMCO and MD.⁶⁰ At this meeting, MD suggested “[substituting] the second hand equipment by brand new ones...” and that “ADEMCO should ... consider new equipment instead of a mix between used and new.”⁶¹
112. ADEMCO and MD entered into a new contract to reflect the use of a new steel plant for USD 585 million (which was antedated to keep the date of 6 February 1998) (the “**Second ADEMCO-MD Contract**”).⁶² In April 1998, MD and Tradecon prepared an information memorandum about the iron ore deposits in the Aswan region (the “**April 1998 MD Report**”).⁶³ Claimant notes that the April 1998 MD Report contemplated a new steel plant

⁵⁴ Confirmation from General Organisation for Industrialisation of Egypt, 10 March 1998, **Exhibit C-0027**; 2019 Merits Hearing, Day 6, pp.4:21-5:2.

⁵⁵ Copy of the Decision number 670 for 1998 of GAFI, 12 April 1998, **Exhibit C-0033**; Claimant’s Reply, para. 59 *citing* GAFI Resolution, 16 July 1998, **Exhibit C-0037**, Article 6; 2018 Merits Hearing, Day 1, pp. 14:21- 15:14.

⁵⁶ Respondent’s Statement of Defense, para. 16.

⁵⁷ Claimant’s Reply, para. 59 *citing* Statement of credit balances ADEMCO, 24 March 1998, **Exhibit C-0032.1**.

⁵⁸ 2018 Merits Hearing, Day 2, p. 42:5-24.

⁵⁹ Copy of a memorandum of a meeting held with Mannesman, 15 and April 1998, **Exhibit C-0029**; Copy of a Letter from Mannesmann to ADEMCO, Contract 1001/98, 22 April 1998, **Exhibit C-0029.1**; 2018 Merits Hearing, Day 1, p. 15:14-24; 2019 Merits Hearing, Day 6, p. 5:3-10.

⁶⁰ Copy of a memorandum of a meeting held with Mannesmann, 15 and 16 April 1998, **Exhibit C-0029**.

⁶¹ Copy of a memorandum of a meeting held with Mannesmann, 15 and 16 April 1998, **Exhibit C-0029**, p. 1.

⁶² Second ADEMCO-MD Contract, 6 February 1998, **Exhibit C-0030**; Claimant’s Reply, para. 23; Respondent’s Statement of Defense, para. 17; 2019 Merits Hearing, Day 6, p. 5:11-17.

⁶³ April 1998 MD Report, 18 and 19 May 1998, **Exhibit C-0031**.

and that the Minister of Industry had no objection to this change.⁶⁴

113. In June 1998, the following shareholders were added to ADEMCO: MD (10%), Cegelec (5%), and Orascom (5%).⁶⁵ Claimant argues that his shareholding in ADEMCO was increased to 12% and Respondent contends that Claimant's shareholding in ADEMCO remained at 12% from this date onwards.⁶⁶
114. ADEMCO's 30-year mining license was confirmed by Law No. 166 on 14 June 1998, which was enacted by the Egyptian Parliament and signed by then President Hosni Mubarak ("Law No. 166" or the "Concession").⁶⁷ Law No. 166 was accompanied by a commitment agreement between ADEMCO and the Ministry of Industry (the "Commitment Agreement").⁶⁸ Under the Commitment Agreement, ADEMCO undertook to "commence the search operations" within three months and to submit, within a year, a "conclusive economic feasibility study."⁶⁹
115. Claimant argues that the conditions of the Commitment Agreement were satisfied, given that the Ministry of Industry had approved the feasibility study in the April 1998 MD Report and the changes to the contract between ADEMCO and MD.⁷⁰ Claimant contends that he was in constant contact with Respondent's authorities at the time and that they did not terminate the Commitment Agreement.⁷¹ Claimant highlights that Respondent continued to support the Project, up until the Project's inauguration on 22 May 1999.⁷² Respondent maintains that the iron ore at Aswan was not suitable for exploitation and argues that Claimant studied the feasibility of the Project only after the conclusion of Commitment Agreement.⁷³ Respondent notes that the press was sceptical about the Project's potential.⁷⁴
116. In July 1998, Mr Shimi's shareholding in ADEMCO dropped to 14.5% after he sold a

⁶⁴ Claimant's Reply, para. 23 *citing* Bahgat WS 5, para. 22; Bahgat WS 2, para. 88.

⁶⁵ Respondent's Statement of Defense, para. 18 *citing* Modification Contract of Articles 6, 7 and 21 of the Statute of ADEMCO, 1 June 1998, **Exhibit R-0047**; Minutes of Meeting of ADEMCO's Extraordinary General Assembly, 31 May 1998, **Exhibit C-0035**.

⁶⁶ Respondent's Statement of Defense, para. 18 *citing* GAFI Resolution, 16 July 1998, **Exhibit C-0037**; GAFI Report, 6 February 2000, **Exhibit C-0052**; GAFI Information Memorandum, 9 April 2008, **Exhibit R-0048**.

⁶⁷ Law No. 166, 14 June 1998, **Exhibit C-0036**; 2019 Merits Hearing, Day 6, p. 5:18-22; Jurisdiction Hearing, Day 1, p. 124:12-16.

⁶⁸ Law No. 166, 14 June 1998, **Exhibit C-0036**; Bahgat WS 2, paras. 72-74.

⁶⁹ Law No. 166, 14 June 1998, **Exhibit C-0036**, Article 4.

⁷⁰ Claimant's Reply, para. 29 *citing* Bahgat WS 5, para. 22.

⁷¹ Claimant's Reply, para. 29 *citing* Bahgat WS 5, para. 22.

⁷² Claimant's Reply, para. 30.

⁷³ Respondent's Statement of Defense, paras. 22-23.

⁷⁴ Respondent's Statement of Defense, p. 8, fn. 36.

majority of his shares in ADEMCO to Claimant.⁷⁵

117. Between July and December 1998, Claimant explains that MD, Cegelec, US Steel, and Pomini (the “**Project Partners**”) each agreed to take equity in ADEMCO, but allowed Claimant to retain legal control over the shares until the companies paid for them.⁷⁶
118. On 9 July 1998, Claimant and the Project Partners entered into an agreement (the “**ADEMCO Shareholder Agreement**”).⁷⁷ According to the ADEMCO Shareholder Agreement, the Project Partners would pay Claimant the nominal value of ADEMCO’s shares (EGP 10/share) and 20 piasters per share and contribute further capital as set out in the Annex to that agreement.⁷⁸
119. Claimant contends that in July 1998, Claimant controlled 80.2% of ADEMCO’s share capital (including the 60% share capital that Claimant had agreed to transfer to the Project Partners).⁷⁹
120. On 21 July 1998, AISCO was established by a decision of ADEMCO’s shareholders, in order to concentrate on the business of manufacturing iron steel in mills and plants constructed for that purpose.⁸⁰ With the authorization of GAFI,⁸¹ AISCO was incorporated in September 1998 and was registered as a corporate entity on 10 September 1998.⁸² Claimant submits that ADEMCO had an 87.5% shareholding in AISCO and Claimant had a 0.2% shareholding in AISCO.⁸³ Accordingly, Claimant states that he had a 34.7% interest in AISCO and,

⁷⁵ Claimant’s Reply, para. 60.

⁷⁶ Claimant’s Reply, paras. 53, 61 *citing* Bahgat WS 2, paras. 67, 101; Bahgat WS 5, paras. 32-33; Mannesmann Temporary Share Certificate, 14 December 1998, **Exhibit C-0136**; Dr Aboulmagd Second Legal Expert Report, 8 November 2012, p. 8.

⁷⁷ ADEMCO Shareholder Agreement, 9 July 1998, **Exhibit C-0108**.

⁷⁸ ADEMCO Shareholder Agreement, 9 July 1998, **Exhibit C-0108**.

⁷⁹ Claimant’s Reply, paras. 62-63. Claimant explains that he held 12% of the shares himself and the following held shares on his behalf: Claimant’s wife (3%); Claimant’s minor daughters (2% each); Tradecon (0.5%); Messrs. Khabir, El-Bardissy, and Badr (0.72% combined); MD (10%); Cegelac (5%); Arab Contractors (10%); Orascom (5%); and Egyptian Company for Investment and Underwriting (30%).

⁸⁰ Claimant’s Statement of Claim, para. 3.5.

⁸¹ Copy of the GAFI Resolution and the attached Preliminary Contract for the Company and the Articles, 9 September 1998, **Exhibit C-0039**.

⁸² Bahgat WS 2, paras. 82-85; Claimant’s Statement of Claim, para. 3.5.

⁸³ Claimant’s Reply, para. 68 *citing* Copy of the GAFI Resolution and the attached Preliminary Contract for the Company and the Articles, 9 September 1998, **Exhibit C-0039**; Matthews Report, para. 2.11; Please note that the First BDO Report, paras. 7.24, 7.36 and the Second BDO Report, para. 6.3, suggest that ADEMCO held 85.7% of AISCO.

correspondingly, an equivalent interest in the Project as a whole.⁸⁴

121. On 2 August 1998, the Minister of Industries signed the Commitment Agreement.⁸⁵ On 25 August 1998, the land covered by the Concession was delivered to ADEMCO.⁸⁶ Claimant argues that in the second half of 1998 and in 1999, there was significant progress on the Project.⁸⁷
122. In October 1998, the Central Metallurgical Research and Development Institute (the “**CMRDI**”), an Egyptian state-owned entity, published a progress report containing an evaluation and beneficiation study of the deposits at the Project.⁸⁸ Respondent notes that this report identified low iron levels and high levels of impurity (particularly, phosphorus).⁸⁹
123. In October 1998, EGSMA, another Egyptian governmental entity produced a report on the iron ore at the Project site.⁹⁰
124. In late 1998, ADEMCO contracted Met-Chem, a private Canadian company and subsidiary of US Steel, to investigate the iron ore at the Project site and to provide a mining plan.⁹¹
125. A December 1998 GAFI decision notes that the Project Partners held shares in ADEMCO in the following percentages: MD (10%), Cegelac (5%), US Steel (10%), and Pomoni (5%).⁹² Claimant explains that the Egyptian Company for Investment and Undertaking returned its shareholding in ADEMCO to Claimant in 1999, and that Arab Contractors and Orascom did the same in 2000.⁹³
126. On 22 January 1999, a feasibility study entitled “Integrated Steel Producing Facilities Aswan Iron and Steel Company, Aswan, Egypt” was prepared by UEC USX Engineers (the “**UEC Study**”) pursuant to Law No. 166 and the Commitment Agreement, which granted ADEMCO mining rights subject to acceptance by the Ministry of Industries of a project

⁸⁴ Claimant’s Reply, para. 68 *citing* Matthews Report, para. 2.11.

⁸⁵ Claimant’s Statement of Claim, para. 3.4.

⁸⁶ Formal Report of Delivery of the Iron Ore Concession Area in Southeast Aswan between the Egyptian Geological, Mining Authority and ADEMCO, 25 August 1998, **Exhibit R-0051**.

⁸⁷ Claimant’s Statement of Claim, para. 3.6.

⁸⁸ CMRDI, *Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, Progress Report No. 1*, South Aswan for Blast Furnace Purposes, October 1998, **Exhibit R-0052**.

⁸⁹ Respondent’s Statement of Defense, para. 24 *citing* CMRDI, *Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, Progress Report No. 1*, South Aswan for Blast Furnace Purposes, October 1998, **Exhibit R-0052**, Section IV.A.1.

⁹⁰ EGSMA, *Iron Ore Assessment East Um-Hebal Area*, Southeast Aswan, October 1998, **Exhibit R-0034**.

⁹¹ Met-Chem Report, November 1999, **Exhibit C-0049**.

⁹² GAFI Resolution, 7 December 1998, **Exhibit C-0042**.

⁹³ Claimant’s Reply, para. 64 *citing* Bahgat WS 5, para. 8 (corrected version of Bahgat WS 2, para. 101).

feasibility study report.⁹⁴ Claimant notes that the UEC Study was positive and therefore Claimant began preparatory work on the Project including various construction works for the installation of the steel equipment.⁹⁵ Claimant notes that he arranged private funding for the Project from HSBC Investment Bank PLC (“**HSBC**”) (which financing arrangement Claimant alleges he was moments away from signing when he was arrested).⁹⁶ Claimant also notes that the UEC Study contemplated the use of a new steel plant.⁹⁷ Respondent contends that the report by UEC cannot be considered a “feasibility study” due to the absence of key technical and economic considerations and any beneficiation solutions, explained by Respondent as the technical and economical process by which iron content is increased and phosphorus content is decreased.⁹⁸ Respondent explains that the UEC Study ignored the low iron content and high phosphorous content of the iron ore at the Project site.⁹⁹

127. The inauguration ceremony of the Project was held on 22 May 1999 and was attended by President Mubarak, the then Prime Minister, the Minister of Industry, and Governor of Aswan and other government officials.¹⁰⁰
128. On 8 September 1999, ADEMCO requested of CMRDI an updated beneficiation assessment.¹⁰¹ Respondent, citing the CMRDI’s reports from January 1999 to December 1999, contends that the CMRDI’s solutions were not satisfactory.¹⁰²
129. In November 1999, Met-Chem published its report for ADEMCO regarding the iron ore

⁹⁴ Claimant’s Statement of Claim, para 3.4; UEC Study, 22 January 1999, **Exhibit C-0043**.

⁹⁵ Claimant’s Statement of Claim, para. 3.6 *citing* Bahgat WS 2, paras. 88-90; Mr Richard Verdier First Witness Statement, 2 November 2012, (“**Verdier WS 1**”), paras. 5-8, 18, 21; Awad WS 1, para. 5; General Abdel Moneim Abdel Rahman Khalifa WS 1.

⁹⁶ Claimant’s Statement of Claim, para. 3.6 *citing* Bahgat W2, para. 94; Copy of the Engagement Agreement signed with AISCO, 23 March 1999, **Exhibit C-0047**.

⁹⁷ Claimant’s Reply, para. 23.

⁹⁸ Respondent’s Statement of Defense, para. 25.

⁹⁹ Respondent’s Statement of Defense, para. 25.

¹⁰⁰ Copies of newspaper reports on the project inauguration by President Mubarak, **Exhibit C-0044**; Video of the inauguration ceremony on 22 May 1999, **Exhibit C-0045**; Transcript of the video of inauguration ceremony, 22 May 1999, **Exhibit C-0086**, pp. 9-10; 2018 Merits Hearing, Day 1, p. 21:15-19.

¹⁰¹ Letter from ADEMCO to CMRDI, New ADEMCO Bulk Sample, 8 September 1999, **Exhibit R-0053**.

¹⁰² Respondent’s Statement of Defense, para. 25 *citing* CMRDI, *Brief Account on Tentative Results of Test Program of Iron Ore Samples No. 98-1 and 98-2*, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purpose, ADEMCO, January 1999, **Exhibit R-0054**; CMRDI, *Progress Report No. 2*, ADEMCO, January 1999, **Exhibit R-0055**; CMRDI, *Summary Report on the Laboratory Beneficiation Options of Samples 98-1 and 98-2*, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, May 1999, **Exhibit R-0056**; CMRDI, *Summary Report, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit*, South Aswan for Blast Furnace Purposes, ADEMCO, December 1999, **Exhibit R-0057**.

deposits at the Project site (the “**Met-Chem Report**”).¹⁰³

2. Claimant’s incarceration and state scrutiny of the Project

130. Claimant contends that following the change in government in October 1999, the newly instated Prime Minister Dr Atef Ebied allegedly took measures to reverse the legacy of former Prime Minister Dr Ganzouri.¹⁰⁴ Claimant exhibits newspaper reports suggesting that the new government had a negative approach to the Project and to Claimant.¹⁰⁵ Claimant points out that his foreign partners, such as MD, continued to support the Project even though it had lost favour with the State-controlled press.¹⁰⁶
131. In September 1998, the Egyptian Capital Market Authority (the “**CMA**”) suspended approval of the establishment of AISCO until it received a bank notice evidencing a transfer of DEM 54 million, equivalent to USD 30 million, to MD.¹⁰⁷ Claimant submits that this was resolved quickly after AISCO representatives met with the CMA.¹⁰⁸
132. On 13 December 1999, Claimant received a letter from the CMA requesting evidence of the payment of USD 30 million to MD.¹⁰⁹
133. On 4 January 2000, the Minister of Industry Technology Development invited only the State-owned shareholders of the Companies and the presidents of GAFI and the CMA to an urgent meeting on the same day to discuss issues relating to the Companies.¹¹⁰ The next day, the Minister of Industry Technology Development wrote a letter to the President of Egypt, forwarded to the Prime Minister and Minister of Justice, in which he noted that the capital of AISCO included a payment of USD 30 million to MD, which had not been proven.¹¹¹ He

¹⁰³ Met-Chem Report dated November 1999, **Exhibit C-0049**.

¹⁰⁴ Bahgat WS 2, para. 112; Jurisdiction Hearing, Day 1, p. 125:1-12; 2018 Merits Hearing, Day 1, p. 4:5-16, 23:8-22.

¹⁰⁵ Bahgat WS 2, para. 117, *citing* Article from Middle East Economic Digest dated 25 February 2000, **Exhibit C-0055**; Article – MEED Quarterly Report, 30 June 2000, **Exhibit C-0055.1**; 2018 Merits Hearing, Day 1, pp. 23:23-24:24.

¹⁰⁶ Claimant’s Reply, para. 33 *citing* Letter from SMS Demag to ADEMCO and AISCO, 14 January 2000, **Exhibit C-0090**, p. 1.

¹⁰⁷ Claimant’s Reply, para. 115; 2018 Merits Hearing, Day 1, p. 19:9-19.

¹⁰⁸ Claimant’s Reply, para. 115.

¹⁰⁹ Letter from the Capital Market Authority to the Claimant, 13 December 1999, **Exhibit C-0121**; 2018 Merits Hearing, Day 1, pp. 25:23-26:4.

¹¹⁰ Letter from the Ministry of Industrial and Technology Development, 4 January 2000, **Exhibit C-0124**; 2018 Merits Hearing, Day 1, p. 26:16-23.

¹¹¹ Letters from the Minister of Industry and Technology Development to the Minister of Justice and to the office director of the President of the Republic, 5 January 2000, **Exhibit C-0125**; 2018 Merits Hearing, Day 1, p. 27:10-15.

- noted that he had contacted GAFI to initiate an investigation.¹¹²
134. The legal advisor of the Companies provided the CMA evidence from the auditors of ADEMCO regarding the transfer of USD 30 million to MD.¹¹³
135. In January 2000, the accounting books of ADEMCO and AISCO were scrutinised by a committee formed by GAFI and chaired by Mr Salah El-deen Mandour (the “Committee”).¹¹⁴
136. On 30 January 2000, the CMA requested Claimant to provide evidence of the payment to MD by 10 February 2000.¹¹⁵ Claimant, citing Respondent’s exhibit, claims that the cheques for USD 15 million each, paid to MD and signed by Claimant, were faxed to Respondent on 15 January 2000 and that “the prosecutor and other parts of the Respondent saw those cheques almost immediately, and they provided the information that the Respondent had been asking for.”¹¹⁶
137. On 5 February 2000 – one day before the Committee report was submitted to GAFI and five days before the deadline imposed by the CMA to provide evidence of the payment to MD – Claimant was arrested by the Egyptian police in connection with ADEMCO’s alleged failure to make payment of USD 30 million to MD.¹¹⁷
138. Claimant alleges that he was banned from travelling outside of Egypt from around the time of his arrest on 5 February 2000 until late June 2005.¹¹⁸ Claimant notes that once he became aware that Egypt had imposed a travel ban on him, he transferred the shares that his wife and daughters held in ADEMCO to himself.¹¹⁹ Claimant notes that this transfer was only recorded on 24 July 2005, once Claimant was released from prison.¹²⁰
139. A 6 February 2000 report by the Committee prompted criminal charges against Claimant and

¹¹² Letters from the Minister of Industry and Technology Development to the Minister of Justice and to the office director of the President of the Republic, 5 January 2000, **Exhibit C-0125**.

¹¹³ Letter from the Project Companies’ legal advisor to the Capital Market Authority, **Exhibit C-0122**; Certificate from the auditors of ADEMCO dated 17 January 2000, **Exhibit C-0123**.

¹¹⁴ Claimant’s Reply, p. 46, fn. 264. 2018 Merits Hearing, Day 1, p. 118:13-19

¹¹⁵ Letter from Capital Market Authority to AISCO, Notice of issuance of the securities of the Company dated 30 January 2000, **Exhibit R-0060**.

¹¹⁶ 2018 Merits Hearing, Day 1, pp. 28:7-14, 30:8-21 *citing* Copy of the Cheques paid to Mannesmann, 26 February 1998 and 3 March 1998, **Exhibit R-0046**.

¹¹⁷ Bahgat WS 2, paras. 120-122; Claimant’s Statement of Claim, paras. 3.8, 3.10; Jurisdiction Hearing, Day 1, p. 125:13-24; 2018 Merits Hearing, Day 1, p. 29:8-19.

¹¹⁸ Claimant’s Statement of Claim, para. 3.8; Bahgat WS 1, para 14; Bahgat WS 5, para 25.

¹¹⁹ Claimant’s Reply, paras. 46, 54.

¹²⁰ Claimant’s Reply, para. 54 *citing* Letter from Mr Hameed, 24 July 2005, **Exhibit C-0051**.

the Companies for the misappropriation of funds.¹²¹ Claimant argues that the GAFI Report dated 6 February 2000 notes that as at January 2000, Claimant owned and controlled 70.22% of ADEMCO (pending payment to Claimant by four Project Partners of 30% of those shares).¹²²

140. On 7 February 2000, AISCO received a letter from MD confirming receipt of USD 30 million from Claimant, referring to the two cheques that had been used to make the payment.¹²³
141. On 10 February 2000, Mr Shimi informed the Egyptian Prime Minister that the AISCO board had sought new shareholders to purchase the public shares of the Project and that Claimant's participation was necessary in order to execute these documents.¹²⁴

3. Criminal proceedings against Claimant

142. On 17 February 2000, the Administrative Control Authority published reports on the search of Claimant's private office and the headquarters of Mr Shimi's company, and on 19 February 2000 on the search of the Companies' headquarters.¹²⁵
143. By order of the Egyptian Public Prosecutor, confirmed by the Cairo Criminal Court on 20 February 2000, Claimant's assets as well as the assets of ADEMCO and AISCO, Claimant's family and his deputy, Mr Shimi, were made subject to the Freezing Order.¹²⁶

¹²¹ Bahgat WS 2, paras. 119-120; Claimant's Statement of Claim, para. 3.10; GAFI Report, 6 February 2000, **Exhibit C-0052**.

¹²² Claimant's Reply, paras. 66-67. Claimant explains that he held 12% of the shares himself and the following held shares on his behalf: Claimant's wife (3%); Claimant's minor daughters (2% each); Tradecon (0.5%); Messrs. Khabir, El-Bardissy, and Badr (5.72% combined); MD (10%, but had not yet paid Claimant for these shares); Cegelac (5%, but had not yet paid Claimant for these shares); Arab Contractors (10%, but had communicated an intention to return this to Claimant); Orascom (5%, but had communicated an intention to return this to Claimant); US Steel (10%, but had not yet paid Claimant for these shares); and Pomoni (5%, but had not yet paid Claimant for these shares).

¹²³ Confirmation of receipt by Mannesmann, 7 February 2000, **Exhibit C-0025.3**; 2018 Merits Hearing, Day 1, p. 29:20-30:7; 2019 Merits Hearing, Day 6, pp. 8:8-9:3.

¹²⁴ Letter from Mr Shimi to the Prime Minister, 10 February 2000, **Exhibit C-0091**.

¹²⁵ Report by the Administrative Control Authority on the search conducted at Claimant's private office, 17 February 2000, **Exhibit C-0093**; Report by the Administrative Control Authority on the search conducted at ADEMCO and AISCO's headquarters, 19 February 2000, **Exhibit C-0094**; Report by the Administrative Control Authority on the search conducted at the headquarters of Mr Shimi's company, Egyptian for Trading and Marketing, 17 February 2000, **Exhibit C-104**; 2019 Merits Hearing, Day 6, p. 9:9-19

¹²⁶ Hearing Minutes, 20 February 2000, **Exhibit C-0056**; Claimant's Statement of Claim, para. 3.8; Claimant's Reply, para. 38; 2019 Merits Hearing, Day 6, p. 9:21-25.

144. In March 2000, the Project was suspended.¹²⁷
145. On 15 February 2001, the Egyptian Supreme State Security Court found Claimant guilty and sentenced him to 15 years of hard labour.¹²⁸ The ruling of the Supreme State Security Court was overturned by the Egyptian Court of Cassation on 18 October 2001, which ordered a new trial before a panel of judges of the Egyptian Supreme State Security Court.¹²⁹
146. On 11 June 2002, the Egyptian Supreme State Security Court acquitted Claimant of all charges.¹³⁰ The Supreme State Security Court found in the prosecution's case "disorientation, imbalance, backwardness, failure, and absence of applying the scientific approach in taking decisions instrumental to the future of Egypt's economic progress."¹³¹ The court found that the testimony in favour of the prosecution's case was "replete with overtones of uncertainties, lack of acquaintance, lack of confidence, doubt and suspicion" and that the record before the court did not support the charges against Claimant.¹³² The court found that the documentary evidence in fact confirmed that the payment to MD was made and that Claimant had not *inter alia* misappropriated public funds, profiteering, or forgery.¹³³
147. On 12 December 2002, the Administrative Court lifted the travel ban on Claimant.¹³⁴
148. Claimant was released from prison in March 2003.¹³⁵
149. On 29 April 2003, the Administrative Court granted Claimant's application to enforce its decision to lift the travel ban on Claimant.¹³⁶
150. In 2003 and 2004, Claimant made requests to the Attorney General and Public Prosecutor to

¹²⁷ Fax from R. Verdier to Dr Mertins, 13 March 2000, **Exhibit C-0150**; Fax from R. Verdier to Mr Liljeberg, 13 March 2000, **Exhibit C-0151**; Fax from R. Verdier to A. Cairns at HSBC, 13 March 2000, **Exhibit C-0152**; Fax from R. Verdier to Dr Aziza and Dr Refaat, 13 March 2000, **Exhibit C-0153**; 2018 Merits Hearing, Day 2, p. 161:2-24.

¹²⁸ Copy of Judgment of the Court of Cassation, 16 May 2006, **Exhibit C-0058**, p. 3.

¹²⁹ Copy of Judgment of the Court of Cassation, 16 May 2006, **Exhibit C-0058**, p. 3; Decision of the Court of Cassation on the Appeal No. 7269 of 2001, **Exhibit R-0089**, p. 7; 2019 Merits Hearing, Day 6, pp. 12:15-14:10.

¹³⁰ Judgment of the Supreme State Security Court, 11 June 2002, **Exhibit C-0002**; 2019 Merits Hearing, Day 6, pp. 14:11-20:6.

¹³¹ Judgment of the Supreme State Security Court, 11 June 2002, **Exhibit C-0002**, p. 15.

¹³² Judgment of the Supreme State Security Court, 11 June 2002, **Exhibit C-0002**, pp. 17-20.

¹³³ Judgment of the Supreme State Security Court, 11 June 2002, **Exhibit C-0002**, p. 20.

¹³⁴ Extract from Decision of the Administrative Court, 17 December 2002, **Exhibit C-0127**, p. 1.

¹³⁵ Bahgat WS 2, para. 123; Respondent's Statement of Defence, para. 32.

¹³⁶ Decision of the Administrative Court, 29 April 2003, **Exhibit C-0128**, pp. 1-2.

lift the travel ban against him¹³⁷ and to terminate the Freezing Order.¹³⁸

151. On 19 June 2005, the Public Prosecutor lifted the travel ban on Claimant.¹³⁹ On 23 June 2005, Claimant returned to Finland.¹⁴⁰
152. Claimant contends that the shares of Messrs Khabir, El-Bardissy, and Badr in ADEMCO were transferred to Claimant in 2005, as per Claimant's request in a share consolidation report (the "**Share Consolidation Report**").¹⁴¹ Claimant maintains that the Share Consolidation Report confirms the understanding between Mr Bahgat on the one hand, and his wife, daughters, and friends on the other, that the latter held shares in ADEMCO on Claimant's behalf.¹⁴²
153. On 16 May 2006, the Court of Cassation dismissed the Public Prosecutor's appeal against Claimant's acquittal by the Egyptian Supreme State Security Court.¹⁴³
154. On 11 October 2006, the Public Prosecutor lifted the Freezing Order against Claimant.¹⁴⁴
155. In March 2011, a newspaper *Al-Shari Weekly* reported that "a decision was taken to wreck the [Project] ... so that [Mr Ahmed Ezz's] monopoly would not be affected. This was with the personal blessing of the former President and his Prime Minister Atef Obeid who took it upon himself to wreck this major project ...".¹⁴⁵

4. Finnish proceedings regarding Claimant's nationality

156. On 23 April 2013, during the pendency of this arbitration, the Finnish Immigration Service issued a decision in which it decided that Claimant had lost his Finnish nationality when he obtained Egyptian nationality on 28 September 1997.¹⁴⁶ On 26 January 2015, the Helsinki

¹³⁷ Request by Claimant's lawyer to the Public Prosecutor, June 2003, **Exhibit C-0130**; Request from Claimant's lawyer to the Public Prosecutor, 19 October 2004, **Exhibit C-131**; 2018 Merits Hearing, Day 1, pp. 43:9-44:5.

¹³⁸ Court decision, 8 March 2003, **Exhibit C-0149**; Request, 21 May 2003, **Exhibit C-0154**; Request, 22 January 2004, **Exhibit C-0156**; Court decision, 14 April 2004, **Exhibit C-0157**; 2018 Merits Hearing, Day 1, p. 44:6-25.

¹³⁹ Letter from the Public Prosecutor, 20 June 2005, **Exhibit C-0096**; 2019 Merits Hearing, Day 6, p. 8:5-7.

¹⁴⁰ Bahgat WS 2, paras. 126-127, 130; Jurisdiction Hearing, Day 1, p. 126:8-19.

¹⁴¹ Claimant's Reply, para. 51 *citing* Letter from Mr Hameed, 24 July 2005, **Exhibit C-0051**.

¹⁴² Claimant's Reply, para. 55; 2018 Merits Hearing, Day 1, pp. 87:25-88:24.

¹⁴³ Claimant's Statement of Claim, para. 3.12; Copy of Judgment of the Court of Cassation, 16 May 2006, **Exhibit C-0058**, p. 10.

¹⁴⁴ Claimant's Reply, para. 138; Claimant's Statement of Claim, para. 3.12; Respondent's Statement of Defence, para. 116.

¹⁴⁵ Newspaper articles *Al-Shari* issue no. 87, 4 March 2011, **Exhibit C-0060**.

¹⁴⁶ Claimant's Counter-Memorial on Jurisdiction, paras. 3.35-37.

Administrative Court upheld the determination of the Finnish Immigration Service.¹⁴⁷

157. On 15 November 2016, Claimant informed the Tribunal that he had prevailed on appeal before the Supreme Administrative Court and that the decisions of the Helsinki Administrative Court and Finnish Immigration Service had been revoked. Claimant provided the Tribunal with a copy of the judgment of the Supreme Administrative Court dated 15 November 2016 (the “**SAC Judgment**”) in Finnish.¹⁴⁸
158. In its Jurisdiction Decision, the Tribunal dismissed the jurisdiction *ratione personae* and *ratione temporis* objections advanced by Respondent and also found that it had jurisdiction to hear claims arising out of alleged breaches of the Egyptian Investment Law.¹⁴⁹ Professor Orrego Vicuña provided a separate opinion expressing concerns about the holding on jurisdiction *ratione personae*, *inter alia*, including his view that only exceptional circumstances may justify departing from the international law rule prohibiting claims by a dual national against the State whose nationality it also holds.¹⁵⁰

B. LEGAL FRAMEWORK

1. The 1980 BIT

159. Article 1(1) of the 1980 BIT, contains the definition of the term “investment”:

For the purposes of this Agreement:

1. The term “investment” means every kind of asset and more particularly, though not exclusively:
 - a) Movable and immovable property as well as other rights, such as mortgage, lien, pledge, usufruct and similar rights;
 - b) Shares or other kinds of interest in companies;
 - c) Title to money or pecuniary claim or right to any performance having an economic value;
 - d) Copyrights, industrial property rights, technical processes, trade names and goodwill; and
 - e) Such business concessions under public law, including concessions regarding the prospecting for or the extraction or winning of natural resources, which entitle the holder to a legal position of some duration;

160. According to Article 2 of the 1980 BIT, investors are afforded fair and equitable treatment (“**FET**”), national treatment, and most-favoured nation (“**MFN**”) protections:

¹⁴⁷ Judgment of the SAC, 15 November 2016, **Exhibit C-0070**, p. 1.

¹⁴⁸ SAC Judgment, 15 November 2016, **Exhibit C-0070**, p. 15.

¹⁴⁹ Jurisdiction Decision, paras. 318-319.

¹⁵⁰ Jurisdiction Decision, Separate Opinion of Professor Orrego Vicuña.

1. Each Contracting State shall, subject to its laws and regulations, at all times ensure fair and equitable treatment to the investments of nationals and companies of the other Contracting State.
2. Investments by nationals of either Contracting State in the territory of the other Contracting State shall not be subjected to a treatment less favourable than that accorded to investments by nationals or companies of third States.
3. Notwithstanding the provisions of paragraph 2 of this Article, a Contracting State which has concluded with one or more other States an agreement regarding the formation of a customs union or a free-trade area shall be free to grant a more favourable treatment to investments by nationals and companies of the State or States which are also parties to such an agreement, or by nationals and companies of these States. A Contracting State shall also be free to grant a more favourable treatment to investments by nationals and companies of other States, if this is stipulated under bilateral agreements concluded with such States before the date of signature of this Agreement.

161. Article 3(1) of the 1980 BIT contains provisions relating to expropriation, nationalization or any other dispossession:

1. Neither Contracting State shall take any measure of expropriation, nationalization or any other dispossession directly or indirectly against the investment of a national or a company of the other Contracting State except under the following conditions:
 - a) The measures are taken in the public interest and under due process of law;
 - b) The measures are not discriminatory; and
 - c) The measures are accompanied by provisions for the payment of prompt, adequate and effective compensation, which shall be freely transferable in convertible currencies from the Contracting State, and the transfer is made within such a period as normally required for the completion of transfer formalities.

162. Article 7 of the 1980 BIT provides for dispute resolution:

1. Any dispute which may arise between a national or a company of one Contracting State and the other Contracting State in connection with an investment on the territory of that other Contracting State or between the Contracting States with respect to the interpretation or application of this Agreement shall be subject to negotiation between the parties in dispute.
2. If the dispute cannot be resolved in accordance with the provisions of the preceding paragraph, any of the parties concerned may demand that the dispute be submitted to arbitration in accordance with the following procedure:
 - a) An arbitration panel consisting of three arbitrators shall be established. Each disputing party shall designate one arbitrator and the two thus designated arbitrators shall appoint the third arbitrator, who shall be chairman. The chairman shall not be a national of a Contracting State.
 - b) Each party shall designate its arbitrator within two months after notice has been given by one disputing party to the other that it wishes to submit the dispute to arbitration. The Chairman is to be agreed upon within three months after such notice. If the time limits have not been adhered to, and the parties to the dispute have not agreed on another designation procedure, any disputing party may request the International Centre for Settlement of Investment Disputes, established under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States, dated 18 March 1965, to effect the necessary

designations.

- c) The arbitration panel shall take its decision by simple majority. The decision of the arbitration panel shall be binding on the parties to the dispute.
- d) The arbitration panel may decide on its place of assembly. It shall adopt its own rules of procedure. The costs of the arbitration shall be shared equally between the parties to the dispute. The arbitration is conducted in the English language.

2. The 2004 BIT

163. Article 2 of the 2004 BIT provides for the promotion and protection of investments:

- 1. Each Contracting Party shall promote in its territory investments by investors of the other Contracting Party and shall, in accordance with its laws and regulations, admit such investments.
- 2. Each Contracting Party shall in its territory accord to investments and returns of investments of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.
- 3. Neither Contracting Party shall in its territory impair by unreasonable or arbitrary measures the acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments of investors of the other Contracting Party.

164. Article 3(1) of the 2004 BIT on the treatment of investments provides that:

Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to its own investors and their investments with respect to the acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments.

165. Article 5(1) of the 2004 BIT on expropriation provides:

Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized or subjected to any other measures, direct or indirect, having an effect equivalent to expropriation or nationalization (hereinafter referred to as "expropriation"), except for a purpose which is in the public interest, on a non-discriminatory basis, in accordance with due process of law, and against prompt, adequate and effective compensation.

166. Article 9 of the 2004 BIT on dispute resolution provides in part:

- 1. Any dispute arising directly from an investment between one Contracting Party and an investor of the other Contracting Party should be settled amicably between the two parties concerned.
- 2. If the dispute has not been settled within three (3) months from the date on which it was raised in writing, the dispute may, at the choice of the investor, be submitted:

...

- (d) to any ad hoc arbitration tribunal which unless otherwise agreed on by the parties to the dispute, is to be established under the Arbitration Rules

of the United Nations Commission on International Trade Law
(UNCITRAL)

3. An investor who has submitted the dispute to a national court may nevertheless have recourse to one of the arbitral tribunals mentioned in paragraphs 2(b) to (d) of this Article if, before a judgement has been delivered on the subject matter by a national court, the investor declares not to pursue the case any longer through national proceedings and withdraws the case.

167. Article 12(2) of the 2004 BIT elaborates on the application of other Rules:

Each Contracting Party shall observe any other obligation it may have with regard to a specific investment of an investor of the other Contracting Party.

3. Egyptian Investment Law

168. Article 8 of the Egyptian Investment Law states that “Companies and firms may not be nationalised or confiscated.”

169. Article 9 of the Egyptian Investment Law states that “Companies and firms may not be sequestered or have their assets attached, seized, distrained, frozen or confiscated by administrative means.”

170. Article 12 of the Egyptian Investment Law states that “Companies and firms shall be entitled to acquire the necessary building land and built properties to carry on or expand their business, whatever the nationality, domiciles or percentage participation of the partners.”

V. THE PARTIES’ CLAIMS ARISING UNDER THE 1980 BIT

171. In this Part V, the Tribunal deals with the Parties’ claims arising under the 1980 BIT. The Tribunal recalls that pursuant to the Jurisdiction Decision, the substantive provisions of the 1980 BIT will be applied to actions that took place before 5 February 2005 and the substantive provisions of the 2004 BIT will be applied to actions that took place after 5 February 2005.¹⁵¹

172. The Tribunal first addresses the new jurisdictional objections raised by Respondent in its Statement of Defense (**Section A**) followed by allegations of expropriation (**Section B**), unfair and inequitable treatment (**Section C**), and alleged breaches pursuant to Article 2(2) of the 1980 BIT (**Section D**).

173. In short, Respondent raises three new jurisdictional objections in its Statement of Defense.

¹⁵¹ Jurisdiction Decision, para. 315.

First, Respondent argues that the 1980 BIT does not apply to any acts against Claimant that are personal injury claims (the “**Personal Injury Objection**”). Second, it submits that the 1980 BIT does not apply beyond Claimant’s shares and capital contributions to the Companies (the “**Investment Objection**”). Respondent further states that the Tribunal has no jurisdiction to award moral damages (explained in Section VIII.B.6). Respondent argues that Claimant cannot import, via the MFN clause in Article 2(2) of the 1980 BIT, investment protection standards that are not contained in the 1980 BIT. In any event, on the merits, Respondent argues that it has not breached the investment protections that Claimant seeks to import, nor any substantive provisions of the 1980 BIT.

174. Claimant contests Respondent’s jurisdictional objections, while also noting that they are untimely. Relying on the MFN clause in the 1980 BIT, Claimant argues that Respondent has breached various protections of the Agreement on Encouragement and Reciprocal Protection of Investments between the Arab Republic of Egypt and the Kingdom of the Netherlands (the “**Netherlands-Egypt BIT**”) and the Agreement on the Promotion and Protection of Investments between the Government of the Republic of Korea and the Government of the Arab Republic of Egypt (the “**Korea-Egypt BIT**”). Claimant further argues that Respondent has breached the FET standard and protections against expropriation contained in the 1980 BIT itself.

A. THE TRIBUNAL’S JURISDICTION UNDER THE 1980 BIT

1. Timeliness of Respondent’s Objections

Respondent’s Position

175. Respondent rejects Claimant’s allegations that its jurisdictional objections are untimely and urges the Tribunal to consider the jurisdictional objections raised in its Statement of Defence.¹⁵² Respondent argues that its Request for Bifurcation only covered its objections *ratione temporis* and *ratione materiae* (that were completely separable from the merits of this arbitration) and included a broad reservation of rights to raise other jurisdiction objections that are entwined with the merits with the Statement of Defence.¹⁵³
176. Respondent cites a number of investment arbitration decisions where certain jurisdictional objections were considered in a dedicated phase, whilst others were considered with the

¹⁵² Respondent’s Rejoinder, paras. 56, 59.

¹⁵³ Respondent’s Rejoinder, para. 57 *citing* Respondent’s Request for Bifurcation, para. 152, p. 43.

merits.¹⁵⁴ In any event, Respondent maintains that belated jurisdiction objections are not to be rejected outright by the Tribunal, but may cause the objecting party to be subject to procedural sanctions.¹⁵⁵

Claimant's Position

177. Claimant submits that at this merits phase of the arbitration it is untimely for Respondent to raise jurisdictional arguments.¹⁵⁶ Claimant recalls that the Tribunal has previously struck out belated jurisdictional objections raised by Respondent after its Memorial on Jurisdiction of 15 July 2013.¹⁵⁷ Claimant therefore argues that Respondent is precluded from now raising its Personal Injury Objection and Investment Objection.¹⁵⁸ Claimant requests that the above objections be declared inadmissible.¹⁵⁹

Tribunal's Analysis

178. The Tribunal will deal with the specific objections made by Respondent, Respondent's Personal Injury Objection and Respondent's Investment Objection (see below at Paragraphs 183 to 187 and Paragraphs 193 to 199 respectively). The Tribunal notes that the objections made by Respondent have not been dealt with in the Decision on Jurisdiction. However, the Tribunal does not agree with Claimant that these objections were belated. The issues concerned are intricately linked with the merits and, accordingly, are to be dealt with in the context of the merits.

2. Respondent's "Personal Injury Objection"

Respondent's Position

179. Respondent argues that the protections of the 1980 BIT cover only Finnish "investments", not Finnish "investors".¹⁶⁰ By contrast, Respondent cites Article 3(1) of the 2004 BIT that accords protections to both "investors" and to their "investments".¹⁶¹ Respondent argues that

¹⁵⁴ Respondent's Rejoinder, para. 58 *citing* *Impregilo v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, **Exhibit CLA-0070**, para. 285; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, **Exhibit CLA-0091**, paras. 107, 257-261; *Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, **Exhibit RLA-0130**, paras. 112-13.

¹⁵⁵ Respondent's Rejoinder, para. 58.

¹⁵⁶ Claimant's Reply, para. 164.

¹⁵⁷ Claimant's Reply, para. 164, *citing* Procedural Order No. 5, 17 May 2017, para. 30.

¹⁵⁸ Claimant's Reply, para. 165.

¹⁵⁹ Claimant's Reply, para. 166.

¹⁶⁰ Respondent's Statement of Defense, paras. 49-52 *citing* 1980 BIT, Articles 2(1), 2(2), 3(1), 7.

¹⁶¹ Respondent's Statement of Defense, paras. 49-52 *citing* 2004 BIT, Article 3(1).

had the drafters of the 1980 BIT intended to grant protections to investors, they should have explicitly stated so.¹⁶² Respondent notes that past tribunals (*Biloune v. Ghana*) have declined jurisdiction over claims arising from actions directed at the investor rather than the investment.¹⁶³

180. Respondent contends that the majority of the acts alleged by Claimant (such as Claimant's arrest, the imposition of the Freezing Order, the alleged political campaign against Claimant, the alleged discrimination in favour of steel companies controlled by Mr Ezz, Claimant's imprisonment, and the travel ban imposed on Claimant) are actions directed at Claimant rather than at his investment, and therefore fall outside the scope of the 1980 BIT.¹⁶⁴ Respondent underlines that the criminal proceedings against Claimant are irrelevant to this arbitration and that Claimant should not bring "under the guise of an investment treaty claim what is in reality a personal injury claim."¹⁶⁵

Claimant's Position

181. Claimant maintains that Respondent's misconduct affected Claimant's *investment* (the Project), not simply Claimant as an *investor*.¹⁶⁶ In particular, Claimant notes that Respondent's conduct prevented the Companies from pursuing the Project by depriving them of their management and that Respondent's actions against Claimant were intimately connected to his actions against the Project.¹⁶⁷ Claimant contends that "steps against him were taken precisely in order to target (and destroy) the investment."¹⁶⁸
182. Further, Claimant denies any distinction between "investment claims" and "investor claims".¹⁶⁹ He points out that the authorities cited by Respondent in support of this distinction also note that personal injury to an investor can be considered by a tribunal if the property rights affecting the investment were also affected.¹⁷⁰ Moreover, according to Claimant, the tribunal in *Biloune v. Ghana* only disregarded those alleged violations of the investor's human rights that were independent causes of action and that were not relevant to the

¹⁶² Respondent's Statement of Defense, para. 53.

¹⁶³ Respondent's Statement of Defense, paras. 54-55 citing Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press (2012), **Exhibit RLA-0088**, pp. 136-137.

¹⁶⁴ Respondent's Statement of Defense, paras. 56-58; Respondent's Rejoinder, para. 95.

¹⁶⁵ Respondent's Statement of Defense, para. 59; 2018 Merits Hearing, Day 1, p. 93:3-9.

¹⁶⁶ Claimant's Reply, para. 168.

¹⁶⁷ Claimant's Reply, paras. 168-169.

¹⁶⁸ Claimant's Reply, para. 169 (emphasis in original).

¹⁶⁹ Claimant's Reply, para. 170.

¹⁷⁰ Claimant's Reply, para. 172.

investment claim.¹⁷¹

Tribunal's Analysis

183. The Tribunal understands Respondent to advance two different objections, a general and a specific one, which supplement each other. In general, Respondent argues that the term “investment” as referred to in the 1980 BIT should be interpreted narrowly with the consequence that the 1980 BIT does not provide jurisdiction to the Tribunal to consider measures taken against the investor, but only in respect of the investment.
184. The Tribunal also notes that Respondent further limits the interpretation of the term “investment” so as to exclude indirect investment (on that see below). Finally, and in respect of the dispute to be decided here Respondent takes the view that the measures against Claimant were directed against him as a person rather than against the investment.
185. The Tribunal holds that the approach advanced by Respondent in general or in respect of the facts of this dispute are not convincing. The success of investments depends on more factors than the unrestricted flow of capital or the absence of measures against the property. Apart from the financial aspect, the success of investments depends upon effective management and making use of the adequate technical expertise, amongst other factors. Measures against an investor or the management, or measures deteriorating circumstances which were favourable for the investment, may equally have a negative impact upon the investment. It would reduce the effectiveness of the system of investment protection system if it would only prohibit limitations to the flow of capital or infringements of property.
186. Both Parties refer for support to *Biloune v. Ghana*.¹⁷² The Tribunal understands from this *Biloune v. Ghana* award that only those alleged violations of the investor’s human rights were disregarded which had no relationship with the investment claim. *Biloune v. Ghana* cannot be used to support the proposition that measures taken against the investor are generally irrelevant when deciding whether an infringement of investment has taken place. In any event, there is ample evidence of measures that were directed at the investment.
187. This brings the Tribunal to the second, specific argument advanced by Respondent. The arrest of Claimant was triggered by a letter of the Minister of Industry Technology Development to the President of the Republic in which it was noted that the capital of AISCO included a

¹⁷¹ Claimant’s Reply, para. 173.

¹⁷² Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press (2012), **Exhibit RLA-0088**, p. 137, fn. 2 citing *Biloune v. Ghana* in page 137.

payment of USD 30 Million to MD, which had not been proven (see above at Paragraph 133). This establishes, in the view of the Tribunal, a close connection between the arrest and the investment. It is evident for the Tribunal that the Freezing Order covering the bank accounts of Claimant as well as the bank accounts of the Companies, the raid of the offices of Claimant, and the prohibition of the staff to enter the site of the Project, were investment related and, *de facto*, ended the Project. Therefore, in the view of the Tribunal, the measures taken by Respondent were predominantly directed against the investment.

3. Respondent's "Investment Objection"

Respondent's Position

188. Respondent argues that the definition of "investment" in the 1980 BIT only covers "every kind of asset and more particularly, though not exclusively ... (b) Shares or other kinds of interest in companies; (c) Title to money or pecuniary claim or right to any performance having an economic value" that are made by nationals of the other contracting state.¹⁷³ Unlike the 2004 BIT, Respondent notes that the 1980 BIT does not cover investments made by companies that are owned and controlled by investors of the other contracting state.¹⁷⁴
189. Accordingly, Respondent maintains that while Claimant's shares and capital contributions to the Companies may be regarded as investments protected by the 1980 BIT, investments made by and assets held by the Companies are not "investments" under the 1980 BIT.¹⁷⁵ Respondent argues that Claimant cannot rely on Article 5(4) of the Egypt-Korea BIT because an MFN provision only allows substantive investment provisions to be imported.¹⁷⁶ Article 5(4) is not a substantive provision because it delineates the scope of application of the treaty, and therefore, cannot be characterised as more or less favourable than the 1980 BIT.¹⁷⁷ Respondent argues that tribunals have cautioned against using MFN clauses to expand the scope of application of a treaty.¹⁷⁸

¹⁷³ Respondent's Statement of Defense, para. 67.

¹⁷⁴ Respondent's Statement of Defense, para. 68 *citing* 2004 BIT, Article 1 ("[i]nvestments made in the territory of one Contracting Party by any legal entity of that same Contracting Party, but actually owned and controlled, directly or indirectly, by investors of the other Contracting Party...").

¹⁷⁵ Respondent's Statement of Defense, para. 70.

¹⁷⁶ Respondent's Rejoinder, para. 82.

¹⁷⁷ Respondent's Rejoinder, para. 83.

¹⁷⁸ Respondent's Rejoinder, para. 84 *citing* *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela* ICSID Case No. ARB(AF)04/6, Award, 16 January 2013, **Exhibit RLA-0145**, para. 133; *Técnicas Medioambientales Tecmed, SA v. The United Mexican States* ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, **Exhibit RLA-0102**, para. 69.

Claimant's Position

190. Claimant maintains that the protections under the 1980 BIT cover alleged misconduct against Claimant, the Companies, other members of senior management and equity stakeholders in the Companies, which was aimed at destroying the Project (i.e., the investment in question).¹⁷⁹ Claimant argues that the shares in Companies that he held in his own name and the USD 39 million capital investment he made in the Companies are “investments” under the 1980 BIT.¹⁸⁰ Further, Claimant contends that the investments made by and assets held by the Companies (including the rights under the Commitment Agreement, land, buildings, equipment, bank accounts, and contractual rights) are also “investments” protected by the 1980 BIT.¹⁸¹
191. Claimant argues that the Companies’ assets constitute investments for the purposes of the 1980 BIT.¹⁸² According to Claimant, Article 1(1)(a) of the 1980 BIT covers moveable and immoveable property, and Article 1(1)(e) covers concessions, but there is no requirement that these assets be directly held.¹⁸³ Claimant points to several prior arbitral awards that have held that indirect investments are protected by investment treaties.¹⁸⁴
192. Claimant further claims that he can, through the MFN provision in Article 2(2) of the 1980 BIT, benefit from the protections in Article 5(4) of the Egypt-Korea BIT, which states that:

Where one Contracting Party expropriates the assets of a company which is incorporated or constitutes under its laws and regulations, and in which investors of the other Contracting Party own shares or other forms of participation, the provisions of this Article shall be applied.¹⁸⁵

Tribunal's Analysis

193. Respondent relies on the absence of the mention of indirect investment in the 1980 BIT compared to the 2004 BIT and two ICSID awards, *Vanessa Ventures v. Venezuela* and *Tecmed v. Mexico*.

¹⁷⁹ Claimant’s Reply, para. 161.

¹⁸⁰ Claimant’s Statement of Claim, paras. 2.7-2.10.

¹⁸¹ Claimant’s Statement of Claim, para. 2.19; 2019 Merits Hearing, Day 6, p. 37: 6-14.

¹⁸² Claimant’s Reply, para. 181.

¹⁸³ Claimant’s Reply, para. 209; 2018 Merits Hearing, Day 1, pp. 49:9-52:2.

¹⁸⁴ Claimant’s Reply, para. 209 citing *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, **Exhibit CLA-0090**, para. 165; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, **Exhibit CLA-0091**, para. 123.

¹⁸⁵ Claimant’s Reply, para. 210.

194. The starting point for the Tribunal has to be the definition of “investment” as contained in Article 1(1) of the 1980 BIT which reads as follows.

1. The term “investment” means every kind of asset and more particularly, though not exclusively.

a) Movable and immovable property as well as other rights, such as mortgage, lien, pledge, usufruct and similar rights;

b) Shares or other kinds of interest in companies;

c) Title to money or pecuniary claim or right to any performance having an economic value;

d) Copyrights, industrial property rights, technical processes, trade names and goodwill; and

e) Such business concessions under public law, including concessions regarding the prospecting for an extraction or winning of natural resources, which entitle the holder of a legal position of some duration;

provided that the investment has been made in accordance with the laws and regulations in the host country but irrespective of whether the investment was made before or after the entry into force of this Agreement.

195. The Tribunal notes that Article 1 of the 1980 BIT does not expound an abstract definition of the term “investment”; there is no reference to direct or indirect investment. It rather includes the more sweeping term “every kind of asset” and resorts to a non-exclusive list of categories of investments. The specific categories included constitute examples rather than excluding others as indicated by the words “not exclusively” at the beginning of the list. The 1980 BIT at Article 1(1)(b) lists “shares or other kinds of interest in companies” as being an investment. The 1980 BIT does not require that there be no interposed companies between the ultimate owners of the company. Therefore, a literal reading of the 1980 BIT does not support the allegation that the definition of investment excludes indirect investments. The Tribunal is aware of the fact that the 2004 BIT explicitly refers to indirect investment. The Tribunal further notes that the Preamble of the 2004 BIT states the Parties’ desire “...to promote greater economic cooperation between them, with respect to investments by nationals and companies of one Contracting Party in the territory of the other Contracting Party.” Both factors in the view of the Tribunal do not, however, convincingly lead to an interpretation of the 1980 BIT excluding indirect investments from Article 1(1). The most reasonable interpretation for this difference between the two BITs is that such reference to indirect investment in the 2004 BIT was meant to be a clarification. To come to this conclusion, for the Tribunal, the literal reading of Article 1(1) of the 1980 BIT, which also refers to “shares or other kinds of interest in companies,” is of essence. Such reference would not make sense if indirect investment was excluded from the 1980 BIT.

196. Apart from the textual interpretation of Article 1(1) of the 1980 BIT, taking the object and purpose of the investment protection into account leads to the same result, namely, that the term “investment” covers direct and indirect investment alike.
197. Additionally, the Tribunal would like to emphasise that, economically speaking, there is no difference between direct and indirect investment; in consequence it would be unreasonable to afford indirect investment lesser protection than direct investment. The jurisprudence is that indirect investments are covered by the definition of an “investment” unless specifically excluded. Accordingly, investments as defined in Article 1(1) of the 1980 BIT can be direct or indirect investments.
198. This reading of Article 1(1) of the 1980 BIT is supported by the international jurisprudence of ICSID tribunals in cases interpreting other investment treaties with clauses similar to the one at hand. Examples to that extent are *Siemens AG v. The Argentine Republic*,¹⁸⁶ *Ioannis Kardassopoulos v. The Republic of Georgia*,¹⁸⁷ and *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*.¹⁸⁸
199. On the basis of the considerations above, the Tribunal discards the narrow interpretation of the term “investment” in the 1980 BIT, as advocated by Respondent.

B. EXPROPRIATION

Claimant’s Position

200. Claimant recalls that Article 3(1) of the 1980 BIT protects investments from “any measure of expropriation, nationalization or any other dispossession directly or indirectly against the investment of a national.”¹⁸⁹ Claimant notes that the language of Article 3(1) is broad because it applies to “any other dispossession” and because it applies to measures which directly or indirectly give rise to an expropriation, nationalization, or other dispossession.¹⁹⁰
201. Claimant points to investment decisions in which arbitral tribunals have interpreted expropriation to include all forms of substantial deprivation. This could result, according to

¹⁸⁶ *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, **Exhibit CLA-0103**.

¹⁸⁷ *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, **Exhibit CLA-0091**.

¹⁸⁸ *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, **Exhibit CLA-0090**.

¹⁸⁹ Claimant’s Statement of Claim, para. 4.3.

¹⁹⁰ Claimant’s Reply, para. 184.

Claimant, from:

depriving the investor of control over the investment, managing the day-to-day operations of the company, arresting and detaining company officials or employees, supervising the work of officials, interfering in administration, impeding the distribution of dividends, interfering in the appointment of officials or managers, or depriving the company of its property or control in whole or in part.¹⁹¹

202. Further, Claimant highlights that the concept of indirect expropriation or “unreasonable interference with the use, enjoyment, or disposal of property” is well-established.¹⁹² Claimant argues, relying on *Quiborax v. Bolivia*, that State interference with company assets can amount to indirect expropriation.¹⁹³
203. Claimant argues that the following conduct of Respondent, which deprived the Companies of the ability to manage their business, amounted to an expropriation of his investment: (i) Claimant’s arrest on 5 February 2000 that deprived the Companies of their chief executive officer and resulted in the Project Partners withdrawing from the Project, (ii) the removal of Claimant’s and the Companies’ documents from their offices in February 2000 that deprived the Companies of their ability to manage their business, (iii) the 9 February 2000 Freezing Order and the resulting discontinuation of the salaries of the Companies’ employees, (iv) the confirmation of the Freezing Order by the Cairo Criminal Court on 20 February 2000, and (v) the resulting permanent closure of the Companies’ offices, the removal of their officers from the Project site, and Respondent’s takeover of the Companies’ properties.¹⁹⁴
204. Claimant clarifies that Respondent did not meet the conditions of Article 3(1)(a)-(c) of the 1980 BIT, and therefore this was not a lawful expropriation.¹⁹⁵
205. Claimant submits that even if the only protected investments in this case are his shareholding in and substantial capital contribution to the Companies, the seizure and non-return of the

¹⁹¹ Claimant’s Statement of Claim, para. 4.6 citing *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, **Exhibit CLA-0021**, para. 284; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, **Exhibit CLA-0022**, paras. 326-30.

¹⁹² Claimant’s Reply, paras. 185-86 citing Draft Convention on the International Responsibility of States for Injuries to Aliens, *The American Journal of International Law*, Vol. 55, No. 3, (July 1961), **Exhibit CLA-0080**, p. 553.

¹⁹³ Claimant’s Reply, paras. 186-87 citing *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, **Exhibit CLA-0081**, para. 238. Claimant also refers to *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, **Exhibit CLA-0078**, para. 111; *Koch Minerals Sàrl v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, **Exhibit CLA-0079**, paras. 5.4 and 5.57.

¹⁹⁴ Claimant’s Statement of Claim, para. 4.5; Claimant’s Reply, para. 176.

¹⁹⁵ Claimant’s Statement of Claim, para. 4.8.

Companies' assets amounts to indirect expropriation of Claimant's investments for the purposes of Article 3 of the 1980 BIT.¹⁹⁶ According to Claimant, he need not have lost title to the shareholding for expropriation to have taken place.¹⁹⁷

206. Claimant submits that *Pope & Talbot v. Canada*, upon which Respondent relies, in fact supports Claimant's case.¹⁹⁸ The *Pope & Talbot v. Canada* tribunal found that expropriation includes action that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property, which is what Respondent has done in the present case.¹⁹⁹
207. Claimant denies that expropriation only results when an investor has lost control of the investment, and notes that expropriation can involve the taking of the use or reasonably expected benefit of the property.²⁰⁰ Claimant argues that the Companies have not been able to continue operations and that, following the reasoning of the tribunal in *LG&E Energy Group v. Argentine Republic*, the economic impact of Respondent's measures in terms of its duration and impact on Claimant's reasonable expectations, was expropriatory.²⁰¹
208. Claimant argues that measures need not be irreversible and permanent to amount to expropriation.²⁰² The tribunal in *SD Myers v. Canada* (upon which Respondent relies) found that expropriation could be partial or temporary.²⁰³ In any event, Claimant's investment was permanently destroyed: his investment was subject to a degree and duration of interference that amounts to expropriation.²⁰⁴
209. Claimant argues that the expropriatory effect of a measure, rather than any expropriatory purpose, is decisive.²⁰⁵ Claimant submits that there has been a substantial deprivation of his

¹⁹⁶ Claimant's Reply, para. 180.

¹⁹⁷ Claimant's Reply, para. 180.

¹⁹⁸ Claimant's Reply, para. 189.

¹⁹⁹ Claimant's Reply, paras. 189-90 citing *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, **Exhibit RLA-0097**, para. 102.

²⁰⁰ Claimant's Reply, para. 192.

²⁰¹ Claimant's Reply, para. 191 citing *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, **Exhibit RLA-0099**, paras. 177, 185, 190.

²⁰² Claimant's Reply, para. 193.

²⁰³ Claimant's Reply, para. 194 citing *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Partial Award, 13 November 2000, **Exhibit RLA-0101**, para. 283; *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, **Exhibit CLA-0038**, para. 99; 2018 Merits Hearing, Day 1, pp. 59:23-60:14.

²⁰⁴ Claimant's Reply, para. 196; 2019 Merits Hearing, Day 6, pp. 36:25-37:5.

²⁰⁵ Claimant's Reply, para. 199 citing *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, **Exhibit RLA-0103**.

investment, even if limited to his shareholding and capital investment in the Companies.²⁰⁶ In any event, Claimant submits that, as per Respondent's submission, the purpose of the measures was to take Claimant's property.²⁰⁷

210. Claimant clarifies that he does not intend to return to Egypt to execute the Project.²⁰⁸ He further clarifies that any "legitimate" concerns Respondent may have had cannot diminish Claimant's expropriation complaint because the measures taken by Respondent, being unsuitable, unnecessary, and excessive, were disproportionate.²⁰⁹ He further argues that the measures taken by Respondent (including Claimant's arrest before he could respond to the CMA's allegations), being in disregard of due process, were arbitrary.²¹⁰

Respondent's Position

211. Respondent denies that it has expropriated Claimant's investments either directly or indirectly.²¹¹ According to Respondent, if Egypt wanted to extend protections for "derivative claims", it would have done so expressly, as in the Egypt-Korean BIT, the 2004 Egypt-Finland BIT, and the Egypt-US BIT.²¹²
212. Citing *Pope & Talbot v. Canada*, Respondent argues that expropriation involves the taking of a property or of the use or reasonable expected benefit of the property.²¹³ Relying on *LG&E Energy v. Argentine Republic*, Respondent highlights that for there to be expropriation, the investor must establish loss of control over its investment pursuant to State measures that are irreversible and permanent.²¹⁴ Additionally, Respondent contends that the State measures in question must envisage the taking of the property that is the subject of the expropriation.²¹⁵
213. Respondent submits that it did not indirectly expropriate Claimant's share in the

²⁰⁶ Claimant's Reply, para. 200.

²⁰⁷ Claimant's Reply, para. 197.

²⁰⁸ Claimant's Reply, para. 201; 2018 Merits Hearing, Day 2, pp. 127:19-130:11.

²⁰⁹ Claimant's Reply, paras. 204-205 citing *Electrabel SA v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, **Exhibit CLA-0085**, para. 179.

²¹⁰ Claimant's Reply, para. 206 citing *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, I.C.J Reports 1989, Judgment, 20 July 1989, **Exhibit CLA-0087**, para. 128.

²¹¹ Respondent's Statement of Defense, paras. 84, 92; Respondent's Rejoinder, para. 61.

²¹² 2018 Merits Hearing, Day 1, p. 180:1-10.

²¹³ Respondent's Statement of Defense, para. 87 citing *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000 **Exhibit RLA-0097**, para. 102.

²¹⁴ Respondent's Statement of Defense, para. 88 citing *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, **Exhibit RLA-0099**, paras. 188, 191; *S.D. Myers, Inc. v. Government of Canada (UNCITRAL)*, Partial Award, 13 November 2000, **Exhibit RLA-0101**, paras. 287-88.

²¹⁵ Respondent's Statement of Defense, para. 88.

Companies.²¹⁶ Respondent maintains that the test to establish indirect expropriation is stringent: Claimant must still establish substantial deprivation of its investment due to the State's conduct.²¹⁷ According to Respondent, the "substantial deprivation" test requires proof of substantial loss of control or value of the investment²¹⁸ and there cannot be indirect expropriation where the investor retains control over the overall investment (even though the investor has been deprived of certain rights).²¹⁹ Respondent underlines that a mere loss of value of the investment cannot establish an indirect expropriation.²²⁰ A finding of indirect expropriation, in Respondent's view, requires a State's measure to be permanent or at least long-lasting.²²¹

214. Respondent argues that Claimant does not allege expropriation of his direct "investments" under the 1980 BIT, i.e., Claimant's shareholding in and capital contributions to the Companies.²²² Respondent notes that both Companies are still in existence and Claimant continues to own his shares in the Companies: these were never taken by Respondent.²²³ Respondent argues that the government continues to support the Project.²²⁴ Respondent

²¹⁶ Respondent's Rejoinder, para. 64.

²¹⁷ Respondent's Rejoinder, para. 66; 2018 Merits Hearing, Day 1, p. 172: 11-21.

²¹⁸ Respondent's Rejoinder, paras. 67, 71 *citing* A. Reinisch, *Expropriation*, *The Oxford Handbook of International Investment Law*, Edited by P. Muchlinski, F. Ortino, Ch. Schreuer, Oxford University Press (2008), **Exhibit RLA-0138**, pp. 438-39; United Nations Commission on International Trade Law, *Taking of Property*, Series on Issues in International Investment Agreements, New York and Geneva, United Nations, (2000), **Exhibit RLA-0139**, p. 41; P. D. Isakoff, *Defining the Scope of Indirect Expropriation for International Investments*, 3 *Global Business Law Review* 189 (2013), **Exhibit RLA-0143**, p. 204.

²¹⁹ Respondent's Rejoinder, para. 67 *citing* *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, **Exhibit RLA-0097**, para. 102; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, **Exhibit RLA-140**, 12 May 2005, paras. 262-63; *Técnicas Medioambientales Tecmed, SA v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, **Exhibit RLA-0102**, para. 115; *Venezuela Holdings B.V. (case formerly known as Mobil Corporation, Venezuela Holdings B.V.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014, **Exhibit RLA-0141**, para. 286; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, **Exhibit CLA-0021**, para. 285; *Azurix Corp v. Argentina* ICSID Case No. ARB/01/12, Award, 14 July 2006, **Exhibit RLA-0100**, para. 322.

²²⁰ Respondent's Rejoinder, para. 68 *citing* *Mamidoil Jetoil Greek Petroleum Products Societe SA v. Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, **Exhibit RLA-0142**, paras. 566-71; *El Paso Energy International Company v. Argentine Republic* ICSID Case No. ARB/01/15, Award, 31 October 2011, **Exhibit RLA-0096**, paras. 245, 249.

²²¹ Respondent's Rejoinder, paras. 69-70 *citing* *LG&E Energy Corp., LG&E Capital Corp. & LG&E International, Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 **Exhibit RLA-0099**, para. 193; *Enkev Beheer B.V. v. The Republic of Poland* PCA Case No. 2013- 01, First Partial Award, 29 April 2014, **Exhibit RLA-0106**, para. 344; 2018 Merits Hearing, Day 1, p. 172: 11-21.

²²² Respondent's Statement of Defense, para. 89.

²²³ Respondent's Statement of Defense, para. 89 *citing* Commercial Registry Excerpts of ADEMCO, 14 February 2018, **Exhibit R-0049**; Commercial Registry Excerpts of AISCO, 14 February 2018, **Exhibit R-0050**.

²²⁴ 2019 Merits Hearing, Day 6, pp. 210:18-214:4.

further notes that the Concession is still in force and that ADEMCO still owns the rights to the Concession.²²⁵ Respondent argues that Egypt did not cancel, rescind, or terminate Claimant's Concession.²²⁶ Respondent notes that as at the alleged period of expropriation (February 2000), the Egyptian Public Prosecutor was merely conducting investigations following the CMA's investigation and had taken conservatory measures against Claimant, all of which were valid and did not amount to an expropriation of Claimant's investments as they did not permanently deprive Claimant of his shares or capital investments in the Companies.²²⁷

215. Respondent maintains that it did not directly expropriate the Companies.²²⁸ First, Respondent reiterates that this claim falls outside the scope of the 1980 BIT, which does not cover the assets of the Companies.²²⁹ Respondent submits that the facts of the case do not support a finding of direct expropriation by it.²³⁰ Respondent argues that the Companies' bank accounts were made subject to the Freezing Order in accordance with Egyptian law.²³¹ Respondent argues that its authorities did not take any assets from the Project site, but merely installed measures to protect these assets.²³² Respondent further alleges that its authorities did not take ownership over the assets of the Companies.²³³ Respondent clarifies that the measures taken against the Companies were not permanent.²³⁴ Respondent points out that Claimant has never filed a request that measures against the Companies be lifted.²³⁵ Respondent states that Claimant has not shown that access to the Project site was denied.²³⁶
216. Respondent highlights that, since the alleged expropriation, Claimant has publically announced his intention to pick up the Project via the Companies and has freely altered his shareholding in the Companies: Claimant acquired further shares in the Companies in May 2004 and even contemplated disposing of his shares in July 2005 (even though this

²²⁵ Respondent's Rejoinder, paras. 61, 72 *citing* Report by the Egyptian Mineral Resources Authority, 27 August 2018, **Exhibit R-0064**.

²²⁶ Respondent's Rejoinder, para. 72.

²²⁷ Respondent's Rejoinder, para. 73.

²²⁸ Respondent's Rejoinder, para. 79.

²²⁹ Respondent's Rejoinder, para. 80.

²³⁰ Respondent's Rejoinder, para. 86.

²³¹ Respondent's Rejoinder, para. 87.

²³² Respondent's Rejoinder, para. 87.

²³³ Respondent's Rejoinder, para. 87.

²³⁴ Respondent's Rejoinder, para. 87.

²³⁵ Respondent's Rejoinder, para. 87.

²³⁶ Respondent's Rejoinder, para. 87.

transaction was not completed).²³⁷

Tribunal's Analysis

217. In order to establish the substantiality of an indirect expropriation, the Tribunal first must define the concept and in a second step ascertain whether the conditions for an indirect expropriation are met.²³⁸
218. The 1980 BIT, like other bilateral investment agreements, does not define what constitutes an expropriation, let alone an indirect expropriation. The relevant part of Article 3(1) of the 1980 BIT reads:
- Neither Contracting State shall take any measure of expropriation, nationalization or any other dispossession directly or indirectly against the investment of a national or a company of the other Contracting State except under the following conditions:...
219. It is to be noted that this article refers to “expropriation, nationalization or any other disposition directly or indirectly against the investment of a national” without offering any definition for the terms used. Therefore, it is for the Tribunal to determine, on the basis of public international law as reflected in international jurisprudence, the criteria which qualify actions or the conduct of a host State directed at or affecting foreign investment as expropriation or other dispossession as referred to in Article 3(1) of the 1980 BIT.
220. In scholarly writing as well as in international jurisprudence two kinds of expropriation are known: direct and indirect.
221. In international jurisprudence, expropriation is described as a measure taken by a public authority if the measure in question deprives the investor of its investment, the deprivation is permanent, and the deprivation finds no justification under the police powers doctrine, that is, ordinary measures of a State and its agencies in the proper execution of the law.²³⁹ For an indirect expropriation to exist, it is generally accepted that the act or acts of the public authority concerned must have the effect of substantially depriving the investor of the

²³⁷ Respondent’s Statement of Defense, paras. 90-91 *citing* Newspaper articles Al-Shari issue no. 87, 4 March 2011, **Exhibit C-0060**.

²³⁸ The Tribunal’s reasoning on the substantial deprivation of Claimant’s investment giving rise to Respondent’s duty to compensate (under the expropriation provisions of either the 1980 or 2004 BIT) was reached by a majority decision.

²³⁹ *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, **Exhibit CLA-0081**, paras. 200-07.

economic value of its investment.²⁴⁰ It is evident that deciding whether an investor has been substantially deprived of the economic value of his investment requires a tribunal to take into account the circumstances of the case.

222. In the dispute before the Tribunal, it is evident and not disputed by the Parties that the claim at issue does not involve direct expropriation since Claimant still is the owner of his shares in ADEMCO and AISCO and since the Concession of ADEMCO concerning mining iron ore is still valid.
223. Therefore, it is only necessary for the Tribunal to establish the meaning of “dispossession directly or indirectly” under Article 3(1) of the 1980 BIT and to ascertain whether the acts and conduct of Respondent substantially deprived Claimant of the economic value of his investment.
224. The interpretation of Article 3(1) of the 1980 BIT has to take into account two principles, the protection of an investment in foreign countries according to public international law on the one side and the sovereign right of States to define and implement their economic and social policy on the other. Therefore, establishing what constitutes a dispossession under Article 3(1) of the 1980 BIT means balancing these two conflicting principles. This has to be achieved by defining an appropriate threshold for what is to be considered dispossession and what constitutes acts or conduct Respondent may undertake according to its legal system.
225. In the view of the Tribunal, the words “dispossession directly or indirectly” cover a situation where acts or the conduct of Respondent do not involve the direct taking over of assets or property of Claimant but effectively neutralize the benefit of Claimant.²⁴¹ In *Pope & Talbot v. Canada*, the tribunal held that the necessary standard of interference to qualify a State’s action as expropriation had to be that the owner “will not be able to use, enjoy or dispose of the property....”²⁴² In *Quiborax v. Bolivia* it is stated that: “For an indirect expropriation to exist, it is generally accepted that the State measure must have the effect of substantially

²⁴⁰ *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, **Exhibit CLA-0081**, para. 238.

²⁴¹ *LG&E Energy Group v. Argentine Republic*, ICSID Case No. ARB/02/01, Decision on Liability, 3 October 2006, **Exhibit RLA-0099**, para. 185 *et seq. citing CME Czech Republic v. Czech Republic* 13 UNCITRAL, Partial Award, 13 September 2001 **Exhibit CLA-0132**.

²⁴² *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, **Exhibit RLA-0097**, para. 102.

depriving the investor of the economic value of its investment.”²⁴³ The *Quiborax v. Bolivia* award proceeds to state that: “Similarly according to the first *Occidental* tribunal, the question is whether there has been a ‘substantial deprivation’ of ‘the use of reasonably expected benefits of the investment’.”²⁴⁴ “In addition as noted in *Burlington*, the deprivation must be permanent and must not be justified by the police powers doctrine.”²⁴⁵ This jurisprudence will guide the Tribunal in the following considerations. The Tribunal in the *Tecmed v. Mexico* case required that claimant had been “radically deprived of the economical use and enjoyment of its investment, as if the rights related thereto – such as the income or benefits related to the [investment] – had ceased to exist.”²⁴⁶ In other words, there will be an indirect expropriation if due to the actions of Respondent, the assets involved have lost their value or economic use for Claimant.

226. The Tribunal is not convinced by the argument of Respondent that Article 3(1) of the 1980 BIT does not cover derivative claims, which are explicitly mentioned in the 2004 Egypt-Finland BIT. The fact that such claims are included in a later BIT does not necessarily mean that the parties had agreed to exclude such claims from the earlier BIT. The explicit reference to derivative claims in the later BIT may have been the consequence of the insight that the 1980 BIT was unclear in this respect. What counts for the Tribunal is first the wording of the 1980 BIT. Article 3(1) of the 1980 BIT speaks of investment. This term is broad and does not exclude derivatives. However, the Tribunal wishes to point out that the expropriation of derivatives, i.e., economic benefits derived from investments, does not necessarily constitute an indirect expropriation. Apart from the effects produced by the measures or conduct in question it is equally necessary to take into account the purpose pursued by the host State concerned. Based on the above, the Tribunal will proceed in three steps. First, it will establish the effects the measures taken by Respondent had and still have on the investment of Claimant. Claimant argues that these measures *de facto* devalued his investment, whereas Respondent emphasises that the investment was without value in the first place, that the

²⁴³ *Quiborax SA, Non Metallic Minerals SA and Allan Fosc Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, **Exhibit CLA-0081**, para. 38 citing *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, **Exhibit RLA-0097**.

²⁴⁴ *Quiborax SA Non Metallic Minerals SA and Allan Fosc Kaplún v. Plurinational State of Bolivia*, (note 261 above), para. 238 citing *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004, para. 89.

²⁴⁵ *Quiborax SA Non Metallic Minerals SA and Allan Fosc Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award of 16 September 2015, **Exhibit CLA-0081**, para. 238 citing *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/05, Decision on Liability, 14 December 2012, **Exhibit CLA-0140**, paras. 471-73.

²⁴⁶ *Técnicas Medioambientales Tecmed, SA v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, **Exhibit RLA-0102**, para. 115.

shares were still the property of Claimant, and the concession for mining was still valid. Second, the Tribunal will ascertain which purpose was pursued by Respondent with the measures undertaken and whether these were legitimate under the rules of public international law on investment protection. Respondent emphasises that the measures taken were fully legitimate under Egyptian law, which Claimant denies. Third, the Tribunal will engage in the question of whether the measures taken were proportional considering the purpose pursued, as Respondent argues and Claimant denies.

227. The Tribunal is aware that Claimant is still the owner of his shares in ADEMCO and AISCO, a fact which Respondent considers to exclude the possibility of qualifying its measures against Claimant as indirect expropriation. The Tribunal takes a different position in this respect as already stated above at Paragraph 225. The taking of property is necessary to qualify State actions against an investor as direct expropriation, whereas other measures, short of taking property but in one way or the other invalidating the investment, such as depriving or almost fully depriving the investment of its future profitability, may be qualified as indirect expropriation. Nevertheless, the Tribunal wishes to point out that the fact that Claimant is still the owner of his shares in ADEMCO and AISCO, which have their basis in the investments made by Claimant, will have to be considered when dealing with damages. As to the effects the measures have had on the investment, the Tribunal is convinced, and Respondent has not disputed this, that the arrest of Claimant on 5 February 2000 deprived ADEMCO and AISCO of their chief executive officer. The removal of Claimant's and the Companies' documents from the offices in February 2000 deprived the Companies of their ability to manage their business. The Freezing Order and its confirmation resulted in the discontinuation of the paying of salaries to the employees. On the same days followed the closure of the offices of ADEMCO and AISCO and the removal of the officers from the Project site. All these measures *de facto* brought an end to all commercial activities of ADEMCO and AISCO. Respondent, without denying these facts, argues that these measures were neither permanent nor irreversible; Claimant could have returned to the management of ADEMCO and AISCO after his release from prison and after opening of access to his as well as the Companies' bank accounts and assets. He could return, as the letter of the Egyptian Prime Minister of November 2018 indicates, to his business even now. The Tribunal does not find these arguments advanced by Respondent to be convincing. Between the arrest of Claimant in February 2000 and his final rehabilitation in 2006 when the Public Prosecutor had lifted the Freezing Order against Claimant on 11 October 2006, more than six years had elapsed.

228. The Parties dispute whether the measures have to be irreversible to qualify as indirect

expropriation. The Tribunal does not consider it necessary to decide on that matter. In its view, no possibility exists to undo the negative impact that the lost 6 years had on Claimant's investment. The Tribunal is aware that the mining concession of ADEMCO is still valid. However, of the 30 years of its duration, due to the standstill of all business between February 2000 and the final rehabilitation of Claimant, 6 years had elapsed. It is, in the view of the Tribunal, unlikely that in the remaining period, the mining project could be brought to economic viability with an adequate return on the investment. At least Respondent has advanced no sustainable argument to substantiate its reasoning in this respect.

229. In conclusion, the Tribunal holds that the measures taken by Respondent against Claimant and his investment as outlined above very significantly and irreversibly devalued his investment.
230. On this basis, the Tribunal will proceed to the second step, namely to ascertain which purpose Respondent's measures pursued and whether these were legitimate under the rules of public international law on investment protection. Respondent characterized the arrest of Claimant and the Freezing Order concerning his, his family's and the Companies' bank accounts, as part of criminal investigations according to Egyptian law. The Tribunal is, in spite of the allegations of Claimant, not in the position to decide as to whether there were other motives for the measures taken against Claimant. However, the undisputed fact that Claimant was arrested even before the period he was given to clarify the question concerning the payment to MD had expired, casts, in the view of the Tribunal, a shadow on the whole procedure. With respect to an allegation of expropriation, the police power defence is not *carte blanche*; a State's actions must be justified, meet the international standards of due process, and *inter alia* be proportional to the threat to public order to which it purports to respond. The Tribunal also notes that the Public Prosecutor objected to lifting the Freezing Order even after Claimant had been acquitted by the Egyptian Supreme State Security Court. However, the Tribunal has already stated (Paragraph 227 above) that the measures taken against Claimant by the prosecution had a substantial, negative effect on his investment.
231. If the investigation had only been triggered by doubts regarding whether the payment to MD had been properly made, this did not justify a Freezing Order on the bank accounts of ADEMCO and AISCO, the closing of the site of ADEMCO and AISCO, and the prohibition on officials of the Companies from returning to the site and conducting their work. The Prosecution should have clearly distinguished between Claimant and ADEMCO as well as AISCO. Therefore, taking action against ADEMCO and AISCO directly, in particular closing

the site, lacked legitimacy from the outset.

232. To conclude, the Tribunal holds that even if the measures taken against Claimant and the Companies had a legitimate purpose they were, as far as their scope was concerned, not proportional to the purpose pursued. Therefore, they fail the police powers test. Due to the significant and lasting negative effect they had on the investment of Claimant, the measures are to be considered as indirect expropriation and thus require compensation.

C. FAIR AND EQUITABLE TREATMENT

Claimant's Position

233. Claimant argues that Respondent has breached the FET standard contained in Article 2(1) of the 1980 BIT.²⁴⁷
234. Relying on arbitral precedent, Claimant argues that the FET standard encompasses an obligation on part of the host state not to:
- (i) abuse its authority or subject investors to harassment or intimidation; (ii) act arbitrarily; (iii) be capricious, indifferent or negligent in its conduct relating to the investment; (iv) act inconsistently or incoherently; (v) engage in a denial of justice; (vi) act in a discriminatory manner; (vii) fail to accord due process; (viii) fail to meet an investor's legitimate expectations; (ix) fail to act with even-handedness; (x) act disproportionately; (xi) act in bad faith; (xii) fail to provide a stable and predictable legal and business environment; (xiii) act nontransparently; or (xiv) fail to provide full protection and security.²⁴⁸
235. Claimant submits that a series of acts and omissions may result in a breach of the FET standard.²⁴⁹
236. Claimant submits that Respondent breached the FET standard by: (i) unlawfully requiring Claimant to acquire Egyptian nationality as a condition for allowing the Project to proceed; (ii) instituting a political campaign against Claimant, the Companies, and others involved in

²⁴⁷ Claimant's Statement of Claim, para. 4.10.

²⁴⁸ Claimant's Statement of Claim, para. 4.11 citing *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, **Exhibit CLA-0023**, para. 407; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 **Exhibit CLA-0024**, para. 602; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, **Exhibit CLA-0025**, para. 609; *Walter Bau v. Thailand*, Award, 1 July 2009 **Exhibit CLA-0026**, para. 12.3; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability of 14 January 2010, **Exhibit CLA-0027**, para. 284; *Ron Fuchs v. Georgia*, ICSID Case No. ARB/07/15, Award, 3 March 2010, **Exhibit CLA-0028**, paras. 428-440.

²⁴⁹ Claimant's Statement of Claim, para. 4.11 citing *Walter Bau v. Thailand*, Award, 1 July 2009, **Exhibit CLA-0026**, para. 12.43; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, **Exhibit CLA-0029**, paras. 518-19.

the Project; (iii) discriminating against Claimant in favour of steel companies owned by Mr Ezz; (iv) suggesting, through GAFI and the Committee, that there was no evidence that ADEMCO had paid MD and perpetuating false stories about Claimant; (v) prosecuting Claimant on false charges; (vi) arresting Claimant, thereby depriving the Companies of their most senior executive; (vii) removing documents from the offices of Claimant and the Companies, thereby depriving the Companies of their ability to manage the business; (viii) imposing the Freezing Order through the Egyptian Public Prosecutor on the bank accounts of Claimant, Claimant's family, and the Companies; (ix) closing and taking over the Project site and excluding the Companies' employees from the Project site; (x) including the Companies in the Freezing Order, despite the criminal charges being imposed only against Claimant; (xi) the Egyptian courts confirming the Public Prosecutor's Freezing Order; (xii) threatening and intimidating representatives of the partners of the Project to prevent them from testifying; (xiii) failing to allow Claimant to access documents for his defence; (xiv) sentencing Claimant to 15 years of hard labour on 15 February 2001; (xv) imprisoning Claimant falsely from February 2000 to March 2003; (xvi) failing to release Claimant from prison after his acquittal by the Court of Cassation on 11 June 2002; (xvii) failing to lift the travel ban on Claimant after his release from prison in March 2003; and (xviii) failing to immediately lift the Freezing Order on 16 May 2006 when the Court of Cassation dismissed the Public Prosecutor's appeal against the order of the Supreme State Security Court that acquitted Claimant.²⁵⁰ Additionally, Claimant alleges Respondent breached the FET obligation under the 2004 BIT, by (xix) continuing to fail to allow representatives of the Companies to access the Companies' bank accounts, assets, or the Project site after the Freezing Order was lifted on 18 October 2006; (xx) continuing to fail to provide protection and security to the Companies' assets at the Project site despite the Egyptian authorities having control over the Project site since February 2000; and (xxi) continuing to fail to return to Claimant and the Companies their property (including the documents requested by Claimant on 24 July 2012).²⁵¹

237. Claimant notes that media reports in February 2000 stated that the Project was "under attack" by senior government officials and in April 2000 the Ministry of Energy declared unreasonable the entry of any new investors into the "dead" Project (even though the

²⁵⁰ Claimant's Statement of Claim, para. 4.12.

²⁵¹ Claimant's Statement of Claim, para. 4.12. Discussed below at Part VI(B).

Commitment Agreement was still in place).²⁵² According to Claimant, the above actions that were taken against the Project and the Companies are a plain violation of the FET standard vis-à-vis Claimant's investment.²⁵³

238. Claimant observes that Respondent has not presented any factual defences to the FET claim.²⁵⁴ Claimant argues that the shares in the Companies are an investment under the 1980 BIT and the imprisonment of Claimant (a significant shareholder, Managing Director, and Chairman of the company) was mistreatment of the investment because a State's commitment to protect an investment extends to key persons connected to the investment as well.²⁵⁵ In any case, Claimant argues that the criminal proceedings against Claimant were intimately connected with the Project and therefore affect whether the FET standard was violated.²⁵⁶ Claimant notes that the investigations against Claimant were conducted in his capacity as the Chairman/Managing Director of the Companies and the investigation pertained to fraud in the means by which Claimant acquired shares in ADEMCO, the misappropriation of ADEMCO's funds, and the falsification of contracts in respect of the work of ADEMCO.²⁵⁷ Claimant recalls that the Companies' offices were searched during the investigation.²⁵⁸
239. Claimant argues that Respondent cannot rely on *Swisslion v. Macedonia* to argue that the Freezing Order was reasonable because the freezing order in that case was in place for merely five months, whereas the Freezing Order against Claimant was in place for six and a half years and the Freezing Order against the Companies is in force to date.²⁵⁹
240. Claimant describes Respondent's argument that the Companies should have found a replacement for Claimant during his imprisonment as a specious argument that ignores the "culpable conduct" of Respondent.²⁶⁰

²⁵² Claimant's Reply, para. 226 *citing* Article from Middle East Economic Digest, 25 February 2000, **Exhibit C-0055**, p. 3; Akhbar El Yom Article, Aswan Iron Project is Dead, 29 April 2000, **Exhibit C-0088**; 2019 Merits Hearing, Day 6, pp. 30:17-31:25.

²⁵³ Claimant's Reply, para. 225; 2019 Merits Hearing, Day 6, pp. 41:2-43:8.

²⁵⁴ Claimant's Reply, para. 219.

²⁵⁵ Claimant's Reply, para. 220 *citing* *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, **Exhibit CLA-0092**, paras. 151-53 and 198-200; 2018 Merits Hearing, Day 1, p. 72:3-20.

²⁵⁶ Claimant's Reply, paras. 221, 224.

²⁵⁷ Claimant's Reply, para. 221.

²⁵⁸ Claimant's Reply, para. 221.

²⁵⁹ Claimant's Reply, para. 228.

²⁶⁰ Claimant's Reply, para. 229.

Respondent's Position

241. Respondent argues that it did not fail to accord FET to Claimant's investments within the meaning of Article 2(1) of the 1980 BIT.²⁶¹ Respondent reiterates that any conduct directed against Claimant or his family and any conduct directed at the bank accounts and assets of the Companies, their employees and agents, and/or against the Project cannot constitute a violation of the FET standard because it was not directed against an "investment" under the 1980 BIT.²⁶²
242. Respondent highlights that a breach of the FET standards requires a showing of "wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety."²⁶³ It cites *Ahmonseto v. Egypt*, a case which also involved the conviction and imprisonment of a claimant for parallel criminal proceedings, in which the tribunal found that to be a violation of the FET standard, the criminal procedure must be "fundamentally unjustified and groundless" and that the annulment of a lower court's decision by a higher court does not necessarily amount to a treaty violation.²⁶⁴ The same tribunal found that imprisonment can only violate an investment protection if it "gravely violates the rights of the person placed in custody."²⁶⁵ Respondent notes that the tribunal in *Ahmonseto v. Egypt* ultimately decided not to opine on decisions that were issued during the criminal procedures.²⁶⁶
243. Respondent maintains that the domestic court proceedings in Mr Bahgat's case were justified.²⁶⁷ It recalls that Claimant was not released upon acquittal because he was serving another jail sentence and that Claimant's initial requests to lift the travel ban and Freezing Order were not acted upon because they were procedurally flawed.²⁶⁸ Respondent notes that it cannot be held liable for breach of the FET standard as a result of the Companies' failure to

²⁶¹ Respondent's Statement of Defense, para. 94.

²⁶² Respondent's Statement of Defense, paras. 95-96.

²⁶³ Respondent's Rejoinder, para. 97 citing *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, I.C.J Reports 1989, Judgment, 20 July 1989, **Exhibit CLA-0087**, para. 128; 2018 Merits Hearing, Day 1, pp. 182:8-183:4.

²⁶⁴ Respondent's Rejoinder, para. 98 citing *Ahmonseto, Inc. (U.S.), E&D Industrial California Overseas Company of America (U.S.), A. BMH & Co., Inc. (U.S.), Adel Talebagha (U.S.), Aida Talebagha (U.S.), Hala Talebagha (U.S.), Badie Talebagha (U.S.) v. Arab Republic of Egypt* ICSID Case No. ARB/02/15, Award, 18 June 2007, **Exhibit RLA-0122**, paras. 255-56; 2018 Merits Hearing, Day 1, pp. 183:5-185:6.

²⁶⁵ Respondent's Rejoinder, para. 99 citing *Ahmonseto, Inc. (U.S.), E&D Industrial California Overseas Company of America (U.S.), A. BMH & Co., Inc. (USA), Adel Talebagha (U.S.), Aida Talebagha (U.S.), Hala Talebagha (U.S.), Badie Talebagha (U.S.) v. Arab Republic of Egypt* ICSID Case No. ARB/02/15, Award, 18 June 2007, **Exhibit RLA-0122**, para. 262; 2018 Merits Hearing, Day 1, pp. 183:5-185:6.

²⁶⁶ Respondent's Rejoinder, para. 100; 2018 Merits Hearing, Day 1, pp. 183:5-185:6.

²⁶⁷ Respondent's Rejoinder, para. 101.

²⁶⁸ Respondent's Rejoinder, para. 101.

appoint an alternative chairman to manage their business during Claimant's imprisonment.²⁶⁹

244. Respondent additionally observes that less than 10 of the exhibits submitted by Claimant with his Reply were obtained in the document production phase of this arbitration, thus suggesting that Claimant was incorrect in arguing that he could not present a proper case because he did not have access to relevant documentation.²⁷⁰

Tribunal's Analysis

245. The Tribunal proceeds from Article 2(1) of the 1980 BIT which reads:

Each Contracting State shall, subject to its laws and regulations, at all times ensure fair and equitable treatment of the investments of nationals and companies of third States.

246. FET is an autonomous standard generally guaranteeing the rule of law in the treatment of foreign investors under the legal systems of host states. It has been held to comprise concepts such as the protection of legitimate expectations, the absence of bad faith, and the requirements that the conduct of the State be transparent, consistent and non-discriminatory and not based on unjustifiable distinctions or arbitrary.²⁷¹
247. The Tribunal does not accept the interpretation of Respondent, which reduces the FET clause of Article 2(1) of the 1980 BIT to minimum standard of treatment or to prohibit denial of justice. Respondent's arguments find no basis in Article 2(1) of the 1980 BIT nor in the object and purpose of the 1980 BIT. Respondent can also not rely on jurisprudence. The Tribunal is aware of the jurisprudence of *Ahmonseto v. Egypt*.²⁷² In the view of the Tribunal, this jurisprudence focuses on arbitrariness and discrimination and not on the applicability of the FET clause as a whole. In the view of the Tribunal, the FET clause has a broader scope.

²⁶⁹ Respondent's Statement of Defense, para. 100.

²⁷⁰ Respondent's Rejoinder, para. 3.

²⁷¹ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, **Exhibit CLA-0024**, para. 602; *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, **Exhibit CLA-0023**, para. 407; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, **Exhibit CLA-0025**, para. 609; *Walter Bau v. Thailand*, Award, 1 July 2009, **Exhibit CLA-0026**, paras. 12.3, 12.43; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, **Exhibit CLA-0027**, para. 284; *Ron Fuchs v. Georgia*, ICSID Case No. ARB/07/15, Award, 3 March 2010, **Exhibit CLA-0028**, paras. 428-40; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, **Exhibit CLA-0029**, paras. 518-19; see also S.W. Schill, *Fair and Equitable Treatment, the Rule of Law and Comparative Public Law*, in *International Investment Law and Comparative Public Law* (S. W. Schill ed., 2010), p. 51.

²⁷² *Ahmonseto Inc. et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/15, Award, 18 June 2007, **Exhibit RLA-0122**, paras. 255-56.

248. The Tribunal notes that the arguments advanced by Claimant in support of his claim that Respondent has violated the FET clause touch upon the elements of fair trial and due process and are identical to the arguments used to establish that the measures undertaken by Respondent amounted to an indirect expropriation of Claimant's investment.
249. The Tribunal is of the view, as already expressed above, that the measures taken against Claimant and the two companies were not proportional considering that it was Claimant who was charged and not his family and the Companies. However, Claimant was not able to establish convincingly that the measures taken against him were motivated by malicious intent and in violation of the applicable rules as referred to in the award in *Ahmonseto v. Egypt*. The reference to newspaper reports upon which Claimant relies to prove that the actions of Respondent were politically motivated is not enough to prove Respondent's improper conduct. Apart from that, the Tribunal cannot fail to note that ADEMCO and AISCO were not financed in a manner that was transparent from the outside. Even for Claimant it was difficult to establish the flow of capital and the fact that the funds invested originated from his private funds. In any event, the Supreme State Security Court found that the CMA had approved and confirmed in 1998 that the payment had been made. Therefore, the investigation was unfounded *ab initio*.
250. However, it is beyond doubt for the Tribunal that the investigations against Claimant and the Companies were not guided by the principle of fair trial; on the contrary, Claimant was a victim of denial of justice. Denial of justice has been recognised to include the entire criminal process, not only the trial, and an eventual acquittal of an investor is not dispositive of whether denial of justice occurred. In international law, denial of justice covers the actions of the prosecution before trial, the trial itself, and post-trial actions. Prosecutorial misconduct, or malicious prosecution, fits neatly into the standard of denial of justice, and breaches the FET standard of treatment.
251. Claimant was arrested even before the time had elapsed for him to clarify whether the payment to MD had been made by Claimant on behalf of ADEMCO. Even after the fact of the payment was established, the prosecution did not drop the case against Claimant. The Tribunal is aware that Article 2(1) of the 1980 BIT refers to the "laws and regulations" of the host State as potential limitations of the applicability of the FET clause, but the Tribunal cannot accept that such disregard of the principle of fair trial was common in Egypt.
252. That Claimant was a victim of denial of justice is also based on the observations of the Supreme State Security Court of Egypt. The court determined that the proceeding against

Claimant was a “clear example of fumbling, defectiveness, retrenchment and failure, and the absence of a scientific methodology in the making and taking of decisions [].” The review of the process by Egypt’s Supreme State Security Court reveals that Claimant’s arrest, prosecution, and incarceration lacked any probable cause, and were an irregular prosecutorial proceeding, performed arbitrarily, in bad faith, with a wilful disregard of any obligation to provide reasonable due diligence in the application of due process of law. All these acts or omissions by the prosecution constitute elements of denial of justice. Respondent has not advanced any reason to doubt the objectivity of the factual assessment of that court and its reasoning.

253. On this basis, the Tribunal concludes that Respondent has violated the clause as contained in Article 2(1) of the 1980 BIT. It shall deal with the consequential compensation in Part VIII.B.5.
254. The Tribunal takes note of the fact that the CMA confirmed, after reviewing all the originals of the documents, that the sum of DEM 54 million was paid by Claimant to MD. The Supreme State Security Court then concluded that the oral testimonies and statements presented by the prosecution were no more than “enquires, or conclusions or personal opinion,” showing lack of certainty, knowledge, conviction and conclusiveness.²⁷³ Egypt’s Supreme State Security Court strongly criticised the lower court for convicting Claimant based on lack of evidence, which the Supreme State Security Court concluded was contrary to the basic expectation and demand of any citizen from a functioning justice system.²⁷⁴
255. The Tribunal notes the Supreme State Security Court’s assessments of the testimonies provided during trial, which resulted in the conclusion that the evidence provided by Claimant, obviously available to the prosecution, “revealed the truth of this debt and provide [sic] adequate evidence that it was paid.”²⁷⁵ Such evidence included a confirmation of the payment by the local agent of MD during the investigation by the public prosecutor (No. 5) and a letter from the company itself (No. 3). This letter proves the irregularity and arbitrariness in arresting Claimant before the deadline for providing the evidence contained in this letter had even passed. Even absent the premature arrest, this letter as well as other evidence cited by the Supreme State Security Court refuting the probable cause against Claimant, was available to the prosecution, which disregarded it.

²⁷³ Judgment of the Supreme State Security Court dated 11 June 2002, **Exhibit C-0002**, p. 17.

²⁷⁴ Judgment of the Supreme State Security Court dated 11 June 2002, **Exhibit C-0002**, p. 17.

²⁷⁵ Judgment of the Supreme State Security Court dated 11 June 2002, **Exhibit C-0002**, p. 20.

256. The Tribunal not only refutes the reasoning of Respondent, which aims at limiting the scope of protection of the FET clause, it also, for the above reasons, disagrees with the argument that the domestic court proceedings against Claimant were justified. Finally, the Tribunal cannot accept the statement that ADEMCO and AISCO could have appointed an alternative chairperson. Such a statement cannot be reconciled with the fact that the sites of ADEMCO and AISCO were closed, access to the site was prohibited, and the assets of both Companies were frozen.
257. Based on the above, the Tribunal concludes that the treatment of Claimant by the prosecution and the lower courts, even disregarding the treatment he received after his acquittal, constituted a violation of the obligations under the FET clause of Article 2(1) of the 1980 BIT.

D. BREACHES PURSUANT TO ARTICLE 2(2) OF THE 1980 BIT

Claimant's Position

258. Claimant argues that under the MFN provision in Article 2(2) of the 1980 BIT, he is entitled to obtain the benefit of the most favourable treatment Respondent accords to foreign investors in its other investment treaties.²⁷⁶ Article 2(2) of the 1980 BIT states that “[i]nvestments by nationals of either Contracting State in the territory of the other Contracting State shall not be subjected to a treatment less favourable than that accorded to investments by nationals or companies of third States.”
259. Claimant accordingly invokes Article 3(1) (no impairment by unreasonable or discriminatory measures and full physical security and protection), Article 3(2) (national treatment), and Article 3(4) (observance of obligations) of the Netherlands-Egypt BIT, and Article 2(2) (full protection and security) of the Korea-Egypt BIT.²⁷⁷
260. Claimant argues that the MFN provision in the 1980 BIT should not be interpreted as Respondent suggests: there is nothing in Article 2(2) that indicates that standards that are not already contained in the 1980 BIT cannot be imported from other treaties.²⁷⁸ Claimant argues that the cases upon which Respondent relies consider MFN clauses that are materially different to Article 2(2) of the 1980 BIT and therefore those precedent are irrelevant to this

²⁷⁶ Claimant's Statement of Claim, para. 4.2.

²⁷⁷ Claimant's Statement of Claim, para. 4.2.

²⁷⁸ Claimant's Reply, paras. 162, 232.

case.²⁷⁹ Claimant argues that in *Teinver v. Argentina*, the tribunal read the MFN clause narrowly on account of the following wording, which is absent in Article 2(2) of the 1980 BIT: “[i]n all matters governed by this Agreement, such treatment shall be no less favourable than that accorded by each Party to investments made in its territory by investors of a third country.”²⁸⁰ Claimant distinguishes the narrow interpretation of the MFN clause by the tribunal in *Paushok v. Mongolia*, on the basis that (i) the tribunal’s decision was based on the specific treaty text, and (ii) the tribunal acknowledged that MFN clauses have generally been interpreted broadly to allow the importation of substantive protections from other treaties.²⁸¹ Claimant similarly distinguishes the findings of the *İçkale v. Turkmenistan* tribunal as being limited to the particular wording of the MFN clause in that case.²⁸² Claimant contends, consistent with the *ejusdem generis* principle, that the Tribunal should apply the general approach to the interpretation of Article 2(2), which has been adopted by several investment tribunals, and allow Claimant to rely on substantive standards not contained in the 1980 BIT.²⁸³

Respondent’s Position

261. Referring to arbitral case law and the *ejusdem generis* principle, Respondent argues that the MFN clause in Article 2(2) of the 1980 BIT can only be used by Claimant to import investment protection standards that are already contained in the 1980 BIT, not entirely new standards that are not otherwise contained in the treaty.²⁸⁴ Respondent refers to Article 9(1) of the International Law Commission’s Draft Articles on MFN Clauses, which states that under

²⁷⁹ Claimant’s Reply, para. 235.

²⁸⁰ Claimant’s Reply, para. 236, citing *Teinver S.A and Transportes de Cercanías S.A v. Argentine Republic* ICSID Case No. ARB/09/1, Award, 21 July 2017, **Exhibit RLA-0093**, para. 884 (emphasis added).

²⁸¹ Claimant’s Reply, para. 239 citing *Sergie Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, **Exhibit RLA-0094**, para. 565.

²⁸² Claimant’s Reply, para. 241 citing *İçkale İnşaat Limited Şirketi v. Turkmenistan* ICSID Case No. ARB/10/24, Award, 8 March 2016, **Exhibit RLA-0095**, paras. 326, 328-29.

²⁸³ Claimant’s Reply, paras. 242-43 citing *EDF International SA, SAUR International SA and Leon Participaciones Argentinas SA v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, **Exhibit CLA-0020**; *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011, **Exhibit CLA-0032**; *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2008, **Exhibit CLA-0058**; *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, **Exhibit CLA-0096**.

²⁸⁴ Respondent’s Statement of Defense, paras. 72-74 citing *Teinver SA and Transportes de Cercanías SA v. Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, **Exhibit RLA-0093**, para. 884; *Sergie Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, **Exhibit RLA-0094**, para. 570; *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/2, Award, 8 March 2016, **Exhibit RLA-0095**, para. 328; Respondent’s Rejoinder, paras. 104-05.

a MFN clause, “the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause.”²⁸⁵ Respondent points out that the International Law Commission’s Commentary on this draft article explains that unless the MFN process is “strictly confined to cases where there is a substantial identity between the subject matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated.”²⁸⁶ Respondent explains that Article 2(2), being part of a specifically negotiated bilateral agreement, cannot be applied in a mechanical way, or as MFN clauses are applied in trade law.²⁸⁷

262. Respondent distinguishes the cases presented by Claimant where MFN clauses were used to import protections that were absent in the treaty underlying the arbitration.²⁸⁸ Respondent submits that in *Bayindir v. Pakistan* the MFN clause was used to invoke FET provisions, but there was a reference to FET in the preamble of the base treaty.²⁸⁹ Respondent notes that the awards in *EDF v. Argentina* and *Arif v. Moldova* have been criticised for their treatment of the MFN clause.²⁹⁰ Respondent argues that the findings of the tribunal in *White Industries v. India* cannot be applied to the present case because that tribunal was faced with denial of justice.²⁹¹ Respondent states that the tribunal in *Devas v. India* only imported the “full legal protection and security” standard because the respondent did not invoke the *ejusdem generis* principle.²⁹²
263. Therefore, Respondent argues that the Tribunal should reject Claimant’s attempt to import the following standards from the Netherlands-Egypt BIT and Korea-Egypt BIT: (i) non-impairment by unreasonable or discriminatory measures; (ii) the national treatment standard;

²⁸⁵ Respondent’s Rejoinder, para. 105 *citing* International Law Commission, *Draft Articles on Most-Favored-Nation Clauses with Commentaries*, in Yearbook of the International Law Commission, Vol. II, Part Two, 30th Session (1978), **Exhibit RLA-0147**, p. 27.

²⁸⁶ Respondent’s Rejoinder, para. 106 *citing* International Law Commission, *Draft Articles on Most-Favored-Nation Clauses with Commentaries*, in Yearbook of the International Law Commission, Vol. II, Part Two, 30th Session (1978), **Exhibit RLA-0147**, p. 30.

²⁸⁷ Respondent’s Rejoinder, para. 107. Respondent explains that in trade law, MFN clauses grant benefits where parties have not previously agreed to liberalise their relations in the same way as it is done in a treaty with a third party).

²⁸⁸ Respondent’s Rejoinder, para. 108.

²⁸⁹ Respondent’s Rejoinder, para. 108 *citing* *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* ICSID Case No. ARB/03/29, Award, 27 August 2009, **Exhibit CLA-0097**, paras. 152-53.

²⁹⁰ Respondent’s Rejoinder, para. 108 *citing* T. Gazzini and A. Tanzi, *Handle with Care: Umbrella Clauses and MFN Treatment in Investment Arbitration*, The Journal of World Investment & Trade 14 (2013), **Exhibit RLA-0146**, p. 991.

²⁹¹ Respondent’s Rejoinder, para. 108.

²⁹² Respondent’s Rejoinder, para. 108.

and (iii) observance of obligations full protection and security.²⁹³

Tribunal's Analysis

264. Having determined that Respondent has breached Articles 2(1) and 3(1) of the 1980 BIT, the Tribunal does not consider it necessary to rule on Claimant's alternative arguments based upon the MFN clause under Article 2(2) of the 1980 BIT with the view to expand the investment protection under the 1980 BIT.

VI. BREACHES OF THE 2004 BIT

265. As noted above, in line with the Tribunal's Jurisdiction Decision, the substantive provisions of the 1980 BIT will be applied to actions that took place before 5 February 2005, and the substantive provisions of the 2004 BIT will be applied to actions that took place after 5 February 2005.²⁹⁴

266. Claimant argues that Respondent breached the expropriation and FET protections contained in the 2004 BIT. Respondent denies Claimant's allegations.

A. EXPROPRIATION

Claimant's Position

267. Claimant argues that, should the Tribunal find that there was no expropriation by 5 February 2005, Respondent's conduct after 5 February 2005 would by itself, or taken with prior conduct, amount to expropriation and a breach of Article 5 of the 2004 BIT.²⁹⁵

268. Claimant argues that, after the 2004 BIT came into force, Respondent failed to lift the Freezing Order and restore the Companies' assets and the Project site.²⁹⁶ Claimant highlights that despite the Freezing Order being lifted, the Companies were deprived of the benefit of their assets, which were stripped of all improvements and movable properties while under Respondent's custody.²⁹⁷ Claimant has no access to the Companies' bank accounts, and the

²⁹³ Respondent's Statement of Defense, para. 75.

²⁹⁴ Jurisdiction Decision, para. 315.

²⁹⁵ Claimant's Reply, para. 213.

²⁹⁶ Claimant's Statement of Claim, para. 4.9.

²⁹⁷ Claimant's Statement of Claim, para. 4.9; Claimant's Reply, paras. 213-214.

Companies' movable assets have disappeared.²⁹⁸

269. Claimant emphasises that he is not under an obligation to exhaust local remedies before approaching this Tribunal.²⁹⁹ He clarifies that he never announced that he intended to return to the Project.³⁰⁰

Respondent's Position

270. Respondent contends that the events between February 2000 and February 2005 do not meet the standards for indirect expropriation as set out in Paragraphs 211-216.³⁰¹
271. Respondent argues that the criminal proceedings associated with the payments to MD lasted 2.5 years and therefore were not permanent or long-term.³⁰² Respondent clarifies that Claimant remained in jail for three years after his acquittal in the matter concerning payment to MD, on account of another three-year sentence, which it notes that Claimant has not criticised in this arbitration.³⁰³ Respondent argues that the failure to lift the travel ban and the Freezing Order does not meet the high standard of indirect expropriation, because these measures were lifted as soon as Claimant submitted the necessary requests before the authorities in an appropriate form.³⁰⁴ Respondent states that it cannot take responsibility for the delays caused by the rejection of Claimant's initial requests to lift the travel ban and Freezing Order, which were not compliant with the applicable procedures.³⁰⁵ Respondent argues that no indirect expropriation on account of Claimant's detention or the investigation into payments due to MD has been established.³⁰⁶ In any event, Respondent points out that Claimant could have avoided any damage to his business due to his imprisonment by simply producing the proof of transfer of funds to MD that was requested by the CMA.³⁰⁷
272. Respondent argues that the sole conduct to be assessed pursuant to the 2004 BIT is the alleged failure of Respondent to restore the Companies' assets following the lifting of the

²⁹⁸ Claimant's Reply, para. 214 *citing* Letter from Claimant to Suez Canal Bank, 28 September 2018, **Exhibit C-0134**; Letter from Claimant to National Societe General Bank Cairo, 28 September 2018, **Exhibit C-0135**.

²⁹⁹ Claimant's Reply, para. 215. Claimant notes that Respondent's local remedies jurisdictional objection was rejected by this Tribunal in Procedural Order No. 5 of 17 May 2017.

³⁰⁰ Claimant's Reply, para. 216.

³⁰¹ Respondent's Rejoinder, para. 74.

³⁰² Respondent's Rejoinder, para. 74.

³⁰³ Respondent's Rejoinder, para. 74.

³⁰⁴ Respondent's Rejoinder, para. 74.

³⁰⁵ Respondent's Rejoinder, para. 74.

³⁰⁶ Respondent's Rejoinder, para. 75.

³⁰⁷ Respondent's Rejoinder, para. 75.

Freezing Order.³⁰⁸ Respondent submits that Claimant has presented insufficient evidence that the Companies do not have access to their assets and bank accounts and notes that the Companies have not approached the Egyptian courts seeking any relief in this regard.³⁰⁹ Respondent notes that Claimant has presented his correspondence with banks confirming that the Companies' bank accounts are frozen as evidence of his inability to access the Companies' bank accounts, but notes that this is insufficient to establish an expropriation claim.³¹⁰ Moreover, Respondent notes that Claimant did not raise this issue in 2011 when he announced that he would continue work on the Project.³¹¹

273. Respondent maintains that the Project was abandoned as early as March 2000 (the month after Claimant's arrest) as evidenced in letters sent by Mr Verdier, and therefore the Project's discontinuance was not caused by Respondent.³¹² Respondent suggests that the decision to discontinue the Project could be because its feasibility had not been demonstrated as at February 2000.³¹³

Tribunal's Analysis

274. The Tribunal notes that there is a disagreement between the Parties as to when the Project was finally abandoned. Respondent relies upon the letter of Mr Verdier whereas Claimant considers activities and omissions by Respondent after the entry into force of the 2004 BIT also to be of relevance. The Tribunal holds that the indirect expropriation took place with the arrest of Claimant and the Freezing Order of his, his families' and the Companies' bank accounts. The Tribunal would like to emphasise that it was not the letter of Mr Verdier, which ended Claimant's Project. Mr Verdier's letter only informed the partners of the actions taken by Respondent. However, the Tribunal finds that acts or omissions of Respondent after the entry into force of the 2004 BIT were not material in constituting indirect expropriation; they constituted the continuation in time of acts against the investment of Claimant. On that basis, the Tribunal holds that Claimant cannot invoke Article 5 of the 2004 BIT concerning indirect expropriation, because the expropriation had already taken place.

³⁰⁸ Respondent's Statement of Defense, para. 103; Respondent's Rejoinder, para. 92.

³⁰⁹ Respondent's Statement of Defense, para. 104; Respondent's Rejoinder, para. 90.

³¹⁰ Respondent's Rejoinder, para. 91 *citing* Letter from Claimant to Suez Canal Bank, 28 September 2018 **Exhibit C-0134**; Letter from Claimant to National Societe General Bank Cairo, 28 September 2018 **Exhibit C-0135**.

³¹¹ Respondent's Statement of Defense, para. 104 *citing* Newspaper articles Al-Shari issue no. 87, 4 March 2011, **Exhibit C-0060**.

³¹² Respondent's Rejoinder, para. 76 *citing* Fax from R. Verdier to Dr Mertins, 13 March 2000, **Exhibit C-0150**; Fax from R. Verdier to Mr Liljeberg, 13 March 2000, **Exhibit C-0151**; Fax from R. Verdier to A. Cairns at HSBC, 13 March 2000, **Exhibit C-0152**.

³¹³ Respondent's Rejoinder, paras. 77, 88.

B. FAIR AND EQUITABLE TREATMENT*Claimant's Position*

275. Claimant submits that Respondent is in continuing breach of Article 2(2) of the 2004 BIT.³¹⁴ Claimant argues that, despite his acquittal by the Supreme State Security Court on 11 June 2002, he was not released from prison until March 2003, he was subject to a travel ban until June 2005, and his assets remained frozen until October 2006.³¹⁵ Further, he notes that Respondent continues to deny him access to the Project site and maintains the Freezing Order against the Companies.³¹⁶

Respondent's Position

276. Respondent argues that Claimant has not established how the alleged conduct violates the stringent FET standard.³¹⁷ Respondent submits that a freezing order is a standard measure under Egyptian law (and in other legal systems) that, being temporary, cannot constitute a treaty breach.³¹⁸ Respondent points out that the Companies took no steps to challenge the Freezing Order when it was in force.³¹⁹

277. Respondent contends that, even if the Tribunal finds that the Freezing Order against Claimant should have been lifted sooner, this is not sufficient to find a breach of the FET standard.³²⁰ Respondent argues that Claimant has not established how the Freezing Order impacted the Project, particularly since he had bank accounts abroad that could have facilitated investment in the Project.³²¹ Respondent further argues that Claimant has not shown how his inability to travel on account of the travel ban impacted the Project.³²²

Tribunal's Analysis

278. The Tribunal wishes to state at the outset that the 2004 BIT only covers acts or omissions of Respondent that took place after the 2004 BIT entered into force. Therefore, the release of Claimant only in March 2003 falls under the 1980 BIT. However, his travel ban until

³¹⁴ Claimant's Reply, para. 230.

³¹⁵ Claimant's Reply, para. 230; 2018 Merits Hearing, Day 1, p. 27:16-23.

³¹⁶ Claimant's Reply, para. 230.

³¹⁷ Respondent's Statement of Defense, para. 97.

³¹⁸ Respondent's Statement of Defense, paras. 98-99 *citing Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, **Exhibit RLA-0104**, para. 248.

³¹⁹ Respondent's Statement of Defense, para. 99; Respondent's Rejoinder, para. 101.

³²⁰ Respondent's Rejoinder, para. 102.

³²¹ Respondent's Rejoinder, para. 102.

³²² Respondent's Rejoinder, para. 102.

June 2005, the freezing of Claimant's assets until October 2006, the denial of Claimant's access to the Project site, and the maintenance of the Freezing Order against the Companies may be assessed under the 2004 BIT. Claimant invokes the violation of the FET clause of the 2004 BIT.

279. Article 2(2) of the 2004 BIT reads:

Each Contracting Party shall in its territory accord to investments and returns of investments of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.

280. The Tribunal notes that Article 2(2) of the 2004 BIT addresses investors and investments alike and that Claimant, in spite of having been released from prison already in June, remained subject to a travel ban until 2005. Further, Claimant's bank accounts remained frozen until October 2006 and the bank accounts of the Companies are still frozen.

281. Respondent offers no convincing justification for not lifting these limitations on Claimant and on his investment. The Tribunal is not convinced by the argument that Claimant had bank accounts abroad and could have used those to conduct his business. Whether such a possibility really existed is not the point; what matters is that Claimant did not have access to his funds in Egypt until 2006, nor to the Companies' funds till date. Apart from that, Claimant had no access to the site. The Tribunal cannot believe—and no reliable information has been produced by Respondent to that extent—that such treatment of an accused who has been acquitted is normal under Egyptian law.

282. On the basis of the above, the Tribunal concludes that Respondent violated its obligation under Article 2(2) of the 2004 BIT vis-à-vis Claimant.

C. OTHER ALLEGED VIOLATIONS OF THE 2004 BIT

Claimant's Position

283. Claimant contends that Respondent violated Article 2(2) of the 2004 BIT, which states that “[e]ach Contracting Party shall in its territory accord to investments and returns of investments of investors of the other Contracting Party ... full and constant protection and security”.³²³

³²³ Claimant's Statement of Claim, para. 4.13 *citing* 2004 BIT, Article 2(2).

284. Claimant contends that Respondent violated Article 2(3) of the 2004 BIT, which states that:

Neither Contracting Party shall in its territory impair by unreasonable or arbitrary measures the acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments of investors of the other Contracting Party.³²⁴

285. Claimant contends that Respondent violated Article 2(1) of the 2004 BIT, which states that:

Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to its own investors and their investments with respect to the acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments.³²⁵

286. Claimant contends that Respondent violated Article 12(2) of the 2004 BIT, which states that “[e]ach Contracting Party shall observe any other obligation it may have with regard to a specific investment of an investor of the other Contracting Party.”³²⁶

Respondent’s Position

287. No specific arguments on these points are made by Respondent.

Tribunal’s Analysis

288. As stated already in Sections V.B, V.C, and VI.B above, the activities of Respondent directed against the investment of Claimant are to be dealt with under the 1980 BIT and under Article 3(1) of the 2004 BIT. Article 12(1) of the 2004 BIT does not offer, in the view of the Tribunal, an additional legal basis to support the claims of Claimant.

VII. BREACHES OF THE EGYPTIAN INVESTMENT LAW

Claimant’s Position

289. Claimant contends that Respondent breached Articles 8 and 9 of the Egyptian Investment Law by virtue of the conduct set out in Paragraphs 203 and 236 above.³²⁷ Claimant emphasises that Article 8 of the Egyptian Investment Law is available not only to companies. He explains that Article 8, which provides that “companies may not be nationalized or confiscated,” would be rendered ineffective if only the nationalised entity (rather than the owners of the entity) could avail themselves of relief.³²⁸ Moreover, Claimant notes that the

³²⁴ Claimant’s Statement of Claim, para. 4.17 *citing* 2004 BIT, Article 2(3).

³²⁵ Claimant’s Statement of Claim, para. 4.20 *citing* 2004 BIT, Article 2(1).

³²⁶ Claimant’s Statement of Claim, para. 4.23 *citing* 2004 BIT, Article 12(1).

³²⁷ Claimant’s Statement of Claim, para. 4.25.

³²⁸ Claimant’s Reply, para. 267.

Egyptian Investment Law refers to investors at various points (including in the dispute resolution provision, Article 7).³²⁹

290. Claimant highlights that Respondent made it impossible for the Companies to pursue their business.³³⁰ As Egyptian law protects against direct and indirect deprivation of ownership, Claimant argues that he is entitled to bring a claim under Article 8.³³¹
291. Claimant rejects Respondent's argument that the Freezing Order was lawful because it was imposed by administrative means.³³² He argues that the Companies, having independent legal personality, should never have been subject to the Freezing Order that arose out of an investigation pertaining to Claimant and notes that he still cannot access the Companies' bank accounts because the Freezing Order continues to operate on the Companies.³³³
292. Claimant argues that Respondent breached Article 12 by coercing Claimant to obtain Egyptian nationality.³³⁴ Claimant notes that Respondent does not contest that it breached Article 12 if Claimant's factual allegations are proven.³³⁵ Claimant notes that Respondent does not factually contest Claimant's account of his being coerced to take on Egyptian nationality.³³⁶ Claimant considers the letter from the Minister of Trade and Industry suggesting that Respondent has never forced anyone to take on Egyptian nationality to be self-serving.³³⁷ Claimant notes that his use of Egyptian nationality at the borders does not speak to the circumstances in which this nationality was acquired.³³⁸ Moreover, Claimant notes that he usually used his Finnish passport and only used his Egyptian passport when travelling with Egyptian officials.³³⁹
293. Claimant criticises Respondent's reliance on the SAC Judgment on the matter of his acquisition of Egyptian nationality.³⁴⁰ Claimant argues that the Finnish Supreme Administrative Court is only competent to decide Claimant's Finnish nationality, not the

³²⁹ Claimant's Reply, para. 268.

³³⁰ Claimant's Reply, para. 270.

³³¹ Claimant's Reply, para. 270.

³³² Claimant's Reply, para. 271.

³³³ Claimant's Reply, para. 271.

³³⁴ Claimant's Statement of Claim, para. 4.26.

³³⁵ Claimant's Reply, para. 272.

³³⁶ Claimant's Reply, para. 272.

³³⁷ Claimant's Reply, para. 273.

³³⁸ Claimant's Reply, para. 274.

³³⁹ Claimant's Reply, para. 274.

³⁴⁰ Claimant's Reply, para. 275.

circumstances in which Claimant acquired his Egyptian nationality.³⁴¹

Respondent's Position

294. Respondent argues that its conduct does not give rise to a breach of the Egyptian Investment Law.³⁴² Respondent submits that the plain text of Articles 8, 9, and 12 indicates that the Egyptian Investment Law only applies to “companies and firms” and not to the owners or shareholders of the same.³⁴³ Therefore, according to Respondent, any wrongful acts alleged against Claimant or his family and personal assets falls outside the scope of the Egyptian Investment Law.³⁴⁴
295. Referring back to its arguments on expropriation, Respondent contends that it did not breach Article 8 of the Egyptian Investment Law because it did not nationalise or confiscate the Companies.³⁴⁵ It argues that ownership of the Companies was never transferred to Respondent; Claimant is today a shareholder of ADEMCO and of AISCO and can freely transfer his shares in the Companies.³⁴⁶
296. Again, referring back to its arguments on expropriation, Respondent argues that it did not breach Article 9 of the Egyptian Investment Law because it did not sequester, attach, seize, distraint, freeze or confiscate any asset of the Companies by administrative means.³⁴⁷ Respondent notes that the Freezing Order was not issued by administrative means but was issued as part of the criminal investigation conducted against Claimant.³⁴⁸ Respondent highlights, moreover, that Claimant never challenged the Freezing Order before the Egyptian courts and that the Freezing Order was temporary.³⁴⁹
297. Respondent denies that it breached Article 12 of the Egyptian Investment Law by coercing Claimant to apply for Egyptian nationality in 1997 but maintains that Claimant voluntarily applied to regain his nationality in order to avail of the opportunity to invest in the Aswan

³⁴¹ Claimant's Reply, para. 275.

³⁴² Respondent's Statement of Defense, para. 107.

³⁴³ Respondent's Statement of Defense, para. 108.

³⁴⁴ Respondent's Statement of Defense, para. 108.

³⁴⁵ Respondent's Statement of Defense, para. 115; Respondent's Rejoinder, para. 133.

³⁴⁶ Respondent's Statement of Defense, para. 115 *citing* GAFI Resolution, 24 December 1997, **Exhibit C-0023**; Copy of the GAFI Resolution and the attached Preliminary Contract for the Company and the Articles, 9 September 1998, **Exhibit C-0039**.

³⁴⁷ Respondent's Statement of Defense, para. 114; Respondent's Rejoinder, para. 133.

³⁴⁸ Respondent's Statement of Defense, para. 116.

³⁴⁹ Respondent's Statement of Defense, para. 116.

region.³⁵⁰ Respondent states that Claimant has not before in these proceedings contested his nationality based on coercion and that Claimant repeatedly travelled abroad on his Egyptian passport.³⁵¹ For its position that Claimant had voluntarily applied for Egyptian nationality, Respondent relies on the Finnish Administrative Court's decision of 26 January 2015.³⁵² Respondent submits that the Supreme Administrative Court of Finland confirmed that "there is no reason to consider that [Claimant] has obtained Egyptian citizenship otherwise than upon his own voluntary application."³⁵³ Respondent argues that the Supreme Administrative Court's findings on Claimant's voluntary acquisition of Egyptian nationality should bind this Tribunal in the same manner that its findings regarding Claimant's dual nationality bound this Tribunal at the jurisdiction phase of this arbitration.³⁵⁴

298. Respondent argues that Claimant has not provided any new evidence of Egypt coercing him to acquire Egyptian nationality and that Claimant only relies on *ex post facto* witness testimony from the jurisdiction phase to support his argumentation.³⁵⁵ Respondent points out that Claimant presents Mr Reda as a key supporter of the Project while at the same time suggesting that he contemporaneously forced Claimant to acquire Egyptian nationality.³⁵⁶ Respondent notes that Claimant has introduced new allegations of threat and coercion by Mr Reda in his later witness statements (that are absent in the early witness statements), which calls into question the authenticity of his claims.³⁵⁷ Respondent argues that the record is clear that Claimant was not coerced by Mr Reda to take Egyptian nationality.³⁵⁸ Respondent emphasises that any procedural irregularities that occurred in the taking of Claimant's Egyptian nationality in 1997 cannot constitute a violation of the Egyptian Investment Law.³⁵⁹
299. Respondent also notes inconsistencies in Claimant's witness statements about when and whether he called the Finnish authorities after he had been informed that his Egyptian

³⁵⁰ Respondent's Statement of Defense, paras 109-110 *citing* Letter from the Egyptian Minister of Trade and Industry to ESLA, 19/20 March 2017, **Exhibit R-0024**.

³⁵¹ Respondent's Statement of Defense, para. 110.

³⁵² Respondent's Statement of Defense, para. 111 *citing* Decision of the Helsinki Administrative Court, Case No. 15/0033/5, 26 January 2015, **Exhibit R-0014**, p. 6.

³⁵³ Respondent's Statement of Defense, para. 112 *citing* Respondent's Translation of the SAC Judgment, **Exhibit R-0025**, p. 14; Second Expert Opinion of Professor Scheinin, 15 March 2017, para. 25(2); 2019 Merits Hearing, Day 6, p. 138:18-24.

³⁵⁴ Respondent's Statement of Defense, para. 113 *citing* Jurisdiction Decision, para. 174.

³⁵⁵ Respondent's Rejoinder, para. 134.

³⁵⁶ Respondent's Rejoinder, para. 134; 2019 Merits Hearing, Day 6, p. 138:2-17

³⁵⁷ 2019 Merits Hearing, Day 6, pp. 136:8-138:1.

³⁵⁸ 2019 Merits Hearing, Day 6, pp. 135:12-136:7.

³⁵⁹ Respondent's Rejoinder, para. 134.

nationality was restored.³⁶⁰ Respondent argues that the record suggests that the Finnish immigration authorities did not know that Claimant had lost his Egyptian nationality in 1980 (making him Finnish) and acquired his Egyptian nationality in 1997 (thus, losing his Finnish nationality).³⁶¹ Respondent argues that Claimant could only have a legitimate expectation of Finnish nationality, as set out by the Supreme Administrative Court of Finland, if he had been transparent with the Finnish authorities about the changes to his nationality, which he was not.³⁶²

Tribunal's Analysis

300. Article 8 of the Egyptian Investment Law states that “[c]ompanies and firms may not be nationalised or confiscated.”³⁶³ Article 9 of the Egyptian Investment Law states that “[c]ompanies and firms may not be sequestered or have their assets attached, seized, distrained, frozen or confiscated by administrative means.”³⁶⁴ Article 12 of the Egyptian Investment Law states that “[c]ompanies and firms shall be entitled to acquire the necessary building land and built properties to carry on or expand their business, whatever the nationality, domiciles or percentage participation of the partners.”³⁶⁵
301. Inasmuch as the Tribunal has already concluded that the treaty was breached, the issues raised in connection with the domestic legislation are moot and there is no need to consider them.
302. Accordingly, Claimant’s request for a declaration that Respondent has violated Articles 8, 9, and 12 of the Egyptian Investment Law is dismissed. The Tribunal nevertheless notes that Claimant makes essentially the same substantive arguments pursuant to Article 8 and 9 of the Egyptian Investment Law as he does pursuant to the expropriation provisions of the 1980 BIT (Article 3(1)) and that the Tribunal has found at Paragraphs 217-232 that Respondent violated Article 3(1) of the 1980 BIT and is entitled to relief for such violations.

VIII. QUANTUM

303. Claimant argues that the Project was feasible. Claimant submits that, to assess the damages due to him, the Tribunal should utilise the discounted cash flow method (“**DCF**”) or

³⁶⁰ 2019 Merits Hearing, Day 6, p. 140:9-25.

³⁶¹ 2019 Merits Hearing, Day 6, p. 141:1-6.

³⁶² 2019 Merits Hearing, Day 6, p. 141:7-20.

³⁶³ Egyptian Investment Law, **Exhibit CLA-0033**, Article 8.

³⁶⁴ Egyptian Investment Law, **Exhibit CLA-0033**, Article 9.

³⁶⁵ Egyptian Investment Law, **Exhibit CLA-0033**, Article 12.

alternatively, the lost investment method. Claimant rejects the alternative method of valuation proposed by Respondent. Claimant submitted with his Statement of Claim, the valuation expert report of Mr Inglis (the “**Inglis Report**”) and with his Reply, the valuation expert report of Mr Noel Matthews (the “**Matthews Report**”), the technical expert reports of Dr Kadri Dagdelen, Mr D Erik Spiller, and Dr Joseph J. Poveromo.

304. Respondent argues that the Project was not feasible from the outset. Should the Tribunal decide to award damages, Respondent rejects the DCF method and the lost investment method and proposes an alternative method of valuation based on the valuation of comparables. Respondent submitted with its Statement of Defence the technical expert report of Dr Mike Armitage and Mr Nick Fox (the “**First SRK Report**”) and the valuation expert report of Mr Gervase MacGregor (the “**First BDO Report**”). With its Rejoinder, Respondent submitted a second technical report of Dr Mike Armitage and Mr Nick Fox (the “**Second SRK Report**”), the second valuation report of Mr Gervase MacGregor (the “**Second BDO Report**”), the first expert report of Dr John Willis, and the expert report of Dr Jürgen Cappel.

A. VIABILITY OF THE PROJECT

Claimant’s Position

305. Claimant denies Respondent’s allegation that the Project was not feasible.³⁶⁶
306. Claimant argues that the Project Partners (who were large international companies with stringent professional obligations) were confident about the viability of the Project.³⁶⁷ Claimant clarifies that the Project Partners left the Project due to the air of hostility around the Project, not on account of its lack of viability.³⁶⁸ Claimant submits that Mr Verdier, who was the most knowledgeable about the Project, was convinced of its viability, even after Mr Bahgat’s arrest.³⁶⁹
307. Claimant argues that Respondent’s criticism of the viability of the Project contradicts its contemporaneous promotion of the Project.³⁷⁰ Claimant recalls that, to assuage concerns about iron ore shortages, the EGSMA published a report in October 1998 estimating the presence of 100 million tons of geological reserves in Egypt after conducting extensive

³⁶⁶ Claimant’s Reply, para. 94.

³⁶⁷ 2019 Merits Hearing, Day 3, pp. 35:1-36:1.

³⁶⁸ 2019 Merits Hearing, Day 3, p. 36:11-25.

³⁶⁹ 2019 Merits Hearing, Day 3, pp. 37:1-38:18.

³⁷⁰ Claimant’s Reply, para. 80; 2019 Merits Hearing, Day 3, pp.28:15-29:4, 33:19-23.

studies.³⁷¹ Several key political figures in Egypt publicly confirmed the presence of iron ore in Aswan and private sector participation was welcomed for its development,³⁷² in the hope that “a large investment project to extract iron ore would be established”³⁷³ that would provide economic benefits for the region.³⁷⁴ Claimant submits that the Egyptian government, in particular the Prime Minister and Mr Reda, encouraged him to develop the Project.³⁷⁵ Claimant adds that the Project received several incentives under the Egyptian Investment Law and the Concession Agreement and that the Egyptian government built two roads for the Project.³⁷⁶ The Egyptian government’s support, according to Claimant, was clear at the inauguration of the Project that was telecasted, widely reported, and attended by key government officials.³⁷⁷ Mr Reda and President Mubarak expressly approved the Project and its partners.³⁷⁸ Claimant, ADEMCO representatives, and representatives of the Project Partners noted at its inauguration that the Project was made possible by the support and policies of the government.³⁷⁹ Claimant explains that, at the time of and immediately after the inauguration of the Project, he was in discussions with the government regarding the provision of water and power and the construction of a railway line connecting the Project site to Aswan.³⁸⁰

308. Claimant submits that the SRK Report’s references to other ores used elsewhere at other times by other projects are not relevant to the Project.³⁸¹ Claimant argues that the Egyptian government, financiers, foreign consultants, and foreign industry partners were confident of the viability of the Project up until February 2000.³⁸²
309. Claimant argues that Respondent cannot take objection to the feasibility reports prepared about the mine: EGSMa and CMRDI conducted extensive studies before concluding that the

³⁷¹ Claimant’s Reply, para. 81 *citing* EGSMa, Iron Ore Assessment, East Hebal Um Area, Southeast Aswan, October 1998, **Exhibit R-0034**, p. 12.

³⁷² Claimant’s Reply, paras. 82-83 *citing* Al Akhbar Newspaper Article, 30 November 1997, **Exhibit C-0138**; Reports, 1, 4, and 7 April 1997, **Exhibit C-0019**, pp. 8-11.

³⁷³ Claimant’s Reply, para. 83 *citing* Reports, 1, 4, and 7 April 1997, **Exhibit C-0019**, p. 8.

³⁷⁴ Claimant’s Reply, para. 83.

³⁷⁵ Claimant’s Reply, paras. 84-85.

³⁷⁶ Claimant’s Reply, paras. 85-86.

³⁷⁷ Claimant’s Reply, para. 87 *citing* Newspaper Reports on the Project Inauguration by President Mubarak, **Exhibit C-0044**, p. 1; Video of the Inauguration Ceremony, 22 May 1999, **Exhibit C-0045**, Transcript of the Video of the Inauguration Ceremony, 22 May 1999, **Exhibit C-0089**; 2018 Merits Hearing, Day 1, pp. 21:15-23:5.

³⁷⁸ Claimant’s Reply, para. 88; 2018 Merits Hearing, Day 1, pp. 9:19-10:3, 20:23-21:3.

³⁷⁹ Claimant’s Reply, para. 90.

³⁸⁰ Claimant’s Reply, paras. 91-92 *citing* Map of the Locations of the Iron Ore in the Concession of ADEMCO – East and South East Aswan, **Exhibit C-0119**.

³⁸¹ Claimant’s Reply, para. 95.

³⁸² Claimant’s Reply, paras. 96-97.

mine was feasible, and EGSMa had concluded that the Aswan region had a number of sites with “good geological reserves and high iron ore grade.”³⁸³ Claimant notes that the UEC Study was a steel plant project feasibility study, not a mining feasibility study, but notes that the UEC Study and the Met-Chem Report supported the feasibility of the mineral resource and reserve estimates at the Project site.³⁸⁴ Claimant maintains that the UEC Study and the Met-Chem Report described technical information regarding exploration (including mineral resource and reserve estimates, mine planning and scheduling, metallurgical test work, beneficiation work, and capital and operating costs estimates for mining and beneficiating the iron ore for the Project).³⁸⁵

1. Mining

310. Claimant denies Respondent’s argument that there was not sufficient ore to run the steel plant for 20 years.³⁸⁶ Claimant notes that EGSMa found 137 million tonnes of confirmed reserves across five numbered areas of Claimant’s Concession,³⁸⁷ which would run the steel plant for over 30 years.³⁸⁸ The UEC Study, after conducting exploration work in the relevant areas, suggested that there were almost 67 million tonnes of mineral reserves in the possible, probable, and proven categories.³⁸⁹ Met-Chem had provided a plan concerning iron ore mining that not only identified sufficient resources for 23 years of production to produce 1.435 metric tons per year of steel billets, but also noted that there was greater potential in the area.³⁹⁰
311. Claimant notes that Met-Chem’s finding of 67 million tonnes of reserves was only reflective of work done up until July that year, was subject to further investigations being conducted at the end of 1999, and was in respect of work that was interrupted by the expropriation.³⁹¹

³⁸³ Claimant’s Reply, para. 99 *citing* EGSMa Geological Survey, Iron Exploration Project (IEP) Phase III Report of 1993-1997, **Exhibit C-0099**, p. 44.

³⁸⁴ Claimant’s Reply, para. 100.

³⁸⁵ Claimant’s Reply, para. 100.

³⁸⁶ 2019 Merits Hearing, Day 3, pp. 39:8-19, 172-8:19.

³⁸⁷ 2019 Merits Hearing, Day 3, pp. 31:21-32:18 *citing* EGSMa Geological Survey, Iron Exploration Project (IEP) Phase I Report of 1993-1996, **Exhibit C-0112**; EGSMa Geological Survey, Iron Exploration Project (IEP) Phase II Report of 1995, **Exhibit C-0113**; EGSMa Geological Survey, Iron Exploration Project (IEP) Phase III Report of 1993-1997, **Exhibit C-0099**; 2019 Merits Hearing, Day 3, p. 170:8-16; Presentation of Dr Kadri Dagdelen, 24 April 2019, Slide 16.

³⁸⁸ 2019 Merits Hearing, Day 3, pp. 39:20-40:8.

³⁸⁹ 2019 Merits Hearing, Day 3, pp. 170:25-171:12.

³⁹⁰ Claimant’s Reply, para. 284; 2018 Merits Hearing, Day 1, p. 20:13-20; 2018 Merits Hearing, Day 2, pp. 123:20-126:21; 2019 Merits Hearing Day 3, pp. 40:21-41:8.

³⁹¹ 2019 Merits Hearing, Day 3, pp. 41:23-42:22; 2019 Merits Hearing, Day 6, pp. 62:23-63:3.

Claimant notes that Met-Chem continued to find more reserves through 1999.³⁹² Mr Verdier testifies that although Met-Chem was the “competent person” evaluating and verifying the result, it was not on the ground collecting the information used in its report.³⁹³ Therefore, Mr Verdier testifies, there might have been gaps between the discovery of reserves and their reflection in the Met-Chem reports.³⁹⁴ Claimant submits that the Tribunal should take into account the other reserves that were identified between July 1999 and the expropriation in February 2000.³⁹⁵ Claimant notes that Respondent’s expert, Dr Armitage, admitted to not having reviewed the EGSMA materials, which casts doubt upon his testimony.³⁹⁶ Further, Claimant submits that even the “possible reserves” set out in the Met-Chem Report already had attained a high level of confidence.³⁹⁷

312. Mr Verdier further testifies that Dr Walter Schiebel, a German mining specialist, was assessing resources in parallel to Met-Chem and had found reserves in area 8 of the concession area.³⁹⁸ Mr Verdier states that in February 2000, the assessment of reserves and resources was to be accelerated in order to find ores of higher quality.³⁹⁹ Claimant argues that the Tribunal cannot accept that the other areas of the Concession (that were partly explored or unexplored) would fail to produce ore, because this is contrary to EGSMA’s estimate of the confirmed reserves and the work of Dr Schiebel.⁴⁰⁰
313. Claimant argues that Respondent’s suggestion that some of the reserves discovered were outside the Concession is a belated argument and was not put to Mr Bahgat or Mr Verdier on cross-examination.⁴⁰¹
314. Claimant suggests that the Tribunal should not rely solely on the views of Dr Armitage and reject the aforementioned, positive evaluations of the reserves provided by those individuals and entities that were most closely involved with the concession area (Met-Chem, EGSMA, and UEC).⁴⁰²
315. Claimant notes that Respondent relies on a contemporaneous study by British Steel. Claimant

³⁹² 2019 Merits Hearing, Day 3, p. 41:9-16; 2019 Merits Hearing, Day 6, p. 65:1-6.

³⁹³ 2019 Merits Hearing, Day 3, pp. 103:17-104:22.

³⁹⁴ 2019 Merits Hearing, Day 3, pp. 106:17-107:9.

³⁹⁵ 2019 Merits Hearing, Day 6, p. 66:14-22.

³⁹⁶ 2019 Merits Hearing, Day 6, pp. 63:20-64:12; 2019 Merits Hearing, Day 3, pp. 217:18-219:19.

³⁹⁷ 2019 Merits Hearing, Day 6, p. 65:7-16.

³⁹⁸ 2019 Merits Hearing, Day 3, pp. 153:2-156:7.

³⁹⁹ 2019 Merits Hearing, Day 3, pp. 155:15-156:7.

⁴⁰⁰ 2019 Merits Hearing, Day 6, pp. 65:17-66:13.

⁴⁰¹ 2019 Merits Hearing, Day 6, p. 45:1-20.

⁴⁰² 2019 Merits Hearing, Day 6, pp. 66:23-67:23; 2019 Merits Hearing, Day 3, pp. 230:13-231:9.

argues that the British Steel study cannot be relied upon because it is not on the record, it was produced after Claimant fell out of favour with Respondent's government, and it post-dates the dispute between the Parties.⁴⁰³ Claimant submits that Dr Armitage has been retained for the purposes of this arbitration, does not have contemporaneous knowledge of the Project, and has not read the record fully.⁴⁰⁴ Claimant suggests that Dr Armitage's evidence is less about available reserves and more targeted towards discrediting the DCF method of valuation.⁴⁰⁵

316. Claimant maintains that the reports on the Project, in line with contemporaneous codes and practices, extensively described the necessary technical information regarding "exploration; mineral resource and reserve estimates; mine planning and scheduling; metallurgical test work; beneficiation work; and capital and operating costs estimates for mining and beneficiating the iron ore."⁴⁰⁶

2. Beneficiation

317. Claimant acknowledges that the iron ore in Aswan has low iron content, but notes that Claimant and the Project Partners were working on increasing the iron content and reducing phosphorus.⁴⁰⁷
318. Addressing Respondent's questions regarding the beneficiation process to be used at the Project, Claimant explains that they planned to use well-known beneficiation processes and to attack the phosphorus content at multiple points in the process sequences.⁴⁰⁸ Claimant submits that the iron ore could be beneficiated further than 1.3% phosphorus and that this was not a major project cost.⁴⁰⁹

⁴⁰³ 2019 Merits Hearing, Day 6, pp. 67:24-68:25.

⁴⁰⁴ 2019 Merits Hearing, Day 6, p. 67:18-23.

⁴⁰⁵ 2019 Merits Hearing, Day 6, pp. 69:1-70:15; 2019 Merits Hearing, Day 3, pp. 219:20-220:19.

⁴⁰⁶ Claimant's Reply, para. 285.

⁴⁰⁷ 2019 Merits Hearing, Day 3, p. 43:14-18.

⁴⁰⁸ Claimant's Reply, para 104 *citing* CMRDI, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, Progress Report No. 1, South Aswan for Blast Furnace Purposes, October 1998, **Exhibit R-0052**; CMRDI, Brief Account on Tentative Results of Test Program of Iron Ore Samples No. 98-1 and 98-2, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purpose, ADEMCO, January 1999, **Exhibit R-0054**; CMRDI, Progress Report No. 2, ADEMCO, January 1999, **Exhibit R-0055**; CMRDI, Summary Report on the Laboratory Beneficiation Options of Samples 98-1 and 98-2, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, May 1999, **Exhibit R-0056**; CMRDI, Summary Report, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, ADEMCO, November 1999, **Exhibit C-0116**; CMRDI, Summary Report, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, ADEMCO, December 1999, **Exhibit C-0115**.

⁴⁰⁹ Claimant's Reply, para. 105.

319. Claimant argues that after several rounds of testing, CMRDI and Met-Chem identified the basic beneficiation techniques for the Aswan ores.⁴¹⁰ Claimant notes that CMRDI and Centre de Recherche minérale (“CRM”) (instructed by Met-Chem) identified two beneficiation methods: wet high-gradient magnetic separation and roasting followed by wet low intensity magnetic separation.⁴¹¹ Both of these processes achieved an upgrade in iron content and reduction in phosphorus.⁴¹² Claimant notes that contemporaneous documents suggest that the focus of the beneficiation was the increase in iron grade, not the reduction of phosphorus content.⁴¹³ The CRM studies showed an iron content of 54.3% in Aswan ores and in early 2000, completed beneficiation work showed iron content of 56%.⁴¹⁴
320. Claimant explains that in late 1999 he had engaged Studiengesellschaft für Eisenerzaufbereitung (“SGA”), a German company, and Svedala, a Swedish company, to finalise the beneficiation process.⁴¹⁵ Claimant argues that SGA and Svedala, based on meetings with representatives in Egypt and observing trials by CMRDI at the Abu Tatur pilot plant, indicated that they could develop viable beneficiation processes that would likely be more effective than the beneficiation tests that were conducted up until that point by the local Abu Tatur plant.⁴¹⁶ Claimant notes that Dr Willis (Respondent’s expert) agreed that SGA might have been able to achieve an iron concentration of 55 to 60%.⁴¹⁷
321. Claimant denies any issues with the scale up of the pilot plant results.⁴¹⁸ Dr Spiller confirms

⁴¹⁰ Claimant’s Reply, para. 287 *citing* CMRDI, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, Progress Report No. 1, South Aswan for Blast Furnace Purposes, October 1998, **Exhibit R-0052**; CMRDI, Brief Account on Tentative Results of Test Program of Iron Ore Samples No. 98-1 and 98-2, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purpose, ADEMCO, January 1999, **Exhibit R-0054**; CMRDI, Progress Report No. 2, ADEMCO, January 1999, **Exhibit R-0055**; CMRDI, Summary Report on the Laboratory Beneficiation Options of Samples 98-1 and 98-2, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, May 1999, **Exhibit R-0056**; CMRDI, Summary Report, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, ADEMCO, November 1999, **Exhibit C-0116**; CMRDI, Summary Report, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, ADEMCO, December 1999, **Exhibit C-0115**; Met-Chem Report, November 1999, **Exhibit C-0049**, pp. 20-22.

⁴¹¹ 2019 Merits Hearing, Day 3, p. 44:4-9; 2019 Merits Hearing, Day 4, p. 4:4-21.

⁴¹² 2019 Merits Hearing, Day 3, pp. 44:23-45:2.

⁴¹³ 2019 Merits Hearing, Day 3, p. 158:4-13.

⁴¹⁴ Claimant’s Reply, para. 287 *citing* CRM Report, 10 August 1999, **Exhibit C-0114**, p. 18.

⁴¹⁵ Claimant’s Reply, para. 106.

⁴¹⁶ Claimant’s Reply, para. 287; 2019 Merits Hearing, Day 3, pp. 45:3-46:4; 2019 Merits Hearing, Day 4, pp. 49:12-50:6.

⁴¹⁷ 2019 Merits Hearing, Day 6, p. 51:8-15; 2019 Merits Hearing, Day 4, pp. 47:20-48:4.

⁴¹⁸ 2019 Merits Hearing, Day 3, pp. 49:15-50:4; 2019 Merits Hearing, Day 4, pp. 50:7-53:25.

this understanding, relying on technical papers.⁴¹⁹

322. Claimant argues that the Project would have been viable based on its 54% iron level and assumed phosphorus levels.⁴²⁰ This is because the plant could process iron ore at 50.25% iron and 1.65% phosphorus (which results the wet high-gradient magnetic separation could achieve).⁴²¹ According to Claimant, Respondent's expert, Dr Willis, confirms this point.⁴²² Mr Verdier clarifies that he was disappointed by the pilot plant testing resulting in 50.25% iron content, but did not have any concerns about the suitability of the ore for the steel plant.⁴²³
323. Addressing Respondent's argument regarding uncertainty of operating costs for the beneficiation, Claimant notes that beneficiation was not expected to be a major cost for the Project: the CMRDI projected beneficiation costs at up to USD 12 per ton, however this cost could have been absorbed by the Project given the low operational costs of the Project and the government incentives.⁴²⁴
324. In summary, Claimant argues that the Project had a clear vision of what would be required to process the iron ore.⁴²⁵ However, due to his arrest, the Companies could not complete the further stages of the development.

3. Steel-making

325. Claimant submits that the steel plant would have been a modern one and most of the technical work was in place by February 2000.⁴²⁶ Claimant notes that the process envisaged was to use a basic oxygen furnace and the "double slagging", which was quite a common process used in several plants across the world and is considered to be technically feasible.⁴²⁷ Claimant notes that the technical and financial feasibility of the Project is not in question, Respondent's

⁴¹⁹ 2019 Merits Hearing, Day 4, pp. 7:10-8:15.

⁴²⁰ Claimant's Reply, para. 289.

⁴²¹ 2019 Merits Hearing, Day 3, pp. 46:25-47:5, 134:18-136:9; 2019 Merits Hearing, Day 6, p. 51:2-7.

⁴²² 2019 Merits Hearing, Day 6, p. 50:18-25.

⁴²³ 2019 Merits Hearing, Day 3, pp. 156:8-157:8.

⁴²⁴ Claimant's Reply, para. 286 *citing* CMRDI, Summary Report, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, ADEMCO dated December 1999, **Exhibit C-0115**; CMRDI, Summary Report, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, ADEMCO dated November 1999, **Exhibit C-0116**.

⁴²⁵ Claimant's Reply, para. 108.

⁴²⁶ 2019 Merits Hearing, Day 6, pp. 53:21-55:9 *citing* Annex 1 to the Mannesmann Contract and partially negotiated Annexes 2, 3 and 4, **Exhibit C-0166**.

⁴²⁷ 2019 Merits Hearing, Day 3, pp. 48:23-50:4; Claimant's Reply, para. 289.

- expert, Dr Cappel, only questions the design of the plant.⁴²⁸
326. According to Claimant, iron ore with high phosphorus content can still be used for the production of steel, noting that oolitic iron ores have been processed successfully across the world.⁴²⁹
327. Claimant submits that the criticisms levied by Respondent's steel expert, Dr Cappel, are unfounded. First, Claimant submits that Dr Cappel ignored that the Annex to the ADEMCO-MD Contract did in fact deal with performance guarantees and sets out the basis and rates for liquidated damages.⁴³⁰
328. Second, Claimant denies that 100% concentrated ore cannot be used in the sinter plant.⁴³¹ Mr Verdier confirmed this in his testimony.⁴³² Further, Claimant recalls that Dr Cappel agreed that the plant could operate on 100% sinter if micropelletising technology was used in the sinter plant package, which was in fact the case with the Project.⁴³³
329. Third, Claimant denies that an additional basic oxygen furnace would be needed to accommodate the double slag process.⁴³⁴ Claimant notes that the Parties' experts agree that the double slag process is well established to process high-phosphorus ores and that historically a third basic oxygen furnace was not necessary.⁴³⁵
330. Fourth, Claimant denies Dr Cappel's argument that a lime injection system was required for the basic oxygen furnace and notes that Dr Cappel has been inconsistent regarding the possible cost of the lime injection system.⁴³⁶ Mr Verdier also confirmed Claimant's argument that a lime injection system was envisaged in the First ADEMCO-MD Contract.⁴³⁷
331. Fifth, Claimant denies Dr Cappel's suggestion that there were insufficient slag pots for the

⁴²⁸ 2019 Merits Hearing, Day 6, pp. 51:21-52:7.

⁴²⁹ Claimant's Reply, para. 288; 2019 Merits Hearing, Day 3, pp. 47:25-48:22, 143:6-145:8; 2019 Merits Hearing, Day 6, p. 52:8-17; 2019 Merits Hearing, Day 4, pp. 9:23-10:10, 73:10-23.

⁴³⁰ 2019 Merits Hearing, Day 6, pp. 55:21-56:24 *citing* Annex 1 to the Mannesmann Contract and Negotiated Annexes 2, 3, and 4, **Exhibit C-0166**, paras. 6.0 *et. seq.*

⁴³¹ 2019 Merits Hearing, Day 3, p. 51:10-12; 2019 Merits Hearing, Day 4, p. 70:6-24; 2019 Merits Hearing, Day 6, p. 57:2-16.

⁴³² 2019 Merits Hearing, Day 3, pp. 83:8-87:7.

⁴³³ 2019 Merits Hearing, Day 6, p. 57:17-25 *citing* Annex 1 to the Mannesmann Contract and Partially Negotiated Annexes 2, 3, and 4, **Exhibit C-0166**, para. 2.2.

⁴³⁴ 2019 Merits Hearing, Day 3, pp. 51:16-20, pp. 87:10-92:21; 2019 Merits Hearing, Day 4, pp. 72:10-73:10.

⁴³⁵ 2019 Merits Hearing, Day 6, pp. 58:3-59:24.

⁴³⁶ 2019 Merits Hearing, Day 6, pp. 59:25-60:6.

⁴³⁷ 2019 Merits Hearing, Day 3, pp. 93:8-94:11.

plant, noting that the ADEMCO-MD Contract calculated the number of slag pots necessary for the project.⁴³⁸

332. Claimant argues that the SRK Report analyses the Project for its potential as a global competitive project, whilst it was actually a smaller scale project.⁴³⁹ Claimant argues that the Project saved costs by using local raw materials and labour (which the SRK Report disregards).⁴⁴⁰ Claimant notes that the plant was in the same location as the iron ore, which was a cost benefit to the Project.⁴⁴¹ Claimant notes that Dr Cappel agrees with this cost analysis.⁴⁴²
333. Claimant submits that there is agreement that the construction of a railway line, a water pipeline, and a gas pipeline was feasible, but the Parties differ on who would pay the resulting costs.⁴⁴³ Claimant notes that the various suppliers would themselves pay for these pipelines.⁴⁴⁴
334. Claimant states that the discussions with Arbed were not terminated. The negotiations with Arbed were suspended until an agreement with MD was reached as to the issue of a performance guarantee for the old factory.⁴⁴⁵

Respondent's Position

335. Respondent rejects Claimant's claim for damages outright, arguing that the mine at Aswan was never economically feasible in light of its location, disposition, and composition of the iron ore, and that therefore, the Project had no value without the mine.⁴⁴⁶
336. Respondent argues that Egypt's support of the Project was in no way a guarantee of its feasibility.⁴⁴⁷ Respondent contends that EGSMA's search for iron in the early 1990s was focused on assessing the geological content of the ground and did not confirm the feasibility

⁴³⁸ 2019 Merits Hearing, Day 6, p. 60:13-20.

⁴³⁹ Claimant's Reply, para. 283; 2019 Merits Hearing, Day 4, p. 74:4-8.

⁴⁴⁰ Claimant's Reply, para. 284.

⁴⁴¹ 2019 Merits Hearing, Day 3, p. 152:6-14; 2019 Merits Hearing, Day 6, p. 61:12-20; 2019 Merits Hearing, Day 4, pp. 67:15-69:20.

⁴⁴² 2019 Merits Hearing, Day 6, pp. 61:21-62:6.

⁴⁴³ 2019 Merits Hearing, Day 6, pp. 80:18-81:5.

⁴⁴⁴ 2019 Merits Hearing, Day 6, p. 81:6-17.

⁴⁴⁵ 2018 Merits Hearing, Day 2, pp. 22:12-23:16.

⁴⁴⁶ Respondent's Statement of Defense, paras. 122, 128.

⁴⁴⁷ Respondent's Rejoinder, para. 11.

of any project.⁴⁴⁸ Whilst Egypt publicised the mining opportunities in Aswan in order to attract investors and generate job and development opportunities in the Aswan region, it never guaranteed the feasibility of Claimant's Project.⁴⁴⁹ Citing the First SRK Report, Respondent explains that it is not unusual for a State to simply identify potential resources and seek out investors, and not conduct any further feasibility studies.⁴⁵⁰ Respondent maintains that it was Claimant's responsibility to determine the feasibility of the Project.⁴⁵¹ Respondent highlights that the concession awarded to Claimant covered "the search for, exploitation and manufacture of iron ore in the east and south east region of Aswan" and such search included a verification of "the existence or potential existence of iron ore" and "determining the iron ore, its quantities, characteristics, means of extraction, breaking, grounding, treating, melting, purifying and marketing and feasibility studies related thereof."⁴⁵² Respondent explains that the concession required Claimant to conduct a search phase for a year and then submit a conclusive feasibility study.⁴⁵³ Respondent notes that the feasibility of the Project could only have become clear after this search phase.⁴⁵⁴

337. Respondent maintains that, had a proper study been conducted by Claimant, the Project would have been abandoned.⁴⁵⁵ Respondent clarifies that it does not allege that Claimant failed to produce a feasibility report pursuant to Article 4, but that Claimant's feasibility studies do not show that the iron ore at Aswan could be economically exploited.⁴⁵⁶
338. Respondent relies on the cancellation of the "premature" First ADEMCO-MD Contract and the conclusion of the Second ADEMCO-MD Contract as contemporaneous evidence that the Project was not moving forward as planned.⁴⁵⁷ Moreover, Respondent points to the lack of evidence that all payments under the Second ADEMCO-MD Contract were made by Claimant.⁴⁵⁸ Respondent submits that the Project Partners did not have confidence in the feasibility of the Project, noting the absence of witness evidence from the Project Partners in

⁴⁴⁸ Respondent's Rejoinder, para. 12 *citing* EGSMAs Geological Survey, Iron Exploration Project (IEP), Phase III Report 1993-1997, **Exhibit C-0099**, pp. 5, 153-55; EGSMAs Geological Survey, Iron Exploration Project (IEP) Phase I Report of 1993-1996, **Exhibit C-0112**; EGSMAs Geological Survey, Iron Exploration Project (IEP) Phase II Report of 1995, **Exhibit C-0113**.

⁴⁴⁹ Respondent's Rejoinder, paras. 13, 16.

⁴⁵⁰ Respondent's Rejoinder, para. 13.

⁴⁵¹ Respondent's Rejoinder, para. 16.

⁴⁵² Respondent's Rejoinder, para. 14 *citing* Law No. 166, 14 June 1998, **Exhibit C-0036**, Article 1 (emphasis added).

⁴⁵³ Respondent's Rejoinder, para. 15 *citing* Law No. 166, 14 June 1998, **Exhibit C-0036**, Article 4.

⁴⁵⁴ Respondent's Rejoinder, para. 15.

⁴⁵⁵ Respondent's Statement of Defense, para. 128.

⁴⁵⁶ Respondent's Rejoinder, paras. 17, 22.

⁴⁵⁷ Respondent's Rejoinder, para. 19; 2019 Merits Hearing, Day 3, p. 60:5-18.

⁴⁵⁸ Respondent's Rejoinder, para. 20; 2019 Merits Hearing, Day 3, p. 61:12-20.

support of the Project⁴⁵⁹ and that none of the Project Partners made payments pursuant to the ADEMCO Shareholder Agreement.⁴⁶⁰ Respondent highlights that on 14 January 2000, MD raised questions about the beneficiation of iron ore and efforts made towards funding the Project.⁴⁶¹

339. Respondent relies on the First SRK Report, which demonstrates that the UEC Study (upon which the Inglis Report relies to assess damages) is not comprehensive and is at best a preliminary study.⁴⁶² Respondent argues that a feasibility study is:

a detailed technical and economic study of a mining project the aim of which is to demonstrate the technical and economic viability of a project to a sufficient level so as to enable the owners of that project to make a decision on whether or not to construct the project and also provide enough certainty in the economic returns to enable a lender or investor to provide sufficient finance to fund [the] construction.⁴⁶³

Respondent argues that the UEC Study does not meet this standard because it does not provide satisfactory solutions for the extraction and beneficiation of the iron ore, nor for the transportation of raw materials (e.g. limestone and coal) required for the factory.⁴⁶⁴ Dr Dagdalen in his testimony confirmed that Section 4 of the UEC Study would not, by itself, comprise a feasibility study, because it is based on reserves of all categories, not just probable and proven reserves.⁴⁶⁵

1. Mining

340. Respondent argues that the quantities of iron ore at Aswan were insufficient to sustain the 20-year mine plan.⁴⁶⁶ Respondent notes that the Met-Chem Report only evidenced a maximum of six years of operation.⁴⁶⁷ Respondent's mining expert, Dr Armitage, suggests that losses and dilutions usually experienced during mining would have reduced the mine life to five years.⁴⁶⁸
341. Respondent argues that the UEC Study states that there were sufficient resources for the Project to operate for 23 years, but in making this determination, includes "proven",

⁴⁵⁹ Respondent's Rejoinder, para. 4.

⁴⁶⁰ Respondent's Rejoinder, para. 21.

⁴⁶¹ Respondent's Rejoinder, para. 21 *citing* Letter from SMS Demag to ADEMCO and AISCO, 14 January 2000, **Exhibit C-0090**, p. 2.

⁴⁶² Respondent's Statement of Defense, para. 123; Respondent's Rejoinder, para. 22; 2019 Merits Hearing, Day 3, p. 213:20-24, p. 214:16-22.

⁴⁶³ Respondent's Statement of Defense, para. 123 *citing* First SRK Report, para. 21.

⁴⁶⁴ Respondent's Statement of Defense, para. 124.

⁴⁶⁵ 2019 Merits Hearing, Day 3, pp. 177:20-179:20.

⁴⁶⁶ Respondent's Rejoinder, paras. 25-27; 2019 Merits Hearing, Day 3, pp. 209:23-210:16.

⁴⁶⁷ 2019 Merits Hearing, Day 3, p. 55:1-22.

⁴⁶⁸ 2019 Merits Hearing, Day 3, pp. 210:17-211:4.

“indicated”, and “inferred” resources. According to Respondent, there is nothing to show that the reserves would have been of sufficient quality to be mined.⁴⁶⁹ Respondent argues that the Met-Chem Report found only 4.4 million tonnes of iron ore in area 10 of Claimant’s concession, in which area EGSMa found 64 million tonnes.⁴⁷⁰ In the other areas of Claimant’s concession, the Met-Chem Report only have “indicated resources”, not the more certain “measured resources”.⁴⁷¹ Respondent further explains that the “inferred resources” referred to in the Met-Chem Report are only possible reserves and this cannot be used for a feasibility study.⁴⁷² Respondent argues that the level of proven resources was reducing as the exploration work continued.⁴⁷³ Respondent notes that EGSMa’s report of October 1998 suggests that the measured and indicated reserves in area 10 were even lower than those indicated in the EGSMa report of 1997 and that these were further reduced in the Met-Chem Report.⁴⁷⁴

342. Respondent acknowledges that although the overall geological resources are higher in the Met-Chem Report, the amount of minable resources would only allow the Project to operate for six years.⁴⁷⁵ Respondent further notes that Dr Dagdalen (Claimant’s expert) agreed that the EGSMa numbers cannot be relied upon.⁴⁷⁶
343. Respondent points out that Met-Chem prepared its June 1999 report on the basis of a concession area that represented the “approximate location of extended concession as filed with Egyptian Mining Authority” that did not conform to the concession area awarded to Claimant (as set out in the Concession Agreement, the UEC Study, and Claimant’s presentation to President Mubarak in May 1999).⁴⁷⁷ Respondent submits that there is no evidence that Claimant applied to extend the concession area.⁴⁷⁸ Respondent notes that 59.4% of the diluted minable reserves estimated by Met-Chem in its 6-year mining plan, come from “area 16” that is not in the original concession area.⁴⁷⁹ Respondent concludes that Claimant moved to exploring other areas because there were insufficient reserves in the concession area

⁴⁶⁹ 2019 Merits Hearing, Day 6, p. 185:3-14.

⁴⁷⁰ 2019 Merits Hearing, Day 3, pp. 55:23-56:12.

⁴⁷¹ 2019 Merits Hearing, Day 3, p. 56:13-22.

⁴⁷² 2019 Merits Hearing, Day 3, p. 56:23-25.

⁴⁷³ 2019 Merits Hearing, Day 6, pp. 187:15-18.

⁴⁷⁴ 2019 Merits Hearing, Day 3, pp. 198:21-201:23.

⁴⁷⁵ 2019 Merits Hearing, Day 3, pp. 56:5-25, 71:19-72:21, 210:11-14.

⁴⁷⁶ 2019 Merits Hearing, Day 6, p. 188:16-19; 2019 Merits Hearing, Day 3, pp. 184:22-185:25.

⁴⁷⁷ 2019 Merits Hearing, Day 6, pp. 146:16-147:9.

⁴⁷⁸ 2019 Merits Hearing, Day 6, p. 147:2-15.

⁴⁷⁹ 2019 Merits Hearing, Day 3, p. 194:3-22; 2019 Merits Hearing, Day 6, pp. 146:3-6, 149:13-18.

granted to him.⁴⁸⁰

344. Respondent suggests that the contemporaneous references by Claimant's officials to the vast iron ore reserves in Aswan, as well as their estimates regarding the viability of the Project, may have included reserves that are not confirmed.⁴⁸¹ Respondent points to contemporaneous news items and a study by British Steel that doubt the feasibility of the Project.⁴⁸² Respondent notes that although the British Steel report has not been produced, there is no reason to doubt the contemporaneous references to that report.⁴⁸³
345. Respondent states that the record demonstrates a lack of confidence in the Project from the Project Partners.⁴⁸⁴ Respondent argues that had the Project Partners been committed to the Project, they would not have abandoned it when Claimant was framed with "trumped up charges".⁴⁸⁵ Respondent surmises that the real reason why the Project Partners left was because they reviewed the November 1999 Met-Chem Report and the UEC Study that revealed a 6-year conceptual mining program and said that the Project would not break even for seven years, and considered that the Project was not viable.⁴⁸⁶
346. Respondent argues that even if Claimant had planned to outsource the mining operations and the transport of the ore to the plant site, he has not provided evidence of a potential contractor or the costs of outsourcing.⁴⁸⁷

2. Beneficiation

347. Respondent argues that the iron ore at Aswan was high in phosphorus and low in iron grade.⁴⁸⁸ In support of this conclusion, Respondent relies on contemporaneous studies carried out by Egyptian Iron & Steel Company and British Steel.⁴⁸⁹ Respondent points to contemporaneous evidence that Mr Verdier acknowledged the poor quality of iron ore at

⁴⁸⁰ 2019 Merits Hearing, Day 6, pp. 142:3-150:19; 2019 Merits Hearing, Day 3, pp. 191:1-195:19.

⁴⁸¹ 2019 Merits Hearing, Day 3, pp. 98:4-101:14, pp. 115:17-116:19.

⁴⁸² 2019 Merits Hearing, Day 6, p. 190:4-13; 2019 Merits Hearing, Day 3, pp. 245:9-247:18.

⁴⁸³ 2019 Merits Hearing, Day 6, p. 190:14-22.

⁴⁸⁴ Respondent's Rejoinder, para. 23.

⁴⁸⁵ 2019 Merits Hearing, Day 6, pp. 179:8-181:9.

⁴⁸⁶ 2019 Merits Hearing, Day 6, pp. 181:10-182:21, 190:23-191:14, 204:8-206:8 *citing* Letter from SMS Demag to ADEMCO and AISCO, 14 January 2000, **Exhibit C-0090**.

⁴⁸⁷ Respondent's Rejoinder, para. 22; 2019 Merits Hearing, Day 3, pp. 58:13-59:7.

⁴⁸⁸ Respondent's Rejoinder, paras. 25-27.

⁴⁸⁹ Respondent's Rejoinder, para. 34 *citing* Letter from Egyptian Iron & Steel Co. to Dr Muhammad Abdel Azeem, South Valley Aswan Iron and Steel Company Plants, 5 April 1998, **Exhibit R-0070**; Letter from the Former Chairman of Iron & Steel Co. to the Prime Minister, Future of Iron Ore in Southern Aswan from Steel Industry Perspective, 17 May 1998, **Exhibit R-0071**; Letter from CMRDI to ADEMCO, 4 January 2000, **Exhibit C-0087**.

Aswan.⁴⁹⁰

348. Further, Respondent argues that the beneficiation of the iron ore at Aswan was challenging.⁴⁹¹ Respondent argues that the UEC Study assumes that the iron ore to be fed into the blast furnace would have 60% concentration in iron (the industry standard), but no feasibility report has identified a method to achieve this concentration of iron in the Project.⁴⁹² Respondent argues that the UEC Study assumes that the level of phosphorus (an impurity that eventually reduces the ductility of steel produced) in the iron ore would reach 1.3%, without providing reasons for this.⁴⁹³
349. Respondent submits that no satisfactory beneficiation process had been identified as of February 2000.⁴⁹⁴ Respondent notes that the contemporaneous CMRDI reports indicate that there was only one pilot plant testing for beneficiation that took place in 1999: half of the sample was dealt with by CMRDI,⁴⁹⁵ and the other half, sent to SGA in Germany, was deemed to have an iron content that was too low for sintering.⁴⁹⁶ Respondent notes that Mr Verdier suggests that SGA was meant to conduct additional tests for dephosphorisation and to define the processes and equipment that were required for the beneficiation, but this was never done.⁴⁹⁷
350. Respondent notes that the CMRDI used the wet high gradient magnetic separation process for beneficiation, because other processes (including wet low intensity magnetic separation) were generally not successful or were not commercially practical.⁴⁹⁸ Respondent notes that the result of the beneficiation test work carried out in February 2000 (on a new sample that had lower iron content taken in mining conditions) was that more test work had to be carried out using the wet high gradient magnetic separation process and other beneficiation processes.⁴⁹⁹ Respondent argues that iron ore has specific characteristics and the beneficiation process used

⁴⁹⁰ Respondent's Rejoinder, para. 31 *citing* Letter from Mr Shimi to the Prime Minister, 10 February 2000, **Exhibit C-0091**; 2019 Merits Hearing, Day 3, pp. 126:22-127:16.

⁴⁹¹ Respondent's Rejoinder, para. 28.

⁴⁹² Respondent's Statement of Defense, para. 126; Respondent's Rejoinder, para. 30; 2018 Merits Hearing, Day 1, pp. 149:4-152:15.

⁴⁹³ Respondent's Statement of Defense, para. 127.

⁴⁹⁴ Respondent's Rejoinder, para. 32; 2019 Merits Hearing, Day 3, pp. 72:15-73:3; 2019 Merits Hearing, Day 6, p. 193:2-8.

⁴⁹⁵ 2019 Merits Hearing, Day 3, pp. 121:12-124:14.

⁴⁹⁶ 2019 Merits Hearing, Day 3, pp. 124:15-125:25 *citing* Report on Testwork with Aswan Ore for Demag Italmimpianti S.p.A. Italy by SGA, 6 August 1998, **Exhibit R-0069**.

⁴⁹⁷ 2019 Merits Hearing, Day 3, pp. 139:12-142:21.

⁴⁹⁸ 2019 Merits Hearing, Day 3, pp. 128:20-131:10.

⁴⁹⁹ 2019 Merits Hearing, Day 4, pp. 18:10-24:4.

for oolitic iron ores in other parts of the world could not simply be applied to the Project.⁵⁰⁰

351. Respondent's beneficiation expert, Dr Willis suggests that going from lab scale to bench scale with the test work using low-intensity magnetic separation and roasting was challenging.⁵⁰¹ He notes that more iron ore would have to be fed into the beneficiation process to achieve the same amount of product.⁵⁰²
352. Respondent argues that the two beneficiation processes that showed potential, i.e., pilot plant testing and lab testing, would have failed to achieve an acceptable level of quality of iron ore, the former achieving an iron concentrate of 50.2% and phosphorus content of 1.65% and the latter an iron content of 54.3% and a phosphorus content of 1.94%.⁵⁰³
353. Respondent notes that the beneficiation analysis produced by Met-Chem at Claimant's request in June 1999 and November 1999 was also not satisfactory and is at best a scoping study that is prepared to determine whether a feasibility analysis should be conducted.⁵⁰⁴ Respondent points out that the Met-Chem Report was presented as a "Conceptual Study".⁵⁰⁵

3. Steel-making

354. Respondent agrees that the Project may have been technically feasible, but raises doubts about its economic feasibility.⁵⁰⁶ Respondent points to uncertainties about the capital expenditure and operating expenditure of the steel plant.⁵⁰⁷
355. Respondent's expert, Dr Cappel, notes that it was unusual for a steel plant to be close to the iron ore mining and that steel plants are usually located closer to customers.⁵⁰⁸
356. Respondent argues that, in order to produce steel at the Project, the iron ore would have to be

⁵⁰⁰ 2019 Merits Hearing, Day 4, pp. 11:1-12:10.

⁵⁰¹ 2019 Merits Hearing, Day 4, p. 32:20-25.

⁵⁰² 2019 Merits Hearing, Day 4, pp. 32:16-33:12, 38:7-39:15; Presentation of Dr Willis, 25 April 2019, Slide 4.

⁵⁰³ Respondent's Rejoinder, para. 29.

⁵⁰⁴ Respondent's Statement of Defense, para. 26 *citing* Met-Chem, Report on Geology, Mining and Beneficiation, Executive Summary, June 1999, **Exhibit R-0058**; Met-Chem Report, November 1999, **Exhibit C-0049**; Respondent's Rejoinder, para. 22.

⁵⁰⁵ Respondent's Rejoinder, para. 22 *citing* Prints from the Website of Met-Chem, accessed 15 November 2018, **Exhibit R-0067**.

⁵⁰⁶ 2019 Merits Hearing, Day 6, pp. 193:17-194:1; 2019 Merits Hearing, Day 4, p. 109:7-15.

⁵⁰⁷ 2019 Merits Hearing, Day 6, pp. 194:2-195:10.

⁵⁰⁸ 2019 Merits Hearing, Day 4, pp. 101:2:6, 107:4-12; 126:12-127:7.

blended with imported sinter feed, which is not permitted by the Commitment Agreement.⁵⁰⁹ Respondent emphasises that the need for additional beneficiation and metallurgical work made the Project unviable and that the UEC Study underestimates the Project's costs.⁵¹⁰ At the 2019 Merits Hearing and in the Joint Steel Report, Dr Cappel stated that it is possible to use 100% concentrate in the sinter, but it is not recommended.⁵¹¹

357. Dr Cappel notes that the silica content of the iron ore would have been high, which would increase the slag volumes to be handled, posing problems for the operation,⁵¹² and that the need for sufficient slag pots and equipment to handle the large amount of slag would have increased the capital expenditure.⁵¹³ Dr Cappel also states that there were no plans for the use of the slag, for example, in producing fertiliser.⁵¹⁴
358. Dr Cappel suggests that account was not taken of the capital expenditures for lime injections. He states in his report that the cost of this could be USD 5 million, but in the Joint Steel Report that this would be USD 10 million.⁵¹⁵
359. Respondent highlights that no provisions were made for the construction of a gas pipeline, for power or for water⁵¹⁶ and denies that the government had committed to provide these facilities to the Project.⁵¹⁷ Respondent further notes that no arrangements were made for the required railroad line that was to encompass at least 50 kilometres and notes that there was no agreement that the government would build this railroad. Respondent notes that Claimant was aware that the government did not have the finances to fund this railway line.⁵¹⁸ Respondent notes that the railway line would not be a straight line, would be congested, and would require considerable maintenance given the harsh desert climate.⁵¹⁹
360. Respondent clarifies that if the iron ore had run out, the Project could not function on imported ore (as the Commitment Agreement provided for making steel out of the local ore)

⁵⁰⁹ Respondent's Rejoinder, para. 33 *citing* Law No. 166, 14 June 1998, **Exhibit C-0036**, Article 13; 2019 Merits Hearing, Day 3, p. 73:4-14; 2019 Merits Hearing, Day 4, p. 110:19-20.

⁵¹⁰ Respondent's Rejoinder, para. 33; 2019 Merits Hearing, Day 3, pp.59:12-60:4.

⁵¹¹ 2019 Merits Hearing, Day 4, pp. 114:22-116:23.

⁵¹² 2019 Merits Hearing, Day 4, pp. 105:18-106:1.

⁵¹³ 2019 Merits Hearing, Day 4, pp. 110:5-16, 111:13-112:11.

⁵¹⁴ 2019 Merits Hearing, Day 4, pp. 112:12-113:8.

⁵¹⁵ 2019 Merits Hearing, Day 4, pp. 127:8-128:2.

⁵¹⁶ 2019 Merits Hearing, Day 3, pp. 63:5-64:3; 2019 Merits Hearing, Day 4, pp. 85:16-89:15.

⁵¹⁷ 2019 Merits Hearing, Day 6, pp. 152:23-153:5.

⁵¹⁸ 2019 Merits Hearing, Day 3, pp. 64:6-12; 2019; 2019 Merits Hearing, Day 4, pp.81:4-84:11; 2019 Merits Hearing, Day 6, pp. 152:2-22, 154:4-156:21.

⁵¹⁹ 2019 Merits Hearing, Day 4, pp. 89:16-96:18; 2019 Merits Hearing, Day 6, p. 152:12-22.

because importing ore would be against the funding concept of the Project.⁵²⁰ Respondent notes that ADEMCO was established to manufacture the iron and steel from the Project, and AISCO was established to run the steel operations, using iron ore mined by ADEMCO.⁵²¹ Respondent notes that AISCO's business was dependent on the quality and quantity of iron ore mined by ADEMCO.⁵²² According to Respondent, if manufacturing iron and steel at Aswan was impossible, then the Project factory would have no value, thus rendering ADEMCO without value.⁵²³

Tribunal's Analysis

361. The Tribunal will first deal with the appropriate method of valuation and second with the matter of causation including the viability of the Project.

B. STANDARD AND METHOD OF ASSESSING DAMAGES

1. Categories of loss that could be claimed under the DCF method

Claimant's Position

362. Claimant explains that although at its establishment the shares in ADEMCO were registered in his name (7%), in the name of his wife (15%), minor daughters (15% each) and friends Messrs Khabir (2.5%), El-Bardissy (2.5%), and Badr (2.7%), and in the name of his wholly-owned company Tradecon (2.5%), Claimant paid for all these shares and exercised the rights and benefits deriving from these shares.⁵²⁴ Claimant notes that Mr Badr separately purchased 30,000 shares in ADEMCO, which does not comprise part of this claim.⁵²⁵ Claimant further notes that Mr Shimi and his family held the remaining 37.5% of ADEMCO's shareholding.⁵²⁶
363. Claimant submits that the ADEMCO shareholding that he controlled increased to 54.3% in April 1998 when ADEMCO's share capital was increased,⁵²⁷ moved to 80.2% when Mr

⁵²⁰ 2019 Merits Hearing, Day 3, pp.64:17-66:17.

⁵²¹ Respondent's Statement of Defense, para. 130.

⁵²² Respondent's Statement of Defense, para. 131 *citing* Feasibility Study Prepared by UEC USX Engineers, 22 January 1999, **Exhibit C-0043**, p. 5.

⁵²³ Respondent's Statement of Defense, paras. 132-34 *citing* Inglis Report, para. 8.2.

⁵²⁴ Claimant's Reply, paras. 43-49, 57-58 *citing* Bahgat WS 2, paras. 44, 100; Bahgat WS 5, paras. 8-9, 26-27; Dahlia Shimi WS, para. 8; Expert Report of Mr Mohamad Talaat, 8 October 2018, para. 16; Judgment of the Supreme State Security Court, 11 June 2002, **Exhibit C-0002**, pp. 7-8; Appendix 6 of the Matthews Report.

⁵²⁵ Claimant's Reply, para. 50.

⁵²⁶ Claimant's Reply, para. 58.

⁵²⁷ Claimant's Reply, para. 59.

Shimi sold his shares to Claimant in July 1998,⁵²⁸ and moved to 70.22% in February 2000 after Claimant transferred shares to the Project Partners and received shares from his family members (which receipt is not challenged by Respondent).⁵²⁹

364. Claimant agrees that ADEMCO held 60% of AISCO's equity, which, along with Mr Bahgat's 0.2% direct interest in AISCO, resulted in Claimant having 87.5% interest in AISCO in total.⁵³⁰
365. Claimant states that international law recognises beneficial ownership, as reflected in Mr Bahgat's agreements with his family and friends regarding their ADEMCO shareholding.⁵³¹ Claimant argues that Respondent's prosecutor recognised through the criminal proceedings against him that Claimant held shares in ADEMCO through his wife, daughters, friends, and Tradecon.⁵³² Therefore, Respondent is now precluded from arguing that those shares did not form a part of Mr Bahgat's investment.⁵³³
366. Claimant explains that Respondent has not contested that Mr Bahgat may claim the loss suffered by Tradecon because it is his wholly-owned company.⁵³⁴
367. Claimant contends that Respondent misrepresents Claimant's shareholding in ADEMCO⁵³⁵ and denies that he has obfuscated its shareholding in the Companies.⁵³⁶
368. Claimant argues that Respondent cannot avoid its international responsibility by artificially distinguishing shareholder losses from company's losses.⁵³⁷ Claimant states that the Project's failure directly impacted the economic value of Claimant's shareholding and argues that Respondent's interference with the Companies is linked to Claimant's losses.⁵³⁸

⁵²⁸ Claimant's Reply, para. 60.

⁵²⁹ Claimant's Reply, para. 67; 2019 Merits Hearing, Day 6, pp. 72:24-53:15, 76:5-10.

⁵³⁰ Claimant's Reply, para. 68. Please note that the Matthews Report, para. 6.21, the First BDO Report, paras. 7.24, 7.36, and the Second BDO Report, para. 6.3, suggest that ADEMCO held 85.7% of AISCO.

⁵³¹ Claimant's Reply, paras. 317-18 *citing* *Ouziel Aryeh, Eliyahou Aryeh, v. The Islamic Republic of Iran*, (Iran-United States Claims Tribunal), Award No. 584-839-3, 25 September 1997, **Exhibit CLA-0109**; 2019 Merits Hearing, Day 6, pp. 73:16-76:4.

⁵³² Claimant's Reply, para. 52 *citing* Judgment of the Supreme State Security Court, 11 June 2002, **Exhibit C-0002**, p. 1; Bahgat WS 2 paras. 44, 100; Bahgat WS 5 paras. 25-27; GAFI Resolution, 16 July 1998, **Exhibit C-0037**.

⁵³³ Claimant's Reply, para. 56.

⁵³⁴ 2019 Merits Hearing, Day 6, p. 72:17-23.

⁵³⁵ Claimant's Reply, para. 43.

⁵³⁶ Claimant's Reply, para. 314.

⁵³⁷ Claimant's Reply, para. 306.

⁵³⁸ Claimant's Reply, para. 307.

369. Claimant suggests that the authorities cited by Respondent actually favour Claimant. Claimant argues that *Asian Agricultural Products v. Sri Lanka* considered the “global” value of the company to the shares of claimant and, therefore, supports Claimant’s case.⁵³⁹ Claimant notes that *Enkev Beheer v. Poland* held that the claimant could only claim for the harm suffered from the “diminution or total loss of rights derived from its shares,” which Claimant argues mirrors his claim in this arbitration.⁵⁴⁰
370. Claimant contends that Respondent ignores prevailing jurisprudence in cases such as *Sistem v. Kyrgyzstan* and *Koch Minerals v. Venezuela* that confirms “flow-through of loss to shareholders in cases of indirect expropriation.”⁵⁴¹

Respondent’s Position

371. Relying on prior arbitral awards, Respondent argues that shareholders are only entitled to claim damages in an amount corresponding to the impact of the alleged breach on the value of the shares themselves.⁵⁴² Relying on *Asian Agricultural Products v. Sri Lanka*, *Enkev Beheer v. Poland*, and the work of commentators, Respondent proposes that a calculation be made not of the loss suffered by the company as a whole, but the difference in the value of the shares between the alleged but for and the actual scenarios.⁵⁴³ Respondent alleges that Claimant has not put the Tribunal in a position to determine the loss in Claimant’s shareholding in the Companies. In Respondent’s words, “[t]his failure alone should be dispositive of Claimant’s quantum case.”⁵⁴⁴

⁵³⁹ Claimant’s Reply, paras. 309-10 citing *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, **Exhibit RLA-0105**, paras. 97-98.

⁵⁴⁰ Claimant’s Reply, para. 311 citing *Enkev Beheer B.V. v. The Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 April 2014, **Exhibit RLA-0106**, para. 313; 2018 Merits Hearing, Day 1, pp. 54:22-57:12.

⁵⁴¹ Claimant’s Reply, para. 312 citing *Sistem Muhendislik Insaat Sanayi v. Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, **Exhibit CLA-0108**, paras. 175-76; *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, **Exhibit CLA-0079**, paras. 9.205 *et seq*; *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, **Exhibit CLA-0078**, para. 111.

⁵⁴² Respondent’s Statement of Defense, para. 136.

⁵⁴³ Respondent’s Statement of Defense, paras. 137-40 citing *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, **Exhibit RLA-0105**, para. 95; *Enkev Beheer B.V. v. The Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 April 2014, **Exhibit RLA-0106**, para. 313; S. Ripinsky with K. Williams, *Damages in international investment law*, London, British Institute of International and Comparative Law, 2008, **Exhibit RLA-0089**, pp.149-50, 155; Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2012, **Exhibit RLA-0088**, p. 443.

⁵⁴⁴ Respondent’s Statement of Defense, paras. 143-45.

372. Respondent argues that Claimant's alleged shareholding in AISCO is "not substantiated".⁵⁴⁵ Respondent maintains that there is no evidence to support the assumption in the Inglis Report that, had the Project gone ahead, ADEMCO would hold 60% of AISCO's shares and Mr Bahgat would hold 0.5% of AISCO's shares.⁵⁴⁶ Respondent notes that AISCO's articles of association stipulate that Mr Bahgat held 0.2% of AISCO's shares.⁵⁴⁷ Respondent further notes that Claimant's suggestion that ADEMCO held 60% of the equity in AISCO when AISCO was incorporated, is contradicted by AISCO's articles of association that make clear that ADEMCO held 85.7% of AISCO's shares upon the latter's incorporation.⁵⁴⁸ In summary, Respondent considers that Claimant never held over 0.2% of AISCO's shares (10.5%, when taken with his indirect shareholding through ADEMCO).⁵⁴⁹
373. Respondent explains that GAFI records the shareholding of joint stock companies such as AISCO and ADEMCO and such companies must obtain GAFI's authorisation when they are founded.⁵⁵⁰ Respondent notes that GAFI recorded that Mr Bahgat had a 7% shareholding in ADEMCO.⁵⁵¹ Respondent notes that on 12 April 1998, according to GAFI's documentation and following an increase of the authorised share capital of ADEMCO, Mr Bahgat still held 7% of the share capital of ADEMCO.⁵⁵² Respondent notes that the description of the shareholding in ADEMCO was amended by GAFI again on 16 July 1998 and 7 December 1998, and GAFI records reflected Mr Bahgat holding 12% of ADEMCO's shares as at February 2000 (which would amount to a 10.5% "shareholding in the Project").⁵⁵³
374. Respondent disputes Claimant's alleged 69.5% interest in ADEMCO.⁵⁵⁴ Respondent characterises as unreliable the *ex post* witness statements of Claimant alleging his 69.5% shareholding in ADEMCO as at 2005.⁵⁵⁵ Respondent argues that the following do not establish his 69.5% interest in ADEMCO: (i) that Claimant increased his shareholding when Mr Shimi reduced his ADEMCO shareholding from 37.5% to 14.5%; (ii) that by

⁵⁴⁵ Respondent's Statement of Defense, para. 156.

⁵⁴⁶ Respondent's Statement of Defense, para. 157.

⁵⁴⁷ Respondent's Statement of Defense, para. 157 *citing* Copy of the GAFI Resolution and the attached Preliminary Contract for the Company and the Articles, **Exhibit C-0039**.

⁵⁴⁸ Respondent's Statement of Defense, para. 158.

⁵⁴⁹ Respondent's Statement of Defense, para. 159.

⁵⁵⁰ Respondent's Rejoinder, para. 140 *citing* Law No. 8 of 1997, **Exhibit RLA-0157**, Articles 4 and 14.

⁵⁵¹ Respondent's Rejoinder, para. 140 *citing* GAFI Resolution, 24 December 1997, **Exhibit C-0023**.

⁵⁵² Respondent's Rejoinder, para. 141 *citing* GAFI Decision No. 670, 12 April 1998, **Exhibit R-0084**.

⁵⁵³ Respondent's Rejoinder, paras. 141, 165 *citing* GAFI Resolution, 16 July 1998, **Exhibit C-0037**; GAFI Resolution, 7 December 1998, **Exhibit C-0042**; Respondent's Statement of Defense, paras. 153, 155 *citing* GAFI Resolution, 24 December 1997, **Exhibit C-0023**, p. 16; GAFI Report, 6 February 2000, **Exhibit C-0052**; GAFI Information Memorandum, 9 April 2008, **Exhibit R-0048**.

⁵⁵⁴ Respondent's Statement of Defense, para. 150.

⁵⁵⁵ Respondent's Statement of Defense, para. 151.

February 2000, the shares held by his family in ADEMCO were transferred to his name, thus making Claimant the owner of 39.5% of ADEMCO and 0.5% of AISCO shares; and (iii) that Arab Contractors, Egyptian Company for Investment and Underwriting, and Orascom returned their shares to Claimant in 1999 and May 2014.⁵⁵⁶ Respondent states that the Share Consolidation Report upon which Claimant relies cannot negate the contemporaneous documentary evidence from GAFI regarding Claimant's shareholding in ADEMCO.⁵⁵⁷ Respondent maintains that only compelling evidence can challenge the evidence presented by GAFI documents and Claimant has not presented such evidence.⁵⁵⁸

375. Respondent explains that Claimant cannot claim for losses linked to the shares of his family members in ADEMCO as Mr Bahgat is the only claimant in this arbitration.⁵⁵⁹ Respondent notes that Claimant has not even produced a written agreement between himself and these other individuals that would suggest that the apparent shareholders are not the true shareholders.⁵⁶⁰ To establish his control over the shares of Mrs Shimi (Claimant's ex-wife), Respondent notes that Claimant merely relies on Mrs Shimi's witness statement rather than any formal contemporaneous correspondence of his payment for the shares or his agreement with Mrs Shimi.⁵⁶¹ Claimant also does not explain why Mrs Shimi held shares for Claimant's benefit.⁵⁶² Moreover, Respondent observes that there is no documentary support for Claimant's daughters holding ADEMCO shares for Claimant's benefit.⁵⁶³ Mr Bahgat's guardianship over his daughters during their minority does not imply that assets and properties held by the daughters were for Respondent's benefit.⁵⁶⁴
376. Respondent underlines that there is nothing on the record, not even witness statements from Claimant's friends, that indicates that Claimant's friends held shares in ADEMCO for Claimant's benefit so that Claimant could avoid "personal exposure".⁵⁶⁵ To the contrary, the record suggests that Claimant's friends were active participants in ADEMCO shareholder meetings.⁵⁶⁶ The witness statements of Claimant's friends, Mr Khabir, Mr El-Bardissy, and Mr Badr that were submitted for the domestic criminal prosecution were dismissed by the

⁵⁵⁶ Respondent's Statement of Defense, para. 152, *citing* Bahgat WS 2, paras. 99, 101-02, 104.

⁵⁵⁷ Respondent's Rejoinder, para. 145.

⁵⁵⁸ Respondent's Rejoinder, paras. 146, 150.

⁵⁵⁹ Respondent's Statement of Defense, para. 153; Respondent's Rejoinder, para. 143.

⁵⁶⁰ Respondent's Rejoinder, para. 146.

⁵⁶¹ Respondent's Rejoinder, para. 151.

⁵⁶² Respondent's Rejoinder, para. 151.

⁵⁶³ Respondent's Rejoinder, para. 152.

⁵⁶⁴ Respondent's Rejoinder, para. 152.

⁵⁶⁵ Respondent's Rejoinder, para. 153.

⁵⁶⁶ Respondent's Rejoinder, para. 153.

Supreme State Security Court for coming after Claimant's friends were accused of misappropriation of funds, implying a personal motive to provide testimony that would assist them in evading charges.⁵⁶⁷ Further, Respondent suggests that their witness testimony indicates that their shares belonged to both Mr Bahgat and Mr Shimi.⁵⁶⁸

377. Respondent queries why Claimant wanted to shield himself from potential liability associated with the Project.⁵⁶⁹ The Public Prosecutor did not confirm that "relations and other persons related" to Claimant held shares on behalf of Claimant, but said that Claimant had used a fictitious payment of USD 30 million to MD to obtain ADEMCO shares for himself and persons related to him.⁵⁷⁰ Respondent clarifies that the Public Prosecutor made his comments regarding Claimant's shareholding in ADEMCO in the context of the criminal proceedings against Claimant, not in relation to arbitration proceedings brought against Claimant.⁵⁷¹
378. Respondent contests Claimant's allegation that the shares listed in the name of the Project Partners should be considered as Claimant's shares because Claimant never received payment for these shares.⁵⁷² First, there is no evidence that the Project Partners' shares belonged to Claimant; the Shareholders' Agreement (which included only MD and Cegelec) does not indicate that Mr Bahgat owned the shares purchased by the Project Partners.⁵⁷³
379. Second, there is no evidence that Claimant held the shares belonging to the Project Partners while he awaited payment.⁵⁷⁴ In fact, the Shareholder's Agreement states that an inability to make payment for the shares would result in a "waiver" of that companies' shares.⁵⁷⁵
380. Respondent argues that GAFI approved MD holding 10% of ADEMCO and Cegelec holding 5% of ADEMCO on 16 July 1998 and that this remained unchanged on 7 December 1998.⁵⁷⁶ Further, the 7 December 1998 GAFI resolution suggests that US Steel and Pomini are 5% and 10% shareholders of ADEMCO.⁵⁷⁷ Respondent maintains that the GAFI records are evidence

⁵⁶⁷ Respondent's Rejoinder, para. 153.

⁵⁶⁸ 2019 Merits Hearing, Day 6, pp. 118:1-119:1.

⁵⁶⁹ Respondent's Rejoinder, para. 153.

⁵⁷⁰ Respondent's Rejoinder, para. 147 *citing* Judgment of the Supreme State Security Court, 11 June 2002, **Exhibit C-0002**, p. 1.

⁵⁷¹ Respondent's Rejoinder, para. 147.

⁵⁷² Respondent's Rejoinder, para. 155.

⁵⁷³ Respondent's Rejoinder, para. 156.

⁵⁷⁴ Respondent's Rejoinder, para. 157.

⁵⁷⁵ Respondent's Rejoinder, para. 157.

⁵⁷⁶ Respondent's Rejoinder, para. 158.

⁵⁷⁷ Respondent's Rejoinder, para. 159 *citing* GAFI Resolution, 7 December 1998, **Exhibit C-0042**.

that the relevant companies were the owners of the above shareholding, not Claimant.⁵⁷⁸ Respondent underlines that nothing on the record suggests that Claimant held the shares of the Project Partners until they made payment.⁵⁷⁹ In fact, Respondent notes that the record indicates that Claimant used the alleged shareholding of the Project Partners to support the seriousness of the Project.⁵⁸⁰

381. Third, Respondent contends that there is no evidence that the Project Partners did not make payment for their shares and argues that the record suggests that MD and Cegelec made their payments.⁵⁸¹
382. Finally, Respondent states that the Project Partners' alleged failure to pay for ADEMCO's shares cannot be attributed to Respondent, but was because the feasibility of the Project had not been established.⁵⁸² Respondent highlights that the legal title of the Project Partners should not be disregarded because they each were involved in the Project: (i) MD was responsible for building the new steel plant, for providing staff training and technical management, and for purchasing the majority of the steel billets products by the Project;⁵⁸³ (ii) Cegelec was responsible for building the utilities infrastructure of the Project;⁵⁸⁴ (iii) US Steel was in charge of preparing studies relating to the iron ore quality and the feasibility of the Project and of providing management services for 10 years;⁵⁸⁵ and (iv) Pomini was meant to act as a sub-contractor of MD for the construction of the plant and to

⁵⁷⁸ Respondent's Rejoinder, para. 158.

⁵⁷⁹ Respondent's Rejoinder, para. 159.

⁵⁸⁰ Respondent's Rejoinder, para. 160.

⁵⁸¹ Respondent's Rejoinder, para. 161 *citing* Letter from Minister Reda to Prime Minister Ganzouri, 1 August 1998, **Exhibit C-0098**; Minutes of ADEMCO shareholders meeting, 31 May 1998; **Exhibit C-0035**, p. 3; Modification Contract of Articles 6, 7 and 21 of the Statute of ADEMCO, 1 June 1998, **Exhibit R-0047**, p. 4.

⁵⁸² Respondent's Rejoinder, para. 162.

⁵⁸³ Respondent's Rejoinder, para. 163 *citing* Contract Aswan Development and Mining Co Mannesman DEMAG **Exhibit C-0030**; Memorandum of Understanding signed between mv company Trade and Development Company and Mannesman Handel AG., 6 February 1998, **Exhibit C-0024.1**; Letter of Intent, 6 December 1998, **Exhibit C-0024**, p. 1; MEED Aswan project marks mining milestone, 9 October 1998 **Exhibit C-0050.5**.

⁵⁸⁴ Respondent's Rejoinder, para. 163 *citing* a copy of Cegelec's letter, 19 May 1998, **Exhibit C-0034**.

⁵⁸⁵ Respondent's Rejoinder, para. 163 *citing* Feasibility Study - Prepared by UEC USX engineers, 22 January 1999, **Exhibit C-0043**; Met-Chem, *Report on Geology, Mining and Beneficiation*, Executive Summary, June 1999, **Exhibit R-0058**; Centre de Recherche Minerale, Development of a Processing Method for the Aswan Ore, Final Report, 10 August 1999, **Exhibit C-0114**; Copy of the Met-Chem Report, November 1999, **Exhibit C-0049**.

apply the rolling mill.⁵⁸⁶

383. Respondent suggests that Claimant has obfuscated the information regarding his shareholding in the Companies in order to seek inflated compensation.⁵⁸⁷ Respondent alleges that Claimant has not presented any evidence regarding his changing shareholding in the Companies over time.⁵⁸⁸ This lack of evidence renders Claimant's valuation of his losses speculative: had the Project proceeded, Claimant's shareholding could have varied from the 21.5% that the Inglis Report uses as a basis to calculate loss⁵⁸⁹ and the Inglis Report does not account for the impact of the one-year delay in the initiation of the project on the financial position of the expected shareholders.⁵⁹⁰
384. Respondent argues that special factors could call for the Tribunal to determine jurisdiction over an asset that is not legally the property of Claimant, based on Claimant's control over the asset, however, Claimant has not presented any such factors to the Tribunal.⁵⁹¹

Tribunal's Analysis

385. The Tribunal will deal with the losses after having established the method of valuation.

2. Discounted Cash Flow

Claimant's Position

386. Claimant notes that in case of a lawful expropriation, the 1980 BIT requires "prompt, adequate and effective compensation" and the 2004 BIT requires compensation of the "value of the expropriated investment" determined as per "generally accepted principles of valuation."⁵⁹² Claimant argues that Respondent's measures did not comply with the standards of lawful expropriation under the 1980 BIT and the 2004 BIT, but neither BIT stipulates the compensation available in case of unlawful expropriation.⁵⁹³ Claimant highlights that international courts have drawn a distinction between damages awarded for lawful and

⁵⁸⁶ Respondent's Rejoinder, para. 163 *citing* Copy of a memorandum of a meeting held with Mannesman, 15 and 16 April 1998, **Exhibit C-0029**, p. 2; MEED EGYPT: Aswan iron and steel venture signs mining concession, 12 June 1998, **Exhibit C-0050.1**.

⁵⁸⁷ Respondent's Statement of Defense, para. 146.

⁵⁸⁸ Respondent's Statement of Defense, para. 147.

⁵⁸⁹ Respondent's Statement of Defense, para. 148.

⁵⁹⁰ Respondent's Statement of Defense, para. 149.

⁵⁹¹ Respondent's Rejoinder, para. 149.

⁵⁹² Claimant's Statement of Claim, para. 5.4 *citing* 1980 BIT, Article 3(1)(c); 2004 BIT, Article 5(2).

⁵⁹³ Claimant's Reply, para. 295.

unlawful expropriation.⁵⁹⁴ Claimant notes that several tribunals have resorted to principles of customary international law to determine the sums payable for unlawful expropriation.⁵⁹⁵ Thus, Claimant contends that as per the *Chorzów Factory* principle, which reflects customary international law, Respondent should for its unlawful expropriation either provide restitution in kind, or should pay Claimant a sum corresponding to the value that restitution in kind would bear.⁵⁹⁶ Claimant explains that he has no desire to return to Egypt to pursue the Project and that the Project has lost its partners and the support of the government.⁵⁹⁷

387. Applying the *Chorzów Factory* principle, where restitution is impossible, Claimant contends that fair market value is the commonly accepted standard to measure losses suffered as a result of the breach of the investment treaty protections and that Respondent has not contested this.⁵⁹⁸ Claimant notes that the fair market value is the price that would be agreed between a buyer and seller for Claimant's interest in the Project as at February 2000, which would require a comparison of the actual scenario against the "but-for" scenario that would have existed if the impugned actions had not been committed (the Discounted Cash Flow method, or the DCF Method).⁵⁹⁹ Claimant maintains that damages should be calculated as at the date of the expropriation and notes that Respondent does not contest this.⁶⁰⁰
388. Claimant assumes that in the but-for scenario the Project Partners would have paid for 30% of ADEMCO's shares in March 2000.⁶⁰¹ The one-year delay in the kick-off of the Project is not considered by Claimant in the valuation because Claimant had a fixed turn-key contract with

⁵⁹⁴ Claimant's Reply, para. 294 citing D.W. Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 59 British Yearbook of International Law 49, 1988, **Exhibit CLA-0101**, p. 61.

⁵⁹⁵ Claimant's Reply, para. 296 citing *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013, **Exhibit CLA-0104**, para. 342.

⁵⁹⁶ Claimant's Statement of Claim, para. 5.2; Claimant's Reply, paras. 294, 298, 299. Claimant notes that this standard has been codified in Article 31(1) of the ILC Articles on State Responsibility, endorsed by the International Law Commission and applied by several investor state tribunals including *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, **Exhibit CLA-0021**, para. 400; *Case Concerning the Factory at Chorzów (Germany v. Poland)*, (1928), P.C.I.J., Series A. No. 17, 13 September 1928, **Exhibit CLA-0100**.

⁵⁹⁷ Claimant's Reply, para. 301.

⁵⁹⁸ Claimant's Statement of Claim, para. 5.3 citing *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, **Exhibit CLA-21**, paras. 403-404; Claimant's Reply, paras. 291, 293, 302; Claimant's Reply, para. 300 citing ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, **Exhibit RLA-0070**, Article 34.

⁵⁹⁹ Claimant's Reply, para. 303; 2019 Merits Hearing, Day 5, p. 5:3-15.

⁶⁰⁰ Claimant's Reply, para. 305.

⁶⁰¹ Claimant's Reply, para. 316.

MD.⁶⁰²

389. The Inglis Report assumes that if the Project had proceeded as planned, Claimant would have directly held 35% of ADEMCO and 0.5% of AISCO and would have made further investments in the Project.⁶⁰³ Claimant notes that he has not made any deductions for lack of control or marketability because Claimant was the CEO of the Companies and with his 35% shareholding, would have exercised de facto control over the Companies.⁶⁰⁴ Further, Claimant argues that minority discounts should not be applied where the loss arises from unlawful conduct.⁶⁰⁵ The Inglis Report proposes that Claimant be awarded the following sums in the table below.⁶⁰⁶ Claimant explains that “Approach A: Absent the Respondent’s unlawful interference, the Project would have commenced operations as planned in January 2003. This approach therefore assumes that Egypt breached obligations under the 1980 BIT resulting in delay in the Project” and “Approach B: The Project would have restarted in October 2006.”

| | February 2000 USD millions | October 2006 Approach A USD millions | October 2006 Approach B USD millions |
|--|---------------------------------------|---|---|
| Claimant’s Share of the Project Returns | 109.05 | 177.67 | 134.30 |
| Deduction of further investment | (35.30) | (35.30) | (35.30) |
| Claimant’s share of the project returns after discounts and further investment | 73.75 | 142.37 | 99.00 |
| Interest from claim date to 31 October 2012, 12 month USD LIBOR compounded annually | 33.87 | 22.71 | 15.79 |
| Total Claim | 107.62 | 165.08 | 114.79 |

390. Mr Matthews relies on the UEC Study, which he thinks contained detailed financial projections.⁶⁰⁷ Even though the Project did not have a track record of financial performance, Mr Matthews notes that UEC had a track record of success in the steel industry and that MD

⁶⁰² Claimant’s Reply, para. 320.

⁶⁰³ Claimant’s Statement of Claim, para. 5.8 *citing* Inglis Report, para. 8.13.

⁶⁰⁴ Claimant’s Statement of Claim, para. 5.9.

⁶⁰⁵ Claimant’s Statement of Claim, para. 5.9.

⁶⁰⁶ Claimant’s Statement of Claim, pp. 44-45.

⁶⁰⁷ Claimant’s Reply, para. 322; 2019 Merits Hearing, Day 6, p. 77:8-15.

had committed to buy 540,000 tonnes of steel billets per year (80% of the project production of the Project).⁶⁰⁸ Further, Claimant contends that the Project's biggest cost, the cost of the plant, was fixed in the turn-key contract with MD.⁶⁰⁹ The above factors lend a degree of certainty to the Project's cash flows.⁶¹⁰

391. Mr Matthews notes that MD valued the Project at USD 354.1 million in April 1998 and UEC valued it at USD 471.6 million in January 1999.⁶¹¹ Claimant highlights that all contemporaneous studies upon which he relies for his quantum analysis were reliable and support the use of the DCF method.⁶¹² Claimant notes that these contemporaneous DCF studies were prepared by experts taking into consideration the relevant factors and that all the contemporaneous reports considered DCF methodology to value the projects.⁶¹³ Claimant defends the UEC Study, noting that it met the industry standards and has been considered reliable by Claimant's experts.⁶¹⁴ Claimant notes that the study conducted by MD was based on the capital and operating costs produced by it, not by Claimant.⁶¹⁵ Claimant notes that the HSBC valuation prepared by Mr Macgregor was more conservative.⁶¹⁶
392. Mr Matthews testifies that the Project Partners, who agreed to invest equity in the Project imply that ADEMCO had a value of at least USD 160 million, which suggests that the valuation of the total Project is USD 185 million.⁶¹⁷ He notes that the presence of the Project Partners made it easier for the Project to raise financing.⁶¹⁸
393. Mr Matthews notes that the sale of ADEMCO's shares to Al Sharq Insurance Company, Bank Misr, and Faisal Islamic Bank at the request of the Egyptian State Government implies that the value of ADEMCO was at least USD 33 million.⁶¹⁹ Mr Matthews states that this figure should be viewed with caution as these were compulsory transactions.⁶²⁰
394. Mr Matthews submits that the discussions between Claimant and the potential Saudi investor

⁶⁰⁸ Claimant's Reply, para. 324; 2018 Merits Hearing, Day 1, p. 16:6-8.

⁶⁰⁹ Claimant's Reply, para. 325.

⁶¹⁰ Claimant's Reply, para. 325.

⁶¹¹ Matthews Presentation, Slide 5.

⁶¹² 2019 Merits Hearing, Day 3, p.14:17-20.

⁶¹³ Claimant's Reply, para. 339; 2019 Merits Hearing, Day 3, pp.12:18-13:1; 2019 Merits Hearing, Day 5, pp. 6:15-7:6.

⁶¹⁴ Claimant's Reply, para. 342.

⁶¹⁵ 2019 Merits Hearing, Day 3, p.14:4-9.

⁶¹⁶ 2019 Merits Hearing, Day 3, p.14:10-16.

⁶¹⁷ 2019 Merits Hearing, Day 5, p. 7:7-19.

⁶¹⁸ 2019 Merits Hearing, Day 5, pp. 7:20-8:6.

⁶¹⁹ 2019 Merits Hearing, Day 5, p. 8:7-19.

⁶²⁰ 2019 Merits Hearing, Day 5, p. 8:7-19.

suggest that the value of the Project was at least USD 230 million.⁶²¹

395. The Matthews Report assesses the value of the Project at February 2000 at USD 341.2 million.⁶²² He explains that this differs from Mr Inglis' projections because: (i) Mr Matthews assumed the Project would begin in early 2004, rather than January 2003 and also assumed mid-year discounting; (ii) Mr Matthews increased projected capital expenditure to account for additional capital costs associated with beneficiation; (iii) Mr Matthews removed all historical cash flows; and (iv) Mr Matthews increased the forecast capital expenditure by USD 28.5 million that were identified after the UEC Study was prepared.⁶²³
396. Mr Matthews assumes that Claimant would have held 34.7% interest in AISCO because his review of the documentation indicated that ADEMCO held 87.5% of AISCO and that the shareholdings of Mr Bahgat's family members and friends should be considered as part of his shareholding.⁶²⁴ Accordingly, Mr Matthews calculates that Claimant's 34.7% investment in the Project would have been worth USD 118.3 million in February 2000.⁶²⁵
397. Applying a 20% discount as an adjustment for lack of control and lack of marketability, Mr Matthews assesses the fair market value of Claimant's investment to be USD 94.6 million.⁶²⁶ As Claimant had agreed to sell a 30% shareholding to the Project Partners, the loss suffered by Claimant as at February 2000, according to Mr Matthews, is USD 103.5 million.⁶²⁷ Claimant clarifies that the failure of the Project Partners to pay for their shares in ADEMCO is not connected to any doubts they had regarding the viability of the Project.⁶²⁸
398. Claimant argues that DCF valuation in this case is not unduly speculative because (i) the resources were defined; (ii) the principal capital expenditures were fixed; (iii) several studies had confirmed the operational expenditures; and (iv) demand for production was high and

⁶²¹ 2019 Merits Hearing, Day 5, pp. 8:20-9:3.

⁶²² Claimant's Reply, para. 326; 2019 Merits Hearing, Day 5, p. 5:16-23; Matthews Presentation, Slide 9.

⁶²³ Claimant's Reply, para. 326; 2019 Merits Hearing, Day 3, p. 18:10-13; 2019 Merits Hearing, Day 5, pp. 11:14-15:5, Matthews Presentation, Slide 8.

⁶²⁴ Claimant's Reply, para. 327. Please note that the Matthews Report, para. 6.21, the First BDO Report, paras. 7.24, 7.36, and the Second BDO Report, para. 6.3, suggest that ADEMCO held 85.7% of AISCO.

⁶²⁵ Claimant's Reply, para. 328; 2019 Merits Hearing, Day 3, p. 20:15-21:5.

⁶²⁶ Claimant's Reply, para. 330; 2019 Merits Hearing, Day 3, p.8:20-9:3; 2019 Merits Hearing, Day 5, p. 16:1-13.

⁶²⁷ Claimant's Reply, para. 332; 2019 Merits Hearing, Day 3, p. 21:10-25; 2019 Merits Hearing, Day 5, p. 18:8-21.

⁶²⁸ 2019 Merits Hearing, Day 3, p. 22:4-23:5.

sales were guaranteed by MD's purchase commitment.⁶²⁹

399. Claimant takes note that *Rusoro Mining v. Venezuela* rejected the DCF method in the absence of evidence of financial performance, however, points out that the *Al-Bahloul v. Tajikistan* tribunal applied the DCF method even though the claimant had not commenced exploration or production of its hydrocarbon project.⁶³⁰ Claimant notes that the Project met all four criteria set by *Al-Bahloul v. Tajikistan* to be accounted for when there is no record of profitability, namely, (i) that the investors can finance the project; (ii) that they will find exploitable reserves; (iii) that they would be able to finance and exploit the reserve; and (iv) that it would be possible to sell the product.⁶³¹ Moreover, Claimant notes that *Vivendi v. Argentina* noted that the absence of a history of profitability does not preclude the application of the DCF method and the likelihood of lost profits can be established where the claimant can show that on a balance of probabilities, the investment would have produced profits.⁶³² Claimant notes that *ADC v. Hungary* relied on a contemporaneous business plan for the purposes of a forward looking valuation, as Claimant is requesting here.⁶³³ Claimant also relies on *PL v. Poland*, in which the tribunal relied on contemporaneous management projections in valuing a newly formed bank with no track record.⁶³⁴
400. Claimant denies Respondent's suggestion that his lack of experience is an argument against the application of the DCF method. Claimant underlines his extensive business experience globally and in Egypt and the leading global partners he had attracted (several of which had invested in the Project).⁶³⁵
401. Claimant clarifies that the Project had sufficient financing after HSBC had been engaged and MD had committed funding.⁶³⁶ Claimant notes that the Project Partners were confident about

⁶²⁹ Claimant's Reply, para. 333.

⁶³⁰ Claimant's Reply, para. 334 citing *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, 8 June 2010, **Exhibit CLA-0110**, para. 75.

⁶³¹ Claimant's Reply, para. 336 citing *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, 8 June 2010, **Exhibit CLA-0110**, para. 77.

⁶³² Claimant's Reply, para. 338 citing *Compania de Aguas de Aconquija SA and Vivendi Universal SA v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, **Exhibit CLA-0111**, para. 8.3.10; 2019 Merits Hearing, Day 3, p.14:25-15:20; Claimant's Opening, Slide 10.

⁶³³ 2019 Merits Hearing, Day 3, p.15:21-16:14; Claimant's Opening, Slide 11.

⁶³⁴ 2019 Merits Hearing, Day 3, p.16:15-22; 2019 Merits Hearing, Day 6, pp. 77:16-78:6.

⁶³⁵ Claimant's Reply, para. 343.

⁶³⁶ Claimant's Reply, para. 345 citing Copy of the Engagement Agreement signed with AISCO, 23 March 1999, **Exhibit C-0047**; Copy of a memorandum of a meeting held with Mannesmann, 15 and 16 April 1998, **Exhibit C-0029**; 2019 Merits Hearing, Day 3, p.20:1-14.

the Project and its financing.⁶³⁷ Claimant explains that he could have raised the funds required to maintain his shareholding.⁶³⁸ In any event, Claimant considers his future ability to raise funds to be irrelevant to the fair market value analysis, as a hypothetical buyer would not be concerned with the seller's ability to raise future funds (as it would be the buyer's responsibility to raise such funds).⁶³⁹

402. Claimant argues that the financing of Claimant's interest in the Project should not be given credit because any gains or losses made by Claimant on funding that would have otherwise been invested in the Project are irrelevant to a fair market value analysis.⁶⁴⁰
403. To address Respondent's concerns about the precise sum invested by Claimant, Claimant explains that his investment of USD 39.7 million in the Project was the payment to MD as part of the USD 555 million payment for the design, engineering, manufacture and delivery of the new plant.⁶⁴¹
404. Claimant submits that the testimony of Mr MacGregor (Respondent's quantum expert) is unreliable. He notes that Mr MacGregor has been repeatedly instructed by Egypt. He notes that Egypt's instructions to Mr MacGregor were designed to create no value for the Project.⁶⁴² Claimant argues that Mr MacGregor was selectively provided with materials that served the interests of Respondent and that were out of date at the time of valuation because it made reference to standards in January 1999.⁶⁴³ Claimant further submits that Mr MacGregor acknowledged that contemporaneous test results and contract specifications were relevant to the DCF analysis, but did not consider this evidence, and that the "contemporaneous evidence" considered by Mr MacGregor was whether or not contemporaneous at all supported Claimant's case.⁶⁴⁴ Claimant notes finally that Mr MacGregor's valuation of the Project (USD 0) cannot be relied upon because it is too distant from contemporaneous and other studies on the record of this arbitration that place the value of the Project in the hundreds of millions.⁶⁴⁵

⁶³⁷ Claimant's Reply, para. 345; 2019 Merits Hearing, Day 3, p.19:2-18; 2019 Merits Hearing, Day 5, pp. 165:1-172-3.

⁶³⁸ Claimant's Reply, para. 346.

⁶³⁹ Claimant's Reply, para. 347.

⁶⁴⁰ Claimant's Reply, para. 349.

⁶⁴¹ Claimant's Reply, para. 350.

⁶⁴² 2019 Merits Hearing, Day 6, pp. 81:18-83:1.

⁶⁴³ 2019 Merits Hearing, Day 6, pp. 82:13-83:1.

⁶⁴⁴ 2019 Merits Hearing, Day 6, pp. 83:2-85:2.

⁶⁴⁵ 2019 Merits Hearing, Day 6, p. 85:3-24.

405. Claimant submits that Mr MacGregor has accepted that in the but for scenario, it must be assumed that Claimant would have been paid for the shares by the Project Partners.⁶⁴⁶
406. Claimant submits that the Parties' experts agree on the revenue side of the DCF analysis, but disagree as to certain costs. Claimant explains that the USD 70 million capital expenditure cost assumed by Mr Matthews was the higher estimate of these costs that was developed by Respondent's CMRDI.⁶⁴⁷

Respondent's Position

407. Mr MacGregor, Respondent's quantum expert, argues that the fair market value of the Project is zero.⁶⁴⁸
408. Respondent agrees that, in order to assess full compensation, tribunals generally compare the actual fair market value of the investment as at the valuation date with the fair market value of the investment "but for" the actions of the State.⁶⁴⁹ Respondent notes that the fair market value is the amount for which an asset should exchange on the valuation date between a willing buyer and seller in an arm's length transaction, after proper marketing, but argues that Claimant's expert, Mr Matthews ignores that in the above definition, each party should have acted knowledgably and prudently.⁶⁵⁰
409. Respondent denies that the DCF method is widely used.⁶⁵¹ Respondent notes that the DCF method is based on "inherently speculative elements" because discounted cash flows can only be recovered if they can be established with reasonable certainty.⁶⁵² Therefore, according to Respondent, the use of the DCF method by investment tribunals depends on evidence demonstrating "the likelihood of projected cash flows actually being realized".⁶⁵³ Respondent submits that tribunals have not used the DCF approach where the data is too uncertain or

⁶⁴⁶ 2019 Merits Hearing, Day 6, pp. 86:2-87:3; 2019 Merits Hearing, Day 5, pp. 161:3-162:23.

⁶⁴⁷ 2019 Merits Hearing, Day 6, pp. 78:14-80:17; 2019 Merits Hearing, Day 5, p. 47:5-13.

⁶⁴⁸ 2019 Merits Hearing, Day 5, p. 107:23-25.

⁶⁴⁹ Respondent's Rejoinder, para. 166.

⁶⁵⁰ Respondent's Rejoinder, para. 173.

⁶⁵¹ Respondent's Statement of Defense, para. 162.

⁶⁵² Respondent's Statement of Defense, paras. 160-62 *citing* S. Ripinsky with K. Williams, *Damages in international investment law*, London, British Institute of International and Comparative Law (2008) **Exhibit RLA-0089**, pp. 201, 280; Respondent's Rejoinder, para. 167 *citing* B. Sabahi and L. Hoder, *Certainty in Recovery of Damages for Losses to New or Incomplete Businesses -Three Paradigms: Biloune v. Ghana, Gemplus v. Mexico, and Siag v. Egypt*, *Journal of Damages in Int. Arb.* (2016), Vol. 3, No. 2, **Exhibit RLA-0156**; 2019 Merits Hearing, Day 5, pp. 89:22-90:14.

⁶⁵³ Respondent's Statement of Defense, para. 163 *citing* S. Ripinsky with K. Williams, *Damages in international investment law*, London, British Institute of International and Comparative Law (2008), **Exhibit RLA-0089**, p. 211.

there is not a sufficient record of profitability for losses to be calculated with precision.⁶⁵⁴ Respondent notes the reality that investments can fail and that the fact that the Project was unlikely to succeed severely diminishes Claimant's claim.⁶⁵⁵

410. Respondent notes that Mr Inglis relies on the cash flows in the UEC Study, which falls short of a feasibility study and takes no account of the quality and sufficiency of the iron ore at Aswan.⁶⁵⁶ Respondent argues that Mr Matthews also relies on the UEC Study and Met-Chem Report, which fall short of being feasibility studies, to argue that the value of the Project would have been higher in February 2000 than in 1998.⁶⁵⁷ Respondent notes that its own expert, Mr MacGregor, demonstrates that the UEC Study and Met-Chem Report would have lowered the value of the Project in the eyes of a prudent investor.⁶⁵⁸ Respondent argues that a knowledgeable buyer and seller would have recognised the above factors and that the iron ore at the Project was of low quality.⁶⁵⁹
411. Respondent points out that the BDO Report confirms that the *Rusoro Mining v. Venezuela* criteria for the application of the DCF model are not met.⁶⁶⁰ These criteria are: a) The enterprise has an established historical record of financial performance; b) There are reliable projections of the enterprise's future cash flows; c) The price at which the enterprise will be able to sell its products can be determined with reasonable certainty; d) The project can be financed with self-generated cash or alternatively there must be no uncertainty regarding the availability of financing; e) It is possible to calculate a meaningful WACC; and f) The enterprise is active in a sector with low regulatory pressure or its scope and effects must be predictable.⁶⁶¹
412. First, Respondent argues that the Project was in its preliminary stages and did not have a

⁶⁵⁴ Respondent's Statement of Defense, paras. 164-165 citing *Caratube International Oil Company LLP and Devinci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, **Exhibit RLA-0110**, para. 1102; 2019 Merits Hearing, Day 3, pp. 73:18-74:7.

⁶⁵⁵ Respondent's Rejoinder, para. 169.

⁶⁵⁶ 2019 Merits Hearing, Day 6, pp. 183:12-184:10.

⁶⁵⁷ Respondent's Rejoinder, para. 174.

⁶⁵⁸ Respondent's Rejoinder, para. 174.

⁶⁵⁹ Respondent's Rejoinder, para. 175; see 2018 Merits Hearing, Day 1, pp. 147:13-149:3.

⁶⁶⁰ Respondent's Statement of Defense, para. 169 citing *Rusoro Mining v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/12/5, Award, 22 August 2016, **Exhibit RLA-0111**, para. 759; see also Respondent's Rejoinder, paras. 171-72.

⁶⁶¹ Respondent's Statement of Defense, para. 169 citing *Rusoro Mining v. Bolivarian Republic of Venezuela* ICSID Case No. ARB (AF)/12/5, Award, 22 August 2016, **Exhibit RLA-0111**, para. 759; Respondent's Rejoinder, paras. 189, 210.

historical record of financial performance⁶⁶² or a trading history,⁶⁶³ which are important to generating reliable forecasts of a company's future performance.⁶⁶⁴ In response to Mr Matthews' argument that it is possible to forecast the cash flows in the absence of a financial record based on the DCF method applied in the UEC Study, Respondent states that (i) the performance of a DCF method by the UEC Study does not imply that the same method must be applied in this arbitration, particularly since the final investment was not received from potential investors and (ii) UEC's expertise cannot replace the record of financial performance in the Project, particularly as there were flaws in the UEC analysis.⁶⁶⁵

413. Second, Respondent notes that there are no reliable projections of the Project's future cash flows. Respondent notes that Mr Matthews relies on three contemporaneous reports, each of which have "wildly" different valuations of the Project, and does not explain how he has used these reports to prepare a reliable estimate of future cash flows.⁶⁶⁶ Respondent argues that the difficulties in forecasting the performance of ADEMCO are borne out in Claimant's expert valuation reports, whose results are so varied that they must be considered unreliable. The Inglis Report relies on projections of future cash flows, whose net present values vary from USD 236.7 million to USD 471.6 million between his three valuations.⁶⁶⁷ Moreover, the valuations conducted by Mr Inglis and Mr Matthews differ by around USD 150 million.⁶⁶⁸ Further, Respondent argues that significant cost would have been expended on further technical work on the Project.⁶⁶⁹
414. Third, for the application of the DCF method to be appropriate, there must be reasonable certainty over the price at which the products will be sold.⁶⁷⁰ Respondent argues that the future sale price of the steel is a moot point, given the poor quality of the ore.⁶⁷¹
415. Fourth, Respondent argues that the financing of the Project was not certain, making the application of the DCF method inappropriate.⁶⁷² Respondent suggests that Mr Matthews, by referring to the ability of a hypothetical seller to sell the Project, ignores Claimant's specific

⁶⁶² Respondent's Statement of Defense, para. 170 *citing* Inglis Report, para. 4.19; 2019 Merits Hearing, Day 5, pp. 94:20-95:13; 2019 Merits Hearing, Day 6, p. 196:1-2.

⁶⁶³ Respondent's Statement of Defense, para. 172.

⁶⁶⁴ Respondent's Rejoinder, para. 194.

⁶⁶⁵ Respondent's Rejoinder, paras. 192-93.

⁶⁶⁶ Respondent's Rejoinder, paras. 195-197; 2019 Merits Hearing, Day 6, p. 196:3-6.

⁶⁶⁷ Respondent's Statement of Defense, para. 173.

⁶⁶⁸ Respondent's Rejoinder, para. 196.

⁶⁶⁹ Respondent's Rejoinder, paras. 174, 198

⁶⁷⁰ Respondent's Rejoinder, para. 200.

⁶⁷¹ Respondent's Statement of Defense, para. 174; Respondent's Rejoinder, para. 200.

⁶⁷² Respondent's Rejoinder, para. 201; 2019 Merits Hearing, Day 5, pp. 95:22-96:5.

inability to raise financing.⁶⁷³ Respondent highlights the absence of evidence of funding for the Project, demonstrated by the Inglis Report being based on three vastly different ranges of capital investment ranging from USD 661 million to USD 908.4 million.⁶⁷⁴ Respondent notes that there is no evidence of the intention or ability of Claimant or other shareholders to contribute funds to the Project or of other debt financing.⁶⁷⁵ Respondent notes that Mr Matthews does not address Claimant's inability to raise funds; Mr Matthews states, contrary to Claimant's own submissions and *Al-Bahloul v. Tajikistan*, that Claimant's ability to raise funds is irrelevant.⁶⁷⁶ Respondent argues that Mr Matthews' analysis ignores that the shareholders of ADEMCO had only agreed to undertake a shareholding of 10% or less and that the debt financing required (USD 496.2 million) was substantial and would have been a concern to any buyer.⁶⁷⁷ Respondent suggests that Mr Matthews should have accounted for the fact that the Project Partners did not pay for their shareholding and the absence of a fixed price in MD's commitment to purchase billets from ADEMCO.⁶⁷⁸ Respondent suggests that Mr Matthews should also have considered whether the commitments made by the Project Partners were prudent.⁶⁷⁹ Respondent suggests that it is not clear why Mr Matthews chose not to rely on the purchase of ADEMCO's shares by local entities for his valuation, given that these were the only transactions that were concluded.⁶⁸⁰

416. Respondent states that Claimant's statement that he had to invest USD 84 million in the Project (from which we could delete USD 39.7 million invested by 2000) is not supported by evidence, neither is the source of these funds allegedly invested by Claimant.⁶⁸¹ In particular, Respondent notes that it is not clear whether the USD 39.7 million allegedly invested by Claimant (which Claimant states represents "the overwhelming majority of his personal wealth") comprised expenses over and above the USD 240 million equity investment required, or whether Claimant would need to invest a further USD 84 million over the first two years of the Project.⁶⁸² Respondent argues that it is not clear how the other shareholders would contribute to raising funds – if Mr Shimi held 14.5% of ADEMCO's shares he would have had to invest USD 34.8 million and there is no evidence that Mr Shimi intended to or

⁶⁷³ 2019 Merits Hearing, Day 5, pp. 54:16-59:3. 68:14-70:9.

⁶⁷⁴ Respondent's Statement of Defense, paras. 176-77.

⁶⁷⁵ Respondent's Statement of Defense, para. 178.

⁶⁷⁶ Respondent's Rejoinder, para. 202; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, 8 June 2010, **Exhibit CLA-0110**.

⁶⁷⁷ Respondent's Rejoinder, para. 205.

⁶⁷⁸ 2019 Merits Hearing, Day 5, pp. 61:17-65:11.

⁶⁷⁹ 2019 Merits Hearing, Day 5, pp. 65:12-68:13.

⁶⁸⁰ 2019 Merits Hearing, Day 5, pp. 70:10-73:1.

⁶⁸¹ Respondent's Statement of Defense, paras. 179-80.

⁶⁸² Respondent's Statement of Defense, para. 181; Respondent's Rejoinder, para. 203.

could invest such a sum in the Project.⁶⁸³

417. Fifth, according to Respondent, the application of the DCF method requires a meaningful weighted average cost of capital.⁶⁸⁴ Respondent argues that the Project had key uncertainties that adversely impact the projections necessary to value the Project.⁶⁸⁵ The SRK Report considers that several “key uncertainties”, such as “the lack of confidence in the resource, the lack of information relating to the mining project, the fact that the ability to produce a product that could be used as feed to the smelter had (and still has not) been demonstrated, and that a source for the limestone and coal has not yet been located,” make DCF an inappropriate valuation methodology for this case.⁶⁸⁶ Respondent argues that it was not possible to manufacture steel economically at the Project and therefore, there would have been insufficient cash flows to calculate a weighted average cost of capital.⁶⁸⁷ Further, the calculation of a weighted average cost of capital was made impossible by the uncertainty regarding the capital structure of the Project.⁶⁸⁸
418. In addition to arguing that the DCF method is inappropriate, Respondent points to problems with Claimant’s expert reports. Respondent points out the following difficulties with the DCF calculation in the Inglis Report: (i) the amount of mineral resources in the Project can only be “inferred”; (ii) Claimant does not show how the quality of iron ore would be increased to the level (60%) used in its valuation or that the costs of reaching this quality of iron ore were accounted for;⁶⁸⁹ (iii) Claimant does not demonstrate how the level of phosphorus in the iron ore would be reduced to the industry standard (0.1%); (iv) the UEC Study cannot be considered a feasibility study because it does not provide solutions to the geological and technical challenges facing the Project; and (v) that the Project did not have sufficient analysis to justify funding.⁶⁹⁰
419. Respondent explains several problems with Mr Matthews’ report. First, Respondent argues that Mr Matthews conflates investment and financing with the chances of profitability and, citing its own Second BDO Report, points to projects that failed despite having substantial

⁶⁸³ Respondent’s Statement of Defense, para. 182.

⁶⁸⁴ Respondent’s Rejoinder, para. 207; 2019 Merits Hearing, Day 5, p. 96:6-15.

⁶⁸⁵ Respondent’s Rejoinder, paras. 170-71.

⁶⁸⁶ Respondent’s Statement of Defense, para. 167.

⁶⁸⁷ Respondent’s Rejoinder, para. 207.

⁶⁸⁸ Respondent’s Rejoinder, para. 209.

⁶⁸⁹ Respondent’s Rejoinder, paras. 175-76.

⁶⁹⁰ Respondent’s Statement of Defense, para. 168.

investment.⁶⁹¹

420. Second, Respondent considers that Mr Matthews has overstated the confidence of third parties in the Project.⁶⁹²

421. Third, Mr Matthews ignores contemporaneous evidence that indicates that the Project's fair market value in 2000 is not equivalent to the commitments made by investors to ADEMCO in 1998 and that the investors were aware of the drawbacks of the Project.⁶⁹³ Respondent argues that Mr Matthews incorrectly calculated the value of the Project based on the offer of investment, a method that ignores the value of other direct shareholdings and inflates the value of a single offer of minority shareholding.⁶⁹⁴ Respondent explains that the Second BDO Report discerns four types of investors: (i) the government controlled entities that each had a 5% shareholding in ADEMCO in 1998 (Mr Matthews uses these transactions to imply a value of USD 33 million to ADEMCO); (ii) MD and Cegelec who agreed to pay USD 16 million for 10% and USD 8 million for 5% of ADEMCO, respectively, in May and July 1998 (Mr Matthews uses these transactions to imply a value of USD 160 million to ADEMCO); and (iii) US Steel and Pomini who committed to acquire a 10% and 5% interest in ADEMCO for USD 2.9 million and USD 1.5 million respectively (by extrapolation, these transactions would have implied that the value of ADEMCO was USD 29.4 million).⁶⁹⁵ Respondent finds no reason why Mr Matthews relied on the second group of transactions to extrapolate the value of ADEMCO, rather than the third group of transactions.⁶⁹⁶ Respondent highlights that Mr Matthews has chosen to base his FMV methodology on the transactions with the Project Partners, who never completed their purchase of ADEMCO shares and by failing to pay for their shares, waived their shareholding in ADEMCO.⁶⁹⁷ Respondent notes that Mr Matthews refers to a proposed share sale to a Saudi Arabian investor, but points out that by Mr Matthews' own admission there was insufficient information about this transaction

⁶⁹¹ Respondent's Rejoinder, paras. 177-79.

⁶⁹² Respondent's Rejoinder, para. 179.

⁶⁹³ Respondent's Rejoinder, paras. 180-81 *citing* Akhbar El Yom Article, Aswan Iron Project is dead, 29 April 2000, **Exhibit C-0088**.

⁶⁹⁴ Respondent's Rejoinder, para. 182.

⁶⁹⁵ Respondent's Rejoinder, para. 183 *citing* ADEMCO Shareholder Agreement, 9 July 1998, **Exhibit C-0108**; Memorandum of Understanding with USX Steel Corporation, 25 October 1998, **Exhibit C-0041**; GAFI Resolution, 7 December 1998, **Exhibit C-0042**.

⁶⁹⁶ Respondent's Rejoinder, para. 184.

⁶⁹⁷ Respondent's Rejoinder, paras. 185-87 *citing* ADEMCO Shareholder Agreement, 9 July 1998, **Exhibit C-0108**.

- making it an inappropriate transaction upon which to base ADEMCO's value.⁶⁹⁸
422. Respondent argues that Mr Matthews' inputs are speculative and sensitive.⁶⁹⁹ Respondent highlights that the cost of the beneficiation process was not certain and implies that these could be higher than the CMDRI estimate of USD 70 million, which is adopted by Mr Matthew.⁷⁰⁰
423. Respondent states that Claimant's experience, not being concentrated in the iron and steel industry, cannot be an argument for the success of the Project.⁷⁰¹ Mr Matthews does not explain why he assumed the start date of the Project to be January 2004 (rather than the January 2003 start assumed by Mr Inglis) and why he assumed 100% capacity in the first year.⁷⁰² Respondent notes that change in the assumed start date resulted in a USD 84.1 million difference between the calculations of Mr Inglis and Mr Matthews.⁷⁰³ Respondent contends that Mr Matthews ignores the revised iron costs across the period from the valuation date.⁷⁰⁴
424. Respondent noted that Mr Matthews conducted his assessment on the basis that the plant would have a 30-year life, even though the UEC Study indicated that there were sufficient resources for 23 years.⁷⁰⁵
425. For the reasons set out in Paragraph 378 above, Respondent denies Claimant's claim of USD 8.9 million representing the value of the shares purchased by the foreign partners.⁷⁰⁶
426. Even if the Project were to be considered feasible, Claimant cannot claim the entire sum of his but-for scenario, by incorrectly assuming that the current market value of his investments is nil.⁷⁰⁷ Respondent notes that ADEMCO still owns the rights to the Concession (which is still valid), and based on the UEC Study, Claimant still has 10 years remaining on the initial Concession term and a right to renew the Concession for an additional 30 years.⁷⁰⁸ As the owners of shares in the Companies, Claimant still owned "10.5 percent of the Project," which

⁶⁹⁸ Respondent's Rejoinder, para. 188.

⁶⁹⁹ Respondent's Rejoinder, para. 213.

⁷⁰⁰ 2019 Merits Hearing, Day 5, pp. 46:14-48:19.

⁷⁰¹ Respondent's Statement of Defense, para. 175.

⁷⁰² Respondent's Rejoinder, para. 213; 2019 Merits Hearing, Day 5, pp. 51:17-54:15.

⁷⁰³ Respondent's Rejoinder, para. 213.

⁷⁰⁴ Respondent's Rejoinder, para. 214.

⁷⁰⁵ 2019 Merits Hearing, Day 5, pp. 42:7-45:11.

⁷⁰⁶ Respondent's Rejoinder, para. 217.

⁷⁰⁷ Respondent's Rejoinder, para. 232; 2019 Merits Hearing, Day 5, pp. 24:19-26:16.

⁷⁰⁸ Respondent's Rejoinder, para. 233.

he could resume to develop or sell to an investor.⁷⁰⁹ Respondent concedes that the value of the investment in the actual scenario would require an adjustment of the price of steel rebars and billets, the cost of beneficiation, and the cost of maintenance and upkeep.⁷¹⁰ However, given advances in technology, Respondent maintains that the market value of the Project would be similar to its original value and that Claimant's losses would be nil.⁷¹¹

Tribunal's Analysis

427. Having found that Respondent's actions are to be qualified as indirect expropriation, the Tribunal must now determine the relief that Claimant is entitled to as a result of that indirect expropriation.
428. The starting point of the Tribunal will be the dictum of the Permanent Court of International Justice in the *Chorzów Factory* case⁷¹² where it has been stated, that where the state has acted contrary to its obligations any award to Claimant should ". . . as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed [the status quo ante]."
429. The Tribunal will now establish the value of losses incurred by Claimant. Several methods are being used in international jurisprudence on valuating investments. The Parties in particular discussed the DCF method, the lost investment method and the valuation based on comparables.
430. The Tribunal will start with the DCF method. The Tribunal notes that the DCF method is used to determine the fair market value of an investment. The DCF method assesses the economic value of an investment by projecting its future cash flows i.e., the stream of value that it could generate over its life. In comparison, the lost investment method to which the Tribunal will turn thereafter is backward-oriented, establishing the value of the investment made while considering why such investment did not lead to the anticipated result.
431. Investment tribunals have been generally confident in applying the DCF method for the valuation of investments that are going concerns. The Tribunal notes that this method requires some speculation about the future development of the investment concerned. The speculative

⁷⁰⁹ Respondent's Rejoinder, para. 234.

⁷¹⁰ Respondent's Rejoinder, para. 235.

⁷¹¹ Respondent's Rejoinder, paras. 235-36.

⁷¹² *Case Concerning the Factory at Chorzów (Germany v. Poland)*, (1928), P.C.I.J., Series A. No. 17, 13 September 1928, **Exhibit CLA-0100**, p. 47.

element is ameliorated if and when the concern in question has a history of profitable operation.⁷¹³ This is because, where there exists a track record of profitability, there is a higher degree of certainty as to what the future cash flows may have been.⁷¹⁴ Some tribunals have rejected the use of the DCF method where there did not exist a sufficient record of profitability. In *Metalclad v. Mexico*, the tribunal found that:⁷¹⁵

Normally, the fair market value of a going concern, which has a history of profitable operation may be based on an estimate of future profits subject to a discounted cash flow analysis. [. . .] However, where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value.

432. Based on the above reasoning, the *Metalclad v. Mexico* tribunal found that a DCF analysis was inappropriate for that case because the landfill in question was never operative and any award based on future profits would be wholly speculative. Citing *Phelps Dodge*, the *Metalclad v. Mexico* tribunal held that the fair market value of the project was best arrived at by reference to Metalclad's actual investment in the project.⁷¹⁶ The reasoning for the rejection of the DCF methodology in *Metalclad v. Mexico* was followed in *Tecmed v. Mexico*.⁷¹⁷
433. It is evident that ADEMCO and AISCO cannot be considered to have constituted going concerns. When their activities came to an abrupt stop due to the arrest of Claimant and the occupation of the site and the premises of ADEMCO and AISCO, the Companies were still at an early stage in the exploration phase.
434. The Tribunal notes, however, that in some cases the application of the DCF method was considered appropriate by investment tribunals even where the concerns in question were not going concerns. What was common to these cases is that there were other factors that allowed a positive assessment of the hypothetical profitability of the companies concerned. *Rusoro Mining v. Venezuela* suggests that the application of the DCF method may be appropriate not just for the valuation of going concerns, but also for enterprises that are not going concerns

⁷¹³ *National Grid P.L.C. v. Argentina Republic*, UNCITRAL, Award, 3 November 2008, para. 276; *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, para. 202.

⁷¹⁴ *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, **Exhibit CLA-0145**, paras. 567-68.

⁷¹⁵ *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Final Award, 30 August 2000, **Exhibit RLA-0113**, paras. 119-20.

⁷¹⁶ *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, **Exhibit RLA-0113**, para. 122 citing *Phelps Dodge Corp. and Overseas Private Investment Corp. v. The Islamic Republic of Iran*, IUSCT, Award No. 217-99-2, 10 Iran-U.S. C.T.R. 121, 19 March 1986.

⁷¹⁷ *Técnicas Medioambientales Tecmed, SA v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, **Exhibit RLA-0102**, para. 186.

but that have detailed business plans, availability of financing, records of financial performance, predictability of performance, foreseeability of costs, and certainty of the price and sale of the concern's products and services.⁷¹⁸ In *Vivendi v. Argentina*⁷¹⁹ in assessing damages for the respondent's breach of the fair and equitable treatment and expropriation standards, the tribunal found that:

[I]n an appropriate case, a claimant might be able to establish the likelihood of lost profits with sufficient certainty even in the absence of a genuine going concern. For example, a claimant might be able to establish clearly that an investment, such as a concession, would have been profitable by presenting *sufficient* evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances.

The tribunal explained that:⁷²⁰

[a] claimant which cannot rely on a record of demonstrated profitability requires to present a thoroughly prepared record of its (or others) successes, based on first-hand experience (its own or that of qualified experts) or corporate records which establish on the balance of the probabilities it would have produced profits from the concession in question in the face of the particular risks involved other than those of Treaty violation.

435. Several awards exist on extraction cases (extraction of oil, gas, or hard minerals) which are of particular interest in the dispute at hand. In *Al-Bahloul v. Tajikistan* the tribunal found that “[a]s a general rule assets need to qualify as a *going concern* and have a proven track record of profitability in order to be valued in accordance with the DCF method,” however, the use of DCF may be justified where the exploration of hydrocarbons is at issue because “the determination of the future cash flow from the exploitation of hydrocarbon reserves need not depend on a past record of profitability.”⁷²¹ The tribunal stated that “there are numerous hydrocarbon reserves around the world, and sufficient data allowing for future cash flow projections should be available to allow a DCF calculation.”⁷²² The tribunal however stated that there were four steps to pass before the cash flow could be expected: (i) was claimant able to finance the exploration for hydrocarbons; (ii) would the exploration have been successful; (iii) would claimant have been able to finance and perform the exploitation of any hydrocarbon reserves found; and (iv) would it have been possible to sell any hydrocarbons to

⁷¹⁸ *Rusoro Mining v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/12/5, Award, 22 August 2016, Exhibit RLA-0111, para. 759.

⁷¹⁹ *Compania de Aguas del Aconquija SA and Vivendi Universal SA v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, **Exhibit CLA-0111**, para. 8.3.4.

⁷²⁰ *Compania de Aguas del Aconquija SA and Vivendi Universal SA v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, **Exhibit CLA-0111**, para. 8.3.10.

⁷²¹ *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, 8 June 2010, **Exhibit CLA-0110**, paras. 71, 75.

⁷²² *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, 8 June 2010, **Exhibit CLA-0110**, para. 75.

be produced.⁷²³ The tribunal found that the claimant was unable to establish that it would have been able to acquire funding for the exploration or for the exploitation of the region; that the record indicated that the discovery of reserves in most of the relevant area was unlikely; and that there was nothing on the record to show that the claimant would have been able to sell the hydrocarbons. Accordingly, the tribunal found that the claimant's position "entail[ed] simply too many unsubstantiated assumptions to justify the application of the DCF-method."⁷²⁴ In *Gold Reserve v. Venezuela*,⁷²⁵ the tribunal awarded damages for the deprivation of a gold mine, which had been explored, but never operated. The tribunal found that:

[A] DCF method can be reliably used in the instant case because of the commodity nature of the product and detailed mining cash flow analysis previously performed.

436. In *Crystallex v. Venezuela*,⁷²⁶ the claimant argued that predicting its future income from ascertained reserves to be extracted by the use of traditional mining techniques, as was the case with the mines involved, could be done with a significant degree of certainty, even without a record of past production. The claimant noted that there was nothing speculative about the damages suffered by it because it had obtained financing for the exploration phase, that there existed proven and probable gold resources and reserves; and that Crystallex had a proven track record of operating gold mines in Venezuela.⁷²⁷ The tribunal found that:⁷²⁸

[T]he Claimant has indeed proven the fact of future profitability. It is undisputed that Crystallex did not have a proven track record of profitability, because it never started operating the mine. However, in the Tribunal's view, it has sufficiently established that, if it had been allowed to operate, it would have engaged in a profitmaking activity and that such activity would have been profitable. The Tribunal considers that this is essentially due to the nature of the investment at stake here as well as the development stage of the project.

437. The tribunal observed that:⁷²⁹

⁷²³ *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, 8 June 2010, **Exhibit CLA-0110**, para. 77.

⁷²⁴ *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, 8 June 2010, **Exhibit CLA-0110**, para. 96.

⁷²⁵ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, **Exhibit CLA-0113**, para. 830.

⁷²⁶ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 733.

⁷²⁷ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 740.

⁷²⁸ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 877.

⁷²⁹ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 879.

...gold, unlike consumer products or even other commodities, is less subject to ordinary supply-demand dynamics or market fluctuations, and, especially in the case of open pit gold mining as in Las Cristinas, is an asset whose costs and future profits can be estimated with greater certainty. The Tribunal thus accepts that predicting future income from ascertained reserves to be extracted by the use of traditional mining techniques—as is the case of Las Cristinas—can be done with a significant degree of certainty, even without a record of past production.

438. The Tribunal summarizes the jurisprudence as follows. Although the DCF method has been used to value going concerns, this methodology has also been applied under certain narrowly defined conditions to investments that are not going concerns. However, the DCF method has been used only if factors were proven that permitted reliable estimation of the investment's future profits. These include the existence of detailed business plans, substantiated information on the price and quantity of the products and services, on the availability of financing, and on the existence of a stable regulatory environment. Even in cases involving commodities that have predictable sale prices, before applying the DCF method, tribunals have assured themselves of the availability of reserves, financing, appropriate methods of exploration, and the possibility of the product being sold.
439. In this case, the Parties' quantum experts agree that the DCF method is a commonly used valuation method. However, the experts do not agree on the appropriateness of applying the DCF method to this case.
440. Claimant's expert (Mr Matthews) opines that the DCF method is appropriate for this case because there is evidence that Claimant's Project was viable and there is no doubt about the technical and economic feasibility of the Project. He thinks that an established record of performance of AISCO and ADEMCO is not necessary to value the Project, because the UEC Study (which was prepared by a reputable company and based on large amounts of contemporaneous industry information) is reliable. Mr Matthews states that the positive attitude of investors suggests that the project could easily have raised financing.
441. Respondent's expert (Mr MacGregor) considers that the DCF method is not appropriate to this case because there were serious technical problems with Claimant's project that could not be overcome. He thinks that the existence of a record of performance is essential to the use of the DCF method. He considers that the UEC Study does not meet the requirements of a feasibility study. He opines that there is no evidence that the iron ore in the Project's concession area could be improved to the grade envisaged in the UEC Study. Mr MacGregor does not see sufficient evidence of guaranteed financing for the Project's total requirement of USD 496.2 million.

442. The Tribunal notes that when deciding on the appropriateness of the DCF method for valuating Claimant's investment, the task of the Tribunal is a limited one. The Tribunal only has to decide whether it has received sufficient information to predict the potential economic development of Claimant's investment with sufficient certainty to use the DCF method for valuating the investment. The Tribunal notes that the application of the DCF method for the valuation of non-going concerns are the exception rather than the rule, since in most of such cases no sufficient objective criteria can be ascertained to reduce the speculative element in the DCF method.
443. The Tribunal acknowledges that specific jurisprudence exists in respect of the application of the DCF method to non-going concerns designed for the exploration and exploitation of natural resources. As decided in *Al-Bahloul v. Tajikistan*, for the application of the DCF method, it is necessary to have certainty about the availability of the resource concerned for the whole period of the project. Claimant argued that the resources for the Project were available, whereas Respondent took the position that this was not the case and that some of Claimant's exploratory activities had been undertaken beyond the limits of the area licensed. The Tribunal will deal with the question of sufficient ore below at Paragraphs 469 *et al.*
444. Finally, the Tribunal notes that the awards in *Gold Reserve v. Venezuela* and *Crystallex v. Venezuela* found that, due to the particularity of the gold market, there was reduced uncertainty concerning the viability of the relevant investments, although in both cases no going concern existed yet. This jurisprudence is guiding the decision of the Tribunal concerning the non-application of the DCF method.
445. In summarizing the relevant international jurisprudence, the Tribunal concludes that the case at hand does not meet the qualifications which allow the application of the DCF method to expropriated non-going concerns. The Tribunal holds that the DCF method is inappropriate to determine the fair market value of Claimant's investment. Having established that the DCF method cannot be used to value the investment of Claimant, the Tribunal considers it unnecessary to consider the arguments exchanged between the Parties concerning which shares in ADEMCO and AISCO belonged to Claimant and on their value.

3. Lost Investment Method

Claimant's Position

446. In the Statement of Claim, Claimant argues that if tribunals have awarded compensation based on the lost investment approach (rather than the cash flow approach), they have

awarded interest rates that reflect the lost opportunity for the investor to earn a competitive commercial rate of return on another project.⁷³⁰ In the Statement of Claim, Claimant presents the following claim based on the lost investment method:

Alternative calculation – amount invested (millions)

| | 12 month USD Libor Rate | 10% Return |
|--|--------------------------------|-------------------|
| Initial Investment | 39.7 | 39.7 |
| Interest due to 31 October 2012 | 23.13 | 114.48 |
| Total Claim | 62.83 | 154.18 |

447. In his Reply, Claimant seeks USD 39.77 million plus interest payable from February 2000 until the date of the report, which is a total loss of USD 126.4 million.⁷³¹ Claimant submits that the USD 39.77 million he claims are his own funds.⁷³²
448. Claimant notes that Respondent now acknowledges that USD 30 million was transferred to MD, but challenges the source of funds.⁷³³ Claimant maintains that the USD 30 million transferred to MD came from Claimant's personal funds: it was withdrawn by the cheques from Claimant's stake in an investment vehicle called Cornwood Limited (which amounted to USD 42.7 million at the time).⁷³⁴ Claimant further maintains that the involvement of Cornwood Limited should not come as a surprise to Respondent given it has been in possession of these cheques and that "if this had been an issue, it certainly was investigated at the time."⁷³⁵ Claimant states that the money paid to Mannesmann was Mr Bahgat's own money, not that of Cornwood Limited.⁷³⁶
449. Moreover, Claimant maintains that the payment of DEM 54 million (USD 30 million or approximately EGP 102 million) to MD is recorded in the February 2000 GAFI Report.⁷³⁷ He argues that when ADEMCO's paid up share capital was increased, it was increased from EGP

⁷³⁰ Claimant's Statement of Claim, para. 5.12 *citing Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, **Exhibit CLA-38**, para. 128.

⁷³¹ Claimant's Reply, para. 356; Matthews Presentation, Slides 12-13.

⁷³² Claimant's Reply, paras. 79, 353; 2019 Merits Hearing, Day 3, p. 9:21-23, p. 23:6-22; Claimant's Opening, Slide 24.

⁷³³ Claimant's Reply, para. 73.

⁷³⁴ Claimant's Reply, para. 74 *citing* Copy of the Checks paid to Mannesmann, 26 February 1998 and 3 March 1998, **Exhibit R-0046**.

⁷³⁵ 2018 Merits Hearing, Day 1, p. 32:12-25.

⁷³⁶ 2018 Merits Hearing, Day 2, p. 71:14-22.

⁷³⁷ GAFI Report, 6 February 2000, **Exhibit C-0052**; 2018 Merits Hearing, Day 2, pp. 10:14-16:16.

2.5 million to EGP 100 million (EGP 97.5 million).⁷³⁸ Claimant notes that when the authorities examined ADEMCO's books, they noted that the increase in capital was with respect to the gap between EGP 2.5 million and EGP 100 million and that there was a surplus payment made by Claimant.⁷³⁹

450. Claimant maintains that USD 9.7 million (of the USD 39.7 million) invested by Claimant came from his personal funds. Claimant cites the February 2000 GAFI report that demonstrates that Claimant paid USD 4.8 million to ADEMCO and the July 2000 report of Khodeir & Company that demonstrates that USD 4.9 million was deposited in ADEMCO's account as payment for the sale of Claimant's shares in ADEMCO to Al Sharq Insurance Company, Bank Misr, and Faisal Islamic Bank (which sums were owed to Claimant personally and not to ADEMCO).⁷⁴⁰
451. Claimant explains that although the advance payment of USD 5 million for the purchase of the used factory was made from Mr Shimi's account, these were Claimant's funds. Claimant states that this is clear from the fact that Claimant (not Mr Shimi) signed the bank transfer to ProfilArbed.⁷⁴¹ Claimant notes that he does not seek to recover this USD 5 million (which was eventually returned to him).⁷⁴²
452. Claimant notes that the Parties' estimations of wasted costs differ by USD 4.5 million. Claimant argues that the GAFI report does not state the source of these funds, but this does not mean that these sums were not paid by Mr Bahgat.⁷⁴³ Claimant submits that there is no doubt that he paid EGP 7.5 million for the Concessions and EGP 5 million for the land in Aswan for the plant.⁷⁴⁴ Claimant suggests that these sums could have been reflected in the USD 4.5 million referred to in the GAFI report.⁷⁴⁵
453. Claimant notes that he also invested USD 73,530 in the plant for the preparation of an iron

⁷³⁸ 2019 Merits Hearing, Day 6, p. 24:10-23.

⁷³⁹ 2019 Merits Hearing, Day 6, p. 25:12-22.

⁷⁴⁰ Claimant's Reply, para. 72 *citing* GAFI Report, 6 February 2000, **Exhibit C-0052**; Report produced by Khodeir & Company, Chartered Accountants, **Exhibit C-0053**; Bahgat WS 2, para. 109; FTI Spreadsheet – Summary of shareholding structure in ADEMCO over time, **Exhibit C-0137**.

⁷⁴¹ Claimant's Reply, para. 70 *citing* Union Bank of Switzerland, Substitute Payment Slip dated 17 December 1997, **Exhibit R-0042**; Bahgat WS 5, para. 16.

⁷⁴² Claimant's Reply, para. 71.

⁷⁴³ 2019 Merits Hearing, Day 5, pp. 156:9-159:5.

⁷⁴⁴ 2019 Merits Hearing, Day 6, pp. 87:11-88:9.

⁷⁴⁵ 2019 Merits Hearing, Day 5, pp. 159:6-160:19.

ore study at Aswan.⁷⁴⁶

454. Claimant denies that his investment was reckless and argues that he invested in the Project based on Respondent's encouragement and that no doubts were expressed about the Project's viability until the change in government in October 1999.⁷⁴⁷ Claimant denies that his payment of USD 30 million to MD pursuant to the First ADEMCO-MD Contract was reckless – after the cancellation of the first contract, the sums were used towards to advance payment for the new steel plant under the Second ADEMCO-MD Contract.⁷⁴⁸ Claimant denies that the payment he made to MD was premature and notes that it post-dated the LOI and encouragement to invest from the highest levels of Respondent's government.⁷⁴⁹
455. Claimant distinguishes this case from *Azurix v. Argentina*, arguing that the latter case involved a maverick investor who would have made the investment irrespective of the economic situation in Argentina.⁷⁵⁰ By contrast, Claimant invested based on the government's assurances and its experts and relied on the expertise of several foreign partners.⁷⁵¹

Respondent's Position

456. Respondent considers the lost investment method, i.e., calculating the total amount invested by Claimant plus interest to the date of the award, to be inappropriate to this case.⁷⁵²
457. In any event, Respondent argues that this wasted costs method can only allow Claimant to recover the sums that he personally invested in the Project.⁷⁵³ According to Respondent, Claimant has not demonstrated that he invested USD 39.7 million in the Project (USD 30 million as an initial payment to MD in 1998 and USD 9.7 million at various stages of the Project).⁷⁵⁴ Respondent contends that this Tribunal must conduct its own assessment of the damages claimed by Claimant, and must not rely on documents prepared in the different context of the Egyptian criminal proceedings or the GAFI reports.⁷⁵⁵

⁷⁴⁶ Claimant's Reply, para. 78 *citing* Cheque from Claimant to CMRDI, 2 August 1998, **Exhibit C-0111**.

⁷⁴⁷ Claimant's Reply, para. 354; 2018 Merits Hearing, Day 1, pp. 11:23-14:6.

⁷⁴⁸ Claimant's Reply, para. 76.

⁷⁴⁹ 2019 Merits Hearing, Day 3, pp. 24:15-25:23.

⁷⁵⁰ Claimant's Reply, para. 355 *citing* *Azurix Corp. v. The Argentina Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, **Exhibit RLA-0100**, para. 426.

⁷⁵¹ Claimant's Reply, para. 355.

⁷⁵² Respondent's Statement of Defense, para. 184.

⁷⁵³ Respondent's Rejoinder, para. 221.

⁷⁵⁴ Respondent's Statement of Defense, paras. 185-86, 188; 2019 Merits Hearing, Day 3, p. 75:2-25; 2019 Merits Hearing, Day 6, pp. 198:18-199:2

⁷⁵⁵ Respondent's Rejoinder, para. 222.

458. Regarding the USD 9.7 million, Respondent notes that a GAFI report suggests that Claimant invested only USD 30,000 in the Project (as capital and cash paid up by Mr Bahgat).⁷⁵⁶ Respondent suggests that Claimant should produce bank statements from his own banks that are evidence of any additional payments that he made.⁷⁵⁷ Respondent argues that the report by Khodeir and Company is not sufficient to justify a wasted costs claim because the documents on which the report is based are not identified.⁷⁵⁸ Further, the report does not clarify whether the shareholders paid for the increase in capital through which the sold shares were created.⁷⁵⁹ By stating that the issued capital of ADEMCO remained unchanged, the report, in Respondent's view, suggests that no payments had been made by the existing shareholders for the new shares.⁷⁶⁰
459. Regarding the USD 30 million that Claimant allegedly paid MD, while there is evidence of the sum being drawn from the account of Cornwood Limited, Respondent argues that "nothing shows that amounts spent by this company should be considered as amounts spent by Mr Bahgat."⁷⁶¹ Respondent argues that there is no evidence that the sums invested by Cornwood Limited belonged to Claimant, Claimant's signature on the cheques and his being a director of Cornwood Limited is not sufficient proof of Claimant's ownership of funds.⁷⁶² Respondent submits that the cheques submitted as evidence of the transfer (drawn on the account of a company called Cornwood Limited) were not in the name of Claimant, Mr Shimi, or ADEMCO and did not demonstrate that the payment had been received or made by a shareholder of ADEMCO.⁷⁶³ Respondent suggests that Claimant obfuscated the source of funds.⁷⁶⁴ Respondent notes that Claimant has explained in the course of this arbitration that Cornwood Limited was an investment vehicle set up by a Mr Parviz, but points out that Claimant does not explain the shareholding of this company or the terms pursuant to which the investment was made through it.⁷⁶⁵ Respondent also questions how Mr Bahgat could be a

⁷⁵⁶ Respondent's Statement of Defense, para. 188 *citing* GAFI Report, 6 February 2000, **Exhibit C-0052**; Respondent's Rejoinder, para. 229.

⁷⁵⁷ Respondent's Statement of Defense, para. 188; Respondent's Rejoinder, para. 229.

⁷⁵⁸ Respondent's Rejoinder, para. 229.

⁷⁵⁹ Respondent's Rejoinder, para. 229.

⁷⁶⁰ Respondent's Rejoinder, para. 229.

⁷⁶¹ Respondent's Statement of Defense, para. 189; 2018 Merits Hearing, Day 1, pp. 97:24-104:23; 2019 Merits Hearing, Day 5, pp. 76:9-78:19; 2019 Merits Hearing, Day 6, p. 199:3-12.

⁷⁶² Respondent's Rejoinder, para. 226.

⁷⁶³ Respondent's Rejoinder, para. 44.

⁷⁶⁴ Respondent's Rejoinder, para. 46 *citing* Copy of a letter from the Chief Prosecutor to one Counsellor Boulis Fahrni and Report on the investigations carried out by the Egyptian Prosecution, 21 February 2000, **Exhibit C-0026**, p. 6; Judgment of the Supreme State Security Court, 11 June 2002, **Exhibit C-0002**, p. 10.

⁷⁶⁵ Respondent's Rejoinder, para. 47.

director of Cornwood Limited in 1990 when, according to Mr Bahgat's witness statement, he met Mr Parviz in 1993.⁷⁶⁶

460. Respondent contends that Claimant cannot rely on the conclusions of the Egyptian courts and authorities to support the proposition that Claimant himself contributed USD 30 million to the Project because: (i) GAFI has confirmed that ADEMCO had not established payment of USD 30 million from the personal account of the shareholders;⁷⁶⁷ (ii) Claimant told the Egyptian local courts that he could not produce bank documentation because he did not want to disclose his account information, but the Tribunal now knows that the investments in ADEMCO's shares were drawn from the account of Mr Shimi, not Mr Bahgat;⁷⁶⁸ (iii) the Supreme State Security Court eventually considered that the payment of USD 30 million to MD had been made by Claimant *and* Mr Shimi, not Claimant alone.⁷⁶⁹ In any event, Respondent maintains that Claimant should not be able to recover the USD 30 million, which it considers to be a reckless expenditure made for the dismantlement of the used factory even before the UEC Study was prepared and before the Concession was granted.⁷⁷⁰ Respondent submits that the change from a used plant to a new plant is a "symptom of Claimant's recklessness" and Claimant should not be allowed to recover costs expended in such a change of plans.⁷⁷¹ Respondent highlights that the First ADEMCO-MD Contract was rescinded because of errors in the assumptions upon which the total price was based.⁷⁷²
461. Respondent disputes the amount of money that was to be paid by Claimant to MD, as well as how the payment was made and by whom.⁷⁷³ Respondent suggests that contemporaneous evidence indicates that the payments for the increase in share capital were made by Mr Bahgat *and* Mr Shimi.⁷⁷⁴ Respondent notes that Claimant testifies that he purchased some shareholding from Mr Shimi, but does not provide any evidence of this payment.⁷⁷⁵ Moreover, Respondent suggests that Claimant changed his testimony in his fifth witness

⁷⁶⁶ 2018 Merits Hearing, Day 1, pp. 103:16-104:23. Mr Bahgat later clarifies that he met Mr Parviz in 1990 (2018 Merits Hearing, Day 2 pp. 24:1-25:8); 2019 Merits Hearing, Day 6, pp. 113:23-114:21.

⁷⁶⁷ Respondent's Rejoinder, para. 227 *citing* GAFI Report, 6 February 2000, **Exhibit C-0052**, p. 7.

⁷⁶⁸ Respondent's Rejoinder, para. 227.

⁷⁶⁹ Respondent's Rejoinder, para. 228 *citing* Judgment of the Supreme State Security Court, 11 June 2002, **Exhibit C-0002**; 2019 Merits Hearing, Day 6, p. 111:5-23.

⁷⁷⁰ Respondent's Statement of Defense, para. 190; Respondent's Rejoinder, para. 228; 2019 Merits Hearing, Day 6, p. 199:13-22.

⁷⁷¹ Respondent's Rejoinder, para. 228.

⁷⁷² Respondent's Statement of Defense, para. 190.

⁷⁷³ 2019 Merits Hearing, Day 6, pp. 98:21-104:17.

⁷⁷⁴ 2019 Merits Hearing, Day 6, pp. 103:22-105:18 *citing* Letter from the Capital Market Authority to ADEMCO, 1 March 1998, **Exhibit C-0117**; Letter from Zarrouk Khaled & Co to the Capital Market Authority, 10 September 1998, **Exhibit C-0040**; GAFI Resolution, 7 December 1998, **Exhibit C-0042**.

⁷⁷⁵ 2019 Merits Hearing, Day 6, pp. 105:19-106:18.

statement to suggest that he purchased shares from Mr Shimi in July 1999 (rather than November 1999 as set out in his other witness statements) to present that the Project Partners purchased all the shares in ADEMCO from him, rather than from him *and* Mr Shimi.⁷⁷⁶ Respondent notes that the shares sold to Al Sharq, Bank Misr, and Faisal Islamic Bank belonged to Claimant and Mr Shimi, not to Claimant alone.⁷⁷⁷

462. According to Respondent, ADEMCO did not pay the sum of DEM 54 million to MD, “neither directly or indirectly” as “[t]he amount was not there.”⁷⁷⁸ Respondent argues that Claimant cannot contend that he received shares for the DEM 54 million he paid to MD on behalf of ADEMCO because the increase in his capital in ADEMCO only amounted to DEM 47 million.⁷⁷⁹ Respondent notes that a capital increase of EGP 90 million equates to DEM 47.6 million, not DEM 54 million.⁷⁸⁰ Respondent cites an annulment case of an investment award in the Court of Appeal of Paris where the investment was found to have been for the purpose of committing money-laundering and could not be afforded protection on the basis of public policy.⁷⁸¹ According to Respondent, “only clean investments are protected” in investment law and:

[N]o company . . . could accept the payment of an invoice to be made by wire transfer, payable in German marks, by two obscure cheques in US dollars from someone who is not a party to the contract, the Cornwood Limited company, on which we just know nothing. This would be simply forbidden . . . The fact is that the shares he [Mr Bahgat] got in ADEMCO, the shares which are his investment, if they were the result of a money-laundering operation, being the payment to Mannesmann in such a bizarre way, that would vitiate the entire thing.

We are not saying, of course, that there was money-laundering. What we are saying is that you have enough strange elements, including the false date and the false number on the contract, so as to prompt you to ask more questions, more supporting documents from Mr Bahgat that he never gave to anyone, including in Egypt . . . [W]here does this money in Ireland come from? Could it be the product of tax evasion? Of course, I am not saying it is; I don't know. But it is a possibility.⁷⁸²

463. Respondent contends that the Project, even if technically feasible, would not have been cash-generating as explained in the SRK Report.⁷⁸³ Respondent maintains that Claimant

⁷⁷⁶ 2019 Merits Hearing, Day 6, pp. 106:3-107:6.

⁷⁷⁷ 2019 Merits Hearing, Day 6, pp. 108:6-111:4 *citing* Report produced by Khodeir & Company, Chartered Accountants, 24 July 2000, **Exhibit C-0053**; Decision of the Supreme State Security Court, Case No. 4191 of 2000 Qasr El Nile (and No. 269 of 20000 Plenary), 15 January 2001, **Exhibit R-0088**.

⁷⁷⁸ 2018 Merits Hearing, Day 1, p. 112:1-16.

⁷⁷⁹ 2018 Merits Hearing, Day 1, p. 108:12-17, p. 109:7-15.

⁷⁸⁰ 2018 Merits Hearing, Day 1, pp. 93:19-97:8.

⁷⁸¹ 2018 Merits Hearing, Day 1, pp. 120:13-122:11, pp. 160:16-162:17, p. 168:2-23 referring to *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3.

⁷⁸² 2018 Merits Hearing, Day 1, pp. 121:12-122:15.

⁷⁸³ Respondent's Statement of Defense, para. 191.

should not be rewarded for risks undertaken based on poor judgment: this would not place Claimant in the position he might have been at, because Claimant would have lost the money he had invested.⁷⁸⁴

464. Respondent maintains that Claimant has by producing the relevant cheques, only established that he made one payment of USD 72,530 to the CMRDI for the iron ore studies.⁷⁸⁵ Respondent queries why Claimant cannot produce similar documentation for the other investments he claims to have made.⁷⁸⁶
465. Respondent submits that the fact that Mr Shimi made a payment of USD 5 million towards the Project suggests that Claimant was not the only individual involved in the Project.⁷⁸⁷ Respondent finds it puzzling and suspicious that Claimant would open a bank account containing his own funds in Mr Shimi's name.⁷⁸⁸ Respondent argues that Claimant does not explain why he would undertake such a scheme and notes that Claimant provides no documentation in support of his explanation.⁷⁸⁹

Tribunal's Analysis

466. The Tribunal states at the outset that its decision concerning the lost investment incurred by Claimant was made by a majority decision.
467. Respondent objects to the application of the lost investment method, first, from a principle point of view. Second, it argues that the investments, which Claimant has made, were lost since the whole Project was not viable right from the beginning. Alternatively, Respondent argues that the Project was not viable at 19 February 2000, the date Claimant considers as the critical date when Claimant was arrested and the sites of ADEMCO and AISCO were closed. Third, and related to the second argument, Respondent argues that its actions did not cause any devaluation of Claimant's investment. Fourth, Respondent argues that the payment made to MD is not attributable to Claimant with the consequence that such payment cannot be counted as an economic loss for Claimant. The Tribunal will deal with each of Respondent's arguments in turn.

⁷⁸⁴ Respondent's Statement of Defense, para. 191.

⁷⁸⁵ Respondent's Rejoinder, para. 223 *citing* Cheque from Claimant to CMRDI, 2 August 1998, **Exhibit C-0111**.

⁷⁸⁶ Respondent's Rejoinder, para. 224.

⁷⁸⁷ Respondent's Rejoinder, para. 225.

⁷⁸⁸ Respondent's Rejoinder, para. 225.

⁷⁸⁹ Respondent's Rejoinder, para. 225.

468. As to the first argument advanced by Respondent, the Tribunal notes that the lost investment method has been used in practice, including, for example, in *Metalclad v. Mexico*⁷⁹⁰ and *Copper Mesa v. Ecuador*.⁷⁹¹ The lost investment method is an established method for the valuation of expropriated investments. Unlike the DCF method, the lost investment method uses inputs from the past and thus looks backward. Still, it attempts to determine the value the investment on the relevant day, namely, the day of expropriation.
469. The Tribunal will now turn to the second argument of Respondent, namely, that the whole Project was not viable from the beginning and therefore the investments made by Claimant would have been lost without Respondent's interference or, to put it differently, Respondent's actions would not have caused any economic loss. The Tribunal is not convinced by the arguments of Respondent that the Project was not viable from the beginning. The Tribunal recalls that EGSMa published a report in October 1998 estimating the presence of 100 million tonnes of geological reserves in Egypt after having conducted studies. On this basis, the then Egyptian government confirmed the presence of iron ore in Aswan and declared that private sector development was welcome. The Project received incentives under Egyptian law and the government built two roads for the Project. The inauguration of the Project was attended by key governmental officials. The Tribunal acknowledges the argument of Respondent that all such support and endorsement does not constitute a guarantee from the side of the government that the project was viable. On the other hand, there is no indication that the Project was not considered viable either. The Tribunal considers that the conduct of both Parties, supported by relevant contemporaneous evidence, like EGSMa's report, supply rather credible evidence of value. That said, what matters more is whether that assumption turned out to be true and whether the Project was viable immediately before expropriation struck. The Tribunal turns to that issue next. As indicated above, the Tribunal must determine whether the Project was viable on the date of expropriation, namely 19 February 2000. The Parties disagreed on this point, both having recourse to experts.
470. Respondent argues that Claimant's Project was not feasible on the date of expropriation and therefore, Respondent did not cause any loss to Claimant. Respondent relies *inter alia* upon the expert reports of Dr Armitage and Mr Fox (mining), Dr Willis (beneficiation), and

⁷⁹⁰ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB (AF)/971/1, Final Award, 30 August 2000, **Exhibit RLA-0113**.

⁷⁹¹ *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-02, Final Award, 15 March 2016, **Exhibit RLA-0112**.

Dr Cappel (steel).⁷⁹² Claimant argues that the Project was technically feasible and economically viable and that there was a realistic prospect of making a profit in the future, relying upon the expert reports of Dr Joseph Poveromo (steel), Dr Kadri Dagdelen (mining), and Mr Eric Spiller (beneficiation).⁷⁹³ The above-mentioned experts who testified as to aspects of the viability of the Project after the date of expropriation made presentations and were cross-examined at the 2019 Merits Hearing.

471. Three areas, each of them being essential for the viability of the Project, were discussed by the experts, namely, the sufficient availability of ore, the beneficiation of the ore, and steel-making. The experts also considered questions of transportation, access to power, and financing.
472. Regarding the availability of ore, namely deposits which would last for the duration of the Project, Claimant relies on the EGSMA and CMRDI reports and in particular the UEC Study and the Met-Chem Report. The Met-Chem Report identified sufficient resources for 23 years of production and noted a potential for identifying 67 million tonnes of reserves in the future. Respondent, however, interprets the Met-Chem Report to say that ore had only been identified to last for six years (*see* Paragraph 342). The Tribunal's reading of the Met-Chem Report does not support Respondent's position. The Met-Chem Report merely stated that it has established a preliminary six-year mine development sequence.⁷⁹⁴ In the view of the Tribunal, considering the other statements in the report, the Met-Chem Report does not support the conclusion that there were only resources available for the period of six years.
473. The Tribunal takes note of the information presented by Respondent's expert Dr Armitage and of a study by US Steel, which question the interpretation of the exploration data and their reliability and whether some part of the exploration was conducted outside the license area. The latter point has been dealt with already above (*see* Paragraph 472). Further investigation of the reserves were interrupted due to the arrest of Claimant and closure of the sites of ADEMCO and AISCO (*see* Paragraphs 255-257). The Tribunal will deal with the question of future exploration below, under the topic of causation.
474. After having assessed the expert reports and presentations, the Tribunal is convinced of the

⁷⁹² Respondent's Statement of Defense, paras. 122-34; Respondent's Rejoinder, paras. 10-34.

⁷⁹³ Claimant's Reply, paras. 282-90:

⁷⁹⁴ Met-Chem Report, November 1999, **Exhibit C-0049**, p. 29 (See the 4th bullet point of the Conclusions after having stated in the 1st bullet point that a total amount of resources in excess of 200 million tonnes had been identified.)

availability of ore, which could have sustained the Project for the anticipated Project period. The Tribunal finds the Met-Chem Report and also the UEC Study (albeit being a steel-making rather than a mining report) convincing because the reports are based on exploration activities on the ground. The Tribunal notes that, conversely, Dr Armitage's report is not based on field study at the Project site and is therefore not as convincing as the Met-Chem Report and UEC Study.

475. The Parties agree that the Aswan ore has low iron content and high phosphorus content. They disagree on the appropriate beneficiation method and in particular as to whether any beneficiation would improve the content of iron and reduce the amount of phosphorus so that the ore could be used for further production. A study of CRM in early 2000 showed that the ore at the Project site had an iron content of 56%.⁷⁹⁵ Further studies were planned with SGA and Svedala, a German and a Swedish company specialised in beneficiation, respectively. Respondent considers the results of the beneficiation as being unsatisfactory without considering that there may have been further improvements.
476. Considering that the process of finding an appropriate beneficiation process was not yet completed and that iron ore with an iron content similar to the one in Aswan had been used successfully in other projects, the Tribunal concludes that beneficiation does not jeopardize the technical and economic viability of the Project. The achieved results were already close to what was considered necessary for the Project to operate successfully and Claimant has thus established that there was quasi-certainty that the ore was of sufficient quality to support operation.
477. As far as steel making is concerned, Respondent does not question technical feasibility (*see* Paragraph 354), but, relying on the expert report of Dr Cappel, raises doubts about the economic viability of the Project. In the view of the Tribunal, the concerns of Dr Cappel were convincingly disputed by Claimant.
478. The Tribunal acknowledges that it was unclear who would pay for a gas pipeline and a railroad, although all experts agree that such a construction was technically feasible. The Tribunal does not consider that the expenses for constructing a railroad and a gas pipeline would render the Project economically infeasible.
479. Based on the considerations above, the Tribunal concludes that, contrary to the arguments

⁷⁹⁵ Claimant's Reply, para. 287 *citing* CRM Report, 10 August 1999, **Exhibit C-0114**, p. 18.

advanced by Respondent, the Project was technically and economically viable on 19 February 2000.

480. The Tribunal takes note of the arguments advanced by Respondent⁷⁹⁶ that the Project Partners' decision not to participate in the Project demonstrates their lack of confidence in the feasibility of the Project. Respondent surmises that the Project Partners abandoned the Project because the Met-Chem Report and the UEC Study supported only a 6-year Project viability. The Tribunal already has dealt with these two reports (*see* Paragraph 474), reading them differently than Respondent has. The Project Partners left after Claimant was arrested by the Egyptian authorities. Given that Claimant was the driving force behind the Project, it would not have made sense for the Project Partners to remain after Claimant had been arrested by the authorities. Moreover, Respondent not only arrested Claimant but also froze the accounts of the companies and prevented employees from entering the site. There may also have been a different explanation for the decisions of the Project Partners, namely that they did not want to get involved in what may have looked as an internal politically motivated controversy in Egypt: indeed while they had called a shareholders' meeting to consider that decision before the expropriation, they finally made their decision after Mr Bahgat's arrest and that arrest definitely was a relevant, causal, element in their decision to leave.
481. As indicated above, the Tribunal will now turn to the question of whether Respondent's actions on 19 February 2000 against Claimant and the Companies caused the termination of the Project.
482. Apart from Respondent's reasoning concerning the lack of viability of the Project, already considered by the Tribunal, Respondent argues that Claimant could and should have appointed another chairman and that it was Mr Verdier's message to the partners that in fact ended the economic development of the Project. The Tribunal is not convinced that the appointment of a new chairperson would have resolved the situation that the Project was placed in, considering that Respondent not only arrested Claimant but also took control over the Project site, froze the assets of the Companies, and prohibited the employees from returning to their offices. The Tribunal is also not convinced that the Project Partners ended their association with the Project due to Mr Verdier's message. In the view of the Tribunal, the ending of the development project was caused by the actions of Respondent and not the information about that event disseminated by Mr Verdier.

⁷⁹⁶ 2019 Merits Hearing, Day 6, pp. 179:8 -181:9.

483. Based on the foregoing, the Tribunal has no doubt that Claimant and his investment suffered legal harm because Claimant was arrested; because the bank accounts of Claimant and the Companies were frozen; and because the site of the Companies had been taken over by Egyptian authorities and the employees were not allowed to return to their offices. As indicated above, these activities have virtually stopped all further activities of Claimant necessary to further develop the Project. What still has to be established as indicated above is the economic quantification of such harm. The tribunal in *Copper Mesa v. Ecuador*,⁷⁹⁷ which was facing a similar factual situation, stated while referring to *Vivendi v. Argentina*:

Nevertheless, there is useful evidence on the record; and it is well settled that the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred. In such cases, approximations are inevitable; the settling of damages is not an exact science. . . . For this reason, rather than seeking to value an elusive loss of a chance to the extent permissible under international law, the Tribunal here prefers to select the Claimant's alternative valuation method of proven expenditure.

The Tribunal will follow this jurisprudence. In doing so the Tribunal will, as necessary, take into account any devaluation of the investment made which is not accountable to the State concerned, such as devaluation due to mismanagement or force majeure.

484. The Tribunal notes, that in his Reply, Claimant seeks USD 39.77 million plus interest payable from February 2000 until the date of the award (as to the composition of this sum see Paragraphs 446-455). He does not claim the USD 5 million, which was paid for purchasing the used steel factory, since this money was returned to him.

485. Respondent contests that the relevant payments were drawn from Claimant's property. As far as the payment of USD 30 million payment to MD is concerned, Respondent raises three objections: first, that it is not clear that the money came from Claimant, second, that the money was received by MD and, third, that the payment was reckless.

486. Claimant in his Reply⁷⁹⁸ points out that the cheques were signed by him and he explains his relationship with Cornwood Limited as well as the objective of his financial engagement in the latter. In his testimony,⁷⁹⁹ which the Tribunal accepts in spite of contradictory evidence also on record, especially the view of the Egyptian Supreme State Security Court in its judgement of 11 June 2002, he emphasises what he had stated in his Reply. On both

⁷⁹⁷ *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-02, Final Award, 15 March 2016, **Exhibit RLA-0112**, para. 7.26.

⁷⁹⁸ Claimant's Reply, paras. 73-75 *citing* Copy of the Checks paid to Mannesmann, 26 February 1998 and 3 March 1998, **Exhibit R-0046**.

⁷⁹⁹ Bahgat WS 5, paras. 29 -30.

occasions, he emphasised that Mr Shimi was not involved in Cornwood Limited.

487. These explanations satisfy the Tribunal that the payment to MD was made from Claimant's funds. Claimant stated in his testimony that the two cheques were paid out from a Barclay's account held by Cornwood Limited and he assured the Tribunal that this account was his personal one. Both cheques had his signature and they were cashed as MD confirmed. The payment was made out of Claimant's personal funds and the fact of them being received by MD is confirmed by the judgment of the Egyptian Supreme Security Court of 11 June 2002.⁸⁰⁰
488. Regarding Respondent's second objection, the confirmation from MD proves to the satisfaction of the Tribunal that the funds transferred by Claimant were received by MD.
489. As to the third objection of Respondent, the Tribunal notes that this payment was in fact made before Claimant had received the license for mining. However, the Tribunal also notes that Claimant had invested these funds based on the government's assurances and therefore these are not to be considered reckless as Respondent argues.
490. The Tribunal found it difficult to ascertain the payment of USD 9.7 million, which Claimant claims to have made in February 2000 and July 2000 respectively to ADEMCO. These payments were reported in the GAFI report and in the Khodeir Company report respectively. Respondent's objection against assigning these payments to Claimant's payments was that these reports could not be trusted (*see* Paragraph 458). Respondent's argument has not been substantiated to the satisfaction of the Tribunal. The Tribunal notes, however, that these payments were not documented as the payment of USD 72,530 to CMRDI was, but they are mentioned in the two reports referred to. The Tribunal has not received sufficient information from Respondent regarding why these reports are not to be trusted. The Tribunal accepts that USD 9.7 million should be added to Claimant's expenses, which together with the payment to MD, total USD 39.7 million.
491. Respondent has accepted that Claimant has paid USD 72,530 to CMRDI for the iron ore studies. This sum has to be added to USD 39.7 million referred to above.
492. Respondent questions whether the payments made by Claimant were "clean investments" but has not substantiated its indication that Claimant might have been engaged in money laundering. Hence, this objection against the applicability of the lost investment method is

⁸⁰⁰ Judgment of the Supreme State Security Court, 11 June 2002, **Exhibit C-0002**, p. 22.

dismissed.

493. Finally, as indicated above (*see* Paragraph 467), after having established that the Project was viable on the date of expropriation, the Tribunal must establish whether the investment made by Claimant had been economically devalued. This investment was used to apply for the license to mine and to produce steel, the establishment of the site of ADEMCO and AISCO, to hire and pay employees, to undertake exploration activities whose results have been documented, and to inquire into the options for the beneficiation of the ore. The Tribunal cannot identify any reasons, apart from the ones discussed and discarded, that the investment made had lost its value or part thereof. Respondent has not advanced any compelling argument to the contrary.
494. Accordingly, the majority of the Tribunal comes to the conclusion that the damages Claimant suffered amount to USD 39.77 million. Respondent should pay Claimant compensation in this sum.

4. Valuation based on comparables

Claimant's Position

495. Claimant considers the method of valuation proposed by Respondent – valuation based on comparables – to be “self-serving and unsuitable”.⁸⁰¹ Claimant notes that the 136 global projects selected without explanation by Respondent all took place after June 2004 and these are narrowed down to six transactions that are not comparable to the Project.⁸⁰²
496. Claimant argues that the valuation is not credible because (i) it incorrectly excludes the value of the steel plant;⁸⁰³ (ii) the valuation focusses on a small set of transactions that are not comparable to the Project; and (iii) it does not appreciate the unique technical and economic merits of the Project.⁸⁰⁴
497. Claimant contends that Respondent's valuation does not have jurisprudential support as tribunals have only considered comparable valuation approaches suitable where the

⁸⁰¹ Claimant's Reply, p. 121.

⁸⁰² Claimant's Reply, para. 357; 2019 Merits Hearing, Day 3, pp. 243:22-244:14.

⁸⁰³ Claimant's Reply, paras. 359-60.

⁸⁰⁴ Claimant's Reply, paras. 361-62.

transactions are genuinely or sufficiently comparable.⁸⁰⁵

Respondent's Position

498. Respondent proposes that the appropriate method of valuation for this matter is a valuation based on comparables.⁸⁰⁶ Under this method, Respondent explains that an analysis of iron ore project transactions is conducted, which would allow the identification of a transaction value in USD per tonne of iron (Respondent uses the catalogue of transactions in the S&P Global Database), and that the transaction value would then be applied to Aswan's project resources.⁸⁰⁷ Respondent notes that to "ensure the accuracy of the selected comparables", the SRK Report chose to: (i) exclude the projects that were operating and those at the reserve stage and (ii) focus the valuation on the 2004-2005 period.⁸⁰⁸ Respondent argues that these choices are favourable to Claimant as the former results in the projects that remained in the pool having a higher iron concentrate and lower phosphorus and the latter results in the use of higher prices of iron ore compared to 2000-2004 (when iron prices were lower).⁸⁰⁹ The six transactions upon which the SRK Report was based had a median transaction value of USD 0.19 per ton of iron ore.⁸¹⁰ On this basis, Respondent argues that the "absolute maximum" valuation of the Aswan Project (of 79.68 million tonnes) should be between USD 3.1 million and USD 6.9 million.⁸¹¹ Claimant, a 12% shareholder, may therefore only claim for a sum between USD 372,000 and USD 828,000.⁸¹² In its Rejoinder, Respondent highlights that the estimate of USD 3.1 million is optimistic because the resources and reserves were not assessed at the same level of certainty as were the comparables.⁸¹³
499. Respondent argues that the value of the Project should be limited to the value of the mine: there was no methodology to make the iron ore suitable for steel production and no additional value should be added for the hypothetical project of constructing a factory near the mine.⁸¹⁴

⁸⁰⁵ Claimant's Reply, para. 363 citing *Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, **Exhibit CLA-0114** (in Spanish), para. 532; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, **Exhibit CLA-0113**, para. 831.

⁸⁰⁶ Respondent's Statement of Defense, para. 193; 2019 Merits Hearing, Day 3, pp.74:8-17.

⁸⁰⁷ Respondent's Statement of Defense, paras. 193-94.

⁸⁰⁸ Respondent's Statement of Defense, para. 195.

⁸⁰⁹ Respondent's Statement of Defense, para. 195.

⁸¹⁰ Respondent's Statement of Defense, paras. 196-97.

⁸¹¹ Respondent's Statement of Defense, para. 197; Respondent's Rejoinder, para. 219.

⁸¹² Respondent's Statement of Defense, para. 198; Respondent's Rejoinder, para. 219.

⁸¹³ Respondent's Rejoinder, para. 220.

⁸¹⁴ Respondent's Statement of Defense, para. 199.

Tribunal's Analysis

500. The Tribunal is not convinced of the suitability of the valuation based on the comparable transactions method as proposed by Respondent although this method has been used in the practice of investment arbitration.⁸¹⁵ The comparable transaction method determines the project value based on transactions involving projects at a similar stage of development. It is mostly used when the project is at an early stage of development and the DCF method cannot be used and it is inappropriate to rely on lost investments. The problem in using this method of comparable transactions is to identify comparable projects.
501. In the view of the Tribunal, the identification of the comparable projects was not convincing. Respondent in applying this method does not reflect sufficiently that the project at hand is not only a mining but also a steel making project. Focusing only on mining, namely on a median transaction value of USD 0.19 per ton of ore, disregards the potential added value of the planned steel making activities. In the view of the Tribunal, the Project's particularity was this combination mining and steel making with the view to reducing the costs of transportation of ore. Claimant always emphasised that it was not the intention of this Project to sell iron ore. The Tribunal is aware that Respondent doubts the technical and economic viability of steelmaking but such doubts should not have influenced Respondent's choice of comparable transactions.

5. Violation of FET Clause under the 1980 BIT and 2004 BIT

502. The Tribunal has decided that the way the prosecution against Claimant was conducted and the treatment he received from the lower courts in Egypt constituted a violation of the FET clause in Article 2(1) of the 1980 BIT. Accordingly, the Tribunal has to decide if and what compensation Claimant should be awarded. Such a decision has to take into account that Claimant will be compensated for the indirect expropriation, which was the result of his arrest. The Tribunal is of the view that, considering the circumstances of the case, it is necessary to distinguish between the methods used by the prosecution and the lower court, which were severely criticized by the Supreme State Security Court of Egypt and the consequences of the arrest and sentencing of Claimant. Considering that the prosecution neglected evidence in its possession and the lower court sentenced Claimant to forced labour without evidence, the Tribunal considers that Claimant should be adequately compensated. In doing so, the Tribunal applies the general principle that internationally wrongful acts entail

⁸¹⁵ *Windstream Energy LLC and Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016.

responsibility and liability. The Tribunal considers the amount of USD 3 million to be adequate.

503. The Tribunal has decided that not lifting the travel ban on Claimant after his acquittal, the belated de-freezing of his assets, and the continued freezing of the assets of the Companies constituted a violation of the FET clause under Article 2(2) of the 2004 BIT. Considering the circumstances of the situation and referring to the reasoning set out in Paragraphs 278-282 above, the Tribunal considers compensation of USD 1 million appropriate.

6. Moral Damages

Claimant's Position

504. Claimant argues that moral, non-material damages are compensable in international law.⁸¹⁶ Article 31 of the Draft Articles on State Responsibility refers to the duty to compensate “material or moral” damages.⁸¹⁷ Further, Claimant refers to the awards of prior investment arbitration tribunals that have granted moral damages to investors.⁸¹⁸
505. Claimant contends that this Tribunal is competent to decide the claim for moral damages because this is an investment claim, not a human rights claim.⁸¹⁹ Claimant notes that investment arbitration tribunals have held that moral damages can be claimed in investment disputes.⁸²⁰
506. Claimant argues that he was imprisoned for over three years on false charges and underwent physical and mental suffering during this period.⁸²¹ Further, he contends that his reputation was tarnished by the Egyptian authorities.⁸²² For these actions, Claimant seeks USD 5 million in moral damages.⁸²³ Claimant maintains that this is an exceptional circumstance warranting

⁸¹⁶ Claimant's Statement of Claim, para. 5.14.

⁸¹⁷ Claimant's Reply, para. 366.

⁸¹⁸ Claimant's Statement of Claim, para. 5.14 *citing* *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, **Exhibit CLA-40**, paras. 290-91; *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, **Exhibit CLA-41**, paras. 326-33; Mixed Claims Commission, (United States-Germany), Opinion in the *Lusitania* Cases, VII Reports of International Arbitral Awards, (1923-1939), **Exhibit CLA-0115**, p. 40.

⁸¹⁹ Claimant's Reply, para. 369; 2018 Merits Hearing, Day 1, pp. 71:12-72:2.

⁸²⁰ Claimant's Reply, para. 370 *citing* *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, **Exhibit RLA-0114**, para. 289.

⁸²¹ Claimant's Statement of Claim, para. 5.15 *citing* Bahgat WS 2, para. 129; Claimant's Reply, paras. 375-76.

⁸²² Claimant's Statement of Claim, para. 5.16 *citing* Bahgat WS 2, paras. 117-32.

⁸²³ Claimant's Statement of Claim, para. 5.17.

moral damages.⁸²⁴ He was kept in jail and subject to a travel ban for several months after his acquittal.⁸²⁵ Further, Claimant notes that the judgments of the Egyptian courts, by awarding him large penalties and dismissing him from positions at the Companies, also humiliated him.⁸²⁶ Claimant submits that Claimant's imprisonment also had an adverse impact on his family.⁸²⁷

507. Claimant points to the similarities between his case and a recent case under the Dutch-Vietnam BIT in which the claimant was awarded USD 10 million in moral damages: both cases involve arrests by Respondent State.⁸²⁸
508. Claimant distinguishes *Biloune v. Ghana* (where moral damages were not granted) from the present case, because the claimant in *Biloune v. Ghana*, unlike Mr Bahgat, specifically claimed a violation of human rights and did not seek moral damages.⁸²⁹ Claimant reiterates that his claim is related to the irreparable reputational loss he faced as a result of Respondent's measures and the fact that Respondent made no effort to reinstate Claimant's business and reputation upon his release.⁸³⁰ Claimant explains that the moral damages claim is linked to his investment because the reputational harm was a part of the principal damage suffered by Claimant in connection with the loss of his investment and that he has satisfied his burden of proof so long as the injury to Claimant's investment was caused by Respondent's measures.⁸³¹
509. Claimant distinguishes *Stati et al v. Kazakhstan* (in which the moral damages claim was denied for not being exceptional) from his case, because the claimant in *Stati et al v. Kazakhstan* was only imprisoned for a few months.⁸³²
510. Claimant considers that through his testimony he has substantiated this claim that Respondent's breaches of the investment protections caused Claimant's physical pain and suffering.⁸³³

⁸²⁴ 2019 Merits Hearing, Day 3, p.10:4-11; 2019 Merits Hearing, Day 6, pp. 88:23-89:7.

⁸²⁵ Claimant's Reply, para. 377.

⁸²⁶ 2019 Merits Hearing, Day 6, p. 89:8-23.

⁸²⁷ 2019 Merits Hearing, Day 6, pp. 89:24-90:4.

⁸²⁸ 2019 Merits Hearing, Day 6, pp. 90:8-91:7 *citing* GAR Article, Dutch national wins moral damages against Vietnam, 15 April 2019, **Exhibit CLA-0148**.

⁸²⁹ Claimant's Reply, para 372.

⁸³⁰ Claimant's Reply, para. 373.

⁸³¹ Claimant's Reply, para. 374.

⁸³² Claimant's Reply, para. 378.

⁸³³ Claimant's Reply, para. 379.

511. Claimant does not consider his moral damages claim to be unrealistic, noting that the tribunal in *Al-Kharafi v. Libya* awarded USD 30 million in moral damages to the claimant.⁸³⁴ Merely because there is not a method to determine moral damages, Claimant argues, does not mean that the damage suffered by Claimant was not real and does not deserve compensation.⁸³⁵
512. Claimant argues that Respondent has raised its objection to the Tribunal's jurisdiction to award moral damages in this matter in an untimely fashion.⁸³⁶

Respondent's Position

513. Respondent argues that the claim for moral damages fails for four reasons.
514. First, this Tribunal is not competent to adjudicate matters concerning human rights.⁸³⁷ Respondent notes that the tribunal in *Biloune v. Ghana* rejected jurisdiction over a claim for damages related to the claimant's detention and expulsion on the basis that its jurisdiction was limited to the treatment of the claimant's investment and did not extend to human rights.⁸³⁸ Respondent highlights that Claimant has not proved the connection between his investment and the moral damages he claims.⁸³⁹ Respondent also notes that this claim in substance remains one for human rights violations.⁸⁴⁰
515. Second, Respondent argues that Claimant's circumstances are not sufficiently exceptional to warrant moral damages.⁸⁴¹ Respondent explains that the tribunal in *Stati et al v. Kazakhstan* did not award the claimants moral damages despite finding the respondent's treatment of the claimants to be "severe, intentional and multi-faceted".⁸⁴² Respondent argues that Claimant has not substantiated how his circumstances were worse than those in *Stati et al v.*

⁸³⁴ Claimant's Reply, para. 380 *citing Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Final Arbitral Award, 22 March 2013, **Exhibit CLA-0119**, p. 369.

⁸³⁵ Claimant's Reply, para. 381.

⁸³⁶ Claimant's Reply, para. 165.

⁸³⁷ Respondent's Statement of Defense, paras. 202-03 *citing* S. Ripinsky with K. Williams, *Damages in international investment law*, London, British Institute of International and Comparative Law (2008), **Exhibit RLA-0089**, p. 257; Respondent's Rejoinder, para. 237.

⁸³⁸ Respondent's Statement of Defense, para. 204 *citing* S. Ripinsky with K. Williams, *Damages in international investment law*, London, British Institute of International and Comparative Law (2008), **Exhibit RLA-0089**, p. 311.

⁸³⁹ Respondent's Statement of Defense, para. 205.

⁸⁴⁰ Respondent's Rejoinder, para. 238.

⁸⁴¹ Respondent's Statement of Defense, para. 207; Respondent's Rejoinder, para. 240 *citing Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2008, **Exhibit CLA-0058**, para. 592.

⁸⁴² Respondent's Statement of Defense, paras. 207-08 *citing Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013, **Exhibit RLA-0116**, paras. 1783, 1786.

Kazakhstan and argues that the charges against Claimant were not “false”.⁸⁴³ Respondent maintains that Claimant’s moral damages claim is based on his imprisonment, which was neither egregious, nor in violation of the norms of international law.⁸⁴⁴ Respondent states that Claimant does not meet the *Lemire v. Ukraine* test because Claimant has not shown: (i) that Respondent contravened the norms “according to which civilized nations are expected to act” or (ii) a complete loss of reputation and position in society, loss of business and severe upheaval to his family.⁸⁴⁵ Regarding the first criteria, Respondent reiterates that Claimant’s circumstances were not “exceptional”; he was prosecuted in accordance with Egyptian law and was given a fair hearing.⁸⁴⁶ Respondent submits that Claimant’s detention after his acquittal was in relation to another criminal sentence and that his acquittal was in any case based on the Egyptian court receiving incomplete information about the payment to MD.⁸⁴⁷ Respondent maintains that Claimant has not established a causal link between the actions alleged and Respondent.⁸⁴⁸ Respondent denies a causal link between its actions and the loss of Claimant’s reputation: the Project failed on account of its shortcomings and Claimant would have suffered reputational loss in relation to his imprisonment for his forgery conviction in any event.⁸⁴⁹

516. Third, Respondent submits that Claimant’s moral damages claim is unsubstantiated and does not meet the high threshold required for the award of moral damages: Claimant was able to obtain recourse from imprisonment using the Egyptian criminal procedure system and was eventually released.⁸⁵⁰

517. Finally, Respondent considers that the quantum of moral damages claimed by Claimant is unrealistic and not in line with the modest damages generally awarded by investment tribunals.⁸⁵¹ Respondent notes that the *Desert Line v. Yemen* tribunal awarded the claimant USD 1 million in moral damages as against the USD 104 million claimed, and the *von Pezold v. Zimbabwe* tribunal awarded one claimant USD 1 million in moral damages as against the

⁸⁴³ Respondent’s Rejoinder, para. 246.

⁸⁴⁴ Respondent’s Statement of Defense, para. 209.

⁸⁴⁵ Respondent’s Rejoinder, para. 241 citing *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, **Exhibit RLA-0115**, para. 333.

⁸⁴⁶ Respondent’s Rejoinder, para. 244; 2018 Merits Hearing, Day 1, p. 178:3-19.

⁸⁴⁷ Respondent’s Rejoinder, para. 244.

⁸⁴⁸ Respondent’s Rejoinder, paras. 241-42.

⁸⁴⁹ Respondent’s Rejoinder, para. 245; see 2018 Merits Hearing, Day 1, pp. 131:17-135:1; 2019 Merits Hearing, Day 6, p. 200:15-20.

⁸⁵⁰ Respondent’s Statement of Defense, paras. 210-12 citing *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013 **Exhibit RLA-0116**, para. 1782.

⁸⁵¹ Respondent’s Statement of Defense, para. 213.

USD 5 million claimed.⁸⁵² Respondent argues that Claimant provides no justification or explanation for his USD 5 million moral damages claim.⁸⁵³ Respondent notes that international law does not recognise punitive damages.⁸⁵⁴ Respondent considers Claimant's reliance on *Al-Kharafi & Sons v. Libya* to be misplaced because that tribunal adjudicated the dispute (including the award of damages) under Libyan law, rather than international law.⁸⁵⁵

518. Respondent argues that Article 31 of the ILC Articles on State Responsibility must be read with Article 36, the commentary to which notes that compensation does not have an exemplary nature and is not intended to punish the responsible State.⁸⁵⁶ Respondent highlights that reparations in investment law take the form of the public international law principle of satisfaction and requests the Tribunal, should it find a breach, to award Claimant satisfaction rather than damages.⁸⁵⁷

Tribunal's Analysis

519. The Tribunal notes that there is no reference in the 1980 BIT to awarding moral damages connected with a dispute concerning investment protection. The Tribunal further is convinced that when the 1980 BIT was drafted the States involved had not in mind to cover damages for human rights violations having occurred in connection with infringements on investments. However, the Tribunal also takes note of the fact that the concern for the protection of human rights has become a dominant consideration in all aspects of international relations, including economic relations. The Tribunal has scrutinized the existing jurisprudence such as *Desert Line v. Yemen* and *von Pezold v. Zimbabwe*.
520. The Tribunal finds that, though the events in the case might have warranted an award of

⁸⁵² Respondent's Statement of Defense, paras. 213-16 citing *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, **Exhibit RLA-0114**, para. 290; *Bernard Von Pezold and Others, v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, **Exhibit RLA-0117**, paras. 921, 932.

⁸⁵³ Respondent's Statement of Defense, paras. 217-18.

⁸⁵⁴ Respondent's Rejoinder, para. 248.

⁸⁵⁵ Respondent's Rejoinder, para. 248 citing *Mohammed Abdulmohsen Al-Kharafi & Sons Co. v Libya and others*, Final Arbitral Award, 22 March 2013, **Exhibit CLA-0119**, p. 3.

⁸⁵⁶ Respondent's Rejoinder, para. 247 citing International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, [2001- II(2)] Yearbook of the International Law Commission, 2001, **Exhibit RLA-0108**, p. 99, para. 4; *Mixed Claims Commission, United States-Germany, Opinion in the Lusitania Cases*, VII Reports of International Arbitral Awards, (1923-1939), **Exhibit CLA-0115**, p. 39.

⁸⁵⁷ Respondent's Rejoinder, para. 247 citing *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, para. 704 (translation from the French original as quoted in I. Marboe, *Calculation of Compensation and Damages in International Investment Law*, 2nd Ed., Oxford International Arbitration Series (2017)), **Exhibit RLA-0152**, p. 319, para. 5.351.

moral damages, Claimant has failed to convince the Tribunal of its competence to award such damages under the treaties in question.

521. In dismissing the claim for moral damages, the Tribunal does not have any doubt that the prosecution of Claimant, his imprisonment, and sentencing to forced labour were disproportionately harsh and particularly degrading for Claimant. It finds the reasoning of Respondent that the treatment of Claimant was in accordance with Egyptian law formalistic, disregarding the circumstances of such arrest, the other measures taken and the economic consequences of such measures. The Tribunal doubts whether the measures taken against Claimant and his companies met international standards for criminal prosecution.

IX. INTEREST

Claimant's Position

522. Claimant argues that full reparation requires that he be paid compound interest on the award of damages.⁸⁵⁸ He notes that Article 38(1) of the ILC Articles on State Responsibility and commentators support his position.⁸⁵⁹
523. Claimant argues that compound interest is now applied as a rule by tribunals because it reflects economic reality and ensures full reparation.⁸⁶⁰ Therefore, Claimant explains, Mr Matthews has applied a LIBOR plus 4% interest rate compounded annually in valuing the sums due to Claimant.⁸⁶¹ Claimant, relying on arbitral precedent, argues that this interest rate is not unusual and is less than the current Egyptian sovereign bond rate of 18.4%.⁸⁶²
524. Claimant presents the following claim for compensation in its Reply:⁸⁶³

| | Loss (pre-interest) | Interest | Loss including interest |
|-------------------|----------------------------|-----------------|--------------------------------|
| Fair market value | 103.5 | 225.4 | 329.0 |

⁸⁵⁸ Claimant's Statement of Claim, para. 5.19 *citing Ron Fuchs v. Georgia*, ICSID Case No. ARB/07/15, Award, 3 March 2010, **Exhibit CLA-28**, para. 659; *Gemplus, SA, SLP, SA and Gemplus Industrial, SA de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, **Exhibit CLA-42**, para. 26; *Quasar de Valores SICAV SA et al. (Formerly Renta 4 S.V.S.A et al.) v. Russian Federation*, SCC Case No. 24/2007, Award, 20 July 2012, **Exhibit CLA-43**, paras. 226-68.

⁸⁵⁹ Claimant's Reply, para. 383 *citing Asian Agricultural Products Limited v. The Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, **Exhibit RLA-0105**, para. 114.

⁸⁶⁰ Claimant's Reply, para. 386.

⁸⁶¹ Claimant's Reply, para. 387; 2019 Merits Hearing, Day 3, p. 9:13-17.

⁸⁶² Claimant's Reply, para. 387.

⁸⁶³ Claimant's Reply, para. 388.

| | | | |
|--------------|------|------|-------|
| Wasted costs | 39.8 | 86.6 | 126.4 |
|--------------|------|------|-------|

525. Claimant argues that if the Tribunal is minded to adopt the wasted costs or lost investment approach, it should award a 10% return rate on the loss, resulting in a claim of USD 234.1 million.⁸⁶⁴
526. Claimant argues that there is no principle of international law that prohibits the awarding of interest of a sum greater than the principal and notes that other tribunals have rejected this argument made by Egypt.⁸⁶⁵
527. Further, Claimant submits that there is no basis to preclude him from interest for certain periods of time, such as for his alleged delay in bringing these proceedings (which delay, Claimant denies) and for the period during which these arbitral proceedings were bifurcated (which Claimant points out was requested by Respondent).⁸⁶⁶

Respondent's Position

528. Respondent does not challenge the principle of awarding interest with damages, but considers Claimant's position to be unreasonable.⁸⁶⁷ Respondent states that Claimant's interest claim ignores that Egyptian law prohibits compound interest and awarding interest in excess of the principal.⁸⁶⁸ It cannot therefore be argued that Egypt consented to the award of compound interest for investments covered by the BITs.⁸⁶⁹ Respondent submits that, if at all, Claimant should only be awarded simple interest and a sum that does not exceed the principal.⁸⁷⁰
529. Respondent criticises the change in the interest rate claimed in the Inglis Report (LIBOR) and the Matthews Report (LIBOR + 4%).⁸⁷¹ Respondent maintains that the latter rate is unjustified and there is no reason to award interest higher than LIBOR (which already favours

⁸⁶⁴ Claimant's Reply, para. 389; 2019 Merits Hearing, Day 3, p.10:1-3.

⁸⁶⁵ 2019 Merits Hearing, Day 6, p. 92:5-25 citing *Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, **Exhibit CLA-0124**; *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, **Exhibit CLA-0145**; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, **Exhibit CLA-0038**.

⁸⁶⁶ 2019 Merits Hearing, Day 6, p. 93:1-94:9.

⁸⁶⁷ Respondent's Rejoinder, para. 250.

⁸⁶⁸ Respondent's Rejoinder, para. 251; 2019 Merits Hearing, Day 6, p. 202:1-4.

⁸⁶⁹ Respondent's Rejoinder, para. 251; 2019 Merits Hearing, Day 6, p. 202:5-15.

⁸⁷⁰ Respondent's Rejoinder, para. 251.

⁸⁷¹ Respondent's Rejoinder, para. 252.

Claimant).⁸⁷²

530. Respondent notes that Claimant cannot benefit from the delays that he caused.⁸⁷³ Respondent notes that Claimant waited 6 years after leaving Egypt in 2005 to bring a Notice of Dispute in 2011 and a Request for Arbitration in 2012.⁸⁷⁴ Moreover, Respondent notes that Claimant agreed to bifurcate the arbitration and to suspend proceedings until the Finnish courts had made a determination regarding his nationality.⁸⁷⁵ Respondent clarifies that it did not initiate the proceedings before the Finnish courts, but that these were likely commenced *sua sponte* by the Finnish authorities.⁸⁷⁶ Given that this arbitration has faced significant delays that cannot be attributed to Respondent, it insists that it should not be ordered to pay compound interest at an unreasonable rate.⁸⁷⁷ Respondent, instead presents an alternative simple interest calculation that accounts for the various delays.⁸⁷⁸

Tribunal's Analysis

531. As far as interests are concerned, the Tribunal has to decide whether LIBOR is appropriate, and whether to apply it as a base rate on its own, or whether to add a premium. The Tribunal notes that originally, the Parties to this arbitration agreed to use USD 12 month LIBOR, but Claimant argues that LIBOR plus a 4% spread is appropriate. Respondent argues that LIBOR without a premium is appropriate, and notes this was initially accepted by Claimant's first expert, Mr Inglis.
532. The Tribunal notes that in a recent study of ICSID awards, three broad categories of interest rates were used: base rates plus a spread (the base rate being a market rate of some kind and usually US Treasury bill rate, or interbank lending rate such as LIBOR, EURIBOR, ROBOR, BRIBOR); a base rate without a spread; and a number specified by the tribunal. However, in the view of the Tribunal a tendency exists to use LIBOR. Several awards in establishing a normal commercial rate have selected LIBOR. This is true for example for *Rusoro Mining v. Venezuela*.⁸⁷⁹ As a justification for this choice, the award emphasised that LIBOR reflects the interest rate at which banks lend to each other money and thus was commercially widely

⁸⁷² Respondent's Rejoinder, para. 252; 2019 Merits Hearing, Day 6, p. 201:19-25.

⁸⁷³ Respondent's Rejoinder, para. 253; 2019 Merits Hearing, Day 6, pp. 202:20-203:2.

⁸⁷⁴ Respondent's Rejoinder, para. 253.

⁸⁷⁵ Respondent's Rejoinder, para. 253.

⁸⁷⁶ Respondent's Rejoinder, para. 253.

⁸⁷⁷ Respondent's Rejoinder, para. 254.

⁸⁷⁸ Respondent's Rejoinder, para. 255 *citing* Second BDO Report, Section 8.

⁸⁷⁹ *Rusoro Mining v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, **Exhibit RLA-0111**.

accepted.⁸⁸⁰ The award in the case *Flughafen Zürich A.G. and Gestión e Ingeniería IDC SA v. Venezuela* emphasised that LIBOR was “universally accepted as a reference for setting interest rates for loans, deposits and other instruments financial.”⁸⁸¹ The award in *RosInvestCo UK Ltd. v. The Russian Federation* followed the same practice.⁸⁸²

533. In the cases mentioned so far, an additional 4% has been added to compensate the present low interest rates. However, the rate of LIBOR plus 2% has frequently been awarded by investment tribunals.⁸⁸³ For example, the tribunal in *Lemire v Ukraine* found in 2011 that LIBOR plus 2% “is a reasonable margin, which reflects the surcharge which an average borrower would have to pay for obtaining financing based on LIBOR.”⁸⁸⁴ This approach was adopted in 2017 by the tribunal in *Burlington v Ecuador*.
534. The Tribunal will now turn to the question of whether a compound or a simple interest is appropriate. That Tribunal notes the argument of Respondent that a compound interest is not in conformity with Egyptian national law. This argument does not convince the Tribunal. First, it has to be noted that investment arbitration is based upon international law as expressed in the 1980 BIT and, second if the BIT is silent on the respective issue, on the jurisprudence of arbitral tribunals. Respondent should be minded that it objected to the arguments advanced by Claimant that the Tribunal should consider a violation of Egyptian national law. That logically excludes having reference to Egyptian national law if it favours the position of Respondent. Second, there is a clearly established trend in investment arbitration to award compound interest for expropriations as that is deemed to be “better reflecting actual economic realities both for the purpose of remedying the loss actually incurred by the injured party and for the prevention of unjustified enrichment of Respondent

⁸⁸⁰ *Rusoro Mining v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, **Exhibit RLA-0111**, para. 838.

⁸⁸¹ *Flughafen Zürich A.G. and Gestión e Ingeniería IDC SA v. Venezuela*, ICSID Case No. ARB/10/19, Award (in Spanish), 11 March 2016, **Exhibit CLA-0127**, para. 963.

⁸⁸² *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010, **Exhibit CLA-0134**, paras. 688-690.

⁸⁸³ See *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, **Exhibit RLA-0103**, para. 348; *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, **Exhibit CLA-0021**, para. 486; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, **Exhibit CLA-0025**, para. 769; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, **Exhibit RLA-0096**, para. 745; *Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, **Exhibit CLA-0122**, para. 314.

⁸⁸⁴ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 356.

state.”⁸⁸⁵ In a study of 167 published ICSID awards, 60 awarded prejudgment interest with 48 of those 60 awarding compound pre-award interest. In recent cases, from 2010 onwards, the trend has been to award compound pre-award interest unless the claimant requests simple interest.⁸⁸⁶ Finally, the Tribunal would like to note that in several investment cases against the Egyptian state, compound interest has been applied, even where Egypt has argued that under domestic Egyptian law, compound interest is not allowed. In *Siag and Vecchi v. Arab Republic of Egypt*,⁸⁸⁷ Respondent had argued that only simple interest should be applied at a rate of just 4% in line with domestic Egyptian law. The tribunal found that interest should be paid on all sums of damages at the six-month LIBOR rate compounded six-monthly stating:

The Tribunal has no hesitation in ruling that interest should run from the date of the expropriation, and that it should be compounded. The claimants submitted that since 2000, no less than 15 out of 16 BIT tribunals have awarded compound interest on damages in investment disputes. Whether or not that statistic is correct, the Tribunal is certain that in recent times compound interest has indeed been awarded more often than not, and is becoming widely accepted as an appropriate and necessary component of compensation for expropriation.⁸⁸⁸

535. Another case to this extent is *Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt*.⁸⁸⁹ The Tribunal emphasised:

. . . that the provision in Egyptian law on which Respondent relies is not applicable to claims based on the BIT, i.e., public international law Regarding such claims for expropriation, international jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation due after the award and that compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law in such expropriation cases.

536. In *Wena Hotels Ltd. v. Arab Republic of Egypt*,⁸⁹⁰ the arbitral tribunal stated that an award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations. Respondent relies on *SPP v. Egypt*⁸⁹¹ in support of its defences that (i) compound interest is not appropriate, and (ii) interest may not exceed principal when

⁸⁸⁵ Irmgard Marboe, Calculation of compensation and damages in international investment law (2nd ed., OUP 2017), para. 6.248.

⁸⁸⁶ James Dow, “Interest” in The Guide to Damages in International Arbitration (ed. John A Tenor, 2nd ed., Global Arbitration Review), pp. 278-79.

⁸⁸⁷ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, **Exhibit CLA-0145**, paras. 594-98.

⁸⁸⁸ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, **Exhibit CLA-0145**, para. 595.

⁸⁸⁹ *Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, **Exhibit CLA-0124**, para. 174.

⁸⁹⁰ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, **Exhibit CLA-0038**, paras. 128-30.

⁸⁹¹ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, **Exhibit RLA-0154**.

domestic law prohibits it. While the tribunal in *SPP v. Egypt* did not award compound interest because of Article 232 of the Civil Code, they did explain that based on decisions of the Egyptian *Cour de Cassation* and doctrinal opinion, “under Egyptian law consideration is given to changes occurring in the price of currency ‘in which the compensation is to be estimated’.”⁸⁹² The Tribunal discards the reference of Respondent to the *Duke Energy Electroquil Partners & Electroquil SA v. Ecuador*,⁸⁹³ since that case was not an expropriation dispute, but a dispute arising from alleged breaches of agreements entered into by the parties for electrical power generation.

537. In this regard, the Tribunal considers the annulment proceeding decision in *Wena Hotels v. Egypt*⁸⁹⁴ to be instructive when considering the weight of the Egyptian Civil Code:

In particular, the rules of international law that directly or indirectly relate to the State’s consent prevail over domestic rules that might be incompatible with them. In this context it cannot be concluded that the resort to the rules of international law under the Convention, or under particular treaties related to its operation, is antagonistic to that State’s national interest.

538. This doctrine applies in the view of the Tribunal not only to the issue of compound interest but also to alleged Egyptian law-based restrictions on interest to which Respondent refers, such as the issue whether the amount of interest must not exceed the principal. In that respect, the Tribunal would like to return to the findings in *Wena Hotels*, which were approved by the *El Paso v. Argentina* tribunal (at Paragraph 536):⁸⁹⁵

Particular emphasis is put on this view when the rules in question have been expressly accepted by the host State. Indeed, under the Egyptian Constitution treaties that have been ratified and published “have the force of law.” Most commentators interpret this provision as equating treaties with domestic legislation. On occasions, the courts have decided that treaty rules prevail not only over prior legislation but also over subsequent legislation. It has also been held that *lex specialis* such as treaty law prevails over *lex generalis* embodied in domestic law. A number of important domestic laws, including the Civil Code and Code of Civil Procedure of Egypt, provide in certain matters for a “without prejudice clause” in favor of the relevant treaty provisions. This amounts to a kind of *renvoi* to international law by the very law of the host State.

This treaty law and practice evidences that when a tribunal applies the law embodied in a treaty to which Egypt is a party it is not applying rules alien to the domestic legal system of

⁸⁹² *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, **Exhibit RLA-0154**, para. 242.

⁸⁹³ *Duke Energy Electroquil Partners & Electroquil SA v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, **Exhibit RLA-0155**, para. 457.

⁸⁹⁴ *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision, 5 February 2002, para. 41.

⁸⁹⁵ *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision, 5 February 2002, paras. 42, 44-45; *El Paso Energy International Company v. Argentine Republic* ICSID Case No. ARB/03/15, Award, 31 October 2011, **Exhibit RLA-0096**, para.133.

this country. This might also be true of other sources of international law, such as those listed in Article 38(1) of the Statute of the International Court of Justice mentioned above. Therefore, the reliance of the Tribunal on the IPPA as the primary source of law is not in derogation or contradiction to the Egyptian law and policy on this matter. In fact, Egyptian law and investment policies are fully supportive of the rights of investors in that country. The ICSID Convention and the related bilateral investment treaties are specifically mentioned in Egypt's foreign investment policy statements.

539. The Tribunal will now turn to the question of whether the interest is payable during the period after Claimant could leave Egypt until he filed the Statement of Claim and whether interest is payable for the period when these arbitral proceedings were suspended due to the proceedings in Finland concerning Claimant's nationality. Respondent objects to including either period.
540. The Tribunal takes the view that after his imprisonment and being sentenced to forced labour Claimant needed time to recover, to engage legal assistance, and to arrange funding for his legal assistance. Apart from that, it was necessary for him to collect the necessary documents for this arbitration, which were mostly left behind in Egypt. As to the period of suspension due to the Finnish nationality proceedings, it was Respondent that triggered the Finnish internal proceedings and was eventually proved to have been wrong in doing so. Therefore, Respondent cannot successfully argue that it was not involved in causing this period of delay in this arbitration.
541. Based on the above, the Tribunal concludes that the period between Claimant's release from prison and the Statement of Claim and the period of suspension of these proceedings due to the domestic Finnish nationality proceedings are to be included in calculating interest to be paid on the amount of compensation for the damages Claimant had suffered.
542. On the basis of the considerations above, the Tribunal concludes that Respondent shall pay to Claimant interest of LIBOR plus 2%, from the date of expropriation (19 February 2000), compounded on yearly intervals. The Tribunal additionally observes that its findings on the appropriate interest rate are also consistent with the commercial rates referenced by the contracting parties to the 2004 BIT in Article 6(b).

X. COSTS

543. Throughout these proceedings, both Parties have sought orders to cover all their costs.⁸⁹⁶

⁸⁹⁶ Including in submissions on interim measures in December 2012; Claimant's Rejoinder on Jurisdiction, para. 261(d); Claimant's Reply, para. 394(h); Respondent's Rejoinder, paras. 256-57; Claimant's and Respondent's Statements of Costs.

544. As noted in Procedural Orders No. 2, No. 4, and in the Jurisdiction Decision, the Tribunal has reserved all questions of costs for the entire arbitral proceedings (including jurisdiction, admissibility and the merits), for determination in this phase of the arbitration.

A. RELEVANT PROVISIONS

545. Article 7.2(d) of the 1980 BIT provides that “the costs of the arbitration shall be shared equally.” There is no such provision in the 2004 BIT, which incorporates by reference the UNCITRAL Rules. Neither Party submits that the Tribunal’s decision on costs in the present arbitration should be determined by Article 7.2(d) of the 1980 BIT. Instead, with respect to costs, both sides have preferred to invoke the provisions of the UNCITRAL Rules throughout the arbitration proceedings in order to claim all of their costs. This has been the case since the 2012 interim measures applications through to the two rounds of costs submissions in June and July 2019. Claimant has argued, by reference to Respondent’s prior costs submissions, that the Parties must be taken as agreeing that Article 7.2(d) of the 1980 BIT does not apply and that the UNCITRAL Rules should apply instead.⁸⁹⁷ Respondent has not rejected this position.

546. Article 38 of the UNCITRAL Rules provides:

The arbitral tribunal shall fix the costs of arbitration in its award. The term “costs” includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

547. Article 39 of the UNCITRAL Rules states in relevant part:

- (1) The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

⁸⁹⁷ See Claimant’s Statement of Costs, para. 5, citing Respondent’s costs claim for interim measures, 7 December 2012.

548. Article 40 of the UNCITRAL Rules states in relevant part that:

- (1) Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
- (2) With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

549. The UNCITRAL Rules thus first require the Tribunal to fix the costs in its Final Award, setting out the amounts for specific categories listed in Article 38. The rules then require the Tribunal to exercise its discretion in apportioning the costs of arbitration. Under Article 40(1) of the UNCITRAL Rules, there is a presumption that the unsuccessful party bears the costs of the arbitration, subject to any determination by the Tribunal as to what apportionment may be reasonable in the circumstances of the case. However, under Article 40(2) of the UNCITRAL Rules, with respect to the costs of legal representation and assistance, there is no such presumption and the Tribunal is free to determine which party shall reasonably bear those costs in the circumstances of the case.

550. As set out in Section II of this Final Award, in accordance with directions issued at the close of the Merits Hearing, and in the Tribunal's letter of 29 April 2019, Claimant filed his Statement of Costs on 9 June 2019. Respondent, having received an extension, filed its Statement on Costs on 25 June 2019. Both Parties submitted reply submissions on costs on 9 July 2019.

B. FIXING OF THE COSTS UNDER ARTICLE 38

551. In this section the Tribunal first fixes the costs of the arbitration under Article 38(a), (b), (c), (d), and (f) (the "**Arbitration Costs**"), and then fixes the reasonable costs of legal representation and assistance of the successful party under Article 38(e) (the "**Legal Costs**").

1. Arbitration Costs

552. The Parties have deposited a total of EUR 1,160,000 with the PCA to cover arbitration costs; i.e., EUR 580,000 each. As recounted in Part II of this Final Award, Respondent failed to make deposit payments in a timely manner, with the result that the Tribunal issued various reminders, and ultimately called on Claimant to make substitute payments under Article 41(4) of the UNCITRAL Rules. On 20 April 2019, in accordance with the Tribunal's directions,

Respondent reimbursed Claimant the amount of EUR 275,000 reflecting the amount of those substitute payments.

553. In accordance with Article 39 of the UNCITRAL Rules, “the fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.”
554. In June 2012, the Parties and Tribunal agreed, in signed Terms of Appointment, on the arrangements for the Tribunal’s fees and expenses, including those of the PCA as Registry.
555. The Tribunal fixes the fees and expenses of the Tribunal, in accordance with Articles 38(a) and (b), and Article 39 of the UNCITRAL Rules, and Paragraph 8 of the Terms of Appointment, as follows:
- Professor Rüdiger Wolfrum: EUR 235,544.52 in fees and EUR 7,917.41 in expenses;
 - Professor W. Michael Reisman: EUR 207,875.00 in fees and EUR 37,654.47 in expenses;
 - Professor Francisco Orrego Vicuña (until 30 September 2018): EUR 117,500.00 in fees and EUR 12,157.48 in expenses; and
 - Mr Laurent Lévy (from 30 October 2018): EUR 202,500.00 in fees and EUR 10,578.94 in expenses.
556. In accordance with Article 38(c) of the UNCITRAL Rules, and Paragraph 9 of the Terms of Appointment, the PCA’s fees and expenses for registry services in assistance of the Tribunal amount to EUR 212,923.41 and EUR 1,579.05 respectively.
557. Other arbitration costs incurred pursuant to Article 38 of the UNCITRAL Rules and approved by the Tribunal in the course of these proceedings, including for hearing and meeting facilities, catering, court reporters, IT support, courier costs, bank costs, communications, supplies, and court filing fees, amount to EUR 113,769.72.
558. The Tribunal considers these amounts reasonable within the meaning of Article 39(1) of the UNCITRAL Rules, bearing in mind the hourly rate agreed by the Parties at the outset of the case (EUR 500), the amount relative to the Parties’ claimed costs, as detailed in section (2) below; the complexity and length of proceedings, which included provisional measures

requests, bifurcation of the jurisdiction/admissibility phase, separate hearings for aspects of the merits to accommodate reconstitution of the tribunal, issuance of 16 reasoned procedural orders and two awards. Moreover, neither Party has submitted that the arbitration costs incurred in this case are unreasonable.

559. Accordingly, the total Arbitration Costs per Article 38 of the UNCITRAL Rules (not including legal costs under Article 38(e) of the UNCITRAL Rules) are fixed in the amount of **EUR 1,160,000**.

560. Apportionment of this amount of EUR 1,160,000 in accordance with Article 40(1) of the UNCITRAL Rules, is addressed in Section X.B.3 below.

561. The Tribunal next turns to fixing the reasonable costs of legal representation and assistance of the successful party under Article 38(e) of the UNCITRAL Rules.

2. Reasonable Costs of Legal Representation and Assistance

562. Article 38(e) of the UNCITRAL Rules requires the Tribunal to fix the “costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable.” The Tribunal sets out below the amounts of costs for legal representation and assistance that are claimed by each of the Parties.

Claimant’s Position

563. Claimant seeks an order that Respondent pay all the costs of the arbitration, including all the fees and expenses of the PCA and the Tribunal, all Claimant’s reasonable costs of legal representation and assistance (including funding costs), all the costs of his experts and witnesses and all related expenses incurred by him.⁸⁹⁸ Claimant also requests interest on costs at the rate of LIBOR plus 4%.⁸⁹⁹

564. Claimant’s enumerated costs claims total EUR 787,316.50, GBP 6,884,800.53 and USD 1,000,000. These figures include the contributions made by Claimant to the Tribunal deposit (EUR 580,000) (which are covered by the Tribunal’s finding at Paragraph 559 above and will not be double-counted as legal costs). The figures do not include the substantial funding costs additionally sought by Claimant, or the post-award interest on costs, neither of

⁸⁹⁸ Claimant’s Statement of Costs, para. 11.

⁸⁹⁹ Claimant’s Statement of Costs, para. 11.

which can be precisely enumerated until after the amounts of damages and costs are established by the Tribunal.⁹⁰⁰

565. Claimant's costs claim is comprised of the following items, set out in the table below which the Tribunal has derived from Parts IV and V of Claimant's Statement of Costs:

| CLAIMANT'S COSTS | |
|---|---|
| IV. Costs incurred during Phase I (before involvement of current counsel/funder) | |
| Fees and expenses of Claimant's counsel in Phase I (Balsara & Co/Saunders Law, Prof. Andrew Newcombe, Samuel Wordsworth QC); legal advisors assisting with Egyptian and Finnish law; expert on Egyptian law (Prof. Aboulmagd); experts on Finnish law (Paavola, Bakström; Prof. Aulis Aarnio, Prof. Tuomas Ojanen); quantum expert (Will Inglis); expenses of witnesses, other costs, including EUR 100,000 share of tribunal deposit). | GBP 1,342,601.38 |
| Saunders Receivable (payable only upon a successful outcome to arbitration) | GBP 538,041.60 |
| Saunders Success Fee (payable only upon a successful outcome to arbitration) | GBP 538,041.60 |
| V. Costs incurred during Phase II (after involvement of current counsel/funder) | |
| A. Costs for Claimant's legal representation and assistance | |
| Fees of Claimant's legal representation payable immediately | GBP 2,862,493.78 |
| Fietta Deferred Fees (payable only upon successful outcome of arbitration) | GBP 955,497.73 |
| Fietta Success Fee (payable only upon successful outcome of arbitration) | USD 1,000,000 |
| Other expenses (including travel, accommodation, translation, photocopies) | GBP 126,468.34 |
| Assistance of Finnish lawyers (including fees paid to litigate the Finnish proceedings but excluding costs recovered in those proceedings) | EUR 162,156.10 |
| Assistance by Egyptian lawyers (including in retrieving documents in Egypt) | GBP 11,124.88 EUR 71,879 |
| Subtotals | EUR 234,035.10 GBP 3,955,584.74 USD 1,000,000.00 |
| B. Fees and expenses of Claimant's Experts | |
| Finnish law expert Prof. Aulis Aarnio | GBP 11,089.89 EUR 52,235.40 |
| Finnish law expert Prof. Tuomas Ojanen | GBP 18,483.10 |
| Egyptian law expert Mohamed Talaat | GBP 22,311.22 |
| Industry expert Dr Kadri Dagdelen | GBP 45,290.34 |
| Industry expert Prof. Erik Spiller | GBP 28,154.79 |
| Industry expert Dr Joseph Poveromo | GBP 29,881.35 |
| Quantum experts FTI Consulting LLP | GBP 282,414.11 |
| Subtotals | EUR 52,235.40 |

⁹⁰⁰ Claimant's Statement of Costs, para. V.F.

| | |
|--|---|
| | GBP 437,624.80 |
| C. Travel and Other Expenses of Claimant's Witnesses | |
| Travel and expenses of witnesses (including Claimant) | GBP 32,906.41 |
| Subtotal | GBP 32,906.41 |
| D. Other costs | |
| Claimant's share of the deposit (in Phase II) | EUR 480,000.00 |
| Claimant's other directly incurred costs (travel, translations, legislation, notarisation) | EUR 21,046.00 |
| Subtotal | EUR 501,046.00 |
| E. Funding costs | |
| Buttonwood Interest | <i>Interest on Buttonwood Principal (GBP 1,342,601.38)⁹⁰¹ calculated on amount of Buttonwood Principal outstanding at rate of 16% p.a. from date of advance until repayment.</i> |
| Buttonwood Success Fees | <i>GBP 1,539,557 + 9% of proceeds of the arbitration, less Buttonwood Interest.</i> |
| Vannin Funding Premium | |
| <u>Scenario 1</u> : if paid by 31 December 2020 | <i>USD 22,500,000 + 1.75 x total distributed fund⁹⁰² (if Recovered Costs and/or Damages > USD 100M)</i> |
| <u>Scenario 2</u> : if paid by 31 December 2021 | <i>USD 25,000,000 + 2 x total distributed fund (if Recovered Costs and/or Damages > USD 100M)</i> |
| <u>Scenario 3</u> : if paid after 1 January 2022 | <i>USD 30,000,000 + 2.25 x total distributed fund (if Recovered Costs and/or Damages > USD 100M)</i> |
| F. Total (excluding claimed funding costs and interest) | |
| | EUR 787,316.50 |
| | GBP 6,844,800.53 |
| | USD 1,000,000 |

566. Claimant regards his legal and expert costs as “reasonable in light of the exceptional length of these proceedings and the scope and complexity of the factual, legal, technical and valuation issues at stake, most or all of which have been raised and contested by the Respondent.”⁹⁰³ He maintains the numbers are “entirely within the normal range for investment treaty arbitrations, let alone ones which have extended for nearly a decade.”⁹⁰⁴

567. Claimant submits that the costs he is entitled to recover should include (i) the fees owed to his

⁹⁰¹ Claimant's Statement of Costs, fn. 60 (explaining that the Buttonwood Principal is equivalent to the costs incurred in Phase I).

⁹⁰² Claimant's Statement of Costs, fn. 63 (“Distributed fund” includes all the costs described in V.A to V.D, excluding the Fietta Deferred Fees and Fietta Success Fee, plus any other costs which may arise after submissions of costs statement).

⁹⁰³ Claimant's Statement of Costs, para. 12.

⁹⁰⁴ Claimant's Reply on Costs, para. 9.b.

former counsel (Saunders) and current counsel (Fietta) that have already been incurred but which will become payable only on a successful recovery and (ii) success fees to Saunders and Fietta, likewise payable only if Claimant prevails.⁹⁰⁵ Claimant points to *Khan v. Mongolia* and *Siag v. Egypt* as examples where other investor-state tribunals have deemed such fees recoverable.⁹⁰⁶

568. Claimant also contends that his funding costs should be included in the recoverable costs.⁹⁰⁷ He points out that without funding, he would have been unable to bring the claim because Respondent's unlawful conduct left him impecunious.
569. Initially, Claimant had a funding arrangement with Buttonwood Legal Capital Limited, Hong Kong ("**Buttonwood**"), pursuant to which he is obliged to re-pay the sum lent (GBP 1,342,601.38) plus 16% p.a. interest, as well as a success fee of GBP 1,539,557 + 9% of proceeds of the arbitration, less the Buttonwood Interest. In 2017, after Buttonwood went bankrupt, and the arbitration proceedings were delayed due to the Finnish proceedings, Claimant later refinanced the claim with Vannin. The arrangement with Vannin is "non-recourse" (i.e. the Claimant has no obligation to repay the funds advanced to him to pursue the arbitration in the event he ultimately recovers no damages). The arrangement includes an obligation on Claimant to pay a premium to Vannin, the size of which depends on the timing and amount of any final damages and costs award, but will in any event exceed USD 22.5 million.⁹⁰⁸
570. Claimant refers the Tribunal to *Essar Oilfields v. Norscot*, a decision of English High Court which upheld an award of an arbitrator finding a claimant entitled to the costs of its litigation funding.⁹⁰⁹ According to Claimant, the overarching consideration for the arbitrator in the case was "what justice requires". Claimant adopts the following eight criteria outlined by the arbitrator in the case underlying *Essar v. Norscot* and submits they all apply in his favour in the present case:⁹¹⁰

(1) the conduct of the parties; (2) the relative financial situation of the parties; (3) the losing party has knowledge of the successful party's financial predicament; (4) the magnitude of

⁹⁰⁵ Claimant's Statement of Costs, paras. 13-14.

⁹⁰⁶ Claimant's Statement of Costs, para. 14.

⁹⁰⁷ Claimant's Statement of Costs, paras. 16-43; *see also* Claimant's Reply, paras. 390-93.

⁹⁰⁸ Claimant's Statement of Costs, paras. 20, 22, V.F.

⁹⁰⁹ *Essar Oilfields v. Norscot*, [2016] EWHC 2361 (Comm), 15 September 2016, **Exhibit CLA-0128**. Reply, paras. 390-393, Claimant's Statement of Costs, paras. 24-43.

⁹¹⁰ Claimant's Reply, para. 391 *citing* *Essar Oilfields v. Norscot*, [2016] EWHC 2361 (Comm), 15 September 2016, **Exhibit CLA-0128**, para. 32; *see also* Claimant's Statement of Costs, paras. 31-42.

the costs incurred by the successful party; (5) the successful party has no credible alternative source of financing; (6) the losing party is aware at least that such recourse has been contracted; (7) the successful party establishes that the funding was properly utilised; and (8) the successful party has contracted the funding on standard market rates and terms for such facility.

571. Claimant also notes the 2017 SIAC Investment Arbitration Rules recognize that arbitral tribunals may take into account third-party funding arrangements in rendering costs orders.⁹¹¹
572. Claimant's Statement of Costs describes the "waterfall", i.e., the order in which various recipients will be paid out of any damages and costs awards he receives in this Final Award, starting with Vannin and ending with Mr Bahgat himself.⁹¹²
573. Claimant's Costs Reply does not take issue with the amounts claimed by Respondent for the costs of its legal representation or assistance. Rather, Claimant focuses on arguments made by Respondent with respect to apportionment of the costs (as to which, see Section 3 below).

Respondent's Position

574. In its Statement of Costs, Respondent claims its total costs and expenses in relation to the arbitration in the sum of EUR 1,742,803.42 and EGP 168,400.54.
575. It provides the following breakdown:⁹¹³

| RESPONDENT'S TABLE OF COSTS | |
|---|--|
| (in Euros) | |
| PCA / Tribunal's Fees | |
| Deposits | 580,000.00 |
| Legal Fees | |
| Bredin Prat | 700,000.00 |
| Others | 6,000.00 |
| Experts | |
| Dr Badran | 7,550.59 |
| Prof. Scheinin | 29,700.00 |
| SRK Consulting | 128,422.80 |
| Dr Cappel | 18,419.41 |
| BDO | 156,800.00 |
| Expenses | |
| Travel, translations, courier, etc. | 115,910.62 |
| Travel, translations, courier, etc. (EGP) | 168,400.54 EGP |
| TOTAL | 1,742,803.42 EUR 168,400.54 EGP |

⁹¹¹ Claimant's Statement of Costs, para. 43, citing arts. 33 and 35 of SIAC Investment Arbitration Rules, 2017.

⁹¹² Claimant's Statement of Costs, para. 23.

⁹¹³ Respondent's Statement of Costs, para. 2.

576. Respondent also provides a chronological breakdown by phase as follows:⁹¹⁴

| RESPONDENT'S TABLE OF COSTS BY PHASE | |
|--|--|
| (in Euros) | |
| INTERIM MEASURES (EUR 25,000) | |
| Legal Fees | |
| Bredin Prat | 25,000.00 |
| BIFURCATION & JURISDICTION (EUR 326,858.61 & 10,712.88 EGP) | |
| Legal Fees | |
| Bredin Prat | 274,618.75 |
| Others | 4,000.00 |
| Experts | |
| Dr Badran | 7,550.59 |
| Prof. Scheinin | 29,700.00 |
| Expenses | |
| Travel, translations, courier, etc. | 10,989.27 |
| Travel, translations, courier, etc. (EGP) | 10,712.88 |
| MERITS (1,390,944.81 EUR & 157,687.66 EGP) | |
| PCA/Tribunal's Fees | |
| Deposits | 580,000.00 |
| Legal Fees | |
| Bredin Prat | 400,381.25 |
| Others | 2,000.00 |
| Experts | |
| SRK Consulting | 128,422.80 |
| Dr Cappel | 18,419.41 |
| BDO | 156,800.00 |
| Expenses | |
| Travel, translations, courier, etc. | 104,921.35 |
| Travel, translations, courier, etc. (EGP) | 157,687.66 EGP |
| TOTAL | 1,390,944.81 EUR 157,687.66 EGP |

577. Respondent states that the above tables show it has kept its costs to a “very reasonable level”.⁹¹⁵

578. By contrast, Respondent describes Claimant’s costs claim, amounting to approximately EUR 10 million and up to EUR 80 million in funding costs, as “utterly irresponsible” and “simply outrageous”.⁹¹⁶ Respondent does not consider Claimant’s claim for Legal Costs to be reasonable within the meaning of Article 38(3) of the UNCITRAL Rules, noting the Tribunal may be guided by comparing the amounts of costs claimed by each side, and in assessing whether the claim is proportionate to the amount in dispute.⁹¹⁷

579. Respondent observes that Claimant’s potential funding costs are double those of his alleged

⁹¹⁴ Respondent’s Statement of Costs, para. 3.

⁹¹⁵ Respondent’s Statement of Costs, para. 6.

⁹¹⁶ Respondent’s Costs Reply, para. 2.

⁹¹⁷ Respondent’s Costs Reply, para. 5.

sunk costs claimed in the arbitration. It submits that “investment arbitration should not be the means by which third parties foreign to the investment should reap huge sums and line their pockets simply because they were prepared to bear the actual costs of prosecuting the investor’s claims and because the investor chose to accept totally unacceptable and disproportionate funding costs.”⁹¹⁸

580. Even excluding the funding costs, Respondent observes that Claimant’s costs claim far exceeds average costs of claimants in UNCITRAL arbitrations and is excessive in circumstances where the case was not particularly complex.⁹¹⁹ It submits the legal costs claimed should be dismissed as unreasonable under Article 38.

581. Respondent contends that the following categories of claimed costs do not constitute recoverable arbitration costs:

- *Success fees of counsel.* Respondent submits these cannot be recovered as they are a reward granted in consideration of success and not arbitration costs; moreover they are not reasonable as they already coming on top of high fixed attorney’s fees.⁹²⁰
- *Funding costs.* Respondent does not take issue with Claimant’s request to reimburse him for arbitration costs already covered by the funder (such as legal and expert fees), but rather the funding costs set out in Section V.E of Claimant’s Statement of Costs.⁹²¹ Respondent points out that it is unclear how amounts could be owed to Buttonwood, a bankrupt entity, or if a premium is owed to Vannin if there is a damages award for less than USD 100 million.⁹²² Respondent does not accept that funding costs, in the form of success fees, constitute costs of “legal representation or assistance” within the meaning of Article 38 of the UNCITRAL Rules. Further, the amounts of funding costs (up to USD 80 million, assuming no payment before 2022), are far from reasonable, including the abusive interest rate of 16% in the Buttonwood arrangement, and should be dismissed.⁹²³ Respondent considers that the case of *Essar v. Norscot* is irrelevant because it focuses on the meaning of “other costs” in the rules (ICC) and law (English) applicable in that case, which is not a category of costs covered by Article 38 of the UNCITRAL Rules. Nevertheless, it addresses the factors set out in that case and

⁹¹⁸ Respondent’s Costs Reply, para. 12.

⁹¹⁹ Respondent’s Costs Reply, para. 13.

⁹²⁰ Respondent’s Costs Reply, para. 23.

⁹²¹ Respondent’s Costs Reply, para. 25.

⁹²² Respondent’s Costs Reply, para. 26.

⁹²³ Respondent’s Costs Reply, para. 31.

distinguishes them from the present case, noting that the delays were not unreasonable, that its conduct has been cooperative throughout proceedings, and that it should not be penalised for Claimant's choice not to invest his own monies but to agree to aggressive and irresponsible funding terms.⁹²⁴

- *Costs of Finnish proceedings.* Respondent was not involved in the Finnish court proceedings. The EUR 162,156.10 claimed in respect of those proceedings is outside the scope of the costs that can be awarded by this Tribunal.⁹²⁵

582. Respondent accordingly requests that the Tribunal dismisses Claimant's costs claim as unreasonable within the meaning of Article 38 of the UNCITRAL Rules.

Tribunal's Analysis

583. In fixing the costs pursuant to Article 38 of the UNCITRAL Rules, the Tribunal is guided by the elements set out in the text of that provision.

584. First, the provision requires the Tribunal to identify the "successful party". Having prevailed on jurisdiction, and most of his claims on liability, and having been awarded a sum of damages, *albeit* significantly lower than the amount claimed, Mr Bahgat is to be considered the "successful party". The degree of his success, and the extent to which it should be taken into account in the apportionment of costs under Article 40 of the UNCITRAL Rules, is dealt with in the subsequent section. For purposes of fixing the costs under Article 38(e), the Tribunal treats Claimant as the successful party. It is therefore unnecessary to fix the costs of Respondent's legal representation and assistance. The Tribunal observes however, that the amounts claimed by Respondent, as set out in the table at Paragraph 575 above, are reasonable in the circumstances of the case. Furthermore, Claimant has made no argument that Respondent's costs are unreasonable in amount.

585. Respondent has objected to the Tribunal adding the costs for the Finnish proceedings as costs of arbitration. The Tribunal cannot accept the statement of Respondent that Respondent was not involved in the Finnish proceedings. It is on the record that such proceedings were triggered by Respondent.⁹²⁶

586. Second, Article 38(e) of the UNCITRAL Rules requires the Tribunal to identify the "costs for

⁹²⁴ Respondent's Costs Reply, para. 32.

⁹²⁵ Respondent's Costs Reply, para. 34.

⁹²⁶ Jurisdiction Decision, para. 115.

legal representation and assistance if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable.” This clause in Article 38(e) of the UNCITRAL Rules is, in the view of the Tribunal, particularly relevant in this case.

587. The Tribunal notes that the costs claimed by Claimant under Article 38(e) of the UNCITRAL Rules exceed the equivalent costs of Respondent. This is mainly due to two factors, the success fees claimed by Saunders and by Fietta, respectively, and the funding costs claimed by Buttonwood and Vannin, respectively. The Tribunal will deal with each of these two factors in turn.
588. Respondent argues that success fees are not costs for legal representation and assistance under Article 38(e) of the UNCITRAL Rules. The Tribunal, however, takes a different position. The wording ‘costs for legal representation and assistance’ is open for interpretation; it all depends whether such fees are being promised in connection with legal representation or assistance, which is beyond dispute in the case at hand. Success fees have become common in international litigation and not considering them as costs for legal representation and assistance would deprive a party from finding adequate legal assistance.⁹²⁷ The Tribunal accepts that Claimant had to incur success fees to get legal assistance. Further, the Tribunal takes note of the arbitral jurisprudence indicating that “it is not unusual for claimants to spend more on costs than respondents given, among other things, the burden of proof.”⁹²⁸ Additionally, the Tribunal notes that Respondent has not further substantiated its view that such costs are unreasonable.
589. Based on the above, the Tribunal decides that the success fees due to Claimant’s legal representatives are reasonable legal costs according to Article 38(e) of the UNCITRAL Rules.
590. The Tribunal now will turn to the third party funding, namely the costs incurred by Claimant vis-à-vis Buttonwood and Vannin. Respondent objects to the inclusion of such costs into the costs apportionment system under Articles 38 and 40 of the UNCITRAL Rules. Respondent’s objection raises several questions, namely, whether third party funding costs are legal costs, whether they were introduced appropriately into the proceedings and whether they are

⁹²⁷ *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, **Exhibit CLA-0145**, para. 604; *Khan Resources Inc., et al. v. The Government of Mongolia*, UNCITRAL, Award on the Merits, 2 March 2015, **Exhibit CLA-154**, paras. 445-48.

⁹²⁸ *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, **Exhibit CLA-0145**, para. 624.

reasonable.

591. Considering the particularities of this case, the Tribunal does not find it necessary to deal with the abstract question of whether third party funding costs are costs for legal representation and assistance. The Tribunal, in the exercise of its discretion under the UNCITRAL Rules, decides that Claimant's third party funding costs shall be borne by Claimant.
592. In the circumstances, and in light of the factors outlined above, the Tribunal considers it reasonable to fix, for purposes of Article 38(e) of the UNCITRAL Rules, the Claimant's reasonable costs for legal representation and assistance at **EUR 207,316.50, GBP 6,844,800.53, and USD 1,000,000.**

3. Apportionment of Costs under Article 40

Claimant's Position

593. Claimant claims all costs incurred by him in this arbitration proceeding.⁹²⁹
594. Claimant observes that should he prevail on the merits of the case, following his defeat of Respondent's multiple jurisdictional objections in the first phase, he will have prevailed on all material aspects of the present dispute. Thus, to the extent success is an overriding factor in determining the apportionment of costs under both Article 40(1) and 40(2) of the UNCITRAL Rules, Claimant should be entitled to arbitration costs and the costs of his legal representation.⁹³⁰ In any event, success is not the only relevant criterion. Claimant argues that the "egregiousness" of Respondent's treaty violations depriving him of his investment, keeping him in prison and freezing his and his family's assets should also be taken into account. Similarly, the quality of his claims, the complexity of issues, the reasonableness of the parties' expenses and the conduct (or misconduct) of the parties should all militate in favour of awarding Claimant costs.⁹³¹
595. In particular, Claimant recalls (a) Respondent triggered the Finnish domestic proceedings leading to suspension of the proceedings over 3 years, (b) Egypt's breach of the confidentiality obligations under the UNCITRAL Rules, (c) Egypt's late jurisdictional objections in its Reply Memorial, (d) Respondent's repeated last minute extension requests, (e) Respondent's refusal until very recently to pay its share of the deposit without reasonable

⁹²⁹ Claimant's Statement of Claim, para. 5.20.

⁹³⁰ Claimant's Statement of Costs, paras. 7-8.

⁹³¹ Claimant's Statement of Costs, para 9.

explanation.⁹³²

596. Claimant rejects the allegations of Respondent in its Statement of Costs that Claimant had engaged in bad faith. It describes this as “merely the latest in a string of unsubstantiated *ad hominem* attacks upon Claimant that have characterised Egypt’s conduct throughout the arbitration” and show “desperation of its position”.⁹³³ Claimant recalls the explanations he provided throughout the proceedings as to the origin of the payment to Mannesmann, and also the reasons why he raised his second criminal conviction at a late stage of proceedings.⁹³⁴
597. In response to Respondent’s arguments about the Interim Measures and Jurisdiction phases, Claimant recalls that he acted reasonably and prevailed in both stages and it is Respondent that should bear the costs of those phases of the arbitration.⁹³⁵
598. Claimant rejects the characterisation of its claim on the merits and quantum as “aggressive”. He describes his case as an orthodox and reasonable case relying on witness and expert statements, extensive pleadings and contemporaneous evidence and legal authority. Claimant defends his legal and expert costs as entirely within the normal range for a case of such length. Finally, he asserts that the financial situation of Egypt is irrelevant to a cost order and cannot be plausibly used “to deny the proper administration of justice (which requires that Claimant be reimbursed his costs in bringing a legitimate claim).”⁹³⁶
599. For these reasons, Claimant argues Respondent’s request that the “Claimant should bear all of the costs of this arbitration” should be dismissed, and he maintains his request that the Tribunal render an award ordering Respondent to pay all the costs of the arbitration, including fees and expenses of the PCA and Tribunal, all Claimant’s reasonable costs of legal representation and assistance (including funding costs) all the costs of his experts and witnesses and all related expenses incurred by him, as well as interest on those costs.⁹³⁷

Respondent’s Position

600. Respondent’s primary position is that if it is successful in convincing the Tribunal that all of Claimant’s claims should be dismissed without merit in this case, then Claimant should bear all of the costs of this arbitration as these proceedings should never have been commenced

⁹³² Claimant’s Statement of Costs, para. 10

⁹³³ Claimant’s Costs Reply, para. 3.

⁹³⁴ Claimant’s Costs Reply, para. 3.

⁹³⁵ Claimant’s Costs Reply, paras. 5-7.

⁹³⁶ Claimant’s Costs Reply, paras. 8-9.

⁹³⁷ Claimant’s Costs Reply, para. 10.

and Egypt should not have had to bear any costs to defend itself.⁹³⁸ In so deciding, Respondent submits that the Tribunal should take into account the alleged bad faith of Claimant in his attempts to hide from the Tribunal (i) the real origin of the payment at the heart of the first criminal proceedings and (ii) the second criminal conviction.⁹³⁹

601. Respondent notes that its costs claim includes costs relating not just to the Merits but also to Interim Measures and Jurisdiction. In this regard, it points out that the Interim Measure phase was a “ruse” because it was initiated by Claimant on the basis that he had no access to documents which it turns out in the Merits phase he did have.⁹⁴⁰ Respondent also maintains that the Jurisdiction phase was triggered by reasonable jurisdictional objections, as evident by the fact Claimant did not object to bifurcation, and by the mixed results in the Finnish courts.⁹⁴¹
602. In any event, even if the Tribunal were to find Egypt in breach of the BIT on the merits, Respondent maintains that in addition to taking into account the above procedural points, the Tribunal should apportion the costs of arbitration taking into account the level of success of Claimant’s case. Respondent describes Claimant’s legal and quantum case as “extremely aggressive” and without the “substantiation one is to expect in investment arbitration.”⁹⁴² Thus, if the Tribunal dismisses part or most of Claimant’s legal and/or damages claims, then costs should be divided in a way that does not “unjustifiably penalize Respondent.”⁹⁴³
603. Additionally, Respondent submits the Tribunal should bear in mind the overall amount of costs claimed by each Party, noting Respondent itself kept its costs to a “very reasonable level” especially in light of the “financial situation the Arab Republic of Egypt has been facing.”⁹⁴⁴
604. Respondent stresses the “reasonableness” requirement in both Article 40(1) and (2) when it comes to apportionment, and interprets the provisions as excluding the costs-follow-the-event rule for legal costs, and expressly allowing the Tribunal to derogate from it for other arbitration costs. Respondent observes that in assessing the most appropriate apportionment of costs, tribunals devise a bespoke result, taking into account the relative success of each

⁹³⁸ Respondent’s Statement of Costs, para. 4.

⁹³⁹ Respondent’s Statement of Costs, para. 4.

⁹⁴⁰ Respondent’s Statement of Costs, para. 5.

⁹⁴¹ Respondent’s Statement of Costs, para. 5.

⁹⁴² Respondent’s Statement of Costs, para. 6.

⁹⁴³ Respondent’s Statement of Costs, para. 6.

⁹⁴⁴ Respondent’s Statement of Costs, para. 6.

party on particular arguments and quantum of claims, as well as the parties' conduct in the context of the arbitration proceedings (and not before – otherwise the costs award would risk becoming a form of punitive damages).⁹⁴⁵

605. Respondent points to the following circumstances which must be taken into account by the Tribunal in apportioning costs under Article 40 of the UNCITRAL Rules:⁹⁴⁶

- *Respondent's conduct was cooperative.* Respondent recalls its role in locating documents which Claimant failed to do in substantiating its claim, in informing the Tribunal of the quantity and quality of the mineral resources with additional experts, and in swiftly appointing a replacement arbitrator who managed to be ready for the scheduled hearing in December 2018, and in demonstrating flexibility in other ways to ensure the hearing schedule could be preserved.
- *Duration of proceedings.* Properly analysed, Respondent notes that the length of proceedings is not that extended in light of the suspension for 3 years for the Finnish proceedings, and the bifurcation of proceedings into two phases.
- *Misrepresentations by Claimant.* According to Respondent, Claimant has made false allegations that he had no access to documents and concealed a second criminal conviction and the origins of the USD 30 million payment to MD.

606. Finally, Respondent stresses that the Tribunal must take into account the relative success of the Parties in light of Claimant's claim of more than USD 329 million with interest plus USD 5 million as moral damages. If the Tribunal finds no expropriation or that damages were far below that claimed, then Claimant should not be considered as a winning party. Claimant's arrangement with Vannin to pay a success fee only if over USD 100 million is telling of the true meaning of 'success' in this case.⁹⁴⁷

607. As discussed above in respect of Article 38, Respondent considers that certain elements of Claimant's costs claim in particular are so unreasonable that they should not be reimbursed irrespective of the outcome of the case on the merits. These include (a) success fees for counsel; (b) funding costs on terms so unreasonable, extreme, and usurious that Respondent could not possibly have appreciated simply by having been notified of the existence of third-

⁹⁴⁵ Respondent's Costs Reply, paras. 7-9.

⁹⁴⁶ Respondent's Costs Reply, paras. 16-21.

⁹⁴⁷ Respondent's Costs Reply, para. 21.

party funders; and (c) costs of the Finnish proceedings to which Respondent was not party.⁹⁴⁸

608. Accordingly, Respondent requests that the Tribunal dismiss Claimant's claim for costs notwithstanding the outcome of the proceedings.

Tribunal's Analysis

609. The Tribunal shall proceed on the basis of Articles 40(1) and 40(2) of the UNCITRAL Rules. These provisions read:

- (1) Except as provided for in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
- (2) With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

610. The Tribunal would like to emphasise that for apportionment of Arbitration Costs *per* Article 40(1), the UNCITRAL Rules express a presumption in favour of costs follow the event / loser pays, but that the Tribunal ultimately has discretion to apportion Arbitration Costs as it sees fit.

611. As to the presumption that costs follow the event, the Tribunal reiterates that Claimant prevailed in Phase I of the proceedings and, as far as Phase II is concerned, on liability, however, significantly less so in quantum. However, this does not alone control the Tribunal's final decision on costs-apportionment. Claimant was successful in claiming that Respondent breached its international obligations. Considering the circumstances of the case, the Tribunal reiterates that Respondent did not pay its deposits for a significant period. It had to be reminded frequently and Claimant had to pay the shares of Respondent to allow the proceedings to continue.

612. The Tribunal notes that Claimant was less successful as far as quantum was concerned and this fact has to be reflected in the Tribunal's decision on cost apportionment.

613. Based on the considerations above, the Tribunal decides that Claimant shall be responsible for 10% of the Arbitration Costs, i.e. EUR 116,000. Thus, Respondent shall be ordered to pay to Claimant EUR 464,000, which is the total advance deposit paid by Claimant (EUR 580,000)

⁹⁴⁸ Respondent's Costs Reply, paras. 22-34.

less the arbitration costs for which Claimant is responsible (EUR 116,000).

614. As for apportionment of Legal Costs under Article 40(2) of the UNCITRAL Rules, the Tribunal is “free to determine” the apportionment of Legal Costs, and considers it appropriate in the circumstances of the present case, as described above, to apply the same apportionment to the reasonable Legal Costs of Claimant as it does to the Arbitration Costs. Accordingly, Respondent shall be ordered to pay to Claimant 90% of the amounts in Paragraph 592 above, i.e., shall pay Claimant the amounts of EUR 186,584.85, GBP 6,160,320.48, and USD 900,000.

C. INTEREST ON COSTS

Claimant’s Position

615. The Tribunal recalls that Claimant seeks interest on costs in the amount of LIBOR + 4%.

Respondent’s Position

616. Respondent has not contested Claimant’s position set out above in Paragraph 615.

Tribunal’s Analysis

617. The Tribunal, in considering the circumstances of the case, decides that the interest to be paid on the payment of the Arbitration Costs and Legal Costs is USD LIBOR + 4% compounded annually. The Tribunal notes that USD LIBOR + 4% is the interest on costs requested by Claimant and that this figure has not been contested by Respondent in the context of the costs claim.

XI. DECISION

618. Based on the foregoing considerations, the Tribunal:

- A. Dismisses Respondent's request for a declaration that Claimant's claims are not covered by the 1980 BIT and the 2004 BIT and confirms its jurisdiction;
- B. Declares that Respondent has breached Articles 2(1) and 3(1) of the 1980 BIT;
- C. Dismisses Claimant's request for a declaration that Respondent has breached Article 2(2) of the 1980 BIT;
- D. Declares that Respondent has breached Article 2(2) of the 2004 BIT;
- E. Dismisses Claimant's request for a declaration that Respondent has breached Articles 3, 5, and 12 of the 2004 BIT;
- F. Dismisses Claimant's request for a declaration that Respondent has breached Articles 8, 9, and 12 of the Egyptian Investment Law;
- G. Orders Respondent to pay Claimant damages in the sum of USD 43.77 million as compensation for the losses caused by Respondent's breaches of the 1980 BIT and 2004 BIT;
- H. Dismisses Claimant's request for moral damages;
- I. Orders Respondent to pay interest on the amount of USD 43.77 million at the rate of USD 12 month LIBOR + 2% compounded annually from the date of expropriation (19 February 2000) until the date upon which payment is made;
- J. Orders Respondent to pay Claimant the amount of EUR 650,584.85, GBP 6,160,320.48 and USD 900,000 representing 90% of the reasonable costs fixed by the Tribunal;
- K. Orders Respondent to pay interest on the amounts in Paragraph J above at the rate of USD 12 month LIBOR + 4% compounded annually from the date of this Award until the date upon which payment is made; and
- L. Save as aforesaid, dismisses all other claims made by the Parties.

Place of Arbitration: The Hague

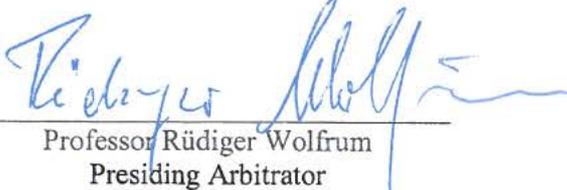
Signed, this 23 day of December 2019,



Professor W. Michael Reisman



Mr Laurent Lévy



Professor Rüdiger Wolfrum
Presiding Arbitrator