

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**AYAT NIZAR RAJA SUMRAIN, ESHRAKA NIZAR RAJA SUMRAIN, ALAA NIZAR  
RAJA SUMRAIN AND MOHAMED NIZAR RAJA SUMRAIN**

Claimants

and

**STATE OF KUWAIT**

Respondent

**ICSID Case No. ARB/19/20**

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**DECISION ON THE JOINDER APPLICATION**

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***Members of the Tribunal***

Prof. Zachary Douglas QC, President of the Tribunal

Mr. Fernando Piérola Castro, Arbitrator

Mr. Samuel Wordsworth QC, Arbitrator

***Secretary of the Tribunal***

Ms. Leah Waithira Njoroge

*Date of dispatch to the Parties: 5 October 2020*

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## **I. INTRODUCTION**

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) by Ayat Nizar Raja Sumrain, Eshraka Nizar Raja Sumrain, Alaa Nizar Raja Sumrain and Mohamed Nizar Raja Sumrain, all nationals of the Arab Republic of Egypt (together, the “**Claimants**”) against the State of Kuwait (“**Kuwait**” or the “**Respondent**”). The Claimants and the Respondent are collectively referred to as the “**Parties.**”
2. The dispute relates to the Claimants’ alleged investment in a real estate development project in Kuwait and was submitted on the basis of the Agreement for the Promotion and Reciprocal Protection of Investments between the Government of the Arab Republic of Egypt and the Government of the State of Kuwait (the “**BIT**” or “**Treaty**”), which entered into force on 26 April 2002, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”).
3. This Decision concerns the Request for Joinder of a Third Party as a Claimant submitted by Ms. Amal Ibrahim Abdel Hamid on 9 July 2020.

## **II. PROCEDURAL HISTORY**

4. On 26 June 2020, the Tribunal held a case management meeting with the Parties by telephone conference.
5. Following the case management meeting, on 30 June 2020, the Tribunal issued Procedural Order No. 1 based on the agreement and discussion with the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006; that the procedural language would be English; and that the place of proceeding would be Paris, France. Transmitted together with Procedural Order No. 1 was a draft procedural timetable, on which the Tribunal requested the Parties’ comments by 8 July 2020.
6. As instructed by the Tribunal, the Parties submitted their comments on the draft procedural timetable on 8 July 2020. With their comments, the Claimants indicated that they would

be making a request for joinder and made proposals for the inclusion of that phase in the procedural timetable.

7. On 9 July 2020, counsel for the Claimants submitted a Request for Joinder of Third Party as a Claimant, together with Exhibits A-001 through A-019 (the “**Joinder Application**,” or the “**Application**”) on behalf of Ms. Amal Ibrahim Abdel Hamid (“**Ms. Abdel Hamid**,” or the “**Applicant**”). On that same date, the Tribunal invited the Respondent to submit its observations on the Application by 17 July 2020.
8. By letter of 17 July 2020, the Respondent stated, *inter alia*, that it did not consent to the Application and requested to provide a response to the Application by 8 August 2020.
9. Following exchanges between the Parties, on 22 July 2020, the Tribunal issued Annex A to Procedural Order No. 1 concerning the procedural calendar, including a timetable for the Parties’ submissions on the Joinder Application.
10. Following further exchanges between the Parties, by letter of 28 July 2020 sent by the Secretary of the Tribunal, the Tribunal confirmed the deadlines set forth in Annex A to Procedural Order No. 1.
11. Pursuant to the procedural calendar, on 8 August 2020, the Respondent filed a Response to the Joinder Application, together with Exhibits 001 through 008 (the “**Response**”). On that same date, the Claimants filed observations on the Joinder Application (the “**Observations**”).
12. On 8 September 2020, the Applicant filed a Reply to the Parties’ Observations on the Joinder Request, together with Exhibit A-022 (the “**Reply**”).
13. The Tribunal has reviewed all the aforementioned submissions and materials in preparing this Decision.

### **III. THE TRIBUNAL’S ANALYSIS**

14. The Applicant, Ms. Amal Ibrahim Abdel Hamid, claims to have an interest in these proceedings as the owner of 49% of the shares in “*The Technical Field Company*”, which

in turn “owns the portfolio managed by The International Investor Company, which in the time of the HVREC’s incorporation formed 80% of HVREC’s shares”.<sup>1</sup> HVREC (the Heritage Village Real Estate Company) is a party to the build, operate and transfer contract with the Ministry of Finance of Kuwait signed on 24 November 2004, which is at the heart of this arbitration. It is also claimed that the Applicant is the main creditor and financier of HVREC insofar as she is said to finance “the Letter of Guarantee (Performance Bond)” in the sum of “KD2,050,000” pursuant to the said contract.<sup>2</sup>

15. The Joinder Application was filed on 9 July 2020. The present arbitration proceedings were commenced on 12 June 2019 when the Claimants filed their Request for Arbitration. It is undisputed that the Applicant was not identified as a party in the Request for Arbitration and therefore cannot be considered as an existing claimant in these proceedings. This explains the request by the Applicant as a third party to be joined to this arbitration as a claimant.
16. There are no specific provisions dealing with the joinder of a third party in the ICSID Convention or the ICSID Arbitration Rules, as the Applicant and the Respondent recognize.<sup>3</sup> The Applicant has nonetheless invoked Articles 25, 36 and 44 of the ICSID Convention in support of her Joinder Application.<sup>4</sup>
17. Article 25 of the ICSID Convention is the core provision of that instrument dealing with the “*Jurisdiction of the Centre*”. It does not address the joinder of parties. Article 36 addresses the “*Request for Arbitration*” and does not address the matter either. Article 44 provides:

*Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the*

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<sup>1</sup> Joinder Application, §2.

<sup>2</sup> Joinder Application, §2.

<sup>3</sup> Joinder Application, §86; Response, §3.1.

<sup>4</sup> Joinder Application, §3.

*Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.*

18. Article 44 certainly envisages that the Tribunal has the power to resolve procedural issues that are not expressly regulated by the ICSID Convention, the ICSID Arbitration Rules or any agreement reached by the parties to the dispute. The question is whether the joinder of a third party is a procedural issue in respect of which the Tribunal has full discretionary power.
19. When the Claimants filed their Request for Arbitration on 12 June 2019, they purported to accept the Respondent's standing offer to arbitrate contained in Article 10 of the BIT. At that point in time, an arbitration agreement came into existence between the Claimants and the Respondent (this discussion is without prejudice to the Tribunal's adjudication of any jurisdictional objections that it may have to decide in due course). The Applicant is not a party to that arbitration agreement.
20. The ICSID Convention and the ICSID Arbitration Rules reveal a heightened concern that the precise identities of the parties to the dispute are stipulated in the Request for Arbitration (*see* Article 36(2) and Rule 2(1) respectively). That concern is understandable due to the importance of defining the parties to the dispute and, in the context of investment treaty arbitration, the parties to the arbitration agreement itself.
21. Once an arbitration agreement comes into existence and the parties to that agreement have been defined, the arbitral tribunal cannot modify that agreement without the consent of all the parties to that agreement. That is a fundamental principle: a tribunal can interpret and apply an arbitration agreement, but it cannot rewrite or amend it. The joinder of a third party to the arbitration agreement (as a claimant) would undoubtedly constitute a modification to it.
22. There are situations where the consent of the parties to the joinder of a third party can be divined from their prior agreement. For instance, if the parties have entered into a contract to govern their relations, they can elect to include specific provisions for dealing with the joinder of a third party to any arbitration commenced on the basis of an arbitration clause in that contract, which the tribunal will then be able to interpret and apply. Likewise, the

parties might agree to the application of set of arbitration rules that include particular provisions for dealing with the joinder of a third party.

23. In the present case, the Respondent's standing offer to arbitrate in the BIT, which the Claimants accepted by filing their Request for Arbitration on 12 June 2019, contains no specific provisions that would allow this Tribunal to order the joinder of a third party. Nor do the arbitration rules that have been chosen to apply to this arbitration vest this Tribunal with such a power either.
24. In these circumstances, the only permissible route to the joinder of the Applicant as a third party that is available is through the express consent of both the Claimants and the Respondent in this arbitration (*i.e.*, all the existing parties to the arbitration agreement). The Claimants have provided that consent,<sup>5</sup> whereas the Respondent has declined to do so.<sup>6</sup> In the absence of the consent of all the parties, the Tribunal is compelled to reject the Joinder Application.
25. It remains for the Tribunal to deal with two subsidiary points raised by the Applicant.
26. The Applicant has sought to establish that she qualifies as an investor who has made an investment under the BIT<sup>7</sup> and the ICSID Convention<sup>8</sup> and that all the requirements for submitting her dispute to ICSID arbitration by reference to the terms of Kuwait's standing offer to arbitrate in the BIT would be satisfied.<sup>9</sup> The Applicant may or may not be correct in these submissions (and the Tribunal refrains from expressing any views) but they are not actually germane to the issue that the Tribunal must decide in ruling on the Joinder Application. Even if all the requirements under the BIT and the ICSID Convention could be satisfied by the Applicant as a putative claimant in her own hypothetical arbitration against the Respondent, there must still be a legal basis to join the Applicant as a party to the present arbitration proceedings. As the Tribunal has already stated, there is no such

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<sup>5</sup> Observations, §2.

<sup>6</sup> Response, §1.3.

<sup>7</sup> Joinder Application, §§68-74.

<sup>8</sup> Joinder Application, §§82-90.

<sup>9</sup> Joinder Application, §§75-81.

legal basis in the absent of the consent of all parties to the existing arbitration agreement between the Claimants and the Respondent.

27. The Applicant has further relied upon the civil procedural law in Kuwait, which in her submission allows the joinder of parties to existing proceedings.<sup>10</sup> The position under civil procedural law is, however, irrelevant to these arbitration proceedings for at least two reasons. First, the rules of municipal laws have no application to the procedure of this arbitration, which is regulated by the ICSID Convention and the ICSID Arbitration Rules. Secondly, international arbitration is a creature of consent in the sense that the powers of the tribunal must be traced to the underlying agreement to arbitrate that binds the parties to the dispute. National courts are in an entirely different position as their source of powers is normally a constitutional instrument. It is for this reason that national courts have wider-ranging powers over third parties in any litigation: those powers are not dependent upon the common denominator of consent of the existing parties to the same litigation.

#### **IV. DECISION**

28. For the reasons set forth above, the Tribunal rejects the Joinder Application.

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<sup>10</sup> Joinder Application, §§91-92.



[signed]

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Mr. Fernando Piérola Castro  
Arbitrator

Date: 5 October 2020

[signed]

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Mr. Samuel Wordsworth QC  
Arbitrator

Date: 5 October 2020

[signed]

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Prof. Zachary Douglas QC  
President of the Tribunal

Date: 5 October 2020