INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

AMPAL-AMERICAN ISRAEL CORP., EGI-FUND (08-10) INVESTORS LLC, EGI-SERIES INVESTMENTS LLC, BSS-EMG INVESTORS LLC, AND MR. DAVID FISCHER

Claimants

and

ARAB REPUBLIC OF EGYPT

Respondent

ICSID Case No. ARB/12/11

DECISION ON JURISDICTION

Members of the Tribunal
The Honorable L. Yves Fortier, CC, OQ, QC, President
Professor Campbell McLachlan, QC
Professor Francisco Orrego Vicuña

Secretary of the Tribunal
Ms. Aïssatou Diop

Assistant to the Tribunal
Ms. Annie Lespérance

Date of the dispatch to the Parties: 1 February 2016

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I. INTRODUCTION

A. THE PARTIES

1. The Claimants in this arbitration are:

   (i) Ampal-American Israel Corp. ("**Ampal**"), a corporation incorporated under the laws of the State of New York, is a public company that was listed on the NASDAQ but filed for reorganization under Chapter 11 of the United States Bankruptcy Code following the destruction of its investment in EMG;[1]

   (ii) EGI-FUND (08-10) Investors LLC, a limited liability company incorporated under the laws of the State of Delaware ("**EGI-Fund Investors**");

   (iii) EGI-Series Investments LLC, a limited liability company incorporated under the laws of the State of Delaware ("**EGI-Series**");

   (iv) BSS-EMG Investors LLC, a limited liability company incorporated under the laws of Delaware ("**BSS-EMG Investors**"); and

   (v) Mr. David Fischer, a national of Germany.

2. The Claimants aver that they own, directly or indirectly, together and with other entities, the East Mediterranean Gas ("**EMG**"), a company incorporated under the laws of Egypt. The Claimants' investment structure is attached as Annex I to the present Decision.

3. The Respondent is the Arab Republic of Egypt ("**Egypt**" or the "**Respondent**").

B. BACKGROUND OF THE DISPUTE

4. A dispute has arisen between the Claimants and the Respondent in respect of which the Claimants filed a request for arbitration (the "**Request**") on 2 May 2012 pursuant to:

[1] Claimants' Memorial (the "Memorial"), 1 March 2013, para. 65.

(i) Article VII of the Treaty Between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments (the "**US Treaty**" or the "**Egypt-US BIT**")[2];

(ii) Article 9 of the Agreement between the Arab Republic of Egypt and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments (the "**Germany Treaty**")[3] (together, the "**Treaties**"); and

(iii) Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "**ICSID Convention**").

5. The dispute relates to the Claimants' investment in EMG. EMG was formed on 19 April 2000 for the dual purposes of purchasing natural gas from Egypt and exporting it to Israel as well as building and operating a pipeline that runs from Al Arish in Egypt to Ashkelon in Israel (the "**Al Arish-Ashkelon pipeline**" or "**EMG Pipeline**"). For these purposes, EMG signed on 13 June 2005 a General Sale and Purchase Agreement (the "**Source GSPA**") with the Egyptian General Petroleum Corporation ("**EGPC**") and Egyptian Natural Gas Holding Company ("**EGAS**").

6. EMG proceeded to sign subsequent agreements, among them, On-Sale Agreements with various customers in Israel, including the State-owned Israel Electric Corporation ("**IEC**"). EMG completed the construction of the pipeline in December 2007 and deliveries commenced in January 2008.

7. The Claimants contend that before the delivery of commercial quantities of natural gas began, Egypt forced renegotiations of the GSPA, revoked EMG's tax-exempt status, failed to ensure delivery of the contracted quantities, restricted EMG's access to funds, and purported to terminate the GSPA.

[2] C-7. The US Treaty was executed in two languages – English and Arabic – both texts being equally authentic. See Request, para. 2.

[3] C-8. The Germany Treaty was executed in three languages – German, Arabic, and English – all texts being equally authentic with the English text prevailing in case of divergent interpretation. See Request, para. 2.

8. On the basis of these acts and omissions, the Claimants allege that Egypt breached a number of protections afforded to the Claimants under the US-Egypt BIT and the Germany-Egypt BIT.

9. The Claimants have quantified their claims as follows[4]:

Summary of aggregate losses to the Claimants including interest and value leakage (US$ million) – Impact of the First Amendment assessed as at Date of the First Amendment

Claimants	Impact of Tax Exemption Revocation	Impact of Tax Exemption Revocation (beyond	Impact of the First Amend-Ment	Impact of the Delivery Failures	Total losses
EGI Fund	37.9	8.0	87.6	76.2	209.7
EGI Series	0.0	0.0	95.6	83.2	178.7
BSS	6.3	1.3	15.9	13.9	37.5
David Fischer	9.5	2.0	23.9	20.7	56.1
Ampal	95.4	20.2	240.5	208.3	564.4
Total	**149.1**	**31.6**	**375.9**	**326.1**	**882.6**

C. PARALLEL PROCEEDINGS

10. In addition to the present proceeding, four other related arbitrations have been launched:

(i) EMG is engaged in three parallel contractual arbitrations involving EGPC, EGAS, and EMG's main downstream customer, IEC. EMG initiated an ICC arbitration (seated in Geneva) against IEC to obtain declaratory relief in relation to the dispute that had arisen between them under their On-Sale Agreement as a result of EGPC/EGAS's supply failures. To ensure that liability for the resulting harm was properly allocated to EGPC/EGAS, EMG then launched another ICC arbitration[5] (again seated in Geneva) against both IEC and EGPC/EGAS pursuant to the

[4] See Letter from FTI Consulting dated 11 August 2014 ("FTI Letter"), Appendix 4 (revised).

[5] ICC Case 18215/GZ/MHM.

Source GSPA and the Tripartite Agreement.[6] EGPC/EGAS immediately contested the jurisdiction of the ICC tribunal, and initiated arbitration against EMG at CRCICA in Cairo, which it contends is the only proper contractual forum.[7] There are thus three inter-related commercial arbitrations.[8]

(ii) There is also a parallel investment treaty arbitration against Egypt, initiated under the UNCITRAL Rules and Egypt's investment treaty with Poland.[9] In that proceeding, the claimants are Polish-Israeli national Yosef Maiman and three companies of the Merhav group of companies that he allegedly controls, including Ampal's subsidiary, Merhav Ampal Group Ltd.[10]

11. The remedies sought in each of these arbitrations is provided at Annex II of the present Decision.

12. As to the status of the above-mentioned arbitrations, the Tribunal notes the following.

(i) In respect of the first ICC arbitration in which EMG seeks declaratory relief against IEC, the parties in the present arbitration indicated at the evidentiary hearing that that arbitration had been suspended by EMG and IEC and that EMG and IEC have now brought coordinated claims against EGAS in the second ICC arbitration.[11]

(ii) The tribunal in the second ICC arbitration issued its Final Award on 4 December 2015. In respect of jurisdictional matters, the ICC tribunal declared (i) that it lacked jurisdiction to adjudicate EMG's GSPA Claims, (ii) that it had jurisdiction to adjudicate EMG's Tripartite Agreement Claims and (iii) that EMG's Tripartite Agreement Claims were admissible.

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[6] For purposes of this Decision on Jurisdiction, the Tribunal will refrain from defining terms which are not pertinent to the present Decision. Those terms will be defined in the Tribunal's decision on the merits.

[7] *Egyptian General Petroleum Corporation and Egyptian Natural Gas Holding Company v. East Mediterranean Gas S.A.E.* ("*EGPC and EGAS v. EMG*") , CRCICA Case 829/2012.

[8] Memorial, para. 323.

[9] PCA Case 2012/26.

[10] Memorial, para. 324.

[11] Tr. Day 9, 73:20-74:3. Respondent's Post-Hearing Brief, footnote 8.

(iii) In respect of the CRCICA arbitration, the Tribunal notes that the Award on Jurisdiction was issued on 11 November 2013[12] and that the hearing on the merits occurred on 15-26 June 2015. In its Award on Jurisdiction, the CRCICA tribunal declared it had jurisdiction over the dispute.

(iv) In respect of the Maiman arbitration, by letter of 18 November 2015, the Maiman tribunal communicated to the parties in that arbitration the following: "the Tribunal has now decided that it has jurisdiction *ratione personae*. The Tribunal will provide the reasons for this decision subsequently, in its award. Consequently, the Tribunal declares the proceedings closed in respect of these issues in accordance with Article 31(1) of the UNCITRAL Arbitration Rules."

13. The Claimants submit that Egypt is responsible for the many proceedings related to the present dispute. They aver, in this connection:

(i) while EMG proposed to consolidate all three commercial arbitration proceedings, under any rules and in any arbitral seat outside Egypt and IEC consented to this proposal, EGPC/EGAS declined;[13]

(ii) while the claimants in the UNCITRAL BIT proceeding sought to appoint Professor Reisman as co-arbitrator, whom EMG had already selected to serve on the CRCICA tribunal, with a view for a commonality between the tribunals, Egypt challenged Professor Reisman on that very basis; [14] and

(iii) while the Claimants and other EMG shareholders offered to consolidate the two treaty arbitrations on 10 May 2013 before this Tribunal because the ICSID Claimants were unwilling to forego the protection of the ICSID Convention[15], Egypt insisted that consolidation could occur only before the UNCITRAL tribunal.[16] At the hearing, Egypt confirmed that this position was based on no

[12] *Egyptian General Petroleum Corporation and Egyptian Natural Gas Holding Company v. East Mediterranean Gas S.A.E.*, CRCICA Case 829/2012, Partial Award on Jurisdiction and Procedural Ruling on Stay Application, 11 November 2013 ("CRCICA Partial Award"), R-813.

[13] Memorial, paras. 325-326. C-313.

[14] Memorial, paras. 325-326.

[15] C-402.

[16] C-407.

reason other than "just testing" to see if the Claimants would agree.[17] The Claimants remain unwilling to forego the protections of the ICSID Convention.[18]

(iv) It thus became clear, the Claimants aver, that consolidation, whether formal or informal, was not possible.[19]

14. In response, the Respondent contends that it is the Claimants who refused to accept consolidation other than on their unilaterally imposed conditions.[20]

15. The relevance of these parallel proceedings in respect of the Respondent's jurisdictional objections is discussed below.

D. SCOPE OF THE PRESENT DECISION

16. The Tribunal recalls that, by Procedural Order No. 2 of 29 April 2013, it decided to join all of the Respondent's objections to jurisdiction and admissibility to the merits, thereby denying the Respondent's request for a bifurcation of the proceedings.[21] The proceedings therefore continued on this basis and the Tribunal received written submissions of the parties on jurisdiction, merits and quantum and heard the parties' oral submissions on those issues during the evidentiary hearing.

17. In view of the complexity of the case and the real risk of contradictions between the four parallel arbitrations, the Tribunal has decided to issue now a decision on jurisdiction only. The present decision will be followed by an award on the merits and, if necessary, on quantum. The Tribunal considers that it is in its power to proceed in this way pursuant to Rule 41(2) of the ICSID Arbitration Rules.[22]

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[17] Tr. Day 1, 23:19-20: "I was just testing the proposition that they want to pick the tribunal". See also Day 1, 178:1-179:1; C-409, p.2.

[18] Claimants' Post-Hearing Brief, para. 18. C-408.

[19] Memorial, paras. 325-326.

[20] Respondent's Rejoinder (the "Rejoinder"), 16 July 2015, paras. 273-274. Respondent's Post-Hearing Brief, footnote 6.

[21] The Tribunal also decided in Procedural Order No. 2 to deny the Respondent's request for a stay of the arbitration pending the outcome of the State-to-State consultation procedure in relation to Egypt's denial of the Treaty's benefits to Ampal.

[22] ICSID Arbitration Rule 41 (2) provides the following :

The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.

18. Accordingly, the scope of the present decision is limited to the Tribunal's decisions in respect of the Respondent's objections to its jurisdiction and the admissibility of the Claimants' claims.

II. PROCEDURAL HISTORY

19. On 4 May 2012, ICSID received the Claimants' request for arbitration dated 2 May 2012 against Egypt (the "**Request**").

20. On 23 May 2012, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention. In the Notice of Registration of same date, the Secretary-General invited the parties to proceed to constitute a Tribunal as soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

21. On 24 July 2012, the Respondent informed the Centre that the parties were unable to reach an agreement on the constitution of the Tribunal and requested that the Tribunal be constituted in accordance with Article 37(2)(b) of the ICSID Convention. The next day, ICSID informed the Claimants, pursuant to Rule 2(3) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), that the Tribunal would be constituted pursuant to the procedure foreseen at Article 37(2)(b) of the ICSID Convention.

22. On 21 August 2012, the Claimants appointed Professor Francisco Orrego Vicuña, a national of Chile, as arbitrator and the Respondent appointed Professor Campbell McLachlan QC, a national of New Zealand, as arbitrator.

23. On 22 August 2012, the parties agreed, pursuant to Article 37(2)(a) of the ICSID Convention, that the party-appointed arbitrators would appoint the presiding arbitrator.

24. On 4 September 2012, ICSID informed the parties that Professor Orrego Vicuña and Professor McLachlan had both accepted their appointments.

25. On 6 September 2012, the Claimants disclosed that Freshfields would be named as counsel of record for Chile in a case before the International Court of Justice where Professor Orrego Vicuña was appointed Judge Ad-Hoc upon nomination of the

government of Chile. The Claimants indicated that the disclosure was made merely for transparency purposes. The Respondent did not react to this disclosure.

26. On 19 September 2012, the Centre informed the parties that the party-appointed arbitrators had decided to appoint the Honorable L. Yves Fortier CC, OQ, QC, a national of Canada, as President of the Tribunal. By the same letter, ICSID informed the parties of Mr. Fortier's disclosure in relation to his appointment by the claimant as arbitrator in the case of *National Gas S.A.E. v. Arab Republic of Egypt* (ICSID Case No. ARB/11/17). By letters of 20 September 2013, both parties confirmed that they had no objection to the appointment of Mr. Fortier as President of the Tribunal in this case.

27. On 15 October 2012, the Acting Secretary-General, in accordance with Arbitration Rule 6(1), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Natali Sequeira, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal. The parties were later informed that Ms. Aïssatou Diop, ICSID Legal Counsel, would replace Ms. Sequeira as Secretary of the Tribunal.

28. On 27 October 2013, the Respondent addressed a letter to Mr. Fortier in response to his statement of acceptance to serve as President of the Tribunal. The Respondent raised a concern relating to a parallel proceeding brought before the ICC against Egypt by EMG, the company in which the Claimants in the present proceeding are investors. The concern was that the claimant in the ICC proceeding was represented by the London office of Norton Rose, a law firm which had been merged with Ogilvy Renault LLP where Mr. Fortier used to be a partner. The Respondent also noted that Mr. Fortier and Professor Orrego Vicuña were both members of the same set of chambers in London. The Respondent invited Mr. Fortier to provide any comments in relation to these concerns.

29. On 28 October 2012, Mr. Fortier replied, stating that he had not been aware of the existence of the ICC proceeding until he received and read the Respondent's letter, and he failed to see how his membership in 20 Essex Street alongside Professor Orrego Vicuña affected in any way his or Professor Orrego Vicuña's impartiality and independence in the present matter. No other issue was raised by either Party further to Mr. Fortier's response.

30. On 29 November 2012, the Tribunal held a first session by telephone conference with the parties. Participating in the first session were:

Members of the Tribunal

- The Hon. L. Yves Fortier, CC, OQ, QC, President; Professor Francisco Orrego Vicuña, Arbitrator; and Professor Campbell McLachlan, QC, Arbitrator

ICSID Secretariat

- Ms. Natali Sequeira, Secretary of the Tribunal

Participating on behalf of the Claimants

- Mr. Noah D. Rubins, Dr. Ben Juratowitch, and Mr. Ben Love of the law firm of Freshfields Bruckhaus Deringer; and Mr. Niv Sever of the law firm of M. Firon & Co. Advocates

Participating on behalf of the Respondent

- Mr. Mohamed El Sheikh, Mr. Mahmoud El Kharashy, Mr. Mohamed Khalaf, Mr. Amr Arafa, Ms. Fatma Khalifa, Ms. Reem Hendy, Ms. Lela Kassem, Mr. Mohamed Shehata, and Mr. Abdelrahman Hassanien of ESLA; and Professor Emmanuel Gaillard, Dr. Yas Banifatemi, and Mr. Alexander Uff of the law firm of Shearman & Sterling LLP

31. During the first session, the parties confirmed that the Tribunal had been validly constituted. It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect as of 10 April 2006, the procedural language would be English, and the place of proceeding would be Paris, France.

32. The agreement of the parties and decisions of the Tribunal on issues raised at the first session were recorded in **Procedural Order No. 1** dated 20 December 2012. In particular, the Respondent having indicated its intention to file objections to jurisdiction and to request bifurcation, the Tribunal fixed two alternative calendars for the written phase of the proceeding. The first calendar outlined the sequence of submissions in the event the Tribunal decided to join jurisdiction to the merits ("scenario 1"). The second

calendar provided for a sequence of submissions in case the proceeding were bifurcated ("scenario 2").

33. On 14 January 2013, the Respondent filed a request to amend the procedural calendar. The Tribunal denied the Respondent's request on 22 January 2013 after having given the Claimants an opportunity to comment on the Respondent's request.

34. On 1 March 2013, the Claimants filed their Memorial pursuant to paragraph 13.1 of Procedural Order No. 1.

35. On 1 April 2013, the Respondent filed a request for bifurcation of its jurisdictional objections and for the suspension of the proceeding pending the outcome of the State-to-State consultation procedure in relation to Egypt's denial of the benefits of the Egypt-US BIT to Claimant Ampal. On 15 April 2013, the Claimants filed their response to the Respondent's request. On 29 April 2013, the Tribunal issued **Procedural Order No. 2**, whereby it decided to join all of the Respondent's jurisdictional objections to the merits; reject the Respondent's request for a stay of the proceeding; and continue the proceeding in accordance with the unified calendar (scenario 1) set out in Procedural Order No. 1.

36. On 8 May 2013, the Respondent requested an amendment to the procedural calendar in view of the political unrest in Egypt. On 17 May 2013, the Claimants opposed the Respondent's request. Following an additional round of comments from the parties, the Tribunal decided to grant the Respondent's request in part as recorded in **Procedural Order No. 3** issued on 11 June 2013.

37. On 10 May 2013, the Claimants made a proposal to the Respondent to consolidate the present case and the UNCITRAL case of *Yosef Maiman and others v. The Arab Republic of Egypt* (PCA Case No. 2012/26) before this ICSID Tribunal.

38. On 14 May 2013, the Respondent replied with a set of conditions under which it would agree to consolidation. The conditions included the constitution of a new tribunal and the parties' agreement on the application of a new set of procedural rules. The parties exchanged further correspondence on the procedural implementation of a consolidation but failed to reach a mutually agreed solution.

39. On 16 July 2013, the Respondent requested a suspension of the procedural calendar in view of escalated political unrest in Egypt. On 22 July 2013, the Claimants filed a response to the Respondent's request, and on 23 July 2013, the Respondent filed a reply to the Claimants' response. On 25 July 2013, the Tribunal issued its decision, denying the Respondent's request.

40. On 16 August 2013, the Respondent filed a renewed request for the suspension of the procedural calendar. Following two rounds of comments from the parties on the Respondent's request, the Tribunal decided on 22 August 2013 to grant the Respondent's Renewed Request and amend the procedural calendar.

41. In accordance with the amended procedural calendar, the Respondent filed its Counter-Memorial (the "Counter-Memorial") on 28 September 2013.

42. On 9 December 2013, the Claimants informed the Tribunal of the parties' agreement to further amend the procedural calendar. On 2 January 2014, the Respondent confirmed the parties' agreement which the Tribunal endorsed the same day.

43. The parties submitted their document production requests to the Tribunal on 19 December 2013. The Tribunal's decisions in respect of the document production requests are recorded in **Procedural Order No. 4** dated 9 January 2014.

44. Pursuant to Procedural Order No. 4, the Claimants filed their privilege log and submitted a draft confidentiality agreement to the Respondent on 31 January 2014. The Respondent responded the same day, indicating that, thus far, it had not identified documents over which it wished to assert privilege. The Respondent also submitted its own draft confidentiality agreement.

45. On 4 February 2014, the Claimants requested the Tribunal to issue an Order on confidentiality. On 5 February 2014, the Respondent requested the Tribunal to reject the Claimants' proposed confidentiality agreement and direct the parties to conclude a confidentiality agreement in the terms proposed by the Respondent. On 12 February 2014, the Tribunal granted the Respondent's request.

46. On 5 March 2014, Ms. Annie Lespérance was appointed as Assistant to the Tribunal with the agreement of the parties.

47. The parties made additional submissions on redaction, privilege and confidentiality in February and March 2014. The Tribunal issued its decision on confidentiality, redaction, and privilege on 20 March 2014.

48. On 24 March 2014, the Respondent notified the Tribunal of the parties' agreement to further amend the procedural calendar. On 25 March 2014, the Claimants confirmed the parties' agreement which the Tribunal endorsed.

49. On 31 March 2014, the Respondent informed the Tribunal that, on the basis of Egyptian law, it was impossible for the Respondent to comply with the Tribunal's decision of 20 March 2014, directing it to submit a log of documents covered by defence secrecy or whose disclosure would be prejudicial to Egyptian national security. On 4 April 2014, the Claimants submitted observations on the Respondent's letter, requesting the Tribunal to draw an appropriate adverse inference as contemplated in Procedural Order No. 4. On 7 April 2014, the Tribunal informed the parties that, at the appropriate time, it may decide to take the Respondent's refusal to produce in camera a privilege log into account in its evaluation of the respective factual allegations and evidence including a possible inference against the Respondent.

50. Pursuant to the amended procedural calendar, the Claimants filed their Reply (the "Reply") on 14 April 2014.

51. The Respondent filed its Rejoinder on 17 July 2014 after having been granted a two-week extension.

52. On 29 August 2014, the Claimants requested leave from the Tribunal to file additional documents in the record. On 3 September 2014, the Respondent opposed the Claimants' request. Further rounds of comments ensued in September 2014.

53. On 26 September 2014, the Claimants submitted a further request seeking leave to file a limited number of additional factual exhibits and legal authorities to which they wished to refer at the evidentiary hearing. On 1 October 2014, the Respondent addressed the Claimants' further request.

54. On 1 October 2014, the President of the Tribunal held, on behalf of the Tribunal, a pre-hearing organizational meeting with the parties by telephone conference. The minutes of the meeting were circulated to the parties on 3 October 2014.

55. On 7 October 2014, the Tribunal granted for the most part the Claimants' requests of 29 August and 26 September 2014.

56. On 15 October 2014, the Respondent requested leave to introduce into the record documents from the final hearing in the Maiman arbitration, documents responsive to the Claimants' newly admitted documents, and a limited number of additional documents. On 16 October, the Claimants sought leave to introduce into the record a limited number of further factual exhibits and legal authorities. On 17 October, the Claimants stated that they had no objection to the Respondent submitting into the record the documents indicated in its request of 15 October, subject to the principle of equality of arms, i.e. that the Respondent accept the admission into the record of the unadmitted documents that the Claimants sought to introduce by their requests of 29 August and 26 September. By letter of 17 October 2014, the Respondent requested the Tribunal to deny the Claimants' request of 16 October. By the same letter, the Respondent characterized as inappropriate the Claimants' proposal contained in their letter of 17 October.

57. On 20 October 2014, the Tribunal granted the Respondent's request of 15 October, noting that the request was unopposed by the Claimants. The Tribunal also granted the Claimants' request of 16 October with respect to the legal authorities but denied it as to the factual exhibits.

58. On 22 October 2014, the Respondent sought leave to introduce five newly published documents into the record. On 24 October 2014, the Claimants confirmed that they had no objection to the Respondent's request.

59. A hearing on jurisdiction and the merits took place from 27 October to 6 November 2014 at the World Bank European Headquarters in Paris for the first week and, further to an agreement of the parties, as approved by the Tribunal, at the Paris office of Shearman & Sterling for the second week. In addition to the Members of the Tribunal,

the Secretary of the Tribunal, and the Assistant to the Tribunal, present at the hearing were:

For the Claimants

- Mr. Jon Wasserman of Equity Group Investments; Mr. Alex Spizz, Chapter 7 Trustee of Ampal-American; Mr. Niv Sever of the law firm of M. Firon & Co. Advocates; Counselor Sarwat Abd El-Shahid, Mr. Girgis Abd El-Shahid, and Mr. César R. Ternieden of the Sarwat A. Shahid Law Firm; Ms. Lucy Reed, Mr. Noah D. Rubins, Mr. Ben Juratowitch, Mr. Ben Love, Mr. Robert Kirkness, Ms. Calista Harris, Mr. Yuri Mantilla, Mr. Kevin Clement of the law firm of Freshfields Bruckhaus Deringer LLP.

For the Respondent

- Counselor Mahmoud El Kharashy and Counselor Fatma Khalifa of the Egyptian State Lawsuits Authority; Professor Emmanuel Gaillard, Dr. Yas Banifatemi, Dr. Mohamed Shelbaya, Mr. Alexander Uff, Ms. Margaret Ryan, Mr. Youssef Daoud, Mr. Dimitrios Katsikis, Mr. Tsegaye Lanrendeau, Mr. Edward Taylor, Ms. Yasmine El Maghraby, Ms. Yael Ribco Borman, Ms. Alia El Sadda, Mr. Omar El-Sada, Ms. Victoria Cadiz of the law firm of Shearman & Sterling LLP.

60. The following witnesses were examined:

On behalf of the Claimants

- Fact witnesses: Mr. Sam Zell, Mr. David Fischer, Mr. Abdel Hamid Ahmed Hamdy, Mr. Maamoun Al Sakka.

- Expert witnesses: Professor Sir Bernard Rix, Mr. Charles C. Freeny, Mr. Benjamin F. Schrader, Major General (ret.) Giora Eiland, Mr. Daniel Muthmann, Dr. Boaz Moselle, and Mr. James Nicholson.

On behalf of the Respondent

- Expert witnesses: Professor Ahmed Belal, Lord Leonard Hoffmann, Major General (ret.) Warren Whiting, Mr. Nicolas Pelham, Professor Kenneth J. Vandevelde, Mr. John Wood-Collins, and Mr. Tim Giles.

61. On 19 November 2014, the Tribunal wrote to the parties with respect to a translation issue which arose during the evidentiary hearing between the Claimants' and the Respondent's respective certified translations of the minutes of the EGPC's board meeting of 24 April 2012 (see C-635 and R-872). The Tribunal informed the parties that, pursuant to the agreement they had reached at the hearing, the Tribunal would retain and instruct, through the Centre, its own translator.

62. On 22 December 2014, the Tribunal shared with the parties the authoritative translation of the disputed Arabic word "*Aqar*", provided by a World Bank certified translator, Mr. Mahmoud Ibrahim.

63. On 9 January 2015, the parties submitted simultaneously their comments in respect of the authoritative translation.

64. The parties filed simultaneous post-hearing briefs on 14 February 2015.

65. On 12 February 2015, the Respondent requested the Tribunal to order the Claimants to produce a document that they had filed in the CRCICA arbitration containing information that "is essential to th[is] Tribunal's determination." On 13 February 2015, the Claimants responded that the document requested had not been sufficiently identified by the Respondent and asked for additional time to address the Respondent's request. Following comments from the parties, the Tribunal decided on 2 March 2015 to grant the Respondent's application, allowing the document in question, identified as ECOM Memo # 62, to be part of the record. On 5 March 2015, the Respondent filed the same as its own exhibit.

66. On 12 March 2015, the Claimants wrote to the Tribunal that the Respondent was advancing a new case on coercion and misrepresentation through this new exhibit and, if the Tribunal was minded to consider the Respondent's new position, then the Claimants would request an opportunity to respond and submit additional documentary and witness evidence. The Respondent commented on the Claimants' application on 18 March 2015. The Tribunal invited the Claimants to provide it with a summary of the

new documentary and/or witness evidence they wished to submit. The Claimants did so on 25 March 2015.

67. Recalling that ECOM Memo 62 (Exhibit R-964) was admitted into the record on 2 March 2015, the Tribunal decided, on 6 April 2015, that the Memo would be taken into account in the course of its continuing deliberations as necessary and in the light of the parties' submissions and arguments up to and including the parties' respective post-hearing briefs. Therefore, the Tribunal decided that the Claimants' application of 12 March 2015 was moot.

68. On 27 May 27 2015, the Respondent submitted an application to the Tribunal for leave to reexamine two of the Claimants' fact witnesses, Mr. Hamdy and Mr. Sakka, and to make written and oral submissions on the impact of the alleged false evidence provided by Mr. Hamdy and the alleged forgery of a document described as "the minutes of the meeting of EMG's Board of Directors, which was held 2 November 2009". The Respondent annexed to its letter two documents identified as "the Authentic Minutes" and "the Forged Minutes".

69. Having considered the Claimants' comments on the Respondent's request and deliberated, the Tribunal ordered the parties on 12 June 2015 to submit, after the conclusion of the hearing before the CRCICA tribunal, an agreed transcript relevant to the Respondent's request, provided that the parties before the CRCICA Tribunal agreed.

70. In compliance with the Tribunal's order of 12 June 2015, the parties submitted on 14 September 2015 agreed excerpts of the CRCICA hearing transcript. On 5 October 2015, the Tribunal issued **Procedural Order No. 5**, admitting the excerpts into the record and inviting each party to make submissions on the impact, if any, of the two versions of EMG's November 2009 Board meeting minutes on the Claimants' claims.

71. On 9 October 2015, the Respondent filed a request asking the Tribunal to admit further evidence into the record of this arbitration emanating from the transcript of the CRCICA hearing. Following further rounds of comments, the Tribunal issued **Procedural Order No. 6** on 29 October 2015 denying the Respondent's request.

72. On 7 December 2015, the Tribunal directed the parties to produce an agreed compendium of documents pertinent to liability in chronological order as requested by the Tribunal in its e-mail to the parties of 28 April 2015 and at the hearing in Paris on 29 October 2014.

73. In compliance with the Tribunal's Procedural Order No. 5, the Respondent filed its submission on the impact of the alleged forgery on 2 November 2015. On 30 November 2015, the Claimants filed their reply. At the Tribunal's invitation, the Respondent confirmed on 9 December 2015 that it did not oppose the admission into the record of the documents attached to the Claimants' submission of 30 November 2015. On 15 December 2015, the Tribunal admitted the Claimants' documents into the record.[23]

III. RELIEF REQUESTED

A. CLAIMANTS' REQUEST FOR RELIEF

74. The Claimants request that the Tribunal grant the following relief:

(i) DISMISS all of Egypt's objections to the jurisdiction of the Tribunal and the admissibility of the claims;

(ii) DECLARE:

a) that Egypt violated Article II(4) of the US Treaty (or Article 2(2) of the UK Treaty, applicable to the US Claimants through Article II(1) of the US Treaty), Article 2(2) of the Germany Treaty, and customary international law by failing to accord the Claimants' investments fair and equitable treatment and impairing their investments through the adoption of unreasonable measures;

b) that Egypt violated Article II(4) of the US Treaty (or Article 2(2) of the UK Treaty, applicable to the US Claimants through Article II(1) of the US Treaty), Article 2(3) of the Germany Treaty, and customary international

[23] In its application of 2 November 2015, the Respondent addressed various requests to the Tribunal. At the time of the issuance of the present Decision, the Tribunal remains seized of the Respondent's application which it will deal with in the course of its continuing deliberations.

law by engaging in arbitrary and discriminatory measures against the Claimants' investment because it was selling natural gas to Jews in Israel;

c) *that Egypt has violated Article 2(2) of the UK Treaty (applicable to the US Claimants through Article II(1) of the US Treaty), Article 7(2) of the Germany Treaty, and customary international law by failing to observe obligations it has entered into with regard to the Claimants' investments;*

d) *that Egypt has violated Article 2(2) of the UK Treaty (applicable to the US Claimants through Article II(1) of the US Treaty), Article 4(1) of the Germany Treaty, and customary international law by failing to provide the Claimants and their investments with full protection and security; and*

e) *that Egypt expropriated the Claimants' investments without payment of adequate and effective compensation, a public purpose, or due process of law in violation of Article III(1) of the US Treaty, Article 4(2) of the Germany Treaty, and customary international law.*

(iii) ORDER Egypt to pay compensation to the Claimants of no less than US$ 882.6 million and, to the extent applicable, DECLARE that the sum awarded has been calculated net of Egyptian taxes;

(iv) ORDER Egypt to pay pre- and post-award interest at Egypt's sovereign borrowing rate (as updated), compounded annually, accruing until payment is made in full;

(v) ORDER Egypt to indemnify the Claimants in full with respect to any Egyptian taxes imposed on the compensation awarded to the extent that such compensation has been calculated net of Egyptian taxes;

(vi) ORDER Egypt to pay all of the costs and expenses of this arbitration, including the Claimants' reasonable legal and expert fees, and the fees and expenses of the Tribunal; and

(vii) AWARD such other relief to the Claimants as the Tribunal considers appropriate.[24]

B. RESPONDENT'S REQUEST FOR RELIEF

75. The Respondent requests the Tribunal to :

(i) Stay this proceeding pending the issuance of Awards in each of CRCICA Case No. 829/2012 and ICC Case No. 18215/GZ/MHM, dismissing the claims made by EMG or awarding damages in respect of such claims;

(ii) Alternatively, dismiss the Claimants' claims in their entirety for lack of jurisdiction and/or as inadmissible;

(iii) Alternatively, dismiss the Claimants' claims on the merits;

(iv) In the event that the Tribunal finds that the Respondent is liable to the Claimants as a matter of principle, stay any decision on quantum pending the issuance of Awards in each of CRCICA Case No. 829/2012, ICC Case No.18215/GZ and PCA Case No. 2012-26, dismissing the claims made by EMG or its shareholders (as applicable) or awarding damages in respect of such claims;

(v) In any event, order the Claimants jointly and severally to pay all of the costs of this arbitration as well as the Respondent's legal costs and expenses in connection with this arbitration, including but not limited to its counsel's fees and expenses and the fees and expenses of its experts; and

(vi) Grant the Respondent such further relief as the Arbitral Tribunal considers appropriate.[25]

IV. THE RESPONDENT'S OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

76. The Tribunal notes that the Respondent has advanced the following seven objections to the Tribunal's jurisdiction and the admissibility of the Claimants' claims: (A) objection

[24] Reply, para. 637.

[25] Rejoinder, para. 1163.

ratione personae in respect of Ampal; (B) objection *ratione personae* in respect of EGI-Fund and EGI-Series; (C) objection *ratione personae* in respect of Mr. David Fischer; (D) objection *ratione materiae* in respect of the Claimants' Gas Supply Claims; (E) objection *ratione materiae* in respect of the Claimants' Tax Claims; (F) inadmissibility of the Claimants' claims in view of the illegality of the GSPA; and (G) inadmissibility of the Claimants' claims for abuse of the arbitral process.

77. The Tribunal will now consider each one of these objections in turn.

A. RATIONE PERSONAE COMPETENCE OVER AMPAL

1. Respondent's Position

78. The Respondent submits that the Tribunal lacks *ratione personae* competence over Ampal because (i) nationals of United States do not have a substantial interest in that company pursuant to the US Treaty, and (ii) in any event, in light of the control exercised by Mr. Maiman over Ampal, the Respondent has denied Ampal the benefits of the US Treaty pursuant to Paragraph 1 of the Protocol thereto, including the Respondent's consent to arbitration at Article VII. In its Post-Hearing Brief, the Respondent also submitted that Ampal has failed to establish its interest in EMG.

a) Substantial US Interest in Ampal

79. The Respondent submits that the State Parties to the US Treaty agreed that its benefits should be extended only to "nationals" and "companies of the other Party".

80. Article I(1)(b) of the US Treaty defines "company of a Party" as:

> *a company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Party or its political subdivisions in which*
>
> *(i) natural persons who are nationals of such Party, or*
>
> *(ii) such Party or its subdivision or its agencies or instrumentalities have a substantial interest.*

81. The Respondent thus avers that Article I(1)(b) contains two cumulative requirements for a company to benefit from the Treaty: (i) a company must be duly incorporated in

one of the Contracting States, and (ii) natural persons who are nationals of that State (or the State of incorporation itself) must "have a substantial interest" in the company.[26]

82. It is common ground between the parties that Ampal is incorporated in the US[27] and that whether the substantial interest requirement is fulfilled in relation to Ampal falls to be determined by the Tribunal.[28]

83. The Respondent submits that it is undisputed between the parties that Mr. Maiman and his family, who are not nationals of the United States, own the majority of the outstanding shares in Ampal and exercise decisive control over that company[29]. This is supported, avers the Respondent, by Ampal's filings at the United States Security and Exchange Commission[30] which confirm that Mr. Maiman owned over 60% of Ampal's shares in 2008 and in 2012. These documents further show that Mr. Maiman and his immediate family, in virtue of their substantial ownership of Ampal's voting stock, were "*able to control [the company's] affairs and to influence the election of the members of [its] board of directors.*"[31]

84. The Respondent thus concludes that "[*i*]*n light of Mr. Maiman's ownership of the majority of Ampal's outstanding shares, and control over the company, it is clear that U.S. citizens do not 'have a substantial interest' in Ampal, and that Ampal does not meet the ratione personae jurisdictional requirements of Article I(1)(b) of the Egypt-U.S. BIT*".[32]

85. In addition, the Respondent asserts that Ampal's business activities and debts are in Israel and that Ampal is managed by non-US nationals.[33]

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[26] Counter-Memorial, para. 107.

[27] C-1.

[28] Respondent's Post-Hearing Brief, para. 16. Claimants' Post-Hearing Brief, para. 4. See Tr. Day 1, 99:7-9.

[29] See Memorial, para. 106 ("*Mr. Maiman, who is not a citizen of the United States, controls approximately 60% of the shares in Ampal...*").

[30] See C- 222 and C-223.

[31] See C- 222, p. 2 and C-223, p.4. Counter-Memorial, para. 108.

[32] Counter-Memorial, para. 109.

[33] Respondent's Post-Hearing Brief, para. 17. See R-404 (Ampal SEC 10-K for 2006 – while Ampal was not required to disclose the nationality of its management to the SEC, its filing indicates that the directors of the company live and work in Israel avers the Respondent) and R-391 (Ampal owed US$ 234.5 million to bondholders in Israel and US$ 115 million to Israeli banks avers the Respondent).

86. In response to the Claimants' allegation that the "principal issue" in determining a substantial U.S. interest is "ownership of equity"[34], the Respondent contends that the Claimants have failed to adduce any evidence that even a single share of Ampal was owned by US nationals.[35] The Claimants ask the Tribunal to infer, based on the Iran-US Claims Tribunal decision in *Flexi-Van Leasing, Inc. v. The Islamic Republic of Iran* ("*Flexi-Van*")[36], that a sufficient portion of Ampal's shares not owned by Mr. Maiman is US-owned. However, argues the Respondent, the purported US ownership of Ampal's shares could not amount to a substantial interest in view of its undisputed majority ownership and control by non-US nationals. The Respondent further argues that, in any event, even if it were otherwise appropriate or had gained any broader acceptance, the Iran-US Claims Tribunal's approach in *Flexi-Van* is expressly inapplicable to companies such as Ampal, which are controlled by a single (non-US) shareholder.[37]

87. In response to the Claimants' argument that the US itself has a substantial interest in Ampal, the Respondent contends that (i) the listing of Ampal on a US stock exchange is insufficient to create jurisdiction, (ii) Mr. Maiman's decision to place Ampal in bankruptcy after initiating this arbitration cannot create jurisdiction, and (iii) Ampal's alleged debt to the US tax authorities pales in comparison to the US$ 240 million owed to its Israeli debenture holders.[38]

b) *Denial of Benefits*

88. Even if Ampal did meet the corporate nationality requirements of the US Treaty, the Respondent submits that it has exercised its right to deny Ampal the benefits of the

[34] Tr. Day 1, 197:16-17.

[35] Tr. Day 1, 202:14-25. The Claimants have only produced spread sheets of Ampal's shareholders between 2008 and 2012, which list the purported residence of those individuals. See C-128.

[36] *Flexi-Van Leasing, Inc. v. The Islamic Republic of Iran*, 1 Iran-U.S.C.T.R. 455, Iran Order No. 36, Order, 15 December 1982, CLA-224.

[37] Respondent's Post-Hearing Brief, para. 18. See *Flexi-Van v. Iran*, CLA-224, p. 458; Tr. Day 9, 260:23-261:2; Rejoinder para. 94.

[38] Respondent's Opening Slide 167.

Egypt-U.S. BIT pursuant to Paragraph 1 of the Protocol thereto.[39] Paragraph 1 of the Protocol provides:

> *Each Party reserves the right to deny the benefits of this Treaty to any company of either Party, or its affiliates or subsidiaries, if nationals of any third country control such company, affiliate or subsidiary; provided that, whenever one Party concludes that the benefits of this Treaty should not be extended for this reason, it shall promptly consult with the other Party to seek a mutually satisfactory resolution of this matter.*[40]

89. Pursuant to Paragraph 2 of the Protocol to the Egypt-U.S. BIT, "control" means "to have a substantial share of ownership rights and the ability to exercise decisive influence".[41]

90. The Respondent submits that, as Professor Vandevelde[42] explained at the evidentiary hearing, the State Parties' explicit reservation of rights to deny benefits is subject to objective conditions set out in the Protocol, namely, the requirement of third-country control and of prompt consultations, and whether those conditions have been met is fully reviewable by the Tribunal.[43] This Tribunal is also empowered to determine the effect of Egypt's denial of benefits on its jurisdiction over Ampal's claims avers the Respondent.[44]

91. The Respondent contends that the requirements of Paragraphs 1 and 2 of the Protocol have been met in the present case and that, consequently, the Respondent has effectively denied Ampal the benefits of the US Treaty:

    (i) By letter dated 27 January 2013, Egypt informed Ampal that it had exercised its right under Paragraph 1 of the Egypt-U.S. BIT to deny the benefits of that Treaty to Ampal in light of the control of that company by Mr. Maiman and his immediate

[39] Counter-Memorial, para. 113.

[40] C-7.

[41] C-7.

[42] Respondent's expert.

[43] Respondent's Post-Hearing Brief, para. 22. See Tr. Day 7, 235:3-236:21.

[44] Tr. Day 7, 172:9-12, 176:4-8.

family.[45] Egypt separately contacted the United States to inform it of its denial of benefits to Ampal.[46]

(ii) The Claimants do not contest that the substantive requirement for a denial of benefits is present in this case, namely, that Ampal is controlled by third party nationals within the meaning of Paragraphs 1 and 2 of the Protocol to the Egypt-U.S. BIT.[47]

(iii) In response to the Respondent's notification, the United States agreed by Diplomatic Note dated 19 March 2013 to hold consultations with Egypt.[48]

(iv) The State Parties met in Washington, D.C. on 30 September 2013 and 9 December 2013 to consult in relation to Egypt's denial of benefits to Ampal.[49]

(v) By Diplomatic Note dated 6 March 2014, the United States wrote to Egypt concluding that:

> *good faith consultations, and the absence of any expressed disagreement, between the United States of America and the Arab Republic of Egypt constitute a mutually satisfactory resolution of this matter, in accordance with Paragraph 1 of the Supplementary Protocol to the Treaty.*[50]

(vi) In response to the United States' communication, Egypt confirmed by Diplomatic Note dated 17 April 2014 its understanding that, given the absence of any disagreement between the two Governments in relation to its denial to Ampal of the benefits of the Treaty, the consultations had resulted in a "*mutually satisfactory resolution of the matter*" within the meaning of Paragraph 1 of the Protocol.[51]

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[45] See Letter from Embassy of Egypt in Tel Aviv (M. El-Kouny) to Ampal dated 27 January 2013, C-224.

[46] See R-24.

[47] Counter-Memorial, para. 118. See Memorial, para. 106: "*Mr. Maiman, who is not a citizen of the United States, controls approximately 60% of the shares in Ampal...*".

[48] R-21.

[49] Rejoinder, para. 112.

[50] R-888.

[51] Rejoinder, para. 115. See R-891. At the hearing, Egypt completed the record with further correspondence between Egypt and the USA (see R-941-R-946).

92. The Respondent submits that the effect of the Respondent's denial of benefits to Ampal is to deprive Ampal of any right to invoke or rely on the US Treaty, including the right to submit disputes to ICSID arbitration.[52]

93. In this respect, the Respondent argues that in its consultations, it provided the United States with the full details of the circumstances having justified its denial of benefits to Ampal in the context of this proceeding. Had the US considered that the Protocol required Egypt to initiate consultations before denying benefits to Ampal, or that benefits could not be denied after Ampal had submitted claims to arbitration, such disagreement would have been raised during the consultations.[53] Instead, the US confirmed by Diplomatic Note dated 6 March 2014 that Egypt had satisfied the requirements of the Protocol and that the consultations between the State Parties had resulted in a "mutually satisfactory resolution". The State Parties' interpretation is the most authoritative interpretation of the Treaty's text, avers the Respondent.[54]

94. In response to the Claimants' argument that Egypt was required to consult the United States before denying benefits to Ampal,[55] the Respondent contends that the plain language of the Protocol requires the parties to "promptly" consult. Professor Vandevelde testified at the hearing that the State Parties agreed to depart from the requirement under the original version of the Treaty that a State must "first" consult before exercising the right to deny benefits.[56]

95. In addition, the Respondent argues that the Claimants' interpretation of paragraph 1 of the Protocol would allow a company to foreclose a State Party's right to deny benefits by simply submitting a claim to arbitration. According to the Claimants, this would undermine the object and purpose of denial of benefits provisions, which is to prevent third-country investors from gaining treaty protection in situations in which the host

[52] Counter-Memorial, para. 119.

[53] Rejoinder, paras. 120-121.

[54] Counter-Memorial, para. 122.

[55] See Tr. Day 1, 223:10-14.

[56] Tr. Day 7, 177:9-178:11. The original version of the Treaty provided that: *Each Party reserves the right to deny to any of its own companies or to a company of the other Party the advantages of this Treaty, if nationals of any third country own or control such company; provided that whenever one Party believes that the benefits of this Treaty should not be extended to a company of the other Party for this reason, it shall first consult with the other Party to seek a mutually satisfactory resolution of this matter.* See Expert Opinion of Professor Kenneth J. Vandevelde ("Vandevelde Expert Legal Opinion"), para. 53.

State did not wish to extend such benefits to them as explained in Professor Vandevelde's written and oral testimony[57]. In its submission as a non-disputing party in *Pac Rim Cayman LLC v. Republic of El Salvador* ("*Pac Rim v. El Salvador*"), the United States confirmed that its "*long-standing policy*" to include denial of benefits provisions in its treaties is aimed at "*safeguard*[ing] *against the potential problem of 'free rider' investors, i.e., third-party entities that may only as a matter of formality be entitled to the benefits of a particular agreement*".[58] The United States further submitted that any requirement to invoke the denial of benefits provision before an investor submits its claim to arbitration "*would place an untenable burden on* [the denying] *Party*", because it would:

> *require the respondent, in effect, to monitor the ever-changing business activities of all enterprises . . . that attempt to make, are making, or have made investments in the territory of the respondent. This would include conducting, on a continuing basis, factual research, for all such enterprises, on their respective corporate structures and the extent of their business activities in those countries.*[59]

96. The Respondent argues that an "unbroken line" of arbitral awards interpreting denial of benefits provisions in US treaties also confirm this policy.[60]

97. In respect of the Claimants' argument that the Respondent's denial of benefits cannot deprive Ampal of any Treaty protection, the Respondent argues that its offer to arbitrate is subject to its right to deny benefits. As Professor Vandevelde opines in his Expert Legal Opinion, a company controlled by third-country nationals "*never has an*

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[57] Vandevelde Expert Legal Opinion, para. 35. Rejoinder, para. 127.

[58] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Submission of the United States of America, 20 May 2011 (Appendix 2 to Vandevelde Expert Legal Opinion), para. 3. The United States specified that the denial of benefits provision in the CAFTA had the same object and purpose as the denial of benefits provisions in its other investment agreements. *See also* Vandevelde Expert Legal Opinion, para. 79.

[59] *Pac Rim v. El Salvador*, ICSID Case No. ARB/09/12, Submission of the United States of America, 20 May 2011, Appendix 2 to Vandevelde Expert Legal Opinion, para. 6. *See also* Vandevelde Expert Legal Opinion, para. 35.

[60] See Respondent's Opening, Slide 186; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, RLA-11; *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia* ("*Guaracachi and Rurelec v. Bolivia*"), UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014, CLA-213; *Ulysseas, Inc. v. The Republic of Ecuador* ("*Ulysseas v. Ecuador*"), UNCITRAL, Interim Award, 28 September 2010, RLA-32; *Empresa Eléctrica del Ecuador, Inc. (EMELEC) v. Republic of Ecuador* ("*EMELEC v. Ecuador*"), ICSID Case No. ARB/05/9, Award, 2 June 2009, RLA-26.

unconditional, or vested, right to treaty protection".[61] Accordingly, a State that invokes a denial of benefits provision after a claim has been submitted to arbitration does not withdraw consent to arbitration that was previously given, but rather exercises a right to deny benefits which was reserved within that consent. To hold otherwise would defeat the purpose of the denial of benefits provision in the Treaty opines Professor Vandevelde.[62] The Respondent submits that tribunals interpreting similar provisions in US treaties have uniformly reached this conclusion[63] and that the Energy Charter Treaty decisions on which the Claimants rely are inapposite since Article 17(1) of the ECT does not condition a State's consent to arbitration.[64]

98. Finally, in respect of the Claimants' argument that jurisdiction of an international tribunal is to be assessed at the time of that jurisdiction being invoked, the Respondent contends that this argument is irrelevant to the question of denial of benefits and has not been considered by any other tribunal in deciding that issue. While the Claimants alleged that "ten cases" supporting this principle could call into question the effect of Egypt's denial of benefits, these cases concern the effect on jurisdiction of extrinsic events that bear no relation to denial of benefits, and are thus irrelevant to the effect of a denial of benefits under the US BIT.[65]

c) Ampal has failed to establish its interest in EMG

99. In its Post-Hearing Brief, the Respondent raised the following new objection to the Tribunal's jurisdiction:

> *The highly convoluted and opaque structure through which Ampal holds its interest in EMG involves not only numerous related intermediary companies, the corporate and financial relationships (including intercompany debts) of which have never been established or explained, but also entirely fails to take account of intervening third party rights including loans, the terms of which are nowhere in the record of this arbitration.... All these matters potentially seriously impair the*

[61] Vandevelde Expert Legal Opinion, para. 121.

[62] Rejoinder, para. 137. See *Guaracachi and Rurelec v. Bolivia*, CLA-213, para. 376.

[63] See R-960, summarizing *Pac Rim v. El Salvador*, RLA-11; *Guaracachi and Rurelec v. Bolivia*, CLA-213; *Ulysseas v. Ecuador*, RLA-32; *EMELEC v. Ecuador*, RLA-26; Tr. Day 9, 263:13-23.

[64] Respondent's Post-Hearing Brief, para. 27. See Tr. Day 7, 187:10-22.

[65] Respondent's Post-Hearing Brief, para. 28. See Respondent's Demonstrative Exhibit R-959.

flow of funds up the corporate chain from EMG to Ampal, contrary to the premise of Ampal's claim.[66]

2. Claimants' Position

a) *Substantial US Interest in Ampal*

100. The Claimants argue that Ampal satisfies both criteria of Article I(1)(b) of the US Treaty.

101. It is common ground between the parties that whether the substantial interest requirement is fulfilled in relation to Ampal falls to be determined by the Tribunal.[67]

102. In respect of the first criterion, the Claimants argue that US nationals have a "substantial interest" in Ampal:

(i) The fact that Mr. Maiman owns a majority of Ampal and controls the company does not preclude US nationals from having a "substantial interest" in the company aver the Claimants. According to the Claimants, "substantial interest" does not mean majority interest nor does it mean a controlling interest, otherwise it would have been stated explicitly in the Treaty.[68]

(ii) The Claimants allege that based on a list dated 1 January 2008, the addresses of 1125 of the 1199 registered owners of voting shares are within the United States, with the US-registered owners holding 38.18% of Ampal's voting share capital.[69] Similarly, in a list dated 1 January 2012, 1145 of the 1215 registered owners of voting shares have addresses within the United States, representing 41.42% of Ampal's voting share capital.[70]

(iii) The Claimants are, however, not in a position to produce direct evidence that these US residents are in fact US nationals: nationalities of shareholders in companies

[66] Respondent's Post-Hearing Brief, para. 36.

[67] Respondent's Post-Hearing Brief, para. 16. Claimants' Post-Hearing Brief, para. 4. See Tr. Day 1, 99:7-9.

[68] Reply, para. 152.

[69] C-128(b).

[70] C-128(f).

publicly-listed in the United States are not recorded.[71] The Claimants nevertheless argue that the Tribunal should follow the Iran-US Claims Tribunal precedent whereby the Iran-US Claims Tribunal accepted evidence from which it drew a reasonable inference regarding shareholder nationality.[72] The process used by the Iran-US Claims Tribunal can be used to estimate the percentage of shares in Ampal held by US nationals assert the Claimants:

- The relevant Ampal SEC filing from 2008, discloses that Ampal was 59.7% beneficially owned by a non-US national, Mr. Maiman.[73]

- Based on US Department of the Treasury data, in 2008, 10.3% of portfolio investment in equity in US companies was foreign owned.[74]

- It is thus reasonable to infer that, when a claim first arose, approximately 36.15% of Ampal was owned by US nationals.[75]

- If the same calculation is undertaken for 2012, when the Request for Arbitration was filed, the percentage is 27.95%.

(iv) These numbers are estimates, not precise calculations. Nonetheless, the evidence provided by the Claimants is sufficient to establish *prima facie* that US nationals have a "substantial interest" in Ampal.[76]

103. In response to Egypt's argument that the *Flexi-Van* test cannot be applied to Ampal because one shareholder controls it, the Claimants contend the following:

> *The fact that a company is controlled by one individual is only relevant because it increases the percentage of a company's share capital in respect of which the nationality of the beneficial owner needs to be proven by direct evidence, and therefore reduces the percentage of shares for which an inference may be drawn. Here, there is direct evidence that a*

[71] Reply, para. 157.

[72] Reply paras. 158-160. See *Flexi-Van v. Iran*, CLA-224.

[73] C-222.

[74] C-448.

[75] Reply, para. 161.

[76] Reply, para. 161. See C-223, C-380, and C-448.

> *majority of the share capital of Ampal-American is beneficially owned by non-US nationals. The question for the Tribunal, unaddressed by Egypt's argument, concerns the use of indirect evidence to reach a conclusion about the ownership of the remaining shares.*[77]

104. In respect of the second criterion, the Claimants submit that the United States has a "substantial" interest in Ampal. The Claimants aver that "substantial interest" is not only concerned with equity interests. As Professor Vandevelde explains: "*a stock ownership test would have overlooked other forms of interest, such as debt securities, that U.S. nationals might have in the company.*"[78]

105. In the present case, the Claimants argue that:

> *a company incorporated in the United States and listed on a US stock exchange is one in which the United States has a substantial interest. The substantial interest that the United States has in such a company is highlighted by the bankruptcy proceedings pending before the US courts in connection with Ampal.... A US federal court (an organ of the United States) has appointed a trustee in bankruptcy, himself a US citizen, who now controls the company for the benefit of its creditors. One of those creditors is the New York State Department of Taxation and Finance....*[79]

b) Denial of Benefits

106. In respect of the Respondent's alternative defence, the Claimants agree with the Respondent that it falls to the Tribunal to determine whether the requirements of third-country control and of prompt consultations have been met, as well as the effect of Egypt's denial of benefits on its jurisdiction over Ampal's claims.

107. The Claimants submit that Egypt's attempt to deny Ampal the benefits of the US Treaty is ineffective.

108. Firstly, the Claimants argue that Egypt cannot unilaterally terminate the jurisdiction of the Tribunal. They explain that on Egypt's case, and leaving aside its jurisdictional

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[77] Claimants' Post-Hearing Brief, para. 5.

[78] Kenneth J. Vandevelde, *U.S. International Investment Agreements*, Oxford University Press, 2009, RLA-25, pp. 150-151, 418, 578-584.

[79] Reply, para. 166.

objections, the Centre was validly seized when Ampal filed its Request for Arbitration in May 2012, and had jurisdiction over the dispute for the next eight months until January 2013, when by its unilateral act, Egypt "terminated" the jurisdiction of the Centre and of this Tribunal.[80] However, the Claimants assert that (i) it is well-established that jurisdiction is to be determined in light of the situation that exists on the date the arbitral proceedings are instituted, not by subsequent events;[81] and (ii) Egypt must confront Article 25(1) of the ICSID Convention which states that "*When the parties have given their consent, no party may withdraw its consent unilaterally*".[82] Egypt is therefore prevented by Article 25(1) of the ICSID Convention from unilaterally withdrawing its consent by way of a purported denial of benefits after Ampal had already accepted Egypt's offer to arbitrate and so perfected the arbitration agreement aver the Claimants.[83] A contrary result would retroactively eliminate a right to arbitration that had already been exercised say the Claimants.[84]

109. Secondly, the Claimants submit that Egypt cannot retroactively nullify substantive treaty protection enjoyed by Ampal at the time of Egypt's challenged measures. They assert that:

> *[w]hether Egypt is seeking to deny a protection already obtained or subject that protection to later cancellation, its position involves retroactivity. Either approach requires Egypt to establish that the denial of benefits provision entitles it to avoid responsibility for internationally wrongful acts where that responsibility had already crystalized at the time of the purported denial. On either approach, Egypt deems [sic] Treaty breaches that did in fact occur not to have occurred. For the Tribunal to find such a retroactive effect, the Tribunal would need to be satisfied that the US Treaty provision concerning denial of benefits rebuts the presumption against retroactivity.*[85]

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[80] Reply, para. 171.

[81] Reply, para. 173. See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* ("*Aguas del Aconquija v. Argentina*"), ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, CLA-140, paras. 61, 63.

[82] Reply, para. 174.

[83] Reply, para. 174.

[84] Repy, para. 179.

[85] Reply, para. 185.

110. The Claimants assert that under cross-examination Professor Vandevelde agreed that a denial of the benefits of the US Treaty only has a prospective effect.[86] Egypt accepts that a denial of the right to submit disputes to arbitration has effect from the time of the denial onwards. According to the Claimants, Egypt must therefore equally accept that the benefits of the substantive protections of the US Treaty are denied only from the point of denial onwards and that Ampal therefore was protected by the substantive protections of the Treaty when the events in dispute occurred. This is also the position that was taken in decisions based on the ECT.[87]

111. Thirdly, the Claimants contend that the jurisdiction of an international tribunal is to be assessed at the time of that jurisdiction being invoked. In other words, consent is only necessary to initiate an arbitration, and conduct occurring thereafter is irrelevant to jurisdiction.[88] The Claimants rely on ten cases[89] in this respect which confirmed that any condition that can be invoked to defeat jurisdiction must be invoked prior to the seisin to have any effect. The Claimants rely in particular on the *Right of Passage* case.[90] They submit:

> *the Rights of Passage case concerned the effect of a condition embedded in Portugal's consent to the jurisdiction of the International Court of Justice. By that condition, Portugal purported to 'reserve[] the right to exclude from the scope of*

[86] Tr. Day 7, 212:5-16.

[87] Tr. Day 1, 97:4-17. Claimants' Post-Hearing Brief, para. 7.

[88] Claimants' Post-Hearing Brief, para. 11.

[89] *Nottebohm case (Liechtenstein v. Guatemala), Preliminary Objections, Judgment of 18 November 1953,* ICJ Reports 1953, CLA-234, p. 123; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgement of 14 February*, ICJ Reports 2002, CLA-127, pp. 12-13, para. 26; *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment of 27 February 1998*, ICJ Reports 1998, p. 9, CLA-235, 23-24, para. 38; *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment of 27 February 1998*, ICJ Reports 1998, p. 115, CLA-236, 129, para. 37; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, Jurisdiction, 24 May 1999, CLA-237, para. 31; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* ("*Enron v. Argentina*"), ICSID Case No. ARB/01/3, Award, 22 May 2007, CLA-147, paras. 192 and 198; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01, Decision on Jurisdiction, 21 December 2012, CLA-149, paras. 255; *Case Concerning the Right of Passage over Indian Territory (Portugal v. India)* ("*Portugal v. India*"), *Preliminary Objections, Judgment of 26 November 1957*, ICJ Reports 1957, p. 125, CLA-214, 142; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, CLA-30, para. 178; *Aguas del Aconquija v. Argentina*, CLA-140.

[90] *Portugal v. India*, CLA-214.

> *the present declaration, at any time during its validity, any given category or categories of disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification.' The court held that: 'It is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction.' None of the cases relied on by Egypt took account of this rule. The alternative position advanced by Egypt – that benefits can be unilaterally denied at any time – is so obviously contrary both to this rule and to the object and purpose of the US Treaty that it could only be countenanced by this Tribunal if explicit treaty terms left it no choice.*[91]

112. Fourthly, the Claimants argue that the object and purpose of the US Treaty as a whole pursuant to Article 31 of the Vienna Convention (as opposed to the object and purpose of the denial of benefits provision alone) militate against the retroactive removal of substantive treaty protection existing at the time of breaches of the US Treaty.[92]

113. Finally, the Claimants argue that even if the Tribunal were to find that benefits can be denied retroactively, Egypt's denial of benefits would still be ineffective in the present case because Egypt failed to fulfil the mandatory condition of consulting with the US Government promptly after deciding that benefits to Ampal should be denied. Indeed, in the present case, Egypt only consulted with the US Government after it had decided to deny them.[93]

3. Tribunal's Analysis

114. The Tribunal notes at the outset that, should it decide to uphold the Respondent's objection *ratione personae* in respect of Ampal, this would be dispositive of Ampal's claims only.

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[91] Claimants' Post-Hearing Brief, para. 11.

[92] Reply, para. 188. The object and purpose of the US Treaty as a whole includes "the pursuit of policies and practices which foster bilateral trade and investment" in order to "contribute substantially to the long-term benefit and welfare of the peoples of each Party," the "encouragement and nondiscriminatory treatment of investments" and the "reciprocal encouragement and protection of investments." See the Preamble to the US Treaty, C-7.

[93] Reply, para. 206. According to para. 1 of the Protocol (C-7), the condition is that "whenever one Party concludes that the benefits of this Treaty should not be extended for this reason, it shall consult with the other Party to seek a mutually satisfactory resolution of this matter."

115. There are two issues before the Tribunal: (a) whether Ampal is a protected "company of a Party", and (b) whether Egypt's denial of benefits is effective. A third issue which has arisen in the Respondent's Post-Hearing Brief is whether Ampal has established its interest in EMG. The Tribunal will consider each of these arguments in turn below.

a) Substantial US Interest in Ampal

116. Article 1(1)(b) of the US Treaty defines "company of a Party" as:

> *A company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Party or its political subdivisions in which*
>
> *(i) natural persons who are nationals of such Party, or*
>
> *(ii) such Party or its subdivision or its agencies or instrumentalities have a substantial interest.*

117. It is common ground between the parties that Ampal is incorporated in the United States and that whether the substantial interest requirement is fulfilled in relation to Ampal is to be determined by the Tribunal.

118. It is also undisputed between the parties that Mr. Maiman and his family, who are not nationals of the United States, own the majority of the outstanding shares in Ampal and exercise control over that company.

119. It now remains for the Tribunal to decide whether the Claimants have proven to its satisfaction that nationals of the United States have a substantial interest in Ampal.

120. The Tribunal starts from the premise that the Treaty does not require that a substantial interest be a controlling or a majority interest.

121. The Claimants have submitted evidence that, as of 1 January 2008, the addresses of 1125 of the 1199 registered owners of voting shares were in the United States and the US-registered owners of shares held 38.18% of Ampal's voting share capital. As of 1 January 2012, 1145 out of the 1215 registered owners have addresses in the United States and they represent 41.42% of Ampal's voting share capital.

122. While the Claimants have not produced direct evidence that these US residents are in fact US nationals, the Tribunal adopts the reasoning of the Iran-US tribunal in the

Flexi-Van case and draws a reasonable inference on the basis of the evidence proffered that the percentage of shares in Ampal held by US nationals as of 1 January 2008 and 1 January 2012 amounts to a substantial interest in that company.[94]

123. Accordingly, the Tribunal rejects the Respondent's objection to jurisdiction over Ampal based on this ground.

b) Denial of Benefits

124. By letter dated 27 January 2013[95], the Respondent informed Claimant Ampal that it had exercised its right to deny to it the benefits of the Egypt-US Treaty pursuant to Paragraph 1 of the Protocol to the BIT.

125. Denial-of-benefits clauses in investment treaties are generally designed to exclude from Treaty protections nationals of third States which claim rights through so-called "mailbox" or "shell" companies that have no economic connection to the state whose nationality is invoked.

126. In recent years, there have been a number of awards and decisions which have interpreted denial-of-benefits clauses. The parties have referred the Tribunal to these awards and decisions and the Tribunal has reviewed them all very carefully.[96]

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[94] *Flexi-Van v. Iran*, CLA-224, pp. 2-3:

"[I]t is neither possible nor necessary to require submission ... of detailed evidence such as either passports, birth certificates or certified copies of naturalization documents for each of the thousands of individuals who collectively own, directly or indirectly, more than 50% of the capital stock of [the claimant].

[...]

Any such requirement . . . would impose excessive burdens on the parties and the Tribunal.

[...]

Other Tribunals which have adjudicated international claims in the past . . . have required what they considered to be sufficient evidence and from that have drawn reasonable inferences." (Emphasis added).

[95] *Flexi-Van v. Iran*, C-224.

[96] See, *inter alia*, *Pac Rim v. El Salvador*, RLA-11; *Guaracachi and Rurelec v. Bolivia*, CLA-213; *Ulysseas v. Ecuador*, RLA-32; *EMELEC v. Ecuador*, RLA-26; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, RLA-22, paras. 159-165; *Yukos Universal Ltd. v. Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, CLA-1, paras. 456-459; *Hulley Enterprises Ltd. v. Russian Federation*, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009, RLA-27, paras. 455-458; *Anatolie Stati et. al. v. The Republic of Kazakhstan*, SCC Case No. V (116/2010), Award, 19 December 2013, CLA-194, para. 717; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, RLA-159, para. 386.

127. The Tribunal's review reveals that different tribunals have reached diverging decisions as to when, how and with what effect such clauses can be invoked.

128. Using a broad brush, the Tribunal notes that there are two principal categories of decisions: those where jurisdiction was based on the Energy Charter Treaty (ECT) and those where the basis of jurisdiction was a clause in US bilateral investment treaties or in the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA).

129. For purposes of its present decision, the Tribunal need not consider those decisions interpreting Article 17(1) of the ECT as the wording of that provision is significantly different from the wording of denial-of-benefits clauses in US BITs and CAFTA. These latter clauses have more in common with the denial-of-benefits clause in the Protocol to the US-Egypt Treaty.

130. With respect to the four principal decisions where tribunals interpreted denial-of-benefits clauses in US BITs and CAFTA[97], the Tribunal has noted that the procedural requirements applicable to a State's exercise of its right of denial are determined in each case on the basis of the distinct factual matrix of the case and an analysis of the particular governing Treaty.

131. Accordingly, the Tribunal will now review the factual matrix of the present case in relation to the issue of the denial of benefits as well as the relevant provisions of the US-Egypt BIT and its Protocol in order to determine whether the denial by Egypt to Ampal of the benefits of the Treaty on 27 January 2013 was a valid exercise of the right reserved to it under the Treaty.

132. Paragraph 1 of the Protocol to the Treaty, prior to 1986, read as follows:

> *Each Party reserves the right to deny the benefits of this Treaty to any company of either Party, or its affiliates or subsidiaries, if nationals of any third country control such company, affiliate or subsidiary; provided that, whenever one Party concludes that the benefits of this Treaty should not be extended for this reason, it shall first consult with the other Party to seek a*

[97] See *Pac Rim v. El Salvador*, RLA-11; *Guaracachi and Rurelec v. Bolivia*, CLA-213; *Ulysseas v. Ecuador*, RLA-32; *EMELEC v. Ecuador*, RLA-26.

> *mutually satisfactory resolution of this matter.*[98] *(Tribunal's emphasis)*

133. On 11 March 1986, Paragraph 1 of the Protocol was amended and it now reads as follows:

> *Each Party reserves the right to deny the benefits of this Treaty to any company of either Party, or its affiliates or subsidiaries, if nationals of any third country control such company, affiliate or subsidiary; provided that, whenever one Party concludes that the benefits of this Treaty should not be extended for this reason, it shall promptly consult with the other Party to seek a mutually satisfactory resolution of this matter.*[99] (Tribunal's emphasis)

134. Article VII of the Treaty provides, in relevant part:

> *2. the parties shall initially seek to resolve the dispute by consultation and negotiation....*
>
> *3 (a) In the event that the legal investment dispute is not resolved under procedures specified above, the national or company concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes ("Centre") for settlement by conciliation or binding arbitration, if, within six (6) months of the date upon which it arose: (i) the dispute has not been settled through consultation and negotiation....* (Tribunal's emphasis)

135. On 18 May 2011, Ampal (and EGI-Fund Investors) sent Egypt a letter informing it of the existence of a legal dispute under the Egypt-US Treaty and the object of the dispute and requesting consultations with Egypt pursuant to the terms of Article VII(2) of the Treaty.[100] The letter reads in relevant part as follows:

> *We hereby advise you of the existence of a legal investment dispute under the Treaty Between the United States of America and The Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments ("U.S.-Egypt BIT" or "Treaty"). As U.S. companies, we control shares in East Mediterranean Gas S.A.E. ("EMG"), the owner and operator of the "Peace Pipeline" between Al-Arish, Egypt and Ashkelon, Israel.*

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[98] C-7.

[99] C-7.

[100] See C-101.

> *[...]*
>
> *Pursuant to the terms of Article VII(2) of the Treaty, we hereby request consultations with your ministries in the interest of resolving this dispute. In the event that we are not able to resolve this dispute through consultations, we intend to submit the dispute to the International Centre for the Settlement of Investment Dispute ("ICSID") for settlement and binding arbitration. In such event, we will also encourage the other EMG shareholders to file for ICSID arbitration, and to pursue all other remedies available to such other EMG shareholders. We will also encourage EMG to pursue all of its remedies pursuant to all applicable contracts and laws.*

136. One year later, on 2 May 2012, the Request for Arbitration was filed by the Claimants (including Ampal) and registered by ICSID on 23 May 2012.

137. On 27 January 2013, Egypt wrote to Ampal. The relevant extracts of that letter provide:

> *In that arbitration, Ampal-American Israel Corporation ("Ampal-American") claims to be entitled to benefit from rights contained in the Treaty. However, based on the facts, albeit limited, which you have disclosed, we understand that Ampal-American, a company incorporated in New York, USA, is controlled by nationals of a country other than the United States of America. Indeed, it appears that Mr. Yosef Maiman and his family own approximately 62% of the voting shares of Ampal-American and control the company. The Arab Republic of Egypt understands that Mr. Maiman and his family are nationals of the State of Israel.*
>
> *[...]*
>
> *Pursuant to this provision [Paragraph 1 of the Protocol to the Treaty], the Arab Republic of Egypt hereby exercises its right to deny Ampal-American the benefits of the Treaty. For the avoidance of doubt, such denial of benefits includes each and every right under the Treaty, including Article VII thereof, and is effective as of the date on which Ampal-American became controlled by nationals of a country other than the United States of America.*[101] (Tribunal's emphasis)

138. The Tribunal has seen and considered the many letters/notes exchanged between Egypt and the United States after 27 January 2013.[102]

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[101] C-224.

[102] See, *inter alia*, R-20, R-21, R-26 to R-30, R-880, R-882, R-888, R-891, R-941 to R-946.

139. The first letter from Egypt to the United States is dated 28 January 2013 and refers to Egypt's notification sent the previous day to Ampal. Egypt concludes in that letter that "it remains available to promptly consult with the Government of the United States of America pursuant to Paragraph 1 of the Protocol."[103]

140. The Tribunal observes that, in its Note of 10 October 2013, Egypt affirmed that the purpose of the consultations contemplated by Paragraph 1 of the Protocol "[was] to resolve any doubts concerning whether the company is, in fact, controlled within the meaning of the Protocol."[104]

141. In its last Note, dated 8 March 2014, the United States wrote:

> *During the consultations, the United States expressed its view that the tribunal formed under Article VII may properly resolve any disputed factual issues of ownership or control. The United States has expressed no views on those or other factual issues in that arbitration.*
>
> *The Department of State further acknowledges that the good-faith consultations, and the absence of any expressed disagreement, between the United States of America and the Arab Republic of Egypt constitute a mutually satisfactory resolution of this matter, in accordance with Paragraph 1 of the Supplementary Protocol to the Treaty.*
>
> *The Department of State would appreciate the Arab Republic of Egypt confirming this understanding by return diplomatic note.*

142. The exchange between the two State Parties ended with a Note from Egypt to the United States on 17 April 2014 which concluded as follows:

> *We note the Department of State's acknowledgement of the good faith consultations that took place between the Government of the United States of America and the Government of the Arab Republic of Egypt pursuant to Paragraph 1 of the Supplementary Protocol of the Treaty. We also note the Department of State's observation that, in the absence of any expressed disagreement between the two Governments, such consultations have resulted in a mutually satisfactory resolution of the matter.*

[103] R-20.

[104] R-880.

> *In response to the Department of State's invitation to the Arab Republic of Egypt to confirm this understanding, the Arab Republic of Egypt hereby confirms that the two Governments have conducted good faith consultations following its denial of the benefits of the Treaty to Ampal-American pursuant to Paragraph 1 of the Supplemental Protocol of the Treaty, and that a mutually satisfactory resolution of the matter has been achieved through these consultations.*[105]

143. As it is common ground between the parties that Mr. Maiman is a national "of a third country" and that he controls Ampal, the question which the Tribunal must now answer is whether, in the circumstances, Egypt has effectively denied Ampal the benefits of the Treaty.

144. The Tribunal, in order to determine this jurisdictional issue, must interpret the text of the Treaty including its Protocol, in accordance with the relevant principles for treaty interpretation under international law as codified in the Vienna Convention on the Law of Treaties.

145. It is significant to note, as expressly stated in Paragraph 1 of the Protocol, that when a Party concludes that it intends to exercise its right to deny the benefits of the Treaty to a company such as Ampal "it shall promptly consult with the other Party to seek a mutually satisfactory resolution of this matter". (Tribunal's emphasis)

146. The ordinary meaning of these terms of the Protocol is very clear to the Tribunal.

147. The Party wishing to invoke the denial-of-benefits provision of the Treaty has the obligation to consult with the other Party in order to search for a mutually satisfactory resolution of the matter and such consultations must be held promptly.

148. In the present case, the Tribunal finds that these mandatory requirements have not been met.

149. As the Tribunal recorded above, after it had reached a decision to deny the benefits of the Treaty to Ampal, Egypt conveyed its decision to the United States on 23 January 2013. The United States was thus presented with a "fait accompli" rather than invited to

[105] R-891.

engage in a process of consultation in order to seek a mutually satisfactory resolution of the issue raised by Egypt.

150. There is no evidence in the correspondence between the two State Parties which followed Egypt's notice to Ampal of any consultations such as clearly envisaged in the Protocol.

151. In the view of the Tribunal, Egypt, by taking a decision and then inviting the United States to engage in a process of consultation, did not act in conformity with the clear terms of the Protocol. Its denial of benefits to Ampal was thus ineffective.

152. The Tribunal noted earlier that, in 1986, after negotiations between the United States and Egypt with respect to changes to the Treaty which each country wished to introduce, a Supplementary Protocol was signed which, *inter alia*, required that a Party should "promptly", rather than "first" consult with the other Party to seek a mutually satisfactory resolution of this matter.

153. The Respondent's expert, Professor Vandevelde, has opined that by replacing the word "first" with the word "promptly", the parties "[had] made clear that the consultations could occur "after" the denial of benefits" and that "the Treaty did not require consultations prior to a denial of benefits."[106]

154. The Tribunal cannot accept Professor Vandevelde's opinion. Again, the ordinary meaning to be given to the terms of the Paragraph 1 of the Protocol, as amended, in their context, is evident. The Party who has concluded that the benefits of the Treaty should not be extended to the national of a third country has the obligation to consult with the other Party in order to seek a mutually satisfactory resolution. The object and purpose of the mandatory consultation is to find a satisfactory resolution, not to discuss whether a decision previously taken by one Party should be endorsed and accepted by the other Party. In this respect, the Tribunal finds that the State Parties' final statements in their correspondence fall short of an acceptance on the part of the United States that Egypt was entitled to deny Ampal the benefits of the Treaty.

[106] Vandevelde Expert Legal Opinion, para. 62 at page 17.

155. The Tribunal is aware of the decision of the tribunal in *Pac-Rim Cayman LLC v. Republic of El Salvador*[107] that the denial of benefits pursuant to a clause nearly identical to that in Paragraph 1 of the Protocol in the present case was held to be effective.

156. However, there is a very significant difference in the Treaty language of that case and the Treaty language in the present case. In CAFTA (the governing Treaty in the Pac-Rim decision), the consultations between the two State parties according to Article 20.4.1 of the Agreement were only discretionary[108], whereas, in the present case, as noted above, the consultations are mandatory.

157. Having concluded that consultations mandated by the Protocol did not take place, the Tribunal will now seek to determine when valid and effective consultations should have been held in this case.

158. The Tribunal recalls that on 18 May 2011[109], Ampal (and EGI-Fund Investors) notified Egypt pursuant to Article VII (2) of the Treaty of the existence of a legal investment dispute under the Treaty.

159. Egypt was then aware that, under the terms of Paragraph 1 of the Protocol to the Treaty, it could deny the benefits of the Treaty to Ampal, a publicly listed company controlled by Mr. Maiman, a national of a third country, but only after having initiated consultations with the United States, the other Contracting State to the Treaty.

160. According to Article VII(2) and (3) of the Treaty, Egypt had a window of six (6) months after 18 May 2011 to seek to resolve the dispute by consultation and negotiation with Ampal. In the opinion of the Tribunal, it was during that six (6) month period that Egypt could also have initiated consultations with the United States pursuant to Paragraph 1 of the Protocol. There is no evidence in the record that such consultations took place during that period.

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[107] RLA-11.

[108] *Pac Rim v. El Salvador*, RLA-11, para. 4.57.

[109] See *supra* at para. 135.

161. If it had done so during the window, it would have acted "promptly". By waiting until January 2013, more than 20 months later, it is obvious to the Tribunal that Egypt did not act promptly.

162. Although not strictly necessary in view of the decision which it has reached that Egypt's notification to Ampal of 23 January 2013 was defective and invalid, the Tribunal will now address nevertheless the scope and effect of Article 25(1) of the ICSID Convention since the parties have submitted detailed and extensive arguments on this issue.

163. The central argument of the Respondent with respect to that jurisdictional issue is that its offer to arbitrate in the Treaty is always subject to its right, enshrined in the Protocol to the Treaty, to deny the benefits of the Treaty to "mailbox" or "shell" companies which, in the words of its expert, Professor Vandevelde, "never [have] an unconditional, or vested, right to treaty protection".[110]

164. The Respondent submits that by invoking the denial-of-benefits provision in the Protocol to the Treaty after Ampal had submitted its claim to ICSID arbitration, it did not withdraw its previously given consent to arbitration but rather exercised its right to deny benefits which was reserved within that consent.

165. On the other hand, the central argument of the Claimants is that the jurisdiction of the Centre is to be assessed at the time that jurisdiction is invoked, to wit when the Request for Arbitration is registered and that, as clearly set out in Article 25(1) of the ICSID Convention, "no Party may withdraw its consent unilaterally." In short, say the Claimants, a denial of benefits such as the present one cannot have retroactive effect. It can only be effective prospectively.

166. The Claimants' interpretation, says the Respondent, would give no "effet utile" to the denial of benefits provision in the Protocol.

167. The Tribunal agrees with the Claimants that the jurisdiction of the Centre must be determined at the time that the Request for Arbitration is registered.

[110] Vandevelde Expert Legal Opinion, para. 121 at p. 40.

168. Article 25(1) of the ICSID Convention is very clear. The jurisdiction of the Centre is to be assessed at the time that jurisdiction is invoked, which is when the investor's Request for Arbitration is registered by the Centre. When jurisdiction has crystallized, "no Party may withdraw its consent unilaterally", says plainly Article 25(1).

169. As the Egypt-US Treaty and its Protocol must be read in the light of the ICSID Convention, the Tribunal finds that there cannot be an embedded conditionality in the Treaty which could be triggered after the submission of the dispute to arbitration.

170. The Tribunal cannot accept the opinion of Professor Vandevelde that Egypt could deny the benefits of the Treaty to a Claimant such as Ampal "at any time" after the Request for Arbitration has been filed.[111] Such denial, to be effective, must be made prior to the filing and registration of the Request for Arbitration. In fact, the Tribunal recalls that Professor Vandevelde agreed in cross-examination during the hearing that a denial of the benefits of the US Treaty only has a prospective effect.[112]

171. The Tribunal observes that its conclusion that the jurisdiction of the Centre must be determined at the time it is seized of the dispute is in conformity with the rule of the International Court of Justice with respect to the time when jurisdiction is vested in the Court. That rule and its effect are well set out by the Court in the *Right of Passage* decision where it held:

> *It is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seized of a dispute, unilateral action by the Respondent State in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction.*[113]

172. This conclusion of the Tribunal is also in conformity with the Tribunal's interpretation of the Protocol and the Treaty that for the denial of benefits to be effective, there must

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[111] Vandevelde Expert Legal Opinion, para. 121 at p. 40.

[112] Tr. Day 7 Day 7, 212:5-16 (Counsel for the Claimants and Professor Vandevelde): "Q. Prior to that time [of a denial of benefits], the jurisdiction that the tribunal did have will be left untouched; is that correct? A. That would be my understanding, yes. Q. So the denial does not erase jurisdiction that existed prior to the denial? A. The word that I used was 'terminates' the jurisdiction: that the benefits have been denied as of a certain moment, and as of that moment the investor is no longer able to avail itself of any of the benefits of the treaty. Q. But it doesn't seek to change the past? A. That's correct."

[113] *Portugal v. India*, CLA-214, p. 142.

be consultations as mandated by the Treaty and such consultations must be made promptly.

173. For the foregoing reasons, the Tribunal finds that the Respondent's denial of benefits to Ampal of 27 January 2013 is not effective and the Respondent's objection to jurisdiction resting on this ground is dismissed.

c) Ampal's interest in EMG

174. The Tribunal notes that the Respondent has made the following objection to the Tribunal's jurisdiction in its Post-Hearing Brief:

> *The highly convoluted and opaque structure through which Ampal holds its interest in EMG involves not only numerous related intermediary companies, the corporate and financial relationships (including intercompany debts) of which have never been established or explained, but also entirely fails to take account of intervening third party rights including loans, the terms of which are nowhere in the record of this arbitration.... All these matters potentially seriously impair the flow of funds up the corporate chain from EMG to Ampal, contrary to the premise of Ampal's claim.*[114]

175. The Tribunal notes that the issue of the flow of funds was indeed raised by the Respondent in its written submissions prior to the evidentiary hearing. However, the issue was raised in relation to quantum. The Respondent only made an objection to jurisdiction on this basis in its Post-Hearing Brief.

176. According to ICSID Arbitration Rule 41(1), this objection should have been made "no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder".

177. Accordingly, the Tribunal denies the Respondent's belated objection which has been made for the first time in its Post-Hearing Brief.

[114] Respondent's Post-Hearing Brief, para. 36.

B. RATIONE PERSONAE COMPETENCE OVER EGI-FUND INVESTORS AND EGI-SERIES

1. Respondent's Position

178. The Respondent submits that it is a basic principle of international investment law that a claimant bears the burden of showing that it has met the jurisdictional requirements of a treaty.[115]

179. The Respondent argues that the Claimants have failed to demonstrate their contention that United States nationals have a "substantial interest" in EGI-Fund Investors and EGI-Series as required in the US Treaty, and thus the Tribunal lacks the *ratione personae* competence over these two entities.

180. In respect of EGI-Fund Investors, the Claimants argued for the first time in their Reply Memorial that the "*only one part*" of the ownership structure of EGI-Fund Investors that is relevant to their allegation that US nationals have a "*substantial interest*" in the company is the three Irrevocable Trusts created in 2004 by the children of Mr. Zell (the "Zell Children Trusts").[116] According to the Respondent, this is contrary to the Claimants' previous allegation that "*92% of* [EGI-Fund Investors] *is held by trusts established for the benefit of Mr. Samuel Zell, his children, and their children, all of whom are US nationals*"(emphasis added by the Tribunal).[117]

181. According to the Respondent, this new argument confirms that the Claimants' allegations concerning the interests in EGI-Fund Investors should not be taken at face value, especially in light of the correction which they bring to the Certificate of Managing Member of EGI-Fund Investors.[118]

182. The Respondent avers that the Claimants have failed to provide any evidence to substantiate the alleged US nationality of Mr. Zell's grandchildren[119] in violation of the

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[115] Counter-Memorial, para. 164. See *Pac Rim v. El Salvador*, RLA-11, para. 2.9: "*[A]ll relevant facts supporting [the Tribunal's] jurisdiction must be established by the Claimant at this jurisdictional stage and not merely assumed in the Claimant's favour.*"

[116] Reply, para. 210.

[117] Memorial, para. 168.

[118] Rejoinder, para. 160. See C-226.

[119] Rejoinder, para. 159. Respondent's Post-Hearing Brief, para. 33.

Tribunal's order to disclose: "*[f]or any interest in EGI-Fund Investors held in trust from 2007 to the present.... Nationality certificates, passports or equivalent Documents of all beneficiaries that are natural persons.*"[120]

183. The Respondent contends that the Claimants' addition to the record of extracts of the US Code of Federal Regulations[121] is part of a series of inappropriate attempts by which they now ask the Tribunal to infer, as a legal matter, the very fact of the Zell grandchildren's nationalities, in relation to which they refuse to provide evidence.[122]

184. The Respondent further argues that, in a similar vein, during the hearing, the Claimants

> *attempted to show birth certificates of the Zell grandchildren on a restricted basis to the Tribunal and Egypt's international counsel, without allowing Egypt or its representatives ESLA to view or independently verify them. These documents do not form part of the evidentiary record and thus cannot be relied on; moreover, this cannot remedy the Claimants' procedural and due process violations, which have deprived Egypt of the opportunity to verify, assess and respond to the EGI Claimants' alleged U.S. nationality.*[123]

185. In addition, the Respondent contends that the Claimants have withheld all information concerning the identity or nationality of the next-in-line beneficiaries of the Zell Children Trusts, who are presumably the spouses of Mr. Zell's children.[124]

186. In any event, avers the Respondent,

> *[t]he Claimants have . . . still failed to prove a substantial U.S. interest in the EGI Claimants at the relevant dates for the Tribunal's jurisdiction ratione personae, i.e. between 2008, from when their cause of action allegedly arose, and 2012, when they initiated this arbitration. To do so, they would have had to produce '[n]ationality certificates, passports or equivalent Documents' covering the material period, in*

[120] See Procedural Order No. 4 granting the Respondent's Request No. 42; Tr. Day 9, 28:38-29:12.

[121] C-655.

[122] Respondent's Post-Hearing Brief, para. 34.

[123] Respondent's Post-Hearing Brief, para. 34. See also Tr. Day 1, 28:38-29:12; Tr. Day 9, 270:14-273:1.

[124] C-454-C-456.

> *accordance with Egypt's document request, which they have consistently refused to do.*[125]

187. On the basis of these unsubstantiated and contradictory allegations, the Respondent argues that it cannot be expected to accept the standing of EGI-Fund Investors which brings claims for over US$ 200 million in this arbitration.[126]

188. In respect of EGI-Series, the Respondent submits the following:

(i) The Claimants assert that EGI-Series meets the treaty's national requirements because EGI-Fund Investors has held a 91.67% interest in that company since August 2008.[127] The Claimants' failure to demonstrate that EGI-Fund Investors meets the Treaty's nationality requirements therefore applies *mutatis mutandis* to EGI-Series says the Respondent.[128]

(ii) In any event, the selective and incomplete disclosure of evidence concerning the corporate structure of EGI-Series does not confirm the portion of that company alleged to be owned by EGI-Fund Investors asserts the Respondent. The Certificate of Formation of EGI-Series indicates that it is a "series limited liability company". The Claimants allege in their Reply that "EGI-Series Investment is composed of two series", the "EGI-EMG Series" and the "EGI-SSE I Series"[129]. The evidence produced to support this contention is a "Supplement to EGI-Series Investments, L.L.C." dated 29 February 2009, pursuant to which the "EGI-SEE I Series" was created[130]. The Respondent argues that this document is dated and that the Claimants have provided no evidence as to whether or not any further "series" of EGI-Series were established before 2012. In the event that EGI-Series is also composed of other "series", this could result in a dilution of EGI-Fund Investors'

[125] Respondent's Post-Hearing Brief, para. 35.

[126] Rejoinder, para. 164.

[127] Memorial, para. 86. In support of the ownership of EGI-Series Investments by EGI- Fund Investors, the Claimants have produced a Certificate of Secretary of EGI-Series Investments LLC, C-42, and a "Contribution Agreement" dated 15 August 2008, C-149.

[128] Counter-Memorial, para. 169 (i).

[129] Reply, para. 214.

[130] C-379.

ownership of that company's capital and, consequently, any substantial interest in EGI-Series Investments by US nationals says the Respondent.[131]

(iii) The Respondent contends that the Claimants have produced no evidence explaining the nature of EGI-Fund Investor's ownership interest in EGI-Series. According to a "Contribution Agreement" signed between those parties on 18 August 2008,[132] EGI-Fund Investors was allocated a 100% "Series Percentage Interest" of the EGI-EMG Series of the LLC, as defined in a separate contract, a "Series Limited Liability Company Agreement" dated 14 March 2008, which the Claimants have chosen not to disclose. EGI-Fund Investors' ownership of the "EGI-EMG Series" of EGI-Series cannot be assumed to result in the same proportion of ownership of the company's entire capital says the Respondent.[133]

2. Claimants' Position

189. The Claimants assert that the Tribunal has *ratione personae* competence over EGI-Fund Investors and EGI-Series since US nationals hold a substantial interest in both entities.

190. In respect of EGI-Fund Investors, the Claimants argue that they have provided a Certificate of Managing Member of EGI-Fund Investors which (i) states that, since 17 April 2007, 92% of the membership interest in the company has been indirectly held by trusts established for the benefit of Samuel Zell, his three children and his minor grandchildren; and (ii) includes copies of the US passports of Samuel Zell and his three children.[134] According to the Claimants, this is sufficient to establish that US nationals have a substantial interest in EGI-Fund Investors.

191. The Claimants explain that the trust structure through which the Zell family members hold their interests in EGI-Fund Investors is complex. However, if the Tribunal considers that evidence beyond the Certificate of Managing Member is necessary to establish the "substantial interest" held by the Zell family, only one part of that

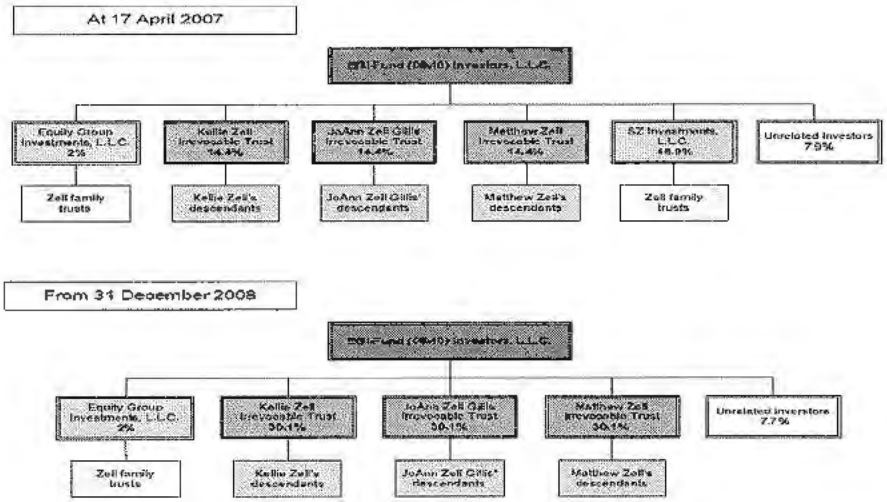
[131] Rejoinder, para. 168.

[132] C-149.

[133] Counter-Memorial, para. 169 (iii).

[134] C-226. For evidence of the Managing Member's appointment and its powers, see C-451 and C-452.

structure need be examined aver the Claimants. That part is three Irrevocable Trusts (the JoAnn Zell Irrevocable Trust, the Kellie Zell Irrevocable Trust, and the Matthew Zell Irrevocable Trust) that hold interests in EGI-Fund Investors. The Claimants submit that those trusts made original capital commitments to EGI-Fund Investors totalling US$432 million[135]– a "substantial" interest – corresponding to 43.2% of the capital of EGI-Fund Investors.[136] On 31 December 2008, the membership interest of the Irrevocable Trusts in EGI-Fund Investors increased to more than 90%.[137] The entire beneficial interest in those trusts is held by the grandchildren of Mr. Zell, a US citizen.[138] The structure is illustrated in the following diagram.[139]



192. The Claimants concede that one correction needs to be made to the Certificate of Managing member of EGI-Fund Investors. The 92% interest held by the Zell family in EGI-Fund Investors is not only held by Mr. Zell, his three children, and his grandchildren, but also by the spouses of two of Mr. Zell's children[140], who are also US nationals. But neither Mr. Zell's children, nor their spouses, hold an interest in the Irrevocable Trusts, which represent 90.3% of the interest in EGI-Fund Investors.[141]. All

[135] C-231 – C-233.

[136] C-452.

[137] C-453.

[138] C-454 – C-457.

[139] Reply, para. 210.

[140] C-458.

[141] Reply, para. 212.

of that interest is held by Mr. Zell's grandchildren. The Claimants have already provided passports showing that Mr. Zell and his three children are US citizens and were born in the US.[142] According to the Claimants, it follows from the US citizenship of Mr. Zell's children that his grandchildren are US citizens.[143]

193. In response to the Respondent's allegation that the Claimants have not met their burden of proof in relation to the nationality of Mr. Zell's grandchildren, the Claimants assert the following:[144]

(i) At the hearing, the Tribunal accepted the Claimants' proposal that a copy of the birth certificates of Mr. Zell's grandchildren be kept available and under seal with the ICSID Secretariat;[145]

(ii) Mr. Zell's grandchildren were born in Illinois, Colorado and California;[146]

(iii) There is only one reason why a person born in the US, to known parents, would fail to acquire US nationality at birth. That is if the person was not "subject to the jurisdiction" of the United States at that time.[147] The only basis for that would be if he or she was born to a foreign diplomatic officer.[148] There is no ground to think that any of the parents of the grandchildren was a foreign diplomatic officer. The US passports of Mr. Zell's three children are on the record[149] and their spouses were all born in the United States.[150]

(iv) If Egypt had a genuine objection to the evidence presented by the Claimants, it could have explored it in cross-examination of Mr. Zell. Egypt did not ask him a single question regarding his children or his grandchildren.

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[142] C-226.

[143] CLA-131.

[144] Claimants' Post-Hearing Brief, para. 15.

[145] Tr. Day 9, 276:10-20. See also Tr. Day 5, 208:20-209:5.

[146] Tr. Day 3, 2:1-4.

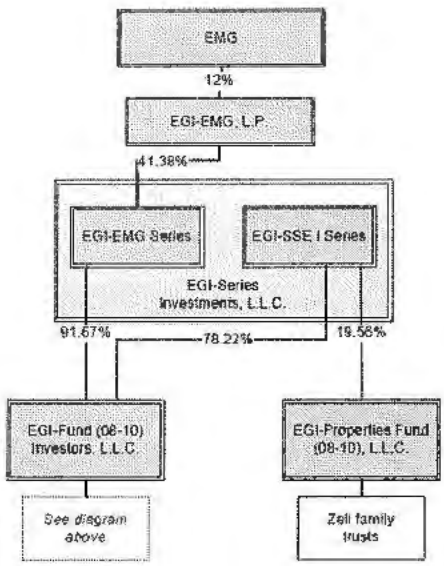
[147] See CLA-131. United States Code, 8 USC section 1401, para. (a).

[148] See C-655. United States Code of Federal Regulations, 8 CFR section 101.3 para. (b).

[149] C-226, pp 4-6.

[150] They were born in California, Minnesota, Texas, and Illinois, as shown in the copies of the birth certificates of the grandchildren of Mr. Zell held under seal with the ICSID Secretary.

194. In respect of EGI-Series, the Claimants assert that a series limited liability company under Delaware law may be composed of multiple series, each of which assumes its own rights and obligations, which cannot be enforced by or against any other series of the company or against the company as a whole.[151] EGI-Series is composed of two series, the EGI-EMG Series (the series which holds an indirect interest in EMG) and the EGI-SSE I Series[152]:



195. The Claimants submit that EGI-Fund Investors hold a 91.67% interest in the EGI-EMG Series of EGI-Series Investments.[153] EGI-Fund Investors holds a 78.22% direct interest in the EGI-SSE I Series, and trusts established for the benefit of the Zell family hold more than 90% of the interest in the Series as a whole.[154] Thus, even if the EGI-SSE I Series is taken into consideration, there is no diluting of the indirect interest held by members of the Zell family.[155]

[151] Reply, para. 213.

[152] Reply, para. 214. See Contribution Agreement, C-149.

[153] C-42.

[154] C-523 and C-379. See diagram above.

[155] Reply, para. 214.

3. Tribunal's Analysis

196. With respect to this objection to the Tribunal's jurisdiction, the Respondent essentially alleges that the Claimants have failed to discharge their burden of proving that US nationals had a "substantial interest" in EGI-Fund Investors and EGI-Series.

a) EGI-Fund Investors

197. While the Claimants only filed the pertinent evidence with their Reply, the record now reveals that there are three Irrevocable Trusts that hold more than a 90% interest in EGI-Fund Investors. The entire beneficial interest in those trusts is held by the minor grandchildren of Mr. Samuel Zell.

198. The Tribunal notes that Mr. Zell and his three children are US nationals. The only outstanding question which the Tribunal has to answer is whether the beneficiaries of these three Irrevocable Trusts, to wit Mr. Zell's grandchildren, are US nationals. If the Tribunal finds that they are US nationals, it will necessarily follow that US nationals have a "substantial interest" in EGI-Fund Investors since they hold a 90.3% interest in this Claimant.

199. For personal security reasons invoked by Mr. Zell, the Claimants' counsel have only allowed members of the Tribunal and the Respondent's international counsel to sight the Zell grandchildren's birth certificates which are kept under seal by the ICSID Secretariat.

200. As the Respondent objects to this belated *in camera* production of the Zell grandchildren's birth certificates, the Tribunal has decided that it will not decide the Respondent's objection to its jurisdiction on the basis of these birth certificates.

201. Having reviewed and considered the other evidence adduced by the Claimants on the issue of the US nationality of the Zell grandchildren, the Tribunal finds that the beneficiaries of the Irrevocable Trusts, the Zell grandchildren, are US nationals.

202. Firstly, according to the representation of counsel for the Claimants as instructed by their client Mr. Zell, all his grandchildren were born in the United States.

203. Secondly, their grandfather, Samuel Zell, and their parents are US nationals.[156]

204. Thirdly, the uncontradicted evidence of the Claimants is that, in such circumstances, there is only one situation in which a person born in the United States would not acquire US nationality at birth and this situation does not apply in the present case.[157]

205. Thus, the Tribunal concludes that US nationals have a "substantial interest" in Claimant EGI-Fund Investors and this objection to jurisdiction of the Respondent is dismissed.

b) EGI-Series

206. EGI-Fund Investors own a 91.67% interest in the EGI-EMG Series of EGI-Series.

207. Since the Tribunal has declared itself satisfied that US nationals have a substantial interest in EGI-Fund Investors, it follows that it is equally satisfied that US nationals have a substantial interest in EGI-Series and the Tribunal so finds.

208. This objection of Respondent to the Tribunal's jurisdiction is accordingly dismissed.

C. RATIONE PERSONAE COMPETENCE OVER MR. DAVID FISCHER

1. Respondent's Position

209. The Respondent contends that Mr. Fischer has not proved his alleged US$ 15 million investment through Prudence Energy Ltd, a vehicle through which (as well as through several other intermediary companies and trusts) he claims to hold a 1.24% indirect interest in EMG.[158] The only further investment Mr. Fischer made was a minimal US$ 20,000 equity interest in a holding company, DF Holdings Investment Ltd.[159]

210. The Respondent submits that, in cross-examination during the evidentiary hearing, the Claimants' quantum expert, Mr. Nicholson of FTI:

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[156] See a copy of the passports of Samuel Zell and his children at C-226.

[157] If he or she was born to a foreign diplomatic officer. See C-655. United States Code of Federal Regulations, 8 CFR section 101.3 para. (b).

[158] Respondent's Post-Hearing Brief, para. 32.

[159] See C-41 (c) and (b).

(i) admitted that he had not "seen the terms of any loans" from Mr. Fischer to Prudence Energy Ltd., nor any other reliable evidence of that loan despite claiming that Mr. Fischer's investment took the form of a loan;[160] and

(ii) Confirmed that there is no evidence that Mr. Fischer still owned the alleged loan to Prudence Energy Ltd when he initiated this arbitration.[161]

211. Accordingly, the Respondent submits that the Tribunal does not have *ratione personae* competence over Mr. David Fischer.

2. Claimants' Position

212. The Claimants argue that Mr. David Fischer's investment has been proved :

> *Exhibit C-41[b] is a Declaration of Trust issued by Line Holdings Limited (Gibraltar) in favor of DF Holdings Investments Limited. The property held in trust by Line Holdings Limited for the absolute benefit of DF Holdings Investments Limited is 15,000 shares (75%) in Prudence Energy Limited.*
>
> *Exhibit C-41[d] is a Declaration of Trust issued by the same Line Holdings Limited, in favor of Mr. David Fischer. The property held in trust by Line Holdings Limited for the absolute benefit of Mr. Fischer is 20,000 shares (100%) in DF Holdings Investments Limited.*
>
> *By these two trusts Mr. Fischer is the beneficial owner of 75% of Prudence Energy Ltd. Prudence Energy Ltd in turn owns 13.79% of EGI-EMG LP, the corporate vehicle created by the EGI group of investors to make their investment in EMG.....*
>
> *[...]*
>
> *The Declarations of Trust in question recite that they were executed "on the 2nd May 2012." Exhibit C-41[b] recites that although signed in 2012 it has "effect from the 26th June 2007," and Exhibit C-41[d] recites that it has "effect from the 25th June 2007." Egypt says in its Submission that this amounts to a claim of "retroactive effect" and adds that: "such allegations, however, is [sic] ineffective to overcome Mr. Fischer's evident lack of standing in this arbitration."*

[160] Tr. Day 8 145:17-21, 135:16-17; 134:4-140:20.

[161] Tr. Day 8, 136:2-6.

> *The evidence that the Claimants have filed is sufficient proof of Mr. Fischer's uninterrupted beneficial ownership of Prudence Energy Ltd from 26 June 2007 until 2 May 2012. The Declarations signed in May 2012 attest that the interests have been held since June 2007.*
>
> *There were also equivalent Declarations of Trust issued by the same trustee to each of the same beneficiaries concerning the same trust property on 26 and 25 June 2007 respectively. These two Declarations signed in 2007 are provided . . . as Exhibits C-317 and C-318. When these were replaced on 2 May 2012 by the two new Declarations of Trust filed with the Request for Arbitration, they had to be cancelled; this is evidenced by the copies of the cancelled 2007 Declarations provided . . . as Exhibits C-319 and C-320.*
>
> *As demonstrated by Exhibits C-41[e], C-41[f] and C-41[g] . . . . the company created as Barolo Enterprises Limited ultimately changed its name to DF Holdings Investments Limited. This explains the difference in the name of the beneficiary entity listed in the Declaration of Trust of June 2007 (Exhibit C-317) (Barolo Enterprises Limited) and that listed in the Declaration dated 2 May 2012 (Exhibit C-41[b]) (DF Holdings Investments Limited). This change in name had no effect on the legal personality of the entity now named DF Holdings Investments Limited.*
>
> *There cannot be any reasonable dispute about Mr. Fischer's ownership of the investment at all relevant times....*[162]

213. The Claimants argue that whether the funds that Mr. Fischer provided to Prudence Energy Ltd for investment in EMG were structured as a loan has no bearing on whether Mr. Fischer holds an equity interest in Prudence Energy, and therefore, in EMG. That equity interest constitutes an investment, and its diminution in value is the measure of his loss.[163]

214. Accordingly, the Claimants submit that the Tribunal has *ratione personae* competence over Mr. David Fischer.

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[162] Claimants' Response to the Respondent's Request for Bifurcation, paras. 13-20.

[163] Claimants' Post-Hearing Brief, para. 17.

3. Tribunal's Analysis

215. In contrast to the Tribunal's earlier conclusion vis-à-vis the objections of the Respondent to its jurisdiction over EGI-Fund Investors and EGI-Series, in the case of the Respondent's objection to the Tribunal's jurisdiction over Mr. David Fischer the Tribunal is not satisfied that the Claimants have discharged their burden of proof.

216. It is trite to say that the party who makes an assertion has the burden of proving it. Accordingly, the burden of proof to establish the Tribunal's jurisdiction over, in this instance, the Claimant David Fischer rests upon David Fischer. The proposition that he who asserts must prove is applicable in investment treaty arbitration.[164]

217. At the jurisdictional stage of this case, Mr. Fischer has the burden of proving that he beneficially owns 75% of Prudence Energy Ltd which in turn owns 13.79% of EGI-EMG L.P., the corporate vehicle through which all Claimants other than Ampal hold their interests in EMG.

218. The Tribunal has heard the evidence of Mr. Fischer and has considered the submissions of Claimants which, they aver, demonstrate "Mr. Fischer's ownership of [his] investment at all relevant times".[165]

219. The Tribunal now turns to determine whether Mr. Fischer has satisfied his jurisdictional burden. On this point, it is important to keep in mind that the burden of proof is not necessarily satisfied by simply producing evidence. As Professor Bin Cheng has neatly stated: "a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency of proof."[166]

220. The definition of an investment under Article 1(1) of the Germany/Egypt Treaty requires that "[the] asset [be] established or acquired by an investor of one Contracting State in the territory of the other Contracting State...". The Claimant, a German national, is attempting to prove beneficial ownership over what he asserts is an

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[164] See *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 83.

[165] See *supra* at para. 212 and Claimants' Response to the Respondent's Request for Bifurcation, paras. 13-20.

[166] Bin Cheng, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (, 1953, p. 329, CLA-153

investment covered by the Treaty through his alleged beneficial ownership of Prudence Energy Ltd.

221. It is not an unusual feature of international corporate business that companies and individuals make their investments through a number of offshore vehicles, often with the view to avoid fiscal liabilities in the home territory of the ultimate owner. Frequently, this involves transferring the title to shares to third parties who may hold them on such terms as may be agreed.

222. In this case, Mr. Fischer admitted that the structure of his investment was deliberately disguised to protect him from tax exposure in Germany and to ensure that he could not be identified as the investor in the event that his investment was successful.

223. The only evidence submitted in respect of Mr. Fischer's beneficial ownership is a one line statement in one of the exhibits (C-318) that the shares in DF Holdings Investments Limited are beneficially owned by Mr. Fischer. No trust deed evidencing the double blind trust has been submitted to the Tribunal. This appears to be consistent with an intention to ensure that Mr. Fischer could not be identified as the investor, should his investment be successful.

224. In these circumstances, the Tribunal has no clear evidence before it relating to the terms of such trust or beneficial ownership.

225. In addition, the Tribunal notes that many of the documents produced by the Claimants in support of Mr. Fischer's alleged investment are executed on 2 May 2012 but, conveniently, they are said to take effect retroactively on 25 June 2007, five years earlier.

226. In view of the many missing evidentiary links, the Tribunal concludes that Mr. Fischer has not discharged his burden of proving that he made an investment that is protected under the German/Egypt BIT. Accordingly, Mr. Fischer is not a protected investor.

227. The Tribunal finds that it has no jurisdiction over Claimant, David Fischer, and this objection of Respondent is therefore sustained.

D. RATIONE MATERIAE COMPETENCE OVER THE CLAIMANTS' GAS SUPPLY CLAIMS

228. In view of the Tribunal's decision to uphold the Respondent's objection *ratione personae* over Mr. David Fischer, the Tribunal needs not summarize the parties' arguments specific to the Germany Treaty.

1. Respondent's Position

229. The Respondent reminds the Tribunal that out of the US$ 882.6 million which the Claimants claim in total,[167] approximately US$ 700 million concern alleged damages which the Claimants suffered due to EGPC and EGAS's alleged failure to supply EMG with gas under the GSPA (the "**Gas Supply Dispute**").[168]

230. The Respondent argues that the Gas Supply Dispute is purely contractual in nature, and thus falls outside the scope of the arbitration clauses in Article VII of the US Treaty, with the result that this Tribunal has no jurisdiction over these claims. In any event, because a necessary element of the Claimants' claims pertaining to the Gas Supply Dispute is a breach of the GSPA, the Respondent avers that the essential basis of the claims is contractual in nature and, as such, falls outside this Tribunal's jurisdiction.[169]

231. However, the Respondent acknowledges that, if the Tribunal agrees that the Gas Supply Dispute is contractual in nature, it would still need to decide the Claimants' tax claims, subject to the Respondent's separate objection in that respect.[170]

232. In support of its argument, the Respondent submits that all of the Claimants' claims concerning the Gas Supply Dispute are claims for alleged breaches of the GSPA. Those claims include[171]:

(i) The claim concerning renegotiations in the midst of non-deliveries – the Respondent argues that the framework governing EGPC and EGAS's obligation to

[167] See FTI Letter, Appendix 4 (revised).

[168] Counter-Memorial, para. 172. Respondent's Opening Slide 221.

[169] Counter-Memorial, para. 173.

[170] Respondent's Opening Slide 219.

[171] They exclude the claim concerning the revocation of EGM's tax-free status which is discussed in the following section of the present Decision.

deliver gas to EMG is set out at Articles 2.1, 6, 7 and 16 of Annex 1 to the GSPA;[172]

(ii) The claim that gas was withheld to compel renegotiation – the Respondent argues that this claim is the same as the previous one;[173]

(iii) The claim concerning the First Amendment to the GSPA - the Respondent argues that any claims concerning the First Amendment, or the performance of the GSPA as amended, are entirely contractual in nature;[174]

(iv) The claim concerning the failure to secure continuous gas supply - the Respondent argues that this is simply a different label for the Claimants' claim that EGPC and EGAS allegedly failed to perform the GSPA;[175]

(v) The claim concerning severe supply shortfalls and failure to protect the pipeline - the Respondent argues that these contentions are exclusively determined by the GSPA: no other instrument makes provisions for On-Sale Notices (Article 6 of Annex 1 to the GSPA), for *force majeure* (Section 16.3 of Annex 1 to the GSPA), for contractual termination rights (Section 2.5.2 of the GSPA) or for the circumstances under which EMG may have been legally entitled to receive gas (Articles 2.1, 6, 7 and 16 of Annex 1 to the GSPA);[176] and

(vi) The claim concerning the repudiation of gas supply obligations - the Respondent argues that EGPC and EGAS's contractual termination rights are set forth at Section 2.5 of Annex 1 to the GSPA.[177]

233. In view of the fact that the Gas Supply Dispute is purely contractual in nature, the Respondent submits that it thus falls outside the scope of the arbitration clauses in the Treaties. According to the Respondent, this is evidenced by the Claimants' elaborate submissions on the GSPA's construction under English law.

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[172] Counter-Memorial, paras. 179-186.

[173] Counter-Memorial, paras. 188-191.

[174] Counter-Memorial, para. 192.

[175] Counter-Memorial, paras. 193-196.

[176] Counter-Memorial, paras. 197-201.

[177] Counter-Memorial, paras. 202-203.

234. In respect of the US Treaty, Article VII applies to the resolution of disputes "*involving (i) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; or (ii) an alleged breach of any right conferred or created by this Treaty with respect to an investment*".

235. The Respondent argues that none of the claims which the Claimants raise in the Gas Supply Dispute concern a right "conferred or created by this Treaty" because those claims are all contractual in nature as shown above and arise from the GSPA, an independent legal instrument to which neither the Claimants nor the Respondent are party.[178]

236. In any event, the Respondent avers that an arbitral tribunal constituted pursuant to a Treaty lacks jurisdiction over purely contractual claims. In support of its argument the Respondent cites the following ICSID decisions:

(i) *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* ("*Hamester v. Ghana*") –

> *As noted earlier in this Award, almost all of the allegations which make up Hamester's claim of breach of the BIT, whether relating to allegations of arbitrary or discriminatory treatment; unfair and inequitable treatment; or expropriation, concern the conduct of Cocobod, in relation to Article 7 of the JVA. This conduct was contractual and not sovereign in nature. It is the Tribunal's view that Hamester's so-called 'treaty claims,' however skilfully repackaged, are inextricably linked to the JVA and are in reality contract claims. To use the language of the award in the Vivendi Annulment case, 'the essential basis' of Hamester's claims is purely contractual.*[179]

(ii) *Malicorp Limited v. The Arab Republic of Egypt* ("*Malicorp v. Egypt*")[180] – the Respondent recalls that the Claimants seek to distinguish this case on the basis that the claimant in that case was a party to the contract and, in contrast, the Claimants are not parties to the GSPA. The Respondent argues that whether the Claimants are parties to the GSPA or not is irrelevant to the issue of whether, by resolving the

[178] Counter-Memorial, para. 21.

[179] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, RLA-9, para. 329. Respondent's Opening Slide 201. See also slides 202-204.

[180] *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, RLA-10.

contractual dispute concerning the performance and termination of the GSPA, one also resolves the Gas Supply Dispute and vice versa. On that issue, the tribunal in *Malicorp* was clear: a breach of contract may only amount to a violation of the treaty when the breach "*could not be resolved by using the ordinary procedure*"[181]. Because the Gas Supply Dispute before this Tribunal falls under the exclusive jurisdiction of the CRCICA tribunal says the Respondent, it "*enables all submissions and arguments to be exhausted*", with the conclusion that this ICSID Tribunal cannot have jurisdiction over the same dispute.[182]

(i) *Iberdrola Energía S.A. v. Republic of Guatemala* ("*Iberdrola v. Guatemala*")[183]– the Respondent recalls that the Claimants seek to distinguish that award by asserting that the tribunal concluded that it had no jurisdiction because the claimant based its treaty claims on breaches of Guatemalan law, not breach of contract. The Respondent argues that this distinction is irrelevant: "*the point remains that if the legal source of the obligation is not the treaty itself, a tribunal constituted pursuant to that treaty does not enjoy jurisdiction over a dispute concerning the obligation's breach*".[184]

(ii) *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* ("*Azinian v. Mexico*")[185]– the Respondent recalls that the tribunal in *Azinian* rejected the claimants' claim for expropriation, finding that it was a disguised attempt to claim for wrongful termination of the concession contract which was pending before the courts of the host State. The Respondent argues that this decision applies *mutatis mutandis* to the present case as the Claimants' claims are based on allegations of breach of contract and the dispute concerning the termination of the GSPA is pending before the appropriate forum under the GSPA, namely the CRCICA Tribunal.[186]

237. The Respondent further argues that the Tribunal lacks jurisdiction because the Gas Supply Dispute falls exclusively within the jurisdiction of the CRCICA Tribunal, a

[181] *Malicorp v. Egypt*, RLA-10, para. 103(c).

[182] Counter-Memorial, paras. 222-226.

[183] *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012 (Unofficial English Translation), RLA-12.

[184] Counter-Memorial, para. 228.

[185] *Azinian v. Mexico* , ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, RLA-1.

[186] Counter-Memorial, paras. 229-231.

tribunal constituted pursuant to the GSPA, and which has upheld its jurisdiction[187]. The Respondent submits that the CRCICA Tribunal is considering, *inter alia*, the same issues which the Claimants seek to disguise as violations of the Treaties in these proceedings[188]. The Respondent avers that both the commercial and investment *fora* could not have jurisdiction over the same claims.[189]

238. Finally, the Respondent submits that should the Tribunal decide that it has jurisdiction over the Gas Supply Dispute, it should not exercise its jurisdiction since all of the Claimants' claims concerning the Gas Supply Dispute would be inadmissible as they require a prior finding that the GSPA itself has been breached.[190]

239. In this respect, the Respondent submits that should the Tribunal decide that it has jurisdiction to determine the Claimants' claims concerning the Gas Supply Dispute, the Tribunal would only be able to exercise its jurisdiction once a determination by the CRCICA Tribunal has been made that EGPC and EGAS breached the GSPA by failing to perform or by terminating the GSPA unlawfully.[191]

240. The Respondent contends that, for this Tribunal to hold the Respondent liable, it must be satisfied, as a matter of law, that EGPC and EGAS were under an obligation to supply gas at all material times under the circumstances or that EGPC and EGAS were

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[187] CRCICA Partial Award, R-813.

[188] Namely :

(i) EGPC and EGAS's exercise of their right to terminate the GSPA due to EMG's continued failure to pay for gas delivered to it;

(ii) EGPC and EGAS's consistent delivery of gas to EMG and EMG's persistent failure to pay for the gas it received;

(iii) EGPC and EGAS's entitlement to reduce or stop the delivery of gas when under force majeure due to terrorist attacks to the pipeline; and

(iv) EMG's failure to provide On-Sale Notices as required by the GSPA before being entitled to receive further gas by EGPC and EGAS.

See EGPC and EGAS's Notice for Arbitration in CRCICA Case No. 829/2012 dated 30 Aprils 2012, Exhibit R-414.

[189] Counter-Memorial, paras. 235-236.

[190] Counter-Memorial, para. 174.

[191] Counter-Memorial, paras. 286 and 287.

not legally justified in informing EMG that should it persist to pay for gas it received and sold onwards, they would terminate the GSPA.[192]

241. The Respondent argues that this prior determination does not fall to be made by this Tribunal but rather by the CRCICA Tribunal, the appropriate forum under the GSPA. Therefore, the Respondent avers that

> *until the dispute concerning the performance and the determination of the GSPA is resolves by the appropriate forum, the Claimants' claims in this arbitration are inadmissible due to them being premature. At the very least, the Tribunal cannot exercise its jurisdiction over such claims because to do so could lead to conflicting decisions by the investment and commercial arbitral tribunals over what is essentially the same dispute and, even if it does not lead to conflicting decisions, may pave the way for the Claimants and EMG to recover twice for what is the same wrong and, correspondingly, the same loss.*[193]

2. Claimants' Position

242. The Claimants submit that the Tribunal has *ratione materiae* competence over the Claimants' claims. They assert that all of their claims in this arbitration are based on the contention that Egypt has breached the Treaties and international law. There can be no doubt that the Tribunal has subject-matter jurisdiction over claims that Egypt has breached the Treaties aver the Claimants.[194]

243. The Claimants argue that Egypt's objection depends entirely on the accusation that the Claimants have submitted contract claims disguised as treaty claims, which is untrue. The Claimants are not and do not pretend to be party to the Source GSPA or any other contractual instrument to which EMG is a party, but since shares in EMG are a protected investment held by the Claimants, breach of EMG's contractual rights by Egypt is a fact relevant to whether Egypt has breached its treaty obligations.[195] As the annulment committee in *Vivendi v. Argentina* observed when annulling the tribunal's award for refusing to interpret an underlying contract when assessing whether

[192] Counter-Memorial, para. 289.

[193] Counter-Memorial, paras. 294-295.

[194] Reply, para. 220.

[195] Reply, para. 221 and 226.

Argentina had breached its treaty obligations, "*[i]t is one thing to exercise contractual jurisdiction . . . and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law.*"[196]

244. In response to (i) the Respondent's argument that tribunals established under investment treaties do not have jurisdiction over claims that, at their essence, are contractual in nature, and (ii) the cases which the Respondent cites in support of its argument, the Claimants submit the following:

(i) *Malicorp v. Egypt*[197]– the Claimants argue that this decision does not support Egypt's jurisdictional objection since the tribunal in that case took jurisdiction over the dispute and proceeded to decide whether Egypt had breached the applicable investment treaty.[198]

(ii) *Iberdrola v. Guatemala*[199]– the Claimants argue that unlike the claimant in *Iberdrola*, the Claimants' case does not depend on breach of contractual obligations. Rather, even if entities under the instruction and control of the Egyptian State complied with all of their contractual obligations, Egypt breached the Treaties by, among other conduct, failing to uphold the sovereign assurances and commitments on which the Claimants relied to invest and failing to protect the Claimants' investment as required by the Treaties.[200]

(iii) *Azinian v. Mexico*[201]– the Claimants argue that this case is not relevant for the same reasons in respect of *Iberdrola* and *Malicorp*, *mutatis mutandis*.[202]

245. The Claimants also submit that the Source GSPA's dispute resolution clause has no bearing on the Tribunal's jurisdiction.

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[196] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* ("*Aguas del Aconquija v. Argentina*"), ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, CLA-85, para. 105. See also *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 15 November 2005, RLA-150, para. 215.

[197] *Malicorp v. Egypt*, RLA-10.

[198] Reply, para. 228.

[199] *Iberdrola v. Guatemala*, RLA-12

[200] Reply, para. 230.

[201] ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, RLA-1.

[202] Reply, para. 231.

246. In this respect, the Claimants argue that a contractual forum-selection clause cannot bind non-signatories such as the Claimants.[203] This is supported by the decision in *EDF v. Argentina.*[204]

247. The Claimants aver that a contractual forum-selection clause cannot deprive the Tribunal of jurisdiction over claims that Egypt has breached the Treaties. As the tribunal in *Total v. Argentina* observed, the distinction between treaty and contract claims "would not prevent the Tribunal when dealing with the merits, from examining *incidenter tantum* whether there have been [contractual] breaches," should this be relevant to ascertain whether the State in question has committed the treaty breaches that the claimant alleged.[205] In any event, the commitments that Egypt contravened, although reflected in part in the Source GSPA, were enshrined elsewhere though unilateral statements of government officials, government acts and the Treaties.[206]

248. Finally, the Claimants submit that their treaty claims do no depend on any other tribunal's decision: as many cases have confirmed, the legality of an act under the relevant contract is not dispositive of that act's legality under international law.[207] The Claimants submit that

> *[t]he only claim that relies on whether the Source GSPA has been breached is the part of the Claimants' umbrella clause claim specifically relying on the Source GSPA as an obligation binding on Egypt. For that claim, as in all others made by the Claimants to which any contract may be relevant, whether the*

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[203] Reply, para. 234.

[204] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, CLA-123, para. 930. Argentina objected to the Tribunal's jurisdiction on the basis that the contract underlying the investment contained a forum-selection clause that precluded jurisdiction over the Claimants' treaty claims, including their claims for violation of Argentina's umbrella clause obligations. The Tribunal rejected Argentina's objection, citing among other reasons that the "Claimants were not party to" the agreement containing the forum-selection clause.

[205] *Total S.A. v. Argentine Republic* ("*Total S.A. v. Argentina*"), ICSID Case No. ARB/04/1, Decision on Objections to Jurisdiction, 25 August 2006, CLA-125, para. 85 (footnote 50). See also Stephen M. Schwebel, "On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law", *Justice in International Law: Selected Writings of Judge Stephen M. Schwebel*, Cambridge University Press, 1994, p.425, CLA-151.

[206] Reply, para. 238.

[207] Reply, para. 320. See for example, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. Arb/03/3, Decision on Jurisdiction, 22 April 2005, CLA-122, para. 26. See also *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, CLA-80, para. 450.

contract has been breached under its governing English law is a question of fact for this Tribunal, which it has jurisdiction to decide as a fact. The question of international law is whether such a fact would then give rise to a breach of the umbrella clause.[208]

3. Tribunal's Analysis

249. Essentially, as was seen above, the Respondent submits that the Tribunal lacks jurisdiction because the Gas Supply Dispute falls exclusively within the jurisdiction of the CRCICA Tribunal which has upheld its jurisdiction.

250. The CRCICA Tribunal, avers the Respondent, is considering the same issues "which the Claimants seek to disguise as violations of the Treaties in these proceedings."

251. Since the Gas Supply Dispute "is purely contractual in nature", the Respondent concludes that it falls outside the scope of the arbitration clause in Article VII of the US-Egypt Treaty.

252. In response, as noted above, the Claimants assert that all of their claims in the present arbitration are based on their contention that Egypt has breached the US-Egypt Treaty and international law.

253. Quoting from the Decision on Annulment of the Vivendi Committee, the Claimants say "*[i]t is one thing to exercise contractual jurisdiction ... and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law.*"[209]

254. The Tribunal agrees with the Claimants.

255. The Tribunal notes that the Claimants claim breaches of various standards under the Treaty in relation to the Gas Supply Dispute, including fair and equitable treatment, unlawful expropriation and breach of the umbrella clause. As to the first two standards, the Tribunal accepts that, in order for it to find that there has been a breach of those standards in relation to the Gas Supply Dispute, it will need to determine as an incidental question whether the Source GSPA was validly terminated. However, this

[208] Reply, para. 318.

[209] *Aguas del Aconquija v. Argentina*, Decision on Annulment, 3 July 2002, CLA-85, para. 105.

does not change the fact that the key issue under the Treaty in respect of a claim for unlawful expropriation or breach of the fair and equitable treatment is whether there has been a loss of property right constituted by the contract or whether legitimate expectations arose under the contract.

256. As to the umbrella clause, the Tribunal notes that there is no umbrella clause in the US Treaty and that it is invoked by the Claimants as having been introduced on the basis of the MFN clause in the Treaty. For purposes of its present decision on jurisdiction, the Tribunal need not determine today whether it has jurisdiction over such a clause. In due course, the question may become otiose.

257. Accordingly, the Respondent's objection to the jurisdiction of the Tribunal over the Claimants' Gas Supply claims based on the alleged breach of the standards of fair and equitable treatment and unlawful expropriation is dismissed. The Tribunal remains seized of the Respondent's objection to the jurisdiction of the Tribunal over the Claimants' Gas Supply claims based on the alleged breach of the umbrella clause.

E. RATIONE MATERIAE COMPETENCE OVER THE TAX CLAIMS

258. In view of the Tribunal's decision to uphold the Respondent's objection *ratione personae* over Mr. David Fischer, the Tribunal need not summarize the parties' arguments specific to the Germany Treaty.

1. Respondent's Position

259. The Respondent recalls that the Claimants claim compensation in the amount of US$ 180.7 million for purported losses resulting from a taxation measure enacted by Egypt in 2008 (the "**Tax Claims**").[210]

260. The Tax Claims can be summarized as follows:

(i) In 1997, the Egyptian Parliament passed the Investment Guarantees and Incentives Law No. 8/1997[211]. The Investment Law contains in its Chapter 3 a sub-statute establishing the so-called free-zones regime (the "**Free Zones Regime**"). In

[210] FTI Letter, 11 August 2014, Appendix 4.

[211] RLA-257.

accordance with the Free Zones Regime, companies benefiting from the free-zone status are treated as "offshore" for taxation and customs purposes, i.e. they are exempt from almost all taxes and customs duties. [212]

(ii) EMG was formed on 19 April 2000 as a Free Zones company and, therefore, was not subject to most taxes or customs.[213]

(iii) Subsequently, in light of the economic conditions prevailing at the time, the Egyptian Parliament adopted Law No. 114/2008 ("**Law No. 114/2008**")[214] which amended the Investment Law by excluding companies such as EMG operating in certain sectors, including petroleum production and transportation, from the Free Zones privileges.[215]

(iv) In their Memorial, the Claimants allege that, by enacting Law No. 114/2008, the Respondent breached the obligation to accord fair and equitable treatment to their alleged investment, and the applicable umbrella clauses, and constituted an unlawful expropriation under the Treaties.[216]

261. The Respondent argues that the Tax Claims were a matter specifically excluded from the scope of standards of protection, and the arbitration agreement, in the US Treaty. As such, avers the Respondent, the Tribunal lacks jurisdiction over the Claimants' Tax claims.[217]

262. In this respect, the Respondent argues the following:

(i) Article XI of the US Treaty provides that:

> *With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investments of nationals or companies of the other Party. Nevertheless, all matters relating to the taxation of nationals or companies of a Party, or their investments in the territories of the other Party*

[212] Counter-Memorial, para. 239.

[213] Counter-Memorial, para. 240.

[214] C-61.

[215] Counter-Memorial, para. 241.

[216] Memorial, paras. 97-99, 215, 242 and 277.

[217] Counter-Memorial, para. 243.

> *or a subdivision thereof shall be excluded from this Treaty, except with regard to measures covered by Article III and the specific provisions of Article V.*[218] (Emphasis added by the Respondent)

(ii) The Respondent contends that that Article XI is clear: it carves out of the Tribunal's jurisdiction "*all matters relating to taxation*", with the exception of measures relating to Article III (Expropriation) and Article V (Transfers) of that Treaty. [219]

(iii) Accordingly, the Respondent argues that the claims of Ampal, EGI-Fund Investors, EGI-Series and BSS-EMG that Egypt's promulgation of Law No. 114/2008 is contrary to its commitments under the US Treaty to accord fair and equitable treatment to investments, and constitutes an unreasonable and discriminatory measure which is contrary to Egypt's obligation entered in regard to investments in its territory, are clearly excluded from the scope of that Treaty and are not subject to the Tribunal's jurisdiction.[220]

(iv) The Respondent however concedes that the only tax claims that could fall within the scope of the US Treaty would be the Claimants' claim concerning "measures covered by Article III", i.e. a measure the effect of which is tantamount to an unlawful expropriation or nationalisation.[221]

2. Claimants' Position

263. The Claimants submit that the Tribunal has jurisdiction over the tax claims under the US Treaty.

264. The Claimants note that the Respondent agrees that Article XI of the Treaty does not carve out measures covered by Article III on expropriation. However, the Claimants argue that the Tribunal does not only have jurisdiction to determine whether Egypt's revocation of EMG's Free-Zone License violated Article III:

> *It also has jurisdiction to determine whether that conduct violated any of the other provisions of the US Treaty. Article XI*

[218] C-7.

[219] Counter-Memorial, para. 250.

[220] Counter-Memorial, para. 250.

[221] Counter-Memorial, para. 251.

> *of the US Treaty provides that 'all matters relating to taxation . . . shall be excluded from this Treaty, except with regard to measures covered by Article III.' To the extent a measure relating to taxation is covered by Article III – that is, constitutes an expropriation – the measure is not excluded from the Treaty. It is included within the scope of the Treaty, and all of the substantive protections in the treaty are applicable to it.*[222]

3. Tribunal's Analysis

265. The Tribunal does not need to consider the Respondent's objection to jurisdiction in respect of the Claimants' tax claims under the Germany-Egypt BIT as the Tribunal has found earlier that it lacked jurisdiction over Claimant David Fischer.

266. Article XI of the US-Egypt BIT is crystal clear. It says what it says that "*all matters relating to the taxation of nationals or companies of a Party, or their investment in the territories of the other Party or a submission thereof shall be excluded from this treaty, except with regard to measures covered by Article III ....*" (Tribunal's emphasis).

267. The Respondent says that this Article is a specific carve-out but recognizes that taxation measures tantamount to an unlawful expropriation are clawed back and are not excluded from the Treaty. The Tribunal agrees and therefore finds that it has jurisdiction over the Claimants' claim that the Respondent's taxation measure was tantamount to an expropriation of the Claimants' investment insofar as deprivation of property or rights might have occurred.

268. Whether or not the scope to the exception to the carve out for measures relating to expropriation encompasses other obligations in the Treaty in virtue of the so-called "Gateway Theory" invoked by the Claimants is not an issue which the Tribunal needs to determine today.

269. The Tribunal need not determine either today whether, when Egypt enacted Law 114 in 2008[223] revoking EMG's free-zone status, it did so in the exercise of its regulatory powers. This is a matter which may arise during the liability phase of this arbitration

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[222] Reply, para. 243. See *Enron v. Argentina*, RLA-142, paras. 65-66, where the tribunal interpreted a provision similar to Article XI of the US Treaty.

[223] C-61.

having regard, in particular, to Decree No. 1020 of 2000 which granted EMG a tax exemption until 2025.

270. Accordingly, the Tribunal dismisses this objection by the Respondent to the jurisdiction of the Tribunal.

F. ALLEGED ILLEGALITY OF THE GSPA

271. In view of the Tribunal's decision to uphold the Respondent's objection *ratione personae* over Mr. David Fischer, the Tribunal need not summarize the parties' arguments specific to the Germany Treaty.

1. Respondent's Position

272. The Claimants describe their alleged "investment" as "the Peace Pipeline project, including the physical pipeline and the business concerned with buying Egyptian natural gas, transporting it through the pipeline to Israel, and on-selling it to Israeli customers."[224]

273. The Respondent submits that the Tribunal cannot assume jurisdiction over the Claimants' purported investment, as it was borne out of and procured in conditions of illegality and corruption, in contravention of Egyptian laws and regulations as well as basic principles of international public policy.

274. The Respondent argues that the requirement of legality is a condition for the jurisdiction of any tribunal constituted on the basis of an investment treaty. The Respondent avers that this was accepted by the Claimants.[225] In support of its argument, the Respondent refers the Tribunal to:

(i) ICSID decisions which confirm the general requirement of international law that investments be procured legally and in good faith; [226] and

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[224] Memorial, para. 179.

[225] See Tr. Day 1, 146:23-147:2. Respondents' Post-Hearing Brief, para. 38.

[226] Counter-Memorial, paras. 74-79. See *Inceysa Vallisoletana S.L. v. Republic of El Salvador* ("*Inceysa Vallisoletana v. El Salvador*"), ICSID Case No. ARB/03/26, Award, 2 August 2006, RLA-6, paras. 247-248; *Phoenix Action Ltd v. Czech Republic* ("*Phoenix Action v. Czech Republic*"), ICSID Case No. ARB/06/5, Award, 15 April 2009, RLA-8, para. 100; *Hamester v. Ghana*, RLA-9, paras. 123-124; *Alasdair Ross*

(ii) the expert legal opinion of Professor Hervé Ascencio concerning the consequences of the Claimants' illegal acts on the protection of their alleged investment under the applicable Treaties. Professor Ascencio remarks that the US Treaty contains a requirement that an investment be made in accordance with the host State's laws and regulations.[227] This requirement is found implicitly at Article II(2).[228] In any event, Professor Ascencio underlines that the absence of any express legality requirement in a treaty does not bar the prohibition, under general international law, against protecting investments obtained illegally.[229]

275. The Respondent alleges that the Claimants' purported investment is illegal since it was procured through connivance between the principal founders of EMG, Hussein Salem and Yosef Maiman, and certain Egyptian Government officials.

276. The Respondent recalls that in October 1999, Mr. Sameh Fahmy left his position as Vice-Chairman of the company MIDOR founded by Messrs. Salem and Maiman, to become Egypt's Minister of Petroleum. The Respondent argues that Messrs. Salem and Maiman used their connection with Mr. Fahmy to have their newly founded company EMG directly selected in April 2000 to purchase gas from EGPC for resale to customers in Israel without any competitive tender process being organised. In this regard, Mr. Salem's long-standing relationship with Mr. Mubarak, then Egypt's President, could only have been of assistance. In other proceedings, Mr. Mohamed Tawila, who signed the GSPA as Chairman of EGAS, testified that the "*friendship*" between Mr. Fahmy and Mr. Salem enabled the selection of EMG, and that "*as soon as Engineer Sameh Fahmy joined [the Ministry of Petroleum], he considered exports and,*

Anderson et al v. Republic of Costa Rica, ICSID Case No. Arb.(AF)/07/3, Award, 19 May 2010, RLA-171, para. 58.

[227] Counter-Memorial, para. 80.

[228] Article II(2) contains a general condition for legality of investments made prior to the Treaty's entry into force: "*This Treaty shall also apply to investments by nationals or companies of either Party, made prior to the entering into force of this Treaty and accepted in accordance with the respective prevailing legislation of either party.*" Professor Ascencio remarks at para. 25 of his opinion that "*such a provision could be interpreted a fortiori: since past investments must comply with the legality requirement, so must subsequent investments.*"

[229] Counter-Memorial, para. 88. Expert Legal Opinion of Hervé Ascensio, 26 September 2013, para. 29.

less than a year thereafter, Hussein Salem was informed that it is him who will export [gas]"[230].

277. According to the Respondent, at the hearing, the Claimants sought to deny Mr. Fahmy's role in the direct selection of EMG for the GSPA in April 2000 arguing that the GSPA was a "sui generis project" approved "at the highest levels" of the Egyptian Government.[231] The Respondent argues that this argument merely reinforces the improper relationships between EMG and key players in the former Egyptian Government.[232]

278. In addition, the Respondent submits that EMG's forgery of the Minutes of the Meeting of EMG dated 2 November 2009[233] clearly shows that the GSPA was procured and concluded through corruption.

279. The Respondent highlights the major differences between the two versions of the minutes as shown in track changes below:

> *Mr. Abdel Hamid Hamdy thanked the Board and stated that without the good relation ~~between the shareholders~~ and the full support ~~of Mr. Hussein Salem who was always supporting us and paving the road in order~~ with the shareholders which led that our negotiation with the Government is fruitful and that he ~~was~~ they were always brainstorming ideas to us which concluded all the amendment we achieved and as well Mr. Abdel Hamid Hamdy thanked Merhav Group for their support during such period and thanked Ms. Ellen Havdala for all her support as well.*
>
> ~~*Mr. Hamdy thanked the Board for their initiative regarding the above mention bonus which is on top to the generous bonus Mr. Hussein Salem gave to EMG team from his personal account which is very much appreciated (Mr. Hamdy pressed that the bonus they receive from Mr. Salem is way above the said bonus and he is announcing such to eliminate any misunderstanding in the future).*~~[234]

[230] Minutes of the questioning of Mohamed Ibrahim Youssef Tawila (R-852). Respondent's Post-Hearing Brief, para. 39.

[231] See Tr. Day 1, 150:2-10, 142:8-16.

[232] Respondent's Post-Hearing Brief, para. 39.

[233] See R-965 (the original minutes) and R-966 (the alleged forged minutes).

[234] Respondent's submission of 2 November 2015, para. 12.

280. According to the Respondent, this forgery was made to conceal the fact that (i) Hussein Salem was directly involved in the operation and management of EMG until at least 2009 and played a key role "supporting [EMG] and paving the road" for EMG to facilitate its negotiation of the First Amendment; and that (ii) Hussein Salem paid "a generous bonus" to EMG's personnel, Messrs Hamdy and Sakka, "from his personal account", following the conclusion of the First Amendment.[235]

281. The Respondent contends that "EMG's alteration of the Minutes to remove all references to Hussein Salem's continuing close involvement in EMG and to the significant bonuses he paid to Mr. Hamdy and Mr. Al Sakka demonstrates EMG's efforts to conceal the web of corruption that surrounds the GSPA."[236]

282. The Respondent avers that the selection of EMG for the purchase of Egyptian gas from EGPC and its exportation, as well as the subsequent conclusion of the GSPA without the organisation of any public tender process was in violation of:

(i) Article 4 of EGPC's Commercial Activity Regulation; [237] and

(ii) Article 115 of the Egyptian Criminal Code.[238]

283. The Respondent submits that, as explained by Professor Ahmed Belal in his expert legal opinion, Mr. Fahmy's involvement in his capacity as Minister of Petroleum in the selection of EMG for the conclusion of the GSPA constituted a crime of "profiteering" under Article 115 of the Egyptian Criminal Code. He opines that Mr. Fahmy obtained for EMG an undue benefit by selecting it for the conclusion of the GSPA (i) despite EMG's complete lack of expertise in the transportation of gas, (ii) at a price that was highly imbalanced compared to EMG's profit from the sale of gas to IEC, its main

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[235] Respondent's submission of 2 November 2015, para. 26.

[236] Respondent's submission of 2 November 2015, para. 27.

[237] See R-11. Article provides that : "*Exportation of crude oil, petroleum products, petrochemicals and natural and liquefied gas cannot be carried out by direct agreement except in case of necessity, at appropriate prices and based on a recommendation by the Deciding Committee and the approval of the Minister of Petroleum and Mineral Resources.*" The Respondent argues that those cumulative conditions were not met in the present case.

[238] See RLA-98. Article 115 provides that : "*Temporary hard labour shall be the punishment inflicted on each public official who obtains or tries to obtain for himself, or for a third party, without due right, a profit or benefit from an act of office.*"

Israeli On-Sale Customer[239], and (iii) without organising a tender process, in order to preclude any more lucrative bids from more experienced competitors.[240]

284. The Respondent also recalls that, at the time of the conclusion of the GSPA, Mr. Ibrahim Tawila[241] was Chairman of EGAS. Mr. Tawila signed the GSPA on 13 June 2005 barely a month before departing EGAS to join EMG[242], where, *inter alia*, he would be paid a salary several times higher than at EGAS[243] and would receive a large bonus.[244]

285. The Respondent contends that Mr. Hamdy's statement at the hearing that EMG offered to engage Mr. Tawila in July 2005, after he signed the GSPA on behalf of EGAS[245], does not withstand scrutiny: Mr. Hamdy admitted that he was not involved in EMG's decision to engage Mr. Tawila[246] and he did not know when or through whom EMG approached Mr. Tawila.[247]

286. In respect of Mr. Tawila's salary, the Respondent contends that the Claimants failed without explanation to produce any evidence of the amounts EMG paid to Mr. Tawila between 2005 and 2008, in violation of the Tribunal's order that they be produced. At the hearing, Mr. Hamdy was unable to confirm how much or by whom Mr. Tawila was paid between 2005 and 2008[248] but speculated that he might have been paid by one of

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[239] The Respondent submits that under the Source GSPA, EGPC and EGAS, whose relevant costs included the exploration, production, development, processing and transport of natural gas to the Delivery Point close to the Egyptian-Israeli border in Al-Arish, were to receive a price ranging between US$ 0.75 and 1.50 per MMBTU (*See* Annex 5 to the GSPA (non-consolidated version), C-99). EMG, by comparison, was to receive US$ 1.25 per MMBTU merely for transporting the gas from Al-Arish to its Israeli customers, that is, simply for acting as an intermediary (*see* IEC On-Sale Agreement (Exhibit 23 to FTI Expert Report), Annex 4, paragraph 1).

[240] Counter-Memorial, paras. 97-98. Expert Legal Opinion of Professor Ahmed Awad Belal ("Belal Expert Legal Opinion"), 26 September 2013, Part 1.

[241] According to the Claimants, Mr. Tawila is now imprisoned in Egypt based on politically-motivated charges related to the EMG project. See footnote 35 of the Claimants' Memorial *in fine*.

[242] See C-10 and R-403.

[243] Counter-Memorial, para. 99. Mr. Tawila received at EGM a monthly salary amounting to US$ 20,830, an amount that is undoubtedly much higher than that which an EGAS official would receive. See R-896.

[244] Rejoinder, para. 33. See R-403.

[245] See Tr. Day 5, 4:11-5:8.

[246] See Tr. Day 5, 32:6-23.

[247] See Tr. Day 5, 34:14-20. See Respondent's Post-Hearing Brief, para. 40.

[248] See Tr. Day 5, 39:20-40:3; 52:2-5.

EMG's shareholders to an account outside of Egypt and in foreign currency.[249] The Respondent argues that EMG's financial statement however make no mention of any payments to Mr. Tawila by EMG or its shareholders, as would be expected if the payments were legitimate.

287. The Respondent also argues that the Claimants' reliance on EMG's 7 August 2005 Extraordinary General Assembly Minutes[250] as well as the 1 August 2005 letter from Mediterranean Gas Pipeline Company ("MGPC") to EMG[251] to establish that MGPC, a shareholder of EMG, paid the salaries of a number of EMG employees, including Chairman Tawila, and reclaimed these amounts from EMG is unavailing. The Respondent contends that the Minutes refer to "pre-operation expenses" and do not mention salaries or other payments to personnel. As to the letter, it generally refers to "salaries & compensations" totalling US$ 1.8 million "which has been paid and will be paid to various employees", and does not evidence any salary paid to Mr. Tawila.[252]

288. The Respondent therefore requests that the Tribunal draw adverse inferences that Mr. Tawila joined EMG for a substantial benefit that he did not receive at EGAS.[253]

289. The Respondent argues that, as confirmed by Professor Belal[254], this can only be explained as a reward to Mr. Tawila for having signed the GSPA with an inexperienced company such as EMG, at a highly imbalanced price and without any tender process having been organised. Mr. Tawila's actions and their reward thus fall under the purview of the crime of bribery as defined by Article 103 of the Egyptian Criminal Code.[255]

290. In conclusion, the Respondent submits that:

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[249] See Tr. Day 5, 49:18-25.

[250] C-653.

[251] C-654.

[252] Respondent's Post-Hearing Brief, para. 41.

[253] Respondent's Post-Hearing Brief, para. 41.

[254] Belal Expert Legal Opinion, Part 2.

[255] Counter-Memorial, para. 100. Article 103 provides as follows: "*Any public official who asks for himself or for a third party, or accepts or takes a promise or a donation in order to perform any of his acts of office shall be considered a bribe-taker and shall be punished by life imprisonment and a fine of not less than one thousand pounds and not exceeding the donation or the promise he was given.*"

(i) Given that the above-mentioned violations of Egyptian law were committed in relation to the conclusion of the GSPA, they render the Claimants' alleged investment illegal and outside of the Treaties' scope of protection.[256]

(ii) This illegality affects all Claimants: "*if the alleged investment was not lawful at the outset and thus was not protected under the Treaties when it was made, it cannot benefit from this protection simply because it was acquired by other entities later in time*".[257]

(iii)The Tribunal therefore has no jurisdiction over the Claimants' claims.[258]

291. In response to the Claimants' argument that allegations of corruption or bribery require clear and convincing evidence and that the Respondent has therefore not met its burden of proof, the Respondent answers that there exists no uniform standard of proof regarding allegations of corruption in international arbitration.[259] Rather, tribunals have tailored the standard of proof to the particular circumstances of each case[260] and have accepted circumstantial evidence as a means of proving allegations of corruption and bribery.[261]

292. In response to the Claimants' reliance on Egyptian court proceedings, the Respondent argues that this reliance in unavailing. The Tribunal has the inherent power to determine for itself whether the Claimants' alleged investment meets the requirements of legality for the purposes of the US Treaty, regardless of the findings of any Egyptian

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[256] Counter-Memorial, para. 101.

[257] Counter-Memorial, para. 102.

[258] Counter-Memorial, para. 103.

[259] *See e.g. Metal-Tech Ltd. v. Republic of Uzbekistan* ("*Metal-Tech v. Uzbekistan*"), ICSID Case No. ARB/10/3, Award, 4 October 2013, RLA-304, paras. 238-239.

[260] In *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* ("*Fraport v. Phillipines*"), for instance, the tribunal rejected the investor's arguments that, with respect to the respondent's allegation of illegality, "the 'preponderance of evidence' test which applies in civil law must yield in the instant case to 'beyond reasonable doubt'". *Fraport v. Phillipines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, CLA-155, para. 399. Similarly, the Tribunal in *Libananco Holdings Co. Limited v. Republic of Turkey* ("*Libananco Holdings v. Turkey*") rejected the "contention that there should be a heightened standard of proof for allegations of 'fraud or other serious wrongdoing", finding that the serious nature of these allegations "does not necessarily entail a higher standard of proof". Arbitral tribunals have also accepted circumstantial evidence as a means of providing allegations of corruption and bribery. *Libananco Holdings v. Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, RLA-34, para. 125.

[261] Rejoinder, para. 46.

court.[262] This is confirmed by arbitral case law submits the Respondent.[263] In any event, the report prepared by the Committee of Five appointed by the Cairo Court in separate criminal proceedings against Mr. Mubarak is irrelevant to the Respondent's case concerning the illegality of the Claimants' alleged investment.[264]

293. In response to the Claimants' argument that the Respondent is precluded from invoking the illegality of the Claimants' alleged investment, the Respondent argues that:

> *the Claimants' allegations overlook the fact that acts of corruption normally involve acts of State officials. Therefore, whether members of the former Egyptian government, among others, may have facilitated the procurement of the Claimants' alleged investment cannot preclude the Respondent from invoking Messrs Salem and Maiman's illicit acts. The relevant issues are: who is responsible for soliciting the corrupt acts, and who benefits from them. It was Messrs Salem and Maiman in both cases. If States were estopped from raising corruption defences in such circumstances, acts of corruption would never be sanctioned.*[265]

2. Claimants' Position

294. The Claimants submit that the Respondent's allegations of criminal wrongdoing by Mr. Fahmy and Mr. Tawila are not supported by any evidence. Such allegations say the Claimants require clear and convincing evidence.[266] To the contrary, the documentary record demonstrates that they are false.

295. In respect of Mr. Fahmy, the Claimants explain that, in October 2013, a Committee of Five was formed at the order of the Cairo Criminal Court in connection with the trial of Hosni Mubarak to scrutinize the negotiation and conclusion of the Source GSPA,

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[262] Rejoinder, para. 52.

[263] *Inceysa Vallisoletana v. El Salvador*, RLA-6, paras. 209-210. *See also Fraport v. Phillipines*, CLA-155, paras. 390-391.

[264] Rejoinder, para. 53.

[265] Rejoinder, para. 64.

[266] Reply, para. 250. *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 221: "[t]he seriousness of the accusation of corruption ... demands clear and convincing evidence". See also *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo* ("*African Holding Company v. DRC*"), ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008, CLA-152, para. 55: "[t]he governments of many respondents involved in international arbitration resort to allegations of corruption to prevent the Tribunal holding that it has jurisdiction or to influence its decision on the merits, which constitutes an additional reason why the standard of proof must, in this regard, be particularly high".

including the circumstances surrounding the selection of EMG.[267] The Committee confirmed that Mr. Fahmy was *not responsible* for the selection of EMG – a central element of Egypt's accusation of profiteering. Rather, the decision to select EMG to transport Egyptian gas to Israel was made at the highest levels of the Egyptian government, and communicated to Mr. Fahmy as a *fait accompli* to be implemented.

296. In respect of Mr. Tawila, the Claimants recall that Mr. Hamdy and Mr. Al Sakka both testified that they recommended to EMG's Board that it appoint Mr. Tawila after the Source GSPA had been signed.[268] Therefore, the Claimants aver that Mr. Tawila could not have known that he would later be offered a position as Chairman of EMG when he signed the Source GSPA in June 2005.[269] In addition, the Claimants explain that: (i) according to a decree of 29 May 2005, Mr. Tawila signed the Source GSPA because he was directed to do so by the Ministry of Petroleum in his capacity as EGAS Chairman and that he had no discretion in the matter.[270]

297. In respect of the Respondent's contention that its allegations of forgery of the Minutes of the Meeting of EMG dated 2 November 2009[271] are directly relevant to the Respondent's claim that the GSPA was procured and concluded through corruption, the Claimants argue the following:

> *This is obviously wrong. The Source GSPA was concluded on 13 June 2005, more than four years before EMG's Board Meeting of 2 November 2009 took place and neither R-965 nor R-966 records anything about the procurement or conclusion of the Source GSPA. Even if Egypt's version of events were to be accepted, the alleged facilitation of the 2009 First Amendment and the alleged payment of bonuses to EMG's management in relation to the conclusion of those negotiations cannot be "directly relevant" to the negotiation and conclusion of the underlying agreement four years earlier, let alone the lawfulness of the Claimants' investments in the EMG project, all of which had been made by the time of the First Amendment negotiations.*

[267] Reply, para. 254. See C-326.

[268] See Second Witness Statement of Abdel Hamid Ahmed Hamdy, 9 April 2014, paras. 58-59 and Second Witness Statement of Maamoun Al-Sakka, 9 April 2014, para. 118.

[269] Reply, para. 257.

[270] Reply, para. 258. C-29.

[271] See R-965 (the original minutes) and R-966 (the alleged forged minutes).

> *Egypt's attempt to link its allegations of forgery to a 'web of corruption' surrounding the Source GSPA is inconsistent with decisions by its own courts.*[272]

298. Finally, in response to the Respondent's allegation that the Claimants' investment was illegal because EMG was selected without a public tender, allegedly in contravention of EGPC's internal "Commercial Activity Regulation", the Claimants argue that this position is "incredible" given that (i) EGPC/EGAS were specifically authorized and instructed by the Egyptian Council of Ministers and the Ministry of Petroleum to enter into the Source GSPA,[273] (ii) these authorizations were incorporated into the contract, (iii) Egypt's Supreme Administrative Court sanctioned these decisions as "an act of sovereignty and a matter of Egyptian national security",[274] and (iv) this conclusion was confirmed by the Committee of Five. In addition, the Claimants aver that this argument was never put forward until the present dispute was well underway.[275]

299. In any event, the Claimants argue that (i) the Respondent cannot rely on the conduct of its own officials to deprive the Claimants of protection under the Treaties[276], and (ii) Egypt represented that the Claimants' investment was valid. [277]

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[272] Claimants' submission of 30 November 2015, paras. 31 and 32. See North Cairo Criminal Court, 4th Circuit, in *Public Prosecution Case No. 1061 of 2011, New Cairo I Criminal Court (and No. 342 of 2011, East Cairo Plenary Prosecution) v. Amin Sameh Samir Amin Fahmy & Ors*, 21 February 2015, C-662, p. 21. See also North Cairo Criminal Court, 2nd Circuit, in *Public Prosecution Case No. 3642 of 2011, Kasr El-Nil Felonies, recorded under No. 157 of 2011, Cairo Downtown, Grand Instance v. Mohamed Hosni El-Sayed Mubarak & Ors*, 29 November 2014, C-663.

[273] Source GSPA, R-225(A), Preamble.

[274] See C-386.

[275] Reply, paras. 259 and 260.

[276] Reply, paras. 262-265. The Claimants submit that Egypt has made no accusation of any kind against any of the Claimants. In view of *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, CLA-4, para. 179, Egypt's contentions about the misconduct of its own officials would have no effect on the Claimants' case say the Claimants.

[277] Reply, paras. 266-273. The Claimants submit that the Egyptian authorities issued all the permits necessary for the construction of the Claimants' pipeline. Even when EGPC/EGAS sought to terminate the Source GSPA in April 2012, they did not suggest any illegality. As a result of this conduct, the Claimants aver that Egypt is now estopped from asserting that the Claimants' investment was illegal since representations that a contract is valid by entities empowered to exercise governmental authority create a legitimate expectation on the part of the investor that those agreements are valid. See *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, CLA-189, para. 81, where the tribunal rejected Egypt's argument that the acts of Egyptian officials upon which the investor had relied were in fact "legally non-existent or absolutely null and void" under Egyptian law.

3. Tribunal's Analysis

300. The Tribunal notes that, if it accepts the Respondent's argument in respect of the alleged illegality of the GSPA, the Claimants' entire case would fall.

301. It is a well-established principle of international law that a tribunal constituted on the basis of an investment treaty has no jurisdiction over a claimant's investment which was made illegally in violation of the laws and regulations of the Contracting State.

302. As set out above, in the instant case, the Respondent avers, *inter alia*, that Messrs Fahmy and Tawila who were instrumental in the selection of EMG for the GSPA in April 2000, were guilty, respectively, of "profiteering" and "bribery" in contravention of provisions of the Egyptian Criminal Code and since Messrs Salem and Maiman benefited from these "corrupt acts", the Claimants' investment was thus procured illegally.

303. The Tribunal notes the Respondent's submission that, where there are allegations of corruption, fraud or other such serious wrongdoing in arbitration proceedings, arbitral tribunals should not apply a higher standard of proof than the preponderance of evidence standard, and that circumstantial evidence may be taken into consideration.

304. The Tribunal also notes the Claimants' submission that the Tribunal should apply a higher standard of proof to those types of allegations, namely clear and convincing evidence.

305. In the view of the Tribunal, this is a complex question which has seen different investment tribunals apply different standards of evidence in such cases.[278] However, whatever standard is applied, in all cases, the tribunals have concluded that they needed to be satisfied that, after having taken into account all of the evidence presented, the burden of proof had been met.

306. In the present case, whether the Tribunal applies a high standard of clear and convincing evidence or even a less demanding one or a combination thereof, in the

[278] See *inter alia*, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, RLA-170, para. 221; *African Holding Company v. DRC*, CLA-152, para. 55; and *Fraport v. Phillipines*, CLA-155, para. 399; *Libananco Holdings v. Turkey*, RLA-34, para. 125; *Metal-Tech v. Uzbekistan*, RLA-304, paras. 238-239.

circumstances, the Tribunal is not persuaded that the Claimants' investment was procured illegally. The Respondent's allegations are all based on innuendos. In sum, the Respondent has failed to discharge its burden of proof.

307. In dismissing this facet of Respondent's objection to its jurisdiction, the Tribunal has taken into consideration the evidence in the record that the decision in Egypt to select EMG to sell and transport gas to Israel was made at the highest level of the Egyptian government and that, pursuant to that decision: (i) EGPC/EGAS were specifically authorized and instructed by the Egyptian Council of Ministers and the Ministry of Petroleum to enter into the Source GSPA, (ii) these authorizations were incorporated into the contract, (iii) Egypt's Supreme Administrative Court sanctioned these decisions as "an act of sovereignty and a matter of Egyptian national security", and (iv) this conclusion was confirmed by the Committee of Five. Moreover, the Cairo Criminal Court has also examined the contractual and factual matrix of the alleged illegality of the GSPA in the light of the Egyptian Criminal Code and concluded that there was no evidence of corruption.[279]

308. In its submission of 2 November 2015 on what the Respondent avers is "the impact on the Claimants' claims in this Arbitration" of "the forgery of the Minutes of EMG's 2 November 2009 Board Meeting", the Respondent alleges that this evidence "is directly relevant to [Egypt's] claim that the GSPA was procured and concluded through corruption.[280]

309. The Claimants deny this submission of the Respondent. They say "*that obviously cannot be the case, when the Source GSPA was concluded more than four years before the EMG Board Meeting of 2 November 2009 took place and neither R-965 nor R-966 makes any reference to the procurement or conclusion of the Source GSPA*".[281]

310. The Tribunal agrees with the Claimants. The two versions of the minutes of the EMG 2 November 2009 Board meeting have no impact whatsoever on the procurement and execution of the Source GSPA.

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[279] C-662 and C-663.

[280] Respondent's Post-Hearing Submissions on Alleged Forgery of 2 November 2015 at paras. 25 and 57(v).

[281] Claimants' submission of 30 November 2015 at para. 11.

311. Accordingly, the Respondent's objection to the jurisdiction of the Tribunal resting on this ground is denied.

G. ALLEGED ABUSE OF THE ARBITRAL PROCESS

1. Respondent's Position

312. The Respondent submits that it is widely acknowledged that (i) investment treaty tribunals have the inherent power to find that claims are inadmissible for abuses of process[282], and (ii) that parties to a proceeding are bound by the principle of good faith.[283] The Respondent argues that the Claimants' claims have been designed and submitted in bad faith and in complete abuse of the arbitral process. [284]

a) Whether the Claimants improperly seek to multiply their chances of recovery

313. The Respondent submits that EMG's shareholders are using multiple arbitrations to advance duplicative claims in respect of the same interest:

(i) Mr. Maiman, the CEO of Ampal, the lead Claimant in these proceedings, confirmed his objective of maximising his chances of recovery, publicly announcing his intention to seek damages up to US$ 8 billion says the Respondent.[285]

(ii) The Respondent contends that Mr. Maiman, a non-US national, restructured his interest in EMG to seek the protection of the US Treaty. The Respondent argues that following the signature of the GSPA on 13 June 2005, Mr. Maiman embarked on a strategic restructuring of his interest in EMG, which at the time was held entirely through his wholly-owned Israeli company, Merhav (mnf) Ltd. Based on the available evidence produced by the Claimants, this involved a series of coordinated transactions between Mr. Maiman's wholly-owned Merhav (mnf) Ltd. and two other Israeli companies under his control: Merhav-Ampal Energy Ltd. (a

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[282] See *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, RLA-161.

[283] *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 11 September 2009, RLA-169.

[284] Counter-Memorial, paras. 254-256.

[285] Counter-Memorial, para. 272. See R-4.

wholly owned subsidiary of Ampal, later called "Merhav-Ampal Group Ltd.") and Merhav Ampal Energy Holdings LP (a company formed in June 2007 as part of the reorganisation of Mr. Maiman's interest in EMG). According to the Respondent, as a result of these transactions, Ampal would hold the majority of its interest in EMG (amounting to a 12.5% indirect interest) through its Israeli subsidiaries Merhav-Ampal Energy Ltd. and Merhav-Ampal Energy Holdings. With this restructuring, Mr. Maiman sought the protection of his interest under the US Treaty, in view of Ampal's place of incorporation in New York, and notwithstanding that there was no US substantial interest involved says the Respondent.[286]

(iii) The Respondent also contends that Mr. Maiman's engaged in insider transactions leading to Ampal's bankruptcy. The Respondent argues that the documentary record shows that Ampal was employed as a vehicle for Mr. Maiman's personal profit. Firstly, Mr. Maiman realised a personal gain of over US$25 million in connection with the restructuring of his interest in EMG.[287] Secondly, Ampal paid to Mr. Maiman's Merhav (mnf) Ltd. a total of 31.8% of its outstanding shares without receiving any cash consideration in return.[288] Thirdly, through his position as President, Chief Executive Officer and Chairman of the Board of Ampal, Mr. Maiman paid himself a salary of over US$ 3 million in 2010 and nearly US$2 million in 2011.[289] Fourthly, Ampal's debt is significant: when it filed for voluntary bankruptcy before the Unites States Bankruptcy Court on the Southern District of New York in August 2012, a few months after it started this arbitration, its outstanding debt to its bondholders amounted to approximately $230 million.[290] As Ampal's CFO described in those proceedings, the company's claims against the Respondent "represent the only mechanism by which Ampal can recover substantial funds that may be used to satisfy Ampal's creditors".[291] The bankruptcy

[286] Counter-Memorial, paras. 257-260.

[287] Counter-Memorial, para. 262. See also R-15, R-6 and R-9.

[288] Counter-Memorial, para. 262. See C-139 - C-142; C-130, C-131 and C-135.

[289] Counter-Memorial, para. 263. See C-233 and R-239.

[290] Counter-Memorial, para. 265. See R-15.

[291] R-382.

proceeding was converted into a liquidation proceeding under Chapter 7 of the United States Bankruptcy Code says the Respondent.[292]

(iv) The Respondent argues that Ampal advances its claim in this arbitration in respect of the exact same 12.5% indirect interest in EMG for which Ampal's 100% subsidiary, Merhav-Ampal Group Ltd and its 50% subsidiary, Merhav Ampal Energy Holdings, claim in the parallel Maiman arbitration.[293] According to the Respondent, the Claimants' quantum experts, FTI, confirmed at the hearing that any compensation awarded to Ampal in this arbitration will be duplicative if any compensation awarded to Merhav-Ampal Group Ltd in the Maiman arbitration.[294] The Respondent contends that the same is true of Ampal's 50% interest in Merhav Ampal Energy Holdings and that the Claimants' strategy constitutes an abuse of process.

(v) The Respondent avers that there is no basis under the relevant treaties or international law to consider that Egypt has consented to be subject to multiple, duplicative derivative claims brought by different levels of holding companies in respect of the same alleged loss to the same underlying shareholding.[295] Accepting the duplicative use of derivative claims would require the most extreme caution as it gives the Claimants duplicative chances to prevail and creates risks of treaty shopping, double recovery and inconsistent outcomes says the Respondent.[296] Egypt cannot be considered to have consented to the Tribunal's jurisdiction over the claim brought by Ampal in this arbitration concludes the Respondent.

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[292] Counter-Memorial, para. 269.

[293] Respondent's Post-Hearing Brief, para. 6.

[294] Tr. Day 8, 59:19-24 (Counsel for the Respondent and Mr. Nicholson of FTI Consulting) ("Q. *So it would be fair to say that if the interests were compensated in the Maiman arbitration, then that would essentially be the same compensation that Ampal is claimant in this arbitration; that's correct isn't it?* "A. (Mr. Nicholson) *Yes. It's not a question we've addressed explicitly, but yes, that seems correct, yes.*")

[295] Respondent's Post-Hearing Brief, para. 8. Tr. Day 9, 249:19-250-2. According to the Respondent, the terms of the Egypt-US BIT provide that the contracting Parties did not consent to the same claim being brought before multiple fora. See Egypt-US BIT (C-7), Art. VII(3)(a): "*(a) In the event that the legal investment dispute is not resolved under procedures specified above, the national or company concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes ("Centre") for settlement by conciliation or binding arbitration, if, within six (6) months of the date upon which it arose: (i) the dispute has not been settled through consultation and negotiation; or (ii) the dispute has not, for any good faith reason, been submitted for resolution in accordance with any applicable dispute-settlement procedures previously agreed to by the Parties to dispute: or (iii) the national or company, has not brought before the courts of justice or administrative tribunal of competent jurisdiction of the Party that is a Party to the dispute.*"

[296] Respondent's Post-Hearing Brief, para. 9.

(vi) The Respondent contends that Ampal's decision to cause its subsidiaries Merhav-Ampal Group Ltd and Merhav Ampal Energy Holdings to make claims under the Egypt-Poland BIT in the Maiman arbitration – thus asserting that those interests have Polish nationality for the purpose of the claim – constitutes a waiver of Ampal's right to assert that the same 12.5% interest in EMG simultaneously has U.S. nationality and is protected, including being entitled to invoke arbitral jurisdiction, under the Egypt-US BIT.[297]

(vii) The Respondent avers that in both this arbitration and in the Maiman arbitration, the Claimants advance claims which directly concern the performance and termination of the GSPA ("Gas Supply Claims") as breaches of the Treaties, while EMG is at the same time already engaged in two commercial arbitrations in which it asserts the exact same claims. According to the Respondent, the Claimants thus seek the same relief in relation to the Gas Supply Claims as that which EMG seeks in the commercial arbitrations.[298] The Respondent argues that these contractual claims are within the exclusive competence of the CRCICA Tribunal constituted pursuant to the GSPA's arbitration clause which has issued an Award upholding jurisdiction.[299] In response to the Claimants' argument that compensation granted to EMG in the contractual arbitrations might not "ultimately find its way to the shareholders" because "EMG has significant debts to NBE, the National Bank of Egypt, and to the other creditors"[300], the Respondent argues that this contradicts the premise of the Claimants' damages claim, i.e. that EMG's losses are sustained by its shareholders in proportion to their interest in the company.[301]

(viii) According to the Respondent, EMG and its shareholders seek to multiply their chances of recovery in respect of the same contractual dispute concerning the performance and termination of the GSPA. They have created a situation in which

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[297] Respondent's Post-Hearing Brief, para. 10. Tr. Day 1, 176:17-20; Tr. Day 9, 252:12-15.

[298] The Respondent avers that this is further exacerbated by the Claimants' quantum expert's calculations which show that almost 90% of the Claimants' damages hinge on whether EGAS's termination of the GSPA was lawful. See Respondent's Post-Hearing Brief, para. 11 and Respondent's Opening, v. I, Slide 222.

[299] Respondent's Post-Hearing Brief, para. 12. R-813, paras. 189 and 207. Respondent's Opening Slides 199-223.

[300] Tr. Day 1, 182:25-183:21.

[301] Respondent's Post-Hearing Brief, para. 13.

they need to persuade only 2 out of 12 arbitrators seized of the Gas Supply Claims. The Respondent submits that the Claimants have improperly sought to instrumentalise the system of international arbitration to achieve an unprecedented abuse of process, which the Tribunal should decline to permit as lacking jurisdiction and/or as inadmissible.[302]

b) Whether indirect minority shareholders can bring claims

314. The Respondent also submits that the Tribunal should decline to hear the claims advanced in this arbitration because the Claimants have too remote a connection with EMG, the company incorporated in Egypt against which the Respondent allegedly took measures in contravention of the Treaties.[303]

315. The Respondent explains that "*tribunals have recognised that, while minority shareholders in a locally-incorporated company may benefit from the protection of an investment treaty, there is a need to set limits on such claims when they concern alleged measures by the host State directed at the rights of a local company.*"[304] The Respondent avers that the need to establish a cut-off point reflects the risk that according unlimited protection to such investors could result in the proliferation of multiple proceedings against a host State and facilitate treaty/forum shopping and abuses of process.[305] The Respondent argues that "*foreign investors who passively hold shares through one or more intermediary entities incorporated in third States would not fall within the class of specific investors with which the State parties foresaw they would arbitrate investment disputes.*"[306]

316. In the present case, the Respondent submits that the claims advanced by the Claimants are too remote from EMG as to fall within the scope of the Respondent's consent to arbitrate, in particular with respect to the following investors:

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[302] Respondent's Post-Hearing Brief, paras. 14-15.

[303] Counter-Memorial, para. 296.

[304] Counter-Memorial, para. 297. See *Enron v. Argentina*, Decision on Jurisdiction, 14 January 2004, RLA-142, para. 42. See also *Phoenix Action v. Czech Republic*, RLA-8, para. 122.

[305] Counter-Memorial, para. 298.

[306] Counter-Memorial, para. 299.

(i) EGI-Fund – The Respondent argues that this company did not fund the Claimants' purported investment, nor did it actively contribute to EMG: according to the Claimants' Memorial, this company merely acquired its indirect minority 4.55% interest by purchasing a minority interest in EGI-EMG LP on 15 August 2008.[307] This passive, indirect and very small interest cannot enjoy any protection under the Egypt-U.S. BIT.

(ii) BSS-EMG Investors – The Respondent argues that BSS-EMG only holds a 0.828% indirect interest in EMG. In addition, this company did not have any involvement in the local business of EMG, let alone the Egyptian gas sector.[308]

(iii)In view of the Tribunal's decision to uphold the Respondent's objection *ratione personae* over Mr. David Fischer, the Tribunal need not summarize the Respondent's arguments specific to him in connection with the present submission.

317. The Respondent concludes that:

> *[it] cannot be taken to have consented to disputes with investors who are so remotely connected to their alleged investment in Egypt. Article VII of the Egypt-US BIT allows for the submission to arbitration of a "legal investment dispute", defined in relevant part as "an alleged breach of any right conferred or created by the Treaty with respect to an investment. [...] The dispute resolution provision in the [Treaty] thus confirm[s] that the Respondent consented only to arbitrate disputes with investors having a meaningful and active connection to an investment in its territory.*[309]

2. Claimants' Position

a) *Whether the Claimants improperly seek to multiply their chances of recovery*

318. The Claimants submit that even if Egypt could show that it is possible as a matter of law for claims over which an ICSID tribunal has jurisdiction to be held "inadmissible

[307] See Memorial, para. 88 and C-149.

[308] Counter-Memorial, para. 300. See Memorial, para. 89.

[309] Counter-Memorial, para. 301.

for abuses of process or other serious forms of misconduct", which it has not, none of the three specific bases of inadmissibility advanced by Egypt has any merit.

319. In respect of Ampal's corporate restructuring, the Claimants argue that it is now well-established that it is legitimate to restructure a company to gain the protection of an investment treaty for future disputes.[310] According to the Claimants, the relevant question therefore is whether Ampal acquired its interest in EMG before Egypt breached the obligations it owed under the US Treaty. The Claimants aver that Ampal had obtained its 12.5% interest in EMG by November 2006, before Egypt breached the US Treaty[311]. This is acknowledged by Egypt say the Claimants.[312]

320. In respect of Egypt's allegation that Mr. Maiman's insider transactions have led to Ampal's bankruptcy, the Claimants submit that this allegation is baseless since, with respect to the restructuring, the independent consultant Houlihan Lokey confirmed that the transactions were fair from a financial point of view.[313] In addition, those transactions were negotiated and approved by a Special Committee of the Board of Directors of Ampal, composed of independent directors.[314] When the Board of Ampal subsequently voted on the transactions, Mr. Maiman recused himself.[315] Finally, profits realized by Mr. Maiman in connection with these transactions are irrelevant to the admissibility of the Ampal's claims in the present arbitration.[316]

321. In respect of Egypt's allegation that EMG and its shareholders have made abusive claims, the Claimants argue that:

    (i) It is not unusual or controversial for a company and its shareholders of different nationalities to have recourse to different fora to vindicate their rights.[317]

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[310] Reply, para. 279. See *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, CLA-5.

[311] Reply, para. 280.

[312] Counter-Memorial, para. 259.

[313] C-393 and C-395.

[314] C-396 - C-400; C-394.

[315] C-399 - C-401.

[316] Reply, para. 287.

[317] Reply, para. 289. See *Ronald S. Lauder v. The Czech Republic* ("*Lauder v. Czech Republic*"), UNCITRAL, Final Award, 3 September 2001, RLA-133, para. 174.

(ii) The Claimants have suggested ways in which double compensation could be avoided[318], and have made representations to that effect.[319] The Respondent's proposition that both treaty tribunals should stay their decisions on compensation is unacceptable: if each Tribunal stayed its decision on compensation pending a full award from the other tribunal, neither Tribunal would ever award compensation.[320]

(iii) According to the Claimants, Egypt has not referred to any authority to support "waiver" as a basis to decline jurisdiction over or support the inadmissibility of Ampal's claims.[321]

(iv) Dismissal of Ampal's claims on the basis that its subsidiary is pursuing its own claims would be unjust in circumstances where only Ampal is entitled to the protection of the ICSID Convention say the Claimants.[322]

(v) The Claimants contend that there is no basis for the assertion that Ampal's claims are beyond the scope of Egypt's consent to arbitrate in the US Treaty.[323] In addition, the possibility of overlapping claims was considered and explicitly addressed in the

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[318] Tr. Day 9, 16:6 – 17:8, Dr Juratowitch: "We accept that there is this overlap in this case. The Claimants have made a representation that they are not seeking double recovery. That is something that enforcement courts and any agreement as to payment of an award, absent the use of enforcement proceedings, would no doubt take account of. And in those circumstances, the abuse is taken care of as much as the Claimants are able to, absent the Respondent's consent to consolidation. For the purposes of your Tribunal, the question before you is harm caused to Ampal, the entity before you, by wrongful conduct. In the Claimants' submission, your jurisdiction, and jurisdictional responsibility, is to decide how much harm that is, and to issue an award accordingly. If, in the fullness of time, an amount is paid to subsidiaries of Ampal that would result in a reflective gain to Ampal that would compensate it for its loss, then Ampal's representation would be invoked and it would not be entitled to those funds. But I emphasise that that is a condition that would be fulfilled upon payment. So staying this arbitration would not be a question of staying until the UNCITRAL tribunal had issued an award, because we have seen from the very first point on the very first day of the UNCITRAL case that the Respondent has made clear its intention with respect to the Dutch courts on that case. So it is payment that would be the relevant feature, rather than an award."

See also Tr. Day 9, 18:16-19; Day 1, 185:25-187:1. See also *Quasar de Valores SICAV S.A. and Ors. v. The Russian Federation*, SCC, Award, 20 July 2012, CLA-160, para. 34.

[319] Tr. Day 9, 14:5-7; Memorial, para. 331; Reply, para. 300.

[320] Claimants' Post-Hearing Brief, para. 20.

[321] Claimants' Post-Hearing Brief, para. 21.

[322] Claimants' Post-Hearing Brief, para. 23.

[323] C-7, Art VII(3)(b): "*Each Party hereby consents to the submission of an investment dispute to the Centre for settlement by conciliation or binding arbitration.*"

Poland Treaty[324], which does not exclude these claims or those made before the Maiman tribunal say the Claimants.[325]

(vi) According to the Claimants, a contractual forum selection clause cannot deprive a tribunal of jurisdiction over treaty claims brought by a non-party to the contract, even where those treaty claims involve consideration of the underlying contractual rights.[326]

(vii) There can be no abuse of process where Egypt itself has obstructed consolidation between the parallel arbitrations aver the Claimants.[327]

(viii) The Claimants submit that if "duplication of chances" were a genuine concern for Egypt, it would not have: (1) commenced the CRCICA arbitration; (2) rejected any consolidation of that arbitration with the two ICC arbitrations; (3) rejected consolidation of the treaty arbitrations before this Tribunal; (4) challenged the appointment of Professor Reisman to two tribunals; (5) refused to allow Jonathan Fisher's claim to be heard with his brother's;[328] or (6) refused to even engage with the Tribunal[329] on how it might coordinate its deliberations with the UNCITRAL Tribunal.[330] In this respect, the Claimants recall that they outlined during the evidentiary hearing a course of action that could be taken to minimize the risk of contradiction, if all parties in both investment arbitrations so consented.[331]

b) *Whether indirect minority shareholders can bring claims*

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[324] C-648, Art 1(4): "*If the investment is made by an investor through an entity not covered by paragraph (c)1 of this Article, in which he holds an equity participation, such investor shall enjoy the benefits of this Agreement to the extent of such indirect equity participation, provided, however, that such an investor shall not enjoy the benefits of this Agreement if the investor invokes the dispute settlement mechanism under another foreign investment protection agreement concluded by the Contracting Party in whose territory the investment is made.*" See also Tr. Day 2, 48:11-49:4.

[325] Claimants' Post-Hearing Brief, para. 24.

[326] Reply, para. 292. *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, CLA-124, paras. 172-176; *Total S.A. v. Argentina*, CLA-125, para. 85.

[327] See para. 13 above. See also Reply para. 298. See *Lauder v. Czech Republic*, RLA-133, para. 178.

[328] C-409, p 2. See also Tr. Day 1, 179:2-24.

[329] Tr. Day 9, 251:7-252:5.

[330] Claimants' Post-Hearing Brief, para. 27.

[331] Tr. Day 9, 20:1-22:13.

322. In view of the Tribunal's decision to uphold the Respondent's objection *ratione personae* over Mr. David Fischer, the Tribunal need not summarize the Claimants' arguments specific to him in connection with the present submission.

323. The Claimants submit that Egypt's objection is based on its submission that the claims are not within the scope of Egypt's consent to arbitration, it is properly characterized as an issue of jurisdiction rather than admissibility.[332]

324. The Claimants argue that their investments in EMG are protected under the US Treaty. Under the Treaty, "investment" is defined to mean "every kind of asset owned or controlled,"[333] and "own or control" include "ownership or control that is direct or *indirect, including ownership or control exercised through subsidiaries* or affiliates."[334]

325. The Claimants recall that BSS-EMG Investors and EGI-Fund Investors hold their interests in EMG through one and two intermediate companies, respectively. The Claimants aver that interests held through up to six intermediaries have been held not to be too remote.[335]In addition, although these entities hold minority interests, the Claimants argue that the Treaty's broad definition of "investment" do cover those interests, as other tribunals have held.[336]

326. In any event, the Claimants argue that even if there were a percentage limit, it would be smaller than any of the percentage holdings at issue in this case, which are 4.552% for EGI-Fund Investors and 0.828% for BSS-EMG Investors. For example, in *Quiborax v. Bolivia*, the tribunal held that it had *ratione personae* jurisdiction over an investor who brought claims in respect of a 0.005% shareholding.[337]

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[332] Reply, para. 303.

[333] C-7, Article I(1)(c).

[334] C-7, Article I(1)(d).

[335] Reply, para. 306. See *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, IIC 366 (2008), 19 September 2008, CLA-116, paras 49-51. For the reasons behind the structure of David Fischer's investment, see DF Second Statement, para. 4.

[336] Reply, para. 307. See for example, *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, CLA-142, para. 115.

[337] Reply, para. 309. *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, RLA-80, paras. 192 and 196. The Tribunal ultimately held that it had no *ratione materiae* jurisdiction as the investor had made no contribution of money or

3. Tribunal's Analysis

327. The Tribunal has set out above what the Respondent argues is a complete abuse by the Claimants of the arbitral process.

a) Whether the Claimants improperly seek to multiply their chances of recovery

328. The Tribunal agrees with the Respondent that the four parallel arbitration with, essentially, the same factual matrix, the same witnesses and many identical claims may look abusive. However, subject to one important qualification in paragraphs 330-333 below, having reviewed carefully all of the Respondent's grounds invoked in support of its submission that the Claimants are not acting in good faith, the Tribunal is not persuaded that the four arbitral proceedings collectively or individually amount to an abuse of process.

329. It is possible, as a jurisdictional matter, for different parties to pursue distinct claims in different fora seeking redress for loss allegedly suffered by each of them arising out of the same factual matrix. As a matter of general principle, contract claims are distinct from treaty claims.[338] Further, in the absence of an agreement to consolidation, two treaty tribunals may each consider claims of separate investors, each of which holds distinct tranches of the same investment. None of the four arbitrations at issue here is, per se, an abuse. It may not be a desirable situation but it cannot be characterized as abusive especially when the Respondent has declined the Claimants' offers to consolidate the proceedings.[339]

330. However, there is one important exception to this finding of the Tribunal. It concerns the overlap of claims by Mr. Maiman in the present case and the UNCITRAL arbitration (the two treaty cases) for the recovery of the same sum.

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assets, but was merely given a share so that a requirement under Bolivian law for a minimum of three shareholders was complied with: *ibid*, paras. 232 and 237.

[338] *Aguas del Aconquija v. Argentina*, Decision on Annulment, (2002) 6 ICSID Rep 327, 3 July, 2002, RLA-136/ CLA-85.

[339] The Tribunal's finding in this respect is without prejudice to those measures that it proposes to take set out in paras. 335-340 in the exercise of its powers of case management in order to mitigate the risk of inconsistent decisions between it and the other tribunals currently seised of related aspects of the overall dispute at the merits stage.

331. Indeed, in the present arbitration, the Claimant Ampal, controlled by Mr. Yosef Maiman, advances its claims in respect of the same 12.5% indirect interest in EMG for which Ampal's 100% subsidiary, Merhav-Ampal Group Ltd (**MAGL**) (and its 50% subsidiary, Merhav-Ampal Energy Holdings) claim in the parallel Maiman arbitration (together the "**MAGL portion**"). This is tantamount to double pursuit of the same claim in respect of the same interest.[340] In the Tribunal's opinion, while the same party in interest might reasonably seek to protect its claim in two fora where the jurisdiction of each tribunal is unclear, once jurisdiction is otherwise confirmed, it would crystallize in an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals. However, the Tribunal wishes to make it very clear that this resulting abuse of process is in no way tainted by bad faith on the part of the Claimants as alleged by the Respondent. It is merely the result of the factual situation that would arise were two claims to be pursued before different investment tribunals in respect of the same tranche of the same investment.

332. On 11 December 2015, the Tribunal was provided with a copy of a letter from the Permanent Court of Arbitration in the *Maiman* arbitration, in which the Tribunal in those proceedings informed the parties therein that "the Tribunal has now decided that it has jurisdiction *ratione personae.* The Tribunal will provide reasons for this decision subsequently, in its Award."[341]

333. The consequence of this finding, together with the balance of the present Decision on Jurisdiction, is that the abuse of process constituted by the double pursuit of the MAGL portion of the claim in both proceedings must now be treated as having crystallised. Both Tribunals have confirmed that they have jurisdiction. It follows from this therefore that there is no risk of a denial of justice occasioned by the absence of a tribunal competent to determine the MAGL portion of the claim. Both Tribunals are seised of the merits and neither Tribunal has yet reached a decision on the merits.

334. It lies in the power of Ampal, as 100% owner of MAGL through Ampal Energy Ltd (Israel) to cure the abuse here identified were Ampal and MAGL to elect, in light of the

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[340] *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, paras. 7.1.5 – 7.1.7; *Apotex Holdings Inc. and Apotex Inc. v. United States of America,* ICSID Case No. ARB/(AF)/12/1, Award, 25 August 2014, para. 7.40.

[341] Letter dated November 18, 2015 from Tribunal to Parties in PCA Case No. 2012-26.

present Decision which has otherwise confirmed the Tribunal's jurisdiction, to submit the MAGL portion of the claim made in the *Maiman* arbitration to the exclusive jurisdiction of the present Tribunal, relinquishing that part of the claim in the *Maiman* arbitration, or conversely to pursue such claim only in the latter proceeding.

335. Article 26 of the ICSID Convention provides "*Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy*".

336. The leading Commentary on the Convention observes.

337. *Once consent to ICSID arbitration has been given, the parties have lost their right to seek relief in another forum, national or international, and are restricted to pursuing their claim through ICSID. This principle operates from the moment of valid consent.* [342]Decisions of ICSID tribunals and annulment committees are to like effect:

> *Article 26 represents one of the singular progressive advantages of the ICSID Convention. It 'create[s] a rule of priority vis-à-vis other systems of adjudication in order to avoid contradictory decisions and to preserve the principle of ne bis in idem.' Article 26 operates as a key element of the parties' agreement to arbitrate – confirming the exclusivity of ICSID arbitration as the means of dispute resolution, where the parties have agreed to such a forum for the resolution of their dispute.*[343]

338. Such an election would secure to Ampal in the present arbitration the advantages of the ICSID Convention, upon which it places special reliance, whilst removing the abuse constituted by the double pursuit of the same claim.[344]

339. In view of the foregoing, the Tribunal invites the Claimant Ampal to elect to pursue the MAGL portion of the claim in the present proceedings alone by 11 March 2016, or make its choice known at that time. The Tribunal will then revisit the question of abuse of process in relation to this portion of the claim in the light of its response.

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[342] Schreuer et al., *THE ICSID CONVENTION: A COMMENTARY* (2nd ed., 2009), 351, RLA-14.

[343] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case no. ARB/05/19, Decision on Annulment, 14 June 2010at para. 45.

[344] Tr. Day 9, 11: 10-12.

b) Whether indirect minority shareholders can bring claims

340. The Tribunal does not need to consider the parties' arguments in relation to Mr. David Fischer as the Tribunal has found earlier that it lacked jurisdiction over him.

341. Under the *chapeau* of its objections to the jurisdiction of the Tribunal based on an abuse of process by the Claimants, the Respondent submits that the Tribunal should decline to arbitrate the claims of Claimants EGI-Fund Investors and BSS-EMG Investors because they each have such minute interests in and "too remote a connection" with EMG and also because "there is a need to set limits on such claims".

342. In the case of Claimants EGI-Fund Investors and BSS-EMG Investors whose claims are based on the alleged breach of the US-Egypt Treaty, the answer to the Respondent's objection is found in Articles I(1)(c) and I(1)(d) of the Treaty which provide as follows:

> *(c) "Investment" means every kind of asset owned or controlled and includes but is not limited to:*
>
> *[...]*
>
> *(d) "own or control" includes ownership or control that is direct or indirect, including ownership or control exercised through subsidiaries or affiliates.* (Tribunal's emphasis)

343. The Tribunal will not read into the Treaty restrictions such as those advanced by the Respondent to the effect that "passive, indirect and very small" holdings cannot enjoy any protection under the Egypt-US BIT.

344. Accordingly, the Respondent's objections to the jurisdiction of the Tribunal over EGI-Fund Investors and BSS-EMG Investors are dismissed.

345. The Tribunal, accordingly, dismisses the Respondent's objection to the jurisdiction of the Tribunal based on an alleged abuse of process by the Claimants subject to Ampal's cure of the abuse of process identified in paragraph 339 above.

V. DECISION

346. Having carefully considered the parties' arguments in their written pleadings and oral submissions, and having deliberated, for the reasons stated above, the Arbitral Tribunal unanimously decides as follows:

a) To deny the Respondent's objections *ratione personae* in respect of Ampal, EGI-Fund and EGI-Series;

b) To uphold the Respondent's objection *ratione personae* in respect of Mr. David Fischer;

c) To declare that both the Centre (ICSID) and the Tribunal have no jurisdiction over Mr. David Fischer's claims in this arbitration by virtue of Articles 25(1) and 25(2)(b) of the ICSID Convention;

d) To deny the Respondent's objection over the Claimants' Gas Supply claims based on the alleged breach of the standards of fair and equitable treatment and unlawful expropriation;

e) To remain seized of the Respondent's objection over the Claimants' Gas Supply claims based on the alleged breach of the umbrella clause;

f) To deny the Respondent's objection *ratione materiae* over the Claimants' tax claims;

g) To deny the Respondent's objection in respect of the alleged illegality of the GSPA;

h) To direct the Claimant Ampal to elect to pursue the MAGL portion of the claim in the present proceedings alone by 11 March 2016 or opt at that time for the pursuance of its claims in the alternative forum;

i) To deny the Respondent's objection based on an alleged abuse of process by the Claimants subject to Ampal's compliance with para. (h) above; and

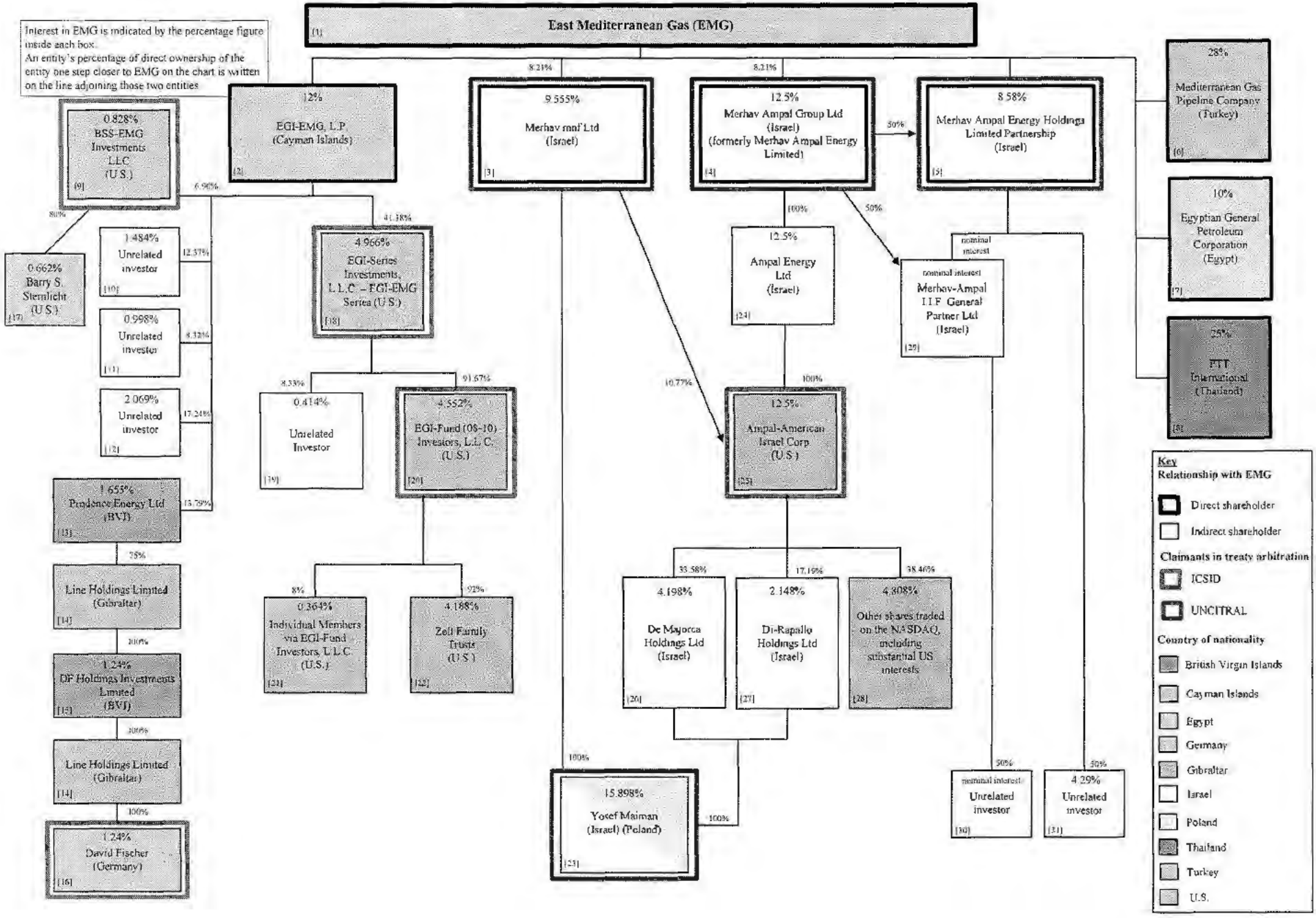
j) To reserve its decision as to costs.

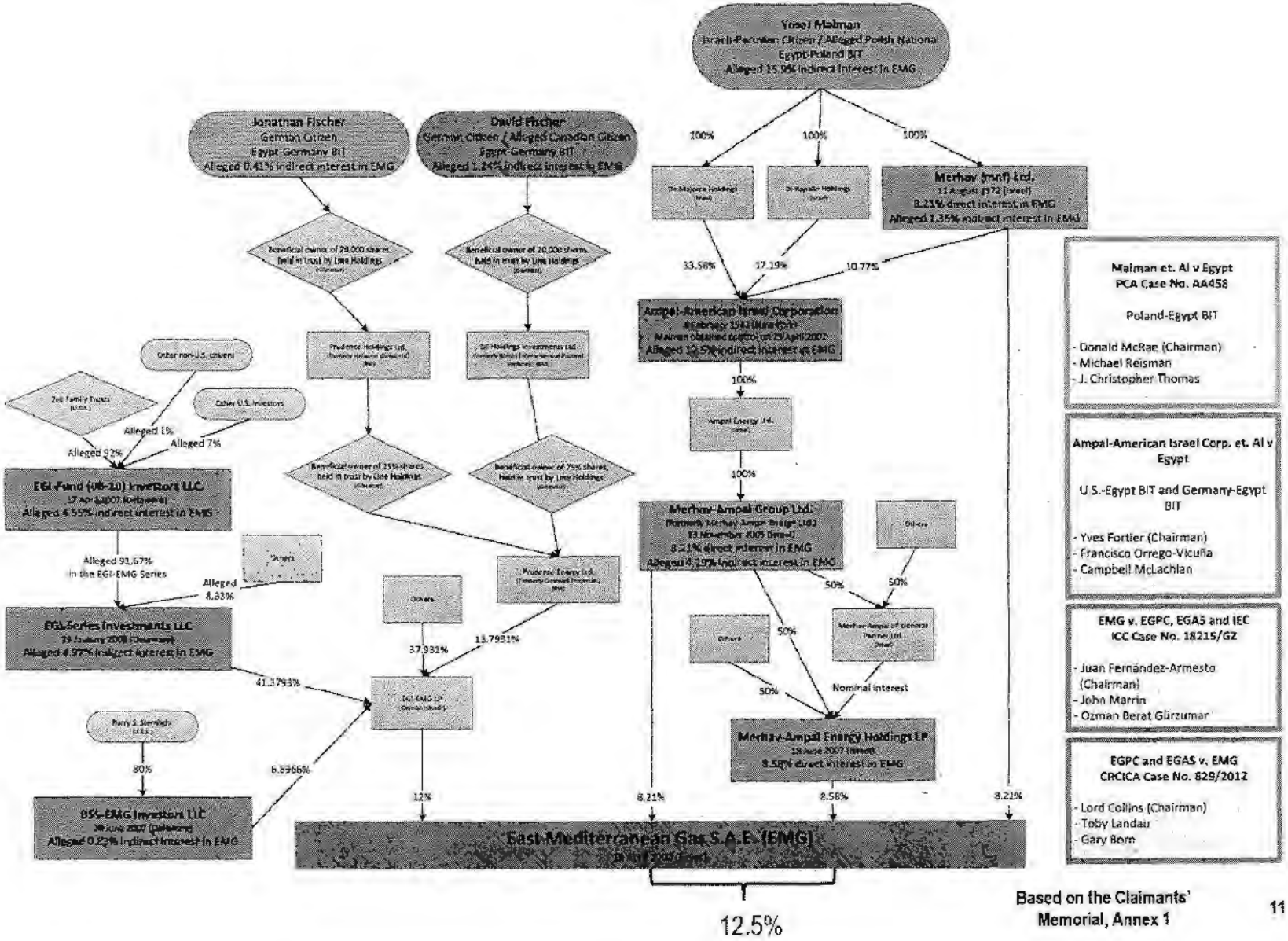
Professor Campbell McLachlan, QC
Arbitrator

Professor Francisco Orrego Vicuña
Arbitrator

The Honorable L. Yves Fortier, CC, OQ, QC
President

ANNEX I


Interest in EMG is indicated by the percentage figure inside each box.
An entity's percentage of direct ownership of the entity one step closer to EMG on the chart is written on the line adjoining those two entities
East Mediterranean Gas (EMG)
[1]
0.828%
BSS-EMG Investments LLC (U.S.)
[9]
12%
EGI-EMG, L.P. (Cayman Islands)
[2]
8.21%
9.555%
Merhav manf Ltd (Israel)
[3]
8.21%
12.5%
Merhav Ampal Group Ltd (Israel) (formerly Merhav Ampal Energy Limited)
[4]
50%
8.58%
Merhav Ampal Energy Holdings Limited Partnership (Israel)
[5]
28%
Mediterranean Gas Pipeline Company (Turkey)
[6]
10%
Egyptian General Petroleum Corporation (Egypt)
[7]
25%
FTT International (Thailand)
[8]
6.90%
41.38%
80%
0.662%
Barry S. Sternlicht (U.S.)
[17]
1.484%
Unrelated investor
[10]
12.57%
0.998%
Unrelated investor
[11]
8.32%
2.069%
Unrelated investor
[12]
17.24%
1.655%
Prudence Energy Ltd (BVI)
[13]
13.79%
75%
Line Holdings Limited (Gibraltar)
[14]
100%
1.24%
DF Holdings Investments Limited (BVI)
[15]
100%
Line Holdings Limited (Gibraltar)
[14]
100%
1.24%
David Fischer (Germany)
[16]
4.966%
EGI-Series Investments, L.L.C. – EGI-EMG Series (U.S.)
[18]
8.33%
91.67%
0.414%
Unrelated Investor
[19]
4.552%
EGI-Fund (08-10) Investors, L.L.C. (U.S.)
[20]
8%
92%
0.364%
Individual Members via EGI-Fund Investors, L.L.C. (U.S.)
[21]
4.188%
Zell Family Trusts (U.S.)
[22]
100%
12.5%
Ampal Energy Ltd (Israel)
[24]
50%
nominal interest
nominal interest
Merhav-Ampal I I F General Partner Ltd (Israel)
[29]
10.77%
100%
12.5%
Ampal-American Israel Corp (U.S.)
[25]
35.58%
17.19%
38.46%
4.198%
De Mayorca Holdings Ltd (Israel)
[26]
2.148%
Di-Rapallo Holdings Ltd (Israel)
[27]
4.808%
Other shares traded on the NASDAQ, including substantial US interests
[28]
100%
15.898%
Yosef Maiman (Israel) (Poland)
[23]
100%
50%
nominal interest
Unrelated investor
[30]
50%
4.29%
Unrelated investor
[31]
Key
Relationship with EMG
Direct shareholder
Indirect shareholder
Claimants in treaty arbitration
ICSID
UNCITRAL
Country of nationality
British Virgin Islands
Cayman Islands
Egypt
Germany
Gibraltar
Israel
Poland
Thailand
Turkey
U.S.



Based on the Claimants' Memorial, Annex 1

ANNEX II

ICSID CASE NO. ARB/12/11
Ampal et al. v. The Arab Republic of Egypt

FOUR PARALLEL ARBITRATIONS FOR THE SAME INTERESTS

	CAIRO CENTRE	ICC	MAIMAN	AMPAL	TOTAL
Claimant(s)	EGPC and EGAS ("EGAS")	EMG	Mr Maiman, Merhav (mnf), Merhav-Ampal Group, Merhav-Ampal Energy Holdings	Ampal-American, EGI-Fund, EGI-Series, BSS-EMG, Mr Fischer	
Respondent(s)	EMG	EGAS, IEC	Arab Republic of Egypt	Arab Republic of Egypt	
Institution	CRCICA	ICC	PCA	ICSID	
Governing law	English law	English law	International law, English law and Egyptian law	International law, English and Egyptian law	
Date of initiation	30 April 2012	6 October 2011	2 May 2012	2 May 2012	
First procedural meeting	None	31 May 2012	21 February 2013	29 November 2012	
Bifurcation of jurisdiction	Yes (Hearing 4 July 2013; Award 11 November 2013)	No (Separate written phase)	No	No	
Status of written pleadings	Parties have filed written pleadings on jurisdiction and Statements of Claim and Defence only[1]	The Parties have filed all their written pleadings	The Parties have filed all their written pleadings with the possible exception of costs submissions	The Parties have filed all their written pleadings, with the possible exception of Post-Hearing Briefs and costs submissions	
Hearings on merits	2 weeks 15-26 Jun. 2015	2 weeks 13-24 Jan. 2014 Closings: 15-16 May 2014	2 weeks 31 Aug.-11 Sep. 2014	9 days 27 Oct.-6 Nov. 2014	41 days of hearings

[1] EMG's Statement of Defence and Counterclaim was filed on 18 July 2014. EGAS is scheduled to file its Reply on 12 December 2014, although the procedural calendar is currently being discussed.

	CAIRO CENTRE	ICC	MAIMAN	AMPAL	TOTAL
Common witnesses presented by EMG or by its shareholders	Mr Al Sakka Mr Hamdy Mr Muthmann Mr Schrader Mr Freeny GCA FTI	Mr Al Sakka Mr Hamdy Mr Muthmann Mr Schrader Mr Freeny GCA FTI Maj. Gen. (ret.) Eiland (witness for IEC)	Mr Al Sakka Mr Hamdy Mr Muthmann Mr Schrader Mr Freeny GCA FTI Maj. Gen. (ret.) Eiland	Mr Al Sakka Mr Hamdy Mr Muthmann Mr Schrader Mr Freeny GCA FTI Maj. Gen. (ret.) Eiland	31 testimonies on the same issues
Common witnesses presented by EGAS or by the Arab Republic of Egypt	Mr Wood-Collins and Mr Giles	Mr Wood-Collins and Mr Giles Mr Pelham Lord Hoffmann	Mr Wood-Collins and Mr Giles Mr Pelham Lord Hoffmann Maj. Gen. (ret.) Whiting Prof. Ascencio Prof. Belal	Mr Wood-Collins and Mr Giles Mr Pelham Lord Hoffmann Maj. Gen. (ret.) Whiting Prof. Ascencio Prof. Belal	16 testimonies on the same issues
Witnesses presented by EMG or by its shareholders or by IEC that only appear in one arbitration		For IEC: Mr Brokman, Mr Ronai, Ms Nudelman, Mr Gurevich, Mr Weiss, Mr Amit, Mr Kay, Mr Zaid, Mr Elmakis, Mr Aronovich, Brigadier Ling, Mr Shuttleworth, Dr Cook, Mr Dvir	Mr Maiman	Mr Zell Mr Fischer Prof. Sir Bernard Rix	18 witnesses that only appear in one proceeding
Witnesses presented by EGAS or by the Arab Republic of Egypt that only appear in one arbitration		Andrews J Grant Thornton	Dr Pudzianowska	Prof. Vandevelde	4 witnesses that only appear in one proceeding

	CAIRO CENTRE	ICC	MAIMAN	AMPAL	TOTAL
Relief sought by EMG and its shareholders	- The First Amendment was obtained through coercion or fraudulent misrepresentation and EGAS is liable in ton or, alternatively, that the First Amendment is rescinded - EGAS breached the GSPA by, inter alia, failing to deliver gas - EGAS repudiated the GSPA by seeking to terminate it unlawfully	- EGAS breached the GSPA by, inter alia, failing to deliver gas - EGAS repudiated the GSPA by seeking to terminate it unlawfully - EGAS breached the Tripartite Agreement by, inter alia, failing to deliver gas - EGAS repudiated the Tripartite Agreement by the unlawful termination of the GSPA (- EMG makes no claim against IEC)	- Egypt treated the Claimants' investment unfairly and inequitably by, inter alia, withdrawing EMG's tax benefit, coercing EMG to conclude the First Amendment, breaching the GSPA and seeking to unlawfully terminate the GSPA - Egypt took arbitrary and discriminatory measures because EMG "was selling natural gas to Jews in Israel" - Egypt breached the umbrella clause by, inter alia, unlawfully terminating the GSPA and by breaching the GSPA - Egypt failed to protect the Claimants' investment (EMG) by, inter alia, failing to protect and repair the Trans-Sinai Pipeline from which EMG received gas - Egypt expropriated the Claimants' investment (EMG) by, inter alia, withdrawing EMG's tax benefit, coercing EMG to conclude the First Amendment, breaching the GSPA, failing to protect the Trans-Sinai Pipeline and seeking to unlawfully terminate the GSPA	- Egypt treated the Claimants' investment unfairly and inequitably by, inter alia, withdrawing EMG's tax benefit, coercing EMG to conclude the First Amendment, breaching the GSPA and seeking to unlawfully terminate the GSPA - Egypt took arbitrary and discriminatory measures because EMG "was selling natural gas to Jews in Israel" - Egypt breached the umbrella clause by, inter alia, unlawfully terminating the GSPA and by breaching the GSPA - Egypt failed to protect the Claimants' investment (EMG) by, inter alia, failing to protect and repair the Trans-Sinai Pipeline from which EMG received gas - Egypt expropriated the Claimants' investment (EMG) by, inter alia, withdrawing EMG's tax benefit, coercing EMG to conclude the First Amendment, breaching the GSPA, failing to protect the Trans-Sinai Pipeline and seeking to unlawfully terminate the GSPA	
	Claim: **US$ 3.561 billion**[i]	**Claim:** **US$ 1.5 billion**[ii] (excluding interest)	**Claim:** **US$ 1.127 billion**[iii]	**Claim:** **US$ 882.6 million**[iv]	**US$ 7.071 billion**

	CAIRO CENTRE	ICC	MAIMAN	AMPAL	TOTAL
Relief sought by EGAS and by the Arab Republic of Egypt	- EGAS terminated the GSPA lawfully, due to EMG's persistent non-payment - EMG breached the GSPA by, inter alia, failing to pay, contracting with unauthorised On-Sale Customers and failing to provide EGAS with essential operational information - The GSPA was unenforceable because its performance was unlawful Claim: US$ 184 million[v] (subject to review and excluding interest)	- The Tribunal has no jurisdiction over EMG's (or IEC's) claims - Alternatively, EMG's (and IEC's) claims are inadmissible	- Stay all of the Claimants' claims pending the issuance of awards in the ICC and CRCICA Arbitrations - Dismiss the Claimants' claims for lack of jurisdiction and admissibility - Dismiss the Claimants' claims on the merits	- Stay all of the Claimants' claims pending the issuance of awards in the ICC and CRCICA Arbitrations - Dismiss the Claimants' claims for lack of jurisdiction and admissibility - Dismiss the Claimants' claims on the merits	US$ 184 million

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[i] As stated in EMG's Statement of Defence and Counterclaim, ¶ 421(f).

[ii] As stated in EMG's Post-Hearing Submission, ¶ 178(c).

[iii] As stated in FTI's Appendix 4 "Assessment of Losses REVISED", sent by FTI with its letter dated 8 August 2014, concerning corrections to FTI's calculations in its Second Report.

[iv] As stated in FTI's Appendix 4 "Assessment of Losses REVISED", sent by FTI with its letter dated 11 August 2014, concerning corrections to FTI's calculations in its Second Report.

[v] As stated in EGAS's Statement of Claim, ¶ 303(iv).

	ICC	ICSID	UNCITRAL	CAIRO CENTRE
Relief sought by claimant(s)	EMG requests that the tribunal: - Dismiss EGPC and EGAS's objections to jurisdiction and admissibility - Declare that the tribunal has jurisdiction over EMG's claims and that those claims are admissible - Declare that EGPC and EGAS breached the Source GSPA - Declare that EGPC and EGAS repudiated the Source GSPA - Declare that EGPC and EGAS breached the Tripartite Agreement - Declare that EGPC and EGAS repudiated the Tripartite Agreement **Claim: US$ 1.5 billion**[i] (excluding interest)	Ampal-American, EGI-Fund, EGI-Series, BSS-EMG, David Fischer request that the tribunal: - Dismiss Egypt's objections to jurisdiction and admissibility - Declare that Egypt failed to accord fair and equitable treatment and impaired the Claimants' investments through the adoption of unreasonable measures, in violation of Arts II(4) or II(1) of the US Treaty, Art 2(2) of the Germany Treaty, and customary international law - Declare that Egypt engaged in arbitrary and discriminatory measures, in violation of Arts II(4) or II(1) of the US Treaty, Art 2(3) of the Germany Treaty, and customary international law - Declare that Egypt failed to observe obligations it has entered into, in violation of Art II(1) of the US Treaty, Art 7(2) of the Germany Treaty, and customary international law - Declare that Egypt failed to provide full protection and security, in violation of Art II(1) of the US Treaty, Art 4(1) of the Germany Treaty, and customary international law - Declare that Egypt expropriated the Claimants' investments, in violation of Art III(1) of the US Treaty, Art 4(2) of the Germany Treaty, and customary international law **Claim: US$ 882.6 million**[ii] (excluding interest)	Yosef Maiman, Merhav (mnf), Merhav Ampal Group, Merhav Ampal Energy Holdings request that the tribunal: - Dismiss Egypt's objections to jurisdiction and admissibility - Declare that Egypt failed to accord fair and equitable treatment and impaired the Claimants' investments through the adoption of unreasonable measures, in violation of Art 3(2) of the Poland Treaty, and customary international law - Declare that Egypt engaged in arbitrary and discriminatory measures, in violation of Arts 3(1) and 3(2) of the Poland Treaty, and customary international law - Declare that Egypt failed to observe obligations it has entered into, in violation of Art 3(2) of the Poland Treaty, and customary international law - Declare that Egypt failed to provide full protection and security, in violation of Arts 3(1) and 3(2) of the Poland Treaty, and customary international law - Declare that Egypt expropriated the Claimants' investments, in violation of Arts 4(1) and 3(2) of the Poland Treaty, and customary international law **Claim: US$ 1.128 billion**[iii] (excluding interest)	EGPC and EGAS request that the tribunal: - Declare that the Source GSPA is unenforceable - Declare that EGAS terminated the Source GSPA lawfully - Declare that EMG breached the Source GSPA - Declare that EMG is barred from bringing its counterclaims and/or that they are inadmissible - Dismiss EMG's counterclaims on their merits **Claim: US$ 327 million plus compensation "to be quantified at a later stage"**[iv] (subject to review and excluding interest)

	ICC	ICSID	UNCITRAL	CAIRO CENTRE
Relief sought by respondent(s)	<u>EGPC and EGAS request that the tribunal:</u> - Declare that the tribunal has no jurisdiction over EMG's or IEC's claims - Declare that EMG's and IEC's claims are inadmissible and/or premature and/or fail to state a cause of action and/or are unfounded <u>IEC requests that the tribunal:</u> - Declare that EGAS/EGPC are in breach of the Tripartite Agreement - Declare that IEC lawfully terminated the Tripartite Agreement on account of EGPC/EGAS's repudiatory breaches and/or breaches of the conditions of that agreement **Claim: US$ 3.849 billion**[v] (excluding interest)	<u>Egypt requests that the tribunal:</u> - Stay the proceeding pending the issuance of full awards in each of the ICC and CRCICA arbitrations - Dismiss the Claimants' claims for lack of jurisdiction and/or as inadmissible - Dismiss the Claimants' claims on the merits - Stay any decision on quantum pending the issuance of full awards in each of the ICC, UNCITRAL and CRCICA arbitrations	<u>Egypt requests that the tribunal:</u> - Stay the proceeding pending the issuance of full awards in each of the ICC and CRCICA arbitrations - Dismiss the Claimants' claims for lack of jurisdiction and/or as inadmissible - Dismiss the Claimants' claims on the merits - Stay any decision on quantum pending the issuance of full awards in each of the ICC, ICSID and CRCICA arbitrations	<u>EMG requests that the tribunal:</u> - Dismiss EGPC and EGAS's requests for relief - Declare that the First Amendment was induced by coercion and fraudulent misrepresentation - Declare that EGPC and EGAS are liable in tort in connection with the conclusion of the First Amendment or that the First Amendment is rescinded - Declare that EGPC and EGAS breached the Source GSPA - Declare that EGPC and EGAS repudiated the Source GSPA - Declare that EGPC/EGAS must indemnify EMG for any damage it sustains vis-à-vis its downstream customers and contractors arising out of EGPC/EGAS's breach and repudiation of the Source GSPA **Claim: US$ 3.561 billion**[vi] (excluding interest)

<u>Modifications made:</u>

1) The relief sought by EGPC and EGAS in the CRCICA arbitration has been updated to reflect what is stated in the request for relief in EGPC and EGAS's Reply and Defence to the Counterclaim, filed on 23 January 2015.
2) The descriptions of the relief sought in each arbitration have been revised to reflect what is stated in the respective requests for relief.
3) The four columns have been reordered based on the order in which the proceedings were commenced, although, as the Tribunal is aware, the investment arbitrations were commenced on the same day.
4) In each column, the relief sought by the claimant(s) before the relevant tribunal is now shown first, followed by the relief sought by the relevant respondent(s), including IEC.
5) The arbitrations are now consistently identified (at the top of the columns) by the institutional rules under which each arbitration is being conducted.
6) The column titled "Total" has been deleted as a consequence of the change described at point (4), above.

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i As stated in EMG's Post-Hearing Submission, ¶ 178(c).

ii As stated in FTI's Appendix 4 "Assessment of Losses REVISED", sent by FTI with its letter dated 11 August 2014, concerning corrections to FTI's calculations in its Second Report.

iii As stated in FTI's Appendix 4 "Assessment of Losses REVISED", sent by FTI with its letter dated 8 August 2014, concerning corrections to FTI's calculations in its Second Report.

iv As stated in EGPC and EGAS's Reply and Defence to the Counterclaim, ¶ 769(iv)-(vi).

v As stated in IEC's Post Hearing Submission, ¶ 294(c)-(h).

vi As stated in EMG's Statement of Defence and Counterclaim, ¶ 421(f).