

**EXCERPTS**

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**CEMENTOS LA UNION S.A. AND ARIDOS JATIVA S.L.U.**

Claimants

and

**ARAB REPUBLIC OF EGYPT**

Respondent

**ICSID Case No. ARB/13/29**

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**AWARD**

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*Members of the Tribunal*

Mr. Christer Söderlund, President  
The Hon. Charles N. Brower, Arbitrator  
Professor Philippe Sands QC, Arbitrator

*Secretary of the Tribunal*

Mr. Alex B. Kaplan

*Assistant to the Tribunal*

Ms. Lauren Schuttloffel

*Date of dispatch to the Parties: 30 October 2020*

## REPRESENTATION OF THE PARTIES

*Representing Cementos La Union S.A. and  
Aridos Jativa S.L.U.:*

Dr. Karim A. Youssef  
Ms. Doha El Eshy  
Ms. Khoulood Maher  
Ms. Alyaa Saleh  
Ms. Nouran Salama  
Ms. Donia Khafagui  
Ms. Sarah El Saeed  
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*Representing the Arab Republic of Egypt:*

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Counselor Razan Abou Zaid  
Counselor Jihan Al Ansary  
Counselor Sara Mohamed  
Egyptian State Lawsuits Authority  
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Arab Republic of Egypt

and

Mr. Louis-Christophe Delanoy  
Mr. Raed Fathallah  
Mr. Tim Portwood  
Mr. Tom Vauthier  
Ms. Laura Fadlallah  
Mr. Suhaib Al Ali  
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**I. GLOSSARY OF ABBREVIATIONS AND DEFINED TERMS**

Abbreviations and Defined Terms	Definitions
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]





## II. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID”) on the basis of the Treaty for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Arab Republic of Egypt, signed on 3 November 1992 and entered into force on 26 April 1994 (the “BIT” or “Treaty”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 14 October 1966 (the “ICSID Convention”).
2. The Claimants are Cementos La Union S.A. (“Claimant Cementos”) and Aridos Jativa S.L.U (“Claimant Aridos Jativa”), both companies organized under the laws of the Kingdom of Spain (together, the “Claimants”). They are represented in this proceeding by the law firm of Youssef and Partners Attorneys, in Giza, Arab Republic of Egypt.
3. The Respondent is the Arab Republic of Egypt (“Egypt” or the “Respondent”). It is represented in this proceeding by the Egyptian State Lawsuits Authority (“ESLA”) and the law firm Bredin Prat in Paris, France.
4. The Claimants and the Respondent are collectively referred to as the “Parties.” The Parties’ representatives and their addresses are listed above on page (i).
5. This dispute relates to the Claimants’ investment in shares of the Arabian Cement Company S.A.E. (“ACC”), an Egyptian company that produces cement and clinker. The Claimants allege that Egypt violated the BIT and international law by requiring ACC to pay excessive licensing and electricity fees, failing to provide an adequate supply of gas and electricity, and denying justice and effective means to the Claimants when they sought recourse before the Egyptian courts and administrative bodies.



### III. PROCEDURAL HISTORY

6. On 14 November 2013, ICSID received a Request for Arbitration, together with Exhibits CE-1 through CE-87<sup>1</sup> and Legal Authorities CL-1 through CL-13 from the Claimants (the “Request”).
7. On 22 November 2013, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
8. In the absence of an agreement between the Parties on the method of constituting the Tribunal, the Tribunal was constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention.
9. The Tribunal is composed of Mr. Christer Söderlund, a national of Sweden, President, appointed on 5 November 2014 by the Chairman of the Administrative Council in accordance with Article 38 of the ICSID Convention; the Hon. Charles N. Brower, a national of the United States of America, appointed on 26 January 2014 by the Claimants; and Prof. Philippe Sands, a national of the United Kingdom and France, appointed on 5 March 2014 by the Respondent.
10. On 6 November 2014, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”), 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. Aïssatou Diop, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

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<sup>1</sup> Beginning with the Memorial on the Merits, the Claimants switched the prefix for their factual exhibits to “C” rather than “CE” but continued the numerical sequence. The Claimants also began referring to the factual exhibits submitted with the Notice of Arbitration with the “C” prefix “for ease of reference.” Cl. Mem. ¶ 4(a). As a result, all factual exhibits submitted by the Claimants, including those initially identified as CE-1 to CE-87, will be cited herein with the “C” prefix.

11. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 26 January 2015 by teleconference. Participating in the First Session were:

Tribunal:

Mr. Christer Söderlund	President
The Hon. Charles N. Brower	Arbitrator
Prof. Philippe Sands	Arbitrator

ICSID Secretariat:

Ms. Aïssatou Diop	Secretary of the Tribunal
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For the Claimants:

Mr. Karim A. Youssef, J.S.D.	Amereller Legal Consultants
Ms. Amani Khalifa	Khalifa Associates
Ms. Nada Oteifi	Amereller Legal Consultants
Mr. Mohamed Eid	Khalifa Associates

For the Respondent:

Mr. Mahmoud El Khrashy	ESLA
Ms. Fatma Khalifa	ESLA
Ms. Razan Abouzaid	ESLA
Ms. Yasmin Salama	ESLA

12. Following the first session, on 16 February 2015, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Washington, D.C., United States of America.
13. By communication of 6 August 2015, the Claimants informed the Tribunal that the Parties agreed to suspend the proceeding for a period of two months.
14. On 14 August of 2015, the Tribunal issued Procedural Order No. 2 suspending the proceeding pursuant to the Parties' agreement.
15. By letter of 8 October 2015, ICSID notified the Parties that the agreed suspension period had expired on 2 October 2015. ICSID invited the Parties to inform the Tribunal of the

next steps they wished to take in this arbitration. In the alternative, ICSID informed the Parties that the Tribunal would reinstate the schedule for the submissions set forth in Procedural Order No. 1.

16. On 9 October 2015, the Claimants informed the Tribunal that they were instructed to proceed with the arbitration. The Claimants proposed to file their Memorial on 31 October 2015 with the rest of the schedule outlined in Procedural Order No. 1 remaining unchanged.
17. The proceeding was resumed on 13 October 2015.
18. By communication of 31 October 2015, the Claimants informed the Tribunal of the Parties' agreement for an extension of time until 8 November 2015 for the Claimants to file their Memorial.
19. On 8 November 2015, the Claimants informed the Tribunal of the Parties' agreement for a further extension until 13 November 2015 for Claimants to file their Memorial.
20. On 13 November 2015, the Claimants informed the Tribunal of the Parties' agreement for a further extension until 16 November 2015 for the Claimants to file their Memorial.
21. On 17 November 2015, the Claimants filed a Memorial on the Merits (the "Claimants' Memorial") together with: the Witness Statement of [REDACTED] dated 16 November 2015; the Expert Report of [REDACTED] dated 16 November 2015, including Appendices 1 through 7 and Exhibits [REDACTED]-1 through [REDACTED]-29; Factual Exhibits C-88 through C-132; and Legal Authorities CL-14 through CL-37.
22. On 18 November 2015, the Respondent sent a message to the Tribunal noting that the Claimants filed their Memorial a day later than the agreed deadline. The Respondent did not object to the late submission but requested that it be granted the same extension in deadline to file its Counter-Memorial. The Respondent also noted that, because Procedural Order No. 1 set the deadline for its Counter-Memorial based on the date of filing of the Claimants' Memorial, it also should have an extension of time resulting from the extensions granted to the Claimants for their Memorial. The Respondent reserved its rights to raise jurisdictional objections or request bifurcation of the proceeding and to request any

additional extensions of deadlines due to the shift of the procedural calendar. The Claimants responded on 24 November 2015 to the Respondent's message agreeing to the extension of deadline for the Respondent's Counter-Memorial with one reservation:

*It seems that Respondent suggests that it is allowed such extension irrespective of the Tribunal's decision on bifurcation, which implies that it should be granted such extension even though it might only file a memorial on jurisdiction (assuming bifurcation is granted). The Claimants object to such assertion. If the proceeding were to proceed based on a separate jurisdictional phase, the Respondent would be entitled to an extension of time for the filing of its memorial on the merits, and not for memorials on jurisdiction, if any.*

23. After reviewing the Parties' exchanges on the matter of scheduling, the Tribunal issued Procedural Order No. 3 on 24 November 2015 setting the deadlines for the Respondent's Counter-Memorial for 4 May 2016 and the Respondent's request for bifurcation, if any, for 29 December 2015.
24. On 29 December 2015, the Respondent notified the Tribunal that it did not wish to request a bifurcation of the questions of jurisdiction and/or admissibility from merits at that stage of the proceeding. On 5 January 2016, the Tribunal advised the Parties that the proceeding will proceed in accordance with the schedule provided in paragraphs 14.5 to 14.7 of Procedural Order No. 1.
25. By letter of 22 April 2016, the Respondent requested a four-week extension to file its Counter-Memorial. The Respondent stated that it was in the process of gathering all necessary evidence but required more time for translation of the documents that were in Arabic. The Respondent also reminded the Tribunal that when the Claimants sought numerous extensions for filing of their Memorial, the Respondent had reserved its right to request an additional extension of time, a reservation to which the Claimants posed no objection. The Respondent further argued that calendar shifts triggered by the Claimants' extensions caused conflicts with the Respondent's counsels' other previously scheduled commitments. As a result, the Respondent requested an additional extension of the deadline until 27 June 2016 to file its Counter-Memorial.
26. On 3 May 2016, the Tribunal granted the Respondent's request.

27. On 7 May 2016, the Claimants wrote to the Tribunal to express their objections to the “very significant” extension of time granted to the Respondent, noting that they were not given a chance to object to the Respondent’s request. The Claimants stated that, if the extension were granted, the Respondent would have more than 7 months for preparation of its Counter-Memorial, while the Claimants had only 5 months and 17 days to prepare their Memorial. The Claimants expressed the view that such an extension would not be procedurally fair. The Claimants noted that, if the Respondent’s counsel had a previously scheduled commitment that conflicted with the deadline in this case, it should have been aware of such fact long before 22 April 2016. The Claimants further stated that gathering of evidence was an “integral part of the job” and did not suffice as a valid reason to seek extension. The Claimants characterized the extension request as a delay tactic, arguing that the Respondent continued to force ACC and the Claimants to pay “unlawful monthly installments” of renewal fees for the “electricity license” without which the production would stop and the Respondent, despite numerous requests by the Claimants, had refused to suspend the payments during the arbitration proceeding. The Claimants argued that any delays in the proceeding exacerbated their situation and caused prejudice.
28. On 9 May 2016, the Tribunal invited the Claimants to submit additional observations on the Respondent’s 22 April request. The Claimants did so on 12 May 2016, noting that they would be willing to agree that the Respondent be granted an extension of three to four weeks.
29. Following an additional brief exchange on the issue, the Tribunal issued Procedural Order No. 4 on 19 May 2016 granting the Respondent extension of time until 13 June 2016 to file its Counter-Memorial.
30. On 9 June 2016, the Respondent wrote to the Tribunal seeking an additional extension until 27 June 2016 for filing its Counter-Memorial. Following the Claimants’ correspondence of the same day in which the Claimants expressed their agreement to the extension, the Tribunal granted the Respondent’s request.
31. On 27 June 2016, the Respondent filed a Counter-Memorial on the Merits (the “Respondent’s Counter-Memorial”) together with: the Witness Statement of

██████████ dated 26 June 2016; the Witness Statement of ██████████ dated 26 June 2016; the Expert Report of ██████████ dated 27 June 2016, including Appendices 1 through 6 and Exhibits A through J; the Legal Opinion of ██████████ dated 26 June 2016, including Annexes 1 through 15; Exhibits R-1 through R-58; and Legal Authorities RL-1 through RL-76.

32. On 4 July 2016, the President of the Tribunal asked ICSID to convey a message to the Parties setting 27 September 2016 as a deadline for filing of the Claimants' Reply. The President further noted that in the event the Parties decided to engage in document production, they should follow the procedure outlined in Section 15 of Procedural Order No. 1.
33. By communication of 12 July 2016, the Parties notified the Tribunal of an agreed amended schedule for the document production procedure. The Tribunal confirmed the amended schedule by communication of 13 July 2016.
34. In accordance with Section 15 of Procedural Order No. 1 and the amended procedural timetable, each Party served on the other Party its requests for production of documents in the form of a Redfern Schedule on 25 July 2016.
35. On 18 August 2016, each Party filed observations on the other Party's requests for production of documents.
36. On 30 August 2016, each Party set forth its reply to the other Party's objections to production, using the same Redfern Schedules. On the same date, each Party submitted its Redfern Schedule to the Tribunal, together with a cover letter offering general observations on the document requests.
37. On 19 September 2016, the Secretary-General notified the Parties that Mr. Alex B. Kaplan, ICSID Legal Counsel, had replaced Ms. Diop as Secretary of the Tribunal.
38. On 12 October 2016, the Tribunal issued Procedural Order No. 5 concerning the Parties' requests for production of documents. The Tribunal ordered that the documents, as outlined in the attached Annexes A and B, should be produced to the other Party on 9 November

2016. The Tribunal noted that if either Party wished a “more stringent confidential treatment” of any of the documents, that Party should apply for a confidentiality order before the production deadline. The Tribunal further stated that each Party would have an opportunity “to comment on the compliance of the other Party” by 7 December 2016.
39. The Tribunal concluded Procedural Order No. 5 by setting the deadlines for filing of the Claimants’ Reply on 9 February 2017 and the Respondent’s Rejoinder on 9 May 2017, noting that the Respondent had not requested bifurcation of the proceeding.
  40. By letter also dated 12 October 2016, ICSID invited the Parties to consult regarding setting the dates for a hearing on the merits and indicated the availability of the Members of the Tribunal in October 2017.
  41. Following exchanges between the Parties on the topic of hearing organization, on 19 December 2016, the Parties notified the Tribunal of their agreement to hold the hearing in September 2018 in Paris, France. By communication of 4 January 2017, the Parties further agreed to extend the deadlines for filing of the remaining submissions by three months.
  42. On 17 January 2017, the Tribunal confirmed the Parties’ agreement setting the dates of the hearing for 10 to 14 September 2018 (with 17 to 19 September 2018 held in reserve). The Tribunal also confirmed the agreed extension of deadlines for the Parties’ submissions setting 9 May 2017 as the deadline for the Claimants’ Reply and 9 November 2017 as the deadline for the Respondent’s Rejoinder.
  43. On 11 April 2017, the Claimants wrote to the Tribunal asking to modify the procedural calendar. The Claimants noted that the Respondent had raised a jurisdictional objection in its Counter-Memorial, an issue on which the Claimants were “entitled to speak last.” The Respondent confirmed its agreement with the proposed modified schedule by communication of 14 April 2017. On 19 April 2017, the Tribunal granted the Claimants’ request to set the following amended procedural schedule: the Claimants’ Reply to be filed on 10 July 2017, the Respondent’s Rejoinder on 9 April 2018, and the Claimants’ Rejoinder on the jurisdictional objection on 10 June 2018.

44. On 8 July 2017, the Claimants wrote to the Tribunal to seek further modification of the procedural calendar. The Respondent confirmed its agreement by communication of the same date but requested that the extension be conditioned on the Claimants refraining from seeking any additional extension; the Respondent also reserved its right to seek an extension of the deadline for filing its Rejoinder as the newly modified deadlines conflicted with previously-scheduled commitments. On 9 July 2017, the Tribunal took note of the revised timetable for the Parties' submissions: the Claimants' Reply to be filed on 3 August 2017, the Respondent's Rejoinder on 27 May 2018, and the Claimants' Rejoinder on the jurisdictional objection on 29 July 2018.
45. On 3 August 2017, the Claimants filed a Reply on the Merits (the "Claimants' Reply") together with: the Second Witness Statement of [REDACTED] dated 3 August 2017; the Witness Statement of [REDACTED] dated 25 July 2017; the Witness Statement of [REDACTED] dated 13 June 2017; the Second Expert Report of [REDACTED] [REDACTED] dated 3 August 2017, including Appendices 1 through 14 and Exhibits [REDACTED]-30 through [REDACTED]-62; Exhibits C-133 through C-213; and Legal Authorities CL-38 through CL-59.
46. On 19 March 2018, ICSID notified the Parties that the hearing that was scheduled for 10 to 14 September 2018 (with 17 to 19 September 2018 held in reserve) would need to be rescheduled due to a conflict that arose in Prof. Philippe Sands' calendar, a hearing scheduled at the International Court of Justice requiring Prof. Sands' attendance. The Tribunal proposed alternative hearing dates for the Parties' consideration.
47. On 26 March 2018, the Parties jointly advised the Tribunal that they were not available for a hearing on the dates proposed by the Tribunal but would revert with alternative dates after consultation among counsel. By communication of 18 April 2018, the Claimants notified the Tribunal that the Parties proposed the week of 8 April 2019 as an alternative date for the hearing.
48. By letter of 4 May 2018, ICSID confirmed that a five-day hearing would take place from 8 to 12 April 2019 in Paris, France. The President also asked the Parties to inform the Tribunal if the Parties were amending the deadlines of their upcoming submissions.



49. On 21 May 2018, the Claimants advised the Tribunal that the Respondent had requested an “extremely long and wholly unreasonable and unjustified extension” for filing of its Rejoinder, which the Claimants opposed. The Claimants also requested an amendment to the procedural calendar to include a cut-off date for the submission of documentary evidence and an additional limited round of submissions citing “new important developments in the material regulatory framework and factual matrix of a number of Claimants’ existing claims.” The Claimants cited the “extremely lengthy time” between their Reply and the hearing in April of 2019 as a reason for that request.
50. On 25 May 2018, the Respondent replied to the Claimants’ 21 May letter stating that the Respondent’s request for an extension was reasonable and did not jeopardize either the Claimants’ preparation of their Rejoinder on Jurisdiction or a potential third round of submissions as requested by the Claimants. The Respondent confirmed that it was seeking an extension until 8 October 2018 to file its Rejoinder, citing the “principle of reciprocity” and noting that the Claimants had had 13 months and one week to file their Reply. The Respondent further asked for an additional five weeks on top of those 13 months and one week to take into account Ramadan and the month of August. The Respondent noted that the new date would be well over six months before the hearing, leaving the Claimants plenty of opportunity to file their Rejoinder on Jurisdiction.
51. In the same letter, the Respondent “firmly” objected to the Claimants’ request for an additional round of submissions, stating that it was unusual in international investment arbitration and would be “unduly burdensome” for the Respondent, which had not anticipated preparing a third round of submissions.
52. By letter of 29 May 2018 the Claimants responded, stating that the extension requested by the Respondent to file its Rejoinder was “abusive, excessive and prolonged.” The Claimants noted that the Respondent objected but did not substantiate its objection to the Claimants’ 21 May 2018 request that the Tribunal set a cut-off date for documentary evidence and grant leave for a limited third round of submissions. The Claimants contended that the Respondent contradicted itself when, on one hand, it objected to the Claimants’ request — stating that “[t]he procedural steps have been set from the very outset of these

proceedings” and should not be altered — but, on the other hand, asked for an extension of time for its own submission. The Claimants further argued that the Respondent’s request for extension of time was “frivolous” and intended to occupy the remainder of the time leading up to the hearing. The Claimants asked that both of the Respondent’s requests be dismissed.

53. Following further exchanges between the Parties, the Tribunal, by ICSID letter of 5 June 2018, addressed the four issues raised by the Parties: (i) whether to permit the Respondent to reply to the Claimants’ letter of 29 May 2018; (ii) the deadline for the submission of the Respondent’s Rejoinder and the Claimants’ Rejoinder on Jurisdiction; (iii) whether to permit a third round of submissions on the merits; and (iv) whether to establish a cut-off date for the submission of new evidence.
54. On the first issue, the Tribunal noted that “the Parties’ views on these scheduling issues are sufficiently before the Tribunal.” The Tribunal denied the Respondent’s request to file a response to the Claimants’ letter of 29 May 2018.
55. The Tribunal then considered and rejected the Respondent’s request to extend the deadline of its Rejoinder to 8 October 2018. The Tribunal concluded that the Respondent had had sufficient time to prepare its Rejoinder and that “the princip[le] of reciprocity does not require that the Respondent be afforded the same number of days as the Claimants’ to file its Reply – plus two additional months.” In light of the delayed hearing, the Tribunal agreed to extend the deadline for the Respondent’s Rejoinder to 23 July 2018 and the deadline for the Claimants’ Rejoinder on Jurisdiction to 23 September 2018.
56. On the third and the fourth issues before it, the Tribunal rejected the Claimants’ request to allow a third round of submissions but granted leave for either Party to submit a reasoned request by 1 November 2018 identifying the intervening facts for which a third round of submissions was warranted. The Tribunal set a cut-off date of 11 February 2019 for the submission of documentary evidence.
57. On 23 July 2018, the Respondent wrote to the Tribunal requesting a one-week extension of the deadline to file its Rejoinder, citing “delays in obtaining documents and

information.” It also noted that the Claimants’ agreement to such extension had not been “forthcoming.”

58. By communication of the same date, the Tribunal responded to the Respondent’s request stating that it had “no choice but to grant the Respondent’s request.” It further confirmed the new deadline of 30 July 2018.
59. On 30 July 2018, the Respondent filed a Rejoinder on the Merits (the “Respondent’s Rejoinder”) together with: the Second Expert Report of [REDACTED] dated 30 July 2018, including Appendices 1 through 5 and Exhibits A through H; Exhibits R-59 through R-68; and Legal Authorities RL-77 through RL-102.
60. By communication of 18 September 2018, the Claimants requested an extension of deadline to file their Rejoinder on Jurisdiction citing the extension the Respondent needed to file its Rejoinder and the fact that the hard copy of the submission had arrived to the Claimants’ counsel’s office three weeks after the submission was due and, as a result, the Claimants did not have sufficient time to examine the documents submitted by the Respondent.
61. On 19 September 2018, the Tribunal confirmed the new deadline for filing of the Claimants’ Rejoinder on Jurisdiction as 18 October 2018.
62. On 16 October 2018, the Parties notified the Tribunal of the Parties’ agreement to extend the deadline for the Claimants’ Rejoinder on Jurisdiction to 23 October 2018. On 23 October 2018, the Parties notified the Tribunal of a further agreed extension to 25 October 2018.
63. On 25 October 2018, the Claimants filed a Rejoinder on Jurisdiction (the Claimants’ Rejoinder”) together with: Exhibits C-214 through C-219 and Legal Authorities CL-60 through CL-84.
64. On 1 November 2018, the Parties notified the Tribunal of their agreement to extend the deadline for filing of the request for a third round of submissions until 12 November 2018.



For the Claimants:

Mr. Moustafa Alameeldin  
Ms. Nada Oteifi

For the Respondent:

Mr. Tim Portwood  
Mr. Suhaib Al Ali  
Ms. Laura Fadlallah  
Ms. Flora Marinho  
Counselor Mohamed Khalaf  
Counselor Amr Arafa Hassan  
Counselor Sara Mohamed  
Counselor Jihan El Ansary  
Counselor Ebtehal Ahmed

71. On 11 March 2019, the Tribunal issued Procedural Order No. 6 concerning the organization of the hearing.
72. On 2 April 2019, the Claimants submitted a letter to the Tribunal explaining that on 28 March 2019 the Respondent notified them that the Respondent's expert on Egyptian law, Prof. Mohamed Badran, would be unable to appear at the hearing due to a medical condition. The Claimants requested that the Tribunal either (1) exclude Prof. Badran's report from the record; or (2) allow the Claimants to introduce four documents related to Egyptian law and regulatory issues which they would have used in cross-examining Prof. Badran had he been available, and also allow the Claimants 45 minutes of additional time to comment on Prof. Badran's Legal Opinion. Additionally, the Claimants requested permission to enter into the record a document referred to as a 2005 judgment rendered by the Egyptian State Council.
73. On 3 April 2019, at the request of the Tribunal, the Respondent submitted its response to the Claimants' 2 April request. The Claimants, with permission of the Tribunal, responded to the Respondent's comments on 4 April 2019. Having considered itself sufficiently briefed on this matter, the Tribunal on 4 April 2019 denied the Respondent's request to respond to the Claimants' letter of 4 April.

74. On 6 April 2019, the Tribunal issued Procedural Order No. 7 deciding that the Legal Opinion of Prof. Badran would not to be struck from the record, but should be considered in light of his inability to testify at the hearing and the Claimants’ resulting inability to cross-examine him. The Tribunal further decided to grant the Claimants 45 minutes of hearing time to comment on Prof. Badran’s Opinion. Finally, the Tribunal denied the Claimants’ request to submit additional documents into the record, ruling that “no additional documents shall be submitted into the record.”
75. A Hearing on the Merits was held in Paris, France from 8 to 11 April 2019 (the “Hearing”). The following persons were present at the Hearing:

Tribunal:

Mr. Christer Söderlund	President
The Hon. Charles N. Brower	Arbitrator
Prof. Philippe Sands	Arbitrator

ICSID Secretariat:

Mr. Alex B. Kaplan	Secretary of the Tribunal
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Assistant to the Tribunal:

Ms. Lauren Schuttloffel

For the Claimants:

*Counsel:*

Dr. Karim A. Youssef	Youssef & Partners Attorneys
Mr. Moustafa Alameldin	Youssef & Partners Attorneys
Ms. Nada Oteifi	Youssef & Partners Attorneys
Mr. Mostafa Abobakr	Youssef & Partners Attorneys
Ms. Alyaa Saleh	Youssef & Partners Attorneys
Ms. Doha El Eshy	Youssef & Partners Attorneys
Ms. Kholoud Maher	Youssef & Partners Attorneys
Ms. Sarah El Saeed	Youssef & Partners Attorneys
Mr. Waheed Zaki	Youssef & Partners Attorneys

*Parties:*

	Cementos La Union S.A.
	Arabian Cement Company

*Witnesses:*

[Redacted]

Arabian Cement Company  
[Redacted]

*Experts:*

[Redacted]

[Redacted]

For the Respondent:

*Counsel:*

Counselor Amr Arafa  
Counselor Sarah Mohamed  
Counselor Jihan El Ansary  
Mr. Louis-Christophe Delanoy  
Mr. Tim Portwood  
Mr. Suhaib Al Ali  
Ms. Laura Fadlallah  
Ms. Flora Marinho  
Ms. Victor Aupetit

ESLA  
ESLA  
ESLA  
Bredin Prat  
Bredin Prat  
Bredin Prat  
Bredin Prat  
Bredin Prat

*Witnesses:*

[Redacted]

*Experts:*

[Redacted]

[Redacted]

Court Reporter:

Ms. Anne-Marie Stallard

The Court Reporter Limited

Interpreters:

Ms. Michele Antaki  
Ms. Asma Benyagoub

76. During the Hearing, the following persons were examined:

On behalf of the Claimants:

[REDACTED]

[REDACTED]

[REDACTED]

On behalf of the Respondent:

[REDACTED]

[REDACTED]

77. Following the Hearing, on 13 April 2019, the Tribunal issued Procedural Order No. 8 setting forth the timing and content of the Parties' post-hearing submissions, submissions on costs, and transcript corrections.
78. The Parties filed simultaneous post-hearing submissions on 11 July 2019.
79. The Parties filed their statements of costs on 31 July 2019.
80. The proceeding was closed on 10 June 2020, and on 1 October 2020, the Tribunal advised the Parties that it had extended the time limit to draw up and sign the Award in accordance with ICSID Arbitration Rule 46.

**IV. FACTUAL BACKGROUND**

81. [REDACTED]



[REDACTED]

A.

[REDACTED]

[REDACTED]

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<sup>2</sup> Procedural Order No. 8 instructed the Parties to prepare a joint chronology. Nonetheless, each Party submitted its own chronology, asserting that the Parties were unable to agree on the proper format. Thus, the Tribunal draws from each chronology and its own synthesis of the facts and exhibits presented.

<sup>3</sup> Cl. Mem. ¶ 33; Resp. C-Mem. ¶ 21; C-3, Articles of Association of Arabian Cement Company (undated).

<sup>4</sup> Cl. Mem. ¶ 38.

<sup>5</sup> Cl. Mem. ¶ 9; C-4, Sale and Purchase of Shares in Aridos Jativa to Cementos (4 May 2004).

<sup>6</sup> C-96, Certificates of Transfer of Ownership of ACC to Aridos Jativa (10 August 2004; 29 August 2004).

<sup>7</sup> Cl. Mem. ¶¶ 9-10; Resp. C-Mem. ¶ 20.

<sup>8</sup> Cl. Mem. ¶ 9.

<sup>9</sup> Cl. Mem. ¶ 9; Resp. C-Mem. ¶ 20.

<sup>10</sup> Cl. Mem. ¶ 10.

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<sup>11</sup> *Id.*, ¶ 40.

<sup>12</sup> C-95, KPMG, Final Report: Market Study and Financial Due Diligence for Rohrbach Zement GmbH & Co. KG, Dotternhausen (Germany) relating to the Arabian Cement Company (S.A.E.), Cairo (Egypt), Investment Project (March 1999) [hereinafter “KPMG Report”]; C-97, Letter from Ahmed Ibrahim M. (Towers & Hamblins) to Blas Garcia (Aridos Jativa) re Arabian Cement Company (“ACC”) land and corporate matters (25 November 2004) [hereinafter “Towers & Hamblins Report”].

<sup>13</sup> C-95, KPMG Report.

<sup>14</sup> *Id.*, p. 6.

<sup>15</sup> Procedural Order No. 5, Annex B, Request 4.

<sup>16</sup> C-97, Towers & Hamblins Report.

<sup>17</sup> See Sections VII.A(1)b and VII.A(2)a(ii) for the Parties’ discussion of due diligence matters.

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<sup>18</sup> R-1, Law 21 of 1958 on Regulating and Encouraging Industry in the Egyptian Territory (29 April 1958) [hereinafter “1958 Industry Law”]; *see also* CL-6, 1958 Industry Law (providing the Claimants’ translation of same).

<sup>19</sup> R-1, 1958 Industry Law.

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<sup>20</sup> R-4, Presidential Decree Passed by the President of the United Arab Republic Promulgating the Executive Regulation of Law 21/1958, Official Gazette Issue No. 12 (29 May 1958) [hereinafter “Executive Regulations to the 1958 Industry Law”].

<sup>21</sup> R-1, 1958 Industry Law, art. 17; R-4, Executive Regulations to the 1958 Industry Law, arts. 15-16.

<sup>22</sup> C-204, Law No. 72 of 2017 Promulgating the Investment Law (31 May 2017). As noted below, the Claimants contend that earlier investment laws had already rendered the 1958 Industry Law obsolete. *See infra* Section VII.A(1)a (FET).

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<sup>23</sup> R-4, Executive Regulations to the 1958 Industry Law, art. 1; Resp. C-Mem. ¶ 34.

<sup>24</sup> Resp. C-Mem ¶ 34 (citing R-5, Presidential Decree No. 1476 of 1964 with regard to General Organization for Industrialization (1964)); *see also* Legal Opinion of Prof. Mohamed Badran (26 June 2016) [hereinafter “Badran Legal Opinion”] ¶ 7.

<sup>25</sup> Cl. PHB ¶ 26.

<sup>26</sup> R-6, Ministry of Industry Ministerial Decision No. 801 of 1986, Egyptian Gazette Number 267 (Annex) (26 November 1986), art. 1; Resp. C-Mem ¶ 34.

<sup>27</sup> Resp. C-Mem. ¶ 35 (citing R-7, Decree of the President of the Arab Republic of Egypt No. 350 of the year 2005 For the establishment of the Industrial Development Authority (22 October 2005)); *see also* Badran Legal Opinion ¶ 9.

<sup>28</sup> R-7, Decree of the President of the Arab Republic of Egypt No. 350 of the year 2005 For the establishment of the Industrial Development Authority (22 October 2005), art. 2.

[REDACTED]

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<sup>29</sup> *Id.*, art. 2 (9).

<sup>30</sup> R-59, Law No. 15 of 2017 on the Facilitation of Granting Licenses to Industrial Facilities, Official Gazette, Issue No. 17 (bis) (d) (31 May 2017) [hereinafter “Law No. 15 of 2017”] (translation submitted by the Respondent); C-203, Law No. 15 of 2017 (translation submitted by the Claimants).

<sup>31</sup> C-203, Law No. 15 of 2017:

*In relation to heavy industries, and any other industry specified by issuance of a decree from the Council of Ministers, licenses for their establishment or expansion may be offered to investors that are technically qualified and financially desirous to obtain one, according to the rules, regulations, and procedures that are specified by the decision. In such cases, the Council of Ministers, in light of the economic benefit, may specify a lump sum to be paid for that license based on the studies presented by the competent minister, such lump sum being in addition to the fees stipulated by law.*

*In the event that several investors are technically and financially qualified to receive the aforementioned license, a comparison is made between them in order to determine the most beneficial offers from an economic standpoint, based on the study setting out the economic benefit presented by the competent minister to the Council of Ministers. The Council of Ministers validates the results of the comparison.*

<sup>32</sup> *Id.*

[REDACTED]

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<sup>33</sup> Cl. Reply ¶ 167.

<sup>34</sup> *Id.*

<sup>35</sup> *See, e.g.*, Prof. Badran Legal Opinion ¶ 12.

<sup>36</sup> Cl. Reply ¶ 68; Cl. PHB ¶ 24.

<sup>37</sup> C-150, Law No. 230 of 1989, Law of Investment Guarantees and Incentives (20 July 1989); *see also* C-151, Executive Regulations to Law No. 230 of 1989, Law of Investment Guarantees and Incentives (6 December 1989).

<sup>38</sup> Cl. Reply n.58. The Tribunal notes that the exhibit does not provide a translation of Articles 52-55 and 58 and therefore relies upon the translation provided in the Claimants' Reply.

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<sup>39</sup> Cl. Reply n.58 (quoting C-152, Law No. 8 of 1997, Law of Investment Guarantees and Incentives and Its Executive Regulations (11 May 1997), art. 53).

<sup>40</sup> Cl. Reply n.58 (quoting C-152, Law No. 8 of 1997, Law of Investment Guarantees and Incentives and Its Executive Regulations (11 May 1997), art. 54).

<sup>41</sup> Cl. Reply n.58 (quoting C-152, Law No. 8 of 1997, Law of Investment Guarantees and Incentives and Its Executive Regulations (11 May 1997), art. 55 and C-153, Law No. 8 of 1997, Law of Investment Guarantees and Incentives & Its Executive Regulations (9 August 1997), art. 22).

<sup>42</sup> C-154, Decree No. 314 of 1996 (7 February 1996), art. 1(4). The Tribunal notes that the English translation of this exhibit, and the Claimants' quotation of it (Cl. Reply n.67), contains language that seems to be the Claimants' argument, not language that appears in the decree itself.

<sup>43</sup> C-133, Law No. 17 of 2015 amending Law No. 8 of 1997, Law of Investment Guarantees and Incentives (12 March 2015); C-204, Law No. 72 of 2017, Promulgating the Investment Law (31 May 2017).



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- 2- *the measures taken by [Egypt], through the IDA, the [Supreme Energy Counsel], and other authorities since 2006 themselves were unlawful,*
- 3- *the imposition of an auction was an unforeseeable and arbitrary measure, and lacked any procedural or substantive propriety,*
- 4- *The imposition of an auction on ACC was a discriminatory measure,*
- 5- *The power station requirement breached [Egypt]'s specific commitment to supply electricity to the plant,*
- 6- *The power station requirement was arbitrary and lacked transparency,*
- 7- *The power station requirement was discriminatory,*
- 8- *The power station requirement was not reasonable,*
- 9- *The electricity consumption factor resulted in double payment by the Claimants for electricity,*
- 10- *The cut-off gas on Line II was unlawful, arbitrary, and discriminatory,*
- 11- *[Egypt], through its administrative courts, flagrantly denied ACC justice [and failed to provide effective means of asserting claims and enforcing rights with respect to the Claimants' investment],*
- 12- *[Egypt] breached its specific commitment undertaken to the Claimants to supply gas to the Plant, with respect to the principle, quantity, price, and duration since 2012,*
- 13- *[Egypt] has failed to properly manage its gas resources in violation of the Claimants' legitimate expectations and the fair and equitable treatment standards, and*

14- *[Egypt]’s failure to provide gas to the plant was arbitrary and discriminatory.*<sup>261</sup>

254. The Tribunal notes that the Claimants did not explicitly request a finding that the Respondent failed to provide effective means of asserting claims and enforcing rights, as noted in brackets in subparagraph 11 immediately above. However, as the Claimants did argue this point in their pleadings and at the hearing, the Tribunal considers it to be part of the Claimants’ request for relief.

255. Upon a finding of violation, the Claimants request that the Tribunal order the Respondent to pay the Claimants damages as follows:

- i) *EUR 78.9 Million corresponding to Claimants’ compensation for lost dividends until March 31, 2019 resulting from [Egypt]’s wrongful demand for payment of the IDA Approval Fees and of the Electricity Generation Fees, with interest thereon until full payment,*
- ii) *EUR 5.4 Million corresponding to Claimants’ lost dividends until March 31, 2019 resulting from [Egypt]’s wrongful withholding of gas supply to ACC’s Line II for the period from March to November 2011, with interest thereon until full payment,*
- iii) *EUR 151.6 Million corresponding to Claimants’ lost dividends until March 31, 2019 resulting from [Egypt]’s failure to deliver to ACC its licensed quantity of gas for the period from January 2012 onwards, with interest thereon until full payment[.]*
- iv) *EUR [100,000] corresponding to Claimants’ lost dividends resulting from the litigation costs incurred as a result of [Egypt]’s wrongful demand for payment of the IDA Approval Fees and of the Electricity Generation Fees, and from [Egypt]’s denial of justice to ACC in this regard to date, with interest thereon until full payment, []*

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<sup>261</sup> *Id.*, ¶ 195.



- v) *The interest shall be calculated based on the 10-year-yield to maturity of government bonds, []*
- vi) *The interest shall accrue at EGP interest rates up to the date of distribution of dividends, that is one year after being generated, and at Euro Interest rates thereafter[,]*
- vii) *Ordering the Respondent to pay the Claimants' costs in these arbitration proceedings, as to be set out in the Claimants' cost submissions, together with interest thereon, including all attorney's fees and expert witness fees and, between the Parties, to bear alone the responsibility for compensating the Arbitral Tribunal and ICSID[, and]*
- viii) *Any other relief that the Tribunal deems just and proper.*<sup>262</sup>

256. The Claimants note that these damages requests were based on totals generated by the Claimants' damages expert [REDACTED] through March 31, 2019, and may be subject to update (e.g., for any pre-award interest) until the Tribunal renders a Final Award.

257. The Respondent disputes the Claimants' allegations and requests that the Tribunal:

- a) *Dismiss Claimants' claims in their entirety as lacking in merits;*
- b) *In the alternative, if, par impossible, the Tribunal finds that the Egypt-Spain BIT has been breached by Egypt on the basis of any of Claimants' claims, dismiss Claimants' corresponding claim(s) for compensation as having failed to establish that Respondent has caused any loss and damage to Claimants and/or as having failed to establish any loss and damage suffered by Claimants; []*
- c) *Order Claimants to bear all the costs of these proceedings, including but not limited to their own costs, all costs and fees of the Tribunal and ICSID, and to pay to Respondent the costs it has incurred for its defense in this arbitration, including but not limited to, the fees and disbursements of its attorneys and experts and the disbursements of its officials and employees incurred in connection with its defense in this*

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<sup>262</sup> *Id.*, ¶ 197.

*arbitration on a full indemnity basis, plus interest thereon at a reasonable rate; [and]*

- d) *Order such other relief as the Tribunal deems appropriate.*<sup>263</sup>

## VI. JURISDICTION

258. Article 11(2) of the Treaty offers a wide range of alternative dispute resolution options, namely:

*If these disputes cannot be settled in this way within six months from the date of the written notification mentioned in paragraph 1, the conflict shall be submitted, at the choice of the investor, to:*

- *a court of arbitration in accordance with the Rules of Procedure of the Arbitration Institute of the Stockholm Chamber of Commerce.*
- *the court of arbitration of the Paris International Chamber of Commerce.*
- *the ad hoc court of arbitration established under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law.*
- *the International Center for Settlement of Investment Disputes (ICSID) set up by the “Convention on Settlement of Investment Disputes between States and Nationals of other States”, in case both Parties become signatories of this Convention.*
- *Regional Center for International Commercial arbitration in Cairo.*

259. The Claimants have elected to submit this investment dispute to adjudication under the rules of the ICSID Convention.<sup>264</sup> Article 42(1) of the ICSID Convention provides that the tribunal shall decide a dispute in accordance with such rules of law as may be agreed by

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<sup>263</sup> Resp. PHB ¶ 101 (emphasis omitted).

<sup>264</sup> Cl. Request ¶ 153.

the parties. From this follows that the Parties have become bound to the applicable-law provision of the Treaty.

260. Article 11(3) of the Treaty is the applicable-law provision, which provides that “[t]he arbitration shall be based on:

- the provisions of this agreement;
- the national law of the Party in whose territory the investment was made, including the rules relative to conflicts of law;
- the rules and the universally accepted principles of international law.”

261. Mindful of these provisions, the Tribunal will proceed to determine whether it has jurisdiction over the Claimants’ claims.

262. The Tribunal notes that the Respondent initially objected to jurisdiction regarding certain claims on two bases: it contended that (1) certain claims sought to vindicate the rights of ACC rather than Claimants themselves; and (2) certain other claims were based on the gas contract rather than on the BIT. The Parties exchanged multiple rounds of briefing regarding these jurisdictional objections. At the Hearing, the Respondent withdrew its jurisdictional objections with the understanding that the Claimants have either clarified or revised their claims to make clear that they do not seek to assert the rights of ACC or base any claims on the gas contract.<sup>265</sup> As a consequence, there are no pending jurisdictional objections.

263. However, pursuant to Article 41 of the ICSID Convention, the Tribunal is the judge of its own competence and must satisfy itself that the submitted dispute meets the jurisdictional requirements set forth in the Treaty and in Article 25 of the ICSID Convention:

- (a) *ratione personae*: the dispute must be between a contracting State and a national of another contracting State;

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<sup>265</sup> Hr’g Tr. Day 3 (10 April 2019) 146:2-148:22.

- (b) *ratione materiae*: the dispute must be a legal dispute arising directly out of an investment;
- (c) *ratione voluntatis*: the parties to the dispute must have consented in writing to ICSID's settling of the dispute; and
- (d) *ratione temporis*: the ICSID Convention must have been applicable at the relevant time.

**A. *RATIONE PERSONAE***

264. The Claimants are companies incorporated under the laws of the Kingdom of Spain and based in Valencia, Spain. The ICSID Convention entered into force for Spain on 17 September 1994. The Claimants are therefore nationals of a contracting state. The ICSID Convention entered into force for Egypt on 2 June 1972. The Respondent was therefore a contracting State at the time this dispute was initiated.
265. The dispute is, therefore, between a contracting State and nationals of another contracting State under the Treaty and the ICSID Convention.

**B. *RATIONE MATERIAE***

266. The Claimants allege violations of the BIT and international law arising out of their ownership of shares in ACC, an Egyptian company listed on the Egyptian stock exchange. Claimant Aridos Jativa is the majority shareholder in ACC. It initially acquired a 68 percent shareholding in ACC, then sold part of its shares in 2008, such that Claimant Aridos Jativa now owns 60 percent of ACC. Claimant Cementos is the sole shareholder of Claimant Aridos Jativa and thus owns 100 percent of its shares.<sup>266</sup>
267. The Treaty provides in its Article 1(2) that an "investment" means "any kind of assets" including "shares and other forms of participation in companies." Consequently, a shareholding in an Egyptian legal entity (ACC) constitutes an "investment" according to the definition contained in the Treaty. Although Article 25 of the ICSID Convention does

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<sup>266</sup> Cl. Mem. ¶ 9.

not define “investment,” it is readily apparent that the acquisition of shares in an asset susceptible of producing income constitutes an investment.

268. As for the fact that the Claimants have brought identical claims based on the same causes of action, the Claimants have presented themselves as “joint investors” under the Treaty. The Respondent has objected to this assertion by the Claimants and noted, *inter alia*:

*If any sense is to be made of the joint claim for damages, however, it should be treated as being a claim by Aridos in respect of its position as a holder of 60% of the shares in ACC. Cementos as the 100% shareholder in Aridos does not have and is not making a separate claim.*<sup>267</sup>

269. In response, the Claimants affirm that they have presented a joint claim and commented on the Respondent’s objection as follows:

*440. Respondent criticizes Claimants’ for presenting a joint claim in these proceedings. Such criticism is theoretical and baseless in the circumstances.*

*441. Respondent does not dispute that both Claimants are “investors” pursuant to the Treaty and that both satisfy the criteria for asserting a claim in these proceedings. Submitting a joint claim is appropriate and expedient in the circumstances. It will be up to Claimants to settle among themselves their respective entitlements in the sums jointly awarded to them by the Tribunal. To the extent that the claims asserted are unambiguously framed as joint claims and not individual claims, it is difficult to understand Respondent’s purported concern.*<sup>268</sup>

270. As for the two Claimants’ respective claims, the Respondent explained the difference between direct and derivative claims, emphasizing that only the value of the Claimants’ shares in ACC is protected. The Respondent did not, however, distinguish between Claimant Aridos Jativa’s direct investment in ACC and Claimant Cementos’s indirect investment in ACC. Indeed, the Respondent specifically “does not contest the fact that

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<sup>267</sup> Resp. C-Mem. ¶ 371, *in fine*.

<sup>268</sup> Cl. Reply ¶¶ 440-441.

Claimants' (direct and indirect) shareholding in ACC is an investment as per Article 1 of the BIT."<sup>269</sup>

271. Also, the Respondent did address the distinction between the two Claimants in its factual background and damages sections, summarizing that: "In other words, though there are two Claimants named in this arbitration against Egypt, they have brought their claims on the basis of the same shareholding."<sup>270</sup>
272. Based on the above, it is clear that the Parties contest the matter of *quantum* as it relates to the respective Claimants, but that there is no issue in this case as concerns their having made an investment in ACC susceptible of vesting the Tribunal with jurisdiction according to the terms of the Treaty and Article 25 of the ICSID Convention.

**C. *RATIONE VOLUNTATIS***

273. Article 11 of the BIT sets forth the Respondent's consent to arbitrate certain disputes before ICSID. The Claimants' Request for Arbitration includes their acceptance of the Respondent's offer to arbitrate before ICSID.<sup>271</sup>
274. The Respondent withdrew all its objections to jurisdiction in the course of the hearing, on the basis of its understanding as to the nature of the claim and the causes of action. Hence, the Parties have consented in writing to submit this dispute to ICSID arbitration.

**D. *RATIONE TEMPORIS***

275. The Treaty came into force on 26 April 1994 and remains in effect.
276. The ICSID Convention entered into force for Egypt on 2 June 1972, and for Spain on 17 September 1994. Claimant Aridos Jativa first acquired ownership of ACC in August 2004.<sup>272</sup> The Claimants allege that the Respondent's violations of the BIT and international

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<sup>269</sup> Resp. C-Mem. ¶ 143; *see also id.* ¶ 146 ("Claimants' one and only investment relevant for this dispute comprises their direct or indirect shareholdings in ACC alone.").

<sup>270</sup> Resp. C-Mem. ¶ 20.

<sup>271</sup> Cl. Request ¶ 2.

<sup>272</sup> Cl. Mem. ¶ 38.

law began in September 2006 and are continuing in nature.<sup>273</sup> It follows that the Treaty and the ICSID Convention were in effect at all relevant times.

\* \* \*

277. For the reasons set forth above, the Tribunal finds that it has jurisdiction to adjudicate the claims brought by the Claimants on their merits.

## VII. THE MERITS

### A. THE PARTIES' STATEMENTS OF CASE

278. The Tribunal starts its analysis of the substantive issues before it by first summarizing the Claimants' and the Respondent's positions.

#### (1) The Claimants' Position

█ [REDACTED]

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<sup>273</sup> See, e.g., Cl. Mem. ¶ 30.

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**B. THE TRIBUNAL’S REASONING**

**(1) The Treaty**

535. Article 2(1) of the Treaty provides:

*Each Party shall encourage, insofar as possible, the investments made in its territory by investors of the other Party and shall accept such investments pursuant to its law.*<sup>835</sup>

536. Article 3(1) of the Treaty provides:

*Each Party shall protect in its territory the investments made in accordance with its laws and regulations, by investors of the other Party and shall not hamper, by means of unjustified or discriminatory measures, the management, maintenance use,*

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<sup>830</sup> *Id.*, ¶ 166 (citing RL-62, *Chevron v. Ecuador*, ¶ 262).

<sup>831</sup> RL-30, *White Industries v. India*, ¶ 11.3.2 (quoted in Resp. Rej. ¶ 167).

<sup>832</sup> Resp. Rej. ¶ 169.

<sup>833</sup> *Id.*, ¶ 170.

<sup>834</sup> *Id.*, ¶ 171.

<sup>835</sup> CL-1, BIT, art. 2(1).

*enjoyment, expansion, sale and if it is the case, the liquidation of such investments.*<sup>836</sup>

537. Articles 4(1) and 4(2) of the Treaty provide:

*1. Each Party shall guarantee in its territory fair and equitable treatment for the investments made by investors of the other Party.*

*2. This treatment shall not be less favorable than that which is extended by each Party to the investments made in its territory by investors of a third country.*<sup>837</sup>

538. In these proceedings, the Claimants claim that the Respondent has subjected the Claimants' investment in ACC to unfair, discriminatory, and arbitrary treatment, and has denied the Claimants' investment justice and effective means to vindicate their rights. By doing so, the Claimants assert:

- The Respondent has breached its obligation to provide fair and equitable treatment as provided in Article 4(1) of the Treaty to the Claimants' investment;
- The Respondent has violated its obligations under Article 3(1) of the Treaty and under international law by treating the Claimants in a discriminatory and arbitrary manner;
- The Respondent has violated its obligations under international law by betraying the Claimants' legitimate expectations; and
- The Respondent has violated its obligations under the Treaty and under international law by denying the Claimants justice, and by failing to provide effective means of asserting claims and enforcing rights with respect to investment authorizations as applicable by virtue of Article 4(2) of the Treaty and Article II(7) of the Egypt-US BIT.

## **(2) Chronology**

539. A chronological description of the factual background and the circumstances constituting the basis for the Claimants' prayers for relief have been laid out in Section IV, "Factual

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<sup>836</sup> *Id.*, art. 3(1).

<sup>837</sup> *Id.*, art. 4(1)-(2).

Background.” Circumstances of a factual nature will also be addressed in more specific detail in the reasoning of the Tribunal insofar they are deemed to be of relevance for that particular issue.

**(3) Has Egypt Breached Any BIT Standard of Protection in Relation to the Licensing Issue?**

***a. Introduction***

540. As has been accounted for in the presentation of the Claimants’ case, *supra* Section VII.A(1), the Claimants consider that the Respondent has violated its obligation under the Treaty to treat their investment in a fair and equitable way, and that the Respondent, in particular, by dealing with the Claimants in a discriminatory and arbitrary fashion has breached its FET obligations under the Treaty when allocating an Industrial License to ACC. Additionally, the Respondent has denied the Claimants justice by failing to provide effective means to the Claimants to enforce their rights.
541. The Treaty breaches alleged by the Claimants concern specifically the licensing procedure adopted by the Respondent’s instrumentalities, dealing with its investment (ACC) by retroactively applying oppressive and discriminatory licensing terms that were introduced in 2007. This is despite the fact that, according to Claimants, ACC had received all requisite approvals some 10 years earlier and had started construction of its cement plant well before 2007.
542. The Claimants further consider that even if ACC would be considered to have failed to receive all requisite approvals at the time of commencement of its cement project (and this would not be attributable to failings of the relevant Respondent instrumentalities), the terms and conditions as well as the procedure applied to ACC for obtaining an approval in 2008 by their arbitrary and egregious implications constitute multiple breaches of the Treaty.
543. The licensing terms imposed on ACC and other applicants for licenses in the cement sector in 2007 constituted a fundamental change in the regulatory regime governing the establishment of cement plants, a regime that, according to the Claimants, represents an irrational, arbitrary, and discriminatory response to any energy or environmental concerns that may be raised in the domain of cement production.

544. As has been accounted for in Section VII.A, “The Parties’ Statements of Case,” the Claimants consider that the Respondent has attracted liability by breaches of the FET standard contained in the Treaty, and additionally by denying the Claimants justice and failing to ensure the Claimants’ investment of effective means to vindicate its claims. These breaches have taken place in the context of the licensing procedure to which the Claimants’ investment, ACC, was subjected as well as in relation to the Respondent’s failure to provide critical utilities to ACC’s cement plant as regards the supply of gas and electricity.
545. In the following, the Tribunal will deal with the Claimants’ allegations of Treaty breaches (and denial of justice) in relation to:
- a) the licensing procedure to which the Claimants’ investment, ACC, was subjected;
  - b) breaches in relation to the Respondents’ undertakings in respect of supply of electricity; and
  - c) breaches in relation to the Respondents’ undertakings in respect of supply of gas.
546. As has been accounted for in describing the factual background of the Claimants’ case in relation to the licensing procedure (described in Section IV.C, “The Licensing Procedure”), the Respondent has subjected ACC — and thus the Claimants — to treatment that is unreasonable, arbitrary, discriminatory, and disproportionate. By so doing, the Respondent is said to be responsible for breaches of the FET standard and the investor’s legitimate expectations arising under the Treaty’s provisions on fair and equitable treatment.
547. Additionally, the Claimants consider that ACC suffered discriminatory treatment in relation to the early actors, and that it has been subjected to treatment in relation to other new entrants that was oppressive and arbitrary.

***b. Did ACC Apply for a License? If So, Did It Submit to the Proper Authority? If So, Was a License Issued?***

548. On the Respondent’s case, ACC failed to comply with the 1958 Industry Law. This, in its Article 1, provided for the duty of any enterprise wishing to establish (or expand) an “industrial establishment” to secure a license for such purpose:



*Part I on Industrial Regulation – Chapter I – Licensing and Registration*

*Article 1*

*It shall not be permitted to establish or expand industrial establishments or change their industrial purpose or their location except by virtue of a license from the Minister of Industry after consultation with a committee which shall be formed by Presidential decree taking into account the State's economic needs and local consumption and exportation capabilities within the scope of the State's economic and social development plans.*<sup>838</sup>

549. In the event of any breach of the provisions of the 1958 Industry Law (as amended on 5 June 1980), Article 16 provides:

*In all the above cases, it shall be permitted to decide the closure of the establishment and the seizure of goods or products which are the object of the violation.*<sup>839</sup>

550. The 1958 Industry Law was in effect from its enactment up to 2017, when it was replaced by the Investment Law No. 15 of 2017 on the Facilitation of Granting Licenses to Industrial Facilities.<sup>840</sup> Thus, the 1958 Industry Law was a part of the regulatory regime at all relevant times, namely the time of ACC's incorporation, when the Claimants acquired its interest in ACC in August of 2004, and at the time of IDA issuing its "Final Approval" in July of 2008.
551. The Claimants assert (among other things) that the requisite license was acquired in 1996, i.e., well before they made their acquisition of an interest in ACC in 2004. The license was issued by GAFI which was the State agency duly entrusted at the time with the task of reviewing and granting licenses. In this regard, the Claimants invoke a letter of 27 February 1996 issued to ACC by GAFI which informs that a committee appointed to evaluate the

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<sup>838</sup> R-1, 1958 Industry Law, art. 1.

<sup>839</sup> *Id.*, art. 16.

<sup>840</sup> R-59, Law No. 15 of 2017 (translation submitted by the Respondent); C-203, Law No. 15 of 2017 (translation submitted by the Claimants).

project had recommended approval of ACC's request subject to certain conditions.<sup>841</sup> The letter notes, by way of conclusion:

*Thus, it is noteworthy that this is only a preliminary approval, and the project will be submitted to the Chairman of the Board of the Authority to get the final approval of the project.*<sup>842</sup>

552. It is clear from GAFI's letter of 27 February 1996 that this agency only issued what it considered to be a "preliminary approval." There is no evidence on record that this "preliminary approval" was ever followed by a further or final approval.
553. It is plain that GAFI put particular emphasis on the approval being "preliminary," with the clear implication that the envisaged project would require further review in order to obtain "Final Approval." In the view of the Tribunal, this creates a strong presumption that GAFI's letter of 27 February 1996 was not — and was not intended to be — a license in the meaning of the 1958 Industry Law, nor could it provide a corresponding authorization for the cement project to go ahead.
554. However, irrespective of this observation, the Tribunal is also bound to determine whether GAFI was, in fact, the proper authority to deal with and issue licenses according to the 1958 Industry Law.
555. For this purpose it is necessary to examine the legislative underpinnings of these respective governmental organs, i.e., IDA and GAFI.

**(i) The 1958 Industry Law**

556. Legislation under the Ministry of Trade and Industry starts out with the 1958 Industry Law. This law was subsequently amended in 1964, in relation to the internal mandate to deal with licensing matters. Specifically, the internal mandate to issue licenses was transferred under this law from the Department of Industrial Regulation to GOFI (or GIA) by Decree 1476 of 1964.

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<sup>841</sup> C-92, Letter from GAFI to ACC (27 February 1996).

<sup>842</sup> *Id.*

*Article 2 – The Department of Industrial Regulation’s prerogatives are transferred to the General Organization for Industrialization.*<sup>843</sup>

557. In 1986 the Vice President of the GIA was inserted in this role by way of Ministerial Decision No. 801 of 1986:

*Article 1- the Vice-president of the General Industrial Authority is entrusted with the competences of the Minister of Industry stated in articles 1 and 2 of the [1958 Industry Law].*<sup>844</sup>

558. Finally, according to a Presidential Decree 350 of 2005 IDA was constituted:

*An industrial general authority shall be established under the name “The Industrial Development Authority” which shall have a public legal personality, its headquarters shall be located in Cairo, it shall be assigned to the Minister in charge of Foreign Trade and Industry and it shall be referred to as “the Authority”.*<sup>845</sup>

559. One may note that the Decree provides that IDA shall derive assistance from GAFI in certain cases.<sup>846</sup>

560. Law No. 15 of 2017 on the Facilitation of Granting Licenses to Industrial Facilities was subsequently enacted for purposes of facilitating licensing procedures.<sup>847</sup> It replaced the 1958 Industry Law in its entirety.<sup>848</sup> By reason of its timing, Law No 15 of 2017 is not relevant for the Tribunal’s assessment of the events impugned by the Claimants in this arbitration.

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<sup>843</sup> R-5, Presidential Decree No. 1476 of 1964 with regard to General Organization for Industrialization (1964), art. 2.

<sup>844</sup> R-6, Ministry of Industry Ministerial Decision No. 801 of 1986, Egyptian Gazette- Number 267 (Annex) (26 November 1986).

<sup>845</sup> R-7, Decree of the President of the Arab Republic of Egypt No. 350 of the year 2005 for the establishment of the Industrial Development Authority (22 October 2005), art.1.

<sup>846</sup> *Id.*, arts. 2(8) and 15.

<sup>847</sup> R-59, Law No. 15 of 2017.

<sup>848</sup> Resp. PHB ¶ 11.

**(ii) The Investment Guarantees and Incentives Law**

561. The initial legal instrument that defines the role and functions of GAFI is Law No. 8 of 1997 concerning Investment Guarantees and Incentives.<sup>849</sup>
562. Amendments to this Law were introduced by way of Law No. 17 of 2015 concerning Investment Guarantees and Incentives.<sup>850</sup>
563. Law No 72 of 2017<sup>851</sup> finally repealed Law No 8 of 1997 (on Investment Guarantees).
564. In addition, the Tribunal notes that, according to the Respondent, GAFI is an entity that is separate from the Ministry of Trade and Industry — it acts under the Ministry of Investment — and GAFI’s preliminary approval is unrelated to the grant of an Industrial License as required from the Ministry of Trade and Industry in accordance with the 1958 Industry Law.<sup>852</sup>
565. GAFI is the authority that is mandated to administer the provisions of Law No. 8 of 1997 concerning Investment Guarantees and Incentives.<sup>853</sup>
566. Going to the law’s Executive Regulations, one may note that any company that wishes to engage in, *inter alia*, industrial activities, that is to say “in the transformation of substances,”<sup>854</sup> shall notify GAFI if it wishes to operate in the north or south Sinai governorates.<sup>855</sup> This is a regulatory prerequisite for enjoying automatic tax exemptions and entitlement to land use.<sup>856</sup>

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<sup>849</sup> C-152, Law No. 8 of 1997, Law of Investment Guarantees and Incentives and Its Executive Regulations (11 May 1997); C-153, Law No. 8 of 1997, Law of Investment Guarantees and Incentives & Its Executive Regulations (9 August 1997).

<sup>850</sup> C-133, Law No. 17 of 2015 amending Law No. 8 of 1997, Law of Investment Guarantees and Incentives (12 March 2015).

<sup>851</sup> C-204, Law No. 72 of 2017 Promulgating the Investment Law (31 May 2017).

<sup>852</sup> Resp. C-Mem. ¶ 21.

<sup>853</sup> C-153, Law No. 8 of 1997, Law of Investment Guarantees and Incentives & Its Executive Regulations (9 August 1997), art. 3.

<sup>854</sup> *Id.*, art. 1(3)(a).

<sup>855</sup> *Id.*, art. 4.

<sup>856</sup> *Id.*, Part 6 (Allotment of Land).

567. On 7 February 1996, Decree No. 314/1996 was issued concerning the establishment of service offices for investors in the governorates.<sup>857</sup> According to this Decree, the investment offices were to act on behalf of investors to obtain all required approvals from the competent authorities. (As mentioned in paragraphs 551-52 above, it was GAFI that issued a “preliminary approval” to ACC concerning the cement project on 27 February 1996.<sup>858</sup>)
568. As stated above (paragraph 113), the Investor Service Office of the Suez Governorate issued a “preliminary approval” concerning allocation of a plot of land on 17 April 1996.<sup>859</sup>
569. There is no information in the record before the Tribunal as to the basis on, or circumstances in, which GAFI granted “preliminary approval” (one may note that this preliminary approval was issued before ACC was incorporated). In contrast, it appears that IDA, when made aware of ACC’s cement project, requested data on the anticipated needs of ACC’s project (as one might reasonably anticipate) in respect of electricity, natural gas, fuel, water, industrial sewage, and sanitation.<sup>860</sup>
570. It is notable that ACC in proceedings before the Administrative Court (as far as its application and the court’s decision shows) did not mention GAFI or argue that its “preliminary approval” constituted a final approval for ACC to proceed with the cement plant or that it was relevant in any other respect.
571. As regards the legislation entrusting GAFI with certain decision-making powers, the following may be noted.
572. The Law No. 8 of 1997 concerning Investment Guarantees and Incentives concerns, as its name implies, investment guarantees and incentives.<sup>861</sup> It regulates the availability of such

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<sup>857</sup> C-154, Decree No. 314/1996 (7 February 1996).

<sup>858</sup> C-92, Letter from GAFI to ACC (27 February 1996).

<sup>859</sup> C-9, Notification of a Preliminary Approval Allocation of a land for establishing a (industrial/touristic/agricultural) project, issued by Suez Governorate Investors Customer Service Office (17 April 1996); C-93, Notification of Allocation of a Land for (Industrial / Tourism / Agricultural) Project, issued by Suez Governorate Investors Service Office (17 April 1996).

<sup>860</sup> C-20, Letter from IDA to ACC (11 November 2006).

<sup>861</sup> C-153, Law No. 8 of 1997, Law of Investment Guarantees and Incentives & Its Executive Regulations (9 August 1997).

investment guarantees and incentives “including tax exemptions”<sup>862</sup> and provides that GAFI is the agency authorized to deal with the matters regulated by this law.<sup>863</sup>

573. The Claimants clarified at the hearing:

*ACC was established under the investment law. Why is this important? Because it's a preferential regime, and it's based on the idea of creating incentives for investors and making things easy for them in terms of establishing and operating their investments. So this mainly goes to the “one-stop shop” — this is an issue I will come recurrently to — and how central it is to this preferential regime that was put forward under the investment law.*<sup>864</sup>

574. The Respondent confirmed this role of GAFI at the hearing:

*So also the GAFI issues the licence too, but an investment licence. A licence enabling the beneficiary of benefiting from the incentives and guarantees from the investment law. That's all. GAFI is not in charge of the industrial policy of the country*<sup>865</sup>

575. The Claimants have clearly stated their position that GAFI was the relevant authority to deal with license applications including the Industrial License. As expressed by the Claimants:

*[S]ince at least 1974 and until 2005, all Respondent's relevant authorities, including the Ministry of Industry and its affiliated authorities, granted their approvals through GAFI and its delegate authorities, the Governorates and the Local Bureaus. As a matter of law, this should have remained so until 2017. As acknowledged by IDA itself, until the 2017 Law, the IDA had no legitimate or lawful right (i.e. one that is rooted in the existing regime) to intervene in the cement industry as it did in 2005, nor was it legally entitled to intervene in Claimants' project as it did since 2006. Therefore, the respected Tribunal shall find that the new licensing system implemented by administrative measures since 2005 – besides the self-standing breach by [Egypt] of having had it implemented*

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<sup>862</sup> *Id.*, art. 2.

<sup>863</sup> *Id.*, art. 5. The Claimants have also filed a version of this law pursuant to amendments by Law No. 17 of 2015. C-133, Law No. 17 of 2015 amending Law No. 8 of 1997, Law of Investment Guarantees and Incentives (12 March 2015). Being later in time than the impugned actions, the Tribunal does not attach any relevance to this version.

<sup>864</sup> Hr'g Tr. Day 1 (8 April 2019) 16:22-17:6.

<sup>865</sup> Hr'g Tr. Day 1 (8 April 2019) 117:15-20.

*without the support of a legislative change – fell short of the standards of treatment and requirements of FET under the BIT and international law.*<sup>866</sup>

576. In support of its argument that “all Respondent’s relevant authorities, including the Ministry of Trade and Industry and its affiliated authorities, granted their approvals through GAFI,”<sup>867</sup> the Claimants have invoked a presentation by IDA captioned “IDA – Main Features of the Executive Regulations for Law 15-2017, Facilitating Industrial Licensing Procedures.”<sup>868</sup>
577. This document does not, however, support the Claimants’ case. It merely lays bare the lack of a coherent administrative apparatus for handling processes with the attendant loss of efficiency and unity of purpose, a factor about which the Claimants would have been aware — or should have been aware — when they made their investments. The shortcomings were only remedied by new legislation in 2017. The document’s reference to “the lack of competencies of [IDA]”<sup>869</sup> does not relate to IDA’s mandate or scope of authority, which was determined by Presidential Decree No. 350/2005 of 22 October 2005 by which IDA was established.<sup>870</sup>
578. Importantly, GAFI derives its authority from the Investment Guarantees and Incentives Law. Its Executive Regulations impose on GAFI a number of functions governed by the Investment Law. The Regulations provide, *inter alia*, in Article 4 that:

*A company or firm that desires to enter into an activity in the fields stated in Article 1 of the present Regulations in any of North or*

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<sup>866</sup> Cl. PHB ¶ 36 (emphasis omitted).

<sup>867</sup> Cl. PHB ¶ 36.

<sup>868</sup> C-220, IDA - Main Features of the Executive Regulations for Law 15-2017 Facilitating Industrial Licensing Procedures (undated). This new Law No. 15 of 2017 sought to remedy a number of shortcomings in the existing order such as “multiple overlapping entities in the process of granting licenses and putting in place the related requirements.” *Id.*, Introduction.

<sup>869</sup> *Id.*

<sup>870</sup> R-7, Decree of the President of the Arab Republic of Egypt No. 350 of the year 2005 For the establishment of the Industrial Development Authority (22 October 2005).

*South Sinai Governorates has to notify the General Authority of Investment and Free Zones in advance.*<sup>871</sup>

579. As follows from the Investment Guarantees and Incentives Law and its Regulations, GAFI does not deal with any license requirement under the 1958 Industry Law, nor does it derive any authority or function in relation to the requirements under that law.
580. The Claimants have referred to certain provisions of the Investment Guarantees and Incentives Law (Articles 52-55) of the following tenor:

*See Article 53 of Law No. 8/1997 (Exhibit C-152):*

*“The investors shall submit to the Authority or its branches, on the forms approved by the Chairman, applications for incorporation and registration of companies and establishments, and obtainment of all licenses and approvals from all the competent governmental bodies, as well as applications for allocation of lands and extension of utilities thereto.”*

*Article 54 of Law No. 8/1997 (Exhibit C-152):*

*“... the body that received the application, shall be responsible for providing the investor with the documents bearing the approvals and licenses of the competent bodies.”*

*Article 52 of Law No. 8/1997 (Exhibit C-152):*

*“The Authority and its branches, on behalf of the investor, shall complete all procedures, and furnish all competent bodies with data and copies of the documents required from the investor.”*

*Article 55 of Law No. 8/1997 (Exhibit C-152):*

*“The Authority shall be in charge of issuing the final license within a period not to exceed (15) days from date of issuance of all licenses and approvals required by the competent bodies through its*

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<sup>871</sup> C-153, Law No. 8 of 1997, Law of Investment Guarantees and Incentives & Its Executive Regulations (9 August 1997), Executive Regulations, art. 4.



*employees at its offices and branches, who are authorized to issue such licenses.”<sup>872</sup>*

581. In the view of the Tribunal, the provisions quoted by the Claimants only deal with a duty of communication and coordination; GAFI can assume no responsibility for the fulfilment of the various application procedures, as such, or their successful completion.
582. The delimitation between GAFI’s scope of authority and IDA’s role was also commented on by the Claimants’ witness [REDACTED], assistant chairman (retired) of [REDACTED]:

*That approval — GAFI is the General Authority for Investment in Egypt. You need to have their approval and you go to them basically seeking to have this statement to decrease the custom duties and to limit it to a 5% of your imported goods to be used for this project. And so before you start, you go to GAFI seeking that. But this is not the industrial approval.<sup>873</sup>*

583. The Claimants also consider that the mere failure of the authorized body to rule on a license application constitutes a constructive acceptance to issue a license. In this regard, the Claimants rely on Article 1 of the Executive Regulations No. 449 to the 1958 Industry Law which provides:

*All requests for obtaining the license provided in Article 1 of law no. 21 of 1958 are to be presented the department of regulating industry in order to be studied and regulated. The department of regulating industry shall, by its turn, present the review result to the committee provided in Article one of the law to make its decision within a month otherwise its silence shall be considered as approval to the department of regulating industry opinion. The Minister of Industry shall issue this Decree after perusing the committee’s opinion and*

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<sup>872</sup> Cl. Reply n.58. It may be noted that the contents of Articles 52-55 of Law No 8 of 1997 as presented by the Claimants (Reply n.58) are not supported by the referenced exhibit (C-152), i.e., the purported English translation of the Law No. 8 of 1997 in its wording at the relevant time (2005). Neither does the Arabic-language original, as it appears, reflect the Law as drafted at that time. However, the amended version of Law No. 8 of 1997 (C-133), gives specific indications (by way of footnotes) where articles have been added or substituted. Looking at this in combination with the fact that the text of the exhibited Law No. 8 of 1997 (C-152 and C-153) is truncated (it is not conceivable that a piece of legislation ends up with a specific article heading (“ARTICLE 46”) with no text to go with it), allows the conclusion that the quoted articles did indeed exist in the original version of the Law. In addition, the Respondent has not contested the existence of these articles. See C-152, Law No. 8 of 1997, Law of Investment Guarantees and Incentives and Its Executive Regulations (11 May 1997); C-153, Law No. 8 of 1997, Law of Investment Guarantees and Incentives & Its Executive Regulations (9 August 1997).

<sup>873</sup> Hr’g Tr. Day 2 (9 April 2019) 42:7-13.

*notify the applicant with his Decree through a registered mail with acknowledgement of receipt.*<sup>874</sup>

584. The Respondent considers that the Claimants' position is simply a misreading of the Regulation: the provision makes reference to an internal committee that shall submit its opinion to the duly empowered body, failing which it shall be understood that the committee agrees with the position of that authority. The Respondent further argues that this time limit only concerns an internal aspect of the approvals process with the empowered agency (at the relevant time, IDA), thus having no effect by default vis-à-vis the applicant.
585. In relation to potential applicants for licenses, the 1958 Industry Law adopts a different approach. The 1958 Industry Law sets out the procedure for licensing and registration of industrial enterprises. As described in Section IV.B above, according to this Law it was the Department of Industrial Regulation that was first tasked with these matters. Over time, that authority transitioned to GIA and then, a little more than a year after the Claimants made its investment in ACC, to IDA.
586. As can be concluded from the above summary — premised on the 1958 Industry Law — the agencies in charge of license matters under the Law were entities other than GAFI.

### **(iii) Conclusion**

587. The Tribunal concludes, on the basis of the record before it, that nothing that occurred up to the point in time when the Claimants acquired a controlling interest in ACC in 2004 may be treated as constituting or amounting to the grant of a license under the 1958 Industry Law, such as to allow the Claimants to proceed to their industrial activities. As for the Claimants' own actions, the record makes clear that no relevant application procedure before IDA, the agency in charge of licensing matters under the 1958 Industry Law at the time, was undertaken from 2004 until 18 September 2006.

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<sup>874</sup> Cl. Mem. ¶ 51 (emphasis omitted). *See also* R-4, Executive Regulations to the 1958 Industry Law, art. 1 (providing the Respondent's translation).

588. The evidence shows a clear succession of authorizations given to executive agencies in application of the 1958 Industry Law and the limited scope of authority given to GAFI on the basis of the Investment Guarantees and Incentives Law. From this record it may properly be concluded that at the time ACC obtained its “preliminary approval” from GAFI, the competent authority to grant an Industrial License was the GIA, as made clear by Ministerial Decree No. 801/1986.<sup>875</sup> GAFI was — in accordance with its enabling legislation — an agency that would consider applicants for preferential tax treatment and other investment incentives. The 27 February 1996 “preliminary approval” issued by GAFI is not a license within the meaning of the 1958 Industry Law.
589. Regarding the Claimants’ contention that absent a decision on a license application within a month, the license would be granted by default, a reading of the plain text of the Executive Regulation on which the Claimants rely necessarily leads to the conclusion that the one-month deadline relates to the internal relationship between IDA and the Committee. Thus, if the Committee that is to be consulted by the empowered agency fails to adopt a decision within a month, the empowered agency shall consider that the Committee’s silence constitutes an approval of the empowered agency’s opinion in respect of the particular application. The Claimants’ broader interpretation is without foundation.
590. In this context, the Claimants have also referred to a Decree of the Ministry of Trade and Industry No. 825/2008 regarding facilitation of procedures to issue Approvals for Industrial Projects.<sup>876</sup> This Decree, which was issued in 2008, includes in its Article 2 certain conditionalities and does not provide for a default provision.

*c. Did ACC Receive Other Approvals that Were Tantamount to an Industrial License?*

591. The Claimants consider that ACC met all requirements and secured all approvals and authorizations that reasonably could be obtained for purposes of complying with regulatory exigencies that could be imposed on the company’s cement project.

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<sup>875</sup> R-6, Ministry of Industry Ministerial Decision No. 801 of 1986, Egyptian Gazette- Number 267 (Annex) (26 November 1986).

<sup>876</sup> Cl. Mem. ¶ 51 (citing CL-7, Decree No. 825/2008, issued by Minister of Commerce and Industry (2008), art. 2).

592. It may be noted that this position of the Claimants is reflected in a Memorandum of 27 June 2007 from ACC to IDA.<sup>877</sup> This Memorandum presented ACC’s case to IDA that it should not be treated as a “new project[s].”<sup>878</sup> The Memorandum stated:

*In the end, we would like to note that the Arabian Cement Company project is not one of new projects that are planned to be established; rather, this project has obtained all approvals required for establishment before the new condition regarding the necessity of getting the approval of the Industrial Development Authority. In addition, due to the magnitude of the project and the progress in its implementation, we hope that you issue the necessary approvals for the completion of the project.*<sup>879</sup>

**(i) Conclusion**

593. The 1958 Industry Law provides in imperative fashion that “[i]t shall not be permitted to establish or expand industrial establishments [...] except by virtue of a license from the Minister of Industry.”<sup>880</sup> On its terms, this is a formal requirement, and one that cannot be replaced by any particular course of conduct or failure to take action on the part of the Respondent. (Nor can the fact that the cement plant because of its sheer volume was “visible” in an optical sense be given any importance.<sup>881</sup>)

594. The fact that the ACC cement plant was not a “new project” — in the sense that it had been planned for many years and that construction activity on the ground had already begun — cannot as such give rise to any vested interest on which the Claimants may rely.

**d. The “One-Stop Shop” Concept**

595. On the Claimants’ case, the issuance of the Investment Guarantees and Incentives Law<sup>882</sup> provided for a form of “one-stop” authorization, with the appointment of GAFI as the agency to secure licenses on behalf of investors.

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<sup>877</sup> C-70, Memorandum from ACC to IDA (24 June 2007).

<sup>878</sup> *Id.*

<sup>879</sup> *Id.*

<sup>880</sup> R-1, 1958 Industry Law, art. 1.

<sup>881</sup> Hr’g Tr. Day 1 (8 April 2019) 17:25-20:4.

<sup>882</sup> C-150, Law No. 230 of 1989, Law of Investment Guarantees and Incentives (20 July 1989).

596. On 7 February 1996, Decree No. 314/1996 was issued concerning the establishment of service offices for investors in the governorates.<sup>883</sup> According to this Decree, the investment offices were to act on behalf of investors to obtain all required approvals from the competent authorities.
597. As stated above (paragraphs 113 and 568), the investor office also issued, on 17 April 1996, a preliminary approval concerning allocation of a plot of land.<sup>884</sup>
598. Based on this legislative and regulatory framework, the Claimants consider that it is not the investor’s role but the host State’s obligation “to regulate, implement regulation and set out the administrative process among different authorities in a completely transparent and unequivocal manner.”<sup>885</sup> For this reason, any oversight for which an applicant may have been responsible in the multi-faceted application process to be performed by foreign investors cannot be invoked by the Respondent to the detriment of the Claimants.
599. The Claimants consider that the Respondent by way of GAFI approved ACC’s cement plant project and that this decision was not subsequently challenged by any agency of the Respondent. This compels the conclusion that the project has been duly approved.
600. The Claimants posit that the Ministry of Trade and Industry — which was the ministry in charge of industrial planning — was created as a “one-stop shop” for industry projects.<sup>886</sup> The Claimants rely on Article 2 of the 1958 Industry Law which provides that “the Ministry of Industry shall communicate with the competent governmental authorities for their approval”<sup>887</sup> and Article 2 of the Executive Regulations of the Law, which provides that the Ministry shall communicate with the license applicant for providing data and information necessary for obtaining information required by the Ministry.<sup>888</sup> The

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<sup>883</sup> C-154, Decree No. 314/1996 (7 February 1996).

<sup>884</sup> C-9, Notification of Allocation of a Preliminary Approval Allocation of a land for establishing a (industrial/touristic/agricultural) project, issued by Suez Governorate Investors Customer Service Office (17 April 1996); C-93, Notification of Allocation of a Land for (Industrial / Tourism / Agricultural) Project, issued by Suez Governorate Investors Service Office (17 April 1996).

<sup>885</sup> Cl. PHB ¶ 33.

<sup>886</sup> Cl. Reply ¶ 75.

<sup>887</sup> Cl. Reply n.43. *See also* R-1, 1958 Industry Law, art. 2.

<sup>888</sup> Cl. Reply n.43. *See also* R-4, Executive Regulations to the 1958 Industry Law, art. 2.

Claimants then submit that GAFI later assumed responsibility for acting as the “one-stop shop.”

601. The Respondent has denied that there was any “one-stop shop” for licensing at the relevant time; instead, an applicant desirous of establishing an industrial enterprise in Egypt had to secure the approval of a number of agencies (as in this case). It was not until 2017 that steps were taken to streamline the application procedure by enactment of the Investment Law No. 72 of 31 May 2017.<sup>889</sup>

602. The Respondent has accepted that GAFI had the power to liaise with other authorities but insists that it could not issue all required licenses and approvals. The Respondent invokes in this context pronouncements by the Egyptian administrative courts that all applications for licenses, including the application of ACC itself, were directly submitted to IDA.<sup>890</sup>

**(i) Conclusion**

603. The Tribunal is unable to conclude, on the basis of the record before it, that there existed an arrangement that could be described as a “one-stop shop” during the relevant period of time, or that the Ministry of Trade and Industry could be considered to have put in place an all-inclusive obligation that GAFI ensure that a putative applicant secured all necessary approvals to implement an industrial project. Moreover, it is to be noted that ACC did not seize the Ministry of Trade and Industry with a license application until it made a submission to IDA on 18 September 2006 (although it may well be that this application, which is not on record, was not, as may be deduced from later exchanges, for a license but for the registration of a license in the industrial register<sup>891</sup>). It should be noted that GAFI, which issued the preliminary approval, does not function under the Ministry of Trade and Industry but the Ministry of Investment.<sup>892</sup>

604. The record shows that ACC did not act on the basis of a belief that there existed a “one-stop shop” mechanism on which it could rely. In fact, starting from 1996, ACC turned to a

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<sup>889</sup> C-204, Law No. 72 of 2017 Promulgating the Investment Law (31 May 2017).

<sup>890</sup> Resp. PHB ¶ 22.

<sup>891</sup> See C-21, Letter from ACC to IDA (16 November 2006).

<sup>892</sup> Cl. Mem. ¶ 19.

multiplicity of State agencies in order to secure a number of different approvals (as accounted for in Section IV.C above). This course of action also proceeded in the period following the Claimants' investment in ACC in 2004.

605. In these circumstances, the Tribunal is unable to conclude that ACC fulfilled its obligations in a way that could be considered as tantamount to a request for the issuance of a license or that, if this were not the case, any shortcoming in the application procedure must be attributable to the Respondent.
606. One may well consider that the circumstances at the relevant time, whereby an applicant had to obtain a wide variety of approvals from various State agencies, with a lack of efficient coordination between them, hardly was conducive to administrative efficiency. It would seem that the Respondent was aware of this lack of administrative cohesion, something that was explained in the IDA Memorandum dealt with above.<sup>893</sup>
607. However, it is clear that a due diligence exercise made in the context of the Claimants' investment in ACC would have brought to light the necessity for any industrial actor (in the cement sector and elsewhere) to apply for an Industrial License from the Ministry of Trade and Industry before implementation measures were initiated. At the time the investment was made, and at no time thereafter, was any representation made, or undertaking given, whether explicit or implicit, on the part of the Respondent that an efficient and seamless application procedure would be in place for purposes of securing all regulatory authorizations for establishing and operating new industrial projects.

*e. Did the "Negative List" Obviate the Need for a License?*

608. According to the Claimants, prior to 15 October 2006 the governorates "had the power to issue approvals for new cement companies or to consider them automatically approved under the negative list without the need to have IDA's approval."<sup>894</sup>

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<sup>893</sup> C-220, IDA - Main Features of the Executive Regulations for Law 15-2017 Facilitating Industrial Licensing Procedures (undated).

<sup>894</sup> Hr'g Tr. Day 1 (8 April 2019) 38:17-21.

609. In their Reply,<sup>895</sup> the Claimants refer to a Supreme Administrative Court decision in which IDA referred to “a negative list of the industries that may not be licensed” while — according to that decision — GAFI, which was later replaced by IDA, “was to issue immediate licenses based on an authorization granted to it by the Minister of Industry within his powers stipulated by [the 1958 Industry Law].”<sup>896</sup>
610. The Respondent has denied the existence of a “negative list” of the kind alleged by the Claimants. If it existed, it argues, it would not have been a public instrument and its contents would not have been accessible to the public.

**(i) Conclusion**

611. There is no evidence before the Tribunal to support the conclusion that a “negative list” existed. As reflected in the Supreme Administrative Court judgment of 22 May 2013,<sup>897</sup> there may have been such a list issued in the early 1990s, which may have specified which industries could not be licensed (which by no means implies that other industries would receive “immediate licenses”). It should be noted, however, that this affirmation was advanced by the complainant in that particular court case and lacks any documentary or other evidential support. It appears, additionally, to have been an internal instruction within the agency and, therefore, nothing that a putative investor could rely on as a dispensation from the obligation to apply for a license.
612. Moreover, the contents of such a “negative list,” if indeed it existed, is not known. It would be highly unlikely that such a list would include a blanket approval of cement plants, since they are known to be amongst the most polluting and energy-consuming of industrial processes.
613. The Tribunal concludes that there is no evidence before it to support the conclusion that there was a “negative list” of any regulatory relevance in existence at the relevant times.

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<sup>895</sup> Cl. Reply nn.113, 115, 437.

<sup>896</sup> R-23, *Chairman of IDA v. [REDACTED]*, Verdict, Appeal No. 35474/54, Council of State, Supreme Court, 6th Circuit (22 May 2013).

<sup>897</sup> *Id.*



Equally, there is no evidence to show that if such a list had existed, it would have exempted cement plants from any licensing requirement.

*f. Circumstances Relating to the Allocation and Pricing of Licenses*

614. The procedure that IDA adopted for purposes of selecting entities from the large number of applicants that expressed interest to obtain Industrial Licenses in 2006-2007, and those five cases subject to “legalization,”<sup>898</sup> is as follows.

**(i) Factual Background**

615. In respect of the so-called “legalization cases,” these applicants were required to pass certain pre-qualification criteria for taking part in the auction but would not be treated as active participants in submitting bids. Rather, they would be treated as being under an obligation to pay a license fee equivalent to the highest bid submitted in the relevant governorate (or the average of the highest bids in the three adjacent governorates).

616. This special procedure was described by IDA in a letter of 10 October 2007.<sup>899</sup> The particulars of this process are not disputed by the Parties, and its essential features are confirmed by the evidence.

617. In brief, the procedure was as follows. By the time that ACC applied for what the Claimants refer to as registration in the industrial register on 18 September 2006, there had been a major increase in the number of applications for building cement plants submitted to IDA. By 2007 IDA had received 54 applications for new or to-be-expanded cement plants. It was clear that the demands on infrastructure caused by such an increase of production capacity would be far beyond that which could be supported by the Egyptian infrastructure. It would also potentially imply a production capacity well in excess of any foreseeable needs of the Egyptian market.

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<sup>898</sup> The cases that were referred to as “legalization cases” by the Respondent were, in addition to ACC: 1) [REDACTED]; 2) [REDACTED] in North Sinai; 3) [REDACTED] in Beni Suef; and 4) [REDACTED] Company in Beni Suef. R-13, Letter from IDA to Minister of Investment (14 November 2007).

<sup>899</sup> C-30, Letter from IDA to ACC (10 October 2007).

618. It is noted that ACC's submission of 18 September 2006 is not on the record before the Tribunal. According to the Claimants, this submission asked for *the registration* of ACC's license in the relevant register; it was not an application for a license. This is supported by documents in the record, e.g., IDA's response of 16 November 2006 to ACC referring to a request concerning registration in the industrial register.<sup>900</sup> In a Memorandum of 24 June 2007 to IDA, ACC again referred to its "application for registration in the industrial register on 18/9/2006."<sup>901</sup> On the other hand, some contemporaneous documents suggest that the application concerned a license, e.g., IDA's confirmation letter of 21 September 2006.<sup>902</sup> Even taking the argument that ACC at the time acted in the belief that it had somehow obtained the requisite approvals and that only the formal requirement of registration remained, such misconception cannot be invoked to the benefit of the Claimants. Whether IDA perceived the application to concern a license or if the letter simply put IDA on notice that ACC was in need of "legalization," and subsequently IDA dealt with ACC on that basis, is of no material consequence.
619. Of interest in this context is also the following. On 1 August 2006, the Minister Cabinet's Decree No. 1395/2006 was issued in respect of the reformation of the Supreme Energy Council.<sup>903</sup> The Supreme Energy Council was given the task of analyzing the energy needs of the country, and, in anticipation of the finalization of such analysis, decided that the issuance of new licenses should be put on hold.
620. In order to deal with this novel situation, the Supreme Energy Council was tasked with reviewing the situation in the round and to come up with a proposal. By Resolution No. 3/06/10/8 of 15 October 2006, the Supreme Energy Council deferred approval of new cement projects "until the extent of the local market's need is examined and the proper means for decreasing pollution."<sup>904</sup> Licensing applications were put on hold until such time as future capabilities and assessments had been evaluated and a plan for dealing with the

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<sup>900</sup> C-21, Letter from ACC to IDA (16 November 2006).

<sup>901</sup> C-70, Memorandum from ACC to IDA (24 June 2007).

<sup>902</sup> C-18, Letter from IDA to ACC (21 September 2006) (referring to ACC's "request to establish a plant").

<sup>903</sup> R-10, The Prime Ministers' Resolution No. 1395 of 2006 (2006).

<sup>904</sup> R-11, Resolutions Made in the 2<sup>nd</sup> meeting of Supreme Energy Council of Energy (15 October 2006).

admission of new capacity had been put in place. ACC was informed on 5 November 2006 that consideration of its application would be temporarily suspended in anticipation of a decision how to proceed in the situation that had arisen.<sup>905</sup>

621. In the end, after having reviewed the anticipated requirements for additional cement production capacity and the infrastructure to cope with such increase, the Supreme Energy Council concluded that it could accommodate 14 new cement plants, with a capacity of 1.5 million tons of cement per year for each plant.<sup>906</sup>
622. Considering the feasibility of 14 plants in the face of applicants in excess of that number, it was apparent that a procedure had to be devised to distribute available licenses.
623. For the purpose of carrying out this selection process, IDA decided that a public auction would be arranged by which qualified applicants would submit bids for an Industrial License in competition with each other. In this context, IDA had to deal with the fact that five applicants had already begun construction of their plants without an Industrial License having been granted. As an alternative to terminating such cement projects, IDA, in the Respondent's opinion, sought a more pragmatic option, under the 1958 Industry Law. This required such applicants to pay a license fee fixed by reference to the amount of the successful bid in the governorate where the cement project had been initiated (or in the absence of such bid, an amount corresponding to the average of the highest bids for an Industrial License in the three most proximate governorates).
624. It appears from a "Report Produced by the Reconciliation Committee Formed Under Ministerial Decree No. 248 of 2008" that the five "legalization cases" that were allowed to engage in the auction on this basis (without being allowed to actively participate) were: [REDACTED], ACC, [REDACTED], [REDACTED], [REDACTED], and [REDACTED].<sup>907</sup>

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<sup>905</sup> C-19, Letter from IDA to ACC (5 November 2006).

<sup>906</sup> R-8, Ministry of Trade & Industry, PowerPoint Presentation: The policy of Ministry of Industry & Foreign Trade for the approval of establishing cement-production projects (undated), slide 4.

<sup>907</sup> R-20, Report Produced by the Reconciliation Committee, Ministry of Trade and Industry Formed Under Ministerial Decree No. 248 of 2008 (2008).

625. Accordingly, by this system these applicants were not allowed to actively take part in the auction by submitting bids but were bound by the other participants' bids.

**(ii) Relevant Events Relating to the License Auction**

626. On 26 February 2007, ACC approached IDA, providing a detailed account for the multifarious application processes it had undergone. Given its interest in finalizing the project, it petitioned IDA “to issue your approval of registering [ACC] in the Industrial Registry.”<sup>908</sup> The letter also raised a concern relating to funding an electricity generation station at the time, as this might postpone start-up of the project for a period of up to three years “which is the time required to make a tender for electricity for [this station] and then award the tender and implement the project.”<sup>909</sup>

627. As noted above (paragraph 621), on 20 June 2007, the Supreme Energy Council reviewed the increase in applications for licensing cement plants. It directed IDA to limit its issuance of licenses to 14 cement production lines with a total yearly production capacity of 21 million tons.<sup>910</sup>

628. On 31 July 2007, IDA advertised in national newspapers that it was prepared to receive applications from companies wishing to establish cement production plants. This public announcement was entitled “Qualification Call for Applying for Establishing Cement Projects.”<sup>911</sup> IDA also sent formal letters to the 54 companies that had previously submitted applications, inviting them to submit to a prescribed prequalification phase.<sup>912</sup>

629. In IDA's letter of 10 October 2007 to ACC, IDA referred to documents submitted by ACC “for harmonizing the situations of your company for obtaining [a] license for cement

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<sup>908</sup> C-65, Letter from ACC to IDA (26 February 2007), p. 3.

<sup>909</sup> *Id.*

<sup>910</sup> R-8, Ministry of Trade & Industry, PowerPoint Presentation: The policy of Ministry of Industry & Foreign Trade for the approval of establishing cement-production projects (undated), slide 4.

<sup>911</sup> R-54, IDA, Qualification Call for Applying for Establishing Cement Projects (31 July 2007).

<sup>912</sup> Resp. C-Mem. ¶ 66; C-141, *IDA v. ACC*, Memorandum of Defense of IDA, Case No. 6664/62, State Council, Administrative Court (7 December 2009) at 6.

production with a production capacity of 4,2 million tons annually in the Governorate of Suez.”<sup>913</sup>

630. Referring to ACC’s “request for harmonizing the situations of your company” (for a production capacity of 2.1 million), IDA requested a finance guarantee of EGP 100 million and an undertaking to pay the license fee for the required production capacity “in conformity with the auction price of the new production line in the Governorate of Suez [...] or the average auction price applied to the new line in the nearest three governorates” if no license was bid for in Suez.<sup>914</sup>
631. From ACC’s letter of 16 October 2007, it appears that a license awarding committee (based on a Ministerial Decree No. 726 of 2007) met on 4 October 2007.<sup>915</sup> It decided to “harmonize”<sup>916</sup> ACC’s situation for purposes of obtaining a license for a cement plant with a production capacity of 2.1 million tons per annum.
632. However, noting that ACC also invested an amount of EGP 120 million in the construction of a second production line (as communicated in a letter of 3 October 2007), ACC sought to amend its application to include an annual production capacity of 4.2 million tons.<sup>917</sup> ACC requested a response before the date of the auction, 28 October 2007.<sup>918</sup>
633. In a letter of 21 October 2007, IDA informed that ACC had been qualified to obtain a license according to a decision by the Awarding Committee of 4 October 2007, on condition of providing a guarantee for EGP 30 million.<sup>919</sup> IDA acknowledged ACC’s request to increase its production capacity to 4.2 million tons annually, indicating that the request “is under consideration by the committee.”<sup>920</sup> The letter stated that the auction was

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<sup>913</sup> C-30, Letter from IDA to ACC (10 October 2007).

<sup>914</sup> *Id.*

<sup>915</sup> C-100, Letter from ACC to IDA (16 October 2007).

<sup>916</sup> The Parties differ as to whether the process that the legalization cases were involved in shall be described as “harmonization” or “legalization” as reflecting the true sense of the Arabic term “تقنين.” However, in the present context the Tribunal considers that these alternative interpretations of the Arabic term are equivalent.

<sup>917</sup> See C-100 Letter from ACC to IDA (16 October 2007) (referencing 3 October 2007 letter).

<sup>918</sup> *Id.*

<sup>919</sup> C-33, Letter from IDA to ACC (21 October 2007).

<sup>920</sup> *Id.*

to be held on 28 October 2007 at the Semiramis Hotel in Cairo. (From the indication that “[y]our representatives may attend in the media room next to the auction room” it may be concluded that ACC was entitled to follow the auction on location but not take active part therein.<sup>921</sup> In fact, ACC was not present.<sup>922</sup>)

634. A document dated on the day of the auction, 28 October 2007, explained that the current cement production in Egypt in 2006 amounted to 37 million tons<sup>923</sup> and an undated presentation entitled “The policy of Ministry of Industry & Foreign Trade [f]or the approval of establishing cement-production projects” explained that Egypt’s needs for cement were estimated at 55 million tons per year in 2011.<sup>924</sup> This estimate tallies with the decision of the Supreme Energy Council to auction out 14 new production lines, each with an annual capacity of 1.5 million tons. *See supra* paragraph 621. It was noted that 54 companies submitted applications for licenses (46 new projects and 8 expansion projects).<sup>925</sup> The announcement of the tender process led to the withdrawal of 34 applications; 19 applicants did submit prequalification documents, of which all but one were held to be qualified.<sup>926</sup>
635. According to the specification regarding the “auction sessions,” the participating contenders for Industrial Licenses for cement production fall into three categories:<sup>927</sup>

1. Companies qualified for bidding on new lines:

[REDACTED]

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<sup>921</sup> *Id.*

<sup>922</sup> Cl. Mem. ¶ 77.

<sup>923</sup> R-58, IDA, Cement Production in Egypt Map (28 October 2007).

<sup>924</sup> R-8, Ministry of Trade & Industry, PowerPoint Presentation: The policy of Ministry of Industry & Foreign Trade for the approval of establishing cement-production projects (undated), slide 2.

<sup>925</sup> *Id.*, slide 2.

<sup>926</sup> *Id.*

<sup>927</sup> R-58, IDA, Cement Production in Egypt Map (28 October 2007).

2. Companies with existing cement production that wished to expand their productive capacity: [REDACTED]
3. Companies that were qualified as “legalization cases” by IDA: [REDACTED] Arabian Cement Company in Suez, and [REDACTED]. (Two of these contenders — [REDACTED] — applied for plant expansion, while the other three (including ACC) were new projects.)

636. Additionally, there was a fourth category of participants, i.e., producers of white cement, which were treated in a way somewhat akin to the “legalization cases” by “applying the auction price in the governorate to the white cement in proportion to the power density”: [REDACTED] and [REDACTED].<sup>928</sup>

637. The auction took place on 28 October 2007.<sup>929</sup>

638. Letters from the Ministry of Trade and Industry to the Minister of Investment and Ministry of Electricity, both dated 14 November 2007, summarized the outcome of the bidding process.<sup>930</sup> It recorded which bidders had paid the highest price for the respective license and the governorate that it had been allocated. From this it appeared that the highest price offered for the second license was by [REDACTED] in the Suez Governorate,<sup>931</sup> at a price of EGP 201 million for a production capacity of 1.5 million tons.<sup>932</sup> Separately, the letter to the Ministry of Investment accounted for “the results of the bid in the legalization cases” as decided in the ministerial decision No. 726 of 2007.<sup>933</sup> It confirmed, *inter alia*, the primary rule that the auction price in the concerned governorate was to apply and that ACC was declared to be qualified for a yearly production capacity of 2.1 million tons. The letter went on to say that it appeared impossible for those companies that had

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<sup>928</sup> R-13, Letter from IDA to Minister of Investment (14 November 2007).

<sup>929</sup> *See Id.*; *see also* R-58, IDA, Cement Production in Egypt Map (28 October 2007) (providing the overview for the auction on 28 October 2007).

<sup>930</sup> R-13, Letter from IDA to Minister of Investment (14 November 2007); C-157, Letter from Ministry of Trade and Industry to Ministry of Electricity (14 November 2007).

<sup>931</sup> R-13, Letter from IDA to Minister of Investment (14 November 2007).

<sup>932</sup> Cl. Mem. ¶ 77.

<sup>933</sup> C-157, Letter from Ministry of Trade and Industry to Ministry of Electricity (14 November 2007).

approached or even entered the production stage without having obtained a license could await the construction of their own power plants. Thus, the letter suggested, these should be excluded from this requirement against the payment of specific cost contributions for electricity.

639. In a letter of 22 January 2008, ACC expressed gratitude for the “legalization of [the] company’s situation” and submitted a number of requests, including that:

1. The production capacity be increased to 4.2 million tons annually;
2. The advance payment be reduced to 10 percent from 25 percent;
3. The payment period be extended to 10 years (without interest accruing); and
4. Payment of the license relating to the second production line to start at the production date.<sup>934</sup>

640. By letter of 23 January 2008, IDA noted with concern the new requests by ACC.<sup>935</sup> It rejected the reduction of the installment on the license requested by ACC and informed that the remainder of the requests would be forwarded to the Awarding Committee for decision-making.

641. By letter of 3 June 2008, IDA informed ACC that the Awarding Committee had recommended that ACC “shall pay the bid price set by Suez Governorate,” i.e., a fee prorated at EGP 281.4 million for the 2.1 million tons annual production capacity (prorated to 1.5 million).<sup>936</sup>

642. An advance payment of 15 percent (instead of 25 percent) was accepted by IDA, implying a compromise to ACC’s proposal in the letter of 22 January 2008.<sup>937</sup> Further, the second production line was approved, subject to ACC meeting the requirements for its first production line, notifying the Ministry of Petroleum that “the gas approved to be supplied to the second line is outside the State plan for the approved factories in cement industry,”

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<sup>934</sup> C-72, Letter from ACC to IDA (22 January 2008).

<sup>935</sup> C-101, Letter from IDA to ACC (23 January 2008).

<sup>936</sup> C-35, Letter from IDA to ACC (3 June 2008).

<sup>937</sup> *Id.*



payment for the second line on the same basis as for the first production line, and an advance payment of 25 percent of the amount.<sup>938</sup>

643. A letter of 4 June 2008 from ACC to IDA made references to decisions by the Awarding Committee at a session of 21 May 2008 to grant a cement manufacturing license to ACC for a doubling of the production capacity to 4.2 tons/year to ACC.<sup>939</sup> ACC again expressed thanks for cooperation in “legalizing the status of the Company.”<sup>940</sup> It attached cheques for 15 percent and 25 percent, respectively, as the agreed installments on the licenses for the first and second production line.

644. Likewise, in its letter of 16 February 2009 to the Minister of Trade and Industry, ACC expressed its gratitude for support in relation to the “company’s legalization.”<sup>941</sup>

***g. Was IDA Allowed to Apply the Tenders Act when Selecting Candidates to be Awarded Licenses to Build Cement Plants?***

645. The Claimants assert that the 1958 Industry Law did not provide for a tender process in the circumstances of this case, and that IDA therefore violated the relevant rules on processing and approving Industrial License applications. Article 5 of the Executive Regulations to the 1958 Industry Law prescribed a payment of a fixed fee of EGP 2 upon submission of an application for a license.<sup>942</sup> Additionally, Article 16 stipulated a maximum of EGP 100 in respect of other services that might be provided under the 1958 Industry Law.<sup>943</sup> These provisions remained in effect at all relevant times.

646. The Respondent denies any impropriety in this regard and notes that the auction was “conducted in a manner inspired by and consistent with the provisions of [the Tenders Act].”<sup>944</sup> In this regard, the Respondent relies on the expert opinion of Prof. Badran,

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<sup>938</sup> C-35, Letter from IDA to ACC (3 June 2008).

<sup>939</sup> R-19, Letter from ACC to IDA (4 June 2008).

<sup>940</sup> *Id.*

<sup>941</sup> C-200, Letter from ACC to IDA (22 January 2008), Letter from IDA to ACC (29 January 2008), Letter from ACC to Ministry of Trade and Industry (16 February 2009).

<sup>942</sup> Cl. Mem. ¶ 52, n.81. *See also* R-4, Executive Regulations to the 1958 Industry Law, art. 5.

<sup>943</sup> *Id.*, art. 16.

<sup>944</sup> Resp. C-Mem. ¶ 68.

paragraphs 34-42 and a Supreme Court decision of 4 July 2012.<sup>945</sup> The Respondent also invokes the opinion of the General Assembly of the Departments of Consultation and Legislation of the State Council (“General Assembly”) No. 54/1/459 of 2 May 2009, which specifically addresses the legality of IDA’s recourse to a tender procedure.<sup>946</sup>

647. The Claimants argue that by taking recourse to the Tenders Act, IDA disregarded the law in effect as the application of this law fell outside the authority of IDA. The Tenders Act was not stipulated in any relevant amendment of the 1958 Industry Law or in any subsequent implementation directives. Additionally, the Tenders Act applied, according to its Article 1, only to contracts regarding “purchase of movables or on business, or transportation receiving services, consultancy studies and technical works.”<sup>947</sup> In other words, the Tenders Act did not apply in any process seeking to allocate a limited number of Industrial Licenses among a multiplicity of applicants and, in any event, IDA did not have the authority to rely on this law.
648. The Tribunal observes, on the basis of the record before it, that an Awarding Committee was formed to decide on pre-qualification applications. The pre-qualification and bidding system was designed in accordance with Article 1 of the 1958 Industry Law, and determined on the basis of the authority vested in IDA by virtue of Article 2(9) of Presidential Decree No. 350 of 2005. In the court proceedings initiated by ACC, IDA noted that the 1958 Industry Law has “no provisions prohibiting conducting bid.”<sup>948</sup> The General Assembly reviewed (retroactively) the legality of granting cement plant licenses by way of a bidding process, which was accepted in the General Assembly’s above-mentioned opinion No. 54/1/459 of 2 May 2009.<sup>949</sup>

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<sup>945</sup> *Id.* (citing Badran Legal Opinion ¶¶ 34-42; R-12, [REDACTED] v. *Chairman of IDA, Minister of Industry & Trade, and Minister of Petroleum*, Verdict, Appeal No. 27986 of 54, Council of State Supreme Court, 6th Circuit (4 July 2012)).

<sup>946</sup> R-18, Opinion of the State Council, General Assembly of the Departments of Consultation and Legislation No. 540/1/459 (2 May 2009).

<sup>947</sup> R-61, Law No. 89 of 1998 regarding tenders and auctions (8 May 1998), art. 1.

<sup>948</sup> C-141, *IDA v. ACC*, Memorandum of Defense of IDA, Case No. 6664/62, State Council, Administrative Court (7 December 2009) at 8.

<sup>949</sup> R-18, Opinion of the State Council, General Assembly of the Departments of Consultation and Legislation No. 540/1/459 (2 May 2009).

649. The Claimants have further invoked a new investment law which entered into effect in 2015,<sup>950</sup> along with its executive regulations.<sup>951</sup> This law provides that selection of suitable bidders should not be restricted by the Tenders Act, but rather by applying a points system described in the executive regulations. This allows, according to the Claimants, the conclusion, *e contrario*, that such process could not be applied by IDA prior to that legislative change.
650. The Tribunal notes that this enactment may have represented an improvement over any potential strictures of the Tenders Act; by reason of its timing, however, it could not have an impact on the propriety of IDA's dealing with the license applications at the relevant time by reliance on the Tenders Act.
651. The Tribunal notes that the aim of the Tenders Act is to regulate the public purchases of goods and services by national and regional governmental agencies. It does not explicitly extend to a situation like the present one where a State agency — IDA — is not procuring goods or services but carrying out a process intended to select a number of investors from a larger number of qualified applicants.
652. The Tribunal notes that there is nothing in the 1958 Industry Law or its Executive Regulations that would explicitly proscribe recourse to the Tenders' Act — or the principles embodied therein — in a situation in which a number of contenders bid for a limited number of licenses. Moreover, what is significant is whether the relevant procedure was conducted in a fair, transparent, and non-discriminatory fashion. The Tribunal finds that this is clearly the case for the following reasons.
653. The 1958 Industry Law vested a right in IDA to terminate construction works that were already in progress based on Article 16 of the 1958 Industry Law, as amended in 1980. Instead, IDA designed an *ad hoc* solution to allow ACC (together with four other entities that also lacked duly issued Industrial Licenses) to take part in the prequalification and

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<sup>950</sup> C-133, Law No. 17 of 2015 amending Law No. 8 of 1997, Law of Investment Guarantees and Incentives (12 March 2015).

<sup>951</sup> C-134, Executive Regulations to Law No. 17 of 2015 (6 July 2015).

auction process allowing for the fact that ACC's cement project was already located in a specific governorate (Suez).

654. By letter of 2 August 2007, IDA informed ACC on how to access the relevant information on the auction proceeding.<sup>952</sup>
655. On 21 October 2007, IDA informed ACC about the particular concessions made “[f]or helping the companies, the situations of which were determined to be brought in conformity with law.”<sup>953</sup>
656. The above allows the Tribunal to conclude that ACC was provided at all times with relevant information as to IDA's decision on how to deal with the particular status of ACC, and that ACC was afforded the possibility to accept the outcome of an open and transparent auction process involving all of those applicants that have chosen to go through the prequalification procedure and take part in the auction. Consequently, the procedure chosen by IDA to allocate the available licenses cannot as such — irrespective of whether it would have violated municipal law or not — constitute a Treaty breach.
657. In the circumstances, the Tribunal considers that the Respondent went out of its way to accommodate the special circumstances of ACC and entities in comparable circumstances in the bidding process and to design a procedure that allowed ACC to abide by license fees that were offered by competitors, acting on their own initiative and by their free volition in a bidding contest, allowing for the fact that ACC already had established *de facto* presence in a specific governorate, rather than having fees determined by IDA thrust upon it. This treatment, whether optimal or not, cannot be described as unfair or inequitable.
658. Further, the Tribunal considers that it cannot be excluded that ACC, in making its application on 18 September 2006, believed that it had somehow obtained the requisite approvals to carry out its cement project. However, there is no evidence available to the Tribunal that would give reason to assume that such belief, if it existed, had been conveyed to ACC by the Respondent. Also, from exchanges in 2007 and 2008 that are on record,

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<sup>952</sup> C-28, Letter from IDA to ACC (2 August 2007).

<sup>953</sup> C-33, Letter from IDA to ACC (21 October 2007).

there is no indication of any objection having been made by ACC that representations by the Respondent had not been fulfilled.

659. For example, in response to a letter from IDA laying out the principles for ACC's role in the imminent auction), ACC wrote on 16 October 2007 to the head of IDA:

***Subject: some inquiries on your letter dated 10/10/2007***

*Referring to your letter with the date referred to on completing submittal of some documents relating to the qualification and harmonization of your situation for obtaining license for establishing cement company in El-Ain El-Sokhna, here are some points we would like the Authority to explain:*

*1- The method applied for calculating the license fee and the payment methodology,*

*2- Whether the license fee applied to our company includes the cost of land allocated for the project, and the payment conditions in case of land inclusion or otherwise,*

*3- The contractual price of land and the payment methodology,*

*4- The auction actions in detail, the time fixed for publishing the official result of auction process and the number of licenses granted to the Governorate of Suez.<sup>954</sup>*

**(i) Conclusion**

660. The Tribunal considers that ACC and the other four cement producers described by the Respondent as "legalization cases" were in a different situation from the newcomers who were involved in the bidding process. The newcomers would need to regard the license fee as part of the investment cost, and could make an informed decision on whether to go forward with their investment based on this cost component and the estimated investment cost in the plant (and taking into account the particular companies' required return on investment and risk). And, one may note, only a minor number of the 54 applicants (nine for new projects and five for expansions) decided to proceed and take part in the auction

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<sup>954</sup> C-32, Letter from ACC to IDA (16 October 2007).

process. However, for applicants that had already expended funds toward realization of their cement plants, the calculus was essentially different. If they did not go along with the process offered by IDA, their investment so far disbursed would have represented sunk cost and would have to have been written off in its entirety. So, the question was strictly whether the additional investment in a license fee would present a better scenario to the applicant than the need to write-off the entire investment before it had produced any income.

661. However, these considerations from the point of the investor were of no concern to the tendering agency. There were certainly alternative ways the tendering agency could have dealt with the “legalization cases” in order to regularize their status, but the chosen alternative can by no means be considered to be discriminatory or unfair. As the fee amounts were offered by the competing bidders and not by the Respondent, one may assume that those fees reflect the competitors’ valuation of market opportunities in the respective governorates. As such, it is not surprising that there was significant variation in the bids tendered in view of the local nature of cement offtake.
662. The Claimants assert that they were discriminated against because they were subjected to a license fee that ACC had not bargained for, and which it had no ability to influence.
663. The Tribunal does not share this assessment. If ACC had participated in the auction, this may well have resulted in final bids to have been *higher* than they were. The bids submitted by the qualified applicants showed great variations, which may reflect the participants’ varying estimates of the value of choosing their preferred sites for cement plants (the offset of cement being essentially limited to the proximate geographical area). Neither can it be considered that the license fee was arbitrary in consideration of the fact that it was not set by IDA but determined by competitors to ACC making their bids on, as must be assumed, a reasonable commercial basis: they bid an amount they considered would represent a viable business proposition taking into account other investment expenditure and market conditions. ACC was also informed in advance about the format of the auction and allowed to attend, making it transparent for purposes of evaluating its execution.

664. The Claimants' decision to invest in cement production facilities in Egypt was adopted and also to a large extent implemented in the period before the sudden increase of applications by foreign investors occurred. If ACC had applied for an Industrial License at the appropriate time — i.e., no later than in 1996-1997 and before the Claimants' acquisition of its interest in ACC — it may well be that the company would have obtained the Industrial License without difficulty and on nominal terms. Neither does it appear that the Claimants' investment decision was driven by the subsequent introduction of a CO<sub>2</sub> emission trading system in Europe. On this basis, it may seem unreasonable that the Claimants' failure to ensure compliance with the license application procedure could carry with it the very dramatic economic consequences that followed from the subsequent surge in investment applications in the cement industry and the associated escalation of bids for cement production licenses.
665. However, having regard to this change in market circumstances, was it illegitimate for Egypt to reconsider its regulatory regime in respect of the establishment of industrial enterprises? The Tribunal considers that it was not. The institution of a tender and auction procedure that took into account infrastructural and market restraints was fully appropriate in this difficult situation. It was indeed spelled out in the 1958 Industry Law that the granting of an Industrial License was predicated on "taking into account the State's economic needs and local consumption and exportation capabilities within the scope of the State's economic and social development plans."<sup>955</sup> Such a possibility was either known to the Claimants, or should have been known. The Respondent has shown that the application of the Tenders Act for this purpose was acceptable.
666. An additional question is whether ACC, in consideration of its prior history in Egypt, its earlier arrival on the market, and its securing a number of permits and authorizations was fairly treated by being exposed to a regulatory regime that applied to newcomers of a later date. It may appear as unreasonable that an oversight in complying with a more or less rubber-stamp procedure to secure a blanket approval associated with the payment of a

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<sup>955</sup> R-1, 1958 Industry Law, art. 1.

nominal fee should carry with it the consequence of ACC ultimately having to pay millions of EGP for a license.

667. ACC's delay in obtaining the requisite licenses, for reasons of its own, cannot give rise to responsibility of the Respondent. There is nothing in the record to indicate that the obligatory requirement to seek an Industrial License for any industrial project according to the 1958 Industry Law was a dead paragraph. In fact, the 1958 Industry Law was not abrogated until 2017 by the enactment of the new Industrial Licenses Law (Law No. 15/2017).<sup>956</sup> The 1958 Industry Law imposed an unconditional licensing requirement. Its Executive Regulations specifically articulated that a failure to seek and obtain such a license could lead to the shutting down of any commenced or completed industrial plant. The requirement for contemplated industrial projects to secure a license is also a reasonable and to-be-anticipated requirement: The State has a legitimate need to monitor the establishment of industrial projects in consideration of existing industrial policies and infrastructural constraints. Such a requirement is not unusual or irrational.
668. It is a remarkable circumstance in the present case that the Claimants prior to, and as a condition for, their acquisition of a substantial share of ACC appear not to have performed an exercise in due diligence to assure themselves as to all the existing formal requirements for establishing a cement plant in Egypt. Such an exercise would, if properly carried out, have disclosed that ACC was under an obligation to apply for an Industrial License, and that this obligation had not been fulfilled at the time of the contemplated acquisition. The Claimants had ample opportunity to evaluate the situation. It is not sufficient for the Claimants to take refuge in the knowledge of the existing board members,<sup>957</sup> which knowledge was shown to be wanting. By failing to carry out a proper exercise in due diligence, the Claimants exposed themselves to a regulatory hazard, and must bear the risk of that oversight.

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<sup>956</sup> Cl. Reply ¶ 37 (citing C-203, Law No. 15 of 2017, art. 4).

<sup>957</sup> See Cl. PHB ¶ 19; *see also* Hr'g Tr. Day 2 (9 April 2019) 177:19-179:14 (testimony of the Claimants' witness, ██████ regarding the composition of the ACC board).



***h. Was the Respondent's Disregard of the Fee Amounts Fixed by the 1958 Industry Law Illegal and a Breach of Its Obligations Under the Treaty?***

669. The exorbitant license fees determined by IDA were, according to the Claimants, arbitrary and in violation of the 1958 Industry Law. The eventuality that the Respondent would impose fees of such a magnitude could not have been disclosed by a due diligence inquiry. This, in the Claimants' view, violates the FET standard under the Treaty and gives rise to liability on the part of the Respondent. Specifically, the Executive Regulations of the 1958 Industry Law set out the various fees applicable in respect of services provided by the Minister of Trade and Industry (or its empowered agency). In respect of an application for an Industrial License, Article 5 of the Executive Regulations requires payment of the nominal amount of EGP 2.<sup>958</sup> The Executive Regulations also specify fixed fees for other services but Article 16 of the Executive Regulations provides that in all cases payment shall range between EGP 2 and the still nominal amount of EGP 100. Article 17 of the 1958 Industry Law imposes a ceiling of EGP 500 for all services that may be provided by the Ministry.
670. The Respondent considers that these fee amounts relate only to the cost of the application (for a license or other services), and do not deal with the fee for the license itself.
671. It appears reasonable to infer from the 1958 Industry Law that it does not foresee the imposition of license fees for the entitlement to obtain approval for an activity subject to licensing requirements (other than nominal amounts). The 1958 Industry Law appears to be geared towards the purpose of promoting and facilitating investment opportunities while securing supervision of the compatibility of specific investment cases to overall economic and industry sector priorities.
672. So, while the Tribunal does not accept the Respondent's position that the 1958 Industry Law, as conceived, necessarily authorized the imposition of license fees, it accepts that the 1958 Industry Law does not preclude such a fee. Moreover, there is nothing in Egyptian law or the BIT that would, as such, prevent Egypt from subsequently imposing a system of

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<sup>958</sup> At the time Claimant Aridos Jativa purchased its shares in ACC, August 2004, EGP 2 was approximately equivalent to EUR 0,27 (twenty-seven cents).

license fees as confirmed by the Reconciliation Committee's Report created by Ministerial Decree No. 248 of 2008<sup>959</sup> and the expression of numerous court decisions.

673. It follows also from IDA's founding document<sup>960</sup> that this State agency has been endowed with wide powers as regards the shaping of the procedures, allocation, and issuance of Industrial Licenses as well the economic conditions heretofore.
674. Thus, Article 2 of this Decree provides in relevant parts the following as regards IDA's scope of powers.

*3. Implement general policies and plans necessary for the development of industrial areas, in coordination with governorates and other concerned areas. The Authority shall have the decision power with respect to the establishment of industrial areas or the enlargement of the established ones, and also to the introduction of conditions and rules related to them, whether such industrial areas belonged to the public sector or the private one.*

[...]

*5. Establish conditions and rules according to which the companies of the private sector would be allowed to establish, promote, and administer the industrial areas, and provide spaces and lands to investors.*

[...]

*8. [...]Set and issue the conditions and rules organizing the necessary approvals and licenses required for industrial projects, and issue the certificates related to the industrial registry, and the Authority shall assign the issuance of the approvals and licenses to the State's entities of its choice.<sup>961</sup>*

675. The conclusion to be drawn from the above, in the Tribunal's view, is that there were no legal or regulatory constraints that in any way excluded or restricted IDA's authority to lay

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<sup>959</sup> R-20, Ministry of Trade and Industry, Report Produced by the Reconciliation Committee formed Under Ministerial Decree No. 248 of 2008 (2008).

<sup>960</sup> R-7, Decree of the President of the Arab Republic of Egypt No. 350 of the year 2005 for the establishment of the Industrial Development Authority (22 October 2005).

<sup>961</sup> *Id.*, art. 2.

down the terms and procedures for awarding a limited number of Industrial Licenses among a larger number of applicants for such licenses. Such terms and procedures could include the imposition of a fee.

*i. The Matter of Discrimination*

676. The Claimants also assert that ACC has been treated in a “wholly arbitrary”<sup>962</sup> and discriminatory way, by comparison to the treatment of other cement companies that have also brought challenges against the decisions of IDA.<sup>963</sup> The Respondent disagrees. In its view the cases are distinguishable on the facts.<sup>964</sup>

677. The Claimants argue that three of ACC’s competitors — namely [REDACTED] — filed court cases against IDA in 2007 and raised similar claims relating to the license fee and the auction procedure, thus finding themselves in a similar situation as ACC.<sup>965</sup> The Claimants assert that these companies received preferential treatment by the administrative courts, because the court granted the companies’ requests for relief and nullified the decisions of IDA as concerns the license fees and the auction process. In its reasoning, according to the Claimants, the court made a strong case against IDA’s authority to deviate from the fee amounts stipulated in the 1958 Industry Law (and notes that IDA was at liberty to propose legislative changes if considered desirable). It also pointed to the Industrial License’s temporary scope and the authority to amend or terminate a license, something which it held to be at odds with the contractual nature of contracts resulting from tender procedures.<sup>966</sup> The courts declared that these competitors ([REDACTED], [REDACTED], and [REDACTED]) would not have to pay additional fees above the nominal amounts provided for in the 1958 Industry Law.<sup>967</sup>

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<sup>962</sup> Cl. Mem. ¶ 165.

<sup>963</sup> Cl. Reply ¶¶ 408 *et seq.*

<sup>964</sup> Resp. C-Mem. ¶ 366.

<sup>965</sup> Cl. Mem. ¶ 128.

<sup>966</sup> It may be noted that the Court appears to have attached no particular relevance to the preliminary approval to ACC, issued by GAFI back in 1996.

<sup>967</sup> Cl. Mem. ¶ 128.

678. The Respondent has rejected these allegations and maintained that the court(s) in fact “upheld the legality of the procedure followed by the Egyptian authorities, including the IDA, and of the decisions taken by the IDA within that procedure.”<sup>968</sup>

(i)

679. The Respondent posits that [REDACTED] was treated in the same way as ACC, i.e., it was invited by IDA to take part in the bidding for licenses but decided not to take part in the auction on its belief that it could not legally be obliged to submit to such a procedure.<sup>969</sup> According to the Respondent, the court (despite a finding of absent jurisdiction) held that [REDACTED] decision not to take part in the auction was the reason for its own loss.

680. To support its case, the Claimants have invoked an excerpt of the judgment of 26 December 2009 by the Administrative Judiciary Court, 7th circuit.<sup>970</sup> The decision invoked by the Claimants was challenged and reversed by the Supreme Administrative Court’s judgment on 22 May 2013.<sup>971</sup> In its reasoning the court held that IDA was authorized to shape the procedure for the selection of which applicants were to be awarded licenses.

(ii)

681. [REDACTED] was one of the “legalization cases.” It asserted that it had received a license on 19 June 2000 from GOFI (IDA’s predecessor), and that it was still in effect.<sup>972</sup> However, according to the Respondent, there is an epilogue to this event in that the decision had been appealed and that the case is still pending, and that in a separate and later action concerning recovery of the first installment of the Industrial License, IDA prevailed on the assumption that [REDACTED] had not fulfilled certain requirements

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<sup>968</sup> Resp. C-Mem. ¶ 86.

<sup>969</sup> Resp. C-Mem. ¶ 87. *See also* R-9, IDA, PowerPoint Presentation: Bidding for cement factories licenses (28 October 2007), slide 15.

<sup>970</sup> Cl. Mem. ¶ 128 (citing C-106, [REDACTED] v. *Chairman of IDA*, Judgment, Case No 1720/62J, Administrative Judiciary Court, 7th Circuit (26 December 2009)).

<sup>971</sup> R-23, *Chairman of IDA v. [REDACTED]*, Verdict, Appeal No. 35474/54, Council of State, Supreme Court, 6th Circuit (22 May 2013).

<sup>972</sup> C-114, [REDACTED] v. *Minister of Investment, Chairman of GAFI, and Minister of Trade & Industry*, Judgment, Case No. 8536/62J, Administrative Judiciary Court, 7th Circuit (26 December 2009).

stipulated in the license.<sup>973</sup> In any event, ACC was not in like circumstances in relation to [REDACTED] for the reason that ACC had not secured a license at the time of the auction.

(iii) [REDACTED]

682. The situation of [REDACTED] appears the most comparable to that of ACC: it is said to have been established according to the Law No. 8/1997 on Investment Guarantees and Incentives and approved by GAFI on 24 September 1996.<sup>974</sup>
683. The court's decision, which was issued on 26 December 2009, granted International Cement's petition.<sup>975</sup> The decision has been appealed,<sup>976</sup> and a decision is yet to be rendered.
684. As far as can be deduced from a reading of the decision of the court, the [REDACTED] [REDACTED] had secured all approvals and approached IDA for final approval.<sup>977</sup> However, the request was denied on the basis that all applications up to July 2007 were to be disregarded and that companies seeking licenses had to submit new applications subject to conditions in the bidding procedure established by IDA.
685. The court opined that IDA certainly had the right to determine legal rules and provisions although this could not be exercised in a way that constituted "violation of law applicable to the rules and procedures for licensing industrial projects and facilities, i.e., the [1958 Industry Law] and the Executive Regulations thereof."<sup>978</sup> The court found that the tender process and the associated undertakings of license fees did violate the governing legislation.

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<sup>973</sup> Resp. C-Mem. ¶ 88.

<sup>974</sup> R-24, [REDACTED] v. *Prime Minister, Minister of Trade and Industry, and Chairman of IDA*, Judgment, Case Nos. 9373/62 and 9426/62, Administrative Court, 7th Circuit (26 December 2009).

<sup>975</sup> *Id.* The Claimants have invoked the dispositive part of the judgment only (C-115), while the Respondent submitted the judgment *in extenso* (R-24).

<sup>976</sup> R-26, [REDACTED] v. *Prime Minister, Minister of Trade and Industry, and Chairman of IDA*, Court Certificate, Challenges Nos. 9373/62 and 9426/62, Administrative Court, 7th Circuit (26 December 2009).

<sup>977</sup> R-24, [REDACTED] v. *Prime Minister, Minister of Trade and Industry, and Chairman of IDA*, Judgment, Case Nos. 9372/62 and 9426/62, Administrative Court, 7th Circuit (26 December 2009).

<sup>978</sup> *Id.*

686. The fact that this court decision is under appeal, that a majority of pending cases have accepted the legality of the tender process, and that the General Assembly has declared the procedure legal provides support to the Tribunal's conclusion that IDA's instituting of a public tender for Industrial Licenses does not amount to a FET breach under the Treaty.

**(iv) Other Cement Plants**

687. A few other cement plants are mentioned by the Claimants in this connection. The Tribunal does not consider them to be relevant for different reasons:

688. [REDACTED]. As for [REDACTED],<sup>979</sup> one should note that the IDA approval explained that it was based on a sales contract of 12 May 2008 between IDA and "this is before the commencement of the auction procedures on licenses for cement."<sup>980</sup> Notable is that [REDACTED] license concerned production of white cement. The date of issuance was 1 May 2010. Plants for white cement were dealt with differently from the grey cement producers (*see supra* Section VII.B(3)f(ii) (Relevant Events Relating to the License Auction)). They were not in "like circumstances" as producers of grey cement (like ACC).

689. [REDACTED]. The Claimants contend that [REDACTED] was given the go-ahead to increase its capacity outside the auction procedure (as was [REDACTED] in 2010 and the Egyptian Cement Company in 2011).<sup>981</sup> However, [REDACTED] started production in June 2011, added a second line in 2012 and third and fourth lines in September 2016.<sup>982</sup> [REDACTED] was not one of the participants in the 2007 auction.<sup>983</sup>

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<sup>979</sup> See Cl. Reply ¶¶ 245-48, n.27.

<sup>980</sup> C-191, Final Approval for the Establishment of an Industrial Project in the Governorates, issued by IDA to [REDACTED] (1 May 2010).

<sup>981</sup> Cl. Reply n.27, ¶ 253.

<sup>982</sup> *Id.*, ¶ 253.

<sup>983</sup> *Id.*, n.232.

690. The Respondent has, on its side, invoked other court cases that are analogous to the ACC case where the administrative courts have rejected several other claims brought by competitors to ACC.
691. [REDACTED]. This court decision ruled that the recourse to a tender process “was valid and made according to legally defined powers and competence of the [IDA].”<sup>984</sup>
692. [REDACTED]. This cement company was established according to the Law on Investment Guarantees and Incentives No. 8 of 1997 and granted approval by GAFI in 2006 (similarly to the case of ACC).<sup>985</sup> Notably, GAFI’s approval made a reference to the necessity of securing approval from IDA.<sup>986</sup>
693. Article 54 of the Investment Guarantees and Incentives Law requires the authority to issue a temporary license, which remains valid until the final license is issued.<sup>987</sup> The court posited, however, that if approvals from other administrative authorities must be obtained, the concerned party must comply with these requirements before obtaining a final license according to the Investment Guarantees and Incentives Law.<sup>988</sup> The judgment refers to Article 2/9 of the Presidential Resolution No 350 of 2005 which authorizes IDA to set regulatory rules and requirements for Industrial Licenses and approvals of industrial projects.<sup>989</sup>
694. The reason why the court dismissed [REDACTED] claims was, according to the Respondent, that it did not abide by the conditions of prequalification and

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<sup>984</sup> R-30, [REDACTED] v. *Chairman of IDA, Minister of Industry & Trade, and Minister of Petroleum*, Verdict, Claim No. 38011/1961, Council of State, Administrative Court, 7th Circuit (12 April 2008) at 12.

<sup>985</sup> R-2, [REDACTED] v. *Prime Minister, Minister of Industry & Trade, Minister of Economy, Chairman of GAFI, and Chairman of IDA*, Verdict, Claim No. 34098/1961, Council of State, Administrative Court, 7th Circuit (12 April 2008).

<sup>986</sup> *Id.* at 3.

<sup>987</sup> *See* Cl. Reply n.57.

<sup>988</sup> *Id.* at 8.

<sup>989</sup> *Id.* at 6.

participation in the tender process as directed by IDA, on the basis that pre-qualification and tender procedures as adopted by IDA were legitimate.<sup>990</sup>

695. [REDACTED]. The Administrative Court’s judgment of 12 April 2008 upheld the auction process<sup>991</sup> just as the court did in the case of ACC. The Supreme Court confirmed the lower court’s decision.<sup>992</sup>
696. [REDACTED]. The judgment summarizes the valuation made by the Ministerial Committee in its Resolution 2/07/04/13 on 24 April 2007 and the subsequent resolution of 26 June 2007 of the Supreme Energy Counsel, limiting the expansion of yearly capacity in the cement industry to 21 million tons.<sup>993</sup>
697. The Court observed in its decision of 9 March 2013 that a license was, by its nature, “temporary, revocable and modifiable at any time,”<sup>994</sup> and concluded that the auction was not in conflict with the authority of IDA to distribute available licenses between participants in a competitive tender.<sup>995</sup>
698. It further appears from reading the judgment that GAFI (with the participation of GOFI) had agreed to start-up of production on 30 January 2004, while applications to GAFI and to GOFI followed in September and November of 2004, respectively.<sup>996</sup> There is no indication that IDA’s predecessor undertook any measures based on [REDACTED] [REDACTED] starting the project on the ground without an Industrial License. [REDACTED] is not one of the five “legalization cases.” It seems that it had completed its plant, failed to take part in the tender process and was, nonetheless, subjected to a license fee according to the standard of the “legalization cases.” It is

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<sup>990</sup> Resp. C-Mem. ¶ 92.

<sup>991</sup> R-31, [REDACTED] v. *Chairman of IDA, Minister of Industry & Trade, and Minister of Petroleum*, Verdict, Claim No. 38010/1961, Council of State, Administrative Court, 7th Circuit (12 April 2008) at 13.

<sup>992</sup> R-12, [REDACTED] v. *Chairman of IDA, Minister of Industry & Trade, and Minister of Petroleum*, Verdict, Appeal No. 27986/54, Council of State Supreme Court, 6th Circuit (4 July 2012) at 5.

<sup>993</sup> R-14, [REDACTED] v. *Chairman of IDA*, Verdict, Claim No. 19412 of 64J, Council of State, Administrative Court, 7th Circuit (9 March 2013) at 10.

<sup>994</sup> *Id.* at 12.

<sup>995</sup> *Id.* at 15.

<sup>996</sup> *Id.* at 13.



noteworthy that [REDACTED] — unlike ACC — did submit a license application in 2004 but that it still was subject to the license fees implemented in 2007.

699. There is no indication that [REDACTED] was treated more favorably than ACC. The information that can be gleaned from the court judgment does not allow the conclusion that there existed a practice pre-2007 to apply for a license as a last step in the project implementation process.

**(v) Conclusion**

700. The Claimants have contended that decisions issued by the Respondent's administrative courts in analogous or related cases support the case against IDA's conduct and decisions.

701. The Respondent denies that these — or other cases brought by applicants for Industrial Licenses — are indicative of any unfairness in relation to the treatment of ACC. As the Respondent has noted,<sup>997</sup> the outcome in these cases — to the extent they differed from the outcome in ACC's case — is explained by their particular circumstances. Each is distinguishable.

702. The Tribunal notes that it is not unusual for courts — and occasionally even the same court — to deal with similar cases in ways that are not necessarily identical, having regard to the particular circumstances of each case. That fact cannot of itself constitute a breach of the FET standard or a denial of justice. For this much more is required, i.e., a clear showing of a bad faith departure from a certain line of decisions that may be assumed to be driven by an intent to treat the particular case to disadvantage a particular applicant. On the basis of the evidence before the Tribunal, it is not able to ascertain a showing of such intent here.

703. Discussions by the Egyptian administrative courts at the intermediate and highest level in cases invoked by the Parties lends strong support to the assumption that in fact recourse to a tender procedure fell within the authority of IDA. In any event, the decision to require a multiplicity of contenders to compete for a limited number of licenses required to install cement production capacity by way of a bidding contest, even if it were in violation of

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<sup>997</sup> Resp. C-Mem. ¶¶ 86-94.

municipal law, would satisfy reasonable requirements of transparency, non-discrimination, and equality of opportunity under the FET standard. In all circumstances, the matter of legality of the tender procedure was referred by IDA on 19 February 2008 to the General Assembly in order to obtain a legal opinion.

704. In its decision of 2 May 2009, the General Assembly held that recourse to the tender procedure was legal.<sup>998</sup> It further found that IDA had the authority either to accept the outcome of the tender procedure or to put the available license out to a renewed public tender. Certainly, ACC was (together with four competitors) faced with the conundrum created by the fact that it already had sunk significant cost into its project.<sup>999</sup> ACC's situation was one of its own making.

*j. Was ACC Discriminated Against in Relation to Existing Cement Plants?*

705. The question whether the Claimants' investment in ACC has been subject to discriminatory treatment depends on whether ACC was treated unfairly by the Respondent in relation to other actors "in like circumstances." This in turn raises the question as to which actors the Claimants shall be compared. Should those actors be those that established cement factories in the period up to 2006? Or should the comparison relate to new entrants into the Egyptian cement market in the years 2006-2007? While the early actors appear to have acquired licenses with a minimum of administrative difficulty, and at nominal cost, the later entrants were required to take part in a more onerous prequalification and bidding procedure which required, *inter alia*, the payment of, in many cases, very significant fees for obtaining a license.<sup>1000</sup>

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<sup>998</sup> R-18, Opinion of the State Council, General Assembly of the Departments of Consultation and Legislation No. 540/1/459 (2 May 2009).

<sup>999</sup> According to a Memorandum of 24 June 2007 prepared by ACC for IDA, ACC had by this time spent an amount of USD 120 million. *See* C-70, Memorandum from ACC to IDA (24 June 2007).

<sup>1000</sup> According to the KPMG Report, only eight cement companies existed at the time of issuance of the Report of which only four were set up after the entry-into-force of the 1958 Industry Law. C-95, KPMG Report, p.35 (table). Only four additional companies were set up between 1999 and 2006 according to what was stated by IDA in a statement of defense in the proceedings initiated by ACC. C-141, *IDA v. ACC*, Memorandum of Defense of IDA, Case No. 6664/62, State Council, Administrative Court (7 December 2009) at 4 (stating that there were 12 cement plants before 2006).

706. The Claimants argue that ACC was entitled to take advantage of the procedures and the terms that were applied in the period up to 2006, and that the subsequently imposed excessive terms for a license constitute a retroactive and unlawful application of unconscionable economic conditions in breach of the Respondent's commitments under the Treaty.
707. The Respondent, on its side, considers that ACC's failure to secure a license in compliance with the requirements of the 1958 Industry Law prior to commencement of construction works exposed the ACC cement plant to the lawful consequence of having to discontinue its operations. In order to enable ACC to proceed with its operations, the Respondent offered ACC, on an exceptional basis, the possibility of acquiring a license on terms that corresponded to those offered by other actors in a bidding contest for a limited number of licenses in the same time period, i.e., 2006-2007.
708. In order to determine whether ACC was exposed to discriminatory treatment as regards the license to operate a cement plant, it is necessary to ascertain whether ACC was entitled to be treated under the regime in effect up to 2006, or if ACC could be subjected to treatment of the kind that the Respondent applied to new entrants in the Egyptian cement market in 2006-2007. The Claimants consider on a number of bases — which the Tribunal has examined above — that ACC had fulfilled all regulatory requirements in the time period up to 2005 and that, as a consequence, any imposition of additional regulatory requirements gave rise to a violation of the Treaty attributable to the Respondent.
709. The Claimants have affirmed that the Respondent exercised its discretion to approve ACC's cement project through GAFI back in February of 1996. There was no residual discretion for IDA to deny ACC its license except by reference to technical requirements. ACC was compliant in all respects with IDA's requirements for issuance of a license in force at the time of its application and ACC should have been granted a license under the existing rules.
710. As the Tribunal has concluded in respect of the specific premises for the Claimants' contentions that the Respondent has breached its FET obligation under the Treaty, it follows that neither of these bases allow it to conclude that ACC procured the appropriate

license under the 1958 Industry Law. Moreover, it cannot be established on the basis of the evidence before the Tribunal that the Ministry of Trade and Industry of Egypt was cognizant of the existence or status of ACC's cement project prior to its application to IDA of 18 September 2006.

711. On this basis, the Tribunal concludes that it is not unreasonable for the "like circumstances" test to have compared ACC with those new applicants that applied in 2006-2007 for an Industrial License, rather than those cement plants that were licensed already at the time of ACC's application.

*k. Was ACC Discriminated Against in Relation to the New Entrants?*

712. The inquiries made in the above sections dealing with the various measures undertaken by ACC up to the Claimants' acquisition of shares in the company are not relevant to whether the Respondent has subjected ACC to treatment violatory of its obligations under the Treaty. Instead, for purposes of deciding whether the Respondent's conduct in relation to ACC breached the standards of protection it had undertaken, the Tribunal has to consider the measures to which ACC was subjected from 2006 and thereafter.
713. Having concluded that ACC was not entitled to be treated as an applicant for an Industrial License under the administrative rules, practices, and fee terms that applied prior to 2006, it falls to be determined whether ACC was treated unfairly in comparison to applicants with which it competed in the context of the October 2007 auction.
714. The Claimants submit that ACC was discriminated against in relation to the new entrants. Those entrants included "[REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]." <sup>1001</sup> Those new entrants were given the benefit of free choice between the governorates that would be available to the prospective licensees. They also had the significant advantage of choosing whether to enter the Egyptian cement market on the terms offered.

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<sup>1001</sup> Cl. Mem. ¶ 156. [REDACTED] is also spelled [REDACTED] in a number of sources.

715. The new entrants were also given the benefit of taking an active part in the bidding process, a benefit that is said not to have been accorded to ACC. ACC was compelled to abide by the outcome of the auction, irrespective of what that outcome would be and irrespective of the fact that it had no possibility to influence its outcome.
716. The “approval fees” that ACC was compelled to pay were, according to the Claimants’ case, entirely arbitrary and discriminatory. The Claimants support their contention on the following bids obtained in the auction:<sup>1002</sup>

#	Company Name:	Approval Production Capacity (per million ton (MT)/year)	Approval Fee
1	████████████████████	1.5 MT/year	251 million EGP
2	████████████████████	1.5 MT/year	201 million EGP
3	████████████████████	1.5 MT/year	200 million EGP
4	████████████████████	1.5 MT/year	83 million EGP
5	████████████████████	1.5 MT/year	44 million EGP
6	████████████████████	1.5 MT/year	22 million EGP

717. The enormous differences in license fees payable according to this table were not, in the view of the Claimants, justified by market factors. They were, in their view, entirely arbitrary.
718. Additionally, ██████████ had to pay a fee based on 1.5 million tons annual capacity although in fact its cement plant was capable of producing 2.1 million tons annually.
719. On this basis the Claimants allege discrimination in the form of the Respondent allowing competitors to exceed their licensed production limits without incurring any economical or other sanctions.<sup>1003</sup>
720. The Claimants’ witness ██████████ has produced a number of specific data on production volumes achieved by other cement plants. He contends, in effect, that these companies were allowed to exceed their licensed production capacity. To the best of ██████

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<sup>1002</sup> *Id.*, ¶ 159.

<sup>1003</sup> *Id.*, ¶ 162

██████████ knowledge, the Respondent has not sanctioned any company for such excesses.<sup>1004</sup>

721. The Respondent rejects the figures presented by ██████████ as speculative.<sup>1005</sup>
722. ██████████ asserts that all cement companies have to report their production data to the Ministry of Trade Industry and the Ministry of Investment, asserting that the authorities are fully aware of production volumes. ██████████ has provided specific figures for the actual production (as compared to the licensed quantity) for five cement plants in addition to ACC.<sup>1006</sup> These figures purport to show significant excesses of actual production in comparison with the licensed quantities. However, he has not provided information as to the sources of his production data, or any documentation to justify the data.
723. Additionally, the stated purpose of ██████████ witness statement is to support the authenticity of “██████████ approach to quantifying for damage caused to ACC.”<sup>1007</sup> Specifically, ██████████ argument does not concern allegations of discriminatory conduct but relates to *quantum* — it is different in that it seeks to argue that ACC’s loss of profit shall not be measured as the difference between actual production and licensed production, but between actual production and the allegedly higher actual production capacity of the relevant equipment. For this reason, ██████████ testimony is not relevant for the Claimants’ case on discriminatory conduct, as it is exclusively linked to the *quantum* issue.
724. Considering that the data provided by ██████████ lacks documentary support, and that the figures are challenged by the Respondent, this threshold issue does not legitimize any further inquiry into whether discriminatory treatment of ACC — if and to the extent it has

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<sup>1004</sup> Witness Statement of ██████████ (25 July 2017) [hereinafter “██████████ Witness Statement”], ¶ 29.

<sup>1005</sup> Resp. Rej. n.229.

<sup>1006</sup> ██████████ Witness Statement ¶ 37.

<sup>1007</sup> *Id.*, ¶ 39.

existed — has been driven by circumstances that can be qualified in terms of treaty breaches.

*1. Was a New Licensing Regime Retroactively Imposed on ACC?*

725. On the Claimants' case, the Respondent unlawfully applied its new licensing regime retroactively to ACC. The Claimants argue that ACC had already acquired all licenses and approvals that were required under the then applicable regulatory provisions, and the Respondent's subsequent application of new and oppressive terms for approving ACC's cement production operations constituted, for this reason, a retroactive application of the new licensing regime and a breach of the Respondent's obligations under the Treaty. On their view, the Respondent's new licensing regime and the fees that ACC was required to pay pursuant to its retroactive application were unlawful and oppressive.
726. The Respondent denies that a new licensing regime was applied to ACC retroactively. It argues that ACC had acquired no rights to operate its cement plant prior to the changes that took place in 2006-2007.
727. It appears that ACC started constructing its cement plant in early 2006. On 1 November 2005, ACC concluded a contract with FLSmidth concerning the design of the cement plant and supply of its production lines and a second contract concerning civil works, installation and commissioning of the Plant.<sup>1008</sup> By that time ACC had also procured a large number of approvals and permits as specified in detail in Section IV.C (The Licensing Procedure) above. According to a letter of 24 June 2007, ACC had by that time invested around USD 120 million in ongoing works.<sup>1009</sup> The Final Approval was issued by IDA on 14 July 2008.<sup>1010</sup>

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<sup>1008</sup> C-16, Contract for Carrying out the Design & Engineering and the Supply of Imported Deliveries of Ramliya Clinker Plant, between ACC and FLSmidth A/S (1 November 2005); C-17, Contract for the Civil Works Construction, Erection, and Start-up and Taking-over Tests of Ramliya Clinker Plant, between ACC and Cement Plant Consultations A/S (1 November 2005).

<sup>1009</sup> C-70, Memorandum from ACC to IDA (24 June 2007).

<sup>1010</sup> C-38, Final Approval To the Establishment of an Industrial Project in Governorates, issued by IDA to ACC (14 July 2008).

728. As the Tribunal has already noted, ACC did not apply for a license under the 1958 Industry Law (or, alternatively, put IDA on notice as to its cement project) until 18 September 2006. This was despite the fact that such application was an obligatory legal requirement for the initiation and operation of any industrial project in Egypt. The fact that ACC had obtained other approvals and permits did not preclude the need to obtain an Industrial License under the 1958 Industry Law.
729. By that time ACC had already initiated construction works and invested significant sums. This does not lead to a different evaluation of the situation, including the obligation to obtain an Industrial License under the 1958 Industry Law.
730. The obligation to obtain an Industrial License under the 1958 Industry Law existed at all material times. It was not imposed retroactively. Nor did the auction process constitute a retroactive application of a regulatory regime to a situation that legally vested in ACC prior to the regulatory changes that took place in 2006 and 2007.

**(4) Did Egypt Take Unlawful Measures Concerning the Supply of Electricity and Natural Gas to ACC’s Cement Plant?**

731. In addition, the Claimants assert that the Respondent has violated principles of fairness and equity by engaging in inherently discriminatory conduct as regards the provision of electricity and natural gas in quantities necessary for the continuous operation of the cement production process at ACC.

***a. Background***

732. Production of clinker requires enormous amounts of thermal energy: to trigger the chemical reactions that are required to produce Portland cement, a temperature of 1450° C is required.<sup>1011</sup> The thermal energy requirement varies between production processes and technologies but is estimated to average presently 3.5 GJ/ton.<sup>1012</sup> Coal is the main contributor to energy in the cement industry, while natural gas also plays an important

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<sup>1011</sup> *Cement Facts*, World Cement Association, available at <https://www.worldcementassociation.org/about-cement/cement-facts> (accessed on 23 October 2020) (“Cement is a fine powder that is made by first crushing and heating limestone along with clay or shale. The milled raw materials are then fired in a rotating kiln at 1450°C.”).

<sup>1012</sup> Peter Levy, et al., *Cement – Tracking Report*, IEA, Paris (June 2020), available at <https://www.iea.org/reports/cement> (accessed on 22 October 2020).



role.<sup>1013</sup> A cement plant also requires significant quantities of electrical energy to be able to operate (but not for purposes of adducing thermal energy).

733. The Tribunal will first deal with the Claimants' contentions as concerns the Respondent's imposition of terms for supply of electricity. The Tribunal will then address the corresponding issues with respect to the supply of natural gas. *See infra* Section VII.B(4)c (Has Egypt Breached Any BIT Standard of Protection in Relation to the Supply of Gas?).

***b. Has Egypt Breached Any BIT Standard of Protection in Relation to the Supply of Electricity?***

734. The generation, transmission, and distribution of electricity in Egypt is managed by EEHC. It is a State agency, which operates under the Ministry of Electricity and Energy.<sup>1014</sup>

735. Decree No. 11/2003, issued by EEHC on 23 January 2003, promulgates the Unified Rules for Electricity Distribution Companies.<sup>1015</sup> This decree was replaced in 2005 by EEHC's Decree No. 86/2005, "Commercial Regulations for Electricity Distribution Companies."<sup>1016</sup> It provides that any request submitted by an end user to allow an industrial project to be connected to the national distribution network must be directed to the EEHC. Article 13 reiterates the requirement that a contract be concluded between the distribution company and the end user.

**(i) The Claimants' Case**

736. On the basis of the foregoing, the Claimants and ACC expected that electricity would be supplied to ACC's cement plant from the national grid, subject to payment of the price stipulated in the contract to be concluded with the electricity distribution company.

737. Adequate supply of electricity at reasonable terms is a critical issue for the operation of a cement plant. In this particular instance, and for these reasons, ACC initiated discussions

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<sup>1013</sup> In the instant case, IDA provided in the Final Approval that natural gas was to be used (*See* C-38, Final Approval To the Establishment of an Industrial Project in Governorates, issued by IDA to ACC (14 July 2008)).

<sup>1014</sup> CL-2, Law No. 164 of 2000 (2000).

<sup>1015</sup> CL-9, Decree No. 11 of 2003 (23 January 2003).

<sup>1016</sup> CL-10, Decision No. 86 of 2005 (16 June 2005).

with the government agency responsible for electricity distribution in Egypt. Such contact was initiated in June 2005.

738. The Claimants' case is that ACC was discriminated against by being coerced into paying — in addition to going rates for off-taken electricity — an amount of EGP 217.2 million for the construction of a power station (later to be converted into a contribution to the build-up of electrical capacity). Neither of those approaches were applied to cement plants that were in existence before 2006.
739. In 2006, government officials announced that the necessary increase in electricity generation capacity nationwide would require an investment of EGP 4 billion. According to the Claimants, this cost was placed entirely on new entrants in the cement market and was, for this reason, discriminatory.
740. The model applied by the Respondent, the Claimants assert, resulted in ACC having to pay twice for the infrastructure cost: once by electricity generation fees, and once by paying for a new “power factor.”
741. On the Claimants' case, the costs for electricity consumption that the Respondent imposed on ACC were egregious. Such costs were not in place when the Claimants invested in ACC and they represented an entirely unanticipated, unreasonable, and discriminatory requirement.
742. In November 2008, the obligation to build a power station was converted into an obligation to pay a surcharge on supplied electricity at a price of EGP 3,620 per kWh. This was a requirement that was not imposed on previously established cement plants, a factor that is said to have placed ACC at a competitive disadvantage. In light of the above, it is the Claimants' position that the Respondent “has breached its obligation to accord the Claimants fair and equitable treatment” and has thoroughly failed in providing “due process, non-discrimination, proportionality [and] transparency.”<sup>1017</sup>

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<sup>1017</sup> Cl. Mem. ¶ 139.

743. In summary, the Claimants assert that ACC was treated in an unfair and discriminatory manner, as it had to pay “two cumulative levies on account of the capital cost of electricity supply (the electricity generation fees and the power factor).”<sup>1018</sup>

**(ii) The Respondent’s Position**

744. In the Respondent’s view, the facts on record in relation to the requirement to pay for power generation capacity show that ACC was not subject to any arbitrary treatment. To the contrary, the facts on record evidence that Egypt acted reasonably in light of serious public policy concerns existing at the relevant time.

745. The Respondent’s treatment of ACC was justified by a rational policy, seeking to manage the surge of applications to establish high-consumption industrial plants in a situation of inadequate access to the state’s energy resources and the demands that this placed on the Respondent’s distribution infrastructure.

**(iii) Recapitulation of Relevant Events**

746. From the record before the Tribunal, it appears that various events conspired to affect the conditions for supply of electricity to ACC’s cement plant:

747. Discussions between EEHC and ACC were initiated as early as June 2005.<sup>1019</sup> In a letter of 30 April 2006 to EEHC, ACC provided technical data pertaining to transformer stations for power off-take from the national grid.<sup>1020</sup>

748. In a project meeting on 29-30 August 2006 between ACC and its contractors, it was noted that ACC had “[v]erbal approval of connection to national grid.”<sup>1021</sup>

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<sup>1018</sup> Cl. Reply ¶ 26.

<sup>1019</sup> See C-61, Letter from ACC to the EETC (30 April 2006) (referencing “your letter dated 26/6/2005”).

<sup>1020</sup> *Id.*

<sup>1021</sup> C-62, Design Meeting No. 6, Minutes of Meeting (29-30 August 2006).

749. A letter from ACC of 31 May 2006 to EETC also dealt with matters regarding the required transformer stations.<sup>1022</sup> Further exchanges, e.g., a letter from Reliance Heavy Industries of 13 September 2006 to EEHC,<sup>1023</sup> also concerned this equipment.
750. EEHC responded to these exchanges in a 7 November 2006 letter, in which it approved the establishment of the required transformer stations subject to certain conditions such as securing a contract for the supply of electricity with EETC.<sup>1024</sup>
751. From these exchanges it appears that the discussion to that point only concerned requirements for transformer capacity, not electricity generating equipment.
752. It should be recalled that IDA in a letter of 10 January 2007 to ACC confirmed receipt of a request “for approval of the establishment of cement production project with a production capacity of 1,8 million tons annually.”<sup>1025</sup> Among the requirements that had to be satisfied for approval was an undertaking for the applicant to procure electricity generation equipment.<sup>1026</sup>
753. On 4 June 2007 ACC entered into a contract with a local Siemens company for the supply and installation of transformers.<sup>1027</sup>
754. A memorandum of 24 June 2007 issued by ACC to IDA included a request to have the project approved.<sup>1028</sup> By way of introduction, ACC informed that “it has submitted an application for registration in the industrial register on 18/9/2006.” The memorandum mentioned that ACC has agreed with EEHC on the supply of electricity “to feed the transformers station.” It also mentioned the Siemens contract for EGP 41 million for “the transformers station.”

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<sup>1022</sup> C-144, Letters from ACC to EETC (30 April 2006, 31 May 2006), Letter from ACC to the EEHC (13 September 2006), Letter from EEHC to ACC (7 November 2006).

<sup>1023</sup> *Id.*

<sup>1024</sup> C-98, Letter from EEHC to ACC (7 November 2006).

<sup>1025</sup> C-22, Letter from IDA to ACC (10 January 2007).

<sup>1026</sup> Cl. Mem. ¶ 63(i); Resp. C-Mem. ¶ 58.

<sup>1027</sup> C-64, Contract for a Conventional Substation between ACC and Siemens Ltd Egypt (4 June 2007).

<sup>1028</sup> C-70, Memorandum from ACC to IDA (24 June 2007).

755. On 1 February 2008, ACC concluded a temporary electric power supply contract with EEHC and EETC, effective in the period February to May 2008.<sup>1029</sup> According to its preamble, a renewal of the contract would require subsequent agreement and approval by IDA (to convert the contract to a permanent basis). This temporary arrangement was in response to a request by ACC on its need for electric power for the commissioning of its production line.
756. The Claimants have also referred to a contract of 14 March 2010 between EETC and ACC that concerns the operation, transmission, and maintenance services of the electrical grid and for this reason does not concern the matter at hand.<sup>1030</sup>
757. As accounted for elsewhere, IDA issued its Final Approval of ACC's cement plant on 14 July 2008.<sup>1031</sup> Importantly, it is noted under "Special conditions" that ACC had an obligation to "establish a power station for the project."
758. A letter of 29 July 2008 from EEHC to ACC informing, *inter alia*, that "your factory is one of the cases subject to legalization of status according to the decisions of the settlement committee formed by the Ministerial Decision No. 726 of the year 2007."<sup>1032</sup> The letter states that a contract for paying investment costs "to establish a generating station" is in the process of being prepared.
759. In the letter, EEHC noted that ACC would have difficulty in establishing an electricity generation station, already having started production, and that, as a consequence, the agency calculated the cost to "cover the loads licensed by the Ministry of Industry," informing that the agency would revert as to the matter of payment of the cost of such

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<sup>1029</sup> C-102, Electric Power Supply Temporary Contract concluded between EETC and AAC (1 February 2008).

<sup>1030</sup> C-69, Contract Agreement for the Operation and Maintenance Services of the Transformers Station of ACC (March 2010). The Claimants have referred to this contract as concerning the supply of electricity between EEHC and ACC which is not correct.

<sup>1031</sup> C-38, Final Approval To the Establishment of an Industrial Project in Governorates, issued by IDA to ACC (14 July 2008).

<sup>1032</sup> C-66, Letter from EEHC to ACC (29 July 2008).

- investment.<sup>1033</sup> (This matter relates to ACC’s letter of 26 February 2007 to IDA, explaining that procuring a power station would delay the project up to three years.<sup>1034</sup>)
760. In ACC’s letter of 9 September 2008 to the Ministry of Trade and Industry there is a mention in passing of “your recently imposed obligation to pay for the building of a power plant for our electrical needs.”<sup>1035</sup> (The letter otherwise focuses on an existing export ban for clinker.)
761. On 19 November 2008, EEHC reverted to ACC and responded to its request to exclude the five cases subject to legalization from the requirement to establish a power station on condition that it pay the fees that represent the cost of establishing energy generating stations at their own expense.<sup>1036</sup> EEHC explained that the obligation to build a power station would be replaced by a duty to pay increased fees at a price of EGP 3,620 per kW. Considering the energy requirement of ACC’s plant amounting to 68 MW, the EEHC determined the amount payable at EGP 246,160,000.
762. In a letter of 17 December 2008 to ACC, EEHC noted that it had not received a reply to its letter of 19 November 2008 and informed that EEHC needed a confirmation, absent which it would have to cut off the electric power.<sup>1037</sup>
763. In a letter of 8 June 2010, IDA notified ACC that the second installment for the second line was due and again requested payment for all installments not yet paid.<sup>1038</sup>
764. In a letter of 14 June 2010, IDA turned to EEHC by reason of the payment status relating to the license fees for ACC’s first and second production lines.<sup>1039</sup> IDA asked EEHC to take measures in order to “prevent supplying the electricity required for operating the

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<sup>1033</sup> *Id.*

<sup>1034</sup> C-65, Letter from ACC to IDA (26 February 2007).

<sup>1035</sup> C-109, Letter from ACC to Ministry of Trade and Industry (9 September 2008).

<sup>1036</sup> C-67, Letter from EEHC to ACC (19 November 2008).

<sup>1037</sup> C-68, Letter from EEHC to ACC (17 December 2008).

<sup>1038</sup> C-49, Letter from IDA to ACC (8 June 2010).

<sup>1039</sup> C-50, Letter from IDA to EEHC (14 June 2010); R-32, Letter from IDA to EGAS (14 June 2010).

second line,” due to ACC’s failure to pay the 15 percent and 25 percent installment payments due for the first and second production lines, respectively.

765. In a further letter from EEHC of 23 December 2010,<sup>1040</sup> the agency referred to a reply letter of 14 October 2010 (not on record) that the amounts claimed by IDA to operate ACC’s second production line were in dispute and subject to review before the Administrative Court (implying, assumedly, that payment should be held in abeyance awaiting resolution of the dispute). EEHC, noting that IDA was the competent authority to decide on license terms, reiterated its request to have ACC pay in order for EETC to supply electricity to ACC’s second production line. In this letter, EEHC informed ACC that it would have to pay its license fee relating to the second production line in order for EEHC “to connect the electricity needed to operate Line II.”
766. The threat from EEHC to cut electricity supplies for the second production line did not materialize, however. This is explained in EEHC’s letter of 20 April 2011.<sup>1041</sup>

#### **(iv) The Tribunal’s Conclusion**

767. It appears to be undisputed that initially — in order to deal with the inadequacy of electricity generation capacity — new licensees would be required to provide for their own electricity needs by establishing generation plants of their own. This onerous requirement was later converted, at the request of ACC, into an obligation to contribute to the financing of additional generation capacity, for purposes of funding what might be referred to as a “virtual” electricity generator. The Claimants consider this requirement exorbitant and dictated not by a *bona fide* effort to seek to remedy the scarcity of electricity supply, but to exert maximum pressure on the new entrants in order to extract the largest payments possible to the Respondent on a solely opportunistic basis.
768. The Claimants consider that the Respondent made a “specific commitment” to supply electricity of a certain specified quantity. This position is based on the contents of IDA’s Final Approval. However, there is no evidence in the record to support this claim.

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<sup>1040</sup> C-117, Letter from EEHC to ACC (23 December 2010).

<sup>1041</sup> C-52, Letter from Ministry of Electricity & Energy and EEHC to the Claimants (20 April 2011).

769. The Final Approval issued by IDA on 14 July 2008<sup>1042</sup> includes, under the heading “The Estimated Production Capacity of the Project and Needs of Electricity & Natural Gas,” the following:

Product Name	The Annual Production Capacity		Needs	
	Unit	Quantity	Electricity	Natural gas
Ordinary Portland Cement	Ton/year	4200000 (four million and two hundred thousands)	464 m k.w.h	378 m cubic meter

770. The table speaks of “estimated” needs of, *inter alia*, electricity. It cannot be construed as expressing any form of undertaking of IDA to ensure that this volume would actually be available. Indeed, the obligation inscribed in the Final Approval that ACC was itself to establish a power station for the project points in the opposite direction.

771. However, it is apparent that ACC’s project was based on the reasonable assumption that electricity would be provided and available. The question is, however, at what terms electricity could be provided without compromising the standard of fair and equitable treatment.

772. The above events, according to the Claimants, attest to the fact that the electricity users were not treated fairly as the additional cost for electricity was passed on to the new entrants, including ACC, and was not shared by all electricity users (or at least all industrial users).<sup>1043</sup> This allegedly discriminatory treatment continued at least until a general “power factor” was introduced in 2014.

773. The Claimants’ complaint seeks support from the later joint request of 1 March 2017 of the new entrants to the cement market in 2008 to the President of Egypt.<sup>1044</sup> This noted that these 16 cement plants had been the subject of a duplication of costs for electricity, as compared with other high-energy consuming industries in Egypt. Rather than supporting the Claimants’ argument, however, this goes to show that ACC had not been discriminated

<sup>1042</sup> C-38, Final Approval To the Establishment of an Industrial Project in Governorates, issued by IDA to ACC (14 July 2008).

<sup>1043</sup> Cl. Reply ¶¶ 236-37.

<sup>1044</sup> C-136, Complaint to Prime Minister (1 March 2017).



against — as regards the supply of electricity — in relation to other new entrants in the Egyptian cement production sector.

774. Generally speaking, one would consider that the State — as a policy matter — should provide basic utilities — such as electricity, natural gas, and others — on equal terms to all consumers, so long as there is no rational basis to differentiate between different consumer groups (for example between residential and industrial consumers, or between specific industry sectors that the State wishes to promote or dissuade on rational grounds of industry policy). On the other hand, it is not unreasonable for a State to change the regulatory environment from time to time depending on policy priorities and prevailing market conditions.
775. In the instant case, the obligation to establish a power station was part and parcel of the licensing terms contained in IDA’s Final Approval. ACC was, at the time, free to accept or reject it. If the term had been imposed on a selective and arbitrary basis after ACC had fully completed a duly licensed investment, that could in principle present a different picture. In this case the situation is different. If ACC had applied for a license at the appropriate time — i.e., before it had incurred any costs in the project — it would have been able to decline the terms for the license, including the investment in a virtual power station, without cost consequences. For this reason, it was not discriminatory.
776. The Respondent’s decision to charge the new entrants, including ACC, with additional costs for funding an increase in the overall electricity generation capacity of the Respondent appears not to have been shared with industrial plants that had acquired their licenses prior to 2006. That may certainly not be optimal from a policy point of view. However, as has been noted (*see supra* Section VII.B.(3)j (Was ACC Discriminated Against in Relation to Existing Cement Plants?)), those industrial enterprises cannot be said to have been in a situation of “like circumstances.”
777. The allocation of costs for the provision of electricity between different categories of comparable consumers that this practice gave rise to can hardly be reconciled with rational policies seeking to avoid competitive distortions in the marketplace. While the maintenance of equal conditions for comparable groups of producers as regards the

provision of basic utilities generally is perceived as a strong policy objective, being conducive to effective competition, departures from such practice do not automatically translate into a violation of the FET standard. Absent any (explicit or implicit) undertakings by a State, the FET standard cannot be said to require a host State to maintain an absolute level playing field between actors with previously acquired rights, on the one hand, and new entrants in a particular market, on the other.

778. In sum, the Tribunal concludes that the Respondent's treatment of the new entrants, including ACC, as regards the provision of electricity, or the terms imposed in connection thereto, was not unreasonable, in the circumstances that prevailed. It cannot be said to be unfair or inequitable, and it does not constitute a breach by the Respondent under the Treaty.

*c. Has Egypt Breached Any BIT Standard of Protection in Relation to the Supply of Gas?*

779. The Claimant further argues that the Respondent breached the requirement of fair and equitable treatment in the context of ensuring ACC the provision of gas supply.

**(i) Background**

780. EGAS operates under the EGPC, which is a public entity subordinate to the Ministry of Petroleum.<sup>1045</sup> EGAS is tasked with the management of transmission of natural gas to local distribution companies such as City Gas. City Gas is a privately held company.

**(ii) The Claimants' Position**

781. Firstly, the Claimants hold the view that the specified gas requirements of the Final Approval<sup>1046</sup> constitute an undertaking by the Respondent as to the availability of that quantity of gas.<sup>1047</sup> However, the volumes of gas supplied to ACC — and necessary for its operation — were far below the covenanted volumes.

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<sup>1045</sup> See Request for Arbitration, n.4 (citing CL-3, Decree no. 1009/2001 (2001) art. 9; CL-4, Law No. 20/1976, art. 2; Presidential Decree no. 164/2007 (2007)).

<sup>1046</sup> C-38, Final Approval To the Establishment of an Industrial Project in Governorates, issued by IDA to ACC (14 July 2008).

<sup>1047</sup> Cl. Reply ¶¶ 214 *et seq.*

782. The Claimants' first-hand position is that by not providing sufficient quantities of gas, the Respondent "was in breach of the terms of the [Industrial License] which guaranteed a gas supply in the amount of 378 million cubic meters annually for a production capacity of 4.2 million tons of clinker."<sup>1048</sup> Therefore, in the Claimants' view, the Respondent violated its undertaking to ensure the supply of the stipulated quantity of gas, constituting inequitable treatment and significant, intentional and prejudicial discrimination of the Claimants' investment in ACC.
783. As was indicated by way of introduction (*see supra* Section VII.B(4)a (Background)), a cement plant is a formidable consumer of thermal energy which may be generated by combustion of natural gas, coal, diesel or alternative fuels, or any combination of the above. In the instant case, one of the conditions for IDA's Final Approval of 14 July 2008 was that the plant would be fueled by natural gas.<sup>1049</sup> In this relation IDA foresaw a need for no less than 378 million m<sup>3</sup> of natural gas per annum for ACC's two production lines with an aggregate output of 4.2 million tons of cement. As a condition for the Final Approval, a requirement was imposed that ACC approach the Ministry of Petroleum for purposes of procuring the requisite volume of natural gas.<sup>1050</sup>
784. The Claimants point out that the Respondent prescribed the use of natural gas as the main source of thermal energy for the operation of ACC's cement plant and undertook liability for supplying ACC with 378 million m<sup>3</sup> annually as expressly recorded in IDA's approval.
785. The Claimants' allegations as to the inequitable and unfair treatment that the Respondent has afforded its investment, ACC, falls into two categories. One category, addressed above, concerns the fact that the Respondent has failed to live up to its commitment to provide the required volume of gas (specified in IDA's Final Approval) necessary for the continuous operation of ACC's two cement production lines (the second line from March 2011). The second category relates to the arbitrary stoppages of gas which the Respondent ordered on

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<sup>1048</sup> Cl. Mem. ¶ 106.

<sup>1049</sup> C-38, Final Approval To the Establishment of an Industrial Project in Governorates, issued by IDA to ACC (14 July 2008).

<sup>1050</sup> *Id.*, item 4.

a number of occasions on the pretext of ACC having failed to pay installments on the license fee.

786. The Claimants have pointed to the following circumstances. The ownership and control over gas distribution in Egypt lies with the Government, which dictates the terms and conditions for the supply of natural gas, irrespective of whether any entity partaking in the distribution chain is privately held or not. As a consequence, ACC was left with no choice but to sign a contract with City Gas on extremely unbalanced terms including severe penalties in case of departure in respect of the off-take of quantities including an exceptionally burdensome take-or-pay obligation.
787. Additionally, ACC could secure only a quantity of 150 million m<sup>3</sup> of natural gas initially, a quantity that was not increased to a maximum level of 320 million m<sup>3</sup> until in April of 2012. This represented a clear breach of the guaranteed gas supply of 378 million m<sup>3</sup> undertaken in the Final Approval as the quantities available to ACC at all times fell short of the guaranteed volume.
788. In addition to the short supply of gas that was visited on ACC on repeated occasions, IDA also instructed EGAS to stop providing the necessary quantities of gas to ACC altogether in an arbitrary and wanton fashion; this led to the limitation of the supply of gas in the required volume as of March 2011.

### **1. Stoppage of Gas**

789. The Claimants assert that in addition to breaching a firm commitment contained in the Final Approval to secure a volume of 378 million m<sup>3</sup> of natural gas on an annual basis — sufficient to cover the energy needs for the production of 4.2 million tons of cement — the Respondent has also ordered stoppages of supplies of natural gas to ACC's cement plant on an arbitrary and discriminatory basis, creating extensive interruptions and disturbances in its production process, inflicting huge costs.
790. The stoppages of gas effected by City Gas are attributable to the Respondent. Furthermore, EGAS and EGPC are both elements of governmental authority and their conduct is directed and controlled by the State. Accordingly, the actions are attributable to the Respondent

pursuant to Articles 4, 5, and 8 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.

## 2. Gas Shortages

791. From early 2012, significant shortages of gas arose with dramatic effects for ACC's production capacity, shortages that the Claimants consider were clearly in breach of the Respondent's obligation in respect of "the allocated gas consumption, fixed by the IDA."<sup>1051</sup>
792. At this time — 2012 — ACC decided to convert to coal for purposes of satisfying the plant's need of thermal energy, procuring the necessary equipment at a cost of EGP 278 million. ACC was allowed to use coal to fuel the processing of clinker from June 2014.<sup>1052</sup>
793. Further, as concerns the operation of the second production line starting in March of 2011, there was a complete failure from various Egyptian authorities to effect the resumption of gas supply, leaving ACC with no option but to take recourse to diesel fuel, which caused extreme adverse consequences for the economic performance of ACC.
794. The Respondent's failure to fulfill its promises by discharging its duty to supply gas in the volumes undertaken by IDA implies that the Respondent by its conduct has breached its duty to award fair and equitable protection of the Claimants' investment. This failure to supply, as put into relief of its conduct in relation to other industrial plants, at the same time demonstrates that the Respondent has acted in a discriminatory fashion towards the Claimants.
795. Under all circumstances, the Respondent's failure to supply gas in agreed quantities constituted a breach of the Claimants' legitimate expectations and for that reason triggered the Respondent's responsibility under the Treaty to ensure fair and equitable treatment of ACC.

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<sup>1051</sup> Cl. Mem. ¶ 113.

<sup>1052</sup> *Id.*, ¶ 114.

796. Additionally, the Respondent's decisions to cause stoppage in gas supply to ACC from time to time have been undertaken without any contractual basis and has been exercised in an arbitrary and discriminatory fashion. The stoppages (while constituting contractual breaches) have been of an exceptionally serious nature to make them rise to the level of breaches of the standards of protection awarded to the Claimants' investment under the terms of the Treaty and international law.

### (iii) The Respondent's Position

797. As regards the supply of natural gas, ACC has entered into agreements with City Gas.<sup>1053</sup> This being so and in the absence of any concrete undertaking on the part of any emanation of the Respondent (such as the Ministry of Petroleum), there is no basis for the Claimants to legally expect supply of gas on other terms than those (including exclusion of liability and the like) that follow from the provisions of the gas supply contracts.

798. The Respondent has emphasized that "ACC's rights to the supply of gas are determined in the gas supply agreement it had signed with City Gas."<sup>1054</sup> It cites certain provisions of the contract of 16 April 2007<sup>1055</sup> such as Article 11-3 (exclusion of liability in force majeure situations);<sup>1056</sup> Article 3-6 (duty of the customer to maintain capacity to protect against *force majeure*);<sup>1057</sup> and Article 4-3 (excluding compensation for purchase of alternative fuel).<sup>1058</sup> The Respondent contrasts this with the *Unión Fenosa* gas case<sup>1059</sup> where there was a warranty to a certain sufficient availability.<sup>1060</sup>

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<sup>1053</sup> See *supra* Section IV.D (The Provision of Gas).

<sup>1054</sup> Hr'g Tr. Day 1 (8 April 2019) 161:22-24.

<sup>1055</sup> C-26, Contract No. 2/2007, Supply of Natural Gases Concluded Between City Gas and AAC (16 April 2007).

<sup>1056</sup> Hr'g Tr. Day 1 (8 April 2019) 162:23.

<sup>1057</sup> Hr'g Tr. Day 1 (8 April 2019) 163:18.

<sup>1058</sup> Hr'g Tr. Day 1 (8 April 2019) 164:5.

<sup>1059</sup> C-232, *Unión Fenosa Gas S.A v Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (31 August 2018), ¶ 9.138.

<sup>1060</sup> Hr'g Tr. Day 1 (8 April 2019) 164:23-165:3.

799. The first amendment in May 2009 increased the quantity of natural gas to 150 million m<sup>3</sup> and additionally inserted a list of priorities to be applied “in the event of shortage of natural gas availability to supply [ACC].”<sup>1061</sup>
800. This also applies to the second amendment signed in May 2010. This amendment increased the annual volume of natural gas (from 1 September 2010) to 320 million m<sup>3</sup>. According to the Respondent, the reason why the February 2013 contract was not executed was ACC’s failure to “adjust the cash deposit.”<sup>1062</sup>
801. The Respondent accepts that there have, indeed, been temporary stoppages of supplies of natural gas. However, these have been justified by the occurrence of repeated breaches of ACC’s obligation to effect timely payments of installments on the license fees relating to its cement production lines. There have also been stoppages of gas supply occasioned by civil unrest and by technical failures at the gas fields. The Respondent has undertaken all reasonable measures in the circumstances in order to prevent or limit the adverse consequences of such obstacles and have followed the contractual list of priorities to be applied in such circumstances.
802. In addition, the Respondent rejects the Claimants’ argument that any action by City Gas may be attributed to the Respondent. Egypt does not enjoy any general control over City Gas, which is owned by a private company that is the leader in the market of gas distribution, with activities in Egypt and abroad. The actions of City Gas were dictated by (i) the regional or national shortages happening at the time and (ii) the provisions of the City Gas Contract relating to the priorities in the provision of gas in the event, which materialized, of shortages.

#### **(iv) The Tribunal’s Considerations**

803. It may be noted that by 16 April 2007, i.e., more than a year before obtaining the Final Approval, ACC had already contracted with City Gas for the supply of a maximum of 150 million m<sup>3</sup> natural gas. This was significantly less than the estimated requirement of natural

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<sup>1061</sup> C-73, Amendment No. 1/2009 to Natural Gas Supply Contract (19 May 2009).

<sup>1062</sup> Hr’g Tr. Day 1 (8 April 2019) 167:23-24 (referencing C-73, Amendment No. 1/2009 to Natural Gas Supply Contract (19 May 2009)).

gas for the two production lines.<sup>1063</sup> The contract, essentially, imposed a supply obligation on City Gas with the exception of circumstances of *force majeure* and “[e]mergent circumstances,” meaning “the occurrence of any sudden breakdown, break explosion or the breaking out of any fire so that the gas transfer networks and its distribution or the severe decrease in the quantities of the delivered gas to the first party.”<sup>1064</sup>

804. The gas supply contract was amended on 19 May 2009,<sup>1065</sup> and then again on 30 May 2010.<sup>1066</sup>
805. The first amendment included a new provision providing for an order of priority of supply in case of shortages of gas available for distribution, putting ACC in the second or, arguably, third order of priority. The second amendment of 30 May 2010 reiterated the priority order.
806. At the beginning of 2013, a new gas supply contract was prepared for a volume of 378 million m<sup>3</sup> (i.e., the volume that was specified in the Final Approval).<sup>1067</sup> However, this contract was not signed due to, according to the Respondent, a failure by ACC to pay an increase in the required cash deposit.<sup>1068</sup>
807. This draft contract included a conventional *force majeure* clause in its Article 16 which — different from the previous contract — included a notification requirement.<sup>1069</sup> This draft, like the previous contracts, included an express entitlement for City Gas to suspend gas supply in case of non-payment. Notably, this was not coupled with the duty to pay installments on the license fee to IDA and it was not, either, connected to the duty to pay

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<sup>1063</sup> C-26, Contract No. 2/2007, Supply of Natural Gases Contract No. 2/2007 (16 April 2007), 5-A, Quantities.

<sup>1064</sup> *Id.*, arts. 3-7 and 11-2.

<sup>1065</sup> C-73, Amendment No. 1/2009 to Natural Gas Supply Contract (19 May 2009).

<sup>1066</sup> R-34, Amendment No. 1/2010 Supply of Natural Gases Contract No. 2/2007 (30 May 2010).

<sup>1067</sup> C-76, Contract No. 9/2012, Supply of Natural Gas Between City Gas Co. And ACC (Expansions) (February 2013).

<sup>1068</sup> Resp. C-Mem. ¶ 105; Hr’g Tr. Day 1 (8 April 2019) 168:3.

<sup>1069</sup> C-76, Contract No. 9/2012, Supply of Natural Gas Between City Gas Co. And ACC (Expansions) (February 2013), art. 16-3.



“other fees and/or taxes” imposed then or in the future on the natural gas according to Article 9-4 of the draft.

808. Consequently, the contracted volume of natural gas to be supplied was increased at different times to reach 320 million m<sup>3</sup> in April of 2012.<sup>1070</sup> However, the Parties never reached agreement on supply of the volume stated in the Final Approval, 378 million m<sup>3</sup>.
809. On a primary basis, the Claimants premise their claim on the Respondent’s breach of its representations regarding an ability to ensure reliable gas supply to ACC and, in particular, its purported undertaking to procure the supply of 378 million m<sup>3</sup> of natural gas annually to ACC’s cement plant as per the contents of IDA’s Final Approval.
810. The Final Approval, which, *inter alia*, includes an estimated need of natural gas (see excerpt from IDA’s Final Approval in paragraph 769 above) imposes a number of “Special Conditions” of which item 4 is relevant here:

*4. The company shall contract with the Ministry of Petroleum on the natural gas quantity authorized for the project based on the specified production capacity, 4,200,000 tons/annually (four million two hundred thousands) Ordinary Portland Cement, to fulfil the needs of manufacturing and generating power at the free international rate, and shall comply with the requirements set by Ministry of Petroleum and the companies affiliated thereto.*<sup>1071</sup>

811. It is clear that the data concerning gas requirements provided in the license do not constitute an undertaking by the Respondent. Apart from that, the Claimants could not legitimately anticipate that gas supply could not be disrupted by circumstances such as civil unrest and technical failures.
812. The Tribunal considers it appropriate, further, to examine whether in fact the Respondent might have had a valid explanation for its decision to suspend natural gas supply to ACC. If this proves not to be the case, there is reason to proceed with the inquiry as to whether

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<sup>1070</sup> Cl. Mem. ¶ 106.

<sup>1071</sup> C-38, Final Approval To the Establishment of an Industrial Project in Governorates, issued by IDA to ACC (14 July 2008), item 4.

such suspensions of gas supply — obviously of critical importance to ACC — may come into conflict with the Respondent's obligations under the Treaty.

813. For purposes of this examination there may be reason to review the following succession of events.
814. In a letter of 22 January 2008, ACC applied to IDA for an adjustment of the licensing terms in that the advance payment of the license fee was reduced to 10 percent (in lieu of 25 percent), that the payment period be extended to 10 years (in lieu of three years), and that the license fee relating to the second production line would not start to accrue until at the time of commencement of production.<sup>1072</sup>
815. In a letter of the following day, IDA rejected ACC's request to have the annual installments on the license fee reduced, informing that ACC's other requests would be forwarded to the Contract Awarding Committee for consideration.<sup>1073</sup>
816. By letter of 4 May 2008, ACC forwarded a cheque in the amount of EGP 84.3 million, representing 15 percent of the total license fee of EGP 562 million.<sup>1074</sup> It explained that the acceptance of this payment essentially was to confirm IDA's readiness to grant a license for the 4.2 million tons/year production capacity.
817. In a letter of 3 June 2008, IDA confirmed to ACC that the license fee for the first production line — prorated — would amount to EGP 281.4 million and that the agency accepted that ACC pay an installment of 15 percent (instead of 25 percent) with the balance paid over five years instead of three.<sup>1075</sup> As for the second production line, the agency requested that an installment be paid according to the original terms, i.e., in an amount of 25 percent with the remainder paid over three years, interest accruing.

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<sup>1072</sup> C-72, Letter from ACC to IDA (22 January 2008).

<sup>1073</sup> C-101, Letter from IDA to ACC (23 January 2008).

<sup>1074</sup> C-104, Letter from ACC to Ministry of Trade and Industry (4 May 2008).

<sup>1075</sup> C-35, Letter from IDA to ACC (3 June 2008).

818. In a letter of 4 June 2008 from ACC to IDA,<sup>1076</sup> reference was made to IDA's letter of 3 June 2008 concerning decisions by the Contract Awarding Committee of 21 May 2008 granting a license for a production capacity of 4.2 million tons/year.<sup>1077</sup> As regards the first line, a cheque was forwarded in the amount of EGP 42 million, representing 15 percent of the license fee for the first production line and a further payment of EGP 70 million, representing 25 percent of the "second line license."
819. In its letter of 5 June 2008, IDA confirmed receipt of the payments (notifying a minor differential amount still payable to the agency).<sup>1078</sup>
820. In a letter of 16 February 2009 to the Ministry of Trade and Industry, ACC asked to be allowed to pay the remaining part of the license fee in equal installments during a 7-year term (with interest).<sup>1079</sup>
821. As noted above, Amendment No. 2 to the gas supply contract was agreed to on 19 May 2009.<sup>1080</sup>
822. On 12 August 2009, IDA sent a reminder to ACC to pay the second installment of 25 percent of the license fee, amounting to EGP 70.35 million.<sup>1081</sup> (The Parties are in agreement that this payment reminder relates to ACC's second production line.)
823. In its letter of 3 September 2009 to IDA, ACC requested that the matter of payments would be placed on hold, pending a decision in relation to ACC's complaint before the Settlement Committee (as well as with a view to liquidity issues).<sup>1082</sup> The letter also petitioned for adjusted payment terms as regards the company's second production line.

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<sup>1076</sup> R-19, Letter from ACC to IDA (4 June 2008).

<sup>1077</sup> C-35, Letter from IDA to ACC (3 June 2008).

<sup>1078</sup> C-37, Letter from IDA to ACC (5 June 2008).

<sup>1079</sup> C-200, Letter from ACC to IDA (22 January 2008), Letter from IDA to ACC (29 January 2008), Letter from ACC to Ministry of Trade and Industry (16 February 2009).

<sup>1080</sup> C-73, Amendment No. 1/2009 to Natural Gas Supply Contract (19 May 2009).

<sup>1081</sup> C-40, Letter from IDA to ACC (12 August 2009).

<sup>1082</sup> C-41, Letter from ACC to IDA (3 September 2009).

824. In its letter of 16 September 2009, IDA rejected ACC's requests and instructed it to effect payment within 15 days.<sup>1083</sup>
825. In its letter of 17 September 2009, ACC asked IDA to reconsider.<sup>1084</sup>
826. In a letter of 30 September 2009, IDA rejected ACC's request, informing that the payment schedule was fixed by the Minister of Trade and Industry and, hence, not subject to adjustment.<sup>1085</sup> IDA reiterated its payment request.
827. In its letter of 15 November 2009, ACC engaged the Ministry of Trade and Industry with an application to have its license fee reduced from EGP 201 million to EGP 108 million, based on the winning bid at the auction which picked the Beni Suef Governorate as its location, obtaining a reduction of its license fee from EGP 251 million to EGP 135 million "by means of a ministerial decision."<sup>1086</sup>
828. Around this time, IDA issued a formal summons for ACC to effect payment. This was followed by a letter of 3 December 2009 to ACC, noting that "the first installment for the first line has become due for payment [in an amount of] EGP 64,261,172," and calling for payment.<sup>1087</sup>
829. In a reply of 21 December 2009, ACC reiterated its request to suspend matters in consideration of the review by the Settlement Committee, and, alternatively, the Administrative Court.<sup>1088</sup> One complaint of ACC was that other plants were afforded a license based on an assumed production of 1.5 million tons per year, irrespective of whether the plant, due to increased efficiency, was able to exceed that volume. It also noted that another cement producer, Lafarge, was allotted a license in Beni Suef Governorate at EGP 134.5 million, constituting a reduction from the amount of EGP 251 million. *See supra* paragraph 827. On the basis of these circumstances, ACC requested IDA to

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<sup>1083</sup> C-42, Letter from IDA to ACC (16 September 2009).

<sup>1084</sup> C-43, Letter from ACC to IDA (17 September 2009).

<sup>1085</sup> C-166, Letter from IDA to ACC (30 September 2009).

<sup>1086</sup> C-44, Letter from ACC to Ministry of Trade and Industry (15 November 2009).

<sup>1087</sup> C-47, Letter from IDA to ACC (3 December 2009).

<sup>1088</sup> C-48, Letter from ACC to IDA (21 December 2009).

reconsider the matter of the license fee, notifying IDA of the fact that, in ACC's view, no amount was outstanding "except for an amount of 2 EGP/license, as per the Law of Industry."

830. On 8 June 2010, IDA forwarded a payment request including also a second installment for the second production line, declaring the overall due amount to be EGP 118,188,000 (exclusive of interest).<sup>1089</sup>
831. In a letter of 21 June 2010, EGAS asked City Gas, on the basis of IDA's aforementioned letter, to prepare suspension of natural gas supply to ACC's second production line.<sup>1090</sup> (It should be noted that this production line did not become operational until March 2011.<sup>1091</sup>)
832. As a consequence, gas supply was reduced by 50 percent, causing stoppages in the operation of ACC's second production line in the period from March to November 2011.
833. In view of this, ACC was left with no choice but to take the emergency measure of resorting to the use of diesel fuel (in order to proceed with the commissioning of the installation of the second production line). This caused it to incur significant additional costs.<sup>1092</sup>
834. In a letter of 21 October 2010, EEHC informed ACC that it has been notified by IDA concerning the imminent start-up of the second production line, admonishing ACC to discharge its indebtedness to the State as per IDA's correspondence "to enable EETC to feed ACC Line II with the needed electricity."<sup>1093</sup>
835. On 8 March 2011, EGAS confirmed its instructions not to supply gas to ACC's second production line in the absence of settlement.<sup>1094</sup> On the following day, 9 March 2011, City Gas relayed EGAS's notification to ACC.<sup>1095</sup>

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<sup>1089</sup> C-49, Letter from IDA to ACC (8 June 2010).

<sup>1090</sup> C-51, Letter from EGAS to City Gas (21 June 2010).

<sup>1091</sup> See Cl. Mem. 109 (citing Witness Statement of [REDACTED] (16 November 2015), ¶70).

<sup>1092</sup> Cl. Mem. ¶¶ 109-11.

<sup>1093</sup> C-168, Letter from EEHC to ACC (18 October 2010).

<sup>1094</sup> C-53, Letter from EGAS to City Gas (8 March 2011).

<sup>1095</sup> C-54, Letter from City Gas to ACC (9 March 2011).

836. On 9 March 2011, ACC asked the Minister of Trade and Industry to intervene.<sup>1096</sup> The letter explained that ACC was “established in 1996 under the Law of Investment No. 230 of 1989 and its Executive Statute and Law No. 95 of 1992.”

837. The letter spoke of the “unlawfully instituted [...] auction process” and asked the Ministry to intervene in view of the imminent threat to ACC’s continued operation because of the potential stoppages of gas and electricity. It stated:

*Surprisingly, we have received letters from the Egyptian Electricity Holding Company and City Gas notifying us that they will cut our gas and electricity supply, unless the company pays the license installments claimed by IDA. Stopping our production will cause an approx. 5% shortage of cement in the Egyptian market. In the current situation, where cement and demand are almost balanced, this will consequently lead to the increase on cement prices, apart from the unfair loss which our company will suffer. That’s why we believe that this issue should be brought immediate attention.*

838. In a letter of 12 March 2011, City Gas confirmed to ACC that it would proceed to suspend gas supply in the absence of payment.<sup>1097</sup>

839. ACC’s further letter to the Minister of Trade and Industry of 17 March 2011 informed about adverse consequences of shutting down “our production line,” causing ongoing and significant loss.<sup>1098</sup>

840. Another follow-up letter was sent by ACC on 30 March 2011, informing, *inter alia*, that “ACC applied for its operating license in **September 2006.**”<sup>1099</sup> It complained of IDA’s purported departure from complying with the 1958 Industry Law, IDA compelling ACC to abide by the outcome of a public tender in which “it was not allowed to participate.” The letter ended with a request to have the gas supply re-established.

841. In the letter ACC also sought the intervention of the Minister of Trade and Industry to resolve the gas stoppage issue. It asked for the Minister’s assistance to deal with ACC’s

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<sup>1096</sup> C-56, Letter from ACC to Ministry of Trade and Industry (9 March 2011).

<sup>1097</sup> C-55, Letter from City Gas to ACC (12 March 2011).

<sup>1098</sup> C-57, Letter from ACC to Ministry of Trade and Industry (17 March 2011).

<sup>1099</sup> C-58, Letter from ACC to Ministry of Trade and Industry (30 March 2011) (emphasis in the original).

dispute with IDA “which has led to the **complete stop of supply of gas for one of our production lines.**”<sup>1100</sup>

842. On 2 November 2011, IDA informed ACC that on 29 September 2011 its Board of Directors had decided to accede to ACC’s application to be allowed to settle the license fees by way of monthly installments of EGP 8 million.<sup>1101</sup> In this relation, ACC was directed to pay EGP 16 million for October and November 2011.
843. On 13 November 2011, ACC submitted a request to IDA to urgently liaise with EGAS and City Gas for purposes of resumption of natural gas supply to the company.<sup>1102</sup>
844. IDA complied with this request the following day, 14 November 2011.<sup>1103</sup>
845. On 20 November 2011, ACC exhorted EGAS to arrange for the speedy resumption of natural gas supply to the second production line “as this line is totally stopped.”<sup>1104</sup>
846. By letter of 22 November 2011, EGAS instructed City Gas to resume gas supply.<sup>1105</sup> However, according to the Respondent, the two production lines worked with coal and other (refuse-derived) fuels from June of 2014. In fact, on 17 January 2013, ACC concluded a Letter of Intent with a supplier for the installation of a coal mill at a cost of EUR 6.2 million.<sup>1106</sup>
847. As for the Claimants’ complaint relating to stoppages of gas supply at specific times as a consequence of an instruction from IDA and allegedly constituting an abusive practice attributable to the Respondent, the documentation appears to show that such stoppages have, in fact, been so ordered as detailed above. This has occurred as a consequence of ACC’s late payment of installments on the license fees. As a practical matter, it is the gas supplier — City Gas, an entity formed under private law — that has effected the stoppage,

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<sup>1100</sup> *Id.* (emphasis in the original).

<sup>1101</sup> C-119, Letter from IDA to ACC (2 November 2011).

<sup>1102</sup> C-59, Letter from ACC to IDA (13 November 2011).

<sup>1103</sup> C-60, Letter from IDA to EGAS (14 November 2011).

<sup>1104</sup> C-120, Letter from ACC to EGAS (20 November 2011).

<sup>1105</sup> C-121, Letter from EGAS to City Gas (22 November 2011).

<sup>1106</sup> C-177, Letter of Intent between ACC and FLSmith A/S (17 January 2013).

although so instructed by the Respondent. Under these circumstances, the act of stoppage should be attributed to the Respondent irrespective of City Gas being a private entity, essentially acting under rules of private law.

848. Article 5 of the ILC (Articles on State Responsibility) provides that the conduct of a private entity may be attributed to the State. Although it is to be assumed that City Gas' conduct and scope of action — as a commercial entity — is circumscribed by national policies in the energy field, this does not imply that City Gas exercises public authority. However, a certain act of a “person or group of persons” may also be attributed to the State if they in fact acted “on the instructions of, or under the direction or control of [the State].”<sup>1107</sup>
849. To cite the *Fenosa* Award: “The Respondents’ decision to cut and curtail gas supply [...] was, by its nature and purpose, a sovereign act by the Respondent under international law. [...] It was not [...] a commercial or operational decision originating with [the operator].”<sup>1108</sup>
850. A private entity acting on commercial terms would be concerned only with non-payment of gas bills but would not be bothered about any possible delinquent payments to the State treasury. However, the Respondent’s instructions to City Gas to suspend gas supply were grounded in ACC’s failure to make payments under the Final Approval. As such, it is difficult to see how they could be characterized as discriminatory or arbitrary measures.
851. As for recurrent shortages and lacking continuity of gas supply, the Respondent considers that these irregularities at intermittent intervals have been caused by the civil unrest (the “Arab Spring”) beginning in 2011 and technical breakdowns at gas fields. Shortages of the supply of natural gas that have been caused by civil unrest or technical failures in the gas distribution system are covered by contractual exclusions of liability. In the context of the repercussions of such situations under the Treaty, the Respondent considers that ACC by accepting the terms for supply of natural gas has been notified of the exclusion of liability

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<sup>1107</sup> CL-18, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), art. 8.

<sup>1108</sup> C-232, *Unión Fenosa Gas S.A v Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (31 August 2018), ¶ 9.138.



and cannot, therefore, argue that such shortages failed the Claimants' legitimate expectations.

852. In the Tribunal's view, the Claimants did not have reason to expect that gas supply could flow without interruptions in the face of public disturbances, or civil unrest, or technical failings. In any event, City Gas in its supply agreements with ACC excluded liability for such events, and there is nothing in the record to support the conclusion that the Respondent singled out ACC for discriminatory or unfair treatment in comparison with other consumer groups of the same category of priority.
853. Based on the above, the Tribunal concludes that that the evidence does not support the contention that Respondent has violated the Treaty or international law by virtue of stoppages or shortages of gas supply, whether ordered by IDA or caused by external circumstances.

**(5) The Respondent's Alleged Fundamental Failure to Provide Fair and Equitable Conditions for the Claimants' Investment in Other Respects**

854. On the Claimants' case, the Respondent has engaged in conduct constituting a breach of its obligations under the Treaty in other respects. It is argued that Respondent introduced and applied a number of economic conditions that in a fundamental way frustrated the premises on which the Claimants' investment in ACC were grounded. By adopting these measures, the Respondent has failed to live up to the Claimants' legitimate expectations, giving rise to liability on the part of the Respondent.
855. Essentially, Claimants assert that the Respondent upset the market conditions in Egypt by allowing build-up of unnecessary additional supply capacity in later years, breaching the fundamental requirement of sustainability that was a guiding objective of its 2007 licensing regime.
856. In particular, according to an EBRD report of 29 July 2016, there would be no need for additional production capacity in the cement sector in Egypt until 2026.<sup>1109</sup> Nonetheless,

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<sup>1109</sup> C-137, *Low-Carbon Roadmap for the Egyptian Cement Industry*, European Bank for Reconstruction and Development (29 July 2016) at 15.

the Respondent went ahead with tendering new licenses with significant adverse consequences for the cement market and the actors involved herein (quite apart from its environmental consequences).

857. Also, on 3 November 2016, the Respondent floated the Egyptian pound with a drastic fall of its exchange rate in relation to world currencies and with a dramatic negative impact on the cost level of input materials not sourced domestically, such as coal.

858. The matters invoked by the Claimants have been particularized by their witness [REDACTED] who made a number of points.<sup>1110</sup> He asserted that the challenges ACC faced were the result of:

- The Respondent’s devaluation of the Egyptian pound on 3 November 2016;<sup>1111</sup>
- The introduction of a Value Added Tax (VAT) of 13 percent on cement as of September 2016;<sup>1112</sup> and
- The deliberate creation of a situation of rampant oversupply.<sup>1113</sup>

859. As regards the devaluation of the Egyptian pound, [REDACTED] has explained that as of the date of devaluation, the US dollar has consistently traded at over EGP 18 which equals an increase of more than over 200 percent as compared to the pre-devaluation exchange of USD 1 = EGP 8.85. This has increased ACC’s production costs due to the necessity to raise wages in alignment with new levels of the cost of living and the need to expend foreign currency for purchasing and stocking coal exacerbated by — on the income side — plummeting demand in the local market.

860. Moreover, the replacement of the previously existing sales tax of 5 percent by a VAT at the rate of 13 percent as of September 2016, caused increased cost to the end customer and adverse impact on demand.

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<sup>1110</sup> [REDACTED] Witness Statement, Section III.

<sup>1111</sup> *Id.*, Section III.A.

<sup>1112</sup> *Id.*, Section III.B.

<sup>1113</sup> *Id.*, Section III.C.

861. Finally, an expansion of supply capacity — significantly in excess of the outlook given by the EBRD in its report of July 2016 — has been allowed by the Respondent in blatant disregard of the EBRD Report, allowing another auction for 14 new cement licenses in November 2016. Although in the end only three companies took part in the bidding procedure, it is reported that IDA still intends to auction off the remaining 11 licenses. Hence, the Respondent is deliberately creating a situation of overcapacity, which will deteriorate as new production lines come into operation by 2018. This will bring added impetus to the trend of the already declining profitability of all cement companies, including ACC.
862. These and other circumstances have led to a situation where the economic premises on which the Claimants made their investment “have been eroded to the point of elimination.”<sup>1114</sup>
863. The Respondent has not commented on these developments specifically, but they fall within the Respondent’s general proposition that “Egypt did not violate the FET standard.”<sup>1115</sup>

*a. The Tribunal’s Conclusion*

864. The Tribunal can deal briefly with this argument. The fact that there may occur over-establishment of production capacity in any particular sector or market is a result of imperfections in the way markets operate, and such occurrences are not easily attributable to the Respondent. Adverse market conditions caused by over-capacity will over time lead to an exodus of underperforming industrial enterprises while, at the same time, offer limited or no incentive for new entrants, leading to a normalization of the market. In the longer perspective, situations of over- (or under-) capacity normally sort themselves out thanks to forces in the marketplace leaving the most efficient operations to continue their business on a profitable basis.

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<sup>1114</sup> Cl. Reply ¶ 71.

<sup>1115</sup> Resp. Rej. Section IV.B(2).

865. Circumstances affecting competition such as production surpluses, technological changes, emergence of substitute offers, changes in customer preferences, and cost variation as regards input parameters are all circumstances that fall within the area of commercial risk with which any entrepreneur or investor is faced. It is only in those instances where the competitive landscape is significantly distorted by irrational, arbitrary, oppressive, or discriminatory measures undertaken by the State that the matter of gauging the resultant effects on the basis of the FET standard may become an issue.
866. Neither can any changes in a state's exchange currency policies be invoked as a failure of the Respondent to give fair treatment to investors. Cross-border investment invariably involves a plethora of risks and, depending on the national market, changes in the exchange rates of the domestic currency is but one of many risk factors that actors engaged in cross-border investment have to face.
867. The matter of exchange currency policies and the attendant currency risk for cross-border investment is normally part of the debate on the so-called country risk. Country risk is an assessed value for any particular State consisting in a compound of risk factors where the currency risk figures eminently.
868. Country risk will be a factor influencing the discount factor used in DCF calculations which implies, simply speaking, that a State with a lower governance record will result in a higher discount factor and, consequently, a lower net present value of any future, anticipated income flowing from the investment. Country risk is inherent in any cross-border commitment of capital and regulations impacting on currency exchange, taxation issues and State regulation of industry are parameters that in respect of each particular investment have to be factored into the overall risk assessment. Thus, the Tribunal concludes that the circumstances identified by the Claimants and addressed by the Tribunal in this Section do not merit a finding of a Treaty breach.

## (6) The Matter of Legitimate Expectations

869. On the Claimants' case, the Respondent "violated its obligations under international law by betraying the Claimants' legitimate expectations".<sup>1116</sup> It did so, allegedly, by exposing the investment in Egypt to treatment in those respects that have been addressed in Sections VII.B(3)-(5) of this Award. Essentially, the Claimants argue that the Respondent "revoked and fundamentally transformed the regulatory framework for the establishment of cement plants which was in existence at the time the investment was made"<sup>1117</sup> and, in so doing, betrayed the Claimants' legitimate expectations.
870. On a general note, it is fair to say that the concept of legitimate expectations is unhelpful when discussing a state's potential breach of treaty-based standards of protection for the investor on a general plane. The inquiry has to be focused on objective circumstances, in particular whether there was a specific commitment or undertaking by the State that the investor was induced to rely upon, and then did rely upon. It further needs to be shown that the undertaking was then violated, or that the State more generally acted in a way that was "manifestly inconsistent, non-transparent, unreasonable (i.e., unrelated to some rational policy), or discriminatory (i.e., based on unjustifiable distinctions)."<sup>1118</sup> It is these objective circumstances that can form the basis for "legitimate expectations" and the inquiry must therefore be focused directly on these circumstances, and in particular the evidence that is said to support them. However, a finding that there was a failure by the State to meet the investor's "legitimate expectations" is only relevant as part of the determination of whether there was a breach of the FET standard on the part of the host State in a treaty context.
871. A starting point on the applicable legal standard is the proposition, which is reflected in the case-law, that a breach of the FET standard may be occasioned where legal and business stability, or the legal framework, has been altered in such a way as to frustrate legitimate and reasonable expectations or guarantees of stability.<sup>1119</sup> Correct as this may be, the

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<sup>1116</sup> Cl. Mem. Section V.D.

<sup>1117</sup> Cl. Mem. ¶ 172.

<sup>1118</sup> CL-21, *Saluka v. Czech Republic*, ¶ 309.

<sup>1119</sup> See CL-22, *Tecmed v. Mexico*, ¶ 154; RL-68, *Duke Energy v. Ecuador*, ¶ 340; RL-58, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009), ¶ 179;

proposition does not itself offer the principles that must be applied in determining the source and scope of the Claimants' expectation, or the requirement that falls on an investor to establish that its expectation is based on some degree of due diligence.<sup>1120</sup>

872. The finding that any such commitment or standard has been breached engages the State's responsibility under the Treaty. Resorting to the concept of "legitimate expectations" does not of itself vary, modify, or assist in the assessment of any putative treaty breach.
873. In keeping with the discussion above, the Tribunal is in agreement with the Respondent's view that the concept of legitimate expectations does not form a particular and separate standard of protection, and that this concept — together with other issues such as the duty to abstain from arbitrary, discriminatory, or non-transparent measures, provide due process, and act in good faith — all fall within the overall scope of the FET standard.<sup>1121</sup> From this follows that the concept of "legitimate expectations," not being independent and disconnected from the necessity of determining whether a certain line of conduct by a host State, encompasses a breach of the FET standard.
874. From the above follows that the Claimants' invocation of "legitimate expectations" does not lead to any conclusions different from those that the Tribunal has drawn in Sections VII.B(3)-(5) of this Award.

*a. Legitimate Expectations and Due Diligence*

875. A State must be at liberty to change its regulatory regime, provided such changes are not retroactive, discriminatory, oppressive, or utterly lacking in any rationale. As the Tribunal has explained elsewhere (*see supra* Section VII.B(3)g(i) (Conclusion)), the Respondent's conduct in significantly changing the terms for the relevant licenses was mandated by compelling reasons of infrastructural restraints and market requirements, and cannot be

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RL-43, *Electrabel v. Hungary*, ¶ 7.74; RL-7, *El Paso v. Argentina*, ¶ 348; RL-89, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly *FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*), Award (8 July 2016), ¶ 320.

<sup>1120</sup> *See* RL-103, *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award (2 May 2018), ¶ 360.

<sup>1121</sup> Resp. C-Mem. ¶ 186.

said to be irrational or, as a general matter, unreasonable, in the circumstances that it faced. The Tribunal has concluded that changes were carried out in a non-discriminatory and transparent fashion. The measures did not constitute any Treaty breach and therefore — if this redundant issue needs to be addressed — did not violate the investor’s legitimate expectations.

876. However, for purposes of argument, if an alternative reasoning based on the concept of “legitimate expectations” would apply, this might be framed as follows. A putative investor venturing into an investment in another country may normally assume that the workings of that country’s public functions — in the executive, legislative, and judiciary — fulfill certain basic criteria as concerns consistency, transparency, and non-discrimination if the circumstances in that country, according to what is notoriously known or may be disclosed by way of a due diligence inquiry, do not subvert this assumption. It may well be said that this state of things will ground certain expectations on the part of the investor and that these expectations are “legitimate.” It is also so that a specific promise or commitment articulated by an empowered emanation of the State, specifically directed to the particular investor, group, or category of investors, must cause expectations on the part of the investor that are also “legitimate”.

877. From the evidence on the record in this case, it appears that the Respondent did not depart from standards of treatment that would trigger responsibility under the Treaty. It is also clear, and nothing in the record indicates otherwise, that the Claimants in making their investment in ACC did not rely on any commitments or promises or representations given by any emanation of the State that could form the basis for any particular expectations, legitimate or not.

878. Seen through the prism of “legitimate expectations,” the above considerations prompt the conclusion that the Respondent has not, as concerns its regulatory environment or the judiciary, failed in meeting the Claimants’ legitimate expectations.

879. The question of whether an investor has carried out proper due diligence in contemplation of a cross-border investment — or if such due diligence, if undertaken, has adequately rendered account for the legal, institutional, or regulatory environment — is of no particular

relevance to the case. What is relevant is a hypothetical question: If an investor would have undertaken a due diligence of the regulatory environment, would it have obtained the appropriate information on which it could make a fair assumption as to the relevant aspects of this framework? It could well be that a due diligence inquiry even when properly performed would not have disclosed the contingencies that were relevant for the investor's decision to make the investment.

880. For the sake of argument and assuming that the performance of a due diligence review in the particular instance would be of relevance, the Tribunal's conclusion is that the Claimants did not, in fact, engage in any meaningful due diligence review. This conclusion rests on the following observations.

881. The Claimants contend that they have, indeed, performed proper due diligence in the context of its acquisition of an interest in ACC. In this respect, the Claimants refer to the following documents:

- KPMG's final report of March 1999 constituting a "market study and financial due diligence" (for the possible acquisition of ACC by a German company).<sup>1122</sup> The report does not deal with regulatory issues at all and appears to be irrelevant (and unrelated to) the Claimants' acquisition. The report expressly excludes legal due diligence which was performed by a Cairo law firm. The Tribunal observes that this report was prepared no less than five years before the Claimants' acquisition of ACC and that it was issued for another client. It does not deal with legal due diligence (within which area regulatory and administrative law falls) and refers in that respect to an Egypt law firm whose report, in the event that it has been provided to the Claimants at all, has not been produced in this arbitration.
- The Trowers & Hamlins Report, a letter of 25 November 2004 from a Cairo law firm to Claimant Aridos Jativa, opining on (1) a land transaction, (2) certain issues relating to quarries and (3) certain corporate matters.<sup>1123</sup> It appears from this, *inter alia*, that ACC had obtained a three-year extension "to complete the construction of the Project," issued by the Department of Civil Planning and Development at the Governorate. The Department required updating on "progress in the construction of the Plant." The letter did not pronounce on regulatory matters. The Tribunal notes that this letter was issued more than three months after Claimant Aridos

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<sup>1122</sup> C-95, KPMG Report.

<sup>1123</sup> C-97, Trowers & Hamlins Report.



Jativa's acquisition of an interest in ACC. It concerned certain specific matters other than regulatory issues concerning project clearance writ large. The letter does not lend support to the assumption that any form of due diligence was undertaken by the Claimants prior to their acquisition of an interest in ACC.

882. There is no indication, and nothing has been alleged to such effect, that the 1958 Industry Law was not publicly accessible at all relevant times.
883. If the Claimants had, in fact, conducted a reasonable due diligence they would, in the view of the Tribunal, have understood that a license was required under the 1958 Industry Law in order to proceed with any industrial project in Egypt, and that ACC at the time of acquisition had not secured such a license. It may well be that a due diligence made at the appropriate time in 2004 would not have disclosed information as regards the subsequent significant changes in Egypt's licensing practices that occurred in 2006-2007. However, in the absence of an Industrial License, a reasonable investor would have turned its mind to the possible consequences of the absence of such a License, and the possibility that future changes could have an impact on the conditions for the grant of such a License, including in relation to costs and other conditions. (The Parties' arguments do not allow the Tribunal any possibility to evaluate whether an Industrial License would have been secured on prior terms in 2004, i.e., at the time of the Claimants' acquisition of its interest in ACC, but it is not necessary for the Tribunal to form an opinion on this matter.)

**(7) Denial of Justice**

***a. The Claimants' Position***

884. The Claimants have submitted that they were denied relief from Egyptian courts and administrative agencies.
885. In consideration of its view that the auction procedure and the imposition of fees on ACC were unlawful, ACC undertook a number of measures to seek redress. These measures were addressed before judicial as well as administrative organs.

886. First, ACC seized the Settlement Committee, established under Decree No. 1272/2004<sup>1124</sup> with the matter. This led to the formation of a sub-committee to deal with the complaint lodged by ACC. However, apart from a first meeting on 8 June 2009, the committee failed to render any decision or otherwise act on the basis of ACC's complaint.<sup>1125</sup>
887. Second, ACC filed an action before the administrative courts on 23 November 2008. While the State Commissioners (rendering an opinion on how the court should rule) recommended that ACC's request be granted,<sup>1126</sup> on 9 March 2013, after a four year delay, the Court dismissed ACC's action.<sup>1127</sup> ACC appealed the 9 March 2013 Administrative Court Judgment to the Supreme Administrative Court which, the Tribunal understands, has not yet rendered a decision despite the lapse of more than seven years.
888. Third, the Respondent also engaged in denial of justice as a consequence of failings by its administrative bodies.<sup>1128</sup> As examples of these failings, the Claimants have pointed to the consistent unresponsiveness from, in particular, the Ministry of Trade and Industry, and also the Ministry of Investment.
889. The way in which ACC's complaints were treated by the Respondent's judiciary and its administrative organs constitute, according to the Claimants, instances of denial of justice under international law as well as a breach of the Respondent's obligations under Article 4(1) of the Treaty (i.e., the obligation to assure investments fair and equitable treatment).
890. In parallel with its denial-of-justice claim, the Claimants also submit that the Respondent has failed in its obligation to provide "effective means" to ACC to assert its claims. The basis for the Claimants' claim is Article 4(2) of the Treaty according to which "this treatment" shall not be less favorable than that which is extended by the Respondent to investors of any third country. In this regard, the Claimants rely on the Respondent's treaty with the United States of America which in its Article II(7) stipulates that each party shall

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<sup>1124</sup> CL-12, Decree No. 1272/2004 (2004).

<sup>1125</sup> Cl. Mem. ¶ 122.

<sup>1126</sup> See *supra* Section IV.F (The Claimants' Efforts to Redress the Alleged Wrongs).

<sup>1127</sup> CL-11, *ACC v. Chairman of GAFI and Chairman of IDA*, Judgment, Case No. 6664/63, Administrative Court, 7th Circuit (9 March 2013).

<sup>1128</sup> Cl. Mem. ¶¶ 220 *et seq.*

“provide effective means of asserting claims and enforcing rights with respect to [...] investment authorizations [...].”<sup>1129</sup> This is, in the Claimants’ view, a more demanding standard than the denial-of-justice standard under customary international law.

891. Specifically, the Claimants point to the excessive delays of the courts’ dealing with ACC’s complaint — four years to render a decision by the first instance court and the lapse of another seven years without a final decision on appeal — and an obvious bias as concerns the substantive conclusions at which the first instance court arrived.
892. The Respondent has also denied justice and failed to provide “effective means” by engaging in discriminatory practices when adjudicating similar cases in ways more favorable to the complainants.

*b. The Respondent’s Position*

893. The Respondent denies that justice has been denied to the Claimants or that “effective means” have not been provided.
894. First, it argues that the circumstances in which the actions or omissions of a non-judicial authority can amount to a denial of justice are limited; the Claimants have failed to show that those circumstances occurred as a result of the alleged actions and omissions of the various non-judicial Egyptian authorities they target, not only because the Claimants have misconceived the law and doctrine on when a denial of justice may be caused by non-judicial authorities, but also because those circumstances never happened in the present case.
895. Second, neither of the cases brought by ACC before the Egyptian courts was — nor is being — instructed with wrongful delay.
896. Third, the content and effects of the 9 March 2013 Administrative Court Judgment in ACC’s case against IDA cannot objectively give rise to a denial of justice because local remedies against this decision have not been exhausted. In any case, the Judgment is not

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<sup>1129</sup> CL-57, Treaty Between The United States Of America And The Arab Republic Of Egypt Concerning The Reciprocal Encouragement And Protection Of Investments, signed 11 March 1986, entered into force 27 June 1992.

vitiated by any defect or insufficiency that would shock, surprise, or offend a sense of judicial propriety.<sup>1130</sup>

***c. The Tribunal's Analysis***

**(i) Treaty-based Investor Protection and Denial of Justice**

897. Denial of justice may occur irrespective of whether the alien has made an investment in the host State or whether there is an investment treaty in place. It is a delict of international customary law. If there is an investment treaty in place, the treaty will prescribe certain standards of protection for the investment as well as an international forum for resolving disputes concerning alleged maltreatment. The treaties do not, generally, articulate a standard that explicitly protects an investor from justice being denied. Instead, protection against situations where justice has been denied would call into operation the ubiquitous FET standard generally found in treaties. In other words, if an investor has been denied justice by the (judicial) organs of the host State, such conduct would breach also the FET standard, and a claim by the investor may be pursued under this heading. Even if the international delict of denial of justice requires exhaustion of local remedies, this is not necessarily so for a finding of an FET breach, having regard to the requirements of a particular treaty.

**(ii) The Case at Hand**

898. In the present case the Claimants consider that they have been treated unfairly and inequitably in the context of acquiring an Industrial License for a cement plant (and certain ancillary rights such as access to natural gas and electricity required to operate the plant). The matter of the Industrial License and the conditions imposed by the Respondent for acquiring same has, in the view of the Claimants, been disproportionate, discriminatory, and oppressive, thus violating the FET standard. In order to obtain redress in respect of this situation of their investment, ACC has submitted to state-administered mediation, brought a legal action before the Respondent's administrative courts, and directed petitions to the relevant ministries. These various measures have not, the Claimants say, led to any

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<sup>1130</sup> Resp. C-Mem. ¶ 307.

meaningful action on the part of the Respondent's administrative and judicial instances, let alone brought about any reversal of the situation.

899. Summing up, the situation is therefore one where, on the Claimants' case, certain conduct by the Respondent has violated the FET standard and where subsequent judicial and administrative proceedings have not remedied the situation, constituting denial of justice and a failure to provide "effective means" to ACC to assert its rights.

**(iii) Applicable Standards of Protection**

900. The Tribunal finds it appropriate to consider in the first instance the Claimants' assertion that by operation of the MFN clause contained in Article 4(2), the "effective means" of asserting claims and enforcing rights with respect to, *inter alia*, investment authorizations may be considered as part of the Respondent's undertaking to afford FET treatment to the Claimants' investments and incorporated into the Treaty.
901. The Tribunal notes that "the MFN clause of the treaty" refers to "this treatment," which must imply a reference to the FET standard and nothing else. The Tribunal believes that the provision of effective means may be subsumed under the FET standard; it is not a free-standing standard separate from the FET standard but, still, informs the FET standard in a way that is relevant for the Tribunal's present enquiry; i.e., within the scope of Article 11(7) of the Egypt-US BIT as regards — as of relevance here — the assertion of claims and enforcement of rights with respect to investment authorizations.
902. In the Tribunal's view, having regard to the arguments put before it by the Parties in relation to this BIT, the "effective means" standard in this BIT may be said to be of a less demanding nature than denial of justice under international customary law. In this respect, the Tribunal shares the analysis provided by the *Chevron* tribunal.
903. The *Chevron* tribunal expressed the following opinion on the "effective means" clause:

*The obligations created by Article II(7) overlap significantly with the prohibition of denial of justice under customary international law. The provision appears to be directed at many of the same potential wrongs as denial of justice. The Tribunal thus agrees with the idea, expressed in Duke Energy v. Ecuador, that Article II(7), to*

some extent, “seeks to implement and form part of the more general guarantee against denial of justice.” Article II(7), however, appears in the BIT as an independent, specific treaty obligation and does not make any explicit reference to denial of justice or customary international law. The Tribunal thus finds that Article II(7), setting out an “effective means” standard, constitutes a *lex specialis* and not a mere restatement of the law on denial of justice. Indeed, the latter intent could have been easily expressed through the inclusion of explicit language to that effect or by using language corresponding to the prevailing standard for denial of justice at the time of drafting.<sup>1131</sup>

904. The *White* tribunal discussed with approval the meaning of “effective means” as interpreted by the *Chevron* tribunal, summarizing it as follows:

(a) the “effective means” standard is *lex specialis* and is a distinct and potentially less demanding test, in comparison to denial of justice in customary international law;

(b) the standard requires both that the host State establish a proper system of laws and institutions and that those systems work effectively in any given case;

(c) a claimant alleging a breach of the effective means standard does not need to establish that the host State interfered in judicial proceedings to establish a breach;

(d) indefinite or undue delay in the host State's courts dealing with an investor's “claim” may amount to a breach of the effective means standard;

(e) court congestion and backlogs are relevant factors to consider, but do not constitute a complete defence. To the extent that the host State's courts experience regular and extensive delays, this may be evidence of a systemic problem with the court system, which would also constitute a breach of the effective means standard;

(f) the issue of whether or not “effective means” have been provided by the host State is to be measured against an objective, international standard;

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<sup>1131</sup> RL-62, *Chevron v. Ecuador*, ¶ 242 (citations omitted).

*(g) a claimant alleging a breach of the standard does not need to prove that it has exhausted local remedies. A claimant must, however, adequately utilise the means available to it to assert claims and enforce rights. It will be up to the host State to prove that local remedies are available and the claimant to show that those remedies were ineffective or futile;*

*(h) whether or not a delay in dealing with an investor's claim breaches the standard will depend on the facts of the case; and*

*(i) as with denial of justice under customary international law, some of the factors that may be considered are the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake in the case and the behaviour of the courts themselves.*

*11.3.3 The Tribunal considers this description of the “effective means” standard to be equally appropriate for application in this case.*<sup>1132</sup>

905. The Respondent has denied that the “effective means” clause may be invoked by the Claimants for the reasons summarized in Section VII.A(2)b(v) (Effective Means) above.<sup>1133</sup> The Tribunal does not share the Respondent’s view. The “effective means” clause is certainly not contained in the Treaty itself and may not be part of the Respondent’s overall treaty practice, its treaty with the United States of America being the only instance. But this instance is certainly sufficient for the application of the MFN clause as concluded above. It is also so that the “effective means,” representing a more demanding standard, is a more favorable application of the FET standard addressing the liability of a host State for undue or egregious delays in primarily domestic court proceedings. Contrary to the Respondent’s assertion,<sup>1134</sup> the Claimants do allege such delay in the Administrative Court proceedings.<sup>1135</sup>

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<sup>1132</sup> RL-30, *White Industries v. India*, ¶¶11.3.2-11.3.3.

<sup>1133</sup> Resp. Rej. ¶ 157 *et seq.*

<sup>1134</sup> *Id.*, ¶ 159.

<sup>1135</sup> Cl. Reply ¶ 399.

**(iv) The Facts of the Case**

906. As a first step, ACC turned to the Settlement Committee which, according to Article 2 of the applicable Decree No. 1272/2004, was tasked with the following role:

*The Ministry Committee is competent in dealing with disputes that are raised by investors and that oppose investors to ministries and the interests of governmental agencies, general authorities and local administrative entities, in addition to disputes that oppose these entities against each other.*<sup>1136</sup>

907. In the event that the Settlement Committee did not deal with the matter — or at least did not render a proposal or recommendation — this is to be deplored.<sup>1137</sup> However, it is not of the nature to trigger responsibility for failing to provide “effective means” as this Committee did not have judicial functions and, more importantly, its having been seized did not prevent a party from raising the matter before an administrative court, as occurred in this case.

908. ACC filed an application with the Administrative Court on 23 November 2008, requesting the recovery of payment of license fees for two lines of cement production.<sup>1138</sup> According to the internal procedure of the Administrative Court, the case was subject to preliminary review by the State Commissioners. In that report, the State Commissioners recommended that the Administrative Court grant ACC’s request. That report was subject to the Administrative Court’s review. In its decision, the court departed from the State Commissioners’ conclusion (which it was entitled to do) and denied relief to ACC.

909. The Administrative Court rendered its decision on 9 March 2013.<sup>1139</sup> It noted that “the legal position of [ACC]” was not completed at the time when new rules on licensing were introduced on 31 July 2007 for a number of reasons, essentially that “it has not got a final

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<sup>1136</sup> CL-12, Decree No. 1272/2004 (2004), art. 2.

<sup>1137</sup> According to the reasoning of the 9 March 2013 Administrative Court Judgment, the Settlement Committee submitted a rejection of the matter on 29 October 2008 which led ACC to initiate the case before the Administrative Court. CL-11, *ACC v. Chairman of GAFI and Chairman of IDA*, Judgment, Case No. 6664/63, Administrative Court, 7th Circuit (9 March 2013).

<sup>1138</sup> C-83, *ACC v. Chairman of IDA*, Claim Submitted to Administrative Court (23 November 2008).

<sup>1139</sup> CL-11, *ACC v. Chairman of GAFI and Chairman of IDA*, Judgment, Case No. 6664/63, Administrative Court, 7th Circuit (9 March 2013).



license from the administrative body.” It also concluded that IDA had wide discretion regarding powers endowed to it by the Supreme Energy Council’s decision of 20 June 2007.

910. On 30 April 2013, ACC lodged an appeal with the Supreme Administrative Court.<sup>1140</sup> According to the Claimants’ undisputed affirmation, the Supreme Administrative Court is yet to render a decision.
911. It is rational to examine, in the first instance, whether the Respondent has failed in providing “effective means” as required by the standard contained in the Egypt-US BIT by operation of the MFN clause of the Treaty, as this inquiry represents a less exacting test than the one that follows from a denial of justice analysis.
912. In the Tribunal’s view, the “effective means” standard does not impose any requirement that a complainant must have exhausted local remedies. However, in a situation like the present one, where the highest instance court seized with the matter has failed to render a decision and further recourse is not possible, the matter of exhaustion cannot arise.<sup>1141</sup>
913. As the Respondent has noted,<sup>1142</sup> undue delay in the administration of justice may rise to the level of denial of justice. A number of previous investment cases have dealt with the laggardness of municipal courts and accepted exceptionally long periods for the procedure without considering that these have reached the level of denial of justice.
914. However, in this case the task placed before the Tribunal is for it to decide whether the delays experienced by ACC in this case are consistent with “effective means” of asserting claims and enforcing rights with respect to the circumstances relating to the auction and the imposition of significant license fees.
915. The Tribunal notes that an action before the Administrative Court was initiated by ACC in November of 2008 and that the decision was not rendered until March of 2013. By the time of the hearing in this arbitration — April 2019 — there was still no decision rendered by

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<sup>1140</sup> R-63, Supreme Administrative Court, Report of Appeal No. 20399/59 (30 April 2013).

<sup>1141</sup> See Resp. C-Mem. ¶ 348.

<sup>1142</sup> Resp. C-Mem. ¶ 319.

the Supreme Administrative Court (although a hearing purportedly took place on 20 June 2016). Such a delay is, by any reasonable standard, lengthy to the point of being excessive. The Tribunal concludes that the instances of delays in the proceedings of the Administrative Court are not consistent with the “effective means” requirement and that, as a consequence, the Respondent is in breach of its obligation to provide such means to ACC to assert its claims by reason of the procedure and the substantive terms that it was subjected to for purposes of obtaining an Industrial License.

916. In view of this conclusion, the Tribunal will have to evaluate the implications of this finding. The Tribunal must note in this regard its conclusion that the impugned circumstances, i.e., those relating to the auction proceedings and the imposition of license fees and other terms, do not constitute Treaty breaches. This being so, the Respondent’s failure to provide “effective means” as regards the resultant court proceedings, has not altered this situation and cannot, therefore, despite its violatory nature, in and of itself give rise to a duty of the Respondent to indemnify the Claimants. In fact, the Respondent argued that no harm has been alleged.<sup>1143</sup>
917. The Claimants have also criticized the reasoning and conclusion of the 9 March 2013 Administrative Court Judgment on a substantive basis as being biased in favor of the Respondent. This Tribunal is not, however, an appellate body in relation to the national court and limits itself to the observation that the court has provided a line of reasoning that is detailed and easy to follow and does not, in the view of the Tribunal, on its face raise any procedural concerns.
918. As recorded above, the Supreme Administrative Court is still to render a decision. However, whether this decision ultimately is favorable or not to ACC is of no consequence; if the final outcome would reverse the Administrative Court’s decision, this is not relevant as the substantive review undertaken by that court as mentioned fulfills such standards as can be required from such review.

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<sup>1143</sup> Resp. C-Mem. ¶ 333.

919. Finally, the Claimants have alleged discriminatory treatment in relation to similar court cases purportedly eventuating in more favorable outcomes than for the Claimants. The Tribunal does not consider such treatment determinable under the “effective means” or denial of justice standards but rather under the general FET standard and has, therefore, chosen to deal with them in the context of Section VII.B(3)i (The Matter of Discrimination) above.
920. Based on the above, the Tribunal concludes that the Respondent has failed to provide “effective means” of enforcement of rights before the Egyptian Administrative Courts and will issue a declaratory judgment to such effect.
921. Having concluded that the Respondent has failed to provide to the Claimants effective means for enforcing rights, there is reason to also examine — for the sake of completeness — whether the Respondent has also denied the Claimants justice (although the outcome of that inquiry cannot bring into cause the liability of the Respondent for reasons explained in the context of the “effective means” issue).
922. To the extent that the comportment of administrative agencies may form the basis for a denial of justice claim, the Tribunal finds that, in some instances, the Respondent has demonstrated a clear lack of celerity (e.g., ACC’s unavailing solicitations to the Minister of Industry in the period June–October 2008 (*see supra* Section IV.F (The Claimants’ Efforts to Redress the Alleged Wrongs))). However, as concerns the essential exchanges evolving between ACC and IDA, the record displays a timely and efficient response from the Respondent agency (irrespective of whether these exchanges as to their substance were satisfactory to ACC). For this reason, the dealings of ACC vis-à-vis the various administrative emanations of the Respondent do not rise to the level of denial of justice.
923. As regards the proceedings before the administrative courts — at their first and appeals instance — the Tribunal notes that those have been remarkably time-consuming and inefficient. The question for the Tribunal is whether such laggardness and inefficiency may be said to rise to the level of denial of justice? Judging the situation in the present case against the backdrop of existing case law, one cannot but note that a denial of justice requires a more egregious level of procedural ineffectiveness than the record discloses in

this case. On this measure, the Tribunal finds that the slow progress of proceedings before the Administrative Court instances does not, on the facts of this case, constitute a denial of justice under the FET standard of the Treaty and international law.

924. The Tribunal notes that the Claimants have raised a specific claim concerning foregone dividends of EUR 0.1 million, attributable to litigation costs. Without taking a position on the justification of such a claim on the level of principle, the Tribunal will not grant damages in view of its conclusion that the conduct that is impugned by the Claimants did not breach any protection afforded by the Treaty and, that therefore, the judicial proceedings embarked upon by ACC were not necessitated to eliminate any such breach. There is no entitlement to recovery of this amount.
925. The Parties have, finally, requested that the Tribunal order relief that “the Tribunal deems just and proper” (the Claimants) or “as the Tribunal deems appropriate” (the Respondent). The Tribunal finds that it cannot entertain such claims for patent lack of specificity, let alone grant any relief thereunder.

## **VIII. COSTS**

926. On 31 July 2019, the Parties filed their respective Statements of Costs. Each of the Parties has requested to be reimbursed by the other Party for the legal costs incurred in these proceedings.

### **A. THE CLAIMANTS’ COST SUBMISSIONS**

927. The Claimants seek reimbursement by the Respondent of “all the costs they have incurred, arising out of, or in relation to, the present Arbitration” and ask that the Respondent be

ordered to bear its own costs.<sup>1144</sup> The Claimants seek reimbursement for six categories of expenses, reflected in the following chart:<sup>1145</sup>

Item	Description	Amount
(1) Legal Counsel Fees	Hafez Advocates, Amereller Legal Consultants, and Youssef & Partners Attorneys	208,285.80 EUR plus 1,935,192.09 USD
(2) Expert Fees and Expenses	FTI Consultants	350,157.33 EUR
(3) Other Costs and Expenses paid by Claimants		63,092.56 EUR
(4) Costs related to Respondent's Jurisdictional objections	Alternative No. 1: 1/6 of the Full amount of the fees of the Legal Counsel in these arbitration proceedings.	1/6 of 208,285.80 EUR plus 1,935,192.09 USD
	Alternative No. 2: Full amount of the Legal Counsel's fees on the Rejoinder on Jurisdiction + 1/6 of the amount of the Legal Counsel's fees on the Hearing preparations.	392,414.91 USD plus 53,413.24 USD
(5) Expenses of Claimants' representatives	Mr. Sergio Alcantarilla	139,118.8 EUR
(6) ICSID and Tribunal fees		799,930.00 USD

928. In addition, the Claimants seek reimbursement for the payments the Claimants made, including those made on the Respondent's behalf, during the Arbitration to cover the fees and expenses of the Tribunal and ICSID.<sup>1146</sup>

<sup>1144</sup> Cl. Costs Submission ¶ 2.

<sup>1145</sup> The chart reflects at category (6) a total of USD 799,930.00 in advance payments to defray ICSID's and the Tribunal's fees and costs. ICSID's accounting records indicate that this amount is in fact USD 1,099,854.00, as reflected in the final financial statement accompanying the Award.

<sup>1146</sup> *Id.*, ¶ 31.

929. In their cost submission the Claimants have provided explanatory comments to the various cost items and noted, *inter alia*, that, irrespective of the outcome of the case, the Respondent should answer for all costs in the arbitration relating to its (subsequently abandoned) jurisdictional objections.

**B. THE RESPONDENT’S COST SUBMISSIONS**

930. The Respondent submits its table of costs as follows:

<b>RESPONDENT’S TABLE OF COSTS</b>		
<b>Legal Fees</b>		
Bredin Prat	EUR	625,000.00
<b>Experts</b>		
Dr. Badran	EGP	200,000.00
BDO	EUR	130,000.00
<b>Expenses</b>		
Travel, translations, courier, etc.	EUR	27,476.97
	EGP	151,264.00
	USD	5,700.00
<b>TOTAL</b>	EUR	782,476.97
	EGP	351,264.00
	USD	5,700.00

931. In its cost submission, the Respondent accepts an apportionment of costs depending on the outcome of the case and stresses, in particular, the allowance of reasonable costs only.<sup>1147</sup>

**C. THE TRIBUNAL’S DECISION ON COSTS**

932. As regards costs, Article 61(2) of the ICSID Convention provides as follows:

*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the*

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<sup>1147</sup> Resp. Costs Submission ¶ 3.

*parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

933. This provision gives the Tribunal a broad discretion to allocate all costs of the arbitration, including attorney’s fees and other costs, between the Parties as it deems appropriate.
934. As to the merits, in the Tribunal’s view the proceedings were expeditiously and efficiently conducted by the representatives of both Parties.
935. In the exercise of its discretion in matters of allocation of costs, the Tribunal finds it reasonable that the Parties bear the costs of the arbitration in equal shares and that each Party bears its own legal and other costs expended in connection with this arbitration. In reaching this decision, the Tribunal has considered all the circumstances of the case, in particular the fact that the Respondent has prevailed on the merits, with the exception of the one finding of a violation of the requirements of the Treaty, for which financial compensation is not due. The Tribunal has also identified the absence of a coherent administrative apparatus for carrying out regulatory processes, shortcomings that the Respondent sought to remedy through new legislation in 2017. While not compromising the standards undertaken by Egypt in the Treaty, the absence of coherent coordination at the time — resulting from “[t]he multiple overlapping entities in the process of granting licenses and putting in place the related requirements”<sup>1148</sup> — was not optimal.
936. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID’s administrative fees and direct expenses, amount to (in USD):

Arbitrators’ fees and expenses	
Mr. Christer Söderlund, President	354,906.30
Judge Charles Brower, Co-arbitrator	224,442.56

<sup>1148</sup> C-220, IDA - Main Features of the Executive Regulations for Law 15-2017 Facilitating Industrial Licensing Procedures (undated).

Mr. Philippe Sands, QC, Co-arbitrator	119,076.44
Ms. Lauren Schuttloffel, Assistant to the Tribunal	93,736.75
ICSID's administrative fees	222,000.00
Direct expenses	78,281.87
<b>Total</b>	<b>1,092,443.92</b>

937. As for the fees and expenses of the members of the Tribunal and the charges for the use of ICSID facilities, these costs have been defrayed out of the advances made by the Claimants. The Respondent will have a duty to reimburse the Claimants 50 percent of these costs as fixed in ICSID's Financial Statement of the case account.
938. Having regard to the Tribunal's decision that these costs shall be borne equally between the Parties and that the Parties shall be ultimately liable for arbitration costs, there will be no order for those costs.

## **IX. AWARD**

939. For the reasons stated above, the Tribunal unanimously:
- (1) decides that it has jurisdiction over the claims submitted by the Claimants;
  - (2) declares that the Respondent has breached the Treaty by failing to provide "effective means of asserting claims and enforcing rights with respect to investment agreements, investments authorizations and properties" before the Egyptian Administrative Courts; and
  - (3) finds that the Respondent has not breached its obligation to accord justice from its judicial and administrative authorities under the Treaty and international law with respect to the Claimants' investment.
940. The Tribunal finds, by majority, that the declaration in paragraph 939(2) of the dispositif that the Respondent has breached the Treaty by failing to provide "effective means of



asserting claims and enforcing rights with respect to investment agreements, investments authorizations and properties,” constitutes adequate satisfaction to the Claimants and that no obligation arises to pay financial compensation on the part of the Respondent.

941. The Tribunal by majority decides that the measures taken by Egypt through IDA and other central and regional authorities since 2006, attributed to Egypt and impugned by the Claimants, do not constitute breaches of the following standards set out in the Treaty or customary international law:

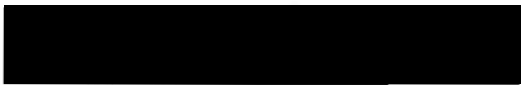
- (1) the right to fair and equitable treatment, under Article 4(1);
- (2) the prohibition against unjustified or discriminatory actions that could hamper investments or related activities, including the management, maintenance, use, enjoyment, expansion, sale, or liquidation, under Article 3(1); and
- (3) the obligation to grant the necessary permits relating to investments and allowing the execution of contracts related to manufacturing licenses and technical, commercial, financial and administrative assistance, under Article 3(2).

The Claimants’ claims for monetary relief are therefore dismissed in their entirety.

942. The Tribunal unanimously dismisses the Claimants’ denial of justice claim.

943. The Tribunal unanimously dismisses all other claims of the Parties.

944. The Tribunal decides, by majority, that the Claimants and the Respondent, respectively, shall bear their own costs in the arbitration, including 50 percent of the fees and costs of the Tribunal and ICSID. The Respondent is therefore ordered to pay the Claimants USD 546,221.96, representing 50 percent of the expended portion of the advances paid by the Claimants.



The Hon. Charles Brower  
Arbitrator

(subject to the attached  
Concurring and Dissenting Opinion)

Date:

**29 OCT 2020**

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Professor Philippe Sands QC  
Arbitrator

Date:


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Mr. Christer Söderlund  
President of the Tribunal

Date:

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The Hon. Charles Brower  
Arbitrator



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Professor Philippe Sands QC  
Arbitrator

(subject to the attached  
Concurring and Dissenting Opinion)

Date:

Date: 29 OCT 2020

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Mr. Christer Söderlund  
President of the Tribunal

Date:

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The Hon. Charles Brower  
Arbitrator

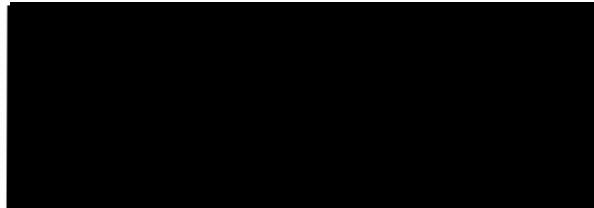
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Professor Philippe Sands QC  
Arbitrator

(subject to the attached  
Concurring and Dissenting Opinion)

Date:

Date:



Mr. Christer Söderlund  
President of the Tribunal

Date:

29 OCT 2020

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**CEMENTOS LA UNION S.A. AND ARIDOS JATIVA S.L.U.**

Claimants

and

**ARAB REPUBLIC OF EGYPT**

Respondent

**ICSID CASE NO. ARB/13/29**

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**CONCURRING AND DISSENTING OPINION OF  
JUDGE CHARLES N. BROWER**

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## I. INTRODUCTION

1. I join my distinguished colleagues in declaring that Respondent has breached the Treaty by failing to “provide effective means of asserting claims and enforcing rights with respect to investment agreements, investments authorizations and properties”<sup>1</sup> as required by the Treaty’s Article 4(2)<sup>2</sup> (in conjunction with Article II(7) of the US-Egypt BIT).<sup>3</sup> I dissent, however, from their conclusion that such failure has nevertheless resulted in Respondent not being liable for any damages whatsoever to Claimants. In that respect the majority has chosen to ignore the age-old rule to “watch what they do, not what they say,” and has swallowed whole Respondent’s litigation pretense of form over the actual substance of what in fact Respondent did. As long ago as Matthew 23:1-3 in the Bible, mankind has been warned that “[t]hey tell you to do these things, but they don’t do those things themselves.” I do not address the Award’s treatment of Claimants’ other claims, as I believe that the Tribunal’s unanimous conclusion that Respondent breached its “effective means” obligation should alone have settled this case in favor of Claimants.
2. I dissent further from the majority’s exclusion of Respondent’s Ministerial Committee for the Settlement of Investment Disputes (“**Ministerial Committee**”) from any responsibility for “effective means,” notwithstanding that Article II(7) of the US-Egypt BIT, the source of Respondent’s “effective means” obligation, expressly applies not only to “courts of justice” and “administrative tribunals and agencies,” but also to “*all other bodies exercising adjudicatory authority*,” which that Committee demonstrably possesses.<sup>4</sup> Finally, our unanimous declaration that Respondent is indeed in breach of the Treaty should have merited Respondent being required to pay some of Claimants’ costs.

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<sup>1</sup> Award ¶ 939(2).

<sup>2</sup> Treaty for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Arab Republic of Egypt, signed 3 November 1992 and entered into force on 26 April 1994 (“**Treaty**”) (Exhibit CL-1), Art. 4(2).

<sup>3</sup> Treaty Between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, signed 11 March 1986 and entered into force 27 June 1992 (“**US-Egypt BIT**”) (Exhibit CL-57), Art. II(7).

<sup>4</sup> *Id.* (emphasis added).

## II. THE BREADTH AND CONSEQUENCES OF THE TREATY BREACH (FAILURE TO “PROVIDE EFFECTIVE MEANS”)

### A. THE BREADTH OF THE FAILURE TO “PROVIDE EFFECTIVE MEANS”

3. I begin by addressing the obligation to “provide effective means.” While I agree that Egypt failed to provide Claimants with an effective means of redress before the Administrative Courts, I also would have found that Egypt did so with regard to the Ministerial Committee, a subcommittee of which, Respondent does not dispute, met to address ACC’s complaints. In the end, the Ministerial Committee never took a decision in the matter. I submit that there is nothing in the applicable “effective means” provision that the Tribunal unanimously has declared to have been breached by Respondent that limits solely to a State’s judiciary the State’s responsibility to “provide effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations and properties.”<sup>5</sup> Notably, the Award cites neither the text of Decree No. 1272/2004, which established the Ministerial Committee, nor any other authority in support of its exclusion of the Ministerial Committee from Respondent’s “effective means” obligation.<sup>6</sup> The fact is that the majority’s exclusion of the Ministerial Committee flies in the face of Article II(7) of the US-Egypt BIT, which, far from applying solely to a “judicial function,”<sup>7</sup> expressly applies to “courts of justice, administrative tribunals and agencies, and *all other bodies exercising adjudicatory authority*.”<sup>8</sup> The Ministerial Committee, whose mandate is to settle investment disputes<sup>9</sup> and is capable of rendering “causative”<sup>10</sup> and “justified”<sup>11</sup> decisions that “shall be enforceable and binding upon the administrative entities

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<sup>5</sup> US-Egypt BIT (Exhibit CL-57), Art. II(7).

<sup>6</sup> See Award ¶ 907; see also Decree No. 1272/2004 dated 19 July 2004 (Exhibit CL-12), Art. 2, which provides the following English translation: “The Ministry Committee is competent in dealing with disputes that are raised by investors and that oppose investors to ministries and the interests of governmental agencies, general authorities and local administrative entities, in addition to disputes that oppose these entities against each other. The Committee must explain and adopt the principles set out in investment legislation, whether in the form of laws, regulation or enforcement decisions.”

<sup>7</sup> Award ¶ 907.

<sup>8</sup> US-Egypt BIT (Exhibit CL-57), Art. II(7) (emphasis added).

<sup>9</sup> See Decree No. 1272/2004 dated 19 July 2004 (Exhibit CL-12), Art. 2; see also Law No. 17 of 2015 dated 12 March 2015 amending Investment Guarantees and Incentives Law No. 8 of 1997 (“**Law No. 17 of 2015**”) (Exhibit C-133), Part 7 Ch. 2, Art. 104; Law No. 72 of 2017 Promulgating the Investment Law dated 31 May 2017 (“**Law No. 72 of 2017**”) (Exhibit C-204), Art. 85.

<sup>10</sup> Law No. 17 of 2015 (Exhibit C-133), Part 7, Ch. 2, Art. 106.

<sup>11</sup> Law No. 72 of 2017 (Exhibit C-204), Art. 86.



concerned[,]”<sup>12</sup> unquestionably is a *body exercising adjudicatory authority*. In light of the language of Article II(7) of the US-Egypt BIT, the Award’s analysis should have taken a closer look at the scope of this “*lex specialis*” it acknowledges in discussing *White Industries*, which case notes that “the standard requires both that the host State establish a proper system of laws and institutions and that those systems work effectively in any given case.”<sup>13</sup>

## **B. THE CONSEQUENCES OF THE FAILURE TO “PROVIDE EFFECTIVE MEANS”**

4. Once Respondent has been declared to be in breach of its Treaty duty to “provide effective means” the Tribunal is bound to decide whether Claimants’ claims before Respondent’s Ministerial Committee and Administrative Courts should have been successful, a duty that the Award shirks on the inapposite ground that it is not an “appellate body.”<sup>14</sup> Of course investor-State arbitral tribunals do not act as appellate instances, second-guessing the decisions of national adjudicatory bodies. When the relevant national bodies have been declared, as this Tribunal has done unanimously, to have failed to provide effective means of possible redress, however, it becomes necessary for the Tribunal to act precisely as the *Chevron* Tribunal did: “The Tribunal’s task, given a completed breach for undue delay, is to evaluate the merits of the underlying cases and decide upon them as it believes an honest, independent, and impartial Ecuadorian court should have.”<sup>15</sup> The *White Industries* Tribunal mirrored this analysis when it evaluated, after finding a treaty breach of “effective means,”<sup>16</sup> whether the underlying ICC award was enforceable under the laws of India.<sup>17</sup> The tribunal in *Chevron* noted that once a breach of “effective means” has been determined, no deference need be shown to a decision of the respondent State’s courts, although such

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<sup>12</sup> Law No. 17 of 2015 (Exhibit C-133), Part 7, Chap. 2, Art. 107; Law No. 72 of 2017 (Exhibit C-204), Art. 87, which ensures decisions “shall be enforceable and binding on the competent administrative authorities and they shall have the executive power.” Article 87 further provides: “Failure to enforce the Committee’s decisions shall cause the enforcement of the provisions of Article (123) of the Penal Code and the penalty prescribed therein. Lodging of complaints against the Committee’s decision shall not suspend enforcement thereof.” (Exhibit C-204).

<sup>13</sup> Award ¶ 904, citing *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award dated 30 November 2011 (“*White Industries*”) (Exhibit RL-30), ¶11.3.2.

<sup>14</sup> Award ¶ 917.

<sup>15</sup> See *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Republic of Ecuador*, UNCITRAL, Partial Award on the Merits dated 30 March 2010 (“*Chevron*”) (Exhibit RL-62), ¶ 377.

<sup>16</sup> See *White Industries* (Exhibit RL-30), ¶11.4.19.

<sup>17</sup> *Id.*, ¶¶ 14.1.1 *et seq.*

a decision may influence causation and damages.<sup>18</sup> While the *Chevron* Tribunal had no lower court decision to consider, the *White Industries* Tribunal evaluated how a local court should have ruled despite court decisions having been rendered in both the first instance and at the appellate level.<sup>19</sup>

5. Here, as noted in the Award,<sup>20</sup> both the Administrative Court system and the Ministerial Committee system have failed to render final decisions addressing ACC's disputes. Despite there being an Administrative Court ruling in the first instance against ACC, the Tribunal here still must step into the shoes of Respondent's adjudicatory bodies and determine how an honest, independent and impartial adjudicator would decide Claimants' case on the merits. In my view, the State Commissioners' Report, issued in May 2010, finding against the Industrial Development Authority's ("IDA") imposition of the new licensing regime on ACC, provides the most honest, independent and impartial assessment of the issues presented to the respective Egyptian adjudicatory entities.<sup>21</sup> That Report concluded that the IDA had exceeded its powers by imposing new fees that had no basis in Egyptian law, and that the only fee payable under Egyptian law was EGP 2. Lower Egyptian Administrative Courts have reached the same conclusion in several other cement industry cases.<sup>22</sup>
6. The Award acknowledges that the license was a "more or less rubber-stamp procedure to secure a blanket approval" for "a nominal fee"<sup>23</sup> and that there was "a lack of efficient coordination" or "the absence of coherent coordination" among Egyptian authorities<sup>24</sup> prior to 2007. Further, the Award acknowledges that the law so heavily emphasized by Respondent does not contemplate or authorize a change to this nominal fee, noting "[i]t appears reasonable to infer from the 1958 Industry Law that it does not foresee the imposition of license fees for the entitlement to obtaining approval for an activity subject

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<sup>18</sup> See *Chevron* (Exhibit RL-62), ¶ 377.

<sup>19</sup> See *White Industries* (Exhibit RL-30), ¶¶ 11.4.19-11.4.20, 14.2 *et seq.*

<sup>20</sup> Award ¶¶ 907, 915.

<sup>21</sup> See State Commissioners' Report in Case No. 6664/63 dated May 2010 (Exhibit C-116).

<sup>22</sup> Award ¶¶ 679-686; *see also* Decision No. 1720 J.Y. 62 [REDACTED] v. IDA dated 1 June 2008 (Exhibit C-106); Decision No 8536 J.Y. 62 [REDACTED] v. IDA dated 26 December 2009 (Exhibit C-114); Decision No. 9372 J.Y. 62 [REDACTED] v. IDA dated December 26, 2009 (Exhibit C-115).

<sup>23</sup> Award, ¶ 666.

<sup>24</sup> Award, ¶¶ 606, 935.

to licensing requirements (other than nominal amounts).”<sup>25</sup> Nevertheless, the majority disregards these facts, writing them off as immaterial and concluding instead that there is “nothing in the record to indicate” that the Industrial License requirement in the Industry Law “was a dead paragraph[,]”<sup>26</sup> and that due diligence “would . . . have disclosed that ACC was under an obligation to apply for an Industrial License.”<sup>27</sup> This conclusion comes against the backdrop of the Award’s own finding that “[i]t may well be that a due diligence made at the appropriate time in 2004 would not have disclosed information as regards the subsequent significant changes in Egypt’s licensing practices that occurred in 2006-2007.”<sup>28</sup> My colleagues take Respondent’s reliance on the letter of the law at face value despite the fact that the weight of the evidence is to the contrary, and thus I cannot help but reiterate my concerns as to this misguided approach.

7. The effective means analysis calls for a stepping into the shoes of the local Egyptian adjudicatory body — in this case the Administrative Courts and/or the Ministerial Committee — to decide what they would have done under Egyptian law. To this end, it is necessary to review the Award’s acceptance of Respondent’s position that it was simply following the Industry Law. As noted above at paragraph 1, the “original sin” committed by the majority is to have swallowed whole Respondent’s pretension in defending this arbitration that throughout the history of this case Respondent always acted in strict accordance with the law as written. In practice, however, in dealing with these Claimants and other cement investors Respondent clearly did not. To paraphrase the introductory biblical quotation from Matthew 23:1-3, Respondent tells the Tribunal to believe that it did these things, but in fact Respondent’s authorities didn’t do those things themselves. Claimants brought their claim to the Ministerial Committee and the Administrative Court system asserting that Respondent subjected Claimants’ investment, ACC, to a new licensing regime with a radically increased fee (from only EGP 2 to EGP 281.4 million), despite ACC’s having established its cement plant project and applied for its industrial license under the prior licensing regime. Respondent argues, and the majority has accepted,

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<sup>25</sup> Award, ¶¶ 671, 677.

<sup>26</sup> Award, ¶ 667.

<sup>27</sup> Award, ¶ 668.

<sup>28</sup> Award, ¶ 883.

that in moving ahead with construction prior to obtaining an industrial license Claimants were in violation of the 1958 Industry Law. In reality, however, the consistent practice of the Egyptian authorities in regulating cement plant investments, which the majority does not dispute, was to allow industrial licensing to occur as a later (and in several cases the final) step in the project development process, and to treat the license as essentially a “rubber stamp” that often was handled more substantively at the local Governorate level and which required only the EGP 2 fee.

8. Furthermore, in the process of acquiring land and building their cement factory, Claimants received formal approvals of numerous national and local governmental authorities. The General Authority for Investment and Free Zones (“GAFI”) granted preliminary approval for ACC to produce different kinds of cement on 27 February 1996.<sup>29</sup> The Suez Governorate allocated an area of one million square meters to ACC on 17 April 1996,<sup>30</sup> which ACC received in January 1997. The Ministry of Defense’s Authority of Armed Forces Operations approved ACC’s request to establish a cement company on 29 July 1997, writing expressly that “we accept the establishment of the project mentioned.”<sup>31</sup> The Egyptian Environmental Affairs Agency granted its approval “in respect of establishing the said project” on 2 November 1997.<sup>32</sup> On 13 July 2004 the Egyptian Department of Urban Planning and Development granted an extension of an additional three years for establishing the cement factory.<sup>33</sup> The Suez Governorate granted an approval for ACC to exploit certain limestone and clay quarries in July and September of 2004.<sup>34</sup> In November 2005 ACC concluded contracts to construct the cement plant and production lines.<sup>35</sup> In 2006 ACC concluded a loan agreement with the National Bank of Egypt<sup>36</sup> and began

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<sup>29</sup> GAFI Preliminary Approval dated 27 February 1996 (Exhibit C-92).

<sup>30</sup> Notification of Allocation of the Land dated 17 April 1996 (Exhibit C-93).

<sup>31</sup> Approval of the Armed Forces dated 29 July 1997 (Exhibit C-94).

<sup>32</sup> Letter from Environmental Affairs Management, Ministers Cabinet, to Suez Governorate, General Secretary, dated 2 November 1997 (Exhibit C-11).

<sup>33</sup> Letter from Department of Urban Planning and Development, Governorate of Suez, to ACC dated 13 July 2004 (Exhibit C-13).

<sup>34</sup> Letter from ACC to Suez Governorate, Manager of the Quarries, dated 31 July 2004 (Exhibit C-14); Letter from ACC to Suez Governorate, Manager of the Quarries, dated 29 September 2004 (Exhibit C-15).

<sup>35</sup> Contract for Carrying out the Design Engineering and the Supply of Imported Deliveries, concluded between ACC and FLSmidth, dated 1 November 2005 (Exhibit C-16); Contract for Civil Works Construction, Erection, and Start-up and Taking-over Tests, concluded between ACC and Cement Plant Consultants, dated 1 November 2005 (Exhibit C-17).

<sup>36</sup> Loan Agreement between ACC and National Bank of Egypt (Exhibit C-205).

construction of the plant, with a planned commencement of operations of Line I in October 2007 and of Line II in October 2008.<sup>37</sup> The Engineering Department of the Suez Governorate granted various construction permits in 2006 and 2007.<sup>38</sup> EGAS approved the required supply of gas to ACC on 2 March 2006.<sup>39</sup> City Gas contracted with ACC for National Gas pipelines feeding the plant on 30 October 2006.<sup>40</sup> The Egyptian Electric Holding Company (“EEHC”) approved construction of the private transmission station on 6 November 2006.<sup>41</sup> ACC contracted with the Armed Forces Land Project Authority for the exploitation of the land on 8 February 2007.<sup>42</sup> Construction was temporarily suspended at the request of the Environmental Affairs Agency on 22 February 2007,<sup>43</sup> but later resumed following intervention from the Suez Governorate on 29 April 2007.<sup>44</sup>

9. Claimants were not alone in proceeding as they did, saving the industrial licensing process for a later or final step in their project development. To the contrary, the Egyptian authorities routinely dealt with a host of other cement companies in the same way. The record indicates that at least seven companies, including some under the “new regime” as well as the “old one,” began the “establishment” process well in advance of obtaining a license. Respondent has conceded that four other companies ( [REDACTED] ) had done so.<sup>45</sup> At least three ( [REDACTED] ), similarly to ACC, applied for their industrial license and registration near the end of their cement plant development process.<sup>46</sup> Respondent also has confirmed that the [REDACTED] plant was fully constructed and

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<sup>37</sup> See Letter from ACC to EEHC dated 30 April 2006 (Exhibit C-61).

<sup>38</sup> Building Permits for ACC’s Plant (Exhibit C-89).

<sup>39</sup> ACC’s memorandum to IDA dated 24 June 2007 referencing said approval and the conclusion of a contract for the supply of gas (Exhibit C-70).

<sup>40</sup> Contract for Construction Works of Natural Gas Pipeline Feeding Arabian Cement Company concluded between ACC and City Gas dated October 30, 2006 (Exhibit C-199).

<sup>41</sup> Letter from Egyptian Electricity Holding Company to ACC dated 8 November 2006 (Exhibit C-63).

<sup>42</sup> Contract for the Exploitation of Land, concluded between ACC and the Armed Forces dated 8 February 2007 (Exhibit C-27).

<sup>43</sup> Letter from Secretary General of Suez Governorate to ACC dated 22 February 2007 (Exhibit C-23).

<sup>44</sup> Letter from Secretary General of Suez Governorate to President of Department for Evaluation of Environmental Effects dated 29 April 2007 (Exhibit C-25).

<sup>45</sup> See Resp. C-Mem. ¶ 53, citing PowerPoint Presentation by IDA, undated, slides 14-17 (Exhibit R-8); see also, e.g., Sinai White Cement Company’s Approval from the General Organization for Industrialization dated 1 August 2001 (Exhibit C-224).

<sup>46</sup> See, e.g., [REDACTED] Approval from the General Organization for Industrialization dated 2 August 2002 (Exhibit C-225) and Information on [REDACTED] Operations (Exhibit C-221) (indicating that the company received its industrial license just months before starting production).

operational, having been approved by a joint committee that included the General Organization for Industrialization (“GOI,” the predecessor authority to the IDA), before it received its license.<sup>47</sup> ██████████, the Assistant Chairman of ██████████, in his testimony confirmed that his company, just like Claimants, had applied to the Ministry of Industry (“MOI”) to register its project and obtain an operating license only when it had neared the start of production.<sup>48</sup> ██████████ testified further that as to ██████████ first production line, established in 2001, no industrial *license* had been obtained, and that instead it had merely been registered with the MOI after commencing production.<sup>49</sup> Further, the ██████████ cement company received approval of its industrial license just months before it started operations.<sup>50</sup>

10. This practice, contrary to Respondent’s pretensive stance in this arbitration, appears to have continued after the change to the regime as well. Royal Minia was awarded an industrial license in 2010 just months prior to the start of its operations.<sup>51</sup> Further, the licensing records produced by Respondent for this arbitration indicate that Al Aresh, which began operations on four cement production lines between 2011 and 2016, never received an industrial license at all.<sup>52</sup> These facts indicate that Respondent permitted construction prior to licensing for some companies even after it had changed its regime, despite deeming Claimants and four others “outlaws” for doing the same prior to the changes. Thus, Respondent did not at all uniformly follow the “strict” interpretation and application of the 1958 Industry Law as it has professed in this arbitration. To the contrary, its conduct demonstrates that the State actively accepted the approach of ACC and many others to the licensing process under the prior regime, and even following adoption of the new regime.

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<sup>47</sup> See Resp. C-Mem. ¶ 94, citing Administrative Court Decision in Case No. 19412 (██████████) dated 9 March 2013 (Exhibit R-14).

<sup>48</sup> See Witness Statement of ██████████, ¶ 14.

<sup>49</sup> See Hr’g Tr. Day 2, 9 April 2019, 36:14–19, 37:8–14.

<sup>50</sup> See ██████████ (S.A.E.)’s Approval from the General Organization for Industrialization dated 2 August 2002 (Exhibit C-225); see also Information on ██████████ (Exhibit C-221); Hr’g Tr. Day 1, 8 April 2019, 63:1–8.

<sup>51</sup> See Final Approval granted by the IDA for ██████████ (Exhibit C-191); see also Hr’g Tr. Day 1, 8 April 2019, 63:6–8, 65:12–14.

<sup>52</sup> See Cl. Reply ¶ 253, n.232, explaining that Respondent did not produce any documentation of an industrial license for Al Aresh despite documentation of its coming online, as cited in Ministerial Report of National Cement and Clinker Production (Exhibit C-164).

11. The record indicates that the grant of an industrial license essentially was a “rubber stamp” on everything that had gone before, often entailing local control at the Governorate level without significant involvement by the MOI. Facts gleaned from court decisions in the record indicate that cement companies had, prior to the changes, received licenses either immediately upon request or at least without significant review.<sup>53</sup> Letters cited from the Egyptian authorities to various Governorates providing “no objection” to the establishment of cement plants indicate that the MOI did not regularly take the lead role in assessing such projects prior to their approval.<sup>54</sup> Indeed, as the Award notes,<sup>55</sup> the key directive issued by the Supreme Energy Council (“SEC”) establishing the new licensing regime called on the Minister of Local Development to ensure that governors cease approving further cement plants.<sup>56</sup> The IDA reiterated this specifically in a letter to the Governor of Assuit dated 20 August 2007.<sup>57</sup> ██████████ testified to this practice as well, noting that Governorates “had ... the power to decide on the investments on their area and they were the ones which you had to communicate and where you had to ask for all the ... pertinent permits.”<sup>58</sup> Thus, prior to the changes in 2006, the MOI’s approval of cement plant licenses *de facto* had been such a rubber stamp procedure that in enacting the 2006-2007 reform the MOI had to reassert expressly to the Governorates its control over the industrial licensing process.
12. Finally, the Treaty breach with respect to the licensing fees entails further damages in the form of Claimants’ losses of its supply of natural gas, which the Award finds attributable to Respondent insofar as they resulted from instructions by Respondent’s agencies triggered by ACC’s failure to pay the license fees.<sup>59</sup>

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<sup>53</sup> See Administrative Court Decision No. 6665 (██████████) dated 9 March 2013 (Exhibit R-56).

<sup>54</sup> See Sinai White Cement Company’s Approval from the General Organization for Industrialization dated 1 August 2001 (Exhibit C-224); see also Administrative Court Decision in Case No. 19412 (██████████) dated 9 March 2013 (Exhibit C-225).

<sup>55</sup> Award ¶ 128.

<sup>56</sup> See Second Meeting of the SEC on 15 October 2006, Resolution No. 2/06/10/8 (Exhibit R-11); see also Hr’g Tr. Day 1, 8 April 2019, 38:7–21.

<sup>57</sup> See Letter from IDA to the Governor of Assiut dated 20 August 2007 (Exhibit R-17).

<sup>58</sup> Hr’g Tr. Day 2, 9 April 2019, 74:14–18.

<sup>59</sup> Award ¶ 850.

### III. CONCLUSION

13. In sum, I am of the view that the underlying licensing claim, and the stoppage of natural gas claim that proceeded from it, would be successful on their merits before the adjudicatory bodies under Egyptian law if acting honestly, independently and impartially, precisely as the independent State Commissioners' Report had recommended. The Claimants should have been awarded damages and interest accordingly. Furthermore, they should have recovered substantial legal costs and costs of the arbitration from the Respondent. Even as regards the Award as it stands, the Tribunal's unanimous declaration that the Respondent breached its "effective means" obligation under the Treaty should have resulted in the Claimants recovering some of their costs from the Respondent.



Charles N. Brower