PCA CASE NO 2012-07

IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENTS BETWEEN THE REPUBLIC OF FINLAND AND THE ARAB REPUBLIC OF EGYPT ON THE PROMOTION AND PROTECTION OF INVESTMENTS RESPECTIVELY DATED 5 MAY 1980 AND 3 MARCH 2004 AND THE UNCITRAL ARBITRATION RULES 1976

BETWEEN

MOHAMED ABDEL RAOUF BAHGAT

The Claimant

- And-

THE ARAB REPUBLIC OF EGYPT

The Respondent

CLAIMANT'S STATEMENT OF CLAIM

ARBITRAL TRIBUNAL

Professor Rüdiger Wolfrum, Presiding Arbitrator
Professor W. Michael Reisman
Professor Francisco Orrego Vicuña

Registry

Permanent Court of Arbitration

CHAPTER 2

JURISDICTION OVER THE CLAIM

2.1. The Tribunal has jurisdiction over the claim by reference to the 1980 BIT and/or the 2004 BIT, as further described below.

(i) The Tribunal has jurisdiction under the 1980 BIT

2.2. Egypt and Finland signed the 1980 BIT on 5 May 1980. The 1980 BIT came into force on 22 January 1982.[4] In accordance with Article 9(3), Articles 1 to 8 of the 1980 BIT remain in force for a period of 20 years in the event of the termination of the BIT. It follows that the substantive protections of the 1980 BIT were in force at all times material to the claim.

(a) The Claimant is a protected investor

2.3. The 1980 BIT provides investment protections to nationals and companies of the Contracting States. Article 1(2)(a) defines "national" as follows: "In respect of Finland, an individual who is a citizen of Finland according to Finnish law".

2.4. As confirmed by the Claimant's Second Witness Statement and accompanying exhibits, Claimant has been a citizen of Finland since 1971.[5] The Claimant has at no stage lost his Finnish citizenship,[6] and in this respect relies on the following: Backström First Expert Opinion; Paavola First Expert Opinion; certified translation into English of the Finnish Nationality 1968 as amended in 1984;[7] and Backström Second Expert Opinion.

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[4] CLA1.
[5] Bahgat Second Witness Statement, ¶¶1-20.
[6] Cf. the contentions of the Respondent in its Answer to the Request for Provisional Measures, made by reference to the Finnish Nationality Act 1968 (as amended).
[7] Exhibit C007.

2.5. Further, insofar as the same becomes an issue in the case, the Claimant did not freely become an Egyptian national in August 1997, but was instead coerced into taking Egyptian nationality as described in the Claimant's Second Witness Statement[8] and the Mokhtar Ali Mohamed Ali El Ashri First Witness Statement.[9] The legal consequences of this are as set out in the Aboulmagd First Expert Opinion and the Aboulmagd Second Expert Opinion. In short, the decision of the Egyptian Minister of Industries to compel the Claimant to accept Egyptian nationality is correctly to be treated as a nullity and of no effect.

(b) The Claimant has made a protected investment

2.6. The 1980 BIT applies to "investments", which are defined in Article 1(1) as follows:

> "1. The term "investment" means every kind of asset and more particularly, though not exclusively.
> a) Movable and immovable property as well as other rights, such as mortgage, lien, pledge, usufruct and similar rights;
> b) Shares or other kinds of interest in companies;
> c) Title to money or pecuniary claim or right to any performance having an economic value;
> d) Copyrights, industrial property rights, technical processes, trade names and goodwill; and
> e) Such business concessions under public law, including concessions regarding the prospecting for or the extraction or winning of natural resources, which entitle the holder to a legal position of some duration;
> provided that the investment has been made in accordance with the laws and regulations in the host country, but irrespective of whether the investment was made before or after the entry into force of this Agreement."

2.7. The Claimant was the founder of and principal investor in ADEMCO. Through ADEMCO's 60% shareholding in AISCO, he was also the principal investor in AISCO (as well as being its founder).[10] The Claimant invested a minimum

[8] Bahgat Second Witness Statement ¶¶27-38.
[9] Mokhtar Ali Mohamed Ali El Ashri First Witness Statement.
[10] Bahgat Second Witness Statement ¶¶90-110.

(a) The Claimant is a protected investor

2.15. The 2004 BIT provides investment protections to "investors". Article 1(3) defines "investors" as follows:

> "3. The term "investor" means, for either Contracting Party, the following subjects who invest in the territory of the other Contracting Party in accordance with the laws of the latter Contracting Party and the provisions of this Agreement:
> (a) any natural person who is a national of either Contracting Party in accordance with its laws; or
> (b) any legal entity such as company, corporation, firm, partnership, business association, institution or organisation, incorporated or constituted in accordance with the laws and regulations of the Contracting Party and having its registered office within the jurisdiction of that Contracting Party, whether or not for profit and whether its liabilities are limited or not."

2.16. As confirmed by the Claimant's Second Witness Statement and accompanying exhibits, Claimant has been a citizen of Finland since 1971.[16] As noted above at ¶2.4, he has never lost that citizenship and, insofar as the same issue arises, the Claimant only became a national of Egypt in 1997 through acts of coercion by the Respondent.

(b) The Claimant has made a protected investment

2.17. The 2004 BIT applies to "investments", which are defined in Article 1(1) as follows:

> "The term "investment" means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party, including in particular, though not exclusively:
> (a) movable and immovable property or any property rights such as mortgages, liens, pledges, leases, usufruct and similar rights;

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[15] CLA2.
[16] Bahgat Second Witness Statement, ¶¶1-20.

CHAPTER 5

REPARATIONS

5.1. The Claimant seeks full reparation for the Respondent's unlawful conduct in breach of the 1980 BIT, the 2004 BIT and the Egyptian Investment Law. The Claimant is entitled to: (i) damages equal to the fair market value of his lost investment; (ii) moral damages for the Claimant's non-material harms; (iii) the return of the Claimant's Documents as requested in the Claimant's Application for Interim Measures dated 19 September 2012 and the Claimant's Interim Measures Reply dated 31 October 2012; and (iv) the costs incurred to bring these proceedings with compound interest on all damages and costs until the receipt of payment.

(i) The Claimant is entitled to damages equal to the fair market value of his lost investment

5.2. Investment treaty tribunals have consistently applied the compensation principle in *Factory at Chorzòw* that reparation "must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear ...".[113]

5.3. The Claimant is entitled to be restored to the position he would have been had the Respondent not engaged in its unlawful conduct breaching the BITs and the Egyptian Investment Law. Fair market value is the commonly accepted standard of valuation to measure the loss suffered as result of breaches of investment treaty

[113] See *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶776-777 (CLA24); *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶¶147-150 (CLA27); *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011, ¶14.3.3 (CLA32). The full judgment of the PCIJ in *Factory at Chorzòw* (*Case Concerning Certain German Interests in Polish Upper Silesia* (Germany v. Poland), Merits, 1928, PCIJ, Series A, No. 17) is available online at: http://www.icjcij.org/pcij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf.

obligations.[114] So far as damages are not made good by restitution, compensation shall cover any "financially assessable damage including loss of profits insofar as it is established."[115]

5.4. The 1980 BIT and the 2004 BIT set out the applicable compensation standards in the case of a lawful expropriation. The 1980 BIT requires "prompt, adequate and effective compensation"[116] and the 2004 BIT requires compensation amounting to the "value of the expropriated investment", to be determined in accordance with "generally accepted principles of valuation".[117]

5.5. The provisions on compensation for expropriation in the 1980 BIT and 2004 BIT provide that compensation is to be assessed as of the date of the expropriation. Where, however, the conduct of the Respondent is unlawful, as in the case before the Tribunal, the Claimant is entitled to full reparation as of the date of the Tribunal's award. Consistent with this approach, the Claimant may recover: (i) the higher value that an investment may have acquired up to the date of the award; and (2) incidental expenses resulting from the unlawful conduct.[118] Further, the unlawfulness of the expropriation may also influence other discretionary choices made by the Tribunal in the assessment of compensation.[119]

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[114] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶¶403-404 (CLA21)
[115] Article 36(2), International Law Commission's Articles on State Responsibility (CLA19).
[116] Article 3(1)(c), 1980 BIT.
[117] Article 5(2), 2004 BIT provides in full: "Such compensation shall amount to the value of the expropriated investment at the time immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier. The value shall be determined in accordance with generally accepted principles of valuation, taking into account, inter alia, the capital invested, replacement value, appreciation, current returns, the projected flow of future returns, goodwill and other relevant factors."
[118] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶¶497-499 (CLA34); *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012, ¶¶305 – 307 (CLA35).
[119] *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012, ¶¶305 – 307 (CLA35)

5.6. The Inglis Report uses the income approach (based on discounted cash flow (DCF)) to determine the fair market value of the Claimant's investment.[120] The damages due to the Claimant will vary depending on the date on which the Tribunal finds any unlawful conduct to have occurred and, if a later date is chosen, whether the Tribunal considers that the Respondent is responsible for the delay in the commencement of the Project.

5.7. Due to the current unrest in Egypt, the Inglis Report does not calculate a current valuation for the investment.[121] The Claimant reserves his rights to submit a valuation of the investment as of the date of any award if the situation in Egypt allows an accurate current valuation to be calculated.

5.8. The Claimant seeks damages based on the assumption that, if the Project were to have proceeded as planned, the Claimant would have held 35% of ADEMCO shares, as well as 0.5% of AISCO shares directly, and would have made further investments to fund the project.[122]

5.9. The Claimant has made no deductions to the valuations in the Inglis Report based on lack of control and marketability. At all relevant times, the Claimant controlled 69.5% of the shares of ADEMCO. He was the founder, principal shareholder and CEO of both ADEMCO and AISCO. If the project had proceeded, he would have continued as the CEO of both companies. With a 35% shareholding, the Claimant would have been the largest shareholder and exercised *de facto* control. Further, as a matter of law, minority discounts should not be applied where the loss in question results from unlawful conduct.[123]

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[120] Report of William Inglis dated 7 November 2012 (Inglis Report), Section 4, Valuation Methodology.
[121] Inglis Report, Section 7.
[122] Bahgat Second Witness Statement, ¶¶102-103 and Inglis Report, ¶8.13.
[123] "Minority Share Discount and Share-Transfer Restrictions" in Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal* (Kluwer Law International 1998), reproduced in R. Doak Bishop, James Crawford and Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary*, (Kluwer Law International 2005) at 1370-1371 (CLA36). In practice, investment treaty tribunals have not applied minority discounts. See *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶421 (CLA37).

5.10. Below, the Claimant sets out three different fair market valuations of his investment based on two different dates:

(i) Fair market valuation as of 9 February 2000 (the date of the initial freezing order)

(ii) Fair market valuation as 11 October 2006 (the date the freezing order was lifted)

Approach A: Absent the Respondent's unlawful interference, the Project would have commenced operations as planned in January 2003. This approach therefore assumes that Egypt breached obligations under the 1980 BIT resulting in delay in the Project.

Approach B: The Project would have restarted in October 2006.[124]

[124] If the Tribunal were to find that it does not have jurisdiction with respect to events prior to the coming into force of the 2004 BIT (5 February 2005), or otherwise finds that the Respondent is not responsible for delays in the Project, then the fair market value of the Claimant's investment would have to reflect the delay in commencing steel production and a corresponding shorter production period for the 30 year concession.

Claimant's Total Claim After Deductions and Including Interest[125]

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

5.11. As additional confirmation of the reasonableness of the income valuation, the above valuations can be compared to alternative calculations based on a reasonable rate of return for the Claimant's out of pocket lost investment of approximately US$ 37.9 million.

5.12. Where tribunals have awarded damages on the basis of lost investment, they have awarded interest rates that reflect the reality that a failed investment due to unlawful government conduct is a lost opportunity for an experienced businessperson to earn a competitive and commercial rate of return in another project. For example, in *Wena Hotels Ltd. v. Arab Republic of Egypt*, the tribunal awarded compensation based on Wena's actual investment and applied an interest rate of 9%, compounded quarterly.[126] If a similar interest rate were applied in this

[125] Based on Tables 8.3 and 9.1, Inglis Report.
[126] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, ¶128 (CLA38).

case, the alternative calculation for lost investment plus interest *would be higher than two of valuations based on the income approach*.

Alternative calculation – amount invested (millions)[127]

	12 Month USD LIBOR Rate	**10% Return**[128]
Initial investment	39.7	39.7
Interest due to 31 October 2012	23.13	114.48
Total claim	**62.83**	**154.18**

5.13. If the Tribunal does not accept that the income approach (DCF) is the appropriate method to calculate the Claimant's loss, then the Claimant seeks his lost investment of US$ 39.7 million plus 10% interest compounded annually as set out above (US$154.18 million).

[127] Inglis Report, Section 10.
[128] The 10% return is based on the discount rate of 10% applied in the Inglis Report (Inglis Report, 10.2).

(ii) The Claimant is entitled to moral damages for the egregious conduct of the Egyptian authorities

5.14. It is well established that moral, non-material damages are compensable in international law.[129] Investment treaty tribunals have confirmed that moral damages can be awarded to foreign investors.[130] In *Desert Line Projects LLC v. Republic of Yemen*, the tribunal awarded US$ 1,000,000 in moral damages in light of the physical duress exerted on the Claimant's executives and their illegal detention for four days.[131] In *Joseph C. Lemire v. Ukraine*, the tribunal affirmed that moral damages can be awarded in cases of illegal detention, deterioration of health, and loss of reputation, credit and social position.[132]

5.15. The Claimant in this case was imprisoned for over three years based on trumped up and politically motivated charges. During his incarceration, he suffered physically and mentally:

> "I still have nightmares about the time I spent in prison in Egypt. I was put in jail from 5 February 2000 to March 2003 for no reason. I had a nervous breakdown in jail. I did not eat on many of the days when I was in prison. I had to sleep on the floor, in a small room with another twenty four prison inmates. I only had 50cm wide and 2 meter long area to sleep. The sanitary facilities were more than awful, not even suitable for animals. We used to be locked up from 5 pm in the evening to 7am on the following morning. There was no health service. I first had a severe dislocation of my spinal cord and there was no medical attention given to me. I tried to get painkiller tablets from outside but each time these tablets were confiscated. I then began to have tooth problems. The only treatment was the removal of the teeth. The dentist gave an injection to remove the teeth. I contacted permanent asthma from the jail. I used to sleep shivering in cold at night as

[129] *Opinion in the Lusitania Cases* (1923) VII R.I.A.A. 32 (CLA39) at 40: "That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages…"

[130] *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶¶290-291 (CLA40); and *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶¶326-333 (CLA41).

[131] *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶¶290-291 (CLA40).

[132] *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶333 (CLA41).

> the room had two windows with only iron bars in them. There was nothing to give us any cover from the cold that came in from the windows."[133]

5.16. As a result of politically motivated attacks and spurious criminal charges, Egyptian authorities savaged the Claimant's reputation.[134]

5.17. In light of the egregiousness of the Respondent's conduct, the Claimant seeks US$ 5 million in moral damages.

(iii) The Respondent must return the Claimant's Documents

5.18. The Claimant seeks return of the Claimant's Documents as requested in the Claimant's Application for Interim Measures dated 19 September 2012 and the Claimant's Interim Measures Reply dated 31 October.

(iv) Full reparation requires payment of compound interest and the full costs the Claimant has and will incur to vindicate his rights

5.19. Full reparation requires the payment of interest on any award of damages.[135] Recent investment treaty awards affirm that compound interest is now the norm as it reflects economic reality.[136]

5.20. Full reparation also requires that the Claimant be awarded all his legal and other costs associated with this this arbitration, including interest of costs.[137] More recent

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[133] Bahgat Second Witness Statement, ¶129.
[134] Bahgat Second Witness Statement, ¶117-132
[135] Article 38, ILC Articles on State Responsibility, provides: "1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result. 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled." (CLA19) For an application of the principle, see *Ron Fuchs v. Georgia*, ICSID Case No. ARB/07/15, Award, 3 March 2010, ¶659 (CLA28).
[136] *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, Part XVI, ¶26 (CLA42) referring to a ""jurisprudence constant" where the presumption has shifted from the position a decade or so ago with the result it would now be more appropriate to order compound interest". See also *Quasar de Valors SICAV S.A. et al. (Formerly Renta 4 S.V.S.A et al.) v. Russian Federation*, SCC Case No. 24/2007, Award, 20 July 2012, ¶¶226-268 (CLA43).
[137] *Walter Bau v. Thailand*, Award, 1 July 2009, ¶16.2 (CLA26).

investment treaty tribunals have followed the principle that "costs follow the event".[138]

5.21. In light of the egregiousness of the Respondent's conduct, it is appropriate for the Tribunal to exercise is discretion under Article 40 of the UNCITRAL Arbitration Rules and order that the Respondent pay the full costs of this arbitration and the costs of the Claimant's legal representation in these proceedings.

5.22. If the Tribunal decides its jurisdiction is based solely on the 1980 BIT, then the Claimant accepts that in accordance with Article 7(2)(d) that: "[t]he costs of the arbitration shall be shared equally between the parties to the dispute". However, the Claimant maintains that in accordance with Article 40(2) of the UNCITRAL Arbitration Rules, with respect to the costs of legal representation and assistance, the Tribunal has discretion to determine which party shall bear such costs and the Respondent should bear those costs.

[138] *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I]*, PCA Case No. AA 277, Final Award, 31 August 2011, ¶376 (CLA44).

THE CLAIMANT'S REQUEST FOR RELIEF

The Claimant respectfully requests the following relief:

(a) a declaration that the Respondent has breached Articles 2 and 3 of the 1980 Treaty, Articles 2, 3, 5 and 12 of the 2004 BIT and the Egyptian Investment Law;

(b) an order that the Respondent return to the Claimant all the Claimant's Documents in its possession;

(c) an order that the Respondent pay the Claimant compensation as set out in Chapter 5 of this Statement of Claim, plus interest at 12 month US$ LIBOR rates, compounded annually from the date of the final award in these proceedings;

(d) an order that Egypt pay the costs of these arbitration proceedings, including the PCA's administration costs, the costs of the Tribunal and the legal and other costs incurred by the Claimant, on a full indemnity basis, with interest at 12 month US$ LIBOR rates, compounded annually, from the date of the final award in these proceedings; and

(e) grant such other relief as the Tribunal may consider appropriate.

10 November 2012

Respectfully submitted,

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