PERMANENT COURT OF ARBITRATION
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

Claimant

AND

THE ARAB REPUBLIC OF EGYPT

Respondent

Respondent's Reply Memorial on Jurisdiction

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1. Pursuant to the procedural timetable set forth in Procedural Order No. 1 (as amended), Respondent respectfully submits its Reply Memorial on Jurisdiction in the above-referenced arbitration in response to Claimant's Counter-Memorial on Jurisdiction dated 30 August 2013 and Claimant's Supplementary Counter-Memorial on Jurisdiction dated 14 December 2016.

2. Article 21(1) of the 1976 UNCITRAL Arbitration Rules provides that "[t]he arbitral tribunal shall have the power to rule on its own jurisdiction". Respondent respectfully objects to the Tribunal's jurisdiction on two grounds.

3. First, Respondent objects to the *ratione personae* jurisdiction of the Tribunal on the ground that Claimant is not "a national of another Contracting State" within the ambit of either the 1980 BIT or the 2004 BIT as Claimant was not a Finnish national during the relevant period, and in the alternative, on the ground that under the 1980 and 2004 BITs and applicable international law, the Tribunal cannot hear any claims by a dual national investor, such as is the case of Claimant, against a State of his nationality, regardless of whether this investor is also a national of another State.

4. Second, Respondent objects to the *ratione temporis* jurisdiction of the Tribunal on the ground that Claimant's claim falls outside the temporal scope of both the 1980 BIT, which had been repealed and replaced before Claimant could have accepted the offer to arbitrate contained therein, and the 2004 BIT, which does not apply to disputes which have arisen prior to its entry into force, such as the present dispute. Moreover, Respondent submits that the Tribunal has no jurisdiction to determine any alleged breaches of the substantive provisions of the 1980 and 2004 BITs.

5. Accordingly, Respondent respectfully requests the Tribunal to find that it lacks jurisdiction to hear Claimant's claim.

6. Accompanying Respondent's Reply Memorial on Jurisdiction is the Second Expert Opinion of Professor Martin Scheinin dated 15 March 2017, and Exhibits R0014 – R0032 and RLA0024-RLA0085.

I. THE TRIBUNAL HAS NO JURISDICTION RATIONE PERSONAE TO HEAR CLAIMANT'S CLAIM

7. In his Supplementary Counter-Memorial on Jurisdiction, Claimant notes that the Supreme Administrative Court of Finland ("SAC") in its judgment of 15 November 2016 ("SAC Judgment") revoked the Finnish Immigration Office's determination of Claimant's Finnish

nationality dated 23 April 2013 and held that Claimant had always been a Finnish citizen since 1971.[1]

8. Claimant submits that the SAC Judgment "demolishes the Respondent's position taken in its Request for Bifurcation to the effect that the Claimant lost his Finnish nationality automatically in 1997 when he took on Egyptian nationality".[2] In particular, according to Claimant, the SAC Judgment "decided that the Claimant has always remained a Finnish citizen since 1971 and that his Finnish nationality has not changed between 1971, when he received Finnish citizenship … and 23 April 2013".[3]

9. On the basis of the above, Claimant concludes that the SAC Judgment is "final and binding as a matter of Finnish law (*res judicata*) and the Judgment provides a final and unequivocal determination that the Claimant has been Finnish since 1971 under Finnish law. Therefore the Tribunal has jurisdiction *ratione personae* under both the 1980 and 2004 BITs".[4]

10. In response, Respondent recalls that it is a fundamental prerequisite of international investment arbitration that the dispute must be between a Contracting Party and a national of another Contracting Party (**A**). However, Claimant was not a Finnish national at the relevant times such that the dispute is not between a Contracting Party and a national of another Contracting Party (**B**). In the alternative, Claimant's dual Finnish-Egyptian nationality prevents him from bringing claims against Egypt under the 1980 and 2004 BITs (**C**). Consequently, Respondent respectfully submits that the Tribunal has no jurisdiction *ratione personae* and must decline to hear Claimant's claim.

A. THE DISPUTE MUST BE BETWEEN A CONTRACTING PARTY AND A NATIONAL OF ANOTHER CONTRACTING PARTY

11. It is common ground that the very purpose of the international investment regime is to encourage foreign investments in host States. Modern investment treaties for the protection of foreign investment, as indicated by their titles, are signed between States to protect and promote foreign investment.[5] In these treaties, the Contracting States provide their investors investing abroad with important substantive and procedural legal protection against interference

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1 Claimant's Supplementary Counter-Memorial on Jurisdiction, 14 December 2016, ¶ 7.
2 Claimant's Supplementary Counter-Memorial on Jurisdiction, 14 December 2016, ¶ 15.
3 Claimant's Supplementary Counter-Memorial on Jurisdiction, 14 December 2016, ¶ 20(a). Claimant also argued that the SAC Judgment confirmed "Claimant's position that he has always been a Finnish citizen since 1971", see Claimant's Supplementary Counter-Memorial on Jurisdiction, 14 December 2016, ¶ 20(b).
4 Claimant's Supplementary Counter-Memorial on Jurisdiction, 14 December 2016, ¶ 21.
5 J. W. Salacuse, The Law of Investment Treaties, OUP, 2015 (**Exhibit RLA0024**), p. 1.

with their investments by the States in which they invest.[6] However, these treaties are not intended by the Contracting States to provide protection to their own investors against interference with their investments in their home State.

12. Accordingly, a "fundamental jurisdictional prerequisite of international investment arbitration is that the dispute opposes a host State and an investor of another State. That the investor be foreign under some objective criterion of the treaty under which it brings its claim is critical to the architecture of the system of international investment arbitration".[7] The test for jurisdiction *ratione personae* is determined by the claimant's foreign nationality and is thus closely bound to the very purpose of the international investment regime.[8]

13. For the Tribunal to have *ratione personae* jurisdiction to hear Claimant's claim against Egypt in the present case, Claimant must satisfy the jurisdictional criteria of the 1980 and the 2004 BITs by qualifying as a national of the other Contracting Party, i.e. as a national of Finland. This Tribunal has no jurisdiction over any claims against Egypt other than those owned by nationals of Finland. It has no jurisdiction over claims against Egypt by nationals of Egypt.

14. Claimant's Finnish nationality must therefore be satisfactorily established as a primary requisite to the examination and decision of his claim. This Tribunal, as the sole judge of its jurisdiction, is both empowered and compelled to determine for itself upon the evidence submitted the question of whether Claimant has satisfied the nationality requirements of the Treaties (**1**), and whether Claimant has satisfied these nationality requirements at the relevant times (**2**). Respondent respectfully submits that he has not.

1. The Tribunal has the power to determine whether the nationality requirements in the 1980 and 2004 BITs have been satisfied

15. It is widely accepted that it is the task of the tribunal, in determining its jurisdiction *ratione personae*, to inquire independently into whether a claimant meets the requisite criteria for

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6 From the perspective of the home State, the definition of "investor" identifies who is to be regarded as its constituents for purposes of investment policy, i.e. who are the categories of persons, industries, and groups that will benefit from the investment treaty program. From the perspective of the host State, the definition of "investor" identifies who the host State's clients are for purposes of investment policy, i.e. who are the persons, industries, and groups that the host State wants to attract in order to increase foreign investment and who will benefit from the protection of the treaty in respect of its investments made in the territory of the host State. See B. Legum, Defining Investment and Investor: Who Is Entitled to Claim?, OECD Symposium "Making the most of International Investment Agreement: A Common Agenda", 12 December 2005 (**Exhibit RLA0058**).

7 L. F. Reed, J. E. Davis, III. Ratione Personae, Who is a protected investor?, in International Investment Law, CH Beck, 2015 (**Exhibit RLA0025**), pp. 614-615.

8 C. MaLachlan, L. Shore, and M. Weiniger, International Investment Arbitration – Substantive Principles, OUP, 2007 (**Exhibit RLA0026**), p. 131.

nationality under domestic law.[9] The test of nationality applied by investment treaty tribunals serves the very limited purpose of regulating who has access to the tribunal. A tribunal of course "does not grant or withdraw nationality when it determines its jurisdiction *ratione personae*, rather, it decides whether to recognize the claimant's asserted nationality for purposes of the arbitration".[10] The *Soufraki* tribunal made it clear that

> "It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality. ... But it is no less accepted that **when, in international arbitral or judicial proceedings, the nationality of a person is challenged, the international tribunal is competent to pass upon that challenge**. It will accord great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities. But **it will in the end decide for itself whether, on the facts and law before it, the person whose nationality is at issue was or was not a national of the State in question and when, and what follows from that finding**. Where, as in the instant case, the jurisdiction of an international tribunal turns on an issue of nationality, the **international tribunal is empowered, indeed bound, to decide that issue**".[11] (emphasis added)

16. Thus, the tribunal is entitled to examine whether the nationality or citizenship that the investor claims to possess really exists and whether in light of the facts of the case the investor did

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9 Respondent's Request for Bifurcation, 26 January 2013, ¶¶ 43-46.

10 L. F. Reed, J. E. Davis, III. Ratione Personae, Who is a protected investor?, in International Investment Law, CH Beck, 2015 (**Exhibit RLA0025**), p. 621.

11 Hussein Nuaman Soufraki v. The United Arab Emirates (ICSID Case No. ARB/02/7), Award, 4 July 2014 (**Exhibit RLA0015**), ¶ 55. The *Soufraki* ad hoc committee endorsed the tribunal's findings and stated that "In the Request for annulment, the Claimant stated that 'no international tribunal has the power to grant or withdraw nationality.' This is correct, but this is not what the Tribunal did in its Award. The question before the Tribunal was not to grant or withdraw Mr. Soufraki's Italian nationality; it was rather to recognize or not his Italian nationality for international arbitration purposes. There is a notable difference between the *granting* of nationality on the national level – which is a *constitutive* act – and the *recognition* of nationality on the international level, – which is a *declaratory* act. The efficacy on the international level of the declaratory act is contingent upon the conformity of the grant of nationality both with the national law of the State of nationality and international law requirements such as effectiveness. International tribunals have consistently followed this approach and have distinguished between determinations of nationality for domestic law purposes – which they have considered to be reserved entirely for sovereign State officials – and the international effect of nationality determinations, for, e.g., jurisdictional purposes in international arbitral systems, which they have considered subject to review in certain limited circumstances", See Hussein Nuaman Soufraki v. The United Arab Emirates (ICSID Case No. ARB/02/7), Decision on Annulment, 5 June 2007 (**Exhibit RLA0016**), ¶ 55. Ch. Schreuer, The ICSID Convention A Commentary, CUP, 2001 (**Exhibit RLA0045**), p. 267: "an international tribunal is not bound by the national law in question under all circumstances. Situations where nationality provisions of national law may be disregarded include cases of ineffective nationality lacking a genuine link between the State and the individual. Other instances where national rules need not be followed are certain situations of involuntary acquisition of nationality in violation of international law or cases of withdrawal of nationality that are contrary to international law". See further V. Nerets, Nationality of investors in ICSID arbitration, RGSL Research Papers No. 2, 2011 (**Exhibit RLA0028**), p. 19.

indeed hold that nationality at the relevant times in accordance with that State's laws. While the tribunal may turn to the laws of the investor's home State in determining the investor's nationality, it must not defer exclusively to that State's interpretation or application of its laws on nationality. In fact, it is well-accepted that when the investor's nationality is in dispute, that dispute cannot be exclusively decided in accordance with the national law of the State in question.[12]

17. Tribunals are also not constrained in their nationality determination by a State's official declaration of a claimant's nationality, nor by official indicia or a State's recognition of an individual's nationality.[13] Documents of nationality issued by a State in this respect, such as certificates of nationality, passports, and official State letters confirming the claimant's nationality, have been considered to constitute *prima facie* evidence of nationality only. They may be subject to independent examination and rebuttal by the tribunal that the claimant holds or does not hold the claimed nationality in accordance with his home State's laws.[14]

18. In the much-cited *Soufraki* case, the claimant, Mr Soufraki, presented to the tribunal five certificates of nationality issued by Italian authorities, copies of Italian passports and a letter from the Italian Ministry of Foreign Affairs stating that "I confirm that the right to have recourse to the said [ICSID/BIT] forum is recognized to you on the basis of your Italian citizenship, which is attested to by the documents that you provided to ... the Ministry of Foreign Affairs".[15] Despite this wealth of documentary evidence, the tribunal undertook an independent examination of the facts and evidence in light of Italian nationality law. It concluded that Mr Soufraki was not an Italian national because he lost his Italian nationality by

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12 Salem Case (Egypt/USA), 8 June 1932, UN Reports of International Arbitral Awards, Vol. 2 (**Exhibit RLA0029**), p. 1184: "The Arbitral Tribunal is therefore entitled to examine whether the American citizenship of Salem really exists. Such examination is not impeded by the principle of international law that every sovereign State is. generally speaking, sovereign in deciding the question as to which persons he will regard as his subjects, because the bestowal of citizenship is a manifestation of his international independence. In fact, as soon as the question of nationality is in dispute between two sovereign powers, it cannot be exclusively decided in accordance with the national law of one of these powers". See also Flutie cases, 1903-1905, U.N. Rep., Vol. IX pp.148-155 (**Exhibit RLA0076**); *Case of Crisanto Medina & Sons v. Costa Rica, decision of the Umpire, Commander Bertinatti (USA v Costa Rica)*, dated 31 December 1862, U.N. Rep., Vol. XXIX pp.75-78 (**Exhibit RLA0077**).

13 See, e.g. Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania (ICSID Case No. ARB/05/20), Decision on Jurisdiction and Admissibility, 24 September 2008 (**Exhibit RLA0030**), ¶¶ 91-97; Victor Pey Casado et al. v. Republic of Chile (ICSID Case No. ARB/98/2), Award, 8 May 2008 (**Exhibit RLA0014**), ¶¶ 319-320.

14 Hussein Nuaman Soufraki v. The United Arab Emirates (ICSID Case No. ARB/02/7), Award, 4 July 2014 (**Exhibit RLA0015**), ¶ 63; Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt (ICSID Case No. ARB/05/15), Decision on Jurisdiction, 11 April 2007 (**Exhibit RLA0031**), ¶¶ 150-153 and 193; Ambiente Ufficio S.p.A. and others v. Argentine Republic (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013 (**Exhibit RLA0032**), ¶¶ 318-319.

15 Hussein Nuaman Soufraki v. The United Arab Emirates (ICSID Case No. ARB/02/7), Award, 4 July 2014 (**Exhibit RLA0015**), ¶ 14.

operation of law when he acquired Canadian nationality in 1991, a fact which Mr Soufraki had not revealed to the Italian authorities when they issued his certificates of nationality and other official documents and which led to the automatic loss of his Italian nationality by operation of the applicable Italian nationality laws.[16]

19. Mr Soufraki subsequently applied to annul the award, arguing *inter alia* that the tribunal exceeded its powers by not merely accepting the certificates as determinative of the question of his nationality and by second-guessing the Italian authorities who were solely competent to confer Italian nationality. The ad hoc committee found that the "principle is in fact well established that international tribunals are empowered to determine whether a party has the alleged nationality in order to ascertain their own jurisdiction, and are not bound by national certificates of nationality or passports or other documentation in making that determination and ascertainment. This principle is well supported by the case law of international tribunals including ICSID tribunals, as well as by scholarly commentary on the subject".[17]

20. In the *Siag v Egypt* case, the tribunal accepted that, as a matter of both Egyptian and international law, the nationality documents relied on by Egypt - passports, letters from the Egyptian Interior Ministry and certain corporate documents relating to the investment[18] - were not determinative and did not bind the tribunal whose jurisdiction depended on the parties having (or not having) the relevant nationality. The tribunal reiterated that "[b]oth Egyptian law and the practice of international tribunals is that the documents referred to by the Respondent evidencing the nationality of the Claimants are *prima facie* evidence only. While such documents are relevant they do not alleviate the requirement on the Tribunal to apply the Egyptian nationality law, which is the only means of determining Egyptian nationality". [19]

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16 Hussein Nuaman Soufraki v. The United Arab Emirates (ICSID Case No. ARB/02/7), Award, 4 July 2014 (**Exhibit RLA0015**), ¶¶ 24, 47-81.

17 Hussein Nuaman Soufraki v. The United Arab Emirates (ICSID Case No. ARB/02/7), Decision on Annulment, 5 June 2007 (**Exhibit RLA0016**), ¶ 64.

18 Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt (ICSID Case No. ARB/05/15), Decision on Jurisdiction, 11 April 2007 (**Exhibit RLA0031**), ¶¶ 148, 192.

19 Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt (ICSID Case No. ARB/05/15), Decision on Jurisdiction, 11 April 2007 (**Exhibit RLA0031**), ¶ 153. In a recent award rendered in July 2016 in the *CEAC Holdings Limited v Montenegro* case, the tribunal confirmed that it was not bound by certificates of nationality issued by domestic authorities in the following words: "In this context, the Tribunal wishes to reemphasize that the question of its jurisdiction is a matter for international, and not domestic, law. The Tribunal therefore has to determine the probative value *in the international legal order* of certificates of registered office issued by Cypriot (i.e., domestic) authorities. In line with earlier decisions of international tribunals, this Tribunal considers that certificates of nationality and, by corollary, other certificates issued by domestic authorities *insofar as they are relied upon by a claimant in order to justify the jurisdiction of international arbitration tribunals*, constitute only *prima facie* evidence of the facts they attest to. An international tribunal is therefore not bound by the nationality determinations and the certificates issued by domestic authorities, but must make its own determination under international law. This

21. It follows from the above that this Tribunal has both the power and the obligation to determine Claimant's nationality for itself and to look beyond the nationality documents and determinations issued by the Finnish authorities, including the determinations made in the SAC Judgment. As Respondent will show in detail below, there are ample reasons as to why the Tribunal should depart from the SAC's nationality determination and use its discretionary powers to ascertain anew Claimant's nationality for purposes of deciding on its jurisdiction *ratione personae*.

2. The relevant times when the nationality requirements in the 1980 and 2004 BITs must be satisfied

22. BITs generally do not set forth the date(s) on which investors must satisfy their conditions *ratione personae* in order to benefit from the protection of the treaty. The 1980 and the 2004 BITs also do not contain any specifications in this regard. Commentary and investment case law are in agreement that despite the silence of BITs, the nationality requirements of the treaties have to be met on both the date of consent to arbitration and on the date of the alleged breach of the treaty.[20]

23. The *Pey Casado* tribunal confirmed that BITs must be read to contain an implicit requirement that the conditions *ratione personae* must also be met on the date of the State's alleged breach of the substantive provisions of the investment agreement at issue.[21] Professor Douglas concurs noting that "[u]nless forum shopping is to be wholly condoned, the claimant must also have the requisite nationality at the time of the alleged breach of obligation that forms the basis of its

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finding does not in any way diminish the probative value of such certificates under domestic law". The tribunal went on to find that the certificates of registered office adduced by the claimant were not conclusive evidence that a registered office indeed existed. On this basis, the tribunal concluded that the claimant did not have a "seat" in Cyprus as required by the applicable Cyprus-Montenegro BIT and therefore did not qualify as a protected investor under the BIT. Consequently, the tribunal decided that it lacked jurisdiction to hear the claimant's case. See CEAC Holdings Limited v Montenegro (ICSID Case No. ARB/14/8), Award, 26 July 2016 (**Exhibit RLA0033**), ¶¶ 154-155, 160, 226.

20 Z. Douglas, The International Law of Investment Claims, CUP, 2009 (**Exhibit RLA0034**), p. 284; L. F. Reed, J. E. Davis, III. Ratione Personae, Who is a protected investor?, in International Investment Law, CH Beck, 2015 **(Exhibit RLA0025**), pp. 633-634: "If a claimant were not a protected investor at the time of the acts that gave rise to the claim, there would be no breach of the treaty's substantive protections".

21 Victor Pey Casado et al. v. Republic of Chile (ICSID Case No. ARB/98/2), Award, 8 May 2008 (**Exhibit RLA0014**), ¶ 414: "De l'avis du Tribunal, la condition de nationalité au sens de l'API doit être établie à la date du consentement de l'investisseur à l'arbitrage. L'offre d'arbitrer contenue dans le traité doit en effet exister, ce qui suppose que les conditions d'application du traité soient satisfaites, à la date du consentement de l'investisseur pour que celui-ci puisse parfaire la convention d'arbitrage résultant de l'offre générale d'arbitrer contenue dans le traité. Par ailleurs, les conditions d'application du traité, dont la condition de nationalité, doivent également être satisfaites, en l'absence de précision contraire du traité, à la date de la ou des violations alléguées, faute de quoi l'investisseur ne pourrait se prévaloir devant le tribunal arbitral mis en place en application du traité d'une violation de celui-ci ».

claim".[22] Professor Orrego Vicuna's Partial Dissenting Opinion in the *Siag* case further confirmed this rule:

> "an investor applying for ICSID proceedings would be required not to be a national of the host State on both the date of expression of consent by the State, or the **date of making the investment**, **and** that of its own expression of consent, and then again at the **time of registration**. This would certainly prevent many kinds of abuse. This is not the same as the traditional requirement of continuing nationality because there could be changes in between both dates of expression of consent. Yet, it would ensure that if the individual was a national of the State party at the outset it would still be ineligible later."[23] (emphasis added)

24. Indeed, if a showing of nationality at the time of the alleged breaches were not required, but only at the time of the request for arbitration, this would encourage business people who suffer measures seen as adverse at the hands of national authorities to subsequently acquire foreign nationality and bring an investment claim against their own State. This could and in fact already has lead to fraudulent treaty shopping as discussed further below.[24] In the case of legal person claimants, tribunals have put a clear limit to treaty shopping by requiring that the investors show that they held an interest in the investment at the time the alleged treaty breaches occurred. [25]

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22 Z. Douglas, The International Law of Investment Claims, CUP, 2009 (**Exhibit RLA0034**), p. 295.

23 Partial Dissenting Opinion of Professor Orrego Vicuna, Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt (ICSID Case No. ARB/05/15), Decision on Jurisdiction, 11 April 2007 (**Exhibit RLA0031**), pp. 65-66.

24 See above ¶¶ 144-151. For example, in a recent case, Mr Cem Uzan, a wealthy Turkish business man and politician, pursued an investment claim against Turkey under the ECT pursuant to the UNCITRAL Arbitration Rules. Cem Uzan alleged that at the time the Turkish Government took away his energy investments, he had permanent residence and a working permit granted by the United Kingdom. On 20 April 2016, an SCC tribunal declined jurisdiction in an unpublished award over Mr Uzan on the grounds that he was not a protected investor under the ECT which underpinned his claim. Turkey's objection centred on Mr Uzan's Turkish nationality, and his claimed route to jurisdiction via permanent residence in the United Kingdom and France at certain crucial times. The tribunal is said to have observed that Mr Uzan was residing in Turkey when he first made his investment in CEAS and Kepez. At this time, the tribunal said, he was a domestic investor, not protected by the ECT. Furthermore, this status continued until the time of the alleged interference with the investment, the tribunal held. The question then for the tribunal was whether a subsequent change in residence would bring this domestic investment under the protection of the ECT. The tribunal rejected this suggestion, finding that a mere change in residence could not "operate to transform the legal characteristic of the person into an Investor, within the meaning of Article 26(1)". See Cem Uzan v. Republic of Turkey, reported in Latest Uzan v Turkey arbitration fails, as SCC tribunal looks past claimant's permanent residence in France and dwells on "domestic" origins of disputed investment, IAReporter, 23 August 2016 (**Exhibit RLA0052**).

25 See, e.g., Phoenix Action, Ltd. v. The Czech Republic (ICSID Case No. ARB/06/05), Award, 15 April 2009 (**Exhibit RLA0035**), ¶¶ 136-143; Europe Cement Investment & Trade S.A. v. Republic of Turkey (ICSID Case No. ARB(AF)/07/2), Award, 13 August 2009 (**Exhibit RLA0036**), ¶¶ 170-175; Cementownia "Nowa Huta" S.A. v. Republic of Turkey (ICSID Case No. RB(AF)/06/2), Award, 17 September 2009 (**Exhibit RLA0037**), ¶¶ 117, 154-156.

25. The tribunal in *Loewen v USA* went even further and introduced the requirement of "continuous nationality" for the claimant investor. It found that "[i]n international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*".[26] The *Loewen* tribunal went on to find that it did not have jurisdiction to hear the claimant's claim due to the lack of the claimant's continuous Canadian nationality.[27]

26. It follows from the above for the purposes of the present proceedings that Claimant must prove that he was a Finnish national both at the time he consented to arbitration, i.e. on 8 July 2011, when he filed his Notice of Arbitration, and on the date of the alleged breaches of the 1980 and 2004 BITs by Egypt, i.e. 9 February 2000, when he allegedly "was deprived of all the benefit of his investment and suffered a dispossession of all the benefit of his investment".[28]

B. CLAIMANT WAS NOT A FINNISH NATIONAL AT THE RELEVANT TIMES

27. Respondent submits that Claimant was not a Finnish national at the relevant times, having automatically lost his Finnish nationality by operation of the 1968 Nationality Act, when he voluntarily reacquired Egyptian nationality in September 1997 **(1)**. This conclusion is not altered by the SAC Judgment which the Tribunal should disregard as concerns its finding on Claimant's Finnish nationality **(2)**. In any event, it follows from the SAC Judgment that Claimant was not a Finnish national at the relevant times, i.e. at the time of the alleged breaches of the 1980 and

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26 Loewen Group, Inc. and Raymond L. Loewen v. United States of America (ICSID Case No. ARB(AF)/98/3), Award, 26 June 2003 (**Exhibit RLA0038**), ¶ 225. See also ¶¶ 229-230: "There is only limited dispute as to the history of the requirement of continuous nationality to the end of any international proceeding. When investment claims were negotiated and resolved only at a governmental level, any change in nationality of the claimant defeated the only reason for the negotiations to continue. The claiming government no longer had a citizen to protect. This history has changed as the nature of the claim process has changed. As claimants have been allowed to prosecute claims in their own right more often, provision has been made for amelioration of the strict requirement of continuous nationality. But those provisions have been specifically spelled out in the various treaties that TLGI cites as proof that international law has changed. Thus, in the claims settlement agreement between Iran and the United States arising out of the hostage crisis, the requirement of continuous nationality was specifically altered in the agreement. Many of the bilateral investment treaties, the so-called "BITs", contain specific modifications of the requirement. But such specific provisions in other treaties and agreements only hinder TLGI's contentions, since NAFTA has no such specific provision. As with most hoary international rules of law, the requirement of continuous nationality was grounded in comity. It was not normally the business of one nation to be interfering into the manner in which another nation handled its internal commerce. Such interference would be justified only to protect the interests of one of its own nationals. If that tie were ended, so was the justification. As international law relaxed to allow aggrieved parties to pursue remedies directly, rather than through diplomatic channels, the need for a rigid rule of *dies ad quem* also was relaxed. But as was previously noted, such relaxations came about specifically in the language of the treaties. There is no such language in the NAFTA document and there are substantial reasons why the Tribunal should not stretch the existing language to affect such a change".

27 Loewen Group, Inc. and Raymond L. Loewen v. United States of America (ICSID Case No. ARB(AF)/98/3), Award, 26 June 2003 (**Exhibit RLA0038**), ¶ 240.

28 Claimant's Statement of Claim, 10 November 2012, ¶ 4.7.

2004 BITs by Egypt **(3)**. It follows that the Tribunal has no jurisdiction *ratione personae* to hear Claimant's claim.

1. Claimant was not a Finnish national at the relevant times, having automatically lost his Finnish nationality by operation of the 1968 Nationality Act when he voluntarily reacquired Egyptian nationality in September 1997

28. In its Request for Bifurcation, Respondent demonstrated in detail with the support of its legal expert, Professor Scheinin, that Finnish nationality law before 2003 prohibited dual nationality and that the 1968 Nationality Law provided for the automatic loss of Finnish nationality by operation of law (ipso jure) in cases where a Finnish national voluntarily acquired the nationality of another State.[29] Respondent also demonstrated that therefore, in light of the applicable 1968 Nationality Law, Claimant automatically lost his Finnish nationality on 28 September 1997 when he regained Egyptian nationality.[30] Respondent noted that Claimant could have applied to regain Finnish nationality within five years of the entry into force of the 2003 Finnish Nationality Act, but had not taken any steps to do so.[31] It follows that Claimant was not a Finnish national at the relevant times, i.e. neither at the time of the alleged Treaty breaches by Egypt, nor at the time of the Notice of Arbitration.

29. In addition, Respondent also demonstrated with the support of its second legal expert, Dr. Badran, that Claimant had been an Egyptian national at all relevant times because he voluntarily reacquired Egyptian nationality in 1997 and has validly held Egyptian nationality ever since.[32]

30. Accordingly, Respondent concluded that Claimant could not benefit from the protection of the underlying BITs, including their dispute resolution clauses, by reason of his lack of Finnish nationality.[33] The Tribunal is kindly referred to the relevant sections of Respondent's Request for Bifurcation dated 26 January 2013, which are not repeated here.

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29 Respondent's Request for Bifurcation, 26 January 2013, ¶¶ 47-61.
30 Respondent's Request for Bifurcation, 26 January 2013, ¶¶ 79-98.
31 Respondent's Request for Bifurcation, 26 January 2013, ¶¶ 66-78.
32 Respondent's Request for Bifurcation, 26 January 2013, ¶¶ 124-131. See also Badran Expert Report.
33 Respondent's Request for Bifurcation, 26 January 2013, ¶¶ 77, 131; Respondent's Memorial on Jurisdiction, 15 July 2013, ¶¶ 1-3.

2. The Tribunal should disregard the SAC Judgment's finding on Claimant's Finnish nationality

31. The SAC Judgment issued on 15 November 2016 reversed the decisions of the Finnish Immigration Service and of the Helsinki Administrative Court and decided that Claimant is to be regarded as a dual national of Finland and Egypt in the following terms:

> "The decisions by the Administrative Court and the Immigration Service are reversed. The Supreme Administrative Court orders that Mohamed Bahgat was, at the time when Immigration Service made its decision subject to this appeal, to be regarded in Finland, besides as an Egyptian national, also as a Finnish national. The nationality status of Bahgat as a Finnish national has not changed after he in 1971 acquired the nationality of Finland, prior to the said decision by the Immigration Service."[34]

32. Respondent respectfully submits that for the reasons below the Tribunal should depart from the nationality determination made in the SAC Judgment. Rather, it should use its discretionary powers to newly ascertain Claimant's nationality for purposes of deciding on its jurisdiction and find that under the applicable Finnish nationality laws Claimant was not a Finnish national at the relevant times.

33. First, the SAC Judgment is an entirely novel, unprecedented, unexpected and highly criticizable judgment which represents a sharp departure from the SAC's well-established case law in matters of nationality and makes a surprising retroactive application of new legal concepts. The SAC Judgment is not grounded in positive law, but is clearly influenced by non-legal considerations of "fairness" and "morality", which should normally be beyond the scope of investigation of a court in nationality matters. Professor Scheinin opines that the SAC Judgment's application of Finnish nationality laws "break new ground and can be characterised both as surprising and as a departure from earlier case law", and constitutes a "radical change in the application of the law" and a "new breakthrough in the application of the principle of legitimate expectations".[35] In sum, the SAC Judgment is 'bad law' and should not influence the Tribunal's decision on its jurisdiction *ratione personae*.

34. Second, the SAC Judgment, in reversing the decisions issued by the Finnish Immigration Service and the Helsinki Administrative Court regarding Claimant's Finnish nationality, did not state that these decisions were based on an erroneous or unlawful application of the applicable

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34 SAC Judgment (**Exhibit R0025**), p. 9.
35 Second Expert Opinion of Professor Scheinin, ¶¶ 10, 15.

substantive law, the 1968 Nationality Act and the 2003 Nationality Act. Instead, the SAC Judgment explicitly found that the Finnish Immigration Service had in fact applied the law correctly:

> "The Immigration Service did possess the legal competence to determine anew his nationality status and as its point of departure its duty has been to assess the matter in light of information on historical events … and in the **light of the law that was applicable** at the respective time.… **it cannot be considered that an error would have been made** in this case in this respect. The objective of the Immigration Service had been to **determine the nationality status of the Claimant correctly, taking into account the law applicable at each point of time**."[36] (emphasis added)

35. To recall, on 23 April 2013, the Finnish Immigration Service determined through a formal, written, and reasoned administrative decision that notwithstanding Claimant's Finnish nationality documents (passport, identity card, etc.), Claimant was to be regarded in Finland as a national of Egypt, having lost his Finnish nationality in 1997 by virtue of the fact that he had asked to be naturalized as an Egyptian citizen by Egypt.[37] The Finnish Immigration Service reaffirmed in the proceeding before the SAC that, as a result of Claimant's failure to inform the Finnish authorities of his voluntary reacquisition of Egyptian nationality in 1997, the "**information** of the Finnish Immigration Service on the matters affecting the case has been **defective**" (emphasis added).[38]

36. On 26 November 2015, the Helsinki Administrative Court confirmed the decision of the Finnish Immigration Service. Moreover, the Helsinki Administrative Court determined that because Mr Bahgat had failed to inform the Finnish authorities of his reacquisition of Egyptian nationality, the Finnish papers issued by the Finnish authorities could not create any legitimate expectations for Mr Bahgat with regard to his Finnish nationality. In particular, it held that the

> "entries in the population information system, the Finnish passport issued to Mr Bahgat and the fact that the Finnish Embassy in Egypt has treated Mr Bahgat as a Finnish national **have no legal**

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36 SAC Judgment (**Exhibit R0025**), pp. 15-16.

37 The Finnish Immigration Service found that "in Finland, Mohamed Abdel Raouf Bahgat is to be considered an Egyptian national" because "Mohamed Abdel Raouf Bahgat got back his Egyptian nationality on September 28, 1997. Obtaining a foreign nationality on the basis of an application or a similar manner caused, by virtue of the legislation on nationality that was in force until May 31, 2003, loosing the Finnish nationality". The Finnish Immigration Service concluded that "[t]herefore Mohamed Abdel Raouf Bahgat lost his Finnish nationality when he obtained the Egyptian nationality on September 28, 1997", see Finnish Immigration Service, Decision on Nationality Situation, Record no. 59/340/2013, 23 April 2013 (**Exhibit C0067**), p. 1.

38 SAC Judgment (**Exhibit R0025**), p. 8.

> **significance as such** for Mr Bahgat's nationality status and these acts **do not constitute a justifiable expectation** based on the legal order referred to in the Administrative Act Section 8 because … [The] **Immigration Service was not aware of the Egyptian nationality having been granted to Mr Bahgat before the disputed matter came up after the meeting in 1997 and the Immigration Service had not determined its effect on Mr Bahgat's nationality position**."[39] (emphasis added)

37. Importantly, in addition, the SAC Judgment did not state that the finding of the Finnish Immigration Service and the Helsinki Administrative Court that Claimant had failed to inform the Finnish authorities of his voluntary reacquisition of Egyptian nationality in 1997, and that, as a consequence, the Finnish nationality documents issued to him were defective, was erroneous or unproven. Therefore, when deciding on Claimant's Finnish nationality for purposes of its jurisdiction *ratione personae*, the Tribunal should bear in mind the decisions of the Finnish Immigration Service and the Helsinki Administrative Court, which correctly found that Claimant lost his Finnish nationality in 1997, as confirmed by the SAC Judgment.

38. Third, Professor Scheinin opines that "[t]he reason why the Supreme Administrative Court held that these decisions [i.e. the decisions of the Finnish Immigration Service and the Helsinki Administrative Court], perhaps **substantively correct** under the statutes in question, should be quashed was that it was **unfair to apply the law** to the detriment of the Claimant. This view was based on a balancing approach" (emphasis added).[40] In Professor Scheinin's assessment, in introducing the balancing approach, "one could say that the Court 'stepped out of the box' of the 1968 and 2003 Nationality Acts and moved to considerations that apply at the level of the legal order taken as a whole".[41]

39. The application of the balancing approach based on legitimate expectations was a novelty which had not been anticipated by Respondent's expert Professor Scheinin, nor by Claimant's Finnish lawyers or Finnish law experts. Moreover, it had also not been anticipated by the Finnish Immigration Service or the Helsinki Administrative Court. That the balancing approach was not anticipated by anyone is because neither the 1968 nor the 2003 Nationality Act make any mention of the need to balance in matters of Finnish nationality between private and public interests or to take into account the protection of legitimate expectations.[42]

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39 Decision of the Helsinki Administrative Court, Case no. 15/0033/5, 26 January 2015 (**Exhibit R0014**), p. 6.
40 Second Expert Opinion of Professor Scheinin, ¶ 14.
41 Second Expert Opinion of Professor Scheinin, ¶ 16.
42 Second Expert Opinion of Professor Scheinin, ¶ 16.

40. In fact, Professor Scheinin explains that the principle of the protection of legitimate expectations was for a long time completely foreign not only to Finnish law on immigration and nationality, but also to the Finnish legal system as a whole, and was imported only around the year 2000 from EU law following Finland's accession to the EU in 1996.[43] The Administrative Procedure Act of 2003, which entered into force on 1 January 2004, introduced in its Section 6 the doctrine of legitimate expectations in Finnish administrative law.[44]

41. Yet another reason why the application of the balancing approach based on the protection of legitimate expectations was not anticipated by anyone is that it goes squarely against the SAC's earlier case law as found in the cases of Mrs B and Mrs C. In the cases of both Mrs B and Mrs C, a woman had automatically lost her Finnish nationality by consenting to (Mrs B) or applying for (Mrs C) naturalization by another country in the 1970s. The determination of their nationality status, officially confirming the loss of Finnish nationality, was made in both cases only several decades later, namely in 2009 in the case of Mrs B, and in 2010 in the case of Mrs C. The SAC confirmed the correctness of the ruling of the Finnish Immigration Service and the Helsinki Administrative Court in both cases. Professor Scheinin observes that when the SAC was seized with the case of Mrs B and with the case of Mrs C, it "did not alter the outcome of Finnish nationality having been lost ipso jure in the 1970s upon the acquisition of another nationality" and did not make "any reference to legitimate expectations or a need to balance between private and public interests".[45]

42. Lastly, the SAC Judgment is all the more surprising considering the fact that it is the very first case (together with the case of Ms A, decided on the same day) in which the SAC applied the doctrine of legitimate expectations to facts which occurred prior to the entry into force of the Administrative Procedures Act, which introduced the notion of legitimate expectations into Finnish law. The retroactive application of the Administrative Procedures Act is entirely unprecedented. Prior to the SAC Judgment, the SAC had relied only once on the doctrine of legitimate expectations as enshrined in the Administrative Procedures Act, namely in a decision published in November 2006 and in respect of facts which occurred after the entry into force of the Administrative Procedures Act on 1 January 2004, thus giving rise to legitimate expectations under that Act.[46]

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43 Second Expert Opinion of Professor Scheinin, ¶ 10.
44 Second Expert Opinion of Professor Scheinin, ¶ 21.
45 Second Expert Opinion of Professor Scheinin, ¶ 12.
46 Second Expert Opinion of Professor Scheinin, ¶ 22.

43. Against all the odds, in Claimant's case, Professor Scheinin explains that the SAC decided that "[t]he benefits of the decision towards public interest (i.e. merely seeking to apply the law correctly) were limited, whereas the negative consequences for the Claimant were significant. Hence, the balance between public interest and legitimate private expectations had in the Court's view not been struck in a fair way. In such circumstances, the decision by the Immigration Service was unlawful".[47] However, the SAC Judgment failed to explain how the SAC could find that Claimant's Finnish nationality was established by reference to Claimant's legitimate expectations given that Claimant had failed to inform or deliberately did not inform the Finnish authorities of his reacquisition of Egyptian nationality and that the Helsinki Administrative Court had already concluded precisely for that reason that Claimant could not have legitimate expectations with regard to his acquisition of Finnish nationality. Therefore, the SAC Judgment's surprising, incoherent and retroactive application of a novel concept should not bind the Tribunal in its examination of Claimant's Finnish nationality for purposes of deciding on its jurisdiction *ratione personae*.

44. Fourth, it transpires from the Finnish court file that Claimant and his lawyers did not limit their arguments to those strictly pertaining to Claimant's Finnish nationality before the SAC. Rather, Claimant and his lawyers have in large part pleaded Claimant's case against Egypt which is the subject matter of this present arbitration, and upon which only the present Tribunal can decide. Upon review of the complete Finnish court file obtained by Respondent from the Registry of the SAC, Professor Scheinin confirmed that "Claimant appears to have argued his case with reference to his interests that are subject to the pending arbitration and has submitted to the Finnish courts extensive materials belonging to that process".[48]

45. In its decision on Claimant's Finnish nationality, the SAC clearly ruled in light of Claimant's case against Egypt so as to allow Claimant to pursue this arbitration, thereby substituting itself for the present Tribunal in a proceeding to which Respondent was not a party. It is not inconceivable that the SAC Judgment, which goes against positive law and the SAC's previous settled case law, was motivated by the SAC's sympathy for Claimant and the desire to allow Claimant to pursue his battle against Egypt. In light of this, it is all the more important for the Tribunal to forge its own independent opinion on Claimant's nationality for purposes of deciding on its jurisdiction rather than taking the SAC Judgment at face value.

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47 Second Expert Opinion of Professor Scheinin, ¶ 14.
48 Second Expert Opinion of Professor Scheinin, ¶ 2.

46. Fifth, in addition to Claimant's allegations against Egypt, the SAC Judgment was likely influenced by another matter decided the same day, namely that of the case of Ms A. In this case, Ms A, born in 1986 to Mrs C, who at that time was thought to be a national of Finland, was entered in the Finnish population register as a Finnish-Israeli national having been born to a Finnish mother. However, in 2010, it transpired that Ms A's mother, Mrs C, had voluntarily acquired Israeli nationality in 1979, which under the then applicable 1968 Nationality Act automatically led to the loss of Finnish nationality. Thus, Mrs C had in fact lost her Finnish nationality even before her daughter, Ms A, was born. Therefore, the Finnish Immigration Service found on 15 June 2012 that Ms A could not be a Finnish national herself, as she was not born to a Finnish mother. Moreover, at the time when Ms A's case was being heard by the Finnish courts, the possibility for Ms A to apply for Finnish nationality in her own right as the child of a former Finnish national had expired. Thus, while Mrs C, Ms A's mother, could reapply for Finnish nationality and had indeed regained Finnish nationality in 2011, no such procedure existed for Ms A. Professor Scheinin explains that

> "In these circumstances, the Supreme Administrative Court resorted to the novel construction of legitimate expectations and held that on 15 June 2012 the Finnish Immigration Service had not struck the balance correctly between private and public interests when it had on its own initiative determined that A was not a Finnish national. The Court … decided that on 15 June 2012 the Finnish Immigration Service did not have weighty enough interest to initiate a process of formal determination of A's nationality status with a negative outcome, as the fact that Finnish authorities had treated A as a Finnish national since her birth in 1986 had created a legitimate expectation that she would continue to be regarded as a Finnish national."[49]

47. Professor Scheinin notes that despite the different facts, namely that contrary to Ms A, Claimant could have reapplied for Finnish nationality under the 2003 Nationality Act (as did Mrs C, the mother of Ms A), the Court nevertheless extended the doctrine of legitimate expectations to the Claimant's case.[50] While the application of the balancing approach based on legitimate expectations may have been justified and appropriate in the case of Ms A who but for the SAC's ruling had no possibility of (re)gaining Finnish nationality, one does not see how and why the same considerations were applied to Claimant's case who could very well make an application to reacquire the Finnish nationality he lost in 1997, when he voluntarily applied to regain Egyptian nationality. This is yet a further reason, Respondent submits, as to why the

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49 Second Expert Opinion of Professor Scheinin, ¶ 10.
50 Second Expert Opinion of Professor Scheinin, ¶ 11.

Tribunal is invited to depart from the nationality findings made in the SAC Judgment and to reassess Claimant's nationality anew for purposes of deciding on its jurisdiction.

48. In sum, it follows from the above that there are sufficient reasons to disregard the nationality determination contained in the SAC Judgment by reason of its opportunistic and surprising nature which make it subject to criticism. Respondent respectfully reiterates that the Tribunal should exercise its power to make its own assessment of Claimant's nationality and find that despite the SAC Judgment Claimant has not satisfactorily established that he was a Finnish national in accordance with Finnish nationality law at the relevant times, having lost his Finnish nationality in 1997 pursuant to the 1968 Nationality Act.

3. It follows from the SAC Judgment that Claimant was not a Finnish national at the time of the alleged breaches of the 1980 and 2004 BITs by Egypt

49. In the event that the Tribunal were to accept the SAC Judgment's determination of Claimant's Finnish nationality, Respondent respectfully submits that even under the SAC Judgment's findings, Claimant did not have Finnish nationality at the relevant times, namely at the time of the alleged treaty breaches by Egypt for the reasons below.

50. The SAC Judgement determined Claimant's nationality status as Finnish as of 23 April 2013, but did not make any determination of whether Claimant had Finnish nationality between 1997 and 2013 **(a)**. In light of the SAC's earlier case law in the field of nationality and the Administrative Procedure Act which formed the basis of the SAC dictum on legitimate expectations, Claimant's legitimate expectations to his Finnish nationality must have arisen sometime between 2012 and 2013, or, at the very earliest, in 2004, when the 2003 Administrative Procedure Act entered into force **(b)**. It follows that between 1997 and 2000, when Respondent allegedly breached its obligations under the 1980 and the 2004 BITs in respect of Claimant's investment, even under the SAC Judgment, Claimant was not a Finnish national.

a. The SAC Judgment determined Claimant's nationality status as Finnish as of 23 April 2013, but did not make any determination of whether Claimant was a Finnish national between 1997 and 2013

51. According to the first sentence of the dictum of the SAC Judgment, Claimant is to be regarded as a Finnish national "at the time when the Finnish Immigration Service made its decision

83. In *Champion Trading*, dual nationals of the USA and Egypt brought claims against Egypt on their behalf and on behalf of companies in which they owned shares. The tribunal found that the claimants had no standing due to their Egyptian nationality and because the claimants had actually relied on their Egyptian nationality at the time of the entry into of the investments. The tribunal went on to deny jurisdiction:

> "The mere fact that this **investment** in Egypt by the three individual Claimants was **done** by using, for whatever reason and purpose, **exclusively their Egyptian nationality** clearly qualifies them as dual nationals within the meaning of the Convention and thereby based on Article 25(2)(a) excludes them from invoking the Convention."[95] (emphasis added)

84. Given that Claimant voluntarily obtained and relied on his Egyptian nationality in order to make and conduct his investment in the Aswan Iron Ore Project which is at issue in this arbitration, and enjoyed various benefits of his Egyptian nationality for purposes of his investment, Respondent respectfully submits that Claimant cannot avail himself now of his Finnish nationality to bring an investment claim against Egypt in relation to the Aswan Iron Ore Project.[96] Claimant has derived benefits based on the fact that he was Egyptian and it would be inequitable for him to be allowed to base claims on his Finnish nationality now. The Tribunal should therefore find that it has no jurisdiction to hear Claimant's claim.

3. The 1980 and the 2004 BITs do not allow a dual national investor such as Claimant to sue his own State in an international forum

85. As a dual national of Egypt and Finland, Claimant does not qualify as a protected investor in his dispute with Egypt under either the 1980 BIT (**a**), or the 2004 BIT (**b**), which were designed to afford certain treaty-based protections to foreign investors engaging in cross-border investment activities. In accordance with the principle of international law that a host State cannot be sued by its own nationals under an investment treaty that it signed to promote investment by foreign nationals in its territory, the 1980 and the 2004 BITs cannot be read to allow a dual national investor to sue his own State of nationality in an international forum (**c**).

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95 Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt (ICSID Case No. ARB/02/9), Decision on Jurisdiction, 21 October 2003 (**Exhibit RLA0039**), p. 17.

96 In accordance with Articles 22§2, 22§3, 25§2 and 25§3 of Egyptian Law No. 86 of 1956 relating to mines and quarries, Egyptian nationals enjoyed priority in obtaining prospecting licences and exploitation leases on the condition that their offers were equivalent to those of foreign nationals. In the present case, it was therefore likely in the interest of Claimant to regain Egyptian nationality in order to be able to compete against the offer of Ahmed Ezz, Claimant's main rival, who was Egyptian himself. See Egyptian Law No. 86 of 1956 relating to mines and quarries (**Exhibit RLA0082**).

a. Claimant is not a protected investor under the 1980 BIT for his dispute with Egypt

86. Egypt and Finland entered into a first BIT on 5 May 1980 with the stated object and purpose to afford certain treaty-based protections to **foreign** investors in respect of their cross-border investments. The Preamble of the 1980 BIT expresses this object and purpose in the following terms:

> "The Government of the Republic of Finland and the Government of the Arab Republic of Egypt, …
>
> Desiring to maintain fair and equitable treatment of investments of **nationals** and companies of **one** Contracting State in the territory of the **other** Contracting State,
>
> Have agreed as follows: …" (emphasis added)

87. The 1980 BIT is thus not intended by the Contracting Parties to afford treaty-based protections to the nationals of one Contracting Party in the territory of that same Contracting Party. Rather, it is intended to apply exclusively in favour of nationals of one Contracting Party in respect of investments made in the territory of the other Contracting Party. Article 1(2) of the 1980 BIT defines the term "national" in respect of Egypt as an "individual who is a citizen of Egypt according to Egyptian law", and in respect of Finland as an "individual who is a citizen of Finland according to Finnish law".

88. The 1980 BIT guarantees substantive protections to nationals of one Contracting Party in respect of their investments made in the territory of the other Contracting Party. Thus, for example, Article 2(1) provides that "**[e]ach** Contracting Party shall, subject to its laws and regulations, at all times ensure fair and equitable treatment to the investments of **nationals** and companies of the **other** Contracting State" (emphasis added). Article 3(1) provides that "**[n]either** Contracting State shall take any measure of expropriation … against the investment of a **national** or a company of the **other** Contracting State…" (emphasis added).

89. Article 7(1) of the 1980 BIT limits access to investor-state arbitration to cases of "dispute which may arise between a **national** or a company of **one** Contracting State and the **other** Contracting State in connection with an investment on the territory of that other Contracting State" (emphasis added). Article 7(2) provides for an ad hoc arbitration to be used to resolve such investment disputes.

90. As Egypt is the Respondent in this case, for the Tribunal to have *ratione personae* jurisdiction under the 1980 BIT, Claimant must show that he is a national of a state other than Egypt. In

other words, for Claimant to be able to enjoy the protection of the 1980 BIT in his investment dispute with Egypt, he must qualify as a "national of the other Contracting State", here Finland.

91. However, Claimant, as a dual national of Egypt and Finland, is an "individual who is a citizen of Finland according to Finnish law" in the sense of Article 1(2) of the 1980 BIT but, at the same time, he is also an "individual who is a citizen of Egypt according to Egyptian law". Claimant thus qualifies as a national of Egypt, in addition to qualifying as a national of Finland, under Article 1(2). As a national of Egypt, Claimant is not a "national of the other Contracting State" and is not entitled to the protection of the Treaty in respect of his dispute with Egypt.

b. Claimant is not a protected investor under the 2004 BIT for his dispute with Egypt

92. Similarly to the 1980 BIT, the Preamble of the 2004 BIT makes it clear that the object and purpose of the Treaty is to protect investments made by investors of one Contracting Party in the territory of the other Contracting Party:

> "The Government of the Republic of Finland and the Government of the Arab Republic of Egypt, hereinafter referred to as the "Contracting Parties",
>
> RECOGNISING the need to protect investments of the investors of **one** Contracting Party in the territory of the **other** Contracting Party on a non-discriminatory basis;
>
> DESIRING to promote greater economic co-operation between them, with respect to investments by nationals and companies of **one** Contracting Party in the territory of the **other** Contracting Party; …
>
> have agreed as follows: …" (emphasis added)

93. The Treaty thus does not protect investments made by investors of one Contracting Party in the territory of that same Contracting Party. Article 1(3) of the 2004 BIT defines in respect of each Contracting Party the natural person "investors" who may benefit from the protection of the Treaty in respect of their investments in the territory of the other Contracting Party as follows:

> 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 …" (emphasis added)

94. Article 1(3) of the 2004 BIT therefore establishes that the BIT does not apply to measures adopted or maintained by Egypt relating to its own nationals. This is underscored by the ensuing obligations. Under the 2004 BIT, the substantive protections are all granted by one Contracting Party to the investors of the other Contracting Party. Thus, for example, Article 2(1) of the 2004 BIT provides that "**[e]ach** Contracting Party shall promote in its territory investments by investors of the **other** Contracting Party…" (emphasis added).

95. Further, Article 3(1) of the 2004 BIT provides that "**[e]ach** Contracting Party shall accord to investors of the **other** Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to its own investors and their investments…" (emphasis added). Article 5 of the 2004 BIT provides that "[i]nvestments by investors of **a** Contracting Party in the territory of the **other** Contracting Party shall not be expropriated…".

96. It is thus perfectly clear that under the 2004 BIT, Egypt owes obligations to nationals (investors) of Finland, but not to nationals (investors) of Egypt, and, conversely, that Finland owes obligations to Egyptian nationals (investors), but not to its own nationals (investors).

97. Importantly, Article 9 of the 2004 BIT restricts access to investment arbitration to "dispute arising directly from an investment between **one** Contracting Party and an investor of the **other** Contracting Party" (emphasis added). Recourse to dispute settlement is thus limited to investors of one Contracting Party in respect of their investments in the other Party. It is not available to investors of one Contracting Party against that same Contracting Party in respect of investments made in the territory of that same Contracting Party.

98. The Contracting Party to the present dispute is Egypt. Therefore, in order for the Tribunal to have jurisdiction over Claimant's claim, Claimant must qualify as an "investor of the other Contracting Party", i.e. as an investor of Finland, under the criteria laid down in Article 1(3)(a) of the 2004 BIT. However, in his dispute with Egypt, Claimant is not an "investor of the other Contracting Party" because he is a national of Egypt and thus an investor of Egypt. He consequently cannot enjoy the protection of the Treaty which is reserved to investors of the other Contracting Party, but not to the State's own investors, i.e. its own nationals.

99. It follows that pursuant to the object and purpose and the plain language of both the 1980 and the 2004 BITs, Claimant is not an "investor of the other Contracting Party" and is not entitled to maintain claims against Egypt.

c. Under international law, a host State cannot be sued by its own nationals under an investment treaty that it signed with another State to promote investments by foreign nationals in its territory

100. As noted above, it is a fundamental tenet of the modern investment protection regime that investment treaties provide protection to foreign investors and that host States cannot be sued under such treaties in international fora by their own nationals.[97] There is an implied principle of international law that a host State cannot be sued by its own nationals under an investment treaty that it signed with another State to promote investment by foreign nationals in its territory. This principle also finds expression in the 1980 and 2004 BITs. Although these Treaties do not contain any express provisions explicitly limiting or excluding recourse to arbitration by investors against their own State of nationality, they cannot be read to mean that the Contracting Parties would have agreed in these Treaties to allow their own nationals to bring investment claims in an international forum against them.

101. In the 1980 BIT, given that at the time of its signature, and for the following 20 years, Finnish law prohibited dual nationality pursuant to the 1968 Nationality Act, there was no need for the Contracting Parties to add any express specification to exclude claims by their own nationals. It was clear that under the applicable domestic legal framework, an investor who was a "national" of Finland as defined in the 1980 BIT could not be at the same time a "national" of Egypt (and vice versa) and could therefore not invoke the Treaty to bring a claim against one of the Contracting Parties of which the investor was a national.

102. In light of the 2003 Nationality Act which introduced dual nationality in Finnish law, in the case of the 2004 BIT, the Contracting Parties could have included a specific provision to deal with claims by dual national investors against their own States. They did not do so. Instead, they agreed in Article 9 of the 2004 BIT to grant investors the option to have recourse to ICSID arbitration.

103. Respondent submits that the inclusion of ICSID in the 2004 BIT as a dispute resolution method confirms the Contracting Parties' continued intention to exclude the possibility of being sued by their own nationals in an international forum. Article 25 of the ICSID Convention delimits the scope of arbitral jurisdiction to investment disputes between a Contracting State and a national of another Contracting State. However, possession of the nationality of the host State is a bar to becoming a party to an international investment

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97 See above ¶¶ 11-14.

proceeding against that State, even in arbitrations which are not conducted pursuant to the ICSID Convention.

104. The limitations imposed by dual nationality cannot be, and are not, exclusive to the cases that are filed within the ICSID framework. Even in proceedings conducted under the UNCITRAL Arbitration Rules, which do not contain the same jurisdictional rule as Article 25 of the ICSID Convention, it must be the case that protection cannot be afforded to investors that have the nationality of the Contracting State that is a party to the dispute. Any other position would go contrary to the very basic understanding on which the modern investment protection regime was built.

105. Indeed, were it otherwise, the scope of consent given by the Contracting States under the 2004 BIT would differ on the basis of the dispute resolution method chosen by the investor. This cannot have been the understanding and intention of the Contracting Parties and would also present an undue discrimination and asymmetry between ICISID and UNCITRAL proceedings. One may expect that the jurisdictional aspects and substantive outcome of a BIT dispute would be the same irrespective of the chosen forum to the extent that the same BIT governs the dispute.

106. Comparing arbitration proceedings under the ICSID and under the UNCITRAL Rules, Ms Levine noted in her informative article that "typically investor-State arbitrations will in reality be similar in most respects under both sets of rules".[98] Ms Levine concluded that "[w]hile a party might consider that opting for arbitration under the UNCITRAL Rules could avoid any potential jurisdictional hurdles encountered by the 'outer limits' of jurisdiction set by Article 25 of the ICSID Convention, even under the UNCITRAL Rules, there is a chance that tribunals could impose jurisdictional limitations based on the 'inherent' meaning of terms in a BIT".[99]

107. In *Romak v Uzbekistan*, the UNCITRAL tribunal was concerned with the definition of 'investment' under the Swiss-Uzbek BIT as the basis for its jurisdiction.[100] In determining the contours of the term 'investment' under the applicable BIT, the *Romak* tribunal rejected an argument by the claimant that the definition of the term 'investment' may vary depending on the investor's choice between UNCITRAL or ICSID arbitration, and the claimant's suggestion

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98 J. Levine, Navigating the Parallel Universe of Investor-State arbitrations under the UNCITRAL Rules, TDM, Vol. 14, issue 1, 2017 (**Exhibit RLA0040**), p. 377.

99 J. Levine, Navigating the Parallel Universe of Investor-State arbitrations under the UNCITRAL Rules, TDM, Vol. 14, issue 1, 2017 (**Exhibit RLA0040**), p. 399.

100 Romak S.A. (Switzerland) v. The Republic of Uzbekistan (UNCITRAL), PCA Case No. AA280, Award, 26 November 2009 (**Exhibit RLA0041**), ¶ 173.

that the definition of 'investment' in UNCITRAL proceedings is wider than in ICSID arbitration.[101] It held that:

> "The Arbitral Tribunal does not share this view, which could lead to '*unreasonable*' results. This view would imply that the substantive protection offered by the BIT would be narrowed or widened, as the case may be, merely by virtue of a choice between the various dispute resolution mechanisms sponsored by the Treaty. This would be both absurd and unreasonable. …"[102]

108. The *Romak* tribunal went on to decline jurisdiction over the investor's claim.[103] Respondent respectfully submits that on the basis of the *Romak* decision, the Tribunal in this case should decide to apply the same principles as would be applicable in ICSID arbitration and find that the 1980 and 2004 BITs do not allow for any claim by a dual national against a State of his nationality. Respondent further submits that, even in the absence of express treaty language to that effect, the Tribunal should find that the 'inherent' meaning of the terms of the 1980 and 2004 BITs is that the possession of the nationality of the host State is an absolute bar to becoming a party to arbitration proceedings against that State.

4. Claimant's effective nationality is Egyptian rather than Finnish and cannot therefore avail himself of his Finnish nationality to bring a claim against Egypt

109. Claimant's effective nationality is Egyptian as his links to Egypt are dominant and effective; at the same time, Claimant lacks any effective links to Finland (**a**). The effective nationality principle provides that a tribunal should decline jurisdiction where the effective nationality of the dual national claimant is that of the respondent State (**b**).

a. Claimant's effective nationality is Egyptian because his links to Egypt are dominant and effective; at the same time, Claimant lacks any effective links to Finland

110. According to the rule of effective nationality, a nationality conferred by a State cannot produce effects unless it is effective and corresponds to a genuine link between the State and the individual. Tribunals have identified the relevant criteria to determine whether a dual national

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101 Romak S.A. (Switzerland) v. The Republic of Uzbekistan (UNCITRAL), PCA Case No. AA280, Award, 26 November 2009 (**Exhibit RLA0041**), ¶ 193. The tribunal held that legal doctrine and decisions of other arbitral tribunals may be of assistance in interpreting the term "investment" in the BIT, even if as an UNCITRAL tribunal it is not faced with the same preoccupations as many other arbitral tribunals acting within the framework of the ICSID Convention, see ¶¶ 190, 192.

102 Romak S.A. (Switzerland) v. The Republic of Uzbekistan (UNCITRAL), PCA Case No. AA280, Award, 26 November 2009 (**Exhibit RLA0041**), ¶ 194.

103 Romak S.A. (Switzerland) v. The Republic of Uzbekistan (UNCITRAL), PCA Case No. AA280, Award, 26 November 2009 (**Exhibit RLA0041**), ¶¶ 242-243.

claimant has any genuine links to the State whose nationality is invoked such as to give rise to an effective nationality. The effective nationality test requires a detailed factual analysis by the tribunal to determine which nationality was the dominant one utilized by the investor at the relevant times.

111. The ICJ in the *Nottebohm* case held that in order to ascertain a claimant's effective nationality "[d]ifferent factors are taken into consideration and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interest, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children".[104] It found that a genuine connection with a State conferring nationality may be evidenced by the fact that the individual is "closely attached by his tradition, his establishment, his interests, his activities, his family ties" to that State.[105]

112. In the *Malek* case, the Iran-US Claims Tribunal echoed the ICJ's observations in *Nottebohm* and added that "to establish what is the dominant and effective nationality at the date the claim arose, it is necessary to scrutinize the events of the Claimant's life preceding this date. Indeed, the entire life of the Claimant, from birth, and all factors which, during this span of time, evidence the reality and sincerity of the choice of national allegiance he claims to have been made, are relevant."[106]

113. In line with the above, investment tribunals have considered factors such as the investor's place of birth,[107] the investor's place of residence,[108] as well as the nationality and residence of the investor's family members[109] as guidance in ascertaining the effective nationality of a dual national claimant.

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104 Nottebohm Case (Liechtenstein v. Guatemala), Second Phase, Judgment of 6 April 1955, ICJ Reports (**Exhibit RLA0042**), p. 22.

105 Nottebohm Case (Liechtenstein v. Guatemala), Second Phase, Judgment of 6 April 1955, ICJ Reports (**Exhibit RLA0042**), p. 24.

106 Reza Said Malek v. Government of the Islamic Republic of Iran, Interlocutory Award, 23 June 1988, 19 Iran-US CTR 48 (**Exhibit RLA0073**), p. 51.

107 Victor Pey Casado et al. v. Republic of Chile (ICSID Case No. ARB/98/2), Award, 8 May 2008 (**Exhibit RLA0014**), ¶ 251; Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania (ICSID Case No. ARB/05/20), Decision on Jurisdiction and Admissibility, 24 September 2008 (**Exhibit RLA0030**), ¶ 1; Saba Fakes v. Republic of Turkey (ICSID Case No. ARB/07/20), Award, 14 July 2010 (**Exhibit RLA0043**), ¶ 80.

108 Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania (ICSID Case No. ARB/05/20), Decision on Jurisdiction and Admissibility, 24 September 2008 (**Exhibit RLA0030**), ¶ 74, Saba Fakes v. Republic of Turkey (ICSID Case No. ARB/07/20), Award, 14 July 2010 (**Exhibit RLA0043**), ¶¶ 78-80.

109 Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania (ICSID Case No. ARB/05/20), Decision on Jurisdiction and Admissibility, 24 September 2008 (**Exhibit**

114. In light of the above criteria, Claimant only has tenuous links with Finland. In October 1967, Claimant moved to Finland and obtained Finnish nationality on 12 February 1971.[110] However, Claimant lost his Finnish nationality in 1997, when he reacquired Egyptian nationality, even if the SAC Judgment has now decided that Claimant must be considered a Finnish national as of 23 April 2013, the date of the nationality determination made by the Finnish Immigration Service.[111]

115. In 1976, Claimant returned to Egypt and from then on regularly travelled to Egypt for work.[112] In 1980, having resided in Finland for 13 years, Claimant permanently moved back to Egypt.[113] Claimant claims to have returned to Finland on 23 June 2005, and to have resided in Finland from summer 2005 onwards.[114] However, Claimant has failed to provide his Finnish address to the Tribunal or present any evidence that he is effectively residing in Finland.

116. In fact, Claimant's claim of his current residence in Finland is squarely contradicted by his address which he communicated to the Tribunal in accordance with Article 3(1)(b) of the UNCITRAL Arbitration Rules in his Notice of Arbitration:[115]

> Fourth Floor
> Thavies Inn House
> 3-4 Holborn Circus
> London ECIN 2HA

117. Claimant has not applied to the Tribunal for the modification of his address, nor has he given a secondary contact address in Finland. Moreover, Claimant currently serves as a Director of a limited liability company registered in England & Wales, LMS TELECOM MISR LIMITED, having been appointed to this office on 1 May 2016.[116] The registered office of LMS TELECOM MISR LIMITED is located at 10a, Craven Street, London, England, WC2N 5PE.[117] Interestingly, Claimant is listed in the Companies House extract of LMS TELECOM MISR LIMITED with his "Country of residence" marked as "England", rather than Finland.[118]

RLA0030), ¶ 104; Saba Fakes v. Republic of Turkey (ICSID Case No. ARB/07/20), Award, 14 July 2010 (**Exhibit RLA0043**), ¶¶ 78-80

110 Bahgat Second Witness Statement, ¶¶ 3, 5.

111 See above ¶¶ 51-54.

112 Respondent's Request for Bifurcation, 26 January 2013, ¶ 20.

113 Claimant's Request for Arbitration, 3 November 2011, ¶ 9.

114 Bahgat Second Witness Statement, ¶ 6.

115 Claimant's Notice of Arbitration, 3 November 2011, ¶ 8.

116 See Companies House Extract for LMS TELECOM MISR LIMITED, Appointment of company director (**Exhibit R0018**).

117 See Companies House Extract for LMS TELECOM MISR LIMITED, Registered office address (**Exhibit R0029**).

118 See Companies House Extract for LMS TELECOM MISR LIMITED, Appointment of company director (**Exhibit R0018**).

It thus follows that Claimant, contrary to his allegation, is not residing in Finland, but in London, UK.[119]

118. In this regard, the extract from the Finnish Population Information System produced by Claimant in this arbitration cannot constitute valid proof of Claimant's actual Finnish residency, given that the extract shows Claimant as a Finnish resident residing in Finland over the 1983-2003 period, thus contradicting Claimant's claims that he was an Egyptian resident at that very same time.[120] In addition, for the sake of completeness, Respondent notes that Claimant's daughters were born in Finland. However, while this may be true, the fact remains that Claimant's daughters moved with him to Egypt in the 1980s, where they have been living ever since. It is therefore undeniable that Claimant does not have any close family ties in Finland to date.

119. It follows that Claimant does not have any meaningful links with Finland, let alone "dominant" or "effective" links. His relatively ephemeral residency in Finland between 1967 and 1980 is of little consequence, considering the fact that it does not coincide with the time of Claimant's investment in Egypt, the alleged Treaty breaches committed by Egypt, or the time of the filing of Claimant's Notice of Arbitration. Claimant's Finnish nationality is, in the words of the *Pey Casado* tribunal, "totally artificial or totally lacking in effectiveness.".[121]

120. Claimants was never "closely attached by his tradition, his establishment, his interests, his activities, his family ties"[122] to Finland, and certainly isn't so attached now. To use Professor Orrego Vicuna's words, Claimant's Finnish nationality does not play "any meaningful role in [Claimant's] life",[123] other than to bring the present claim against Egypt. Claimant's assertion of his Finnish nationality is a purely opportunistic maneuver to benefit from the protection granted under the 1980 and 2004 BITs to Finnish investors investing in Egypt.

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119 For the sake of completeness, Respondent notes that the results of a search undertaken in the online Finnish companies register show that Claimant was a member of the board of directors and served as the managing director of a Finnish company Oy Finnpesticides Ltd between 2006 and 2007, see Finnish companies register extract for Oy Finnpesticides Ltd, Assignments and positions in the company (**Exhibit R0019**). Moreover, Claimant and his daughters are shareholders in another Finnish Company, Oy Delta Trading Ltd, which was incorporated in 2008. Claimant is registered as the chairman of the board. see Finnish companies register extract for Oy Delta Trading Ltd, Assignments and positions in the company (**Exhibit R020**); Finnish companies register extract for Oy Delta Trading Ltd, Register Information (**Exhibit R021**).

120 Copy of an Extract from the population information system in Finland dated 22 September 2009 (**Exhibit C0014**).

121 Victor Pey Casado et al. v. Republic of Chile (ICSID Case No. ARB/98/2), Award, 8 May 2008 (**Exhibit RLA0014**), ¶ 241.

122 Nottebohm Case (Liechtenstein v. Guatemala), Second Phase, Judgment of 6 April 1955, ICJ Reports (**Exhibit RLA0042**), p. 23.

123 Partial Dissenting Opinion of Professor Orrego Vicuna, Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt (ICSID Case No. ARB/05/15), Decision on Jurisdiction, 11 April 2007 (**Exhibit RLA0031**), pp. 65-66.

121. In contrast, Claimant is "closely attached by his tradition, his establishment, his interests, his activities, his family ties" to Egypt,[124] and has generally "stronger factual ties" with Egypt.[125]

122. As stated above, Claimant was born to Egyptian parents in Egypt on 1 May 1940.[126] Claimant lived in Egypt until October 1967 when he moved to Finland.[127] In 1976, Claimant returned to Egypt and from then on regularly travelled to Egypt for work, selling timber and timber products in Egypt. [128] In 1980, Claimant opened up a local subsidiary in Egypt and permanently moved back to Egypt with his family the same year.[129] Claimant lived and resided in Egypt from 1980 until 2005. [130] Thus, Claimant has lived and resided in Egypt for over 50 years in total.

123. As also stated above, Claimant is an Egyptian national by birth.[131] Claimant held Egyptian nationality from 1 May 1940 until 6 November 1980 (i.e. for 40 years) when he officially renounced his Egyptian nationality.[132] However, some 17 years later, Claimant applied to regain his Egyptian nationality, which he did, in September 1997, and has held Egyptian nationality ever since.[133]

124. In addition, Claimant's family ties are closely linked to Egypt. Claimant is married to an Egyptian woman, whose brother, Claimant's brother-in-law, Dr. Mohamed Shimi, was Claimant's business partner and played an important role in the making of Claimant's investment in the Aswan Iron Ore Project.[134] Claimant's two daughters, who were born in Finland, are Egyptian-Finnish dual nationals, Claimant having applied to obtain Egyptian nationality for his daughters less than 2 months after reacquiring Egyptian nationality in 1997 himself.[135] Claimant's daughters grew up in Egypt and live and reside in Egypt.[136] Claimant's eldest daughter, Soraya Bahgat, is a HR and Administrative Executive Director at Qsoft

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124 Nottebohm Case (Liechtenstein v. Guatemala), Second Phase, Judgment of 6 April 1955, ICJ Reports (**Exhibit RLA0042**), p. 23.
125 Iran-United States Claims Tribunal, Case No. A/18, Decision of 6 April 1984, 5 Iran-US CTR 251 (**Exhibit RLA0074**), p. 194.
126 Respondent's Request for Bifurcation, 26 January 2013, ¶ 9.
127 Bahgat Second Witness Statement, ¶ 3.
128 Respondent's Request for Bifurcation, 23 January 2013, ¶ 20; Bahgat Second Witness Statement, ¶¶ 9-10.
129 Claimant's Request for Arbitration, 3 November 2011, ¶ 9; Bahgat Second Witness Statement, ¶ 12.
130 Bahgat Second Witness Statement, ¶ 6.
131 Respondent's Request for Bifurcation, 26 January 2013, ¶ 9.
132 Bahgat Second Witness Statement, ¶ 16.
133 Claimant held a valid Egyptian Passport until at least 2011, see Egyptian passport with a validity period between 13 October 2004 and 12 October 2011 (**Exhibit R0008**).
134 Claimant's Notice of Dispute, 8 July 2011, pp. 6-7; Newspaper article in "Akhbar Al Yom", 17 September 2011 with English translation (**Exhibit C0001**).
135 Respondent's Request for Bifurcation, 23 January 2013, ¶ 23.
136 Letter from PENA to the Manager of the German School in Cairo dated 10 November 1997 (**Exhibit R0010**).

Holding in Cairo, one of the leading media companies in Egypt and the Middle East.[137] Her Wikipedia entry describes her as a "Finnish-Egyptian career woman, social entrepreneur and women's rights advocate active in Egypt" who founded in 2012 the "Tahrir Bodyguard, a movement comprising uniformed volunteers to protect women from the mob sexual assaults in Tahrir Square".[138] Claimant's younger daughter, Amina Bahgat, is a Marketing Planning Coordinator at Orascom Telecom in Cairo.[139]

125. Importantly, and as discussed in more detail above, Claimant relied on his Egyptian nationality to make and operate his investment in the Aswan Iron Ore Project which is currently in issue in the proceeding pending before this Tribunal.[140] Claimant also relied on his Egyptian nationality to accompany President Mubarak and other high State officials on internationals trips and visit to promote his investment.[141] Claimant appeared in the Middle East Economic Digest and in other business magazines as an Egyptian business man.[142]

126. In the *Siag* case, Professor Orrego Vicuna noted Mr Siag's extensive connections with Egypt and his apparent lack of connections with Italy on whose nationality Mr Siag attempted to rely in order to bring his claim. On the facts of the case, Professor Orrego Vicuna found that:

> "I believe that the whole question of having acquired Lebanese nationality is in essence artificial as far as the investment is concerned. The investment was made by an Egyptian citizen, a fact which is not disputed by the parties, who has effectively kept all his links with that country, who wishes to remain Egyptian, who then alleges to have become Lebanese and to have lost his Egyptian nationality, but who does not claim under the existing BIT between Egypt and Lebanon, but under a BIT with Italy, a country with which he has at best remote connections. This is not what international law or the ICSID Convention could have possibly intended. Neither is it what the expression of consent of Egypt could have possibly meant …"[143]

127. Just like Mr Siag, Claimant had and has extensive connections with Egypt, and, at the same time, he had and has far fewer and far less meaningful connections with Finland. It is thus clear

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137 Soraya Bahgat, LinkedIn (**Exhibit R0022**).
138 Soraya Bahgat, Wikipedia (**Exhibit R0023**).
139 Amina Bahgat, LinkedIn (**Exhibit R0030**).
140 See above ¶¶ 78-80.
141 See above ¶ 81.
142 Aswan project marks mining milestone, Middle East Economic Digest, 9 October 1998 (**Exhibit C0050**).
143 Partial Dissenting Opinion of Professor Orrego Vicuna, Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt (ICSID Case No. ARB/05/15), Decision on Jurisdiction, 11 April 2007 (**Exhibit RLA0031**), pp. 68-69. See also F. Orrego Vicuna, Arbitrating Investment Disputes, 2008 (**Exhibit RLA0085**), p. 14: "the claimant was a national of the defendant state at the time the investment was made, continued to benefit from that nationality and the later expression of consent to arbitration by such claimant could not abrogate the fact that he was a national of that State at the time the latter expressed its own consent in the treaty".

that in light of the criteria laid down by international tribunals to assess an investor's effective nationality, Claimant's Egyptian nationality is effective and corresponds to a genuine and dominant link that has always existed and continues to exist between Claimant and Egypt. In contrast, Claimant's Finnish nationality is no more than a nationality of convenience.

b. The effective nationality principle provides that a tribunal should decline jurisdiction where the effective nationality of the dual national claimant is that of the respondent State

128. The effective nationality principle has its roots in the case law of the ICJ and the Iran-US Claims Tribunal. It finds application as a general principle of international law, even in the absence of specific treaty language providing for it, where a claim is brought by a dual national investor against a State of which they are a national and can be invoked to decline jurisdiction where the effective nationality of the dual national investor is that of the respondent State.

129. In the infamous *Nottebohm* case, the ICJ denied Liechtenstein's right to exercise diplomatic protection over Mr Nottebohm because of a lack of a real and effective connection, that is, a genuine link between Mr Nottebohm and his country of nationality, Liechstenstein. The Nottebohm dictum, which is widely considered as constituting "a natural reflection of a fundamental concept which has long been inherent in the materials concerning nationality on the international plane",[144] confirmed that international arbitrators must give "their preference to the **real and effective nationality**, which accorded with the facts that based on **stronger factual ties** between the **person** concerned and one of the **States whose nationality is involved**".[145] (emphasis added)

130. The Iran-US Claims Tribunal in *Case No. A/18* had to interpret the Algiers Declaration to decide whether to accept jurisdiction *ratione personae* over claims brought by dual Iranian-US nationals in the absence of specific treaty language dealing with the status of dual nationals.[146] The Claims Tribunal endorsed the ICJ's approach in the *Nottebohm* case and held that "thus, the relevant rule of international law which the Tribunal may take into account … is the rule that flows from the dictum, in Nottebohm, the rule of real and effective nationality, and the search for 'stronger factual ties between the person concerned and one of the States whose nationality

144 I. Brownlie, Principles of Public International Law, OUP, 2003 (**Exhibit RLA0059**), p. 396.

145 Nottebohm Case (Liechtenstein v. Guatemala), Second Phase, Judgment of 6 April 1955, ICJ Reports (**Exhibit RLA0045**), p. 22.

146 Algiers Accords, Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981 (**Exhibit RLA0044**), Article VII: "For the purpose of this Agreement: 1. A 'national' of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States".

is involved'. In view of the **pervasive effect of this rule** since the Nottebohm decision, the Tribunal concludes that the **references to 'national' and 'nationals' in the Algiers Declaration must be considered as consistent with that rule unless an exception is clearly stated**."[147] (emphasis added)

131. Just like the Algiers Declaration, most investment treaties, including the 1980 and 2004 BITs, are silent about the status of dual national claimants. It is generally accepted that, "in the absence of a specific treaty provision dealing with dual nationals, a tribunal may apply international law to fill any perceived lacunae, also permitting the application of the effective nationality test".[148]

132. Dolzer and Steven's survey of BITs confirms that, by and large, BITs fail to address questions of dual nationality. The authors conclude that therefore general principles of international law would apply, according to which the effective nationality of the individual would govern:

> "Most BITs fail to address two potential problem areas concerning nationality. The first concerns the determination of the rules applicable to the situation where a national of one Contracting Party also holds the nationality of the other Contracting Party. **In the absence of treaty regulation, general principles of international law would apply, according to which the 'effective' nationality of the individual would govern**". (emphasis added)[149]

133. There is a growing number of scholars and commentators who concur that the effective nationality requirement, as derived from international law, has an important role to play in assessing jurisdiction based on a dual-national investor's claimed nationality, irrespective of the BIT's wording. Thus, Richard Happ notes that the applicability of the effective nationality test "seems … to have been accepted with regard to investment disputes".[150] Professor Douglas argues that dual national investors should be allowed to invoke only their effective or dominant nationality, i.e. the nationality of the State with which they maintain stronger ties and personal

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147 Iran-United States Claims Tribunal, Case No. A/18, Decision of 6 April 1984, 5 Iran-US CTR 251 (**Exhibit RLA0074**), p. 194. Similarly, in the Malek Case, the Iran-US Claims Tribunal accepted the effective nationality principle, see Reza Said Malek v. Government of the Islamic Republic of Iran, Interlocutory Award, 23 June 1988, 19 Iran-US CTR 48 (**Exhibit RLA0073**).

148 CH. Dugan, S. Wallace, N. Rubins, B. Sabahi, Investor-State Arbitration, OUP 2008 (**Exhibit RLA0060**), pp. 303-304.

149 R. Dolzer, M. Stevens, Bilaterial Investment Treaties, Martinus Nijhoff Publishers, 1995 (**Exhibit RLA0061**), p. 34.

150 R. Happ, The foreign nationality requirement and the exhaustion of local remedies in recent ICSID jurisprudence, in The International Convention for the Settlement of Investment Disputes: Taking Stock after 40 years, Nomos, 2007 (**Exhibit RLA0062**), p. 106.

links, for purposes of bringing investment claims.[151] Professor Schreuer opines that "[s]ituations where nationality provisions of national law may be disregarded include cases of ineffective nationality lacking a genuine link between the State and the individual".[152]

134. According to Norah Gallagher, nationality and the nationality link "has to be something more than mere convenience for individuals. This is very clear from the decision in Nottebohm and the more recent award in Soufraki. It must be dominant and it must be effective if dual nationality is involved. The connecting factor retains its significance in public international law as confirmed in the report of the International Law Commission, but the distinction remains valid to avoid abuse of process both by individuals and by States".[153] Anthony Sinclair adds that "allowing dual nationals without effective and dominant link to rely on nationality of convenience would open the doors to 'nationality hunting'. Shopping for treaty protection is indeed a recognized phenomenon".[154]

135. While no arbitral tribunal has to date applied the effective nationality principle to decline jurisdiction, several investment tribunals have expressly recognized the possible application of this principle in specific circumstances.[155] For example, the *Saba Fakes* tribunal declined to apply the effective nationality principle under Article 25 of the ICSID Convention but noted that:

> "[t]his is **not to say that the effective nationality test never has any bearing in the context of ICSID arbitration**. One might envisage several instances when its application could be justified in

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151 Z. Douglas, The International Law of Investment Claims, CUP (**Exhibit RLA0034**), pp. 321-322. See also A.C. Sinclair, Nationality of individual investors in ICSID arbitration, Int. ALR 2004, 7(6) (**Exhibit RLA0046**), p. 194: "In entering into investment treaties states generally act upon a desire to create favourable conditions for greater investment flows between the Contracting States in the mutual hope that this will increase their prosperity and the prosperity of their nationals. These goals suggest that **as between an investor and the State under whose treaty of protection it seeks to gain protection there is a need for a bond of more substance than mere nationality on paper**" (emphasis added).

152 Ch. Schreuer, The ICSID Convention, A Commentary, CUP, 2001 (**Exhibit RLA0045**), p. 267.

153 N. Gallagher, The Requirement for Substantive Nationality, in Investment Treaty Law – Current Issues II, BIICL 2007 (**Exhibit RLA0047**), p. 38.

154 A.C. Sinclair, Nationality of individual investors in ICSID arbitration, Int. ALR 2004, 7(6) (**Exhibit RLA0046**), p. 194. See also D. Krishan, Nationality of Physical Persons, in Investment Treaty Law Current Issues II, Federico Ortino, Lahra Liberti, Audley Sheppard and Hugo Warner (eds.), British Institute of International and Comparative Law 2007 (**Exhibit RLA0077**), p. 66: "…the effective link, or the effective nationality theory should have application only in extremely particular circumstances, and it should only apply in multiple nationality cases where the effective link is *with* the defendant State. Its operation *against* the Claimant should only apply when the Respondent State is one if the multiple nations involved".

155 Respondent notes that in *Siag*, Professor Reisman acted as claimants' expert on nationality. In that capacity, Professor Reisman opined that questions of effectiveness of nationality did not arise in that case because claimants were not dual-nationals by operation of the applicable nationality laws. It follows that in cases where claimants are dual nationals by operation of the applicable nationality laws, such as the present case, the effectiveness of the nationality relied on by the claimants must be investigated by the tribunal. See Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt (ICSID Case No. ARB/05/15), Decision on Jurisdiction, 11 April 2007 (**Exhibit RLA0031**), ¶ 147.

> light of the particular circumstances of a given case. Broches observed that 'there was a general recognition that in the course of ruling on their competence Commissions and Tribunals might have to decide whether a nationality of convenience, or a nationality acquired involuntarily by an investor could or should be disregarded.' Thus, one might argue that a **nationality of convenience**, acquired "in exceptional circumstances of speed and accommodation", for the purposes of bringing a claim before the Centre **should not be considered to satisfy the nationality requirements of a BIT**…."[156] (emphasis added)

136. The *Pey Casado* tribunal also opined that where a dual national possesses the host State's nationality but that nationality is "totally artificial or totally ineffective", a question of whether the tribunal should decline jurisdiction could arise.[157] In *Olguin v Paraguay*, the tribunal accepted jurisdiction after having confirmed for itself that the claimant's Peruvian nationality on which he relied was actual and effective.[158]

137. The tribunal in *Siag* acknowledged that an arbitral tribunal could disregard the nationality of the investor for purposes of deciding on its jurisdiction where such nationality is ineffective:

> "situations where a nationality that is valid under domestic law may be disregarded as a matter of international law are situations of **ineffective nationality lacking a genuine link between the State and the individual**, involuntary acquisition of nationality or withdrawal of nationality contrary to international law".[159] (emphasis added)

138. In his Partial Dissenting Opinion in the *Siag* case, Professor Orrego Vicuna observed that one of the principles of international law governing the matter of jurisdiction in light of nationality is that of effectiveness, and observed that the application of the effective nationality principle is also necessary for policy reasons, namely the containing of abuse:

> "… the principles of international law governing this matter come into play instantly. **Cardinal among such principles is that of effectiveness**. Ever since the Nottebohm case, this has been the accepted premise in international law and the recent work on the diplomatic protection of persons and property of both the International Law Commission and the International Law

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156 Saba Fakes v. Republic of Turkey (ICSID Case No. ARB/07/20), Award, 14 July 2010 (**Exhibit RLA0043**), ¶¶ 77-78.

157 Victor Pey Casado et al. v. Republic of Chile (ICSID Case No. ARB/98/2), Award, 8 May 2008 (**Exhibit RLA0014**), ¶ 241.

158 Eudoro Armando Olguín v. Republic of Paraguay (ICSID Case No. ARB/98/5), Award, 26 July 2001 (**Exhibit RLA0048**), ¶ 61.

159 Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt (ICSID Case No. ARB/05/15), Decision on Jurisdiction, 11 April 2007 (**Exhibit RLA0031**), ¶ 195.

> Association so confirms. … True enough, **dual nationality is the most common situation in respect of which effectiveness applies**. … Indeed, much concern has been expressed in contemporary international law about the use of flags of convenience, whether in connection with maritime transportation, fisheries or any other matter. In the instant case, **the principle of effectiveness prevents that the use of a nationality which is more convenient to Waguih might prevail over the real and effective nationality**". (emphasis added)[160]

139. In light of the above, Respondent respectfully submits that the Tribunal should pronounce itself to the effect that the effective nationality principle has its place in modern investment treaty arbitration and applies to the 1980 and 2004 BITs, even in the absence of specific treaty language to that effect. Respondent further submits that on the basis of the clear facts of the case, the Tribunal should find that Claimant's effective and dominant nationality is his Egyptian nationality by reason of his dominant and effective links to Egypt, whereas Claimant's Finnish nationality is merely a nationality of convenience given his scarce links to Finland. Applying the effective nationality principle, the Tribunal should conclude that it has no jurisdiction *ratione personae* to hear Claimant's claim under the 1980 and 2004 BITs, because Claimant's effective nationality is that of the Respondent State, here Egypt.

5. The Tribunal should decline jurisdiction to discourage passport shopping and to safeguard the sustainability of the modern investment protection regime

140. Respondent respectfully submits that the Tribunal's decision on its jurisdiction *ratione personae* will have significant ramifications well beyond the confines of the present case. The Tribunal is tasked to decide the parties' dispute, and, in that decision, to draw the boundaries of access to investor-state arbitration for natural person investors at a time when abusive treaty shopping practices by legal person investors have considerably weakened the reputation and general acceptance of the system. The Tribunal's award will be particularly closely watched and commented by the international arbitration community as regards the direction it sets for investment arbitration, and will fuel the debate on the issue of whether an investor should be

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160 Partial Dissenting Opinion of Professor Orrego Vicuna, Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt (ICSID Case No. ARB/05/15), Decision on Jurisdiction, 11 April 2007 (**Exhibit RLA0031**), pp. 62-63, 68.

allowed to invoke his "State B nationality to sue State A under the BIT between both countries, even though he is also a national of State A".[161]

141. The Tribunal's award will be all the more closely watched as it will be the first award to be rendered in the aftermath of the *Garcia v Venezuela* decision which Counsel for Claimant had described as "unusual".[162] To recall, in the *Garcia* case, two Spanish-Venezuelan nationals brought a claim against Venezuela on the basis of the Spain-Venezuela BIT over the expropriation of their investment. Venezuela objected to the jurisdiction of the tribunal on the ground that the investors seeking redress from a state in an international forum may not be nationals of that state, and, if they are, the nationality they invoke must be effective and predominate over the nationality of the state named in their claim. The *Garcia* tribunal dismissed Venezuela's objection and held that the only nationality requirements that apply are the ones explicitly contained in the BIT.[163]

142. Respondent submits that the Tribunal should not follow the findings made by the tribunal in the *Garcia* case which in any event can be readily distinguished from the present case on the basis that the Spanish investors " were arguably more connected to Venezuela than to Spain",[164] whereas Claimant is clearly more connected to Egypt than to Finland. Moreover, in *Garcia*, the claimants did not rely on their Spanish nationality to invest in Venezuela, whereas Claimant in the present case expressly applied for Egyptian nationality to be able to make his investment in Egypt and availed himself of his Egyptian nationality in the conduct of his investment as described in more detail above.[165] In addition, Respondent submits that the Tribunal should consider the following important policy factors when deciding to depart from the *Garcia* decision and to decline jurisdiction *ratione personae* in the present case.

143. First, as recalled above, it is important for the Tribunal to be mindful of the very basic understanding on which modern investment protection was built and of the object and purpose of investment treaties, including the 1980 and 2004 BITs, namely the protection of <u>foreign</u> investment, i.e. investment made by investors of <u>one</u> contracting party in the territory of the

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161 Article: May 2016: International Arbitration Update, Quinn Emmanuel Business Litigation Reports (**Exhibit RLA0083**).

162 VolterraFietta E-Newsletter, Does a second passport entitle a private investor to BIT protection? (**Exhibit RLA0084**).

163 Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela (UNCITRAL), PCA Case No. 2013-3, Decision on Jurisdiction, 15 December 2014 (**Exhibit RLA0049**).

164 VolterraFietta E-Newsletter, Does a second passport entitle a private investor to BIT protection? (**Exhibit RLA0084**).

165 See above ¶¶ 75-76, 78-81.

other contracting party.[166] Respondent submits that the Tribunal cannot render a decision which would go squarely against these fundamental principles of modern investment protection.

144. Second, at the time when the majority of the currently existing network of almost 3000 BITs, including the 1980 and 2004 BITs, were signed, globalisation was much less advanced, dual (or multiple) nationality among natural persons was less common and many domestic nationality laws excluded the possibility of dual nationality. The rapid changes in the international economic relations which have come about since were not contemplated in these treaties.

145. Today, due to the increased trans-border movement of persons and changes in domestic nationality laws, individuals increasingly can adopt multiple nationalities, including nationalities of convenience. The reality of the modern global order is that people can collect different nationalities at very little cost and without any meaningful attachment to those states in which nationality is maintained.[167] The Tribunal has therefore all the more a reason to limit access to investment arbitration on the basis of effective nationality only.[168]

146. Third, a decision on jurisdiction *ratione persone* in favour of Claimant could be seen to endorse passport shopping and thereby encourage domestic business people to get a second or third passport to ensure they can internationalize their claim and avail themselves of ISDS if things go wrong.[169] This creates a potential for investors to abuse a quintessential component of the

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166 See above ¶¶ 11-13.

167 See Tickets to paradise, and beyond, The Economist, 4 July 2015 (**Exhibit R0026**): "Travel papers from tiny islands help all sorts of folk reach bigger places … THIS is a remarkably rewarding industry, Timothy Harris, the prime minister of St Kitts & Nevis, told the leaders of three similarly small island nations—Antigua, Dominica and Grenada—last month. Selling passports is indeed a boon to those four mini-states. Clients do well too: their documents give them visa-free entry to many countries, including Britain and the 26 European nations of the Schengen area. … Apart from money, the islands don't ask much. You have to spend five days on Antigua; the others do not demand even that. In St Kitts, this year's budget statement called the sales a "mainstay".… Antigua decided in 2013 to enter the trade; it says this year's takings will be one-quarter of state revenue. Up to last month, it had sold 510 passports: twofifths went to China and a third to the Middle East".

168 Number of Finns holding dual citizenship has multiplied threefold in ten years, Helsingin Sanomat (**Exhibit C0069**): "The Citizenship Act permitting dual citizenship was pressed for, among other things, so that expatriate Finns could maintain or obtain the Finnish passport. ln the light of statistics, however, it seems that greater interest in the possibility of dual citizenship has been shown by foreigners living in Finland, who can now keep their old citizenship even when receiving Finnish passports".

169 Such concerns have been voiced with respect to legal person investors for example by Chairman Prosper Weil in his Dissenting Opinion in the case Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18), 29 April 2004 (**Exhibit RLA0075**), ¶ 30: "The ICSID mechanism and remedy are not meant for, and are not to be construed as, allowing – and even less encouraging – nationals of a State party to the ICSID Convention to use a foreign corporation, whether preexistent or created for that purpose, as a means of evading the jurisdiction of their domestic courts and the application of their national law. It is meant to protect – and thus encourage – international investment. It is regrettable, so it seems to me, to put the extraordinary success met by ICSID at risk by extending its scope and application beyond the limits so carefully assigned to it by the Convention. This might

contemporary treaty framework and institutional regime for investor-state arbitration. The international community has already voiced concerns and criticism at the increasing practice of high net-worth individuals acquiring multiple passports as a matter of insurance policy against deterioration in relationship with high-ranking officials in their State of origin and of investment.[170]

147. There is a legitimate worry that absent an appropriate limit on investors' ability to avail themselves of nationalities of convenience, the investor-state arbitration system may be manipulated in ways neither envisioned by its drafters nor desirable as a matter of international economic law and policy. In fact, in recent years, a new type of claim has been emerging in the field of investment treaty arbitration, whereby investors initiate proceedings against their own States before an international arbitration tribunal. As the ICSID Convention expressly excludes individuals that hold the nationality of the State party to the dispute from the jurisdiction of the tribunal, some individuals have started proceedings against their own State before arbitration tribunals constituted pursuant to the UNCITRAL Arbitration Rules.

148. Thus, for example, on 9 November 2015, a French-Mauritian dual national filed an investment claim against Mauritius under the France-Mauritius BIT.[171] The controversial investment claim brought by Russian business man Mr Pugachev against Russia is currently being heard by the PCA.[172] Furthermore, as mentioned above, Turkish business man Cem Uzan brought a claim under the ECT against Turkey.[173] If the Tribunal were to rule in Claimant's favour, it would open the floodgates of claims by dual nationals and would encourage domestic investors to shop around for a foreign nationality for the purpose of internationalising what would otherwise be a purely domestic dispute.[174]

149. Fourth, such manipulation of investor nationality could jeopardized the current framework for international arbitration. Respondent respectfully submits that the Tribunal must bear in mind

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dissuade Governments either from adhering to the Convention or, if they have already adhered, from providing for ICSID arbitration in their future BITs or investment contracts."

170 A multi-billion dollar claim and one insurmountable hurdle, Russian Arbitration Association, 19 November 2015 (**Exhibit R0027**).

171 Dawood Rawat v. The Republic of Mauritius (UNCITRAL), PCA Case 2016-20, Notice of Arbitration and Statement of Claim, 9 November 2015 (**Exhibit RLA0050**).

172 Sergei Viktorovich Pugachev v. The Russian Federation (UNCITRAL), Notice of Arbitration, 21 September 2015 (**Exhibit RLA0051**).

173 Latest Uzan v Turkey arbitration fails, as SCC tribunal looks past claimant's permanent residence in France and dwells on "domestic" origins of disputed investment, IA Reporter, 23 August 2016 (**Exhibit RLA0052**).

174 Commentators warn against such risk, see e.g. C. Trevino, Treaty claims by dual nationals: A new frontier?, Kluwer Arbitration Blog, 8 October 2015 (**Exhibit RLA0053**). See also L. F. Reed, J. E. Davis, III. Ratione Personae, Who is a protected investor?, in International Investment Law, CH Beck, 2015 (**Exhibit RLA0025**), p. 624.

the interest in the integrity and sustainability of the investment treaty regime which should lead it to decline jurisdiction *ratione personae* even if it concludes that Claimant had the prerequisite Finnish nationality.[175]

150. Fifth, a decision in Claimant's favour would further deepen the divide between arbitration proceedings under the ICSID Convention, which exclude claims by dual national claimants against a State of their nationality, and the UNCITRAL Arbitration Rules, which do not. This would contribute to an undesirable fragmentation of international investment law and should therefore not be endorsed.

151. In light of the above considerations, Respondent respectfully reiterates that the Tribunal should decline jurisdiction *ratione personae* in the present case, and should set a limit to passport shopping by natural person investors in order to safeguard the sustainability of the modern investment protection and arbitration regime.

II. THE TRIBUNAL HAS NO JURISDICTION RATIONE TEMPORIS TO HEAR CLAIMANT'S CLAIM

152. In his Counter-Memorial on Jurisdiction, Claimant argues that the Tribunal has temporal jurisdiction over Claimant's claim under the 1980 BIT and/or the 2004 BIT. Claimant submits that "the Tribunal has two separate and distinct jurisdictions: one under the 1980 BIT and one under the 2004 BIT. Events that occurred before 5 February 2005 are governed by the 1980 BIT; events that occurred on or after that date are governed by the 2004 BIT".[176]

153. However, as already demonstrated in Respondent's Request for Bifurcation, the Tribunal lacks jurisdiction *ratione temporis* over Claimant's claim both under the 1980 BIT (**A**) and under the 2004 BIT (**B**). Consequently, Respondent respectfully submits that the Tribunal must decline to hear Claimant's claim.

A. THE TRIBUNAL LACKS JURISDICTION RATIONE TEMPORIS UNDER THE 1980 BIT

154. Claimant submits that "[i]n accordance with Article 7 of the 1980 BIT, the Respondent agreed to arbitrate disputes 'in connection with an investment' between it and Finnish nationals"[177] and that "Claimant accepted Egypt's standing offer to arbitrate by service of his Notice of

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175 Z. Douglas, The International Law of Investment Claims, CUP, 2009 (**Exhibit RLA0034**), p. 289.
176 Claimant's Counter-Memorial on Jurisdiction, 30 August 2013, ¶ 4.1.
177 Claimant's Statement of Claim, 10 November 2012, ¶ 2.12.