PERMANENT COURT OF ARBITRATION

(Case No. 2012-07)

MOHAMED ABDEL RAOUF BAHGAT

CLAIMANT

v.

THE ARAB REPUBLIC OF EGYPT

RESPONDENT

REPLY

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9 October 2018

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TABLE OF CONTENTS

But the SAC is not, and cannot be, a relevant authority for determining the question of the Claimant's forced reacquisition of *Egyptian nationality*. That is a matter of Egyptian law and a matter of fact for this Tribunal to determine.

V. THE CLAIMANT IS ENTITLED TO FULL COMPENSATION

276. As noted above, the Statement of Defence makes clear from paragraph 2 onwards that the Respondent accepts that, following the failure of its six-year challenge to jurisdiction, this is now a damages case. The overwhelming focus of the Statement of Defence is therefore aimed at diminishing the damages payable to the Claimant; first, by making the remarkable assertion that Egypt's breaches "did not cause any financial loss to Claimant" (Statement of Defence, Section IV.A); second, by asserting that any damages payable should be "minimal", as a result of the Respondent's efforts to exclude most of the Claimant's shareholding and sunk costs from his damages claim (Statement of Defence, Section IV.B); and, third, by denying the Claimants right to claim, and the Tribunal's inherent right to award, moral damages (Statement of Defence, Section IV.C).

277. Each of the Respondent's three attempts to minimise the damages payable to the Claimant does not withstand scrutiny.

278. Section II of this Reply has set out the myriad reasons why it is beyond doubt that the Respondent's conduct both destroyed the Project and caused the Claimant's loss. As Section III.C above explains with reference to the overwhelming fact evidence, and Section V.A below elaborates with reference to expert opinion, the Respondent's attacks on the viability of the Project, which began following the October 1999 election and are elaborated for the first time in its Statement of Defence, are an obvious attempt to justify its taking of the Claimant's investment and avoid its international responsibility under the BITs.

279. Sections V.B to V.D below explain why the damages payable by Egypt following its egregious mistreatment of the Claimant and his investment are anything but "minimal". Section V.B reiterates the orthodox nature of the Claimant's damages claim based on the fair market value of his lost investment in the Project. As Section

III.B above has set out with reference to the contemporaneous evidence, the Claimant's account of his shareholding in the Project was not "exaggerated" in his Statement of Claim. Section V.C explains that a DCF-based valuation as at the expropriation date is the appropriate way of ensuring full reparation to the Claimant in this case, while Section V.D identifies how the Claimant's substantial wasted costs (comprised of his life savings following a successful business career in Finland and the Middle East) provide an alternative basis to award compensation, albeit not one that would provide full reparation. Section III.B above has already rebutted, again with reference to contemporaneous evidence and further testimony, the Respondent's assertion that the Claimant has not met his burden of proof with reference to those sunk costs.

280. Section V.E below explains that the Respondent's so-called "alternative valuation" is no such thing and is patently unsuitable for any calculation of damages. Section V.F confirms the Claimant's entitlement to moral damages on the facts of this case. Finally, Section V.G addresses the important question of the compound interest payable on any damages awarded.

281. As the Tribunal will recall, with his Statement of Claim the Claimant presented a damages expert report by Mr William Inglis (the "**Inglis Report**"). Mr Inglis has since retired from serving as a valuation expert. As is explained by the Claimant's second expert report prepared by Mr Noel Matthews of FTI (the "**Matthews Report**"), which adopts the Inglis Report as its foundation, the majority of the Respondent's damages expert's criticisms of the Inglis report have no merit. The Matthews Report sets out the quantum of the Claimant's updated damages claims, following Mr Matthews' independent assessment.

A. The Respondent's assault on the "feasibility" of the Project (and the mine in particular) is self-serving and flawed

282. The Respondent relies heavily on the SRK Report to assert that the Project "was not economically feasible"[475] because "the quality of the iron ore was too poor to be able

475 Statement of Defence, Section IV(A)(1).

to manufacture steel"[476] and could not be commercially exploited.[477] For the reasons outlined at Section III.B above, the Respondent's assertions are irreconcilable with the contemporaneous record (including the Respondent's own firm encouragement and support of the Project) and witness testimony. For the reasons elaborated below, they are also disproven by expert evidence presented by Dr Kadri Dagdelen, an expert in resource and reserve estimation; Mr Erik Spiller, an expert in process development metallurgical testing; and Dr Joseph Poveromo, an expert in steelmaking raw materials and ironmaking processes.

283. The Project involved local iron ore being used as a source of low cost feed material for an integrated steel plant near Aswan, Egypt.[478] In particular, the iron ore portion of the Project needed only to be large enough to support steel production.[479] The Project was unique, given that it included a mine and steel plant on one site.[480] Dr Poveromo concludes that the iron ore segment of the Project would have been economical at a much smaller scale than typical global iron ore projects.[481] On the other hand, SRK principally analysed the Project for its potential as a large scale globally competitive iron ore project, which it was never intended to be.[482]

284. The project was using readily available domestic raw materials and local labour, all of which would keep costs down.[483] The SRK Report assumes, by contrast, that resources were not easily available at a low cost.[484] ADEMCO had contracted with Met-Chem, a subsidiary of UEC, to provide an iron ore mining plan.[485] Enough resources had been identified for 23 years of steel plant operation to produce 1.435

476 Statement of Defence, para. 2.

477 Statement of Defence, para. 23.

478 Poveromo Expert Opinion, paras 18 and 48.

479 Poveromo Expert Opinion, para. 53.

480 Verdier Second Witness Statement, para. 70.

481 Poveromo Expert Opinion, para. 56.

482 Poveromo Expert Opinion, para. 48.

483 Verdier Second Witness Statement, paras 53-54.

484 SRK Report, Section 4.5; Second Verdier Witness Statement, para. 53.

485 Met-Chem Report dated November 1999, **C0049**; Met-Chem, Report on Geology, Mining and Beneficiation, Executive Summary, June 1999, **R0058**. See also UEC Feasibility Study dated January 1999, **C0043**, Section 1, p. 2.

metric tonnes per year of steel billets.[486] The potential for additional reserves was also believed to be excellent as only 6 of 13 areas had been explored in only one third of the concession area.[487]

285. As Dr Dagdelen observes, the reports on the Project extensively described the technical information regarding exploration; mineral resource and reserve estimates; mine planning and scheduling; metallurgical test work; beneficiation work; and capital and operating cost estimates for mining and beneficiating the iron ore for the Project.[488] These reports also complied with contemporaneous codes and practices, in particular, the 1996 Definition of the Canadian Institute of Mining, Metallurgy and Petroleum.[489]

286. SRK's report heavily relies on the supposed uncertainty to beneficiate the ore; the supposed inability to accurately quantify operating costs for beneficiation; and the supposed inability to establish accurate capital costs for the equipment required by the beneficiation flowsheet. Mr Verdier explains that beneficiation was not expected to be a major operating cost in the overall scheme of the Project.[490] In December 1999, the Respondent's CMRDI projected that beneficiation costs would be approximately USD 2 per tonne, or EGP 6.60 per tonne.[491] Even higher previous beneficiation cost forecasts, which had been up to USD 12 (or EGP 43) per tonne, could easily have been absorbed by the Project, given the comparatively low costs elsewhere and the heavy incentives provided by the government.[492]

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486 UEC Feasibility Study dated January 1999, **C0043**, Section 1, pp. 1, 3, 7; Section 3, p. 1.

487 UEC Feasibility Study dated January 1999, **C0043,** Section 1, p. 3.

488 Dagdelen Expert Opinion, para. 36.

489 SRK Report, paras 27, 31; Statement of Defence, paras 128-129; Dagdelen Expert Opinion, paras 37-38, 40, 43-45. Current definitions by the Committee for Mineral Reserves International Reporting Standards do not include the category that was known in 1999 as "Possible Reserves".

490 Verdier Second Witness Statement, para. 64.

491 CMRDI, Summary Report, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, ADEMCO dated December 1999, **C0115**.

492 Verdier Second Witness Statement, para. 64; see also CMRDI, Summary Report, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, ADEMCO dated November 1999, **C0116**.

287. After several rounds of testing, CMRDI successfully identified and proved the basic beneficiation techniques for the Aswan ores.[493] The private Canadian company, Met-Chem, reached similar conclusions.[494] An iron (Fe) content of 54.3% was achieved in the CRM studies[495] and, by early 2000, completed beneficiation work showed that the iron (Fe) content could go up to 56%.[496] The companies Svedala and SGA also expressed confidence that they could develop a technically and commercially viable beneficiation process.[497] Mr Spiller, an iron ore beneficiation expert, confirms that the techniques identified were viable beneficiation methods and that the Aswan iron ore could have been effectively beneficiated further to act as feed to iron and steel production.[498]

288. What is more, it had also been shown that the Aswan ore could be beneficiated further than 1.3% phosphorous (P) levels, contrary to what SRK suggests.[499] In any event, even when the phosphorus (P) content remains high after beneficiation, such ores can still be used to produce iron and steel.[500] In this regard, oolitic iron ores have been mined and processed successfully around the world, including in Western Europe, North America, and South America.[501]

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493 CMRDI, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, Progress Report No. 1, South Aswan for Blast Furnace Purposes, October 1998, **R0052**; CMRDI, Brief Account on Tentative Results of Test Program of Iron Ore Samples No. 98-1 and 98-2, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purpose, ADEMCO, January 1999, **R0054**; CMRDI, Progress Report No. 2, ADEMCO, January 1999, **R0055**; CMRDI, Summary Report on the Laboratory Beneficiation Options of Samples 98-1 and 98-2, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, May 1999, **R0056**; CMRDI, Summary Report, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, ADEMCO, November 1999, **C0116**; CMRDI, Summary Report, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, ADEMCO, December 1999, **C0115**; Verdier Second Witness Statement, paras 69, 77.

494 Met-Chem Report dated November 1999, **C0049**, pp. 20-22; Spiller Expert Opinion, para. 20.

495 CRM Report dated 10 August 1999, **C0114**, p. 18.

496 Verdier Second Witness Statement, para. 69.

497 Verdier Second Witness Statement, para. 36.

498 Spiller Expert Opinion, paras 24, 30.

499 SRK Report, paras 43, 46; Spiller Expert Report, para. 23.

500 Spiller Expert Opinion, para. 19.

501 For example, the Minette ores in Belgium, Kiruna and Gellivara ores in Sweden, and the Conception ores in Newfoundland all contained in the range of 0.9% phosphorous (P). Another example of oolitic

289. Dr Poveromo explains that the Aswan ore was capable of supporting a viable steel project[502] with 54% iron (Fe) and the assumed phosphorous (P) levels.[503] In particular, the UEC Study and Dr Poveromo's report show that the ADEMCO ore, even before final optimization of beneficiation, would have resulted in a viable and profitable operation.[504] Dr Poveromo also notes that other steel plants globally have been viable, even when based on exploiting local, low-grade iron ore deposits.[505]

290. In conclusion, expert testimony presented for the purposes of this arbitration proceeding confirms the viability of the Project, thus corroborating the overwhelming contemporaneous evidence of such viability.

B. The Claimant's request for full reparation is legally orthodox and founded

291. The Respondent does not contest that the fair market value of the investment is the standard approach in international law for the valuation of damages following expropriation, or that full reparation is the applicable overriding principle.[506] Instead, the Respondent considers that Mr Inglis' method of valuing the Claimant's investment is flawed and exaggerated.[507]

292. Section V.B(i) explains that, in the case of unlawful expropriations (as here), the Claimant is entitled to full reparation in accordance with basic principle and long-standing jurisprudence. Section V.B(ii) explains that the Claimant's request for damages equal to the fair market value of his lost investment is uncontroversial.

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high phosphorus ores used to produce steel is the Aceris Paz de Rio, S.A. mine in Colombia, South America. Spiller Expert Opinion, para. 19; Verdier Second Witness Statement, para. 31.

502 Poveromo Expert Opinion, para. 80.

503 Poveromo Expert Opinion, para. 67. Dr Poveromo and Mr Spiller both observe that oolitic ores, with an Fe content of 25%–40% iron (Fe), have been exploited elsewhere in the world. Poveromo Expert Opinion, para. 83; Spiller Expert Opinion, para. 19. Mr Verdier further notes that oolitic ores similar to that in Aswan had been mined and successfully used for steelmaking in Europe for many years up to the late 20th century, until the domestic ores eventually ran out and higher-grade imported ores were substituted. Verdier Second Witness Statement, para. 31.

504 Poveromo Expert Opinion, para. 67. The long-standing Hadisolb BF/BOF plant in Egypt operated with the same type of ore to ADEMCO from 1959 through 1974.

505 Poveromo Expert Opinion, paras 80, 83, Appendix A.

506 Statement of Defence, para. 135.

507 Statement of Defence, para. 135.

Section V.B(iii) explains that the Respondent's distinction between "shareholders' losses" and "company's losses" is highly artificial and flawed. Section V.B(iv) confirms, with reference to the more detailed factual account at Section III.B above, that the Claimant's shareholding at the date of the expropriation is clear.

(i) The Claimant's request for full reparation accords with basic principles and long-standing jurisprudence

293. The Respondent argues that the "Claimant's method of valuing the investment is deeply flawed".[508] This is wrong. The Claimant's request for full reparation accords with general principles of international law and long-standing jurisprudence.

294. The Claimant explained in his Statement of Claim that the Claimant is entitled to full reparation under the standard of compensation set out in the *Chorzów Factory* case.[509] International courts and tribunals have consistently drawn a distinction between a lawful and an unlawful expropriation, recognising that a different standard of compensation applies to each.[510] Professor Derek Bowett observes that "it offends against all common sense to suggest that it makes no difference whether the taking is lawful or unlawful and that the financial consequences will be the same in both cases".[511]

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508 Statement of Defence, para. 135.

509 Statement of Claim, para. 5.2.

510 *Case Concerning the Factory at Chorzów (Germany v. Poland)*, (1928), P.C.I.J, Series A. No. 17, 13 September 1928, **CLA0100**, p. 47 (in which the Permanent Court of International Justice explained that applying the same measure of damages to a lawful and unlawful expropriation "would not only be unjust, but also and above all incompatible with the aim of Article 6… – that is to say, the prohibition, in principle, of the liquidation of the property… – since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned"). See also *Amoco International Finance v. Iran*, Award, 15 Iran-US CTR 189, 14 July 1987, **RLA0107**, para. 189 ("the Treaty determines the conditions that an expropriation should meet in order to be in conformity with its terms and therefore defines the standard of compensation only in case of a lawful expropriation. A nationalization in breach of the Treaty, on the other hand, would render applicable the rules relating to State responsibility, which are to be found not in the Treaty but in customary [international] law."); and *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, **CLA0034**, para. 481 ("The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation.").

511 Bowett, "State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach", 59 *British Yearbook of International Law* 49 ((1988), **CLA0101**, p. 61.

295. As explained in the Statement of Claim, the 1980 BIT and the 2004 BIT set out the applicable compensation standards in the case of a lawful expropriation.[512] The Respondent's expropriation of the Claimant's investment did not comply with the requirements for a lawful expropriation established in Article 3 of the 1980 BIT and Article 5 of the 2004 BIT. Neither BIT stipulates the standard of compensation that is payable to protected investors when a State has unlawfully expropriated the investment (or have taken measures tantamount to expropriation). As a result, the standard of compensation set out in the 1980 BIT and 2004 BIT is not applicable here.

296. Numerous investor-State tribunals have resorted to the relevant principles of customary international law to determine the amount of compensation payable in cases of unlawful expropriation.[513] For example, in *ConocoPhillips v. Venezuela*, the tribunal stated that it:

> … does not consider that the extent of the compensation payable in respect of an unlawful taking of an investment ... is to be determined under Article 6(c): that provision establishes a condition to be met if the expropriation is in all other respects in accordance with Article 6. So, in the *Chorzów* case, the Court did not determine reparation in accordance with the provisions of the Convention before it, because it was concerned with a dispossession in breach of those provisions. It decided in accordance with "the essential principle" quoted earlier, that is a principle of customary international law, not dependent on the Convention provisions.[514]

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512 Statement of Claim, para. 5.4.

513 See, for example, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, **CLA0102**, para. 201 ("Article 5(1)(3) of the BIT which describes the just compensation due in case of an expropriation refers to 'the real market value of the investment … according to internationally acknowledged evaluation standards'. This provision is not applicable to determine the amount of compensation in the present instance because it sets out the measure of compensation for lawful expropriation which this one is not. Hence, the Tribunal will resort to the relevant principles of customary international law and in particular to the principle set out by the Permanent Court of Justice in the *Chorzów Factory case*…"); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, **CLA0103**, para. 349 ("Argentina took measures that had the effect of expropriating the investment and that such expropriation is in breach of the Treaty, and hence unlawful ... The law applicable to the determination of compensation for a breach of such Treaty obligations is customary international law. The Treaty itself only provides for compensation for expropriation in accordance with the terms of the Treaty.").

514 *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013, **CLA0104**, para. 342.

297. This Tribunal also should recognise the Claimant's right to receive compensation in accordance with customary international law for the Respondent's breach of the BITs and order the Respondent to pay compensation accordingly.

298. Customary international law mandates that the Respondent must make reparation to the Claimant which, as far as possible, wipes out all the consequences of its illegal acts and re-establishes the situation which would, in all probability, have existed if those acts had not been committed. The principle was articulated by the PCIJ in the oft-cited *Chorzów Factory* case.[515]

299. The *Chorzów Factory* articulation of the full reparation standard has been codified in Article 31(1) of the ILC Articles on State Responsibility,[516] endorsed by the International Law Commission[517] and applied by many investor-State tribunals. For example, in *Sempra Energy v. Argentina* the tribunal stated that:

> The principles governing compensation under international law were well explained by the Permanent Court of International Justice in the *Chorzów Factory Case* and have been developed in numerous decisions of international courts and tribunals. As the Permanent Court held in that case, "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[518]

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515 *Case Concerning the Factory at Chorzów* (Germany v. Poland), (1928), P.C.I.J, Series A. No. 17, 13 September 1928, **CLA0100**, p. 47.

516 Article 31(1) of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts states that: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act", ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, **RLA0070**, Article 31(1).

517 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, **RLA0070**, Article 31, p. 91 (explaining that: "[t]he obligation placed on the responsible State by article 31 is to make 'full reparation' in the *Factory at Chorzów* sense").

518 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, **CLA0021**, para. 400.

300. The ILC Articles on State Responsibility confirm that full reparation can take the form of restitution (to restore the *status quo ante*) or compensation.[519] If restitution is not possible, the injured party is entitled to monetary compensation.[520]

301. The Respondent's "preliminary remark" on the Claimant's request for full reparation is that, "interestingly, Claimant does not request an order aimed at ensuring that he can resume the Project".[521] The Claimant explains in his witness statement that, "I have no intention of ever going back to Egypt and I would fear for my life if I did."[522] After the Respondent's treatment of the Claimant, described in detail in Section III.D above, it cannot be surprising that the Claimant has no desire to return to Egypt, let alone to resume the Project. Moreover, it is obvious that the Project is dead given the Respondent's withdrawal of government support, and the withdrawal of all of the essential foreign partners. Restitution is therefore not an appropriate remedy in this case. Monetary compensation is the appropriate remedy.

(ii) The Claimant's request for damages equal to the fair market value of his lost investment in the Project is similarly uncontroversial

302. In the application of the *Chorzów Factory* principle to the present case, and in order for the Respondent to discharge its duty to make full reparation to the Claimant, compensation must be equivalent to the fair market value of the expropriated investment immediately before the expropriatory conduct. The Respondent does not dispute this.[523] The Respondent' expert, Mr MacGregor, in his report (the "**BDO Report**") states that in "circumstances where a company has been expropriated, the normal way to calculate damages is to estimate the 'fair market value' of the

519 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, **RLA0070**, Article 34.

520 *Case Concerning the Factory at Chorzów* (Germany v. Poland), (1928), P.C.I.J, Series A. No. 17, 13 September 1928, **CLA0100**, p. 47.

521 Statement of Defence, para. 118.

522 Bahgat Fifth Witness Statement, para. 45.

523 Matthews Report, para. 3.2; BDO Report, para. 2.1.

company".[524] The Claimant's valuation expert, Mr Matthews has adopted Mr Inglis' and Mr MacGregor's approach.[525]

303. In the present case, the fair market value represents the price that would be agreed between a willing buyer and willing seller for the Claimant's interest in the Project, as at February 2000.[526] The Respondent does not dispute that, in order to estimate the fair market value of the Claimant's investment, tribunals are required to compare the injured party's real-life situation (the "actual" scenario) to "the situation which would, in all probability, have existed if that act had not been committed"[527] (the "but for" scenario). This counterfactual approach is endorsed in many recent awards.[528]

304. As explained below, Mr Matthews has constructed a but-for scenario consistent with the standard of full reparation.

305. Finally, the Respondent does not contest that damages should be calculated as at the date of the expropriation. This is consistent with prevailing jurisprudence, which confirms that in the case of unlawful expropriations, the claimant can choose either the date of expropriation or the date of the award as the date of valuation.[529] The

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524 BDO Report, para. 5.3.

525 Matthews Report, para. 3.2.

526 Matthews Report, para. 3.6.

527 *Case Concerning the Factory at Chorzów* (Germany v. Poland), (1928), P.C.I.J, Series A. No. 17, 13 September 1928, **CLA0100**, p. 47.

528 See, *e.g.*, *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v. The Republic of Ecuador [I]*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010, **CLA0105**, paras 374-375, (where the tribunal accepted the claimant's argument that "the loss due to an international wrong is to be measured by the comparison of the victim's actual situation to that which would have prevailed had the illegal acts not been committed"). See also *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March 2005, **CLA0106**, pp. 77-78, ("The Arbitral Tribunal agrees that, insofar as it appears that Petrobart has suffered damage as a result of the Republic's breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred."); and *Biloune and Marine Drive Complex Limited v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability (27 October 1989) and Award on Damages and Costs (30 June 1999), 95 ILR 183, **CLA0077**, p. 228, ("The standard for compensation in cases of expropriation is restoration of the claimant to the position he would have enjoyed but for the expropriation. This principle of customary international law is stated in many recent awards of international arbitral tribunals.").

529 *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014, **CLA0107**, para. 1763.

Claimant in the present case has selected the date of expropriation, i.e., February 2000, as the valuation date.

(iii) The Respondent's attempt to avoid its international responsibility by distinguishing "shareholders' losses" from "company's losses" should be rejected

306. The Respondent, in order to avoid its international responsibility under the BITs and customary international law, attempts to distinguish the Claimant's "shareholders' losses" from the "company losses".[530]

307. At no point in his submissions has the Claimant attempted to appropriate the companies' losses as his own. However, the Respondent cannot argue that the Project's failure had no effect on the Claimant's interest in the Project Companies. The Project's demise directly eradicated the economic value of the Claimant's shareholding, which can only be attributed to the Respondent's conduct.

308. The Respondent cites to Ripinsky and Williams to argue that "if shares are the protected investment, a more sophisticated analysis will be required that should focus on how the interference with the business affects the claimant-shareholder".[531] As explained in Section II above and further below, the Claimant has engaged in a detailed and "sophisticated analysis" and has established a clear link between how the Respondent's interference with ADEMCO and AISCO affected the Claimant.

309. The Respondent relies on *AAPL. v. Sri Lanka* to support its point that the losses attributed to ADEMCO and AISCO cannot directly flow through to Mr Bahgat.[532] However, the decision in *AAPL* supports the Claimant's position. In the paragraphs subsequent to the one cited by the Respondent, the tribunal states as follows:

> 97. Certainly, all the physical assets of Serendib, as well as its intangible assets, have to be taken into consideration in establishing the reasonable value of what the potential purchaser could have been willing to offer on January 27 for acquiring AAPL's shares in Serendib. But the reasonable price should have reflected also Serendib's global liability at that date; *i.e.* the

530 Statement of Defence, paras 136-142.

531 Statement of Defence, para. 139 (citing to **RLA0089**).

532 Statement of Defence, para. 137.

> aggregate amount of the current debts, loans, interests, etc ... due to Serendib's creditors.
>
> 98. Consequently, the Tribunal is of the opinion that the determination of the percentage of AAPL's share-holding in Serendib's capital is a false problem, since the relevant factor is to establish a comprehensive balance sheet which reflects the result of assessing the global assets of Serendib in comparison with all the outstanding indebtedness thereof at the relevant time.[533]

310. As a result, the *AAPL* tribunal decided to look at the "global" value of the project company to value the shares of the claimant.

311. The Respondent's reliance on *Enkev v. Poland* is similarly misplaced.[534] In *Enkev*, the claimant claimed that the retention of profits, goodwill, know-how and management by the claimant constituted further investments.[535] In the paragraph cited by the Respondent, the *Enkev* tribunal decided that these did not constitute separate investments. It was in this context that the tribunal found that the claimant could only claim for "harm suffered … from the diminution or total loss of rights derived from its shares".[536] The Claimant is seeking compensation for the harm suffered as a result of the total loss of value of his shares.

312. The Respondent ignores the prevailing jurisprudence confirming flow-through of loss to shareholders in cases of indirect expropriation (See Section IV.D). Accordingly, in *Sistem v. Kyrgyzstan*, the tribunal first estimated the value of the project at the time of the state's unlawful conduct, and then calculated the value of the claimant's interest in the project.[537] Similarly, in *Koch Minerals v. Venezuela*, the claimants held shares in a local company that owned an expropriated Venezuelan fertiliser plant. The tribunal considered the value of the plant before and after the

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533 *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, **RLA0105**, paras 97-98.

534 Statement of Defence, para. 138.

535 *Enkev Beheer B.V. v. The Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 April 2014, **RLA0106**, para. 312.

536 *Enkev Beheer B.V. v. The Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 April 2014, **RLA0106**, para. 313.

537 *Sistem Muhendislik Insaat Sanayi v. Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, **CLA0108**, paras 175-176.

expropriation, and then estimated the proportionate value of the claimants' interest in the local company.[538] Professor Douglas, on whose opinion the Respondent relies in this context,[539] was a member of the tribunal in *Koch v. Venezuela*.

313. Consequently, the Respondent's attempt to draw an artificial distinction between the Claimant's losses and those of the Project Companies should be dismissed. The Claimant's approach is uncontroversial and supported by prevailing jurisprudence.

(iv) The Claimant has not "obfuscated his shareholding in ADEMCO and AISCO"; the Claimant's shareholding as at the date of expropriation is clear

314. The Respondent asserts that the "Claimant's presentation of his shareholding of the investment in question has been opaque".[540] The Claimant has confirmed the detail of his shareholdings in ADEMCO and AISCO at the relevant times at Section III.B above.

315. For the purposes of valuing the Claimant's investment, Mr Matthews has also reviewed the contemporaneous evidence around the Claimant's shareholding in ADEMCO and AISCO, and comes to the same result as that set out at Section III.B above.

316. Mr Matthews observes that, had the Project proceeded (i.e., in the but-for scenario), the four foreign partners (Mannesmann, Cegelec, US Steel and Pomini) would have paid for the 30% of ADEMCO shares registered in their names by GAFI in its February 2000 report.[541] He assumes that they would have made such payments in March 2000, in light of the Claimant's explanation that substantial capital contributions were planned from the shareholders at that time.[542] But for the Respondent's intervention, Mr Bahgat would therefore have received payment from the four foreign partners of the price agreed in the ADEMCO Shareholder

538 *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, **CLA0079**, paras 9.205 *et seq*; see also *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, **CLA0078**, para. 111.

539 Statement of Defence para. 140.

540 Statement of Defence, para. 146.

541 Matthews Report, para. 6.16.

542 Bahgat Fifth Witness Statement, para. 32.

Agreement. Mr Bahgat would have continued separately to own and control 40.22% of the shares in ADEMCO.[543]

317. The Respondent alleges that Mr Bahgat "cannot claim for the interests held by other shareholders in ADEMCO."[544] The Respondent cites to no authority to support its assertion. As explained at Section III.B above, the Respondent's attempt to deprive Mr Bahgat of the value of shares held upon his behalf by his company, close family and three friends contradicts starkly with the Prosecutor's focus during the criminal proceedings upon Mr Bahgat's acquisition of shares through them.[545]

318. International law recognises the concept of beneficial ownership as reflected in the arrangements made between Mr Bahgat and his family and three friends. Under appropriate circumstances, like those described at Section III.B above with respect to Mr Bahgat's shareholding in ADEMCO, a claimant "who is not the record owner of property nevertheless may be found to hold a beneficial and compensable interest in that property."[546]

319. With regards to the Claimant's shareholding in AISCO, as explained in Section III.B, the Respondent is correct that Mr Bahgat held an 87.5% interest in AISCO at the date of expropriation. This correction is reflected in Mr Matthew's Valuation Report.[547]

320. The Respondent also states that the Claimant "does not account for the impact that the one-year delay in the kick-off of the Project had on the financial position of the expected shareholders".[548] Mr Bahgat explains in his fifth witness statement that this is because "no additional investment would have been required as a result of the delay because we had a fixed turn-key contract with Mannesmann".[549] Mr Matthews

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543 ADEMCO Shareholder Agreement dated 9 July 1998, **C0108**.

544 Statement of Defence, para. 153.

545 Judgment of the Supreme state security court dated 11 June 2002, **C0002**.

546 *Ouziel Aryeh, Eliyahou Aryeh, v. The Islamic Republic of Iran*, (Iran-United States Claims Tribunal), Award No. 584-839-3, 25 September 1997, **CLA0109**.

547 Matthews Report, paras 6.18 *et seq*.

548 Statement of Defence, para. 149.

549 Bahgat Fifth Witness Statement, para. 34.

explains that even if "some of the capital expenditure would have been delayed as well, this would have the effect of increasing the value of the Project".[550]

C. DCF is the appropriate way to ensure full reparation by valuing the Claimant's lost investment in the Project as at the expropriation date

321. The Respondent disagrees with the use of DCF as the appropriate methodology in this case to estimate the fair market value of the Claimant's interest in the Project.

322. The Respondent relies primarily on its industry expert to support its argument "that DCF cannot be considered as an appropriate valuation methodology of Claimant's investment".[551] The Claimant's valuation expert Mr Matthews, like Mr Inglis before him, considers it appropriate to apply the DCF methodology. Mr Matthews also considers it appropriate to rely on the forecasts in the UEC Feasibility Study.[552] In doing so, Mr Matthews has relied on the available contemporaneous evidence and considered Mr Verdier's witness statements and the corroborating opinions of the Claimant's industry experts.[553]

323. Mr Matthews notes that the UEC Feasibility Study "was prepared by industry experts in January 1999, and contained detailed financial projections".[554] Mr Matthews observes that:

> The evidence I have reviewed indicates that, to the extent that there had been any changes in the expected financial performance of the Project between the date of the UEC Report and the valuation date of February 2000, those changes were largely positive.[555]

324. The Respondent argues that without a sufficient track record of profitable operations on the Project, the Claimant cannot rely on the DCF approach. The Respondent is wrong. Mr Matthews acknowledges that the Project had no track record of financial

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550 Matthews Report, para. 5.29.

551 Statement of Defence, para. 166.

552 Matthews Report, para. 2.9.

553 Matthews Report, para. 2.9.

554 Matthews Report, para. 2.9.

555 Matthews Report, para. 2.9.

performance. However, he explains that "UEC (and its parent US Steel) did have a track record of expertise and success in the steel industry", such that its projections were reliable.[556] Furthermore, Mr Matthews explains that the certainty relating to the Project's financial performance was further increased as a result of Mannesmann's commitment to buy 540,000 tonnes of steel billets per year, equating to around 80% of projected production of billets at the Steel Plant.[557]

325. Just as the Project's largest revenue stream was secure, so was its biggest cost – namely, the cost of the Steel Plant, which was fixed in the turn-key contract with Mannesmann and reflected in the UEC Feasibility Study.[558]

326. Mr Matthews assesses the value of the Project in February 2000 as USD 341.2 million. Mr Matthews explains that the results of his DCF calculation differ from Mr Inglis' equivalent calculation because of the following assumptions:

> (1) Timing of the Project: Based on Mr Verdier's evidence, I assume that the Project would have started commercial production at the beginning of 2004, rather than January 2003 as assumed by Mr Inglis. I also assume mid-year discounting (Mr Inglis discounted cash flows from the start of each year starting from 2001).
>
> (2) Beneficiation costs: I increase the projected capital expenditure to take account of additional capital costs in relation to beneficiation that may have been required. The increase I adopt is based on work carried out relating to beneficiation costs after the UEC Report was prepared.
>
> (3) Adjustment for historical capital expenditure: For a valuation as at February 2000, it is only appropriate to include future projected cash flows at that time. Historical cash flows should be excluded (since the cash flow has already occurred). The capital expenditure projected in the UEC Report includes an investment of USD 30 million that had already made by February 2000. I have removed that expenditure from the projections in the UEC Report.

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556 Matthews Report, para. 2.9.

557 Matthews Report, para. 2.9 (internal citations omitted).

558 UEC Feasibility Study dated January 1999, **C0043**; see also Bahgat Fifth Witness Statement, para. 34.

> (4) Adjustment to forecast capital expenditure: I have increased the UEC forecast of capital expenditure to include additional USD 28.5 million in capital costs that were identified after the UEC Report was prepared (in addition to the beneficiation capital expenditure).[559]

327. Mr Matthews also assumes that Mr Bahgat would have held a 34.7% interest in AISCO (and therefore an equivalent interest in the overall returns on the Project).[560] Mr Matthews' assumption differs from Mr Inglis' for the following reasons:

> (1) My analysis of the Claimant's shareholding takes account of various documents that Mr Inglis does not appear to have seen. I also have available to me Mr Bahgat's fifth witness statement which clarifies his shareholding. The largest difference between me and Mr Inglis arises because I assume that ADEMCO would have had an 87.5% shareholding in AISCO. Mr Inglis assumed this would have been 60%.
>
> (2) I assume that the shareholdings held by Mr Bahgat's wife, children and company should be considered as part of his shareholding by reference to Mr Talaat's report, Mr Bahgat's wife's witness statement and my instructions. Further, I have been instructed to assume that shares held by certain Egyptian nationals were held on behalf of Mr Bahgat and should be included in my analysis of Mr Bahgat's shareholding.[561]

328. Mr Matthews calculates that on a pro-rata basis, a 34.7% equity investment in the Project would have been worth USD 118.3 million in February 2000.[562]

329. In his DCF calculation, Mr Matthews makes an adjustment for lack of control and lack of marketability. Mr Matthews explains that he considers that a 20% discount is appropriate to apply in the present case.[563] Mr Matthews also explains that he did not deduct Mr Bahgat's future equity investments in the Project that Mr Inglis had

559 Matthews Report, para. 2.10.

560 Matthews Report, para. 2.11.

561 Matthews Report, para. 2.11. Notably, the first (largest) difference arises out of the correction made by the Respondent's damages expert in the BDO Report.

562 Matthews Report, para. 2.12.

563 Matthews Report, para. 2.13.

deducted because a further deduction leads to double counting the required deductions.[564]

330. Following application of his 20% discount, Mr Matthews assesses the fair market value of Mr Bahgat's interest in the Project to have been USD 94.6 million.[565]

331. Finally, Mr Bahgat had agreed to sell a 30% shareholding in ADEMCO to the four foreign partners for USD 8.9 million (i.e., the nominal value of EGP 10 per share plus 20 piasters, set out in the ADEMCO Shareholder Agreement).[566] Mr Matthews explains that:

> Mr Bahgat expected to receive this payment in March 2000 if the Project had gone ahead as planned. I consider that it is appropriate to take this amount into account when calculating Mr Bahgat's loss.[567]

332. In total, Mr Matthews assesses the loss suffered by the Claimant as at February 2000 at USD 103.5 million.[568]

333. Contrary to the Respondent's argument, the DCF valuation in this case is not unduly and speculative because: (1) the resources were defined;[569] (2) the principal capital expenditures of the Project were locked in;[570] (3) the operational expenditures were confirmed by multiple authoritative and contemporaneous studies (including those prepared by the Respondent's own CMRDI);[571] and (4) demand for production was

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564 Matthews Report, para. 2.14.

565 Matthews Report, para. 2.15.

566 Matthews Report, para. 2.16; see also ADEMCO Shareholder Agreement dated 9 July 1998, **C0108**; Bahgat Fifth Witness Statement, para. 32.

567 Matthews Report, para. 2.16.

568 Matthews Report, para. 2.17.

569 UEC Feasibility Study dated January 1999, **C0043**; see also Dagdelen Expert Opinion, paras 29-38; Section V.A above.

570 Second Contract between ADEMCO and Mannesmann, **C0030**; UEC Feasibility Study dated January 1999, **C0043**; Bahgat Fifth Witness Statement, para. 34.

571 CMRDI, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, Progress Report No. 1, South Aswan for Blast Furnace Purposes, October 1998**, R0052**; CMRDI, Brief Account on Tentative Results of Test Program of Iron Ore Samples No. 98-1 and 98-2, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purpose, ADEMCO, January 1999, **R0054**; CMRDI, Progress Report No. 2, ADEMCO, January 1999, **R0055**; CMRDI, Summary Report on the Laboratory Beneficiation Options of Samples 98-1 and 98-2, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace

high, and the majority of billet sales were confirmed via the Mannesmann offtake commitment.[572] As a result, there is "sufficient evidence to support the projected cash flows".[573]

334. In support of its resistance to the DCF methodology, the Respondent claims, based on the *Rusoro Mining v. Venezuela* award, that because the Project was at the early stages, there is no established historical record of financial performance.[574] Even though a record of performance is an element to consider when applying a DCF methodology, it is not a *sine qua non* for its application. In *Al-Bahloul v. Tajikistan*, the claimant had not commenced any exploration or production of his hydrocarbon project. Nevertheless, the tribunal found that a DCF analysis was appropriate.[575] It considered that:

> [D]etermination of the future cash flow from the exploitation of hydrocarbon reserves need not depend on a past record of profitability. There are numerous hydrocarbon reserves around the world, and sufficient data allowing for future cash flow projections should be available to allow a DCF-calculation.[576]

335. Similarly, in the present case, there was sufficient data to allow predictions for future cash flow projections.

336. The *Al-Bahloul* tribunal sets out four criteria to be considered in circumstances where there is no past record of profitability: (i) that the investors will be able to finance the project; (ii) that they would find exploitable reserves; (iii) that they would be able

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Purposes, May 1999, **R0056**; CMRDI, Summary Report, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, ADEMCO, November 1999, **C0116**; CMRDI, Summary Report, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, ADEMCO, December 1999, **C0115**; see also Met-Chem Report dated November 1999, **C0049**. See above, Section V.A.

572 Mannesmann Report dated April 1998, **C0031**, p. 31; UEC Feasibility Study dated January 1999, **C0043** (see 540,000 billets); see further Section V.A above.

573 Statement of Defence, para. 162.

574 Statement of Defence, paras 170, 172.

575 *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, 8 June 2010, **CLA0110**, para. 74.

576 *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, 8 June 2010, **CLA0110**, para. 75.

to finance and exploit the reserve; and (iv) that it would be possible to sell the product.[577]

337. All of these requirements are fulfilled in the present case. The Claimant was in a position to finance the Project and exploitation of the reserve, in collaboration with his pre-eminent Project partners and HSBC. The existence of extensive iron ore reserves in the concession area was well-known;[578] Mannesmann had made the commitment to buy 540,000 tonnes per year of the produced steel billets for the first five years.[579] The large market for steel products in Egypt was without question.

338. The tribunal in *Vivendi v. Argentina* reached a similar conclusion. It found that, under appropriate circumstances, even in the absence of a going concern, the claimant can establish "the likelihood of lost profits with sufficient certainty".[580] That is the case when the claimant can:

> present a thoroughly prepared record of its (or others) successes, based on first hand experience (its own or that of qualified experts) or corporate records which establish on the balance of the probabilities it would have produced profits from the concession in question."[581]

339. All the contemporaneous studies in this case were prepared by "qualified experts" based on their on-site (as opposed to desktop) review of the available information. The UEC Feasibility Study was prepared by experts from US Steel. The Mannesmann Report was prepared by the leading steel company in Europe. Both companies subsequently decided to purchase equity in the Project. Furthermore, as discussed above in Section III.C and V.A, the reports prepared by the Respondent's own CMRDI were based on local expertise and knowledge, taking into consideration historical steel prices, supply and consumption of steel products in Egypt and

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577 *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, 8 June 2010, **CLA0110**, para. 77.

578 Dagdelen Expert Opinion, para. 25; see also Section V.A.

579 Mannesmann Report dated April 1998, **C0031**, p. 31; Matthews Report, para. 3.22.

580 *Compania de Aguas de Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, **CLA0111**, para. 8.3.10.

581 *Compania de Aguas de Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, **CLA0111**, para. 8.3.10.

worldwide, and market reviews on future steel prices and expected demand, so as to render their cash flow projections accurate.[582]

340. The Respondent further challenges the application of the DCF methodology case on the ground that the UEC Feasibility Study had too many "shortcomings" and hence its cash flow forecasts are not reliable enough.[583] It asserts that the UEC Feasibility Study was a pre-feasibility study at best and cannot "allow for the finding of financing for the Project."[584]

341. The primary "shortcomings" that the Respondent identifies are the high levels of phosphorus in the ore, the allegedly insufficient technical work already performed, the "inferred" mineral resources of the Project, and the lack of an effective beneficiation process.[585]

342. The fact, however, is that the UEC Feasibility Study did meet the industry standards at the time. This is confirmed by Mr Verdier and corroborated by the Claimant's industry experts.[586] Further, Dr Poveromo's expert opinion explains that the projected Project costs set out in the UEC Feasibility Study are reliable.[587]

343. The Respondent also argues that the Claimant's lack of experience in the mining and steel industries constitutes a reason to not apply the DCF method.[588] This argument is ludicrous. The Claimant had been a successful businessman in Finland and the

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582 Matthews Report, para. 2.9(5); see also CMRDI, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, Progress Report No. 1, South Aswan for Blast Furnace Purposes, October 1998**, R0052**; CMRDI, Brief Account on Tentative Results of Test Program of Iron Ore Samples No. 98-1 and 98-2, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purpose, ADEMCO, January 1999, **R0054**; CMRDI, Progress Report No. 2, ADEMCO, January 1999, **R0055**; CMRDI, Summary Report on the Laboratory Beneficiation Options of Samples 98-1 and 98-2, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, May 1999, **R0056**; CMRDI, Summary Report, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, ADEMCO, November 1999, **C0116**; CMRDI, Summary Report, Evaluation and Beneficiation Studies of Um-Hebal Iron Ore Deposit, South Aswan for Blast Furnace Purposes, ADEMCO, December 1999, **C0115**.

583 Statement of Defence, para. 168.

584 Statement of Defence, para. 168.

585 Statement of Defence, para. 168; BDO Report, paras 6.53- 6.70.

586 Verdier Second Witness Statement, para. 17; Dagdelen Expert Opinion, paras 43-46.

587 Poveromo Expert Opinion, para. 81.

588 Statement of Defence, para. 175.

Middle East for decades. It was his extensive business experience, including in Egypt, on which he could rely, and which in turn resulted in him attracting a team of leading global industry partners to assist with every stage of the Project. The Claimant has never pretended to be a mining or steel expert; he did not need to be.

344. The leading experts on whom the Claimant relied (including Mannesmann, Cegelec, US Steel and Pomini) not only predicted the success of the Project, but were so certain of it that they decided to invest in it themselves.

345. As far as financing is concerned, this process was well underway following the engagement of HSBC as the Project's financing partner.[589] Mannesmann had also committed to assist as necessary with the financing.[590] Each of the foreign partners committed to President Mubarak in person in May 1999 to deliver the Project "on time and on budget".[591] Obviously, they would not have done so had there been any serious doubt around the financing of the Project.

346. The Respondent further alleges that there was uncertainty in respect of the Claimant's ability to invest more funds personally.[592] The Claimant explained in his second witness statement how he would have raised the amounts necessary to maintain his shareholding.[593]

347. In any event, Mr Matthews points out that it is not necessary to demonstrate that the Claimant would have been able to raise these funds, in the context of computing the fair market value of his interest in the Project. Mr Matthews explains that:

> To the extent that further equity investments were required, a hypothetical buyer would not be concerned with the seller's ability to raise these funds. In fact, it would be this investor, rather than the seller, who would have been required to contribute these amounts.[594]

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589 Engagement Agreement between HSBC and AISCO dated 23 March 1999, **C0047.**

590 Memorandum of meeting with Mannesmann dated 15-16 April 1998, **C0029**.

591 Video recording of inauguration ceremony dated 22 May 1999, **C0045**; Transcript of the video of inauguration ceremony on 22 May 1999, **C0086**.

592 Statement of Defence, para. 178.

593 Bahgat Second Witness Statement, para. 103.

594 Matthews Report, para. 6.45.

348. The BDO Report seems to be in agreement with this, stating that "the value of Mr Bahgat's shares or interest in the Project would be dependent on what a potential buyer would be willing to pay for these shares or interest in the Project."[595]

349. In the same vein, the Respondent, relying on the BDO Report, argues that any financing of the Claimant's interest in the Project should also be given credit.[596] This is incorrect. Mr Matthews explains why:

> Suppose, for argument's sake, that the Claimant subsequently made a *loss* on the funds that would have otherwise have been invested in the Project. An implication of Mr MacGregor's suggested approach is that this loss should further *increase* the Claimant's losses. This seems to me to be wrong. The compensation that is claimed by Mr Bahgat is the fair market value of his interest in the Project. Any gains or losses made by Mr Bahgat on funding that would otherwise have been invested in the Project are entirely unconnected to that fair market value.[597]

350. Moreover, the Respondent doubts whether the required equity investment of USD 240 million included the USD 39.7 million that the Claimant had already invested. The UEC Feasibility Study clearly specifies that the capital investment for the Project in relation to "Steel Plant Supplies/Services" would be USD 555 million.[598] USD 555 million was the amount agreed between Mannesmann and the Claimant for the design, engineering, manufacture and delivery of the new plant.[599] The majority of the Claimant's investment of USD 39.7 million was the upfront payment to Mannesmann as part of that USD 555 million.[600]

351. In conclusion, despite the Respondent's assertions, the DCF methodology is the appropriate method to evaluate the fair market value of the Claimant's lost investment. Indeed, any alternative approach to the valuation of the Claimant's

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595 BDO Report, para. 7.44.

596 BDO Report, para. 6.30.

597 Matthews Report, para. 6.50.

598 UEC Feasibility Study dated January 1999, **C0043**, Table 8.1 Section 8, p. 2.

599 Matthews Report, para. 4.48

600 Second contract between ADEMCO and Mannesmann, **C0030**, Cl. 5.2.1.

investment would seriously understate the compensation to which he is entitled as a matter of international law.

D. The Claimant's substantial wasted costs are proven and provide an alternative basis to award full reparation

352. The Respondent's BDO Report explains that, in case the Tribunal cannot quantify the Claimant's loss, the wasted costs approach based on amounts invested in the Project is appropriate.[601] Both Mr Inglis and Mr Matthews have presented an alternative wasted costs-based calculation of the Claimant's losses. However, any damages award based upon wasted costs alone would clearly fall short of providing full reparation in this case.

353. As explained in Section III.B, the Claimant invested USD 39.77 million of his own funds in the Project. The Respondent challenges the source of these funds. The Claimant has explained in detail in Section III.B that the USD 39.77 million came from his personal funds.[602]

354. The Respondent asserts that the Claimant should not recover his wasted costs because it was "a reckless expenditure or "a serious business misjudgement".[603] The Claimant has explained that he invested in the Project on the Respondent's specific encouragement (Section II) and that, until the change in government in October 1999, no doubts had been expressed about the Project's viability (Section III.C and Section V.A).

355. The Respondent relies on the award in *Azurix v. Argentina* to support its argument that the amounts invested by the Claimant constituted a "reckless expenditure".[604] However, the investor in that case was a maverick who, the tribunal observed, would "have paid for the Concession the price … irrespective of the actions taken by the Province and of the economic situation of Argentina at that time".[605] There is a vast

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601 BDO Report, para. 8.1.

602 See also Matthews Report, paras 7.9-7.10.

603 Statement of Defence, paras 190-191.

604 Statement of Defence, para. 190.

605 *Azurix Corp. v. The Argentina Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, **RLA0100**, para. 426.

difference between *Azurix* and the present case. The Claimant relied on the assurances given by the Respondent and the Respondent's own specialists to invest in the Project, and consequently obtained further confirmation of the ores at the Project site with the assistance of several foreign partners. The Claimant acted prudently and with due diligence up until his arrest in February 2000.

356. Mr Matthews has undertaken an updated "wasted costs" valuation of loss at Section 7 of the Matthews Report. He calculates that the Claimant's total loss on a "wasted costs" approach amounts to USD 39.77 million plus interest payable from February 2000 until the date of his report. This gives a total loss of USD 126.4 million.[606]

E. The Respondent's "alternative valuation" is patently self-serving and unsuitable

357. Having dismissed the Claimant's DCF and wasted costs approaches, the Respondent relies on its industry expert to propose an alternative (supposedly market-based) valuation of the Project. That alternative valuation derives from a total of 136 global transactions in mining projects, none of which took place before June 2004 (more than four years after the expropriation) and the most recent of which took place in September 2017. Of those 136 transactions, the industry expert ultimately relies upon six, without explaining why any of them are even remotely comparable to the Project.

358. Leaving aside the question of whether the Respondent's industry experts are qualified to provide such an opinion on quantification, the Respondent's "alternative valuation" can be rejected out of hand.

359. SRK's alternative valuation concludes that the value of the Claimant's lost investment is USD 372,000.[607] This valuation excludes the Steel Plant on viability grounds and, consequently, the BDO Report assumes that the Steel Plant had no value.[608]

606 Matthews Report, para. 8.12.

607 Statement of Defence, para. 198; SRK Report, para. 69.

608 Matthews Report, para. 9.1.

360. Mr Matthews explains why the SRK alternative valuation is not credible:

> First, SRK performs a valuation of the Mine in isolation from the Steel Mill. For the reasons explained in Sections 3 to 5, I consider that the Project (i.e. the Mine and the Steel Plant) was valuable and therefore a valuation of the Mine only will materially understate the value of the Project.
>
> Second, SRK's conclusion is based on a very small set of transactions that involve assets that may not be comparable to the Mine.[609]

361. Mr Matthews highlights that "SRK does not perform any analysis of the market for iron ore to establish that the conditions in the market were such that transactions that occurred post-2004 are comparable to those that took place in 2000."[610]

362. Mr Verdier explains that the SRK alternative evaluation:

> ignores how our project was unique, given that it included a mine and steel plant on one site. Every project is unique and has to stand on its own technical and economic merits. The factors relating to the Aswan project yielded a result that promised technical and commercial success.[611]

363. The Respondent conspicuously does not rely on any jurisprudence to support the appropriateness of its alternative market-based valuation. Investment arbitration tribunals have consistently held that comparable valuation approaches are only suitable when the transactions are "genuinely" or "sufficiently" comparable to the one in question.[612] For example, in *Tenaris v. Venezuela*, the tribunal dismissed the comparable transactions proposed by the respondent, holding that:

> … in the context of the DCF method, the uncertainties presented in the Venezuelan market at the time of the expropriation presented complex circumstances which render comparisons of the value of Matesi with even ostensibly similar companies in other countries very difficult indeed. The Tribunal is not

609 Matthews Report, paras 9.7-9.8.

610 Matthews Report, para. 9.9.

611 Verdier Second Witness Statement, para. 70.

612 *Dunkeld International Investment Ltd. v. The Government of Belize (Number 1*), PCA Case No. 2010-13, UNCITRAL, Award, 28 June 2016, **CLA0112**, para. 275; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, **CLA0113**, para. 831.

> persuaded that the five companies selected by Claimants' experts as most comparable to Matesi (all of which operate in India and which make somewhat different products with different technologies) provide reliable guidance to the Tribunal on the basis of which it might proceed to achieve a satisfactory finding of value in this case.[613]

364. Similarly, in *Gold Reserve v. Venezuela*, the tribunal rejected the claimant's proposed comparable mining transactions because they were not "sufficiently similar".[614] That tribunal also had on the record other methodologies, including comparable transactions, that it could have adopted to calculate the fair market value of the investment. The respondent, however, argued that "there were simply no comparable companies or transactions close enough to be used as a measure of value".[615] The tribunal agreed with the respondent.[616]

365. SRK's "alternative" valuation can be of no relevance to assessing the damages payable to the Claimant in this case.

F. The Claimant is entitled to moral damages

366. In his Statement of Claim, the Claimant requested that he be awarded USD 5 million in moral damages.[617] As the Claimant explained in his Statement of Claim, nothing prevents a tribunal from awarding moral damages.[618] Article 31 of the Draft Articles on State Responsibility explicitly refer to the duty to compensate any damage "whether material or *moral*".[619] It has long been upheld by international courts and tribunals that "one injured is … entitled to be compensated for an injury inflicted

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613 *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, **CLA0114** (in Spanish), para. 532;

614 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, **CLA0113**, para. 831.

615 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, **CLA0113**, para. 831.

616 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, **CLA0113**, para. 831.

617 Statement of Claim, para. 5.17.

618 Statement of Claim, para. 5.14.

619 Article 31(2) of the ILC Articles on State Responsibility states that: "Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State." ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, **RLA0070**, Article 31(2).

resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation".[620]

367. The Respondent's treatment of the Claimant resulted not only in severe physical suffering over a protracted period of incarceration, but also in the complete loss of Mr Bahgat's reputation and position in society, the loss of his business and severe upheaval to his family in Egypt (including a long-term freezing order over their assets).

368. The Respondent argues that the Claimant's moral damages claim must fail for four reasons. The Claimant will address each in turn.

(i) This Tribunal is competent to award moral damages.

369. The Respondent argues that "this Tribunal is not competent to adjudicate such claims as they relate to alleged abuses of human rights, rather than investment claims".[621] This is categorically untrue. This is an investment claim, not a "human rights claim". As the Respondent itself acknowledges, moral damages can be payable in investment cases in "exceptional circumstances".[622] This is just such a case.

370. The Respondent's view is contrary to prevailing jurisprudence that has unequivocally upheld that moral damages are "admissible under international law"[623] and that "investment treaties … do not exclude … that a party may, in exceptional circumstances, ask for compensation for moral damages".[624]

371. To support its position, the Respondent relies on the *Biloune v. Ghana* case, in which the tribunal declined jurisdiction over a claim for damages resulting from the arbitrary detention and expulsion of the claimant.[625] The tribunal in that case found

620 Mixed Claims Commission, United States-Germany, Opinion in the *Lusitania* Cases, VII Reports of International Arbitral Awards, (1923-1939), **CLA0115**, p. 40.

621 Statement of Defence, para. 202.

622 Statement of Defence, para. 201.

623 *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, **CLA0116**, para. 895.

624 *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, **RLA0114**, para. 289.

625 Statement of Defence, para. 204.

that the claim constituted a "claim for violation of human rights".[626] The tribunal's decision in *Biloune* is easily distinguishable from the present case.

372. The claimant in *Biloune* explicitly claimed a violation of human rights and did not request moral damages at all.[627] The two concepts are not identical, which is why human rights courts can grant moral damages in addition to reparations for the violation of human rights. Moral damages are awarded in order to alleviate the pain and suffering, mental anguish, humiliation, loss of enjoyment of life or damage to reputation that has been caused by the violation of a primary obligation (of the wrongful act).[628]

373. Curiously, the Respondent alleges that the "Claimant is not claiming for any conduct that adversely affected his credit or reputation".[629] However, the Claimant's Statement of Claim clearly presents Mr Bahgat's submission that "*Egyptian authorities savaged* [his] *reputation*".[630] The Claimant reiterates that his reputation was irreparably damaged as a direct result of the Respondent's conduct. Moreover, when he was belatedly acquitted and released from prison, the Respondent made no effort to reinstate the Claimant's business interests or reputation. On the contrary, it maintained a freezing order against him and his family and a travel ban prohibiting him from leaving Egypt to return home for years afterwards.

374. In a final attempt to support its argument on the Tribunal's lack of competence, the Respondent asserts that the Claimant has not satisfied his burden of proving the connection between his investment and the request for moral damages. As mentioned above, moral damages constitute an integral part of the principal damage suffered by the Claimant in connection with his investment. As long as it is proven that the injury caused to the Claimant's investment was a result of the Respondent's wrongful conduct, the Claimant's burden of proof is satisfied.

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626 Statement of Defence, para. 204.

627 Dumberry, 'Compensation for Moral Damages in Investor-State Arbitration Disputes' 27(3) Journal of International Arbitration 247, 21 January 2010, **CLA0117**, p. 255.

628 Ripinsky and Williams, Damages in International Investment Law, BIICL (2008), **CLA0118**, p. 308.

629 Statement of Defence, para. 205.

630 Statement of Claim, para. 5.16.

(ii) The Claimant's moral damages claim meets the threshold set by the jurisprudence

375. The Respondent states that "the award of moral damages only occurs in truly 'exceptional circumstances'".[631] The Claimant agrees that this is the standard set by tribunals and believes that this case meets that threshold.

376. The *Lemire* tribunal was the first to attempt to evaluate what situations fall under the threshold of exceptionality. It concluded that that is the case when:

> the State's actions imply physical threat, illegal detention, or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act, [and when] the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position...[632]

377. As demonstrated above Section III.D, the Claimant had to undergo not only three years of unjust imprisonment under unsanitary and degrading conditions, which directly caused his health to deteriorate; he also had to bear the fabricated allegations against him that irreparably damaged his reputation and his previous good name. The Respondent purposefully initiated a media campaign against the Claimant and his investment in order to discredit both of them.[633] The Respondent also commenced criminal proceedings based on contrived allegations despite overwhelming evidence proving the Claimant's innocence. Even after his acquittal, the Respondent kept the Claimant imprisoned for several months, and, even after his release, it maintained the asset freeze and travel ban. These circumstances are truly exceptional.

378. The Respondent relies on *Stati et al v. Kazakhstan* to argue that the Claimant's ill treatment was not exceptional.[634] In the Respondent's own telling, in *Stati*, an

631 Statement of Defence, para. 207.

632 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, **RLA0115**, para. 333.

633 Article from Middle East Economic Digest dated 25 February 2000, **C0055**; Copy of newspaper article dated 5 November 2011, **C0057**; Wafd Newspaper Article dated 21 June 2000, **C0141**; Sout El Omma Newspaper Article dated 19 June 2006, **C0142**.

634 Statement of Defence, paras 207-208.

employee of the claimant "was arrested and incarcerated for months".[635] The facts of this case are clearly more extraordinary than those in *Stati*. In the present case, the Claimant himself was arrested on false charges before a deadline imposed by the Respondent for answering those charges had expired, and was imprisoned for more than three years. Mr Bahgat suffered severe physical hardship while in prison. His imprisonment was accompanied by other egregious and grossly disproportionate misconduct, in violation of the BITs. The physical, psychological and reputational damage of that misconduct cannot be captured in a fair market valuation of the Claimant's lost investment.

(iii) The Claimant has substantiated the claim

379. The Respondent's third argument is that the Claimant has not proven liability.[636] The Respondent's breaches of the BIT are the direct cause of the Claimant's physical, psychological and reputational suffering. In *Desert Line v. Yemen*, the tribunal held Yemen liable for injury suffered by the claimant, "whether it be bodily, moral or material in nature".[637] In *Pezold v. Zimbabwe*, the claimant's testimony alone was sufficient to establish moral damages for his suffering.[638] In the present case, the deliberate and grossly disproportionate physical, psychological and reputational mistreatment of Mr Bahgat and his investment was manifest on multiple fronts.

(iv) The amount claimed is not unrealistic, given the egregiousness of the Respondent's misconduct

380. Finally, the Respondent alleges that the amount sought by the Claimant is "entirely unrealistic" and that it would be a "vast departure from international arbitration jurisprudence."[639] The Respondent misrepresents the relevant jurisprudence. For

635 Statement of Defence, para. 207.

636 Statement of Defence, para. 211.

637 *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, **RLA0114**, para. 290.

638 *Bernhard Von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, **RLA0117**, paras 918-921.

639 Statement of Defence, para. 213.

example, in *Al-Kharafi v. Libya*, the tribunal awarded USD 30 million in moral damages to the claimant due to the "damage caused to its reputation".[640]

381. The Respondent further argues that the Claimant "plucked a number out of thin air".[641] There is no standard method of evaluating moral damages. However, this does not mean that the moral damage suffered by the Claimant was not "very real, and the mere fact that [damages] are difficult to measure or estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be compensated".[642]

382. The Respondent believes that the amount of USD 5 million is exaggerated,[643] because in *Desert Line*, an award rendered 10 years ago, and in *Pezold*, which simply ordered the *Desert Line* sum without separate consideration, a sum of USD 1 million was awarded in moral damages.[644] However, as mentioned above, in *Al-Kharafi v. Libya*, the tribunal awarded moral damages of USD 30 million.[645] Given the Claimant's extraordinary (and entirely foreseeable) moral damage at the hand of the Respondent over a prolonged period of more than six years, USD 5 million is not exaggerated.

G. The Claimant is entitled to compound interest

383. As noted above, the Respondent is under a duty to make full reparation to the Claimant for its breaches of the BITs. Interest is an integral component of full reparation under customary international law. This is explicitly mandated by Article

640 *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Final Arbitral Award, 22 March 2013, **CLA0119**, p. 369.

641 Statement of Defence, para. 218.

642 *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, **RLA0114**, para. 289.

643 Statement of Defence, para. 217.

644 Statement of Defence, paras 214-215; *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, **RLA0114**, para. 290; *Bernhard Von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, **RLA0117**, para. 921.

645 *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Final Arbitral Award, 22 March 2013, **CLA0119**, p. 369.

38(1) of the ILC Articles on State Responsibility,[646] and has been confirmed by numerous arbitral tribunals and learned commentators.[647] In the words of the tribunal in *Asian Agricultural Products v. Sri Lanka*:

> … the case-law elaborated by international arbitral tribunals strongly suggests that in assessing the liability due for losses incurred the interest becomes an integral part of the compensation itself ...[648]

384. An award of interest thus serves the objective of placing the claimant in the position that it would have occupied had the State not acted unlawfully. Therefore, an award of interest is not separate from full reparation under the *Chorzów Factory* standard; it is a component of, and gives effect to, the principle of full reparation.[649]

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646 Article 38(1) of the ILC Articles on State Responsibility states: "Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set as to achieve that result." ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, **RLA0070**, Article 38. See also Marboe, *Calculation of Compensation and Damages in International Investment Law* (OUP, 2017), para. 6.18 ("In cases of State responsibility the duty to pay interest results from the obligation to 'full reparation'"), **CLA0120**.

647 See, *e.g.*, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, **CLA0121**, para. 55 ("In the Tribunal's view, interest is part of the 'full' reparation to which the Claimants are entitled to assure that they are made whole. In fact, interest recognizes the fact that, between the date of the illegal act and the date of actual payment, the injured party cannot use or invest the amounts of money due."). See also *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, **CLA0122**, para. 308, ("As a general principle, almost invariably, justice requires that the wrongdoer who has deliberately failed to pay compensation should pay interest for the period during it has withheld that compensation unlawfully. The claimant, in addition to suffering from the wrongdoing giving rise to compensation, has suffered a further loss from non-payment of that compensation when it should have been paid by the wrongdoer. Moreover, a wrongdoer withholding payment may be unjustly enriched by its deliberate non-payment of such compensation, at the expense of the claimant. In these circumstances, therefore, full reparation will include an order for interest."); Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), **CLA0123**, p. 235, para. 2, ("As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgment or award concerning, the claim and to the extent that it is necessary to ensure full reparation.").

648 *Asian Agricultural Products Limited v. The Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, **RLA0105**, para. 114.

649 See, *e.g.*, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, **CLA0124**, para. 174, ("Regarding such claims for expropriation, international jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation due after the award and that compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law in such expropriation cases."). See also *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Final Award, 30 August 2000, **RLA0113**, para. 128.

385. The principle of full reparation informs all aspects of an interest award,[650] including the rate of interest, and whether interest should be simple or compound.

386. The Respondent has not contested in its Statement of Defence the Claimant's request for compound interest. Indeed, Ripinsky and Williams, as well as Marboe, confirm that compound interest is now generally considered the rule applied by investment arbitration tribunals.[651] For example, in *Middle East Cement* as well as in *El Paso*, the tribunals recognised that compound interest is generally applied as it "reflects economic reality" and would "better ensure full reparation of the Claimant's damage".[652]

387. Consequently, the interest rate applied by Mr Matthews is LIBOR plus 4% compounded annually.[653] The LIBOR rate plus a premium is commonly applied as a rate of interest intended to reflect a commercial rate of borrowing.[654] In *OIEG v. Venezuela*, the tribunal found that "[a] LIBOR rate for one-year plus 4% is a 'normal commercial rate' that guarantees full compensation to Claimant".[655] Notably, an

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650 Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), **CLA0123**, p. 235.

651 Ripinsky and Williams, Damages in International Investment Law, BIICL (2008), **CLA0118**, p. 379; Marboe, Calculation of Compensation and Damages in International Investment Law, Oxford University Press (OUP 2017), **CLA0120**, p. 392.

652 *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, **RLA0096**, para. 746; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, **CLA0124**, para. 174.

653 Matthews Report, para. 2.21. While the LIBOR plus 4% interest rate was not used in the Statement of Claim, it is very substantially less than the "10% return" rate presented at paragraph 5.12 of the Inglis Report. Should such a 10% rate be applied to the Claimant's "wasted costs", the total damages payable would be USD 234.1 million. Should the Tribunal decide to award compensation based upon wasted costs, the Claimant submits that such a 10% return rate would be suitable as "other and further relief", following the *Wena Hotels* award (which applied a 9% interest rate, compounded quarterly), cited in the Statement of Claim at footnote 126 (**CLA0038**).

654 See, *e.g.*, *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (Tanesco)*, ICSID Case No. ARB/10/20, Award, 12 September 2016, **CLA0125**, paras 387-390; *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, **RLA0111**, paras 832-838; M*obil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Award, 20 February 2015, **CLA0126**, para. 170; *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ISCID Case No. ARB/11/25, Award, 10 March 2015, **CLA0078**, para. 944; *Flughafen Zuerich A.G. and Gestion e Ingenieria IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 11 March, **CLA0127**, paras 962-965 (in Spanish); *Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/07/15, Award, 3 March 2010, **CLA0028**, para. 678.

655 *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ISCID Case No. ARB/11/25, Award, 10 March 2015, **CLA0078**, para. 944.

interest rate of LIBOR plus 4% is substantially less than the current Egyptian sovereign bond interest rate of 18.4%.[656] The annual compounding applied by Mr Matthews is also conservative compared to the six-monthly, quarterly or even monthly compounding observed by Marboe to have been applied in other cases.[657]

388. This results in the total compensation payable shown in Table 2-1 of the Matthews Report, as follows:

Table V-1: Summary of losses (interest at USD 12m LIBOR + 4%) (USD million)

	Loss (pre-interest)	**Interest**	**Loss including interest**
Fair market value	103.5	225.4	329.0
Wasted costs	39.8	86.6	126.4

389. Mr Matthews uses the date of his report as a proxy for the date of the Award. As such, the Claimant's loss based on the fair market value of his investment is, at a minimum, USD 329 million (including USD 225.4 million compound interest since February 2000). Alternatively, Mr Matthews calculates the Claimant's loss based on his wasted costs at USD 126.4 million (including USD 86.6 million compound interest since February 2000). If a 10% return rate is applied to the Claimant's wasted costs, as proposed at footnote 653 above, the Claimant's loss is USD 234.1 million.

H. The Claimant is entitled to recovery of his costs, including his reasonable funding costs

390. As part of the costs included in his Request for Relief, the Claimant claims his reasonable funding costs. These have been materially increased due to the lengthy delay caused by the Respondent's obfuscation in the jurisdiction phase of these proceedings. International arbitral jurisprudence confirms that, when it comes to

656 Screenshot from Bloomberg, Yield on most recently issued Egyptian bond dated 9 October 2018, **C0143** (showing that the rate has been consistently above 17.6% since August 2018).

657 Marboe, Calculation of Compensation and Damages in International Investment Law, Oxford University Press (OUP 2017), **CLA0120**, p. 389.

considering a claim for funding costs, the "overarching consideration was 'what justice requires'".[658]

391. In *Essar v. Norscot*, the arbitrator enumerated eight factors as the basis for his ruling to award funding costs to the claimant, namely: (1) the conduct of the parties; (2) the relative financial situation of the parties; (3) the losing party has knowledge of the successful party's financial predicament; (4) the magnitude of the costs incurred by the successful party; (5) the successful party has no credible alternative source of financing; (6) the losing party is aware at least that such recourse has been contracted; (7) the successful party establishes that the funding was properly utilised; and (8) the successful party has contracted the funding on standard market rates and terms for such facility.[659]

392. All eight factors apply to the Claimant's funding arrangement and demonstrate the exceptional nature of his case. Indeed, the Claimant has had to wait so long as a result of Egypt's tactics that his first funder has gone bankrupt and he has had to find a second funder, at substantial personal cost. The ICC Commission Report on Decisions on Costs in International Arbitration provides that:

> Where a successful claimant or counterclaimant has been funded by a third party, the third-party funder is usually repaid (at least) the costs of the arbitration from the sum awarded. Therefore, the successful party will itself ultimately be out of pocket upon reimbursing such costs to the third-party funder and may therefore be entitled to recover its reasonable costs, including what it needs to pay to the third-party funder, from the unsuccessful party. The tribunal will need to determine whether these costs were actually incurred and paid or payable by the party seeking to recover them, and were reasonable. The fact that the successful party must in turn reimburse those costs to a third-party funder is, in itself, largely immaterial.[660]

393. The Claimant will elaborate on the details of his funding costs in his Costs Submission.

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658 See, *e.g.*, the ICC arbitration case that forms the basis of the High Court judgment *Essar Oilfields v. Norscot*, [2016] EWHC 2361 (Comm), 15 September 2016**, CLA0128**, para. 32.

659 In *Essar v. Norscot*, the arbitrator enumerated various factors as the basis for his ruling, which are recited in the High Court's judgment *Essar Oilfields v. Norscot*, [2016] EWHC 2361 (Comm), 15 September 2016, **CLA0128**, para. 32.

660 ICC Commission Report, Decisions on Costs in International Arbitration, 2015, **CLA0129**, para. 87.

VI. REQUEST FOR RELIEF

394. The Claimant requests that the Tribunal render an award:

a. rejecting the Respondent's new objections to jurisdiction as untimely or, alternatively, without merit;

b. declaring that the Respondent has breached Articles 2 and 3 of the 1980 BIT;

c. declaring that the Respondent has breached Articles 2, 3, 5 and 12 of the 2004 BIT;

d. declaring that the Respondent has breached Articles 8, 9 and 12 of the Respondent's Investment Law;

e. ordering that the Respondent pay damages to the Claimant in the amount of not less than USD 103.5 million;

f. ordering that the Respondent pay USD 5 million to the Claimant by way of moral damages;

g. ordering the Respondent to pay compound interest of LIBOR + 4 percent compounded annually on any amount awarded to the Claimant, such compound interest to run from the date of the expropriation until the date upon which payment is made;

h. ordering the Respondent to pay all the costs of the arbitration, including all the fees and expenses of the PCA and the Tribunal, all the legal costs, funding costs and expenses incurred by the Claimant, with interest calculated in accordance with paragraph (g) above; and

i. ordering such other and further relief as the Tribunal deems appropriate.

Respectfully submitted,

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Counsel to the Claimant