

H&H Enterprises Investments, Inc. v. Arab Republic of Egypt
(ICSID Case No. ARB/09/15)

Excerpts of the Award of May 6, 2014 made pursuant to Rule 48(4) of the ICSID Arbitration
Rules of 2006

Claimant

H&H Enterprises Investments, Inc. (“H&H”, a California (USA) corporation)

Respondent

Arab Republic of Egypt (“Egypt”)

Tribunal

Bernardo M. Cremades (President of the Tribunal, Spanish), appointed by the Chairman of the ICSID Administrative Council

Veijo Heiskanen (Finnish), appointed by the Claimant

Hamid Gharavi (French/Iranian), appointed by the Respondent

Award

Award of May 6, 2014

Instrument relied on for consent to ICSID arbitration

Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, signed on 11 March 1986 and entered into force on 27 June 1992 (“Treaty”)

Procedure

Applicable Arbitration Rules: ICSID Arbitration Rules of 2006

Place of Proceedings: Washington, D.C.

Procedural Language: English

Full procedural details: Available at <https://www.worldbank.org/icsid>

Factual Background

The dispute concerned a management and operation contract (“MOC) concluded between H&H and an Egyptian government owned company, regarding a resort on the Gulf of Suez. Following arbitration and court proceedings in Egypt, the Claimant brought ICSID proceedings in 2009 under the Treaty claiming, among other things, that Egypt’s eviction of H&H from the resort and refusal to recognize its option to buy the resort property (“Option to Buy”) breached the fair and equitable treatment, expropriation, and full protection and security standards of the Treaty. The Claimant also alleged denial of justice and denial of effective means concerning the local proceedings.

Egypt raised various jurisdictional objections and the proceedings were bifurcated with the agreement of the parties. In its [Decision on Jurisdiction](#), the Tribunal dismissed Respondent’s objections based on *ratione personae*, *ratione materiae*, *ratione temporis* and equitable prescription arguments and joined to the merits, *inter alia*, the question of the validity of the Option to Buy and Respondent’s objections based on the Treaty’s fork-in-the-road provision.

The Award concluded that the Tribunal lacked jurisdiction over the dispute because H&H’s previous submission of claims with ‘the same fundamental basis’ to an arbitral tribunal under the MOC, and to Egyptian courts, had triggered the fork-in-the-road provision. Claimant’s claims of corruption, denial of justice and denial of effective means were dismissed on the merits for lack of a causal link between the alleged actions and the loss of the investment. The Tribunal ordered the parties to bear their own costs, and limited the Respondent’s share of the costs of the arbitration proceeding to USD 225,000, while ordering the Claimant to bear the remaining costs.

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**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**
WASHINGTON, D.C.

In the arbitration proceeding between

H&H ENTERPRISES INVESTMENTS, INC.

Claimant

and

THE ARAB REPUBLIC OF EGYPT

Respondent

ICSID Case No. ARB/09/15

AWARD

Members of the Tribunal

Dr. Bernardo M. Cremades, President

Dr. Veijo Heiskanen

Dr. Hamid Gharavi

Secretary of the Tribunal

Ms. Milanka Kostadinova

Date of dispatch to the Parties: May 6, 2014

REPRESENTATION OF THE PARTIES

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ABBREVIATIONS AND ACRONYMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings (2006)
BIT or US-Egypt BIT	Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragements and Protections of Investments, signed in Washington on 29 September 1982, with a Related Exchange of Letters signed 11 March 1985 and a Supplementary Protocol signed 11 March 1986; entered into force 27 June 1992
Claimant's Memorial on the Merits	Claimant's Memorial on the Merits, dated 15 October 2010
Claimant's Response to Objections to Jurisdiction	Claimant's Response to the Respondent's Objections to Jurisdiction and Request for Bifurcation, dated 9 September 2011
Claimant's Rejoinder to Objections to Jurisdiction	Claimant's Rejoinder to the Respondent's Objections to Jurisdiction, dated 15 May 2012
Claimant's Reply on the Merits	Claimant's Reply Memorial on the Merits and Rejoinder on Remaining Jurisdictional Issues, dated 1 August 2013
Decision on Jurisdiction	Tribunal's Decision on Respondent's Objections to Jurisdiction, dispatched on 5 June 2011
EGOTH	Egyptian General Company for Tourism and Hotels
GHE	Grand Hotels of Egypt
HOTAC	Holding Company for Tourism, Hotels and Cinema
HT	Transcripts of the Hearing on the Merits and Remaining Jurisdictional Issues
ICSID Convention/Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
L.E.	Egyptian pounds

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MOC	[...] Hotel Management and Operation Contract [...]
Parties	H&H Enterprises Investments, Inc. and the Arab Republic of Egypt
POT	Public Sector Organization for Tourism
Respondent's Objections to Jurisdiction	Respondent's Jurisdictional Objections and Request for Bifurcation, dated 6 June 2011
Respondent's Reply on Objections to Jurisdiction	Respondent's Reply to the Claimant's Response to the Objections to Jurisdiction, dated 19 January 2012
Respondent's Counter-Memorial on the Merits	Respondent's Counter-Memorial on the Merits and Reply on Remaining Jurisdictional Issues, dated 16 May 2013
Respondent's Rejoinder on the Merits	Respondent's Rejoinder on the Merits and Surreply on Remaining Jurisdictional Issues, 11 October 2013
U.S.	United States of America
USD	United States Dollar
Vienna Convention	Vienna Convention on the Law of Treaties of May 23, 1969

I. THE PARTIES

A. THE CLAIMANT

1. H&H Enterprises Investments Inc. (“**H&H**” or “**the Claimant**”) is a California corporation established in 1988 by [...], a United States investor of Egyptian origin. [...] also formed an Egyptian affiliate, the Egyptian American Company for Development and Tourism – H&H Enterprises (“**H&H Egypt**”) which was recognized as such by the Government. Another local affiliate, [...], was created to help oversee renovations of the Resort, as described further in this Award.

B. THE RESPONDENT

2. The Respondent is the Arab Republic of Egypt (“**the Respondent**”). As a public sector company (or after 1991, a public business sector subsidiary company), Grand Hotels of Egypt (“**GHE**”) is owned by the Government of Egypt and at the time owned and managed certain of the country’s hotels with the Egyptian Ministry of Tourism. GHE was wholly owned first by the Public Sector Organization for Tours (“**POT**”) and later by the Holding Company for Tourism, Hotels and Cinema (“**HOTAC**”), a public sector organization structured as an Egyptian joint stock holding company wholly owned by the Ministry of Tourism. In 1996, GHE merged into the Egyptian General Company for Tourism and Hotels (“**EGOTH**”).

II. THE PROCEDURAL HISTORY

A. INITIATION OF THE ARBITRATION

3. On 17 July 2009, the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) received a request for arbitration (the “**Request**”) from the Claimant against the Respondent. The Request was made pursuant to the Treaty between the United States of America and the Arab

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Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, which was signed on 11 March 1986 and entered into force on 27 June 1992 (the “**US-Egypt BIT**” or the “**Treaty**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**” or “**Convention**”).

4. On 11 August 2009, the Secretary-General of ICSID sent the Claimant and the Respondent a Notice of Registration in accordance with Article 36(3) of the ICSID Convention.
5. On 29 October 2009, the Parties informed the Centre that they had agreed to adopt a formula similar to the one set out in the provision of Article 37(2)(b) of the ICSID Convention as their method for constitution of the Arbitral Tribunal. This letter was acknowledged by a letter from ICSID to the Parties of the same date. Accordingly, it was confirmed that: (1) the Tribunal would consist of three arbitrators; (2) one arbitrator would be appointed by each Party; and (3) the third, presiding, arbitrator would be appointed by agreement of the Parties.
6. Pursuant to this agreement, the Claimant appointed Dr. Veijo Heiskanen, a national of Finland, as a member of the Tribunal. Dr. Heiskanen accepted his appointment on 31 October 2009. The Respondent appointed Dr. Hamid Gharavi, a dual national of France and Iran. Dr. Gharavi accepted his appointment on 30 October 2009.
7. On 21 December 2009, the Claimant requested the appointment of the presiding arbitrator by the Chairman of the ICSID Administrative Council as provided for in Article 38 of the Convention and Rule 4(1) of the Arbitration Rules, following the Parties’ failure to reach an agreement on the person to serve as President of the Tribunal.
8. By letter of 2 February 2010, the Secretary-General informed the Parties that the Chairman of the ICSID Administrative Council had appointed Dr. Bernardo M. Cremades, a national of Spain, as the third arbitrator and President of the Tribunal.

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9. The Tribunal was officially constituted on 2 February 2010, in accordance with the Convention and the Rules of Procedure for Arbitration Proceedings (“**Arbitration Rules**”). Ms. Milanka Kostadinova, Senior Counsel, ICSID, was designated to serve as the Secretary of the Tribunal.

10. The First Session of the Tribunal was held on 18 March 2010 at the World Bank Paris office. At the Session, the Tribunal heard, among other things, the Parties’ proposals for addressing any objections to jurisdiction and a potential request for bifurcation of the proceeding by the Respondent. The Tribunal also approved the Parties’ agreed schedule for preliminary submissions, which included a phase for the Claimant’s request for document production prior to the filing of the Claimant’s Memorial on the Merits and a phase for the Respondent’s request for document production prior to the filing of the Respondent’s Objections to Jurisdiction. It was further agreed that the Claimant would file a response to the Respondent’s jurisdictional objections and that a one-day procedural hearing would be held on the issue of bifurcation of the proceedings.

11. On 28 March 2010, the Claimant filed a request for production of documents, which was subsequently amended on 8 April 2010. On 8 May 2010, the Respondent filed a reply to the Claimant’s request. Following further exchanges between the Parties, on 2 June 2010 the Claimant requested that the Tribunal schedule an oral hearing concerning the Respondent’s refusal to comply with outstanding document production requests. Having received the Respondent’s comments on 11 June 2010, the Tribunal rendered its First Production Order Concerning the Claimant’s Request for Production and Related Questions, dated 17 June 2010.

12. On 15 October 2010, the Claimant filed its Memorial on the Merits.

13. On 8 November 2010, the Respondent filed a request for production of documents. On 13 December 2010, the Claimant submitted observations to the Respondent’s request objecting to the production of certain documents. By letter of 30 December 2010, the Claimant wrote to draw the Tribunal’s attention to the fact that the Respondent had failed to respond to the Claimant’s observations by

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23 December 2010, as required by the agreement for timing of the pleadings in this matter. No response was received from the Respondent and the Claimant requested that the Tribunal rule on the Claimant's objections to the Respondent's document production request. The Respondent filed its response subsequently. On 25 January 2011, the Tribunal rendered the Second Procedural Order of the Tribunal Concerning the Respondent's Request for Production of Documents.

B. THE RESPONDENT'S OBJECTIONS TO JURISDICTION

14. On 27 April 2011, the due date for the Respondent's submission of the Memorial on Objections to Jurisdiction, the Respondent filed a request for a six-week extension for filing of its jurisdictional objections. By letter of 28 April 2011, the Tribunal granted a four-week extension and determined that the Respondent's objections to jurisdiction should be submitted by 26 May 2011. On the same date, the Respondent informed the Tribunal that the Parties had agreed on a further extension of one week. The Tribunal confirmed the Parties' agreement on 27 May 2011.
15. On 6 June 2011, the Respondent filed its Memorial on Jurisdictional Objections and Request for Bifurcation.
16. On 9 September 2011, Claimant filed its Response to the Respondent's Jurisdictional Objections and Request for Bifurcation.
17. On 13 September 2011, the Tribunal invited the Parties to indicate whether they still wished to hold a hearing on the issue of bifurcation of the proceedings, as initially contemplated at the First Session. On 20 September 2011, the Respondent confirmed that it wished for a one-day hearing on bifurcation of the proceeding. The Claimant asked the Tribunal to forgo the hearing but deferred the decision to the Tribunal.
18. A hearing on the question whether to address the objections to jurisdiction as a preliminary matter was held on 15 November 2011, in Washington, D.C.
19. The Parties were represented as follows:

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The Claimant

Mr. Arif H. Ali, Mr. Baiju Vasani, Ms. Marguerite C. Walter, and
Ms. Emily Alban, Crowell & Moring LLP;
Mr. Khaled El Shalakany, Shalakany Law Office, Cairo;

The Respondent

Dr. Karim Hafez, Dr. Dalia Hussein and Ms. Johanne Cox, Hafez, Cairo;
Ms. Fatma Khalifa and Mr. Amr Arafa, Egyptian State Lawsuits
Authority

20. On 22 November 2011, the Tribunal issued Procedural Order No. 3 Concerning Bifurcation of Certain Objections to Jurisdiction. The Tribunal confirmed the Parties' agreement at the hearing to bifurcate the proceedings into a preliminary jurisdictional phase to precede the merits phase. In its Procedural Order No. 3, the Tribunal outlined the jurisdictional objections to be decided in the preliminary jurisdictional phase. The Tribunal also fixed a calendar for the written pleadings and the hearing on the preliminary jurisdictional issues.
21. Pursuant to the filing calendar set forth in Procedural Order No. 3, on 19 January 2012, the Respondent filed a Reply to the Claimant's Response to the Objections to Jurisdiction.
22. On 15 March, 2012, the Claimant filed a Rejoinder to the Respondent's Objections to Jurisdiction.
23. A hearing on preliminary jurisdictional issues was held on 23, 24 and 25 March 2012, in Washington, D.C.
24. The Parties were represented as follows:

The Claimant

Mr. Arif H. Ali, Weil Gotshal & Manges LLP;
Mr. Baiju Vasani, Ms. Marguerite C. Walter, Ms. Emily Alban, and
Mr. Kassi D. Tallent, Crowell & Moring LLP;
Dr. Khaled El Shalakany and Mr. Adam El Shalakany. Shalakany Law
Office;

The Respondent

Dr. Karim Hafez, Dr. Dalia Hussein and Ms. Johanne Cox, Hafez, Cairo;
Ms. Fatma Khalifa and Mr. Amr Arafa, Egyptian State Lawsuits
Authority

C. DECISION ON JURISDICTION

25. On 5 June 2012, the Tribunal rendered its Decision on the Respondent's Objections to Jurisdiction. The Tribunal dismissed the Respondent's jurisdictional objections based on the Respondent's *ratione personae*, *ratione temporis* and equitable prescription arguments. The Tribunal also rejected the Respondent's jurisdictional objections based on the lack of *ratione materiae* jurisdiction and joined the question of the validity of the Option to Buy to the merits. The jurisdictional objections based on the fork-in-the-road provision of the BIT were also joined to the merits. The Tribunal decided to reserve any decision on the allocation of costs until the conclusion of the proceedings. The Decision on Jurisdiction is incorporated herein by reference.

D. SUBMISSIONS ON THE MERITS AND THE REMAINING JURISDICTIONAL ISSUES

26. On 13 June 2012, the Tribunal invited the Parties to propose a procedural calendar for the remaining steps of the proceedings. By letter of 11 July 2012, the Respondent requested a two-month extension for submission of its Counter-Memorial on the Merits and Reply on Remaining Jurisdictional Issues. In its letter, the Respondent suggested a revised procedural calendar. By letter of 19 July 2012, the Claimant indicated its agreement with the Respondent's proposal with a few amendments. On 25 July 2012, the Tribunal confirmed the Parties' agreed schedule which was attached to the Claimant's letter of 19 July 2012.

27. By letter of 23 August 2012, the Respondent informed the Tribunal of Dr. Karim Hafez's withdrawal as the Respondent's counsel and requested a further extension of the time limit for submission of its Counter-Memorial on the Merits. On 27 August 2012, the Claimant indicated that it did not object to the Respondent's request for a further extension, but was of the view that any such

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extension should not exceed one month. On 29 August 2012, the Tribunal set out a revised procedural calendar.

28. On 22 October 2012, the Respondent requested that the time limit for filing of the Counter-Memorial on the Merits be extended until 28 March 2013. By letter of 31 October 2012, the Claimant agreed on a further modification of the procedural calendar by the Tribunal under the condition that the Respondent made an appropriate showing of its substantial effort to appoint new counsel.
29. By letter of 7 November 2012, the Egyptian State Lawsuits Authority confirmed that the Respondent was in the process of retaining Cleary Gottlieb Steen & Hamilton LLP as counsel in this proceeding. The Respondent also confirmed that, given the circumstances, it would be able to submit the Counter-Memorial on the Merits by 28 March 2012.
30. By letter of 15 January 2013, the Claimant informed the Tribunal that the Parties had jointly agreed and proposed to the Tribunal a revised procedural calendar. The procedural calendar was subsequently adjusted due to further requests for extension of time limits.
31. On 16 May 2013, the Respondent submitted its Counter-Memorial on the Merits and a Reply on Remaining Jurisdictional Issues. On 1 August 2013, the Claimant submitted its Reply on the Merits and a Rejoinder on Remaining Jurisdictional Issues. On 11 October 2013, the Respondent submitted its Rejoinder on the Merits.

E. HEARING ON THE MERITS AND THE REMAINING JURISDICTIONAL ISSUES

32. A pre-hearing organizational meeting was held by telephone conference on 14 October 2013. On 15 October 2012, the Tribunal ruled on certain outstanding procedural matters.
33. The hearing on the merits and the remaining jurisdictional issues was held on 5, 6, 7 and 8 November 2013, in Washington, D.C.

34. The Parties were represented as follows:

The Claimant

Mr. Arif H. Ali and Ms. Marguerite C. Walter, Weil Gotshal & Manges LLP;
Mr. Clifton Elgarten, Ms. Kathryn Kirmayer, Ms. Jane Wessel, Ms. Meriam Alrashid, Ms. Emily Alban, Ms. Amal Bouhabib, Ms. Randa Adra, Ms. Derya Tokdemir, Mr. Ian Laird, Mr. John Shuler, Mr. Alex Erines and Ms. Jasmine Dehghan-Dusch, Crowell & Moring LLP;
Dr. Khaled El Shalakany and Mr. Adam El Shalakany, Shalakany Law Office;

The Respondent

Dr. Claudia Annacker, Mr. Robert T. Greig, Mr. J. Cameron Murphy, Mr. Larry Work-Dembowski, Ms. Laurie Achtouk-Spivak, Dr. Affef Ben Mansour, Mr. Sean McGrew, Cleary Gottlieb Steen & Hamilton, LLP;
Mr. Amr Arafa, Ms. Salma Mohy Eldin Khalid Elalaily and Ms. Yasmine Mohamed Aziz Lotfy Shamekh, Egyptian State Lawsuits Authority

35. At the end of the hearing, the President of the Tribunal requested that the Parties prepare and present to the Tribunal submissions on costs by 25 November 2013. Subsequently, the Tribunal granted the Parties' request for an extension of this time limit until 9 December 2013.

F. SUBMISSIONS ON COSTS AND THE CLOSING OF THE PROCEEDINGS

36. On 9 December 2013, each Party filed its submission on costs.
37. The Claimant seeks to recover fees and expenses for legal representation and experts totaling USD 9,677,868.84 and reimbursement of its advance payment of USD 450,000 for the direct costs of the arbitration and any further advance payments that might need to be made.
38. The Respondent claims a total of USD 1,583,133.16 for legal and all other costs, including the Respondent's advance payment of USD 225,000 for the direct costs of the arbitration.

39. On 15 January 2014, Claimant made an advance payment of USD 200,000 representing the outstanding amount of an advance payment due from Respondent, following the default of the Respondent on that payment.

40. The Tribunal declared the proceedings closed on 12 March 2014.

III. THE AGREEMENTS

A. THE OPTION TO BUY

41. [...]

[...]

B. THE MANAGEMENT AND OPERATION CONTRACT

45. [...]

IV. SUMMARY OF THE FACTS AND DISPUTE

46. [...]

[...]

66. On 17 July 2009, the Claimant filed the present ICSID proceedings.

V. THE REMAINING ISSUES TO BE DETERMINED AND THE PARTIES' POSITIONS

A. THE OPTION TO BUY

Claimant's Submission¹

¹ See Claimant's Memorial on the Merits, ¶¶145-162, pp. 81-90.

67. [...]

[...]

Respondent's Submission²

79. [...]

[...]

B. EXECUTION OF THE MOC

Claimant's Submission³

94. The Claimant submits that it performed its obligations under the MOC:

a) Formation of H&H Enterprises (Egypt) and H&H

95. [...]

[...]

b) Financing the Project

97. [...]

[...]

c) Renovation and Development of the Resort

102. [...]

[...]

d) Marketing and Operation of the Resort

107. [...]

[...]

² See Respondent's Objections to Jurisdiction, ¶¶38-63, pp. 16-20.

³ See Claimant's Memorial on the Merits, ¶¶78-144, pp. 42-81.

e) The Respondent's Arbitrary Treatment and Interference with the Claimant's Investment under the MOC Obstructed the Claimant's Ability to Perform under the MOC

109. [...]

[...]

Respondent's Submission⁴

116. According to the Respondent, the Claimant failed to meet its obligations under the MOC:

a) The Claimant Promised in the MOC to Improve the Existing Facilities at the Hotel Site to a Four-Star Level and to Make a Minimum Investment

117. [...]

[...]

b) The Claimant Failed to Improve the Existing Facilities as It Was Required to Do under the MOC

122. [...]

[...]

c) The Claimant Failed to Invest the Minimum of L.E. 5 Million Required under the MOC

131. [...]

[...]

d) The Claimant Failed to Pay Rent as Required under the MOC

137. [...]

138. [...] According to the Respondent:

⁴ See Respondent's Counter-Memorial on the Merits, ¶¶11-39, pp. 26-95; and Respondent's Rejoinder on the Merits, ¶¶ 20-86, pp. 8-36.

i. GHE Handed Over the Hotel Site

139. [...]

ii. GHE Provided the Assistance for H&H's Licensing Efforts that the MOC Required, Even Though the Hotel Site Was Never Entitled to a Permanent Operating License

140. [...]

[...]

iii. GHE Did All That the Cairo Arbitral Tribunal Ordered It to Do

143. [...]

C. ATTRIBUTION PRINCIPLE

Respondent's Submission⁵

144. [...] In this regard, the Respondent submits the following:

a) GHE and EGOTH Are Not State Organs

145. [...]

[...]

b) GHE and EGOTH Are Not Empowered to and Did Not Exercise Governmental Authority with Respect to the Allegedly Wrongful Conduct

147. [...]

[...]

⁵ See Respondent's Counter-Memorial on the Merits, ¶¶178-215, pp. 71-85.

c) The Claimant Has Proffered No Evidence that EGOth, GHE or the Individuals Whose Conduct Is Alleged to Amount to a Breach of the US-Egypt BIT Were Acting under the Instructions, Direction or Control of the Respondent

149. [...]

[...]

Claimant's Submission⁶

157. The Claimant submits the following:

a) Both GHE and EGOth Are Owned and Controlled by the Respondent

158. [...]

[...]

b) The Ministry Controlled GHE and Made All of the Significant Commitments to H&H

164. [...]

[...]

c) The Ministry of Tourism Directly Participated in the Destruction of H&H's Investment

168. [...]

[...]

D. CORRUPTION CLAIMS

Claimant's Submission⁷

171. [...]

[...]

⁶ See Claimant's Reply on the Merits, ¶¶172-203, pp. 89-102.

⁷ See Claimant's Reply on the Merits, ¶¶204-209, pp. 103-105.

Respondent's Submission⁸

176. [...]

[...]

VI. TREATY CLAIMS

A. THE RESPONDENT EXPROPRIATED THE CLAIMANT'S INVESTMENT WITHOUT COMPENSATION

Claimant's Submission⁹

182. [...]

a) The Claimant's Rights Were Expropriated by Actions of the Respondent

183. [...]

b) The Respondent Expropriated the Claimant's Investment through an Exercise of Sovereign Power

184. [...]

[...]

c) The Rights That Were Expropriated Were Valid under Applicable Egyptian Law

191. [...]

[...]

d) The Respondent Neither Curbed Nor Cured the Bribery Solicitations

195. [...]

⁸ See Respondent's Counter-Memorial on the Merits, ¶¶134-138, pp. 53-55.

⁹ See Claimant's Reply on the Merits, ¶¶356-375, pp. 168-177; and Claimant's Memorial on the Merits, ¶¶256-266, pp. 134-138.

- e) **The Expropriation Was Not Accompanied by the Payment of Prompt, Adequate and Effective Compensation, Was Not Done for a Public Purpose, Was Not Made under Due Process of Law and Was Arbitrary and Discriminatory**

196. [...]

[...]

Respondent's Submission¹⁰

200. The Respondent submits that the Claimant's claim of expropriation fails for the following reasons:

- a) **The Bulk of the Conduct Alleged to Be Expropriation Is Not Attributable to the Respondent**

201. [...]

- b) **The Alleged Breaches of Contract Are Not Expropriatory Within the Meaning of Article III of the US-Egypt BIT**

202. [...]

[...]

- c) **The Contractual Rights That Do Not Exist under Applicable Local Law or Were Properly Terminated by Local Courts in Application of Local Law Cannot Be Expropriated**

204. [...]

[...]

- d) **The Alleged Failure to Provide Relief for the Alleged Solicitation of Bribes Did Not Cause the Deprivation of the Claimant's Contractual Rights to Manage and Operate the Hotel and, In Any Event, Has Not Been Established**

207. [...]

[...]

¹⁰ See Respondent's Counter-Memorial on the Merits, ¶¶244-258, pp. 97-104.

B. THE RESPONDENT HAS NOT PROVIDED AN ADEQUATE JUDICIAL SYSTEM TO HEAR THE CLAIMANT’S CLAIMS, RESULTING IN A CLEAR DENIAL OF JUSTICE

Claimant’s Submission¹¹

209. [...]

a) The Cairo Court of Appeals’ Decision Was a Denial of Justice

210. [...]

b) The Court of Cassation’s Refusal to Entertain the Claimant’s Appeal Constitutes a Failure of Due Process and a Denial of Justice

211. [...]

[...]

c) The Respondent Failed to Provide Effective Means

213. [...]

Respondent’s Submission¹²

214. [...]

[...]

C. THE RESPONDENT VIOLATED ITS OBLIGATION TO PROVIDE FAIR AND EQUITABLE TREATMENT TO THE CLAIMANT’S INVESTMENT

Claimant’s Submission¹³

218. [...] In this regard, the Claimant claims the following:

¹¹ See Claimant’s Reply on the Merits, ¶¶ 336-351, pp. 159-165.

¹² See the Respondent’s Counter-Memorial on the Merits, ¶¶ 261-276, pp. 105-110.

¹³ See Claimant’s Memorial on the Merits, ¶¶ 267-281, pp. 138-145; and Claimant’s Reply on the Merits, ¶¶ 262-307, pp. 126-148.

a) The Respondent Is Obligated to Provide Fair and Equitable Treatment to the Claimant's Investment Pursuant to Article II(2)(a) of the US-Egypt BIT

219. [...]

[...]

b) The Claimant Had Legitimate Expectations Arising from the Respondent's Representations

223. [...]

c) The Respondent Blocked the Operation of the Resort

224. [...]

[...]

d) The Respondent Arbitrarily Denied the Claimant's Development Rights

227. [...]

[...]

e) The Respondent Repeatedly Failed to Honor the Claimant's Option to Buy

235. [...]

[...]

Respondent's Submission¹⁴

238. The Respondent submits the following:

a) Article II of the Germany-Egypt BIT Is Not Applicable

239. [...]

[...]

b) The Claimant Has Failed to Establish That the Respondent Violated the FET Standard or Impaired the Claimant's Investment through Arbitrary or Discriminatory Measures

¹⁴ See Respondent's Counter-Memorial on the Merits, ¶¶ 288-314, pp. 118-129.

243. The Respondent submits that the Claimant's FET claims fail as follows:

i. Claimant Has Failed to Establish That the Respondent Is Responsible for the Bulk of the Conduct Complained of

244. [...]

ii. The Claimant Has Failed to Establish That the Respondent Unfairly or Unreasonably Denied Operating Licenses to the Resort

245. [...]

[...]

iii. The Claimant Has Failed to Establish That the Respondent Frustrated Legitimate Expectations with Respect to the Alleged Option to Buy

250. [...]

[...]

D. THE RESPONDENT IMPAIRED THE CLAIMANT'S INVESTMENT THROUGH ARBITRARY AND/OR DISCRIMINATORY MEASURES

Claimant's Submission¹⁵

255. [...]

256. The Claimant claims that the Respondent breached its international law obligation to refrain from impairing the Claimant's investment through arbitrary and discriminatory measures as follows:

a) The Respondent Impaired the Claimant's Investment in Developing the Resort through Arbitrary and Discriminatory Measures

¹⁵ See Claimant's Memorial on the Merits, ¶¶311-318, pp. 159-163.

257. [...]

- b) The Respondent Impaired the Claimant's Investment in the Management and Operation of the Resort through Arbitrary and Discriminatory Measures**

258. [...]

Respondent's Submission¹⁶

- a) Claimant Has Failed to Establish That the Respondent Is Responsible for the Bulk of the Conduct Complained of**

259. [...]

- b) The Claimant Has Failed to Establish That the Respondent Unfairly or Unreasonably Denied Operating Licenses to the Resort**

260. [...]

[...]

E. THE RESPONDENT BREACHED ITS MINIMUM STANDARD OBLIGATION

Claimant's Submission¹⁷

262. [...]

[...]

Respondent Submission¹⁸

265. [...]

[...]

¹⁶ See Respondent's Counter Memorial on the Merits, ¶¶297-307, pp. 121-125.

¹⁷ See Claimant's Memorial on the Merits, ¶¶ 341-347, pp. 171-173.

¹⁸ See Respondent's Counter-Memorial on the Merits, ¶¶279-287, pp. 112-117.

F. THE RESPONDENT VIOLATED ITS OBLIGATION TO OBSERVE OBLIGATIONS ENTERED INTO WITH OTHER INVESTORS

Claimant's Submission¹⁹

268. [...]

[...]

Respondent's Submission²⁰

a) The Umbrella Clause Does Not Transform GHE's or EGOTH's Contractual Obligations into the Respondent's Contractual Obligations

272. [...]

[...]

b) In Any Event, the Claimant's Umbrella Clause Claim Is without Merit

274. [...]

VII. RES JUDICATA

Respondent's Submission²¹

277. [...]

a) The Actions and Legal Claims of Both GHE and the Claimant up to 1995 Were Litigated in the Cairo Arbitration

278. [...]

[...]

b) The Actions of GHE and the Claimant Were Further Litigated in Proceedings before the Egyptian Courts Related to Enforcement and Validity of the Cairo Arbitral Award

¹⁹ See Claimant's Memorial on the Merits, ¶¶329-340, pp. 166-170.

²⁰ See Respondent's Counter-Memorial on the Merits, ¶¶ 279-287, pp. 112-117.

²¹ See Respondent's Counter-Memorial on the Merits, ¶¶141-161, pp. 56-63.

280. [...]

[...]

c) The Actions of GHE and the Claimant Were Further Litigated in Collateral Proceedings before the Egyptian Courts

284. [...]

[...]

d) The Claimant Submitted to the Egyptian Courts Its Allegations about EGOH's Purported Failure to Obtain the Ministry of Tourism's Approval of the December 1992 "Plan" and to Obtain an Operating License for the Hotel

290. [...]

[...]

e) The Claimant Submitted Its Allegations Related to GHE's Efforts to Sell the Hotel Site in 1995 to the Egyptian Courts

293. [...]

[...]

f) The Claimant's Allegations about the Cairo Apartments Were Submitted to the Egyptian Courts and Finally Resolved through a Settlement

295. [...]

[...]

Claimant's Submission²²

297. As to *res judicata*, the Claimant claims the following:

a) *Res Judicata* Does Not Bar the Claims in These Proceedings

²² See Claimant's Reply Memorial on the Merits, ¶¶131-165, pp. 71-86.

i. Decisions of Local Courts and Tribunals Are Not Entitled to *Res Judicata* Effect in International Tribunals

298. [...]

[...]

ii. The Respondent's Reliance on *Res Judicata* Based on the Effect of Decisions within the Domestic Legal Order Is Misplaced

302. [...]

[...]

iii. The Specific Candidates for the Application of *Res Judicata* in the Present Case

305. The Claimant submits that the following three contexts are the ones in which the Tribunal in the present case may consider that some respect may be due to decisions by national tribunals.

a. The Rulings of the Cairo Arbitral Tribunal in Favor of the Claimant on Issues of Contract Performance Are Not Challenged by the Respondent

306. [...]

[...]

b. The Ruling of the Cairo Arbitral Award on the Option to Buy Has No Application in the Present Proceedings

310. [...]

[...]

c. The 2001 Cairo Court of Appeals Decision is Largely Irrelevant to the Issues Presented in This Case

312. [...]

[...]

VIII. THE TRIBUNAL LACKS JURISDICTION OVER THE BULK OF THE CLAIMANT'S CLAIMS UNDER ARTICLE VII (3) OF THE US-EGYPT BIT

Respondent's Submission²³

a) The Respondent Did Not Consent to Arbitrate Claims Submitted to the Cairo Arbitral Tribunal or the Egyptian Courts

316. [...]

[...]

b) The Claimant Cannot Circumvent the Prerequisites of the Respondent's Consent to Arbitrate in the US-Egypt BIT through the Operation of the Most-Favored Nation Clause

322. [...]

[...]

Claimant's Submission²⁴

a) Article VII's Fork-In-The-Road Provisions Present No Jurisdictional Bar to the Claimant's Treaty Claims

329. [...] The Claimant claims the following:

i. The Fork-In-The-Road Provisions of Article VII Are Not Triggered by the Presentation of Contract Disputes to Domestic Tribunals

²³ See Respondent's Counter-Memorial on the Merits, ¶¶ 328-363, pp. 136-147.

²⁴ See Claimant's Reply Memorial on the Merits, ¶¶ 97-130, pp. 57-71.

330. [...]
[...]

ii. The Cairo Arbitration Did Not Trigger the Fork-In-The-Road Provision of Article VII(3)(a)

334. [...]
[...]

iii. The Fork-in-the-Road Does Not Apply to Disputes Brought Against a Foreign Investor

338. [...]
[...]

IX. THE CLAIMANT'S IDENTITY

Respondent's Submission²⁵

a) H&H-Egypt Is Neither Identical With Nor Legally Connected to the Claimant

342. [...]
[...]

b) The [...] Partnership Is Neither Identical With Nor Legally Connected to the Claimant

348. [...]
[...]

Claimant's Submission²⁶

352. [...]
[...]

²⁵ See Respondent's Counter-Memorial on the Merits, ¶¶ 165-177, pp. 65-70.

²⁶ See Claimant's Reply Memorial on the Merits, ¶¶ 404-405, pp. 191-192.

X. THE DECISION

354. On 5 June 2012, the Tribunal rendered its Decision on the Respondent's Objections to Jurisdiction²⁷ and decided as follows:

1. *The Tribunal rejects Respondent's jurisdictional objection based on *ratione materiae* and joins the question of the validity of the option to buy to the merits.*
2. *The Tribunal rejects Respondent's jurisdictional objection based on *ratione temporis*.*
3. *The Tribunal rejects Respondent's jurisdictional objection based on *ratione personae*.*
4. *The Tribunal joins Respondent's jurisdictional objection based on the fork-in-the-road clause to the merits.*
5. *The Tribunal rejects Respondent's jurisdictional objection based on equitable prescription.*

355. Accordingly, the present Award deals with the jurisdictional issues joined to the merits and, if and to the extent jurisdiction is found, the merits of the Claimant's claims.

A. FORK-IN-THE ROAD

356. The Tribunal first deals with the question of whether the fork-in-the-road clause of the US-Egypt BIT could constitute a bar to its jurisdiction, or whether the dispute resolution clause contained in the Germany-Egypt BIT, which does not contain such a requirement, could be imported through the MFN clause contained in Article II(2) of the US-Egypt BIT. Moreover, the Tribunal assumes for purposes of deciding on the issue of the application of the fork-in-the-road clause, that the acts of GHE and EGOH are attributable to the State of Egypt on a *prima facie* basis.

²⁷ The Tribunal's Decision on Respondent's Objections to Jurisdiction, dated 5 June 2012.

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357. The Claimant argues that the fork-in-the-road clause does not apply in the present case by virtue of the MFN clause contained in Article II(2) therein, by reference to the 2009 Germany-Egypt BIT, which does not contain such a requirement.²⁸ The Respondent disagrees with the Claimant's position, on the basis, *inter alia*, that MFN clauses may not be used to incorporate arbitration clauses from other investment treaties or circumvent the host State's consent to arbitrate.²⁹

358. The Tribunal agrees with the Respondent that the MFN clause contained in the US-Egypt BIT cannot be used to avoid the application of the fork-in-the-road clause contained therein. The Tribunal shares in this respect the view of the tribunal in *Plama v. Bulgaria*, which noted that dispute resolution provisions are separable from the remainder of the treaty and "constitute an agreement on their own"; accordingly, "*an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.*"³⁰ However, nothing in the wording of Article II(2) of the US-Egypt BIT indicates that the Parties intended that provisions relating to dispute resolution be included within its scope. Moreover, the Germany-Egypt BIT, on which the Claimant relies, entered into force only on 22 November 2009, that is, after the Claimant accepted the Respondent's offer to arbitrate in its Request for Arbitration filed on 17 July 2009. In these circumstances, the Tribunal concludes that the application of the fork-in-the-road clause of the US-Egypt BIT cannot be avoided in this case.

359. The Tribunal now turns to the question whether the fork-in-the-road clause of the US-Egypt BIT constitutes a bar to the Tribunal's jurisdiction.

360. The Tribunal notes, at the outset, that the basis for the Claimant's Treaty claims and its contractual claims, which are based on the Option to Buy and the

²⁸ Claimant's Response to Objections to Jurisdiction, ¶¶246-249; and Claimant's Rejoinder on Objections to Jurisdiction, ¶¶266-280.

²⁹ Respondent's Counter-Memorial on the Merits, ¶¶342-353.

³⁰ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 [RA-240], ¶¶212, 223.

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MOC as well as associated correspondence, are fundamentally the same. These claims were settled by the Cairo Arbitral Award, rendered in Cairo on 28 February 1995.

361. The Tribunal does not agree with the Claimant's categorization of the relation between the Treaty claims and the contractual claims as merely an "overlap".

362. The US-Egypt BIT contains a fork-in-the road provision (Article VII 3(a)), which provides the following:

"In the event that the legal investment dispute is not resolved under procedures specified above, the national or company concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes ("Centre") for settlement by conciliation or binding arbitration, if, within six (6) months of the date upon which it arose: (i) the dispute has not been settled through consultation and negotiation; or (ii) the dispute has not, for any good faith reason, been submitted for resolution in accordance with any applicable dispute-settlement procedures previously agreed to by the Parties to the dispute; or (iii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a Party to the dispute".

363. The Claimant argues that the principal claims are only barred by a fork-in-the-road clause when the claims in the domestic proceedings and the claims in the international proceedings meet the triple identity test: the same parties, the same object, and the same cause of action.

364. However, Article VII of the US-Egypt BIT does not expressly require that the triple identity test be met before the fork-in-the-road provision can be invoked. The triple identity test raised by the Claimant in this case is based on

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its reading of arbitral jurisprudence as opposed to the specific language of the US-Egypt BIT and/or its interpretation.

365. In order to decide whether the fork-in-the-road provision is triggered in the present case, the Tribunal must interpret Article VII of the US-Egypt BIT. In doing so, the Tribunal relies on the general rule of treaty interpretation in Article 31 of the Vienna Convention on the Law of Treaties, which provides that a “*treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”.

366. Article VII 3(a) (ii) and (iii) provides that “[i]n the event that the legal investment dispute is not resolved under procedures specified above, the national or company concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes (“Centre”) for settlement by conciliation or binding arbitration, if, within six (6) months of the date upon which it arose: [...] (ii) the **dispute has not**, for any good faith reason, **been submitted for resolution in accordance with any applicable dispute-settlement procedures previously agreed to by the Parties to the dispute**; or (iii) the national or company concerned has not brought the dispute **before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a Party to the dispute**” (emphasis added). It is quite clear from the language of Article VII that the State parties provided for an ICSID arbitration procedure only to the extent the dispute had not been submitted to dispute settlement procedures agreed to by the Parties or to the competent domestic courts. ICSID arbitration has not been intended as an appeals process. In this case the dispute has been submitted to both previously agreed dispute settlement procedures as well as to competent domestic courts, as set out below.

367. Additionally, the Tribunal is of the view that the triple identity test is not the relevant test as it would defeat the purpose of Article VII of the US-Egypt BIT, which is to ensure that the same dispute is not litigated before different fora. It would also deprive Article VII from any practical meaning. The Tribunal notes

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that the triple identity test originates from the doctrine of *res judicata*. However, investment arbitration proceedings and local court proceedings are often not only based on different causes of action but also involve different parties. More importantly, the language of Article VII does not require specifically that the parties be the same, but rather that the dispute at hand not be submitted to other dispute resolution procedures; what matters therefore is the subject matter of the dispute rather than whether the parties are exactly the same. Finally, and in any event, it would defeat the purpose of the Treaty and allow form to prevail over substance if the respondents were required to be strictly the same because in practice, local court proceedings are often brought against state instrumentalities having a separate legal personality and not the state itself.³¹ This is also the case here, and indeed both the Claimant and the Respondent consistently considered, in the course of the Cairo Arbitration and Egyptian local proceedings, GHE and EGOTH as being the competent parties to account for these claims.

368. In the Tribunal's view, therefore, instead of focusing on whether the causes of actions relied upon in the claims brought to the local courts and the arbitration are identical, one must assess whether the claims share the same fundamental basis.

369. Accordingly, in order to decide whether the Claimant's Treaty claims in the present case are barred by the fork-in-the-road clause, the Tribunal must determine whether the Treaty claims have the same fundamental basis as the claims submitted before the local fora.

370. The "fundamental basis of the claim" test, first set out by the American Venezuelan Mixed Commission in the *Woodruff* case (1903), was also adopted in *Pantechniki v. The Republic of Albania*, where the Sole Arbitrator, Mr. Jan Paulsson found that:

³¹ Jan Ole Vosse, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*, Martinus Nijhoff, 2011, p.291; the exact wording is: "[W]hilst the claim before local courts is usually brought by a locally established subsidiary against a regional or local administrative authority, the investment treaty claim is lodged by the foreign investor itself against the host State".

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“Its final submission [...] was that it was entitled to payment of US\$1,821,796 “because the Defendant had recognised and admitted that this amount is due”. The logic is inescapable. To the extent that this prayer was accepted it would grant the Claimant exactly what it is seeking before ICSID – and on the same “fundamental basis”. The Claimant’s grievance thus arises out of the same purported entitlement that it invoked in the contractual debate it began with the General Roads Directorate. The Claimant chose to take this matter to the Albanian courts. It cannot now adopt the same fundamental basis as the foundation of a Treaty claim. Having made the election to seise the national jurisdiction the Claimant is no longer permitted to raise the same contention before ICSID”³².

371. In the present arbitration, the Claimant’s expropriation claim is based on the alleged interference by GHE with the Claimant’s rights under the MOC. The Claimant contends that the Respondent obstructed the Claimant’s ability to perform the MOC, refusing to accept the Claimant’s development plans and preventing it from obtaining a permanent operating license, and finally cancelling the MOC. The Claimant’s expropriation claim is also based on GHE’s denial of the existence of the Option to Buy.

372. The Tribunal notes that the Cairo Arbitration³³ concerned (i) the Claimant’s rights under the MOC; (ii) GHE’s alleged breach of the MOC by way of its failure to accept the development plans; (iii) the failure of the Ministry of Tourism to issue a permanent operating license as a result of GHE’s alleged interference and instructions to the Ministry; (iv) GHE’s alleged right to revoke the MOC and demand delivery of the Hotel and Land from the Claimant; and (v) the Claimant’s alleged Option to Buy.

373. These claims were resolved by the Cairo Arbitral Tribunal in its Award rendered on 28 February 1995, by which it decided among other things, that the

³² *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009 [RA-36], ¶67.

³³ *Grand Hotels of Egypt v. H&H Enterprises*, 28 February 1995, the Cairo Arbitral Award [RA-2].

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Option to Buy did not exist under the applicable Egyptian law since the parties had failed to agree on the *essentialia negotii*.

374. The Tribunal notes that the Claimant also initiated two proceedings in the South Cairo Court of First Instance on 1 and 4 June 1995 respectively, claiming damages for breach of the MOC based, *inter alia*, on GHE's alleged refusal to accept the Claimant's development plans and interference with the licensing process, and complaining of GHE's failure to honor the alleged Option to Buy. The Cairo Court of First Instance issued a judgment on 15 June 1997³⁴, which the Claimant appealed to the Cairo Court of Appeals. The Cairo Court of Appeals in its judgment of 30 April 2001³⁵ terminated the MOC on account of the Claimant's failure to perform its obligations under the MOC and the Cairo Arbitral Award.

375. In addition, the Claimant sought an order from the South Cairo Court of First Instance requesting that EGOH be compelled to procure the Ministry of Tourism's approval of the December 1992 development plan, and the Ministry's issuance of an operating license. These claims were rejected on 27 December 1998.

376. The Tribunal considers that the Claimant's expropriation claim and its claims before the Cairo Arbitral Tribunal and the local courts share the same fundamental basis. In both proceedings the Claimant alleged that GHE directly interfered with the licensing process and instructed the Ministry of Tourism not to issue a permanent license and further alleged that it had been denied its Option to Buy. The expropriation claim is based on the alleged interference by GHE with the licensing process and the denial of its Option to Buy. As mentioned above, the Claimant's claim before the Cairo Arbitral Tribunal and the Egyptian local courts were based on GHE's alleged refusal to accept the Claimant's development plans and interference with the licensing process, and complaining of GHE's failure to honor the alleged Option to Buy. The bases of

³⁴ South Cairo of First Instance, Civil Circuit, Claims Nos. 5451-5549/1995 & No.1963/1996 [RA-3].

³⁵ Cairo Court of Appeal Claims Nos. 9331/2001 and 9487/2001 [RA-4].

both the expropriation and the contractual claims are therefore fundamentally the same.

377. It is also important to note that the Claimant's expropriation claim does not have an autonomous existence outside the contract. The Claimant's expropriation claim is in reality based on an alleged violation of Articles 2.7, 2.1 and 3.5 of the MOC. As set out by the Sole Arbitrator in *Pantechniki v. Albania*,

*“[the] arbitration cannot proceed on a contractual basis for the simple reason that ICSID jurisdiction must be founded on the Treaty. [...] Yet there comes a time when it is no longer sufficient merely to assert that a claim is founded on the Treaty. The Tribunal must determine whether the claim truly does have an autonomous existence outside the contract. Otherwise the Claimant must live with the consequences of having elected to take its grievance to the national courts”.*³⁶

378. For these reasons, the Tribunal finds that the fork-in-the-road clause in Article VII 3(a) of the US-Egypt BIT is triggered in the present case and bars the Claimant from pursuing its expropriation claim before the present Arbitral Tribunal. This also applies to the Claimant's expropriation claim insofar as it is based on an alleged lack of support of, and/or failure to intervene by, the Ministry of Tourism. These allegations share fundamentally the same factual basis as, and therefore cannot be considered separable from, the Claimant's claims against GHE and EGOTH.

379. Similarly, the breaches that allegedly violate the FET standard – the breach of the Option to Buy, failure to accept the development plans, failure to assist the Claimant in obtaining licenses as result of GHE's alleged interference and instructions to the Ministry of Tourism – were raised as counterclaims by the Claimant both in the Cairo Arbitration and before the Egyptian local courts. Moreover, the Claimant's complaints regarding the Respondent's purported refusal to accept the Option to Buy were also raised before the Cairo Arbitral

³⁶ *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009 [RA-36], ¶64.

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Tribunal and the Egyptian local courts. In fact the Egyptian local courts did not decide on this issue, on the basis that it had been held by the Cairo Arbitral Tribunal that the Option to Buy did not exist.

380. The same reasoning applies to the Claimant's Observation of Obligations claim, its Arbitrary and/or Discriminatory Treatment claim as well as the Minimum Standard of Treatment claim. The Claimant claims that the Respondent systematically rejected all of the Claimant's development plans and refused to grant it a permanent operating license based on GHE's objections, which according to the Claimant constitutes a discriminatory and arbitrary measure under the US-Egypt BIT, and is also in breach of the Respondent's Observations of Obligations and the Minimum Standard of Treatment provisions of the Treaty. As it has been demonstrated throughout the proceedings by the Claimant itself, the Cairo Arbitration concerned among other things GHE's alleged breach of the MOC by its failure to accept the development plans, and the failure of the Ministry of Tourism to issue a permanent operating license on the basis of GHE's alleged interference and instructions to the Ministry. Additionally, the Egyptian local proceedings, all in which the Claimant was an active participant, were based on *inter alia*, GHE's alleged refusal to accept the Claimant's development plans and its interference with the licensing process.
381. Once again, the Tribunal observes that these treaty claims have the same fundamental basis and share the same factual components as the claims filed before the Cairo Arbitral Tribunal and the Egyptian local courts.
382. The Tribunal cannot accept claims which are fundamentally based on the very same facts and, contrary to what the Claimant alleges, on the very same contract relied upon by the Claimant in support of the claims submitted before the Cairo Arbitral Tribunal and Egyptian local courts. Accepting the Claimant's argument would deprive Article VII 3(a) of the Treaty of any meaning and effect.

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383. The Tribunal also agrees with the Respondent's argument³⁷ that where, as in the present arbitration, jurisdiction is allegedly based on the conduct of an entity with legal personality separate from the respondent State – pursuant to a *prima facie* standard that there is a dispute with the respondent State – the same standard must apply to the tribunal's assessment of all jurisdictional conditions and limitations, including a fork-in-the-road clause. This position is reinforced by the Arbitral Tribunal in *Helnan v. Arab Republic of Egypt*³⁸ which held that:

“[...] it is *HELNAN's* position that the initiation of the Cairo arbitration proceedings is one of *EGYPT's* breaches of its obligations to provide fair and equitable treatment to the investors. Thus it is not without some contradiction that *HELNAN* relies on the own legal personality of *EGOTH*, distinct from the Egyptian State, for the sole purpose of denying the alleged *res judicata* effect of the Cairo Award”.

384. Whether or not the Respondent was *per se* a party to the local arbitration, the Claimant is not permitted to re-litigate issues that were submitted for resolution to the Cairo Arbitral Tribunal and the Egyptian Courts. Such a finding does not contradict, for the reasons set out below and those advanced by the Respondent at the Hearing,³⁹ the Respondent's position that GHE and EGOTH are not State entities.

385. In conclusion, the fork-in-the-road provision has been triggered in the present case, and as a consequence the Tribunal has no jurisdiction to decide on the Claimant's above-mentioned treaty claims.

386. Also, as a consequence of the operation of the fork-in-the road clause, the Tribunal does not have jurisdiction to decide on the validity of the Option to Buy.

387. In any event, with respect to Claimant's claims resulting from the acts and omissions of GHE and EGOTH, the Tribunal considers that GHE and EGOTH

³⁷ The Respondent's Rejoinder on the Merits, ¶381, p.166.

³⁸ *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008 [RA-124], ¶127.

³⁹ HT, 8 November 2013, p. 987, 988.

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are commercial companies with a separate legal identity and, as such, do not constitute State organs even if they are owned by the State. In order for the Respondent to be responsible for the conduct of GHE and EGOTH, the latter must have been granted the right to exercise public powers (*puissance publique*), and the claims must have arisen out of the alleged exercise of such powers.⁴⁰ The Claimant has failed to provide evidence of either in the present arbitration. The Tribunal concludes therefore that the Respondent in any event cannot be held liable for the conduct of GHE and EGOTH, which is not attributable to the State.

B. THE CORRUPTION CLAIMS

388. Concerning the corruption claims, the Tribunal notes that these claims have not been brought before the Cairo Arbitral Tribunal or the Egyptian local courts, and consequently are not excluded by the fork-in-the-road provision. The Tribunal has therefore jurisdiction to decide on the corruption claims.

389. In this regard, the Claimant argues that the Respondent refuses to address the issue of the unlawful solicitations made by the GHE and EGOTH officials within the fair and equitable treatment standard. But according to the Claimant, these bribery solicitations demonstrate the complete failure of the Respondent's State apparatus to protect and defend H&H's legitimate expectation of a fair legal framework for its investment. The Claimant claims that "*exercising a State's discretion on the basis of corruption is a fundamental breach of transparency and legitimate expectations*".

390. The Tribunal is of the view that the corruption allegations are a very serious matter, particularly against government officials, as they involve criminal conduct and therefore cannot be taken lightly. By the same token, because of the gravity of such allegations, the evidentiary threshold must be high.

391. The Tribunal has reviewed carefully the evidence presented by the Claimant which includes the statements made by [...], and which the Claimant filed to

⁴⁰ "Report of the Commission to the General Assembly on the Work of its Fifty Third Session", *Yearbook of the International Law Commission*, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), 2001, p. 39.

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support its corruption allegations against the State of Egypt. The Claimant has argued throughout the proceedings that the Respondent failed to take any measures against the bribery solicitations made by GHE and EGOTH officials. However, the Tribunal finds that the Claimant failed to satisfy the burden of proof because the evidence presented, in the view of the Tribunal fail to support the corruption claims against the Respondent, and there is no evidence that the solicitations are attributable to the State. In any event and as concluded in paragraph 389 above, there can be no liability by the Respondent since the conduct GHE and EGOTH is not attributable to the State.

392. Moreover, even if the Tribunal were to assume for the sake of argument that the corruption claims stand and it is established that the Respondent failed to take the necessary measures against the bribery solicitations, the Tribunal concludes that these corruption claims would not constitute a breach of the US-Egypt BIT. Even if the Tribunal were to accept the Claimant's allegations of corruption at face value, they do not support a claim for a breach of the Treaty.

393. The Claimant must establish that the bribe solicitations resulted in the deprivation of its investment, which in the view of the Tribunal the Claimant has failed to do.

394. The Claimant not only claims that bribery solicitations were made by GHE and EGOTH officials, but it also alleges that the Respondent did not take the necessary steps to curb the actions of these officials – which is fundamentally the basis for the Claimant's Corruption claims – and, as a consequence, the Claimant allegedly was not able to realize its investment.

395. The Claimant's Corruption claim raises the issue of whether the required causal link exists between the alleged bribery and the Claimant's loss of its investment. The evidence does not appear to establish any such link, and the Claimant does not appear to have alleged that the solicitation of bribes by GHE officials was linked with the difficulties the Claimant experienced in its attempts to obtain the operating license and to have the development plan approved. In other words, the Claimant does not appear to have alleged, and there is no evidence, that GHE and EGOTH officials intentionally created difficulties for

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the Claimant, in order to put themselves in a position to solicit bribes in exchange of removing those difficulties. Also, while the Claimant argues that the Ministry of Tourism, as the competent supervisory authority, failed to take effective measures to repair the damage caused, it appears that the two individuals concerned were removed from their positions, and there does not appear to be sufficient evidence of a causal link between the bribery solicitation and the Claimant's loss of its investment.

396. Notwithstanding the Tribunal's finding that the fork-in-the-road provision was triggered in the present case in relation to most of the Claimant's claims, it has been demonstrated during the proceedings and through the Parties' own submissions and evidence that the Claimant was unable to realize its investment for reasons of its own inability to fulfill its obligations under the MOC, which included among other things improving the existing facilities and the Hotel to a four-star standard. One of the reasons behind the Ministry of Tourism's refusal to grant the Claimant a permanent operating license that would have permitted the Claimant to continue its investment on the Resort was that, as demonstrated by the evidence, the Claimant failed to meet the required conditions to obtain a permanent operating license.

397. The Tribunal is not persuaded by the Claimant's argument that the bribe solicitations had deprived the Claimant of its investment, since there is no proven connection between the corruption allegations and the Claimant's alleged deprivation from its investment. For this, the Claimant would have needed to demonstrate, as the Tribunal pointed out at the Hearing,⁴¹ that the bribes in question were solicited to undo wrongful acts adverse to the Claimant, as opposed to undo rightful acts adverse to the Claimant. Yet, this was not established by the Claimant.

398. Furthermore, the Claimant alleges the solicitation of bribes by GHE and EGOTH officials, but on the Claimant's own case, the Respondent has investigated the alleged bribery attempts by GHE and EGOTH officials reported by [...], which resulted in the forced retirement of the GHE and EGOTH officials

⁴¹ HT, 6 November 2013, pp. 497-498.

concerned. There are no allegations of damage sustained in the meantime, and thus here again no causation demonstrated.

399. In other words, assuming for the sake of argument that the conduct of GHE and EGOH officials were attributable to the State, this would still not be sufficient to hold the Respondent liable therefor in the absence of a proven causal link between the alleged breach and the damage.

C. DENIAL OF JUSTICE AND DENIAL OF EFFECTIVE MEANS

400. As to the Claimant's allegation of denial of justice and denial of effective means, the Tribunal points out that its role is not to correct procedural or substantive errors that might have been committed by the local courts in Egypt. As explained by Jan Paulsson in his book *Denial of Justice in International Law*⁴², the international obligation on states is not to create a perfect system of justice but a system of justice where serious errors are avoided or corrected. The Tribunal also stresses that the evidentiary threshold to establish a claim of denial of justice is high.

401. In the present proceedings, the Claimant claims that the Cairo Court of Appeals decided in 2001 that only the Claimant's claims were *res judicata*, but that the same principle did not apply to GHE recession claims, and on this basis the Cairo Court of Appeals held itself free to determine GHE's claim seeking the termination of the MOC.

402. The Tribunal refers to the definition of denial of justice in Article 9 of the Harvard Law School Draft Convention on the Law of the Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners:

"A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration

⁴² Jan Paulsson, *Denial of Justice in International Law*, Cambridge University Press, 2005, p. 306.

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of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable in the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice”.

403. The Tribunal is of the view that the Claimant has failed to prove that the decision of the Cairo Court of Appeals amounted to a denial of justice. Even if the Tribunal were to assume for the sake of argument that the decision was as erroneous and defective as the Claimant claims, the Claimant has failed to prove that the decision of the Cairo Court of Appeals was “manifestly unjust”, or that there had been a “gross deficiency” in the administration of the process, resulting in a denial of justice. The evidence presented by the Parties, including the Claimant’s own submissions confirm, if anything, that the Claimant had the opportunity not only to participate in the local proceedings but also to present its claims and counterclaims.

404. The Tribunal finds support for its decision in the interpretation of denial of justice in the ICSID case *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*⁴³, where the Tribunal concluded “*that Respondent can only be held liable for denial of justice if Claimants are able to prove that the court system fundamentally failed. Such failure is mainly to be held established in cases of major procedural errors such as lack of due process. The substantive outcome of a case can be relevant as an indication of lack of due process and thus can be considered as an element to prove denial of justice*”.

405. Concerning the delay by the Court of Cassation as a basis for a denial of justice claim, the Tribunal notes that neither the Treaty nor international law establishes fixed time limits. This position was reinforced by the arbitral tribunal in *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, which was referred to by the Claimant⁴⁴. The tribunal rightly stated that “[i]t has to be conceded that international law has no strict standards to assess whether court delays are

⁴³ *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010 (Excerpts) [RA-224], ¶279.

⁴⁴ *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009 [CLA- 87], ¶¶155 and 163.

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a denial of justice. [...] In fact, whether justice is rendered within a reasonable delay depends on the circumstances and the context of the case”.

406. It appears in the present case that the Claimant did not actively pursue its claim before the Court of Cassation filed in 2001 until its withdrawal in 2010. The Claimant has failed to provide any evidence to the contrary, and has also failed to prove that the delay in the proceedings of the Court of Cassation had caused any of the losses claimed by the Claimant. In the circumstances, the Tribunal finds that this delay does not amount to a denial of justice. The same reasoning applies to the Claimant’s claim for denial of effective means.

XI. COSTS

407. Both Parties have claimed costs in this arbitration and filed short submissions quantifying their fees and costs. Article 61(2) of the ICSID Convention provides:

“In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award”.

408. The Claimant seeks reimbursement of USD 8,301,882.51 in costs of legal representation and USD 803,988.33 in other costs, USD 571.998 in costs of experts, as well as reimbursement of its advance payment of USD 450,000 for the costs of arbitration and any further advance payments that might need to be made.

409. The Respondent claims USD 1,035,911.79 in costs of legal fees and expenses, USD \$279,893.22 in expert fees and expenses and USD 40,328.15 in other costs, as well as reimbursement of its advance payment of USD 225,000 for the costs of arbitration.

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410. The Tribunal notes that the Claimant was partially successful in the preliminary jurisdictional phase of the proceedings on the issues of *jurisdiction ratione materiae, ratione temporis, ratione personae* and equitable prescription. On the other hand, the Claimant has failed to prove that all of its claims are not fundamentally different from claims already brought in other proceedings, and therefore not barred by the fork-in-the-road clause. The Claimant also failed to succeed on its corruption and denial of justice claims.
411. The Tribunal also notes that the Parties have argued their positions and filed their submissions diligently and in good faith throughout the proceedings.
412. The Tribunal decides, based on the above considerations, that each Party shall bear its own legal expenses and costs.
413. In relation to the direct costs and expenses of the arbitration, the Tribunal notes that by letter of 11 April 2012, the Centre requested each Party to make an advance payment in the amount of USD 200,000. On 28 May 2012, the Centre received the Claimant's share in the amount of USD 200,000 as payment for its share of the third request for funds. On 28 October 2013 and following several reminders, the Respondent informed the Centre that due to the current situation in Egypt the Respondent was unable to pay its share of the advance payment. In light of the Respondent's default of payment, the Centre, in accordance with Regulation 14(3)(d) of the ICSID Administrative and Financial Regulations, invited either Party to proceed with the payment of the outstanding amount. On 17 January 2014, the Centre confirmed receipt of USD 200,000 from the Claimant as payment of the Respondent's share.
414. In light of the outcome of the Award and since the Respondent has been successful on all the claims on the merits, the Tribunal decides that the Respondent shall bear direct costs of this arbitration proceeding in the amount of USD 225,000. The remaining direct costs of the proceeding shall be borne by the Claimant.

XII. AWARD

415. For the forgoing reasons the Tribunal decides as follows:

- (a) The Tribunal has no jurisdiction over the Claimant's claims, with the exception of the Corruption claim, the Denial of Justice claim and the Denial of Effective Means claim;
- (b) Accordingly, all of the Claimant's claims with the exception of the Corruption claim, the Denial of Justice claim and the Denial of Effective Means claim are dismissed for lack of jurisdiction;
- (c) The Claimant's claim for Corruption is dismissed on the merits;
- (d) The Claimant's claims for Denial of Justice and Denial of Effective Means are dismissed on the merits;
- (e) The Claimant and the Respondent shall each bear their own costs in full, without recourse to each other; and
- (f) The Respondent shall bear direct costs of this arbitration proceeding in the amount of USD 225,000. The remaining direct costs of the proceeding shall be borne by the Claimant.

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The Tribunal

[signed]

Dr. Bernardo M. Cremades
President

Date: 30 April 2014

[signed]

Dr. Hamid G. Gharavi
Arbitrator

Date: 28 April 2014

[signed]

Dr. Veijo Heiskanen
Arbitrator

Date: 25 April 2014