



ICSID (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES)

ICSID Case No. ARB/02/15

AHMONSETO, INC. AND OTHERS V. ARAB REPUBLIC OF EGYPT

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AWARD

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18 June 2007

**Tribunal:**

[Alain Viandier](#) (Appointed by the State)

[Ibrahim Fadlallah](#) (Appointed by the investor)

[Pierre D. Tercier](#) (President)

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# Award

[...]

## II. JURISDICTION OF THE ARBITRAL TRIBUNAL

### 1. the Issue

[...]

170. The Arbitral Tribunal's jurisdiction over the present dispute is governed by [Article 25 of the ICSID Convention](#), which provides as follows:

*"(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally".*

171. Put differently, for the Arbitral Tribunal to have jurisdiction, the following conditions must be fulfilled:

- (i) there must be a legal dispute,
- (ii) arising directly out of an investment,
- (iii) between a Contracting State and a national of another Contracting State, and
- (iv) which the parties to the dispute have consented in writing to submit to the Centre.

[...]

### 2. the objective Jurisdiction

#### (a) the Issue

174. The Respondent considers that the dispute does not arise directly out of an investment and as such

does not fulfil the objective condition required by [Article 25 of the ICSID Convention](#). The Claimants request the Arbitral Tribunal to reject the Respondent's objection because, in their opinion, Egypt's actions and inactions have directly affected their investment.

## (b) the Positions of the Parties

[...]

## c) the Position of the Arbitral tribunal

177. Since the Parties dispute the objective jurisdiction of the present Tribunal, the latter will decide whether the claims raised by the Claimants in these arbitration proceedings are claims "arising directly" out of an investment within the meaning of [Article 25 \(1\) of the ICSID Convention](#).

178. [...]

179. [...] The only questions are whether the measures taken by Egypt and referred to by the Claimants were prejudicial to the latter and whether these measures were related to or have negatively and directly affected the investments.

180. In order to decide whether the measures taken by Egypt described in the next paragraph fall within its jurisdiction, the Arbitral Tribunal has to reason by hypothetically admitting that the alleged facts have been proven. It is not enough only to allege a breach of the BIT; the Claimants also have to establish that the alleged facts hypothetically confirm or fulfil the conditions of application of the BIT.

181. [...]

182. Should the Arbitral Tribunal admit its jurisdiction, it will then verify whether the Claimants' allegations are true and whether any provisions of the BIT were breached. It goes without saying that the decision on jurisdiction will be without prejudice to the decision on the merits of the case.

183. Regarding the wording of [Article 25 of the ICSID Convention](#) ("*[t]he jurisdiction of the Centre shall extend to any legal dispute arising **directly** out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State* emphasis added), the Arbitral Tribunal acknowledges that the First Draft of Article 25 foresaw the Centre's jurisdiction for all legal disputes "*arising out of or in connection with any investment*" (C. H. Schreuer, *The ICSID Convention: A Commentary*, Cambridge 2001, no. 65 ad Art. 25 with reference to History, Vol. I, p. 116). Later on, an additional qualification to the word "investment" was adopted (i.e. the word "directly"). However, no definition or explanation of this qualification was offered (*Idem*). Nevertheless, it results from the insertion of the term "*directly*" in the adopted version of this provision that the authors of the ICSID Convention had the intention to exclude from the Convention legal disputes arising indirectly out of an investment.

184. Therefore, the Tribunal acknowledges that any connection between the State action and an investment would not suffice and that this connection must show distinctive features. This means that, no matter what the parties have agreed, the dispute must not only be connected to an investment but must also be reasonably closely connected (C. H. Schreuer, *op. cit.*, no. 63 and 67 ad Art. 25 with references to the ICSID case law).
185. However, the Arbitral Tribunal is of the opinion that no clear objective criteria exist that would permit to draw a precise line between disputes arising "directly" and those arising only "indirectly" out of an investment. The determination of what is direct and what is indirect is part of the judicial effort to limit—by means of recourse to the required link of causation—the scope of the examined legal provision. Indeed, not any link of causation between State actions and the destiny of an investment would be sufficient to create jurisdiction of the Centre. Like in other fields where similar notions are used, these two concepts (direct / indirect) signalize more a quantitative than a qualitative difference. In addition, the scope of one category as compared to the other cannot always be clearly distinguished and there may be a grey area of uncertainty. What is uncontested is that the link between the dispute and the investment must be of a certain "intensity". This requirement also applies in other legal fields, notably in private international law for the determination of the applicable law, or even in international investment procedures ([Consortium R.F.C.C. v. Kingdom of Morocco, decision on jurisdiction dated July 16, 2001, no. 60](#)).
186. Nevertheless, ICSID practice yields certain indications for the distinction. Accordingly, the fact that transactions which are ancillary but vital to the investment are made in separate form and even through separate entities does not deprive a dispute relating to them of its direct character. Furthermore, the fact that a dispute with the government has important repercussions on relationships with private entities in the host State does not negate its character as arising directly out of an investment.
187. For instance, in [the] [CMS Gas Transmission Company v. Republic of Argentina case \(ICSID Case No. ARB/01/8, decision of the Tribunal on objections to jurisdiction dated July 17, 2003, no. 35\)](#), the arbitrators held that: "*for the time being, the fact that the Claimant has demonstrated prima facie that it has been adversely affected by measures adopted by the Republic of Argentina is sufficient for the Tribunal to consider that the claim, as far as this matter is concerned, is admissible and that it has jurisdiction to examine it on the merits*". Therefore, the Tribunal did not deem it necessary to make a definitive interpretation of the substantive BIT obligations at issue and limited itself to a *prima facie* examination. Put differently, it clearly engaged in a process to determine if the facts alleged were "capable" of coming within the provision of the BIT in a general manner. Two other cases adopted the same approach ([Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, decision on jurisdiction \(ancillary claim\) dated August 2, 2004](#) and [LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, decision on objections to jurisdiction dated April 30, 2004](#); cited by I. Laird, A Distinction Without A Difference? An Examination of the Concepts of Admissibility and Jurisdiction in *Salini v Jordan* and *Methanex v USA*, in T. Weiler (ed.), *International Investment Law and Arbitration*, London 2005, 217).
188. As pointed out by Schreuer, disputes, in order to be arising directly, must have "*distinctive features linking them to the investment that are not shared by disputes unrelated to investments*" (C. H.

Schreuer, *op. cit.*, no. 78 ad Art. 25). In other words, the dispute must relate to rights and obligations applicable to an investor as a consequence of the special investment relationship. By contrast, legal disputes concerning the rights and obligations that are applicable to any persons, who are within the reach of a host State's jurisdiction, as a matter of general law, do not fall under [Article 25 \(1\) of the ICSID Convention](#) and must be decided by the appropriate procedures in the relevant jurisdiction. For instance, questions of general public economy not directly related to the investments, as opposed to measures specifically addressed to the operation of the business concerned, will be considered as indirectly linked with the investments and normally fall outside the jurisdiction of the Centre (*CMS v. Argentina* cited above no. 187; Exh. C-108).

189. This follows the decision in *Amco Asia Corporation and others v. Republic of Indonesia* (Resubmitted case, decision on jurisdiction dated May 10, 1988, 1 ICSID Reports 543, 562-565). In the said case, the Tribunal drew a distinction between rights and obligations of general application and those applicable to an investor as a consequence of the special investment relationship.
190. However, in *CMS v. Argentina* and *Enron v. Argentina* (see above no. 187), the Tribunals explicitly stated that "[a] direct relationship can, however, be established if those general measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts" (Exh. C-108, no. 27) or in other words, that "[they have] jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislations or contracts" (Exh C-108, no. 27 and Exh. C-150, no. 12; see also [El Paso Energy International Company v. The Argentine Republic](#), ICSID Case No. ARB/03/15, decision on jurisdiction dated April 27, 2006; [Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic](#), ICSID Case No. ARB/03/17, decision on jurisdiction dated May 16, 2006; [LESI, S.p.A. and ASTALDI S.p.A. v. People's Democratic Republic of Algeria](#), ICSID Case No. ARB/05/3, decision dated July 12, 2006; [Azurix Corp. v. The Argentine Republic](#), ICSID Case No. ARB/01/12, Award dated July 14, 2006; *Pan American Energy LLC, and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, and *BP America Production Company and others v. The Argentine Republic*, ICSID Case No. ARB/04/8, decision on preliminary objections dated July 27, 2006; [Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic](#), ICSID Case No. ARB/03/19, decision on jurisdiction dated August 3, 2006; [ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary](#), ICSID Case No. ARB/03/16, dated October 2, 2006).
191. Similarly, in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ARB 01/7, Exh. C-151, no. 99), the Tribunal quoted the *CMS v. Argentina* decision and held that "[...] by entering into the BIT, the Contracting Parties did not limit the exercise of their authority under their national laws or policies except to the extent that this exercise would contravene obligations undertaken in the BIT itself".
192. The scope of the above-mentioned decisions was further confirmed by the commentators and case law. Indeed, the required special relationship may also be grounded on the host State's investment legislation or on a bilateral investment treaty (C. H. Schreuer, *op. cit.*, no. 76 ad Art. 25). In summary, a direct relationship can be established if those general measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts. As in the recent ICSID cases cited above (no. 187 *et seq.*), what is submitted to the jurisdiction of the Centre in the present

arbitration proceedings is "*not the measures in themselves but the extent to which they may violate the rights granted to foreign investors under these specific commitments*" (*CMS v. Argentina*, Exh. C-108, no. 27).

193. In the present case, if the Arbitral Tribunal were to admit that Egypt has violated by its acts and omissions its obligations under the BIT, namely those contained in Articles II(2)(a), II(4) and III of the BIT, the present dispute would then clearly arise directly out of an investment and would therefore satisfy the jurisdictional requirements of [Article 25 \(1\) of the ICSID Convention](#). In other words, the present dispute, even to the extent it involves general law measures, falls within [Article 25 \(1\) of the ICSID Convention](#) as a dispute arising directly out of an investment where the investor alleges breaches of rights and obligations resulting from an investment treaty.
194. Considering the above-mentioned case law and opinions of legal authors, the directness requirement must not be interpreted too restrictively and must be considered as satisfied when the dispute and investment are reasonably closely connected. Put differently, the Arbitral Tribunal is of the opinion that it does not have to be excessively demanding when applying [Article 25 of the ICSID Convention](#). The scope of this Article is not only limited to actions that directly harm the investment itself (like expropriation, appropriation and destruction) but also includes measures having an analogous effect like harassment of employees, blocking access to plants, banning of certain operations, blocking of imports and exports, etc. Any different and stricter approach would encourage States to apply measures that appear to be indirect albeit they in effect directly harm the investments.
195. On the facts, there are two issues relevant to decide on the objective jurisdiction of the present Tribunal:
- *The blockage of funds indispensable for Ahmonseto, Inc.* resulting from the change of the [Bank]'s credit management, which deprived Ahmonseto, Inc. of financial resources. It is plain that measures, which forbid or impede for instance import of raw materials or supply of energy, fall within the scope of the ICSID Convention. More generally, measures having impact on the specific indispensable resources of investments fall within the scope of [Article 25 of the ICSID Convention](#).
  - *The harassment of the managers who are indispensable to effectively lead the company.* Their arrest and sequestration can also create jurisdiction under [Article 25 of the ICSID Convention](#). It is plain that this would be the case if access were to be blocked by the State to workers or management of an investor irrespectively of whether such blockage is legally or illegally decided or whether it is a *de facto* measure. There are no reasons to treat differently a case where the person at the head of the investor was deprived of control over his companies, as on the facts.
196. Indeed, the award of the Iran-US Claims Tribunal in the *Tippetts* case involving the replacement by Iran of the foreign managers of an investment in Iran ([Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA, The Government of the Islamic Republic of Iran and others](#), Award No. 141-7-2 dated June 22, 1984, [Iran-US Claims Tribunal Reports, vol. 6](#), Exh. C-156) as well as the decisions in cases *Wena v. Egypt* and *Biloune v. Ghana* (*Wena Hotels Ltd. v. Arab Republic of Egypt*, ARB/98/4, Award on the Merits dated December 8, 2000, 41 ILM 896 [2002], Exh. C-94; and *Biloune, et al. v. Ghana Investment*

*Centre, et al.*, Award dated October 27, 1989, Yearbook Comm. Arb'n XIX [1994], p. 11-32, Exh. C-103) support the proposition that measures directed at the managers, management or operations of investments are measures affecting investments that can amount to breaches of rights to investors under a BIT or relevant treaties.

197. Without prejudice to the decision on the merits of the issues described above, the measures directed at the [Family] and managers of the [Family] Group constitute measures directed at the investments themselves within the meaning of the above-mentioned case law. Since the Claimants have demonstrated *prima facie* that their investments have been adversely affected by the Respondent's actions, the Respondent's objections to the objective jurisdiction of the present Arbitral Tribunal are rejected.

198. [...]

199. In conclusion, the Arbitral Tribunal has the objective jurisdiction over the present dispute.

### 3. the Subjective Jurisdiction

#### (a) the Issue

200. [...]

201. In summary, the issue of subjective jurisdiction principally depends on the interpretation of the BIT, and in particular of [its] Article VII, which has the following wording:

*"Settlement of Legal Investment Disputes Between One Party and a National or Company of the Other Party*

*1. For purposes of this Article, a legal investment dispute is defined as a dispute involving (i) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; or (ii) an alleged breach of any right conferred or created by this Treaty with respect to an investment.*

*2. In the event of a legal investment dispute between a Party and a national or company of the other Party with respect to an investment of such national or company in the territory of such Party, the parties shall initially seek to resolve the dispute by consultation and negotiation. The Parties may, upon the initiative of either of them and as a part of their consultation and negotiation, agree to rely upon non-binding, third-Party procedures. If the dispute cannot be resolved through consultation and negotiation, then the dispute shall be submitted for settlement in accordance with the applicable dispute-settlement procedures upon which a Party and national or company of the other Party have previously agreed. With respect to expropriation by either Party, any dispute-settlement procedures specified in an investment agreement between such Party and such national or company shall remain binding and shall be enforceable in accordance with the terms of the investment agreement and relevant provisions*



*of domestic laws of such Party and treaties and other international agreements regarding enforcement of arbitral awards to which such Party has subscribed.*

202. The Tribunal will examine whether or not the Respondent has fully agreed to submit the present dispute to ICSID arbitration pursuant to [Article 25 of the ICSID Convention](#).

## **(b) the Positions of the Parties**

203. [...]

204. [...]

## **(c) the Position of the Arbitral tribunal**

205. Before examining the subjective jurisdiction of the present Tribunal, it is recalled that it is undisputed between the Parties that there is no investment contract between them.

206. Thus, the subjective jurisdiction has to be established on the basis of the BIT. The BIT in its Article VII (1) contains the following definition of the term investment dispute: *"a legal investment dispute is defined as a dispute involving (i) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; or (ii) an alleged breach of any right conferred or created by this Treaty with respect to an investment"....*

207. Therefore, the Respondent's consent is limited to disputes relating to a breach of rights conferred by the BIT with respect to an investment. The present dispute is a proper legal investment dispute within the meaning of Article VII (1) of the BIT because it is based on the alleged Egypt's breach of rights conferred by the BIT on the Claimants.

208. Taking as a criterion the applicability of the BIT, it is possible to divide all the issues potentially relating to the Treaty into the following three categories:

- Aspects that are clearly excluded from the scope of the BIT. As it is the case for measures listed in Article XI of the BIT, which provides that *"all matters relating to the taxation of nationals or companies of a Party, or their investments in the territories of the other Party or a subdivision thereof shall be excluded from this Treaty, except with regard to measures covered by Article III and the specific provisions of Article V"*.
- Aspects that are not specifically excluded from the scope of the BIT but that the Parties have not agreed to submit to the jurisdiction of the Centre, e.g. Article VII (6) of the BIT, which provides that *"[t]he provisions of this Article shall not apply to a dispute arising under an official export credit, guarantee, or insurance arrangement, pursuant to which the Parties have*

*agreed to other means of settling disputes".*

- Aspects that are neither excluded from the scope of the Treaty, nor from the jurisdiction of the Centre but that are in principle reserved to the State. The State has the right to take such measures but, depending on their subject matter, they can fall within the competence of an arbitral tribunal instituted under the Centre. For instance, Article X of the BIT, which reserves the measures taken by the State and necessary for the maintenance of public order and morals.

209. As to the *Customs Case*, the Respondent submits that the issues relating to this case fall within the first category, i.e. are excluded by effect of Article XI of the BIT from the competence of the present Tribunal.

210. However, the Respondent fails to make a distinction between disputes over the substantive content of customs laws themselves or their application and those relating to Egypt's conduct regarding the *Customs Case*, which was allegedly used as a pretext for unfounded criminal action. The present dispute clearly falls within the second category because the Claimants allege that the manner in which the Respondent was acting in reviving the customs dispute gives rise to breaches of the Claimants' rights under the BIT.

211. In any case, according to the recent case law, the present dispute is carved out of the tax matters by exception provided for in Article III of the BIT relating to expropriation. It is also important to note that, as already has been held in *Enron v. Argentina* discussed above (see nos. 187 and 190), once expropriation is invoked, as indeed it has been, then the connection between Article III of the BIT and the standards of treatment under Article II (2) of the Treaty becomes operational, including fair and equitable treatment, full protection and security and treatment not less than that required by international law. In turn, this brings the present dispute in the meaning of Article XI of the BIT. It is in this context, and not in isolation, that the questions of transparency and the availability of effective remedies also become relevant. And, above all, the whole discussion is then governed by Article VII of the Treaty on the settlement of disputes.

212. Therefore, since the Claimants alleged that the tax assessments resulted in the violation of specific provisions and standards of treatment established in the BIT, these allegations can only be considered at the merits phase of the case, but *prima facie* they are sufficient to justify the exercise of the right of action by the Claimants ([Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ARB/00/4, decision on jurisdiction dated July 23, 2001, Exh. R-151, no. 62 et seq.](#) ; [Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan, ARB/02/13, decision on jurisdiction dated November 29, 2004, no. 151](#); [Consortium Groupement L.E.S.I. — DIPENTA v. Algeria, Award of January 10, 2005, Part II, no. 25](#); [LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria, Decision dated July 12, 2006, no. 84](#)). One may set apart the case where the allegations are obviously baseless or abusive. Accordingly, the Tribunal upholds jurisdiction to consider the matter on the merits as far as the *Customs Case* is concerned. It is dispensed from examining whether Article XI applies to matters relating to customs duties.

213. As to the *criminal proceedings* initiated against [the Head of the Family] in Egypt, the Respondent

denies the competence of the present Tribunal to rule on this issue on the basis of Article X of the BIT, which has the following wording:

*"Measures Not Precluded by Treaty*

*1. This Treaty shall not preclude the application by either Party or any subdivision thereof of any and all measures necessary for the maintenance of public order and morals, the fulfilment of its existing international obligations, the protection of its own security interests, or such measures deemed appropriate by the Parties to fulfil future international obligations.*

*2. This Treaty shall not preclude either Party from prescribed special formalities in connection with the establishment of investments in its territory of nationals and companies of the other Party, but such formalities shall not impair the substance of any of the rights set forth in this Treaty".*

214. It results from this provision that the measures mentioned therein remain doubtlessly within the jurisdiction of the State. Nevertheless, they do not preclude the Arbitral Tribunal from recognising its jurisdiction in relation to the alleged violation of the provisions of the BIT by such measures. In other words, Article X of the BIT does not limit the competence of the present Arbitral Tribunal because it falls within the third of the three above-mentioned categories (see above no. 208), and only defines the measures not precluded by the BIT.
215. Therefore, irrespective of whether the said criminal proceedings constitute measures necessary for the maintenance of public order and morals, Article X [of the] BIT constitutes an affirmative defence on the merits which is available to the Respondent in the present case, but it does not operate to exclude certain disputes from the scope of application of the BIT or of its dispute resolution mechanism.
216. The Arbitral Tribunal is thus dispensed from deciding at this stage whether the Respondent has demonstrated that the requirements of Article X of the BIT are satisfied because this provision is in any case improper to exclude the competence of the present Arbitral Tribunal over the present dispute.
217. The above considerations on Article X of the BIT also apply to the Respondent's objections to the present Tribunal's competence over the dispute relating to the [Bank]'s actions.
218. As to the Respondent's submission that the latter dispute constitutes a commercial dispute and is therefore excluded from the present Tribunal's jurisdiction, the Arbitral Tribunal notes that the [Bank] is structurally and functionally connected to the Government of Egypt so that its acts are attributable to the Respondent because the examination of the structural and functional elements of an apparently separate legal entity's relationship with the State determines whether the acts of such an entity can be attributed to the State (S. Manciaux, *Investissements étrangers et arbitrage entre Etats et ressortissants d'autres Etats—Trente années d'activité du Cirdi*, Litec 2004, no. 118; S. Lemaire, *Treaty claims et contract claims: la compétence du Cirdi a l'épreuve de la dualité de l'Etat*, *Revue de l'arbitrage* 2006, N° 2, p. 353, 372, no. 33).
219. Indeed, it is generally accepted that *"any commercial company dominated or predominantly*

*controlled by the State or by State institutions, whether it has a legal personality or not, is considered to be a State-owned company"* ([Salini v. Morocco, ARB/00/4, decision on jurisdiction dated July 23, 2001, Exh. R-151, no. 31](#) with reference to L.J. Bouchez, *The Prospects for International Arbitration: Disputes Between States and Private Enterprises*, 8 *Journal of International Arbitration* 1, 1991, p. 81 *et seq.*; K.-H. Bockstiegel, *Arbitration and State Enterprises: Survey on the National and International State of Law and Practice*, *Arbitration International*, vol. 1, n° 2, 1985, p. 195 *et seq.*). To support this finding, the Arbitral Tribunal may also refer to the concept expressed in Article 8 of the "International Law Commission Draft Articles on State Responsibility" which has the following wording: "*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of or under the direction or control of, that State in carrying out the conduct*".

[...]

225. The material consideration as to the effect of the [Bank]'s policy on the Claimants' state of affairs is a matter to be resolved on the merits. However, as far as the jurisdiction is concerned, the Arbitral Tribunal finds that the alleged actions of the [Bank] could *prima facie* amount to violations of the BIT. The alleged breaches by the Respondent of the BIT are excluded neither from the scope of application of the BIT, nor from the jurisdiction of the Centre. More specifically, the issue of the alleged blockage of funds and the changes of credit policy of the [Bank] are covered by the jurisdiction of the Arbitral Tribunal.
226. In conclusion, all the claims formulated by the Claimants in the present arbitration proceedings fall within the subjective jurisdiction of the present Arbitral Tribunal.

## 4. the Conclusion of the Arbitral tribunal

227. As a result of the above considerations, the Arbitral Tribunal decides that it has jurisdiction over the present dispute.

## III. THE MERITS OF THE CASE

### 1. In General

228. [...]

229. More precisely, the issues at stake are (i) whether Egypt has failed to provide the Claimants' investment with the treatment, protection and security required by international law and national legislation; (ii) whether Egypt has failed to ensure the most favourable treatment of the Claimants' investments; and (iii) whether Egypt has taken measures tantamount to expropriation of the Claimants' investments.

230. Before deciding on whether [the] Respondent has committed a breach of the BIT, it is first necessary to ascertain whether the measures taken by Egypt against the Claimants were illegal and whether they were obviously unjustified. Should the measures taken by Egypt be sufficiently justified, no breach of the BIT can be found in their respect.

## 2. the Measures taken by the [Bank] Affecting the [Family] Group

### (a) the Issue

231. The issue to be decided by the Arbitral Tribunal is whether the decision taken by the [Bank] on [date] to freeze all the [Family] Group's credit facilities was unreasonable and unfair, and consequently, resulted into a violation of the BIT.

[...]

### (b) the Positions of the Parties

[...]

### (c) the Position of the Arbitral tribunal

235. Before examining whether the acts and omissions of the [Bank] were unjustified and consequently resulted into a violation of the BIT, the Arbitral Tribunal will ascertain whether such acts and omissions of the [Bank] are attributable to Egypt.

[...]

238. Since the [Bank] was under [the] total legal and factual control of Egypt, the Arbitral Tribunal acknowledges that the Respondent had the opportunity to influence directly the policy of the [Bank], if it wished to do so. As already stated before (no. 219), the Arbitral Tribunal refers to the concept expressed in Article 8 of the "International Law Commission Draft Articles on State Responsibility" which has the following wording: *"The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct"*.

239. Therefore, it is not only necessary but also sufficient that a State controls an entity in order to be held responsible for its actions. The required control must not only be supervisory and

prudential—which is usual in the banking sector—but rather of a direct nature.

240. [...]

241. Once it has been established that decisions, acts and omissions of the [Bank] are attributable to Egypt, the Arbitral Tribunal will examine whether the facts relied upon by the Claimants constitute a violation of the BIT.

[...]

247. In view of the above considerations, the toughening of the [Bank]'s policy does not constitute an unlawful or unjustified measure. Furthermore, the Claimants failed to demonstrate that this attitude had a discriminatory nature because it concerned only the [Family] Group to the exclusion of other clients of the [Bank] placed in a similar situation. The decisions taken are to be considered in the specific context of the Egyptian economic conditions.

248. Since the measures introduced by the [Bank]—and indirectly by the Respondent—were justified, the Respondent has neither breached its obligation to ensure the most favourable treatment of the Claimants' investment, nor its obligation to provide the Claimants' investments with the treatment, protection and security required by international law and national legislation.

249. In conclusion, the decisions and the actions of the [Bank] attributable to the Respondent do not constitute a violation of the BIT.

### **3. the Criminal Actions Conducted in Egypt and Affecting the [Family] Group and Family**

#### **(a) the Issue**

250. The issue to be decided by the Arbitral Tribunal is whether the criminal actions affecting the [Family] Group and the [Family] were groundless, unfair and unreasonable and, consequently, amounted to a violation of the BIT.

251. Before ruling on this issue, the Arbitral Tribunal recalls briefly the cases on which the Claimants based their allegations.

252. [...]

#### **(b) the Positions of the Parties**

253. [...]

## (c) the Position of the Arbitral tribunal

254. Before examining the merits of the Claimants' allegations, the Arbitral Tribunal acknowledges that Egypt is in principle responsible for the acts of its judicial and administrative authorities. However, the acts in question, namely the acts of criminal prosecutions, are to a large extent excluded from the scope of the BIT because they are part of the reserved competence of the State. Nevertheless, the Arbitral Tribunal has to verify whether such acts are of arbitrary nature and, in this way, potentially violate the rights and the obligations resulting from the BIT.
255. [...] In order for a criminal procedure to amount to a violation of the BIT, it must be fundamentally unjustified and groundless, so that it constitutes a discriminatory measure that resulted in preventing the Claimants to manage their businesses or to have them managed in an acceptable way.
256. In this context, if a higher court considers after a lengthy procedure that a lower court's judgment is wrong and annuls it, this does not necessarily amount to a violation of the BIT. In particular, the fact that a higher court qualifies the prosecution and the lower court's judgment as arbitrary, does not automatically imply arbitrariness in the sense of the BIT.
- [...]
261. [...] [I]mprisonment is a more serious measure than the mere opening and conduct of a criminal procedure, since it has ultimately a direct effect on the capacity of the concerned person to manage his businesses. In this regard, not only the placement in custody but also the conditions of detention are relevant.
262. Nevertheless, a violation of the BIT can only be accepted if the imprisonment constitutes a measure that gravely violates the rights of the person placed in custody. In this regard, the benchmark to be set by the Arbitral Tribunal is not the one of a court of human rights or the one of a state authority charged with the application of criminal law. The judgment of the Arbitral Tribunal shall be the one of an international tribunal that has to adjudicate upon excessive impairment of investments.
263. [...]
264. Having said this, the Arbitral Tribunal shall now consider whether the findings of facts and their appraisal by the arbitrators are sufficient to prove and establish a violation of the principles of equitable treatment amounting to a violation of the BIT. Only after long hesitation, the majority of the Arbitral Tribunal holds that, in the present case, the required degree of intensity is not met in order to sufficiently impair the investment, the more so as the measures taken against [the Head of the Family], who presented himself as a strategic rather than a day to day manager could not prevent, only by themselves, an appropriate management of the [Family] Group. This finding is not purported to be of a general character and only relies on the fact that, in the present case, the majority of the Arbitral Tribunal is of the opinion that this factor does not suffice to amount to a direct impairment of the investment. This does not mean that the majority denies the lengthy and cumbersome character of the detention of [the Head of the Family] and the precarious conditions that prevailed in jail. Albeit, the majority of the Arbitral Tribunal considers that it is not the task of

the Arbitral Tribunal to take a hand in the decisions that were issued during the above-mentioned criminal procedures.

265. One member of the Arbitral Tribunal does not share the opinion of the majority on this score. In his opinion, the repeated deprivations of liberty that were inflicted to [the Head of the Family]—both because of their duration and their conditions—were so severe that they globally amount to a violation of the rights and obligations under the BIT.
266. Even if one would admit such conclusion, the Arbitral Tribunal, in order to grant the conclusions of the Claimants, would still have to assess whether the measures taken against [the Head of the Family] effectively lead to the claimed loss of the Claimants' investments in Egypt. Such a condition would require that the Claimants establish the causation link between (i) the placement in custody of [the Head of the Family] and (ii) the degradation of the financial and economic conditions of the [Family] Group. With regard to this element, the Arbitral Tribunal holds that the establishment of such a causal link is rather unlikely because of the preponderant impact of other causations inherent to the [Family] Group and to the general situation of the textile market.
267. Further, even if the presence of a violation of the rights and the obligations of the BIT as well as the causation between the custody and the damages suffered by the Claimants could be established, one would still have to examine whether the Claimants met their duty to mitigate their losses. The Arbitral Tribunal considers that, in any case, the Claimants did not establish with sufficient certainty that other measures, e.g. the nomination of a substitute general director, would not have prevented the losses they allegedly suffered.
268. In conclusion, the Arbitral Tribunal holds that the criminal proceedings conducted in Egypt against [the Head of the Family] and [one of his sons] do not amount to an inequitable treatment under the terms of the BIT. Furthermore, the majority of the Arbitral Tribunal comes to the same conclusion regarding the detention of [the Head of the Family].

## **4. the Combination of the Measures taken by the Respondent and Affecting the Claimants**

### **(a) the Issue**

269. The issue to be decided by the Arbitral Tribunal is whether, by considering the allegations submitted by the Claimants as a whole, the combined effect of the actions taken by the Respondent and affecting the Claimants could constitute a breach of the BIT.

### **(b) the Positions of the Parties**

[...]



## **(c) the Position of the Arbitral tribunal**

[...]

274. [A]ccording to the Arbitral Tribunal, the combination of the measures and decisions taken by the Respondent do not amount to a direct impairment of the Claimants' investments sufficient to constitute a breach of the BIT. Indeed, the said measures and decisions—individually admissible—likely influenced the management of the Claimants' investments, but their combination does not make them appear as deliberate and malicious as to constitute a violation of the BIT.

## **5. the Financial Consequences of the Arbitral Proceedings for the Respondent**

### **(a) the Issue**

275. The issue to be decided by the Arbitral Tribunal is whether the Respondent is entitled to seek relief for its prejudice, including both its damages and a compensation for pain and suffering. [...]

### **(b) the Positions of the Parties**

[...]

### **(c) the Position of the Arbitral tribunal**

278. Theoretically, the Respondent could seek relief based on the alleged prejudice resulting from the arbitral proceedings instigated by the Claimants. According to the common principles applying to such a petition, the Respondent should then establish the substantiality and the amount of its prejudice, the type of liability, and the causation between the type of liability and the alleged prejudice.

279. The Arbitral Tribunal unanimously is of the opinion that the Respondent did not sufficiently establish its prejudice:

- As to its material damage, the Respondent mentions only the fees and costs related to the present proceedings. This petition belongs to the positions on which the Arbitral Tribunal must rule on, according to the ICSID Arbitration Rules. Therefore, the petition at hand cannot be considered as a specific position on the Respondent's damage and will be treated in the section specifically dedicated to the arbitration costs.

- As to the compensation for pain and suffering, it is generally recognized that a legal person (as opposed to a natural one) may be awarded damages for pain and suffering in extraordinary circumstances only. Even if such a claim was admissible in the present case, the Respondent would not have adequately established the nature and the substantiality of its moral damages.

280. Notwithstanding the foregoing, the Arbitral Tribunal is anyway of the opinion that the causes brought forward by the Respondent do not adequately justify the compensation of the alleged prejudice. The Respondent did not establish that the filing of the present action by the Claimants was malicious ("*malveillante*"). The measures and decisions taken by the Respondent may effectively have affected the Claimants in such a way that they decided to seek a condemnation of the Respondent. Therefore, the Claimants' actions cannot be considered as abusive. This position is supported by the fact that the present award, at least on one claim, is not rendered unanimously, but is decided by the majority of the Arbitral Tribunal only. The majority of the Arbitral Tribunal has ruled that the Claimants' claims were not sufficiently established indeed, but this does not, in itself, imply that the Claimants have to compensate the Respondent's prejudice.

281. [...]

## IV. THE ARBITRATION COSTS AND THE LEGAL EXPENSES OF THE PARTIES

### (a) the Issue

282. The issue to be decided by the Arbitral Tribunal is how to allocate the cost of the proceeding. [...]

### (b) the Positions of the Parties

[...]

### (c) the Position of the Arbitral tribunal

285. According to [Rule 47 \(1\) of the ICSID Arbitration Rules](#), the arbitral "award shall contain any decision [...] (j) regarding the cost of the proceeding".

286. In connection with the costs of the arbitral proceedings, the ICSID Arbitration Rules deliberately leave a large margin of discretion to the arbitrators. The Arbitral Tribunal is not bound by any pre-established rule, [including] the one which would entirely impose the costs of the proceedings and the attorney's fees on the Party whose claims have been dismissed.

287. [...]

288. Therefore, the Arbitral Tribunal holds that it is just and equitable that each Party will bear the arbitration costs in equal shares.

[...]

## C. AWARD

In view of the above, the Arbitral Tribunal hereby issues the following award:

1. The Arbitral Tribunal has jurisdiction over the present dispute.
2. The decisions and the actions of the [Bank] attributable to the Respondent and affecting the Claimants do not constitute a violation of the BIT.
3. The criminal actions and the measures conducted in Egypt and affecting the Claimants—taken individually or as a whole—do not constitute a violation of the BIT. One arbitrator disagrees and considers that the duration and the conditions of the detention of [the Head of the Family] constitute a violation of the BIT.
4. The Respondent's claim to payment of USD [...] as an indemnity for its suffered prejudice is dismissed.
5. Each party will bear the arbitration costs in equal shares.
6. Each party is to bear its own legal costs.
7. All other claims are rejected.

[...]