INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

AMPAL-AMERICAN ISRAEL CORP., EGI-FUND (08-10) INVESTORS LLC, EGI-SERIES INVESTMENTS LLC, AND BSS-EMG INVESTORS LLC

Claimants

and

ARAB REPUBLIC OF EGYPT

Respondent

ICSID Case No. ARB/12/11

DECISION ON LIABILITY AND HEADS OF LOSS

Members of the Tribunal
The Honorable L. Yves Fortier, QC, President
Professor Campbell McLachlan, QC, Arbitrator
Professor Francisco Orrego Vicuña, Arbitrator

Secretary of the Tribunal
Ms. Aïssatou Diop

Assistant to the Tribunal
Ms. Annie Lespérance

Date of the dispatch to the Parties: 21 February 2017

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I. INTRODUCTION

1. Having issued a Decision on Jurisdiction on 1 February 2016, the Tribunal now turns to the Parties' submissions in respect of attribution, liability and heads of loss.

2. As explained later[1], the present Decision addresses and decides the issues of attribution and liability as well as determining the applicable heads of loss.[2] The calculation of damages will follow in a separate Award.

3. The present Decision should be read together with the Tribunal's Decision on Jurisdiction. Therefore, the Tribunal sees no need to traverse again the procedural history of these proceedings, which it reviewed at length in its Decision on Jurisdiction. Initially, the Tribunal will recall its findings on jurisdiction, review the status of the parallel proceedings, and then set out the procedural history of the proceedings after the issuance of its Decision on Jurisdiction.

4. In order to set the stage for its decision on attribution and liability, the Tribunal will then review the background of the Claimants' investment in Egypt and the Respondent's alleged measures that, the Claimants say, breached provisions of the Treaty.

5. The Parties' requests for relief are set out in Section III. In its analysis, the Tribunal has considered not only the submissions of the Parties summarised in the present Decision, but also the numerous detailed arguments presented by the Parties in their written and oral pleadings. To the extent that these arguments are not referred to expressly, they should be deemed to be subsumed into the Tribunal's analysis.

A. DECISION ON JURISDICTION

6. On 1 February 2016, the Tribunal issued its Decision on Jurisdiction.

7. The operative part of the Decision provides as follows:

> *346. Having carefully considered the parties' arguments in their written pleadings and oral submissions, and having deliberated, for the reasons stated above, the Arbitral Tribunal unanimously decides as follows:*
>
> *(a) To deny the Respondent's objections ratione personae in respect of Ampal, EGI-Fund and EGI-Series;*

[1] See *infra*, Section VI of the present Decision.
[2] Capitalized terms used but not defined herein have the meanings given to them in the Decision on Jurisdiction.

(b) To uphold the Respondent's objection ratione personae in respect of Mr. David Fischer;

(c) To declare that both the Centre (ICSID) and the Tribunal have no jurisdiction over Mr. David Fischer's claims in this arbitration by virtue of Articles 25(1) and 25(2)(b) of the ICSID Convention;

(d) To deny the Respondent's objection over the Claimants' Gas Supply claims based on the alleged breach of the standards of fair and equitable treatment and unlawful expropriation;

(e) To remain seized of the Respondent's objection over the Claimants' Gas Supply claims based on the alleged breach of the umbrella clause;

(f) To deny the Respondent's objection ratione materiae over the Claimants' tax claims;

(g) To deny the Respondent's objection in respect of the alleged illegality of the GSPA;

(h) To direct the Claimant Ampal to elect to pursue the MAGL portion of the claim in the present proceedings alone by 11 March 2016 or opt at that time for the pursuance of its claims in the alternative forum;

(i) To deny the Respondent's objection based on an alleged abuse of process by the Claimants subject to Ampal's compliance with para. (h) above; and

(j) To reserve its decision as to costs.

B. STATUS OF THE PARALLEL PROCEEDINGS

8. The Tribunal recorded in its Decision on Jurisdiction that, in addition to the present arbitration, four other arbitrations between the same and/or related parties had been commenced.[3] Of particular interest, the Tribunal noted that the Final Award in ICC Case 18215/GZ/MHM had been issued on 4 December 2015.[4]

9. The Tribunal invited the parties to provide comments on the relevance and impact of the ICC Award on the present case if any. The Respondent provided its comments on 17 February 2016 and the Claimants on 11 March 2016. The implications of the ICC Award on the present case are discussed below.[5]

10. As of the date of issuance of the present Decision, no other award on the merits has been issued in any one of the other parallel proceedings.

[3] See para. 10 of the Decision on Jurisdiction.
[4] See para. 12(ii) of the Decision on Jurisdiction.
[5] See *infra*, sub-sections V, E, 2 (c) and (d), and sub-section V, E, 3 (d).

C. HISTORY OF THE PROCEEDINGS FOLLOWING THE ISSUANCE OF THE DECISION ON JURISDICTION

11. Following the issuance of the Decision of Jurisdiction and further to paragraph 346(h) of the Decision, the Claimants wrote to the Tribunal in the following terms on 9 March 2016:

> *Ampal's preferred method of complying with the Tribunal's invitation would be to elect to pursue the claim for compensation arising from the portion of its interest in EMG held directly by Merhav Ampal Group Ltd (i.e., 8.21%) only in this proceeding, with Merhav Ampal Group Ltd withdrawing its entire claim in the UNCITRAL arbitration, but to leave Merhav Ampal Energy Holdings Limited Partnership to pursue its entire claim for its direct interest in EMG (8.58%) in the UNCITRAL arbitration, with Ampal withdrawing the part of its claim in this arbitration arising from the half of that 8.58% interest in EMG directly held by Merhav Ampal Energy Holdings Limited Partnership.*
>
> *This election would leave no claims being pursued in both fora in relation to the same shares in EMG, and thus no overlap between compensation sought in the two arbitrations. It would preserve the protection of the ICSID Convention for Ampal's interest in EMG held directly by Merhav Ampal Group Ltd, while avoiding difficulties that would otherwise be caused by seeking to withdraw 50% of the interest in Merhav Ampal Energy Holdings Limited Partnership's compensation claim from the UNCITRAL arbitration and leaving the remaining 50% of that same claim, which involves no overlap, to be adjudicated there, with any award in that arbitration in its favour to be payable to the Limited Partnership as a whole, but with only some of the holders of its equity being entitled to its benefit.*
>
> *As Ampal understands the Decision on Jurisdiction, the Tribunal's concern arises from the pursuit of compensation in relation to the same EMG shares in two different proceedings. This proposal would meet that concern. Ampal respectfully requests that the Tribunal confirm that such an election would be satisfactory to it. If it is, Ampal would remain at the Tribunal's disposal to provide any specification it may require as to the effect of this election on Ampal's claim for compensation in this proceeding.*
>
> *Before definitively making such an election, Ampal would need to obtain confirmation from the UNCITRAL tribunal that it has decided to dismiss all of Egypt's objections to jurisdiction and admissibility. […][and] Ampal must receive approval from the United States Bankruptcy Court in the Southern District of New York. […]*
>
> *[…]*
>
> *Ampal therefore respectfully requests that the deadline for making its election be extended until the UNCITRAL tribunal has indicated whether it has decided to dismiss all objections to jurisdiction and admissibility still pending before it and until Ampal has been able to obtain the requisite court approval for it to withdraw part of its claim in this arbitration and for Merhav Ampal Group Ltd to withdraw all of its claim before the UNCITRAL tribunal.*
>
> *[…]*

12. On 11 March 2016, the Tribunal granted the Claimants' request for an extension to make their election and directed the Claimants to provide the Tribunal, every 15 days, with updates on the developments in the related proceedings relevant to the Claimants' election, namely the

Maiman arbitration and the proceedings before the United States Bankruptcy Court in the Southern District of New York.

13. On 21 March 2016, the Tribunal issued **Procedural Order No. 7** rejecting the Respondent's request in its submission of 17 February 2016 to "*[s]tay this proceeding pending the issuance of the Award in the [related] CRCICA Case No. 829/2012.*"

14. On 5 May 2016, the Acting Secretary-General of ICSID informed the Tribunal and the Parties that the Secretary of the Tribunal, Ms. Aïssatou Diop, would be on leave as of 6 May 2016 and that Ms. Jara Mínguez Almeida would serve as Secretary of the Tribunal during Ms. Diop's absence. Ms. Diop resumed her duties as Secretary of the Tribunal on 6 September 2016.

15. On 6 May 2016, the Claimants informed the Tribunal that, on 5 May 2016, the Maiman Tribunal had decided:

> *[…] to dismiss all of the Respondent's objections to jurisdiction and admissibility. Consequently, the Tribunal declares the proceedings closed in respect of the issues of jurisdiction and admissibility in accordance with Article 31(1) of the UNCITRAL Arbitration Rules.*
>
> *The full reasons for the Tribunal's decision on jurisdiction and admissibility will be included in the Tribunal's Award.*

16. On 12 May 2016, the Parties informed the Tribunal that they were in the process of finalizing an agreed compendium of documents pertinent to liability, as requested by the Tribunal at the conclusion of the Hearing on 6 November 2014 and again on 7 December 2015. As the Parties could not agree the compendium, on 27 July 2016, the Tribunal directed the parties to submit simultaneously separate compendia. The Respondent filed its compendium on 15 August and the Claimants theirs on 16 August 2016.

17. On 16 June 2016, the Claimants filed with the Tribunal the decision of the United Bankruptcy Court for the Southern District of New York, which confirmed their election.

18. The Respondent submitted its comments on the Claimants' election on 20 June 2016, the Claimants responded on 28 June 2016, and the Respondent submitted further comments on 6 July 2016.

19. On 13 July 2016, the Tribunal issued **Procedural Order No. 8**, directing the Claimants to inform the Tribunal when their election was given effect in the UNCITRAL arbitration, admitting certain documents into the record, inviting the Claimants to comment on the admitted documents, and remaining seized of other requests made between the parties.

20. On 25 July 2016, the Claimants submitted an application to the Tribunal, requesting an "*indicat[ion of] whether the election that Ampal has proposed would cure the abuse of process*

that the Tribunal found to have crystalized once both investment tribunals had found that they had jurisdiction."[6] The Tribunal ruled on 15 August 2016 that the Claimants' election would cure the abuse of process.

21. On 27 July 2016, the Claimants submitted their comments on the documents that were admitted into the record, pursuant to Procedural Order No. 8.

22. On 16 August 2016, further to Procedural Order No. 8, the Claimants provided the Tribunal with a copy of their letter to the Maiman tribunal making their election before that tribunal:

> *The Claimants write respectfully to inform the Tribunal that Merhav Ampal Group Ltd (Merhav AGL) no longer seeks any compensation for the harm caused to it through its direct shareholding in EMG, as more specifically described in the attached 9 March 2016 letter from the claimants in the related ICSID arbitration to the ICSID tribunal. The purpose of this withdrawal is to eliminate any overlap in the compensation claimed in this and the related ICSID arbitration, now that both tribunals have confirmed their jurisdiction. The modification of the Claimants' claim to compensation is reflected in tabular form in the annex to this letter.*

23. On 31 August 2016, the Claimants submitted comments on the Respondent's compendium of documents relevant to liability, and the Resspondent responded on 9 September 2016.

II. FACTUAL BACKGROUND

24. As mentioned earlier, the Tribunal will now review the background to the Claimants' investment in Egypt and the measures of the Respondent that, the Claimants say, breached provisions of the Treaty.

A. BACKGROUND TO THE CLAIMANTS' INVESTMENT

25. The Claimants' investment in Egypt has its origin in the 1979 Peace Treaty between Israel and Egypt,[7] which envisaged an inter-governmental commitment to energy interdependence between the two countries.

26. Egypt's initial energy exports to Israel consisted of oil, but with discoveries of vast natural gas reserves, the Egyptian Ministry of Petroleum embarked on a program to develop terms of

[6] Claimants' letter to the ICSID Tribunal dated 25 July 2016.
[7] Peace Treaty between Israel and Egypt (26 March 1979; in force on 25 April 1979), **C-11**, Agreed Minutes to Annex III, providing that normal economic relations will be established between the two States, which, according to the Agreed Minutes, includes "normal commercial sales of oil by Egypt to Israel." (*Tribunal's emphasis*)

agreements to produce and sell natural gas. These terms were eventually codified in various laws and regulations passed by the Egyptian Parliament in the late 1990s. [8]

27. To carry out its gas sector policies, Egypt established the Egyptian Natural Gas Holding Company ("**EGAS**") in 2001, a local holding company for natural gas wholly owned by the Egyptian government. The Ministry of Petroleum also formed GASCO, a subsidiary of EGAS, which would own the pipeline system to be constructed in Egypt.[9]

28. The Cabinet of Ministers decided in 2000 to set a uniform gas price, with a floor of US$0.75/MMBTU and a ceiling of US$1.25-1.50/MMBTU, at delivery point for gas exports from Egypt.[10]

29. The Israeli market was a prime target for Egyptian gas exports. As Egypt's capacity to export oil dwindled and new discoveries of natural gas were made, Israel began to develop its energy infrastructure, which would rely more on natural gas.[11]

30. Independent Israeli and Egyptian investors began discussing gas exports to Israel with the Egyptian government in the late 1990s. These discussions lead to the formation of the East Mediterranean Gas Company S.A.E. ("**EMG**").[12] EMG's primary purpose was to purchase natural gas from Egypt and export it to Israel through a pipeline between Al-Arish in Egypt and Ashkelon in Israel.[13] As a free-zone company, EMG benefitted from special status under Law 8/1997.[14]

31. The construction of a pipeline from Egypt to Israel was a capital-intensive project that required firm supply commitments from the Egyptian government. According to the Claimants, without such commitments, EMG would have been unable to secure financing for the pipeline or commitments from Israeli customers to purchase large quantities of gas on a long-term basis[15], in particular from State-owned Israel Electric Corporation ("**IEC**").

32. As the Egyptian government maintained control of the country's hydrocarbon resources, EMG approached the Egyptian General Petroleum Corporation ("**EGPC**") with a view to purchasing

[8] Memorial, paras. 15-16.
[9] Memorial, para. 17.
[10] Memorial, para. 20. Egyptian Council of Ministers Resolution (the ***September 2000 CoM Resolution***), 18 September 2000, **C-23**. See also Letter from the Prime Minister of Egypt (A. Ebeid) to Chairman of East Gas, March 2001, **C-112**, (informing East Gas of the natural gas price set for FOB delivery at the Al-Arish delivery point).
[11] Memorial, para. 21.
[12] Memorial, para. 23. EMG's incorporation was authorized by Decree 230/2000 of the Egyptian General Authority for Investment and Free Zones (***GAFI***), GAFI Decree 1020/2000, and an Approval of the Prime Minister of Egypt dated 23 January 2000.
[13] Memorial, para. 23. EMG Bylaws, *Investment Gazette* 3381/2000, 28 May 2000, **C-15**, Second Article.
[14] Memorial, para. 45. See Law 8/1997, **C-17**, Articles 16-19.
[15] Memorial, para. 24.

gas directly at the source, rather than from private gas producers.[16] EMG suggested to EGPC that it acquire a 10% stake in EMG. On 12 April 2000, EGPC's Board of Directors accepted both proposals. EGPC thus became a shareholder of EMG in April 2000.[17]

33. According to the Claimants, the commitments of EGPC[18] and other Egyptian governmental bodies[19], including the Prime Minster and the Council of Ministers, were crucial to IEC's decision to contract with EMG for the initial purchase of 1.7 BCM annually.[20]

34. EMG then commenced negotiations with EGPC for a long-term upstream supply contract. On 18 September 2000, the Egyptian Council of Ministers resolved that EGPC would sell up to 7 BCM of gas annually to EMG at a minimum price of US$0.75/MMBTU and a maximum price of US$1.25-1.50/MMBTU in accordance with the "applicable international formula" used by Egypt for gas export contracts.[21]

35. On 7 October 2000, EGPC and EMG signed a Preliminary Agreement for the sale of 7 BCM of natural gas per year.[22] The Prime Minister of Egypt then wrote to EMG and confirmed Egypt's commitment to provide this quantity of natural gas at the decreed price.[23]

36. Negotiations were interrupted because of the Second Intifada, which commenced in September 2000. By 2003, the Egyptian Minister of Petroleum, Sameh Fahmy, expressed doubt as to the viability of Egypt's commitment.[24]

37. On 9 September 2003, EMG asked the Egyptian government to resume negotiations and to reaffirm its commitment to the gas supply arrangement. The following day, the Chairman of EGPC wrote to IEC confirming the Egyptian gas supply commitments and reinitiating tripartite negotiations.[25]

38. On 26 January 2004, the Egyptian Minister of Petroleum confirmed Egypt's commitment to supply EMG with 7 BCM annually for onward sale to Israeli customers, and instructed EGPC

[16] See Letter from EMG to EGPC, **C-113**, 2 April 2000.
[17] Memorial, para. 25. See Minutes of the Seventh Meeting of the Board of Directors of the Egyptian General Petroleum Corporation, 12 April 2000, **C-20**.
[18] EGPC wrote to IEC in May 2000 to confirm that EGM was the « Authorized Seller » of Egyptian gas to Israel. See Letter from EGPC (M. Tawila) to IEC (E. Landau), 24 May 2000, **C-21**.
[19] On 31 May 2000, the Egyptian Embassy in Tel Aviv reiterated EGPC's commitment to IEC in a letter attaching a 12 April 2000 EGPC Board Resolution approving EGPC's commitment to the project. Letter from Egyptian Ambassador to Israel (M. Bassiouny) to IEC (E. Landau and Y. Dvir), 31 May 2000, **C-22**.
[20] Memorial, paras 26-28.
[21] Memorial, para. 30. See Egyptian Council of Ministers Resolution, 18 September 2000, **C-23**. (as incorporated into Source GSPA, **C-10**, Preamble, p. 8).
[22] Preliminary Agreement by and between the Egyptian General Petroleum Corporation and East Mediterranean Gas Company, 7 October 2000, **C-117**.
[23] Memorial, para. 32. See Letter from the Prime Minister of Egypt to EMG, 19 March 2001, **C-24** (as incorporated into Source GSPA, **C-10**, Preamble, p. 5).
[24] Memorial, para. 33. See A. Cohen, "Egyptian petroleum minister backtracks on Israeli gas deal," *Haaretz*, 3 June 2003, **C-118**.
[25] Memorial, para. 36. See Letter from EGPC (I. Mahmoud) to IEC (E. Landau), 10 September 2003, **C-25**.

and EGAS to conclude a gas supply agreement with EMG in accordance with the framework of the September 2000 Council of Ministers Resolution.[26]

39. The Egyptian and Israeli governments then exchanged drafts of an inter-State Memorandum of Understanding confirming Egypt's supply commitment and authorizing EGPC/EGAS to act as representatives of the Egyptian Ministry of Petroleum in executing the Source GSPA and a tripartite agreement with EMG and IEC.[27]

40. On 13 June 2005, EMG and EGPC/EGAS signed the Source GSPA and the Tripartite Agreement. Egypt and Israel executed the Memorandum of Understanding on 30 June 2005.[28]

41. EMG and IEC signed an On-Sale Agreement on 8 August 2005 and the Tripartite Agreement on 28 August 2005. According to the Claimants, these agreements, together with the Source GSPA and the Memorandum of Understanding, formed a unit of intertwined commitments.[29]

42. EMG also entered into ten additional downstream contracts with other Israeli customers in the industrial and power generation sectors.[30] The Tribunal notes that EGPC/EGAS did not enter into additional Tripartite Agreements with EMG and its other Isreali customers. [31]

B. EGYPT'S ALLEGED MEASURES

43. According to the Claimants, Egypt's following measures destroyed their investment.

44. First, the Egyptian government revoked EMG's tax-exempt status by promulgating Law 114/2008 on 5 May 2008.[32] As a result of this law, EMG's annual tax burden was increased from 1% of its revenues to 20%.[33] Egypt's revocation of EMG's free-zone status not only increased the tax levied on EMG's revenues, say the Claimants, but also subjected EMG to taxes on assets and operations that were previously non-taxable. The revocation also obliged EMG to pay customs duties, sales taxes, and duties on equipment and machinery.[34]

45. Second, according to the Claimants, Egypt withheld gas from EMG in order to compel renegotiation of the Source GSPA and coerce the Claimants into signing the First Amendment.

[26] Memorial, para. 37. See Ministry of Petroleum Resolution 100/2004, 26 January 2004, **C-26**.
[27] Memorial, para. 37. See Memorandum of Understanding Between the Government of the Arab Republic of Egypt and the Government of the State of Israel (Draft), 17 February 2004, **C-124**.
[28] Memorial, para. 42.
[29] Memorial, para. 44.
[30] Memorial, para. 56. For an illustration of these commitments, see the table at para. 56 of the Claimants' Memorial.
[31] Memorial, para. 59.
[32] Law 114/2008, *Official Journal*, Issue No. 18 (bis), 5 May 2008, **C-61**, Article 11.
[33] Memorial, para. 46. See Law 8/1997, 11 May 1997, **C-17**, Article 35.
[34] Memorial, para. 99. See Law 8/1997, 11 May 1997, **C-17**, Article 32 and 35.

46. The Claimants aver that, as EMG was set to begin receiving limited gas quantities in January 2008 during the First Commissioning Period when the pipeline was going to be tested,[35] EGPC/EGAS notified EMG that they would have difficulty supplying the contractual quantities of gas necessary for testing, because Egypt had committed to supply more gas to various buyers than it could deliver.[36]

47. Throughout the spring of 2008, EGPC/EGAS continued to undersupply EMG, citing gas shortages in Egypt.[37] These delays damaged EMG's credibility with IEC, say the Claimants.[38]

48. During the same period, the Egyptian Minister of Petroleum was informed by the Egyptian Attorney General that pressure groups and lawyers were complaining about Egypt's gas export practices.[39] On 3 April 2008, EGPC/EGAS wrote to EMG demanding a price increase.[40]

49. Reluctantly, say the Claimants, EMG nevertheless entered into discussions with the Egyptian government to revise the Source GSPA.[41]

50. The Tribunal recalls that Mr. Zell, an EMG Board Member and the founder and chairman of EGI, represented EMG and the Claimants in the negotiations of the Source GSPA with the Egyptian government.[42]

51. According to the Claimants, while Egypt was demanding renegotiation of the Source GSPA, it continued to withhold gas during the negotiations in order to coerce the Claimants into agreeing increased prices for reduced quantities of gas.

52. Compelled to renegotiate, argue the Claimants, EMG made significant concessions[43] and signed the First Amendment to the Source GSPA on 31 May 2009.

53. Third, according to the Claimants, even after the First Amendment was signed, Egypt continued to flout its supply obligations.

54. In 2010, EMG experienced delivery irregularities, which impacted its ability to reimburse its loan installments to NBE and to supply full contractual volumes to its customers. This

[35] Letter from EMG (M. Tawila) to EGPC (A. Taha) and EGAS (M. Amer), 4 December 2007, **C- 153**; Letter from EMG (M. Tawila) to EGAS (M. Amer), 6 January 2008, **C-154**.
[36] Memorial, para. 92. See Minutes of Meetings between EMG, EGAS, and GASCO, 6 January 2008, **C-155**. See also Letter from EGAS (M. Amer) to EMG (M. Tawila), 8 January 2008, **C-55**.
[37] Letter from EGAS (M. Amer) to EMG (M. Tawila), 15 March 2008, **C-46**; Letter from EGAS (M. Amer) to EMG (M. Tawila), 27 March 2008, **C-47**; Letter from EGAS (M. Amer) to EMG (M. Tawila), 16 April 2008, **C-48**.
[38] Memorial, para. 93.
[39] Letter from Attorney General (A. Mahmoud) to the Minister of Petroleum (S. Fahmy), 17 March 2008, **C-156**.
[40] Memorial, para. 94. See, e.g., Letter from EGPC (A. Taha) and EGAS (M. Amer) to EMG (M. Tawila), 3 April 2008, **C-51.**
[41] Memorial, para. 96.
[42] Memorial, para. 100.
[43] Memorial, paras. 117 and 118. See **C-50** for the First Amendment.

prompted complaints by EMG's anchor buyer, IEC.[44] At a December 2010 meeting in Cairo between EGPC/EGAS, EMG and IEC, the Claimants write, "*EGPC/EGAS acknowledged that Egypt's inability to deliver full contractual quantities was due to production shortages in Egypt, which had resulted from the overextension of gas supply capabilities and mismanagement of upstream resources. EGPC/EGAS sought to assuage the concerns of EMG and IEC about the security of contractual volumes, laying out plans to develop new gas fields and to accelerate the development of delayed projects. EGPC/EGAS also confirmed their commitment to deliver extra gas to compensate for the substantial shortfalls that had accumulated since the start of delivery under the Source GSPA.*"[45]

55. Fourth, according to the Claimants, while Egypt subjected EMG to severe supply shortfalls, it also failed to protect its Pipeline from attacks as the Arab Spring began.

56. The change of government in Egypt coincided with a series of attacks on the Egyptian pipeline system used to deliver gas to the EMG Pipeline. Some Egyptian politicians condoned the attacks that interrupted gas flow to Israel.[46]

57. After an attack on the Egyptian pipeline system on 5 February 2011, supply came to a halt. Although the system was eventually repaired, EMG never received its full contractual volumes, submit the Claimants. In the fourteen months between this first attack and the termination by EGPC/EGAS of the Source GSPA in April 2012, only two months of contracted quantities were delivered.[47]

58. Egypt's delivery failures deprived EMG of its sole source of revenue and strained EMG's relationships with its customers. According to the Claimants, Egypt sought to exploit EMG by demanding yet again on 3 March 2011 changes to the quantity and price provisions of the Source GSPA.[48]

59. After the first attack, according to the Claimants, Egypt took no concrete steps to protect its pipeline network until April 2012 when it announced that it was sending reinforcements[49], notwithstanding EMG's complaints about the lack of security over the course of 2011.[50] During those fourteen months between the first attack and April 2012, 14 attacks were carried out on the Egyptian pipeline system.[51]

[44] Memorial, paras 119 and 121.
[45] Memorial, para. 126.
[46] Memorial, para. 127. See **C-198**.
[47] Memorial, para. 128. See FTI Report, para. 4.6.
[48] Memorial, paras. 129-130. See **C-65**.
[49] Memorial, para. 134.
[50] Memorial, para. 141.
[51] Memorial, para. 135.

60. After an attack on 12 July 2011, EMG did not receive any gas for 99 days. During this period of non-delivery, EGAS/EGPC, on 24 August 2011, threatened to terminate the Source GSPA, alleging that EMG had failed to pay invoices for gas supply in early 2011.[52] The Claimants aver that: "*[t]he termination threat […] took no account of EGPC/EGAS's own non-performance, the partial payments that EMG had made on the invoices in question, or the fact that the alleged arrears on which the threat was based were counterbalanced by Shortfall Compensation in accordance with the Source GSPA.*"[53]

61. EMG paid the disputed invoices under protest. However, the NBE informed EMG on 5 September 2011 that it would not transfer US$14 million to EGAS unless EGPC/EGAS confirmed their intention to perform their obligations under the Source GSPA and to resume gas supplies.[54] EGPC/EGAS refused and the funds remained frozen in EMG's account.[55]

62. The Claimants point out that while EMG received no gas due to an alleged state of *force majeure*, EGPC/EGAS continued to supply gas to Jordan. When the pipeline system was attacked again on 27 September 2011 – this time affecting gas flow to Jordan and other Arab customers – EGPC/EGAS reacted and repaired in less than one month damage far more serious than the damage caused by the 12 July 2011 attack that left EMG's Pipeline without gas for 99 days.[56]

63. The Claimants submit that, as EMG had received no gas at all in August or September 2011, minimal quantities in October and November, and again nothing in December, its financial position deteriorated.[57]

64. During the first four months of 2012, EGPC/EGAS, invoking *force majeure*, either delivered no gas at all to EMG or sent minimal quantities averaging approximately 5.4% of contracted volumes.[58]

65. The Claimants write that on 12 March 2012, Egypt's Parliament voted to expel Israel's Ambassador to Egypt and to put an end to gas exports to Israel.[59] This vote followed a report by the Egyptian Parliament's Arab Affairs Committee declaring Israel to be Egypt's "number one enemy" and calling upon the Egyptian government "to review all its relations and accords with

[52] Memorial, paras. 141-142. See C-85.
[53] Memorial, para. 142.
[54] Memorial, para. 143. See **C-86**, **C-208**, and **C-209**.
[55] Memorial, para. 143. C-209.
[56] Memorial, para. 144. Al Sakka Witness Statement, para. 109.
[57] Memorial, para. 147. See FTI Report, Appendix 8.
[58] Memorial, para. 148. See **C-215**.
[59] Memorial, para. 149. See **C-217** and **C-88**.

that enemy."[60] According to the Claimants, these statements demonstrate explicitly the discriminatory political motivation behind Egypt's treatment of the Claimants' investment.[61]

66. On 19 April 2012, EGPC/EGAS sent EMG a notice of termination of the Source GSPA for alleged non-performance by EMG.[62] EMG responded with a letter stating that the termination attempt was invalid and in bad faith, and that the notice should be withdrawn.[63] On 9 May 2012, as it had no choice, write the Claimants, EMG accepted EGPC/EGAS's repudiation, terminated the Source GSPA, and elected to seek damages from EGPC and EGAS.[64]

67. In summary, the Claimants submit that their investment has been destroyed because Egypt:

(i) revoked EMG's tax-free status, further burdening EMG's finances and significantly lowering the value of the Claimants' investment;

(ii) deliberately withheld contractual quantities from EMG in order to coerce price increases and attempt to decrease contractual quantities;

(iii) overcommitted to supplying gas to third parties and failed to make sufficient quantities available to EMG for delivery to Israeli customers in breach of the State's supply obligations;

(iv) failed to prevent sabotage of the pipeline system and then failed to ensure that its State entities repaired the resulting damage within a reasonable time, delivering no gas at all to EMG for months at a time; and

(v) sought to make up contractual grounds in order to carry out government policy and put an end to all exports to Israel.[65]

III. RELIEF REQUESTED

A. CLAIMANTS' REQUEST FOR RELIEF

68. The Claimants request that the Tribunal grant the following relief:

(a) DISMISS all of Egypt's objections to the jurisdiction of the Tribunal and the admissibility of the claims;

(b) DECLARE:

[60] **C-88**.
[61] Memorial, para. 149.
[62] Memorial, para. 150. See C-92.
[63] **C-93**.
[64] Memorial, para. 150. See C-219; ICC arbitration 18215/GZ/MHM.
[65] Memorial, paras. 151-157.

(i) *that Egypt violated Article II(4) of the US Treaty (or Article 2(2) of the UK Treaty, applicable to the US Claimants through Article II(1) of the US Treaty), and customary international law by failing to accord the Claimants' investments fair and equitable treatment and impairing their investments through the adoption of unreasonable measures;*

(ii) *that Egypt violated Article II(4) of the US Treaty (or Article 2(2) of the UK Treaty, applicable to the US Claimants through Article II(1) of the US Treaty), and customary international law by engaging in arbitrary and discriminatory measures against the Claimants' investment because it was selling natural gas to Jews in Israel;*

(iii) *that Egypt has violated Article 2(2) of the UK Treaty (applicable to the US Claimants through Article II(1) of the US Treaty), and customary international law by failing to observe obligations it has entered into with regard to the Claimants' investments;*

(iv) *that Egypt has violated Article 2(2) of the UK Treaty (applicable to the US Claimants through Article II(1) of the US Treaty), and customary international law by failing to provide the Claimants and their investments with full protection and security; and*

(v) *that Egypt expropriated the Claimants' investments without payment of adequate and effective compensation, a public purpose, or due process of law in violation of Article III(1) of the US Treaty, and customary international law.*

(c) *ORDER Egypt to pay compensation to the Claimants of no less than US$ 635.0 million and, to the extent applicable, DECLARE that the sum awarded has been calculated net of Egyptian taxes;*

(d) *ORDER Egypt to pay pre- and post-award interest at Egypt's sovereign borrowing rate (as updated), compounded annually, accruing until payment is made in full;*

(e) *ORDER Egypt to indemnify the Claimants in full with respect to any Egyptian taxes imposed on the compensation awarded to the extent that such compensation has been calculated net of Egyptian taxes;*

(f) *ORDER Egypt to pay all of the costs and expenses of this arbitration, including the Claimants' reasonable legal and expert fees, and the fees and expenses of the Tribunal; and*

(g) AWARD such other relief to the Claimants as the Tribunal considers appropriate.[66]

B. RESPONDENT'S REQUEST FOR RELIEF

69. The Respondent request the Tribunal to :

(a) Stay this proceeding pending the issuance of Awards in each of CRCICA Case No. 829/2012 and ICC Case No. 18215/GZ/MHM, dismissing the claims made by EMG or awarding damages in respect of such claims;

(b) Alternatively, dismiss the Claimants' claims in their entirety for lack of jurisdiction and/or as inadmissible;

(c) Alternatively, dismiss the Claimants' claims on the merits;

(d) In the event that the Tribunal finds that the Respondent is liable to the Claimants as a matter of principle, stay any decision on quantum pending the issuance of Awards in each of CRCICA Case No. 829/2012, ICC Case No.18215/GZ and PCA Case No. 2012-26, dismissing the claims made by EMG or its shareholders (as applicable) or awarding damages in respect of such claims;

(e) In any event, order the Claimants jointly and severally to pay all of the costs of this arbitration as well as the Respondent's legal costs and expenses in connection with this arbitration, including but not limited to its counsel's fees and expenses and the fees and expenses of its experts; and

(f) Grant the Respondent such further relief as the Arbitral Tribunal considers appropriate.[67]

IV. THE TRIBUNAL'S ANALYSIS

70. Although the Claimants pleaded their case in a number of different ways, the Tribunal, in the light of its Decision on Jurisdiction and its analysis below of the law and evidence, formulates the issues that it is called upon to determine in this Decision on Liability and Heads of Loss as the following:

(1) *Attribution.* To the extent that the Claimants rely on the acts or omissions of EGPC or EGAS as engaging the responsibility of the Respondent under the Egypt-US BIT, to what extent are the actions of EGPC or EGAS attributable to the Respondent as a matter of international law (V)?

[66] Claimants' Reply, para. 637, as adjusted to remove David Fischer's claim and reduce Ampal's claim in accordance with its election. See Claimants' letter of 28 June 2016, Annex B.
[67] Respondent's Rejoinder, para. 1163.

(2) *Revocation of tax exemption to 2025.* Was the Respondent's revocation by Law 114 of 2008 of the tax exemption granted to EMG by Decree No. 1020 of 2000 until 2025 a measure "tantamount to expropriation" of the Claimants' investment under Article III of the Egypt-US BIT giving rise to the Respondent's obligation to compensate the Claimants for the fair market value of the expropriated investment (VI B)?

(3) *Revocation of tax exemption after 2025.* Does such revocation give rise to a claim for breach of Article III beyond 2025 (being the date of expiry of the licence for tax exemption granted to EMG by Decree No. 1020) (VI C)?

(4) *Execution of First Amendment.* As a matter of fact, was the execution of the First Amendment to the GSPA on 31 May 2009 procured by the Respondent's coercion of EMG, so as to be capable of giving rise to a separate claim by the Claimants of breach of treaty (VI D)?

(5) *Delivery shortfall until January 2011.* Does the alleged shortfall in deliveries of gas under the GSPA from July 2009 until January 2011 (prior to the attacks on the Pipeline) constitute a breach of the Claimants' treaty rights by the Respondent (VI E 1)?

(6) *Protection of Pipeline February 2011–May 2012.* Did the Respondent breach Article II 4 of the Egypt-US BIT by failing to exercise due diligence in the protection and security of the Claimants' investment as required by international law in response to the attacks on the Pipeline between 5 February 2011 (the date of the first attack) and 9 May 2012, the date on which EMG accepted EGAS's repudiation of the GSPA (VI E 2)?

(7) *Termination of the GSPA.* Did the Respondent expropriate the Claimants' investment in EMG when EGAS terminated the GSPA with effect from 9 May 2012 (VI E 3)?

The Tribunal will deal with each of these issues in turn.

V. ATTRIBUTION

A. INTRODUCTION : THE RELEVANCE OF ATTRIBUTION

71. The Tribunal turns first to the issue of attribution. This issue only arises to the extent that the Claimants advance claims against the Respondent of breach of treaty in reliance upon the actions or omissions of EGPC/EGAS, such that it is necessary to determine whether and, if so, to what extent, the actions of those bodies are attributable to Egypt as a matter of international law.

72. The Claimants are of the view that there is no issue of attribution in respect of most of the Respondent's actions. Egypt's arguments concerning attribution are raised only with respect to the actions of EGPC and EGAS in the context of the Source GSPA. The Claimants say that attribution is an issue only with respect to one facet of the Claimants' third head of compensation: the gas supply failures.[68]

73. The Respondent, on the other hand, argues that it is not responsible for EGPC and EGAS's contractual obligations. The Respondent starts from the premise that the Claimants, being unable to find any agreement concluded between the Respondent and EMG, distort the principles of international law by submitting that contractual obligations undertaken by EGPC and EGAS should be "attributed" to the Respondent. The Respondent argues that this is unavailing.[69]

74. The Respondent points out that neither the GSPA, the Tripartite Agreement nor the MoU were contracts between the Respondent and EMG:

(i) The Respondent was not a party to the GSPA;[70]

(ii) The Respondent was not a party to the Tripartite Agreement – the Tripartite Agreement only created obligations for EGPC and EGAS vis-à-vis IEC, not EMG;[71]

(iii) EMG was not a party to the Egypt-Israel MoU – the fact that EGPC, EGAS and EMG decided to include a copy of the MoU as a schedule to the GSPA does not have any legal effect.[72]

75. The Respondent also submits that the Claimants cannot invoke the rules of attribution in order to create contractual obligations for the Respondent.

76. The rules of attribution, says the Respondent, apply specifically to conduct which is internationally wrongful not to the undertaking of obligations.[73] The inapplicability of the rules of attribution to international obligations of States is highlighted in the following paragraph of the ILC Commentary[74]:

> *The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary*

[68] Claimants' Skeleton, paras. 30-31.
[69] Rejoinder, para. 351.
[70] Rejoinder, paras. 353-354.
[71] Rejoinder, para. 355. See **C-30** for the Tripartite Agreement.
[72] Rejoinder, para. 356. See **C-31** for the MoU.
[73] Rejoinder, para. 358
[74] Rejoinder, para. 363.

rules, whose codification would involve restating most of substantive customary and conventional international law.[75]

77. The Respondent argues that the rules of attribution are *a fortiori* inapplicable to contractual obligations. According to Egypt, it is well settled that the rules of attribution do not determine whether or not a contract entered into by a separate entity binds a State.[76] In support of its argument, the Respondent refers, *inter alia*, to the award in *EDF (Services)* v. *Romania*:

[T]he attribution to Respondent of AIBO's and TAROM's acts and conduct does not render the State directly bound by the ASRO Contract or the SKY Contract for purposes of the umbrella clause. […] Attribution does not change the extent and content of the obligations arising under the ASRO Contract and the SKY Contract, that remain contractual, nor does it make Romania party to such contracts.[77]

78. The Respondent asserts that it thus follows that "*the characterisation of the contracting party as organ of the State under the ILC Articles is wholly irrelevant when it comes to determining whether a State is bound by a contract. What is relevant is whether the State itself has entered into the contract.*"[78] The Respondent submits that many arbitral tribunals have confirmed the inapplicability of the rules of attribution to contractual obligations undertaken by entities having a separate legal personality has been confirmed by many arbitral tribunals.[79]

79. The Tribunal makes two preliminary observations with regard to the issues in the present arbitration to which the international law rules of attribution are relevant.

80. First, the question of attribution here is only engaged in relation to the claim of expropriation arising from the termination of the GSPA and the resulting failure to supply gas to the Claimants issue (7):

(a) The claims in relation to the revocation of EMG tax-free status (issues (2) and (3) above) depend upon decisions of the Respondent itself, not EGPC or EGAS;

[75] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, (2001), II (Part Two) *Yearbook of the International Law Commission* 31, **RLA-255**, General Comments 1-4 (emphasis added).
[76] Rejoinder, para. 364.
[77] *EDF (Services) Limited v. Romania ("EDF (Services) v. Romania"* or *"EDF")*, ICSID Case No. ARB/05/13, Award, 8 October 2009, **RLA-71**, paras. 318-319.
[78] Rejoinder, para. 368.
[79] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, **CLA-85**, para. 96; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, **CLA-122**, para. 216; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, **RLA-9**, para. 347; *William Nagel v. Czech Republic*, SCC No. 049/2002, Final Award, 9 September 2003, **RLA-140**, para. 321; *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005 (ECT), Final Award, 26 March 2008, **RLA-24**, paras. 110-112.

(b) In considering the claim in relation to the execution of the First Amendment, it is first necessary to decide on the facts whether the Claimants' plea of coercion is made out on the facts (issue (4)). Whether or not any acts of EGPC or EGAS in relation to the First Amendment are attributable to the Respondent will be academic unless the factual predicate for the Claimants' claim is made out;

(c) A determination of attribution in relation to alleged delivery shortfalls prior to the attacks on the pipeline (issue (5)) would only arise in the event that the Tribunal finds that this claim is capable of constituting a breach of treaty and not merely a breach of contract. So it is first necessary to characterise the nature of this claim; and,

(d) The claim for failure to protect the Pipeline from attack (issue (6)) is a claim of direct responsibility on the part of the Respondent State and does not depend upon the attribution of acts or omissions of EGPC/EGAS.

81. The Tribunal accepts the Respondent's submission that the rules of attribution only apply to the determination of breaches of international law. They are not applicable to contractual breaches. As it has already held in paragraphs 254-5 of its Decision on Jurisdiction, the Tribunal only has jurisdiction in the present case over breaches of the Treaty under international law. In that context, it observed that:

> *in order for it to find that there has been a breach of those standards in relation to the Gas Supply Dispute [fair and equitable treatment and unlawful expropriation], it will need to determine as an incidental question whether the Source GSPA was validly terminated. However this does not change the fact that the key issue under the Treaty in respect of a claim for unlawful expropriation or breach of the fair and equitable treatment is whether there has been a loss of property right constituted by the contract or whether legitimate expectations arose under the contract.*

82. It is for this purpose, and only for this purpose, that the question of the attribution to the Respondent of the acts and omissions of EGPC/EGAS arises. With these clarifications, it is now possible to turn to consider the Parties' pleadings on the applicable legal standards for attribution and their application on the facts, before ruling on the issue.

B. CLAIMANTS' POSITION

83. The Claimants contend that EGPC/EGAS's conduct is attributable to the State in virtue of Articles 4, 5, 8, 11 of the ILC Articles on State Responsibility.[80] The Tribunal will review briefly the Claimants' arguments pertaining to those articles.

84. The Claimants assert that the point of departure for assessing whether conduct is attributable to a State is whether the actor in question is a State organ as set out in Article 4[81]:

> *1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*
>
> *2. An organ includes any person or entity which has that status in accordance with the internal law of the State.*[82]

85. The Claimants argue that, under Article 4, the standard for the classification of an entity as a State organ is an international one, and that entities may be classified as State organs under international law even if they do not have that status under their own national law.[83]

86. In the alternative, the Claimants submit that, according to Article 5 of the ILC Articles, the acts of an entity that does not qualify as a State organ may nonetheless be attributable to the State in circumstances where the entity exercises elements of governmental authority[84]:

> *The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.*[85]

87. In respect of Article 5 of the ILC Articles, the Claimants argue that the meaning of governmental authority is specific to the facts of each case. In particular, whether the conduct

[80] Claimants' Skeleton, para. 34.
[81] Reply, para. 326.
[82] ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts," with commentaries (2001), II (Part Two) *Yearbook of the ILC* 31, **RLA-255**, Article 4, p. 40. See also US Treaty, **C-7,** Article XII ("This Treaty shall apply to the political and/or administrative subdivisions of each Party").
[83] ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts," with commentaries (2001), II (Part Two) *Yearbook of the ILC* 31, **RLA-255**, Article 4, p. 42, para 11 ("while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an 'organ', internal law will not itself perform the task of classification").
[84] Reply, para. 327.
[85] ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts," with commentaries (2001), II (Part Two) *Yearbook of the ILC* 31, **RLA-255**, Article 5, p. 42.

in question is exercised by private actors under general law or is exclusive to entities acting on behalf of the State (for example, the granting of oil and gas contracts) may be relevant.[86]

88. In the further alternative, the Claimants contend that according to Article 8 of the ILC Articles, even when an entity is not a State organ and is not exercising governmental authority, its conduct may be attributable to the State if it acts under the instructions of, or under the direction or control of, the State:

> *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.*[87]

89. In respect of Article 8, the Claimants argue that factors that may lead to a finding of attribution of such entity's conduct include governmental ownership or control of that entity as well as government participation on the entity's board of directors, or even the submission of the company's minutes of meetings by the Minister.[88]

90. The Claimants submit that if conduct is not attributable to the State on the basis of Articles 4, 5, or 8 of the ILC Articles, it may nonetheless be attributable to the State under Article 11,[89] which provides:

> *Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.*[90]

91. Accordingly, the Claimants argue that international law has always recognized the past conduct of an entity which the State later recognizes and adopts as its own, may be attributed to the State.[91]

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[86] Reply, para. 328. See *Petrolane, Inc., Eastman Whipstock Manufacturing, Inc., and Seahorse Fleet, Inc. v. The Government of The Islamic Republic of Iran, Iranian Pan American Oil Company, National Iranian Oil Company, and Oil Services Company of Iran* , 27 Iran-US CTR 64, Award No. 518-131-2, 14 August 1991, **CLA-163**, paras 85-97; *EnCana Corporation v. Republic of Ecuador* (UNCITRAL) (LCIA Case No. UN3481) Award, 3 February 2006, **RLA-5**, paras 154-161; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco ("Salini v. Morocco")* (ICSID Case No. ARB/00/4) Decision on Jurisdiction, 16 July 2001, **RLA-55**, paras 30-35; *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/05/3) Award, 12 November 2008, **CLA-164**, paras. 107-109.

[87] ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts," with commentaries (2001), II (Part Two) *Yearbook of the ILC* 31, **RLA-255**, Article 8, p. 47.

[88] Reply, para. 329. See *Salini v. Morocco,* Decision on Jurisdiction, 16 July 2001, **RLA-55**, paras. 32-35. See also Case 249/81 *Commission of the European Communities v. Ireland* (1982) ECR 4006, **CLA-166**, para. 15 (Ireland held responsible for conduct of separate entity where Ireland appointed the members of its management committee, granted it public subsidies that covered most of its expenses, and defined its aims).

[89] Reply, para. 330.

[90] ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts," with commentaries (2001), II (Part Two) *Yearbook of the ILC* 31, **RLA-255**, Article 11, p. 52.

92. After having laid out the legal framework in respect of attribution, the Claimants submit that the conduct of the Respondent's actions in the present case is attributable to Egypt.

93. At the outset, the Claimants recall that Egypt does not dispute that the conduct (including representations and commitments) of the Council of Ministers, the Prime Minister, the Ministry of Petroleum, the Ministry of Trade and Industry, the Egyptian Ambassador to Israel or other Egyptian government representatitves are attributable to the Egyptian State.[92]

94. There is no dispute, say the Claimants, that the representations and commitments made in these documents were made by the State. Nor has Egypt disputed that the verbal representations and commitments it made directly to EMG and its shareholders are attributable to the State.[93]

95. There only remains for decision of the Tribunal, write the Claimants, the issue of whether the representations and obligations of EGPC and EGAS are attributable to the Egyptian State.

96. The Claimants submit that both EGPC and EGAS are State organs under Article 4 of the ILC Articles.

97. In respect of EGPC, the Claimants point out that, according to Egyptian law, it is a "public authority", a term defined as an entity with legal personality "undertak[ing] the management of a utility rendering a benefit or public service".[94] EGPC is therefore a State organ as a matter of Egyptian law, conclude the Claimants, and this renders it a State organ for purposes of international law under Article 4(2) of the ILC Articles.[95]

98. Alternatively, say the Claimants, EGPC is a *de facto* State organ under ILC Article 4 because[96]:

    (i) It acts within the confines of State policy;[97]

    (ii) Its funds are public funds and its budget requires parliamentary approval;[98]

    (iii) Its employees are public employees;[99]

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[91] Reply, para. 331. See E Vattel, *Le Droit des gens*, Book II, Chapter VI, §§ 73-4 (1758), **CLA-167**; H. Grotius, *De Iure Belli ac Pacis*, Book II, Chapter XXI, § II.1 (1625), **CLA-168**.
[92] Reply, para. 336.
[93] Reply, para. 337.
[94] Decree No. 61 of 1963 of the President of the United Arab Republic promulgating the Public Authorities Law, 29 April 1963, **C-410**, Article 1. See also Law 20/1976 regarding the Egyptian General Petroleum Authority, *Official Journal*, Issue No. 11 (bis), 17 March 1976, **C-13**, Article 1. Public authorities are sometimes described as "general" authorities in Egypt.
[95] Reply, para. 339. For alternative arguments that EGPC is a State organ, see Reply, paras. 340-344 (for example, the Egyptian Government is involved in the appointment of members of EGPC's board of directors, and EGPC employees are State employees under Egyptian law).
[96] Claimants' Skeleton, para. 36.
[97] **C-634**, Articles 1 and 9; **C-325**, Article 3.
[98] **C-634**, Article 5; **C-414**, Article 3.
[99] **C-634**, Article 18; **C-609**, p 2.

(iv) Its board is its supreme power and is populated entirely with State officials in their official capacity; [100]and

(v) The Minister of Petroleum is the Chairman of EGPC's board and has authority to approve, amend, or annul the board' decisions.[101]

99. In respect of EGAS, the Claimants argue that although EGAS is not considered a *de jure* State organ under Egyptian law, it bears the characteristics of a *de facto* State organ under Article 4(1) of the ILC Articles[102] for the following reasons[103]:

(iv) The Prime Minister created EGAS in 2001 as a public sector holding company;[104]

(v) EGAS's general mandate is to "operate in all natural gas activities" in Egypt. In particular, it is empowered to "assume the management and supervision of gas activity as shall be determined by the Ministry of Petroleum";[105]

(vi) EGAS is wholly-owned by EGPC;[106]

(vii) EGAS's annual profits are remitted to the Ministry of Finance;[107]

(viii) As a public sector holding company, EGAS was assigned as supervisory Minister the Minister of Petroleum.[108] The Minister has played an active role in the management of EGAS since its incorporation. The Chairman of EGAS's Board reports to the Minister and provides him with, *inter alia*, a quarterly report on the company's activities.[109] The Minister, in turn, is required to submit a report on EGAS to the Cabinet on a biannual basis.[110]

100. There are precedents, submit the Claimants, where, in similar circumstances, arbitral tribunals concluded that the entity in question was a State organ[111]:

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[100] **C-634**, Articles 2 and 9; **C-413**; **C-635**.
[101] **C-634**, Article 11.
[102] Reply, para. 345.
[103] See Reply, paras.345-350.
[104] Prime Minister's Decree No. 1009 of 2001, 19 July 2001, **C-416**. See also Law No. 203 of 1991 (Public Business Sector Companies Law), 19 June 1991, **C-417**.
[105] Prime Minister's Decree No. 1009 of 2001, 19 July 2001, **C-416**, Article 4. See also Extract from Commercial Register No. 42328, Ministry of Trade and Industry, Commercial Registration Authority, 29 October 2013, **C-418**.
[106] Prime Minister's Decree No. 1009 of 2001, 19 July 2001, **C-416**, Article 9.
[107] Prime Minister's Decree No. 1009 of 2001, 19 July 2001, **C-416**, Article 11.
[108] Prime Minister's Decree No. 1009 of 2001, 19 July 2001, **C-416**, Article 3. See also Law No. 203 of 1991, 19 June 1991, **C-417**, Article 8 ("concerned Minister").
[109] Prime Minister's Decree No. 1590 of 1991, 28 October 1991, **C-420**, Article 16.
[110] Prime Minister's Decree No. 1590 of 1991, 28 October 1991, **C-420**, Article 78.
[111] Reply, paras. 351-354. See, for instance, *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, SCC Case 118/2001, Award, 16 December 2003, **CLA-101;** and *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, **CLA-177.**

101. The Claimants also contend that EGPC and EGAS's representations and commitments to EMG are attributable to the Respondent State under Article 5 of the ILC Articles because EGPC and EGAS made them in the exercise of sovereign authority.[112] The Claimants write that:

> *Egyptian courts have confirmed that the act of entering into a natural gas contract is an exercise of governmental authority.[113] EGPC and EGAS's commitments to supply natural gas through written and verbal assurances, and ultimately through gas supply contracts such as the Source GSPA […] and the Tripartite Agreement, were therefore exercises of governmental authority. […] [T]he Prime Minister, the Minister of Petroleum, and the Minister of Finance confirmed this fact before the Egyptian Supreme Administrative Court.[114] These facts alone are sufficient to conclude that EGPC and EGAS exercised sovereign authority when undertaking commitments and providing assurances to the Claimants and their investment.[115]*

102. The Claimants also argue that EGPC and EGAS's representations and commitments to EMG are attributable to the State under Article 8 of the ILC Articles, because they made all of their gas supply undertakings to the Claimants under the direction, instructions and control of the Egyptian State.[116] The Claimants aver that:

(i) Numerous documents demonstrate that EGPC and EGAS entered into the Source GSPA pursuant to the instruction and under the control of the Egyptian State; [117]

(ii) Egyptian government officials continued to exercise decisive influence over EGPC and EGAS after signature of the Source GSPA: when negotiations for the First Amendment were imposed upon EMG and its shareholders, the Ministry of Petroleum and the Ministry of Trade and Industry represented EGPC and EGAS in the negotiation ,[118] and

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[112] Reply, para. 355.
[113] See Case No. 111 of Judicial Year 126, Cairo Court of Appeal, 27 May 2010, **C-415**. See also Appeals Nos. 5546 and 6013 of Judicial Year 55, Egyptian Supreme Administrative Court, 27 February 2010, **C-386**.
[114] See Appeals Nos. 5546 and 6013 of Judicial Year 55, Egyptian Supreme Administrative Court, 27 February 2010, **C-386**.
[115] Reply, paras. 355 and 356.
[116] Reply, para. 359.
[117] See Ministry of Petroleum Resolution 100/2004, 26 January 2004, **C-26** (incorporated into the Source GSPA, **R-225(A),** Preamble, p. 9), Article 2; Ministry of Petroleum Resolution 456/2005, 23 May 2005, **C-29** (incorporated into the Source GSPA, **R-225(A),** Preamble, p. 12), Article 4; MoU, **C-31**, Article 7; Ministry of Petroleum Decree No. 2511, 30 December 2007, **C-325**; Committee of Five Report, **C-326**, pp. 18-21, 53-54; Statement of former Egyptian Minister of Petroleum (S. Fahmy) to Egyptian Prosecutor General (*Excerpt*), 5 March 2011, **C-421,** p.3; Public Prosecution, Attorney General Bureau, State Security Supreme Prosecution, Minutes of Questioning of the Accused Ismail Hamed Ismail Karara: First Undersecretary of the Ministry of Petroleum, Case No. 41 of 2011 January Events Complaints, 13 March 2011, **C-169**.
[118] See, e.g., Letter from Equity Group Investments, L.L.C. (S. Zell) to Ministry of Trade & Industry (R. Rachid), 16 June 2008, **C-167**; Letter from Ministry of Trade & Industry (R. Rachid) to Equity Group Investments, L.L.C. (S. Zell), 25 June 2008, **C-168**; Letter from Equity Group Investments, L.L.C. (S. Zell) to Ministry of Trade & Industry (R. Rachid), 2 July 2008, **C-170**; Letter from Equity Group Investments, L.L.C. (E. Havdala) to Ministry of Trade & Industry (S. Fawzy), 19 July 2008, **C-174**; Letter from Ministry of Trade &

EGPC and EGAS did not sign the First Amendment until the relevant government ministries approved its terms;[119]

(iii) When they negotiated the Source GSPA and the First Amendment, EGPC and EGAS represented the Egyptian State and acted under government direction and control. EGPC and EGAS held themselves out as representatives of the government, and represented to EMG and the Claimants that they were acting under the control of the highest levels of the Egyptian government.[120]

103. As to the application of Article 11, the Claimants contend that when Egyptian government officials threathened to cancel the GSPA, they affirmed that Egypt "*is willing to renegotiate the deal, though it would be under a new contract, with new terms and prices*".[121] This was clearly an act of the State.

104. In furthering their arguments on attribution, the Tribunal recalls that the Claimants invoked their version of the translation of the minutes of the meeting on 24 April 2012 of the Board of Directors of EGPC.

105. The original minutes are in Arabic. The parties have filed their respective certified English translations of the minutes.

106. In the Claimants' translation, the Board's decision is translated as follows:

*The matter is presented to the esteemed board for its information and **approval**.*

Decision: After a discussion and review of different opinions:

*The Board noted and **approved** the action taken to terminate the contract to supply and purchase gas, signed with East Mediterranean Gas Company on 13 June 2005."*

At the next Board session of the Authority, held on 19/6/2012, the above-mentioned decision of the Authority's Board of Directors was ratified in the presence of the esteemed members of the Board.[122]

107. The Respondent's translation reads as follows:

*The matter is presented to the respectful board for information and **acknowledgement**.*

Industry (S. Fawzy) to Equity Group Investments, L.L.C. (E. Havdala), 2 August 2008, **C-175**; Meeting Notes of N. Novik, 6 August 2008, **C-176**. See also Memorial, paras. 100-117.

[119] Statement of former Egyptian Minister of Petroleum (S. Fahmy) to Egyptian Prosecutor General (*Excerpt*), 5 March 2011, **C-421**, p.3; Public Prosecution, Attorney General Bureau, State Security Supreme Prosecution, Minutes of Questioning of the Accused Ismail Hamed Ismail Karara: First Undersecretary of the Ministry of Petroleum, Case No. 41 of 2011 January Events Complaints, 13 March 2011, **C-169**. See also AHH First Statement, paras 53-62.

[120] Ibids. See also MS Second Statement, para 8; Meeting Notes of N. Novik, 6 August 2008, **C-176**.

[121] Claimants' Skeleton, para. 43. See C-94 and C-422.

[122] **C-635**. Emphasis as in original except for the word "approved" which has been added.

Decision: after deliberations and in light of the opinions exchanged:

The board has been informed and has ***acknowledged*** *what has taken place regarding the termination of the Gas Supply and Purchase Agreement entered into with EMG on 13 June 2005.*

In the following session of the board of directors held on 19/6/2012, the decision of EGPC's board of directors has been ratified in the presence of the respectful members of the board of directors.[123]

108. The Tribunal notes that the parties' dispute relates to the Arabic word "Aqar" and whether it should be translated as "approved" or "acknowledged".

109. After the hearing, the Tribunal (with the consent of the Parties) requested a translation from an ICSID approved translator who opined that the Arabic word "Aqar" should be translated as "confirmed".

110. Asked by the Tribunal to provide their comments, the Parties both contended that the word "confirmed" was consistent with their own respective translations.

111. In their Post-Hearing Brief, the Claimants submit that the minutes of that meeting of the EGPC Board demonstrate that EGPC'S termination of the GSPA is attributable to Egypt under any one of Articles 4, 5, 8 or 11 of the ILC.[124]

112. In respect of Article 4, the Claimants contend that the minutes:

> *illustrate that State ministers, sitting in their official capacities [as opposed to the individuals themselves], control EGPC's Board and therefore EGPC, since the Board is its highest authority. The Minister of Petroleum is the designated Chairman with plenary authority to approve, amend, or annul all board decisions. It is a characteristic of Egyptian State Authorities to have boards controlled by the supervising government minister. This reflects EGPC's status in the Egyptian governmental structure as a State Authority, and therefore its status as a State organ under ILC Article 4.*[125]

113. In respect of Article 5, the Claimants argue that EGPC's Board is populated almost entirely with Egyptian government ministers and that it clearly exercises governmental authority.[126]

[123] **R-872**. Emphasis as in original except for the word "acknowledged" which has been added.
[124] Claimants' Post-Hearing Brief, para. 31.
[125] Claimants' Post-Hearing Brief, para. 31.
[126] In *Wintershall A.G., et al. v. Government of Qatar*, Partial Award on Liability of 5 February 1988, 28 I.L.M. 795, 811-812(1989), the tribunal found that the Qatar General Petroleum Corporation (QGPC) was an agent of the State. See **CLA-245**, pp 36-38.

114. In respect of Article 8, the Claimants contend that these minutes demonstrate that the purported termination of the GSPA was an act of the State as the Board was controlled by the State.[127]

115. According to the Claimants, Egypt's last argument against a finding of attribution is that termination cannot be attributable to the State on the basis of the meeting of 24 April 2012 since EGPC and EGAS had already terminated the GSPA five days earlier. The Claimants respond that, at the time of the Board meeting, EGPC and EGAS were considering EMG's 22 April 2012 request that they withdraw their purported termination. The EGPC Board confirmed the purported termination, and EGAS conveyed that decision to EMG on 29 April 2012.[128] The Respondent's argument thus fails, conclude the Claimants.

116. Finally, in respect of Article 11, the Claimants note Egypt's argument and respond that in view of the fact that EGPC Board members sit in their official capacities, and that the Minister of Petroleum failed to annul or amend the decision at the meeting, even an "acknowledgement" of the termination was sufficient for such an act to be attributed to Egypt.[129]

117. On the basis of the foregoing, the Claimants assert that EGPC/EGAS's acts are attributable to Egypt.

C. RESPONDENT'S POSITION

118. The Respondent contends that ILC Articles 4, 5, 8 or 11, on which the Claimants rely, do not provide any basis for attribution.

119. In respect of Article 4, the Respondent submits that an entity will be a "State organ" if the internal law of the State classifies it as such.[130] An entity that has separate legal personality will not be considered as a State organ.[131] Even if an entity carries out some public services, that will not make it a State organ.[132]

120. The Respondent acknowledges however that an entity will be considered a State organ if, in "*exceptional*" circumstances it is in "*complete dependence on the State*", as the ICJ held in

[127] In response to the Respondent's argument that the presence of government ministers only shows that Egypt controls EGPC, but does not show that Egypt gave specific instructions to terminate the GSPA, the Claimants answer that the test under Article 8 is whether EGPC acted under State control or whether the State gave specific instructions to the company. (See Claimants' Post-Hearing Brief, para. 33.)
[128] Claimants' Post-Hearing Brief, para. 35.
[129] Claimants' Post-Hearing Brief, para. 37.
[130] Respondent's Post-Hearing Brief, para. 112.
[131] See *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, **RLA-295**, para. 161; *EDF (Services) v. Romania*, **RLA-71**, para. 190 and *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* ("*Jan de Nul*"), ICSID Case No. ARB/04/13, Award, 6 November 2008, **RLA-292**, para. 160.
[132] See *Jan de Nul*, **RLA-292**, para. 161; *Ulysseas, Inc. v. The Republic of Ecuador* ("*Ulysseas*"), **RLA-299**, paras. 127-135.

Nicaragua[133] and in *Bosnia*[134]. Proof of complete dependence requires "*proof of a particularly great degree of State control*".[135]

121. The Respondent submits that EGAS and EGPC are not State organs. As a matter of Egyptian law, both EGAS and EGPC have separate legal personality.[136] Moreover, neither EGAS nor EGPC is part of the Government of Egypt, as defined in Article 153 of the Egyptian Constitution.[137]

122. The Respondent also submits that neither EGAS nor EGPC are completely dependent on the State:

(i) EGAS is a private law entity, which invests funds on its own or through affiliated companies, holds its own property as *domaine privé* and is financially independent.[138] It is represented by the Chairman of its Board in its relationships with third parties and is managed by its Board of Directors.[139]

(ii) EGPC has and manages its own independent budget, and holds its own capital and funds.[140] EGPC must pay corporate tax.[141] EGPC's CEO, as EGPC's legal representative, is authorised to conclude contracts for EGPC and is not a government official. EGPC's CEO can bind EGPC in agreements without ministerial approval, which is only required when EGPC, for example, contracts for the export of petroleum products without a tender process.[142]

123. In respect of attribution under Article 5, the Respondent contends that the conduct of the entity must be in the exercise of governmental authority, i.e. there must be an exercise of "*prérogatives de puissance publique*".[143] However, avers the Respondent, EGPC and EGAS's termination of the GSPA was the kind of decision any private party to a contract could have taken and the Claimants have not demonstrated that the termination was made in the exercise of governmental authority.[144]

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[133] *Nicaragua v. United States of America ("Nicaragua")*, Internaitonanl Court of Justice, Judgment, June 27 1986, **RLA-270**, paras 109-110. *Bosnia and Herzegovina v. Serbia and Montenegro* (*"Bosnia*"), Judgment, 26 February 2007, **RLA-288**, paras 391-393.
[134] *Bosnia*, **RLA-288**, paras. 391-393.
[135] *Ibid*, para. 393.
[136] See **RLA-369** and **RLA-391**. Respondent's Opening Slides, v III, 257-262.
[137] **C-388**, Article 153.
[138] See **RLA-369** and **R-821**.
[139] Ibids.
[140] See **RLA-391** and **RLA-366**.
[141] **RLA-391**.
[142] **R-11**.
[143] See *Jan de Nul*, **RLA-292**, para. 170.
[144] Respondent's Post-Hearing Brief, para. 118.

124. In respect of Article 8, the Respondent contends that EGPC and EGAS's termination of the GSPA was not done pursuant to the instructions or under the direction or control of the State. The minutes of the meeting of 24 April 2012 on which the Claimants rely [145] do not evidence any instruction of the State to terminate the contract since they (i) post-date the GSPA's termination and, in any event (ii) EGPC's Board cannot be considered as the State.[146]

125. In respect of Article 11, the Respondent submits that it only applies when a State, in a "*clear and unequivocal*" manner, "*acknowledges and adopts […] as its own*" conduct that would not otherwise have been attributable to it.[147] According to the Respondent, the Minister of Petroleum did not ratify (or confirm) the minutes of the 24 April 2012 meeting and there is no evidence of "clear and unequivocal" adoption. For conduct to be adopted as its own under Article 11, the State must "*identif[y] the conduct in question and make[] it its own.*"[148]

126. Finally, the Respondent stresses that the Claimants cannot point to any unilateral undertaking by the Respondent to supply gas to EMG.

127. The Respondent avers that not one document relied on by the Claimants evidences a commitment by Egypt to supply gas to EMG. Every document relied on by the Claimants simply notes that the GSPA and/or the Tripartite Agreement will be concluded by EGPC and EGAS and these agreements were, in fact, concluded by EGPC and EGAS. [149]

128. Nor did the Respondent guarantee gas supply to EMG, says the Respondent. The only assurance that the Respondent made in respect of gas supply was made to a third party in the MoU.[150]

129. Furthermore, the Respondent denies that it ever verbally undertook to supply gas to EMG.[151] In any event, the alleged statements of Messrs. Hamdy and Zell[152] cannot bind Egypt as it is well settled that international law requires that a declaration be made in public and evidence an intent to be bound in order to have a binding effect.[153]

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[145] **R-872**.
[146] **C-92**; **C-97**. Respondent's Post-Hearing Brief, para. 119.
[147] See **RLA-255**, Article 11 and Article 11 Commentary, para. 8, p.53.
[148] **RLA-255**, Article 11 Commentary, para. 6, p.53. See Respondent's Post-Hearing Brief, paras. 120-124.
[149] Rejoinder, para. 393.
[150] Rejoinder, para. 395.
[151] Rejoinder, prara. 398.
[152] Mr. Hamdy alleges that officials from the Ministry of Petroleum assured EMG that the quantities of gas delivered to EMG were to increase to the contractual levels in 2009.542 Mr. Zell alleges that the Egyptian government provided him with "*direct confirmation* […] *that Egypt was committed to honor the terms of the deal*".See Hamdy Witness Statement, paras. 25-30, 57-62; Hamdy Second Witness Statement, paras. 8; Zell Witness Statement, paras. 10.
[153] See *Case Concerning Nuclear Tests (Australia v. France)*, Judgment, 20 December 1974, ICJ Reports 1974, **RLA-263**, para. 43.

130. The Respondent submits that, in any event, any declaration made in respect of EGPC and EGAS's supply of gas to EMG before the conclusion of the GSPA would necessarily be superseded by the contract itself. In the words of the *Burlington* v. *Ecuador* tribunal, the purpose of these statements "*was exhausted when the promises* […] *were turned into contractual obligations*".[154] The same conclusion must be reached in the present case, affirms the Respondent.[155]

131. For all these reasons, the Respondent asserts that is not responsible for EGPC/EGAS's acts and contractual obligations which cannot be attributed to Egypt.[156]

D. TRIBUNAL'S ANALYSIS

132. Having considered the totality of the Parties' submissions on the issue of attribution, the Tribunal will now proceed to set forth its findings and conclusions.

133. The Tribunal notes at the outset that Egypt does not dispute that the revocation of EMG's tax-free status was attributable to the Egyptian State.

134. As noted above, Egypt does dispute, however, that EGPC and EGAS's conduct related to Egypt's gas supply pursuant to the GSPA is attributable to it under international law.

135. For the following reasons, the Tribunal has formed the view that the acts or omissions of EGPC or EGAS relevant to the conclusion and termination of the GSPA are attributable to the Respondent under the relevant provisions of the ILC Draft Articles on State Responsibility, which form part of the applicable customary international law.

136. For ease of reference, the Tribunal will set out these the relevant articles in full below:

> *"Article 4*
>
> *Conduct of Organs of a State*
>
> *(1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.*
>
> *(2) An organ includes any person or entity which has that status in accordance with the internal law of the State.*
>
> *Article 5*
>
> *Conduct of persons or entities exercising elements of governmental authority*

[154] *Burlington Resources Inc. v. Republic of Ecuador* ("*Burlington* v. *Ecuador*"), ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, **RLA-13**, paras. 206-207.
[155] Rejoinder, para. 406.
[156] For further argument in relation to whether EGPC/EGAS are State organs, etc., see Rejoinder, paras. 409 and ff.

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 8

Conduct directed or controlled by a State

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.

Article 11

Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own."[157]

137. Both EGPC and EGAS are corporate entities within the overall structure of the Ministry of Petroleum.

138. That EGPC is an Egyptian State organ is evidenced by the following.

(i) Pursuant to Egyptian Law No. 20 of 1976[158], EGPC is a "*Public Authority endowed with an independent juristic personality, engaged in developing and properly utilizing the petroleum wealth and in supplying the country's requirements of the various petroleum products …*".

(ii) Pursuant to Articles 2 and 3 of Law No. 20, "*[t]he Authority shall be overseen by the Minister of Petroleum*" and its capital shall consist of "*[f]unds allocated to it by the State*".

(iii) Pursuant to Articles 8 and 9 of Law No. 20, EGPC is governed by a Board of Directors. The chairman of the Board which is appointed by decree of the President of Egypt and the members are appointed by decree of the Prime Minister of Egypt on the recommendation of the Minister of Petroleum.

(iv) Pursuant to Article 11 of Law No. 20, resolutions of EGPC's Board of Directors are forwarded to the Minister of Petroleum for ratification. He is empowered to amend or cancel such resolutions.

[157] **RLA-255**.
[158] **C-634**.

(v) By Decree No. 164 of 2007, the President of Egypt decided that "*[t]he Board of Directors of the Egyptian General Petroleum Corporation shall be composed under the chairmanship of the Minister of Petroleum and with the membership of: the Minister of Finance; the Minister of Electricity and Energy; the Minister of Investment; the Minister of Trade and Industry; the Minister of State for Local Development; the Head of the Cabinet Advisors' Panel; the Chief Executive Officer of the Egyptian General Petroleum Corporation; and three employees from the Ministry of Petroleum and the entities affiliated thereto with experience in the main activities of the Corporation. They shall be appointed by virtue of a resolution of the Board of Directors upon a recommendation by the Minister of Petroleum.*"[159]

139. According to its Organic Law[160], EGAS is a public sector holding company wholly owned by EGPC. The Minister of Petroleum chairs its general assembly and recommends the appointment of all assembly and board members.[161] It holds funds as public property and distributes its profits to the Ministry of Finance[162]. Its chairman is a secondee from EGPC.[163]

140. The evidence reviewed briefly in the following paragraphs also reveals that both EGPC's and EGAS's conduct is clearly attributable to the Egyptian State because they both acted at all times under State direction and control in the sense of ILC Article 8. Furthermore, the State acknowledged their acts as its own under ILC Article 11.

141. As recorded in the Preamble of the GSPA:

(i) On 18 September 2000, the Council of Ministers of Egypt adopted a resolution which provides *inter alia* that "*[t]he Egyptian general Petroleum Corporation shall sell natural gas to East Mediterranean Gas Company for the purpose of export to consuming markets in the Mediterranean area and Europe through the pipeline*" and records its decision to "*[a]uthorize the Ministry of Petroleum represented by the Egyptian General Petroleum Corporation to negotiate […] and conclude the contract.*" (Tribunal's emphasis.)

(ii) The Egyptian Council of Ministers, by letter of 19 March 2001, informed EMG of this resolution of 18 September 2000.

(iii) By Ministerial Decree No. 100 of 26 January 2004, the Minister of Petroleum authorized both EGPC's Chairman and EGAS's Chairman to contract with EMG in furtherance of the Council of Ministers' resolution of 18 September 2000.

[159] See Article 1 of Decree No. 164 of 2007, **C-413**.
[160] Decree No. 1009 of 2001, **C-416**.
[161] Ibid., Articles 7 and 8.
[162] Ibid., Article 11.
[163] See **C-339** and **C-418**.

(iv) By Ministerial Decree No. 456 of 23 May 2005, the Minister of Petroleum empowered both EGPC's Chairman and EGAS's Chairman to sign the Source GSPA and the Tripartite Agreement.

(v) By Memorandum of Understanding (MoU) between Egypt and Israel dated 30 June 2005, the two States recalled the Peace Treaty between them of 26 March 1979, which included provisions for economic cooperation; emphasized that *"the supply of natural gas from Egypt to Israel will contribute to enhancing peace and stability in the Middle East";* and acknowledged the Resolution of the Egyptian Council of Ministers of 18 September 2000. By Article 2, Egypt specifically *"guarantees the continuous and uninterrupted supply of the Natural Gas contracted and/or to be contracted".* By Article 7, Egypt *"designates the Egyptian General Petroleum Corporation (EGPC) and the Egyptian Gas Holding Company (EGAS) as representatives of the Egyptian Ministry of Petroleum in signing the tripartite agreement."*

142. With respect to the termination of the GSPA, the Tribunal notes a memorandum signed by both EGPC's CEO and EGAS's Chairman which records that, following the advice of their international legal counsel, "*EGPC and EGAS exercised their contractual rights by terminating the contract of supply and purchase of gas in the execution of the stipulations of the commercial contract concluded with EMG, and notified EMG of the termination on Thursday 19/04/2012*."

143. Their memorandum was tabled before EGPC's Board of Directors on 24 April 2012 as recorded in the minutes of that meeting[164] which read as follows:

The matter is presented to the respectful board for information and ***confirmation***.

Decision: after deliberations and in light of the opinions exchanged:

"The board has been informed and has ***confirmed*** *what has taken place regarding the termination of the Gas Supply and Purchase Agreement entered into with EMG on 13 June 2005."*

In the following session of the board of directors held on 19/6/2012, the decision of EGPC's board of directors has been ratified in the presence of the respectful members of the board of directors.

[Emphasis as in original except for the word "confirmed" which has been added].

[164] See Exhibits **C-635** and **R-872** for the Claimants' and the Respondent's respective translations of those minutes in English. The Tribunal thereafter sought a translation of the Minutes by an ICSID certified translator. The ICSID translator translated the Arabic word "Aqar" as "confirmed". The translation was accepted by both Parties.

144. The Tribunal notes that, as recorded in the minutes, the meeting was chaired by the Minister of Petroleum, who by decree is designated as the Chairman of EGPC. Many other Ministers, members of EGPC's Board, also attended the meeting as well as the Chairman of EGAS in his capacity as a member of EGPC's Board. EGPC's Board confirmed the termination of the GSPA, an act clearly attributable to Egypt.

145. The minutes also record that there was a further meeting of EGPC's Board on 19 June 2012 where the decision to confirm the termination was ratified. The Tribunal recalls that, by law, all decisions of EGPC's Board must be submitted to the Minister of Petroleum for his review [165] and that the Minister of Petroleum, by decree of the President of Egypt, chaired the Board at all times.[166]

146. The Tribunal finds that there is overwhelming evidence that the decisions of EGPC and EGAS to conclude and terminate the GSPA were all taken with the blessing of the highest levels of the Egyptian Government. Such acts are attributable to the Respondent pursuant to Article 8 of the ILC Draft Articles on State Responsibility as EGPC and EGAS were "*in fact acting on the instructions of, or under the direction or control of"* the Respondent in relation to the particular conduct.[167] In any event, the Tribunal finds that the Respondent subsequently ratified the termination of the GSPA and thus "*acknowledge[d] and adopt[ed] the conduct in question as its own"* within the terms of Article 11.

147. The Tribunal is therefore satisfied that, for the purpose of determining whether or not a breach of the US-Egypt BIT occurred as alleged by the Claimants, any acts or omissions of EGPC/EGAS constituting such breach may be attributed to Egypt in the present case and it so finds.

[165] See Article 11 of No. 20 of 1976, **C-634**.
[166] Decree No. 164 of 2007, **C-413**.
[167] As in *EDF (Services)v. Romania*, **RLA-71**, paras. 318-319.

VI. LIABILITY

A. INTRODUCTION

148. The Tribunal notes that, after the Decision on Jurisdiction and Ampal's election, the Claimants modified their claim for damages. They now claim US$635 million detailed as follows[168]:

Summary of aggregate losses now claimed in the ICSID arbitration, including interest and value leakage (US$million) and as adjusted to remove David Fischer's claim and reduce Ampal's claim in accordance with its election

Claimants	Impact of Tax Exemption Revocation (until 2025)	Impact of Tax Exemption Revocation (beyond 2025)	Impact of the First Amend-ment	Impact of the Delivery Failures	Total Losses (excl. Interest)	Interest to 11 April 2014	Total losses (incl. interest)
EGI Fund	29.4	6.2	71.7	69.2	176.5	33.3	209.7
EGI Series	0.0	0.0	78.2	75.5	153.7	25.0	178.7
BSS	4.9	1.0	13.0	12.6	31.6	5.9	37.5
Ampal	48.5	10.3	129.3	126.1	314.2	58.6	372.8
Total	**82.8**	**17.5**	**220.6**	**214.2**	**535.1**	**99.9**	**635.0**

149. The Tribunal will now address, in that order, the Parties' arguments in respect of each head of claim.

B. THE REVOCATION OF THE TAX EXEMPTION (UNTIL 2025)

150. The Claimants submit that, by enacting Law No. 114/2008 which amended the Investment Law and excluded companies, such as EMG, operating, *inter alia*, in petroleum production and transportation, from the Free Zones privileges, the Respondent breached the fair and equitable treatment (FET)[169] and full protection and security[170] standards, as well as the umbrella clause[171], and that this constituted an expropriation[172] under the Treaty.

151. The Tribunal recalls that, in its Decision on Jurisdiction, it dismissed the Respondent's objection *ratione materiae* over the Claimants' tax claims in the following terms.

[168] See Annex B to the Claimants' letter of 28 June 2016.
[169] Claimants' Reply, paras. 398-403. See also Claimants' Memorial, para. 215.
[170] Claimants' Reply, paras. 477, 484.
[171] Claimants' Reply, para. 460. See also Claimants' Memorial, para. 242.
[172] Claimants' Reply, paras. 487-489. See also Claimants' Memorial, para. 277.

> *266. Article XI of the US-Egypt BIT is crystal clear. It says what it says that "all matters relating to the taxation of nationals or companies of a Party, or their investment in the territories of the other Party or a submission thereof shall be excluded from this treaty, except with regard to measures covered by Article III …." (Tribunal's emphasis).*
>
> *267. The Respondent says that this Article is a specific carve-out but recognizes that taxation measures tantamount to an unlawful expropriation are clawed back and are not excluded from the Treaty. The Tribunal agrees and therefore finds that it has jurisdiction over the Claimants' claim that the Respondent's taxation measure was tantamount to an expropriation of the Claimants' investment insofar as deprivation of property or rights might have occurred.*
>
> *268. Whether or not the scope to the exception to the carve out for measures relating to expropriation encompasses other obligations in the Treaty in virtue of the so-called "Gateway Theory" invoked by the Claimants is not an issue which the Tribunal needs to determine today.*
>
> *269. The Tribunal need not determine either today whether, when Egypt enacted Law 114 in 2008 revoking EMG's free-zone status, it did so in the exercise of its regulatory powers. This is a matter which may arise during the liability phase of this arbitration having regard, in particular, to Decree No. 1020 of 2000 which granted EMG a tax exemption until 2025.*
>
> *270. Accordingly, the Tribunal dismisses this objection by the Respondent to the jurisdiction of the Tribunal.*

152. Accordingly, the Tribunal will now determine whether the revocation of EMG's tax exemption is tantamount to an expropriation. The Tribunal will begin its analysis by setting out the facts relating to the revocation of EMG's tax license.

1. Facts relating to the revocation of EMG's tax license

153. EMG was established on 19 April 2000 pursuant to GAFI Decrees 230/2000[173] and 1020/2000[174]. As a free-zone company, EMG had special status under Law 8/1997, entitled "Promulgating Law on Investment Guarantees and Incentives".[175] Under that law, Egypt committed to exempt companies such as EMG from taxation on their revenue derived from commercial and industrial activities for a period of up to 20 years.[176]

[173] Decree of the General Authority for Investment and FreeZones approving the incorporation of East Mediterranean Gas Company to operate under the Private Free Zones regime (***GAFI Decree 230/2000***), 29 January 2000, **C-16**.
[174] Decree of the General Authority for Investment and Free Zones No. 1020 of 2000 regarding authorization for the establishment of East Mediterranean Gas Company, an Egyptian joint stock company according to the Special Free Zones System (***GAFI Decree 1020/2000***), 17 April 2000, as incorporated in EMG Bylaws, *Investment Gazette* 3381/2000, 28 May 2000, **C-15**, p. 1.
[175] Law 8/1997 Promulgating Law on Investment Guarantees and Incentives, *Official Journal*, Issue No. 19 (bis) (***Law 8/1997***), **C-17**.
[176] Law 8/1997, **C-17**, Articles 16-19.

154. In 2005, the Egyptian government promulgated Tax Law 91/2005 which cancelled certain tax exemptions under Law 8/1997 for companies not subject to the Free Zones system and instituted a new corporate tax of 20%.[177]

155. The Law 91/2005 had no effect on EMG which continued to benefit from the tax exemptions under Law 8/1997. The Egyptian government confirmed this in Decree 1917/2006, which authorized EMG to continue to operate as a free-zone company for a renewable term of one year.[178] In 2007, Decree 81/M/2007 amended Article 5 of Decree 1917/2006 and extended EMG's tax-fee status for an additional period of 18 years until 18 April 2025:

> *The license granted for said Company [i.e., EMG] for exercising its activity under the private free zones system shall be extended as of the date of expiry of the present license on December 24, 2007 and shall expire upon the end of the Company's term specified in its commercial register on April 18, 2025. Said license shall be renewed for other additional terms upon the approval of the General Authority for Investment and Free Zones in light of the Company's compliance with the terms and conditions of operation under the private free zones system.*[179]

156. On 5 May 2008, before EMG received any gas, Egypt promulgated Law 114/2008, which revoked the Free-Zone licenses of companies such as EMG operating in certain industries, including transportation of natural gas.[180] According to the Claimants, the termination of EMG's Free-Zone License impacted negatively the economics of the Claimants' investment by subjecting EMG to new taxes, including a 20% corporate income tax that was later raised to 25%.

2. Whether the revocation of EMG's tax license is tantamount to an expropriation

157. According to the Claimants, the enactment of Law No. 114/2008 was a direct taking of a discrete investment. They also claim that the revocation of the tax benefits associated with EMG's license was one of a series of measures amounting to creeping expropriation.[181]

158. In support of their claim that the revocation of EMG's tax exemption by Egypt constituted a direct taking by Egypt of a discrete investment protected under the Treaty, the license, the Claimants write:

> *As a license bestowing vested rights directly upon EMG for a defined period of time, it constituted a vested right and an investment directly protected by the [Treaty].*[182]

[177] Memorial, para. 46
[178] Decree 1917/2006 of the General Authority for Investment and Free Zones authorizing East Mediterranean Gas Company S.A.E. to operate under the Private Free Zones Regime and identifying its boundaries as a Private Free Zone (***Decree 1917/2006***), **C-129**, Article 1.
[179] Decree 1917/2006, as amended by Decree 81/M/2007 of the Chairman of the General Authority for Investment and Free Zones as published in Investment Gazette, 1449/2008, 25 March 2008, **C-19**, Article 1.
[180] Law 114/2008, 5 May 2008, **C-61**, Article 11.
[181] Reply, paras 486-487.

> *[T]he revocation of EMG's license to operate as a Free-Zone company […] constituted the direct taking of a discrete investment protected under the Treaties. Egypt contends that "tax benefits" do not qualify as an investment under the Treaties, and proceeds to review investment treaty case law relating to the ability of States to introduce general measures of taxation. But the Claimants' "investment" is the license itself, not an ancillary tax benefit associated with private Free-Zone status. GAFI authorized EMG to purchase natural gas for export to the eastern Mediterranean as a private Free- Zone company for a defined term of 25 years. This license conferred by GAFI satisfies the broad definitions of "investment" in the Treaties which cover "every kind of asset" and set out non-exhaustive lists of different types of tangible and intangible assets.*[183]
>
> *Egypt argues that revocation of that license did not result in a significant deprivation or wholesale destruction of the Claimants' investment. The Claimants do not contend that the loss of the license in itself destroyed the entire Peace Pipeline Project. Since the license was an investment in its own right, the revocation constituted a direct and total taking of a discrete investment protected by the Treaties.* [184]

159. In response, the Respondent submits that a fiscal benefit, such as the one which EMG enjoyed under the Free Zone Regime, is not a protected investment which can be expropriated.[185] In any event, says the Respondent, GAFI's authorization or license to operate under the Free Zone regime is not the same as a concession, nor does it confer to the licensee any self-standing right or benefits beyond those established in Law No. 8/1997.[186] Furthermore, submits the Respondent, Law No. 114/2008 is a *bona fide* regulatory measure.[187] In this respect, the Respondent argues:

> *It is a widely recognised principle that taxation constitutes a special category of regulatory power and that the bar for finding that a tax measure is expropriatory is particularly high. Absent any abusive, excessive, discriminatory or arbitrary character of the measure, as in the present case, an expropriation claim fails.*
>
> *Indeed, the Claimants have failed to show that Law 114/2008 is confiscatory in character or tainted by discrimination. Law No. 114/2008 is a general measure which applied to a number of different sectors of the Egyptian economy including fertilisers and petroleum sectors.*
>
> *Moreover, EMG did not complain of this legislative amendment until it initiated these proceedings over four years after its enactment. […]*[188]

160. The Tribunal must first determine whether the Claimants' tax license constitutes an investment under the Treaty.

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[182] Claimants' Memorial, para. 279.
[183] Claimants' Reply, para. 488.
[184] Claimants' Reply, para. 489.
[185] Counter-Memorial, para. 616.
[186] Rejoinder, para. 881
[187] Rejoinder, para. 888.
[188] Rejoinder, paras 888-890.

161. The term "investment" is defined at Article I (c) of the Treaty as follows:

> *"Investment" means* every kind of asset *owned or controlled and includes but is not limited to:*
>
> *(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;*
> *(ii) a company or shares, stock, or other interests in a company or interests in the assets thereof;*
> *(iii) a claim to money or a claim to performance having economic value, and associated with an investment;*
> *(iv) valid intellectual and industrial rights property, including, but not limited to rights with respect to copyrights and related patents, trade marks and trade names, industrial designs, trade secrets and know-how, and goodwill.*
> *(v)* licenses *and permits* issued pursuant to law*, including those issued for manufacture and sale of products.*
> *(vi) any right conferred by law or contract, but not limited to rights within the confines of law to search for or utilize natural resources, and rights to manufacture, use and sell products;*
> *(vii) returns which are reinvested.*[189]
>
> [Tribunal's emphasis]

162. The Claimants contend that their investment consists of "*EMG's vested right to tax-free status conferred by Decree No. 1917 of 24 December 2006 to operate under the Private Free Zones Regime, as extended until 2025 by Decree 81/M of 5 December 2007*"[190].

163. The Respondent on the other hand contends that a tax exemption or benefit, enjoyed by virtue of Law No. 8/1997 by companies established in the Free Zone Regime, cannot vest a right to tax-free status particular to the Claimants protected under the Treaty.

164. The Tribunal disagrees with the Respondent. As will be seen, the relevant laws and decisions in the record do not support the Respondent's submission.

165. Under Law 8/1997,[191] entitled "Promulgating Law on Investment Guarantees and Incentives", the Egyptian government established private free zones. Article 29 of the Law provides that "*A decree of the competent administrative quarter may be issued concerning the establishment of private free zones, each confined to a single project, if the nature thereof necessitates so doing.*"

166. This Law also sets out clearly the benefits enjoyed by companies operating in these private free zones. Article 32 of the Law provides that "*[…] goods which are exported abroad by the Free Zone projects or imported to exercise their activity shall not be subject to the rules on imports*

[189] C-7.
[190] Memorial, para. 180.
[191] C-17.

and exports, nor to the customs procedures for exports and imports. Nor shall these goods be subject to Customs Taxes, the General Tax on Sales and other taxes and duties."[192]

167. As noted earlier, by Decree No. 230 issued on 29 January 2000[193], the General Authority for Investment and Free Zones (GAFI) approved the incorporation of EMG to operate under the Private Free Zones regime. The approval by the Prime Minister of the incorporation of EMG under the Free Zones Regime is recorded in the preamble of the decree[194] and Article 8 provides that the term of the license shall be 25 years, "*to be renewed upon the approval of the General Authority for Investment and Free Zones.*"

168. By Decree No. 1020 of 2000[195], the GAFI authorized the establishment of EMG as an Egyptian Joint Stock Company according to the Special Free zones system. Article 2 of the Decree states that the objective of the company is to carry out specific activities in the special free zone.

169. By Decree No. 1917 issued on 24 December 2006,[196] the GAFI authorized EMG to operate under the Private Free Zones Regime. Article 5 of the Decree provides that "*[t]he term of this authorization is one year, to be renewed for other terms in case of meeting all conditions of the private free zones […].*" Article 12 of the Decree provides that "*[t]his authorization is issued particularly to the Company […].*" (*Tribunal's emphasis*)

170. By Decree No. 81/M of 5 December 2007,[197] the GAFI amended Article 5 of Decree No. 1917 as follows:

> *The license granted for said Company [i.e., EMG] for exercising its activity under the private free zones system shall be extended as of the date of expiry of the present license on December 24, 2007 and shall expire upon the end of the Company's term specified in its commercial register on April 18, 2025. Said license shall be renewed for other additional terms upon the approval of the General Authority for Investment and Free Zones in light of the Company's compliance with the terms and conditions of operation under the private free zones system.*[198]
>
> (*Tribunal's emphasis*)

171. By Law No. 114 of 2008,[199] the Egyptian government revoked certain licenses. Article 11 of the Law provides as follows:

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[192] Ibid.
[193] C-16.
[194] C-16, preamble in relevant part: "*The memorandum presented by the Free Zones Sector in this respect, which includes the approval of the Prime Minister on the incorporation of the Company under the free zones regime.*"
[195] C-15.
[196] C-129.
[197] C-19.
[198] Decree 1917/2006, as amended by Decree 81/M/2007 of the Chairman of the General Authority for Investment and Free Zones as published in Investment Gazette, 1449/2008, 25 March 2008, **C-19**, Article 1.
[199] **C-61**.

> *The licenses related to investment projects which are established under the free zones system in the field of fertilizers, iron & steel and petroleum industries as well as the field of processing, liquefying and transporting the natural gas, and are existing on the date of enforcing the present law, shall be terminated.*
>
> [Tribunal's emphasis]

172. There can be no doubt that, by virtue of Law 8/1997 and Decrees Nos. 230 and 1020 of 2000, the Egyptian government conferred to EMG specifically a right to the benefits of a free zone company, including tax-free status, until April 2025. That right was vested in EMG in virtue of the license it was granted by Decree 1917/2006, as extended by GAFI Decree 81/M/2007.

173. The license granted by GAFI is an "investment" as defined in the Treaty, which refers broadly to "every kind of asset".

174. More specifically, paragraph V of Article 1 of the Treaty lists "licenses issued pursuant to law" as the kind of asset included in the definition of investments. The license conferred by GAFI to EMG is a protected investment under the Treaty and the Tribunal so finds.[200]

175. The Tribunal will now determine whether the Respondent, by enacting Law No. 114/2008, expropriated the Claimants' investment.

176. Article III(1) of the US Treaty provides:

> *No investment or any part of an investment of a national or company of either Party shall be expropriated or nationalized by the other Party or by – a subdivision thereof – or subjected to any other measure, direct or indirect, if the effect of such other measures, or a series of such measures, would be tantamount to expropriation or nationalization (all expropriations, all nationalizations and all such other measures hereinafter referred to as "expropriation") – unless the expropriation*
>
> *(a) is done for a public purpose;*
> *(b) is accomplished under due process of law;*
> *(c) is not discriminatory;*
> *(d) is accompanied by prompt and adequate compensation, freely realizable; and*
> *(e) does not violate any specific contractual engagement.*
>
> *Compensation shall be equivalent to the fair market value of the expropriated investment on the date of expropriation. The calculation of such compensation shall not reflect any reduction in such fair market value due to either prior public notice or announcement of the expropriatory action, or the occurrence of the events that constituted or resulted in the expropriatory action. Such compensation shall include payments for delay as may be considered appropriate under international law, and shall be freely transferable at the prevailing rate of exchange for current transactions on the date of the expropriatory action.*

[200] See the decision in *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, where the tribunal held that a free zone license granted by Egypt to Middle East Cement was a "[concession] conferred by law" and therefore met the definition of investment in Article 1 of the Egypt-Greece BIT. Award, 12 April 2002, **CLA-19**, paras. 100-101.

177. Law No. 114/2008 terminated, in terms, the Claimants' license, and the rights associated to it under Law No. 8/1997.

178. The Respondent argues that the enactment of Law No. 114/2008 (i) was a *bona fide* exercise of public authority and (ii) cannot constitute an unlawful expropriation as it was not discriminatory in nature and did not deprive the Claimants of the totality of their investment.

179. The Claimants acknowledge that the revocation of the license did not, *per se*, destroy the entire Peace Pipeline Project. However, the Claimants submit that since the license was an investment in its own right, its revocation constituted a direct and total taking of a discrete investment protected by the Treaty.

180. The Tribunal agrees with the Claimants. The decision in *Gami Investment, Inc. v. The Government of the United Mexican States* in which the tribunal found that "*The taking of 50 acres of a farm is equally expropriatory whether that is the whole farm or just a fraction*"[201] is an authority which supports its finding.

181. The incorporation of EMG as *"an Egyptian joint stock company established according to the Special Free Zones System under the Investment Law No. 8 for the year 1997"* as the vehicle for the Claimants' investment was an integral part of the investment. It is recorded as such in the opening words of the GSPA. Mr. Zell deposed that he *"emphasized the importance of EMG's tax-free status"* in his discussions with Government ministers in 2008.[202]

182. The Tribunal finds that the inclusion of EMG within the tax-free zone system in Egypt was a fundamental part of the economic structure of the investment, which the Respondent knew and accepted from the outset at the highest level of Government, and which it confirmed by the issue of the specific licence to EMG, conferring tax-free status under the free zones system until 2025. These facts take the consideration of a change in the tax regime applicable to Claimants' investment in EMG well outside the realm of the ordinary exercise of the State's regulatory power.

183. In the case of this investment, the Respondent's decision to remove EMG's tax-free status took away a defined and valuable interest that had been validly conferred according to Egyptian law at the time that the investment was made and that had been guaranteed by the State for a defined period. It was not to be subject to the vicissitudes of changes in State tax policy over that time period. For this reason, the taking is tantamount to expropriation.

[201] *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, **RLA-145**, paras 126 and 127.
[202] Zell Witness Statement, para. 16.

184. The Respondent argues that the revocation of the Claimants' license was a *bona fide* exercise of public authority and not discriminatory in nature. The Tribunal accepts that Law No. 114 of 2008 was enacted for public purposes, including increasing the remuneration of civil servants; increasing civil and military pensions and increasing the commodities specified in ration cards (Article 1). Its provision for the revocation of tax free licences (Article 11) applied to all investment projects under the free zones system *"in the field of fertilizers, iron & steel and petroleum industries as well as the field of processing, liquefying and transporting the natural gas."* It was not specifically targeted in a discriminatory fashion at the EMG.

185. However, Article III(1) of the Treaty protects an investment from expropriation unless, inter alia, it is accompanied by "*by prompt and adequate compensation"*. The Article goes on to prescribe that such compensation *"shall be equivalent to the fair market value of the expropriated investment on the date of expropriation."*

186. By these terms, Article III(1) creates an international obligation on the part of the State to pay compensation for the expropriation of an investor's property. This Tribunal is empowered to enforce that obligation, calculating the amount of compensation due according to the standard prescribed in the Treaty, in the event that the State fails to pay such compensation. This does not require the Tribunal to find that the expropriation in question was unlawful, as may be the case in the event that the taking was not done for a public purpose or was discriminatory.[203]

187. Having found that the revocation of the tax exemption is tantamount to an expropriation, the Tribunal need not determine whether the revocation of the tax exemption also constitutes a breach of the FET, the full protection and security standards of the Treaty or the umbrella clause by virtue of the so-called "*Gateway Theory*".

C. THE REVOCATION OF THE TAX EXEMPTION (BEYOND 2025)

188. The Claimants submit that EMG would have retained its Free-Zone status after the expiry of its License in 2025 and claim damages beyond that year.

189. The Respondent asserts that this claim is entirely speculative and should not be entertained by the Tribunal.

190. In response, the Claimants argue the following:

> *the assumption that EMG would have maintained its free-status indefinitely is sound. The Egyptian State represented to the Claimants that EMG would operate as a Free-Zone company, without any suggestion that this status would expire. Moreover, the renewal of EMG's Free-Zone License was contingent merely on EMG complying with*

[203] *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Award, 13 March 2015, paras. 129–146.

> *the conditions for operating as a Free-Zone company. Egypt has offered no basis for the conclusion that EMG would not have complied with those conditions in the counterfactual scenario. In any case, it has a minimal impact on the Claimants' damages.*[204]

191. The Tribunal cannot agree with the Claimants.

192. Whether the license would have been renewed on 18 April 2025 by GAFI is entirely speculative and the Tribunal sees no ground on which it could base such a decision.

193. Accordingly, the damages owed to the Claimants by the Respondent as a result of the revocation of EMG's tax license will be calculated up to 2025 and not beyond.

D. EXECUTION OF THE FIRST AMENDMENT (ALLEGED COERCION)

194. The Claimants submit that they were coerced into signing the First Amendment to the GSPA which, they allege, is a breach of the FET, the full protection and security standards and the umbrella clause of the Treaty, and that this was an element of the creeping expropriation by Egypt of their investment.

195. The Tribunal must first determine whether the Claimants were indeed coerced into signing the First Amendment.

196. For the reasons that follow, the Tribunal is of the view that the Claimants have not discharged their burden of proof in relation to their allegation that they were coerced into signing the First Amendment. Quite the contrary, the evidence reveals that, far from being coerced, the Claimants considered that it was in their interest to negotiate and execute an amendment to the GSPA.

197. The Tribunal recalls that by Decree No. 2511 of 2007, the Minister of Petroleum instructed "*the Chairman of the Egyptian Natural Gas Holding Company and the Chief Executive Officer of the Egyptian General Petroleum Corporation [to] review all sale agreements and contracts concluded for supplying natural gas to local and international markets and undertake necessary actions for negotiating with parties to said agreements in order to profit from any increase in the financial proceeds of said agreements and contracts as a result of the higher oil prices in the international markets, with the objective of maximising the proceeds and resources of the Petroleum Sector therefrom.*"[205] (*Tribunal's emphasis*)

198. By letter dated 3 April 2008, EGPC and EGAS, noted that "*an unprecedented change was recently witnessed in the international markets for crude oil and natural gas, whereby […] natural gas price indicators ranged between US$8 and US$11/MMBtu*", and invited EMG to

[204] Reply, para. 608.
[205] See **C-325**, Article 2.

meet in order to discuss "*alternatives to restore balance between the parties of the Gas Sale and Purchase Agreement*".[206]

199. By letter dated 16 June 2008, Mr. Zell wrote to Mr. Rachid, Minister of Trade & Industry as follows:

> *Dear Minister Rachid,*
>
> *I enjoyed meeting you and Minister Fahmy last Monday and from our discussion believe we will be able to quickly and amicably resolve the issues we both currently face. As agreed, I am outlining the situation affecting the relationship between the Government of Egypt (GOE) and East Mediterranean Gas (EMG) and the menu of potential areas of flexibility which will allow for an equitable solution.*
>
> *The EMG/EGAs supply contract was signed in 2005 when the $35/barrel maximum reference price of crude oil was deemed conservative. Obviously, substantial higher oil prices have increased the pressure on the GOE to raise the price it charges for natural gas. However, EMG has negotiated in good faith with its Israeli off-take clients over the past few years given its signed contract with EGAS for 7 BCM/year at $1.50/mmbtu and with no price opener for 15 years. […] Moreover, EMG's tax-free status was also a critical component to reaching these capital decisions and any change thereto will hurt EMG's current stakeholders significantly.*
>
> *[…] [I]t is in the interest of both the GOE and EMG to determine a revised pricing scheme that allows the GOE to publicly announce higher pricing for its gas but does not undermine the economic viability of EMG or EMG's credibility with the Israeli market.*
>
> *EMG categorizes its clients in three groups and they are probably the best means to focus our discussion […] –*
>
> *1. The Israel Electric Company (IEC) contract for 2.125 BCM/year*
>
> *2. Clients purchasing the next 2.375 BCM/year that represents the balance of the initial 4.5 BCM/year, the delivery schedule of which was according to the contract and confirmed by EGAS*
>
> *3. The third quantity of 2.5 BCM/year under the 7.0 BCM per annum contract, anticipated for delivery beginning in 2012.*
>
> *The initial quantity under the IEC contract is by far the most problematic for EMG to adjust its pricing. As you know, based on the contract signed with EGPC/EGAS on June 13, 2005, EMG signed the fixed-price 20-year IEC contract on August 5, 2005. […] [T]o the best of our understanding, IEC is unable to pay more for gas under this contract […]*
>
> *EMG is slated to begin delivering gas to the second group of clients in 2010. […]*
>
> *EMG has more flexibility on the final 2.5 BCM of gas, although we need to be respectful of the off-take market in which we have been negotiating. […]*[207]

200. On 25 June 2008, the Minister of Trade and Industry replied to Mr. Zell's proposal in the following words:

[206] **C-51**.
[207] **C-167** (emphasis added).

> *After studying your letter carefully, we are constrained to assume that we have not properly conveyed to you the current realities of the energy challenges we are all facing. It is hard to negotiate a pricing scheme of physically unavailable commodity. We have to admit shortfalls of other existing supply agreements, particularly those which are supplied from the national grid [which includes the Source GSPA] and not directly linked to dedicated export fields. […]*
>
> *[…] The overriding element is physical availability of surplus gas, which in fact would hardly cover what you refer to as the first group of 2.125 BCM/p.a.*[208]
>
> (*Tribunal's emphasis*)

201. Negotiations followed both with respect to the pricing scheme and the availability of the gas. They were concluded by the end of 2008 and the First Amendment was executed on 31 May 2009.[209]

202. The principal changes which were introduced by the First Amendment are the following:

	Before the First Amendment	**After the First Amendment**
Quantity	Up to 7 BCM per year (Art. 5.1)	Q1: (IEC volumes): 2.125 BCM per year Q2: 2.375 BCM per year Q3: up to 2.5 BCM per year with the Parties to begin negotiations no later than 1 January 2011 to agree a delivery schedule to begin between 2014 and 2017 (Art. 5.3)
Price	US$1.50 per MMBTU (Art. 2.2.1)	Q1: US$3.00 per MMBTU Q2: US$3.00 to US$4.00 per MMBTU Q3: subject to the Parties' agreement (Annex 5, paras. 1-5)
Shortfalls	Hourly Shortfall Compensation Daily Shortfall Compensation (Annex 1, Arts. 6.7-6.8)	Hourly Shortfall Compensation Daily Shortfall Compensation Monthly Shortfall Compensation (Annex 1, Arts. 6.7-6.9)

[208] **C-168**.
[209] Tr. Day 2, 139/10-17. First Amendment, **C-50**.

203. The Tribunal notes that, on the same date, EGPC, EGAS and EMG concluded the following agreement (the "**Release Agreement**"):

> *[…]*
>
> *Each of the Parties hereby undertakes and agrees as follows:*
>
> 1. *Subject in all events to the provisions of Paragraph 2 of this letter, as of the First Amendment Effective Date, each Party hereby releases the other Party from any liability for breach or alleged breach pursuant to the GSPA which may have occurred during the period up to the First Amendment Effective Date.*
>
> 2. *Notwithstanding the foregoing provisions of Paragraph I above, each Party shall retain all rights under the GSPA against the other Party, and the releases set forth in Paragraph 1 shall be of no force or effect, in the event of any claim by the Initial On-Sale Customer with respect to any breach or alleged breach under the Initial On-Sale Agreement, the GSPA or the Tripartite Agreement which may have occurred prior to the First Amendment Effective Date.* [210]
>
> *[…]*

204. The Claimants submit that they were coerced into signing the First Amendment. They say that, as part of their strategy to induce EMG and the Claimants to renegotiate the GSPA and agree revised gas price and volumes, EGPC and EGAS withheld gas supply and refused to issue invoices.

205. The Claimants, in support of this allegation, refer to the testimony in an Egyptian court proceeding of Ismail Hamed Ismail Karra, the First Undersecretary of the Ministry of Petroleum responsible for gas affairs at that time:

> *Q: In light of the non-existence of a mechanism that allows for modification of the price in the old contract [i.e., the Source GSPA], how was the contract and pricing amended?*
>
> *A: We had made up some technical problems and relied on them to not deliver the gas in the dates determined in the contract and threatened that we did not have the capacity to supply gas so that we could force them to enter into negotiations through which we managed to raise the price and modify the terms.*[211]

206. Whether or not EGPC and EGAS, as part of their negotiation tactics, were withholding supply and refusing to issue invoices in order to induce EMG and the Claimants to renegotiate the GSPA and consent to the government's demands is of no moment in view of the clear evidence of the Claimants' negotiator, Mr. Zell, that the First Amendment was in the interest of EMG.

[210] Letter from EGPC and EGAS to EMG dated 31 May 2009, **C-60** (emphasis added).
[211] Public Prosecution, Attorney General Bureau, State Security Supreme Prosecution, Minutes of Questioning of Ismail Hamed Ismail Karra: First Undersecretary of the Ministry of Petroleum, Case No. 41 of 2011 January Events Complaints, 13 March 2011, **C-169**.

207. In this connection, the Tribunal notes that the volumes of gas to be delivered were not modified under the First Amendment. As the Claimants themselves concede in their Reply, "*[t]he significance of dividing the quantities into Q1, Q2, and Q3 related to schedule and price, not availability of the full 7 BCM annually*."[212] In other words, the Claimants were still contractually entitled to receive 7 BCM of gas annually after the First Amendment was executed.

208. As to price, the renegotiated price was to apply retroactively to Q1 quantities, an escalated price was set for Q2 quantities, and Q3 prices were to be established by the parties at a later date.

209. The Claimants submit that they were coerced into renegotiating and agreeing those new prices in circumstances where the Egyptian Government failed to deliver the gas, putting the entire project at risk.[213]

210. Again, the evidence does not support the Claimants' allegation. As recorded in Mr. Zell's letter of 16 June 2008[214], the Claimants were clearly amenable to the renegotiation of prices in view of the increase in the price of crude oil in the international markets. There is no mention in that letter of any opposition to the renegotiation of prices.

211. In any event, the Claimants were not affected by the price increase as they preserved their margins on Q1 volumes by passing on to IEC this price increase. This was confirmed by Mr. Zell during his cross-examination:

> *Q: […] I'm saying that if you compare the initial GSPA and the GSPA with the first amendment, it's a fair statement that in contractual terms, with respect to Q1, EMG's margin was entirely preserved because the increase in price was entirely passed on [to] IEC; correct?*
>
> *A. Correct.*
>
> *Q. Right. So –*
>
> *A. However, the fact that you didn't -- the Egyptian Government didn't deliver the gas effectively made the amendment, you know, the terms of it, irrelevant in terms of preserving our prior position.*
>
> *Q. But, Mr. Zell, isn't it then a problem of implementation of the first amendment, as opposed to, "The first amendment is killing me, it's terrible, it's terrible for me"? It's a matter of implementation of the first amendment. Had the first amendment been implemented properly, according to what you say you expected, then you would have been happy, right?*
>
> *A. If we had gotten what we had bargained for, we would be happy.*[215]

[212] Memorial, para. 118.
[213] Zell cross-examination, Tr. Day 4/47/14-16.
[214] **C-167**.
[215] Zell cross-examination, Tr. Day 4/49/4-23.

212. As to gas delivery schedules, the Claimants argue that "*[the] delays in the delivery schedule for full volumes constituted a substantial concession by EMG, reducing the value of the Claimants' investment significantly […]*"[216]

213. Again, the Tribunal disagrees with the Claimants. Only Q3 volumes were contractually subject to delays. Indeed, the First Amendment delayed the initial delivery of Q3 volumes (2.5 BCM per contract year) until sometime between 2014 and 2017, at a date to be agreed in 2011. As noted above, at the time of the conclusion of the First Amendment, EMG had signed only three contracts, with a total volume of 2.934 BCM.[217] The Tribunal does not believe that the Claimants were coerced into conceding to a delayed delivery for Q3 volumes when, at the time, they had not even contracted with on-sale customers for volumes of gas above the 4.5 BCM threshold set by the Q3 volume category.

214. Finally, the Minutes of the Meeting of the EMG Board of 2 November 2009 is contemporaneous evidence that the Directors of EMG were pleased with the conclusion of the First Amendment. There are two versions of the Minutes and the differences between the two versions are shown in track changes below:

> *Mr. Abdel Hamid Hamdy thanked the Board and stated that without the good relation between the shareholders and the full support of Mr. Hussein Salem [one of EMG's founders] who was always supporting us and paving the road in order with the shareholders which led that our negotiation with the Government is fruitful and that he was they were always brainstorming ideas to us which concluded all the amendment we achieved and as well Mr. Abdel Hamid Hamdy thanked Merhav Group for their support during such period and thanked Ms. Ellen Havdala for all her support as well.*
>
> *Mr. Hamdy thanked the Board for their initiative regarding the above mention bonus which is on top to the generous bonus Mr. Hussein Salem gave to EMG team from his personal account which is very much appreciated (Mr. Hamdy pressed that the bonus they receive from Mr. Salem is way above the said bonus and he is announcing such to eliminate any misunderstanding in the future).*[218]
>
> (Tribunal's emphasis)

215. The Tribunal need not make a finding as to which version of the Minutes is accurate as it considers that both versions record the Board's satisfaction with the conclusion of the First Amendment.

[216] Memorial, para. 118.
[217] See First Expert Report of Wood-Collins, pages 67-68.
[218] See **R-965** (the original minutes) and **R-966** (the alleged forged minutes).

216. In view of the above, the Tribunal finds that the Claimants were not coerced into concluding the First Amendment. Accordingly, this claim which, they allege, resulted in multiple breaches of the Treaty and caused them damages, is dismissed.

E. IMPACT OF DELIVERY FAILURES

217. The Claimants submit that they are entitled to damages in view of the Respondent's failure to ensure regular and continuous supply of the volumes committed under the terms of the GSPA.

218. According to the Claimants' quantum experts:

> *1.19 As a result of the failure to ensure supply of the volumes committed before the Date of Injury (the "Past Delivery Failures"), the Claimants were deprived of the equity value that would have resulted from EMG's profits from the on-sale of gas to its Israeli customers under the terms of the various agreements that were in force before the Date of Injury. […]*
>
> *1.20 The repudiation of Egypt's gas supply obligations and the failure to supply any gas beyond the Date of Injury (the "Future Delivery Failures") caused EMG to be deprived of cash flows in the foreseeable future and EMG's shareholders of the return on their prior investment. […]*
>
> *1.21 Past and Future Delivery Failures deprived EMG of substantial profits, reducing the value of the Claimants' interest in EMG. […]*[219]

219. The Date of Injury corresponds to the date on which EMG accepted EGAS's repudiation of the GSPA, to wit 9 May 2012.

220. With respect to Past Delivery Failures, the Claimants' quantum experts write as follows:

> *Each day, EMG provided the Seller with daily nominations reflecting the request from EMG's On-Sale Customers. Providing that the amounts requested were consistent with the terms of the GSPA, the Seller was obliged to deliver the gas the following day. The Seller however often failed to meet this obligation and delivered significantly less gas than was properly nominated.*[220]

221. They explain that damages arising from Past Delivery Failures were assessed from 1 July 2009, after the First Amendment came into effect, up to the Date of Injury.[221]

222. They then divide this period of time into two sub-periods, the first from 1 July 2009 to 31 January 2011, and the second from 1 February 2011 to 9 May 2012.

223. As regards the first sub-period, they write: "*[t]he difference between the amount nominated and actually delivered until February 2011 was 1.12bcm, or 21% of the total amount nominated*".[222]

224. As regards the second sub-period, they write:

[219] FTI Consulting First Expert Report, paras 1.19-1.21.
[220] FTI Consulting First Expert Report, para. 4.4.
[221] FTI Consulting First Expert Report, para. 4.3.
[222] FTI Consulting First Expert Report, para. 4.5.

> *We understand from Counsel that from February 2011 onwards, the Seller claimed a series of Force Majeure periods [due to attacks on the pipeline] (311 days out of a total of 464 between 1 February 2011 and 9 May 2012) during which EMG generally stopped nominating gas to the Seller, or nominated reduced amounts of gas. In comparison to the 3.97 bcm that was or we assess would have been nominated but for the Delivery Failures from February 2011 to the Date of Injury, only 0.53 bcm, or 13.3% of the total amount nominated or that would have been nominated absent the Seller's Force Majeure claims, was delivered.*

225. Consequently, the Tribunal has to determine whether the Respondent breached the Treaty by failing to supply gas to EMG during three periods: (1) between July 2009 and January 2011, (2) between February 2011 and May 2012, and (3) following EMG's acceptance of EGAS's repudiation of the GSPA.

1. Delivery Failures from 1 July 2009 to 31 January 2011

226. The first period runs from the conclusion of the First Amendment until the outbreak of Arab Spring and the incidence of attacks on the Pipeline. The Claimants allege that in this period EGPC and EGAS failed to deliver the quantities of gas that EMG was entitled to receive under the GSPA and has suffered a loss of profits as a result.[223]

227. In addition to its jurisdictional objections,[224] the Respondent submits on the merits that this element of the claim is not well founded. It alleges that:

(1) EMG was only entitled to receive gas that it had actually nominated under the terms of section 6 of the GSPA and not the maximum amount of gas provided for in the First Contract Year;[225]

(2) The Claimants' claim exceeds the amount of Q1 gas that may be nominated in any given period under section 5.4 of the GSPA;[226]

(3) The Claimants include nominations for unauthorised customers for which EMG did not follow the mandatory procedures of the GSPA;[227] and,

(4) To the extent that there was any shortfall, the contractual procedure provided under the GSPA was to deduct any compensation from the payments due to EGPC and EGAS.[228]

[223] Memorial, paras. 119 – 126; Reply, paras 54 – 63. The Claimants and their experts do not separately itemise their alleged losses in this period, claiming it as part of a global claim for losses attributable to delivery failures between 1 July 2009 and 9 May 2012, the Date of Injury.
[224] Decision on Jurisdiction, paras. 229 – 257.
[225] Counter-Memorial, paras. 380 – 381.
[226] Rejoinder, para. 502.
[227] Ibid.
[228] Rejoinder, para. 501.

228. The Tribunal does not consider that the dispute about alleged delivery failures during this period can possibly amount to an international delict such as a breach of the Respondent's treaty undertaking to provide fair and equitable treatment or to compensate for expropriation.

229. The Claimants also allege a breach of the observance of undertakings – or "umbrella" – clauses in the UK-Egypt BITs, which they submit they are entitled to invoke pursuant to the MFN clause in the US-Egypt BIT.[229] In its Decision on Jurisdiction, the Tribunal reserved to the merits phase the question whether such clauses in Egypt's treaties with third States might properly be invoked pursuant to the MFN clause, noting that *"[i]n due course the question may become otiose."*[230]

230. Here the Tribunal finds that it does not need to determine the question of whether, as a matter of international law, the umbrella clauses in treaties with third States may be invoked to found a cause of action on the part of the Claimants in the present proceedings. That is because on no view does the Tribunal consider that, in the period prior to 1 February 2011 could the Respondent be considered to have failed to observe its undertakings.

231. The Claimants invoke the undertaking to deliver *"up to 7 BCM of natural gas per year to EMG."*[231] The Tribunal considers that this undertaking cannot be separated from the precise requirements of the GSPA itself, which was the means by which the undertaking was given effect. It has also found that the Respondent committed no breach of treaty in concluding the First Amendment. As a result, the extent of the delivery obligatons upon EGPC/EGAS and the modalities for giving effect to such obligations must be construed in the light of the terms of the GSPA as amended by the First Amendment. Further, Articles 6.8 and 6.9 of Annex 1 to the GSPA anticipate the possibility of shortfalls in delivery and provide a contractual procedure for compensation.[232]

232. The ICC Tribunal gave detailed consideration to EMG's claim of delivery shortfalls in its Award.[233] For the period in question it found that *"the Shortfall Compensation regime represents a complete code of remedies in cases of delivery breach"* and that *"[t]he Parties do not question that EGAS complied with the Shortfall Compensation regime until the end of January 2011."*[234]

[229] Request for Arbitration, para. 77, citing Art. 2(2) of the U.K.-Egypt BIT, **C-98**.
[230] Decision on Jurisdiction, paras. 256 – 7.
[231] Memorial, para. 238.
[232] R-225(H).
[233] **C-667**.
[234] Ibid, paras. 1282 – 1283.

233. In the present case, the Claimants have not alleged any other basis upon which the Respondent may be said to be in breach of its undertakings beyond the basic delivery obligation, which the Tribunal has already held must be construed in its contractual framework.

234. Accordingly, the Claimants claim for alleged losses in this period must be rejected.

2. Delivery Failures from 1 February 2011 to 9 May 2012 (Attacks on the Pipeline)

(a) Introduction

235. The Claimants submit that Egypt failed to take steps to protect the Claimants' investment from damage caused by third parties in breach of the full protection and security standard under the Treaty.

236. They argue that Egypt failed to take reasonable precautionary, preventive, and remedial measures to ensure the physical security of its pipeline network from attacks by saboteurs between February 2011, which corresponds to the beginning of the Arab Spring Revolution, and April 2012, which corresponds to the termination of the GSPA. They say the pipeline was attacked thirteen times over this period by saboteurs intent on preventing the flow of gas to EMG and from EMG to Israel. These attacks caused damage that prevented EGPC/EGAS from supplying EMG with gas for substantial periods over 2011 and early 2012.[235] In fact, say the Claimants, no gas at all was delivered in 328 of the 464 days between 1 February 2011 and the termination of the GSPA on 9 May 2012.[236]

237. The Respondent does not deny that these thirteen attacks on the pipeline occured. It submits, however, that those attacks which affected EGPC and EGAS's gas deliveries under the GSPA are in effect a series of *force majeure* events pursuant to Article 16 of Annex 1 to the GSPA.[237] EGPC and EGAS' gas delivery obligations under the GSPA were therefore suspended during these periods (311 days out of a total of 464 between 1 February 2011 and 9 May 2012) asserts the Respondent.[238]

238. A diagram of the attacks on the pipeline is attached as Annex 1 to the present Decision.[239]

(b) Applicable Standard

239. The Tribunal notes that its jurisdiction derives from the Treaty. It must therefore apply the Treaty standards in its analysis rather than any standard under the contractual regime of the

[235] Memorial, para. 249.
[236] FTI Consulting, first report, para. 1.13.
[237] Article 16 of Annex 1 to the GSPA is quoted, in relevant part, at para. 301 below.
[238] Counter-Memorial, para. 386.
[239] This diagram was filed by the Claimants with their Memorial.

GSPA such as *force majeure* or failure to act as a Reasonable and Prudent Pipeline Operator ("**RRPO**").

240. Article II(4) of the US-Egypt BIT provides that "*[t]he treatment, protection and security of investments shall never be less than that required by international law and national legislation.*" The Tribunal considers that one important element of the international law standard is the requirement to provide full protection and security.

241. The Tribunal is of the view that the duty imposed upon the host State by this standard is not one of strict liability. Rather the State is obliged to exert due diligence in order to protect a claimant's investment – a standard that must be assessed according to the particular circumstances in which the damage occurs.[240]

242. In this respect, the Tribunal notes that a Chamber of the International Court of Justice in *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* held that it "*cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.*"[241] Although the investor's factory had been occupied by the workers for some time, the Chamber observed that "*[t]he dismissal of 800 workers could not reasonably be expected to pass without some protest*".[242] It concluded that the conduct of the Italian authorities, in protecting the plant and even continuing some production, did not fall below the standard.

243. Similarly, in *AAPL v Sri Lanka,* the tribunal found that the standard was not one of strict liability and was in accord with the standard in customary international law.[243] The tribunal relied on both jurisprudence and doctrine as supporting this standard.

244. The Tribunal notes that subsequent awards have confirmed that the standard is not one of strict liability, but rather one of due diligence.[244] In *Pantechniki,* Sole Arbitrator Paulsson further suggested that the adequacy of the State's response should be assessed in the light of the scale of the disorder and the extent of its resources:

> *A failure of protection and security is to the contrary likely to arise in an unpredictable instance of civil disorder which could have been readily controlled by a*

[240] The earlier authorities on the engagement of state responsibility in respect of the acts of private persons, including those engaged in revolutions or civil wars, are also consistent on this point: International Law Commission, *Digest of the decisions of international tribunals relating to state responsibility* [1964] 2 YB ILC 132, 152–4.
[241] *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* ICJ Rep. 15, Judgment, 20 July 1989, **RLA-118,** para 108.
[242] Ibid.
[243] *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, **CLA-117**.
[244] e.g. *Tecnicas Medioambientales, Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003**CLA-22**, para. 177; *Saluka Investments BV (The Netherlands) v. Czech Republic*, 15 ICSID Rep. 274, Partial Award, UNCITRAL, 2006, **CLA-31**, para. 484.

> *powerful state but which overwhelms the limited capacities of one which is poor and fragile. There is no issue of incentives or disincentives with regard to unforeseen breakdowns of public order; it seems difficult to maintain that a government incurs international responsibility for failure to plan for unprecedented trouble of unprecedented magnitude in unprecedented places. The case for an element of proportionality in applying the international standard is stronger than with respect to claims of denial of justice.*[245]

245. The duty imposed by the international standard is one that rests upon the State. However, since it concerns an obligation of diligence, the Tribunal is of the view that the operation of the standard does not depend upon whether the acts that give rise to the damage to the Claimants' investment are committed by agents of State (which are thus directly attributable to the State) or by third parties. Rather the focus is on the acts or omissions of the State in addressing the unrest that gives rise to the damage.[246]

246. Having determined the applicable standard, the Tribunal will now review the acts and omissions of the Respondent in reaction to the attacks on the pipeline in order to determine whether the Respondent has breached the full protection and security standard of the Treaty.

247. The Tribunal will first determine whether and, if so, to what extent the findings of the ICC tribunal in respect of the attacks on the pipelone are *res judicata* between the Parties in the present proceedings.

(c) Res Judicata Effect of the ICC Award

248. The Tribunal recalls that the ICC tribunal in ICC Case No. 18215/GZ/MHM between EMG, as Claimant, and EGPC, EGAS and IEC, as Respondents, issued its Final Award on 4 December 2015.

249. As noted above,[247] the Tribunal invited the parties to provide comments on the relevance and impact of the ICC Award on the present case if any. The Respondent provided its comments on 17 February 2016 and the Claimants on 11 March 2016.

250. The Respondent submits that *"the Tribunal must take into account the ICC Tribunal's order as a factual datum in order to avoid double compensation".*[248] At the same time it submits that the Tribunal must disregard the ICC Tribunal's reasoning on the merits.[249] If, nevertheless, the

[245] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, **RLA-168**, para. 77.
[246] *American Manufacturing and Trading Inc v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, **RLA-124**, ; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 **RLA-132**, upheld on annulment, 6 ICSID Rep 129.114 fn 198.
[247] Para. 10.
[248] Respondent's Submission on ICC Award, para. 6.
[249] Ibid, paras. 27 – 62.

present Tribunal is minded to take the ICC Award into account, it submits a list of findings made by the ICC Tribunal that it invites the present Tribunal to consider.[250]

251. The Claimants submit that the ICC Award has no impact on the quantum of compensation that this Tribunal should award.[251] On issues of liability, it argues that the treaty claims over which the Tribunal has found jurisdiction do not depend on the ICC Award.[252] It submits that the Respondent's position is "paradoxical".[253] Having argued before the present Tribunal that the issues before it turn on issues of contract, it now seeks to disavow the decisions of a tribunal charged with determining the contractual claims.

252. The present Tribunal has been concerned throughout these proceedings with the potential for overlap and inconsistent findings between the various tribunals charged with determining claims arising out of the same factual matrix between the same or related persons. It was for that reason that it directed the Parties (who are both represented by the same counsel in all the proceedings) to keep it fully informed as to the decisions of the other tribunals. It determined in its Decision on Jurisdiction that the concurrent pursuit of claims in contract and under treaty is not an abuse of process and did not deprive the present Tribunal of jurisdiction or render the present claims inadmissible.[254] But this is not to say that the decisions of other tribunals on questions within their respective remits are necessarily irrelevant to its decision on the merits.

253. The Tribunal observed in its Decision on Jurisdiction, citing with approval the Decision on Annulment of the Vivendi Committee, that *"in order for it to find that there has been a breach of [the fair and equitable treatment and expropriation] standards in relation to the Gas Supply Dispute, it will need to determine as an incidental question whether the Source GSPA was validly terminated."* [255] At the same time it emphasised that the question of breach of treaty remained one for it, to be judged by the reference to international law.

254. The same point may be made about the factual findings in relation to attacks on the pipeline. The question for the present Tribunal is whether the Respondent failed to exercise due diligence in protecting the Pipeline, and thus the Claimants' investment, from attack. An essential predicate to this question is the determination of the issues of fact as to the nature of the terrorist attacks on the Pipeline and the response of the Respondent.

[250] Ibid, paras. 63 – 77.
[251] Claimants' Response on ICC Award, Part II.
[252] Ibid, Part III.
[253] Ibid, para. 20.
[254] Decision on Jurisdiction, paras. 328 – 9.
[255] Ibid, paras. 253 – 5, citing *Compania de Aguas del Aconquija v. Argentine Republic,* Decision on Annulment, 3 July 2002, **CLA-85**, para. 105

255. These factual issues have already received very detailed consideration by the ICC Tribunal for the purpose of its decision as a matter of contract law as to whether any failure of gas supply in this period is excused by *force majeure.*

256. The present Tribunal must therefore consider as a prelimary matter whether, and if so to what extent, the decisions of the ICC Tribunal on those questions bind the Claimants in the present proceedings.

257. The determination of the *res judicata* effect of the ICC Award on the Claimants in the present proceedings turns upon two questions:

(i) the effect of a determination in the contractual dispute upon the treaty claims in the present proceedings;

(ii) the effect of a determination in a case to which the investment company (EMG) is party upon the rights of its shareholders as investors.

Effect of findings in contract forum

258. Where the parties have chosen the forum to decide their contractual dispute, the findings of that court or tribunal will be entitled to *res judicata* effect within the legal order in which they were rendered.[256] Accordingly, where a contractual claim between an investor and the host State has been the subject of an authoritative determination by an arbitral tribunal appointed under the contract, "*[t]he authority as res judicata of a decision given by another competent jurisdiction between the same parties, concerning the same claims and based on the same factual and legal bases, prohibits a party from reintroducing a new action that is similar on all points.*"[257]

259. If, in order to decide a claim of breach of treaty, an investment tribunal is obliged first to answer a question of contract law, that question must be decided by reference to the proper law of the contract. The Tribunal is of the view that where a contractually appointed tribunal has decided that question as between the parties, the investment treaty tribunal is entitled to refer to, and rely upon, the findings of the contract tribunal, provided that it finds the resulting award to be binding upon the parties[258] which is the case here today.[259]

Effect upon investors

[256] *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, **RLA-10**, upheld on annulment, 3 July 2013.
[257] *Ibid.* at para. 103(b).
[258] *Malicorp Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/ 08/18, Decision on Annulment, 3 July 2013, paras. 156 - 160.
[259] Although the Award of the ICC tribunal has been challenged before the Swiss Courts.

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260. Investment treaties permit a shareholder with a different nationality from that of the investment company to pursue his own direct claim against the host State for loss to his investment, even though such investment is held indirectly through the investment company. One of the consequences of that is that the investor/shareholder is treated as a privy to the investment company for the purposes of the rule of *res judicata*. Otherwise the investor/shareholder would be able to approbate and reprobate from the same investment treaty. He would take the benefit of an extended right of direct action—looking through the investment company at the economic effect of the host State's actions directly upon his shareholding—which would not found the basis of a claim under customary international law. But he would not bear the burden of being bound by any finding arising out of a claim by the investment company itself on the same facts.

261. In other legal contexts, the doctrine of *res judicata* applies not simply to the parties themselves, but also to those who are in privity of interest with them. As Megarry V-C put it in *Gleeson v J Wippell & Co Ltd*, "*there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase "privity of interest*"'.[260] Similarly, in European private international law, the European Court of Justice has held that the requirement of 'same parties' for *lis pendens* purposes extends to cases where there is an identity of interest such that the claims of the two parties are *indissociable*.[261]

262. This approach has now been adopted in two important investment awards considering the *res judicata* effect of prior awards rendered in claims brought by investment companies wholly owned by the claimants in the second arbitration. These two decisions are not on the record of the present arbitration. The Tribunal nevertheless relies on them as they are in the public domain and state a general principle of law.

263. *RSM Production Corporation and others v. Grenada*[262] concerned the effect of the award of a prior ICSID Tribunal dismissing claims brought by a corporate entity, RSM, that was wholly owned by the three individual claimants in the *RSM* proceedings. The Tribunal held that the decisions in the prior Award bound the claimants by way of issue (collateral) estoppel. It reasoned:

> *[T]he fact the three individual Claimants were not parties to the prior arbitration does not assist. This is because they are, and were at the time of the Prior Arbitration, RSM's three sole shareholders. They were thus privies of RSM at the time. As such, they, like RSM, are bound by those factual and other determinations regarding questions and rights arising out of or relating to the Agreement.*

[260] *Gleeson v. J. Wippell & Co. Ltd.* [1977] 1 WLR 510, 515.
[261] Case C-351/96 *Drouot Assurances SA v Consolidated Metallurgical Industries* [1998] ECR I-3075.
[262] *RSM Production and Others v. Grenada,* ICSID Case No. ARB/10/6, Award, 10 December 2010, Rowley P, Nottingham, Tercier.

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> *Of course, RSM is a juridical entity with a legal personality separate from its three shareholders. But this does not alter the analysis. First, the Claimant shareholders' only investment is a contract to which RSM is a party and the shareholders are not: the shareholders seek compensation for damage they allege they have suffered indirectly, "through RSM," for violations of RSM's legal rights.*
>
> *It is true that shareholders, under many systems of law, may undertake litigation to pursue or defend rights belonging to the corporation. However, shareholders cannot use such opportunities as both sword and shield. If they wish to claim standing on the basis of their indirect interest in corporate assets, they must be subject to defences that would be available against the corporation - including collateral estoppel. Second, the three individual Claimants collectively own 100% of RSM's stock and therefore entirely control the corporation. In these circumstances, we agree with Respondent, that there is nothing unfair in holding them to the results of RSM's Prior Arbitration.*[263]

264. In *Apotex Holdings Inc v. USA*,[264] the Tribunal had to consider the effect of a prior NAFTA Award between Apotex Inc and the United States upon a subsequent claim brought, *inter alia*, by the parent company, Apotex Holdings Inc. It held, following *RSM*, that Apotex Holdings is to be treated as a privy with Apotex Inc its subsidiary: "*Its relevant claims in this arbitration, albeit made in its own right and in its own name, depend upon Apotex Inc's ANDAs [Abbreviated New Drugs Applications] as investments under NAFTA Articles 1116 and 1139; and if these are not investments, Apotex-Holdings cannot bring such claims before this Tribunal as a matter of jurisdiction*"[265]

265. The Tribunal observes that the ICSID tribunals in these cases make two points that are applicable to the position of the parties in the present case vis-à-vis the ICC Award between the investment vehicle (EMG) on the one hand and the Egyptian State instrumentalities with which it contracted on the other hand (EGPC & EGAS).

266. They apply the doctrine of *res judicata* to the parties to the prior award and to those persons who are in privity of interest with them. They do so on the basis that since, in the context of investment arbitration, a shareholder is entitled to pursue a claim for investments that are indirectly held through a corporation, it must also be subject to defences that would be available against the corporation, including the defences of estoppel based on a prior judgment.

267. The Tribunal recognizes that, in the two cases cited above, the investment vehicle was wholly-owned by the claimant, and that, in the present case, in addition to the Claimants, other shareholders own EMG.

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[263] Ibid, paras. 7.1.5 - 7.1.7.
[264] *Apotex Holdings Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, Veeder P, Crook, Rowley.
[265] Ibid, para. 7.40.

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268. However, the Tribunal considers that the Claimants in the present proceedings are in privity of interest with EMG, the claimant in the ICC proceedings. The Claimants' claims in the present proceedings exist only through EMG and in respect of a contract that EMG entered into. This is reflected in the Claimants' claim for damages: the Claimants are only seeking in damages the diminution of the value of their shares as a result of the damages sustained by EMG.

269. The Tribunal has already found in Part IV C above that the relevant acts of EGPC and EGAS are attributable to the Respondent. EGPC is an organ of the Respondent. The relevant acts of EGAS were directed by the Respondent or adopted by it as its own conduct. As a result, the Respondent is in privity of interest with EGPC and EGAS and is bound by the findings of the ICC Tribunal on the same facts.

270. It is on this basis that the Tribunal concludes that the findings of the ICC tribunal which are relevant to the claims before this Tribunal have a *res judicata* effect between the Parties in the present proceedings.[266]

(d) Relevant Findings of the ICC Tribunal

271. The ICC tribunal recorded at para. 596 of its award that "*although the Tribunal has found it lacks jurisdiction under the GSPA, it is uncontested that the Parties have empowered the Tribunal to interpret and apply the GSPA in adjudicating the force majeure issue*".

272. The ICC tribunal then made certain factual findings in respect of the attacks on the pipeline and determined that those attacks did not consist of *force majeure* events under the GSPA. The ICC tribunal ultimately concluded that EGAS had failed to act as a Reasonable and Prudent Pipeline Operator under the GSPA.

273. As the Tribunal determined above,[267] the full protection and security standard under the Treaty is applicable in the present case and the Tribunal has determined the scope of that standard.

274. While the ICC tribunal's findings in relation to *force majeure* and RRPO under the GSPA are not relevant in the present case, the ICC tribunal's findings of fact in respect of the attacks of the pipeline are *res judicata* between the parties in the present proceedings.

275. These findings of fact of the ICC tribunal include the following.

The Pipeline

> *597. Line 36 of the Arab Gas Pipeline is almost 192 km long and runs between Damietta and the east of Al-Arish, where it connects with EMG's own section of the pipeline. Line 36*

[266] This finding of the Tribunal is without prejudice to the Tribunal's findings on quantum in the next phase of the present arbitration.
[267] See *supra*., paras. 239-247.

*has been defined as the "**Pipeline**".*

*598. The Pipeline is a straight pipe, interrupted by valve stations, railway valves, traps and off-take rooms [jointly, the "**Facilities**"]. The Pipeline has around 15 of such Facilities, all relatively small in size (typically, 25 m x 25 m). These Facilities serve specific purposes and usually host valuable equipment. Off-take rooms, for example, are used to connect the main pipeline with a ramification of smaller diameter leading to a certain customer and house among other material, metering equipment used to measure supplies to a particular customer.*

599. Another characteristic feature of the Pipeline is that for half of its length it is looped. The section of the Pipeline between Off-take room nos. 2 and 3 is doubled: there is thus a mainline with several valve rooms, and a simple looping line of approximately 100 km length.

600. EMG's facility is located at the end of the Pipeline in the town of El Sheikh al Zuwaid – in close vicinity of the Gaza border. From there, the pipeline is operated by EMG and leads underwater to Israel.

North Sinai

601. The Pipeline crosses North Sinai. All experts agree that this has been and continues to be a historically conflictive zone. It is populated mostly by Bedouin, who were marginalised during the Mubarak era, and regarded themselves as an alien body within the Egyptian Republic. Restricted from entry into the formal economy, Bedouins developed a market for unlicenced tourism, cannabis and opium cultivation, arms-running and smuggling into Israel and Gaza. Bedouin are organised in tribes, with their own terrain; and revenues from the informal economy helped revive old coping mechanisms and patronage networks.

602. After the Camp David Accords, Egyptian military presence in Sinai was curtailed. Sinai was divided in four zones, named A through D, with Egyptian military presence decreasing from west to east. EGAS' Pipeline runs through Zone B, where military force was limited to four infantry battalions (approx. 2,000 troops), armed with AK 47 rifles. As a counterweight to the low military presence, there was a strong local police (under the Ministry of Interior), which – at least during the Mubarak era – was effective in keeping the area secure.

Revolution and attacks

603. With the eruption of the popular uprising that toppled President Mubarak in January 2011, Sinai's Bedouin seized the opportunity to shrug off Egypt's internal security yoke and push for communal empowerment. Militants grew strong and lawless, and their violence against the police led Egypt's State police to abandon the area. A security vacuum resulted.

604. In this context of revolution, in the period between February 2011 and April 2012 the Pipeline suffered a total of 13 attacks, which significantly affected gas supply.[268]

[268] ICC Award, paras. 597-604. Internal citations omitted.

276. A map of the Sinai divided in Zones A through D following the Camp David Accords is attached as Annex 2 to the present Decision.[269]

277. The ICC Tribunal then carried on with its factual findings.

5.1 THE CONSTRUCTION OF THE PIPELINE

759. The Pipeline crossing the Sinai peninsula was built in 2001, the GSPA was signed in 2005, while it was not until 2008 that the EMG Pipeline entered into operational mode for the supply of gas to Israel.

760. At the beginning of the XXI century, when the construction of the Pipeline was undertaken, EGAS and GASCO (the Pipeline operator) must have been aware that a pipe crossing a historically conflictive zone, which was (at least partially) intended for the supply of gas to Israel, was open to attack. The awareness of some risk is evidenced by the fact that EGAS decided to adopt at least certain protective measures:

- *Some segments of the Pipeline were protected by cement: experts have explained that in risky areas it is advisable that the pipeline be covered with cements slabs as an additional protection to delay attacks; of the 192 km long Pipeline, a 30 km long section was covered with cement; no explanation has been provided as to why only this small proportion of the pipeline benefitted from this extra protection, or on the criteria used to select the portion of the pipe which was protected; it can already be anticipated that all attacks on the pipe were performed on unprotected segments;*

- *GASCO sought offers for the procurement of security systems: experts agree that the installation of special fibre optic monitoring cable buried above the pipeline is a basic detection measures, and visual surveillance is also essential to detect intrusions; there is some evidence that GASCO asked international companies to submit offers for the supply of fibre cable and visual surveillance; there is however no proof that this equipment was ever procured or employed.*

- *All facilities were surrounded by a defensive brick wall topped by barbed wire.*

5.2 OPERATION OF THE PIPELINE UP TO THE REVOLUTION

761. The Pipeline operated for a period of three years (2008 – 2011), before the Arab Spring Revolution toppled the government of President Mubarak. EGAS has not provided much information on how it organised security during that period.

762. In his expert report Mr. Pelham recalls that though police presence was limited in size and arms, due to the Camp David Accords, the State Security apparatus was effective in tamping down dissent, and he did not shy away from conceding that such effectiveness was procured by the use of all kind of means, including non- conventional ones.

763. There is no evidence that during this period any special security measures were adopted, and the Tribunal must assume that police protection plus limited structural defences around facilities were the only measures in existence. In any event, it is a fact that the Pipeline did

[269] See Expert Report of Major-General (Ret.) Warren J. Whiting, Annex 2.

not suffer any harm during three years: save for a threat which was reported in June 2010, no incidents occurred.

EMG's security

764. *EMG, on the other hand, who had to operate its own facility in North Sinai, approached security concerns the opposite way: instead of relying on the local police, it contracted the Ministry of Interior to militarise and fortify its premises, providing guards in nine sentry towers, with a total of 50 armed guards securing the facility, taking shifts at all gates and patrolling the compound with an armoured vehicle. Guards were supervised by an officer and a retired general from the Army was engaged as a consultant. The facility also provided housing for guards and weapon storage.*

765. *Mr. Pelham (EGAS' expert on security in Sinai) has confirmed that EMG's facility was well guarded, when he testified that it lay behind the road leading from Al Arish to Sheikh Zuwayed and that, whenever he passed by the road, his guides would caution him not to stop, because EMG's guards were prone to open fire.*

5.3 ATTACKS AFTER THE REVOLUTION

766. *On 25 January 2011 a popular uprising precipitated the fall of the Mubarak regime. Chaos and violence ensued in Egypt. Particularly in North Sinai, violent Bedouins seized the opportunity to shrug off Egypt's internal security yoke and push for communal empowerment. Across the peninsula, police took flight, while police stations and prisons were attacked. And the Army, too preoccupied with events in Cairo and the Nile Valley, shied away from curbing the mayhem in the Sinai.*

767. *The Pipeline's security, which had mainly relied on police forces, literally disappeared overnight. Insurgents soon took advantage of the vacuum and attacked the Pipeline. Between February 2011 and April 2012 (the date of termination of the GSPA), the Pipeline suffered 13 attacks. In contrast, EMG, who operated in the same area at the same time, suffered one attempted attack, which was quickly repelled.*

768. *All of the attacks (but one) took place around the area of Al Arish. The first six targeted facilities on the Pipeline (such as valve and off-take rooms), while the other seven blew up segments of pipe. It is no surprise that saboteurs, at first, preferred the Facilities to the pipe: Facilities are the most vulnerable elements of a Pipeline, as they are:*

- *limited in size (not bigger than 25 m x 25 m) and number (there were around 15 of them);*
- *located above ground (in comparison to the pipe, which is mostly buried) and therefore easy to locate; and*
- *house valuable equipment, so that damage to a facility causes potentially more severe economic consequences than damage to the pipe.*

On the other hand, it is equally true that for the same reasons, the 15 Facilities are easier to protect than the pipe, which runs for 192 km.

A. ATTACKS ON FACILITIES

769. *There were a total of six attacks on facilities: on off-take room no. 4, trap 2 (twice), off-take room no. 3, railway valve no. 2 and valve station no. 7. Attacks started on 5*

February 2011 and there were two more on 27 March and April 2011. A two month truce ensued. But attacks resumed, hitting twice on 4 and 12 July 2011 and once again on 27 September 2011.

a. ATTACK NO. 1 (AND 2) (FEBRUARY – MARCH 2011)

770. After the fall of President Mubarak on 25 January 2011 the police fled from North Sinai and the Pipeline's protection was left to itself. Some 10 days thereafter, the first attack occurred.

771. All proven facts regarding the first attack have been drawn from the Technical Report dated 10 April 2011, which EGAS prepared and sent to EMG, and from contemporaneous press articles. The facts are the following:

> *On 5 February 2011 at 8.30 am four masked men arrived in two unmarked vehicles at off-take room no. 4, which is located some 20 km east from El-Arish. The perimeter brick walls with wire fences on top and the four guards who were posted "in the area" were not sufficient deterrent. There is no proof of how saboteurs forced the guards to leave their post: none of the produced documents mentions whether the attackers or the guards were armed nor, if they were, what kind of arms they had. In any event, it is undisputed that no shooting took place and, though saboteurs and guards were equal in number, there is no evidence that the guards challenged the attackers. The attackers locked the four men who guarded the facility in a car and placed two explosives that were successfully detonated, causing a large fire and significant damage to the pipe and the gas filtering and metering equipment.*

772. There is no evidence that a security protocol was set in motion to apprehend the attackers. The Technical Report only describes the actions taken to control the damages caused on the Pipeline. And there is also no evidence that EGAS adopted any security measures after the first attack or that it performed a risk assessment.

773. The second attack took place on 27 March 2011 at Trap 2, which is 10 km west from El-Arish. The attack is of minor significance because no damage was caused and gas flow was only stopped for half a day. The assault is only worth mentioning because it has been described by EGAS as a successfully repelled attack. Yet the evidence (a contemporaneous news article) shows that it was pure luck that no damage occurred: apparently six armed persons attacked the (only) guard present at the facility and set a bomb, but the explosive failed to explode. Again, there is no evidence that a response protocol was activated, nor of any measures being adopted to increase security.

b. SUBSEQUENT ATTACKS AND REACTIONS

Attack no. 3 (April 2011)

774. Exactly a month later, the third attack took place at off-take room no. 3, which forks from the Pipeline to supply customers in El-Arish. For reasons which have not been disclosed, this point of the Pipeline was especially prone to attacks: after this initial attack, the pipe close to the off-take room would again be blown up in five successive blasts (November 2011 – April 2012).

775. The Technical Report prepared after this third attack only mentions that on 27 April 2011 at 3.30 am the off-take room was blown up with explosives. There is no indication of any guards being present and the fact that the attackers were not described reinforces the

presumption that there were no security forces guarding the facility.

Reaction from the State (May – June 2011)

776. After three unchallenged attacks there is evidence showing that the Egyptian State decided to get involved in the security issues affecting the Pipeline. The Ministry of Defence and the Supreme Military Council warned EGAS that they would not allow resumption of the gas transmission unless additional security on the Pipeline was provided and, in particular, the following measures were undertaken:

- *raising height of fences;*
- *installing barbed wires on top of fences;*
- *increasing lighting;*
- *levelling sand dunes around each site; and*
- *installing monitoring system with TV cameras.*

777. Upon this warning, GASCO's Chairman and its Managing Director held a meeting on 1 June 2011 in which they took the following decisions:

- *to assign the security of valve rooms to the Engineering Service of the Armed Forces with an estimated cost of 3,023,000 Egyptian pounds*;
- *to build 20 housing units to accommodate the security agents;*
- *to install 5,562 km of barbed wire around the gas rooms;*
- *to heighten walls with 4,782 km of concertina wire.*

778. The minutes of the meeting reflect that the above decisions were subject to approval by the Board of Directors. The first of the decisions, however, seems to have been executed right away, because EGAS has produced a copy of a check in an amount of 3,023,000 Egyptian pounds, the beneficiary being the Engineering Service of the Armed Forces.

779. A second meeting, this time of GASCO's Board of Directors was held on 15 June 2011. The Board of Directors approved two of the decisions proposed by the Chairman and Managing Director:

- *The purchase of iron angles to heighten the walls with wire, in an amount of 160,750 Egyptian pounds;*
- *The construction of 20 housing units for the security agents in an amount of 400,000 Egyptian pounds.*
- *GASCO's Contingency Plan (probably after June 2011).*

780. IEC has produced GASCO's Contingency Plan, which it obtained through the document production procedure. The document is dated April 2011, but according to IEC there are doubts whether all of its content was prepared at such date.

781. The Contingency Plan lists the so called "solutions applied to the reactive phase to avoid

the recurrence of line explosion accidents". Although the term ("applied") is used, a careful analysis of the Contingency Plan reveals that: (i) not all of the measures proposed were actually implemented, and (ii) those measures that were implemented, could not have been in place by April 2011:

782. (i) The list clearly differentiates between measures which were in place and those which were still being discussed:

- *Solutions in place:*
- *Cooperation with armed forces and Ministry of Interior to secure the site of priority valve rooms and supervision of the Al-Arish line using four-wheel drive cars provided by GASCO and cell phones to ensure communication in case of discovery.*
- *Establishing guard persons in the valve rooms and stations and along the line track, with accommodation rooms.*
- *Metal cladding of the doors of valve rooms, changing the barbed wire and raising its height in valve rooms, and improve lighting.*
- *Solutions under discussion: assignment of the protection of valve rooms to a specialised security company able to provide trained and armed staff; a study is to be prepared and, if accepted, a tender should be organised.*

783. (ii) The Contingency Plan is dated April 2011 in its front page. The list with the security solutions is an annex to the document. Was this attachment prepared on the same date as the Contingency Plan, or was it added at a later stage? Contemporaneous evidence seems to indicate that the list may have been added afterwards: the minutes of GASCO's Board of Directors meeting mentioned supra in paras. 777 and 779, where cooperation with the Army, the building of housing and the raising and installation of barbed wire was considered for the first time, took place two months later, in June 2011. And payment for the construction of accommodation was not made until December 2011 (see para. 796 infra).

Attack no. 4 (July 2011)

784. This is the only attack that did not occur within a 25 km radius around Al-Arish radius, but 80 km west from Al-Arish. The attack took place on 4 July 2011 and targeted Railway Valve Room 2. According to a press article, it was again pure luck that not all the explosives exploded and therefore damage was constrained to a one day shutdown.

785. The Technical Report prepared by EGAS does not describe any additional protective measures in place (this was the first attack after the warning made by the State requiring additional protection), and the photographs contained in the report show a protective perimeter wall with a wire fence on top, which does not seem to be significantly higher than the walls around previously attacked facilities. IEC has produced a very interesting newspaper article, contemporaneous to the attack:

> *The article is dated 21 July 2011 and refers in total to three attacks which seem to coincide with Attacks nos. 3, 4 and 5. The reporter had the opportunity to interview guards involved in the attacks, other security guards, neighbours, and even a security official of GASCO. The scene described in the report is very similar in all attacks: the facility is guarded by unarmed persons who, once confronted with armed attackers, leave the site immediately. Guards complain that their duty is to monitor the stations rather than to protect them because "security without weapons means that there is*

> *no security", and that a two meters high wall covered with barbed wire is no obstacle to attackers. Criticism extends to the housing, which consists of primitive tents, and to the absence of any lighting which makes identification of suspects in the area impossible. GASCO was also blamed for lack of response: in case of Attack no. 4 guards reported unusual suspicious activity in the area before the attacks, but triggered no reaction in GASCO. In the case of Attack no. 5, the guard "rushed to call the security officers […] but none of them was able to do anything about the situation […] then there was an explosion".*

Attack no. 5 (July 2011)

786. This attack has given rise to much debate. On 12 July 2011 Valve Station 7 was assaulted. This is the one shutdown of gas which affected EMG only, because Valve Station 7 is located 2 km east from the offtake heading south to Jordan. There is an allegation made by EMG that this damage, although less complex, took the longest to repair (84 days), the reason being that Israel was the only customer affected, and so EGAS had no incentive to speed up repairs.

787. The attack is reported in a Technical Report prepared on 28 December 2011. For once this report provides some details on how the attack was perpetrated and how security was built up. The account of events is the following:

> *Apparently Valve Station 7 was secured by one guard only, living there with persons whom the experts identify as family (the report simply refers to "those associated with him"). The facility was protected by the usual brick wall with wire fence on top, but there seemed to be also a lower concertina wire fence running in parallel.*
>
> *Around 1 am four armed masked individuals entered the facility, threatened the guard and demanded that he leave the facility. The guard complied with the order, and promptly (at 1.20 am) contacted the security officer in the administrative offices of GASCO, who in turn informed the security officer at the East Gas station. This security officer called the military force unit in the area (pro memoria: in June GASCO had transferred a significant amount of money to the Army for security services). The security officer reported that only some soldiers were available, but not the Army officer in command, and the soldiers then replied that they could do nothing.*
>
> *40 minutes after the initial call from the guard, the explosives placed at Valve Station 7 exploded. There was no attempt to identify or chase the intruders.*

788. This new attack caused the State to intervene again on security issues. The Technical Service of the National Defence Council requested GASCO to draft a memorandum on surveillance of the Pipeline. GASCO sent on 26 July 2011 a technical study to secure the Pipeline by monitor surveillance cameras and digital recording systems for a distance of 190 km with a cost of 16,875,000 Egyptian pounds. There is no evidence that surveillance cameras ever were purchased or employed: no purchase order, contract, proof of payment, footage or pictures has been produced by EGAS.

Attack no. 6 (September 2011)

789. On 27 September 2011 Trap 2 exploded. This attack is noteworthy because it was the last attack perpetrated against facilities and it was also the second assault on the same target (Trap 2 had already suffered an attack on 27 March 2011 but at that time luckily explosives failed to detonate).

790. In contrast with the first assault, this second time there was not even one watchman. In fact, the attack was noticed – according to the Technical Report on prepared by EGAS on

28 December 2011– by the watchman of another facility (Valve Room 5), who saw distant fire on the track of the pipeline towards Al-Arish.

B. ATTACKS ON PIPE

a. Operation Eagle (August 2011)

791. The Egyptian armed forces, well-resourced and the largest in the Middle East, remained powerful after the January uprising. At that time the Egyptian military had 11 battalions in the Sinai Peninsula and on 30 July 2011 it launched operation Eagle aimed at reverting the deterioration of the general security situation in Sinai.

792. By the end of August 2011 3,750 soldiers were placed to supply area defence and road blocks were set up. There is no evidence whether the duties assumed by the Army included the protection of the Pipeline. Brig. Ling submits that it was not until March 2012 that troops started assisting with direct pipeline protection and EGAS has not challenged this assertion. Be it as it may, there is no doubt that the presence of the Military in the area had an effect on attackers: saboteurs shifted their modus operandi to attacking the pipeline, instead of the facilities.

793. As said before, from a security point of view, facilities and pipes are the two basic elements to protect and they are completely different from another: facilities are more vulnerable because they are visible, limited in number and size and contain valuable equipment; the segments of pipe are difficult to locate because they are (mostly) buried, but on the other hand, it is extremely burdensome to guard a 192 km long Pipeline with security forces.

b. SUBSEQUENT ATTACKS AND REACTIONS

Attacks nos. 7, 8 and 9 (November 2011)

794. Attacks nos. 7 and 8 targeted the pipeline at the same segment: 121 KP. The first was on 10 November 2011; and as soon as damage was repaired it was attacked a second time on 25 November 2011. Attack no. 9 hit two sections of the pipe (136 and 148 KP).

795. The modus operandi was the same: saboteurs dug up sections of the pipeline and detonated explosives. This is only a presumption because EGAS provided no technical reports. There is also no evidence that any security measure detected the attacks and/or responded to them.

796. After the especially violent month of November, GASCO's Board of Directors met on 14 December 2011. The minutes of the meeting reflect that the Board decided to:

- *pay 10 Million Egyptian pounds to the Engineering Service of the Armed Forces to build housing camps for the security agents;*
- *pay 655,820 Egyptian pounds to the Engineering Service of the Armed Forces to protect police vehicles;*
- *complete land communication means with telephone lines for a cost of 1 Million Egyptian pounds.*

797. There is evidence of the disbursement of the 10 Million Egyptian pounds; no proof has been marshalled as regards implementation of the other measures.

Attacks nos. 10 – 13 (December 2011 – April 2012)

798. *Despite the payments made to the Army, and of a further payment of 2 Million Egyptian pounds made in early March 2012, attacks did not stop, but went on – while the GSPA was in force – until 9 April 2012. All sabotages concentrated around two segments:*

- *151/153 KP: Attacks nos. 10, 11 and 12 (18 December 2011, 5 February and 5 March 2012). This section of the pipe was attacked three times in a row, as soon as repairs were completed.*

- *140 KP: Attack no. 13 on 28 November 2011 (this segment had already been attacked in no. 9).*

799. *The modus operandi was the same and no technical reports were provided which could serve as evidence of the security measures in place. It must be assumed that security measures had not improved.*

5.4 ATTACKS ON OTHER TARGETS

800. *In the hazardous environment of the Sinai, during this period violent groups targeted various assets. The parties have discussed at length two particular scenarios: the facilities of EMG and of the MFO. […]*

801. *Interestingly, both parties have used the example of the MFO in support of their arguments: EGAS to report a case which, despite heightened security, could not prevent attacks; IEC to show how the MFO enhanced security after the Revolution and the first attacks.*

802. *The MFO stands for the Multinational Force and Observers, an independent international organisation with peacekeeping responsibilities in Sinai, whose main base is located in El Gorah, in Zone C (pro memoria: the Pipeline mainly runs across Zone B, with higher military presence).*

803. *As evidence of MFO's efforts in security, IEC has produced the 2011 Annual Report, which summarises the attacks suffered by the MFO:*

- *Local grievances in the form of peaceful protests outside MFO facilities, intermittent attempts to restrict the movement of MFO vehicles.*

- *On 27 May 2011 an improvised explosive device was exploded as a armoured vehicle passed.*

  [Note: the parties also placed importance on the attack on the MFO's main base in September 2012. Since this occurred after the termination of the GSPA and long after the events for which EGAS has claimed force majeure, the parties' discussion is not relevant and will be omitted from this summary.]

Response by the MFO

804. *As early as the first uprisings, the MFO set in motion a series of internal steps to review possible enhancements to its security and to increase vigilance at all their sites. Concurrent with increased security concerns the MFO conducted a weekly evaluation of security and travel conditions which resulted in an advisory approved by the Force Commander on security concerns. In March 2011, at the request of the Director General,*

the U.S. Army Central Command Joint Security Office conducted a force protection assessment of both MFO camps, of all remote sites and of the dock area.

805. The MFO undertook the following security improvements:

- *remote site renovations completed by October 2011, including the installation of ballistic towers, replacement perimeter fencing, protective blast walls, bunkers and improved lighting;*
- *acquisition of five fully armoured vehicles, in addition to the exiting three light armoured vehicles;*
- *command and control procedures: including, among other things, a new operations centre, centralising all operational elements and facilitating command and control of MFO assets.*

5.5 IDENTITY OF THE ATTACKERS

806. Gen. Eiland (one of IEC's experts) notes that up to three terrorist organisations have claimed responsibility for the attacks on the Pipeline: Ansar al-Hijad in the Sinai, Ansar Baytal-Maqdi and Al-Jabhahal-Salafiya fi Sinaa.

807. Based on his expertise, Gen. Eiland is of the opinion that Ansar Baytal-Maqdis are the most credible authors of the attacks. Mr. Pelham (EGAS' expert) found this conclusion questionable and thought that it was more likely that Jihadi groups and Al Quade were guilty. In any event – he insisted – all these militant groups are well-trained and battle-hardened. They maintain their own training camps, insurgency and they acquired an array of weaponry from North Africa's fallen regimes; and as far as Jama'at Ansar Bayt al-Maqdis is concerned, this group has claimed responsibility for lethal raids and rocket attacks on Israel among other attacks. Mr. Pelham insisted that, whoever was responsible, it would not be a primitive group.

808. As regards the degree of violence used in the attacks against the Pipeline, Mr. Pelham recognised that attacks "only" involved the direct use of explosive devices and, as compared to other targets of Jihadi militants (such as the MFO), no violent crowd was present, nor were Molotov cocktails used.

809. Mr. Schrader also underlined that there is no evidence that attackers were heavily armed and there would not even be a need for the use of strong weapons, as none of the attackers was ever challenged.[270]

278. The Tribunal notes that nearly all of the expert reports relied on by the parties in the ICC proceedings are in the record of the present arbitration as shown in the table below.

Claimant EMG	**Issue**	**On the record of this arbitration at:**

[270] ICC Award, paras. 759-809. Internal citations omitted.

Mr. Charles C. Freeny, Mr. Gerald B. Gump and Mr. Timothy D. Rooney from *Baker & O'Brien*	Two expert reports on repairs of the Pipeline	R-780 R-783
Mr. Benjamin F. Schrader from *Baker & O'Brien*	Two expert reports on security	R-784 R-790

Respondents 1 and 2 (EGPC/EGAS)	**Issue:**	**On the record of this arbitration at:**
Mr. Nicolas Pelham (independent consultant)	Two expert reports on security	Not on the record

Respondent 3 (IEC)	**Issue:**	**On the record of this arbitration at:**
Major General (ret.) Giora Eiland	An expert report on security	R-788
Dr. Steven Cook, Senior Fellow at the *Council on Foreign Relations*	An expert report on security	Not on the record
Brigadier Tony Ling CBE	Two expert reports on security	Not on the record

279. The Tribunal further notes that the transcript of the ICC hearing on jurisdiction, merits and quantum is also before this Tribunal[271] and Mr Pelham submitted two reports in the present proceedings and gave evidence.

280. In addition, the various technical reports referenced in the ICC Award are also on the record of the present proceedings.[272]

281. The Tribunal has found, for the reasons stated above, that the findings of fact in relation to the Attacks on the Pipeline in the ICC Award are binding on the Parties in the present proceedings.

282. Nevertheless, independently of this finding, it has also conducted its own evaluation of the evidence presented to it about the same factual matters, which, as it has just noted, is substantially identical to that presented in the ICC proceedings. On the basis of this evaluation, the present Tribunal is satisfied that the findings of fact of the ICC tribunal set out above are correct and it so finds.

[271] See **R-791** to **R-800**.
[272] See **C-203**; **C-272**; **C-273**; **C-206** and **C-355**.

(e) Whether the Respondent has breached the Full Protection & Security Standard

283. The Tribunal must now determine whether the Respondent acted diligently in preventing the attacks on the Trans-Sinai pipeline and repairing the damage caused to the pipeline.

284. At the outset, the Tribunal acknowledges that the circumstances in the North Sinai Egypt were difficult in the wake of the Arab Spring Revolution. Armed militant groups took advantage of the political instability, security deterioration and general lawlessness that ensued in the North Sinai[273] to perpretate the attacks on the Trans-Sinai Pipeline.

285. In this context, the Tribunal is of the view that the first attack on 5 February 2011 could not have been prevented by the Respondent and cannot amount to a breach of the full protection and security standard in itself. As Sole Arbitrator Paulsson said in *Pantechniki*: "*[…] it seems difficult to maintain that a government incurs international responsibility for failure to plan for unprecedented trouble of unprecented magnitude in unprecedented places.*"[274]

286. However, the Tribunal considers the thirteen attacks that were perpertrated on the Trans-Sinai Pipeline as a whole in determining whether the Respondent has breached the standard of full protection and security under the Treaty.

287. It is apparent to the Tribunal that, when considering the totality of these attacks, a certain pattern emerges: an attack is perpetrated, to which GASCO reacts months later and then adopts some measures to heighten the security of the pipeline, those measures are seldom implemented (or there is no evidence on the record that they were), another attack happens, and so on.

288. The failure by State security forces in the Northern Sinai to take any steps to stop saboteurs from damaging the lifeline of the Claimants' investment, whether preventive or reactive, is revealed by EGPC/EGAS's technical report on the 12 July 2011 attack (attack no. 5): the report describes how, as the attack was unfolding, EGAS personnel made contact with an Egyptian army patrol and asked them to stop saboteurs from laying explosives on the pipeline at a facility just 1.5 kilometers away from where the patrol was stationed. The Egyptian security forces refused to mobilize. Some 40 minutes later, the explosives were detonated.[275] Gas supply to EMG was cut-off for almost three months thereafter.

289. The Tribunal notes that the first four attacks had been carried out on the facilities between February and July 2011. Clearly, these four first attacks should have been seen as a warning to the Egyptian State that further attacks might be carried out if security measures were not taken and implemented.

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[273] See Expert Report of Major-General (Ret.) Warren J. Whiting, paras. 1-31.
[274] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, **RLA-168**, para 77.
[275] **C-206**.

290. It is thus clear to the Tribunal that the failure by the Egyptian authorities to take any concrete steps to protect the Claimants' investment from damage in reaction to third party attacks on the upstream pipeline system, as of the date of attack no. 5, to wit 12 July 2011, constitutes a breach of the obligation of due diligence that Egypt was required to exercise in ensuring the full protection and security of the Claimants' investment.

291. In view of the Tribunal's finding of a breach by the Respondent of the full protection and security standard and for the sake of procedural economy, the Tribunal need not analyse whether the delivery failures from 1 February 2011 to 9 May 2012 are in breach of the FET standard or the umbrella clause under the Treaty or whether they constitute an unlawful expropriation of the Claimants' investment under Treaty.

3. Delivery Failures following the Termination of the GSPA

(a) Introduction

292. The Tribunal recalls that, in its Decision on Jurisdiction, it concluded as follows in respect of the Respondent's objection *ratione materiae* in relation to the Claimants' Gas Supply Dispute:

> *249. Essentially, as was seen above, the Respondent submits that the Tribunal lacks jurisdiction because the Gas Supply Dispute falls exclusively within the jurisdiction of the CRCICA Tribunal which has upheld its jurisdiction.*
>
> *250. The CRCICA Tribunal, avers the Respondent, is considering the same issues "which the Claimants seek to disguise as violations of the Treaties in these proceedings."*
>
> *251. Since the Gas Supply Dispute "is purely contractual in nature", the Respondent concludes that it falls outside the scope of the arbitration clause in Article VII of the US-Egypt Treaty.*
>
> *252. In response, as noted above, the Claimants assert that all of their claims in the present arbitration are based on their contention that Egypt has breached the US-Egypt Treaty and international law.*
>
> *253. Quoting from the Decision on Annulment of the Vivendi Committee, the Claimants say "[i]t is one thing to exercise contractual jurisdiction … and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law."*
>
> *254. The Tribunal agrees with the Claimants.*
>
> *255. The Tribunal notes that the Claimants claim breaches of various standards under the Treaty in relation to the Gas Supply Dispute, including fair and equitable treatment, unlawful expropriation and breach of the umbrella clause. As to the first two standards, the Tribunal accepts that, in order for it to find that there has been a breach of those standards in relation to the Gas Supply Dispute, it will need to determine as an incidental question whether the Source*

> *GSPA was validly terminated. However, this does not change the fact that the key issue under the Treaty in respect of a claim for unlawful expropriation or breach of the fair and equitable treatment is whether there has been a loss of property right constituted by the contract or whether legitimate expectations arose under the contract.*
>
> *256. As to the umbrella clause, the Tribunal notes that there is no umbrella clause in the US Treaty and that it is invoked by the Claimants as having been introduced on the basis of the MFN clause in the Treaty. For purposes of its present decision on jurisdiction, the Tribunal need not determine today whether it has jurisdiction over such a clause. In due course, the question may become otiose.*
>
> *257. Accordingly, the Respondent's objection to the jurisdiction of the Tribunal over the Claimants' Gas Supply claims based on the alleged breach of the standards of fair and equitable treatment and unlawful expropriation is dismissed. The Tribunal remains seized of the Respondent's objection to the jurisdiction of the Tribunal over the Claimants' Gas Supply claims based on the alleged breach of the umbrella clause*. (Tribunal's emphasis)

293. The Tribunal recorded at paragraph 232 of its Decision on Jurisdiction that the Gas Supply Dispute covers, *inter alia*, "the repudiation of gas supply obligations"[276]:

294. In light of its Decision on Jurisdiction, the Tribunal will first determine, as an incidental question to the alleged Treaty breaches, whether the Source GSPA was validly terminated.

(b) Relevant Provisions of the GSPA

295. The Tribunal sets out below the relevant provisions of the GSPA in respect of termination.

296. Article 2.5.2 of Annex 1 to the GSPA provides:

> *In the event that Buyer fails to timely pay any amounts due under this Agreement for four (4) consecutive Months, Seller shall be entitled to terminate this Agreement upon delivery of written notice to Buyer, provided that such failure shall not create the right to terminate this Agreement unless Buyer fails to cure such failure within thirty (30) Business Days after receiving notice from Seller of the fourth (4th) consecutive occurrence of such non-payment.*

297. Section 6.8 of Annex 1 to the GSPA provides:

> *6.8 Daily Delivery Failure.*
>
> *6.8.1 To the extent that Seller fails to deliver during any Day during the Supply Period the aggregate of the Properly Nominated Quantities for such Day (other than in circumstances which Seller is excused pursuant to this Agreement) ("**Daily Delivery Failure**"), the quantity of Gas attributable to the Daily Delivery Failure that is greater than an amount equal to two percent (2%) of the aggregate Properly Nominated Quantity for that Day shall be classified as "**Daily Shortfall Gas**."*

[276] See para. 232 (vi) of the Tribunal's Decision on Jurisdiction.

6.8.2 If and to the extent that a Daily Delivery Failure is agreed by the Parties in writing or decided pursuant to Article 16 of Annex 1 to have been due to an event of Force Majeure affecting Seller, the corresponding quantity of Gas that was classified as Daily Shortfall Gas shall no longer be so classified. In those circumstances, Seller shall make the necessary adjustment in the next Annual Statement following that agreement or decision so as to adjust any amounts previously credited to Buyer under this Section 6.8 of Annex 1, together with interest on the adjustment amount at a rate equal to the Agreed Interest Rate plus three (3) percentage point (compounded annually) from the Annual Statement Due Date in respect of the Annual Statement for the Contract Year in which the Daily Delivery Failure occurred.

*6.8.3 In respect of any Daily Shortfall Gas in a Delivery Month, the Monthly Payment (as described in Section 9.3.2 of this Annex 1) for such Contract Year shall be reduced by an amount (the "**Daily Shortfall Compensation**") equal to the sum of:*

(a) with respect to each On-Sale Agreement in force during such Delivery Month, ten percent (10%) of the product of (i) the amount of the Daily Shortfall Gas attributable to such On-Sale Agreement for each Day during which there was a Daily Delivery Failure during such Delivery Month, multiplied by (ii) the then applicable Contract Price with respect to such On-Sale Agreement (for purposes of Section 6.8.3(a)(i) of this Annex 1, Daily Shortfall Gas shall be allocated on a pro rata basis among all On-Sale Agreements with respect to which there have been nominations for delivery of Gas on the Day that such Daily Delivery Failure occurred based on the respective nominations for such On-Sale Agreements for such Day); and

(b) any costs, expenses or penalties incurred by an On-Sale Customer under a Transportation Agreement payable by Buyer (or Buyer's Affiliate) where Buyer can demonstrate that such cost, expense, or penalty resulted from Seller's Daily Delivery Failure; and

6.8.4 For the sole purpose of calculating any Daily Shortfall Gas in respect of a Day during periods of permitted Seller's Scheduled Maintenance or Seller's Unscheduled Maintenance, the aggregate of the Properly Nominated Quantities for such Day shall be deemed to be the lesser of the aggregate of Buyer's actual Properly Nominated Quantities for such Day and the aggregate of the maximum hourly quantities of Gas that Seller anticipated Seller could deliver during each Hour of such Day pursuant to Seller's notice to Buyer in accordance with Section 5.2 of this Annex 1.

298. Section 6.9 of Annex 1 to the GSPA provides:

6.9 Monthly Delivery Failure.

6.9.1 To the extent that Seller fails to deliver during any Month during the Supply Period the Properly Nominated Quantities on a Day-by-Day basis for such Month (other than in circumstances which Seller is excused pursuant to this Agreement) ("Monthly Delivery Failure") the aggregate quantity of Gas that Seller fails to deliver on a Day-by-Day basis during such Delivery Month shall be classified as "Monthly Shortfall Gas." Notwithstanding the foregoing, to the extent Seller fails to deliver a Properly Nominated Quantity on a given Day, if Seller, on or before 18:00 on the Day immediately following the Day of such failure, notifies Buyer that Seller shall make such undelivered Gas available to Buyer within three Days after the Day that Seller failed to deliver, and Seller actually delivers such Gas to Buyer on the date so notified (and within such three Day period), the amount of such Gas so delivered shall reduce the aggregate amount of Monthly Shortfall Gas.

6.9.2 If and to the extent that a Monthly Delivery Failure is agreed by the Parties in writing or decided pursuant to Article 16 of Annex 1 to have been due to an event of Force Majeure affecting Seller, the corresponding quantity of Gas that was classified as Monthly Shortfall Gas shall no longer be so classified. In those circumstances, Seller shall make the necessary adjustment in the next Annual Statement following that agreement or decision so as to adjust any amounts previously paid (or credited) to Buyer under this Section 6.9 of Annex 1, together with interest on the adjustment amount at a rate equal to the Agreed Interest Rate plus three (3) percentage point (compounded annually) from the Annual Statement Due Date in respect of the Annual Statement for the Contract Year in which the Monthly Delivery Failure occurred.

6.9.3 To the extent that the Monthly Delivery Failure in any Delivery Month attributable to the Initial On-Sale Agreement is greater than seven percent (7%) of the aggregate Properly Nominated Quantities for such Delivery Month for the Initial On-Sale Agreement, in addition to any Daily Shortfall Compensation payable pursuant to Section 6.8.3 of Annex 1 with respect to such quantities of Q1 and in addition to the re-delivery obligations of Seller set forth in Section 6.9.5, Buyer shall be entitled to receive an amount (the "Monthly Shortfall Compensation") equal to the product of (a) ten percent (10%), multiplied by (b) the amount of the Monthly Shortfall Gas attributable to the Initial On-Sale Agreement during such Delivery Month, multiplied by (c) the then applicable Contract Price with respect to the Initial On-Sale Agreement. For purposes of this Section 6.9.3, Monthly Delivery Failure and Monthly Shortfall Gas shall be allocated on a pro rata basis among all On-Sale Agreements with respect to which there have been nominations for delivery of Gas during the Delivery Month during which such Monthly Delivery Failure occurred based on the respective nominations for such On-Sale Agreements for such Month.

6.9.4 Buyer shall deduct any Monthly Shortfall Compensation payable by Seller pursuant to Section 6.9.3 of Annex 1 from the Monthly Payment (as described in Section 9.3.2 of this Annex 1) for such Delivery Month.

6.9.5 To the extent that there is a Monthly Delivery Failure in respect of any Delivery Month, Seller shall be obligated to deliver such Monthly Shortfall Gas in accordance with the following procedures:

(a) Within thirty (30) days following the Delivery Month in which the Monthly Delivery Failure occurred, the Parties, acting in good faith, will agree on the delivery schedule of such Monthly Shortfall Gas; such delivery schedule shall provide for the delivery of all such Monthly Shortfall Gas within a period of 180 days following the last day of the Delivery Month during which the Monthly Delivery Failure occurred.

(b) The delivery of such Monthly Shortfall Gas shall be in addition to the other delivery obligations of Seller pursuant to this Agreement. Buyer shall pay no additional amounts for such Gas other than the applicable Contract Price for such Gas in effect during the Delivery Month in which the Monthly Delivery Failure occurred.

(c) To the extent that Seller makes available quantities of Monthly Shortfall Gas in accordance with the provisions of this Section 6.9.5, any Daily Shortfall Compensation previously deducted by Buyer pursuant to Section 6.8.3(a) of Annex 1, and any Monthly Shortfall Compensation previously deducted by Buyer pursuant to Sections 6.9.3 and 6.9.4 of Annex 1, attributable to such quantities of Monthly Shortfall Gas shall be paid by Buyer to Seller, such payment to be made within thirty

(30) days following the end of the Month during which such deliveries of Monthly Shortfall Gas occurred.

6.9.6 For the sole purpose of calculating any Monthly Shortfall Gas in respect of periods of permitted Seller's Scheduled Maintenance or Seller's Unscheduled Maintenance, the aggregate of the Properly Nominated Quantities for each Day during such Delivery Month shall be deemed to be the lesser of the aggregate of Buyer's actual Properly Nominated Quantities for such Day and the aggregate of the maximum hourly quantities of Gas that Seller anticipated Seller could deliver during each Hour of such Day pursuant to Seller's notice to Buyer in accordance with Section 5.2 of this Annex 1.

299. Section 9.3.2 of Annex 1 to the GSPA provides:

Monthly Payment. On or before the fifteenth (15th) Business Day after Buyer's receipt by facsimile of Seller's Monthly Invoice (the "Monthly Payment Due Date") Buyer shall pay Seller the "Monthly Payment", which is an amount equal to

(a) the total quantity of Gas taken by Buyer during the Delivery Month multiplied by (ii) the applicable Contract Price;

Except for reasons of Force Majeure, less the aggregate of:

(b) the Daily Shortfall Compensation for such Delivery Month;

(c) Payments due to Buyer during the Delivery Month from Seller as a result of Seller's failure to begin deliveries as set forth in Sections 4.5 and 4.6;

(d) Payments due to Buyer during the Delivery Month from Seller as a result of Seller's delivery of Off-Specification Gas during such Delivery Month, as set forth in Sections 8.4 and 8.5;

(e) any other amounts due to Buyer from Seller during such delivery Month.

300. Section 9.4.7 of Annex 1 to the GSPA provides:

Disputed Invoices. If a Party has a bona fide dispute with respect to any sum shown in any invoice (or accompanying statement) as being payable by that Party, then such Party shall (i) pay in full all of the undisputed amount shown in such invoice on or before the relevant due date, (ii) promptly give notice to the other Party of the amount in dispute and the reasons therefore, (iii) in such notice, inform the other Party whether the Party disputing such amount intends to pay such disputed amount pending resolution of such dispute (in which case such disputed amount shall be paid together with the payment of any undisputed amount), or withhold payment of the disputed amount pending resolution of the dispute. The Parties shall seek to settle the disputed amount as soon as reasonably practicable. Any disputed amount agreed or determined, pursuant to Article 14 to be not payable by the Party disputing such amount shall (to the extent that such disputing Party previously paid such disputed amount) shall be re-paid by the other Party to the disputing Party (such amount to be included in the Monthly Invoice or Annual Statement, as applicable, next following such agreement or determination, together with the interest on such amount at a rate equal to the Agreed Interest Rate plus three percent (3%) (compounded annually)

> *from the date when such payment was due until and including the date when the disputed amount was settled or decided pursuant to Article 14. Any disputed amounts agreed or determined, pursuant to Article 14, to be payable by the Party disputing such amount shall be retained by the other Party if the disputing Party previously paid such disputed amount, or (to the extent that such disputing Party elected not to pay such disputed amount) shall be paid by the disputing Party to the other Party (such amount to be included in the Monthly Invoice or Annual Statement, as applicable, next following such agreed or determination, together with interest on such amount at a rate equal to the Agreed Interest Rate plus three percent (3%) (compounded annually) from the date when such payment was due until and including the date when the disputed amount was settled or decided pursuant to Article 14.*

301. Art. 16.3 Annex 1 to the GSPA defines "*force majeure*" as follows:

> *[it] means an event or circumstance which is beyond the control of the Party concerned (acting and having acted as a Reasonable and Prudent Person), resulting in or causing the delay or the failure by such Party to perform all or any of its obligations under this Agreement (including, in the case of Buyer, the inability to take delivery of any Properly Nominated Quantity of Gas and in the case of Seller, the inability to deliver the Properly Nominated Quantities of Gas), which delay or failure could not have been prevented or overcome by the standard of a Reasonable and Prudent Person.*

302. A reasonable and prudent person is defined in Annex 6 to the GSPA as follows:

> *A Person seeking in good faith to perform its contractual obligations and in so doing and in the general conduct of its undertaking exercising that degree of skill, prudence, diligence and foresight that would reasonably and ordinarily be expected from a skilled and experienced Person complying with Law engaged in the same type of undertaking under the same or similar circumstances and conditions.*

303. The requirement to act with this standard of diligence is developed in Art. 16.2 of Annex 1 to the GSPA as follows:

> *A Party claiming force majeure must act as a Reasonable and Prudent Person in preventing the effects of any force majeure events (and as soon as reasonably practicable after the commencement of an event of force majeure, a Party claiming force majeure must act as a Reasonable and Prudent Person to overcome and mitigate the effects of such event of force majeure), and shall continue to perform its obligations pursuant to this Agreement to the extent such obligations are not impacted by such force majeure events. To the extent a Party claiming force majeure fails to act as a Reasonable and Prudent Person in preventing or mitigating the effects of any force majeure events, such Party shall not be excused for any delay or failure to perform that would have been avoided if such Party had acted as a Reasonable and Prudent Person.*

304. Art. 16.7 of Annex 1 to the GSPA imposes an obligation to remedy:

> *Force majeure relief will cease to be available to the affected Party in the event of a failure to take all reasonable steps to remedy the failure as soon as practicable.*

305. And 16.8 of Annex 1 to the GSPA provides the following notification requirement:

> *Notice of force majeure: In the event of a force majeure, the affected Party will serve notice of such force majeure to the other Party as soon as is reasonably practicable, promptly provide a report of the circumstances of such force majeure, providing all relevant information as is available as to such event (including the Place thereof, the reasons for failure and the reasons why such Party's obligations under this Agreement were affected), and from time to time, provide updates of such event, including further information and explanation as it becomes available.*

(c) Parties' Positions

306. EGAS terminated the GSPA pursuant to Article 2.5.2 of Annex 1 to the GSPA on 25 April 2012. On 9 May 2012, EMG accepted EGAS's repudiation of the GSPA and elected to seek damages in the ICC arbitration.

307. The Tribunal notes that it is common ground between the Parties that failure to pay the Seller's invoices for four consecutive months justifies a termination under Article 2.5.2.[277] It is also common ground between the Parties that, in the event of a failure to pay, EGAS must send a written notice to EMG and that, if EMG does not cure its failure within 30 Business Days, EGAS can terminate the GSPA.

308. According to the Respondent, EMG failed to pay the invoices for the months of January to April 2011. In fact, asserts the Respondent, EMG failed to pay for gas that it received and sold onwards even after April 2011, and defaulted in respect of many other obligations under the GSPA, such as its obligation to pay part of the Provisional Credit.[278]

309. In respect of the months of January to April 2011, the Respondent maintains that the following facts are uncontested.

(i) During those months, EGAS delivered gas to EMG and issued invoices[279], however, EMG did not pay any of these invoices in full when they became due[280] despite selling the gas onwards to its On-Sale Customers and receiving payment for the gas.

(ii) As a result, EGAS notified EMG that it would terminate the GSPA pursuant to Section 2.5.2 on 24 August 2011.[281]

(iii) By 11 October 2011, 30 Business Days after EGAS's written notice, EMG had not made any payment of the amounts it owed.

(iv) Over the following six months, EGAS provided EMG with five opportunities to cure its default.[282]

[277] Tr. Day 9, 72:2-10, 72:23-73:2.
[278] Tr. Day 9, 165:12-166:18; R's Closing, v. I, 76.
[279] Invoices from EGPC and EGAS to EMG for gas delivered from January to April 2011 (**R-348** to **R-354**).
[280] NBE Bank Transfers of 10 April 2011 (**C-584, 585**) and 27 June 2011 (**C-597**).
[281] Letter from EGPC and EGAS to EMG dated 24 August 2011 (**C-85**).

(v) By April 2012, EMG had not paid for any of the invoices issued between January 2011 through March 2012, except for the principal amount of the January 2011 invoice and a partial payment of the February 2011 invoice, almost a year late in each case.[283]

(vi) EGAS sent EMG a letter on 19 April 2012, stating that it was exercising its right to terminate the GSPA under Section 2.5.2.[284]

(vii) On 9 May 2012, EMG wrote to EGAS stating that it terminated the GSPA at common law, reasoning that EGAS has committed a repudiatory breach of the GSPA.

310. The Claimants contest that any amount was due to EGAS for the month of February 2011.

311. At the outset, the Claimants submit that EMG does not have to dispute an invoice EGAS sent to it, because invoices do not give rise to an obligation to pay pursuant to Article 9.4.7 of Annex 1 to the GSPA and relies on the expert evidence of Sir Bernard Rix on English law in support of its argument.[285]

312. Under Sir Bernard's construction of Article 9.4.7, a Party which does not dispute an invoice under 9.4.7(ii), is not under an obligation to pay the undisputed amount under 9.4.7(i).[286] The Party receiving the invoice could dispute it by doing nothing[287], so that it would be for the other Party (the Seller in the case of monthly invoices) to find out if the Buyer is actually disputing the invoice or not.[288] In answer to a question from the President, Sir Bernard confirmed that even if the Buyer failed to dispute an invoice under 9.4.7, that would not "*change*[] *the amounts that are due*" for purposes of Article 2.5.2.[289]

313. The Respondent and its expert on English law, Lord Hoffmann, interpret Article 9.4.7 differently. Under Lord Hoffmann's construction of 9.4.7, once a Party receives an invoice, which is a claim for what is due[290], that Party has an obligation to (i) pay in full whatever amount it does not dispute; or, (ii) give notice to dispute the amount of the invoice it does not agree with, giving reasons for its dispute. For a dispute under 9.4.7 (ii), the criteria of that

[282] These are letters dated 13 October 2011 (**R-301**), 24 October 2011 (**R-304**), 15 November 2011 (**R-307**), 18 December 2011 (re extension of deadline for payment) (**R-314**) and 31 January 2012 (**C-214**).
[283] See Credit Note of US$ 10,000,000.00 dated 5 January 2012 (**R-411**); Credit Note of US$ 1,906,584.91 dated 31 January 2012 (**R-413**); Credit Note of US$ 60,284.25 dated 31 January 2012 (**R-412**).
[284] Letter from EGPC and EGAS to EMG dated 18 April 2012 (**C-92**).
[285] English law is the applicable law to the GSPA.
[286] Tr. Day 4, 188:6-24.
[287] Tr. Day 4, 191:9-20.
[288] Tr. Day 4, 155:20-156:15.
[289] Tr. Day 4, 214:3-24, 216:16-20.
[290] Tr. Day 6, 24:4-14, 26:19-24.

provision must be met: a general allegation of dispute between the Parties will not suffice, and neither will doing nothing.[291]

314. Both Lord Hoffmann and Sir Bernard agree, however, that the use of the term "*shall*" in Article 9.4.7 is mandatory, and that it triggers an obligation to pay any undisputed amount shown as being payable in an invoice.[292]

315. If the Tribunal adopts Lord Hoffman's construction of Article 9.4.7, the Respondent submits that since EMG did not challenge the February 2011 invoice it was obliged to pay it.

316. If the Tribunal adopts Sir Bernard Rix's construction, the Claimants submit that since they disputed the February invoice by rejecting EGPC/EGAS' *force majeure* claim in respect of the 5 February 2011 attack, the balance of payment for the month of February 2011 under Article 9.3.2 was in EMG's favour and thus no amount was due from EMG to EGPC/EGAS.[293] Accordingly, assert the Claimants, this deprived EGPC/EGAS of any entitlement to terminate the Source GSPA.

317. The Claimants argue that:

> *Articles 6.8 and 6.9 of Annex 1 to the Source GSPA expressly provided that shortfall compensation would continue to accrue regardless of any claim of force majeure, pending agreement of the parties or an arbitral decision. Once agreement was reached or a tribunal confirmed the force majeure entitlement, EGPC/EGAS would then be credited for any shortfall penalties for which it was not liable. In the meantime, shortfall penalties were incorporated into the Monthly Payment calculation described in Article 9.3.2 for purposes of determining the amounts due under the Source GSPA. No agreement was ever reached between the parties, and arbitral proceedings under the Source GSPA are still pending. EGPC/EGAS therefore had no entitlement to terminate the Source GSPA.*[294] *(Tribunal's emphasis)*

318. The Claimants submit that Egypt miscontrues the clear wording of Articles 6.8 and 6.9, and the equally clear consequences of those provisions for the calculation of "amounts due" under Article 9.3.2. According to the Claimants, Article 9.3.2 alone determines the "amounts due" on a monthly basis.

319. Egypt and Lord Hoffmann take the view that a failure to dispute a Monthly Invoice issued under Article 9.3.1 using the procedures established in Article 9.4.7, constitutes an independent ground for creating an "amount due" for a given month, and that it is Article 9.4.7, not 9.3.2, under which it is due. The Claimants assert that Article 9.4.7 cannot itself create any "amount

[291] Respondent's Post-Hearing Brief, para. 71.
[292] Tr. Day 6, 62:21-63:12; Tr. Day 4, 194:3-23, 194:24-195:10.
[293] Reply, para. 105.
[294] Reply, para. 106.

due", let alone do so on a monthly basis. It must be read in the context of Article 9.4 and the Source GSPA more generally.[295]

320. The Claimants recall that on several occasions EMG requested additional information, as necessary to evaluate the February 2011 *force majeure* declaration.[296] They say that the information received in April 2011 was inadequate, and that EMG registered its complaint in this regard.[297] When EMG attempted to calculate the Annual Statement in September 2011, it specifically reserved its rights with respect to the February 2011 *force majeure* claim.[298] It subsequently paid the corresponding amounts under express protest.[299]

321. On the basis of the foregoing, the Claimants submit that no amount was due from EMG to EGPC/EGAS for the month of February 2011 and that, consequently, the Respondent wrongfully terminated the GSPA under Article 2.5.2 of Annex 1 to the GSPA.

322. In response to the Claimants' submission, the Respondent contends that EMG owed amounts to EGAS for February 2011 independently of *force majeure*.[300] In any event, the Respondent argues that EGAS could not have prevented the 5 February 2011 attack.[301]

323. The Parties have made several other arguments in respect of the termination of the GSPA. They include whether EMG paid the January 2011 invoice, whether EGPC/EGAS relied on their own wrong to invoke Article 2.5.2, and whether EGPC/EGAS terminated the GSPA in bad faith. In reaching its decision, the Tribunal has considered all of the Parties' arguments.

(d) Relevant Findings of the ICC Tribunal

324. The Tribunal notes that the issue of the lawful or unlawful termination of the GSPA was reviewed at great length and determined by the ICC Tribunal in its Award of 4 December 2015.

325. In its Award, the ICC Tribunal clearly sided with Sir Bernard's interpretation of Article 9.4.7 of Annex 1 to the GSPA. It concluded:

1028. The Tribunal finds the following matters compelling:

[295] Claimants' Post-Hearing Brief, para. 66.
[296] Letter from EMG (A. Hamdy and M. Al Sakka) to EGAS (H. El Mahdy), 23 March 2011, **C-361**; Letter from EMG (M. Al Sakka and A. Hamdy) to EGPC (H. Dahy) and EGAS (H. El Mahdy), 22 May 2011, **C-362**; Letter from EMG (M. Al Sakka) to EGAS (A. Zaki), 17 July 2011, **C-270**.
[297] Technical Report on the attack of the Al-Arish gas distribution station on 5 February 2011, 10 April 2011, **C-203**; Letter from EMG (M. Al Sakka and A. Hamdy) to EGPC (H. Dahy) and EGAS (H. El Mahdy), 22 May 2011, **C-362**; Letter from EMG (M. Al Sakka) to EGAS (A. Zaki), 17 July 2011, **C-270**.
[298] Letter from EMG (A. Hamdy and M. Al Sakka) to EGPC and EGAS, 21 September 2011, **C-208**.
[299] Letter from EMG (M. Al Sakka and A. Hamdy) to EGAS (H. El Mahdy) and EGPC (H. Dahy), 25 September 2011, **C-279**; NBE Bank Transfer from EMG to EGAS for Invoice 2/I/NG 2011 (29 March 2011), 30 January 2012, **C-310**.
[300] Respondent's Post-Hearing Brief, para. 83.
[301] Respondent's Post-Hearing Brief, para. 94.

- *The matters to be specified in a statement supporting a Monthly Invoice under Art. 9.3.1 differ in material respects from the elements to be taken into account in calculating the Monthly Payment under Art. 9.3.2;*

- *The GSPA accords primacy to the Monthly Payment, in that the Monthly Payment is expressed to be the amount payable by EMG;*

- *[…] circumstances might well arise in which there was nothing to challenge in a Monthly Invoice even though the invoiced amount was greater, perhaps substantially greater, than the Monthly Payment, correctly calculated; in such circumstances, it would be surprising if EMG became bound to pay the greater amount, merely by reason of its failure to launch a challenge to an invoice that was unimpeachable;*

- *It is necessary to bear in mind that the contractual provisions relating to monthly payments underpin the grounds for termination set out at Art. 2.5.2 of Annex 1;*

- *On EGAS' case, the payment obligation at Art. 9.3.2 ceases to apply, being supplanted by an obligation to pay the amount claimed in a Monthly Invoice;*

- *Annex 1 contains no wording, still less clear wording, to show that, in the absence of a challenge an invoiced amount becomes payable;*

- *Similarly, there is no wording to show that the payment obligation at Art. 9.3.2 is supplanted.*

1029. Having regard to these matters, on this question the Tribunal prefers the arguments advanced on behalf of EMG and IEC. It holds that Art. 9.4.7 did not apply to Monthly Invoices issued pursuant to Art. 9.3.1.[302]

326. The ICC tribunal found that Article 9.3.2 alone determines the "amounts due" to EGPC/EGAS on a monthly basis and that Article 9.4.7 did not apply to Monthly Invoices issued pursuant to Article 9.3.1.

327. The ICC tribunal also concluded that it was "*satisfied that, even in a case of suspected or alleged force majeure, the deductions fall to be made, unless and until there is agreement or a determination to the effect that the force majeure provisions apply.*"[303]

328. The ICC Tribunal then continued its analysis as follows:

1064. The Tribunal must now decide whether EGAS' termination was prima facie lawful: had EMG failed to pay the amounts due for four consecutive months? EMG accepts that it owed amounts for the months of January, March and April 2011; but it denies that amounts were due for February 2011 – quite the contrary, EMG submits that for that month it was EGAS who owed EMG a sizeable amount.

1065. Determination of how much was owed for February 2011 requires as a first step to decide whether EMG can be deemed to have recurrently nominated quantities during that month (A.) and, if so, how much gas was deemed nominated (B.) and whether such

[302] ICC Award, paras. 1028 – 1029.
[303] ICC Award, para. 1039.

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deemed nomination is in agreement with the maximum daily nominations admitted by the GSPA (C.). As a third step the Tribunal must establish the amount EGAS owed to EMG for that month as Shortfall Compensation (D.). Finally, the Tribunal will prepare a table with the balance due (E.) […][304]

329. On the basis of its calculation, the ICC tribunal ultimately concluded that EMG did not owe any amount to EGAS under the GSPA for February 2011 (in fact it was EGAS which owed money to EMG)[305], and that consequently, EGAS' termination of the GSPA did not meet the requirement of Article 2.5.2. EGAS' purported termination of the GSPA on 18 April 2012 was thus unlawful.[306]

330. The ICC tribunal also found that EGAS could not invoke the *force majeure* defence. As a result, the deductions for the shortfall compensations it had applied could not be credited to EGPC/EGAS and its finding that EMG did not owe any amount to EGAS under the GSPA for the month of February 2011 was reiterated. The ICC Tribunal summarized its findings in respect of *force majeure* as follows:

1790. Between 5 February 2005 and 9 April 2012 the Pipeline was attacked 13 times, explosives were used to blow up the pipe or its facilities, the gas flow was interrupted while repairs were carried out, and EGAS stopped gas deliveries to EMG (and EMG to IEC). EGAS claims that the attacks on the Pipeline amounted to force majeure events, that the contractual requirements for that force majeure event to become a contractual remedy have been met, and that EGAS' failure to deliver is thereby justified.

1791. The GSPA establishes two requirements for the availability of EGAS' force majeure defence:

- *the requirement that EGAS acted as a RPPO (i.e. as a Reasonable and Prudent Pipeline Operator) and*
- *the so-called Avoidance Requirement: had EGAS acted as a RPPO the attacks could indeed have been mitigated or prevented.*

1792. After a detailed review of the evidence marshalled by the Parties, the Tribunal has come to the conclusion:

- *That EGAS has failed to prove that it acted as a RPPO in preventing and mitigating the effects of the attacks; in particular, it has failed to prove that it implemented security plans, provided physical security to the pipe, deployed technological detection devices, and retained proper security forces; and*
- *That the evidence in the file indicates that the attacks initially against the facilities and afterwards against the pipe could have been avoided (or, at least, significantly mitigated) had EGAS acted as a RPPO and adopted the minimal standard security measures suggested by the counter-experts.*

[304] ICC Award, paras. 1064 – 1065.
[305] ICC Award, para. 1125.
[306] ICC Award, para. 1203.

> *1793. Consequently, the Tribunal dismissed the force majeure defence: EGAS' failure to perform and to deliver the contractually agreed quantities of gas cannot be excused. The Tribunal also dismissed all additional arguments and defences raised by EGAS relating to this issue.*[307]

331. For the reasons which it explained earlier, these findings of the ICC tribunal on contractual matters within its mandate are *res judicata* between the Parties to the present proceedings who are in privity of interest with the Parties to the ICC Award.

332. Nevertheless, independently of this finding, the present Tribunal has also conducted its own evaluation of the evidence presented to it about the same factual matters. On the basis of this evaluation, the Tribunal is satisfied that the findings of fact of the ICC tribunal set out above are correct and it so finds.

333. Accordingly, the Tribunal finds that EGPC/EGAS have wrongfully terminated the GSPA.

(e) Whether the termination of the GSPA is tantamount to an expropriation

334. The Tribunal has determined that EGPC/EGAS have wrongfully terminated the GSPA and that EGPC/EGAS' termination of the GSPA is attributable to the Respondent.[308]

335. The Tribunal needs to determine now whether the wrongful termination of the GSPA constitutes an unlawful expropriation under the Treaty which gives rise to a claim for damages by the Claimants against the Respondent.

336. As is well known, a State may breach a contract without breaching a Treaty and vice versa. In the words of the Annulment Committee in the Vivendi case:

> *[W]hether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract by the proper law of the contract […]*[309]

337. The first question which arises for the Tribunal is whether the Claimants' property interest in the GSPA constitutes an investment under the Treaty.

338. The term "investment" is defined in Article I of the Treaty as follows:

> *"Investment" means every kind of asset owned or controlled and includes but is not limited to:*
>
> *(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;*

[307] ICC Award, paras. 1790-1793. Internal citations omitted.
[308] See *supra*, paras 142-146.
[309] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 (**RLA-136**), ¶¶ 95-96 (emphasis added).

> *(ii) a company or shares, stock, or other interests in a company or interests in the assets thereof;*
>
> *(iii) a claim to money or a claim to performance having economic value, and associated with an investment;*
>
> *(iv) valid intellectual and industrial rights property, including, but not limited to rights with respect to copyrights and related patents, trade marks and trade names, industrial designs, trade secrets and know-how, and goodwill.*
>
> *(v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products.*
>
> *(vi) <u>any right conferred by</u> law or <u>contract</u>, but not limited to rights within the confines of law to search for or utilize natural resources, and rights to manufacture, use and sell products;*
>
> *(vii) returns which are reinvested.*[310]

339. Clearly, the Claimants' rights conferred by the GSPA constitute an investment which is protected under the Treaty. This does not appear to be contested by the Respondent.

340. Did the Respondent, by wrongfully terminating the GSPA, expropriate the Claimants' investment?

341. The Tribunal recalls that Article III(1) of the US Treaty provides:

> *No investment or any part of an investment of a national or company of either Party shall be expropriated or nationalized by the other Party or by a subdivision thereof – or subjected to any other measure, direct or indirect, if the effect of such other measures, or a series of such measures, would be tantamount to expropriation or nationalization (all expropriations, all nationalizations and all such other measures hereinafter referred to as "expropriation") – unless the expropriation*
>
> *(a) Is done for a public purpose;*
> *(b) Is accomplished under due process of law;*
> *(c) Is not discriminatory;*
> *(d) Is accompanied by prompt and adequate compensation, freely realizable; and*
> *(e) Does not violate any specific contractual engagement.*
>
> *[…]*

342. It is clear to the Tribunal that the Respondent has breached all the conditions set out in this Article III(1) of the Treaty and the expropriation is thus unlawful.

343. The Claimants also submit that the Respondent's termination of the GSPA was a disproportionate act by Egypt that neutralized their investment and is thus tantamount to an

[310] Tribunal's emphasis.

indirect expropriation.[311] They write that, although, as the Respondent avers, they do retain control of their shares in EMG, which continues to own the pipeline and has the right to recover damages for breach of contract, their investment "has come to an end" [312] and they have never been compensated for that *de facto* expropriation.[313]

344. The Tribunal agrees with the Claimants that the termination of the GSPA was a disproportionate act. As already determined, the termination was wrongful and the GSPA was terminated for the non-payment of US$37 million allegedly due[314] – a very relatively small amount having regard to the potential economic benefits to Egypt and EMG's investors (which include EGPC) which amount to billions of dollars. In addition, EGPC/EGAS terminated the GSPA at a time when many in Egypt voiced strong opposition to the supply of gas to Israel[315].

345. It is clear to the Tribunal that the termination of the GSPA destroyed the Claimants' investment activity.

346. It is well settled that the "irreparable cessation" of an investment activity caused by the disproportionate act of a State is tantamount to an expropriation.[316]

347. Accordingly, the Tribunal finds that the Claimants' property interest in the GSPA has been unlawfully expropriated by the Respondent.

348. Having found that the wrongful termination of the GSPA by the Respondent is tantamount to an expropriation, the Tribunal need not determine whether the termination constitutes a breach of the FET standard or the umbrella clause[317].

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[311] Claimants' Reply, para. 495.
[312] Claimants' Reply, para. 498.
[313] Claimants' Reply, para. 502.
[314] Counter-Memorial, para. 575.
[315] See People's Assembly 2012, First ordinary Session, Minutes of the Thirty-Fourth Meeting on 12 March 2012, Official Journal, No. 34, 8 May 2012, **C-217**.
[316] See *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana* (UNCITRAL) Award on Jurisdiction and Liability, 27 October 1989, **CLA-79**, pp. 207-210 (finding that failure to award a construction permit to a local-operating entity in contravention of the investor's justified reliance on host State representations constituted a constructive expropriation because it resulted in the "irreparable cessation" of investment activity). See also *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1) Award, 30 August 2000, **CLA-43**, paras 107-108; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, **CLA-47**, paras. 7.5.26-7.5.28, 7.5.33.
[317] In respect of the umbrella clause, the Tribunal recalls para. 256 of its Decision on Jurisdiction where it concluded that:

> *256. As to the umbrella clause, the Tribunal notes that there is no umbrella clause in the US Treaty and that it is invoked by the Claimants as having been introduced on the basis of the MFN clause in the Treaty. For purposes of its present decision on jurisdiction, the Tribunal need not determine today whether it has jurisdiction over such a clause. In due course, the question may become otiose.*

This question has indeed become otiose.

VII. HEADS OF LOSS

349. The Tribunal recalls that the Claimants modified their claim for damages after the Decision on Jurisdiction and Ampal's election. They now claim US$635 million detailed as follows[318]:

Summary of aggregate losses now claimed in the ICSID arbitration, including interest and value leakage (US$million) and as adjusted to remove David Fischer's claim and reduce Ampal's claim in accordance with its election

Claimants	Impact of Tax Exemption Revocation (until 2025)	Impact of Tax Exemption Revocation (beyond 2025)	Impact of the First Amend-ment	Impact of the Delivery Failures	Total Losses (excl. Interest)	Interest to 11 April 2014	Total losses (incl. interest)
EGI Fund	29.4	6.2	71.7	69.2	176.5	33.3	209.7
EGI Series	0.0	0.0	78.2	75.5	153.7	25.0	178.7
BSS	4.9	1.0	13.0	12.6	31.6	5.9	37.5
Ampal	48.5	10.3	129.3	126.1	314.2	58.6	372.8
Total	**82.8**	**17.5**	**220.6**	**214.2**	**535.1**	**99.9**	**635.0**

350. In summary, the Tribunal, in the present Decision, has concluded that:

(a) the Claimants' property interest in the tax license was unlawfully expropriated by the Respondent by the enactment of Law 114/2008 on 5 May 2008 and that the Claimants should be compensated for this unlawful expropriation up until the year 2025 (and not beyond);

(b) the Claimants were not coerced into signing the First Amendment and are therefore not entitled to any compensation in relation to this head of loss;

(c) the Claimants have not succeeded in their claim of losses attriutable to delivery failures between July 2009 and February 2011;

(d) by failing to protect the Trans-Sinai pipeline, the Respondent breached the standard of full protection and security under the Treaty and the Claimants should be compensated for this breach as of attack no. 5 (12 July 2011); and

(e) the Claimants' property interest in its shares in EMG was unlawfully expropriated by the Respondent by the wrongful termination of the GSPA on 9 May 2012 and the Claimants should be compensated for this breach.

[318] See Annex B to the Claimants' letter of 28 June 2016.

351. The Tribunal must now determine the quantum of the damages to which the Claimants are entitled as a result of the breaches of the Treaty by the Respondent which it has found in the present Decision.

352. Essentially, the Tribunal's task in the quantum phase of the present arbitration is to establish the fair market value (as opposed to ownership value)[319] of the Claimants' shareholdings in EMG.

353. In a separate procedural order to be issued by 24 February 2017, the Tribunal will issue directions to the Parties' experts to assist the Tribunal in the determination of the Claimants' damages based on specific parameters.

VIII. DECISION

354. Having carefully considered the parties' arguments in their written pleadings and oral submissions, and having deliberated, for the reasons stated above, the Arbitral Tribunal unanimously decides as follows:

(a) To the extent relevant to the claims before the Tribunal, EGPC/EGAS's acts are attributable to the Respondent;

(b) The Respondent breached Article III(1) of the Treaty by expropriating the Claimants' property interest in EMG's tax license on 5 May 2008;

(c) The Respondent breached Article II(4) of the Treaty by failing to protect the Claimants' investment as of 12 July 2011;

(d) The Respondent breached Article III(1) of the Treaty by expropriating the Claimants' investment in EMG on 9 May 2012;

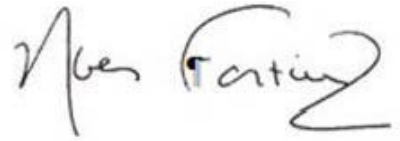
(e) Dismisses the Parties' other claims in respect of liability; and

(f) Reserves its decision as to quantum and costs.

[319] The Tribunal considers that establishing the fair market value of the Claimants' shareholding in EMG is consistent with the compensation framework established by the Treaty under which the Claimants are not entitled to compensation that exceeds the "fair market value" of their investment.

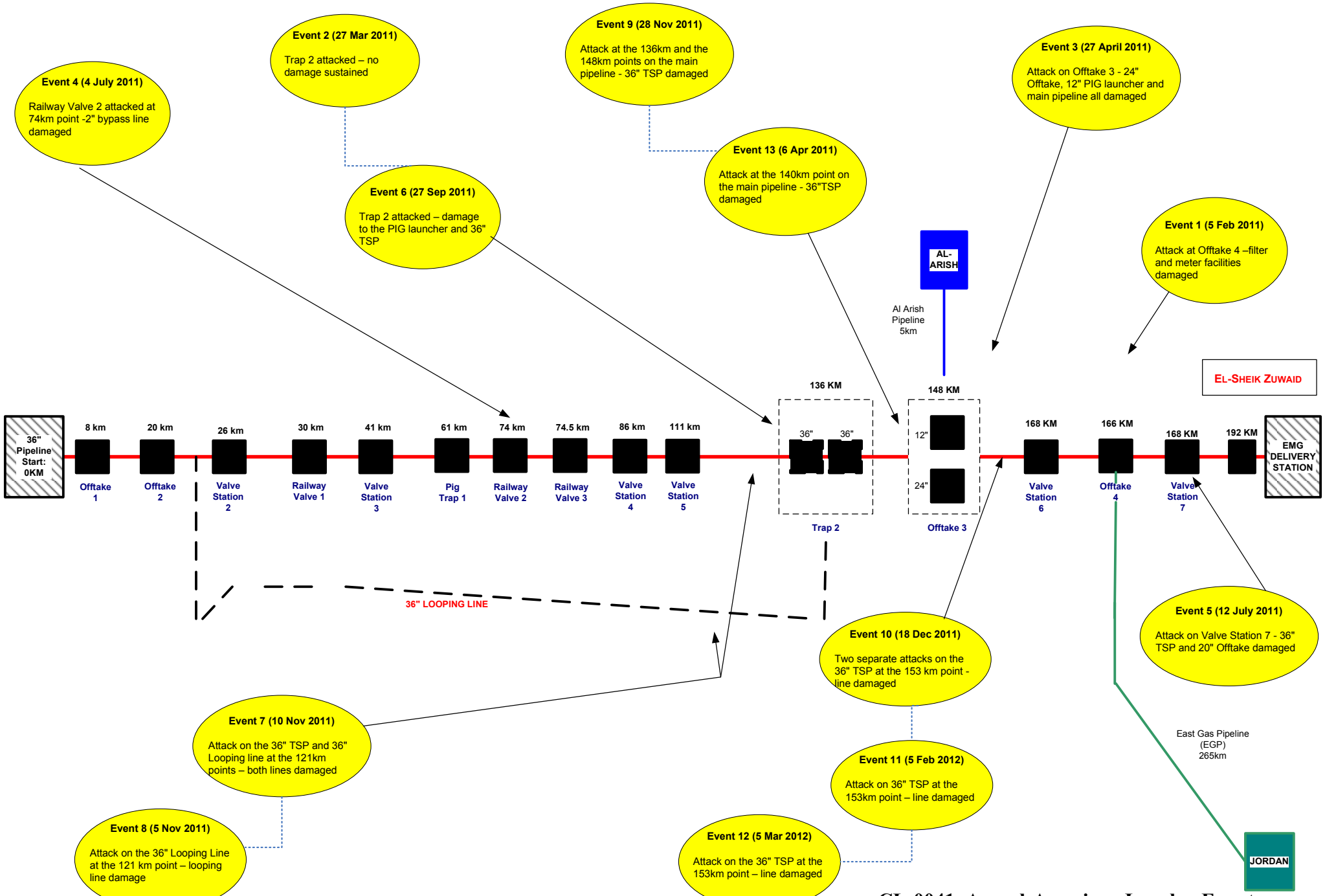
_____
Professor Campbell McLachlan, QC
Arbitrator

_____
Professor Francisco Orrego Vicuña
Arbitrator



_____
The Honorable L. Yves Fortier, QC
President

Annex 1



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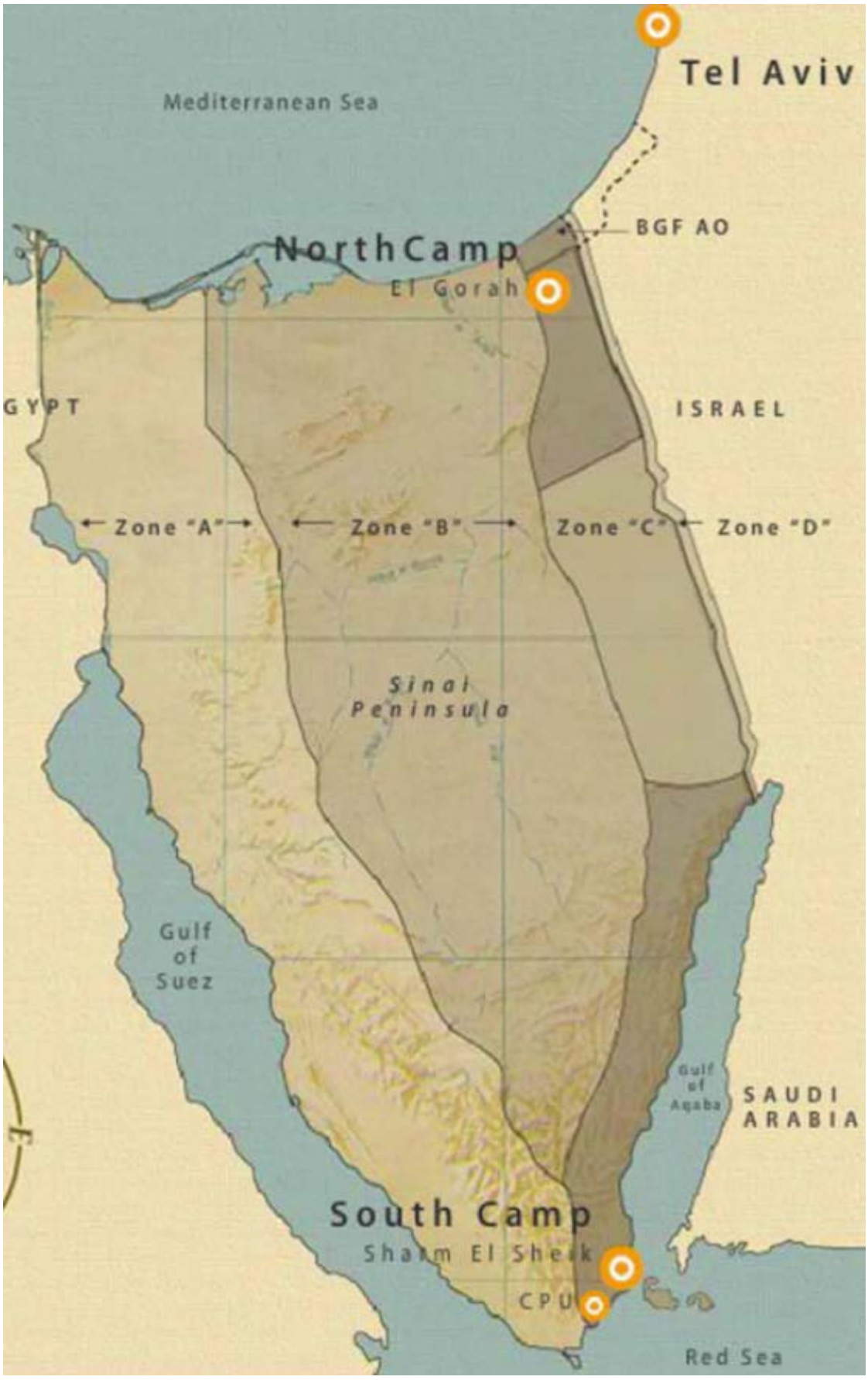
Annex 2

ANNEX 2: MAP OF THE SINAI PENINSULA



(http://mfo.org/Sinai) (**Exhibit R-417**).