

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

IN THE PROCEEDING BETWEEN

**WAGUIH ELIE GEORGE SIAG AND CLORINDA VECCHI
(CLAIMANTS)**

and

**THE ARAB REPUBLIC OF EGYPT
(RESPONDENT)**

(ICSID Case No. ARB/05/15)

DECISION ON JURISDICTION

Members of the Tribunal

Prof Michael Pryles, Arbitrator
Prof Francisco Orrego Vicuña, Arbitrator
Mr David A R Williams QC, President

Secretary of the Tribunal

Ms Milanka Kostadinova

Representing the Claimants:

Mr Reginald R Smith
Mr R Doak Bishop
Mr Kenneth R Fleuriet
King & Spalding LLP

Representing the Respondent:

H E Counselor Milad Sidhom Boutros
President of the Egyptian State
Lawsuits Authority
and
Prof Dr A Kamal Aboulmagd
Mr Hazim A Rizkana
Helmy, Hamza & Partners/Baker &
McKenzie, Egypt

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I. **PROCEDURE**

A. **Registration of the Request for Arbitration**

1. On 26 May 2005, Mr Waguih Elie George Siag and Ms Clorinda Vecchi (“Mr Siag” and “Ms Vecchi,” collectively “the Claimants”) filed with the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) a Request for Arbitration (“the Request”) directed against the Arab Republic of Egypt (“Egypt” or “the Respondent”). The Request invoked the ICSID arbitration provision of Article 9 of the Agreement for the Promotion and Protection of Investments between the Republic of Italy and the Arab Republic of Egypt dated 2 March 1989 (the “BIT”).
2. The Centre, on 2 June 2005, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “ICSID Institution Rules”) acknowledged receipt of the request and on the same day transmitted a copy to Egypt and to the Egyptian Embassy in Washington, D.C.
3. Thereafter, Egypt by letter to ICSID dated 29 June 2005 objected to the registration of the Request on the grounds that the dispute was outside the jurisdiction of ICSID. The Claimants responded by letter of 8 July 2005 stating that the objections raised by Egypt were entirely without merit. ICSID received further correspondence on this issue from Egypt dated 1 August 2005 and from the Claimants dated 4 August 2005.
4. The Request was registered by the Centre on 5 August 2005, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“the ICSID Convention”) and on the same day the Acting Secretary-General, in accordance with ICSID Institution Rule 7, notified the parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

B. Constitution of the Arbitral Tribunal and Commencement of the Proceeding

5. Following the registration of the Request by the Centre, the parties agreed on a three-member Tribunal. The parties agreed that each would appoint an arbitrator and that the third arbitrator, who would be the president of the Tribunal, would be appointed by agreement of the two party appointed arbitrators.
6. The Claimants appointed Professor Michael Pryles, a national of Australia, Level 18, 333 Collins Street, Melbourne, Australia and the Respondent appointed Professor Francisco Orrego Vicuña, a national of Chile, Abenida El Golf 40, Piso 6, Santiago, Chile.
7. The two party appointed arbitrators appointed as President of the Tribunal, Mr David A R Williams QC, a national of New Zealand, Bankside Chambers, Level 22, 88 Shortland Street, Auckland, New Zealand.
8. All three arbitrators having accepted their appointments, the Centre by a letter of 10 January 2006 informed the parties of the constitution of the Tribunal, and that the proceeding was deemed to have commenced on that day, pursuant to Rule 6(1) of the ICSID's Rules of Procedure for Arbitration Proceedings ("the ICSID Arbitration Rules"). The parties were further informed that Ms Milanka Kostadinova, Senior Counsel at ICSID, would serve as Secretary of the Tribunal.

C. Written and Oral Procedure

9. In accordance with ICSID Arbitration Rule 13(1), after consulting with the parties and the Centre, the Tribunal scheduled a first session, in Paris for 24 March 2006. By letter of 16 March 2006, the Claimants advised that no agreement between the parties had been reached on the procedural matters identified in the provisional agenda for the first session, which had been sent to them by the Tribunal's Secretary. The Claimants set out their comments on a suggested procedural timetable including how the Respondent's objections to jurisdiction should be dealt with. By letter dated 20 March 2006, the Respondent set forth its agreement that the language of the arbitration should be English and also expressed its views as to an appropriate timetable for the determination of its objections to jurisdiction.

10. At the first session of the Tribunal, held in Paris on 24 March 2006, the procedural issues were discussed and agreed. All the conclusions were reflected in the written minutes of the session, signed by the President and the Secretary of the Tribunal and provided to the parties, as well as all Members of the Tribunal. It was agreed that the Respondent's objections to jurisdiction would be treated as a preliminary question. A schedule for the filing of memorials and for the holding of a hearing on jurisdiction in Paris on 8-9 August 2006 was agreed.
11. It was agreed at the first session that the Claimant would file its Memorial on the Merits in advance to any objections to jurisdiction the Respondent wished to file. Pursuant to the agreed schedule the Claimants filed their Memorial on the Merits on 12 May 2006 along with the Witness Statements of Waguïh Elie George Siag dated 8 May 2006 and Dr Mustafa Abou Zeid Fahmy dated 2 May 2006.
12. The Respondent filed a Memorial on Jurisdiction dated 12 June 2006 along with the Expert Opinion of Dr Hafiza El Haddad and the Joint Expert Opinion of Prof Dr Mohamed El-Said El-Dakkak and Prof Dr Okasha Mohamed Abdel Aal. The Claimants submitted a Counter-Memorial on Jurisdiction dated 12 July 2006 supported by the Expert Opinion of Prof. Fouad A Riad dated 10 July 2006 and the Expert Opinion of Prof W Michael Reisman dated 12 July 2006.
13. This was followed, on 24 July 2006, by a Reply on Jurisdiction from the Respondent and Supplementary Expert Opinion of Dr Hafiza El Haddad dated 24 July 2006. The Claimants then filed a Rejoinder on Jurisdiction dated 4 August 2006 and the Expert Opinion of Prof. Fouad A Riad dated 1 August 2006 and the Expert Opinion of Prof. W Michael Reisman dated 31 July 2006.
14. A hearing on jurisdiction was held in Paris on 8-9 August 2006, during which Mr Reginald R Smith, Mr Kenneth R Fleuriet and Mr R Doak Bishop addressed the Tribunal on behalf of the Claimants and Dr A Kamal Aboulmagd and Mr Hazim A Rizkana addressed the Tribunal on behalf of the Respondent. No witnesses were called for cross-examination. Counsel for both parties presented oral submissions and answered questions from members of the Tribunal.
15. At the hearing, counsel for the Respondent made an application to file additional material after the conclusion of the hearing. After considering oral submissions by both sides the President granted the application on these terms:

So against that background the respondent's application to adduce additional material, specifically to supply copies of all the cases on the Article 10(3) issue referred to by the Professor this morning, along with any further submissions of counsel derived from those cases [...] that application will be admitted, on the basis that it must be supplied within 21 days from today's date.

[...]

The Claimant's will have the right within a further 21 days, to respond to the materials adduced by the respondent, either, at their option, by way of further submissions from counsel or by way of further expert evidence, should they elect to adduce such evidence. They can either do one or the other, or both.¹

16. Pursuant to the permission granted at the hearing on 29 August 2006, Egypt filed its Submission in Relation to the Non-Applicability of Article 10(3) of the Egyptian Nationality Law No. 26 of 1975. On 11 September 2006, the Claimants filed their Reply to Egypt's Post-Hearing Submission. In their Reply submission the Claimants objected that Egypt's post-hearing submission exceeded the permission granted by the Arbitral Tribunal in that it contained submissions that were not derived from the additional cases which counsel for Egypt had sought permission to submit at the hearing. Given its findings set out below the Tribunal does not consider it necessary to rule on this objection.

II. BACKGROUND FACTS

17. According to the Request, in 1989 the Egyptian Ministry of Tourism sold a parcel of property on the Gulf of Aqaba to a company called Siag Touristic Investments and Hotels Management Company ("Siag Touristic"), which is owned principally by the Claimants. Siag Touristic is an Egyptian joint stock company. The purpose of the sale was to permit Siag Touristic to develop a tourist resort on the property. Development commenced on the property. However, in 1996 the property was confiscated by the Egyptian Government. Although the Claimants obtained relief from the Egyptian courts this was ignored by the Egyptian Government.
18. The Claimant seeks a declaration that the Respondent has violated the BIT, international law and Egyptian law, compensation for all damages suffered, costs and an award of compound interest.

¹ Transcript of the Hearing on Jurisdiction [hereinafter Transcript], Day 2, pp. 82-83 (emphasis added).

19. The BIT has the objective of creating favourable conditions for greater economic cooperation between Italy and Egypt, particularly for investments by one Contracting State in the territory of the other. It is recognized that the encouragement and reciprocal protection under international agreements of such investments will be conducive to the stimulation of business initiative and will increase prosperity in both Contracting States. The BIT provides a number of guarantees and protections to investors including: (1) fair and equitable treatment of investments; (2) a prohibition against unreasonable or discriminatory measures; (3) most favoured nation treatment of investments; (4) most favoured nation treatment of activity in connection with investments; (5) full protection; (6) a prohibition against measures that limit the right of ownership, possession, control, or enjoyment of investments; and (7) a prohibition against direct or indirect nationalization or expropriation, or measures having an equivalent effect, except for a public purpose in the national interest and against payment of adequate and fair compensation calculated at market value. Article 9 of the BIT is devoted to dispute resolution and provides, *inter alia*, the right of investors to resort to arbitration pursuant to the ICSID Convention.
20. Egypt ratified the ICSID Convention on 3 May 1972. Italy did so on 29 March 1971.
21. Article 25(1) and 25(2)(a) of the ICSID Convention provides as follows:
 - (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
 - (2) "National of another Contracting State" means:
 - (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute.
22. The texts of certain relevant provisions of the Egyptian Nationality Law and the BIT are as follows:

Egyptian Nationality Law No. 26 of 1975 (“the Nationality Law”)²**Article 1**

Egyptian citizens fall under the following categories:

[...]

Second

Those who were Egyptian citizens as of 22 February 1958 under the provisions of Law No. 391 of 1956 concerned with Egyptian Nationality.

[...]

Article 6

If a foreign husband gains Egyptian nationality, this does not also necessarily entitle his wife to gain Egyptian nationality unless she notifies the Minister of Interior of such wish, provided the marriage does not end before the lapse of two years from the date of such notification unless the husband dies. Nevertheless, before the lapse of a two-year period, the Minister of Interior may decline to grant the wife Egyptian nationality by virtue of a justified decree.

[...]

Article 7

Any foreign woman who marries an Egyptian may not acquire Egyptian nationality unless she notifies the Minister of Interior of such wish and provided the marriage does not end before the lapse of a two-year period from the date of such notification, unless the husband dies. Notwithstanding, before the lapse of such two-year period, the Minister of Interior may decline to grant the wife Egyptian nationality by virtue of a justified decree.

Article 8

If a foreign woman acquires the Egyptian nationality under the provisions of the two previous articles, she will not forfeit it with the termination of marriage, unless she has restored her foreign nationality, or gets married to a foreigner and acquires his nationality by virtue of the law governing that nationality.

[...]

Article 10

An Egyptian may not gain a foreign nationality except after being permitted by virtue of a decree from the Minister of Interior; otherwise such person shall still be considered an Egyptian in every respect and under all circumstances, unless the Cabinet decides to withdraw his nationality under the provision of Article 16 of this Law.

² These English translations are from Respondent’s Memorial on Jurisdiction, Legal Authorities, Exhibit 5.

In the event an Egyptian is permitted to gain a foreign nationality, then this shall lead to the withdrawal of the Egyptian nationality.

However, permission to acquire a foreign nationality may allow the person for whom such permission is given, his wife and minor children to retain the Egyptian nationality, provided he notifies his wish to take advantage of such benefit within a period not exceeding one year from the date of gaining the foreign nationality, and in such case they may retain the Egyptian nationality despite having gained a foreign nationality.³

[...]

Article 16

Egyptian nationality may be withdrawn from anybody by virtue of a justified decree by the Minister of Defense in any of the following cases:

- (i) Gaining foreign nationality in breach of Article 10.

[...]

Article 20

Declarations, notifications, documents and applications stipulated under this Law shall be addressed to the Minister of Interior or whomever he delegates in this regard, and issued on the forms determined by virtue of a decree from the Minister of Interior.

The BIT

Article 1(1)

The term "investment" shall comprise every kind of asset invested before or after the entry into force of this Agreement by a natural or juridical person including the Government of a Contracting State, in the territory and maritime zones of the other Contracting State, in accordance with the laws and the regulations of that State. Without restricting the generality of the foregoing, the term "investment" shall include:

- (b) movable and immovable property as well as any other property rights *in rem* such as mortgages, liens, pledges, usufruct and similar rights;
- (c) shares, stocks and debentures of companies, or other rights or interests in such companies, and government issued securities;
- (d) claims to money, or to any performance having economic value associated with an investment;
- (e) copyrights, trademarks, patents, industrial designs, and other industrial property rights, know-how, trade juridical rights and goodwill;

any right conferred by law or contract, and any licenses and permits pursuant to law, including the right to search for, extract and exploit natural resources."

³ There was a slight difference between the translation submitted by the Respondent in its Memorial on Jurisdiction, paragraph 28 and Legal Authorities, Exhibit 5. It was agreed that these differences were not material. However, it was agreed that the Tribunal should refer to Respondent's Exhibit E5. See Transcript, Day 1, pp. 49-51.

Article 1(3)

The term “natural person” shall mean, with respect to either Contracting State, a natural person holding the nationality of that State in accordance with its laws.

[...]

Article 9

- (1) All kinds of disputes or differences, including disputes over the amount of compensation for expropriation, nationalizations or similar measures, between one Contracting State and an investor of the other Contracting State concerning an investment of that investor in the territory and maritime zones of the former Contracting State shall, if possible, be settled amicably.
- (2) If such dispute or difference cannot be settled according to the provisions of paragraph (1) of this Article within six months from the date of request for settlement, the investor concerned may:
 - a. submit the dispute to the competent court of the Contracting State for decision;
 - b. initiate proceedings for conciliation or arbitration, in accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18th March, 1965 and the Additional Facility Rules thereof. In the event of neither of these procedures being applicable, the arbitration shall take place in accordance with the United Nations Commission on International Trade Law Arbitration Rules of 1976 (UNCITRAL).
- (3) Neither Contracting State shall pursue through diplomatic channels any matter referred to arbitration until the proceedings have terminated and a Contracting State has failed to abide by, or to comply with, the award rendered by the Arbitral Tribunal.

III. THE SUBMISSIONS OF THE PARTIES ON JURISDICTION

23. The Claimants argued in the Request that the Respondent had consented to ICSID arbitration of disputes such as their investment in Siag Touristic by virtue of signing and ratifying the BIT which contains an ICSID arbitration clause (Article 9).

A. The Respondent’s Memorial on Jurisdiction

24. On 12 June 2006, the Respondent filed a Memorial on Jurisdiction. Its principal arguments are summarized in paragraphs 25 to 42 hereafter.
25. The Respondent asserted that the Claimants have failed to satisfy the *ratione personae* and *ratione materiae* requirements under Article 25(1) and (2) of the ICSID Convention. As to Mr Siag, he was born as an Egyptian national on 12

March 1962. When Mr Siag's father died in 1987 the Claimants and the rest of the Siag family took over the family businesses. One of these businesses was Siag Touristic. In 1993 Siag Touristic entered into a Conditional Sale Contract with the Touristic Development Authority to develop a large plot of land in the southern area of Taba. The purpose was to develop a touristic resort. In 1993 another company was formed, Siag Taba.

26. Pursuant to Article 25 of the ICSID Convention it was indisputable that the investor in ICSID proceedings is subject to a positive and negative nationality requirement. It was further submitted that the determination of whether an investor was a national of an ICSID Contracting State and not a national of the host State should be made by reference to the domestic law of the State whose nationality was at issue.

Mr Siag

27. With respect to Mr Siag, it was noted that he based his claim that he lost Egyptian nationality on his subsequent acquisition of Lebanese nationality. The evidence of Lebanese nationality, in the form of copies of relevant parts of his Lebanese passport submitted to the Egyptian Minister of Interior on 19 December 1989 in an application for permission to acquire Lebanese nationality, was inconclusive and did not establish the date of acquisition of such nationality.
28. The Respondent asserted that Mr Siag's interpretation of the Nationality Law was incorrect. Under Article 10, a person who desired to acquire foreign nationality must obtain prior permission to this effect from the Egyptian Minister of Interior. When permission is granted the Minister may also give an applicant the option to maintain his/her Egyptian nationality, by means of a declaration made to this effect within a one-year period following the acquisition of foreign nationality. The Respondent relied on an interpretation of Article 10 which would require no further expression within the one-year period once permission was granted and the foreign nationality was acquired. It was stated that this interpretation was supported by mainstream Egyptian jurisprudence.
29. The Respondent also submitted that from the time of acquiring Lebanese nationality in 1990, Mr Siag was aware of his Egyptian nationality up to the time he revealed his Italian nationality in the context of asserting Egypt's violations of the BIT in October 2004. He was issued with numerous Egyptian nationality

certificates from 1991-1997. Mr Siag had also made a number of declarations concerning his nationality status as an Egyptian for the purposes of the Siag Touristic and Siag Taba companies and the development in Taba. The Respondent referred to the *Champion Trading* case where the ICSID Tribunal stated:

The mere fact that this investment in Egypt by the three individual Claimants was done by using, for whatever reason and purpose, exclusively their Egyptian nationality clearly qualifies them as dual nationals within the meaning of the Convention and thereby based on Article 25(2) (a) excludes them from invoking the Convention.⁴

30. It could be inferred from the application for permission that Mr Siag submitted on 19 December 1989 that he acquired Lebanese nationality through an application of the *jus sanguinis*. This being the case the application for permission could be characterized as an application for recognition and the decree of the Egyptian Minister of Interior more in the nature of an official recognition of Lebanese nationality.
31. Article 10 deals with instances of the acquisition of a foreign nationality only after permission is granted from the Egyptian Minister of Interior. In those circumstances there were two alternatives: (1) permission granted while maintaining Egyptian nationality and (2) permission granted without the right to maintain Egyptian nationality, in which case the person may express his/her desire to maintain Egyptian nationality within the one-year period.
32. The Respondent concluded that since the third paragraph of Article 10 did not apply to Mr Siag, pursuant to the first part of Article 10 of the Nationality Law he was to be treated as Egyptian in all respects and under all circumstances. He could only lose his Egyptian nationality through a decree from the Egyptian Cabinet under Article 16 of the Nationality Law.

Ms Vecchi

33. Ms Vecchi was married to Mr Siag's father, Mr Elie Siag. She applied for Egyptian nationality on 20 April 1955 pursuant to Egyptian Nationality Law 160 of 1950 and on the expiration of two years acquired Egyptian nationality under the

⁴ Respondent's Memorial on Jurisdiction, para. 57, citing *Champion Trading Company et. al. v Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003, reproduced in 19 ICSID Rev.—FILJ 275, 289 (2004).

Nationality Law No. 391 of 1956 on 19 April 1957. She lost her Italian nationality at this time.

34. Relying on Article 8 of the Nationality Law the Claimants asserted that Ms Vecchi reacquired her Italian nationality in 1993. Even after this date several documents, such as her passport and nationality certificates, evidenced Ms Vecchi's continued Egyptian nationality.
35. The Respondent asserted that the Claimants interpretation of Article 8 was flawed. The scope of Article 8 was limited to foreign women who acquired Egyptian nationality "pursuant to the provisions of the two previous articles." It was submitted that Ms Vecchi was not a "foreign woman" pursuant to Article 7 of the Nationality Law since she came within the definition of an Egyptian national under Article 1 (Second) of the Nationality Law. Since she was an Egyptian national the only way Ms Vecchi could lose her Egyptian nationality was by virtue of a decree of Cabinet pursuant to Article 16.
36. It may be noted that the Respondent based its *ratione personae* objections to jurisdiction solely on its assertions as to the true construction of the Nationality Law.

Existence of an "Investment"

37. With respect to the requirement of an investment under Article 25(1) of the ICSID Convention, the Respondent submitted that there must be expenditure and that such expenditure must have a foreign origin. As to expenditure, the Respondent asserted that the Claimants had not demonstrated that they made personal expenditure. The expenditure cited by the Claimants in their Memorial was in fact corporate expenditure by the companies, Siag Touristic and Siag Taba.
38. As to the foreign element, the Respondent relied on the Preamble to the ICSID Convention which states that the Contracting States should "[consider] the need for international cooperation for economic development, and the role of private international investment therein." Taking into account the object and purpose of the ICSID Convention the Respondent concluded that the origin of capital was

relevant, decisive and crucial. The Respondent pointed to two ICSID decisions said to identify an injection of funds principle.⁵

39. Turning to the specific terms of the BIT the Respondent referred to the preamble, which states:

The Government of the Republic of Italy and [Egypt]

[...]

Recogniz[e] that the encouragement and reciprocal protection under international agreement of such investment will be conducive to the stimulation of business initiative and will increase prosperity in both Contracting States [...].

40. Based on this passage the Respondent submitted that the origin of capital requirement was further narrowed down so as to require an Italian origin. This was said to be further supported by Article 6 of the BIT which speaks of “repatriation.” The Italian origin of investment had not been established.
41. In the event the Claimants were able to satisfy the nationality requirement of the ICSID Convention the Respondent asserted that they should be estopped from bringing their claim due to the concealment of their Italian nationalities. Such concealment had resulted in the possibility that the Claimants would become unexpected beneficiaries of the protections afforded in the BIT.
42. For all the reasons set forth in its Memorial on Jurisdiction, the Respondent requested a declaration that this dispute did not fall within the jurisdiction of the Centre and that the Claimants’ claims were inadmissible. The Respondent also requested the Tribunal to order the Claimants to compensate it for all the costs and expenses of this proceeding including legal fees.

B. The Claimants’ Counter-Memorial on Jurisdiction

43. The Claimants filed a Counter-Memorial on Jurisdiction on 12 July 2006, which contended that the Claimants had satisfied the jurisdictional requirements of Article 25 of the ICSID Convention and Article 9 of the BIT. The Claimants’ principal arguments are summarized in paragraphs 44 to 68 below.

⁵ *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003; *Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004.

44. The Claimants submitted that, based on the Respondent's Memorial, some aspects of jurisdiction were agreed. These were the Italian nationality of the Claimants, Mr Siag's Lebanese nationality, the existence of a "legal dispute" and the parties' consent to ICSID jurisdiction.
45. As to the negative nationality requirement under Article 25(2) of the ICSID Convention the Claimants asserted that on the date the parties consented to arbitration and the date the Request was registered they were not Egyptian nationals. By operation of the Nationality Law, Mr Siag lost Egyptian nationality on 14 June 1990 and Ms Vecchi lost Egyptian nationality on 14 September 1993.
46. Claimants agreed with the Respondent that the determination of a person's nationality was controlled by the laws of the State whose nationality was in question. Reference was made to Article 1 of the 1930 Hague Convention, which provides:
- It is for each State to determine under its own law who are its nationals.
47. Article 2 provides:
- Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.
48. As to the practice of ICSID Tribunals, the Claimants noted that this principle had also been observed by ICSID Tribunals.⁶ On the question of the various documents of the Claimants evidencing Egyptian nationality which had been referred to by the Respondent, the Claimants submitted that such documents were *prima facie* evidence of nationality only and could not supersede the application of the relevant nationality law. Analysis of the applicable nationality law should be made by the international tribunal. The Tribunal should not just blithely apply the conclusions reached by the authorities in the State in question when issuing documents evidencing nationality.
49. The Respondent's reference to the *Champion Trading* case was said to have been taken out of context and did not support the conclusion that in this case the Claimants held Egyptian nationality at the relevant times for the purposes of the ICSID Convention. In the *Champion Trading* case the Tribunal applied the Egyptian nationality law and based on that application found that the three

⁶ The example given was *Hussein Nuaman Soufraki v The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004 [hereinafter *Soufraki*].

brothers held Egyptian nationality and so did not satisfy the negative nationality requirement. It was irrelevant how the children were characterized when making the investment. That case emphasized the primacy of an application of the domestic law of the State in question to determine nationality. The Claimants noted that the *Champion Trading* Tribunal had held that there was no room in an application of Article 25 of the ICSID Convention for a “dominant” or “effective” nationality analysis. Under Egyptian law the provisions of the nationality laws are the exclusive determinant of Egyptian nationality. If a person failed to satisfy those provisions, Egyptian nationality was lost *ipso jure*.

50. Any instruments or acts in contravention of the nationality laws could have no effect. The Claimants referred to the expert opinion of Professor F Riad, a member of the Law Faculty at Cairo University. Professor Riad stated:

It should be emphasized that all provisions relating to the Laws of Nationality are *per se* a matter of public order, since they relate to one of the fundamental Laws of the State. The Egyptian Constitution of 1971 specifies in its article (6) that “The Egyptian nationality is regulated by the law.” Hence, any decision or regulation or instrument inferior to legislation should not be taken into consideration with regard to nationality except as provided by the said Law. Any such inferior instrument or act is null and void and has no legal weight or value if it contradicts the provisions of the Nationality Law.⁷

51. This conclusion was said to be supported by the decisions of Egypt’s courts. One decision of the Administrative Court stated that “[w]hereas the establishment of the nationality of a person is determined exclusively by the provisions of the legislation regulating the nationality, all data in documents, even official, have no legal value in proving the Egyptian nationality.”⁸ More recently the Supreme Administrative Court, in a case involving the application of Article 10 of the Nationality Law,⁹ held that three separate confirmations of Egyptian nationality were irrelevant because they violated the terms of the Nationality Law. Similarly, the Egyptian courts had held that the acquisition or use of an Egyptian passport is only *prima facie* evidence of Egyptian nationality, which can only be determined by operation of the law.¹⁰

⁷ Expert Opinion of Prof Dr Riad, 10 July 2006, para. 38.

⁸ Claimants’ Counter-Memorial on Jurisdiction, para. 21 (referring to Prof Dr Riad’s Expert Opinion, who cites a Decision of the Supreme Administrative Court of 28 December 1965).

⁹ Supreme Administrative Court, Decision of 10 December 2000, Nos. 1946 and 1947 of Judicial Year 47 [hereinafter the *Saleh* case].

¹⁰ Claimants’ Counter-Memorial on Jurisdiction, paras. 24-28.

Mr Siag

52. It was contended that Mr Siag had lost his Egyptian nationality by operation of the Nationality Law. Pursuant to Article 10, Mr Siag was granted permission to acquire Lebanese nationality by decree of the Egyptian Minister of Interior on 5 March 1990. For the purposes of Article 10 he acquired Lebanese nationality on 14 June 1990 and lost Egyptian nationality on the same date. Mr Siag could have sought to retain his Egyptian nationality by making a declaration to that effect within one year. However, he did not do so.
53. The Claimants rejected the Respondent's assertion that mainstream Egyptian jurisprudence and the opinion of legal scholars does not favour a literal reading of the declaration requirement in the third paragraph of Article 10. Indeed, the opinion of Professor Riad was that such an interpretation would render the third paragraph of Article 10 meaningless.
54. The Claimants also referred to the case of Mr Saleh in the Supreme Administrative Court. Mr Saleh's candidacy for parliament was contested on the basis that he was a dual-national of Germany and Egypt. The Supreme Administrative Court held:

Further, the Egyptian nationality automatically terminates when an Egyptian obtains a foreign nationality with the requisite permission. However, the permission to obtain a foreign nationality may also grant an Egyptian national and his wife and children the option to maintain their Egyptian nationality, if he declares his desire to benefit from this exception within a period not to exceed one year from the date of acquiring foreign nationality. In the latter case, the husband and wife and children continue to be Egyptian nationals even though they obtained a foreign nationality.

It is understood from the previous passage that the legislator has resolved that an Egyptian national who is permitted to obtain a foreign nationality and who does so loses his Egyptian citizenship. However, the legislator also resolved that the person has the right to request that he maintain his Egyptian citizenship, if the right is exercised within the specified period immediately after obtaining the foreign nationality. That period may not exceed one year from the date on which the foreign nationality is acquired. A newly naturalized person that successfully declares this intention will remain an Egyptian national. However, the legislator placed a key condition on the newly naturalized person's ability to successfully retain Egyptian nationality. In order to possess the right to remain an Egyptian national, the Minister of Interior's decree authorizing the foreign citizenship must also expressly authorize maintaining the Egyptian nationality. In addition, section 2 of article 18 states, "an Egyptian nationality that is lost by foreign naturalization may be reacquired by a decree from the Minister of Interior to that effect." Accordingly, a person that loses the Egyptian nationality by acquiring another (with permission) does not automatically regain his right to maintain his Egyptian nationality by simply submitting an application to that effect. To the contrary, the person can only regain that right by a decree to that effect issued by the Minister of Interior, which is the entity entrusted by the legislature to reinstate the Egyptian nationality when the Egyptian nationality is either: lost because the granted permission approving the acquisition of the foreign

nationality did not also approve retaining the Egyptian nationality; or lost because the granted permission did in fact expressly approve retaining the Egyptian nationality but that right was not exercised within the requisite period set by the law.¹¹

55. As to opinions of legal scholars, the Claimants submitted that the requirement for a declaration within one year under the third paragraph of Article 10 was recognized by Professor Riad and also by Professor A Algedaoui.¹² In the Claimants view, the opinion of Professor A Salama, referred to by the Respondent's experts, Dr M El-Dakkak,¹³ and Prof Dr O Abdel Aal,¹⁴ to support the view that the declaration requirement is ignored, had been misquoted. In fact, Professor Salama acknowledged the declaration requirement but supported a change to this requirement. The Respondent's experts, Drs Abdel Aal and El Haddad, had also recently released a book¹⁵ where they had acknowledged that an explicit expression of the wish to retain Egyptian nationality must be made within a one-year period or the right to retain Egyptian nationality would be lost.
56. As to the Respondent's contention that Article 10 of the Nationality Law did not apply to Mr Siag because he acquired Lebanese nationality prior to submitting his application for permission to the Egyptian Minister of Interior the Respondent was attempting to utilize part of Article 10 while denying the application of the rest of the article.
57. The Claimants submitted that the time when Mr Siag acquired Lebanese nationality as a matter of Lebanese law was irrelevant to the questions of Egyptian nationality raised in this arbitration. Egyptian law was competent only to establish the acquisition or loss of Egyptian nationality and the circumstances in which Egypt will recognize a foreign nationality. The reference in the Nationality Law to the acquisition of a foreign nationality meant acquisition in the eyes of Egyptian law. As explained by Professor Riad:

If Article 10 were to be understood as inapplicable to any Egyptian who acquires a foreign nationality under foreign law prior to requesting Egypt's permission, no Egyptian who acquired a foreign nationality prior to 1975 (when Article 10 was enacted) would ever be able to have that nationality recognized by Egypt, even if such a person subsequently went through the procedure of Article 10. It would also seem that no Egyptian born with a second nationality could ever benefit from the

¹¹ The *Saleh* case, *supra* note 9, pp. 7-8. The Claimants also refer to similar statements of the Supreme Administrative Court in Decision of 21 December 2002, No. 6083 of Judicial Year 47, pp. 3-5.

¹² Head of the Private International Law Department at Ain Shams University.

¹³ Professor of International General Law, Alexandria University.

¹⁴ Professor of Private International Law, Alexandria University.

¹⁵ Drs Hisham Sadek, Abdel Aal and El Haddad, *The Nationality and the Status of Foreigners – Comparative Study* (2006), pp. 4-6.

options provided by Article 10. Article 10 was not intended to discriminate among Egyptians, with random timing creating one group that could have another nationality recognized and another group that would never be able to do so. Such a situation would clearly constitute a violation of one of the main principles of the Egyptian Constitution, according to which all Egyptians are equal under the law.¹⁶

58. Article 10 of the Nationality Law required a person to seek permission from the Egyptian Minister of Interior before a foreign nationality could be acquired in the eyes of Egyptian law. Once permission was granted, the date of acquisition was the first date on which there was a “formal expression” of Lebanese nationality after the issuance of the Egyptian Minister of Interior’s authorization. This date was 14 June 1990 when Mr Siag was issued a Lebanese passport.
59. Even if the date of acquisition of foreign nationality referred to the date upon which Mr Siag acquired Lebanese nationality in the eyes of Lebanese law, pursuant to Article 10 the Egyptian Minister of Interior had considered Mr Siag’s application and granted Mr Siag permission. Once that occurred Mr Siag was entitled to go through the Article 10 procedure. The opinion of Dr Abdel Aad and Dr El Haddad,¹⁷ in their 2006 book was that a person who acquires a foreign nationality was entitled to subsequently seek the permission of the Egyptian Minister of Interior’s under Article 10. Their conclusion was that the date of acquisition in this case was the date on which permission had been granted by the Egyptian Minister of Interior.¹⁸ The only difference between the opinions of the experts therefore was the date of loss of nationality. The Respondent’s experts maintained that it was lost on 5 March 1990 the date permission was granted by the Egyptian Minister of Interior. Irrespective of the date chosen, Mr Siag had not made the required declaration within the one year period.

Ms Vecchi

60. In the case of Ms Vecchi the Claimants contended that she *ipso jure* lost her Egyptian nationality on 14 September 1993 pursuant to Article 8 of the Nationality Law. Article 8 of the Nationality Law referred to the factual situations described in Articles 6 and 7 notwithstanding that, as in the case of Ms Vecchi, Egyptian nationality was acquired under a previous nationality law. This reading

¹⁶ Expert Opinion of Prof Dr Riad of 10 July 2006, para. 33.

¹⁷ Professor of Private International Law and International Commercial Arbitration at Alexandria University.

¹⁸ The Claimants noted that this conclusion was the opposite to the statement made on page 5 in Professor El Haddad’s Expert Opinion. See Claimants’ Counter-Memorial on Jurisdiction, para. 67-68.

of Article 8 was reinforced by the fact that the wording in Article 7 was identical to the provisions in previous nationality laws.

61. As to the argument that Ms Vecchi was not a “foreign woman” due to Article 1 of the Nationality Law, the Claimants replied that Article 1 had nothing to do with the situation of Ms Vecchi. As explained by Professor Riad, Article 1 established who were “original” Egyptians prior to the brief union of Egypt and Syria as the United Arab Republic between 1958 and 1961:

Marriage to an Egyptian national was the sole cause of Ms Vecchi’s acquisition of Egyptian nationality. That fact is not altered in any way by the provisions of Article 1 of the Law No. 26 of 1975. As this law was the first nationality law to be enacted after the separation of Egypt and Syria from their brief union as the United Arab Republic, Article 1 endeavored to draw a global distinction between those who were Egyptian before that union and those who were not. In other words, this article has nothing to do with the grounds on which the nationality of each Egyptian is established. Hence, it has no relevance to the way Ms Vecchi acquired her Egyptian nationality and does not mean that she falls outside of Article 8 of Law No. 26, dealing with foreign women who acquired the Egyptian nationality by marriage to an Egyptian.¹⁹

Existence of an “Investment”

62. The Claimants contended that they had established jurisdiction *ratione materiae*. The Respondent’s contentions that the Claimants had not proven personal expenditure and that there was an origin of capital requirement were groundless.
63. The Claimants contested the Respondent’s assertion that they did not make investments in their personal capacities. In any event, it was submitted that it was irrelevant that the Claimants may have invested through the corporate vehicles, Siag Touristic and Siag Taba.
64. The definition of “investment” under the BIT covered “every kind of asset invested [...] by a natural or juridical person [...] in the territory or maritime zones of the other Contracting State.” The BIT included a non-exhaustive list of examples of “investments.” The Claimants submitted that they had made “investments” for the purposes of the BIT by acquiring shares in Siag Touristic and Siag Taba and by acquiring “claims to money” from Siag Touristic and Siag Taba related to the land purchased in Taba and the development of the touristic resort. Through their shareholdings in these companies the Claimants invested in “movable and immovable property” and acquired other “property rights *in rem*” and “rights conferred by law or contract.”

¹⁹ Expert Opinion of Prof Dr Riad of 10 July 2006, para. 51.

65. The Claimants submitted that the Respondent's contention that the ICSID Convention and the BIT contained and express or implied "origin of capital" requirement found no support in the ICSID Convention, the BIT or the object purpose of these two instruments. Article 25 of the ICSID Convention intentionally did not limit the term "investment." It was to be given "broad reach."²⁰ In the BIT "investment" was given a broad definition and the types of investment given as examples were also defined broadly. The Claimants also contended that the Respondent's reliance on repatriation of returns was misplaced and did not support an "Italian capital" requirement. On the issue of the object and purpose of the ICSID Convention the Claimants asserted that imposing an origin of capital requirement would have a chilling effect and discourage foreign investment.
66. Other ICSID Tribunals had categorically rejected the "origin of capital" argument. The Claimants referred to the case of *Tokios Tokeles v. Ukraine*.²¹ The Tribunal in *Tokios Tokeles* rejected the argument that an origin of capital requirement ought to be implied into the BIT and the ICSID Convention.
67. With respect to the Respondent's estoppel argument, the Claimants submitted that this was not a jurisdictional issue under Article 25 of the ICSID Convention or Article 9 of the BIT but was related to the merits. In any event the suggestion that the Claimants had "concealed" their Italian nationality was rejected. The Claimants also submitted that being held to the standards of investment protection in the BIT was not "detriment" for the purposes of an estoppel claim.
68. In their request for relief the Claimants asked the Tribunal to make a decision which would:
- (i) Dismiss Egypt's objections to jurisdiction in their entirety.
 - (ii) Award the Claimants all costs of the jurisdictional phase of the proceedings plus interest.
 - (iii) Order the continuance of the merits phase of the proceeding.

²⁰ *Fedax N.V. v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997 [hereinafter *Fedax*], para. 24.

²¹ *Tokios Tokeles v Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, 20 ICSID Rev.—FILJ 205 (2005) [hereinafter *Tokios Tokeles*].

C. The Respondent's Reply on Jurisdiction

69. On 24 July 2006 the Respondent filed a Reply on Jurisdiction. Its principal arguments are summarized below in paragraphs 70 to 88.

70. After making some preliminary observations the Respondent stated that it did not intend to deviate from the objections it had initially raised and presented in its Memorial on Jurisdiction. It said:

In sum, Egypt's objections on jurisdiction rests on the following:

- (i) lack of jurisdiction *rationae personae* due to the Egyptian nationality of claimants [...] and
- (ii) lack of jurisdiction *rationae materiae* due to the lack of investment in the specific meaning of the Convention and the BIT [...].²²

71. In addition the Respondent further argued that the present dispute should not be admissible before the Centre and Claimants should, without hesitation, be estopped from seeking relief through the Centre.

72. The Respondents also commented upon the observations raised in Professor Reisman's opinion²³ as to the *bona fide* Italian nationality of Claimants. Professor Reisman's view was that both the Claimants had lost their Egyptian nationality by operation of Egyptian law and acquired Italian nationality. Therefore, any historic and continuing links they had to Egypt were irrelevant. Likewise, since they were not dual nationals a search for dominant or effective nationality was inapposite. Additionally, there was no suggestion that the Claimants' Italian nationality had been acquired fraudulently or as a mere expedient to bring these claims before ICSID.

73. In response, the Respondent stated that it did not deal with the Italian nationality of the Claimants because of their established Egyptian nationality and links to Egypt. The Respondent noted its view that neither Mr Siag nor Ms Vecchi had the type of connections with Italy that would permit a finding of effective nationality under international law. Egypt was not required under international

²² Respondent's Reply on Jurisdiction, para. 5.

²³ *Id.* para. 7, (referring to para. 26 of the Expert Opinion of Prof W Michael Reisman of 12 July 2006).

law to arbitrate an investment with persons who had non-existent, spurious or insubstantial links to the State of which they might formally be nationals.

74. Dealing first with lack of jurisdiction *rationae personae*, resulting from the Egyptian nationality of the Claimants, the Respondent first observed that the Claimants' alleged loss of Egyptian nationality had been used as a *deus ex machina* to transform the domestic claims which Claimants had been pursuing into international claims. Formality over equity was the reality and substance of what the Claimants were now presenting to the Tribunal.
75. The Respondent suggested that the Claimants had opened their Counter Memorial with the statement that "[the Nationality Law] means exactly what it says and may be applied in [a] straightforward fashion to the facts of this case." However, this approach was inconsistent with their contention that the timing of the acquisition of Lebanese nationality prior to submitting the application for permission was immaterial.

Mr Siag

76. The Respondent analyzed Mr Siag's nationality based on the assumption that Mr Siag acquired his Lebanese nationality at birth. It was noted that when he applied to the Egyptian Minister of Interior, Mr Siag submitted a nationality certificate issued by the Lebanese Minister of Interior stating that "[Mr Siag] has been a Lebanese national for over 10 years." The Respondent disagreed with the Claimants' interpretation of Article 10 of the Nationality Law whereby it was said to apply only to recognition of nationality in the eyes of Egyptian law. Such an interpretation would mean that the one-year declaration period under the third paragraph was triggered either on the existence of a "formal expression" of Lebanese nationality or, alternatively, on the date the Egyptian Minister of Interior granted permission under Article 10.
77. The Respondent emphasized that Article 10 dealt solely with those instances where a foreign nationality was acquired through naturalization following the grant of permission by the Egyptian Minister of Interior. As a Lebanese national by birth, the only part of Article 10 relevant to Mr Siag was the first paragraph of Article 10. Under this part of Article 10, Mr Siag must be considered as Egyptian in every respect and under all circumstances. The Respondent submitted that the writing of Dr Salama supported this view:

The provisions of Article 10 [...] stipulate that the renouncement of Egyptian nationality is conditional upon two requirements:

First Condition: an individual must obtain a prior permission from the administrative authority. This condition is explicitly stipulated under the provision of Article 10, which provides that an Egyptian may not become naturalized “except after obtaining a permission to do so from the Minister of Interior” as stipulated in paragraph 2 of this Article that renouncement of the Egyptian nationality shall not occur “so long as such person is permitted [...]” to become naturalized and provided he has actually done so.

[...]

The provision of Article 10 [...] stipulates that such permission must be obtained before naturalization and not after. Therefore, if such permission is issued thereafter, it would merely serve to confirm the reality, together with protecting the individual from being penalized by being divested of his Egyptian nationality as stipulated under Article 16(1).²⁴

78. The Claimant also asserted that Professor Riad’s opinion was contradicted by one of his scholarly books where he made a distinction between acquisition of nationality by naturalization and by other means.

Ms Vecchi

79. As to Ms Vecchi, she acquired Egyptian nationality as described in the 1956 nationality law not in Article 7 of the Nationality Law. The Respondent referred to the articles in previous nationality laws prior to Article 8 of the Nationality Law. Article 14 of the 1958 nationality law provided the following:

This provision shall apply to a foreign woman who acquired Egyptian nationality pursuant to Articles 8 and 9 of the Presidential Decree issuing [the 1956 Law].

80. Such a sentence did not appear in Article 8. If the legislators had wished to cover the same “factual situation” as Article 7 they could have preserved this sentence.
81. In addition, the Respondent emphasized that under Article 1 of the Nationality Law, Ms Vecchi was an Egyptian and not a “foreign woman” for the purposes of Article 7. The Claimants’ argument would result in classifying two groups; those women who had acquired Egyptian nationality on the basis of marriage under the 1958 nationality law and those women who had acquired Egyptian nationality under the 1956 nationality law. Only those who come under the 1956 nationality law could lose their Egyptian nationality. If a person did not come under Articles

²⁴ Respondent’s Reply on Jurisdiction, para. 30.

6 and 7 of the Nationality Law they could utilize Article 10. Contrary to the opinion of Professor Riad such persons were, therefore, able to reacquire their former nationality.

82. The Respondent noted its agreement that a person's nationality should initially be determined by the laws of the State whose nationality is in question. However, it disagreed with what it described as the Claimants' attempts to divest nationality certificates of all value. The Respondent referred to a statement of Professor Schreuer that:

A certificate of nationality will be treated as part of the 'documents or other evidence' to be examined by the Tribunal in accordance with Art. 43. Such a certificate will be given its appropriate weight but does not preclude a decision at variance with its contents.²⁵

83. The amount of weight that should be given to nationality certificates depended on the prevailing circumstances and conditions under which the certificates were issued or obtained. The Respondent submitted that the factual situation in the *Soufraki* case differed from this case in that in *Soufraki* no Italian official undertook an inquiry to determine whether Mr Soufraki had lost his Italian nationality. Egypt's administrative practice was and is to undertake an investigation of the applicant's record. The relative weight of nationality certificates should be assessed based on the following twofold test:

- i. With respect to the investor the question relates to the circumstances under which he/she has obtained nationality certificates. Albeit in the absence of fraud on the part of the investor, the pertinent question becomes: has the latter obtain [sic] such certificate for the sole purpose of seeking recourse to ICSID?
- ii. With respect to the concerned State, two questions are pertinent:
 - (a) What are the circumstances under which the State issued its nationality certificates to the investor? In particular, is there evidence, even circumstantial, that the State was in fact attempting to be subject to ICSID by issuing nationality certificates to foreign investors?
 - (b) What are the procedures followed by the State in issuing nationality certificates?²⁶

84. The overwhelming number of declarations and official documents issued to the Claimants evidencing their Egyptian nationality should be taken seriously.

²⁵ Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001), p. 268.

²⁶ Respondent's Reply on Jurisdiction, para. 54.

85. The Respondent contested the Claimants' analysis of the *Champion Trading* decision as based on an assessment of Egypt's nationality laws and reaffirmed its contention that the decision "has established an incontestable linkage between the *personal behavior* of the claimants (determined through the factual background and circumstances), on the one hand, and deciding the issue of nationality, on the other"²⁷ (emphasis in original). The Claimants' behaviour in setting up the Siag Touristic and Siag Taba companies and traveling extensively on Egyptian passports was relevant to the Tribunal's enquiry as to the nationality of the Claimants.

Existence of an "Investment"

86. On the subject of its objections to jurisdiction *ratione materiae* the Respondent submitted that although the term investment has a broad definition it is not without limitations and should be determined on a case by case basis. Foreign investment requires a placement of foreign capital in the host state under the complete or incomplete control of foreign investors. The purpose of the ICSID Convention is to afford a higher level of protection to foreign investors. The Respondent emphasized that the purpose of the ICSID Convention was the settlement of international disputes. That is, investments by foreign investors involving the flow of foreign private funds to the host State. It was submitted that ICSID cases involve at least one foreign element and differ from municipal economic activities. At the date Egypt and Italy concluded the BIT on 2 March 1989, and at the date of entering into the sale contract on 4 January 1989 the Claimants were Egyptian nationals. The two companies, Siag Touristic and Siag Taba were established under Egyptian laws. From their inception, the economic activities of the Claimants were devoid of any foreign element. By contrast, both the *Fedax* case and the *Tokios Tokeles* case referred to by the Claimants had involved a foreign element from the beginning.
87. The Respondent continued to assert that, in any event, the Claimants should be estopped from bringing their claim before this Tribunal due to their attempting to "have it both ways" when it came to their assertions and denials of Egyptian nationality. It was a settled principle of international law that a person may not take advantage of a change of nationality to bring a claim where the investment in question was made using a former nationality. The Claimants obtained the

²⁷ *Id.* para. 63.

benefits of Egyptian nationality in making their investments and so should be estopped from bringing a claim based on their Italian nationality. The enquiry should be at the time of the investment not the time of the injury when assessing whether a claimant was seeking to take advantage of inconsistent rights afforded by multiple nationalities.

88. Finally, the Respondent set forth its request for relief in identical terms to those in its Memorial on Jurisdiction.

D. The Claimants' Rejoinder on Jurisdiction

89. The Claimants filed a Rejoinder on Jurisdiction dated 4 August 2006. The principal arguments made in the Rejoinder are summarized below in paragraphs 90 to 102 below.

90. In their Rejoinder the Claimants reiterated that the case law of the Egyptian courts was clear that documentary evidence of nationality is *prima facie* evidence only. The most recent decision of the Supreme Administrative Court on 25 June 2005 held that it was "well settled jurisprudence that the Egyptian nationality is a legal status determined pursuant to the dictates of the applicable Egyptian nationality laws."²⁸ The Claimants submitted that the Respondent had chosen to ignore this well-settled jurisprudence and had not even commented on the six decisions of the Supreme Administrative Court which Claimants had referred to in their Counter-Memorial. In terms of ICSID practice, both the *Soufraki* and *Champion Trading* cases reinforced the established principle that nationality was determined by application of the terms of the relevant nationality law and documents evidencing nationality were *prima facie* evidence only.

Mr Siag

91. As to Article 10 of the Nationality Law, its purpose was to provide the legal framework by which an Egyptian may seek to have his/her foreign nationality recognized and to determine the impact of that event upon the person's Egyptian nationality. With respect to the Respondent's contention that it was important whether Mr Siag acquired his Lebanese nationality "voluntarily" or "involuntarily" this was in fact irrelevant. In any event, Egypt chose to invoke Article 10 when it

²⁸ Claimants' Legal Authority 92, p. 4.

received Mr Siag's application in December 1989 and could not now credibly argue that it was inapplicable. When it invoked Article 10 it did so in the belief that Mr Siag had acquired his Lebanese nationality at birth i.e. "involuntarily."

92. On the question of the satisfaction of the third paragraph of Article 10 by an "implied declaration," it was submitted that the passage from the Supreme Administrative Court's decision of 10 December 2000 provided no support for Dr El Haddad's contention that the declaration requirement may be satisfied by an "implied" or an "assumed" declaration. The Claimants recited Article 20 of the Nationality Law which provides that "[d]eclarations, notifications, documents and applications stipulated under this Law shall be addressed to the Minister of Interior or whomever he delegates in this regard, and issued on the forms determined by virtue of a decree from the Minister of Interior." The Claimants concluded that the declaration under Article 10 must be a formal declaration.
93. As a matter of law Article 10 applied both to nationalities acquired voluntarily through naturalization and involuntarily such as at birth. It was contended that the Respondent's argument would discriminate between Egyptians, which is impermissible under the Egyptian Constitution. Furthermore, there was nothing in the text of Article 10 to suggest that a person who acquires a foreign nationality involuntarily cannot apply under Article 10. This was reflected in the form from the Egyptian Ministry of Interior filled out by Mr Siag. It had a notation "date acquired" and Mr Siag wrote "from birth." This did not prevent the Ministry from processing Mr Siag's application. The passages from scholars relied upon by the Respondent, including Professor Riad, did not support its argument. All that they stood for was the unremarkable proposition that "an Egyptian who 'involuntarily' possesses a foreign nationality and does not seek to have such foreign nationality recognized under the provisions of Article 10 should not be stripped of his Egyptian nationality based solely on his failure to seek permission to acquire such foreign nationality under Article 10."²⁹
94. The date of and the manner of Mr Siag's acquisition of Lebanese nationality continued to be an area of contention between the parties. The Claimants summarized Mr Siag's acquisition of Lebanese nationality and the documents submitted in evidence as follows. Mr Siag acquired Lebanese nationality by naturalization in December 1989. There was no evidence from the Lebanese

²⁹ Claimants' Rejoinder on Jurisdiction, para. 60.

Embassy in Cairo to suggest that Mr Siag acquired Lebanese nationality at birth. Mr Siag was born of Lebanese origin because his ancestors on his father's side of the family had been Lebanese. It was submitted that the documents relied upon by Egypt to demonstrate that Mr Siag acquired his Lebanese nationality at birth were inconclusive. Mr Siag wrote the words "at birth" on his application for permission, dated 19 December 1989, for the reference to the date he "acquired" Lebanese nationality. He understood this to be a reference to his Lebanese origin. Similarly, the notation on his individual record "more than ten years" showed that he came from an "original" Lebanese family. Finally, the letter to Mr Siag from the Lebanese Embassy in Cairo of 19 December 1989 had been mistranslated by Egypt. It states "was born in Cairo on 12 March 1962, and he is of Lebanese nationality and registered in the records of this mission" not "was born in Cairo on 12 March 1962, of Lebanese nationality and recorded in the registers of this mission." In addition, the Respondent made a request to the Lebanese Embassy for documents proving Mr Siag acquired Lebanese nationality at birth and evidence of his father's Lebanese nationality. The Lebanese Embassy responded that it had no such evidence.

Ms Vecchi

95. As to Ms Vecchi, the Claimants contended that the Respondent's suggestion that there was a difference between the terms of the 1956 nationality law and the 1958 nationality law was misplaced. The two applicable provisions were identical. Likewise, as stated in the Counter-Memorial and the Expert Opinion of Professor Riad, Article 1 of the Nationality Law was only meant to address who were "original" Egyptians prior to the establishment of the United Arab Republic.
96. It was submitted that the Nationality Law was a matter of "public order." Therefore, it was immediately applicable to all Egyptians without discrimination. It was not possible for the Nationality Law to apply only to those women who acquired the Egyptian nationality of their husbands after 1975. Moreover, the prior nationality laws of 1956 and 1958 contained the same provisions as Articles 7 and 8 of the Nationality Law.
97. In relation to the Respondent's contention that the legislators could have retained a similar sentence to that found in Article 14 of the 1958 nationality law, the Claimants asserted that this argument was misplaced. The reason for the

sentence being in the 1958 law had been explained by Professor Riad. He stated that it was there because the 1958 law established nationality in the United Arab Republic. This need was not there when the Nationality Law was enacted in 1975.

98. The Claimants then asserted that the Respondent's interpretation and application of its nationality law in this case constituted an abuse of rights under international law. The Respondent had inconsistently applied its nationality law for the sole purpose of evading its international obligations.
99. On the procedural matter of the burden of proof the Claimants submitted that the Respondent bore the burden of proof with respect to each of its jurisdictional objections. Claimants relied upon the opinion of Professor W Michael Reisman³⁰ that stated "Egypt, as the party advancing the objections to jurisdiction following a *prima facie* showing by the Claimants, bears the burden to prove their elements."³¹

Ratione Materiae Objections

100. Turning to the *ratione materiae* objections the Claimants submitted that the terms of the ICSID Convention and the BIT were relevant. The drafters of the ICSID Convention intentionally left the term "investment" undefined. The BIT in this case contained a very broad definition of "investment." The Claimants reiterated that the reading in of an origin of capital requirement has been firmly rejected in ICSID practice. It was submitted that the Respondent's attempt to distinguish the *Fedax* and *Tokios Tokeles* cases on the basis that the economic activities in question possessed a foreign element from the very beginning were not of assistance. This difference was immaterial to the propositions expressed in those cases concerning the definition of investment and an origin of capital requirement. The Respondent's argument that the investments were never controlled by a foreign investor was also challenged. The Claimants submitted that Mr Siag and Ms Vecchi acquired Italian nationality on 3 May 1993 and 14 September 1993 respectively. The vast majority of the money they invested was invested from 1994 onwards.

³⁰ Myres S McDougal Professor of International Law at Yale Law School.

³¹ Prof W Michael Reisman's Opinion of 31 July 2006, para. 5.

101. The Claimants repeated their contention that the Respondent's estoppel argument was not a jurisdictional issue and should be part of the merits stage of these proceedings. In any event, the claim was baseless. The Claimants never attempted to conceal their Italian nationality or deliberately failed to disclose their loss of Egyptian nationality. There was also no evidence that the Claimants wilfully manipulated their nationality. Their acquisition of Italian nationality was unrelated to these proceedings.
102. The Claimants' request for relief remained the same as in the Counter-Memorial on Jurisdiction.

E. The Hearing on 8-9 August 2006

103. At the hearing on 8–9 August 2006 no witnesses were called for cross-examination. Each side made oral presentation of its respective case and responded to questions from the Tribunal. The presentations closely followed the written submissions discussed above and to avoid undue repetition the following analysis is a brief summary only.

The Respondent's Arguments

104. The Respondent noted that there were two ways to approach the interpretation of the ICSID Convention and the BIT, namely the literal approach and the contextual approach. It was submitted that the contextual approach, taking into account the objectives of these instruments, was the preferred approach. Turning to the Nationality Law the object was to encourage Egyptians to maintain their Egyptian nationality and so their links to Egypt if they acquired another foreign nationality through migration to another country. This was reflected in the first paragraph of Article 10 which stated that if permission was not granted by the Egyptian Minister of Interior to acquire a foreign nationality the person retained their Egyptian nationality.
105. It was suggested that there was no unanimity of opinion among scholars as to the requirement to make a declaration under the third paragraph of Article 10 within the one year period following the grant of permission. The trend of legal scholarship was towards not requiring a declaration within the one year period once permission had been granted. It was also submitted that the decisions of

the Egyptian courts were not unanimous on the one year requirement under Article 10(3). Counsel for the Respondent mentioned four cases that it said supported that trend. (After hearing the submissions of both parties the Respondent was granted permission to produce these four cases and a post-hearing submission.)

106. There was not a consistent line of court decisions and it was the consistent practice of the Egyptian Ministry of Interior not to require the declaration. However, no evidence to this latter effect was produced. It was also claimed that there was no official form for the declaration.
107. Where a person applied to the Egyptian Minister of Interior under Article 10 for an already acquired foreign nationality what was actually being sought was recognition of that foreign nationality. If that person was permitted to maintain his Egyptian nationality that was the end of the matter and no further action was required. It was immaterial whether Mr Siag had been born Lebanese or became naturalized as a Lebanese. He did not get prior permission to acquire that Lebanese nationality and so under the first paragraph of Article 10 he remained Egyptian.
108. With respect to Ms Vecchi, she was not covered by Article 8 of the Nationality Law since pursuant to Article 1 she is not to be considered a "foreign woman." Moreover, when she reacquired her Italian nationality Ms Vecchi did nothing to inform the Egyptian Ministry of Interior. Article 10 would apply and she has never sought permission under that article.
109. On the burden of proof it was said that this was covered by Article 24 of the Nationality Law which provided that "the onus of proof of nationality shall be borne by whoever upholds or alleges not carrying Egyptian nationality." In short, he or she who asserts must prove.
110. The Respondent accepted that the definition of "investment" was undefined in the ICSID Convention. However, consistent with its earlier written submissions, it was contended that there must be some foreign element. The Respondent maintained its contention that the purpose and objectives of the ICSID Convention required an origin of capital requirement. It was acknowledged that such a view was the opposite to the view reached by a number of ICSID tribunals. In those cases, though, the economic activity comprised at least one

foreign element from its inception. To include the Claimants' investment under the protection of the ICSID Convention would expand the scope of international investment protection to include what were municipal economic activities.

111. The Respondent reiterated that its estoppel claim could be considered at the jurisdictional phase although it was acknowledged that it did not form part of the tests set out in Article 25 of the ICSID Convention. As to the substance of its estoppel claim, the Respondent asserted that the Claimants had derived benefits based on the belief that they were Egyptians and it was inequitable for them to now base claims on the fact such nationality had been lost.
112. As to the Claimants' contention that the Respondent has committed an abuse of rights under international law the Respondent submitted that it was entitled to take the position it had taken on interpretation of the Nationality Law and that the opinion of Professor Reisman was unbalanced and biased.

The Claimants' Arguments

113. On the issue of nationality it was contended that the Claimants had provided unrebutted *prima facie* proof of the positive nationality requirement, Italian nationality, at the time the claim was filed and registered. The Claimants also satisfied the negative nationality requirement.
114. Mr Siag lost his Egyptian nationality through the operation of Egyptian law when he failed to make a declaration within the one year period stipulated in the third paragraph of Article 10. This view was supported by the premier Egyptian expert on the Nationality Law, Professor Riad and the Egyptian courts. Article 10 concerned the recognition of a foreign nationality by Egypt and the determination of whether Egypt will give such nationality some legal effect in Egypt. It was acknowledged by Respondent's experts that Article 10 could be utilized irrespective of whether or not the nationality was acquired before or after permission was sought. It also applied irrespective of whether the nationality was acquired voluntarily or involuntarily.
115. The first paragraph of Article 10 did state that a person who acquired a foreign nationality without obtaining permission retains their Egyptian nationality. However, there is discretion under Article 16 to also strip that person of their Egyptian nationality. Although it was contended that it was not an issue, the

Claimants submitted that Mr Siag acquired his Lebanese nationality through naturalization not at birth.

116. It was the view of Professor Riad that when permission is granted for an already acquired foreign nationality that there should be a formal expression, such as making an application for and receiving a passport, after the permission is granted. The view of the Respondent's experts Professors El Haddad and Abdel Aal that the one-year period starts when permission is granted was noted. The Claimants submitted that on either calculation there was no declaration made within the one year period. Article 20 of the Nationality Law set out the requirements for declarations and it was clear that these requirements applied to the declaration requirement under Article 10.
117. It was submitted that extrinsic evidence of nationality was *prima facie* evidence only. Such was the holding of Egypt's Supreme Administrative Court and also other ICSID tribunals. However, such evidence is irrelevant if inconsistent with an application of the relevant law.
118. With respect to Ms Vecchi's nationality it was contended that she gained her Egyptian nationality exactly in the manner described in Article 7 of the Nationality Law except that it was under the relevant article of the prior nationality law, which was worded identically. It was submitted that the Nationality Law applied to Ms Vecchi but, even if it did not, she lost her Egyptian nationality in any event through the operation of the prior nationality law.
119. The Claimants summarized their claim that there had been an abuse of rights under international law. It was asserted that the Respondent was not allowed under international law to apply its laws arbitrarily so as to evade jurisdiction under the ICSID Convention.
120. As to the Respondent's estoppel claim, the Claimants reiterated their primary argument that this claim should properly be dealt with as part of the determination of the merits of the dispute. In any event, it was denied that the Claimants concealed their Italian nationality from Egypt or in any way had behaved inequitably. The detriment relied upon by Egypt of being held to the stricter standards of investment protection under international law was also questioned.

121. The Claimants maintained that the Respondent's objections to jurisdiction *ratione materiae* were without merit. The Claimants had stated that they invested US\$20 million in the Taba project in their personal capacities. In any event, it made no difference if the Claimants' funds were channeled through the two companies formed for the purpose of the investment.
122. There was no origin of capital requirement or any requirement that part of the funds invested should be from Italy. The suggestion to the contrary derived no support from the terms of the ICSID Convention, the BIT or the decisions of ICSID Tribunals. No ICSID tribunal had held that the ICSID Convention requires a foreign origin of capital.
123. The Claimants disagreed with the argument raised by the Respondent that the Claimants were Egyptian nationals in 1989 when the BIT was entered into and that was the time that mattered. The Claimants investments were made between 1994 and 1996 after they acquired Italian nationality and lost Egyptian nationality. The acts of Egypt that were complained of also occurred after the Claimants acquired Italian nationality.
124. The Claimants contended that any legitimate expectations that they were Egyptian nationals were not relevant to determining the issue of nationality. This issue was a matter of public order to be determined by the application of Egyptian law. The *Champion Trading* and *Soufraki* Tribunals had ruled to this effect.
125. On the relevance of the abuse of rights argument, it was submitted that this set an outer limit on what the Respondent could argue in this proceeding. It was also relevant to the determination of costs of the jurisdiction phase. In response to a question raised by Professor Vicuña concerning the relevance of continuity of nationality it was submitted that on the facts of this case the Claimants acquired their Italian nationality prior to the time that the vast majority of the investment was made and well before the acts which were the subject of the complaint. Also, for the purposes of jurisdiction the only two dates that mattered were those dates set out in the ICSID Convention.
126. As to the matters raised concerning the Claimants' Italian and Lebanese nationality it was argued that the matter of positive nationality was closed. The Claimants had made a *prima facie* showing of Italian nationality in their Memorial

on the Merits and that had not been rebutted by the Respondent. Nor had Mr Siag's Lebanese nationality been debated. All that had been raised was whether he acquired such nationality at birth or by naturalization. This was a question of fact under Egyptian law in terms of Article 10.

127. On the matter of interpretation of the international instruments involved in this case it was submitted that the Tribunal should give deference to the negotiated language of the treaty, including how Egypt and Italy chose to define "natural person" and "protected investment." The Tribunal should not rewrite the BIT to achieve policy ends. If it did so, the Tribunal would be replacing its judgment for that of the Contracting States.

F. Post-Hearing Submissions

The Respondent's Post-Hearing Submission

128. Pursuant to the Tribunal's ruling at the jurisdictional hearing, the Respondent filed a post-hearing submission dated 29 August 2006.
129. The Respondent first discussed the alleged date of Mr Siag's Lebanese nationality. The Respondent argued that the Claimants had retreated from the "at birth" statement on Mr Siag's application and now contended that he acquired Lebanese nationality in December 1989 through naturalization.
130. In any case, it was submitted that it was accepted that Mr Siag acquired Lebanese nationality prior to his application for permission. This was decisive to the applicability of Article 10(3) and was supported by the decision of the Egyptian courts in a recent case (the *Lakah* case referred to below).
131. It was submitted that the two decisions of the Supreme Administrative Court of 21 December 2002 and 10 December 2000³² submitted by the Claimants on the application of Article 10(3) of the Nationality Law did not in fact provide any guidance as to its application. The 2000 decision (the *Saleh* case) merely stated what the Article said and the 2002 decision related to a different factual situation. The Respondent submitted that the most recent relevant decision of the Supreme Administrative Court was a decision rendered on 27 August 2001.³³

³² See *supra*, para. 54.

³³ Rulings Nos. 5329 and 5344 of Judicial Year 47 [hereinafter the *Lakah* case].

This case concerned a Mr Raymond Lakah, a dual-national of Egypt and France. The Respondent submitted that it could be inferred from the Court's decision that Mr Lakah held French nationality prior to seeking permission under Article 10, that he made no declaration within the one-year period, and that the Court did not investigate any formal expression of French nationality once permission was granted.

132. The Respondent also provided two further decisions of the Supreme Administrative Court³⁴ which, although not touching on the interpretation of Article 10, were said to illustrate the objective of the Nationality Law.³⁵

The Claimants' Post-Hearing Submission

133. The Claimant filed its Post-Hearing submission on 11 September 2006.
134. As to the decision of the Supreme Administrative of 10 December 2000 in the *Saleh* case, the Claimants said that Mr Saleh lost his Egyptian nationality because the steps required by Article 10 were not followed. Although he made a declaration within the one-year period, he had not in fact been granted the requisite permission by the Egyptian Minister of Interior. The Supreme Administrative Court emphasized and explained the requirement to obtain permission from the Egyptian Minister of Interior and then to make a declaration within one year from the date of acquisition of the foreign nationality. The Claimants submitted that the Respondent's attempt to distinguish this case was unavailing since Mr Siag's situation (permission granted but no declaration) was explicitly addressed by the Court. Similarly, the Respondent's attempt to distinguish the December 2002 Supreme Administrative Court decision as one concerning a minor failed to acknowledge that a minor's Egyptian nationality is directly linked to the declaration made by the father under Article 10(3).
135. The Claimants asserted that the three new judgments submitted by the Respondent were unrelated to Article 10(3) and noted that they were unaccompanied by any further expert opinion. The *Lakah* case raised interesting constitutional questions but shed no light on the interpretation of Article 10(3). The inferences the Respondent sought to draw from a brief passage of the

³⁴ Rulings Nos. 1648 and 1960 of Judicial Year 47 issued by the First Circuit of the Higher Administrative Court on 6 November 2000.

³⁵ *Id.*

judgment were groundless. There was simply no analysis of Mr Lakah's Egyptian nationality under Article 10. As to the other two cases submitted by the Respondent, the Respondent had acknowledged that they did not touch upon the declaration requirement under Article 10.³⁶

136. In its post-hearing submission the Claimant also objected to the Respondent's post-hearing submission on the grounds that it made submissions that went beyond the areas that the Tribunal directed. The Claimants requested the Tribunal to disregard all submissions made by the Respondent in its Post-Hearing Submission that were not in compliance with the directions made by the Tribunal at the jurisdictional hearing. As noted above, the Tribunal does not consider it necessary to rule on this objection.

IV. EXAMINATION OF THE PARTIES' SUBMISSIONS

137. Under Rule 41 of the ICSID Arbitration Rules the Tribunal is required to decide the Respondent's objection that the present dispute "is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal." The Claimants contend that the Tribunal's jurisdiction is established under two instruments referred to at the outset of this Decision: (a) the BIT and (b) the ICSID Convention.
138. On the burden of proof, the Respondent asserted that despite the fact that it had raised the objections to jurisdiction in this case, the burden of proof lay with the Claimants to prove they were not Egyptian nationals at the relevant times. The Respondent relied upon Article 24 of the Nationality Law which provides "the onus of proof of nationality shall be borne by whoever upholds or alleges not carrying Egyptian nationality."³⁷ The Tribunal does not agree that this Article extends to the burden of proof for what are jurisdictional objections asserted by the Respondent.
139. As regards the burden of proof on the Respondent's jurisdictional objections, the Tribunal adopts the test proffered by Judge Higgins, President of the

³⁶ Respondent's Post-Hearing Submission, para. 28.

³⁷ Transcript, Day 1, p. 46. See also Respondent's Memorial on Jurisdiction, para. 6.

International Court of Justice, in her separate opinion in the *Oil Platforms Case*.³⁸ The principle proposed by Judge Higgins was the following:

The Court should [...] see if, on the facts as alleged by [Claimant], the [Respondent's] actions complained of might violate the Treaty articles (§ 33) [...] Nothing in this approach puts at risk the obligation of the Court to keep separate the jurisdictional and merits phases [...] and to protect the integrity of the proceedings on the merits [...] what is for the merits, (and which remains pristine and untouched by this approach to the jurisdictional issue) is to determine what exactly the facts are, whether as finally determined they do sustain a violation of [the treaty] and if so, whether there is a defence to that violation [...]. In short it is at the merits that one sees "whether there really has been a breach."

140. This principle has been followed by a number of international arbitration tribunals deciding jurisdictional objections by a respondent state against a claimant investor. The Tribunal in the case of *Plama Consortium Limited v Republic of Bulgaria*³⁹ stated that it did not understand that Judge Higgins' approach was in any sense controversial. In the *Salini v Jordan*⁴⁰ case, referred to in *Plama Consortium*, the Tribunal stated:

In considering issues of jurisdiction, courts and tribunals do not go into the merits of the case without sufficient prior debate. In conformity with this jurisprudence, the Tribunal will accordingly seek to determine whether the facts alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked.

141. The Tribunal agrees with this approach and applies it to the jurisdictional issues considered below.

A. Alleged Lack of Jurisdiction Ratione Personae

142. It is common ground between the parties that under Article 25(2)(a) of the ICSID Convention there is a positive and negative nationality requirement. It is important to stress that the Claimants' assertion that they held Italian nationality at the relevant times so as to satisfy the positive nationality under Article 25 of the Convention has not been contested by the Respondent.⁴¹ Rather, the

³⁸ Case concerning Oil Platforms (Islamic Republic of Iran v United States of America), 1996, ICJ Reports 803, 810).

³⁹ *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, 20 ICSID Rev.—FILJ 262 (2005), para. 119

⁴⁰ *Salini Costruttori S.p.A and Italstrade S.p.A v The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award, 15 November 2004, para. 151.

⁴¹ Although the Respondent does in passing question the strength of the Claimants' connections with Italy in its Reply, when responding to Professor Reisman's Opinion that the Claimants' Italian nationality was acquired for *bona fide* reasons and that there was no room for an application of effective nationality principles since this was not a case of dual-nationality.

Respondent's *ratione personae* objections to jurisdiction focus on the negative requirement. That is, were the Claimants, at the relevant times under Article 25, nationals of the Host State, Egypt, and so barred from bringing their claim before ICSID under the ICSID Convention?

143. It is well established that the domestic laws of each Contracting State determine nationality. This has been accepted in ICSID practice.⁴² Both parties accepted and followed this general principle of international law in their submissions and at the hearing.⁴³ Thus, Egypt's Memorial on Jurisdiction at paragraph 21 describes it as "indisputable." Claimants' Counter Memorial refers to Articles 1 and 2 of the 1930 Hague Convention ("the Hague Convention") and the 1997 European Convention on Nationality, Article 3(1) as examples of international conventions reflecting the international law principles. Although it never became effective, the Hague Convention is often referred to as reflecting the current international law principles on nationality of individuals. Article 1 states:

It is for each State to determine under its laws who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.

144. Article 1 identifies that international law sets limits on the power of a state to confer nationality.⁴⁴ The relevance of international law to the state's determination of nationality under its municipal law as recognised in Article 1 of the Hague Convention is described in Oppenheim's International Law as follows:

This permits of some control of exorbitant attributions by states of their nationality, by depriving them of much of their international effect. Such control is needed since, although the grant of nationality is for each state to decide for itself in accordance with its own laws, the consequences as against other states of this unilateral act occur on the international plane and are to be determined by international law.⁴⁵

145. In the context of the settlement of investment disputes under the terms of the ICSID Convention, Professor Schreuer comments:

Whether a person is a nation of a particular State is determined, in the first place, by the law of the State whose nationality is claimed [...]. But an international tribunal is not bound by the national law in question under all circumstances. Situations where nationality provisions of national law may be disregarded include cases of ineffective

⁴² See *Soufraki*, *supra* note 6.

⁴³ See Respondent's opening, Transcript, Day 1, p. 30 ("nationality is of public order – I think this is in agreement – and is determined by Egyptian law").

⁴⁴ Ian Brownlie, *Principles of Public International Law*, 6 ed., p. 377.

⁴⁵ Oppenheim's International Law, (Robert Jennings and Arthur Watts eds., 9 ed.), p. 853.

nationality lacking a genuine link between the State and the individual. Other instances where national rules need not be followed are certain situations of involuntary acquisition of nationality in violation of international law or cases of withdrawal of nationality that are contrary to international law.⁴⁶

146. The international law rule that the municipal law of the state determines nationality is also reflected in the BIT. Article 1(3) of the BIT provides: “The term ‘natural person’ shall mean, with respect to either Contracting State, a natural person holding the nationality of that State in accordance with its laws” (underlining added).
147. The Parties in their written and oral submissions both placed primary emphasis on the interpretation of the Egyptian nationality law to determine whether the Claimants were Egyptian nationals at the relevant time and so did not satisfy the negative nationality test. However, in its Reply the Respondent made reference to the question of effective nationality⁴⁷ but this was in response to the opinion of Professor Reisman that since the Claimants were not dual-nationals by operation of the Nationality Law, questions of effectiveness of nationality did not arise. The Claimants acknowledged that there was scope for the Tribunal to take into account international law on nationality.⁴⁸ The applicability of the concept of effective or dominant nationality is discussed further below.

Documents of Egyptian Nationality *Prima Facie* Evidence Only

148. In its written and oral submissions the Respondent referred to several official documents from the Egyptian Interior Ministry as reflecting that Mr Siag had in fact retained his Egyptian nationality after 1990 and through to the present date. These documents included letters from the Ministry, as well as passport, and company documents relating to the investment in Taba.
149. Claimants asserted that as a matter of Egyptian law the determination of Egyptian nationality was a matter of public order. Article 6 of the Egyptian Constitution of 1971 states that “the Egyptian nationality is regulated by the

⁴⁶ *Id.* p. 267.

⁴⁷ See Respondent’s Reply on Jurisdiction, para. 8 (“there is no evidence that either Waguih or Clorinda has the type of connections with Italy that would permit a finding of effective nationality under international law”); and para. 9 (“Egypt is not required under international law to arbitrate investment with persons who have non-existen[t], spurious or insubstantial links to the State of which they may be formally nationals”).

⁴⁸ Transcript, Day 1, p. 157. For example, Counsel for the Claimants noted that the Tribunal is fully entitled to consider whether Egypt’s application of its nationality law is objectionable as a matter of international law (although this was in the context of the abuse of rights doctrine).

law.”⁴⁹ As such, it could only be determined by application of the Nationality Law. Such an approach has also been confirmed by Egypt’s Administrative Court of 28 December 1965 where in a decision cited by the Claimants it was stated that “whereas the establishment of the nationality of a person is determined exclusively by the provisions of the legislation regulating the nationality, all data in documents even official have no legal value in proving the Egyptian nationality.”⁵⁰

150. This has also been the practice of other ICSID Tribunals. In the *Soufraki* case the Tribunal was urged to accept the finding of the Italian Government that Mr Soufraki had Italian nationality. The Tribunal ruled as follows:

It is accepted within international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality. Article 1(3) of the BIT reflects this rule. But it is no less accepted that when, in international arbitral or judicial proceedings, the nationality of a person is challenged, the international tribunal is competent to pass upon that challenge. It will accord great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities. But it will in the end decide for itself whether, on the facts and the law before it, the person whose nationality is at issue was or was not a national of the State in question and when, and what follows from that finding. Where, as in the instant case, the jurisdiction of an international tribunal turns on an issue of nationality, the international tribunal is empowered, indeed bound, to decide that issue.⁵¹

151. As to the evidential weight to be accorded to certificates of nationality and other official documents the *Soufraki* Tribunal found that these were *prima facie* evidence of nationality only and said:

The Tribunal will, of course, accept Claimant’s Certificates of Nationality as “*prima facie*” evidence. We agree with Professor Schreuer that:

A certificate of nationality will be treated as part of the “documents or other evidence” to be examined by the Tribunal in accordance with Art. 43 [of the Convention]. Such a certificate will be given its appropriate weight but does not preclude a decision at variance with its contents.⁵²

⁴⁹ This was also confirmed by Professor El Haddad in her Supplemental Expert Opinion, para. 51 (“the loss and acquisition of Egyptian nationality is a matter that is not subject to the will of the concerned parties but remains governed by imperative legal rules that must be applied irrespective of the stance of individuals towards such rules”).

⁵⁰ Claimants’ Counter-Memorial on Jurisdiction, para. 21 (referring to para. 39 of Prof Dr Riad’s Expert Opinion). Claimants also referred to five other decisions of the Egyptian courts, which came to the same conclusion.

⁵¹ *Soufraki*, *supra* note 6, para. 55.

⁵² *Id.* para. 63.

152. In this case, the Respondent urged the Tribunal to take into account the cumulative effect of the number of documents evidencing the Egyptian nationality of the Claimants that were in existence throughout the 1990s and up until the Request for Arbitration was filed in 2005. However, the Respondent did not present any arguments to counter the expert opinion of Professor Riad and the decisions of Egyptian courts that under Egyptian law such documents were *prima facie* evidence of nationality only and should be disregarded if they were inconsistent with the applicable law.
153. The Tribunal must determine the nationality of the Claimants.⁵³ Application of international law principles requires an application of the Egyptian nationality laws with reference to international law as may be appropriate in the circumstances. Both Egyptian law and the practice of international tribunals is that the documents referred to by the Respondent evidencing the nationality of the Claimants are *prima facie* evidence only. While such documents are relevant they do not alleviate the requirement on the Tribunal to apply the Egyptian nationality law, which is the only means of determining Egyptian nationality.

Mr Waquih Elie George Siag – Background

154. Mr Siag was born in Egypt on 12 March 1962 to Egyptian parents. He was, therefore, an Egyptian national from birth. On 19 December 1989, Mr Siag submitted an application for permission to acquire Lebanese nationality under Article 10 of the Nationality Law. Prior to submitting his application Mr Siag received a nationality certificate from the Lebanese Ministry of Interior on 15 December 1989 and a letter from the Lebanese Consulate in Cairo that he was “of Lebanese nationality and recorded in the registers of this mission.” On 5 March 1990, the Egyptian Minister of Interior issued his Decree No. 1353 of 1990 acknowledging Mr Siag’s prior acquisition of Lebanese nationality and granting him permission to maintain his Egyptian nationality. On 8 March 1990 the Nationality Authority issued a letter to the Military Conscription Department to exempt Mr Siag from performing compulsory military service on the basis of his having dual-nationality. Mr Siag obtained a Lebanese passport on 14 June 1990. Mr Siag acquired Italian nationality on 3 May 1993 by decree of the Italian Minister of Interior. This was obtained on the basis of his marriage to an Italian

⁵³ Article 41 of the ICSID Convention.

citizen and the provisions of Article 5 of the Italian nationality law Number 91 of 1992. Mr Siag received an Italian passport on 12 July 1995, and remains a citizen of Italy at the present time.

155. In his application for permission to acquire Lebanese nationality Mr Siag sought permission to maintain his Egyptian nationality pursuant to the third paragraph of Article 10 of the Nationality Law. The third paragraph of Article 10 contains a requirement, once permission to maintain Egyptian nationality is granted, to further notify the Egyptian Interior Ministry within the period of one year of the desire to retain Egyptian nationality.

Egyptian Nationality Law

Applicability of Article 10 of the Nationality Law – Voluntary/Involuntary Acquisition of Foreign Nationality – Acquisition Prior to Seeking Permission

156. The Respondent contended that since Mr Siag acquired his Lebanese nationality prior to seeking permission under Article 10 of the Nationality Law, Article 10 was, in fact, not applicable to Mr Siag.⁵⁴ In this respect Respondent made detailed submissions devoted to the issue of the accuracy of the documentation that Mr Siag submitted to the Egyptian Interior Ministry and to the categorization of Mr Siag's Lebanese nationality as either voluntary in the sense that it was acquired through naturalization or involuntarily in that it was acquired at birth through application of *jus sanguinis*.
157. The Tribunal finds that it is unnecessary for the purpose of this ruling on jurisdiction to determine whether Mr Siag acquired his Lebanese nationality voluntarily or involuntarily. The Tribunal accepts the evidence of Professor Riad that the Nationality Law does not differentiate between involuntary and voluntary acquisition of a foreign nationality in the application of Article 10.⁵⁵ Professor Riad served on the commission of legal experts who drafted the Nationality Law for the Egyptian Parliament. He also served on the commission that drafted Egypt's previous nationality law of 1956 for the Egyptian Parliament. The Tribunal concurs with the Claimants that Professor Riad is in a unique position to

⁵⁴ See Respondent's Memorial on Jurisdiction, para. 49. See also Respondent's Post-Hearing Submission, para. 17.

⁵⁵ Professor Riad's opinion was that this categorization may play a part under the application of Article 16 which concerns the stripping of Egyptian nationality when an Egyptian national acquires a foreign nationality without permission but had no relevance to the operation of Article 10.

be able to comment on the application of Egypt's nationality laws and is properly regarded as the leading Egyptian authority on the Nationality Law.

158. At the time Mr Siag applied for permission to acquire Lebanese nationality in December 1989 he already possessed Lebanese nationality. The Respondent asserted that Article 10 of the Nationality Law only applied to situations where the foreign nationality had not yet been acquired. Therefore, pursuant to the first paragraph of Article 10 Mr Siag was considered to be an Egyptian in every respect and under all circumstances.
159. The Tribunal adopts the opinions of Professor Riad that Article 10 addresses the recognition of foreign nationality in the "eyes of Egypt." The view of Professor Riad was that the prior acquisition of a foreign nationality under the law of a foreign state made no difference to the permission sought under Article 10.⁵⁶ Article 10 was "blind"⁵⁷ to the operation of the foreign law. Under international law, as noted above, the conferral of a foreign nationality is a matter for the domestic law of the foreign state. The Tribunal upholds the Claimants' assertion that the Nationality Law was concerned with the recognition of that foreign nationality as a matter of Egyptian law and so Article 10 applies in the case of a person seeking permission under Article 10 for a foreign nationality that they already possess.⁵⁸
160. This view of the interpretation of Article 10 is also reinforced by the application form of the Egyptian Ministry of the Interior. This form includes a section that asks applicants to indicate that date on which foreign nationality "was acquired."⁵⁹ Mr Siag's application form under this section was noted "at birth." Despite this notation which clearly indicated Mr Siag had already acquired his Lebanese nationality, the Egyptian Ministry of Interior proceeded to grant Mr Siag permission under Article 10.

⁵⁶ This was also the view of Professor Salama, referred to in Egypt's Reply, para. 30: "Therefore, if such permission is issued thereafter, it would merely serve to confirm the reality, together with protecting the individual from being penalized by being divested of his Egyptian nationality as stipulated under Article 16(1)."

⁵⁷ See Expert Opinion of Prof Dr Riad of 10 July 2006, para. 31, and his supplementary Opinion of 1 August 2006, para. 5. Any such discrimination would, as explained by Professor Riad, be contrary to the Egyptian Constitution, which strictly requires that all Egyptians be treated equally under the law.

⁵⁸ Claimants' Counter-Memorial, para. 57. See also Supplementary Expert Opinion of Prof Dr El Haddad, para. 17, where it was conceded, at least in the case of a nationality acquired through naturalization, that a person may apply to the Egyptian Minister of Interior for permission despite having already acquired the nationality of the foreign country.

⁵⁹ See Claimants' Rejoinder, para. 11.

161. The Tribunal holds that Article 10 may be used to seek permission for an already acquired foreign nationality. In that case, though, the determining date for the commencement of the one year period under the third paragraph of Article 10 would not be the date of the acquisition of the foreign nationality. As Professor Riad stated:

In terms of applying Article 10, the date that should be considered for purposes of the third paragraph of Article 10 is the first date on which there was a formal expression of Mr Siag's foreign nationality after the issuance of the Minister's authorization to acquire the foreign nationality, for it is only at that point in time that Egyptian law acknowledged Mr Siag's acquisition of the foreign nationality.⁶⁰

162. There was some difference of opinion between the experts as to whether the operative date for the commencement of the one-year period was the date when permission was granted by the Egyptian Minister of Interior or when a "formal expression" of the foreign nationality was made. The Tribunal does not find it necessary to determine this latter point. It makes no difference to the finding of the Tribunal as to the declaration by Mr Siag since no formal declaration was made within a one year period commencing from either March 1990 when permission was granted or June 1990 when a formal expression was made through Mr Siag obtaining a Lebanese passport.

Article 10(3) – The One-Year Period

163. Under Article 10(3), an applicant seeking permission to obtain a foreign nationality may at the same time seek permission to retain his or her Egyptian nationality. If permission to retain Egyptian nationality is granted, Article 10(3) states the applicant may retain his or her Egyptian nationality "provided he notifies his wish to take advantage of such benefit within a period not exceeding one year from the date of acquiring the foreign nationality."
164. The Tribunal accepts the opinion of Professor Riad that the purpose for the one-year period was

to give the applicant enough time after acquiring the Minister's permission and the foreign nationality to consider the appropriateness of retaining the Egyptian nationality before the ultimate decision is taken.⁶¹

⁶⁰ Expert Opinion of Prof Dr Riad of 10 July 2006, para. 34 (emphasis added).

⁶¹ *Id.* para. 26.

165. The Tribunal also agrees with the view of Professor Riad that:

The existence of this two-step requirement has never been challenged in Egyptian legal doctrine. Egyptian scholars are unanimous in considering that the Minister's authorization alone merely constitutes a permission to acquire the foreign nationality and a license for the applicant to formally declare his wish to retain the Egyptian nationality. Indeed, the two-step requirement contained in article 10 has been deemed by certain authors as rather excessive.⁶²

166. In its Memorial on Jurisdiction the Respondent argued that a literal interpretation of Article 10(3) requiring a formal declaration within the one year period was not favoured by "current mainstream jurisprudence."⁶³ However, the Tribunal notes that, in the face of the authorities submitted by the Claimants, in particular those from Egypt's Supreme Administrative Court,⁶⁴ and evidence that in a recent book authored by the Respondent's experts Drs Abdel Aal and El Haddad they had stated that there was such a requirement,⁶⁵ the Respondent backtracked somewhat on its initial claim.⁶⁶ For example, at the hearing, counsel for the Respondent asserted that the unanimity of opinion expressed by Claimants created a false impression and in fact Professor Riad had not mentioned those scholars who held a contrary opinion.⁶⁷

167. The Respondent also continued to maintain at the hearing that there was a lack of consensus in Egyptian judicial authority as to the application of Article 10(3).⁶⁸ Leave was granted to it to submit after the hearing four additional cases which its Counsel had referred to at the jurisdictional hearing as demonstrating an alternative view.

168. The three additional cases supplied with the Respondent's post-hearing submission do not support its position.

⁶² *Id.* para. 19.

⁶³ Respondent's Memorial on Jurisdiction, paras. 34-35.

⁶⁴ Decisions of 10 December 2000 and 21 December 2002.

⁶⁵ See also Supplemental Expert Opinion of Professor El Haddad, para. 30 ("Despite the eloquence and strength of conviction of this opinion, it still does not comply with the current provision of the Egyptian Nationality Act, which requires a person to reiterate his wish to retain the Egyptian nationality after his willful naturalization").

⁶⁶ In addition, Professor El Haddad's Supplemental Opinion stated at para. 30, when discussing the critical view of Professor Salama, that "[d]espite the eloquence and strength of conviction of this opinion, it still does not comply with the current provision of the Egyptian Nationality Act, which requires a person to reiterate his wish to retain the Egyptian nationality after his willful naturalization."

⁶⁷ Transcript, Day 2, p. 15.

⁶⁸ *Id.* p. 20.

169. The Respondent placed its reliance on the *Lakah* case. The decision of the Higher Administrative Court was given on 27 August 2001.⁶⁹ The Tribunal agrees with the contention of the Claimants in their post-hearing submission that this case did not involve any detailed analysis of Article 10(3). From the discussion of Mr Lakah's dual French/Egyptian nationality it is not possible to infer anything about the Court's view of the application of Article 10(3) and the need for a declaration within a one year period of acquisition of the foreign nationality or, in the case of an already acquired foreign nationality, the date permission is granted by the Egyptian Ministry of Interior or a "formal expression" made. The remaining two cases, as acknowledged by Respondent,⁷⁰ do not touch on the application of Article 10(3) at all. They merely provide some background to the motivation and concerns of the drafters of the Nationality Law. The Tribunal does not find these decisions in any way demonstrate a contrary judicial opinion on the application of the two-step requirement under Article 10(3).
170. In her supplemental opinion Professor El Haddad, an expert retained by the Respondent, suggested that a declaration of intent to retain Egyptian nationality could be implied or assumed. At paragraph 35 of her supplemental opinion Professor El Haddad appeared to attempt to rewrite the terms of Article 10(3) and place a positive obligation on a person to renounce that person's Egyptian nationality. The Tribunal finds that such a reading of Article 10(3) is unsupported by the language of Article 10(3).
171. Professor Riad in his reply expert opinion confirmed that in his view an official declaration would be required. The Tribunal agrees such a requirement is strongly supported by the language of Article 20. Respondent made reference to the fact that there is no official form for the declaration in satisfaction of the two-step requirement. Like the official documents evidencing nationality the Tribunal finds that the practice of the Egyptian Interior Ministry is *prima facie* evidence only. The plain language of Article 20 makes it clear that what is required, at the very least, is an official declaration to the Egyptian Minister of Interior of the applicant's wish to retain Egyptian nationality. In the view of the Tribunal this provision leaves no room for such a declaration to be implied or assumed. The reason that Article 20 sets out formal requirements for a declaration is to provide

⁶⁹ See the *Lakah* case, *supra* note 33.

⁷⁰ Respondent's Post-Hearing Submission, para. 28.

for clarity and the avoidance of doubt. It is not disputed that Mr Siag made no such declaration.

172. The Tribunal finds that it is settled under Egyptian law that under Article 10(3) an applicant must make a formal declaration within one year of permission being granted in order to retain his or her Egyptian nationality. Whether the relevant date was 5 March 1990 or 14 June 1990, Mr Siag made no such declaration within the one year period and so lost his Egyptian nationality by operation of Egyptian law in 1991. The only way for him to regain that nationality was through Egyptian law. This has not taken place.
173. For all of the reasons set out above the Tribunal finds that, at all relevant times for the purposes of the ICSID Convention, Mr Siag was an Italian national and did not have Egyptian nationality.

Ms Clorinda Vecchi – Background

174. Ms Clorinda Vecchi is the mother of Mr Siag. Ms Vecchi was born in 1937 of parents who were Italian citizens and Mr Vecchi acquired Italian citizenship at birth. In 1954 Ms Vecchi married Mr Elie George Siag, the father of Mr Siag. On 19 April 1955 Ms Vecchi informed the Egyptian Interior Ministry that she wished to acquire the Egyptian citizenship of her husband. The Egyptian Minister of the Interior did not issue any decree preventing Ms Vecchi from acquiring Egyptian nationality and Ms Vecchi acquired Egyptian nationality on 19 April 1957. It appears that she then lost her Italian nationality.
175. Ms Vecchi's marriage came to an end in 1987 upon the death of her husband, Mr Elie George Siag. Ms Vecchi reacquired her Italian citizenship on 14 September 1993 by making a declaration under article 17 of the Italian Nationality Law No. 91 of 1992 which accords former Italian citizens the right to reacquire Italian nationality. Ms Vecchi's Italian nationality is not in dispute. What is in dispute is her continued possession of Egyptian nationality.

Acquisition of Egyptian Nationality

176. When Ms Vecchi informed the Egyptian Interior Ministry on 19 April 1955 that she wished to acquire Egyptian citizenship, paragraph 1 of Article 9 of Act 160 of 1950 (“the 1950 Law”), concerning Egyptian nationality, provided as follows:

Any foreign woman who marries an Egyptian may not acquire Egyptian nationality unless she proves such wish in her marriage contract and notifies the Minister of Interior with same or submits an application stating such wish after marriage, provided that in both cases the marriage does not end before the lapse of a two-year period from the date of such notification.

177. The 1950 Law was replaced by Law No. 391 of 1956 ("the 1956 Law"). Article 9 of the 1956 Law made similar provision as follows:

Any foreign woman who marries an Egyptian may not gain Egyptian nationality unless she notifies the Minister of Interior of such wish and provided the marriage does not end before the lapse of a two-year period from the date of such notification.

Notwithstanding, before the lapse of such two-year period, the Minister of Interior may decline to grant the wife Egyptian nationality by virtue of a justified decree.

178. According to the Respondent's Expert Opinion prepared by Professor El Haddad, which the Tribunal accepts, an official document issued in 1994 by the Egyptian Ministry of Interior's nationality department stated that it was under Article 9 of the 1956 Law that Ms Vecchi acquired her Egyptian nationality on 19 April 1957.

179. The 1956 Law was replaced by a new law in 1958 ("the 1958 Law") and it, in turn, was replaced by the current law, the Nationality Law. Both the 1958 Law (Article 13) and the Nationality Law (Article 7) contain provisions analogous to Article 9 of the 1956 Law. Indeed Article 7 of the Nationality Law is identical to Article 9 of the 1956 Law.

Loss of Egyptian Nationality

180. The Claimants contended that Ms Vecchi lost her Egyptian nationality when she reacquired her Italian nationality on 14 September 1993. They submitted that Egyptian nationality was lost pursuant to Article 8 of the Nationality Law which for ease of reference is repeated here:

If a foreign woman acquires the Egyptian nationality under the provisions of the two previous articles, she will not forfeit it with the termination of marriage, unless she has restored her foreign nationality, or gets married to a foreigner and acquires his nationality by virtue of the law governing that nationality.

181. The Respondent, on the other hand, submitted that Article 8 was inapplicable for two reasons:

- (i) It only applied to foreign woman and Ms Vecchi is not a "foreign woman," and
- (ii) Article 8 only applies to a foreign woman who acquired Egyptian nationality under Articles 6 or 7 of the Nationality Law and Ms Vecchi acquired her Egyptian nationality under the 1956 Law.

182. In addition the Respondent asserted that the nationality file of Ms Vecchi held with the national authority indicated her full awareness of her Egyptian nationality status, from the time of acquisition until very recently, even after the alleged date of losing her Egyptian nationality in 1993 and that she relied upon her Egyptian nationality, for example, by using her Egyptian passport for overseas travel.

Articles 6, 7 and 8 of the Nationality Law

183. Article 8 prescribes circumstances where a foreign woman who acquires Egyptian nationality will subsequently lose it. It is confined to circumstances where a foreign woman acquires Egyptian nationality "under the provisions of the two previous articles." The Respondent contended that Article 8 was not applicable to Ms Vecchi because she acquired her Egyptian nationality under Article 9 of the 1956 Law and not pursuant to Article 7 of the Nationality Law.
184. Article 7 of the Nationality Law is substantially similar to Article 9 of the 1956 Law (and indeed Article 13 of the 1958 law). Both Article 9 of the 1956 Law and Article 7 of the Nationality Law provide that a foreign woman who marries an Egyptian may gain Egyptian nationality if she notifies the Egyptian Minister of the Interior and provided the marriage does not end before the lapse of a two year period. In addition the Egyptian Minister of Interior may decline to grant the wife Egyptian nationality. Thus the provision under which Ms Vecchi acquired Egyptian nationality, Article 9 of the 1956 Law, is virtually the same as Article 7 of the Nationality Law. Despite this, the Respondent contended that Article 8 of the 1975 Law refers to the acquisition of nationality under Article 7 of the Nationality Law and does not pick up a corresponding provision of an earlier nationality law.
185. The Claimant, for its part, contended that the reference in Article 8, to the acquisition of Egyptian nationality under the provisions of the previous two articles, is not a temporal reference to the acquisition of nationality under Articles

6 or 7 of the Nationality Law but rather a reference to "the substantive provisions of those articles." This was explained by the Claimants' expert, Professor Riad, in his expert opinion as follows:

This is incorrect. The phrase "under the provisions of the two previous articles" refers to the factual situations described in Articles 6 and 7 (which use the same wording as similar provisions in Egypt's previous nationality laws). If this were not the case, Ms. Vecchi and many other women who acquired the Egyptian nationality of their husbands prior to 1975 would never be able to lose their Egyptian nationality, even if their marriage terminated and they reacquired their former nationality. Egypt's Nationality Laws are a matter of public order of the highest rank, since they determine one of the basic elements of the state. Hence, the rules apply immediately as regulations applicable to all citizens. A nationality law's specification of a manner of acquiring or losing the Egyptian nationality is applicable to all Egyptians without discrimination.⁷¹

186. Professor Riad stated, in his reply opinion that:

No other interpretation of Article 8 is permissible under Egyptian law. Once a new nationality law is enacted, it is immediately applicable to all Egyptians without discrimination. Under Egyptian law, it is not possible to interpret Article 8 as only applying to those women who acquired the Egyptian nationality of their husbands after 1975, excluding those who acquired the Egyptian nationality of their husbands before that time. Such a random discrimination could not legally flow from the phrase "under the provisions of the two previous articles."⁷²

187. The Tribunal finds Professor Riad's interpretation of Article 8 persuasive and compelling. As the Nationality Law supersedes the previous laws, it would be illogical to confine the operation of Article 8 to Egyptian women who acquired nationality under Article 7 of the Nationality Law but not under a corresponding provision of an earlier law.

Article 8 and "Foreign Women"

188. Article 8 of the Nationality Law provides for the loss of Egyptian nationality of a "foreign woman" who has previously acquired Egyptian nationality. The Respondent contended that Ms Vecchi was not a "foreign woman" within the meaning of Article 8 and that in consequence it could have no application to her. The Respondent's argument is predicated on Article 1 of the Nationality Law which provides, in part, that Egyptian nationals include:

Those who were Egyptian nationals as of 22 February 1958 under the provisions of [the 1956 law] concerned with Egyptian nationality.

⁷¹ Expert Opinion of Prof Dr Riad of 10 July 2006, para. 49.

⁷² Expert Opinion of Prof Dr Riad of 1 August 2006, para. 20.

189. As Ms Vecchi acquired her Egyptian nationality under the 1956 Law and was an Egyptian national on 22 February 1958, the Respondent contended that Ms Vecchi was an Egyptian and was therefore not a "foreign woman" within the meaning of Article 8 of the Nationality Law.
190. The Claimants contended that Ms Vecchi was a "foreign woman" within the meaning of Article 8. Professor Riad pointed out that the Nationality Law was the first nationality law to be enacted after the separation of Egypt and Syria from the union known as the United Arab Republic and the purpose of Article 1 was to endeavour to draw a global distinction between those who were Egyptian before the union and those who were not. He stated in his expert opinion:

It is also suggested that Article 8 of Law No. 26 of 1975 is not applicable to Ms Vecchi because she was not a "foreign woman" as mentioned in Articles 7 or 8. It is suggested that Ms Vecchi was an "original" Egyptian national under Article 1 of Law No. 26 of 1975. That article refers to those who were Egyptian nationals as of the date of Egypt's nationality law of 1958 under the provisions of Egypt's nationality law of 1956.

Marriage to an Egyptian national was the sole cause of Ms Vecchi's acquisition of Egyptian nationality. That fact is not altered in any way by the provisions of Article 1 of Law No 26 of 1975. As this law was the first nationality law to be enacted after the separation of Egypt and Syria from their brief union as the United Arab Republic, Article 1 endeavored to draw a global distinction between those who were Egyptian before that union and those who were not. In other words, this article has nothing to do with the grounds on which the nationality of each Egyptian is established. Hence, it has no relevance to the way Ms Vecchi acquired her Egyptian nationality and does not mean that she falls outside of Article 8 of Law No 26, dealing with foreign women who acquired the Egyptian nationality by marriage to an Egyptian.⁷³

191. The Tribunal accepts this analysis of Article 8 which is strongly supported by the statutory language. If Ms Vecchi was not a "foreign woman" she could not have acquired Egyptian nationality under the principles espoused in Article 6 and 7 of the Nationality Law. In truth the contention of Egypt is in essence a restatement of its earlier argument that the reference to "the two previous articles" in Article 8 confines the operation of Article 8 to a person who acquired Egyptian nationality under the Nationality Law. This is a contention which the Tribunal has not upheld for the reasons given in paragraphs 183-187 above.
192. In its Memorial on Jurisdiction the Respondent contended that Ms Vecchi was aware of her Egyptian nationality status and sought to use it even after the

⁷³ Expert Opinion of Prof Dr Riad of 10 July 2006, paras. 50-51.

alleged "loss" of her nationality in 1993. The Respondent referred to a number of documents to this effect:

The nationality file of Clorinda held with the Nationality Authority indicates her full awareness of her Egyptian nationality status, from the time of acquisition thereof until very recently even after the alleged date of losing her Egyptian nationality in 1993 and registering the Request for Arbitration.

To strengthen same, such awareness is fully illustrated in a vast array of documents that include the following:

- Nationality certificates issued to verify the Egyptian nationality of Clorinda (issued in *July 26, 1966* and *March 1, 1993*).
- Clorinda's application to the Egyptian authorities to review her passport, an instrument that is granted solely to the nationals of Egypt and her declaration that all information contained in the application form was accurate (submitted on *May 11, 1999*). The declaration contained in this application reads in its relevant part as follows:

I hereby declare that all data stated hereinabove as well as the documents submitted by myself are valid and in conformity with my current status and further declare that any passport previously issued for me has expired and may not be renewed. Additionally, I hereby undertake to advise the [*Nationality*] Authority with any loss of the passport of modification thereto in the future.

- Clorinda used extensively her Egyptian passport to travel to and from Egypt even *after* the date of submitting the Request for Arbitration and the registration thereof (that took place on August 5, 2005).

As we mentioned earlier, these above referenced acts of Clorinda leave no option but to rely on the notion reflected in the ICSID decision of *Champion Trading et al v Egypt* that ruled the following:

The mere fact that this investment in Egypt by the three individual Claimants was done by using, for whatever reason and purpose, exclusively their Egyptian nationality clearly qualifies them as dual nationals within the meaning of the Convention and thereby based on Article 25 (2)(a) excludes them from invoking the Convention.⁷⁴

193. For all of the reasons given above the Tribunal finds that such references to documents reflecting nationality are *prima facie* evidence only and the Ms Vecchi's nationality falls to be determined by the Tribunal's interpretation and application of Egyptian law.

194. Professor Riad's opinion was that, on the date Ms Vecchi reacquired Italian nationality on 14 September 1993 "[u]nder Article 8, she automatically and *ipso jure* lost Egyptian nationality"⁷⁵ under the Nationality Law. Once again the Tribunal accepts this opinion. Such operation of Article 8 of the Nationality Law

⁷⁴ Respondent's Memorial on Jurisdiction, paras. 55-57.

⁷⁵ Expert Opinion of Prof Dr Riad of 10 July 2006, para. 47.

was not disputed by the Respondent, perhaps because it advanced an alternative argument that Article 8 was not applicable. The Tribunal finds that Ms Vecchi was at the relevant times an Italian national only and so satisfies the requirements set out in Article 25 of the Convention.

Is the Application of Egypt's Nationality Law Contrary to International Law?

195. The Tribunal has ruled that on an application of the nationality law of Egypt both Mr Siag and Ms Vecchi satisfy the negative nationality requirement having lost their Egyptian nationality prior to the relevant dates under the ICSID Convention. As noted by Professor Schreuer, situations where a nationality that is valid under domestic law may be disregarded as a matter of international law are situations of ineffective nationality lacking a genuine link between the State and the individual, involuntary acquisition of nationality or withdrawal of nationality contrary to international law.
196. The Respondent has asserted that all of the Claimants' connections are with Egypt. This is another way of saying that the Claimants links with Italy are ineffective to establish jurisdiction under the ICSID Convention as a matter of international law. The links of the Claimants with Egypt are not disputed. However, as noted above the Tribunal's findings are that through the operation of the Nationality Law both Claimants have lost their Egyptian nationality and only held Italian nationality at the relevant times for the purposes of the Convention. Thus, this is not a situation where the Claimants are dual-nationals.⁷⁶ In such a case of dual-nationality, the clear provisions of Article 25 of the ICSID Convention state that the Claimants would not have satisfied the so-called negative nationality requirement. The Tribunal agrees with the view of Professor Reisman who stated:

Siag and Vecchi's historic and continuing residence and operation of business interests in Egypt is likewise irrelevant, under the municipal laws of Italy and Egypt, respectively, to their legal status as Italian nationals and their loss of legal status as Egyptian nationals. Under Egyptian law, as Dr Riad explains, Siag lost his Egyptian nationality in 1990; under Italian law, he acquired Italian nationality (by virtue of his marriage to an Italian citizen) in 1993. Vecchi, similarly, lost her Egyptian nationality in 1993, when she chose to reacquire the Italian nationality that she possessed at

⁷⁶ See Expert Opinion of Prof Reisman of 12 July 2006, para. 25 (referring to *Feldman v Mexico*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000 ("dual nationality problems, including the search of the 'dominant or effective nationality', require," in the first place, "the existence of a double citizenship" as a *matter of law*" (emphasis in the original))).

birth. Neither Siag nor Vecchi qualifies as a dual national, rendering the search for 'genuine links' inapposite. Again, no evidence suggests that either Siag or Vecchi modified their nationality for fraudulent purposes or as a mere expedient, that is, to gain international legal protection under the BIT that they would otherwise lack. To the contrary, the events that legally terminated their Egyptian nationality and conferred (or, in the case of Vecchi, re-conferred) their Italian nationality preceded, by more than a decade, the institution of this arbitration [...].⁷⁷

197. The view of the ICSID Tribunal in the *Champion Trading* case was that the provisions of Article 25 were clear and left no room for a discussion of "dominant" or "effective" nationality. It said:

According to the Claimants this Tribunal should, when applying the nationality requirement under Convention, use the definition as it has been developed in international law as shown in the above quoted Nottebohm and A/18 decisions.

The Claimants argue that the Egyptian nationality of the three individual Claimants does not correspond to the prevailing definition of nationality in international law. If they are to be considered Egyptian it is only because of Egyptian law which conferred Egyptian nationality on them at birth. The Claimants submit that, in fact, they neither have today nor ever have had any particular ties or relations with Egypt. Claimants conclude that such an involuntary nationality should not be taken into account when interpreting the Convention.

The Nottebohm and A/18 decisions, in the opinion of the Tribunal, find no application in the present case. The Convention in Article 25(2)(a) contains a clear and specific rule regarding dual nationals. The Tribunal notes that the above cited A/18 decision contained an important reservation that the real and effective nationality was indeed relevant "*unless an exception is clearly stated.*" The Tribunal is faced here with such a clear exception.⁷⁸

198. The Tribunal concurs with the finding of the ICSID Tribunal in the *Champion Trading* case that the regime established under Article 25 of the ICSID Tribunal does not leave room for a test of dominant or effective nationality. The BIT contains a clear definition of who is to be considered a national. Article 1(3) defines a "natural person" as "with respect to either Contracting State, a natural person holding the nationality of that State in accordance with its laws" (underlining added). This is the kind of exception referred to in the decision of the Iran-United States Claims Tribunal in the A/18 case.⁷⁹ While it may be asserted that if this were a diplomatic protection case it could be argued differently, the parties have consented to have their dispute resolved under the ICSID Convention and it sets out a particular regime for the determination of jurisdiction. Under Article 9(3) of the BIT the avenue of diplomatic protection is specifically excluded while the arbitration is in progress. Developments in international law concerning nationality of individuals in the field of diplomatic

⁷⁷ *Id.* para. 26.

⁷⁸ *Champion Trading*, *supra* note 4, p. 288 (emphasis in the original).

⁷⁹ Case No. A/18, 6 April 1984, Iran-United States Claims Tribunal (5 Iran-U.S.C.T.R. 251).

protection including, for example, greater flexibility in the requirement for the link of nationality, while of interest, must give way to the specific regime under the ICSID Convention and the terms of the BIT.

199. This is not a situation where a claimant is seeking to assert a particular nationality in order to bring a claim and that nationality is claimed to be ineffective. Nor is it a case where the consequence of a determination of the nationality of an individual by one state as against other states falls to be determined. This case concerns a state, through operation of its domestic law, ceasing to regard individuals as its nationals.⁸⁰ In this case the Claimants contend that they lost their Egyptian nationality through operation of Egyptian domestic law so that they were not dual-nationals at all. In the *Champion Trading* case the claimants asserted that the test of effective nationality should be applied as an alternative argument based on a finding that under the operation of Egypt's nationality law they had acquired Egyptian nationality involuntarily and so were dual-nationals. It is the Tribunal's view that in this case it does not even have to consider that possibility since it has found as a matter of Egyptian law that the Claimants did not possess Egyptian nationality at the relevant times under the ICSID Convention.
200. In any event, as to the Claimants links to Italy, it is uncontested that the Claimants have Italian nationality. The Respondent focused on the Claimants' connections to Egypt and has not questioned the acquisition of Italian nationality by the Claimants except to note, in response to the opinion of Professor Reisman that an examination of effectiveness of nationality was inapplicable in this case, that their connections to that country are slight. The Tribunal finds that the Respondent has not demonstrated that the Claimants acquired Italian nationality as a mere expedient in order to bring these claims before ICSID. Both Claimants acquired Italian nationality in 1993, a long time before these claims were brought. Italian nationality was also acquired for recognized reasons i.e. marriage to an Italian in the case of Mr Siag and reacquisition following the death of a husband in the case of Ms Vecchi. The Tribunal finds that the Claimants possess genuine links to Italy.
201. The Tribunal finds that this case does not present a situation where there is scope for international law principles to override the operation of Egyptian

⁸⁰ See the extract from Oppenheim's International Law quoted at paragraph 144 above.

domestic law as to nationality. To do so would in effect involve the illegitimate revision of the terms of the BIT and the Nationality Law by the Tribunal.

B. Alleged Lack of Jurisdiction *Ratione Materiae*

202. In its Memorial on Jurisdiction the Respondent questioned the presence of expenditure by the Claimants in their personal capacities and what was described as the “foreign origin” of the expenditure.⁸¹ As to the second element the Respondent submitted, making reference to what it called “the intent of the Convention,” that a foreign origin of investment was required. With reference to the preamble of the BIT, it was submitted that the origin of the investment required “Italian” capital. Article 6 of the BIT was also relied on since its subject heading referred to “Repatriation of Capital and Returns.” It was Respondent’s contention that this envisaged a prior act of importation from Italy.
203. The Respondent asserted that the investment in this case was devoid of any foreign element from its inception. It was noted that at the Claimants were indisputably Egyptian nationals at the time the BIT was entered into on 2 March 1989, and on the date of entering into the Municipal Sales Contract with the Egyptian Ministry of Tourism on 4 January 1989. In addition, the corporate vehicles used for the purposes of the investment Siag Touristic and Siag Taba were local entities established under applicable Egyptian laws.
204. Claimants replied that the only dates of relevance under the Convention so far as the nationality requirement was concerned were the date of consent and the date of registration. In any event, the Claimants emphasized the fact that the bulk of the investment took place in the 1990s after, on Claimants’ case, the Claimants lost their Egyptian nationality and acquired Italian nationality. The definition of “investment” was broad. Consistent with the practice and decisions of ICSID Tribunals such a definition should be given “broad reach.”⁸² Claimants submitted that as set out in their Memorial on the Merits their shares in Siag Touristic and Siag Taba as well as claims to money from these companies relating to the property and the project fell within the definition of “investment.” It was contended that it was immaterial that these investments were made through the medium of companies, which were controlled by the Claimants.

⁸¹ Respondent’s Memorial on Jurisdiction, paras. 70-71.

⁸² See *Fedax*, *supra* note 20, para. 24. The term “investment” in Article 25 of the Convention must be given a “broad reach.” The Tribunal observed that “distinguished commentators of the Convention have concluded that a ‘broad approach to the interpretation of this term is warranted.’” *Id.* para. 22.

205. As to the timing issue, Professor Schreuer has stated in his authoritative treatise:

In the traditional law of diplomatic protection, a requirement of continuous nationality is often asserted from the time the claim arises up to the date it is taken up by the State of the injured person's nationality or even up to the date of a decision. The Convention does not require continuity of nationality. Its wording is directed at distinct points in time and not at a continuous period of time, which could have been expressed quite easily by "from to" or "continuously until" rather than by "as well as" and "on either date."⁸³

206. The Tribunal agrees with the conclusions of Professor Schreuer and finds that the relevant dates under the Convention are the date of consent and the date of registration.

207. The Convention requires an "investment" but does not limit the term in any manner. The BIT, like many BITs contains a broad definition of "investment." The Claimants have submitted that the majority of expenditure in the Taba project was made by them personally. For the purposes of determining jurisdiction the Tribunal finds this fact to be established. In any event, the definition of "investment" at Article 1(1)(b) of the BIT includes acquisitions of shares in companies and under (c) "claims to money." The Tribunal finds that the fact Claimants managed their investment through the medium of companies incorporated under Egyptian law does not exclude the Claimants from falling within the definition of "investment" of the BIT.

208. The Claimants noted that the recent majority decision of an ICSID Tribunal had specifically rejected an "origin of capital" requirement.⁸⁴ The *Tokios Tokeles* Tribunal found as follows after examining the terms of the Ukraine-Lithuania BIT:

Article 1(1) of the BIT defines "investment" as "every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter [...]."⁸⁵
[...]

The Treaty contains no requirement that the capital used by the investor to make the investment originate in Lithuania, or, indeed, that such capital not have originated in Ukraine.⁸⁶
[...]

The Respondent requests the Tribunal to infer, without textual foundation, that the Ukraine-Lithuania BIT requires the Claimant to demonstrate further that the capital used to make an investment in Ukraine originated from non-Ukrainian sources. In our view, however, neither the text of the definition of "investment," nor the context in

⁸³ Schreuer, *supra* note 25, p. 274.

⁸⁴ *Tokios Tokeles*, *supra* note 21, para. 82.

⁸⁵ *Id.* para. 17.

⁸⁶ *Id.* para. 74.

which the term is defined, nor the object and purpose of the Treaty allow such an origin-of-capital requirement to be implied. The requirement is plainly absent from the text. In addition, the context in which the term “investment” is defined, namely, “every kind of asset invested by an investor,” does not support the restriction advocated by the Respondent. Finally, the origin-of-capital requirement is inconsistent with the object and purpose of the Treaty, which, as discussed above, is to provide broad protection to investors and their investments in the territory of either party. Accordingly, the Tribunal finds no basis on which to impose the restriction proposed by the Respondent on the scope of covered investments.⁸⁷

209. The Tribunal in *Tokios Tokeles* also stated:

Even assuming *arguendo*, that all of the capital used by the Claimant to invest in Ukraine had its ultimate origin in Ukraine, the resulting investment would not be outside the scope of the Convention. The Claimant made an investment for the purposes of the Convention when it decided to deploy capital under its control in the territory of Ukraine instead of investing it elsewhere. The origin of the capital is not relevant to the existence of an investment.⁸⁸

[...]

[T]he Claimant in the present case owns and controls the assets in Ukraine that have given rise to this dispute. The origin of the capital used to acquire these assets is not relevant to the question of jurisdiction under the Convention.

In our view, the ICSID Convention contains no inchoate requirement that the investment at issue in a dispute have an international character in which the origin of the capital is decisive.⁸⁹

210. The Tribunal finds that the situation is no different in this case and agrees with the conclusions reached by the *Tokios Tokeles* Tribunal. The terms of the BIT do not impose any “origin of capital” requirement. The Respondent’s objection on this basis is not upheld.

211. For all of the above reasons the Tribunal finds that the Claimants have made an investment for the purposes of Article 25 of the ICSID Convention.

C. Estoppel

212. The Tribunal finds that the provisions of Article 25 of the Convention contain a complete procedure for the determination of jurisdictional issues.⁹⁰ There is no room to introduce additional estoppel arguments. Such matters should be addressed at the merits stage. For these reasons the Tribunal finds that the estoppel arguments raised by the Respondent as objections to jurisdiction are not upheld. Since these issues are more properly matters for the merits of the

⁸⁷ *Id.* para. 77.

⁸⁸ *Id.* para. 80.

⁸⁹ *Id.* paras. 81-82.

⁹⁰ See Transcript, Day 1, p. 74. Counsel for Egypt conceded as much at the hearing when he acknowledged that *estoppel* is “not a hundred per cent jurisdiction.” *Id.*

dispute the Tribunal does not find it necessary to comment on them further at this stage.

D. Abuse of Rights

213. In its submissions the Claimants raised the international law doctrine of abuse of rights. Given its findings in relation to the Respondent's objections to jurisdiction above the Tribunal does not find it necessary to rule on the issues raised with respect to the abuse of rights doctrine.

E. Costs

214. Each party has requested the Tribunal to award it costs for the jurisdictional phase of the arbitration. For the time being, the Tribunal has decided to defer a decision on costs to the second phase of the case when it will be in a position to make an overall judgment about the costs of the arbitration.

V. THE DECISION

215. For all the foregoing reasons and rejecting all submissions to the contrary the Tribunal makes the following decisions:

- (i) That the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal.
- (ii) That the dispute should proceed to the merits.
- (iii) That the costs of the proceeding, including the fees and expenses of the Tribunal and the ICSID Secretariat, are reserved for further consideration and subsequent determination.

[Signed]

David A R Williams QC
President of the Tribunal

[Signed]

Michael Pryles
Arbitrator

[Signed]

Francisco Orrego Vicuña
Arbitrator
(signed subject to the attached
partial dissenting opinion)

Date: 11 April 2007

Partial Dissenting Opinion of Professor Francisco Orrego Vicuña

I have requested leave to submit a partial dissent in respect of the Decision on Jurisdiction, which in no way detracts from the greatest respect I have for both the President of the Tribunal and my fellow co-arbitrator. This dissent refers only to the conclusions reached by the Decision in respect of Mr. Waguih Siag. For everything else I am in agreement with my learned colleagues.

The dissent is based on considerations that relate to both international law and the applicable Egyptian legislation. I shall address these matters in succession.

International Law Issues

This case is quite unique in connection with the facts and the issues they raise concerning the nationality of individuals, as separate and distinct from the nationality of corporate entities and juridical persons. The more strict treatment that the ICSID Convention gives to the nationality of individuals, as compared to the flexibility evidenced in respect of corporate nationality, is well justified. In fact, nationality of individuals entails a link of allegiance with the nation and the State, while corporate nationality is more a question of convenience.

This different treatment was explicitly explained in the Report of the Executive Directors accompanying the ICSID Convention (ICSID, Documents Concerning the Origin and the Formulation of the Convention, 1986, Vol. II, Part 2, at 1078-1079).

Waguih is presently an Italian national who shows little or no connection with Italy, who further alleges now not to be Egyptian because he is Lebanese, but who claimed at all relevant times to be Egyptian, and whose links with Lebanon are not quite evident either.

As the ICSID Convention does not define nationality, the principles of international law governing this matter come into play instantly. Cardinal among such principles is that of effectiveness. Ever since the *Nottebohm* case, this has been the accepted premise in international law and the recent work on the diplomatic protection of persons and property of both the International Law Commission and the International Law Association so confirms. There is no difference of opinion on this question with my learned colleagues.

The difference arises in connection with the extent of the principle under Article 25(2)(a) of the Convention. The Decision believes the principle in question is only applicable in respect of questions of dual nationality, but in this case the loss of

Egyptian nationality means that Waguih is not a dual national. True enough, dual nationality is the most common situation in respect of which effectiveness applies. However, I tend to see the issue in broader terms, particularly in connection with the dates required under the Convention to satisfy the test of nationality.

The drafting history of Article 25(2)(a) is unequivocal about the concern expressed by many countries that did not want to be taken to international arbitration by investors who were their nationals, even if holding the nationality of another Contracting Party as well. This concern is the one the Convention attends to, a situation which the Report of the Executive Directors explained in terms of considering a natural person who was a national of the State party to the dispute ineligible to be a party in proceedings under the Centre, even if he had the nationality of another State. The Report adds that “[t]his ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent” (Report cit., at 1078).

This conclusion is equivalent to the recognition that the prohibition in question is a kind of rule of *jus cogens* which does not admit derogation by consent, at any rate for the parties to the Convention. Such kind of rule is not unknown in the practice of conventions that lay the constitutional foundations for the development of new aspects of the law.

It is in this context that the situation of Waguih appears to be at odds with the meaning of the Convention. The investor was Egyptian at the time the investment was made, benefited from Egyptian legislation granting exclusive rights to Egyptian citizens and was at all times considered to be Egyptian, not just by the Egyptian Government but this was also his own understanding and that of his family. The argument relied upon by the Claimant to the effect that he had not realized that he had lost his Egyptian nationality, is a rather bad one.

The fact that Waguih later acquired a different nationality (Italy) and allegedly lost his original nationality (Egypt) because of acquiring that of a third State (Lebanon), cannot in my view prevail over the precise prohibition of the Convention. It is on this point where I believe the Convention goes beyond the strict technical situation of dual nationals and the dates used to this effect and covers additional situations that could contradict the prohibition in question, not to mention the fact that otherwise there could be uncontrollable abuse arising from acquisition or loss of nationalities.

I am intrigued by the question of the dates the Convention uses to establish the eligibility of the claimant. This problem has not been argued or pleaded in this proceeding and in that respect the Decision is right in not considering it. However, I believe it is right on my part to raise the question even if no answer is readily available for the moment.

Article 25(2)(a) of the Convention contains both the positive and the negative test in respect of who is an eligible claimant. The negative test, which is the one that matters here, establishes that a national of another Contracting State does not include as far as jurisdiction is concerned any person who on two dates had the nationality of the host and respondent State. The first is the date “on which the parties consented to submit such dispute to conciliation or arbitration.” The second is the date of registration. My query relates to the first date. The Convention was quite evidently envisaging the most common situation foreseeable that is an agreement in which both parties express simultaneously their consent to arbitration. Bilateral Investment Treaties were not yet common at all. In that context, it made sense that the dates indicated would require the compliance with the negative test at the time that both parties expressed their consent and later at the time of registration, without further elaboration.

This understanding changed when Bilateral Investment Treaties became widespread, as then the common situation became one where the State expresses its consent in the treaty and later the investor expresses its own consent in either a separate instrument or by simply applying to the Centre for the registration of its claim. At that point the expression of consent became decoupled and separated by a lapse of time, many times long. It has been often understood that the consent of the State was an offer, which upon acceptance by the investor became the consent to arbitration.

This is the situation later reflected in Rule 2 of the ICSID Institution Rules which takes the “[d]ate of consent” to mean, when both parties did not act simultaneously, the date in which the second party acted, which is usually the case of the investor.

Yet, the date in which the State expresses its consent in the treaty is not just an offer. It is much more than that and it has specific legal effects, including obligations of the host State under the treaty and the prohibition to exercise diplomatic protection by the other Contracting Party. The date of expression of consent for the State is that of the entry into force of the treaty or some other instrument which embodies that consent. When this consent is later matched by the consent of the foreign investor, the required conditions for submitting the dispute to arbitration are met, but the respective expressions of consent do not appear to change their dates. It is the operation of the principle of *pactum de contrahendo*, which not because it materializes at a different date it loses its mandatory nature.

The drafting history of the Convention also evidences that the Bank’s General Counsel was aware of the possibility of differed expressions of consent. In this respect he explained that consent may have been expressed in advance, for instance in a contract the parties to which agree to have recourse to conciliation or arbitration for the

settlement of disputes arising out of the contract (ICSID, Documents cit., Vol. II, Part 1, at 77-78).

In the light of this meaning, could it be held that the safeguard the State had under the Convention not to be taken to arbitration by those who were its own nationals at the time of expressing its consent, or at any rate at the time the investment was made, simply vanished? Could it be right that thereafter the process of eligibility would be controlled solely by the investor in the light of the situation prevailing at the time of its acceptance of consent, in disregard of the equivalent right of the State?

This would certainly be at odds with the absolute prohibition of the Convention noted above and a peculiar way to derogate from a kind of rule of *jus cogens*, which not because it is different it is less mandatory. As noted, the Report of the Executive Directors explains the prohibition as absolute and does not distinguish whether the derogation it prohibits is contained in a contract or in a treaty.

Even in matters where the Convention has left the parties at liberty to define certain requirements concerning the jurisdiction of the Centre, the definitions adopted cannot be contrary to the meaning of the Convention in respect of the exercise of jurisdiction by the Centre. This happens, for example, in connection with the definition of investment, where the liberty of the parties does not extend as far as to consider an investment something that would be entirely at odds with the meaning of the Convention. Similar is the situation of nationality, where, moreover, the Convention itself contains specific limits.

In this context, an alternative reading of the Convention to the effect that the negative test applies not only at the date in which the investor consents but also at that in which the State consents, or at the date the investment was made as some treaties require, would be plausible and much in harmony with the meaning of the Convention in the light of its drafting history. In such a case, the interpretation given by the Institutional Rules would need to be supplemented or clarified.

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

Such considerations reinforce my concern that Waguih is not a rightful claimant as far as jurisdiction is concerned because of the effectiveness of the connections he

had with Egypt at all relevant times. Neither Italian nor Lebanese nationalities play any meaningful role in Waguih's life.

Moreover, there are elements in the record that allow being skeptical about the other nationalities that come into play in this case. While the Respondent has not objected to the existence of Italian nationality, there have been arguments advanced by Egypt questioning how serious or rightful this acquisition was. Certainly there is nothing as effectiveness in the link with Italy.

It must also be noted that the whole argument of Waguih is constructed on the basis of the acquisition of Lebanese nationality and the effect this would have had in the loss of his Egyptian nationality. It is also possible to have serious doubts about how serious or rightful this other acquisition was. The certificate granted by a Secretary of the Lebanese Embassy in Cairo and the documents that followed from the Lebanese Ministry of the Interior are quite feeble and unconvincing. There is no reference to any record or file and the answer of the Lebanese Embassy to an inquiry by Egypt's counsel in this case was extremely vague and unhelpful.

It has been well established that in matters of nationality government certificates are just *prima facie* evidence of such nationality. There is good reason in this case to believe that doubtful documentary evidence does not meet the evidentiary requirements that would be needed to prevail over the effectiveness of the links with Egypt.

The Interpretation of Egypt's Nationality Law

There is no disagreement with my learned colleagues about the fact that international law leaves the determination of nationality to the legislation of the State concerned, in this case Egypt. Yet, this does not mean that international law loses control over such determinations as it will be always in the position to decide about matters on which that law is not clear or contradictory, just as the Decision underlines.

This brings us to the interpretation of Egypt's Nationality Law. As explained in detail in the Decision, the issue concerns the meaning of Article 10, par. 3, of this Law. I am most grateful for the illuminating discussion that in this matter was provided by counsel for both parties and learned experts on constitutional law. For the sake of clarity, may I repeat the key provision in question:

However, permission to acquire a foreign nationality may allow the person for whom such permission is given, his wife and minor children to retain the Egyptian nationality, provided he notifies his wish to take advantage of such benefit within a period not exceeding one year from the date of acquiring the foreign nationality, and in such case they may retain the Egyptian nationality despite having acquired a foreign nationality.

The Decision opts for one interpretation that concludes that because Waguih did not confirm his intention of retaining Egyptian nationality within one year after he was authorized by the Egyptian authorities to acquire Lebanese nationality and also retain Egyptian nationality, he lost his Egyptian nationality.

I have favored a different interpretation. One must first note that Article 10, par. 1, prohibits the acquisition of foreign nationality (“may not acquire”), except if permitted by Decree. This acquisition is not otherwise recognized under the Law (“shall still be considered an Egyptian in every respect and under all circumstances”).

Waguih acquired Lebanese nationality in breach of this prohibition, apparently with a view to be dispensed from service in the Egyptian army. There are no records available about the legal basis on which he acquired that nationality. He only applied for permission later, including the request to remain Egyptian. This permission was granted and, therefore, it validates retroactively the earlier, unlawful acquisition of foreign nationality. Otherwise in the light of Egypt’s law, Waguih would have no Lebanese nationality at all as he did not acquire that nationality after the Decree, only before, and this is then accepted by the Egyptian Government.

One must turn next to the purpose of par. 3 reproduced above. This is to ensure that he who becomes a foreign national and has been granted permission to remain Egyptian, has one year “from the date of acquiring the foreign nationality” to make up his mind and notify his wish to take advantage of such benefit. The date of acquiring the foreign nationality is in this case prior to that of the Decree. There is no such date afterwards.

The law does not say what Professor Riad, a distinguished constitutional scholar appearing for Waguih, would like it to say, namely that the one year is counted from the date in which the Government acknowledges the existence of a foreign nationality. Professor Riad’s view to the effect that the whole process only begins when the authorizing decree is enacted is not tenable, as then the decree would validate an act retroactively but not a subordinate right such as the notification. Either it applies retroactively to the act and its subordinate rights, in which case the whole process is validated, or it applies only prospectively, in which case there is no foreign nationality at all because none was acquired after the Decree, lawfully or unlawfully, and no subordinate right can be exercised either.

As the foreign nationality has been validated retroactively, it is the earlier point in time that triggers the year to make up his mind. If as a foreign national he later requests to keep his Egyptian nationality, it is this specific request that must be considered the act of making up his mind and so having notified. In other words, the purpose of paragraph 3 is met at the point of so requesting and this is the point of

completion of the transitional period. Waguih exercised this option within the period mandated by the Law. In fact, he exercised it in a matter of days (15 December 1989 foreign nationality is acquired; on 19 December 1989 he requests to remain Egyptian).

Egyptian law must be applied in its entirety. This is not just Article 10, par. 3, it is also par. 1, under which the acquisition of foreign nationality without prior permission is illegal and hence does not deprive Waguih of his Egyptian nationality.

It is quite true that Egyptian law and administrative practices require many formalities, including the confirmation needed under Article 10, par. 3. Yet, here again is where international law must intervene. In leaving the determination of nationality to the State in question, international law is only concerned with the substance of the law, not the procedure. International law would be concerned, for example, with whether the law applies *jus sanguinis* or *jus soli*, but not about the procedures for handling such substantive determinations.

In the instant case, what matters for the determination of jurisdictional requirements under the Convention is whether Waguih expressed its intent to remain Egyptian, which he did in applying to retain Egyptian nationality; whether this was done before the competent authority, which it was as the request was made to the Egyptian Ministry of the Interior; and whether this was done within the period mandated by the law, which was also the case as the expression of intent came within a few days after the acquisition of foreign nationality. It would not matter whether Waguih used form A or B, which is purely a minor administrative requirement.

Many interpretations of the law are always possible and I, of course, greatly respect that for which my learned colleagues have opted. I submit, however, that the interpretation I have offered is the one which better serves the purposes of the Convention.

Indeed, much concern has been expressed in contemporary international law about the use of flags of convenience, whether in connection with maritime transportation, fisheries or any other matter. In the instant case, the principle of effectiveness prevents that the use of a nationality which is more convenient to Waguih might prevail over the real and effective nationality.

Conclusion

In the end, I believe that the whole question of having acquired Lebanese nationality is in essence artificial as far as the investment is concerned. The investment was made by an Egyptian citizen, a fact which is not disputed by the parties, who has effectively kept all his links with that country, who wishes to remain

Egyptian, who then alleges to have become Lebanese and to have lost his Egyptian nationality, but who does not claim under the existing BIT between Egypt and Lebanon, but under a BIT with Italy, a country with which he has at best remote connections.

This is not what international law or the ICSID Convention could have possibly intended. Neither is it what the expression of consent of Egypt could have possibly meant or what the Egypt's Nationality Law could be taken to say.

Again regretting not to be able to join the view of my learned colleagues in so far as Waguih is concerned, I look forward to working with them and the parties in the merits phase of this case which will now follow.

[Signed]

Francisco Orrego Vicuña