INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

VEOLIA PROPRETÉ

Claimant

and

ARAB REPUBLIC OF EGYPT

Respondent

ICSID Case No. ARB/12/15

AWARD

Members of the Tribunal
Judge Abdulqawi Ahmed Yusuf, President
Prof. Dr. Klaus M. Sachs, Arbitrator
Prof. Zachary Douglas QC, Arbitrator

Secretary of the Tribunal
Ms. Aïssatou Diop

Assistant to the Tribunal
Dr. Fernando Lusa Bordin

Date of dispatch to the Parties: May 25, 2018

REPRESENTATION OF THE PARTIES

Representing Veolia Propreté:

Mr. Joël Alquezar
Ms. Héloïse Hervé
Mr. Cédric Soule
Mr. Rami Chahine
Ms. Magali Garin
King & Spalding International LLP
Paris, French Republic

Representing the Arab Republic of Egypt:

H.E. Counselor Hussein Khalil Hamza
Counselor Mahmoud Elkhrashy
Counselor Mohamed Khalaf
Counselor Amr Arafa
Counselor Fatma Khalifa
Counselor Lela Kassem
Counselor Salma Elalaily
Counselor Nada Elzahar
Egyptian State Lawsuits Authority
Giza, Arab Republic of Egypt

Ms. Anna Joubin-Bret

Mr. Dany Khayat
Mr. José Caicedo
Ms. Joy Kreidi
Mr. William Ahern
Mayer Brown LLP
Paris, French Republic

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Articles on State Responsibility	Draft Articles on Responsibility of States for Intentionally Wrongful Acts, with commentaries (2001) (RLA-342)
BIT	Convention between the Government of the Arab Republic of Egypt and the Government of the French Republic concerning the mutual promotion and protection of investments dated 22 December 1974 - Convention entre le Gouvernement de la République Française et le Gouvernement de la République Arabe d'Egypte sur l'Encouragement et la Protection Réciproques des Investissements du 22 décembre 1974 (RLA-001)
Contract	Contract for the Public Cleanliness Project, concluded on 3 September 2000 between the Governorate of Alexandria and Compagnie Générale d'Entreprises Automobiles (later Veolia Propreté) (C-012)
CRCICA	Cairo Regional Center for International Commercial Arbitration
CRCICA Award	Award of Arbitral Tribunal Formed in the Matter of Arbitration No. 536 of 2007 between Onyx Integrated Services for Waste Management & The Governorate of Alexandria, Cairo Regional Centre for International Commercial Arbitration dated 3 March 2008 (C-045)
FET	Fair and equitable treatment
GAFI	Egypt's General Authority for Investment
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965

ICSID or the Centre	International Centre for Settlement of Investment Disputes
MFN	Most-favoured nation
Tribunal	Arbitral tribunal constituted on 11 February 2013
RfA	Claimant's Request for Arbitration dated 6 June 2014
Cl. Mem. Merits	Claimant's Memorial dated 30 September 2013
Resp. Mem. Jur.	Respondent's Objections to Jurisdiction and Request for Bifurcation dated dated 27 December 2013
Resp. C-M. Merits	Respondent's Counter-Memorial on the Merits dated 15 September 2015
Cl. Rep. Merits	Claimant's Reply on the Merits dated 15 April 2016
Resp. Rej. Merits	Respondent's Rejoinder on the Merits dated 17 August 2016
Respondent's Motion	Respondent's Motion Regarding the Inadmissibility of the Claimant's New Claims and Revisited Case dated 17 August 2016
Claimant's Response to the Motion	Claimant's Response to the Motion on Inadmissibility dated 14 October 2016
Cl. Rej. Jur. & Admiss.	Claimant's Rejoinder on Jurisdiction and Admissibility dated 21 September 2016
Cl.'s Submission on Costs	Claimant's Submission on Costs dated 3 May 2017
Resp.'s Submission on Costs	Respondent's Submission on Costs dated 3 May 2017
C-[#]	Claimant's Exhibit
CL-[#]	Claimant's Legal Authority
R-[#]	Respondent's Exhibit

RL-[#]	Respondent’s Legal Authority
Hearing on the Merits	Hearing on the merits held in Paris from 21 to 24 November 2016
Hearing on Closing Arguments	Hearing on Closing Arguments held in Paris on 9 February 2017
Tr. Merits Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing on the Merits
Tr. Closings Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing on Closing Arguments
Decision on Bifurcation	Procedural order No. 2 concerning the Respondent's request to address the objections to jurisdiction as a preliminary question dated 20 February 2014
Decision on Jurisdiction	Decision on Jurisdiction dated 13 April 2015

I. PROCEDURAL HISTORY

1. On 13 April 2015, the Tribunal issued its Decision on Jurisdiction,[1] which forms part of this Award. For an introduction to this dispute and the Parties, and the procedural history of the case up to 13 April 2015, the Tribunal refers to its Decision on Jurisdiction.

2. In the Decision on Jurisdiction, the Tribunal decided that:

> *1) It has jurisdiction to hear this dispute on the basis of Article 7 of the BIT between France and Egypt;*
>
> *2) The MFN clause in Article 3(2) of the BIT is restricted to the FET in Article 3(1) of the treaty, and consequently cannot be used to import other substantive standards into the treaty to expand the scope of jurisdiction of the Tribunal.*
>
> *3) It will deal with costs in the further proceedings.*[2]

3. With respect to Article 7,

> *the Tribunal conclude[d] that it has jurisdiction in the present case since Egypt made an offer of consent in Article 7 of its BIT with France of 1974, the Claimant gave its consent by instituting this proceeding, and there is no issue between the Parties as to the existence of a dispute between them in respect of Veolia's investments in Egypt.*[3]

4. With respect to Article 3,

> *the Tribunal conclude[d] that the MFN clause contained in Article 3(2) of the BIT is subordinated to the FET standard in paragraph 3(1) of the treaty and may therefore be used to import more detailed or more favourable FET clauses in other treaties concluded by Egypt. It cannot, however, be used to import other standards of international investment law such as FPS or an umbrella clause which, in the view of this Tribunal, neither belong to the same subject or the same category as the FET standard nor are encapsulated in it.*[4]

[1] Attached as Annex 1.

[2] Decision on Jurisdiction dated 13 April 2015, ("Decision on Jurisdiction") ¶159.

[3] Decision on Jurisdiction, ¶111.

[4] Decision on Jurisdiction, ¶158.

5. In the Decision on Jurisdiction, the Tribunal "called upon the Parties to confer and submit a joint proposal on a schedule for the merits phase to the Tribunal within 30 days of the issuance of this decision. If the Parties cannot reach an agreement, the Tribunal will decide in consultation with them."

6. The Claimant submitted the Parties' joint proposal by letter of 13 May 2015. On the basis of the Parties' joint proposal and a further exchange between the Parties and the Tribunal regarding hearing dates, the Tribunal issued Procedural Order No. 3 on 10 June 2015, laying out the procedural calendar for the remainder of the procedure.

7. A hearing on non-bifurcated questions of jurisdiction and merits was held in Paris from 21 to 24 November 2016 (the "Hearing on the Merits"). The following persons were present at the Hearing on the Merits:

Tribunal:

Judge Abdulqawi Ahmed Yusuf	President
Professor Dr. Klaus Sachs	Arbitrator
Professor Zachary Douglas QC	Arbitrator

ICSID Secretariat:

Ms. Aïssatou Diop	Secretary of the Tribunal

University of Cambridge:

Dr. Fernando Lusa Bordin	Assistant to the Tribunal

For the Claimant:

Counsel:

Mr. Joël Alquezar	King & Spalding
Ms. Héloïse Hervé	King & Spalding
Mr. Cedric Soule	King & Spalding
Mr. Rami Chahine	King & Spalding
Ms. Magali Garin	King & Spalding
Ms. Serena Bertinetto	King & Spalding
Mr. Enzo Paolinetti	King & Spalding

Parties:

Mr. Eric Haza	Veolia

Mr. Bruno Masson	Veolia
Mr. Jean-Marc Guillot	Veolia
Mr. Vincenzo Bozzetto	Veolia
Mr. Tarek El Akkari	Onyx Alexandria

For the Respondent:

Counsel:

Mr. Mahmoud Elkhrashy	Egyptian State Lawsuits Authority
Ms. Salma Elalaily	Egyptian State Lawsuits Authority
Ms. Nada Elzahar	Egyptian State Lawsuits Authority
Ms. Anna Joubin-Bret	Cabinet Joubin-Bret
Mr. Dany Khayat	Mayer Brown
Mr. José Caicedo	Mayer Brown
Mr. William Ahern	Mayer Brown
Ms. Nicole Araygi	Mayer Brown

Court Reporters:

Ms. Simone Bardot	Briault Reporting
Ms. Louise Pepper	Briault Reporting
Ms. Emma Lavell	Briault Reporting

Interpreters:

Ms. Anne-Marie Arbaji	French-Arabic
Ms. Radhia Ben Zribi	French-Arabic
Ms. Amira Abdel Alim	French-Arabic
Ms. Sarah Rossi	French-English
Ms. Eliza Burnham	French-English
Mr. Jesus Getan	French-English

8. During the Hearing on the Merits, the following persons were examined:

On behalf of the Claimant:

Witnesses:

Mr. Jean-Pierre Hansen	Onyx Alexandria
Mr. Pascal Decary	Veolia
Mr. Jérôme Le Conte	Saur

Experts:

Mr. Xavier Gallais	Accuracy
Ms. Delphine Sztermer	Accuracy
Mr. Florent Bouilliez	Accuracy

On behalf of the Respondent:

Witnesses:
Mr. Mohamed Ahmed Basyouny Abougendy
Ms. Layla Saad Abouelfetouh Shaat
Mr. Ahmed Mohamed Abdalla Elmahdy

Experts:

Mr. Gervase MacGregor	BDO
Mr. Andrew Maclay	BDO
Mr. Calley Williams	BDO

9. In consultation with the Parties, the Tribunal decided that the Parties would not file post-hearing briefs but would, instead, present oral closing arguments ("Hearing on Closing Arguments") to the Tribunal on 9 February 2017 in Paris.

10. The Hearing on Closing Arguments was held as scheduled. Present at the Hearing on Closing Arguments were:

Tribunal:

Judge Abdulqawi Ahmed Yusuf	President
Professor Dr. Klaus Sachs	Arbitrator
Professor Zachary Douglas QC	Arbitrator

ICSID Secretariat:

Ms. Aïssatou Diop	Secretary of the Tribunal

University of Cambridge:

Dr. Fernando Lusa Bordin	Assistant to the Tribunal

For the Claimant:

Counsel:

Mr. Joël Alquezar	King & Spalding
Ms. Héloïse Hervé	King & Spalding
Mr. Cedric Soule	King & Spalding
Mr. Rami Chahine	King & Spalding
Ms. Magali Garin	King & Spalding
Mr. Elias Boukachabine	King & Spalding

Parties:

Mr. Jean-Marc Guillot	Veolia
Mr. Vincenzo Bozzetto	Veolia
Mr. Tarek El Akkari	Onyx Alexandria

For the Respondent:

Counsel:

Ms. Lela Kassem	Egyptian State Lawsuits Authority
Ms. Salma Elalaily	Egyptian State Lawsuits Authority
Ms. Nada Elzahar	Egyptian State Lawsuits Authority
Ms. Anna Joubin-Bret	Cabinet Joubin-Bret
Mr. Dany Khayat	Mayer Brown
Mr. José Caicedo	Mayer Brown
Mr. William Ahern	Mayer Brown
Ms. Nicole Araygi	Mayer Brown

Court Reporters:

Ms. Cathy Le Madic	Simone Bardot
Ms. Isabelle Questel	Simone Bardot
Ms. Claire Hill	Realtime Reporting

Interpreters:

Ms. Sarah Rossi	French-English
Ms. Eliza Burnham	French-Arabic
Mr. Jesus Getan	French-Arabic

11. During the Hearing on the Merits, the following persons were examined:

On behalf of the Claimant:

Witnesses:

Mr. Jean-Pierre Hansen	Onyx Alexandria
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Mr. Jérôme Le Conte	Saur

Experts:

Mr. Xavier Gallais	Accuracy
Ms. Delphine Sztermer	Accuracy
Mr. Florent Bouilliez	Accuracy

On behalf of the Respondent:

Witnesses:
Mr. Mohamed Ahmed Basyouny Abougendy
Ms. Layla Saad Abouelfetouh Shaat
Mr. Ahmed Mohamed Abdalla Elmahdy

Experts:

Mr. Gervase MacGregor	BDO
Mr. Andrew Maclay	BDO
Mr. Calley Williams	BDO

12. The Parties filed their submissions on costs on 3 May 2017.

13. The proceeding was closed on 28 November 2017.

II. FACTUAL BACKGROUND

14. In this section, the Tribunal will briefly recall the circumstances in which the Parties formed a relationship, the obligations each undertook towards the other, and the events surrounding their dispute. The facts pertaining to the dispute, and points of contention between the Parties, will be further described, as appropriate, in the Tribunal's analysis of their respective claims in sections VI and VII below.

15. On 3 September 2000, the Governorate of Alexandria concluded a Contract for the Public Cleanliness Project[5] with the Compagnie Générale d'Entreprises Automobiles – CGEA – Onyx France (later "Veolia Propreté" or "Veolia") for a period of 15 years. The Contract was signed following a tender process organised by the Governorate of Alexandria, and a period of negotiations spanning from June to September 2000. During the negotiations, the parties agreed to exchange letters on the issue of the economic equilibrium of the Contract, which they did between 5 and 6 September 2000.

16. Onyx Alexandria ("Onyx") was set up in March 2001 as a locally incorporated Egyptian company with Veolia as its sole shareholder. Onyx then substituted Veolia under the

[5] Contract for the Public Cleanliness Project, concluded on 3 September 2000 between the Governorate of Alexandria and Compagnie Générale d'Entreprises Automobiles (later Veolia Propreté) (the "Contract"), C-012.

Contract, as previously agreed by the parties. The service provided by Onyx, as specified in the preamble of the Contract, included the "collection of household, commercial, industrial and medical waste as well as debris and bulky garbage, in addition to public cleanliness, including evacuation and maintaining of waste bins, the sweeping of streets, main roads, cleaning of beaches, public parks, and the cleansing of memorials, statues, fountains and public markets".[6] Compensation for Onyx's services during the 15 years was set in the Contract at a base annual rate organized by periods of three years as follows[7]:

The trienniums	Amount payable in EGP
Years 1 to 3 (2001-2004)	72,008,000
Years 4 to 6 (2004-2007)	107,649,000
Years 7 to 9 (2007-2010)	121,966,000
Years 10 to 12 (2010-2013)	133,291,000
Years 13 to 15 (2013-2016)	150,985,000

17. For its part, the Governorate of Alexandria undertook, under Article 3.3 of the Contract, to grant to Onyx Alexandria "the exclusive right to solely perform the service of collection, treatment and final disposal of waste over the whole of the Alexandria Governorate territory", and "not to take any legal or administrative actions, decisions or dispositions that may impair the technical or economic conditions of the Contract, unless the Governorate ensures that Contractor is fairly compensated". It was further specified that the compensation owed to Onyx would be "fair if it [achieved] Economic Balance to the contract or [enabled] the Contract [to] restore such balance".[8] Article 35 of the Contract dealt with dispute settlement, envisaging procedures for the amicable settlement of disputes; recourse to a neutral tripartite committee to be established by the parties on an *ad*

[6] Contract, C-012, p.4.
[7] Contract, C-012, ¶25.2.
[8] Contract, C-012, ¶3.3.

hoc basis; and recourse to arbitration in accordance with the rules of the Cairo Regional Center for International Commercial Arbitration ("CRCICA").

18. The dispute between the Parties concerns events that took place in the first three triennial periods of the operation of Onyx Alexandria, that is, years 1 to 9 between 2001 and 2010. It comprises four main points of contention.

19. The first point of contention is the alleged failure by the Governorate of Alexandria to restore the economic equilibrium of the Contract in the aftermath of macro-economic changes adopted by the Egyptian Government between 2002 and 2003, which made performance of Onyx's contractual obligations more onerous. Those changes included the abandonment of the parity between the Egyptian pound and the US dollar, the adoption by the Egyptian Central Bank of a policy of floating exchange rates and the enactment of legislation increasing the minimum wage.

20. Seeking to restore the economic equilibrium for the first triennium of the Contract, Onyx Alexandria resorted to CRCICA arbitration, obtaining, on 3 March 2008, an award of EGP 8 million. In response, the Governorate of Alexandria initiated proceedings before the Egyptian courts with a view to annulling the award. That application to annul was ultimately dismissed and the award was satisfied by the Governorate on 18 February 2010.

21. On 31 August 2008, Onyx Alexandria lodged a complaint to the General Authority for Investment ("GAFI") relating to the economic equilibrium of the Contract and other matters. It asked the Authority for compensation for imbalance in the Contract, an increase in the price of the Contract, and a recommendation that recent legislation be extended to the Contract so that the price for Onyx's services could be amended every three months according to the fluctuation of the exchange rate. A sub-committee established by GAFI to address Onyx's complaint concluded, on 8 April 2009, that it was not in a position to deal with the dispute, which ought rather to be settled by arbitration as provided in the Contract. On 1 February 2010, Onyx was informed that its complaint had been rejected.

22. Between 2004 and 2010, the parties corresponded extensively on the issue of the economic equilibrium of the Contract and held a few meetings in this connection.

23. The second point of contention concerns the imposition by the Governorate of contractual penalties on Onyx. In the periods spanning from July to October 2007, and September 2009 to December 2010, there was a sharp increase in the amount of penalties, which averaged over 10% of the annual contractual price. Onyx Alexandria challenged the amount of the penalties through a series of letters sent to the Governorate of Alexandria, complaining, in particular, about procedural irregularities such as duplication and lack of notice. In November 2010, the parties agreed to the creation of a bipartite committee charged with the review of the penalties incurred by Onyx in July 2010. That committee concluded, on 6 June 2011, that the Governorate ought to return to Onyx over half of the amount of penalties that had been levied that month.

24. The third point of contention relates to the procedure for the granting to Onyx Alexandria of an authorisation to collect and handle medical waste, one of the services envisaged in the Contract. Onyx started preparing an environmental impact assessment in 2002, which was approved by the Ministry for Environmental Affairs on 18 April 2004. Onyx then applied for the requisite license from the Ministry of Health on 1 March 2009, which it only obtained on 23 August 2011. For a number of reasons, the process for the granting of that license moved slowly. It comprised several exchanges from Onyx and the various organs of the Egyptian central government involved, including meetings and visits to the waste management facilities. In the meantime, Onyx had started, at the urging of the Governorate, to provide its services on an "experimental basis", for which it was remunerated at 50% of the contractual price.

25. The fourth point of contention comprises two instances in which the Governorate of Alexandria did not adequately remunerate Onyx Alexandria for its services. First, from 2008 onwards the Governorate defaulted on invoices relating to the operation of an additional landfill in El Hammam, the creation of which, although not envisaged in the Contract, had been requested by the Egyptian government. Second, from February to June 2011, in the months following the revolution that erupted in Egypt in January 2011, the Governorate was severely delayed in settling the invoices relating to Onyx's general services under the Contract.

26. Ultimately, Veolia Propreté instructed Onyx Alexandria to terminate the Contract, on the ground that the Governorate had failed to remunerate Onyx for its contractual services for three consecutive months, as provided in Article 30(2) of the Contract. On 30 June 2011, Onyx notified the Governorate of Alexandria of the termination of the Contract, to take effect three months thereafter on 30 September 2011. Onyx continued to provide its services until 31 October 2011, however, in order to ensure continuity. On 1 January 2014, Onyx filed for bankruptcy.

III. RELIEF REQUESTED

A. THE CLAIMANT'S PRAYER FOR RELIEF

27. The Claimant makes the following prayer for relief:

- A declaration that the Tribunal has jurisdiction to hear all of Veolia Propreté's claims, and that those claims are admissible.

- The rejection of all further preliminary objections lodged by the Respondent, including its Motion Regarding the Inadmissibility of the Claimant's New Claims and Revisited Case.

- A declaration that Egypt violated the BIT and international law with regard to the Claimant's investments.

- An award of damages to be paid to the Claimant for all the injuries that it has suffered and is yet to suffer, as described in the Memorial and the Reply, and further developed during the course of this proceeding.

- An award of pre- and post-award interest, compounded monthly until the full payment of the award by Egypt.

- An award of costs of the proceeding, including the fees and expenses of the Claimant's counsel and experts.

B. THE RESPONDENT'S PRAYER FOR RELIEF

28. The Respondent makes the following prayer for relief:

- A declaration that the Tribunal does not have jurisdiction to hear this dispute and/or that the Claimant's claims are inadmissible.

- A declaration that the new case and claims belatedly brought forward by the Claimant in its Reply, as identified in the Respondent's Motion, are inadmissible.

- Alternatively, the rejection of all claims by the Claimant in their entirety.

- In any event, an award of costs of the proceeding, comprising all costs and expenses incurred in connection with this arbitration, in particular the fees and expenses of the Respondent's counsel and experts.

- Any such further relief as the Arbitral Tribunal considers appropriate.

IV. JURISDICTION

29. It should be recalled at the outset that the Respondent has raised a number of objections to the jurisdiction of the Tribunal and to the admissibility of the Claimant's claims. In its Procedural Order No. 2, the Tribunal decided to grant the Respondent's request for bifurcation with regard to its objections on consent to arbitration (Article 7 of the BIT) and on reliance by the Claimant on the MFN clause of the BIT (Article 3) as described in paragraph 13 of the Order. It decided at the same time to join the other objections on jurisdiction and admissibility raised by the Respondent to the merits of the case.

30. In its Decision on Jurisdiction of 13 April 2015, the Tribunal ruled upon the above-mentioned bifurcated issues. The Tribunal concluded that it had jurisdiction to hear this dispute on the basis of Article 7 of the BIT between France and Egypt, and that the MFN clause in Article 3(2) of the BIT was restricted to the FET standard in Article 3(1) of the BIT, and consequently could not be used to import other substantive standards into the treaty to expand the scope of jurisdiction of the Tribunal.

31. It now remains for the Tribunal to pronounce upon the other non-bifurcated objections to jurisdiction and admissibility raised by the Respondent in its memorial on objections to jurisdiction and admissibility and request for bifurcation of December 27, 2013, namely that: (a) the Tribunal lacks jurisdiction because the dispute is contractual in nature; (b) the Tribunal must give full effect to the dispute settlement clause of the Contract; and (c) the Claimant's claims are inadmissible for lack of legal interest in Onyx's assets and rights.

32. In its Procedural Order No. 2, the Tribunal stated as follows:

> *The Tribunal is of the view that the objection of Respondent with respect to the nature of Claimant's claims, which Respondent characterizes as mere contractual claims disguised as treaty claims that should be settled under the exclusive jurisdiction clause of the Contract, is a matter which is closely intertwined with the facts of the case and would require a detailed review of argument and evidence that the Tribunal would also need to review at the merits stage.*[9]

33. In the same procedural order, the Tribunal observed with regard to the objection on admissibility that:

> *The Tribunal is of the view that it is preferable to consider issues of admissibility only once it has clearly established its jurisdiction in the instant case. In view of the fact that not all of Respondent's jurisdictional objections can be dealt with in a preliminary phase and are not being bifurcated under this Order, the Tribunal considers that this objection should be joined to the merits and that it should consequently be taken up during that phase of the proceedings.*[10]

34. Now that the Tribunal has heard the Parties on the merits of the case, it finds itself in a position to rule on the specific objections raised by the Respondent and to take them up for consideration in the following paragraphs, subject to a further preliminary issue that is set out in the next paragraph. It should, however, be recalled that in its Decision on Jurisdiction the Tribunal settled the issue of the consent to its jurisdiction by concluding that: "it has jurisdiction in the present case since Egypt made an offer of consent in Article 7 of its BIT

[9] Procedural order No. 2 concerning the Respondent's request to address the objections to jurisdiction as a preliminary question dated 20 February 2014, (the "Decision on Bifurcation") ¶47
[10] Decision on Bifurcation, ¶48

with France of 1974, the Claimant gave its consent by instituting this proceeding, and there is no issue between the Parties as to the existence of a dispute between them in respect of Veolia's investments in Egypt".[11] Thus, the issue of consent need not be revisited here.

35. The additional preliminary issue that must be ruled upon before the Tribunal considers the Respondent's remaining objections on jurisdiction and admissibility is the Respondent's "Motion Regarding the Inadmissibility of the Claimant's New Claims".

A. ISSUES OF JURISDICTION AND ADMISSIBILITY ARISING FROM THE ALLEGED "NEW CLAIMS"

(1) The Parties' Positions

a. Respondent's Position

36. In its Motion Regarding the Inadmissibility of the Claimant's New Claims and Revisited Case, the Respondent argues that in order to circumvent its objection on standing the Claimant advanced "an entirely new case" in the Reply: that measures taken by Egypt against Onyx Alexandria affected the value of Veolia Propreté's shares in Onyx and led to the loss of financial claims that Veolia Propreté had against Onyx, including operational costs and loans.[12] This attempt to shift the focus from Onyx's losses to the parent company's losses constitutes, according to the Respondent, a "new case based on new investments".[13] In its Motion and Rejoinder, the Respondent advances five preliminary objections: three concerning jurisdiction, two concerning admissibility.

37. First, the Respondent contends that the Claimant has failed to establish that the relevant dealings between Onyx and its parent company fall under Article 1 of the BIT. This provision requires that the different forms of investment protected by the treaty be made "conformément à la législation de la Partie contractante sur le territoire de laquelle l'investissement est effectué".[14] For the Respondent, the Claimant showed neither that the

[11] Decision on Jurisdiction, ¶111.
[12] See Claimant's Reply on the Merits dated 15 April 2016 ("Cl. Rep. Merits'), ¶46.
[13] Respondent's Motion Regarding the Inadmissibility of the Claimant's New Claims and Revisited Case (Respondent's Motion), ¶¶31-37.
[14] Convention between the Government of the Arab Republic of Egypt and the Government of the French Republic concerning the mutual promotion and protection of investments dated 22 December 1974 - Convention entre le

transactions between Veolia and Onyx were made in conformity with Egyptian law, nor that they indeed took place in Egyptian territory.

38. Second, the Respondent argues that the "new case" does not satisfy the condition in the applicable compromissory clause that a three-month period of unsuccessful negotiations elapse before arbitral proceedings are initiated.[15] The Respondent contends that the negotiations between the parties were confined to contractual claims involving Onyx directly, with no reference made to breaches of the BIT or to losses incurred by the parent company *qua* the sole shareholder of Onyx. Given that the procedural condition in the compromissory clause was thus left unfulfilled, the Tribunal would lack jurisdiction to hear the Claimant's "new case".

39. Third, the Respondent argues that the dispute as recast by the Claimant does not arise "directly out of an investment" as required by Article 25(1) of the ICSID Convention. Relying on *Metalpar v. Argentina*, it maintains that for the Tribunal to have jurisdiction "there must be an immediate link (as opposed to remote) between the impairment of an investment and the actions invoked as breaching the Treaty".[16] That requirement would be left unfulfilled in the present case because the measures against which the Claimant complaints – refusal to renegotiate the Contract, imposition of penalties and other actions of omissions of the Egyptian Government – were not "capable of directly impairing Veolia's rights as a shareholder in Onyx or its rights as an alleged creditor to Onyx".[17]

40. Fourth, the Respondent argues that the Tribunal should decline to hear the "new case" on grounds of procedural fairness. The main reason is that the Claimant now relies on transactions between the parent company and Onyx of which it provides no evidence, making it impossible for the Respondent to challenge the "new case" effectively now that

Gouvernement de la République Française et le Gouvernement de la République Arabe d'Egypte sur l'Encouragement et la Protection Réciproques des Investissements du 22 décembre 1974, (the "BIT"), RLA-001, p.2.

[15] The Parties agree that Article 7 of the BIT, as amended by the Exchange of Letters of 20 March 1986, comprises a three-month negotiating period.

[16] Respondent's Rejoinder on the Merits dated 17 August 2016 ("Resp. Rej. Merits"), ¶289.

[17] Resp. Rej. Merits, ¶¶289-311.

the production of documents phase is over.[18] This would curtail the Respondent's right of defence.

41. Fifth, the Respondent maintains that a claim relating to the effect of the measures addressed at Onyx Alexandria on the devaluation of the Claimant's shares and contractual debts constitutes an "indirect claim" insofar as it relates to losses resulting from losses suffered by a third party. Such claims, the Respondent argues, are not admissible under customary international law as held in *Dickson car wheel co. v. Mexico*.[19] The Respondent further contends that in any event the indirect claim would have to be confined to dividends not received and to the exact amount of the loans, which total far less than what the Claimant is currently asking the Tribunal to award in the guise of personal losses.[20]

42. In addition to bringing a "new case", the Respondent criticises the Claimant for advancing the following inadmissible new claims: regardless of the relevant contractual provisions, the economic equilibrium claim finds support on the "normal practice in the industry"; in imposing penalties for breach of contract the Governorate was in fact implementing a public policy to reduce the costs of waste collection and cleanliness services. Another "new claim" which the Respondent identifies concerns the medical waste issue. The Respondent emphasises that the Claimant has "completely altered its position" on that issue by conceding several elements of the factual account that the Respondent gave in the Counter-Memorial.

43. Finally, in its Motion the Respondent requests that the Tribunal exclude from the proceedings certain claims and positions which the Claimant has allegedly abandoned in its Reply. Those are the following:

> i. "that the Respondent had an obligation, pursuant to the Contract and local laws, to maintain the exchange rate and labor laws, or to fully compensate it for all costs arising out of these changes";[21]

[18] Respondent's Motion, ¶60.
[19] Resp. Rej. Merits, ¶¶355-358.
[20] Resp. Rej. Merits, ¶¶360-363.
[21] Respondent's Motion, ¶83.

ii. that the penalties imposed by the Respondent amounted to breaches of the Contract;

iii. that the "alleged refusal to pay the amounts purportedly due for the collection of medical waste" was a violation of the BIT;[22]

iv. that GAFI "was under a purported obligation to re-establish the economic equilibrium of the Contract";[23]

v. that "the allegedly dilatory appeal initiated by the Governorate against the CRCICA award and the refusal of the Governorate to immediately comply with it and pay the amount awarded" constituted a breach of the BIT;[24]

vi. that lack of coherence, arbitrariness and unfairness in the behaviour of the Respondent amounted to a breach of fair and equitable treatment.

44. While noting that the conclusion of the Claimant's Reply comprises a reference to "les raisons présentées… dans son Mémoire en demande", the Respondent considers that "generic, undefined and undetermined reference" insufficient to maintain claims that have been in fact abandoned.[25]

b. Claimant's Position

45. First and foremost, the Claimant disavows the Respondent's contention that it is bringing two claims, one based on Onyx's losses, another based on its own shares and unpaid loans. Rather, it argues that that the subject of the dispute are the losses that Veolia Propreté suffered as a result of the Respondent's wrongful interference with the "operation économique globale" that it set up in Egypt to provide services of public cleanliness. The Claimant clarifies in its Rejoinder on Jurisdiction and Admissibility that what the Respondent calls a "new investment" is merely an alternative method to calculate compensation, the suggestion being that Veolia Propreté's losses can be estimated either (i) on the basis of losses incurred by Onyx (as proposed in the Memorial and reiterated in its Response to the Motion on Inadmissability) or (ii) on the basis of the diminution in the

[22] Respondent's Motion, ¶87.
[23] Respondent's Motion, ¶88.
[24] Respondent's Motion, ¶89.
[25] Respondent's Motion, ¶101.

value of Veolia Propreté's shares in Onyx and unpaid loans and other costs (as proposed, alternatively, in the Reply).[26] The Claimant stresses that the two briefs on the merits that it has filed comprise identical submissions, and that any discrepancies between the Memorial and the Reply reflect the evolution of its legal arguments in light of the Respondent's Counter-Memorial, which is "une pratique largement admise" and "inhérente à tout processus contentieux contradictoire".[27]

46. As regards the Respondent's specific preliminary objections, the Claimant argues that:

> (i) Veolia Propreté's funding of Onyx is explained in Accuracy's second report and additional information on the debts owed by Onyx Alexandria is available in tax returns submitted to the Egyptian government. There could be thus no obstacles for the Respondent to ascertain that the relevant transactions were made in conformity with Egyptian law and took place in Egyptian territory;[28]
>
> (ii) that the alternative method for the quantification of damages meets the requirement of Article 25 of the ICSID Convention to the extent that there is a clear link – as shown by Accuracy – between the actions and omissions of the Respondent and the damage suffered by the Claimant, namely the loss of value of the shares and unpaid loans;[29]
>
> (iii) even if the Respondent were correct in characterising its argument on damages as a "new claim", that claim would be admissible pursuant to Article 46 of the ICSID Convention and Article 40 of the Rules of Arbitration insofar as it arises directly out of the subject-matter of the dispute, is within the consent of the parties under Article 7 of the France-Egypt BIT and was presented in the Reply in a timely fashion.[30] The Claimant's response to the Respondent's contention that the three-month negotiations period has not been observed is twofold. First, the Claimant

[26] Cl. Rej. Jur. & Admiss., ¶84. Claimant's Response to the Motion on Inadmissibility dated 14 October 2016 ("Claimant's Response to the Motion"), ¶26. The question of what method to choose, the Claimant continues, pertains to the compensation phase of the proceedings and has no bearing upon the jurisdiction or admissibility of the claims concerning its investment in Egypt.
[27] Claimant's Letter of 24 August 2016, p.4.
[28] Claimant's Response to the Motion, ¶¶22-25.
[29] Cl. Rej. Jur. & Admiss., ¶80.
[30] Claimant's Response to the Motion, ¶¶40-45.

argues that compliance with time-limits in compromissory clauses is not required for additional claims as held in *CMS v. Argentina*.[31] Second, it argues in any event that the notice of dispute dated 27 December makes reference both to Veolia Propreté's participation in Onyx and to financial claims covered by the Treaty;[32]

(iv) that the procedural equality of the Parties has been respected as the Respondent has had the occasion to offer a full response in its Rejoinder to any additional claims that the Claimant may have put forth.[33]

47. The Claimant likewise disputes that the changes to which the Respondent alludes constitute new claims and describes them rather as responses to points made by the Respondent, the refinement of existing claims or at best new arguments, which do not raise any questions of jurisdiction or admissibility.[34]

Finally, the Claimant clarifies that, as a closer reading of the materials shows, it has not abandoned any of its claims.[35] It argues that there is no legal basis for the Respondent's request that claims be considered as abandoned in advance of the hearings.[36]

(2) The Tribunal's Analysis

48. In its "Motion regarding the inadmissibility of the Claimant's new claims and revisited case" submitted on 17 August 2016 following the Reply of the Claimant, the Respondent argues that the Claimant changed the content of its claims and raised new claims for which either the jurisdiction of the Tribunal was not established or which should be declared inadmissible by the Tribunal on grounds of procedural fairness or lack of satisfaction of the requirement of prior negotiations under the BIT. The Claimant rejects the arguments of the Respondent and contends that there is nothing new about its claims. It affirms that it has simply refined its arguments following the decisions on bifurcation and on jurisdiction by the Tribunal.

[31] Claimant's Response to the Motion, ¶58.
[32] Claimant's Response to the Motion, ¶67.
[33] Claimant's Response to the Motion, ¶56.
[34] Claimant's Response to the Motion, ¶¶12-14; 28-38.
[35] Claimant's Response to the Motion, ¶¶84-89.
[36] Claimant's Response to the Motion, ¶¶90-93.

49. The Tribunal at this point will only consider whether the Claimant has raised new claims in its Reply such that the procedural requirements for advancing new claims would apply. In respect of this issue the Tribunal is in agreement with the Claimant that it has not asserted claims that are materially different from those originally submitted in its Request for Arbitration. Indeed, in its Request, the Claimant stated that: "Le différend soumis au CIRDI est en relation directe avec l'investissement de Veolia Propreté en Egypte"[37], and then defined what that investment consisted of:

> *L'investissement de Veolia Propreté comprend, inter alia, des 'actions et autres formes de participation ... aux sociétés constituées sur le territoire de l'une des Parties contractantes', conformément à l'Article 1(b) du TBI. Veolia Propreté, l'Investisseur, est en effet l'actionnaire direct et détient l'intégralité du capital d'Onyx Alexandria, une société constituée sous la loi de l'Etat égyptien. Le présent différend est en relation directe avec Onyx Alexandria.*[38]

It also added:

> *Par ailleurs, l'investissement de Veolia Propreté intègre, également, inter alia, des 'créances ou [des] droits à prestations ayant une valeur économique', conformément à l'Article l(c) du TBI. L'investisseur est titulaire de créances et de droits à prestations ayant une valeur économique relatifs au service de propreté publique du Gouvernorat d'Alexandrie. Le présent différend est lié à la perte des créances et des droits à prestations du Marché.*[39]

50. The same elements are to be found in the claims presented later by the Claimant in its Reply, while the dispute submitted to the Tribunal continued to be characterized as a dispute regarding the investment of Veolia Propreté in Egypt, which consisted of shares and other forms of participation in the locally incorporated company (Onyx Alexandria), which was a fully owned subsidiary, as well as loans and other contributions made to Onyx Alexandria. Thus, notwithstanding the manner in which the arguments of the Claimant were presented in its written submissions, the essence of the claims that it made in its Request for Arbitration regarding its investment in Egypt has not, in the opinion of the

[37] Claimant's Request for Arbitration dated 6 June 2014 ("RfA"), ¶20.
[38] RfA, ¶21.
[39] RfA, ¶22.

Tribunal, substantially changed so as to be considered as "a revisited case or new claims" as contended by the Respondent in its Motion.

51. Having thus established that there are neither new claims nor a new case presented by the Claimant, the Tribunal does not consider it necessary to deal with the issues of procedural fairness and lack of satisfaction of the requirement for prior negotiations raised by the Respondent, since they are related to the contention by the Respondent of the existence of "new claims" which the Tribunal considers unfounded.

52. Finally, the Tribunal is of the view that the issue raised by the Respondent on whether certain claims have been abandoned by the Claimant in its Reply does not belong to the considerations on jurisdiction and admissibility and therefore should not be addressed here. Nonetheless, it takes note of the Claimant's assertion that it has not abandoned any of its claims.

B. THE CHARACTERISATION OF THE CLAIMANT'S CLAIMS

(1) The Parties' Positions

a. Respondent's Position

53. In its Objections to Jurisdiction and Admissibility filed on 27 December 2013, the Respondent contends that the Tribunal lacks jurisdiction because the dispute is of a contractual character, a point that is reiterated in the Counter-Memorial and Rejoinder in light of the Tribunal's conclusion that the Claimant may not rely on Article 3(2) of the BIT to import an umbrella clause. For the Respondent, the Tribunal is under a duty to carry out "a prior objective characterization of the claims" and ought not to rely on the characterisation advanced by the Claimant, which purports to repackage contractual claims as treaty claims. In undertaking that objective characterisation, the Tribunal would have to ascertain: (i) that the content of the rights invoked by the Claimant not only have their "legal source or basis" in the BIT but also that their content is different from that of Onyx Alexandria's contractual rights;[40] and, (ii) that it is possible to make a finding of

[40] Respondent's Objections to Jurisdiction and Request for Bifurcation dated 27 December 2013 ("Resp. Mem. Jur."), ¶114.

international responsibility independently of a prior finding that the Contract has been breached.[41]

54. The Respondent argues that at the present stage of the proceedings the objective characterisation of the claims should not be made on a *prima facie* basis, but rather on the basis of proven facts. The *prima facie* test for jurisdiction would have no place when jurisdictional objections are considered alongside the merits of the dispute. In support of this position, the Respondent argues that most of the arbitral awards invoked by the Claimant applied the *prima facie* test at the jurisdictional phase of proceedings that had been bifurcated.[42] The sole exception was *Tenaris v. Venezuela*, but the Respondent criticises the tribunal in that case for an "inefficient administration of justice" because that tribunal ultimately found, on the merits, that the investor's claims were contractual.[43] Moreover, the Respondent criticises the Claimant for taking a contradictory position on this issue, having originally objected to the Respondent's request for bifurcation on the grounds that a characterisation of the claims required a more profound analysis of the facts than was possible at that stage of the proceedings, only to change its mind by asking the Tribunal presently to apply the *prima facie* test.[44]

55. The Respondent reiterated its position on the applicable jurisdictional test in its Closing Statement on 9 February 2017.[45] When asked by a member of the Tribunal whether it was necessary for the Tribunal to identify and apply a jurisdictional test at this stage of the proceedings, given that it had already heard the Parties on the merits,[46] Counsel for the Respondent maintained that doing otherwise would allow claimants to bring cases by labelling their submissions "treaty claims" and force respondents to fight those ill-advised cases.[47]

56. The Respondent argues that claims relating to the economic balance of the Contract; the imposition of penalties envisaged in the Contract; and alleged actions and omissions

[41] Resp. Rej. Merits, ¶231.
[42] Resp. Rej. Merits, ¶214.
[43] Resp. Rej. Merits, ¶216.
[44] Resp. Rej. Merits, ¶¶217-222.
[45] Tr. Closings Day 1 (English Version) Joubin-Bret 125:15-129:13.
[46] Tr. Closings Day 1 (English Version) Douglas 240:13-20.
[47] Tr. Closings Day 1 (English Version) Joubin-Bret 246:11-248:19.

attributable to Egypt that interfered with the performance of the Contract (e.g. obstacles to obtaining an authorisation to handle medical waste, recourse to CRCICA, the conduct of GAFI) are all of purely contractual character.[48] The Respondent adds that, in any event, the Tribunal should decline jurisdiction even if it chose to apply the *prima facie* test, since the Claimant failed to explain "how and why the facts are capable of being characterized as breaches of the fair and equitable treatment undertaking and as an expropriation".[49]

57. An additional argument which the Respondent advances in connection with the characterisation of claims concerns Article 35 of the Contract, according to which disputes that cannot be settled amicably by the parties are to be submitted to CRCICA. The Respondent's argument is twofold. First, the Tribunal would be under a duty to enforce the choice of forum clause to which the Governorate and Onyx both committed. In support of this position, the Respondent relies on the annulment decision in *Vivendi*.[50] Second, the fact that the Claimant has not followed the route prescribed in the Contract would make the alleged contractual breaches incapable of giving rise to breaches of the BIT.[51] To substantiate this view, the Respondent refers to *SGS v. Philippines* and *BIVAC v. Paraguay*, in which claims of expropriation were rejected on a preliminary basis because the relevant investors had not pursued the remedies to which they were entitled under the applicable contracts.[52]

b. Claimant's Position

58. For the Claimant, the jurisdictional question for the Tribunal is whether the Respondent's actions and omissions, if assumed to be true, would constitute *prima facie* violations of the BIT. In support of the *prima facie* test, it relies on a number of investment awards, in particular *Tenaris v. Venezuela*.[53] The Claimant disavows the Respondent's suggestion that the *prima facie* test only applies when proceedings are bifurcated, noting that there is

[48] This characterisation is argued at length in Resp. Mem. Jur., ¶¶125-198.
[49] Resp. Rej. Merits, ¶238.
[50] *Compañía de Aguas del Aconquija S.A. v. Vivendi Universal (former Compagnie Générale des Eaux) v. Argentina*, ICSID Case No. ARB/97/3, Annulment Decision (3 July 2002), RLA-015, ¶98.
[51] Resp. Mem. Jur., ¶¶318-326.
[52] Resp. Mem. Jur., ¶¶319-325.
[53] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, CLA-194, ¶301.

nothing in the several awards applying the test that would support such a conclusion.[54] It points out, in this connection, that the test suggested by the Respondent would create "une confusion injustifiable entre la question de savoir si un tribunal est compétent afin de déterminer le bienfondé d'une demande et la question de savoir si cette même demande est réellement fondée".[55]

59. Likewise, the Claimant disagrees with the Respondent in that claims premised upon contractual breaches cannot constitute veritable treaty claims, referring to the award in *Noble Ventures v. Romania* and the annulment decision in *Vivendi* for the proposition that a single act can simultaneously constitute a contractual breach under municipal law and a treaty breach under international law.[56] In its Opening Statement on 21 November 2016, the Claimant emphasised that "[s]i ces demandes sont fondées ou non est une question qui relève strictement du fond, mais c'est en tout cas une question que Veolia Propreté est en droit de voir examiner par un Tribunal arbitral indépendant".[57]

60. Relying on the *prima facie* test, the Claimant argues that the alleged acts are capable of breaching Articles 3 and 4 of the BIT.[58] As regards fair and equitable treatment, the Claimant maintains that Veolia Propreté could legitimately expect, in the context of its "véritable partenariat" with the Governorate, that the economic equilibrium of the Contract would be restored;[59] that arbitrary penalties would not be imposed on Onyx as a strategy for the Governorate to deal with its budgetary difficulties;[60] that the Governorate would not harm Veolia Propreté's investment by refusing to remunerate Onyx for the operation of the landfill in El Hamman following governmental decisions (in particular, the report adopted by the Central Auditing Agency) devoid of any transparency and good faith;[61] and that a license to treat medical waste would be granted to Onyx duly and timely.[62] The same

[54] Cl. Rej. Jur. & Admiss, ¶7.
[55] Claimant's Rejoinder on Jurisdiction and Admissibility dated 21 September 2016 ("Cl. Rej. Jur. & Admiss."), ¶13.
[56] Cl. Rej. Jur. & Admiss., ¶¶23-25.
[57] Tr. Merits Day 1 (French Version) Hervé 22:811-813.
[58] Cl. Rej. Jur. & Admiss., ¶¶28-34.
[59] Cl. Rej. Jur. & Admiss., ¶40.
[60] Cl. Rej. Jur. & Admiss., ¶41.
[61] Cl. Rej. Jur. & Admiss., ¶42.
[62] Cl. Rej. Jur. & Admiss., ¶43.

acts, the Claimant adds, constitute the creeping expropriation of Veolia Propreté's investment in breach of the prohibition contained in Article 4 of the BIT.[63]

61. The Claimant emphasises, in any event, that some of its claims concern actions and omissions which are attributable to Egyptian authorities and cannot be said to be of a contractual character even if they ultimately affected the Contract's performance and profitability.[64] Those comprise the obstacles Onyx faced to obtain an authorisation to handle medical waste; the conduct of the Central Auditing Agency; and the conduct of General Authority for Investment and Free Zones.[65] In its Rejoinder on Jurisdiction, the Claimant expresses the view that the Contract constituted a "véritable délégation de service public", and as such was subject to "prérogatives de puissance publique" exercised by the Governor of Alexandria, who enjoys the rank of minister under Egyptian law.[66]

62. The Claimant disagrees that Article 35 of the Contract can have the effect of depriving the Tribunal of jurisdiction.[67] It refers to the award of the tribunal in *Crystallex v. Venezuela* and to the decision of the Annulment Committee in *Vivendi* to argue that the existence of dispute settlement clauses in a contract cannot debar investors from bringing claims under a BIT. The Claimant refers to *Tenaris v. Venezuela* for that proposition that Veolia Propreté, not being itself a party to the Contract, can neither rely on nor be affected by the Contract's dispute resolution provisions.[68] On that basis, it also seeks to distinguish the present case from *SGS v. Philippines* and *BIVAC v. Paraguay*, where the claimants had themselves concluded contracts with the respondents.[69] The Claimant also offers another ground of distinction, namely that the measures which the Respondent took to expropriate Veolia Propreté's investment go far beyond the mere failure to make contractual payments which was at stake in those cases.[70]

[63] Cl. Rep. Merits, ¶30.
[64] Cl. Rep. Merits, ¶33.
[65] Cl. Rej. Jur. & Admiss., ¶44.
[66] Cl. Rej. Jur. & Admiss., ¶¶45-46.
[67] Cl. Rep. Merits, ¶¶36-37.
[68] Cl. Rep. Merits, ¶35.
[69] Cl. Rep. Merits, ¶38.
[70] Cl. Rep. Merits, ¶38.

(2) The Tribunal's Analysis

a. The Characterization of the Claimant's Claims

63. The Respondent contends that the Tribunal lacks jurisdiction because the dispute is of contractual nature, and that the claims advanced by the Claimant are in essence contractual claims rather than treaty claims. Thus, for the Respondent the Tribunal has a duty to carry out "a prior objective characterization of the claims"[71] in order to ascertain: (i) that the content of the rights invoked by the Claimant not only have their "legal source or basis" in the BIT but also that their content is different from that of Onyx Alexandria's contractual rights;[72] and, (ii) that it is possible to make a finding of international responsibility independently of a prior finding that the Contract has been breached.[73]

64. The Claimant does not contest that a treaty claim, in order to qualify as such, must be based on the breach of a right conferred by a treaty, while a contractual claim is based on the violation of a right created and defined in a contract.[74] It maintains, however, that the claims advanced by Veolia Propreté in the instant case directly relate to the breach by Egypt of rights conferred by the BIT. In this context, the Claimant recalls that the rights it invokes are those defined in Articles 3 and 4 of the BIT, which respectively provide for fair and equitable treatment for its investments in Egypt and for the prohibition of direct or indirect expropriation without the payment of fair compensation.[75]

65. Thus, in carrying out an objective characterization of the Claims submitted to it as requested by the Respondent, the Tribunal has to ascertain in the first instance that the alleged breaches relate to rights that find their legal basis in the BIT. In this connection, the Tribunal notes that the Claimant has not requested the Tribunal to decide on claims by Onyx Alexandria on the basis of the Contract concluded by the latter with the Governorate of Alexandria. The Claimant is indeed not a party to that Contract. By invoking Article 25(1) of the ICSID Convention, the Claimant has requested the Tribunal to rule upon a legal dispute arising directly out of its investment in Egypt, since, according to it, this

[71] Resp. Mem. Jur., ¶108.
[72] Resp. Mem. Jur., ¶114.
[73] Resp. Rej. Merits, ¶231.
[74] Cl. Rej. Jur. & Admiss., ¶17
[75] Cl. Rej. Jur. & Admiss., ¶18

dispute “soulève des questions relatives à la violation du TBI par la République arabe d'Egypte et à l'indemnité due pour cette violation. Il se fonde sur l'existence des droits et des obligations juridiques des Parties ainsi que sur les recours juridiques qui leurs sont offerts afin qu'elles puissent en bénéficier”.[76]

66. Secondly, the Tribunal must look at the claims as presented by the Claimant in its Application and in its subsequent submissions, and whether such claims fall within the parameters of jurisdiction as defined by the enabling treaty, namely the BIT. In the *Oil Platforms case (Iran v United States)*, the ICJ defined its task at the jurisdictional level by pointing out that it “must ascertain whether the violations… pleaded… do or do not fall within the provisions of the [1955] Treaty [of Amity] and whether, as a consequence, the dispute is one which the Court has jurisdiction *rationae materiae* to entertain…”.[77]

67. Thirdly, much has been said by the Parties in their written and oral pleadings about the use or non-use of a *prima facie* test by the Tribunal in the characterization of the Claimant’s claims at this stage of the proceedings, particularly in view of the fact that the Tribunal had reserved the objections to jurisdiction regarding the characterization of the nature of the claims by Claimant as a matter to be reviewed at the merits stage. This means that such objections to jurisdiction did not possess an exclusively preliminary character. It did not mean, however, that they required a ruling on the merits before the Tribunal could decide on whether or not it had jurisdiction.

68. It is important to be clear about the nature of the Tribunal’s task at this merits stage of the proceedings. The Tribunal can no longer apply a *prima facie* threshold to any issue in dispute at this juncture. The *prima facie* test for a tribunal’s *ratione materiae* jurisdiction over claims is an acceptable test at the preliminary phase of the proceedings because, if that threshold is satisfied, the tribunal will return to make a definitive characterisation of the claims in adjudging their merits at a subsequent phase of the proceedings. At the preliminary phase, the *prima facie* test is designed to ensure that the claims are sufficiently

[76] RfA, ¶¶19-20.
[77] Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment (Preliminary Objection), I.C.J Reports 1996, RLA-019, ¶16.

grounded upon legal obligations that are within the tribunal's jurisdictional mandate to proceed to the adjudication of the merits of those claims.

69. Thus, while the Tribunal agrees with the Respondent's argument that a *prima facie* test is no longer pertinent at this stage of the proceedings, it cannot subscribe to the assertion by the Respondent that the Tribunal would only have jurisdiction if the facts alleged by the Claimant were proven, in view of the fact that the objections were joined to the merits. Such a conception of the task of the Tribunal blurs the lines between jurisdiction and the merits; and would lead to the untenable proposition that an investment tribunal would possess jurisdiction only in those circumstances where it is able to uphold successful claims. The Tribunal decided to join those objections to the merits because, as was stated by the Permanent Court of International Justice (PCIJ) in the *Pajszs, Csaky, Esterhazy* case: "[t]he further proceedings on the merits… will place the Court in a better position to adjudicate with a full knowledge of the facts"; and because "the questions raised by… these objections and those arising… on the merits are too intimately related and too closely interconnected for the Court to be able to adjudicate upon the former without prejudging the latter".[78]

70. The Tribunal's perception that the preliminary objections raised by the Respondent required a detailed assessment of the facts of the case pertaining to the merits has been subsequently confirmed by the Parties' pleadings. The task of identifying the specific powers invoked by the Governorate of Alexandria in relation to the Contract in particular has required an assessment of the relevant provisions of the Contract and Egyptian law as well as the factual matrix providing the context for the Governorate's actions to ascertain whether or not the Governorate exercised public powers or whether it merely acted within the contractual framework by exercising rights as a party to the Contract.

71. Consequently, the Tribunal considers that the current proceedings on the merits have placed it in a better position to determine whether the alleged breaches by Egypt of the standard of fair and equitable treatment and the prohibition of expropriation without

[78] *The Pajszs, Csaky, Esterhazy Case (Hungary v. Yugoslavia)*, Series A/B, p. 9.

payment of fair compensation as defined by the provisions of the BIT have actually occurred. It will thus undertake such determination in the corresponding part of this award.

b. The Dispute Settlement Clause of the Contract

72. An additional argument which the Respondent advances in connection with its views on the characterisation of claims concerns Article 35 of the Contract concluded between the Governorate of Alexandria and Onyx Alexandria, which reads as follows:

> *Amicable Settlement of Disputes: If any type of dispute arises out of or in connection with this Contract, the Parties shall first seek to resolve the same within thirty (30) days through amicable negotiations. Failing to resolve the dispute within the period specified, the Parties shall then apply the following procedures:*
>
> *b. Neutral Tripartite Committee…*
>
> *c. Arbitration…*[79]

73. According to the Respondent, the existence of this clause obliges the Tribunal to enforce the choice of forum clause to which both the Governorate and Onyx have committed. In support of this position, the Respondent relies on the annulment decision in *Vivendi*, where the committee noted that "[i]n a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract".[80] It also refers to *SGS v. Philippines* and *BIVAC v. Paraguay*, in which claims of expropriation were rejected on a preliminary basis because the relevant investors had not pursued the remedies to which they were entitled under the applicable contracts.[81]

74. It is the view of the Tribunal that this issue is also linked to the characterisation of the Claimant's claims on the merits at this stage of the proceedings. If the Tribunal were to find that any of the Claimant's claims alleged to be founded on the obligations of the BIT should be upheld on the merits, then such a claim cannot by definition be within the scope of the forum selection clause in the Contract. In that scenario, the Respondent's

[79] Contract, C-012, ¶35.
[80] *Compañía de Aguas del Aconquija S.A. y Vivendi Universal (former Compagnie Générale des Eaux) v. Argentina*, ICSID Case No. ARB/97/3, Annulment Decision (3 July 2002), RLA-015, ¶98.
[81] Resp. Mem. Jur., ¶¶319-325.

admissibility objection would be rejected by implication. Conversely, if the Tribunal were to dismiss any of the Claimant's claims at this stage, then it may or may not be possible to deduce from the Tribunal's reasoning leading to that conclusion that they are claims that should have been advanced as contractual claims by Onyx Alexandria in accordance with dispute resolution provisions of the Contract rather than as treaty claims before this Tribunal. But at that point the Respondent's objection to the admissibility of the claims would be moot because they would have been dismissed on the merits as treaty claims.

C. THE CLAIMANT'S STANDING TO SUE AS AN INVESTOR UNDER THE BIT

(1) The Parties' Positions

a. Respondent's Position

75. The Respondent challenges the Claimant's standing to sue for losses incurred by Onyx, a subsidiary of Veolia Propreté incorporated under Egyptian law. It invokes the distinction between companies and their shareholders articulated by the International Court of Justice in cases such as *Barcelona Traction* and *Diallo*, in which it was decided that only the State of nationality of a company (and not that of its shareholders) may bring international claims relating to damages suffered by that company. That distinction, for the Respondent, is applicable to investment cases brought under the France-Egypt BIT for two main (connected) reasons.

76. First, the definition of investment in Article 1 of the France-Egypt BIT covers "shares and others forms of participation… in companies organized in the territory of either Contracting Party" but not – as was the case with other contemporaneous bilateral investment treaties – subsidiary companies as such. It would be thus unacceptable, as a matter of treaty interpretation, to conflate the term "shares" (which features in the BIT) with the phrase "locally incorporated companies" (which does not).[82] Doing otherwise would not only depart from the ordinary meaning of Article 1(1)(b), but also disregard the context in which the provision is inserted, because had the parties intended to "extend the protection of the Treaty to companies under control by each other's nationals" they could

[82] Resp. Mem. Jur., ¶362.

have made that clear in the definition of "companies" found in paragraph 3 of Article 1.[83] This conclusion is in no way affected, the Respondent adds, by the object and purpose of the BIT, given that the purpose of the treaty was "to comply with mandatory conditions imposed by the French legislator on the French government to grant investment guarantees".[84] As a result, the Respondent argues that there is "absolutely nothing in the analysis of the ordinary meaning of the terms used by the Treaty in their context [that] allows a *bona fide* interpreter to conclude that the intention of the contracting parties by including shares in locally incorporated companies among the protected investments was to allow shareholders to claim *in lieu* of the locally incorporated company".[85]

77. Second, in the absence of express language including locally incorporated companies in the definition of investment, the rule of general international law found in *Barcelona Traction* and *Diallo* must inform the interpretation of the BIT, as prescribed by Article 31(3)(c) of the Vienna Convention on the Law of the Treaties.[86] In the words of the ICJ in *Barcelona Traction*, "[m]unicipal law determines the legal situation not only of such limited companies but also of those persons who hold shares in them. Separated from the company by numerous barriers, the shareholders cannot be identified with it".[87] For the Respondent, international case law, as exemplified by the *ELSI* case, supports the proposition that the parties to a treaty must not be assumed to have intended to derogate from rules of general international law unless such an intention is evident from the language chosen by the parties.[88]

78. The Respondent rejects, with reference to the work of commentators, the notion that a special rule departing from *Barcelona Traction* has emerged in any regime of customary law that may apply to investment disputes.[89] It adds that the position taken in *Teinver v. Argentina* – one of the awards on which the Claimant relies in support of its interpretation

[83] Resp. Mem. Jur., ¶377. Article 1(3): "Le terme de «sociétés» désigne toute personne morale constituée sur le territoire de l'une des Parties contractantes conformément à la législation de celle-ci et y possédant son siège social."
[84] Resp. Mem. Jur., ¶372.
[85] Resp. Mem. Jur., ¶379.
[86] Resp. Mem. Jur., ¶384.
[87] *Case concerning the Barcelona Traction, Light and Power Company, Limited, Judgment (Merits), I.C.J. Reports 1970*, RLA-040, ¶41.
[88] Resp. Mem. Jur., ¶388.
[89] Resp. Rej. Merits, ¶¶317-325.

of Article 1 of the BIT – is contradicted by the case law of "the immense majority of international tribunals", including the Inter-American Court of Human Rights, the European Court of Human Rights and the Caribbean Court of Justice, which upholds the separation between companies and shareholders as recognised in *Barcelona Traction*.[90]

79. The Respondent further disagrees that the France-Egypt BIT can be interpreted in light of recent awards construing broad definitions in investment agreements as comprising indirect investments in the form of locally incorporated companies. Emphasising that the Treaty was concluded by France and Egypt in 1972, the Respondent argues against such an "evolutionary interpretation", and criticises the Claimant for misunderstanding the requirements laid down by the ICJ in its judgment in the *San Juan River* case.[91] First, it notes that the Claimant has failed to point to a "generic term" in the Treaty that can be said to have evolved over time, having rather suggested without more that recent ICSID awards should be favoured over *Barcelona Traction* and *Diallo*.[92] Second, it stresses that France and Egypt cannot be presumed to have agreed to subject the Treaty to future developments of investment law concerning locally incorporated companies. Such an assumption must be rejected in light of the fact that when they drafted the treaty the parties were aware of *Barcelona Traction* and yet refrained from adding language departing from the distinction between companies and shareholders to be found in that judgment; and of the fact that the Treaty cannot be said to be of a "continuing duration" insofar as it contains provisions on duration (initially for 10 years) and termination (denunciation being available on a one-year notice).[93]

80. For all those reasons, the Respondent disputes the Claimant's standing "to raise a claim based on the Treaty seeking compensation for the losses of Onyx – as opposed to the Claimant's losses that are separate and distinct from the company's loss".[94]

[90] Resp. Rej. Merits, ¶333.
[91] Resp. Rej. Merits, ¶345.
[92] Resp. Rej. Merits, ¶348.
[93] Resp. Rej. Merits, ¶349.
[94] Resp. Mem. Jur., ¶358.

b. Claimant's Position

81. The Claimant's response to the Respondent's objection, as clarified and further refined in its Rejoinder on jurisdiction, is that Article 1 of the France-Egypt BIT should be construed so as to encompass Onyx Alexandria as a covered investment. The Claimant disagrees that Veolia Propreté ought to be viewed as a mere shareholder of Onyx, pointing out that Veolia Propreté's investment in Egypt amounts to an "opération économique globale" comprising: the incorporation of a subsidiary in Egypt; the negotiation and signing of the Contract on behalf of that subsidiary; and the supplementary financial contributions made by the parent company to its subsidiary.[95] There are three elements to the Claimant's argument of why this "global economic operation" would be covered by the definition in Article 1.

82. First, Article 1 provides a "liste non-exhaustive" of "[des] avoirs de toute nature", and explicitly protects indirect investments in the form of "actions et autres formes de participation même minoritaires ou indirectes aux sociétés constituées sur le territoire de l'une des Parties contractantes" as provided in paragraph 1, letter b.[96]

83. Second, Article 1 further prescribes that "[t]oute modification de la forme d'investissement des avoirs n'affecte pas leur qualification d'investissement", which is further evidence that the fact that the Claimant's investment has taken the form of a locally incorporated company cannot be an obstacle to the bringing of a claim under the Treaty.[97] In the Claimant's words, "ce que le TBI protège à travers les avoirs pouvant être qualifiés d'investissement concerne la valeur économique de ces avoirs, et va au-delà de la qualification juridique qu'ils peuvent revêtir".[98]

84. Third, the Claimant relies on a series of investment awards[99] – in particular *Teinver v. Argentina* and *Von Pezold v. Zimbabwe* – which concerned analogous definitions of "investment" construed by the respective tribunals as allowing shareholders of companies incorporated in the host State to bring claims for losses suffered by those companies. In its

[95] Cl. Rej. Jur. & Admiss., ¶67. Also Tr. Merits Day 1 (French Version) Hervé 20:716-729.
[96] Cl. Mem., ¶68.
[97] Cl. Rej. Jur. & Admiss., ¶68.
[98] Cl. Rej. Jur. & Admiss., ¶90.
[99] Cl. Rep. Merits, ¶¶41-44; Cl. Rej. Jur. & Admiss., ¶¶91-93.

Rejoinder on jurisdiction the Claimant clarifies that by relying on these awards it does not purport to rely on a "droit des investissements" of a customary character, and that, in this respect, the Respondent has misconstrued its claim.[100] Rather, the Claimant asks the Tribunal to pay due regard to decisions of tribunals which were called upon to interpret treaty provisions identical or almost identical to Article 1 of the France-Egypt BIT.[101]

85. The Claimant believes that those precedents are relevant because, as affirmed by the ICJ in cases such as *San Juan River* and *Pulp Mills*, a treaty may be construed in a way that takes into account the meaning of its terms at the time at which those terms are applied, especially if that treaty is of continuing duration.[102] The Claimant adds that the fact that the parties have been tacitly accepting the renewal of the BIT under Article 13 militates in favour of interpreting its terms as understood at the date of the BIT's most recent renewal. Finally, the Claimant argues that the Respondent's suggestion that the intention of France and Egypt was that the distinction between companies and shareholders in *Barcelona Traction* should apply to the BIT is speculative, and rebutted by the very fact that – shortly after *Barcelona Traction* was decided – they decided to conclude a bilateral treaty laying down special rules for the protection of foreign investment.[103]

86. Fourth, the Claimant stresses that in *Barcelona Traction* and *Diallo* the ICJ made it clear that the customary principle affecting the admissibility of shareholders' claims in cases of diplomatic protection "ne trouve pas à s'appliquer en présence de dispositions conventionnelles pertinentes".[104] That interpretation would find support in *Teinver v. Argentina*, presided over by Judge Buergenthal, who had been a member of the Court when the judgment on preliminary objections in *Diallo* was given.[105] Given that the BIT confers on French investors the right to bring claims against Egypt before an ICSID tribunal, and given that such claims "peuvent concerner tous leurs investissements protégés ou seulement certains d'entre eux, qu'ils soient détenus directement ou indirectement, ou que leur forme juridique ait été modifiée ou non", the distinction between company and

[100] Cl. Rej. Jur. & Admiss., ¶95.
[101] Cl. Rej. Jur. & Admiss., ¶94.
[102] Cl. Rep. Merits, ¶45.
[103] Cl. Rej. Jur. & Admiss., ¶97.
[104] Tr. Merits Day 1 (French Version) Hervé 20: 753-756.
[105] Tr. Merits Day 1 (French Version) Hervé 20-21:757-769.

shareholders in *Barcelona Traction* and *Diallo* would find no application in the present case.[106]

(2) The Tribunal's Analysis

87. The Respondent contends that the Claimant has no standing to bring claims related to losses suffered by a company (Onyx Alexandria) incorporated in Egypt, first because Article 1(1) of the BIT covers "shares and other participation" in companies organized in each party's territory, but not subsidiary companies, as such; and secondly because it relies on the strict distinction between companies and their shareholders that informed the approach that the ICJ took to nationality of claims in *Barcelona Traction* and *Diallo*, in the absence of express language including locally incorporated companies in the definition of investment in the BIT.

88. The Claimant contests this challenge to its right to bring claims before an ICSID tribunal and points to the fact that the definition of investment in Article 1(1) of the BIT covers "les avoirs de toute nature" and provides for a non-exhaustive list of such assets, including "les actions et autres formes de participation".[107] The Claimant further maintains that the fact that its investment has taken the form of a locally incorporated company cannot be an obstacle to the bringing of a claim under the BIT, and refers to decisions of tribunals called upon to decide to interpret treaty provisions identical or almost identical to Article 1 of the France-Egypt BIT, in particular the awards on *Teinver v. Argentina* and *Von Pezold v. Zimbabwe*, to support its argument.

89. Article 1(1) of the BIT reads as follows:

> *The term 'investments' shall apply to all categories of assets, particularly but not exclusively:*
>
> *(a) movable and immovable property and all other real rights, such as mortgages, preferences, usufructs, sureties and similar rights;*

[106] Tr. Merits Day 1 (French Version) Hervé 21:770-779.
[107] BIT, RLA-001, p.2.

> *(b) shares and other forms of participation, albeit minority or indirect, in companies organized in the territory of either Contracting Party;*
>
> *(c) claims or any rights to benefits having an economic value;*
>
> *(d) copyright, industrial property rights, technical processes, registered trade names, and goodwill;*
>
> *(e) industrial concessions accorded by law or by virtue of a contract, including concessions for prospecting, cultivating, mining or developing natural resources, including those situated on the continental shelf;*
>
> *it being understood that the said assets shall be invested in accordance with the legislation of the contracting Party in whose territory the investment is made, before or after the entry into force of this Convention.*
>
> *Any change in the form in which assets are invested shall not affect their status as an investment, provided that the change is not contrary either to the legislation of the State in whose territory the investment is made or to the approval granted for the original investment.* [108]

90. The Tribunal notes that the definition of "investments" in the BIT includes "all categories of assets", comprising a non-exhaustive list of assets, which indicates that the specific categories of investments included in the definition are exemplary rather than exclusive. The incorporation of a local company such as Onyx Alexandria which was created for the purpose of executing the contract awarded to Veolia Propreté by the Governorate of Alexandria is not excluded by such a list, in view also of the fact that Veolia is the only shareholder of the locally incorporated company. Article 1(1) also provides that: "the said assets shall be invested in accordance with the legislation of the Contracting Party in whose territory the investment is made".[109] The incorporation of Onyx Alexandria in Egypt meets this condition, particularly when taken together with the last sub-paragraph of Article 1(1), which stipulates that "any change in the form in which assets are invested shall not affect their status as an investment".[110]

[108] BIT, RLA-001, p.9.
[109] BIT, RLA-001, p.9.
[110] BIT, RLA-001, p.9.

91. The fact that the assets were invested in a local company the incorporation of which, in accordance with the Contract (see clause 32.2), was rendered necessary both by the need to have a local entity capable of implementing the contract awarded to Veolia Propreté and to comply with the above-mentioned condition in Article 1(1) of investing such assets in conformity with local legislation, does not alter the status of such an investment as specified in Article 1(1). It remains a covered investment under the provisions of the BIT.

92. As was observed by the tribunal in *Siemens v. Argentina*, after analysing an almost identical text in the Germany-Argentina BIT:

> *The definition of 'investment' is very broad. An investment is any kind of asset considered to be such under the law of the Contracting Party where the investment has been made. The specific categories of investment included in the definition are included as examples rather than with the purpose of excluding those not listed. The drafters were careful to use the words 'not exclusively' before listing the categories of 'particularly' included investments. One of the categories consists of 'shares, rights of participation in companies and other types of participation in companies'. The plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.*[111]

93. Consequently, the Tribunal is of the view that the local incorporation of Onyx Alexandria as a vehicle for the investments of Veolia Propreté in Egypt, and in particular, as a means to ensure the implementation of the Contract awarded to it by the Governorate of Alexandria for its General Cleanliness Project, is covered by the definition of the term "investments" under the BIT. Indeed, in addition to the reference to all categories of assets, which appears to encompass local companies incorporated by the investor as a vehicle for its investment, the definition of investment includes also: "shares and other forms of participation, albeit minority or indirect, in companies organized in the territory of either Contracting Party". Veolia Propreté being the only shareholder of Onyx Alexandria, all the

[111] *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004), 30 April 2004, CLA-051, ¶137.

shares it held in the latter company and all the financial contributions Veolia made to Onyx, are protected under the BIT in accordance with Article 1(1).

94. It would indeed be surprising if the fact that the Claimant is a shareholder of the company which it created for the specific purpose of implementing the Contract it was awarded by the Governorate of Alexandria and which had therefore to be incorporated in Egypt would deprive it of a standing to bring claims under the BIT to an ICSID Tribunal under Article 7 of the BIT for alleged breaches by Egypt of that treaty. In this connection, the Tribunal notes the Claimant's submission in its Reply that it is not bringing a claim on behalf of Onyx Alexandria, but a claim for its own losses in respect of what are, as a result of its "global economic operation" in Egypt, its own investments. As such, it asserts a cause of action under the BIT in connection with all its protected investments in Egypt.

95. Based on the foregoing analysis of the ordinary meaning of Article I(1), Veolia Propreté undoubtedly has an investment in Egypt and thus has standing to present claims relating to that investment as a qualifying investor under the BIT. The question of jurisdiction must, therefore, be answered in the affirmative. That does not mean, however, that any claims advanced by Veolia Propreté are necessarily admissible. The distinction between jurisdiction and admissibility is important in this context. If, for example, Veolia Propreté were seeking in essence to recover a contractual debt owed to Onyx Alexandria under the Contract, such a claim would not be admissible because Veolia Propreté, as the parent company, has no rights under the Contract between Onyx Alexandria and the Governorate of Alexandria. The Tribunal, however, is satisfied that Veolia Propreté is asserting claims in relation to its own investments in Egypt. This issue was put beyond doubt by the Claimant in its Reply where it clarified that its claims were for losses incurred directly as the party financing Onyx Alexandria's operations and as the sole shareholder of Onyx Alexandria. This is not, therefore, a situation where a parent company is claiming solely for reflective loss in relation to damage suffered by its subsidiary. The Tribunal further considers that a claim by a parent company for the expropriation of its subsidiary is not a claim merely for the diminution of the value of its shares because the retention of the bare legal title to something that has been rendered worthless and inoperative (i.e. shares in an expropriated enterprise) is consistent with a deprivation of property rights associated with

the shares. Veolia Propreté is advancing such a claim for expropriation in this case and it is clearly admissible.

96. If and to the extent that Veolia Propreté is claiming for the diminution of the value of its shares based only on losses suffered by Onyx Alexandria under the contractual framework, which would raise admissibility concerns, the Tribunal will return to those issues in its assessment of the merits of the claims once it has analysed the factual matrix underlying Veolia Propreté's claims.

V. GENERAL ISSUES PERTAINING TO THE MERITS OF THE DISPUTE

A. APPLICABLE LAW

(1) The Parties' Positions

a. Respondent's Position

97. In relation to the law applicable to the dispute, the Parties disagree as to the role played by Egyptian law. The relevant provision in this connection is Article 42(1) of the ICSID Convention, which reads as follows:

> *The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*[112]

98. The Respondent argues that Egyptian law is applicable to the dispute alongside international law for three reasons. First, the Respondent rejects the view that the parties have explicitly agreed that only international law would apply to disputes arising under the France-Egypt BIT.[113] Second, recourse to Egyptian domestic law would be necessary for the application of certain treaty provisions, especially when, as argued by the Claimant, the alleged treaty breaches are connected with contractual breaches;[114] likewise, the question

[112] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965 (the "ICSID Convention"), p.23.
[113] Respondent's Counter-Memorial on the Merits dated 15 September 2015 ("Resp. C-M. Merits"), ¶241.
[114] Resp. C-M. Merits, ¶¶242-246.

of whether domestic legislation and procedures have created legitimate expectations for the Claimant could only be determined by reference to Egyptian law.[115] Third, the Respondent points out that the BIT itself envisages that domestic law will be relevant, with Article 3(1) requiring that the exercise of rights granted as part of fair and equitable treatment is not impeded *de jure*, a phrase which could only refer to the domestic law of the hosting State.[116]

99. This point is further elaborated in the Rejoinder, where the Respondent explains that certain issues will be governed by domestic law and others by public international law, the Tribunal's task being to characterize them correctly.[117] For example, rules and concepts such as the economic equilibrium of the contract; the rules on penalties envisaged by the Contract; the procedure to be followed by the General Authority for Foreign Investment (GAFI); and the conditions for the granting of an authorisation to handle medical waste could not be understood and applied without reference to Egyptian law.[118]

100. In this connection, the Respondent refers to a number of precedents,[119] in particular the decision of the annulment committee in *Wena v. Egypt*, which indicates that the question of the applicability of international law and domestic law to investment disputes is more nuanced than the Claimant suggests, rather depending on the provisions of the applicable BIT. Likewise, the Respondent challenges the Claimant's reading of the *German Interests in Polish Upper Silesia* case, distinguishing the Permanent Court's task in that case from that of an ICSID tribunal required to consider domestic law in applying the substantive standards in a BIT.[120]

b. Claimant's Position

101. For the Claimant, given that the proceedings were instituted on the basis of the France-Egypt BIT, the dispute is to be settled by reference to the rules of international law applicable between France and Egypt. The BIT would comprise the rules of law "agreed

[115] Resp. C-M. Merits, ¶¶246-248.
[116] Resp. C-M. Merits, ¶248.
[117] Resp. Rej. Merits, ¶376.
[118] Resp. Rej. Merits, ¶378.
[119] Resp. Rej. Merits, ¶¶372 and 381.
[120] Resp. C-M. Merits, ¶¶248-252.

by the parties", and questions involving the application of Egyptian law ought to be treated as a matter of fact.[121]

102. If the Tribunal were to find instead that there was no agreement between the parties as to the applicable law, turning as a result to the second sentence of Article 42(1), the Claimant points the Tribunal to the consideration of that provision in cases such as *El Paso v. Argentina* and *Alpha v. Ukraine*. Those awards would stand for the proposition that the applicable law was to be found in the relevant BITs, not in the domestic law of the host States.[122] The Claimant also makes reference to the position taken by the Permanent Court of International Justice as regards the relevance of domestic law in *Certain German Interests in Polish Upper Silesia*.

103. Finally, the Claimant disagrees with the Respondent that Article 3(1) of the BIT as such envisages the applicability of Egyptian law. It argues that Egypt would be in breach of Article 3(1) if any measure adopted by one of its organs constituted a violation of the fair and equitable treatment standard, irrespective of that measure's characterisation under Egyptian law.[123]

(2) The Tribunal's Analysis

104. The Parties are not in agreement with regard to the applicable law. In the absence of such agreement, Article 42(1) of the ICSID Convention provides that "[t]he tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of law) and such rules of international law as may be applicable". This does not establish a clear and neat distinction of the respective roles of international law and the law of the host State. Indeed, as discussed by the annulment committee in *Wena*, different interpretations have been proposed to this provision.[124] Article 42(1) leaves the Tribunal with a certain margin for interpretation and application of the rules of the two legal systems.

[121] Claimant's Memorial dated 30 September 2013 ("Cl. Mem. Merits"), ¶¶123-132.
[122] Cl. Mem. Merits, ¶¶127-128.
[123] Cl. Rep. Merits, ¶205.
[124] *Wena Hotels Limited v. Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 19 August 2005, CLA-208, ¶¶37-40.

105. In relation to claims which are properly characterised as being founded on the investment protection obligations set out in the BIT, they fall to be decided in accordance with the provisions of the BIT and of international law in general, as the BIT's governing law. This does not mean, however, that the domestic law of Egypt does not have a role to play. Nor does it mean that such role is limited only to factual questions. It is international law which primarily applies to the dispute, but recourse may also be had to domestic law rules where they are considered applicable to the analysis of issues presented to the Tribunal. Because of the nature of the dispute and the issues underlying it, certain matters can be determined only through the application of international law, while others will have to be resolved through the application of domestic law. Thus, international law and domestic law have complementary roles to play.

106. Indeed, the rules of international law, including the BIT, may sometimes direct the Tribunal to the host State's law on certain issues, for example on the requirement that covered investments are to "be invested in accordance with the legislation of the Contracting Party in whose territory the investment is made" (Article 1(1)), or in the determination of what constitutes, under domestic law, an organ of a State for the purposes of State responsibility (Article 4(2), Articles on State Responsibility). Moreover, to the extent that the Claimant relies on matters governed by Egyptian law, such as the Contract, as elements underlying the alleged breach of Articles 3 and 4 of the BIT, the provisions of domestic law become relevant and have to be taken into account by the Tribunal. The same applies to the analysis of legislative or administrative measures issued by the Egyptian Government or by the Governorate of Alexandria to which some of the alleged breaches may be attributed.

107. In light of the above, the Tribunal will apply international law rules and domestic law rules to the extent that each is relevant to the determination of issues under its consideration.

B. THE ATTRIBUTION OF BREACHES ALLEGED BY THE CLAIMANT FOR THE PURPOSE OF STATE RESPONSIBILITY

(1) The Parties' Positions

a. Respondent's Position

108. The dispute before the Tribunal concerns, to a significant degree, actions and omissions of the Governorate of Alexandria in connection with the performance of the Contract for the Public Cleanliness Project signed by the parties on 3 September 2000.

109. The Respondent challenges the Claimant's assumption that all the acts performed by the Governorate in furtherance of the Contract can be attributed to Egypt, claiming that "when … a municipality concludes a contract in its private capacity, the entry into a Contract is not an act of State under international law".[125] It invites the Tribunal to conclude, as a result, that measures taken by the Governorate for the privatisation and decentralisation of the waste management industry, especially the Contract, are not attributable to Egypt for the purposes of State responsibility.[126]

110. In support of its claim, the Respondent relies mainly on the *Guaira* case, in which the tribunal found that a contract between a municipal council and a company for the construction and operation of an electricity plant was not connected with the State's governmental or public functions as a political subdivision of the State and that as a result the municipality was to be regarded as "neither more nor less than a private corporation";[127] and the award in *Siemens AG v. Argentina*, where the Tribunal noted that "for the State to incur international responsibility it must act as such, it must use its public authority".[128] The Respondent maintains, on the basis of a survey of the history of the ILC's Articles on State Responsibility, that the action or omission of an organ will only be attributed to the State if that organ was acting "as such", and that the rule to be found in Article 4 of the Articles necessitates a more nuanced reading than that proposed by the Claimant.[129]

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[125] Resp. C-M. Merits, ¶270.
[126] Resp. C-M. Merits, ¶269.
[127] *La Guaira Electric Light and Power Company Case (1905*), IX UNRIAA 240, RLA-337, at 337; Resp. Rej. Merits, ¶¶402-406.
[128] *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, CLA-051, ¶53.
[129] Resp. C-M. Merits, ¶¶265-267.

111. In the Rejoinder, the Respondent distinguishes the cases relied upon by the Claimant from the present facts by suggesting that, while in those instances the organs in question were acting in their capacity of organs of the State, "[t]he Claimant has failed to prove that the Governorate's conduct, including the signature of the Contract, were taken in the capacity of an organ".[130] It denies that the Contract for public cleanliness was adopted following a policy adopted by the Egyptian President, noting that the national strategy being pursued ensured that governorates would have autonomy to organise the provision of cleanliness services.[131]

b. Claimant's Position

112. The Claimant relies on the rule articulated in Article 4 of the Articles on State Responsibility, and on the corresponding commentary of the International Law Commission, according to which the acts of the organ of a State are attributable to that State under international law.[132] Under that rule, the acts of the Governorate would be all attributable to Egypt for the purpose of State responsibility, even those having a contractual character.[133]

113. This understanding of the law is reflected, the Claimant argues, in a series of investment arbitral awards, notably *Parkerings v. Lithuania*, *Noble Ventures v. Romania* and *Eureko v. Poland*. It disagrees that the *Guaira* case and *Siemens v. Argentina* would point to the opposite conclusion: the *Guaira* case concerned a dispute between private parties relating to a contract, while the passage from *Siemens v. Argentina* relied upon by the Respondent did not concern attribution of conduct as such but rather the issue of breach of the BIT.[134]

114. The Claimant maintains that in conducting the tender process leading to the signing of the Contract for public cleanliness in Alexandria, the Governorate was implementing a policy

[130] Resp. Rej. Merits, ¶396.
[131] Resp. Rej. Merits, ¶397.
[132] Cl. Mem. Merits, ¶134.
[133] Cl. Mem. Merits, ¶¶135 and 138-141.
[134] Cl. Rep. Merits, ¶210.

adopted by the Egyptian President. It further observes that the Contract was reviewed and modified by Egypt's Conseil d'Etat.[135]

(2) The Tribunal's Analysis

115. The Parties are in agreement that the international law rules of attribution have to be applied in the present case and, for this purpose, make reference to the Articles on the Responsibility of States for Internationally Wrongful Acts. The Tribunal will have recourse to those Articles on State Responsibility to deal with the issue of attribution. Article 4, entitled "Conduct of organs of a State", reads as follows:

> *1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.*
>
> *2. An organ includes any person or entity which has that status in accordance with the internal law of the State.*[136]

116. The reference to State organ in Article 4 of the Articles on State Responsibility includes an organ of any territorial entity of the State as is clearly indicated by the final phrase: "and whatever its character as an organ of the central government or of a territorial unit of the State". This provision therefore extends to organs of the State at whatever level in the hierarchy, including at the provincial or local level. The Respondent contends that measures taken by the Governorate of Alexandria for the privatisation and decentralisation of the waste management industry, especially the Contract, are not attributable to Egypt for the purposes of State responsibility.[137] By contrast, the Claimant argues that "tout acte ou omission du Gouvernorat en violation du TBI est attributable à l'Egypte et engage sa responsabilité internationale".[138]

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[135] Cl. Rep. Merits, ¶208.
[136] Draft Articles on Responsibility of States for Intentionally Wrongful Acts, with commentaries (2001), (Articles on State Responsibility)*Yearbook of the International Law Commission, 2001*, vol. II, Part Two, RLA-342, p.40.
[137] Resp. C-M. Merits, ¶269.
[138] Cl. Rep. Merits, ¶206.

117. The Tribunal notes that the Parties are in agreement that the Governorate of Alexandria is an organ, an administrative unit, of the Egyptian State.[139] Indeed, Article 175 of the Egyptian Constitution of 2014 entitled "Administrative units" provides that: "the State is divided into local administrative units that have legal personality. They include governorates, cities and villages." These administrative units are territorial entities of the State and receive their mandate from the central government on behalf of which they act at the local level. They establish and manage within their territory all public utilities, provide services and designate industrial areas.[140]

118. The Respondent, rather than denying that the Governorate of Alexandria is a State entity, appears to argue that in concluding the Contract for general cleanliness and waste management with Veolia Propreté, the Governorate was acting in a private capacity and not as an organ of the State. Consequently, it advances the view that the action or omission of an organ will only be attributed to the State if that organ was acting "as such".

119. The Tribunal records at the outset that it is not particularly useful or appropriate to consider questions of attribution in the abstract. What must be capable of being attributed to the State pursuant to Article 2 of the Articles on State Responsibility, which lays down the elements of the internationally wrongful act, are the precise acts or omissions that are alleged to constitute a breach of the primary obligation and not otherwise. The question of whether the act of the Governorate of Alexandria in entering into the Contract with Veolia Propreté is attributable to Egypt is irrelevant to this inquiry because it is not suggested by the Claimants that the Governorate's act of concluding the Contract with Veolia Propreté was a violation of the BIT. In other words, this is not the act that must be attributed to Egypt to establish the international responsibility of Egypt under the BIT.

120. For this reason, the Tribunal will consider the question of attribution in the context of the Claimants' individual claims for breaches of the BIT and in relation to the precise acts or omissions alleged by the Claimants to constitute those breaches.

[139] Counter-Memorial, ¶256.
[140] For a description, see Republic of Egypt, Public Administration Country Profile. Division for Public Administration and Development Management, Department of Economic and Social Affairs, United Nations, 2004.

121. It suffices for the Tribunal at this stage to conclude that any acts or omissions of the Governorate of Alexandria, as an organ of the Egyptian State, are acts of the State of Egypt pursuant to Article 4 of the Articles on State Responsibility and thus are *prima facie* capable of being attributed to the Respondent for the purposes of Article 2. None of the acts or omissions of the Governorate of Alexandria that the Tribunal will consider in the context of adjudicating the Claimants' claims were so removed from the scope of its official functions as a territorial entity as to be assimilated to that of private individuals not capable of being attributable to the State. The Respondent has also not furnished any evidence showing that the Governorate was exercising "a proprietary function", as was stated by the tribunal in the *Guaira* case on which it relies, or that it was not acting in connection with its governmental or public functions as a territorial unit of the State.

C. LOSS OF THE RIGHT TO INVOKE STATE RESPONSIBILITY

(1) The Parties' Positions

a. Respondent's Position

122. In its Counter-Memorial, the Respondent points out that "on no less than 15 occasions and for as long as 11 years" Onyx and the Claimant complained about the conduct of the Governorate and other Egyptian authorities without ever invoking the France-Egypt BIT.[141] On that ground, and as further elaborated in the Rejoinder, it contends that the Claimant must be deemed to have waived its right to invoke the Respondent's responsibility pursuant to the rule articulated by Article 45(b) of the Articles on State Responsibility: "the responsibility of a State may not be invoked if… the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim".[142] For the Respondent, "[b]y that prolonged and repeated inaction, the Claimant created an impression that it considered that the obligations under the Treaty had not been breached or were inapplicable".[143]

[141] Resp. C-M. Merits, ¶¶365-366.
[142] Resp. Rej. Merits, ¶488.
[143] Resp. Rej. Merits, ¶502.

123. The Respondent also points out that its reliance on the Claimant's position had an element of detriment: "[h]ad the Claimant, as a protected investor under the Treaty, promptly invoked the standards of international law it now claims, corrective action might have been possible by Egypt".[144] But because Onyx Alexandria's allegations were all based on the Contract, "there was no reason for Egypt to interfere in the contractual relationship between Onyx Alexandria and the Governorate and to act under the standards of international law now invoked by the Claimant".[145]

124. The Respondent notes, in addition, that the position is the same whether the conduct is "analyzed under the prism of preclusion, estoppel, acquiescence or waiver of right".[146] In this connection, it refers to Judge Alfaro's Separate Opinion in the *Temple* case. Counsel for the Respondent reiterated this claim in the Closing Statement on 9 February 2017, where it was argued that the Claimant lost its right to invoke Egypt's responsibility under the "general principle of acquiescence".[147]

125. In addition, the Respondent criticises the Claimant's reading of the law and reliance on arbitral awards concerning "procedural issues" that are not comparable to the substantive questions arising in the present case.[148] A valid waiver could be "express or implied" so long as it is "unequivocal".[149] The Respondent disagrees that it is purporting to rely on a "simple silence" on the part of the Claimant, arguing instead that the latter's was a "qualified silence".[150] In this connection, it compares the Claimant's behaviour unfavourably to that of the claimants in the *Vivendi* and *EDF v. Argentina* cases, who instituted ICSID proceedings timely and promptly when disputes relating to economic equilibrium of contracts and creeping expropriation arose.[151]

126. Finally, the Respondent criticises the Claimant for maintaining that it cannot be estopped as a result of Onyx Alexandria's failure to act because it would otherwise be affected by

[144] Resp. Rej. Merits, ¶502
[145] Resp. Rej. Merits, ¶502.
[146] Resp. C-M. Merits, ¶371.
[147] Tr. Closings Day 1 (English Version) Caicedo 135:1 to 141:8.
[148] Resp. Rej. Merits, ¶490.
[149] Resp. Rej. Merits, ¶491.
[150] Resp. Rej. Merits, ¶494.
[151] Resp. Rej. Merits, ¶495-501.

the conduct of a third party. It points out that Veolia Propreté was responsible for signing and terminating the Contract, and referred to the *Landreau* and *Interpretation of the Air Transport Services Agreement between the United States of America and France* cases as precedents supporting the possibility of findings or waiver or acquiescence in comparable circumstances.[152] In short, the Respondent maintains that "the Claimant explicitly claims, for its own benefit, that it had full knowledge of Onyx's repeated requests to the Governorate and Egyptian authorities regarding the reestablishment of the economic equilibrium of the Contract, the penalties and the unpaid bills", and that it would be "simply absurd to believe that Onyx could have acted without full knowledge and approval of the Claimant".[153]

b. Claimant's Position

127. In response to the Respondent's argument, the Claimant makes two points.

128. First, the Claimant maintains that an argument based on estoppel can only be opposed to the entity whose conduct would have given rise to that estoppel.[154] It was Onyx Alexandria – and not Veolia Propreté – which refrained from relying on the BIT in the instances listed by the Respondent. "La raison pour laquelle Onyx Alexandria n'a jamais invoqué le TBI dans ses interactions avec les autorités égyptiennes",[155] the Claimant explains, "est très simple: seule Veolia Propreté est titulaire de droits en vertu du TBI et donc seule Veolia Propreté était en mesure de se prévaloir de la violation de ces droits".[156] The Claimant emphasises that the correspondence on which the Respondent relies to make its argument opposed the Egyptian authorities and Onyx – never Veolia Propreté.[157] It then contends that it would be unfair to deprive an entity of the right to take a course of action because of the conduct of a third party.[158]

[152] Resp. Rej. Merits, ¶504-509.
[153] Resp. Rej. Merits, ¶510.
[154] Cl. Rep. Merits, ¶318.
[155] Cl. Rep. Merits, ¶320
[156] Cl. Rep. Merits, ¶320.
[157] Cl. Rep. Merits, ¶322.
[158] Cl. Rep. Merits, ¶319.

129. Second, the Claimant argues that mere silence cannot be taken as renunciation of a right provided under a BIT.[159] It refers to the awards in *SGS v. Paraguay*, *Duke Energy v. Ecuador* and *Aguas del Tunari v. Bolivia* to substantiate its view that a treaty right cannot be lightly renounced, an explicit act to that effect being required.[160]

(2) The Tribunal's Analysis

130. Article 45(b) of the Articles on State Responsibility, which the Respondent invokes, reads as follows[161]:

> *The responsibility of a State may not be invoked if… the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.*

131. As indicated in its text, the provision applies to inter-state relations, but there is no reason that the concept of acquiescence cannot apply to investor-State relations if required by the circumstances of the case. It must, however, be noted that although the principle that a State, or an investor for that matter, may by acquiescence lose its right to invoke responsibility is generally admitted in international law, the International Court of Justice observed in *Certain Phosphate Lands in Nauru* that:

> *International law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in light of the circumstances of each case whether the passage of time renders an application inadmissible.*[162]

132. International tribunals have not applied any precise time limits nor have they laid down criteria for measuring the lapse of time. In the *LaGrand* case, the ICJ held the German application to be admissible even though Germany had taken legal action some years after the breach had become known to it.[163] The commentary to the Articles on State Responsibility also highlights that there are no clear-cut time limits to determine whether

[159] Cl. Rep. Merits, ¶322.
[160] Cl. Rep. Merits, ¶322.
[161] Articles on State Responsibility, RLA-342, p.121.
[162] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* RLA-410, ¶13.
[163] *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001,* ¶¶53-57.

acquiescence will apply and notes that "[t]he decisive factor is whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued".[164]

133. The Tribunal notes that the Respondent has not furnished any evidence which indicates that Egypt has suffered a prejudice as a result of a delay in the presentation of the claims by Veolia Propreté, nor that it had a reasonable expectation that the Claimant would no longer pursue its claims by virtue of its conduct and the circumstances underlying the present case. It should also be added that the lapse of time between the termination of the Contract by Onyx Alexandria and the presentation by Veolia of its Request for arbitration to ICSID was only twelve months.

134. For the reasons described above, the Tribunal does not consider that the principle that a State, or an investor for that matter, may by acquiescence lose its right to invoke responsibility is applicable to the present case.

VI. LIABILITY UNDER ARTICLE 3 OF THE BIT

135. The Claimant argues that a number of measures taken by the Governorate of Alexandria and other organs of the Egypt breached Article 3 of the BIT. The Claimant's position on the manner in which various actions and omissions attributable to Egypt violated the fair and equitable treatment standard was refined throughout the proceedings. In its Closing Statement, the Claimant identified four internationally wrongful acts which would independently entail the Respondent's State responsibility under Article 3: (a) the Governorate's refusal to restore the economic equilibrium of the Contract; (b) the imposition of penalties; (c) the handling of Onyx Alexandria's application for a license to treat medical waste; and (d) the refusal to make payment for general and additional services provided by Onyx Alexandria.[165]

136. According to the Claimant, although those four acts constitute independent violations of Article 3 of the BIT, they are all connected to the extent that "ils participent d'une même

[164] Articles on State Responsibility, RLA-342, p.123.
[165] Tr. Closings Day 1 (French Version) Chahine 35:34-34:32.

stratégie: à savoir réduire au maximum les montants dus à Onyx Alexandria, quitte à pousser celle-ci à la faillite et donc à faire supporter à Veolia Propreté toutes les conséquences soit du manque de moyens, soit du manque de volonté politique pour mettre en œuvre un service public essentiel qu'est la propreté d'Alexandrie… de manière de faire subventionner ce service public par Veolia Propreté".[166]

137. Before the Tribunal addresses those claims, it will consider the views expressed by the Parties as to the content and scope of the obligation to provide fair and equitable treatment under Article 3 of the BIT.

A. THE CONTENT AND SCOPE OF ARTICLE 3 OF THE BIT

(1) The Parties' Positions

a. Claimant's Position

a.1 Claimant's position on the content of FET

138. On the basis of a number of arbitral awards, in particular *Tecmed v. Mexico*, the Claimant argues that the fair and equitable treatment standard in Article 3(1) of the BIT comprises five interrelated obligations.

139. The first is the duty to respect legitimate expectations relating to the terms of the investment, which requires the host State to ensure the stability of the domestic legal framework under which the investment is made.[167] This would prevent host States from inciting "investissements en promouvant un certain cadre légal ou réglementaire ou en acceptant certains termes dans un contrat, puis de modifier ces 'règles du jeu' une fois l'investissement réalise".[168] While the Claimant agrees that States possess the right to legislate and regulate all matters falling under their jurisdiction, it points out that the exercise of that right may be limited by international obligations such as those arising from the France-Egypt BIT.[169] For the Claimant, both the "attentes élémentaires" relating to the general stability, coherence and clarity of the legal system and the "attentes spécifiques"

[166] Tr. Closings Day 1 (French Version) Chahine 34:26-32.
[167] Cl. Mem. Merits, ¶¶151-156.
[168] Cl. Mem. Merits, ¶146.
[169] Cl. Rep. Merits, ¶251.

relating to specific positions adopted by the host State vis-à-vis the investor would be covered by the FET standard.[170] The Claimant also contends that the existence of legitimate expectations can be established by considering all the relevant facts, and can thus arise from different sources, including legislation, contracts and specific promises.[171] Among other awards, the Claimant relies on *Saluka v. Czech Republic*, *PSEG Global v. Turkey*, *LG&E v. Argentina* and *Impregilo v. Argentina* for the proposition that a duty to respect legitimate expectations is part and parcel of fair and equitable treatment.

140. The second related obligation is the duty to act in a coherent manner and fulfil specific promises made to the investor.[172] Among other cases, the Claimant relies on *CME v. Czech Republic* and *El Paso v. Argentina*.

141. The third is the duty to act with transparency.[173] In this connection, the Claimant relies principally on *Metalclad v. Mexico*. Reacting to an argument made by the Respondent, the Claimant emphasises that the duty of transparency does not arise solely from treaties containing express references to that effect, quoting as an example the award in *Electrabel v. Hungary*.

142. The fourth is the duty to act with good faith in all circumstances, which the Claimant describes as a "gap filler" precluding, *inter alia*, a State to inflict damage upon an investor purposefully.[174] For the Claimant, international tribunals and academic commentary have recognised that "un comportement adopté de mauvaise foi – y compris dans la mise en œuvre de droits et pouvoirs existants en droit interne ou de droits contractuels – n'était pas nécessaire, mais a pu suffire, à fonder une violation du TJE".[175]

143. The fifth is the duty not to act in a way that is arbitrary, manifestly unjust, idiosyncratic, discriminatory or irregular, as affirmed in *Waste Management v Mexico*.[176] In addition, the Claimant notes that this aspect of the FET standard coincides with the "non-impairment

[170] Cl. Rep. Merits, ¶254.
[171] Cl. Rep. Merits, ¶252.
[172] Cl. Mem. Merits, ¶¶157-158.
[173] Cl. Mem. Merits, ¶159.
[174] Cl. Rep. Merits, ¶264.
[175] Cl. Rep. Merits, ¶264.
[176] Cl. Mem. Merits, ¶¶166-168.

clause", fleshed out in the more favourable FET provision in the Algeria-Egypt BIT, which the Claimant is entitled to invoke pursuant to Article 3(2) of the France-Egypt BIT.[177] That provision reads as follows:

> *Chacune des parties contractantes s'engage à garantir un traitement juste et équitable sur son territoire et sa zone maritime pour les investissements des nationaux et sociétés de l'autre partie contractante, excluant la prise de toute mesure injustifiée ou discriminatoire qui pourrait entraver en droit ou en fait la gestion de ces investissements ou leur maintenance, ou leur utilisation, ou la jouissance ou leur liquidation.*[178]

144. In its Reply, the Claimant emphasises that, contrary to what the Respondent suggests and as explained in *Glamis Gold v. United States*, Article 3 does not require the Tribunal to identify and apply the minimum standard of treatment under customary international law.[179] That would only be the case for treaties that expressly assimilate fair and equitable treatment with the minimum standard of treatment. In contrast, in treaties such as the France-Egypt BIT, the correct methodology for the application of the "standard autonome" of FET contained in the BIT would be that of treaty interpretation in accordance with the rules codified in Articles 31-33 of the Vienna Convention on the Law of Treaties. For the Claimant, fair and equitable treatment is "par nature un standard évolutif et flexible", the content of which has been helpfully elucidated by the case law of arbitral tribunals.[180]

145. Responding to arguments advanced by the Respondent, the Claimant emphasises that in the realm of treaty interpretation State practice is only directly relevant in two cases. First, if it amounts to the subsequent practice of the parties in the application of the treaty as provided in Art 31(3)(b) VCLT. That is not the case here, the Claimant explains, because there is no common practice between France and Egypt in the application of the BIT that would justify reading Article 3(1) narrowly or assimilating it to customary international law.[181] Second, if State practice is formative of a customary rule binding on the parties and which as such can inform the interpretation of the treaty as provided in Article 31(3)(c)

[177] Cl. Rep. Merits, ¶¶260-261.
[178] Cl. Rep. Merits, ¶¶239-247, citing Traité bilatéral d'investissement entre l'Egypte et l'Algérie, CLA-218.
[179] Cl. Rep. Merits, ¶227.
[180] Cl. Rep. Merits, ¶235.
[181] Cl. Rep. Merits, ¶273.

VCLT; in this connection, the Claimant notes that the practice identified by the Respondent of drafting FET clauses narrowly comprises a dozen examples which are not representative of the great bulk of existing BITs.[182] The Claimant adds, in this connection, that the Egyptian practice concerning BITs does not follow a restrictive trend, but rather favours "les clauses TJE larges et non circonstanciées".[183]

146. The Claimant maintains that fair and equitable treatment is a "concept profondément évolutif", and that the choice of such "notions flexibles et larges" is meant to allow BITs to evolve and adapt to the "situations existantes ou futures auxquelles sera confronté un investisseur protégé".[184] On that basis, the Claimant rejects the Respondent's contention that only precedents contemporaneous with the France-Egypt BIT can inform the interpretation of Article 3(1) of the BIT.[185] An additional argument that the Claimant puts forth in support of its position that Article 3(1) comprises "une version particulièrement protectrice de TJE" is based on the most-favoured-nation clause in Article 3(2) of the BIT, pursuant to which the Claimant is entitled to benefit from more favourable FET clauses from other treaties concluded by Egypt. According to the Claimant, the effect of Article 3(2) in the interpretation of the standard found in Article 3(1) is that "le sens le plus favorable possible devra être privilégié par l'interprète du TBI lorsque deux interprétations, l'une plus favorable que l'autre, sont envisageables, et ce dans la limite du traitement accordé dans d'autres accords internationaux ou en droit local".[186]

a.2 Claimant's position on the scope of FET

147. As regards the question of whether conduct not carried out in the exercise of sovereign authority may breach the obligation to provide fair and equitable treatment, the Claimant's position is most clearly articulated in its Rejoinder on Jurisdiction. Referring to the ILC's commentary to Article 4 of the Articles on State Responsibility, in which the Commission says that "the breach by a State of a contract does not as such entail a breach of international law" as "[s]omething further is required", the Claimant disagrees that that "something

[182] Cl. Rep. Merits, ¶¶278-281.
[183] Cl. Rep. Merits, ¶282.
[184] Cl. Rep. Merits, ¶¶288-289.
[185] Cl. Rep. Merits, ¶¶286-291.
[186] Cl. Rep. Merits, ¶238.

further" has to be a sovereign act.[187] In reply to a question asked by a member of the Tribunal, Counsel for the Claimant said the following:

> *La question qui doit se poser est de savoir si ce comportement, indépendamment de son caractère commercial ou souverain, est contraire à ce qui a été promis dans le traité. En d'autres termes, la question est simplement de savoir si ce comportement est, oui ou non, juste et équitable, ni plus ni moins. Ni le TBI ni le droit coutumier ne posent comme condition à la responsabilité internationale d'un État que celui-ci ait agi en tant que souverain.*[188]

148. In support of this view, the Claimant refers, *inter alia*, to: a footnote to the ILC commentary in which it is said that the members of the Sixth Committee of the UN General Assembly, answering a question posed by the Commission, agreed that the distinction between sovereign acts and commercial acts is immaterial for the characterisation of an action or omission as internationally wrongful; the rejection of the relevance of the distinction between sovereign acts and commercial acts in *Noble Ventures v. Romania*; and the work of Rosalyn Higgins, who expresses the opinion that contractual breaches can amount to internationally wrongful acts under general international law.[189]

149. For the Claimant, the "something further" explaining why breaches of the Contract also violate the France-Egypt BIT is the incompatibility of the Respondent's behaviour with Articles 3 and 4 of the Treaty, that is, the fact that the various actions and omissions in relation to the Claimant's investment violate the requirement to provide fair and equitable treatment and the prohibition on expropriation.[190] The Claimant adds, in any event, that the complaints relating to the conduct of the Central Auditing Agency, the General Authority for Foreign Investment and the Ministry of Health all constitute sovereign interferences with Onyx's contractual relationship with the Governorate.[191]

150. Finally, the Claimant seeks to persuade the Tribunal that the Contract for the Public Cleanliness Project, rather than a "simple contrat de services", constitutes a veritable

[187] Cl. Rej. Jur. & Admiss., ¶¶31-32.
[188] Tr. Merits Day 1 (French Version) Hervé 23:876-882.
[189] Cl. Rej. Jur. & Admiss., ¶¶32-35.
[190] Cl. Rej. Jur. & Admiss., ¶¶36-38.
[191] Cl. Rej. Jur. & Admiss., ¶¶42-44.

delegation of a public service in the exercise of a sovereign prerogative, and an emanation of Egypt's Environmental Policy Program.[192] In this connection, it argues that: (i) Onyx's mission concerned prerogatives and obligations vis-à-vis the population of a sovereign State; (ii) the Governor – who delegated the mission to Onyx – has the rank and the authority of a minister; and (iii) the characterisation of an act as sovereign is not only a matter of form but also a matter of purpose, as held in *Vigotop v. Hungary*.[193]

b. Respondent's Position

b.1 Respondent's position on the content of FET

151. The Respondent challenges the Claimant's views on the content of fair and equitable treatment on three main grounds.

152. First, it argues that to invoke Article 3(1) the Claimant needs to establish the customary rules of fair and equitable treatment, which can only be done by reference to State practice and *opinio juris*, and not on the basis of a selective reading of arbitral awards. In this connection, the Respondent disagrees with the views on the content of fair and equitable treatment offered by the Claimant. In particular, the Respondent: (i) disagrees that the obligation to respect legitimate expectations is well established in custom and contends that, even if that were the case, the obligation would not debar States from changing their economic policy or legislative framework absent promises specifically made to the investor, as held in the *EDF v. Romania* case;[194] (ii) disputes that a self-standing obligation of transparency is part of fair and equitable treatment, noting that the awards invoked by the Claimant are either unconvincing or rely on the text of the particular treaties being applied by the tribunals;[195] (iii) argues that the Claimant has failed to show that Article 3(1) of the BIT protects it from arbitrary, unjust, idiosyncratic, discriminatory or unlawful conduct as that conclusion is not actually supported by *Waste Management v. Mexico*;[196] (iv) argues that the principle of good faith is not a source of specific obligations in international law – but rather has a subordinate and complementary function: governing

[192] Cl. Rej. Jur. & Admiss., ¶45.
[193] Cl. Rej. Jur. & Admiss., ¶¶46-48.
[194] Resp. C-M. Merits, ¶299.
[195] Resp. C-M. Merits, ¶301.
[196] Resp. C-M. Merits, ¶302.

the application of a specific rule – and cannot as such substantiate an obligation to perform contracts.[197]

153. The Respondent likewise rejects the methodology of treaty interpretation advocated by the Claimant for Article 3(1) of the BIT, which would be "based on the false premise that there is one common and uniform notion of fair and equitable treatment".[198] Given that the Claimant's interpretation would lead to an "ambiguous or obscure meaning" of the text of Article 3(1) of the BIT, recourse should be had to the *travaux préparatoires* of the France-Egypt BIT, which would instead support the Respondent's view that the treaty refers to the minimum standard of treatment under customary international law. The Respondent points, in this connection, to the report of the French Minister of Foreign Affairs when the BIT was presented to the French Parliament, which expressed the understanding that Article 3 refers to the standard in general international law.[199] The Respondent also argues, relying on the work of commentators, that France used as a model for the France-Egypt BIT the Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD, the FET clause of which was meant to reflect the minimum standard of treatment.[200]

154. Second, the Respondent argues that State practice favours a restrictive application of the fair and equitable treatment standard. That is evidenced by: the interpretative note adopted in the context of the North America Free Trade Agreement (NAFTA) equating FET with the minimum international standard; BITs taking a similar approach to that of NAFTA, such as the United States-Uruguay BIT and the Canada-Romania BIT; the position taken by the European Commission in the context of a public consultation that FET should not be understood as a "stabilization obligation"; and the treaty practice of France and States from various regions of the world.[201]

155. Third, the Respondent contends that the case law invoked by the Claimant, not being contemporaneous with the France-Egypt BIT, cannot help elucidate the meaning of Article

[197] Resp. C-M. Merits, ¶¶303-204.
[198] Resp. Rej. Merits, ¶¶421; 427-428.
[199] Resp. Rej. Merits, ¶429.
[200] Resp. Rej. Merits, ¶431.
[201] Resp. C-M. Merits, ¶¶305-309.

3(1).[202] This claim is further elaborated in the Rejoinder, where the Respondent argues that if the Tribunal were to agree with the Claimant that the provision comprises a self-standing obligation with no connection to customary international law, "its ordinary meaning should then be that of the time of the conclusion of the Treaty".[203] The Respondent criticises the Claimant's position that fair and equitable treatment is a concept susceptible of evolutionary interpretation, noting that: (i) evolutionary interpretation is only appropriate for treaties concluded for a long period of time, and this would not be the case with the France-Egypt BIT, which was initially concluded for a period of 10 years only; (ii) the Claimant ignores the "historical context at the time of the conclusion of the Treaty", marked by a "struggle between capital importers and exports countries over the New Economic Order", which militates against the conclusion that the parties wished to subject the 1974 BIT to developments in international investment law;[204] (iii) it cannot be presumed without more that the parties to a treaty intended a generic term to be susceptible to evolutionary interpretation, especially when that generic term is a legal term of art such as "fair and equitable treatment";[205] (iv) the Claimant is wrong to suggest that the recent academic commentary and precedent on which it relies, relating to much more recent BITs, can shed light on the intention of France and Egypt in concluding the 1974 BIT;[206] (v) the Claimant has failed to show that because of the nature of the phrase "fair and equitable" the parties were necessarily "aware that the meaning of the terms was likely to evolve over time", as required by the ICJ in the *San Juan River* case.[207]

156. In its Rejoinder, the Respondent addresses two additional criticisms at the Claimant's position on the content of the fair and equitable treatment standard. First, it maintains that the Claimant is arguing, at the same time, that FET imposes an "obligation of means" and an "obligation of result". This is relevant, the Respondent continues, because it bears upon the characterisation of acts as wrongful: if FET were an obligation of means, the legality

[202] Resp. C-M. Merits, ¶¶312-314.
[203] Resp. Rej. Merits, ¶435.
[204] Resp. Rej. Merits, ¶¶422-444. The term 'fair and equitable treatment', the Respondent adds, had been historically used in many contexts so that no inference that France and Egypt had the contemporary concept of international investment law in mind can be made; Resp. Rej. Merits, ¶445.
[205] Resp. Rej. Merits, ¶¶446-448.
[206] Resp. Rej. Merits, ¶¶450-451.
[207] Resp. Rej. Merits, ¶¶453-454.

of each particular act performed by the Respondent would be at stake; if FET were an obligation of result, the question would be whether the result prescribed by the standard was ultimately achieved by the Respondent.[208] Second, the Respondent criticises the Claimant for seeking to import, on the basis of the most-favoured-nation clause in Article 3(3) of the BIT, the "non-impairment clause" without explaining what difference that would make for the claims originally made, given that the Claimant has not established the existence of an impairment.[209] The Respondent relies, in this connection, on the award in *CMS Gas Transmission Company v. Argentina*.[210]

b.2 Respondent's position on the scope of FET

157. As regards the scope of FET, the Respondent argues that "[c]ontractual claims are not, in the absence of a specific undertaking at the international level from the contracting State, capable to raise an international issue".[211] In the absence of an umbrella clause, it contends, Article 3(1) of the BIT cannot be viewed as a "specific undertaking at the international level" which would turn contractual claims into breaches of an international obligation owed to the Claimant. [212] That the obligation to provide fair and equitable treatment does not in principle govern contractual behaviour is confirmed by ample authority, including:

(i) the awards in *Hamester v. Ghana*, *Noble Ventures v. Romania* and *Bayindir v. Pakistan*, and the annulment decision in *Vivendi I*, all pointing to the distinction between contract claims and treaty claims and the fact that, in the words of the annulment committee in *Vivendi I*, "a Treaty cause of action" – unlike a contractual cause of action – "requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standards".[213] The Respondent notes that even cases which might suggest otherwise, such as the award in *SGS v. Paraguay*, require that non-payment under a contract amount to "a repudiation of the contract, frustration of

[208] Resp. Rej. Merits, ¶465.
[209] Resp. Rej. Merits, ¶479.
[210] Resp. Rej. Merits, ¶478.
[211] Resp. C-M. Merits, ¶277.
[212] Resp. C-M. Merits, ¶277-8.
[213] *Compañía de Aguas del Aconquija S.A. y Vivendi Universal (former Compagnie Générale des Eaux) v. Argentina*, ICSID Case No. ARB/97/3, Annulment Decision (3 July 2002), RLA-015, ¶113.

its economic purpose, or substantial deprivation of its value" for a breach of FET to materialise;[214]

(ii) the awards in *Parkerings v. Lithuania* and *Hamester v. Ghana*, standing for the more specific proposition that contract violations do not as a matter of principle give rise to a frustration of legitimate expectations, the tribunal in the former case having said that "[c]ontracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law";[215]

(iii) the work of commentators, in particular a piece in which Christoph Schreuer explains that a breach of contract does not "automatically [amount] to a violation of international law" and that it is thus "necessary to examine whether a breach of contract violates the standards guaranteed by [the] particular BIT".[216]

158. In this connection, the Respondent maintains that, for a contractual breach to amount to a breach of FET, the acts frustrating the contract must be characterised by an exercise of governmental authority that goes beyond the range of measures that the parties to a contract are in a position to take in their private capacity. It refers to *Siemens v. Argentina, Suez v. Argentina, Tulip v. Turkey, Hamester v. Ghana, Azurix v. Argentina* and *Duke Energy v. Ecuador*, all of which stand for the proposition that State interference of a sovereign character is required to turn a contract breach into a treaty breach.[217]

159. The Respondent then argues that the Claimant "has failed to show that the acts of the Governorate… were acts taken in sovereign capacity, and thus that any of the alleged acts in this regard constitutes a treaty violation".[218] Rather, the Respondent continues, the actions of which the Claimant complains are all "decidedly commercial",[219] in particular the application of contractual penalties, the alleged refusal to pay invoices and the alleged refusal to renegotiate contract terms.[220] In the Closing Statement, Counsel for the

[214] *SGS Société Générale de Surveillance S.A. v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, CLA-046, ¶146.
[215] *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, ¶344, CLA-026.
[216] Christoph Schreuer, 'Investment Treaty Arbitration And Jurisdiction Over Contract Claims - The Vivendi I Case Considered' in Todd Weiler (ed.), *International Investment Law and Arbitration*, RLA-365, p.295.
[217] Resp. C-M. Merits, ¶322.
[218] Resp. Rej. Merits, ¶409.
[219] Resp. Rej. Merits, ¶¶415-416.
[220] Resp. C-M. Merits, ¶333.

Respondent described the Claimant's position that "a contractual breach amounts to a treaty violation when it breaches the treaty" as "circular" and a "meaningless tautology" which falls short of showing that there were elements in the conduct of Egypt that would elevate contractual breaches into a breach of the BIT.[221] Articles 3 and 4 of the BIT only concerns acts carried out by the parties *qua* sovereign States.[222]

(2) The Tribunal's Analysis

160. In its decision on Jurisdiction, the Tribunal stated that the meaning and scope of the standard of fair and equitable treatment "will often depend on the specific circumstances of the case at hand. In the instant case, what constitutes FET will thus be examined in light of the facts of the case, and the Tribunal will deal with those facts in the merits phase of these proceedings".[223] The opinion of the Tribunal remains the same; however, in view of the disagreements expressed by the Parties on the nature, content and scope of the FET clause as contained in Article 3 of the BIT, as well as in international law in general, the Tribunal considers it useful to address those legal divergences, to clarify these issues, before examining the specific circumstances of the case in light of the undertaking by each of the parties to the BIT to "accord in its territory just and equitable treatment to the investments of nationals and companies of the other Party and to ensure that the exercise of the right so granted is not impeded either *de jure or de facto*."

161. Fair and equitable treatment is a standard, and a legal term of art, which is found in the great majority of BITs, although the specific formulation of the clauses articulating it may vary across such agreements. Its content is not always defined in investment agreements, which is the case also of the France-Egypt BIT. Because of its frequent occurrence in BITs, its meaning, content and scope has been dealt with in many arbitral tribunal decisions on investor-State disputes, as well as in academic writings. In analyzing this feature of BITs, arbitral tribunals have adopted different approaches, some of them basing themselves on Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) to ascertain its plain meaning, while others have resorted to a comparative analysis of what is generally

[221] Tr. Closings Day 1 (English Version) Caicedo 146:2-148:13.
[222] Tr. Closings Day 1 (English Version) Caicedo 150:2-151:13.
[223] Decision on Jurisdiction, ¶142.

considered as unfair and inequitable conduct towards private firms and foreign investors under most legal systems to extrapolate from this the meaning and content of the standard at the international level.

162. Some of the tribunals have also interpreted FET as an autonomous and unqualified treaty standard, while others have linked it to the minimum standard of treatment of aliens under customary international law. The latter approach has most often been adopted in cases where the relevant treaty itself textually links FET to the minimum standard, or where, as in the case of NAFTA, a Note of Interpretation has been issued by the Contracting Parties equating fair and equitable treatment to the minimum standard under customary international law. The NAFTA Note of Interpretation, which was issued by its Free Trade Commission on 31 July 2001 has subsequently found its way into some BITs.

163. This is not the case of the France-Egypt BIT, which was concluded in 1974. There is no evidence, even in the *travaux préparatoires*, to support the view advanced by the Respondent that the treaty refers to the minimum standard of treatment under customary international law. The Respondent, in its Rejoinder, misquotes from the "Exposé des Motifs" of the draft law presented before the French National Assembly for the incorporation of the France-Egypt BIT into French law, which does not refer to the "standard du droit international général", but reads as follows:

> *L'Article 3 se réfère aux critères combinés du droit international ainsi que du traitement national et du traitement de la nation la plus favorisée en ce qui concerne la protection des investissements des ressortissants et sociétés de l'une des parties sur le territoires de l'autre.*[224]

This means that the FET has to be interpreted with reference to international law and applied in conformity with the rules and principles of that law. However, the manner in which it is formulated in the France-Egypt BIT, as well as its context, indicates its

[224] Projet de Loi autorisant l'approbation de la Convention entre le Gouvernement de la République française et le Gouvernement de la République arabe d'Egypte sur l'encouragement et la protection réciproque des investissements, signée au Caire le 22 décembre 1974, complétée par deux échanges de lettres, présenté par M. Jean Sauvagnargues (Ministre des Affaires étrangères), 3 May 1975, R-13, p.2.

autonomous character and distinguishes it from the classical minimum standard of international law.

164. In the bilateral treaties concluded by Egypt or by France with other States, there are instances in which the parties adopt the same formulation as the 1974 BIT, but there are also others in which they add other elements such as "conformity with international law", or they specify some of the elements incorporated in the FET standard. Thus, in the France-Algeria BIT of 13 February 1993, it is stipulated in Article 3 that: "Chacune des Parties Contractantes s'engage à assurer, sur son territoire et dans sa zone maritime, un traitement juste et équitable, conformément aux principes de Droit international, aux investissements des nationaux et sociétés de l'autre partie".[225] Similar language is adopted in the case of Egypt in the Canada-Egypt treaty of 1996, in which Article 2(a) reads as follows: "Chacune des Parties Contractantes accorde aux investissements ou aux revenus des investissements de l'autre Partie Contractante… un traitement juste et équitable, en conformité avec les principes du droit international".[226] In view of the fact that even this type of reference to "conformity with the principles of international law", which both France and Egypt have included in some of their subsequent agreements with other States, is not to be found in the 1974 BIT, it would not be correct to presume that France and Egypt intended to refer to the minimum standard of customary international law in their 1974 BIT.

165. Moreover, a particular feature of Article 3 of the 1974 BIT between France and Egypt is its second paragraph which combines the FET standard with national treatment and most-favoured nation treatment in the following terms: "Such treatment shall be at least the same as that accorded by each Contracting Party to its own nationals or companies or the treatment accorded to nationals or companies of the most-favoured nation, if the latter is more advantageous". This approach, which is also found in a number of other bilateral investment agreements, requires the Tribunal, in establishing the content of the FET standard with regard to the specific treaty under consideration in the instant case, to take into account the existence of more favourable FET clauses contained in other treaties concluded by Egypt. As argued by the Claimant, the existence of the MFN clause in Article

[225] Traité bilatéral d'investissement entre l'Egypte et l'Algérie, CLA-218, p.4.
[226] Traité bilatéral d'investissement entre l'Egypte et le Canada, CLA-238, p.4.

3(2) militates in favour of construing Article 3(1) as an autonomous standard rather than the minimum standard in customary international law. The Tribunal agrees with this assessment. The decision of the parties to subject the FET clause in the first paragraph of Article 3 to the MFN clause in the second paragraph of that provision renders unpersuasive any attempt to give Article 3(1) a narrow reading on the basis of the preparatory work of the 1974 BIT. This is, of course, without prejudice to the Tribunal's conclusion, in its Decision on Jurisdiction, that Article 3(2) that the MFN in Article 3(2) cannot be "used to import other standards of international investment law such as FPS or an umbrella clause which, in the view of this Tribunal, neither belong to the same subject or the same category as the FET standard nor are encapsulated in it".[227]

166. Regarding the normative content of the FET standard, the interpretations of the standard by arbitral tribunals are not binding as precedent on this Tribunal, but may be used as a source of inspiration in trying to delimit the scope and content of this commonly used standard of investment agreements. In any case, the interpretation carried out by each tribunal concerns the FET provision found in the treaty applicable to the particular case under its consideration, since the actual formulation of such undertakings is not uniform in investment agreements. Nevertheless, an analysis of the arbitral tribunal decisions reveals a certain measure of convergence in terms of the requirements that the FET standard incorporates, regardless of how it is expressed in the treaty. These elements include: (1) the obligation to respect legitimate expectations of the investor based on the conditions offered or representations made at the time of the investment;[228] (2) the obligation not to act in a manifestly arbitrary or grossly unfair manner towards the investor or its property;[229] (3) the obligation not to act in a way that is manifestly discriminatory;[230] and, (4) whenever

[227] Decision on Jurisdiction, ¶158.
[228] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, CLA-088, ¶¶113-124; *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, CLA-029, ¶302; *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, CLA-016, ¶154; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13), Award, 8 October 2009, CLA-076, ¶216.
[229] *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, CLA-041, ¶98; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, CLA-242, ¶290.
[230] *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, CLA-029, ¶307; 12 May 2005; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, CLA-242, ¶290.; *LG&E Energy Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1, Award, 3 October 2006, CLA-033, ¶128.

the claimant has recourse to domestic courts, the obligation to respect basic due process requirements and to avoid denial of justice.[231]

167. The identification of the above elements does not mean that they always form part of the substantive content of the FET standard, whatever may be the treaty in which it is contained. Nor is it the view of this Tribunal that these elements constitute an exhaustive list of the requirements included in such a standard. The standard must thus be defined on the basis of the relevant treaty.

168. In the present case, the Tribunal concludes that the FET standard must be interpreted to comprise the above-mentioned elements. That is because, as concluded above, Article 3(1) contains an autonomous treaty standard the interpretation of which can be informed by that which other investment tribunals have given to similarly formulated clauses. Moreover, the Claimant purports to rely, on the basis of Article 3(2), on the more favourable FET clause in the Algeria-Egypt, according to which:

> *Chacune des parties contractantes s'engage à garantir un traitement juste et équitable sur son territoire et sa zone maritime pour les investissements des nationaux et sociétés de l'autre partie contractante, excluant la prise de toute mesure injustifiée ou discriminatoire qui pourrait entraver en droit ou en fait la gestion de ces investissements ou leur maintenance, ou leur utilisation, ou la jouissance ou leur liquidation.*[232]

That clause, by focusing on "la prise de toute mesure injustifiée ou discriminatoire qui pourrait entraver en droit ou en fait la gestion de ces investissements ou leur maintenance, ou leur utilisation, ou la jouissance ou leur liquidation", encapsulates the elements identified in the case law of investment tribunals. A measure taken by the host State against an investor would be considered as "injustifiée ou discriminatoire" if it did not respect legitimate expectations based on the conditions offered or representations made at the time of the investment; if it were manifestly arbitrary, grossly unfair, manifestly

[231] *Loewen v. United States of America*, Case No. ARB(AF)/98/3, Award, 26 June 2003, RLA-069, ¶¶129-132; *Jan de Nul N.V., Dredging International N.V. v. Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, CLA-136, ¶¶187-188.
[232] Traité bilatéral d'investissement entre l'Egypte et l'Algérie, CLA-218

discriminatory; or if it failed to respect basic due process requirements thereby resulting in a denial of justice.

169. At the same time, the Tribunal observes that the application of the FET standard, and the practical relevance of any of the elements that it may comprise, depend on the claims made by the parties and the particular aspects of the dispute. What is fair and equitable in any given case can only be ascertained through the actual application of that standard, as formulated in the treaty, to a set of specific facts. In this regard, the Tribunal is in agreement with the award in the *Continental Casualty v. Argentina* case, where it was stated that "[t]he content of the obligation incumbent upon the host State to treat a foreign investor in a fair and equitable manner, even when applicable 'at all times' as specified in Article II(2)(a) of the BIT, varies in part depending on the circumstances in which the standard is invoked: the concept of fairness being inherently related to keeping justice in variable factual contexts".[233] Similarly, in *AWG Group v. Argentina*, the tribunal observed that:

> *[T]he context of the term fair and equitable largely depends on the contents of the treaty in which it is employed. Thus, the term must be interpreted not as three words plucked from the [Bilateral Investment Treaty] text but within the context of the various rights and responsibilities with all the conditions and limitations to which the contracting parties agreed.*[234]

170. The Tribunal will therefore use the above elements in carrying out its analysis of the merits, to the extent that they have been argued by the Parties in these proceedings, and on the basis of the evidence presented by them. In other words, the application of these elements and the conclusions to be derived from them will depend on the specific facts of the case at hand, as well as their relevance for the alleged conduct of the Respondent and not on their abstract existence.

171. Regarding the scope of the FET, the Parties are in disagreement on whether a breach of contract can amount to a breach of the FET standard in the BIT. Both Parties refer to the commentary to Article 4 of the Articles on State Responsibility, but appear to have

[233] *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, RLA-463, ¶255.
[234] *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on liability, 30 July 2010, ¶214.

differing views on the position that the ILC has expressed with respect to contractual breaches. In this connection, the Tribunal observes, in the first instance, that Article 4 deals with attribution of conduct to a State and not with the breach of international obligations by States. Secondly, the commentary of the ILC to Article 4 is quite clear on this issue. It reads, *inter alia*, as follows:

> *It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as 'acta iure gestionis'. Of course, the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party.*[235]

172. The key words in the above passage are "as such" and "something further". This means that a simple breach of a contract by a contractual partner, be it the State or one of its entities, does not necessarily trigger a violation of the FET standard. This view is consistent with the decisions of a number of arbitral tribunals, including *Bayindir v. Pakistan*, in which the tribunal observed that "because a treaty breach is different from a contract violation, the Tribunal considers that the claimant must establish a breach different in nature from a simple contract violation, in other words one which the State commits in the exercise of its sovereign power".[236] Similarly, in *Siemens v. Argentina*, the tribunal stated that "arbitral tribunals have considered that, for the behavior of the State as a party to a contract to be considered a breach of an investment treaty, such behavior must be beyond that which an ordinary contracting party could adopt and involve State interference with the operation of the contract".[237]

173. For the Claimant, the "something further" does not have to be sovereign power, so long as it is incompatible with the conduct expected under the BIT, that is, insofar as the various actions and omissions in relation to the Claimant's investment violate the requirement to provide fair and equitable treatment under the Treaty. It is true that both in *Mondev v.*

[235] Articles on State Responsibility, RLA-342, at 41.
[236] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, CLA-019, ¶180.
[237] *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, CLA-051, ¶248.

United States[238] and *SGS v. Philippines*,[239] the tribunals asserted that a breach of contract may amount to a breach of the fair and equitable treatment standard. However, they did not elaborate under which circumstances this may actually happen. At the same time, the tribunal in *Azurix v. Argentina* explained that "[a] state or its instrumentalities may perform a contract badly, but this will not result in a breach of treaty provisions unless it is proved that the State or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign". This view is consistent with a line of cases including *RFCC v. Morocco*, *Waste Management*, *Impregilo v. Pakistan* and *Duke Energy v. Ecuador*.

174. It is the view of this Tribunal that more than a simple contract breach is required to constitute a violation of the fair and equitable treatment standard. The acts frustrating the contract must be characterized by an exercise of governmental authority that goes beyond the range of measures that the parties to a contract are in a position to take in their private capacity, or there must be aggravating circumstances showing a significant arbitrary behaviour on the part of the State in the pursuit of governmental purposes, or interference by State organs resulting in the total repudiation of the contract.

175. The Tribunal will now turn to the application of the FET standard in the BIT, as discussed above, to the facts of the case so as to evaluate Veolia Propreté's claims of breach by Egypt. To this end, it will examine the following heads of claim: the economic equilibrium of the Contract (section B); the alleged imposition of abusive penalties (section C); the handling of the application for a license to collect medical waste (section D); and the alleged refusal to remunerate Onyx for services provided (section E).

176. While doing so, the Tribunal will look into the capacity in which the Egyptian State or the Governorate, which is an emanation of the State, may have acted in their alleged non-compliance and/or interference with the Contract, and will consider factors such as the

[238] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, RLA-060, ¶¶98 and 134.
[239] *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, CLA-046, ¶162.

existence of undertakings or assurances made to the investor in connection with the Contract and the reliance of the investor on such assurances.

177. Although the Claimant has not advanced claims for breach of the Contract under its proper law, the Tribunal must nevertheless take into account the terms of the Contract as a factual element reflecting the expectations of the parties to the Contract, and examine the conduct of the Parties with regard to its performance in light of the allegations made by the Claimant. As was explained by the *Vivendi II* tribunal, "it is permissible for the tribunal to consider such alleged contractual breaches, not for the purpose of determining whether a party has incurred liability under domestic law, but to the extent necessary to analyze and determine whether there has been a breach of the treaty".[240] In particular, the Tribunal will examine such alleged contractual breaches to see if there was an exercise of governmental authority that goes beyond the range of measures that the parties to a contract are in a position to take in their private capacity, or if there were any aggravating circumstances showing a significant arbitrary behaviour on the part of the State in the pursuit of governmental purposes, or interference by State organs resulting in total repudiation of the contract.

B. RESTORATION OF THE ECONOMIC EQUILIBRIUM OF THE CONTRACT

(1) The Parties' Positions

a. Claimant's Position

178. In its Memorial, the Claimant argues that the Respondent's breach of fair and equitable treatment in connection with the losses that the Claimant incurred as a result of changes in Egypt's economic and social policy was twofold. On the one hand, the Respondent is said to have breached the Claimant's legitimate expectations and the obligation to act with coherence by abandoning its original exchange rate policy and altering labour laws without compensating the Claimant for the negative impact that those measures caused on the investment. On the other hand, the Respondent is said to have infringed upon the

[240] *Compañia de Aguas del Aconquija S.A. et al. v. Argentina ('Vivendi II')*, ICSID Case No. ARB/97/3, Award, 20 August 2007, CLA-042, ¶¶7.3.1-7.3.4.

Claimant's legitimate expectations and breached the obligation to act in good faith by refusing to renegotiate the economic equilibrium of the Contract.

179. The factual premises common to the Claimant's two arguments are the following.

180. First, the Parties had agreed on essential elements of the economic equilibrium protected by Article 24 of the Contract, namely a 4% inflation rate and a foreign exchange value established at EGP 3.43 / 1 USD. Those essential elements were to be found in a carefully negotiated exchange of letters made immediately after the Contract was signed.[241] Noting that the Governorate's response to Veolia Propreté's letter of 4 September 2000 acknowledged the "important explanations" given by Veolia which were "essential" for the parties to "understand as the basis for the starting points" of their project, the Claimant argues that the Governorate thereby agreed to the essential elements of the economic equilibrium of the Contract as described in Veolia Propreté's letter.[242] In addition, the Claimant relies on Article 22 bis 1 of Law No. 89, the Law on Organizing Tenders and Bids, which provided for automatic readjustments of the prices of contracts with public entities the execution of which extended for six months or more.

181. Second, Egypt made changes to its economic and social policy that had an impact on the economic equilibrium of the Contract, namely the adoption of a floating exchange rate for the Egyptian pound and an increase to the minimum wage by 7% in 2003 and to the wage of civil servants by 30% in 2008. The changes to currency policy led to an increase in the inflation rate which, according to the Claimant, further contributed to jeopardising the economic equilibrium of the Contract.

182. Third, despite the fact that the Contract had become excessively onerous for Onyx Alexandria as a result of measures taken by the central authorities of Egypt, the Governorate consistently and unjustifiably refused to renegotiate the economic equilibrium of the Contract notwithstanding Onyx Alexandria's many attempts to raise the issue.

[241] Cl. Rep. Merits, ¶79.
[242] Cl. Rep. Merits, ¶80.

183. In its Reply and in the subsequent hearings, the Claimant chose not to restate the claim that the economic and social measures taken by the Respondent constituted *per se* a breach of fair and equitable treatment. Rather, its evolved position is that the fact that the economic equilibrium of the Contract was jeopardised by governmental measures attributable to the Respondent makes the Governorate's refusal to renegotiate the terms of the Contract an even more glaring breach of FET.[243] To that the Claimant adds that even if there had been no agreement between the parties on the elements underlying economic equilibrium, the Respondent would still be under a duty to renegotiate in good faith a contract so severely impacted by measures that it chose to take.[244] The Claimant argues that the facts of the present dispute are similar to those of *EDF v. Argentina*, in which the tribunal found that refusal to re-establish the economic equilibrium of a concession contract compromised by economic measures taken by Argentina amounted to a breach of fair and equitable treatment.

184. In its Closing Statement at the hearing of 9 February 2017, the Claimant further particularised its argument by characterising the Respondent's alleged breach of FET as:

> *le refus obstiné du gouvernorat d'Alexandrie de rétablir l'équilibre économique du marché alors pourtant que cet équilibre… était fondamentalement bouleversé, que le gouvernorat et l'Égypte ne pouvaient pas ignorer que l'exécution du marché dans ces conditions n'était pas viable, et que ce rééquilibrage était requis tant par la loi, le Contrat, la coutume, et bien évidemment l'équité.*[245]

The Respondent's refusal to restore the economic equilibrium of the Contract was compounded by: (i) the Governorate's refusal, over the course of years of exchanges, to engage properly and constructively with Onyx's repeated requests to discuss the subject; (ii) by the Governorate's conduct in the context of the arbitration proceedings before CRCICA and in its aftermath; and (iii) by the conduct of the Egyptian authorities in relation to Onyx Alexandria's requests to have the economic equilibrium of the Contract restored by GAFI. The two latter claims, originally presented in the Memorial as independent

[243] Cl. Rep. Merits, ¶293.
[244] Cl. Rep. Merits, ¶294.
[245] Tr. Closings Day 1 (French Version) Chahine 33:35-40.

breaches of Article 3 of the BIT,[246] were thus repackaged as elements of the Claimant's consolidated position on the Respondent's violation of FET in connection with the economic equilibrium of the Contract.

185. The Claimant explains that, when Onyx Alexandria asked the Governorate to restore the economic equilibrium of the Contract following the first triennial period (1 October 2001 – 30 September 2004), the Governorate had initially indicated its willingness to establish a tripartite committee to look into the issue as envisaged by Article 35 of the Contract. However, the Governorate is said to have ignored Onyx Alexandria's multiple requests, in the period spanning from July 2004 to October 2006, to continue the process for establishing that tripartite committee, forcing Onyx Alexandria to resort to arbitration before CRCICA.[247]

186. For the Claimant, the position taken by the Governorate in the CRCICA proceedings also revealed that the Governorate had never intended to restore the economic equilibrium of the Contract,[248] because the Governorate attempted to have Article 24 of the Contract annulled on the ground that it contravened the terms of the bid and Egyptian administrative law. The Governorate's unwillingness to engage in negotiations of any kind was further corroborated by General Bassiouni's Second Witness Statement, in which he stressed that "it was clear and well known to the Governorate that requests for rebalancing the economic equilibrium of the Contract were to be submitted to arbitration".[249]

187. The Claimant further criticises the measures taken by the Governorate in the aftermath of the CRCICA proceedings, when the Governorate sought the annulment of the CRCICA award of 3 March 2008, which had been favourable to Onyx Alexandria. It points out that those measures were prohibited by the Contract; were presented before administrative

[246] Cl. Mem. Merits, ¶¶185-189.
[247] E.g. Tr. Merits Day 1 (French Version) Alquezar 11-13:326-400.
[248] Tr. Closings Day 1 (French Version) Alquezar 12:17-23.
[249] Second Witness Statement of General Mohammad Ahmad Bassiouni, ¶13; E.g. Tr. Merits Day 1 (French Version) Alquezar 11-13: 326-400.

courts that the Governorate knew had no jurisdiction; and were ultimately dismissed by the Cairo Court of Appeal.[250]

188. As regards the second triennial period of the Contract, the Claimant maintains that, following its request to restore the economic equilibrium of the Contract on 24 September 2007, the Egyptian authorities misled Onyx Alexandria into pursuing the intervention of GAFI only to be told, after a prolonged process (initiated on 31 August 2008 and concluded on 1 February 2009), that GAFI was incompetent to handle the matter.[251] Counsel for the Claimant pointed out that GAFI was unresponsive in relation to Onyx Alexandria's repeated requests to expedite the process even though a position to reject the claim had been taken within GAFI as early as in April 2008.[252] In the Memorial, the Claimant also claimed that GAFI had failed to comply with its internal regulations requiring the Authority to provide a reasoned decision within the time-frame of three months.[253]

189. As regards the third triennial period of the Contract, the Claimant contends that Onyx Alexandria's letter requesting the restoration of the economic equilibrium on 28 September 2010 went unanswered by the Governorate.[254] Counsel for the Claimant explained that in any event there was no prospect at that time of achieving the rebalancing of the Contract given the financial trouble in which the Governorate found itself: "c'était déjà trop tard".[255]

190. The Claimant finally explains that the reason why it did not resort to CRCICA arbitration for the second and third triennial periods of the cleanliness project in Alexandria was that it expected the Governorate to challenge any future awards, thus making CRCICA arbitration an unviable avenue to seek the restoration of the economic equilibrium of the Contract.[256]

191. All those actions and omissions resulted, as summarised by Counsel in the Claimant's Closing submission, in breaches of the Claimant's legitimate expectations; the duty to act

[250] Cl. Mem. Merits, ¶¶185-186.
[251] Tr. Closings Day 1 (French Version) Alquezar 14:24-16-8.
[252] Tr. Closings Day 1 (French Version) Alquezar 16:1-5.
[253] Tr. Closings Day 1 (French Version) Alquezar 16:14-20.
[254] Tr. Closings Day 1 (French Version) Alquezar 16:14-20.
[255] Tr. Closings Day 1 (French Version) Alquezar 16:21-39.
[256] Tr. Closings Day 1 (French Version) Alquezar 14:24-28.

with coherence; the duty of transparency; the duty to treat the investor with good faith; and the duty to refrain from arbitrary and unjust behaviour – all deriving from Article 3 of the BIT.[257]

b. Respondent's Position

192. The Respondent disputes most of the factual premises of the Claimant's submission. It argues that the case law of investment tribunals is clear in that changes to economic and social policy made in the public interest in a non-discriminatory manner are not contrary to the fair and equitable treatment standard absent a "promise of legal stability".[258] According to the Respondent, the Egyptian Government did not make a promise of this kind to the Claimant for a number of reasons.

193. First, the Claimant was not in a position to rely on Article 22 bis 1 of Law No. 89 since that provision was added in 2005 and subsequently amended in 2008, which means that it "did not in fact exist at the time of the investment and was never subsequently applicable to the Tender or the Contract".[259]

194. Second, contrary to what the Claimant argues, the exchange of letters following the signing of the Contract did not entail an agreement as to the essential elements of economic equilibrium. The Governorate's letter of 5 September 2000 merely thanked the Claimant for "the important explanations" given by the latter and underlined the importance of holding "regular meetings", without expressing an acceptance of conditions that had been purposefully left out of the Contract itself.[260] The Respondent emphasises that through its participation in the Tender and the subsequent offer that it submitted to the Governorate the Claimant committed to a system of fixed rates. That much was evidenced by the Tender process itself – where the Governorate had made it clear to all participants that the proposed prices were final and binding – and by the negotiation history of the Contract – when

[257] Tr. Closings Day 1 (French Version) Alquezar 16:40-17:30.
[258] Resp. C-M. Merits, ¶¶ 399-400.
[259] Resp. C-M. Merits, ¶422.
[260] Resp. C-M. Merits, ¶¶470-480.

attempts by Veolia Propreté to include clauses providing for readjustment for changes in the exchange and inflation rates were unequivocally rejected.[261]

195. Furthermore, the request for compensation based on changes to labour laws was baseless as no promises in this regard had ever been made by the Egyptian authorities or by the Governorate in the Contract or otherwise, and the impeding introduction of the new legislation was a matter of public knowledge at the relevant time.[262] That was the position, the Respondent adds, taken by the CRCICA Tribunal in dismissing a claim by Onyx Alexandria based on changes to labour laws.[263]

196. Third, the Contract did not entitle Onyx to demand compensation for all losses incurred due to changes in exchange and inflation rates, but rather to have recourse to CRCICA arbitration to re-establish the economic equilibrium of the Contract within reasonable limits and taking into account the interests of both parties.[264] This was, the Respondent adds, how Article 24 of the Contract (which reflects a rule from the Egyptian Civil Code) was construed not only by the CRCICA Tribunal, but also by the Claimant's legal advisors in advance of the signing of the Contract.[265]

197. Fourth, the Respondent maintains that the Governorate did not refuse to hold discussions with Onyx concerning economic equilibrium. Rather, by the Claimant's own admission a number of meetings were held between the Governorate and Onyx on the subject.[266] In addition to the meetings on the record, the Respondent relies on the cross-examinations of Mr Hansen and Mr Bassiouni for evidence that additional meetings and informal discussions between the parties took place in the relevant period.[267]

198. As regards exchanges relating to the first triennial period of the Contract, the Respondent rejects that the Claimant's contention that the Governorate sought to delay the restoration of the economic equilibrium from 2004 to 2006, noting that Onyx Alexandria did not

[261] Resp. C-M. Merits, ¶¶52 and 63.
[262] Resp. C-M. Merits, ¶¶393; 450-465.
[263] Resp. C-M. Merits, ¶465.
[264] Resp. C-M. Merits, ¶¶90-93.
[265] Resp. Rej. Merits, ¶86.
[266] Resp. C-M. Merits, ¶¶496-498.
[267] Tr. Closings Day 1 (English Version) Khayat 155:10-22.

require any specific answer from the Governorate to initiate arbitration before CRCICA. As envisaged in the Contract, in the absence of agreement the issue of economic equilibrium was to be submitted to arbitration. As a result, the series of letters warning the Governorate of Onyx Alexandria's intention to resort to arbitration served no useful purpose and any delays in commencing CRCICA procedures was to be blamed on Onyx Alexandria, not on any lack of response on the part of the Governorate.[268] In this connection, Counsel for the Respondent criticised the Claimant's characterisation of the correspondence between the parties between 2004 and 2006, denying that that correspondence concerned the establishment of a tripartite committee under Article 35 of the Contract; the Respondent rather maintains that Article 24 of the Contract envisaged direct recourse to arbitration for issues relating to the restoration of the economic equilibrium.[269]

199. As regards the second triennial period of the Contract, the Respondent contends that, having chosen to resort to GAFI, Onyx Alexandria ceased to actively pursue direct negotiations with the Governorate to restore the economic equilibrium of the Contract.[270] In any event, Counsel for the Respondent argued, on the basis of Mr Hansen's cross-examination, that there had been exchanges and discussions on economic equilibrium between the Governorate and Onyx Alexandria in the procedure before GAFI.[271] With regard to the role played by GAFI, the Respondent emphasises that there were no substantive or procedural irregularities because GAFI, which does not have the competence to settle investment disputes (but only to facilitate their settlement), could not have given the relief that Onyx Alexandria sought.[272] Therefore, GAFI's conclusion that the dispute between Onyx and the Governorate concerned "technical and financial matters that require specialized experts to draft their report to allow the settlement of the claims" and that arbitration under the Contract was "an appropriate alternative means of settlement of disputes" was appropriate.[273] The Respondent likewise rejects the Claimant's suggestion,

[268] Tr. Merits Day 1 (English Version) Khayat 107:19 to 109:18.
[269] Tr. Closings Day 1 (English Version) Khayat 159:11-17.
[270] Tr. Merits Day 1 (English Version) Khayat 107:19-112:25.
[271] Tr. Closings Day 1 (English Version) Khayat p. 159:11-17.
[272] Resp. C-M. Merits, ¶699.
[273] Resp. Rej. Merits, ¶661, citing Report of the Council of Ministers Consultants Commission dated 8 April 2009, R-155

in the Memorial, that GAFI had the obligation to provide a reasoned decision in a three-month period, pointing out that the Claimant provided no evidence of the existence of the internal regulations on which it relies, and that such procedural requirements would have been at odds with GAFI's mandate.[274]

200. As regards the third triennial period of the Contract, the Respondent observes that Mr Hansen's cross-examination provides evidence of exchanges on economic equilibrium between General Labib, the Governor of Alexandria, and representatives of Onyx,[275] and that there was no attempt by Onyx Alexandria to initiate arbitral proceedings before CRCICA.[276]

201. Fifth, the alleged lack of economic equilibrium ultimately results from Onyx Alexandria's own conduct, as the latter took the unacceptable negotiating position to ask for full compensation for losses incurred as a result of macroeconomic changes which, it was fully aware, the Contract did not warrant, and failed to initiate proceedings before CRCICA as envisaged by the Contract.[277] There was thus no evidence of any bad faith on the part of the Governorate in the exchanges between the parties.[278] Likewise, even if contractual provisions could be the source of legitimate expectations – which the Respondent disputes – the Claimant cannot establish a legitimate expectation "that it should be compensated at the level that they [had] been requesting from the Governorate at the time, again, 100% of the losses under the concept of economic equilibrium".[279]

202. In this connection, the Respondent maintains that Onyx Alexandria did secure the restoration of the economic equilibrium of the Contract for the first triennial period of the Contract by resorting to CRCICA Arbitration.[280] The Respondent denies that its decision to seek the annulment of the award given by the CRCICA tribunal and to ask for a suspension of its enforcement was in any way irregular. That was because the Governorate was merely exercising its procedural rights under Egyptian law, which allowed for

[274] Resp. Rej. Merits, ¶649.
[275] Tr. Closings Day 1 (English Version) Khayat 160:14-161:6.
[276] Resp. Rej. Merits, ¶592.
[277] Resp. Rej. Merits, ¶582.
[278] Tr. Closings Day 1 (English Version) Khayat 180:2-13.
[279] Tr. Closings Day 1 (English Version) Khayat 183:1-6.
[280] Resp. Rej. Merits, ¶282.

annulment proceedings to be initiated on certain grounds. The Respondent explains that the Governorate initially asked for annulment before the Supreme Administrative Court because it deemed that the Contract qualified as an "administrative contract" under Egyptian law, a characterisation with which the Court ultimately disagreed remanding the case to the Cairo Court of Appeal.[281] The Respondent maintains that even though the Governorate's request was ultimately dismissed, there is no evidence that the Governorate abused its rights or acted unreasonably by seeking to enforce its rights.[282] The Respondent also clarifies that the Governorate settled the award as soon as the courts rejected its request for a suspension of the award's enforcement.[283]

203. The Respondent further disagrees with the Claimant's attempt to compare the present dispute with *EDF v. Argentina*. In that case, the investor was able to rely on an umbrella clause and the host State had made specific promises to attract investors, including a legislative currency clause.[284] Neither of those elements was to be found in the present case.

204. Counsel for the Respondent finally stressed that Onyx's decision not to seek the restoration of the economic equilibrium of the Contract for the second and third triennial periods of the Contract before CRCICA was due to its dissatisfaction with the outcome of the CRCICA award of 3 March 2008. That was because that award only provided partial compensation for changes in the essential elements of the Contract instead of the full compensation which Onyx had always insisted in its dealings with the Governorate and the Egyptian authorities. To corroborate this view, Counsel relied on Mr Hansen's cross-examination at the hearing held in November 2016, when Mr Hansen described the CRCICA award as "décevante".[285]

[281] Resp. C-M. Merits, ¶¶733-737.
[282] Resp. C-M. Merits, ¶¶748-755.
[283] Resp. C-M. Merits, ¶747.
[284] Resp. Rej. Merits, ¶¶600-601.
[285] Tr. Closings Day 1 (English Version) Khayat 173:6-174:12.

(2) The Tribunal's Analysis

205. The Claimant alleges that the Respondent breached its obligations under Article 3 of the BIT, establishing fair and equitable treatment, and consequently frustrated its legitimate expectations and failed to act with coherence, as required by the FET clause, by abandoning its original exchange rate policy and enacting new labour laws without compensating the Claimant for the negative impact that those measures caused to the investment. It further claims that the Respondent acted in breach of the Claimant's legitimate expectations and the obligation to act in good faith through its refusal to renegotiate the economic equilibrium of the Contract. The Respondent rejects both allegations.

206. The Tribunal has considered the views of the Parties as summarized above, as well as the many detailed arguments made in their written submissions and at the hearings. In case any particular details of the Parties' arguments are not discussed explicitly below, this does not mean that they have not been taken into consideration by the Tribunal.

207. The Tribunal will briefly recall in a chronological order the process through which the Contract was awarded to Veolia Propreté for the Alexandria Governorate's General Cleanliness Project, and the subsequent events that led to the dispute between Veolia and the Governorate with respect to the restoration of the economic equilibrium of the Contract, as well as the various attempts to settle it, before addressing the application of the FET standard, as contained in the BIT and analysed above with regard to its scope and content, to the specific facts related to the changes affecting the Claimant's investment in Egypt and the allegations made by the Claimant in this regard.

a. The Origins of the Dispute on the Restoration of the Economic Equilibrium of the Contract

208. Following a call for applications for a "General Cleanliness Project" issued in July 1999, the Governorate of Alexandria issued on 6 January 2000 the Specifications and Provisions for the Tender of the Alexandria Governorate General Cleanliness Project, which was addressed to eight qualified companies. On 29 January 2000, the Governorate answered, in its booklet on questions and enquiries regarding the tender, questions by one of the companies relating to "unforeseen and unexpected" changes not mentioned in the Tender,

and in particular: "currency fluctuations against the US dollar"; "[c]hange in the laws relating to the income per capita and / or social security contributions"; and "global fluctuations and effects in gas and energy prices".[286] The answer referred back to the terms of the Tender and merely added that "the contractor may take out an insurance policy against any risks other than those mentioned in the bid requirements to cope with any fluctuations he believes that he can be exposed to".[287]

209. On 1 April 2000, GCEA-ONYX (hereinafter Veolia Propreté, as it was later renamed) submitted its offer to the Governorate, and was selected on 31 May by the committee in charge of the Tender as one of three companies shortlisted for the award of the contract. On 13 June, Veolia Propreté sent a fax to the Governorate confirming the terms of its offer, and committing to a flat fixed inflation rate of 4% and a fixed rate for the anticipated growth of tonnage. On 20 June, the committee in charge of the Tender selected Veolia Propreté's bid. The fax of 13 June is mentioned in the committee's decision, which describes that fax as a "modification in favor of the administrative authority… [which] includes a waiver of the reservations that accompanied [Veolia Propreté's] bid".[288] On 26 July, Veolia Propreté sent a letter to the Governorate proposing to add to the Contract clauses envisaging compensation if the fixed rates for inflation and tonnage, as well as the presumed exchange rate between USD and EGP, prove inadequate. Veolia's proposal was not accepted by the Governorate.

210. El Gamal, the Egyptian law firm which represented Veolia in the negotiations, explained to Veolia, in a legal advice provided to it, that the Governorate was not in a position to accept clauses readjusting the price of the Contract by virtue of changes in the inflation and exchange rates, but that it had agreed to a clause on economic equilibrium that would "support you in case of an evolution that will unable you to perform your obligations as per the agreed upon remuneration".[289] This would not, however, be "a mechanism for an

[286] Response of the Governorate of Alexandria to questions concerning the economic equilibrium of the contract dated 29 January 2000, R-145, p.2.
[287] Response of the Governorate of Alexandria to questions concerning the economic equilibrium of the contract, dated 29 January 2000, R-145, p.2.
[288] Minutes of the meeting of the Committee responsible of the limited tender no. 16 of 1999, with respect to the general waste management project of the Governorate of Alexandria dated 20 June 2000, R-146, p.4.
[289] Legal Opinion given by El Gamal Law Firm, 20 August 2000, C-133, p.2.

automatic adjustment of price". The advice further clarified that the provision on the economic equilibrium of the Contract did not envisage "the right to claim readjustment as stipulated in clause No. 34 of the contract" but that it allowed the company to consult with the Governorate "regularly to readjust the Equilibrium of the contract as per clause No. 25 of the Contract".[290]

211. In addition, the law firm stated that it had agreed with the Governorate's representatives that the latter would accept a letter, following the signature of the Contract, where the Company "would explain all the details that [it] would like to set the record with related to [its] model of Price calculation and to the elements [it] would highlight related to the Economical Equilibrium".[291]

212. On 21 August, Jean-Dominique Mallet, Senior Vice-President for International Affairs, of Veolia, wrote an internal email to Dennis Gasquet, the Chief Executive Officer of the Company and Director General of Veolia Propreté, noting that the negotiations on inflation and exchange rate had come to a stalemate, "le tout lié à un cahier des charges mal conçu mais dont le Gouvernorat se sent (à juste titre) légalement prisonnier". Mr Mallet, after discussing the pros and cons of signing the Contract, which he characterized as being "loin d'être parfait", advised his Chief Executive to go ahead with the Contract, stating that it was:

> *Une décision difficile : après y avoir beaucoup réfléchi, je pense qu'il faut y aller. J'ai en tout cas promis une décision pour la fin de cette semaine.*[292]

213. The Contract was signed on 3 September 2000 between Veolia Propreté (at the time CGEA-ONYX) and the Governorate. It was, however, stipulated in the Contract that:

> *the Contract shall be deemed as signed by ONYX ALEXANDRIA, an Egyptian joint stock company, as soon as a written notice is served on the Governorate stating that ONYX ALEXANDRIA has been duly incorporated in accordance with the Egyptian Law. It is further agreed that the French Parent Company shall act, in all cases, as*

[290] Legal Opinion given by El Gamal Law Firm, 20 August 2000, C-133, p.3.
[291] Legal Opinion given by El Gamal Law Firm, 20 August 2000, C-133, p.3.
[292] Email from Jean-Dominique Mallet to Denis Gasquet, 21 August 2000, C-131, p.2.

guarantor of the newly incorporated company, according to the provisions of this Clause.[293]

214. On 4 September, Veolia Propreté sent a letter to the Governorate of Alexandria offering its view on the "essential elements" underlying the economic equilibrium of the Contract (in particular, a 4% inflation rate and an EGP 3.43/U$1 exchange rate) and expressing the wish to hold regular meetings at the end of each triennium to discuss the economic equilibrium of the Contract.[294] On 5 September, the Governor of Alexandria replied to Veolia Propreté's letter thanking the company for "its important explanations which [was] essential for [them], as partners, to understand as the basis for the starting points of [their] project" and agreeing that "the success of this project relies on preserving the common interest of both parties".[295]

215. In January 2003, the Egyptian Central Bank adopted a policy of floating exchange rates, and on 7 April 2003 the Government of Egypt enacted a new law (Law No. 12/2003) increasing the minimum wage by 7 per cent. Following these developments, Onyx Alexandria, which was now a locally incorporated company, and a subsidiary of Veolia Propreté, sent a letter on 11 July 2004 to the Governorate, referring to Articles 24 and 31 of the Contract, and calling for negotiations with the Governorate with a view to restoring the economic equilibrium of the Contract, with respect to the first triennium in light of the macro-economic changes that took place in 2002 and 2003. On 12 October 2004, the Governorate replied to Onyx's letter informing the company that the Governorate was "in the process of constituting a committee to participate in the arbitration and study the impacts referred to in your letter in order to activate articles 24 and 31 of the contract concluded with the Company on 02/09/2004".[296] On 1 December 2004, Onyx replied to the Governorate's letter appointing a company representative for the procedures under Article 35 of the Contract.

[293] Contract, C-012, ¶32.2.
[294] Letter from Denis Gasquet, Director-General of Veolia Propreté, to Mohammed Abdel Salam El Mahgoub, Governor of Alexandria, 4 September 2000, C-016.
[295] Letter from Mohammed Abdel Salam El Mahgoub, Governor of Alexandria, to Denis Gasquet, Director-General of Veolia Propreté, 5 September 2000, C-019, p.1.
[296] Letter from Onyx to the Governorate, 12 October 2004, R-163, p.1.

216. In a letter addressed to the Governorate on 20 March 2006, Onyx stated that it had "nominated in the representative of the company in the association committee for arbitration and the activation of the contract articles No. 24, 31, 35 of the contract".[297] On 17 October, Onyx sent another letter to the Governorate reminding it to give continuation to the process for restoring the economic equilibrium of the Contract, and indicating that it was preparing to resort to arbitration before CRCICA. On 31 October, a meeting was held at the Ministry of Finance, with representatives of Onyx, the Governorate, and the Ministry where it was agreed that the Ministry of Finance would release funds to pay for the invoiced amounts owed to Onyx by the Governorate, and that, absent any agreement on how to restore the economic equilibrium of the Contract, Onyx would resort to CRCICA arbitration. On 7 March 2007, Onyx instituted proceedings before the CRCICA seeking to restore the economic equilibrium of the Contract. It submitted a claim for compensation of EGP 32.54m.

217. While the CRCICA arbitration was pending, Onyx sent two letters to the Governorate – on 24 September 2007 and on 15 November 2007 – with a view to holding negotiations to restore the economic equilibrium of the Contract for the second triennium of the Contract, indicating that it was preparing to resort to CRCICA arbitration for that period as well. On 11 November 2007, and on 3 January 2008, Onyx also wrote to the Ministry of Finance to complain, *inter alia*, about the Governorate's refusal to re-establish the Contract's economic equilibrium.

b. The Submission of the Dispute to CRCICA

218. On 7 March, 2007, Onyx submitted a request for arbitration to CRCICA against the Governorate of Alexandria, seeking that the following be adjudicated in its favour:

> a) The amount of EGP 29,894,000 as compensation for the rise of the exchange rate of the US$ and other currencies and its impact on the execution of the contract for the duration of the first three year period of the Contract;

[297] Letter from Onyx Alexandria to the Governorate of Alexandria, 20 March 2006, C-175, p.1.

b) The amount of EGP 308,700 as compensation for the increase in salaries resulting from the Egyptian Labour law (Law no. 12 of 2003) raising the minimum annual salary increase to 7 per cent;

c) The amount of EGP 2,345,000 in compensation for the claimant's borrowing from banks to provide financial liquidity.

219. In response, the Governorate submitted a defence seeking the invalidation of Article 24 of the Contract related to the economic equilibrium of the Contract. Moreover, it presented a counterclaim requesting, *inter alia*, the tribunal to order Onyx to pay the Governorate compensation in the amount of EGP 20 million for failure to perform the cleanliness works in the manner provided for in the Terms and Specifications Note as well as in the offer and conditions of the Contract, and to order Onyx to pay the Governorate EGP 10 million as compensation for the damage resulting from failure to employ 50 per cent of the Governorate's employees working in the field of cleanliness.

220. In an award issued on 3 March, 2008, the CRCICA tribunal decided to order the Governorate to pay Onyx Alexandria the amount of EGP 8 million as compensation for some of the losses sustained due to the rise of the US dollar exchange rate and the interest on the amounts of money borrowed from banks.[298] In doing so, the tribunal noted that Article 24 of the Contract on economic equilibrium "constitutes an integral part of the contract, which should be abided by and adhered to, given that it does not include any elements that contradict the public order",[299] and that Article 24 of the Contract was based on Article 147 of the Egyptian Civil Code, applicable to both civil and administrative contracts. Based on the above, the tribunal rejected the Governorate's defence that Article 24 of the Contract was invalid. The tribunal further noted that Article 24 was:

> *not meant to compensate the injured party for the injury resulting from each change that occurs in the exchange rate of the US$, but… it is only for the change that leads to the impairment of the financial and economic balance of the contract and, consequently, making it*

[298] Award of Arbitral Tribunal Formed in the Matter of Arbitration No. 536 of 2007 between Onyx Integrated Services for Waste Management & The Governorate of Alexandria, Cairo Regional Centre for International Commercial Arbitration, 3 March 2008, ("CRCICA Award") C-045.
[299] CRCICA Award, C-045, p. 24.

onerous for either party to honor its obligations under the contract.[300]

221. With regard to Onyx's claims related to the wage increases pursuant to Labor Law No. 12 of 2003, the tribunal stated that the Contract "did not contain any provision entitling the Claimant to receive any potential increments in the wages of workers in application of any new legislation", as it was "duly established, according to Article 658 of the Civil Code, that a contractor has no claim to an increase of price on the grounds of an increase in labor prices or any other costs, even if such increase is so great as to render the performance of the contract onerous".[301] The tribunal further stated that compensation was inappropriate for two reasons. First, the wage increases imposed by the Labor Law were limited and "under no circumstances would result in the collapse of the financial equilibrium of this Contract". Second, the wage increases prescribed by the law were not unforeseen, but rather should have been expected because the conclusion of the Contract was contemporaneous to the public discussion of a draft of the Law, including in newspapers.

222. The CRCICA tribunal accepted one of the counterclaims of the Governorate and ordered Onyx to pay the Governorate EGP 3 million as compensation "for the injuries sustained thereby due to failure of borrowing 50% at least of the janitors working for the Respondent".[302] On 17 July 2008, the Governorate submitted a request for the annulment of the CRCICA award before the Egyptian Supreme Administrative Court relying on grounds provided by the applicable domestic legislation. On 18 February 2010, the Governorate paid to Onyx the 5 million EGP awarded by the CRCICA tribunal. On 22 January 2013, the Supreme Administrative Court declined jurisdiction over the Governorate's request for the annulment of the CRCICA award and referred it to the Cairo Court of Appeal, which rejected the Governorate's annulment request against the CRCICA award on the merits on 25 November 2014.

[300] CRCICA Award, C-045, p.24.
[301] CRCICA Award, C-045, p. 27.
[302] CRCICA Award, C-045., p. 31

c. The Recourse to GAFI

223. On 31 August 2008, Onyx submitted a claim to GAFI relating to the economic equilibrium of the Contract and other matters. It asked GAFI to schedule a meeting with a view to issuing a decision obliging the Governorate to restore the economic equilibrium of the Contract by paying to the company an amount of EGP 93,554,000 as compensation for the losses it suffered in addition to legal interest as of the date of the decision through to the date of the full payment of such compensation. It also requested that such decision should order the Governorate to increase the price of the Contract by 25% as of October 2007 and to recommend that Law No. 191 of 2008 be extended to the Contract so that the price for Onyx's services be amended every three months according to the fluctuation of the exchange rate.

224. Several meetings were held by the Technical and Administrative Committee (TAC) of GAFI in November 2008. GAFI then referred the matter to the Ministerial Committee for the Settlement of Investment Disputes as provided for by Articles 65 and 66 of Egyptian Law no. 8, which met on 12 January 2009 to discuss Onyx's request and decided to establish a sub-committee to report on that request. Following a request by Onyx to the Deputy President of GAFI for an expedited process, the sub-committee formed by virtue of the decision of GAFI's Ministerial Group for Settlement of Investment Disputes met on 8 April 2009 with representatives from Onyx and the Governorate. The sub-committee subsequently prepared a report of the meeting concluding that the dispute concerned "technical and financial matters that [required] specialized experts to draft their report to allow the settlement of the claims", involved "insolvable matters", that arbitration under the Contract was "an appropriate alternative means of settlement of disputes" and that given that the parties "had already resorted to arbitration… the disputes shall be settled in the same manner if the parties agree to an arbitration submission clause and to execute the contract".[303]

225. On 17 December 2009, Onyx wrote to the Minister of Investment complaining about the delay of the procedure before GAFI and indicating that it was still to receive any

[303] Report of the Council of Ministers Consultants Commission, 8 April 2009, R-155, p.14.

information about its outcome 15 months after its claim submitted to GAFI and 8 months after its meeting with the Ministerial Committee for the Settlement of Investment Disputes. In a decision adopted on 28 December 2009, the Ministerial Committee endorsed the recommendation of the sub-committee dated 8 April 2009, and rejected Onyx's request. On 1 February 2010, the Cabinet General Secretary of the Prime Minister's Office informed the Representatives of Onyx that "the Ministerial Committee for Investment Disputes Settlement [had] reviewed on 28/12/2009 the report of the Sub-Committee composed to study the dispute between Onyx Alexandria for Integrated Services and Alexandria Governorate in relation to the performance of the General Cleanliness Contract entered into between both parties, and decided to reject the claim", adding that the decision had been "approved by the Cabinet in its session held on 27/01/2010".[304]

226. On 17 March 2010, Onyx asked the Minister of Investment to reconsider the decision of the Ministerial Committee, endorsed by the Cabinet of Ministers, which rejected its request, since this matter was important for the company's investment. On 19 April 2010, the Ministerial Committee for the Settlement of Investment Disputes rejected Onyx's request to reconsider its decision.

d. Further Attempts to Resolve the Dispute Through the Application of the Provisions of Article 35 of the Contract

227. Following the rejection of its request for the reconsideration of the decision of the Ministerial Committee, Onyx addressed a letter to the Governorate on 11 July 2010, requesting the appointment of a Tripartite Commission of Experts, as provided under Article 35(b) of the Contract, to settle the dispute concerning the restoration of the Contract's economic equilibrium for the second triennial period. In its letter, Onyx stated, *inter alia*, that the company was:

> *financially suffering from the absence of the economical balance of the correlative obligations under the contract signed on 2000 which [was] implemented till [then] despite the acute changes influencing*

[304] Reply sent by GAFI to Onyx Alexandra, 1 February 2010, C-061, p.1.

> *the exchange rate or the inflation rates that were considered when executing the contract as well as in the legislative changes.*[305]

In addition, it pointed out that it was "obvious that this [could] oppress the company financially and technically" and "inhibit the company from performing its obligations and to stop the service", a situation that was only avoided by the Company's "borrowing funds to perform the provision of a high level of service to which the contract and governorate aim".[306] The letter concluded with a request to the Governorate to appoint its representative to the Tripartite Commission pursuant to Article 35(b) of the Contract.

228. On 28 September 2010, Onyx sent another letter to the Governorate, this time with a view to renegotiating the Contract with respect to the third triennium in light of the relevant macro-economic changes. In its letter, Onyx refers to the need to restore the economic equilibrium of the Contract, which is to be determined:

> *according to Article 24 and 31 of the mentioned contract and the letter of Mr. Denis GASQUET, General Manager of CGEA Onyx-France dated September 4th, 2000 approved by the letter of Alexandria Governor dated September 5th, 2000 which [represented] the group of economic, legal, financial and other circumstances under which the contract was signed.*[307]

229. Onyx referred in the same letter to the CRCICA award relating to the first triennium of the Contract, which had been settled by that date, and stated that "the arbitration for the second three years period of the contract is under process to be presented in front of the same center". After a detailed presentation of its claims arising, *inter alia*, from the devaluation of the Egyptian Pound, the inflation rate impact, the effect of new labour laws, the rise in financing costs and loss of profit, Onyx concluded its letter with a request for a meeting "in order to reach the better way to restore the economic equilibrium of the contract".[308]

[305] Letters from Onyx Alexandria to the Governorate of Alexandria, 11 July 2010, C-087, p.3.
[306] Letters from Onyx Alexandria to the Governorate of Alexandria, 11 July 2010, C-087, p.3.
[307] Letters from Onyx Alexandria to the Governorate of Alexandria, 28 September 2010, C-088, p.2.
[308] Letters from Onyx Alexandria to the Governorate of Alexandria, 28 September 2010, C-088, p.10.

e. Application of the Fair and Equitable Treatment Standard

230. According to the Claimant, the FET Standard has been breached in two ways by the Respondent, both of which resulted in consequential losses for its investment in Egypt. First, by abandoning its original exchange rate policy and labour laws without compensating the Claimant for the negative impact that those measures caused on the investment, the Respondent violated the Claimant's legitimate expectations and failed to act in a coherent manner. Secondly, through its refusal to renegotiate the economic equilibrium of the contract, the Governorate acted in breach of the Claimant's legitimate expectations and of its obligation of good faith. For the Claimant, the two violations are interrelated since the fact that the economic equilibrium of the Contract was jeopardised by governmental measures attributable to the Respondent made the Governorate's refusal to renegotiate the terms of the Contract an even more glaring breach of the FET standard.

231. In his closing arguments at the oral proceedings, Counsel for the Claimant elaborated on the above claims as follows:

> *Nous considérons que ces agissements en ce qui concerne le rééquilibrage économique du marché sont constitutifs d'une violation du traitement juste et équitable et ont participé, avec d'autres éléments, à l'expropriation rampante des investissements de Veolia Propreté.*
>
> *En définitive, l'Égypte dans son ensemble et le gouvernorat en particulier ont agi à l'encontre des attentes légitimes de Veolia Propreté et de sa filiale en refusant systématiquement de rétablir les conditions ayant présidé à l'établissement de son investissement, en utilisant tous les moyens pour y parvenir alors même que le changement de cadre juridique et économique découlait de décisions souveraines prises par l'État égyptien en matière de taux de change et de réglementation du travail.*
>
> *De la même manière, l'Égypte ne s'est pas comportée de manière cohérente. En laissant penser qu'elle pourrait régler les problèmes auxquels étaient confrontés l'investisseur et sa filiale, en laissant croire au niveau des autorités centrales que l'on pouvait trouver des solutions, notamment par l'intermédiaire du GAFI, alors que les budgets publics ne prévoyaient rien et que la subdivision de l'État — le gouvernorat d'Alexandrie — y était farouchement opposée, elle voulait uniquement gagner du temps.*

Le gouvernorat d'Alexandrie est loin d'avoir agi de façon transparente. Il suffit de se rappeler l'attitude du gouvernorat dans le cadre des manœuvres employées entre 2004 et 2006, je l'ai évoqué tout à l'heure, pour retarder l'arbitrage CRCICA ou les arguments avancés devant le Tribunal arbitral de même que les recours successifs.

Il en est de même de l'orientation suggérée à Onyx Alexandria de saisir le GAFI qui s'est avérée être une voie de garage. Que dire encore — je l'ai largement développé — d'une décision prise par le GAFI le 8 avril 2009 et qui ne sera notifiée que le 1er février 2010.

On va même pousser le cynisme, alors que la décision est déjà prise le 8 avril 2009, jusqu'à demander un Mémorandum à Onyx Alexandria, laissant penser que l'instruction de la demande est toujours en cours.

Enfin, au lieu de se comporter comme un partenaire de bonne foi au vu de ce qu'était l'évolution de la situation économique, le gouvernorat a systématiquement et farouchement refusé toute négociation portant sur l'équilibre économique du marché en utilisant tous les moyens possibles et toutes les arcanes administratives et juridictionnelles possibles alors qu'il était évident que les conditions s'y prêtaient et aussi parce que le gouvernement savait forcément que la détérioration de la situation économique remettait en cause la viabilité des investissements de Veolia Propreté, remise en cause qui avait été largement indiquée à l'ensemble des autorités de la République Arabe d'Égypte.

Tous ces agissements développés avant montrent à quel point le gouvernorat et les autorités centrales égyptiennes ont été de mauvaise foi à l'égard d'Onyx Alexandria.

Faisant tout cela, l'Égypte s'est enfin comportée de façon arbitraire et manifestement injuste envers l'investisseur. Non seulement elle a refusé de rétablir l'équilibre économique du marché mais elle a même refusé d'engager des négociations à ce sujet.[309]

232. The Tribunal will deal with the above issues raised by the Claimant under the following three headings: (e.1) the FET Standard, Regulatory Changes and Alleged Assurances and Commitments by the Respondent (e.2) the FET Standard, Contractual Undertakings and

[309] Tr. Closings Day 1 (French Version) Alquezar 16:40-17:30.

Alleged Refusal to Negotiate the Rebalancing of the Contract, and (e.3) the Governorate's Actions Following the CRCICA Arbitration and the Recourse to GAFI.

e.1 The FET Standard, Regulatory Changes and Alleged Assurances and Commitments by the Respondent

233. The Claimant does not appear to insist any longer that the regulatory and policy changes made by Egypt with regard to the exchange rate of the Egyptian Pound vis-à-vis the US Dollar and other major currencies as well as the amendments to the labour laws frustrated its legitimate expectations and consequently violated the FET standard of the BIT. However, it continues to argue that the Respondent had an obligation to compensate it against the negative impact of those measures and that by refusing to re-establish or restore "les conditions ayant présidé à l'établissement de son investissement",[310] Egypt breached the Claimant's legitimate expectations and failed to act in a coherent manner. According to the Claimant, these legitimate expectations and the duty to act in a coherent manner were based on the FET standard itself, on the Respondent's legislation, on negotiations conducted between the parties to the Contract during the tender process, and on assurances and commitments received from Egyptian authorities in connection with the Contract. The Tribunal will examine these elements hereunder.

234. First, the Tribunal notes that the 1974 BIT does not mention the stability of the legal and policy framework as one of the commitments mutually undertaken by France and Egypt. Secondly, it is the view of this Tribunal that the FET standard cannot be considered to "ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilization clauses specifically granted to foreign investors with whom the State has signed investment agreements".[311] This approach has been underlined by a number of arbitral tribunals. Thus, in *EDF v. Argentina*, the tribunal held that "the idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad manner and unqualified formulation", as "FET might then mean the virtual freezing of the legal

[310] Tr. Closings Day 1 (French Version) Alquezar 16:46-47.
[311] *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, CLA-013, ¶368.

regulation of economic activities in contrast with the State's normal regulatory power and the evolutionary character of economic life".[312] Similarly, in *Micula v. Romania*, the tribunal explained that "the fair and equitable treatment standard does not give a right to regulatory stability per se", for "[t]he State has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability".[313]

235. Thirdly, the Tribunal observes that there is nothing to indicate that the measures adopted by Egypt unexpectedly removed the essential features of the regulatory framework in place; nor that they "went too far by completely dismantling the very legal framework constructed to attract investors".[314] Thus, the regulatory and policy measures enacted by Egypt cannot be compared to the situation described by some of the arbitral tribunals that had to deal with changes to the regulatory framework in Argentina, such as *CMS v. Argentina*, *LG&E v. Argentina*, *El Paso v. Argentina*, or *BGV Group v. Argentina*. These measures did not amount to "a total alteration of the entire legal setup for foreign investments", as stated in the *El Paso* award;[315] nor did they "entirely alter the legal and business environment", as underlined by the tribunal in *BGV Group v. Argentina*.[316]

236. In light of the above, it is the view of the Tribunal that the Respondent had no obligation under the FET standard to compensate the Claimant for the negative impact that the policy and regulatory measures enacted by Egypt with regard to the exchange rate of the Egyptian Pound and the amendments to the labour laws might have had on its investment unless there were specific guarantees or commitments undertaken by the Respondent. In other words, a duty to compensate for regulatory and policy changes cannot be founded on unilateral expectations of the investor; it has to be based on the conditions offered and the commitment made by the host State at the time the investment is made. The Tribunal will therefore turn now to the examination of whether such commitments existed under

[312] *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012, CLA-076, ¶156.
[313] *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, RLA-386, ¶666.
[314] *LG&E et al. v. Argentine Republic*, ICSID case No. ARB/02/1, Decision on Liability, 25 July 2007, CLA-033, ¶139.
[315] *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, CLA-013, ¶517.
[316] *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶307.

Egyptian legislation at the time the Contract was concluded or whether they were undertaken by the Egyptian authorities in connection with the Contract.

237. With regard to legislation, the Claimant relies on Article 22 Bis-1 of Law no. 89/1998 of Egypt to argue that it was entitled to compensation as a result of the changes in the exchange rate of the Egyptian Pound and the legislation increasing the minimum wage by 7 per cent. Law no. 89 of 1998 relates to tenders, and it is stated in its Article 22-Bis that:

> *In case of the contracts the execution of which extends for six months or more, the contracting entity shall, at the end of each three-months contracting, modify the contract amount based on the increase or decrease in the costs of the contract items which have taken place after the date specified for opening the technical envelopes, or after the date of concluding the contract that is based on direct assignation. The foregoing shall be subject to certain coefficients to be specified by the contractor in his tender, and on the basis of which the contract shall be concluded. The said modification shall be binding on both parties, and each agreement violates the aforesaid shall be null and void.*[317]

238. The Tribunal, however, notes that the provision invoked by the Claimant was added to Law no. 89 of 1998 in 2005 by way of article 1 of Law no. 5, which was subsequently replaced by Article 22 Bis-1 of the amending Law no. 191 of 2008. Since this provision did not exist at the time of the conclusion of the Contract, the Tribunal does not consider it applicable to the relations between Onyx and the Governorate; nor can it be used, in the opinion of the Tribunal, as grounds for the legitimate expectation of the Claimant in this case. The Tribunal does not, therefore, need to consider as a matter of law whether a commitment in general legislation could provide the basis of a legitimate expectation the breach of which is actionable under the FET standard.

239. In relation to direct representations and assurances allegedly made by the Respondent, the Claimant argues that the essential elements of the economic equilibrium of the Contract were discussed during the tender process and the negotiations conducted between the parties prior to the signing of the Contract, and subsequently reflected in an exchange of letters made immediately after the Contract was signed. Thus, the legitimate expectations

[317] Loi no. 89 de 1998 sur les appels d'offres, C-018, pp.11-12.

which the Claimant alleges to have been breached, and the lack of coherence attributed to the authorities, arise, according to the Claimant, from the representations and assurances received through the negotiations and through the exchange of letters with the Governorate.

240. The Tribunal recalls that Article 2.82 of the Specifications and Provisions for the Tender of the Alexandria Governorate General's Cleanliness Project, issued in January 2002, stipulated that:

> *Prices mentioned in the bid are comprehensive to all expenditures born by the contractor including: Insurance, freight, customs, clearance, transference and services to employees. It also includes establishing preparation centers, garages, offices, housing, operation costs and spare parts and, materials insurance. The prices mentioned in the bid are final and valid for three years from the date of signing the contract. No amendments are allowed after bidding them. The bidder should state the increments of prices with reference to inflation, price raises, and the level of overpopulation every three years during the contract's term. Therefore, the bidder should specify this percentage and the way of calculating it.*[318]

241. The Tribunal also recalls, in this context, that when one of companies participating in the bidding sought clarification with respect to "unforeseen and unexpected" changes not mentioned in the Tender, in particular "currency fluctuations against the US dollar", "[c]hange in the laws relating to the income per capita and/or social security contributions", and "global fluctuations and effects in gas and energy price", the Governorate replied that the prices to be submitted were final and binding and that it was the bidder's responsibility to determine the triennial increase in the submitted prices based on inflation, increases in prices, and increases in the number of inhabitants, as well as the method of calculation.[319] The Governorate further indicated that with respect to other elements such as exchange rate currency or the effects of changes of laws, the contractor could take out an insurance policy to cover against such risks.

[318] Specifications and Provisions the Tender of Alexandria Governorate General Cleanliness Project, 6 January 2000, C-011, p.24.
[319] Response of the Governorate of Alexandria to questions concerning the economic equilibrium of the contract dated 29 January 2000, R-145, pp.1-2.

242. The Tribunal, therefore, finds unconvincing the Claimant's assertion that "ni l'appel d'offres, ni les réponses du comité n'excluaient une compensation en cas d'augmentation de certains coûts, tels que l'inflation, la hausse des prix et la croissance de la population, mentionnés spécifiquement dans le cahier des charges".[320] The evidence on the record instead indicates, as will be shown below, that it was because the tender specifications provided for binding, stable and final prices, which could not be amended after the award of the contract, and which did not provide for an adjustment mechanism except for the triennial increments indicated in the bid, that Veolia (CGEA-Onyx) engaged in negotiations with the Governorate to find a solution to these issues before signing the Contract.

243. The Tribunal also notes that the reasons mentioned by the Committee which approved the award of the contract to Veolia included a clear reference to the representations received from Veolia in its letter of 13 June 2000 in which the company offered a stable and final lump sum tariff for the services to be provided in each triennium, which corresponded to the conditions of the tender, including acceptance of a flat fixed inflation rate of 4% and a fixed rate for the anticipated growth of tonnage. This is reflected in the minutes of the meeting held by the Committee on 20 June 2000:

> *The committee also found that the bid submitted by Onyx was accompanied by reservations that might affect the accurate determination of the value of the bid as previously mentioned, but after that the committee examined the fax dated 13/06/2000 sent by this company which includes that:*
>
> *1. The company undertakes to abide by the prices included in the price evolution table presented in its bid.*
>
> *2. The company complies with the fixed inflation rate of (4%) per annum throughout the duration of the contract.*
>
> *3. These prices have been set based on a fixed rate of increase in the quantities and on a fixed rate of population growth in Alexandria Governorate of 1.68% per annum as stated in the bid requirement. The company complies with this fixed rate throughout the contract period.*

[320] Cl. Rep. Merits, ¶ 73.

> *The Committee considers that the content of this fax even if received after the date specified in abovementioned Article (63), includes a modification in favor of the administrative authority and does not affect at the same time the bid priority as it is sent by the owner of the lowest bid and as it includes a waiver of the reservations that accompanied its bid, therefore the committee accepts the modifications included in the fax in favor of the administrative authority.*[321]

244. The fact that Veolia's letter of 13 June 2000 offered a stable and fixed lump sum price, including flat population growth rates and a fixed inflation rate, in conformity with the tender terms and conditions, was also mentioned by the Secretary-General of the Governorate in his letter to Veolia of 21 June 2000 as one of the reasons which led to the acceptance of the bid by Veolia. In his letter the Secretary-General stated the following:

> *We are pleased to notify your Excellency that the Governor of Alexandria has adopted the recommendations of the Decision Committee which included approval of accepting the tender submitted by Onyx company for the general cleanliness project for Alexandria Governorate" and that this was done "after briefing the Committee on the letter submitted by the company on 13/6/2000, which included the following: 1) The company is committed to the set prices in the table of prices development contained on Page 10/2; 2) The company adheres to the fixed inflation rate whose rate is 4 % annually. The company is committed to this fixed rate throughout the contract period on whose basis the prices indicated in the above table are constructed; 3) These prices have been built on the basis of a fixed rate to increase the quantities for growth of the population of Alexandria Governorate of that amounts to (1.86%) annually as contained in the book of terms. The company adheres to this fixed rate throughout the contract period.* [322]

245. The adherence of Veolia's offer to the conditions of the Tender in terms of the stability of prices appears therefore to have been a determining factor in the award of the contract to Veolia. The issues related to compensation for the evolution of the tonnage, increase in the rate of inflation, and changes in the exchange rate of the Egyptian Pound, were, however, raised again by Veolia during the negotiations held with the Governorate in July-August 2000 to finalize the contract. This is shown in a letter to the Governor of Alexandria by

[321] Minutes of the meeting of the Committee responsible of the limited Tender No. 16 of 1999, with respect to the General Waste Management Project of the Governorate of Alexandria, 20 June 2000, R-146, p.4.
[322] Letter from Onyx Alexandria to the Governorate of Alexandria, 26 July 2000, C-130, p.2.

Mr. Jean-Dominique Mallet, Senior Vice-President for International Affairs of Veolia dated 26 July 2000, which reads, *inter alia*, as follows:

> *As per your invitation, ONYX along with their advisors Yahyia El Gamal Law Office, has had several opportunities to meet and review the terms of the Contract with the Governorate of Alexandria, represented by M. Ahmed Khalaf, Counselor Mustafa El Naggar and other advisors since July 6th, 2000.*
>
> *Despite the time invested by all the Parties, we must notice that we have been unable yet to reach a mutually satisfactory agreement, primarily because of our differences on the following issues in respect of which we would like to confirm our position:*
>
> *1. Tonnage*
>
> *Regard given to the 15 years duration of the Contract, a professional company such as Onyx must take into account an evolution of tonnage which will necessary be influenced by two key factors:*
>
> *- the increase in population - the increase in the purchasing power of the population resulting, as experience shows evidence worldwide, in an increase in the production of garbage per inhabitant, And in this specific project, all the more needed that no measurable data on the existing tonnage is available.*
>
> *2. Inflation*
>
> *Although we have agreed to exclusively index the Contract on official inflation rate (by opposition to standard practices which refer to other indexes such as, in particular, salaries and fuel, - truly reflecting the cost component of the service), our function cannot be to predict what the inflation cost will be over a duration of 15 years.*
>
> *As clearly stated, our position is that both Parties should be entitled to compensation should the assumed inflation rate of 4% p.a. prove to be inadequate*
>
> *3. Foreign exchange*
>
> *The combination of the need for state of the art equipment and lack of relevant manufacturing capacities in the Republic of Egypt, and access to favourable foreign currency financing make.it a necessity to import a minimum amount payable in US dollars.*

> *As specified in our Proposal, the value of those investments was based on the prevailing rate at the time of our offer of LE 3.43 I 1 US.*
>
> *In view of the lack of a market for long-term coverage of LE vs USD, and as is customary in a contract of this nature, the Contract must cover for the eventual depreciation / appreciation of the currency compared to the base rate at time of submission of the Proposal.*[323]

246. The refusal of the Governorate to agree, during those negotiations, to a price adjustment mechanism with respect to variations in the inflation rate and the tonnage of waste was subsequently described both by the law firm advising Veolia, and by Mr. Mallet himself, as being due to the requirement that the Contract should be in strict compliance with the terms and conditions of the Tender. In its letter to Mr. Mallet of 20 August, summarizing the outcome of the negotiations with the Governorate, the El Gamal law firm stated that they had "tried to modify [the Contract] on several attempts to include details requested by [Veolia] pertaining mainly to pre-finance, inflation rate, Foreign exchange rate & Variation of quantity of waste produced Per habitant" but that their "attempts, except on the issue related to the Foreign Exchange, were faced by the rigidity of the contract having to be in exact compliance of the terms and conditions of the tender documents"[324] Similarly, for Mr. Mallet, in an internal email to Dennis Gasquet, the Chief Executive Officer of the Company, dated 21 August 2000, noted that the negotiations on inflation and exchange rate had come to a stalemate, "le tout lié à un cahier des charges mal conçu mais dont le Gouvernorat se sent (à juste titre) légalement prisionnier".[325]

247. As noted in the letter of the El Gamal law firm, a solution acceptable to both parties was, however, found with regard to the inclusion in the Contract of clauses on economic equilibrium and on exempting circumstances. The parties also agreed on an exchange of letters following the signature of the contract. According to the El Gamal Law firm:

> *[W]ith this formula of the Contract and the Explanatory Letter, you are sure to be covered by the Egyptian Civil Law Article 147 in case of any significant variation of the elements of the Economic Equilibrium and, or through the Exceptional Exempting*

[323] Letter from Onyx Alexandria to the Governorate of Alexandria, 26 July 2000, C-130, p.2.
[324] Legal Opinion given by El Gamal Law Firm, 20 August 2000, C-133, p.2.
[325] Email from Jean-Dominique Mallet to Denis Gasquet, 21 August 2000, C-131, p.1.

> *Circumstances which is a legal principle well practiced in the French Law as well. It is worthily important to underline the fact that these clauses support you in case of an evolution that will unable you to perform your obligations as per the agreed upon remuneration. It is not a mechanism for an automatic adjustment of price. It does cover you to have the right to claim readjustment as stipulated in clause No. 34 of the contract. And permits the concertation with the Governorate regularly to readjust the Equilibrium of the contract as per clause No. 25 of the Contract.*[326]

248. It is evident from the above documents and exchanges that no assurances or representations were given by the Governorate during the July-August 2000 negotiations with regard to compensation for variations in the rate of inflation or in the tonnage of waste due to increase of population save for accepting the inclusion in the Contract of the clauses mentioned above by the El Gamal law firm; namely a clause on the economic equilibrium of the contract and one on exempting contingent circumstances. It is significant that the El Gamal law firm emphasized in its letter that these clauses did not constitute "a mechanism for any automatic adjustment of price", but would allow Veolia to "claim readjustment" and to consult with the Governorate ("concertation with the Governorate") regularly to readjust the equilibrium of the Contract.[327] In other words, a procedural right would be available to Veolia, but not an automatic compensation or readjustment of prices in case of variations in the factors which affect the cost of the services provided. This procedural right to make a claim was provided by the Contract itself through the clauses included there, and was also made available to Veolia in the form of regular consultations with the Governorate.

249. In light of the above, it is the view of the Tribunal that the negotiations between the parties in July-August 2000 did not result in commitments, assurances or representations which could give rise to legitimate expectations in relation to compensation or automatic adjustment for variations in the factors affecting the cost of services to be delivered by Veolia. Adjustments instead were to be made by reference to the clauses included in the Contract itself which, as described by the El Gamal Law firm, did not constitute "a mechanism for any automatic adjustment of price",[328] but a procedural right to claim

[326] Legal Opinion given by El Gamal Law Firm, 20 August 2000, C-133, pp.2-3.
[327] Legal Opinion given by El Gamal Law Firm, 20 August 2000, C-133, pp.2-3.
[328] Legal Opinion given by El Gamal Law Firm, 20 August 2000, C-133, pp.2-3.

readjustment and to consult with the Governorate. The legal commitment given by the Egyptian authorities were the clauses included in the Contract, in particular the clause on economic equilibrium, which the Tribunal will deal with below (paragraphs 257-267).

250. As for the other outcome of the negotiations, namely the exchange of letters between the parties following the signing of the contract, the Tribunal notes that this exchange was referred to in the above-mentioned El Gamal law firm letter of 20 August in the following terms: "we agreed with the Governorate's representatives that they will accept a letter from you 'following the Signature of the contract' where you would explain all the details that you would like to set the record with related to your model of Price calculation and to the elements you would highlight related to the Economical Equilibrium".[329] This was not therefore an exchange of letters in the sense of a formal agreement between parties, but a promise by the Governorate that they were willing to receive a letter from Veolia where the latter would detail the elements that constitute their model of price calculation. It was indeed characterized in the letter of the El Gamal law firm as an "Explanatory letter" to be sent by Veolia. An internal note of Veolia Management dated 25 August 2000 described the letter in a similar manner: "après signature du Contrat, nous adresserons un courrier au Gouvernorat indiquant spécifiquement les paramètres économiques retenus (qui par ailleurs figurent dans notre offre) pour le change, l'inflation et les tonnages, et le Gouvernorat nous répondra avoir pris bonne note de ces paramètres (courrier préparé avec nos conseils locaux)".[330]

251. In its letter of 4 September 2000 to the Governorate, Veolia detailed the "essential elements that are the basis of our calculation and assumptions pertaining to the Economic Equilibrium of such Contract", and stated that:

> *As partners in this new venture, we look forward to conduct regular meetings, beyond your routine control of the quality of our performance, to monitor the evolution of those parameters pertaining to the Economic Equilibrium of the Contract, in a total transparency, in particular with a proper registry and recording at the treatment centers weight bridges of the actual quantity of waste collected and treated. This will allow us to jointly reach*

[329] Legal Opinion given by El Gamal Law Firm, 20 August 2000, C-133, p.2.
[330] Note prepared by Jean-Dominique Mallet for François Bruyant and Denis Gasquet, 25 August 2000, C-132, p.4.

> *recommendations to readjust at the end of each three years period, and without affecting our contractual commitment for a prime quality service, operational and financial terms of our long-term partnership which we are sure you are keen to maintain as mutually beneficial.*[331]

252. The letter concluded as follows: "We trust you will agree this detailed explanation of our costing is essential for both partners to mutually appreciate key decisions they will have to take jointly throughout the life of this Contract".

253. The reply of the Governor of Alexandria reads as follows:

> *I would like to thank you for your above mentioned letter and its important explanations which is essential for us, as partners, to understand as the basis for the starting points of our project.*
>
> *I also agree that the success of this project relies on preserving the common interest of both parties. Based on that, I underline on the importance of regular meetings to be conducted to monitor the evolution of performance and its conformity with all assumed parameters.*
>
> *It is normal but required that an important meeting has to take place between the Governorate and ONYX at the end of every three years contractual period, to make sure of the matching of actual conditions with the required economic equilibrium to ensure the service at the required level for the next phase.*
>
> *Protecting both parties interest is the basis for cooperation for the benefit of the ultimate beneficiary: the people of Alexandria.*[332]

254. In the view of the Tribunal, the explanatory letter from Veolia and the reply to it by the Governorate do not contain any specific legal commitments between the parties, nor do they reflect any objective representation or assurance by the Governorate toward Veolia regarding what the latter referred to as essential elements that are the basis of its calculation and assumptions relating to the economic equilibrium of the Contract. The importance of meetings between the parties is acknowledged by both of them, although the Governor's letter refers in particular to the need for one important meeting to take place at the end of

[331] Letter from Denis Gasquet, Director-General of Veolia Propreté, to Mohammed Abdel Salam El Mahgoub, Governor of Alexandria, 4 September 2000, C-016, p.2.
[332] Letter from Mohammed Abdel Salam El Mahgoub, Governor of Alexandria, to Denis Gasquet, Director-General of Veolia Propreté, 5 September 2000, C-019, p.1.

every triennial contractual period. However, the reference to a readjustment of operational and financial terms at the end of each triennial period of "our long-term partnership" in Veolia's letter is not echoed by the Governor's letter, which seems to emphasize the preservation of the common interests of the parties, in general, as the basis of future cooperation for the benefit of the people of Alexandria. Consequently, it is the view of the Tribunal that there was no objective assurance or representation by the Governorate arising from the exchange of letters that could form the basis of a legitimate expectation on the part of the Veolia that might be protected by the BIT.

255. Neither the evidence on the record relating to the negotiations between the parties in July-August 2000 during the Tender process nor the exchange of letters following the signing of the Contract demonstrates that a commitment was given by the Egyptian authorities, in general, or by the Governorate, in particular, to the payment of compensation or to the automatic adjustment of the fixed prices provided in the contract for variations in the factors affecting the cost of services to be delivered by Veolia. Veolia's management itself acknowledged in its Internal Note dated 25 August 2000 that its attempts to obtain an automatic readjustment of the contract price were considered by the Governorate to be in direct contravention with the terms and conditions of the Tender. It was thus stated in the Note that:

> *Nous nous sommes heurtés au cours des trois derniers mois à des interlocuteurs peu habitués à des négociations avec des entreprises internationales, et enfermés dans le carcan d'un cahier des charges très limitatif en particulier sur les possibilités de révision des prix dues à une évolution non anticipée du tonnage et de l'inflation… Nos interlocuteurs ont parfaitement compris notre position telle qu'exprimée dans notre offre, (couverture des évolutions non anticipées de l'inflation, du tonnage et du change), tout en ne souhaitant pas revenir sur le principe du cahier des charges par peur de recours éventuels de concurrents, et par obligation administrative de respecter à la lettre le cahier des charges.*[333]

256. The only exception was the acceptance by the Governorate to include a clause on the economic equilibrium in Article 24 of the Contract, to which the Tribunal will now turn.

[333] Note prepared by Jean-Dominique Mallet for François Bruyant and Denis Gasquet, 25 August 2000, C-132, p.4.

The Claimant relies upon Article 24 as another basis for the legitimate expectations invoked by it, and which Veolia also contends have been frustrated by the Respondent, particularly through the latter's failure to re-establish the economic equilibrium of the Contract after the adoption by the Government of Egypt of certain legislative and policy changes which purportedly affected the economic equilibrium of the Contract, and the Governorate's alleged refusal to negotiate the rebalancing of the Contract.

e.2 The FET standard, Contractual Undertakings and Alleged Refusal to Negotiate the Rebalancing of the Contract

257. Before undertaking its analysis of the alleged contractual breaches upon which the Claimant relies to assert a violation of the FET standard, the Tribunal makes the following observations. First, the Tribunal, as observed earlier, will take into account the terms of the Contract for the sole purpose of determining whether there has been a breach of the BIT in terms of the frustration of the legitimate expectations of the Claimant. Thus, its analysis is not directed to the question of whether a party has incurred liability under domestic law.

258. Secondly, with regard to the specific undertaking in Article 24 relating to the economic equilibrium of the Contract, the Tribunal observes that, as indicated above (paragraphs 173-174), although the obligation to respect legitimate expectations is a basic element of the FET principle, State conduct, in the sense of the exercise of its sovereign powers, is required for an alleged breach of contract to be considered as a breach of the fair and equitable treatment. As was stated by the tribunal in *Impregilo SPA v. Argentina*, "[i]n order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behavior going beyond that which an ordinary contracting party could adopt", and "[o]nly the State in the exercise of its sovereign powers ('puissance publique') and not as a contracting party, may breach the obligations assumed under the BIT".[334] A similar line of reasoning was adopted by the tribunals in *Consortium RFCC v. Morocco*, *Duke Energy SA v. Ecuador* and *Bayinder v. Pakistan*.[335]

[334] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, CLA-034, ¶260.
[335] *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Award, 22 December 2003, RLA-488, ¶51; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award,

259. Consequently, it is not sufficient to claim the violation of contractual obligations, such as Article 24 on the economic equilibrium of the Contract, as being tantamount to a breach of the FET standard. It must be demonstrated, as stated in paragraph 174 above, that the acts frustrating the contractual arrangements were characterized by an exercise of governmental authority that goes beyond the range of measures that the parties to a contract are in a position to take in their private capacity; or by the existence of aggravating circumstances showing a significant arbitrary behaviour on the part of the State in the pursuit of governmental purposes or by interference by State organs resulting in total repudiation of the contract. The Tribunal will therefore have to examine whether the alleged failure of the Egyptian authorities to restore the economic equilibrium of the Contract provided for in Article 24 crossed the threshold defined above for a potential breach of treaty obligations.

260. In this connection, the Tribunal recalls that the El Gamal Law firm, which was advising Veolia during the negotiations on the Contract, observed in its legal opinion of 20 August 2000, that the Governorate, "showing goodwill", had accepted to include clauses in the Contract covering the economic equilibrium and exceptional exempting circumstances. The Egyptian legal advisers of Veolia added, however, that these provisions did not constitute "a mechanism for any automatic adjustment of price", but that they would enable Veolia to "be covered by the Egyptian Civil Law 147 in case of any significant variation of the elements of the Economic Equilibrium and or through the Exceptional Exempting Circumstances which is a legal principle well practiced in French Law as well".[336]

261. Economic equilibrium is defined in the Contract as "[t]he economic, legal, financial and other relevant conditions on the basis of which the Parties have agreed to carry out their rights and obligations under this Contract at the Signature Date". It is protected by Article 24 of the Contract which reads as follows:

> *24.1 The Contract Parties agreed that in case of deficiency of the economic balance of this Contract in accordance with the definition stated in sub-clause 1-1 of Part 1 – Definitions, which may lead to the negative exhaustion of any of the Contract Parties in carrying*

18 August 2008, CLA-032, ¶345; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, CLA-019, ¶257.

[336] Legal Opinion given by El Gamal Law Firm, 20 August 2000, C-133, p.2.

out its obligations stated herein, such party may refer the matter to arbitration as stated in clause (35) to determine the following:

- The value of change occurred to the US Dollar exchange rate, leading to the deficiency of the financial and economic balance of the contract.

- The value of the foreign component affected by the change of the exchange rate.

- The value of the damage incurred to the party requesting arbitration. In all events, the above stated shall not affect the priority of the tenders in accordance with the provisions of Law 89/1998 regarding tenders and bids, taking into consideration the change included in other bids.

24.2 The request for arbitration shall be submitted during the six months period preceding the end of each three-year period of the Contract Term. Such request for arbitration shall be upheld with related documents and evidences. The Contract Parties agreed to add or deduct the amount decided by the arbitral tribunal to or from the amount due for the following three year period, while noting not to affect the priority of bids.[337]

262. Thus, the restoration of the economic equilibrium of the Contract, in case of a deficiency which leads to the "negative exhaustion of any of the Contract Parties",[338] is contingent on the submission of the matter by the affected party to CRCICA arbitration under Article 35(c) of the Contract. It neither requires action by the other party, nor does it involve an obligation of direct compensation by such party. It provides a procedural right to submit a claim for compensation or readjustment of prices for the next triennium to the arbitral tribunal which determines the compensation due on the basis of the deficiency suffered. The Claimant followed that procedure at the end of the first triennial period of the Contract, following the changes introduced by the Egyptian Central Bank to the exchange rate, and submitted the matter to CRCICA. It did not, however, do so for the second and third triennial periods, although it indicated in a letter to the Governorate dated 15 November 2007 that it was preparing to resort to CRCICA arbitration for the second triennial arbitration.

[337] Contract, C-012, ¶¶24.1-24.2.
[338] Contract, C-012, ¶24.1.

263. Moreover, as explained by the CRCICA arbitral tribunal, Article 24 of the Contract is based on Article 147 of the Egyptian Civil Code which provides that when "as a result of exceptional and unpredictable events of a general character, the performance of the contractual obligation, without becoming impossible, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the judge may according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits, the obligation that has become excessive" and that "[a]ny agreement to the contrary is void".[339] As such, according to the CRCICA arbitration award, Article 24:

> *is not meant to compensate the injured party for the injury resulting from each change that occurs in the exchange rate of the US$ but, however, it is only for the change that leads to the impairment of the financial and economic balance of the contract and, consequently, making it onerous for either party to honor its obligations under the contract.*[340]

264. In its award of 3 March 2008, the CRCICA tribunal ordered the Governorate to pay to Onyx Alexandria EGP 8 million as compensation for some of the losses sustained due to the changes in the exchange rate of the Egyptian Pound and the interest on money borrowed from banks. The CRCICA tribunal ruled, however, that the changes to labour legislation and subsequent minimum wage increases were not covered by Article 24 of the Contract, since such wage increases were limited and "under no circumstances would result in the collapse of the financial equilibrium of this Contract".[341] This Tribunal finds no reason to disagree with the above analysis of the CRCICA tribunal with regard to the contents and scope of Article 24 of the Contract as well as its findings on the extent of the applicability of this provision to changes to the exchange rate and the labour legislation of Egypt.

265. The Claimant asserts also that it was entitled to compensation for all deficiencies due to all increases in the inflation rate above 4% by virtue of Article 24 of the Contract.[342] The Tribunal notes, however, that Onyx Alexandria did not make such a claim before the CRCICA arbitral tribunal. In its request for arbitration, Onyx stated that:

[339] CRCICA Award, C-045, p.15.
[340] CRCICA Award, C-045, p.24.
[341] CRCICA Award, C-045, p.27.
[342] Cl. Mem. Merits, ¶282.

> *within the scope of this arbitration, we shall limit our claims to the restoration of the economic balance of the mentioned contract without submitting any claims related to the unexpected increase as a result of the unexpected inflation rates that hit the Egyptian market during that period.*[343]

266. In light of the above, it is the view of the Tribunal that the Governorate of Alexandria had no legal obligation to restore by itself the economic equilibrium of the Contract or to compensate directly for any deficiency in such balance; but that adequate provision was made in the Contract for the party suffering from an impairment or deficiency of the financial and economic equilibrium to submit a claim for arbitration to CRCICA, which the Claimant's subsidiary did with respect to the first triennial period, but failed to do for the second and third triennial periods. In the absence of such an obligation on the part of the Governorate of Alexandria, the Claimant could not reasonably have legitimate expectations that had to be honoured by the Respondent. Moreover, although the Claimant's subsidiary had access to the CRCICA for the determination of the financial or economic deficiency suffered due to changes in the exchange rate policy, it did not diligently pursue the settlement of all its claims before the arbitration centre.

267. As was stated by the tribunal in *Toto Costruzioni Generali v. Lebanon*, "if the treaty requires recourse to domestic courts, it is not the existence of a contractual breach as such, but the 'treatment' that the alleged breach of contract received in the domestic context that may determine whether the treaty obligation of fair and equitable treatment has been breached".[344] Similarly, if the Contract between the parties provided recourse to a regional arbitration centre located in Egypt, there could be no breach of legitimate expectations, and hence of fair and equitable treatment, unless the Claimant's submission of the matter to arbitration suffered from a lack of due process or undue sovereign interference by the State. Although Veolia appears not to have been fully satisfied with the award of CRCICA regarding its claims for the first triennial period, it has never alleged that due process was

[343] Onyx's Statement of Claim in the CRCICA arbitration between Onyx and the Governorate of Alexandria no. 536 of 2007, 7 March 2007, R-002, p.18.
[344] *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, ¶163.

not observed in the handling of the arbitration by the Centre or that the process was somehow abused; nor has it in any way impugned the outcome of the arbitration.

268. Besides the negotiations held with the Governorate in July-August 2000, the exchange of letters, and Article 24 of the Contract, the Claimant also relies on Articles 3.3 and 34.2 of the Contract to argue that it was entitled to compensation as a result of the changes in the exchange rate of the Egyptian Pound and the legislation increasing the minimum wages by 7 per cent. Article 3.3 of the Contract provides that:

> *the Governorate undertakes not to take any legal or administrative actions, decisions or dispositions that may impair the technical or economic conditions of the Contract, unless the Governorate ensures that Contractor is fairly compensated. For the purpose of this clause, such compensation shall be deemed fair if it achieves Economic Balance to the contract or enables the Contract restore such balance.*[345]

The Tribunal observes that this provision cannot apply to the changes in labour laws enacted by the Government of Egypt or to the exchange rate changes implemented by the Egyptian Central Bank which the Claimant alleges to have impaired the economic equilibrium of the Contract.

269. Article 34.2, equally invoked by the Claimant reads as follows: "If any legislation, laws, regulations or internal rules having the force of law are enforced after the entry into force of this Contract, which may cause increase or decrease in the Contractor's expenses required for performance of any part of the Service, this increase or decrease shall be added to or deducted from the Contractor's Compensation". The Tribunal observes, in the first instance, that this provision cannot apply to the policy changes decided by the Egyptian Central Bank with regard to the exchange rate of the Egyptian Pound. Secondly, and perhaps more importantly, Article 34.2, provides that "[i]n case any dispute arises out of the application of this Clause, such dispute shall be referred to a specialized neutral tripartite committee provided for in Clause (35) herein".[346] The Tribunal notes that it was only in a letter dated 11 July 2010 to the Governorate that Onyx Alexandria proposed for

[345] Contract, C-012, ¶3.3.
[346] Contract, C-012, ¶34.2.

the first time the establishment of a neutral tripartite commission of experts to resolve the dispute between the parties regarding the economic equilibrium pursuant to Clause 35(b) of the Contract. There was no follow-up to this suggestion, but there is also no evidence that the Governorate refused or frustrated the establishment of the commission.

270. Finally, the Claimant relies on *EDF v. Argentina* for authority that refusal to re-establish the economic equilibrium of a concession contract affected by economic measures taken by Argentina amounted to a breach of the fair and equitable treatment.[347] The Tribunal is, however, of the view that *EDF v. Argentina* cannot provide such authority due to substantive differences between the two cases. Indeed, in that case, the investor could rely on an umbrella clause and the host State had made specific promises to attract foreign investors including a legislative currency clause. Neither of those elements is present in this case.

271. The Claimant maintains that there was an agreement between Veolia and the Governorate to renegotiate the economic equilibrium of the Contract at the end of each triennium. For Veolia: "Cet engagement étaient contenu dans le Marché lui-même, ainsi que dans l'échange de lettres des 4 et 5 septembre 2000".[348] To substantiate its argument, the Claimant refers to Article 1.1 and Article 25.2 of the Contract as well as to the exchange of letters. The Tribunal notes, however, that Article 1.1 of the Contract deals with definitions and does not contain any substantive provisions regarding the re-negotiation of the Contract. Article 25.2 establishes the yearly basic compensation of the contractor for its services, and then provides that "[f]or the sake of clarification, it is hereby specified that the amounts stated herein above include the anticipated rate of inflation and the increase of population, agreed upon in the Contract, which the Contractor has deemed relevant to achieve the Contract Economic Balance".[349] Thus, this provision does not indicate a commitment by either party to renegotiate the economic equilibrium of the Contract. As for the exchange of letters of 4 and 5 September, the Tribunal has already stated that it did

[347] *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012, CLA-076.
[348] Cl. Mem. Merits, ¶177.
[349] Contract, C-012, ¶25.2.

not constitute an agreement between the parties; nor did it contain any concrete commitments or representations regarding the economic equilibrium of the Contract.

272. The Claimant avers that "[e]n effet, dés la fin de la première période triennale en 2004, et ce jusqu'en octobre 2011, les autorités égyptiennes ont systématiquement refusé d'entamer des discussions concernant le rééquilibrage économique du Marché".[350] The alleged refusal is sometimes referred to as a refusal to negotiate the rebalancing of the Contract, while in others it is mentioned as a refusal to renegotiate the terms of the Contract; but the two expressions appear to be used interchangeably in the written pleadings of the Claimant. For Veolia, this refusal constitutes a violation of its legitimate expectations, since it expected "au moins à ce que le Gouvernorat d'Alexandrie discute de la possibilité de rééquilibrer le Marché".[351]

273. The Claimant also contends that the Governorate's refusal to engage properly and constructively in discussions on the rebalancing of the Contract was further compounded: (i) by the Governorate's conduct in the context of the arbitration proceedings before CRCICA and in its aftermath; and (ii) by the conduct of the Egyptian authorities in relation to Onyx Alexandria's requests to have the economic equilibrium of the Contract restored by GAFI. For Veolia, these actions and omissions by the Governorate and other Egyptian authorities also constituted a breach of the duty to act with coherence; the duty of transparency; the duty to treat the investor with good faith; and the duty to refrain from arbitrary and unjust behaviour – all deriving from Article 3 of the BIT.

274. The Respondent maintains that the Governorate never refused to hold discussions with Onyx concerning its claims for readjustment of the economic equilibrium, but that the latter should have, in any case, resorted to the arbitration procedure of Article 24 of the Contract which is applicable when one party feels that readjustment of the economic equilibrium is required. In the view of the Respondent, Onyx did not require any action or any answer from the Governorate to initiate arbitration before CRCICA if it felt that a readjustment or rebalancing of the terms of the Contract was necessary; and it finally did so at least for the

[350] Cl. Mem. Merits, ¶183.
[351] Cl. Mem. Merits, ¶184.

first triennium. As for the Governorate's decision to seek the annulment of the award given by the CRCICA, the Respondent asserts that it was merely exercising its procedural rights under Egyptian law, which allowed for annulment proceedings to be initiated on certain grounds. With regard to the role played by GAFI, the Respondent emphasises that GAFI could not have given the relief that Onyx Alexandria sought, since it has no competence for dispute settlement. The Respondent also rejects the Claimant's assertion that the Egyptian authorities breached their obligation to accord fair and equitable treatment to the Claimant.

275. The Tribunal has already concluded that there is no evidence on the record to indicate that the Governorate, or other Government organs of Egypt, had given assurances or representations to the Claimant concerning the readjustment of the economic equilibrium of the Contract outside the inclusion in the Contract itself of a provision on the economic equilibrium which could be used by either party in case of deficiency which leads to "negative exhaustion… in carrying out its obligations" (Article 24(1) of the Contract).[352] The Tribunal also finds no evidence to substantiate the Claimant's argument that there was an agreement between the Claimant and the Governorate to renegotiate the economic equilibrium of the Contract at the end of each triennial period.

276. With regard to the alleged systematic refusal by the Governorate to hold meetings to discuss constructively the issue of the rebalancing of the Contract following the changes in the exchange rate and in the labour legislation of Egypt, the Tribunal notes that the CRCICA award refers to the fact, based on Onyx's own statement of claim before that tribunal, that a number of meetings were held between the Governorate and Onyx to consider and discuss the financial claims of Onyx against the Governorate, including claims for debt as well as claims related to the restoration of the economic equilibrium, following the letter of Onyx to the Governorate of 4 August 2004 requesting consultation meetings on the way to restore the Contract's economic equilibrium pursuant to Articles 24 and 31 thereof. These meetings related to the first triennial period of the implementation

[352] Contract, C-012, ¶24.1.

of the Contract, and the efforts by Onyx to find a solution to the readjustment of the terms of the Contract.

277. The Tribunal also notes that as regards the second triennial period and the search by Onyx for ways to obtain the rebalancing of the Contract short of resort to arbitration, Onyx itself in a letter dated 27 August 2008 refers to the meetings it held with the Governorate in the following terms: "[w]e would like to inform you – as we have previously mentioned in our previous meetings – that the company decided to be presented to the ministerial committee of the investment litigations (The General Authority for Investment and the Free Zones), asking for restoring the economical balance of the contract".[353] Subsequently, exchanges and discussions on economic equilibrium between the Governorate and Onyx Alexandria, regarding the second triennial period, were held in the context of the procedure before GAFI.[354] As for the meetings on the same subject-matter requested with respect to the third triennial period, the Tribunal further notes that although Onyx Alexandria's letter dated 28 September 2010 requesting the restoration of the economic equilibrium went unanswered by the Governorate, Counsel for the Claimant explained that in any event there was no prospect at that time of achieving the rebalancing of the Contract given the financial trouble in which the Governorate found itself: "c'était déjà trop tard".[355]

278. In light of the above, the Tribunal finds no evidence of systematic refusal on the part of the Governorate to hold meetings or consultations with Onyx Alexandria to discuss issues pertaining to the execution of the Contract or to the changes affecting such execution. In any event, a refusal to renegotiate the contract or to rebalance its terms would not have constituted a breach of the legitimate expectations of the Claimant, since as previously stated there was neither an agreement between the parties to do so, nor were there assurances, representations, or contractual or legislative prescriptions which established such an obligation. The Tribunal has undertaken the above detailed analysis of the allegations made by the Claimant not to pronounce on the issue of whether or not the Governorate has breached the Contract by refusing as a contracting party to renegotiate or

[353] Letter from Onyx Alexandria to the Governorate of Alexandria, 27 August 2008, C-051, pp.2-3.
[354] Tr. Closings Day 1 (English Version) Khayat 160:6-13.
[355] Tr. Closings Day 1 (French Version) Alquezar 16:34.

restore the Contract's economic equilibrium in accordance with Article 24 thereof, but to ascertain whether the alleged conduct of the Governorate throughout this process could constitute a breach of treaty obligations. This is clearly not the case: at no point did the Respondent resort to sovereign powers to frustrate the performance of an obligation under the Contract. Indeed, as the foregoing analysis demonstrates, there was no contractual obligation in the terms advanced by the Claimant in any event.

e.3 The Governorate's Actions Following the CRCICA Award and the Recourse to GAFI

279. Turning now to the conduct of the Governorate in the context of the CRCICA arbitration and its aftermath, it seems clear that the Governorate's argument during the proceedings that Article 24 of the Contract contravened the terms of the bid and Egyptian administrative law lacked merit because the Governorate consented to the inclusion of that clause in the Contract after long negotiations in July-August 2000. For the same reason, the efforts by the Governorate to challenge the CRCICA award before the Egyptian courts were also likely to be futile and indeed that challenge was dismissed. However, none of those actions could, in the opinion of the Tribunal, amount to arbitrary conduct or bad faith or an abuse of process for the purposes of the FET standard. The Governorate was apparently exercising its procedural rights under Egyptian Law, which allowed a contracting party to initiate annulment proceedings on certain grounds. There is, however, no indication on the record of sovereign interference in the CRCICA procedure itself, nor in the procedures before the domestic courts which ultimately dismissed the request by the Governorate.

280. The Claimant maintains that the Egyptian authorities misled Onyx Alexandria into pursuing the intervention of GAFI only to be told, after a prolonged process (initiated on 31 August 2008 and concluded on 1 February 2009), that GAFI was incompetent to handle the matter. The record before the Tribunal does not, however, support this allegation. In a letter to the Governorate of Alexandria dated 27 August 2008, Onyx stated that it would like to inform the Governorate:

> *that the company decided to be presented to the ministerial committee of the investment litigations (The General Authority for Investment and the Free Zones), asking for restoring the economical*

> *balance of the contract, compensating the company for its endurance in the past period of the contract and correcting the value of this contract in the future to assure this balance in commitment with the Egyptian law and its changes in this concern.*[356]

Since the recourse to GAFI was undertaken at the initiative of Onyx Alexandria itself, and the Governorate was only informed of Onyx's decision to "be presented" to GAFI, the Tribunal cannot accept the Claimant's argument that Onyx Alexandria was misled into pursuing the intervention of GAFI.

281. There is also nothing in the record which indicates that substantive or procedural irregularities were committed by GAFI, or that an abuse of procedure occurred. GAFI's main task is the promotion of foreign investment and the facilitation of investment projects, as a one-stop shop that brings together various administrative entities of the Egyptian Government dealing with foreign investment matters. As such, it does not have the competence to settle investment disputes, but only to facilitate their settlement. Moreover, its conclusion that the dispute between Onyx and the Governorate should be submitted to arbitration under the Contract since it concerned "technical and financial matters that require specialized experts to draft their report to allow the settlement of the claims" appears to have been reasonable. It is true that the process took a long time to unfold, and that the decision of the Ministerial Committee was not communicated in a timely manner to Onyx, but the Tribunal finds no evidence of an arbitrary or unfair procedure that could amount to a breach of fair and equitable treatment.

e.4 Conclusion

282. The Tribunal concludes, in light of the above analysis, that the Claimant's allegations regarding the breach by the Respondent of the fair and equitable treatment provision of the BIT, through the frustration of its legitimate expectations, cannot be upheld. There was no guarantee by the Respondent either through its legislation or by representations or commitments made to the Claimant that the macroeconomic and regulatory conditions existing at the time of the investment, particularly the exchange rate and the labour law, would not change. The Tribunal does not also find undertakings by the Respondent, either

[356] Letter from Onyx Alexandria to the Governorate of Alexandria, 27 August 2008, C-051, p.3.

through its legislation or in representations made to the Claimant directly, to restore automatically the balance of the Contract by compensating the Claimant for changes in the macroeconomic and regulatory conditions existing at the time of the investment. With regard to the Governorate's actions during and after the CRCICA award, the Tribunal is of the view that the Governorate acted at all times as a contractual party and did not engage in unfair or inequitable conduct, as a State organ, by seeking to set aside the award. Similarly, the Tribunal concludes that the role played by GAFI in trying to facilitate the resolution of the dispute between the Governorate and the Claimant did not rise to the level of a breach of the fair and equitable standard of treatment.

283. Finally, the Tribunal considers that the Claimant's FET claim would not succeed even if the Governorate's conduct as a contractual party were to be covered by Article 3(1) of the BIT, insofar as the Contract does not create any legitimate expectation of full and automatic compensation for changes in the macroeconomic and regulatory conditions existing at the time of the investment on which the Claimant relies. The Tribunal also does not find clear evidence of a systematic refusal by the Governorate to negotiate or restore the economic equilibrium of the Contract or to block the procedural mechanisms provided by the Contract in favour of the Claimant so as to frustrate any expectations that the Claimant could legitimately draw from the Contract.

C. IMPOSITION OF PENALTIES

(1) The Parties' Positions

a. Claimant's Position

284. The Claimant argues that the Governorate's imposition of unjustified penalties upon Onyx Alexandria from December 2006 onwards breaches the fair and equitable treatment standard to the extent that it disregards the Claimant's legitimate expectations and constitutes violations of the Respondent's obligations of transparency, good faith and to refrain from arbitrary conduct. This is because most of the penalties imposed in the relevant period were: unjustified and in breach of the substantive and procedural conditions

stipulated in the Contract;[357] levied by personnel who did not have the competence to do so, namely "district inspectors" engaged by General Labib, leading to irregularities such as duplication of penalties;[358] and applied in connection with facts and situations lying beyond Onyx Alexandria's control.[359]

285. To substantiate this claim, the Claimant relies on a table documenting abnormal spikes in penalties, in particular in the periods of July to October 2007 and September 2009 to December 2010, and refers to various letters sent by Onyx Alexandria to challenge the fines over the years.[360] It also relies on the report of a bipartite committee constituted of representatives of the Governorate and Onyx Alexandria, which concluded that the Governorate ought to return to Onyx EGP 710,000 out of the fines imposed in July 2010 (totalling EGP 1.27m) as a result of irregularities in the imposition of penalties.[361] As evidence that the penalties were not imposed as a result of Onyx's failure to provide its cleanliness services adequately, the Claimant points to: the Witness Statements of Mr Hansen and Mr Le Conte; prizes that Onyx Alexandria received in 2005, 2006, 2009 and 2010 in recognition of the quality of its services;[362] the fact that the Governorate never sought to terminate the Contract even though it had the right to do so whenever, as envisaged in Article 28.5, the annual amount of fines surpassed 10% of the annual contractual price, which it did both in 2007 and 2010;[363] and the fact that the Governorate asked Onyx Alexandria to reconsider its decision to terminate the Contract, which it would not have done if the Governorate had not been satisfied with Onyx's services.[364]

286. Compounding the breach of fair and equitable treatment, the Claimant adds, was the refusal by the Governorate – and other Egyptian authorities called upon to intervene – to discuss and remedy the issue in an effective manner. The Governorate is said to have only agreed to set up a single bipartite committee to review the fines imposed in July 2010.[365] In reply

[357] Cl. Mem. Merits, ¶79.
[358] Cl. Rep. Merits, ¶105.
[359] Cl. Mem. Merits, ¶192.
[360] Tr. Closings Day 1 (French Version) Soule 22:31-23:20.
[361] Cl. Rep. Merits, ¶140.
[362] Cl. Rep. Merits, ¶138.
[363] Cl. Rep. Merits, ¶298.
[364] Tr. Closings Day 1 (French Version) Soule 91:35-42.
[365] E.g. Cl. Mem. Merits, ¶¶190-192.

to a question asked by a member of the Tribunal as to whether there had been attempts to enlarge the scope of review of that committee, Counsel for the Claimant answered that "le seul comité qui ait rendu une décision, et que nous avons les preuves au dossier, c'est ce fameux comité sur les pénalités de juillet 2010".[366]

287. In its Reply, the Claimant emphasises that the imposition of fines was the result of a deliberate policy pursued by the Governorate to reduce the fees owed to Onyx as much as possible, given that the Governorate faced at the time severe budgetary constraints due to the additional cost of operating an additional landfill in El Hamman.[367] The adoption and implementation of such a policy, coinciding with General Labib's appointment as the new Governor of Alexandria, would be the only plausible explanation for the spikes in fines seen between 2006 and 2007 and, again, in 2010. The Claimant credits the decrease in penalties in the first semester of 2008 to a "brigade d'intervention rapide" that Onyx Alexandria deployed to take pictures of infraction sites so as to make it easier for it to challenge the penalties.[368]

288. The Claimant further elaborated on this argument in the hearings on the merits, where Counsel stressed that the Respondent provided no evidence that would contradict the Claimant's thesis,[369] and argued that the spikes in penalties which took place between 2006 and 2007 could not be explained on the basis of the justifications provided by the Respondent, namely, that Onyx had not hired a sufficient number of employees or placed a sufficient number of bins on the streets. Rather, it was pointed out that Onyx Alexandria had hired 1,500 new employees between December 2006 and December 2007, and that, as confirmed by the cross-examination of Mr El Mahdi, penalties were not imposed whenever Onyx Alexandria swept streets where the bins had been removed.[370] Counsel for the Claimant conceded that there were no "éléments dans le dossier, à notre sens, qui expliquent pourquoi, soudainement, les pénalités augmentent de manière aussi élevée", but inferred from the discrepancy between the penalties imposed in that period and those

[366] Tr. Closings Day 1 (French Version) Soule 94:34-35.
[367] Cl. Rep. Merits, ¶¶142 and 297.
[368] Cl. Mem. Merits, ¶80.
[369] Tr. Closings Day 1 (French Version) Soule 18:47-48.
[370] Tr. Closings Day 1 (French Version) Soule 20:45-21:7.

imposed in the preceding months "le côté totalement arbitraire de ces pénalités qui ne correspondent absolument pas à ce qu'il se passait sur le terrain".[371] In support of the view that the penalties were imposed as part of a strategy ordered by General Labib, and that the Governorate was generally satisfied with Onyx Alexandria's work, the Claimant reiterated that the Governorate never sought to terminate the Contract and went as far as asking Onyx to reconsider its decision to rescind the Contract.[372]

289. The Claimant compares the present facts with those in *Vivendi II*, where the tribunal found that Argentina had breached the fair and equitable treatment standard by taking a number of measures, including the imposition of unjustified penalties, with a view to damaging the protected investment.[373]

b. Respondent's Position

290. The Respondent maintains that the imposition of penalties, even if those had been unjustified and abusive as argued by the Claimant, cannot constitute a breach of fair and equitable treatment because it was "merely contractual in nature".[374] It contends, in any event, that such penalties were applied pursuant to the Contract in response to deficiencies in the services provided by Onyx Alexandria. The increase in the amount of fines was due both to the Governorate's abandonment of its earlier lenient approach to Onyx Alexandria's performance[375] and to the progressive worsening of the services provided, with Onyx Alexandria stopping "renewing material and personnel".[376] The Respondent rejects the Claimant's contentions that penalties were imposed without prior notice; that the Governorate did not comply with the 24-hour remedy period envisaged in the Contract; that Onyx Alexandria was not duly notified of the time and place of breaches for which it was penalised; that penalties were imposed for failing to clean streets to which Onyx Alexandria had no access as a result of public works; that penalties were imposed by district

[371] Tr. Closings Day 1 (French Version) Soule 20:46-21:5.
[372] Tr. Closings Day 1 (French Version) Soule 22:1-13.
[373] Cl. Mem. Merits, ¶192, footnote 326; Cl. Rep. Merits, ¶¶300-301.
[374] Resp. C-M. Merits, ¶¶538-539.
[375] Resp. C-M. Merits, ¶529.
[376] Resp. C-M. Merits, ¶¶99 and 530.

inspectors not entitled to do so under the Contract; and that there was duplication of penalties.[377]

291. In support of its position, the Respondent points to the fact that the great majority of appeals lodged by Onyx Alexandria concerned "procedural and formal issues", such as the absence of due notification, as opposed to substantive defences of the services provided;[378] relies on media reports of popular dissatisfaction with Onyx's services[379] and complaints made by members of the public;[380] and notes that the prizes that the Claimant invokes as evidence of good service date back to the period preceding the increase in fines, with the Claimant failing to provide details or evidence of more recent awards that Onyx Alexandria allegedly won.[381] The Respondent moreover emphasises that the Claimant failed to provide "contemporaneous and exact proof" that the penalties were unjustified and abusive, relying solely on Witness Statements that fall short of meeting the required burden of proof.[382]

292. The Respondent also emphasises that, contrary to what the Claimant suggests, the Governorate was not under an obligation, contractual or otherwise, to set up a "contrôle contradictoire" for the penalties,[383] but that the fact that the Governorate did agree to establish a bipartite committee to look into the fines for the month of July 2010 was "the ultimate proof of the Respondent's good faith".[384] The Respondent however contests the probative value of the report of the bipartite committee adduced by the Claimant on the ground that it refers to a single month in the life of the Contract.[385] It further notes that an alternative version of that report omitted the recommendation that the Governorate reimburse Onyx Alexandria with EGP 710,000 and that, in any event, that report was disregarded by another committee set up by the Governorate to review the work of the bipartite committee.[386]

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[377] Resp. C-M. Merits, ¶¶522-528.
[378] Resp. C-M. Merits, ¶¶517-519.
[379] Resp. C-M. Merits, ¶¶100.
[380] Resp. C-M. Merits, ¶¶121-127.
[381] E.g. Resp. Rej. Merits, ¶147.
[382] Resp. Rej. Merits, ¶131.
[383] Resp. Rej. Merits, ¶153.
[384] Resp. Rej. Merits, ¶160.
[385] Resp. Rej. Merits, ¶163.
[386] Resp. Rej. Merits, ¶¶160-162.

293. Finally, the Respondent describes the Claimant's suggestion of a governmental policy to reduce as much as possible the fees owed to Onyx through the imposition of fines as wholly speculative. It stresses that the Claimant has failed to provide any evidence that would substantiate this view, and that "a bad faith allegation is very serious and the threshold to prove it very high".[387] In the hearings on the merits, Counsel for the Respondent argued that, on the one hand, there was no proof that "the Governorate wanted to save money", and, on the other hand, that the Claimant's case on penalties was based solely on what Mr. Hansen admitted, when cross-examined, was his "conviction personnelle".[388] The Respondent also argued that the Claimant's theory, while seeking to explain the increase in penalties, fails to explain why it was that for many months in the relevant periods the level of imposed penalties was low even though General Labib remained in charge of the Governorate.[389] "[I]f there is a grand scheme", Counsel for the Respondent said, "it is not possible to explain why the penalties did not remain at the high stage in 2008 and 2009".[390] In this connection, the Respondent points out that the Claimant offered no proof of the existence of a "brigade d'intervention" as described in the Memorial and the Reply, or that such a "brigade d'intervention" was the cause for the decrease in penalties in the period between the spikes.[391]

294. As regards the absence of a decision to terminate the Contract, the Respondent maintains that under the Contract this course of action was a mere option, which was not in the Governorate's interest to take. Rather than replacing Onyx and incurring the inevitable cost and delay in opening a new tender process, the Governorate's focus was on ensuring that Onyx provided good service.[392]

295. The Respondent distinguishes the present facts from those in *Vivendi II* on the ground that in that case Argentina had imposed penalties in contravention of a sixth-month contractual grace period, and not, as was the case with the Governorate, as a justified response against

[387] Resp. Rej. Merits, ¶¶137-146; 620.
[388] Tr. Closings Day 1 (English Version) Khayat 185:11-25.
[389] Tr. Closings Day 1 (English Version) Khayat 186:11-24.
[390] Tr. Closings Day 1 (English Version) Khayat: 191:6-8.
[391] Resp. Rej. Merits, ¶132.
[392] Tr. Closings Day 1 (English Version) Khayat 189:17-24.

contractual breaches.[393] The Respondent likewise doubts that any of the arbitral awards quoted by the Claimant in the latter's discussion of the fair and equitable treatment standard would make the imposition of contractual penalties by the Governorate a breach of Egypt's international obligations under the BIT.[394]

(2) The Tribunal's Analysis

296. The Claimant's allegations regarding the imposition of unjustified and exponentially increased penalties on Onyx Alexandria by the Governorate as of December 2006 are based not only on a violation of the terms of Article 28 of the Contract, but also on a breach of the fair and equitable standard in the BIT, since "leur unique objectif était de diminuer le plus possible les redevances versées à Onyx Alexandria, et non pas de sanctionner d'éventuels manquements au Marché, comme le prétend l'Egypte".[395] It describes the sharp increases in the penalties in 2006/2007 and 2009/2010 as abusive, and in breach of the Respondent's obligations of good faith and transparency, and to refrain from arbitrary conduct.

297. The Respondent does not contest the increase in penalties imposed by the Governorate during certain periods in 2006/2007 and 2009/2010, but maintains that they were applied pursuant to the Contract, particularly Article 28 thereof, and in response to deficiencies in the services provided by Onyx. It also argues that even if the penalties were unjustified or abusive, this would not constitute a breach of the FET standard because it was merely contractual in nature. It also rejects the alleged violations of the obligations of good faith and transparency and not to act in a manifestly arbitrary manner.

298. The Tribunal observes that, as it stated in paragraph 174 above, a contractual breach does not by itself give rise to a violation of the FET standard unless the related conduct was undertaken in the exercise of governmental authority that goes beyond the range of measures that the parties to a contract are in a position to take in their private capacity, or there were aggravating circumstances showing a significant arbitrary behaviour on the part

[393] Resp. C-M. Merits, ¶575.
[394] Resp. C-M. Merits, ¶¶559-585.
[395] Cl. Rep. Merits, ¶297.

of the State in the pursuit of governmental purposes, or interference by State organs resulting in the total repudiation of the Contract. Thus, the Tribunal will have to examine whether the Governorate used its authority, as a State organ, to impose unjustified penalties in contravention of the provisions of the Contract, and whether this was done in pursuit of a deliberate policy to reduce the fees owed to Onyx, as alleged by the Claimant. In this context, and as outlined in paragraph 257 above, the analysis of the Contract is not undertaken by the Tribunal for the purpose of establishing liability under domestic law, but in order to ascertain whether the actions or the omissions of the Respondent in connection with the performance of the Contract amount, as alleged by the Claimant, to a violation of the FET standard of the BIT.

299. Article 28 of the Contract, which deals with penalties, grants a contractual right to the Governorate to impose penalties on the contractor in case of breaches regarding waste collection, waste transport, and cleanliness activities; treatment of works; and landfilling works. It also specifies the manner in which penalties are to be applied, and the notification procedures for such penalties. Indeed, the Parties agree that penalties were imposed by the Governorate on Onyx from 2002 onwards, and that there was nothing unusual about the imposition of penalties as such; but they disagree both on the rate of increase from December 2006 onwards, as well as on the reasons underlying such increases. For the Claimant, the penalties increased from about 1% of the monthly billing charges by Veolia in 2002-2006 to about 8.32% from December 2006 to May 2011, rising during certain periods in 2007 and in 2009/2010 to about 10% or 13% of such charges.

300. Veolia claims that the penalties were abusive for the following reasons: (i) the penalties were imposed without prior notice; (ii) the Governorate did not comply with a 24-hour remedy period; (iii) no information was given to Veolia as to the time and place of the breach; (iv) no supporting document was given, preventing Onyx from contesting the penalties; (v) some penalties were imposed for not cleaning streets to which Onyx did not have access due to public road works; (vi) some penalties were imposed for breaches caused by the Zabbaleen which Onyx had warned the Governorate about; (vii) some penalties were imposed by inspectors not entitled to do so under the Contract; and, (viii)

some penalties were imposed twice for the same breach.[396] The Respondent rejects these allegations.

301. The record shows that Onyx Alexandria wrote many letters to the Governor between 2007 and 2011 contesting the penalties imposed without the necessary notification, the double imposition of fines by district inspectors and by the Department of Control and Environmental follow-up of the Governorate, and penalties imposed contrary to the procedures defined in the Contract, particularly in Article 28(1) thereof. Those letters requested the Governor to issue instructions for the revision of the penalties deducted from its monthly fees, and to ensure compliance with the procedures defined in the Contract concerning penalties. Onyx also requested the Governor in those letters to convene joint meetings of the parties to discuss these issues in accordance with Article 35 of the Contract on the settlement of disputes. It appears from the record, however, that action was not taken by the Governorate on the establishment of joint committees except in two instances. According to the First Witness Statement by Mr Hansen, a first bipartite committee was created in 2006, but suspended its activities in 2008 without making a finding.[397] The second bipartite committee was established by decision of the Governor of Alexandria in response to a letter by Onyx dated 18 August 2010 contesting the penalties of July 2010. That committee concluded that the Governorate should refund the amount of EGP 710,000 to Onyx, out of a total amount of EGP 1.27 million of penalties imposed in July 2010.

302. In its Report, the committee, after reviewing the penalties in light of Article 28(1) and 28(2) of the Contract, stated, *inter alia*, that:

> *a - As for the sweeping works, the amount of EGP 430,000 (four hundred and thirty thousand Egyptian Pounds only) has been imposed in this regard by mistake as it was imposed upon the observation time and not the notification time.*
>
> *b - Regarding the collection works (containers' discharge), the amount of EGP 96,760 (ninety six thousand and seven hundred and sixty Egyptian Pounds only) has been imposed by mistake as it was imposed upon the observation time and not the notification time.*

[396] Cl. Mem. Merits, ¶79.
[397] Witness Statement, Jean-Pierre Hansen, 16 September 2013, ¶56.

> *c - Concerning the infractions of the non-cleaning the Company's vehicles, a penalty of EGP 1.050 (one thousand and fifty Egyptian Pounds only) has been imposed by mistake as it was imposed upon the observation time and not the notification time.*
>
> *Accordingly, total penalties imposed by mistake against sweeping and collection works (discharge of vehicles) and violating vehicles is 527,810 (five hundred and twenty seven thousand and eight hundred and ten Egyptian Pounds only) as shown in the last attached statement No. (6) Serial No. (217).*[398]

303. The committee also recommended the repayment to Onyx of EGP 140,940 for penalties imposed by district inspectors, and not by the inspectors of the environmental control department of the Governorate. According to the committee, "[i]n case the Governorate assigns any of the cleaning monitoring and control works according to the Contract, the Governorate shall notify the Company and shall receive an approval from the Company on assigning the controllers", and "[a]s the Governorate didn't notify the company that the districts are performing the monitoring works and following the contract articles, accordingly the penalties imposed by the districts… should be cancelled". Finally, the committee proposed that "[t]he value of the penalties amounting EGP 41,300 (only forty one thousand and three hundred Egyptian pounds) applied on medical wastes were all imposed by mistake" and should be refunded.[399]

304. Although it thus appears that there were some attempts by the Governorate to address the complaints raised by Onyx regarding the imposition of the penalties, there is no clear indication that the Governorate was seriously minded to have the issue resolved either through joint committees or through the dispute settlement procedures established under Article 35 of the Contract. On the contrary, there is evidence to indicate that the Governorate tried to revise the recommendations of the bipartite committee which called for the repayment of EGP 710,000 to Onyx through the creation of another committee to review its findings.

[398] Report of the bilateral committee established to review penalties imposed in July 2010, 16 June 2011, C-234, pp.3-4.
[399] Report of the bilateral committee established to review penalties imposed in July 2010, 16 June 2011, C-234, p.6.

305. The Tribunal notes that the bipartite committee justified its conclusions on the basis of evidence of mistakes and irregularities in the imposition of the penalties.[400] However, mistakes or irregularities cannot qualify as unfair or inequitable treatment nor can they be characterized as an arbitrary imposition of fines. Much more than that would be needed for an arbitrary conduct or for bad faith to be established for the purposes of the FET standard.

306. The Claimant advances two interconnected reasons for the continued imposition by the Governorate of erroneous or unjustified penalties which were periodically characterized by sharp rises in the amounts charged. First, it attributes the increase to the appointment of General Adel Labib as Governor of Alexandria in September 2006. According to the Claimant, "[e]n septembre 2006, un gouverneur entreprenant, le Gouverneur El Mahgoub, a été remplacé par un gouverneur particulièrement attaché à la gestion publique. Le Général Labib est l'ancien gouverneur de Qena, rendu célèbre pour le projet de propreté mis en place par l'intermédiaire d'une gestion entièrement publique".[401] Secondly, the Claimant maintains that there was a deliberate policy to reduce the amount of monthly fees payable to Onyx through the imposition of higher penalties in view of the budgetary constraints experienced by the Governorate.

307. Regarding General Labib, the evidence before the Tribunal shows that the new Governor came to the assistance of Onyx on at least two occasions to reduce the penalties imposed. Indeed, the Claimant states in its Reply that on 29 September 2010, following a visit of President Mubarak to Borg El Arab, "le Gouverneur d'Alexandrie a demandé à ses services de baisser les pénalités prévues pour août 2010".[402] This is further confirmed by an internal memorandum of Veolia Propreté in which Mr. Hansen, the Managing Director of Onyx Alexandria, informs Mr. Zorn of the Hong Kong Office that "[c]oncerning August, the Governor asked his monitoring dept to check the penalties and decrease its level".[403] Also, Onyx Alexandria, in its letters complaining about the increase in the amount of penalties, makes reference to the non-implementation of the instructions of the Governor concerning

[400] Report of the bilateral committee established to review penalties imposed in July 2010, 16 June 2011, C-234.
[401] Cl. Rep. Merits, ¶102.
[402] Cl. Rep. Merits, ¶141.
[403] Email from J.-P. Hansen to J. Zorn, 3 October 2010, C-235, p.1.

the transfer of any infractions coming from district inspectors to the department of control and environmental follow-up as one of the mistakes in the calculation of penalties.[404]

308. In any event, the inference that the Claimant draws from the Governor's attachment to the public management of cleanliness projects, which he promoted in his previous position as Governor of Qena, does not prove the existence of an ulterior or improper purpose pursued by the Governor through the imposition of the penalties. There is also no clear evidence on the record to show that the new Governor was hostile to the involvement of Onyx in the general cleanliness project in Alexandria or that he was trying to get rid of it through the imposition of burdensome penalties. In his first Witness Statement, Mr. Hansen declares that, when he presented to Governor Labib in August 2007 a detailed report concerning "les pénalités injustifiées": "[ç]a seule réponse orale que nous ayons obtenue a été 'ce n'est pas notre problème'".[405] Even if taken at its face value, such a statement does not constitute evidence of a deliberate policy or decision by the Governor to impose heavy penalties on Onyx to make it abandon the project. Moreover, there is no evidence that the sharp increases in the imposition of penalties persisted or continued in a consistent manner throughout the tenure of General Labib as the Governor of Alexandria (August 2006 to February 2011). The documents submitted by the Claimant show that there were relatively long periods of time during which the penalties imposed were not different from those which were imposed in 2002-2006 prior to the appointment of General Labib as Governor.

309. With respect to the second reason advanced by the Claimant to demonstrate an ulterior motive in the Governorate's imposition of increased penalties from 2007 to 2011, the Claimant argues in its Reply that:

> *Il existe une explication plus plausible à la décision du Gouverneur d'Alexandrie de réduire les coûts de la gestion des déchets à Alexandrie à tout prix que celle présentée par l'Egypte dans le présent arbitrage, à savoir les soi-disantes mauvaises prestations d'Onyx Alexandria. Ainsi qu'expliqué aux paragraphes 98 à 99 ci-dessus, le service de propreté publique du Gouvernorat d'Alexandrie était financé en partie par la taxe de propreté et en partie par le Ministère des Finances sur le budget de l'Etat. Alors*

[404] See e.g. Letter from Onyx Alexandria to the Governorate of Alexandria, 17 October 2007, C-199.
[405] Witness Statement, Jean-Pierre Hansen, 16 September 2013, ¶46.

> *même que la délégation de la propreté publique résulte d'une décision du Gouvernement égyptien sous l'impulsion du Président Moubarak, il semble que le Ministère des Finances ait renâclé à fournir les fonds nécessaires au Gouvernorat d'Alexandrie. Pour la part du Gouvernorat, la compagnie d'électricité collectait et reversait environ 45 à 50 millions de livres égyptiennes par an au titre de la taxe de propreté. Or, le Ministère des Finances ne versait au Gouvernorat d'Alexandrie que 4,5 ou 4,6 millions de livres égyptiennes par mois à partir du budget pour financer le service publique de la propreté à Alexandrie (soit environ 55 millions de livres égyptiennes par an). Ce montant cumulé était nettement inférieur à la redevance due à Onyx Alexandria qui s'élevait à environ 133 millions de livres égyptiennes, hors rééquilibrage économique du Marché et sans les paiements pour le CET d'El Hammam et la réhabilitation des anciens centres de traitement (s'élevant à plus de 15 millions de livres égyptiennes par an). Il semble que la question du montant des fonds que le Ministère des Finances devrait fournir a été discutée avec ce dernier à de nombreuses reprises, sans résultat. Le Gouverneur d'Alexandrie a donc réduit les coûts du service de propreté publique en refusant de renégocier l'Equilibre Economique du Marché, en imposant des pénalités injustifiées et en refusant de régler certaines prestations d'Onyx Alexandria.*[406]

310. These assertions are contested by the Respondent, which argues that "the Claimant is simply attempting to deflect attention from its own violations of the Contract which justified the imposition of penalties, by raising unfounded allegations as to the Governorate's motives".[407] More importantly, however, and in the view of the Tribunal, the Claimant's allegation that the Governorate decided to impose excessive and unjustified penalties as part of an attempt to reduce costs regarding waste management in Alexandria because it did not have sufficient funds to pay Onyx's dues is not supported by evidence. The Claimant's statement that the Ministry of Finance "apparently" refused to furnish the necessary funds to the Governorate is speculative.

311. The manner in which the Claimant formulated the statement is revealing in this regard. Indeed, the claims are phrased as follows: "il semble que le Ministère des Finances ait renâclé à fournir les fonds nécessaires au Gouvernorat d'Alexandrie" and "[i]l semble que la question du montant des fonds que le Ministère des Finances devrait fournir a été

[406] Cl. Rep. Merits, ¶142.
[407] Resp. Rej. Merits, ¶136.

discutée avec ce dernier à de nombreuses reprises, sans résultat".[408] Moreover, during the hearing, the Managing Director of Veolia, Mr. Hansen, stated during his cross-examination that: "Comme vous le dites très justement, ces pénalités étaient injustifiées. Donc, le fait qu'elles soient injustifiées, pour moi – là encore, c'est ma conviction personnelle – c'est pour diminuer le montant que le gouvernorat devait verser à Onyx Alexandria. Je ne vois pas d'autres raisons".[409] Mr. Hansen did not, however, point to any evidence on the record to substantiate his personal conviction.

312. Further, the link between the alleged unwillingness of the Ministry of Finance to provide the necessary funding and the increased imposition of the penalties is not supported by any evidence with regard to the periods in which there was a sharp rise in the penalties (2006-2007 and 2009-2010) or throughout the tenure of General Labib as Governor of Alexandria. Thus, the Tribunal cannot draw an inference from the budgetary constraints that the Governorate might have experienced at the time that there existed a deliberate policy to reduce costs for the cleanliness project through an excessive imposition of penalties on Onyx Alexandria.

313. To substantiate its arguments regarding the ulterior or improper purpose underlying the excessive increase in the penalties imposed, the Claimant further asserts that:

> *[s]i les prestations de Veolia Propreté justifiaient réellement l'imposition de pénalités dépassant 10% de la facture mensuelle pour une année donnée, comme cela a parfois été le cas, le Gouvernorat d'Alexandrie était en droit de résilier le Marché. Or, le Gouvernorat n'a jamais exercé cette option sachant pertinemment que les pénalités imposées étaient abusives. Le niveau des pénalités infligées ne reflétait en rien la qualité des services de propreté publique d'Onyx Alexandria.*[410]

314. There were undoubtedly irregularities and mistakes committed by the Governorate in the imposition of penalties. This was recognized by the bipartite committee which recommended the repayment of erroneously imposed penalties to Onyx. However, based on the evidence presented before the Tribunal, the actions and omissions of the

[408] Cl. Rep. Merits, ¶142.
[409] Tr. Merits Day 1 (French Version) Hansen 67: 2917-2920.
[410] Cl. Mem. Merits, ¶83.

Governorate, which may have at times led to an erroneous and excessive imposition of penalties or to irregularities in the procedures for such imposition, neither amount to arbitrary conduct nor a breach of legitimate expectations and the consequent violation of Article 3 of the BIT. They are the actions or omissions of a contracting party, and there is no evidence that they were part of a deliberate strategy to reduce payments to Onyx Alexandria or of the use of governmental authority for ulterior motives unrelated to the performance of the Contract.

315. With regard to the procedures for the imposition of the penalties, Onyx Alexandria referred on several occasions in its letters to the Governorate concerning the imposition of penalties that "the penalties are applied on all infractions as soon as it has been pretended that they occurred without considering the corrected ones during the grace period stated in the contract",[411] and called for "[r]evising the amounts of penalties deducted by mistake or on contradictory to the contract".[412] Thus, although Onyx Alexandria did not agree with the penalties imposed, and considered them excessive or erroneous, it was regularly informed of such penalties and notified of the infractions for which they were imposed.

316. In the face of the conduct of the Governorate on the issue of penalties, and its unwillingness to engage in negotiations or to address Onyx's complaints through joint committees pursuant to the Contract, Onyx Alexandria had the possibility of resorting to CRCICA arbitration in accordance with Article 35(c) of the Contract. It chose not to do so, and to resort instead to other governmental authorities, such as the Ministry of Finance, the Ministry of Environment or the Joint French-Egyptian Conseil Présidentiel to find a political solution to the issue.[413] Such a solution was not, however, found.

317. In light of the above analysis and considering the evidence on the record regarding the penalties imposed between 2006 and 2011, the Tribunal concludes that the claims of Veolia Propreté concerning the breach of the fair and equitable standard in the BIT through the

[411] See, for example, Letter from Onyx Alexandria to the Governorate of Alexandria, 31 July 2007, C-192.
[412] See, for example, Letter from Onyx Alexandria to the Governorate of Alexandria, 22 November 2009, C-221.
[413] Witness Statement, Jean-Pierre Hansen, 16 September 2013, ¶¶29 and 57-59.

imposition of excessive and erroneous penalties by the Governorate of Alexandria cannot be upheld.

D. ONYX'S APPLICATION FOR A LICENSE TO COLLECT AND HANDLE MEDICAL WASTE

(1) The Parties' Positions

a. Claimant's Position

318. The Claimant argues that the Egyptian authorities' handling of Onyx Alexandria's application for a license to collect and handle medical waste, required for Onyx to provide the services agreed in the Contract, breaches the Respondent's obligation to provide fair and equitable treatment.

319. The Claimant's position evolved throughout the proceedings. It initially contended, on the basis of the first Witness Statement by Mr Hansen, that Onyx Alexandria had never received a license from the Ministry of Health to handle medical waste; that Onyx Alexandria was never in a position to comprehend properly the legal and administrative requirements for the granting of such licence; and that the Governorate had paid only half of the contractual fees for the services Onyx provided.[414] In the Reply, the Claimant conceded that Onyx Alexandria did obtain the required license eventually (on 23 August 2010) and offered instead a pointed criticism of the manner in which the Governorate and the Minister of Health handled Onyx's application for that license and a description of the losses that Onyx incurred as a result.

320. First, the Claimant criticises the delay of three years and a half for the granting of a license despite the fact that Onyx Alexandria had met the legislative and administrative requirements, and notwithstanding the company's best efforts in conveying that to the relevant authorities.[415] For the Claimant, that delay results in a breach of the Respondent's duties to act with transparency and good faith.[416]

[414] Cl. Mem. Merits, ¶195.
[415] Cl. Rep. Merits, ¶302.
[416] Cl. Rep. Merits, ¶303.

321. Second, the Claimant criticises the decision of the Governorate to require Onyx Alexandria to start handling medical waste by 18 February 2007 on an "experimental basis" in full awareness that the Onyx had not yet obtained a license from the Ministry of Health.[417] That decision would have forced Onyx Alexandria to provide services for which it was never adequately compensated, given that in the later years of the Contract the company was handling more medical waste than the 50% envisaged for services provided on an experimental basis.[418] That decision would also have forced the company to operate "dans l'illégalité" and exposed it to the "risque d'une double sanction: une sanction financière, d'abord – pénalité et diminution de la redevance – et [une sanction] pénale".[419] At the same time, Counsel for the Claimant conceded that the Governorate had made attempts to expedite the process for the granting of a license to Onyx Alexandria.[420]

322. Third, the Claimant points to the lack of coordination between Egyptian authorities, evidenced by the fact that, while both the Governorate and the Ministry of Environment had approved the method of autoclaves for the handling of medical waste by 2005, it took the Ministry of Health until 2009 to complete the process.[421] The Claimant also complains about the "unjustified" and "irrational" recommendations that the Ministry of Health made to Onyx Alexandria, and about the fact that the responsible administrative division – the Environmental Affairs Central Administration – was insistent in making recommendations on matters unrelated to medical waste, such as Onyx Alexandria's handling of industrial waste. Those matters, the Claimant explains, were under the purview of the Ministry of Environment and Onyx had already obtained all the required licences from that organ.[422]

b. Respondent's Position

323. The Respondent first and foremost criticises the manner in which the Claimant puts forth its claim on medical waste. It points, in particular, to the lack of substantiation of the arguments advanced in the Memorial (based solely on Mr Hansen's Witness Statement)

[417] Cl. Rep. Merits, ¶¶169-171.
[418] E.g. Cl. Rep. Merits, ¶¶193 and 200.
[419] Tr. Closings Day 1 (French Version) Hervé 27:14-18.
[420] Tr. Closings Day 1 (French Version) Hervé 27:25-28.
[421] Cl. Rep. Merits, ¶174.
[422] Cl. Rep. Merits, ¶¶177-178.

and to the Claimant's change of course between the Memorial and the Reply, with the Claimant conceding that, contrary to what it had originally argued, Onyx Alexandria did eventually obtain a license for the handling of medical waste.[423]

324. Second, the Respondent argues that the Egyptian authorities did not breach any transparency duty as the Claimant had always known that it had to obtain the required license under Egyptian law, as evidenced by the Tender and the Claimant's offer. It notes, furthermore, that the rules with which Onyx Alexandria had to comply (namely Law No. 4/1994 and its Executive Regulations) were easily accessible.[424]

325. Third, the Respondent disagrees that the Governorate acted arbitrarily or unjustly, as Onyx was not forced – but rather agreed – to start providing its services "on an experimental basis" on 12 February 2007. That being the case, Onyx was paid proportionately for the amount of medical waste actually handled, and suffered no demonstrable harm as a result of the alleged mishandling of its license application.[425] The Respondent emphasises that there is no "abuse of right, bad faith, unreasonableness, arbitrariness and injustice" in paying only for services actually provided.[426]

326. Fourth, according to the Respondent, the Minister of Health did not treat Onyx unfairly by requiring further proof that the proposed method of treatment of medical waste (the autoclaves) was adequate. The series of visits that its authorities paid to Onyx's installations; the meetings held with Onyx representatives; the voluminous correspondence in the relevant period; and the committees established to look into the technical specifications of the project all attest to Egypt's constructive approach to getting Onyx through the process while ensuring that the applicable regulations were complied with.[427] In this connection, the Respondent adds that the Governorate itself did its best to assist Onyx with the process of obtaining a license, as evidenced by the correspondence between the two entities.[428] Counsel for the Respondent pointed out that the delay about which the

[423] Resp. C-M. Merits, ¶760; 765-768; Resp. Rej. Merits, ¶¶171-174.
[424] Resp. C-M. Merits, ¶¶779-798.
[425] Resp. C-M. Merits, ¶¶814-816.
[426] Resp. C-M. Merits, ¶¶620-621.
[427] Resp. Rej. Merits, ¶¶179-181.
[428] Resp. Rej. Merits, ¶181.

Claimant complains took place because "Veolia was late in initiating the environmental impact assessment, and it was late in providing the relevant documents in order to obtain the license".[429]

327. Finally, the Respondent emphasises that as a matter of law the threshold for finding a breach of fair and equitable treatment is high, requiring some form of deliberate action or demonstrable neglect.[430] A breach of Article 3 of the BIT would not ensue from a mere delay in providing a license, even more so if the host State "was actively involved in the process" as the record shows was the case with the Egyptian authorities.[431] In this connection, the Respondent refers to the awards in *Genin v. Estonia* and *GAMI Investments Inc v. Mexico*.

(2) The Tribunal's Analysis

328. The Parties agree on the fact that Onyx Alexandria had the obligation, under the Contract, to ensure the collection and handling of medical waste and that it had to obtain a number of licenses and administrative authorizations to do that, namely: (i) the approval by the Egyptian Environmental Affairs Agency (EEAA) of the Environmental Impact Assessment (EIA) prepared by Onyx; (ii) a license from the Ministry of Health to collect and handle medical waste; and, (iii) a license from the Ministry of Housing for the treatment unit. The approval of the EEAA and the license of the Ministry of Housing were obtained regularly and without delay; thus, the dispute between the Parties focuses on the conditions under which Onyx Alexandria was allegedly forced by the Governorate to start handling medical waste on an "experimental basis" pending the issuance of the license by the Ministry of Health; the alleged contradictory conduct and lack of coordination of various Egyptian authorities involved in the granting of the license, and the delay of three and a half years for the granting of a license by the Ministry of Health. These issues are analysed below.

[429] Tr. Closings Day 1 (English Version) Khayat 194:2-4.
[430] Resp. Rej. Merits, ¶634.
[431] Resp. Rej. Merits, ¶634.

a. Alleged Imposition on Onyx to Start Collection of Medical Waste and Contradictory Conduct of Governmental Authorities

329. The Tribunal notes that it took some time, after the conclusion of the Contract, for the parties to agree on whether the method of incineration of medical waste envisaged in the Tender and Contract specifications or the autoclaves system of waste disposal proposed by Veolia Propreté was the most appropriate method for the handling and treatment of medical waste. It was only in May 2004, after a visit to France by the Secretary-General of the Governorate, General Bassiouni, arranged by Onyx Alexandria, that a meeting was convened to take a decision on the matter. General Bassiouni's visit was organized by Onyx so that he could see in person the autoclaves method, which was being used by Veolia in France and other European countries. At the meeting of 5 May 2004, the Secretary-General briefly exposed "the disposal of medical waste using the 'autoclave' method, which he discovered during his visit to France" and pointed out that, while under the Contract's conditions and specifications it had been foreseen that Onyx Alexandria would use the incineration method, "the Autoclave method was acknowledged as having several advantages and as being an environment friendly method which does not produce pollution, providing a higher level of safety compared to the incinerating method, and for this reason the Governorate wishes to use that method".[432]

330. At the same meeting, the Governorate requested Onyx Alexandria to commence the execution of the new system by mid-July 2004, although the representatives of Onyx pointed out that this might need much more time due to the technical issues to be dealt with and the need to obtain the required license from the Ministry of Health. Nonetheless, the representatives of Onyx "requested the Governorate to address the Company an official letter asking for the activation of the medical waste disposal service using the 'autoclave' method."[433] On 22 May, the Governorate wrote a letter to Onyx Alexandria authorizing it to substitute the technique of incineration originally proposed with that of autoclaves.[434]

[432] Minutes of the meeting held on 5 May 2004 by the Committee created pursuant to Decree No. 181/2004, R-059, p.3.
[433] Minutes of the meeting held on 5 May 2004 by the Committee created pursuant to Decree No. 181/2004, R-059, p.4.
[434] Letter from the Governorate of Alexandria to Onyx Alexandria, 22 May 2004, C-030, p.1.

331. On 18 April 2005, the Central Directorate for Environmental Impact Assessment of the Ministry of Environmental Affairs approved Onyx Alexandria's EIA on the handling and treatment of medical waste. Subsequently, in the autumn of 2006, Onyx established a centre for the treatment of medical waste in El Hammam. On 12 February 2007 a meeting was held at the Governorate at which it was decided that Onyx would begin to collect and treat medical waste coming from public and military hospitals on 18 February 2007 until it was confirmed, after a proper review, that the collection and disposal of medical waste and the execution of the sterilizations was proper. According to the minutes of that meeting:

> *Onyx shall start the implementation of the service of collection, processing and disposal of medical waste for the Government hospitals and the Armed Forces hospitals on Sunday 18/02/2007 as a first stage, provided that this is followed by the entry of service for the rest of the units. In case of non-commencement of implementation of the service at this location, the financial penalty related to the same shall be imposed.*[435]

332. In letters sent to Onyx on 13 and 20 February, the Undersecretary of the Ministry of Health in Alexandria reminded the company that, pursuant to Law No. 4/199, it was forbidden to transport hazardous waste (such as medical wastes) without a license and advised it that it should request the Central Administration for Environmental Affairs at the Ministry of Health in Cairo to obtain the license. On 1 March 2007, Onyx Alexandria submitted its application for the license to the Central Directorate for Environmental Affairs. The Claimant complains of this situation, and states that:

> *Prise entre le marteau et l'enclume, Onyx Alexandria a ainsi dû se résoudre, face à l'insistance du Gouvernorat d'Alexandrie et sous la menace de pénalités, à commencer la collecte et le traitement des déchets médicaux dès le 18 février 2007, sans pourtant avoir de licence d'exploitation de la part du Ministère de la Santé. Pour pallier à cette situation délicate, Onyx Alexandria n'a pu faire autrement que de présenter cette activité comme « expérimentale », même si elle collectait et traitait environ 1,4 tonnes par jour de déchets médicaux dès février 2007 (soit environ 30% des 5 tonnes de déchets médicaux produits prévus dans l'appel d'offres).*[436]

[435] Minutes of the meeting held on 12 February 2007 by the Governorate of Alexandria and Onyx, R-065, pp.5-6.
[436] Cl. Rep. Merits, ¶168.

333. It is in light of this state of affairs that the Claimant alleges to have been forced, as a result of the decision of 12 February 2007, to operate "dans l'illégalité" and exposed to the "risque d'une double sanction: une sanction financière, d'abord – pénalité et diminution de la redevance – et [une sanction] pénale".[437] The Claimant, however, conceded during the hearing that efforts were made by the Governorate to help expedite the granting of the licence by the Ministry of Health. Nevertheless, the Claimant argues that the acts and omissions of the Egyptian authorities involved a breach of the Claimant's legitimate expectations and constituted violations of the obligations of transparency, good faith and not to engage in arbitrary and unjust behaviour.

334. The Tribunal notes that the minutes of the meeting of 12 February 2007, which was attended by representatives of Onyx Alexandria, indicate that a decision was taken, but contain neither an agreement by the representatives of Onyx, contrary to the assertions by the Respondent, nor their clear objection to them. At the same time, there is no indication that the representatives of Onyx raised the issue of the license as an obstacle to the commencement of operations. It is simply stated in the minutes that "[d]uring the [discussions], the following was decided".[438] The decision came with the warning that "[i]n case of non-commencement of implementation of the service at this location, the financial penalty related to the same shall be imposed".[439] However, this did not expose Onyx Alexandria to financial penalties beyond those already contemplated by the Contract, since Article 28.2 therein provides that "in case the medical waste is not collected from hospitals and health centers, a penalty of one hundred Egyptian Pounds (EGP 100) shall be imposed for each breach".[440] Nor could it be considered, for the same reason, to constitute a threat capable of forcing it to perform acts beyond those envisaged in the Contract for the collection of medical waste.

335. The Tribunal notes that in a letter of 22 December 2008, Onyx informed the Governorate that, in light of the Ministry of Health's delay in granting the license, it would be "obliged to stop the collect and treatment of the medical waste from the government hospitals…

[437] Tr. Closings Day 1 (French Version) Hervé 27:14-18.
[438] Minutes of the meeting held on 12 February 2007 by the Governorate of Alexandria and Onyx, R-065, p.5.
[439] Minutes of the meeting held on 12 February 2007 by the Governorate of Alexandria and Onyx, R-065, pp.5-6.
[440] Contract, C-012, ¶28.2.

after nearly two years from what was called 'experimental operation' based on the governorate request, amounting about 50% of the total volume of Alexandria medical waste".[441] If Onyx was in a position to announce that it would stop providing the service that the Governorate had "requested", it does not seem that it had been forced to provide such a service, let alone forced to do so as a result of an exercise of governmental authority.

336. It is true that the decision of the Governorate of 12 February 2007 resulted in a situation of contradictory instructions from various government authorities in Egypt at the time, which corroborates the Claimant's argument that there was lack of coordination among those authorities in ensuring the execution of Onyx's contractual obligations in the collection and treatment of medical waste in the Governorate of Alexandria while complying with local laws and regulations on the transportation of hazardous waste. However, Onyx's letter of 22 March 2007 addressed to the Secretary-General of the Governorate, in which it replied to some of the issues raised by the Ministry of Health, appears to have clarified the situation for all concerned by pointing out that:

> *[T]he company has not actually begun working, waiting to obtain the approval of the Ministry of Health to authorize this activity and what is happening lately is just some experiments upon Alexandria Governorate's request conducted under the control and censorship of the University of Alexandria.*[442]

337. In view of this explanation by Onyx itself which to a large extent justifies and accounts for the decision adopted on 12 February 2007 to commence the collection and treatment of medical waste by the method of autoclaves pending the issuance of the related license, the Tribunal does not find that such a decision frustrated the legitimate expectations of the Claimant or otherwise breached the fair and equitable treatment standard.

b. The Delay in the Granting of a License by the Ministry of Health

338. In its Memorial, the Claimant initially affirms that "malgré des promesses d'obtention rapide de la licence d'exploitation, Onyx Alexandria ne l'a jamais reçue", adding that the

[441] Letter of Onyx Alexandria to the Governor of Alexandria, 22 December 2008, C-277, p.2.
[442] Letter from Mr. Yannick Morillon (Onyx Alexandria) to the Secretary-General of the Governorate of Alexandria, 22 March 2007, R-071, p.1.

Ministry of Health "n'a jamais accordé de licence d'exploitation".[443] However, in its Reply, it states that the license was eventually received on 23 August 2010. The Claimant maintains, however, that it took the Egyptian authorities more than three years to issue the license, while Onyx Alexandria fulfilled all the conditions required for obtaining the license. According to the Claimant, the Egyptian authorities have never explained the reason for this delay and the delay itself is a breach of the Respondent's obligation to provide fair and equitable treatment, characterizing the conduct of Egyptian authorities on this matter as "abusif, contradictoire, non-transparent, voire discriminatoire".[444] For the Respondent, the delay took place because "Veolia was late in initiating the environmental impact assessment, and it was late in providing the relevant documents in order to obtain the license".[445] The Respondent also rejects the Claimant's allegations of breach of the standard of fair and equitable treatment, under the BIT, which it maintains cannot ensue from a mere delay in granting a license.

339. The Tribunal notes that Onyx Alexandria submitted to the Ministry of Health its application to obtain the license on 1 March 2007, less than a month after the decision by the Governorate of Alexandria that the collection, handling and treatment of medical waste through the method of autoclaves should start at a first stage, and in an experimental manner, with public and military hospitals. According to the evidence on the record, what took a long time was the decision by the Governorate whether the method of incineration, as provided in the tender documents, or that of autoclaves, as proposed by Onyx Alexandria, should be used in medical waste treatment and disposal. It was only on 22 May 2004 that Onyx Alexandria received the authorization from the Governorate to substitute the technique of incineration with that of autoclaves. An EIA could not have been submitted by Onyx Alexandria to the Central Directorate for Environmental Affairs prior to such a decision. Thus, the record does not reveal that the Claimant's subsidiary was solely responsible for the late submission of its EIA for approval by the competent authorities.

[443] Cl. Mem. Merits, ¶106.
[444] Cl. Rep. Merits, ¶159.
[445] Tr. Closings Day 1 (English Version) Khayat 194:2-4.

340. The record also shows that what rendered the process long was the enquiry by the Ministry of Health on whether the autoclave method was appropriate, and the multiple on-site visits conducted by various committees of the Ministry to Onyx's waste management facilities. Indeed, on 14 March 2007, two weeks after the request from Onyx for the license, the Central Directorate for Environmental Affairs, in a letter to the Governorate, questioned the appropriateness of the autoclave system for all kinds of medical waste treatment. In the letter, it was stated, *inter alia*, that "the file didn't specify the location of medical hazardous waste storages where wastes are stored temporary "; and that "the file envisages that the final disposal of the wastes will be through shredding devices and sterilization, noting that this process doesn't fit all kinds of waste including the filters of kidneys purification and others that require a huge capacity to shred and breakage, as well as it doesn't fit chemical waste, pathological waste and blood bags and others".[446]

341. On 22 March 2007, Onyx Alexandria replied through the Governorate that the company:

> *presented the manual of the Autoclave 'the device of shredding-[sterilization]' among the documents attached to the authorization request sent to the Environmental Affairs Central Administration. This manual illustrates the ability of the devices to shred all medical hazardous waste including the filters of kidneys purification and others, as well as their ability to shred and autoclave the pathological waste, the blood bags and others. This was 100% proved by the analysis' results of the treatment outcomes conducted by the competent laboratories at the Public Health High Institute of Alexandria University. Knowing that the only waste not to be treated in such system is the chemical and the radiant waste that needs to be treated first inside hospitals and then transferred to the hazardous waste landfill in El Nasreya or to the incinerators.*[447]

After several exchanges of letters between the Ministry of Health and Onyx Alexandria on this matter, the Central Directorate for Environmental Affairs organized, on 5 December 2007, an on-site visit to Onyx's medical waste management facilities, making a number of recommendations, to which Onyx responds in a letter dated 29 January 2008.

[446] Letter from the Chairman of the Environmental Affairs Central Administration to the Secretary-General of the Governorate of Alexandria, 14 March 2007, R-070, p.1.
[447] Letter from Mr. Yannick Morillon (Onyx Alexandria) to the Secretary-General of the Governorate of Alexandria, 22 March 2007, R-071, p.1.

342. The first visit was followed by a second visit on 3 March 2008, and a third visit on 11 October 2008, both of which came up with further recommendations to which Onyx Alexandria responded. In the meantime, the Governorate of Alexandria wrote a letter to the Ministry of Health on 25 September 2008 to inquire about the status of Onyx's application and the reasons for the delay in granting the license for the handling, treatment and disposal of medical waste. The record does not indicate that a reply was received to this letter. However, on 14 October 2008, the Central Directorate for Environmental Affairs informed the Assistant Minister of Health that Onyx had disregarded some of its recommendations, while acting on others.[448] On 2 November 2008, Onyx addressed these complaints in a letter to the Ministry of Health.

343. On 21 December 2008, a meeting was convened between representatives of the Ministry of Health, the Governorate and Onyx in which Onyx expressed its dissatisfaction with the Ministry's handling of its application for a license. Onyx informed the Governorate that it would end the experimental phase of collection/handling of medical waste on 31 December until the license was finally granted. The meeting recommended that a committee be formed to inspect the medical waste dumping sites and landfills in Alexandria. On 31 December 2008, the committee formed to visit the waste dumping sites and landfills, after making several recommendations to be implemented by Onyx Alexandria on, *inter alia*, storage of medical waste, hazardous medical waste transportation vehicles, collection operations, shredding and sterilization, and sanitary landfills, decided "to grant the Company an approval to obtain licenses if the latter executed these recommendations after that this Committee or the delegates of the authorities participating in it verify this execution two week as of the date of this report".[449]

344. After further exchanges of letters between Onyx Alexandria and the Ministry of Health on compliance with the recommendations of the above-mentioned committee between January and May 2009, and a meeting held with the Minister of Health, in the presence of representatives of Onyx and the Governorate on 23 February 2009, the Commission for

[448] Letter from the Director of the General Administration for Environmental Health to the Minister of Health, 14 October 2008, R-075.
[449] Report from a committee constituted by representatives of the Governorate of Alexandria and Onyx Alexandria, 31 December 2008, R-076, p.5.

Hazardous Waste and Material, an organ of the Environmental Affairs Central Administration, approved Onyx's system for the handling of medical waste.[450] This was not, however, the end of what the Claimant referred to in its Reply as "la saga des déchets médicaux".[451] Indeed, it took more than another year, and several other exchanges of letters between Onyx Alexandria and the Ministry of Health, before a license was finally issued to Onyx on 23 August 2010 for the handling, treatment and disposal of medical waste.

345. The Tribunal observes that the protracted enquiries by the Ministry of Health which involved various committees, meetings, and on-site visits lasting over three and half years undoubtedly constituted an excessive bureaucratic exercise and created difficulties for Onyx to accommodate, on the one hand, the request by the Governorate to start the collection, handling and treatment of medical waste through the autoclave method, and, on the other hand, the repeated delays by the Ministry of Health to grant the license. However, there is no evidence to support the allegations by the Claimant that the actions and omissions of the Egyptian authorities, be they those of the Governorate or of the Ministry of Health, and its Central Administration for Environmental Affairs, constitute abusive or discriminatory behaviour. Indeed, the Claimant has not presented to the Tribunal evidence indicating bad faith on the part of the Ministry of Health or the Governorate,[452] or actions which clearly discriminated against it. It did not also show that the enquiries and recommendations made by the competent authorities of the Ministry of Health were simply spurious administrative requirements which were not provided for by the applicable laws and regulations. Moreover, the granting of the license was never refused, as originally alleged by the Claimant in its Memorial.

[450] Minutes of the meeting held on 12 February 2007 by the Governorate of Alexandria and Onyx Alexandria, R-065.
[451] Cl. Rep. Merits, ¶158.
[452] The Tribunal observes, in this connection, that bad faith is not an indispensable element of a breach of FET. In the words of the tribunal in *Jan de Nul v. Egypt*, "[f]air and equitable treatment is a flexible and somewhat vague concept, which must be appreciated in concreto taking into account the specific circumstances of each case. It is accepted today that a breach of fair and equitable treatment does not presuppose bad faith on the part of the State": *Jan de Nul N.V., Dredging International N.V. v. Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, CLA-136, ¶185. See also *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/08, Award, 12 May 2005, CLA-242, ¶280 and *Azurix Corp v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶372.

346. The Tribunal notes the Claimant's statement that it received support from the Governorate in its efforts to overcome the bureaucratic handling of its application by the Ministry of Health, and to expedite the process. Moreover, the Claimant confirms that:

> *[m]algré ces difficultés, Onyx Alexandria est tout de même parvenue à traiter toujours plus de déchets médicaux, dépassant le tonnage stipulé dans l'appel d'offres et atteignant près de 70% de la production totale d'Alexandrie (à savoir près de 7 tonnes journalières) à l'été 2010.*[453]

The bureaucratic delays do not, therefore, appear to have prevented it from performing its obligations under the Contract. The Claimant further confirms that it was able to execute all the recommendations made by the various committees of the Ministry of Health which indicates that at no time did it fundamentally disagree or reject those recommendations as being abusive or discriminatory throughout the period in which the process lasted. Consequently, the Tribunal concludes that the actions and omissions of the Egyptian authorities of which the Claimant complains do not rise to the level of a breach of fair and equitable treatment, as provided under Article 3 of the BIT.

347. The Claimant raises also the issue of non-payment by the Governorate for all the services provided in the collection, handling and treatment of medical waste. The Tribunal notes, however, that the "experimental" collection, handling and treatment of medical waste was an arrangement negotiated and agreed upon between the Claimant and the Governorate in the context of their Contract, and did not involve, according to the evidence before the Tribunal, any sovereign interference or the exercise of sovereign authority on the part of the Respondent. Thus, the dispute between the parties to the Contract on the non-payment or delayed payment for such contractual services is a matter which falls squarely within their contractual relations and does not in any way trigger Article 3 of the BIT.

[453] Cl. Rep. Merits, ¶200.

E. THE REMUNERATION OF ONYX FOR SERVICES PROVIDED

(1) The Parties' Positions

a. Claimant's Position

348. The Claimant argues that the Respondent has breached its obligations of transparency and to refrain from arbitrary and unjust behaviour by withholding payment for Onyx's services in two ways.

349. First, the Governorate failed to pay invoices relating to the operation of the landfill in El Hammam from the year 2008 onwards on the basis of a report issued by the Central Auditing Agency (CAA) in March 2009.[454] In that report, the Claimant maintains, the CAA wrongly concluded that Onyx Alexandria had shut the landfill in Borg El Arab in October 2003 and, since then, solely operated the landfill in El Hamman, which would have placed the company in breach of the Contract. On the basis of Mr Hansen's account of a meeting held in Spring 2009, the Claimant contends that Onyx Alexandria was informed that, in light of said report, the Governorate would not settle the invoices relating to the operation of the landfill in El Hamman. It adds that it was only given access to the CAA report in November 2011, that is, after the termination of the Contract. For that reason, it did not have the opportunity to present a defence against the allegations until January 2012.[455]

350. In the Claimant's Closing Statement, Counsel clarified that the amount owed by the Governorate to Onyx Alexandria in connection with the landfill in El Hammam was of the order of 39.6 million Egyptian Pounds.[456] It was contended that by withholding payment for such additional services:

> *L'Égypte a… retenu Veolia Propreté en otage en violation des diverses composantes du traitement juste et equitable" and that "[d]e tels agissements constituent un comportement manifestement coercitif, arbitraire, injuste, contraire aux attentes légitimes de Veolia Propreté et à l'obligation de l'Égypte d'agir de bonne foi, y*

[454] Cl. Mem. Merits, ¶¶196-198.
[455] Cl. Mem. Merits, ¶198.
[456] Tr. Closings Day 1 (French Version) Hervé 29:47-48.

compris en ne nuisant pas aux investissements de Veolia Propreté.[457]

The Claimant stresses that the decision to operate two seasonal landfills, one in El Hamman for the summer, the other in Borg-El-Arab for the remainder of the year, was made by the Egyptian Prime Minister himself, with the Egyptian Government agreeing to incur the consequent additional costs.[458]

351. Second, the Claimant argues that the Governorate failed to pay Onyx Alexandria for its general services for a number of months in 2011, prompting Onyx to serve its notice of termination of the Contract. In the Claimant's Closing Statement it was argued by reference to a letter sent by the Governor of Alexandria to Jean Pierre Hansen on 27 August 2011, that the default was not caused by difficulties faced by the Governorate, but was rather a deliberate decision of the Ministry of Finance resulting from the audit then being conducted by the CAA.[459] Counsel then submitted that the CAA, "qui est une émanation de l'État", interfered with the Contract "de manière non transparente et en toute mauvaise foi".[460]

352. The Claimant rejects the Respondent's contention that no fees were due for the month of February 2011 because no services had been provided in connection with Onyx Alexandria's invocation of *force majeure* in the context of the Egyptian revolution. Rather, the Claimant maintains that, except for a couple of days that month, Onyx proceeded to clean the city of Alexandria as usual.[461]

353. The Claimant relies on the awards in *SGS v. Philippines* and *SGS v. Paraguay* for the view that contractual defaults may constitute a breach of the fair and equitable treatment standard.[462] In any event, as described above, its position is that the contractual defaults were committed in connection with the exercise of public power by Egyptian authorities, in particular the CAA. In the Claimant's Closing Statement, Counsel added that the lack of payments is contrary to the fair and equitable treatment standard because, being part of

[457] Tr. Closings Day 1 (French Version) Hervé 28:9-13.
[458] E.g. Tr. Closings Day 1 (French Version) Hervé 28:21-44.
[459] Tr. Closings Day 1 (French Version) Hervé 32:26-33:6.
[460] Tr. Closings Day 1 (French Version) Hervé 33:7-9.
[461] Tr. Closings Day 1 (French Version) Hervé 30:46-31:2.
[462] Cl. Mem. Merits, ¶165.

the Respondent's strategy to reduce Onyx Alexandria's revenues, it showcases an "intention de nuire" and a "mode opératoire qui est constant, qui est récurrent".[463]

b. Respondent's Position

354. The Respondent contends that there is no evidence beyond the Witness Statement of Mr Hansen indicating that the delays in settling the bills for the operation of the landfill in El Hamman were motivated by the CAA report.[464] Rather, the Respondent notes that the Governorate only relied upon the report to ask Onyx Alexandria for compensation for previous contractual breaches, and that followed the termination of the Contract.[465] The Respondent's position is that the Governorate "always paid, as soon as possible and to the extent possible, the amounts invoiced".[466] In addition, the Respondent claims that the Claimant failed to show that the investigation conducted by the CAA was in any way arbitrary.[467]

355. In addition, the Respondent explains that the CAA is an independent and autonomous body under Egyptian law, the reports of which are strictly internal.[468] As a result, Onyx Alexandria had no right to view the report and the CAA did not have any obligation to make it available. The fact that it eventually did so illustrates Egypt's commitment to transparency.[469] Finally, the Respondent points out that the Claimant suffered no prejudice in connection with or as a result of the CAA Report.[470]

356. As regards lack of payment for general services in the aftermath of the 2011 Egyptian Revolution, the Respondent first of all reiterates that a mere contractual breach cannot without more constitute a breach of fair and equitable treatment.[471] It disagrees that the awards in *SGS v. Philippines* and *SGS v. Paraguay* help the Claimant's case, because the Claimant has failed to show that the Governorate's default constituted an unjustified refusal

[463] Tr. Closings Day 1 (French Version) Chahine 34:36-40.
[464] Resp. Rej. Merits, ¶645.
[465] Resp. C-M. Merits, ¶133.
[466] Resp. C-M. Merits, ¶603.
[467] Resp. C-M. Merits, ¶622.
[468] Resp. C-M. Merits, ¶131.
[469] Resp. C-M. Merits, ¶¶607-608.
[470] Resp. C-M. Merits, ¶606.
[471] Resp. C-M. Merits, ¶616.

to pay with wide-reaching implications for the Contract.[472] The Respondent's position is that the Governorate was doing what it could to pay for Onyx's services at an exceptionally difficult time, namely the outbreak of the Egyptian revolution.[473] In its Opening Statement, Counsel highlighted that "what matters here is that the Governorate did not dispute, and never disputed, that it had the obligation to pay" for the invoices concerning Onyx Alexandria's general services.[474]

357. The Respondent further argues that it was justified in not settling the invoice for the month of February 2011 given that Onyx had invoked *force majeure* and that the Governorate was not in a position to ascertain whether Onyx had provided its services that month.[475] Further, the Respondent disputes the Claimant's argument that Onyx did not receive any payments from the Governorate from February 2011, noting instead that by the time the termination notice was given (on 16 May 2011) some of the invoices had already been settled.[476]

(2) The Tribunal's Analysis

358. The Parties are in disagreement on two issues: first, the withholding of the payment of invoices for the operation of the El Hammam landfill based, according to Claimant, on a report of Egypt's Central Auditing Agency (CAA) which concluded that Onyx Alexandria had unduly received payments for the El Hammam landfill, which was closed down. Secondly, the alleged lack of payment by the Egyptian authorities for services rendered by Onyx for the first five months of 2011, which, according to Claimant, prompted Onyx to terminate its Contract. For the Claimant, the manner in which payments were withheld in both instances by the Egyptian authorities for services rendered constitutes a breach of the Respondent's obligation of transparency and its obligation to refrain from arbitrary and unjust behaviour. The Respondent disputes the Claimant's allegations and maintains that there was neither lack of transparency nor arbitrary and unjust behaviour on the part of Egyptian authorities with respect to the issue of payments.

[472] Resp. C-M. Merits, ¶625.
[473] Resp. C-M. Merits, ¶¶637-649; Tr. Merits Day 1 (English Version) Caicedo 130:20-132:4, and 134:13-135:4.
[474] Tr. Merits Day 1 (English Version) Caicedo 133:2-5.
[475] Resp. C-M. Merits, ¶200.
[476] Resp. C-M. Merits, ¶642.

359. The Claimant's assertion that there was a link between the report of the CAA and the non-payment by the Governorate of the invoices related to El Hammam is based on the Witness Statement of Mr. Hansen, the Managing Director of Onyx, in which he stated that:

> *Fin mars 2009, des représentants du Central Auditing Authority (« CAA ») se sont présentés sur nos installations pour effectuer un contrôle. D'après le Gouverneur, la CAA a présenté un rapport oral au Gouverneur peu de temps après cet audit accusant Onyx Alexandria de détournement de fonds concernant l'exploitation de ses deux centres d'enfouissement techniques ('CET').*[477]

According to Mr. Hansen, starting from the date of this oral report by the CAA to the Governor, the Governorate stopped its payments to Onyx for the invoices related to the El Hammam landfill including those of 2008.

360. Thus, the Claimant seeks to establish a direct link between the non-payment or delayed payment of the invoices for El Hammam and the CAA Report. The Tribunal notes, however, that there is nothing in the Report of the CAA, which was communicated to the Claimant in 2012 after the termination of the Contract, which indicates that Onyx had committed a "détournement de fonds"; nor is there any documentary evidence in the case file to corroborate Mr. Hansen's statement that there was a direct link between the CAA report and the non-payment or delayed payment of the invoices for the El Hammam landfill.

361. The Respondent asserts that, despite the fact that CAA reports are not meant to be made public under the law (Law No. 144/1988, establishing the Auditing Agency), the Governorate communicated a copy of the report to the Claimant, for the sake of transparency, when it decided to rely on it against Onyx after the termination of the Contract to claim compensation for contractual breaches allegedly committed by Onyx. The Claimant does not contest those assertions.

362. With regard to the issue of payments for services rendered in 2011, the Parties are in agreement that some of those payments had been made, but not the totality of the amounts due to Onyx. They disagree, however, on whether there was a delay due to the

[477] Witness Statement, Jean-Pierre Hansen, 16 September 2013, ¶77.

circumstances prevailing in Egypt at the time, or a purposeful withholding of payments. The Claimant affirms that "[a]u 3 Juillet 2011, le Gouvernorat avait effectivement réglé la facture du mois de janvier 2011 et une partie de la facture du mois de mars 2011. Cependant, les factures pour les mois de février et d'avril 2011 ainsi que le solde du mois de mars demeuraient impayés".[478] The Claimant, however, adds that only a part of the invoice for the month of April was paid on 31 July 2011; while the one for the month of May which was submitted on 2 June 2011 was never settled. Finally, it states that the invoices for June to October 2011 were never paid to Onyx.[479]

363. According to the Respondent, "the Governorate did not refuse to pay invoices from February 2011 onwards. Rather, it fell behind on its payments at this time because of the political and administrative vacuum as well as serious financial difficulty which arose from the Revolution".[480] The Respondent further affirms that "[d]espite these serious difficulties… [the Governorate] continued to pay portions of Onyx's invoices whenever it was able to access funds… having paid a total of EGP 20,919,987 between March and July 2011 in seven instalments".[481] The Respondent asserts that the Governorate did not pay the February 2011 invoice because it was served a force majeure notice by Onyx and there was no control of the services it provided by the Control Department of the Governorate during the month of February.[482] The Claimant maintains that its force majeure notice applied to only two days of interruption due to the riots in Alexandria, but that for the rest of the month Onyx performed its cleanliness services as usual.

364. In response to the arguments of the Claimant on refusal of payment or their purposeful withholding by the Governorate, the Respondent refers to the minutes of a meeting held between the representatives of Onyx and the Governorate[483] and to a letter from the Governor to Mr. Hansen on 27 August 2011[484] to insist that the Governorate did not have

[478] Cl. Rep. Merits, ¶148.
[479] Cl. Rep., ¶¶148 and 150.
[480] Resp. Rej. Merits, ¶188.
[481] Resp. Rej. Merits, ¶188.
[482] Resp. C-M. Merits, ¶201.
[483] Minutes of the meeting held on 21 September 2011 between the Governorate of Alexandria and Onyx Alexandria, R-111.
[484] Letter from Dr. Oussama El-Fouly (Governor of Alexandria) to Mr. Jean-Pierre Hansen (Onyx Alexandria), 27 August 2011, R-104.

bad intentions with respect to the payment of the financial dues to the company, but that the temporary difficulties were due to the force majeure, including the revolution and the disorders that the country was going through during that period.[485]

365. The Tribunal observes that during the period under discussion (from January to October 2011) Egypt experienced a popular uprising, which involved rioting and widespread disorder throughout the country, including the burning down of the buildings of the Alexandria Governorate. It was for this reason that both the Governorate and Onyx Alexandria gave a notice of force majeure to each other, although the interruption of the activities of the Governorate lasted much longer than those of Onyx. The Respondent has emphasized that the delayed payments were due to the difficulties experienced by Egypt during the revolution of 2011. This does not, however, fully justify the non-payment of the outstanding invoices by the Governorate. Nonetheless, the Tribunal does not consider that there was a purposeful withholding of payment or a repudiation by the Respondent of the amounts due.

366. It is not therefore the view of the Tribunal that there was an arbitrary or unjust behaviour on the part of the Respondent, or that the non-payment of invoices involved a breach of the obligation of good faith. As for the alleged interference by the CAA in the payment of the invoices in a non-transparent manner and in bad faith, as claimed by the Claimant, the Tribunal finds no evidence to substantiate this allegation. The only reference to the CAA in connection with the payment of invoices is to be found in a letter addressed by the Governor to Mr. Hansen on 27 August 2011 in which it is stated that:

> *The Ministry of Finance agreed to pay the amount of EGP 9 million for your dues of the months of July and August 2011, provided that the remaining dues are settled after completion by the Audit Central Agency of its study, auditing and approval of the financial position of the national and foreign cleaning companies contracting with Alexandria Governorate until 30/09/2011. The necessary actions are taken for the disbursement of your dues of July 2011.*[486]

[485] Resp. Rej. Merits, ¶199.
[486] Letter from Dr. Oussama El-Fouly (Governor of Alexandria) to Mr. Jean-Pierre Hansen (Onyx Alexandria), 27 August 2011, R-104.

This sharing of information with Veolia about the status of the payment of arrears shows neither non-transparency nor bad faith on the part of the Respondent.

367. Finally, the Claimant invokes the authority of *SGS v. Philippines* and *SGS v. Paraguay* for the view that payment defaults may constitute a breach of the fair and equitable treatment standard. The Tribunal is, however, of the view that neither of those decisions, which were both rendered on jurisdiction, offers support to the arguments of the Claimant for the following reasons. First, in the *SGS v. Philippines* decision, the Tribunal stated that "an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues" under the FET provision in the applicable BIT.[487] In the instant case, it has not been shown by the Claimant that there was an "unjustified refusal" to pay nor that there was even a clear refusal to pay the amounts due. Secondly, in *SGS v Paraguay*, the Tribunal expressed the view that "a State's non-payment under a contract is… capable of giving rise to a breach of a fair and equitable treatment requirement, such as perhaps where the non-payment amounts to a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of its value".[488] Without necessarily viewing this dictum of the *SGS v. Paraguay* tribunal as a precedent by which it is to be guided, the Tribunal finds that none of the conditions laid down in that pronouncement have been shown to exist in the present case, nor has evidence been adduced to demonstrate that the non-payment in this case could give rise to any of those situations.

368. In light of the above, the Tribunal concludes that there is no evidence to indicate that the Governorate's failure to pay Onyx in a timely fashion (or the non-payment of some invoices) for services rendered in 2011 was prompted by actions or omissions of sovereign character aimed at frustrating the legitimate expectations of the Claimant or that they were due to sovereign interference, including by the CAA. There was simply a failure on the part of the Governorate to meet its financial obligations in a timely fashion as a contracting

[487] *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, CLA-045, ¶162.
[488] *SGS Société Générale de Surveillance S.A. v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, CLA-046, ¶146.

party and this failure cannot, as such, trigger Egypt's responsibility under Article 3 of the BIT.

VII. LIABILITY UNDER ARTICLE 4 OF THE BIT

A. THE CONTENT AND SCOPE OF THE OBLIGATION NOT TO EXPROPRIATE

(1) The Parties' Positions

a. Claimant's Position

369. The Claimant argues that the Respondent has expropriated its investment in breach of Article 4 of the BIT, according to which:

> *Aucune des Parties contractantes ne prendra de mesures d'expropriation, de nationalisation ou de dépossession, directes ou indirectes, à l'encontre d'investissements de ressortissants ou sociétés de l'autre Partie contractante, sauf pour cause d'utilité publique et à condition qu'elles ne soient ni discriminatoires ni contraires à un engagement particulier.*
>
> *Les mesures de dépossession qui pourraient être prises devront donner lieu au paiement d'une juste indemnité dont le montant devra correspondre à la valeur réelle au jour de la dépossession des biens, droits et intérêts dépossèdes….*[489]

370. For the Claimant, the reference to "mesures indirectes" in Article 4 entails that it protects investors from any "creeping expropriation" comprising a series of measures which, in combination, lead to the dispossession of their investment.[490] The Claimant maintains that contractual rights can be the subject of expropriation, as recognised in a series of precedents dating back to *Affaire Rudolf* and *Certain German Interests in Upper Polish Silesia*.[491]

371. The test to determine whether an expropriation has taken place, according to the Claimant, is that of the effective neutralisation of the economic value or enjoyment of the investment, as held in *Electrabel v. Hungary*, *SAUR v. Argentina* and other arbitral awards.[492] In

[489] BIT, RLA-001, p.3.
[490] Cl. Mem. Merits, ¶201.
[491] Cl. Mem. Merits, ¶¶204-205.
[492] Cl. Mem. Merits, ¶207.

applying this test, the host State's intention would be irrelevant so long as the effect of the measures taken is to deprive the investor of the value or enjoyment of its investment, as decided in cases such as *Saipem v. Bangladesh*, *Vivendi II* and *Tecmed v. Mexico*.[493]

372. In its Reply, the Claimant submits that under the case law "dans le cadre d'une expropriation rampante, aucune mesure de la série ne doit nécessairement constituer une mesure d'expropriation". This submission responds to the Respondent's contention that there cannot be expropriation if the measures leading to dispossession consist in contractual breaches, as opposed to sovereign acts.[494] The Claimant maintains that there is no doubt that all the measures in question are attributable to Egypt under the law codified in the Articles on State Responsibility, and argues that for its claim to succeed it suffices that those measures have resulted in the creeping expropriation of its investment.[495]

b. Respondent's Position

373. The Respondent largely agrees with the Claimant's description of the test for expropriation under Article 4 of the BIT,[496] but emphasises that measures resulting in indirect expropriation must produce the same effect that measures of direct expropriation would.[497] In this connection, the Respondent suggests that "complete *deprivation*" of the value of the property is required for a claim of creeping expropriation to succeed.[498] This point is developed in the Rejoinder, where the Respondent contends that the threshold is high. Measures leading to economic unsustainability would not be sufficient to found a claim of expropriation as a "persistent or irreparable obstacle" to the enjoyment of the investment is required.[499] In this connection, it refers to cases such as *Tecmed v. Mexico*, *Telenor v. Hungary* and *Azurix v. Argentina*.

374. As it does in relation to fair and equitable treatment, the Respondent argues that "[c]ontractual behaviour *per se* does not qualify as a 'mesure de dépossession'".[500] It notes

[493] Cl. Mem. Merits, ¶¶208-209; Cl. Rep. Merits, ¶306.
[494] Cl. Rep. Merits, ¶314.
[495] Cl. Rep. Merits, ¶¶313-314.
[496] Resp. C-M. Merits, ¶629.
[497] Resp. C-M. Merits, ¶627.
[498] Resp. C-M. Merits, ¶628.
[499] Resp. Rej. Merits, ¶¶685-689.
[500] Resp. C-M. Merits, ¶345.

that in two cases relied upon by the Claimant – *SAUR v. Argentina* and *Vivendi II* – the respective tribunals made it clear that the relevant acts of expropriation were not of a commercial character, rather consisting in measures taken in the exercise of governmental power.[501] In support of its position, it also relies on the awards in *Waste Management v. Mexico* and *Azurix v. Argentina*.

375. The Respondent submits that the Claimant's Reply does not adequately address the authorities supporting the Respondent's position on the law, and claims that its characterisation of the conduct identified by the Claimant as contractual breaches as opposed to sovereign acts must be considered as conceded.[502]

(2) The Tribunal's Analysis

376. Article 4 of the BIT prohibits either Party to "take direct or indirect expropriation, nationalization, or dispossession measures with respect to investments of nationals or companies of the other contracting Party".[503] There are, however, three exceptions to this prohibition: (a) if such measures are taken for reasons of public necessity; (b) if they are not discriminatory; and (c) if they are not contrary to a specific undertaking. The Claimant complains of indirect expropriation of its investment by the Respondent. It is, therefore, the concept of expropriation in the above provision which is relevant for the purposes of this case.

377. For the definition of expropriation, the Claimant refers to the award in *SAUR v. Argentina* where the tribunal stated that:

> *L''expropriation' consiste en ce que l'État, dans l'exercice de ses pouvoirs souverains, nuit à un investisseur protégé par le traité en le dépossédant du contrôle ou de la propriété d'un investissement protégé. [Le traité], comme d'autres [traités] signés par la France, se centre sur le concept de 'dépossession' comme exigence fondamentale de l'existence d'une expropriation. La dépossession implique que l'investisseur subisse la perte de l'usage et de la jouissance (et pas nécessairement de la propriété) de l'investissement. La définition [du traité] est donc centrée sur*

[501] Resp. C-M. Merits, ¶¶346-348.
[502] Resp. Rej. Merits, ¶674.
[503] BIT, RLA-001, p.10.

> *l'investisseur et non pas sur l'État. Elle n'exige pas que la dépossession de l'investisseur se traduise par une appropriation au bénéfice de l'État (ou d'un tiers agissant pour son compte).*[504]

378. It is, therefore, the disappearance or loss by the investor of one of the essential components of property rights – control, use or enjoyment – that characterizes indirect expropriation. As was emphasized by the tribunal in *El Paso v. Argentina*:

> *The overwhelming majority of investment arbitration cases stand for the proposition that an expropriation usually implies a 'removal of the ability of an owner to make use of its economic rights'. It is generally accepted that the decisive element in an indirect expropriation is the 'loss of control' of a foreign investment, in the absence of any physical taking.*[505]

379. Thus, the tribunal in the *El Paso* case concluded that "a mere loss in value of the investment, even if important, is not an indirect expropriation".[506] It refers, with approval, to the finding in in the *Waste Management* case where the tribunal explicitly pointed out that "the loss of benefits or expectations is not a sufficient criterion for an expropriation, even if it is a necessary one."[507] This Tribunal shares that assessment. In this context, it recalls also the statement by the tribunal in *Lauder v. the Czech Republic*, according to which "[d]etrimental effect on the economic value of property is not sufficient; Parties to [the Bilateral Treaty] are not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State".[508]

380. Turning now to the notion of "measures" the Tribunal observes, in the first instance, that such measures may include regulatory, legislative, administrative or judicial acts adopted by a State in the exercise of its sovereign or police powers which interfere with the essential components of the property rights of the investor as specified above. Secondly, the Tribunal emphasizes that general regulatory measures, adopted by a State in the exercise of its

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[504] *SAUR International S.A. v. Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Libaility, 6 June 2012, CLA-024, ¶366.
[505] *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, CLA-013, ¶245.
[506] *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, CLA-013, ¶249.
[507] *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, CLA-041, ¶159.
[508] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶198.

governmental powers, the object of which is not the taking of property, do not amount to an indirect expropriation unless they are arbitrary, discriminatory or disproportionate to the needs being addressed; or unless they constitute an unreasonable interference with the use and enjoyment of a property.

381. As stated by the tribunal in *Saluka* "it is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare".[509] Similarly the 1961 Harvard Draft Convention on the International Responsibility of States for Injures to Aliens recognized in its Article 10(5) the existence of a category of non-compensable takings:

> *An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful.*[510]

382. Another exception to the legitimate exercise of such regulatory powers which is referred to by the Claimant is that it should not be contrary to a specific undertaking as provided in Article 4 of the BIT. Such specific undertaking could arise from a contractual provision, or a written commitment addressed to the investor, or it may also result from coherent and concrete behaviour specifically directed to the investor that can be objectively determined. In any event, there has to be an identifiable legal commitment on which the investor relied for his investment.

383. In this context, an issue in contention between the Parties is whether the breach of a contractual undertaking can amount to a compensable expropriation under the BIT. It is the view of the Tribunal that contractual breaches by governmental authorities, acting as a contracting party, cannot by themselves give rise to compensable expropriation unless the

[509] *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, CLA-029, ¶255.
[510] Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961) 55 *American Journal of International Law* 545, RLA-390, p.144.

relevant BIT provides otherwise. That is not the case here. As was stated by the tribunal in *Azurix v. Argentina*, "a State or its instrumentalities may perform a contract badly, but this will not result in a breach of treaty provisions unless it is proved that the State or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign".[511] Contractual breaches by governmental organs can give rise to a compensable expropriation only when such organs step out of their role as a contracting party, act in their sovereign capacity or otherwise use the powers of public office to interfere with the property rights of the investor.

384. This type of situation was described as follows by the tribunal in *Vivendi II*:

> *[T]he Province's destructive campaign against CAA and CGE/Vivendi cannot in any circumstance be cast as simple commercial acts of or relating to non-performance by a contracting counter-party. Here we have illegitimate sovereign acts, taken by the Province in its official capacity, backed by the force of law and with all the authoritative powers of public office.*[512]

The Tribunal will therefore have to assess in the first place whether the alleged contractual breaches were accompanied or underpinned by measures adopted by the governmental authorities in the exercise of their sovereign capacity, and not simply in their role as a contracting party relying upon provisions of the Contract. Secondly, the Tribunal will have to determine whether the actions or omissions complained of by the Claimant have had the effect of neutralising the Claimant's investment and depriving the Claimant of the use, control or enjoyment of its property.

B. THE ALLEGED EXPROPRIATORY MEASURES

(1) The Parties' Positions

a. Claimant's Position

385. The Claimant argues that a series of measures taken by the Respondent have jointly brought about the creeping expropriation of its investment, leaving Onyx no choice but to terminate

[511] *Azurix Corp v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶315.
[512] *Compañia de Aguas del Aconquija S.A. et al. v. Argentina ('Vivendi II')*, ICSID Case No. ARB/97/3, Award, 20 August 2007, CLA-042, ¶ 7.5.8.

the Contract. Those are: the economic and social changes effected by the Egyptian authorities; the refusal to restore the economic equilibrium of the Contract; the imposition of unjustified penalties; the refusal to fully pay Onyx for the collection and handling of medical waste; and – what the Claimant describes as "la goutte d'eau qui a fait déborder le vase" – the interruption in the payment for Onyx's services under the Contract from February 2011 until the notice of termination of the Contract in May 2011.[513] That interruption, the Claimant argues, made what had been a serious financial situation untenable, for Onyx could no longer finance its operations, and marked the moment at which the value and enjoyment of the Claimant's investment was neutralised.[514] The Claimant compares the facts of the present dispute with those of *Vivendi II*, in which the tribunal decided that a number measures taken by Argentina had forced the investor to terminate a concession agreement and for that reason constituted an expropriation.[515]

386. The Claimant's case on expropriation was further developed in its Closing Statement, where Counsel argued that the creeping expropriation of Veolia Propreté's investment comprises the Respondent's four alleged breaches of the fair and equitable treatment: failure to restore the economic equilibrium of the Contract; abusive penalties; mishandling of the application for a license and insufficient compensation for medical waste services; and failure to compensate Onyx Alexandria for the operation of the landfill in El Hamman and for general services in the last months of the Contract.[516] At the same time, Counsel specified that two of those breaches – failure to restore the economic equilibrium of the Contract and imposition of abusive penalties – sufficed to ground the expropriation claim.[517]

387. The Claimant notes that the expropriation of its investment was unlawful because it does not meet the requirement in Article 4 of the BIT. That is because the Respondent's measures were not taken for a reason of public utility and were all in breach of the

[513] Cl. Mem. Merits, ¶¶211-216.
[514] Cl. Mem. Merits, ¶216.
[515] Cl. Mem. Merits, ¶217.
[516] Tr. Closings Day 1 (French Version) Chahine 35:10-20.
[517] Tr. Closings Day 1 (French Version) Chahine 35:21-31.

Contract.[518] In addition, the Claimant argues that the Respondent never compensated it for the expropriation as required by the BIT.[519]

388. In its Reply, the Claimant dismisses the Respondent's argument that Onyx terminated the Contract in breach of Egyptian law. It submits that this argument finds no basis in law but explains that it will not deal with it because "[i]l n'appartient pas au Tribunal de décider si la résiliation du Marché par Onyx Alexandria était légale en droit égyptien pour déterminer si les investissements de Veolia Propreté ont été expropriés en violation de l'article 4 du TBI."[520]

b. Respondent's Position

389. The Respondent contests all the factual premises of the Claimant's claim. First, it argues that the Claimant has failed to establish that its investment was destroyed, providing no evidence that the value of its shares in Onyx Alexandria was reduced to zero, that it was unable to pay its employees and suppliers and that the Contract was worthless at the time of termination.[521] The Respondent adds that, as explained in the Second Report prepared by BDO, Onyx Alexandria's value was nil at the time of the alleged expropriation.[522] Second, it denies having forced the Claimant to terminate the Contract, suggesting that the Claimant did so in the aftermath of the Egyptian revolution of 25 January 2011 because it deemed that the investment was not as profitable as expected.[523] Counsel for the Respondent emphasised that, rather than any of the measures that the Respondent took or failed to take, the reason why Onyx Alexandria was never profitable was "Veolia's initial and wilful and repeated misapplication of the economic equilibrium of the Contract", with the company unjustifiably expecting compensation for contractual imbalances at 100%.[524]

390. The Respondent adds that the Government was doing what it could to pay for Onyx's services at that very difficult time; that Onyx could have instead sought to suspend the

[518] Cl. Mem. Merits, ¶¶220-222.
[519] Cl. Mem. Merits, ¶223.
[520] Cl. Rep. Merits, ¶310.
[521] Resp. C-M. Merits, ¶¶633-636.
[522] Resp. Rej. Merits, ¶690.
[523] Resp. C-M. Merits, ¶¶635; 641.
[524] Tr. Merits Day 1 (English Version) Caicedo 141:19-142:18.

Contract; and that the Governorate pleaded with Onyx to refrain from terminating the Contract.[525] In this connection, the Respondent disputes the Claimant's argument that Onyx did not receive any payments from the Governorate from February 2011, saying instead that by the time the termination notice was given (on 16 May 2011) some of the invoices had already been settled.[526] The Respondent's position is that, in short, the measures against which the Claimant complains had neither an "expropriatory effect" nor an "expropriatory intent", and fall short of constituting an expropriation under the requirements laid down in cases such as *Olguin v. Paraguay*.[527]

391. The Respondent also argues that the termination of the Contract, performed by Onyx Alexandria in bad faith, breached Egyptian law and the relevant contractual terms so that the Claimant cannot now seek to rely on its own wrongdoing.[528] This was the case, *inter alia*, because: the Claimant failed to comply with Article 30.2 of the Contract, according to which a notice may be given if "[t]he Governorate fails to pay the Contractor's Compensations stated herein for three consecutive (3) months" insofar as it gave premature notice of termination; according to Egyptian contract law, Article 30.2 must be construed as requiring Onyx to pursue termination through CRCICA arbitration; and Onyx was wrong to rely on the lack of payment in the month of February 2011 as that was excused, under the Egyptian law and the Contract, by *force majeure*. The position in and the relevance of Egyptian law were reiterated by Counsel in the Respondent's Opening Statement.[529]

392. Finally, the Respondent reiterates that the key measures about which the Claimant complains – refusal to restore the economic equilibrium of the Contract, penalties and lack of payments – were not sovereign acts, but rather, at best, contractual breaches.[530] As a result, even if they had in fact resulted in the neutralisation of the Claimant's investment, they could not have constituted an expropriation. The Respondent maintains that the

[525] Resp. C-M. Merits, ¶¶637-649.
[526] Resp. C-M. Merits, ¶642.
[527] Resp. C-M. Merits, ¶¶647-649.
[528] Resp. C-M. Merits, ¶¶650-686.
[529] Tr. Merits Day 1 (English Version) Elkhrashy 121:3-130:7.
[530] Resp. C-M. Merits, ¶¶692-697.

present facts contrast sharply with those in *Vivendi II*, where a number of "illegitimate sovereign acts" were held to compound an unlawful expropriation.[531]

393. In its Rejoinder, the Respondent accuses the Claimant of failing to reply to many of its arguments concerning expropriation. In particular, it argues that the Claimant has not proved dispossession or the economic destruction of its investment, especially now that the Claimant has recast the investment as consisting in loss of value in Veolia Propreté's shares of Onyx and loss of receivables from loans made by the parent company to its subsidiary. The Respondent contends that the Claimant: (i) failed to provide evidence of the relevant loan agreements (mere "cash injections" made by Veolia Propreté into Onyx would not constitute "property rights capable of expropriation");[532] (ii) failed to provide evidence that the parent company's claims against its subsidiary are definitively lost, including details of Onyx's liquidation procedures;[533] and, (iii) continued injecting funds into Onyx despite being fully aware of the Governorate's position on the contractual dispute, and as a result "cannot attempt to attribute fault to the Respondent for any losses" caused by its own informed decision to keep Onyx afloat.[534]

394. At the Hearing on the Merits, Counsel for the Respondent reiterated that the delayed payments that the Claimant describes as "la goutte d'eau" were not a measure having the effect of neutralising the Claimant's investment. Rather, the record shows that Onyx's situation had been critical for many years.[535] It was also emphasised that, as a temporary measure, delays in settling invoices cannot constitute an expropriatory measure.[536] Counsel for the Respondent also pointed out that because Onyx was not entitled to full compensation for changes in the currency exchange and the inflation rate, but at best to partial compensation as negotiated with the Governorate or awarded by a CRCICA tribunal, Onyx's cash flow would have been negative even if the Governorate had not (as alleged by the Claimant) failed to restore the economic equilibrium of the Contract.[537]

[531] Resp. C-M. Merits, ¶¶693-695.
[532] Resp. Rej. Merits, ¶¶703-705
[533] Resp. Rej. Merits, ¶¶706-707
[534] Resp. Rej. Merits, ¶¶708-715.
[535] Tr. Merits Day 1 (English Version) Caicedo 138:9-139:25.
[536] Tr. Closings Day 1 (English Version) Caicedo 196:23-197:16.
[537] Tr. Merits Day 1 (English Version) Caicedo 144:24-148.

(2) The Tribunal's Analysis

395. The Tribunal notes that the Claimant has dropped, in its Reply and in its Closing Statement, the allegation that Egypt's changes to its exchange rate policy and labour laws were part of the alleged creeping expropriation. In its Reply the Claimant asserts that the following four measures taken by the Respondent have jointly brought about the creeping expropriation of its investment, leaving Onyx no choice but to terminate the Contract: (a) the refusal to restore the economic equilibrium of the Contract; (b) the imposition of unjustified penalties; (c) the refusal to fully pay Onyx for the collecting and handling of medical waste; and – what the Claimant describes as "la goutte d'eau qui a fait déborder le vase" – (d) the interruption in the payment for Onyx's services under the Contract from February 2011 until the notice of termination of the Contract in May 2011.

396. In its Closing Statement, the Claimant reiterated that the creeping expropriation of Veolia Propreté's investment comprises the four alleged breaches mentioned above, which constitute at the same time, in its opinion, breaches of the fair and equitable treatment standard. Counsel for the Claimant specified, however, that two of those breaches – failure to restore the economic equilibrium of the Contract and imposition of abusive penalties – sufficed to ground the expropriation claim. For the Respondent, "such alleged contractual breaches were not sovereign acts, but rather contractual actions that any private contracting party could undertake, and were therefore not governed by the Treaty's expropriation provision nor capable of amounting to expropriation".[538]

397. The Tribunal observes that breaches of the FET standard, which have to be examined under Article 3 of the BIT, should not be conflated with breaches giving rise to expropriation under Article 4 of the Treaty. The two issues are regulated separately due to the differing conditions and requirements underlying them. In any event, the Tribunal has already concluded that the Respondent has not breached its obligations under Article 3 of the BIT. It will therefore turn now to the determination, first, of whether the measures complained of by the Respondent are based on the Contract or, as alleged by the Claimant, they are based on the exercise of governmental authority by the Respondent; and secondly, whether

[538] Resp. Rej. Merits, ¶674.

the actions or omissions attributed to the Respondent, taken together, amount to indirect expropriation as defined in Article 4 of the BIT which has been analysed by the Tribunal above.

a. The Refusal to Restore the Economic Equilibrium of the Contract

398. The Claimant does not add any new elements to the arguments it had already presented on the refusal to restore the economic equilibrium of the Contract with regard to the alleged breach of the FET standard. In this connection, it reiterates the two basic assertions which it had made previously, namely: (i) that the parties had agreed to renegotiate at the end of each triennial period the economic equilibrium of the Contract; and (ii) that there was a systematic refusal on the part of the Governorate to renegotiate the economic equilibrium of the Contract. The Claimant argues that this conduct of the Egyptian authorities had a profound impact on the cash flow ("trésorie") of Onyx Alexandria and rendered its long-term financial situation untenable.

399. The Tribunal has already examined the facts pertaining to these assertions and the evidence in the case (see paragraphs 208-229 above), and has come to the conclusion that there was no evidence to show the existence of an agreement or understanding between the parties to renegotiate or restore at the end of each triennium the economic equilibrium of the Contract; nor was there an undertaking, representations or assurances made by the Governorate to that end on which the Claimant could reasonably rely. There were references in the correspondence between the parties, and in the legal opinion provided to Onyx by the Egyptian law firm advising it on the matter, to meetings at the end of each triennium and to consultations with the Governorate. Those meetings and consultations appear to have taken place, but they did not lead to any agreement on the readjustment or renegotiation of the economic equilibrium of the Contract.

400. Thus, there being no undertaking or agreement to renegotiate or restore the economic equilibrium of the Contract, there could not have been an unlawful systematic refusal to engage in such negotiations. In any event, consultations were held between the parties, but they did not enable the parties to overcome the main disagreement between them, namely whether there existed, outside the Contract between the parties, an understanding between

the Governorate and Veolia (or its subsidiary) that they would re-negotiate the terms of the Contract at the end of each triennium or that Onyx would be compensated directly by the Governorate for any deficiencies of the economic equilibrium of the Contract.

401. Consequently, the Tribunal considers that the financial difficulties experienced by Onyx Alexandria were neither caused by the failure of Egyptian authorities to honour an undertaking by the Governorate to renegotiate the economic equilibrium of the Contract at the end of each triennial period nor by an unlawful systematic refusal of the Governorate to engage in such negotiations. The only undertaking that the Tribunal could find with regard to the economic equilibrium of the Contract is that of Article 24 of the Contract itself, which, in the absence of agreement between the parties, makes the restoration of the economic equilibrium subject to a determination by an arbitral tribunal of the CRCICA upon referral of the matter to it by the party suffering from "negative exhaustion… in carrying out its obligations" (Article 24(1) of the Contract).[539] This referral procedure was resorted to by the Claimant only at the end of the first triennial period, but was never used by it for the second or third triennial periods. As for the other legislative instruments that were invoked by the Claimant, particularly Law no. 89 of 1998, the Tribunal found that the provisions to which the Claimant referred were not applicable to the relations between the parties.

b. The Imposition of Unjustified Penalties

402. The second factor on which the Claimant relies in its arguments relating to a creeping expropriation of its investments by the Egyptian authorities is the alleged imposition by the Governorate of Alexandria, with effect from December 2006, of excessive and unjustified penalties which "ont grandement contribué à la détérioration de la situation financière d' Onyx Alexandria".[540] The Tribunal has already examined the issue of the penalties in relation to the Claimant's claims pertaining to the FET standard, and concluded that based on the evidence presented before the Tribunal, the actions and omissions of the Governorate, which may have at times involved mistakes or irregularities in the imposition of penalties, as noted by a bipartite Committee established to investigate the penalties of

[539] Contract, C-012, ¶24(1).
[540] Cl. Mem. Merits, ¶214.

July 2010, neither amount to an abuse of right nor to a breach of legitimate expectations and the consequent violation of Article 3 of the BIT. In other words, it is the view of the Tribunal that the imposition of penalties did not arise from an exercise by the Governorate of its sovereign powers or the force of the law, but from its right, as a contracting party, to impose penalties, although the exercise of that right by the Governorate may have sometimes involved mistakes and irregularities.

403. The Claimant cites the tribunal's award in *Vivendi II* in support of its arguments on the relationship between the penalties imposed and the alleged indirect expropriation. It states in its Memorial that:

> *Les faits en l'espèce se rapprochent considérablement des faits de l'affaire CIRDI Vivendi II contre Argentine. Dans cette affaire, les organes de l'Etat argentin avaient imposé une série de mesures visant à nuire à une concession pour les services d'eau et d'eaux usées dans la province de Tucumán. Ces mesures, qui incluaient l'imposition de pénalités injustifiées, avaient finalement contraint l'investisseur à résilier l'accord de concession.*[541]

The facts in the two cases are, however, quite different.

404. As noted above, in *Vivendi II*, the tribunal found that the measures attributable to Argentina could not "be cast as simple commercial acts of or relating to non-performance by a contracting counter-party" but rather were "illegitimate sovereign acts, taken by the Province in its official capacity, backed by the force of law and with all the authoritative powers of public office".[542] The measures referred to included politically motivated regulatory action against the claimant designed to put pressure on the claimant to renegotiate its rates; legislative action unilaterally imposing a tariff reduction; false public statements by high level government officers concerning the health risks over the claimant's service; statements by public officials, including through the media, by the state government urging local residents not to pay the bills of the claimant (and referring to the

[541] Cl. Mem. Merits, ¶163.
[542] *Compañia de Aguas del Aconquija S.A. et al. v. Argentina ('Vivendi II')*, ICSID Case No. ARB/97/3, Award, 20 August 2007, CLA-042, ¶7.5.8.

claimants as criminals); and the forced renegotiation of the concession on favourable terms for the government under constant threat of recession of the contract.

405. Summarizing these facts, the tribunal concluded that it was only possible:

> *to conclude that the Bussi government, improperly and without justification, mounted an illegitimate 'campaign' against the concession, the Concession Agreement, and the 'foreign' concessionaire from the moment it took office, aimed either at reversing the privatisation or forcing the concessionaire to renegotiate (and lower) CAA's tariffs.*[543]

406. This was not the case with regard to the penalties imposed by the Governorate. There was no similar campaign against Onyx Alexandria, and the Governorate never made public statements disparaging its work nor did it ever suggest that Onyx should reduce the monthly fees it charged for the cleanliness project in accordance with the Contract. Moreover, as pointed out above, following Onyx Alexandria's complaint against excessive penalties, the Governorate set up in 2010 a bipartite committee to look into the matter. The committee, in its final report, recognized that some of the penalties were mistakenly imposed on Onyx and recommended their repayment. The Claimant also concedes that at least on another occasion, i.e. in September 2010, the Governor asked his monitoring department to check the penalties for August 2010 and reduce their level.

407. The Tribunal therefore considers that there is no evidence on the record to show that the sharp rise in the penalties contributed to a loss by the Claimant of the use or enjoyment of its investment in the cleanliness project or the loss of control over such investment. Even if it were to be assumed that the sharp spike in the amount of penalties imposed during certain periods, particularly between 2007 and 2009, amounted to a breach of contractual obligations, such a breach is not to be equated to a taking of property unless it has had the effect of neutralising the Claimant's investment and resulted in depriving the Claimant of the use or enjoyment of its property, which was not clearly the case here. As was stated by the tribunal in *Olguin v. Paraguay*:

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[543] *Compañia de Aguas del Aconquija S.A. et al. v. Argentina ('Vivendi II')*, ICSID Case No. ARB/97/3, Award, 20 August 2007, CLA-042, ¶7.4.19.

> *For an expropriation to occur, there must be actions that can be considered reasonably appropriate for producing the effect of depriving the affected party of the property it owns, in such a way that whoever performs those actions will acquire, directly or indirectly, control, or at least the fruits of the expropriated property.*[544]

c. The Withholding of Payments for Medical Waste and for Services Rendered in 2011

408. The Claimant's claims relating to the withholding of payments consist of: (a) the non-payment or delayed payments to Onyx for the "experimental" collection, handling and treatment of medical waste pending the granting of license by the Ministry of Health and the lack of payments for additional cleanliness services relating to the operation of the landfill in El Hammam; and, (b) the interruption in the payments for Onyx's services under the Contract from February 2011 until the notice of termination of the Contract in May 2011. These claims will be dealt with in this section together since they both relate to the withholding of payments as a contributing factor to a "creeping expropriation" by the Respondent.

409. The Tribunal has already examined the issue of non-payment or delayed payments for the collection of medical waste and for the operation of the El Hammam landfill for medical waste as well as for the general cleanliness services rendered by Onyx in 2011. With regard to the "experimental" collection of medical waste and the operation of El Hamman, the Parties are in dispute as to the exact amount that is still due from the Governorate, particularly for the period of 2009-2011. There is also discrepancy between the Experts' Reports presented by the Parties for 2009-2010, while for 2011 the Respondent's Expert Report concedes that the invoices for El Hammam for 2011 may not have been paid. The Respondent, however, maintains that for 2009-2010 the documentation in relation to those invoices was lost as a result of the Revolution in January 2011 during which the Governorate's building in Alexandria was destroyed by fire.

[544] *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001 (unofficial English translation), RLA-394, ¶84.

410. Beyond these disputes on the unpaid amounts, which can normally exist between contracting parties, the main argument presented by the Claimant with regard to El Hammam's unpaid invoices was that this was due to interference by the Central Audit Agency (CAA) of Egypt which advised the Governorate not to make such payments. The Tribunal was not, however, able to find a link between the CAA Report which was made available to the Claimant in 2012, after the termination of the Contract, and the issue of unpaid invoices by the Governorate. Thus, although it appears that there are some invoices for 2009-2010, as well as the invoices for 2011 for El Hammam for which payments were not made by the Governorate, there is no evidence that this was due to the interference of the CAA or other Government agencies, nor that the Governorate wilfully withheld such payments in the exercise of its governmental powers. There is, on the other hand, evidence on the record that the Governorate paid most of the invoices for 2008 at some point between 5 June 2009 and 29 August 2010, that is, after the CAA issued its report around March 2009.

411. Turning now to the payments for services rendered by Onyx in 2011, the Tribunal has already found, in relation to the FET above, that there was neither a refusal to pay for the services, nor a denial of the amounts involved, nor a repudiation of the debt owed or the Contract between the parties on the part of the Governorate, at least until the termination of the Contract by Onyx Alexandria. There is also no evidence that there was interference by the CAA in the sense of advice given to the Governorate or to the Ministry of Finance of Egypt not to make the payments to Onyx. Until that date, the only disputed payment between the parties appears to be for the month of February 2011 for which the Respondent claims that a notice of force majeure was given by Onyx, due to the Revolution in Egypt, while the Claimant maintains that the notice was only for one day in February.

412. The Tribunal finds, on the other hand, that there was a correlation between the delayed payments in early 2011 and the popular uprising in Egypt during that period. The Tribunal also notes that the Governorate made efforts until the notice of termination of the Contract by Onyx in June 2011, and even afterwards in August 2011, to obtain the necessary funds from the Ministry of Finance to pay the outstanding invoices of Onyx Alexandria. In a letter to Mr. Hansen, the Governorate emphasized that it had no bad intentions with respect

to the payment of the invoices, but that the delays were due at the time to the disruptions caused by the revolution. The relationship between the parties appears, however, to have turned for the worse after the termination of the Contract by Onyx, but that is a different matter which does not fall within the purview of this case.

d. Do these Actions and Omissions Taken Together Amount to Indirect Expropriation?

413. The Claimant contends that the above-mentioned actions and omissions by the Respondent had arisen in the exercise of sovereign power by the Governorate and other Egyptian authorities and in their capacity as governmental authorities and that all those actions and omissions, taken together, amount to indirect expropriation since they have destroyed the value of Veolia Propreté's shares in Onyx and led to the loss of financial claims that Veolia Propreté had against Onyx, including operational costs and loans.

414. The Tribunal observes that, under Article 4 of the 1974 BIT, the expropriatory measures have to be taken by one of the parties to the treaty, which means that they have to be measures adopted by a State in the exercise of its regulatory powers and acting in its capacity as a sovereign. The Tribunal finds that the Claimant has failed to prove that the above measures, including actions and omissions by the Governorate of Alexandria, even when considered together, were taken by the Respondent in its capacity as a governmental authority to deprive the Claimant of its rights in its investment. Consequently, it is the view of the Tribunal that the Claimant has not shown that those acts, whether they are considered individually or collectively, were part of an overall strategy or scheme undertaken by the Respondent's authorities, in their capacity as governmental authorities, to neutralize the property rights of the Claimant in Onyx Alexandria and to destroy the value of its investment.

415. Moreover, even if all the above-mentioned actions or omissions of the Governorate relating to the economic equilibrium, the penalties, and the non-payment or delayed payment for services rendered had led to the neutralization of the investment of the Claimant – a matter which has not been clearly established by the Claimant – such acts could not amount to a creeping expropriation because there is nothing to show that they were taken as sovereign

acts by the Governorate or by other Governmental authorities of Egypt. As pointed out above, the Claimant invokes the case of *Vivendi II* as authority to support its claim of creeping expropriation, but the facts of that case are quite different, and there is no evidence that in the instant case a scheme or a campaign or a strategy was put in place by the governmental authorities in order to force the Claimant to renegotiate the Contract with the Governorate or to terminate it.

416. Consequently, the Tribunal concludes that the actions of the Governorate, as described above, do not constitute expropriatory measures, and did not result in the substantial or total destruction of the Claimant's investment nor did they radically deprive the Claimant of its rights to the investment in Onyx Alexandria. The Contract was finally terminated by the Claimant itself, despite the fact that the Governorate appealed on several occasions to the Claimant not to do so, or to reconsider its decision after the termination notice.

VIII. DAMAGES

417. The Parties have made extensive submissions about the extent of the losses incurred by Veolia Propreté as a result of the breaches of the BIT allegedly committed by Egypt. Their arguments covered not only evidence of those losses, but also the appropriate methods for their calculation. Given its conclusions on the Respondent's liability under Article 3 and 4 of the BIT, there is no need for the Tribunal to address the question of quantum in the present Award.

IX. COSTS

A. CLAIMANT'S COST SUBMISSIONS

418. In its submission on costs, the Claimant argues that the Respondent should bear the total arbitration costs incurred by Claimants, including legal fees and expenses totalling €2,662,719,36 plus USD 1.125,000, broken down as follows:[545]

[545] Claimant's Submission on Costs dated 3 May 2017, ("Cl.'s Submission on Costs"), ¶¶1.

Category	Amount
Legal fees and expenses with counsel: - Legal fees invoiced by King & Spalding - Expenses incurred by counsel - Legal fees invoiced by Winston & Strawn	 €2,135,999 €72,564.09 €32,269.67
Cost for expert advice: - Legal fees of Prof Alain Pellet - Fees of Accuracy	 €37,980.00 €383,906.60
Amount advanced for the legal fees of the members of the Tribunal and administrative costs incurred by ICSID	USD 1.125.000

419. The Claimant makes it claim on the basis of the principle of full reparation, arguing that the internationally wrongful acts attributable to the Respondent were the cause of the present proceeding. It refers to awards such as *ADC v. Hungary* and *Hrvatska v. Slovenia* in support of its position.[546]

420. Furthermore, the Claimant maintains that the legal costs and other expenses that it incurred in connection with the arbitration were reasonable. It recognises, as relevant factors for reasonability, the duration and the complexity of the proceedings; the amount of damages sought; the number of parties; and the efficiency with which each of the parties presents their position. Referring to the successive submissions that it presented in the duration of

[546] Cl.'s Submission on Costs, ¶¶ 4-9.

the proceedings, it contends that those submissions were not only necessary but also concise and precise.[547]

421. The Claimant finally criticises the Respondent's procedural detours that unnecessarily increased the Claimant's legal costs, in particular the request for the bifurcation of the proceedings and the Motion Regarding the Inadmissibility of the Claimant's New Claims and Revisited Case.[548]

B. RESPONDENT'S COST SUBMISSIONS

422. In its submission on costs, the Respondent submits that the Claimant should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses totalling €763,264.98, USD 33,700 and EGP 324,006, broken down as follows:

Category	Amount
Legal fees and expenses with counsel:	
- Legal fees invoiced by Cabinet Joubin-Bret	€200,000
- Legal fees invoiced by Mayer Brown	€400,000
- Expenses incurred by Mayer Brown	€7,128.58 + USD 28,700
- Expenses incurred by the Counselors from ESLA	EGP 196,100 + USD 3,080 + €79.20
Cost for expert advice:	
- Fees of BDO	€150,000
- Expenses incurred by BDO	€5,978

[547] Cl.'s Submission on Costs, ¶¶11-12.
[548] Cl.'s Submission on Costs, ¶13.

Expenses incurred by the witnesses in connection with the hearings	EGP 127,906 + USD 1,920 + €79.20

423. Recalling the discretion that the Tribunal enjoys under the ICSID Convention, the Respondent points to the trend – shared by investment tribunals and illustrated, in particular, by *Burlington Resources v. Ecuador* – to allocate costs on the basis of three main factors: the degree of success of the parties in making their claims and arguments; procedural conduct that results in unnecessarily increased costs; and the reasonableness of the costs claimed.[549] It maintains that its legal costs and other expenses were reasonable in the circumstances of the present proceedings, and discusses how the costs should be allocated between the parties under alternative scenarios of success.

424. First, the Respondent argues that the Claimant should bear the full cost of the proceedings if the Tribunal concludes that it does not have jurisdiction or if it finds for the Respondent on the merits. In the former scenario, in which the Claimant would have instituted proceedings before an inappropriate forum, allocating full costs to the unsuccessful claimant is supported by various arbitral awards, in particular *Al Tamimi v. Oman*. In the latter scenario, the Respondent justifies its position on the grounds that it was partially successful during the bifurcated stage on jurisdiction, and points to the decisions in *GEA Group v. Ukraine* and *Iberdrola v. Guatemala*, in which the respective claimants had to bear all the costs in similar circumstances.[550] It contends, in addition, that its remaining preliminary objections are not frivolous, not least given the Claimant's radical change of position in its Reply, which prompted the Respondent to react by submitting its Motion.[551] The Respondent also argues that the Claimant should bear all the costs relating to the claims on jurisdiction that the Claimant abandoned when it sought to recast the investment as the "global economic operation" instead of Onyx Alexandria or Veolia's loans to and shares in Onyx.[552]

[549] Respondent's Submission on Costs dated 3 May 2017, ("Resp.'s Submission on Costs"), ¶¶13-15.
[550] Resp.'s Submission on Costs, ¶¶18-22.
[551] Resp.'s Submission on Costs, ¶¶25-26.
[552] Resp.'s Submission on Costs, ¶26.

425. Second, the Respondent argues that, if it were to find for the Claimants on the merits, the Tribunal should take into consideration the Claimant's abandonment of certain claims, as well as the "radical transformation" of many of the arguments underpinning the claims that remained. In this connection, the Respondent recalls some of the points that were made in its Motion, referring specifically to changes in the way the claims on economic equilibrium of the Contract, medical waste and penalties were argued, and to the abandonment of the claims relating to the CRCICA award and recourse to GAFI.[553] To that the Respondent adds what it describes as "improper procedural conduct that has unnecessarily complicated the discussions between the Parties and increased the Respondent's costs".[554]

426. Finally, the Respondent maintains that the Claimant should bear the full costs for: (i) the engagement of Professor Pellet as expert in the jurisdictional phase, given that his report was unnecessary; and for (ii) the reports on damages prepared by Accuracy, given that their "all or nothing approach", equating "all losses to Onyx Alexandria business to corresponding losses in the value in the shares of Onyx Alexandria", resulted in "unnecessary additional costs" for the Respondent and would be unhelpful for the Tribunal unless it were to agree with the Claimant's position in its entirety.[555]

C. THE TRIBUNAL'S DECISION ON COSTS

427. The Tribunal notes that each Party requests that the Tribunal order the other Party to bear the entirety of the expenses incurred in these proceedings, including the fees and expenses of the arbitrators and the expenses and charges of the ICSID Secretariat.

428. According to Article 61(2) of the ICSID Convention, the Tribunal has a wide discretion with regard to cost allocation. Article 61(2) reads as follows:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members*

[553] Resp.'s Submission on Costs, ¶¶32-37.
[554] Resp.'s Submission on Costs, ¶38.
[555] Resp.'s Submission on Costs, ¶40.

of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.[556]

429. The Tribunal also notes that important and complex legal issues have been raised by both Parties in the course of these proceedings and that neither of them has fully succeeded in the positions it has put forward before the Tribunal. Indeed, the Tribunal has rejected almost all the jurisdictional objections raised by the Respondent, while the Claimants' claims relating to the breach of the provisions of the BIT have failed.

430. In view of this outcome, and of all the circumstances of the case, the Tribunal deems it fair and reasonable that the costs of the proceedings be paid by the Parties as follows: each Party shall assume its own costs, while the Claimant shall bear all the costs arising from the fees and expenses of the Tribunal and the ICSID Secretariat's expenses and administrative charges for which it has already made the necessary advances. These costs amount to (in USD):

Arbitrators' fees and expenses	
Judge Abdulqawi Ahmed Yusuf	318,230.57
Professor Dr. Klaus Sachs	225,563.25
Professor Zachary Douglas QC	115,005.75
Assistant's fees and expenses	
Dr. Fernando Lusa Bordin	73,050.95
ICSID's administrative fees	202,000.00
Direct expenses	183,579.90
Total	**1,117,430.42**

X. AWARD

431. For the reasons set forth above, the Tribunal decides as follows:

(1) On jurisdiction and admissibility: the Tribunal rejects the objections of the Respondent to: (a) the jurisdiction of the Tribunal over the Claimant's claims; (b) the

[556] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965 (the "ICSID Convention"), pp. 29-30.

legal standing of the Claimant to bring those claims before the Tribunal; and (c) the admissibility of the Claimant's claims;

(2) On liability under Article 3 of the BIT: the Tribunal finds that the Respondent has not breached its obligations under Article 3 of the BIT;

(3) On liability under Article 4 of the BIT: the Tribunal finds that the Respondent has not breached its obligations under Article 4 of the BIT;

(4) In light of sub-paragraphs 2 and 3 above, the Tribunal awards no damages to the Claimant;

(5) On Costs: the Tribunal decides that the costs of the proceedings shall be paid by the Parties as follows: each Party shall assume its own costs, while the Claimant shall bear all the costs arising from the fees and expenses of the Tribunal and the ICSID Secretariat's expenses and administrative charges for which it has already made the necessary advances. The ICSID Secretariat will provide the parties with a detailed Financial Statement of the case account once all invoices are received and the account is final.

(6) All other claims and requests for relief are dismissed.

[SIGNED]

Professor Zachary Douglas QC
Arbitrator

Date: May 22, 2018

[SIGNED]

Professor Dr. Klaus Sachs
Arbitrator

Date: May 23, 2018

[SIGNED]

Judge Abdulqawi Ahmed Yusuf
President

Date: May 16, 2018

Annex 1

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

In the arbitration proceeding between

VEOLIA PROPRETÉ
Claimant

and

ARAB REPUBLIC OF EGYPT
Respondent

ICSID Case No. ARB/12/15

DECISION ON JURISDICTION

Members of the Tribunal
Judge Abdulqawi Ahmed Yusuf, President of the Tribunal
Prof. Dr. Klaus M. Sachs, Arbitrator
Prof. Zachary Douglas QC, Arbitrator

Secretary of the Tribunal
Ms. Aïssatou Diop

Date of Dispatch: April 13, 2015

REPRESENTATION OF THE PARTIES

Representing Veolia Propreté:

Me Joël Alquezar
Me Héloïse Hervé
Me Cédric Soule
King & Spalding International LLP

Representing the Arab Republic of Egypt:

H.E. Mr. Ali Zaki Sokar
Mr. Mahmoud Elkhrashy
Ms. Lela Kassem
Mr. Amr Arafa
Ms. Fatma Khalifa
Ms. Salam El-Alaily
Egyptian State Lawsuits Authority

Ms. Anna Joubin-Bret
Cabinet Joubin-Bret

Mr. Dany Khayat
Dr. José Caicedo
Mayer Brown LLP

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT	Convention between the Government of the Arab Republic of Egypt and the Government of the French Republic concerning the mutual promotion and protection of investments dated 22 December 1974 - Convention entre le Gouvernement de la République Française et le Gouvernement de la République Arabe d'Egypte sur l'Encouragement et la Protection Réciproques des Investissements du 22 Decembre 1974
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
C-# / R-#	Claimant's Exhibit, Respondent's Exhibit
CLA-# / RLA-#	Claimant's Legal Authority, Respondent's Legal Authority
Cl. Mem.	Claimant's Memorial dated September 30, 2013
Resp. Mem. Jur	Respondent's Objections to Jurisdiction and request for Bifurcation dated December 27, 2013
Cl. Response	Claimant's Response to Respondent's Request for Bifurcation dated January 20, 2014
Cl. C-Mem.	Claimant's Counter-Memorial on jurisdiction and admissibility dated April 24, 2014
Resp. Rep.	Respondent's Reply on jurisdiction dated June 26, 2014

Cl. Rej.	Claimant's Rejoinder on jurisdiction dated August 25, 2014
Amended Tr. [page:line]	Transcript of the hearing on jurisdiction as amended by agreement of the Parties
FET	Fair and equitable treatment
FPS	Full protection and security
MFN	Most-favored nation

I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of the Bilateral Investment Treaty between the Arab Republic of Egypt and the French Republic (the "BIT") of 22 December 1974, which entered into force on October 1, 1975, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "ICSID Convention").

2. The Claimant is Veolia Propreté and is hereinafter referred to as "Veolia" or the "Claimant." Veolia is a company incorporated under the laws of France.

3. The Respondent is the Arab Republic of Egypt and is hereinafter referred to as "Egypt" or the "Respondent."

4. The Claimant and the Respondent are hereinafter collectively referred to as the "Parties." The Parties' respective representatives are listed above on page (i).

II. PROCEDURAL HISTORY

5. On June 7, 2012, ICSID received a Request for Arbitration dated June 6, 2012, from Veolia Propreté against Egypt (the "Request").

6. On June 25, 2012, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

7. In the absence of an agreement between the Parties as to the number of arbitrators and method of their appointment, the Respondent invoked Article 37(2)(b) of the ICSID Convention on September 2, 2012. Following this, on September 21, 2012, the Claimant appointed Prof. Dr. Klaus Sachs, a national of Germany, as arbitrator, and on September 22, 2012, the Respondent appointed Prof. Zachary Douglas QC, a national of Australia, as arbitrator.

8. By letter of October 24, 2012, the Claimant invoked Article 38 of the ICSID Convention for the appointment of the Tribunal President. Subsequently, the Chairman of the ICSID Administrative Council appointed Judge Abdulqawi Ahmed Yusuf, a national of Somalia, as presiding arbitrator.

9. On February 11, 2013, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules") notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Aïssatou Diop, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

10. The Tribunal held a first session by telephone conference without the Parties on March 26, 2013.

11. On May 29, 2013, the Tribunal held a first procedural consultation by videoconference with the Parties. The Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect from April 10, 2006, the procedural languages would be English and French, and the place of proceedings would be The Hague, Netherlands, but that the Tribunal could hold hearings at any other place it considered appropriate after consulting with the Parties. The Parties agreed on a schedule for the jurisdictional phase of the proceedings. The agreement of the Parties was embodied in Procedural Order No. 1 dated July 15, 2013, signed by the President and circulated to the Parties.

12. Under Item 13 of Procedural Order No. 1, the Respondent expressed its intention to raise jurisdictional objections and its wish that the objections be heard separately from the merits.

13. On this basis, the Claimant filed its Memorial on the merits on September 30, 2013, and the Respondent filed its Memorial on objections to jurisdiction and admissibility and request for bifurcation on December 27, 2013. The Claimant filed its Response to the request for bifurcation on January 20, 2014.

14. On February 20, 2014, the Tribunal issued Procedural Order No. 2 granting in part the Respondent's request for bifurcation and suspending the proceeding on the merits.

15. On April 24, 2014, the Claimant filed its Counter-Memorial on jurisdiction and admissibility. On June 26, 2014, the Respondent filed its Reply on jurisdiction and on August 25, 2014, the Claimant filed its Rejoinder on jurisdiction.

16. A hearing on jurisdiction took place in Paris, France, on December 2, 2014. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

For the Claimant:

Joël Alquezar	King & Spalding
Héloïse Hervé	King & Spalding
Cédric Soule	King & Spalding
Bruno Masson	Veolia Propreté
Jean-Marc Guillot	Veolia Propreté
Vincenzo Bozzetto	Veolia Propreté
Marie-Laure Cornu	Veolia Propreté

For the Respondent:

Anna Joubin-Bret	Cabinet Joubin-Bret
Dany Khayat	Mayer Brown
José Caicedo	Mayer Brown
William Ahern	Mayer Brown
Juliette Fradeau	Mayer Brown
Mohammed Sayed Omar	Mayer Brown
Lela Kassem	Egyptian State Lawsuits Authority
Salma El Alaily	Egyptian State Lawsuits Authority

17. On December 3, 2014, the Tribunal invited the parties to submit post-hearing briefs, if they so wished. On December 9, 2014, the parties declined the Tribunal's invitation.

III. SUMMARY OF RELEVANT FACTS

18. For the purposes of its decision, the Tribunal will recall, albeit briefly and to the extent relevant and helpful, the circumstances in which the parties formed a relationship, the obligations each undertook toward the other, and the events surrounding their dispute.

19. On September 3, 2000, the Governorate of Alexandria concluded a contract for the Public Cleanliness Project (the "Contract") with the Compagnie Generale d'Entreprises Automobiles – CGEA – Onyx France (later "Veolia Propreté" or "Veolia") for a period of 15

years. The Contract was signed following a tender process organised by the Governorate of Alexandria.

20. Onyx Alexandria ("Onyx") was set up in March 2001 as a locally incorporated Egyptian company with Veolia as its sole shareholder. Onyx then substituted Veolia under the Contract, as previously agreed by the parties.

21. Onyx's obligations under the Contract "included the collection of household, commercial, industrial and medical waste, treatment of solid waste, urban cleaning and cleaning of ports and public transportation [as well as] the construction and preparation works for existing and future transport stations and landfills."[1]

22. Compensation for Onyx's services during the 15 years was set in the Contract at a base annual rate organized by periods of three years as follows.

The three-year periods	**Amount payable in EGP**
Years 1 to 3 (2001-2004)	72,008,000
Years 4 to 6 (2004-2007)	107,649,000
Years 7 to 9 (2007-2010)	121,966,000
Years 10 to 12 (2010-2013)	133,291,000
Years 13 to 15 (2013-2016)	150,985,000

23. According to Article 25.2 of the Contract, "the amounts stated herein above include the anticipated rate of inflation and the increase of population, agreed upon in the Contract, which the Contractor has deemed relevant to achieve the Contract Economic Balance."

24. For its part, the Governorate of Alexandria undertook at Article 3.3 of the Contract:

> not to carry out any legal or administrative procedures or decisions or dispositions that may breach the technical or economic conditions of the Contract, unless the Governorate assures that Contractor is fairly compensated. For the purpose of this clause, such compensation shall be considered fair compensation if it achieves Economic Balance to the contract or enables the Contract restore same.

[1] Resp. Mem. Jur., ¶ 34.

25. The dispute between the parties spanned the first three periods of operation, *i.e.*, years 1 to 9 between 2001 and 2010. The dispute concerned allegations that the Governorate of Alexandria failed to pay Onyx for services rendered and refused to take the steps necessary to adjust the economic equilibrium of the Contract, including to renegotiate the Contract periodically.

26. More specifically, the Claimant makes the following allegations: *first*, the Governorate quadrupled the number of its hired controllers who then increased the number and amounts of fines imposed on Onyx; s*econd*, the elements which were taken into account to determine the economic equilibrium of the Contract, *i.e.*, the exchange rate, inflation, and population growth, changed subsequently due to measures taken by the Central Bank of Egypt and the Government of Egypt; *third*, having requested that Onyx start collecting and treating medical waste before receiving the appropriate license, the Governorate of Alexandria then refused to pay for the services for the reason that Onyx did not have a licence; *fourth*, by requiring Onyx to operate two waste processing centres, one for winter and the other for summer, the Governorate of Alexandria placed a heavy financial burden on Onyx.[2] Some of these allegations are disputed by the Respondent; to the extent that the events in question are not in dispute then the meaning and the inference to be drawn from those events are contested.

27. Ultimately, Veolia instructed Onyx to terminate the Contract. On June 30, 2011, Onyx notified the Governorate of Alexandria of the termination of the Contract to take effect three months thereafter on September 30, 2011. However, at the request of the new contractors, Onyx continued to provide its services until October 31, 2011 in order to ensure continuity.[3]

IV. RELIEF REQUESTED

A. The Respondent's Prayer for Relief

28. The original relief sought by the Respondent included a request that the Respondent's objections to jurisdiction and admissibility be dealt with as a preliminary matter. Following the Tribunal's decision to bifurcate the proceedings, this request was dropped from the Respondent's subsequent request for relief which is as follows:

- A decision that the Tribunal does not have jurisdiction to hear this dispute for lack of consent from the Respondent.

[2] Cl. Mem., ¶¶ 77-114; Resp. Mem. Jur., ¶ 118.
[3] Cl. Mem., ¶¶ 115-117.

- Alternatively, if the Tribunal were to find that the Respondent consented to ICSID arbitration, a decision that the Tribunal nonetheless lacks jurisdiction regarding the umbrella clause and the full protection and security ("FPS") obligation.

- An order that the Claimant pay (i) the costs of this arbitration, (ii) the costs incurred by Egypt in presenting its defence, including the cost of the Tribunal and the legal and other costs incurred by Egypt on a full indemnity basis; and (iii) interest on any costs awarded to Egypt in an amount to be determined by the Arbitral Tribunal.

B. The Claimant's Prayer for Relief

29. The Claimant makes the following prayer for relief:

- A finding that Article 7 of the BIT is an expression of Egypt's consent to ICSID arbitration.

- A finding that the most-favoured nation ("MFN") clause in Article 3 of the BIT allows Veolia Propreté to benefit from the protections granted respectively by the umbrella clause and the FPS clause.

- A declaration that the Tribunal is competent to hear Veolia Propreté's claims as formulated in the Claimant's Memorial.

- A rejection of all of the Respondent's claims.

30. In addition, Veolia maintains the prayers it formulated in its Memorial requesting the Tribunal to issue an award granting the Claimant the following reparation:

- A declaration that Egypt violated the BIT and international law with regard to the Claimant's investments.

- An award of damages paid to the Claimant for all the harm that it has undergone and will undergo, as described in the Memorial on the Merits, to be further developed during the course of this proceeding.

- An award of pre- and post-award interest, compounded monthly until the full payment of the award by Egypt.

- An award of costs of the proceeding, including the fees and expenses of the Claimant's Counsel and experts.

V. RELEVANT LEGAL PROVISIONS

A. ICSID Convention

31. Article 25 of the ICSID Convention reads as follows:

> 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.

B. The BIT

32. Article 7 of the BIT provides as follows:

> Chacune des Parties contractantes accepte de soumettre au Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.), les différends qui pourraient l'opposer à un ressortissant ou à une société de l'autre Partie contractante.

33. The Respondent provides the following English translation of the provision:

> Article 7.
>
> Each Contracting Party shall agree to submit to the International Centre for Settlement of Investment Disputes any dispute which may arise between it and a national or company of the other Contracting Party.[4]

34. Article 3 of the BIT provides that:

> 1. Chacune des Parties contractantes s'engage à assurer sur son territoire un traitement juste et équitable aux investissements des ressortissants et sociétés de l'autre Partie et à faire en sorte que l'exercice du droit ainsi reconnu ne soit entravé ni en droit, ni en fait.
>
> 2. Ce traitement sera au moins égal à celui qui est accordé par chaque Partie contractante à ses propres ressortissants ou sociétés ou au traitement accordé aux ressortissants ou sociétés de la nation la plus favorisée, si ce dernier est plus avantageux.

[4] Resp. Mem. Jur., ¶ 340.

> 3. Il ne s'étendra toutefois pas aux privilèges qu'une Partie contractante accorde, en vertu de sa participation ou de son association à une union douanière, un marché commun ou une zone de libre échange, aux ressortissants et sociétés d'un Etat tiers.

35. The Respondent provides the following English translation of Article 3 of the BIT:

> 1. Each Contracting Party shall undertake to accord in its territory just and equitable treatment to the investments of nationals and companies of the other Party and to ensure that the exercise of the right so granted is not impeded either *de jure* or *de facto*.
>
> 2. Such treatment shall be at least the same as that accorded by each Contracting Party to its own nationals or companies or the treatment accorded to nationals or companies of the most-favoured nation, if the latter is more advantageous.
>
> 3. It shall not, however, include privileges granted by either Contracting Party by virtue of its participation in or association with a customs union, common market or free trade area to nationals or companies of a third State.[5]

C. The Customary International Law of Treaty Interpretation

36. France is not a party to the Vienna Convention on the Law of Treaties ("VCLT" or "Vienna Convention"). Nonetheless, the Tribunal will apply Articles 31 and 32 of the VCLT, which it considers to reflect customary international law.

> **Article 31 General rule of interpretation**
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

[5] RLA-001.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

VI. RESPONDENT'S OBJECTIONS TO JURISDICTION: THE POSITIONS OF THE PARTIES

37. In its Memorial on objections to jurisdiction and admissibility and request for bifurcation, the Respondent makes five objections to jurisdiction and admissibility: **A**) the dispute is contractual in nature and falls outside the Tribunal's jurisdiction; **B**) the Claimant cannot rely on the reference to the MFN clause to import an umbrella clause or FPS clause; **C**) the Tribunal must give full effect to the exclusive jurisdiction clause in the Contract; **D**) the Claimant failed to prove that Egypt consented to arbitration; and **E)** the Claimant's claims are inadmissible for lack of legal interest in Onyx's assets and rights.

38. Following the Tribunal's Decision in its Procedural Order No. 2 to grant the Respondent's request for bifurcation with regard to its objections on consent to arbitration and on reliance on the MFN Clause of the BIT as described in paragraph 13 of the Order and to join the other jurisdictional objections and the admissibility objection by the Respondent to the merits of the case, the Claimant, in its Counter-Memorial on jurisdiction, answers only to points B and D of the Respondent's above-listed objections in the following way: **A**) Egypt did consent to ICSID arbitration at Article 7 of the BIT and **B**) the MFN clause at Article 3 allows

for the importation of an umbrella clause and provisions on FPS from 'more favourable' BITs that Egypt has concluded with third States.

39. The Respondent's Reply and the Claimant's Counter-Memorial and Rejoinder as well as the Parties' respective oral arguments at the hearing were all limited to developing further their arguments on the two bifurcated issues relating to Article 7 and Article 3 of the BIT. Consequently, the Tribunal will only decide at this stage the two bifurcated issues on jurisdiction.

A. The issue of Egypt's consent to ICSID

1. The provisions of the BIT on ICSID arbitration

40. The parties hold radically different views as to whether Article 7 of the BIT establishes Egypt's consent to ICSID arbitration for the purposes of Veolia's claims. While the Claimant argues that a textual interpretation of Article 7 warrants an affirmative answer, the Respondent contends that, by means of a contextual and teleological interpretation, Article 7 should be read as a provision complementing Article 8, which further requires that consent be given in "engagements particuliers."

41. Article 7 reads as follows: "[c]hacune des Parties contractantes accepte de soumettre au Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.) les différends qui pourraient l'opposer à un ressortissant ou à une société de l'autre Parties contractante."

42. Article 8 provides that:

> Dans la mesure où la règlementation de l'une des Parties contractantes prévoit une garantie pour les investissements effectués à l'étranger, celle-ci pourra être accordée, dans le cadre d'un examen cas par cas, à des investissements effectués sur le territoire de l'autre Partie, par des ressortissants ou sociétés de cette Partie.
>
> Les investissements des ressortissants et sociétés de l'une des Parties contractantes sur le territoire de l'autre Partie ne pourront obtenir la garantie visée à l'alinéa ci-dessus que s'ils ont, au préalable, obtenu l'agrément de cette dernière Partie et fait l'objet de la part de celle-ci à l'égard desdits ressortissants ou sociétés d'un engagement particulier comportant notamment le recours au Centre international pour le Règlement des Différends relatifs

> aux Investissements si, en cas de litige, un accord amiable n'a pu intervenir dans un délai de trois mois.

43. In its objections to jurisdiction, the Respondent describes Article 7 as "an old generation dispute settlement provision that does not give an option to the investor and does not contain recourse to domestic courts or other arbitration fora" and refers to the provision's "narrow wording."[6] Later on, in its Reply on jurisdiction, it adds that because Article 7 does not include the phrase 'each Contracting Party hereby consents to submit' which is typical of a number of arbitration clauses in BITs, it is not as univocal as the Claimant suggests and needs to be interpreted by reference to the context and object and purpose of the BIT.[7]

44. The Respondent's objection to the jurisdiction of the Tribunal on grounds of lack of consent is based on a contextual and teleological interpretation of Article 7. According to the Respondent, Article 7 must be read alongside Article 8, which prescribes that investors may benefit from a system of investment guarantees provided by their State of nationality under domestic law in relation to investments carried out in the territory the host State as long as these investments:

> ont, au préalable, obtenu l'agrément de cette dernière Partie et fait l'objet de la part de celle-ci à l'égard desdits ressortissants ou sociétés d'un engagement particulier comportant notamment le recours au Centre international pour le Règlement des Différends relatifs aux Investissements si, en cas de litige, un accord amiable n'a pu intervenir dans un délai de trois mois.

45. Accordingly, for the Respondent, Article 7 does not constitute a "stand-alone and self-executing consent" to ICSID arbitration, but rather a provision that envisages the possibility that specific undertakings (des "engagements particuliers") to submit disputes be given under the system of guarantees established under Article 8.[8] To make the point, the Respondent relies not only on contextual interpretation, but also on what it views as the object and purpose of the treaty. The object and purpose of the BIT, the Respondent argues, was to establish a framework for investment guarantees and protection that complied with the "mandatory conditions imposed by the French legislator on the French government to grant investment guarantees over political risk to French investors in Egypt and, as such, fulfilling the objectives aimed in the Preamble."[9] In other words, France concluded the BIT to comply with the requirements

[6] Resp. Mem. Jur., ¶¶ 231-232.
[7] Resp. Rep., ¶¶ 27-28.
[8] Resp. Rep., ¶ 57.
[9] Resp. Mem. Jur., ¶ 223.

under French law for the concession of guarantees. When read in its proper context and in light of this object and purpose, Article 7 would not bear the ordinary meaning that the Claimant ascribes to it.

46. To substantiate its contextual and teleological interpretation, the Respondent relies on the following:

(i) The historical origins of the BIT: The Respondent's overarching argument is that "[i]t would not be correct to interpret the Treaty in the light of the radically different investment landscape in place in most countries to-date after systematic and substantial liberalization of investment flows has taken place and in the light of numerous investor-State disputes interpreting a variety of treaties…."[10] Rather, the emphasis should be on the "separate negotiation process" of the BIT, which is tied to the requirement under French law that a treaty be concluded before an investor can obtain an investment guarantee from the French government.[11] This would be supported by French treaty practice at the time to include provisions envisaging specific undertakings for ICSID arbitration (namely, France-Zaire BIT 1972, France-Korea BIT 1977).

(ii) The position that individual provisions occupy in the BIT:[12] For the Respondent, while Articles 2 to 6 establish substantive rules applicable to all investments, Articles 7 to 10 concern the regime of investment guarantees. The Respondent argues that the BIT should be construed as if it were divided into sections, and that the general provision in Article 7 belongs in the section governed by Article 8 rather than in that of Articles 2 to 6. This would be the case because Articles 7 to 9 all contain references to ICSID.[13]

(iii) The alleged incoherence between Article 7 and Article 8 if the former is seen as a provision on "stand-alone and self-executing consent." For the Respondent, "it is simply impossible to understand why a specific undertaking from the host State to submit its disputes with the investor would be required if, as argued by the Claimant, the Contracting Parties have already consented to ICSID arbitration…."[14]

[10] Resp. Mem. Jur., ¶ 220.
[11] Resp. Mem. Jur., ¶ 220.
[12] Resp. Rep., ¶ 49.
[13] Resp. Rep., ¶ 50.
[14] Resp. Rep., ¶ 67.

47. For the Claimant, the text of Article 7 is so "univocal" that recourse to the rules of interpretation in the Vienna Convention is neither necessary nor justifiable.[15] The provision establishes the Contracting Parties' "acceptance" of the obligation to submit to ICSID arbitration any dispute between an investor and the host State arising under the BIT. In support of its view, the Claimant refers to:

(i) A Model Clause on dispute settlement published by ICSID in 1969 on which Article 7 is allegedly based. ICSID's commentary to the Model Clause clarifies that a provision whereby the parties "convient par les présents de soumettre tout différénd" to arbitration constitutes "in itself" the written consent that Article 25(1) of the ICSID Convention requires.[16]

(ii) Extrinsic evidence from the time at which the BIT was concluded, including the legislative debate at the French Assemblée Nationale in June 1974, in which rapporteur Jacques Chaumont referred to the BIT as an agreement "envisaging international arbitration" and the first time Egypt had ever accepted recourse to ICSID arbitration.[17]

(iii) The award in *Malicorp v Egypt*,[18] in which an ICSID tribunal interpreted Article 8(1) of the UK-Egypt BIT—containing the nearly identical phrase "[c]haque Partie contractante accepte de soumettre"—as expressing valid consent to ICSID arbitration.[19] Likewise, the Claimant refers to the award in *Millicom et Sentel v Senegal* [20] in which a provision that Senegal "devra consentir à toute demande de la part de ce ressortissant en vue de soumettre" a dispute—was construed by the tribunal as providing general consent to ICSID arbitration.[21]

48. In its Counter Memorial, the Claimant focuses on establishing that the interpretation favoured by the Respondent is irreconcilable with the clear text of the provision, and that it would deprive Article 7 of its *effet utile*.[22] According to the Claimant, if the consent to

[15] Cl. C-Mem., ¶ 6; Cl. Rej., ¶ 6.
[16] Cl. C-Mem., ¶¶ 10-11.
[17] Cl. C-Mem., ¶ 12.
[18] *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶100, RLA-20 ("*Malicorp v Egypt*").
[19] Cl. C-Mem., ¶ 14.
[20] *Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on Jurisdiction, 16 July 2011, ¶ 66, CLA-165 ("*Millicom and Sentel v Senegal*").
[21] Cl. C-Mem., ¶ 22.
[22] Cl. C-Mem., ¶¶ 23-30.

arbitration given in Article 7 were indeed dependent upon subsequent consent in specific undertakings, "engagements particuliers," Article 7 would never be applicable.[23]

49. In its Rejoinder, the Claimant offers a more direct response to the Respondent's views on the object and purpose of the BIT. It contends that the Respondent has conflated the reason (*finalité*) why France sought to conclude the BIT (that the BIT was indeed a requirement under domestic law for the granting of investment guarantees to French investors operating abroad) with the BIT's object and purpose (protection of foreign investment between France and Egypt).[24] The implication of accepting the Respondent's emphasis on the *finalité* is that the BIT would be devoid of its reciprocal character: it would benefit only French investors insofar as there was no domestic system for investment guarantees in Egypt.[25]

50. As regards the Respondent's contextual interpretation of Articles 7 and 8, the Claimant maintains that if the Contracting Parties had intended to subordinate Article 7 to Article 8, they would have done so by combining the two in the same provision.[26] In this respect, the Claimant disagrees with the Respondent's analysis of French treaty practice (noting that a general provision such as Article 7 was not included in treaties where consent to arbitration was truly conditioned by special undertakings, *e.g.*, in the France-Zaire BIT),[27] and refers to contemporaneous statements confirming that Articles 7 and 8 are distinct provisions[28] and to academic commentary.[29]

51. The issue of textual interpretation was once again argued by the Parties at the hearing of December 2, 2014. The Respondent emphasised that the France-Egypt BIT was placed "at a juncture" between non-reciprocal and reciprocal BITs,[30] and that as a result the text of Article 7 did not include a "complete" expression of consent to ICSID arbitration. In contrast with, *e.g.*, the UK-Egypt BIT, Article 7 of the 1974 BIT contained neither expressions such as "hereby consents" and "any disputes" nor a provision for a cooling off period.[31] The Claimant, on its part, stressed that the language of Article 7 was clear and that the Respondent's attempts to deconstruct it were fallacious. It once again referred to *Malicorp v Egypt*, where Egypt itself

[23] Cl. C-Mem., ¶ 28.
[24] Cl. Rej., ¶ 31.
[25] Cl. Rej., ¶ 32.
[26] Cl. Rej., ¶ 36.
[27] Cl. Rej., ¶ 34.
[28] Cl. Rej., ¶ 33.
[29] Cl. Rej., ¶¶ 33 and 35.
[30] *E.g.*, Amended Tr., p. 9, lines 6-12.
[31] Amended Tr. p. 13, line 15 to p. 14, line 1.

had provided to that tribunal a translation of the expression "hereby consents to submit" that read as "accepte de soumettre," which is the formula used in the France-Egypt BIT of 1974.[32]

52. The Claimant maintained its argument that "in no way can [the BIT] be construed as covering only guaranteed investments."[33] It stressed that none of the preceding "non-reciprocal" treaties concluded by France (which the Respondent had sought to rely upon as contemporaneous practice) contained a clause comparable to Article 7,[34] and that the reason why subsequent treaties contained a provision analogous to Article 8 but without reference to ICSID arbitration was that "it was understood that it was unnecessary, it was superfluous, because if it is a guaranteed investment or if it is a non-guaranteed investment, the general clause establishing ICSID jurisdiction is applicable."[35]

53. The Respondent insisted that the "Egypt-France treaty is a hybrid, it is not completely reciprocal, because it is still subject to two conditions for the granting of the guarantees: approval by the host state and ICSID arbitration in the specific undertaking."[36] It further emphasised that "if you read Article 7 without reading Article 8, then Article 8 has no 'effet utile.'"[37] When asked by a member of the Tribunal whether "only investments that have the insurance guarantee are protected by the treaty,"[38] Counsel for the Respondent explained that while investments without a guarantee were protected by the treaty, they did not "have the trigger of the guarantee" or "the trigger of investor-state dispute settlement."[39] "[T]here is a lot of protection," Counsel said, "but it is not operationalized by an investor-state dispute settlement clause."[40]

2. The role of the subsequent exchange of letters with regard to Egypt's Consent to Arbitration

54. As an additional argument, the Claimant relies on an exchange of letters dated March 20, 1986 in which the parties agreed that:

> l'engagement du Gouvernement (mentionné à l'article 8) sur le territoire duquel était effectué l'investissement de recourir au

[32] Amended Tr. p. 100, line 17 to p. 101, line 12.
[33] Amended Tr. p. 101, lines 24-25.
[34] Amended Tr. p. 104, line 24 to p. 105, line 8.
[35] Amended Tr. p. 106, lines 16-20.
[36] Amended Tr. p. 20, line 22 to p. 21, line 1.
[37] Amended Tr. p. 25, lines 5-7.
[38] Amended Tr. p. 26, lines 18-19.
[39] Amended Tr. p. 92, lines 12-14.
[40] Amended Tr. p. 92, lines 16-18.

> Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.), tel qu'il est prévu à l'article 7 de la Convention, était réputé acquis dès lors que l'investissement était effectué en conformité avec la législation de l'Etat d'accueil.[41]

That would confirm, the Claimant maintains, that Egypt has consented to ICSID arbitration without the need for the "special undertakings" envisaged by Article 8.[42]

55. Moreover, the Claimant argues in its Rejoinder that: (i) Egypt had referred to the exchange of letters in its Objections to jurisdiction (filed in December 2013) without questioning its validity;[43] and, (ii) if the exchange of letters indeed required ratification to become effective, "[i]l appartenait à l'Egypte d'informer la France que cet échange de lettres n'était pas valable de faire, ainsi que de faire tous les efforts possibles pour ratifier cet accord."[44] But the Claimant does not seek to characterise the exchange of letters as an amendment to the BIT: it rather insists that the exchange constitutes an "official interpretation" that comes to Veolia's aid as a subsequent means of interpretation.[45]

56. The Claimant also maintains that the exchange of letters does not modify the obligations of the parties, for the only supplementary obligation established thereunder (a cooling-off period of three months before a dispute may be brought before an ICSID tribunal) is applicable to investors alone.[46] For the Claimant, what the exchange of letters does is to demonstrate that the Parties agreed that Article 8 did not impose a requirement of consent additional to that envisaged under Article 7.[47]

57. The Respondent challenges the exchange of letters on the grounds that, rather than interpreting the BIT, the purpose of the exchange was to amend it. This would be demonstrated: (i) by the title of the exchange of letters (which includes the expression "modifiant la Convention du 22 décembre 1974"); (ii) by the fact that the presumption of acquired consent contained in the exchange was a "legal fiction" in relation to the express stipulations of the BIT; and, (iii) by the additional elements that the exchange adds to the

[41] Cl. C-Mem., ¶ 29.
[42] Cl. C-Mem., ¶ 30.
[43] Cl. Rej., ¶¶ 20-21.
[44] Cl. Rej., ¶ 22.
[45] Cl. Rej., ¶ 24.
[46] Cl. Rej., ¶ 25.
[47] Cl. Rej., ¶ 28.

original agreement between the Contracting Parties (including a three-month cooling-off period).[48]

58. The Respondent seeks to rely upon Article 46 of the VCLT to argue that, because the exchange of letters was not ratified by Egypt as required by the Egyptian Constitution of 1974, it cannot possibly have modified the BIT.[49] This would have implied a manifest violation of a rule of internal law of fundamental importance that was objectively evident to France in the sense of Article 46.[50] As a result, for the Respondent "the exchange of letters could, at most, be seen as a mere preliminary discussion or communication with regard to a potential amendment," on which the Claimant cannot rely.[51]

59. The issue of the status of the exchange of letters was further debated in the hearing. The Respondent recalled that while France ratified and published the exchange of letters in accordance with the French Constitution (and that it was "useless to say that all these procedures would not have been followed if we are in the presence of an interpretation"),[52] the same had not been done by Egypt.[53] According to the Respondent, "the exchanged letters have not been signed by the competent authority in Egypt and the case record is devoid of any document that proves that there is a delegation of such power to the signatory."[54]

60. When asked by a member of the Tribunal whether it was the argument of Egypt that the Egyptian authority "had actually signed and exchanged these letters with the French Government without having been authorised by the Egyptian Government to do that" and, if so, why an official would "have done such a thing,"[55] Counsel for the Respondent answered that "[t]he papers didn't show if he was mandated or not" and pointed to problems with corruption,[56] but ultimately pointed out that the Egyptian Ministry of Foreign Affairs "didn't find anything in the archives" so that they could only show "the absence of proof" that the Egyptian official had been authorised to sign the exchange of letters.[57]

[48] Resp. Rep., ¶¶ 100-101.
[49] Resp. Rep., ¶¶ 103-108.
[50] Resp. Rep., ¶¶ 109-112.
[51] Resp. Rep., ¶ 113.
[52] Amended Tr. p. 33, lines 23-25.
[53] Amended Tr. p. 36, lines 14-17.
[54] Amended Tr. p. 36, lines 19-22.
[55] Amended Tr. p. 40, lines 12-17.
[56] Amended Tr. p. 41, lines 3-9.
[57] Amended Tr. p. 42, lines 19-23.

61. On its part, the Claimant clarified, in response to a question by a member of the Tribunal, that the fact that a publication decree of the exchange of letters had been issued did not mean that the French Government treated such exchange as an amendment to the 1974 BIT. Counsel for the Claimant argued that "[t]here was no intervention of the [French] Parliament, no involvement," which would have been required in the case of an amendment.[58] The Claimant thus insisted that the exchange of letters was only an authoritative statement as to the *interpretation* of the BIT, and recalled that "no reservation was expressed for a period of 18 years, so for 18 years, Egypt did not see any difficulties with this exchange of letters."[59]

B. Reliance by the Claimant on the MFN clause in Article 3(2) for the purpose of importing an umbrella clause and a clause of FPS

62. In relation to the second question that the Arbitral Tribunal bifurcated, the Claimant argues that Article 3 of the BIT contains a MFN clause that allows for the importation of umbrella clauses and provisions on FPS from "more favourable" BITs that Egypt has concluded with third States. As an alternative argument, the Claimant contends that protection against contractual breaches and the standard of FPS are subsumed under the standard of fair and equitable treatment ("FET") envisaged by the BIT. The Respondent strongly disagrees with both the Claimant's interpretation of Article 3 and with its argument that FET encapsulates an umbrella clause and FPS standard.

1. The interpretation of Article 3(2)

63. Article 3 of the France-Egypt BIT reads as follows:

> [First clause:] Chacune des Parties contractantes s'engage à assurer sur son territoire un traitement juste et équitable aux investissements des ressortissants et sociétés de l'autre Partie et à faire en sorte que l'exercice du droit ainsi reconnu ne soit entravé ni en droit, ni en fait.
>
> [Second clause:] Ce traitement sera au moins égal à celui qui est accordé par chaque Partie contractante à ses propres ressortissants ou sociétés ou au traitement accordé aux ressortissants ou sociétés de la nation la plus favorisée, si ce dernier est plus avantageux.
>
> [Third clause:] Il ne s'étendra toutefois pas aux privilèges qu'une Partie contractante accorde, en vertu de sa participation ou de son association à une union douanière, un marché commun ou

[58] Amended Tr. p. 111, lines 7-10.
[59] Amended Tr. p. 108, lines 22-24.

> une zone de libre échange, aux ressortissants et sociétés d'un Etat tiers.

64. According to the Claimant, the MFN clause in Article 3 (the second clause) is not subordinated to the FET provision that stands above it (the first clause). The Claimant denies that the phrase "ce traitement" in the first clause is limited to the "un traitement juste et equitable" to which the first clause refers, and argues that the phrase bears a wider meaning: that of the general treatment that each of the Contracting Parties undertakes to give to each other's investors.[60]

65. In its Rejoinder, responding to the Respondent's grammatical analysis of Article 3, the Claimant argues that if the intention of the Contracting Parties had been to limit the scope of the term "treatment" to FET, the second clause would have provided that "[c]e traitement sera au moins égal . . . au traitement [*juste et equitable*] accordé aux ressortissants ou sociétés de la nation la plus favorisée." Because the "traitement accordé aux ressortissants ou sociétés de la nation la plus favorisée" which serves as comparator for "ce traitement" is not qualified by FET but rather expressed in general terms, the phrase "ce traitement" has to be construed accordingly.[61]

66. In support of its claim, the Claimant principally relies on the third clause of Article 3, which prescribes that the treatment that constitutes the subject-matter of Article 3 ("Il") does not include privileges accorded under a customs union, common market or free trade zone.[62] For the Claimant, Article 3 would not make sense if the treatment mentioned in the third clause—which must logically be the same mentioned in the MFN clause—was confined to the FET standard: "les privilèges accordés en vertu d'une participation ou d'une association à une union douanière, un marché commun ou une zone de libre échange n'ont rien à voir avec le principe de traitement juste et equitable."[63]

67. On the above grounds, the Claimant contends that the interpretation favoured by the Respondent would be "incomplete" and "defective." To substantiate its own interpretation, the Claimant refers to:

[60] Cl. C-Mem., ¶ 41.
[61] Cl. Rej., ¶ 53.
[62] Cl. C-Mem., ¶¶ 42-43.
[63] Cl. C-Mem., ¶ 43.

(i) Four arbitral awards - *Maffezini v Spain*,[64] *Gas Natural SDG SA v Argentina*,[65] *Suez et al. v Argentina*[66] and *Teinver S.A. et al.* v *Argentina*[67] - construing a provision in the Argentina-Spain BIT, the first clause of which prescribes that "[e]ach Party shall guarantee in its territory fair and equitable treatment of investments made by investors of the other Party" and second of which provides that "[i]n all matters governed by this Agreement, such treatment shall be no less favorable than that accorded by each Party to investments made in its territory by investors of a third country."[68] Admitting that Article 3 of the BIT does not contain the phrase "in all matters governed by this Agreement," the Claimant pointed out that the awards are nevertheless relevant because there was no suggestion on the part of the tribunals that the phrase "*such* treatment" in the second clause was subordinated to the reference to "fair and equitable treatment" in the first clause.[69]

(ii) The award in *Quasar de Valors v Russia*,[70] including the Separate Opinion of Charles Brower (who dissented from the tribunal expressing an opinion fully in line with that of the Claimant). The tribunal had to construe a provision comprising a first clause prescribing FET and a second clause starting with the phrase "[t]he treatment referred to in paragraph 1 above," followed by a clause which—similar to Article 3 of the BIT—removed from the scope of the MFN clause the favourable treatment provided under customs unions, common markets or free trade areas. The tribunal recognised that the treatment covered by the third clause did not seem confined to FET and stated the following: "[t]he fact that an import duty may be set at x% or y% is naturally not a matter of FET.

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[64] *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, ¶ 64, CLA-168 ("*Maffezini v Spain*").
[65] *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction, 17 June 2005, ¶ 31, CLA-169 ("*Gas Natural SDG SA v Argentina*").
[66] *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, ¶¶ 55-56, CLA-170 ("*Suez et al. v Argentina*").
[67] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, ¶ 186, CLA-171 ("*Teinver S.A. et al. v Argentina*").
[68] Cl. C-Mem., ¶¶ 49-51.
[69] Cl. C-Mem., ¶ 51; Cl. Rej., ¶ 65.
[70] *Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A. Orgor de Valores SICAV S.A., and GBI 9000 SICAV S.A. v. The Russian Federation*, SCC. No. 24/2007, Decision on Preliminary Objections, 20 March 2009, RLA-31 ("*Quasar de Valors v Russia*").

> This strongly suggests that the pronoun 'such' in Subparagraph 3 cannot be read to stand for 'fair and equitable treatment' but rather for 'treatment' simpliciter."[71]

68. Whilst conceding that the majority in *Quasar de Valors v Russia* went on to conclude that MFN provided in the subparagraph 2 was limited to FET prescribed in subparagraph 1, the Claimant seeks to distinguish that case from the present case on the grounds that: (a) Article 3(2) of the BIT refers to "ce traitement," a less restrictive formulation than that of "the treatment referred to in paragraph 1 above" adopted in the treaty interpreted in *Quasar de Valors v Russia*;[72] and that (b) the claimant in *Quasar de Valors v Russia* was seeking to rely on the MFN clause to import dispute settlement provisions that bypassed the provisions on consent specific to that treaty, which, for the Claimant, warranted the more conservative approach on the part of the tribunal in that case.[73]

69. Likewise, the Claimant seeks to distinguish *Paushok v Mongolia*[74] on the grounds that the language of the MFN clause in the treaty construed in *Paushok v Mongolia* is similar to that in *Quasar de Valors v Russia* but different from that of Article 3 of the BIT. The Claimant further criticises the reasoning of the tribunal for failing to analyse the other relevant clauses of the provision being construed (which included a customs union, common market and free trade area exception) and hence engaging in an "incomplete interpretation."[75]

70. According to the Respondent, the reference to MFN in the second clause of Article 3 is strictly limited in scope: the phrase "ce traitement" refers back to the phrase "un traitement juste et equitable" contained in the first clause of Article 3.[76] This means that it is only in relation to the obligation to grant FET that the Claimant may invoke MFN treatment. Apart from grammatical considerations, the Respondent's argument relies on:

(i) The *ejusdem generis* principle as the controlling canon of interpretation. The principle, as reflected in Article 9(1) of the ILC Articles on MFN Clauses, prescribes that under an MFN clause "only those rights which fall within the limits

[71] *Quasar de Valors v Russia*, ¶112, RLA-31.
[72] Cl. C-Mem., ¶ 57.
[73] Cl. C-Mem., ¶ 59.
[74] *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, RLA-32 ("*Paushok v Mongolia*").
[75] Cl. C-Mem., ¶¶ 54-55.
[76] Resp. Mem. Jur., ¶¶ 260-261.

of the subject-matter of the clause" may be acquired.[77] The subject-matter of Article 3 being "un traitement juste et equitable," the Claimant can only rely on more favourable FET rights from other treaties concluded by Egypt – not on the umbrella clauses or FPS clauses in those treaties.

(ii) The awards in *Quasar de Valors v Russia* and *Paushok v Mongolia*. In both cases, the respective tribunals had to construe a provision containing a first clause prescribing FET and a second clause starting with the phrase "[t]he treatment mentioned [under/referred to in] paragraph 1 [of this Article/above]."

71. The Respondent further points out that, in *Quasar de Valors v Russia*, the tribunal found that the claimant could not rely upon the FET-related MFN clause to invoke the dispute settlement provisions of more favourable BITs. Though noting that the third clause of the article on "treatment" (which is similar to the third clause of the BIT) suggested a different interpretation, the tribunal ultimately concluded that, "[t]he choice is between an explicit stipulation and a revelation by grammatical deconstruction," and that it would "naturally [prefer] the former."[78] It pointed out that the language of the third clause could neither "dislodge the qualifying adjectives 'fair and equitable' in Subparagraph 1" nor "the unambiguous reference in Subparagraph 2 to 'treatment' referred to in paragraph 1 above."[79]

72. Likewise, for the Respondent, in *Paushok v Mongolia* the tribunal found that the claimant could not rely on the MFN clause to import an umbrella clause because the treaty was "quite clear as to the interpretation to be given to the MFN clause contained in Article 3(2): the extension of substantive rights it allows only has to do with Article 3(1) which deals with fair and equitable treatment . . . such investor cannot use that MFN clause to introduce into the Treaty completely new substantive rights, such as those granted under an umbrella clause."[80]

73. In its Reply, the Respondent challenges the Claimant's interpretation of Article 3(2) and reliance on the third clause on three grounds:

(i) The argument is not supported by French treaty practice, which indicates that "in 86% of the treaties concluded by France, the most-favored-nation and the fair and equitable treatment are treated separately in two independent

[77] Resp. Mem. Jur., ¶¶ 269-270.
[78] *Quasar de Valors v Russia*, ¶ 117, RLA-31.
[79] *Quasar de Valors v Russia*, ¶ 117, RLA-31.
[80] *Paushok v Mongolia*, ¶ 570, RLA-32.

provisions"[81] and comprises examples of articles combining FET and MFN without subordinating the latter to the former.[82] The inference is that had France intended to adopt a general MFN clause, it would have done so clearly and unambiguously.

(ii) The third clause of Article 3 is not rendered meaningless if "Il" is construed as "traitement juste et equitable" as there can be an overlap between FET and privileges arising from common markets, customs unions and free trade areas.[83] The analysis focuses on the European Union and finds some support in the literature.

(iii) The four awards applying the Argentina-Spain BIT do not support the Claimant's interpretation of Article 3 of the 1974 France-Egypt BIT because they include the unambiguous phrase "in all matters governed by this Agreement." In *Maffezini v Spain*, the tribunal contrasted the broad formulation adopted in the Argentina-Spain BIT with other treaties concluded by Spain which, not containing that phrase, had employed "of course a narrower formulation."[84] The Respondent further points out that the awards consistently focused on the broad language that the relevant provision used, which indicates that the Claimant's inference of the interpretation of the phrase "such treatment"—which was not specifically discussed by the parties—is misleading.[85]

74. At the hearing of December 2, 2014, the Parties for the most part repeated arguments that had been made in the written pleadings. However, a few points stand out.

75. The Claimant reiterated its view on the correct grammatical interpretation of Article 3. As regards the Claimant's reliance on precedent, when asked by a member of the Tribunal about the significance of the expression "in all the fields governed by this agreement" in the Argentina-Spain BIT, Counsel for the Claimant replied that the presence of that expression was immaterial to the "grammatical" interpretation of the words "ce traitement."[86]

[81] Resp. Rep., ¶ 146.
[82] Resp. Rep., ¶ 147.
[83] Resp. Rep., ¶¶ 170-176.
[84] *Maffezini v Spain*, ¶ 60, CLA-168.
[85] Resp. Rep., ¶¶ 207-210.
[86] Amended Tr. p. 122, lines 2-11.

76. An additional argument, outlined in the Rejoinder but further developed by the Claimant at the hearing, was premised on the fact that the words "ce traitement" in Article 3(2) refer not only to MFN treatment, but also to *national treatment*: "Ce traitement sera au moins égal à celui qui est accordé par chaque Partie contractante à ses propres ressortissants." Because "fair and equitable treatment is a concept of international law that doesn't apply to the treatment by a state of its own investors," but rather to *foreign* investors, Egypt's interpretation of paragraph 2 as limited to FET would not "make sense."[87] In support of this claim, Counsel for the Claimant referred to an expert opinion of Christoph Schreuer in the *Philip Morris* case in which he allegedly came to the exact same conclusion when interpreting a virtually identical provision from the Switzerland-Uruguay BIT.[88] (Addressing this contention, the Respondent argued that "[f]oreigners are granted as a minimum the same treatment as nationals and there is nothing nonsensical or exotic about this."[89])

77. Restating its view on the correct grammatical interpretation of the first two clauses of Article 3 and replying to arguments made by the Claimant in its Rejoinder, the Respondent emphasised that "fair and equitable treatment" is a term of art, "a specific legal concept." As a result, the suggestion that "ce traitement" from the second paragraph only encapsulated the word "traitement" from the first paragraph was "wrong and not a matter of opinion."[90] "[F]air and equitable," Counsel for the Respondent contended, were "not adjectives of a general undefined treatment, but the proper name of a specific international standard with its own identity."[91]

78. As regards *effet utile*, the Respondent argued that its interpretation of Article 3(2) was sensible to the extent that "the most favoured nation FET under Article 3(2) will produce its effet utile with respect to other FET clauses which go beyond customary international law."[92] In any case, the Respondent noted, "effet utile means that the provision shall produce its natural effects and not every possible effect that might be considered useful by one party, including by the investor in this case."[93] The "natural effects" of an MFN clause would depend on the content of existing treaties concluded by the relevant parties and of future treaties that these

[87] Amended Tr. p. 123, lines 11-17.
[88] Amended Tr. p. 123, line 20 to p. 124, line 10.
[89] Amended Tr. p. 69, lines 1-3.
[90] Amended Tr. p. 48, lines 17-23.
[91] Amended Tr. p. 50, lines 22-24.
[92] Amended Tr. p. 65, line 23 to p. 66, line 1.
[93] Amended Tr. p. 67, lines 11-14.

parties might conclude, so that "the lack of a better treatment today does not mean that the clause is deprived of its effet utile."[94]

79. In addition, the Respondent argued that the regional economic integration organisation ("REIO") exception in the third paragraph of Article 3 would not be deprived of *effet utile* if the second clause was construed as confined to most favoured FET. In this context, Counsel for the Respondent referred to a dispute between Germany and the European Community concerning the Telecommunications Directive of 1990 and Germany's objection to the implementation of Article 29 of the Directive based on Article XVII (2) of its FCN (Friendship, Commerce and Navigation) Treaty with the United States. According to the Respondent, Article XVII (2) of the FCN Treaty concluded between Germany and the United States is similar to Article 3 of the BIT, since it contains an explicit reference to fair and equitable treatment; the only difference being that there is no REIO exception and that was because the FCN Treaty was concluded before Germany entered into the European Community, so there was no reason to include such an exception.

2. Does the FET standard in Article 3 encapsulate the obligation to respect contractual duties and an FPS clause?

80. As an alternative argument, the Claimant argues in its Counter-Memorial that even if the Tribunal concludes that the MFN clause in Article 3 of the BIT only applies to FET, the FET standard encapsulates the obligation not to breach contractual undertakings (normally the subject-matter of a discrete umbrella clause) and the standard of full protection and security.[95]

81. As regards the relationship between FET and umbrella clauses, the Claimant relies on: (a) the award in *Noble Ventures v Romania*, which construed Article II(2) of the BIT between Romania and the United States, in light of its placement at the very beginning of the treaty, as a "more general standard which finds its specific application in *inter alia* the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor"[96]; (b) the award in *MTD Equity v Chile*, in which the tribunal concluded that "under the BIT, the fair and equitable standard of treatment has to be interpreted in the manner most conducive to fulfill the objective

[94] *E.g.*, Amended Tr. p. 68, lines 11-13.
[95] Cl. C-Mem., ¶ 23.
[96] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶ 182, CLA-44 ("*Noble Ventures v. Romania*").

of the BIT to protect investments and create conditions favorable to investments" and that this would include the importation of umbrella clauses.[97]

82. As regards the relationship between FET and full protection and security, the Claimant refers in support of its arguments to: (a) the award in *Wena Hotels v Egypt* [98] in which a clause on FET and FPS was applied to the facts without the tribunal distinguishing between the two standards; and (b) the award in *Occidental v Ecuador*, in which the tribunal found that because Ecuador had breached FET "the question of whether in addition there [had] been a breach of full protection and security [under Article II(3)(a) of the BIT] became moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment."[99]

83. The Claimant further relies on: (a) the award in *Impregilo v Argentina*, which contains a passage similar to that of *Occidental v Ecuador* to the effect that "it is not necessary to examine whether there has also been a failure to ensure full protection and security" if the FET standard has been breached;[100] and (b) the awards in *Total v Argentina* and *SAUR International v Argentina*, which construed a provision affording FPS "en application du principle de traitement juste et equitable"; [101] as well as on (c) French treaty practice confirming the relationship between the FET and full protection and security, exemplified by the France-Zaire BIT (1972), the France-Morocco BIT (1975) and the France-Argentina BIT (1991).[102]

84. At the end of its Rejoinder, the Claimant states in clearer terms that its intention is to import Article 2(2) of the Egypt-UK BIT "qui est plus détaillé que le premier alinéa de l'article 3 du TBI, constitue un traitement juste et équitable plus favorable que celui dont bénéficie la demanderesse en vertu du TBI" and provides as follows:

> Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Each Contracting Party shall ensure that

[97] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 104, CLA-9 ("*MTD Equity v Chile*").
[98] *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, CLA-100 ("*Wena Hotels v Egypt*").
[99] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Award, 1 July 2004, ¶ 187, CLA-144 ("*Occidental v Ecuador*").
[100] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, ¶ 334, CLA-34 ("*Impregilo v Argentina*").
[101] Cl. C-Mem., ¶ 80.
[102] Cl. C-Mem., ¶¶ 78-79.

> the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party is not in any way impaired by unreasonable or discriminatory measures. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.[103]

85. The Respondent rejects the assimilation by the Claimant of umbrella clauses and the FPS standard to FET. The three standards serve different purposes, possess a distinct legal nature and have different contents. As regards purpose, umbrella clauses allow investors to complain about contractual breaches otherwise governed by domestic law, FPS has to do with protection from physical violence in its various forms, and FET performs a gap-filling role in relation to more specific standards.[104] As regards legal nature, the Respondent contends that FET and FPS constitute "substantive protections" while umbrella clauses are procedural in character.[105] As regards content, umbrella clauses are said not to impose additional obligations (they only bring contractual undertakings under the purview of the treaty), while FPS establish liability for action carried out by third parties that cannot fall under the scope of FET.[106]

86. In support of these arguments, the Respondent relies upon:

(i) legal commentary (*e.g.*, Schreuer) distinguishing between the standards (especially FET and full protection and security);[107]

(ii) the treaty practice of States, such as France, where, according to the Respondent, 75% of the BITs concluded by France include FET and FPS in separate clauses, and only two include umbrella clauses.[108] The Respondent describes the examples provided by the Claimant as "mere hasty generalization."[109] The Respondent also refers to the treaty practice of Egypt, which, while more varied than France, does not warrant the conclusion that FET and FPS are assimilated, and 60 out of 78 BITs concluded by Egypt do not contain an umbrella clause. From this, the Respondent infers that "the only explanation possible to the absence of an umbrella clause in the France-Egypt

[103] Cl. Rej., ¶ 127.
[104] Resp. Rep., ¶¶ 261-264.
[105] Resp. Rep., ¶ 266.
[106] Resp. Rep., ¶ 269.
[107] Resp. Rep., ¶ 270.
[108] Resp. Rep., ¶ 274.
[109] Resp. Rep., ¶ 278.

treaty is that the Contracting Parties wilfully omitted to include any such clause."[110]

(iii) the award in *Eureko v Poland*, which, referring to the principle of *effet utile*, stated that the effect of the umbrella clause being construed could not "be overlooked, or equated with the Treaty's provisions for fair and equitable treatment, national treatment, most-favored-nation treatment, deprivation of investments, and full protection and security."[111]

(iv) the award of *Electrabel v Hungary*, which, in regard to the Energy Charter Treaty, noted that FET and FPS "must have, by application of the legal principle of 'effet utile,' a different scope and role."[112]

87. The Respondent further criticises the Claimant for its reliance on what the Respondent considers to be misleading *obiter dicta*.[113] It provides tables as Annexes 3 and 4 to its Reply purporting to show that the *ratio decidendi* of the cases cited by the Claimant in reality "have considered claims for the breaches of those separate obligations separately, in separate parts of the decision, and not as single obligation."[114]

88. As regards the case law on umbrella clauses, the Respondent claims that tribunals tend to rely "on the *summa divisio* between international and domestic law to reject the possibility of including umbrella clauses among the elements of the fair and equitable treatment standard."[115] The Respondent criticises the Claimant for its reliance on *MTD Equity v Chile* because the tribunal's pronouncement on the connection between the umbrella clause and FET was later disapproved in a brief passage of the decision of the *ad hoc* annulment committee established to review the award.[116] It also contends that the Claimant reads *Noble Ventures v Romania* selectively without considering that the tribunal had earlier in the award found that the treaty in question comprised a proper umbrella clause.[117]

89. As regards the case law on full protection and security, the Respondent denies that any of the cases quoted by the Claimant supports assimilation. For the Respondent, *Wena Hotels v*

[110] Resp. Rep., ¶ 275.
[111] *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, ¶ 249 CLA-139 ("*Eureko v Poland*").
[112] *Electrabel v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶7.83, CLA-31 ("*Elektrabel v Hungary*"); Resp. Rep., ¶ 296.
[113] Resp. Rep., ¶ 281.
[114] Resp. Rep., ¶ 282.
[115] Resp. Rep., ¶ 285.
[116] Resp. Rep., ¶ 289.
[117] Resp. Rep., ¶ 293.

Egypt only dealt with full protection and security: FET was only mentioned in the tribunal's conclusion because it belonged to the same clause as full protection and security.[118] As to *Occidental v Ecuador*, the passage invoked by the Claimant would constitute mere *obiter dicta* as a breach of FPS was not argued by the investor.[119]

90. At the Hearing of December 2, 2014, Counsel for the Claimant explained that Veolia's subsidiary argument was that "the protections granted by the umbrella clause and the full protection and security clause are part of the FET, therefore Veolia Propreté doesn't try to extend the MFN clause beyond the FET."[120] "It is simply," Counsel added, "trying to enjoy the most favourable FET possible."[121] After restating its views on the significance of the precedents quoted in its written pleadings, the Claimant stated that:

> the parties agree that if Veolia can demonstrate that a treaty signed by Egypt defines fair and equitable treatment as encompassing protection given by the umbrella clause and the FPS clause, then Veolia would be within its rights to get this fair and equitable treatment that would necessarily be more favourable than what it is already getting.[122]

91. The allegedly most favourable treaty that the Claimant sought to rely upon at that stage of the proceedings was Article 2(2) of the Egypt-UK BIT. When asked by a member of the Tribunal why that clause did not comprise "three separate obligations" (as argued by the Respondent), Counsel for the Claimant referred to an UNCTAD report on the UK Model BIT that considered an identical clause as comprising a "general standard" of which the other standards "were only specific applications."[123] He added that the tribunal's finding in *Noble Ventures v Romania* (that FET was a "more general standard which finds its specific application in *inter alia* the duty to provide full protection and security . . . and the obligation to observe contractual obligations towards the investor") was based on the interpretation of a similar FET clause from the Romania-US BIT.[124]

92. The Claimant also suggested that a better interpretation of *Noble Ventures v Romania* than that provided by the Respondent was that the apparent contradiction within the award was

[118] Resp. Rep., ¶ 298.
[119] Resp. Rep., ¶ 299.
[120] Amended Tr. p. 137, lines 2-5.
[121] Amended Tr. p. 137, lines 5-7.
[122] Amended Tr. p. 145, lines 11-17.
[123] Amended Tr. p. 147, lines 2-8.
[124] Amended Tr. p. 149, lines 3-7.

due to the fact that the tribunal wished to make the point that an umbrella clause by definition imports "contractual obligations" that are "beyond what is in the BIT," which did not mean that the tribunal considered that the umbrella clause did not form part of the FET provided by the Romania-US BIT.[125]

93. When asked by a member of the Tribunal what the "subsidiary argument" meant for the jurisdictional phase of the proceeding, Counsel for the Claimant explained that the Claimant was asking the Tribunal to decide that the MFN clause was general, and, in the alternative, to find that the MFN, even if restricted to FET, would allow the Claimant to import "the more favourable fair and equitable treatment" which "includes all of the arguments that we have made that have to do with the breach of the umbrella clause and the breach of the FPS clause."[126]

94. The Respondent addressed the Claimant's "subsidiary argument" by asking "why bother and go and seek an MFN provision if the fair and equitable treatment, according to Veolia, encompasses the standard, full protection and security, and the umbrella clause?"[127] It accused the Claimant of pursuing a contradictory line of argument by contending, in its written pleadings, that a narrow reading of "ce traitement" would compromise the *effet utile* of Article 3(2), and arguing, later on, that there were "more favourable FET clauses" which could be imported via Article 3(2) even if narrowly construed.[128] The Respondent then considered the merit of the Claimant's reliance on Article 2(3) of the Egypt-Denmark BIT and Article 2(2) of the Egypt-UK BIT. First, it pointed out that Article 2(3) did not concern FET at all.[129] Second, it argued that Article 2(2) of the Egypt-UK BIT dealt, in a single provision, with three different standards expressed with different verbs and nouns.[130]

95. The Respondent further sought to downplay the relevance of that UNCTAD report as authority in support of the Claimant's position and reaffirmed its understanding that, in *Noble Ventures v Romania,* the tribunal had found that the BIT in question comprised an umbrella clause proper, which it considered to produce effects *beyond* what was already provided by the

[125] Amended Tr. pp. 196-197.
[126] Amended Tr. p. 152, lines 21-23.
[127] Amended Tr. p. 77, lines 7-11.
[128] Amended Tr. p. 78.
[129] Amended Tr. p. 84, lines 8-10. At the hearing, the Claimant appears to have dropped this argument.
[130] Amended Tr. p. 82.

provisions of the treaty.[131] Counsel for the Respondent suggested that the "tribunal may have, at a separate stage of its reasoning, made a confusion between FET and umbrella clauses."[132]

VII. THE TRIBUNAL'S ANALYSIS

A. The Issue of Egypt's Consent to ICSID Arbitration

96. The Respondent contends that Article 7 of the France-Egypt BIT requires a contextual and teleological interpretation, since a textual interpretation would only reveal its ambiguous nature. For the Claimant, the text of Article 7 is so "univocal" that recourse to the rules of interpretation in the Vienna Convention is neither necessary nor justifiable.[133]

97. Since the provision in contention between the Parties is part of a treaty concluded between States, the Tribunal will use Article 31 of the VCLT, which reflects customary international law, to interpret it. Article 31(1) of the VCLT reads as follows: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[134]

98. The authentic text of the BIT is in French and Article 7 thereof is formulated in the following terms:

> [c]hacune des Parties contractantes accepte de soumettre au Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.) les différends qui pourraient l'opposer à un ressortissant ou à une société de l'autre Parties contractante.

The crucial words whose ordinary meaning has to be established by the Tribunal in the above provision, for the purpose of ascertaining the consent of the Contracting States to ICSID arbitration in case of a dispute between one of them and a national or a company of the other, are "accepte de soumettre" to the ICSID.

99. The English translation of the text published in the United Nations Treaty Series uses the formulation "shall agree to submit." In other instances, however, the phrase "accepte de soumettre" is translated as being equivalent to "consents to submit." Indeed, the Claimant

[131] Amended Tr. pp. 181-182.
[132] Amended Tr. p. 182, lines 14-16.
[133] Cl. C-Mem., ¶ 6; Cl. Rej., ¶ 6.
[134] The Tribunal has already indicated at ¶ 37 that, even though France is not a party to the VCLT, the Tribunal considers it to reflect customary international law.

referred to *Malicorp v Egypt*, where Egypt itself had provided to that tribunal a translation of the expression "hereby consents to submit" that read as "accepte de soumettre."[135] The Respondent did not contest that assertion.

100. Moreover, the expression "consents to the submission" or "consented to submit" in the Report of the Executive Directors on ICSID is rendered in the French text of the Report (paragraph 33) as "accepte de soumettre" and "ont consenti à soumettre." It follows that, in the view of the Tribunal, the expression "accepte de soumettre" in its ordinary meaning constitutes an offer of consent by each of the two Contracting Parties to the BIT, which may be taken up by a national or company of the other to submit a dispute for arbitration to the ICSID Centre. Thus, the Tribunal does not find persuasive the argument of the Respondent that the expression "accepte de soumettre" does not constitute an offer to the investor, but is "rather a typical two-stage consent where the treaty sets the agreement to consent on the basis of a commitment."[136] The Tribunal cannot find in the language used in Article 7 any indication of a two-stage consent, which would subject the expression "accepte de soumettre" to a further agreement between one of the parties and a national or company of the other. Rather, the use of the expression "accepte de soumettre" in the present tense in French makes the statement mandatory.

101. Notwithstanding the above preliminary conclusion based on the natural and ordinary meaning of the words employed in Article 7, the Tribunal, in the application of Article 31(1) of the Vienna Convention, shall also examine Article 7 in its context and in light of the object and purpose of the treaty in order to address the other objections to its jurisdiction raised by the Respondent on the basis of the text of Article 7 and its context. Indeed, the Respondent's objection to the jurisdiction of the Tribunal on grounds of lack of consent is also based on a contextual and teleological interpretation of Article 7.

102. The Respondent contends that Article 7 does not constitute a "stand-alone and self-executing consent" to ICSID arbitration, but rather a provision which depends on the existence of specific undertakings (the "engagements particuliers") to submit disputes arising from investments that are subject to the system of guarantees established under Article 8.[137] It further emphasises that "if you read Article 7 without reading Article 8, then Article 8 has no

[135] Amended Tr. p. 100, line 24 to p. 101, line 6.
[136] Resp. Mem. Jur., ¶ 232.
[137] Resp. Rep., ¶ 57.

effet utile."[138] The Claimant disagrees with the Respondent's analysis (noting that a general provision such as Article 7 was not included in treaties where consent to arbitration was truly conditioned by special undertakings, *e.g.*, in the France-Zaire BIT),[139] and refers to contemporaneous statements confirming that Articles 7 and 8 are distinct provisions[140] and to academic commentary[141] allegedly supporting its interpretation.

103. The Tribunal considers that if the consent to arbitration given in Article 7 were indeed dependent upon subsequent specific undertakings ("engagements particuliers"), such as those provided for in Articles 8-10, Article 7 would not be applicable at all and this would deprive it of its "*effet utile*." This would also mean that only those investments which are guaranteed by the government of one of the Contracting Parties are protected by the BIT. In the view of the Tribunal, Article 7 is an offer of consent available to all investors, not just guaranteed investors; while Article 8 deals with a subset of investments where there is a guarantee that may be issued by either of the Contracting Parties. In this context, the Tribunal notes that the manner in which the first sentence of Article 8 is formulated clearly suggests that it introduces a set of provisions (Articles 8-10) which deal with the provision of guarantees to investments by either of the Contracting Parties on a case-by-case review.

104. With regard to the object and purpose of the BIT, the Respondent argues that its object and purpose was to establish a framework for investment guarantees and protection that complied with the "mandatory condition imposed by the French legislator on the French government to grant investment guarantees over political risk to French investors in Egypt and, as such, fulfilling the objectives aimed in the Preamble."[142] In other words, France concluded the BIT to comply with the requirements under French law for the provision of guarantees. Thus, for the Respondent, when read in its proper context and in light of this object and purpose, Article 7 would not bear the ordinary meaning that the Claimant ascribes to it.

105. The Tribunal is of the view that an analysis of the various provisions of the BIT, including its preamble, does not support such an interpretation. The Preamble of the BIT expresses the Contracting Parties' desire to "increase economic cooperation between the two States and to create favourable conditions for French investments in Egypt and Egyptian

[138] Amended Tr. p 25, lines 5-7.
[139] Cl. Rej., ¶ 34.
[140] Cl. Rej., ¶ 33.
[141] Cl. Rej., ¶¶ 33, 35.
[142] Resp. Mem. Jur., ¶ 223.

investments in France." It also states the conviction that "the promotion and protection of such investments are likely to stimulate transfers of capital between the two countries in the interest of their economic development." The preamble thus refers to "French investments in Egypt" and "Egyptian investments in France" as a whole and does not in any way single out those investments that are granted "investment guarantees."

106. This is followed by a set of general substantive provisions relating to the promotion and protection of "investments," as defined in Article 1 of the Convention, FET, MFN, national treatment, and prohibition of expropriation without fair compensation (Articles 2-6). These obligations are quite distinct from the provisions relating to specific undertakings ("engagements particuliers"), which are dealt with under Articles 8-10 of the Convention. The latter provisions are introduced by the first sentence of Article 8: "[i]n so far as the regulations of one Contracting Party provide for guaranteeing external investments," and deal with a subset of investments to which investment guarantees are granted by the regulations of one or the other of the Contracting Parties.

107. Article 7 stands between the two sets of provisions and appears to relate to dispute settlement with respect to the general obligations set out in Articles 2-6, while the reference to "recourse to the International Centre for Settlement of Investment Disputes" in Article 8 applies to the subset of investments subject to guarantees granted by one of the Contracting Parties. In this respect, the Tribunal finds plausible the explanation by the Claimant that the reason why subsequent investment treaties concluded by France comprised a provision analogous to Article 8 but without reference to ICSID arbitration was that "it was understood that it was unnecessary, it was superfluous, because if it is a guaranteed investment or if it is a non-guaranteed investment, the general clause establishing ICSID jurisdiction is applicable."[143]

108. Article 25(1) of the ICSID Convention reads as follows: "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."

[143] Amended Tr. p. 106, lines 16-20.

109. The ICSID Convention does not specify how consent should be given. Such consent may be given, in a clause included in an investment treaty providing for the submission to the Centre of future disputes arising out of that agreement, or in a *compromis* regarding a dispute, which has already arisen. A host State may also offer consent in its investment legislation to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor may give his consent by accepting the offer in writing.[144]

110. As stated in Professor Schreuer's commentary on the ICSID Convention: "[t]he same principle is applied to treaties to which the host State is a party. While the treaty on its own cannot amount to consent to the Centre's jurisdiction by the parties to the dispute, it may constitute the host State's offer to do so. This offer may then be taken up by a national of the other State party to the treaty."[145] Thus, in the present case, Veolia has taken up Egypt's offer to consent under Article 7 of the France-Egypt BIT of 1974 by submitting a request for arbitration to the Centre. As shown in the analysis of the Tribunal in paragraphs 98-100, 103 and 105 above, the BIT concluded between France and Egypt in 1974, on which the Claimant bases its Request for Arbitration to the Centre, provides such an offer of consent.

111. Consequently, the Tribunal concludes that it has jurisdiction in the present case since Egypt made an offer of consent in Article 7 of its BIT with France of 1974, the Claimant gave its consent by instituting this proceeding, and there is no issue between the Parties as to the existence of a dispute between them in respect of Veolia's investments in Egypt.

112. In light of the above conclusion with regard to the consent of the Parties, the Tribunal does not consider it necessary to examine the arguments of the Parties with respect to the issue of the exchange of letters between France and Egypt. Having said that, the Tribunal observes with respect to the relationship between Articles 7 and 8 of the BIT, without determining the legal status of the exchange of letters, that the fact that the letters purported to introduce a cooling off period into Article 7 of the BIT would have made no sense if Articles 7 and 8 were meant to be read together, as argued by Respondent, since Article 8 already contained such a cooling off period.

[144] See Report of the Executive Directors on the ICSID Convention, ¶ 24.
[145] C. Schreuer, THE ICSID CONVENTION: A COMMENTARY, Cambridge, Cambridge University Press, 2nd edition, 2009, p. 205, ¶ 427.

B. Veolia Propreté's Reliance on the MFN Clause in Article 3 to import an umbrella clause and an FPS clause

113. In relation to Article 3 of the BIT and its possible effect on the scope of the jurisdiction of the Tribunal, the Claimant pursues two lines of argument. In the first instance the Claimant asserts that the MFN clause in Article 3 of the BIT allows for the importation of umbrella clauses and provisions on FPS from "more favourable" treaties concluded by Egypt with third States. Secondly, and as an alternative argument, the Claimant contends that protection against contractual breaches and the standard of FPS are subsumed under the FET standard envisaged by the BIT. The Respondent strongly disagrees with both the Claimant's interpretation of Article 3 and with its argument that FET encapsulates an umbrella clause and full protection and security. The Tribunal will address both arguments below.

114. With regard to the first argument, the Claimant relies on a textual interpretation of Article 3, on treaty practice and on the jurisprudence of arbitral awards which deal with similar issues (see paragraphs 64, 67-69 above). In particular, the Claimant asserts that the phrase "ce traitement" in the second paragraph of Article 3 is not limited to the "un traitement juste et equitable" to which the first paragraph refers, and argues that the phrase bears a wider meaning: that of the general treatment that each of the Contracting Parties undertakes to give to each other's investors.[146] For the Respondent, the reference to MFN in the second paragraph of Article 3 is strictly limited in scope: the phrase "ce traitement" refers back to the phrase "un traitement juste et equitable" contained in the first clause of Article 3.[147]

115. The Tribunal will start its analysis of Article 3 with the examination of the operation and scope of the MFN clause contained in the second paragraph of the provision. In this context, it will use the Draft Articles of the International Law Commission of 1978 on Most-Favoured-Nation Clauses ("ILC Draft Articles on MFN"), which, although they did not become a treaty and are thus non-binding, clearly codify the definition and the rules governing the operation of the MFN clause.[148] The definition is provided in Article 4 which reads as follows: "[a] most-favoured nation clause is a treaty provision whereby a State undertakes an

[146] Cl. C-Mem., ¶ 41.
[147] Resp. Mem. Jur., ¶¶ 260-261.
[148] International Law Commission, Draft Arts. on Most-Favoured-Nation Clauses (hereinafter "ILC Draft Articles on MFN"), text adopted by the International Law Commission at its 30th session (1978), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_3_1.

obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations."[149]

116. The MFN treatment is further defined under Article 5 as the "treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State."[150] Article 9 describes the scope of the right and provides that the beneficiary of MFN treatment can only demand the application of the more favourable treatment accorded to a third State when it falls within the limits of the subject matter of the clause.

117. Despite their prevalence in investment treaties, the formulation and application of MFN clauses vary widely among such treaties. The proper interpretation and application of an MFN clause in a particular case, such as the present one, requires a careful examination of the text of such a provision in accordance with the rules of interpretation contained in Article 31 of the Vienna Convention. Moreover, as expressed in Article 9 of the ILC Draft Articles on MFN, and in accordance with the *ejusdem generis* principle contained therein, an MFN clause can attract the more favourable treatment available in other treaties only in regard to the same subject matter. In the instant case, the parties disagree on the limits of the subject matter of the clause.

118. A first question for the Tribunal is to determine whether the phrase "ce traitement" in the second paragraph operates a *renvoi* to the FET obligation provided by the first paragraph, and therefore, the MFN treatment refers and applies to FET alone; or whether the *renvoi* is to treatment in general, which may allow the MFN clause to import other protections from treaties concluded by Egypt with third States.

119. It is not disputed between the parties that "ce traitement" is an anaphora and the term to which it refers is the "traitement" to be found in the first paragraph of Article 3. The disputed issue appears to be the determination of the meaning and scope of the word "traitement" in the first paragraph. For the Respondent, the only "traitement" in paragraph 1 is "un traitement juste

[149] ILC Draft Articles on MFN, Article 4.
[150] ILC Draft Articles on MFN, Article 5.

et equitable," while for the Claimant the "traitement" in paragraph 1 is a general treatment which applies to investments and includes, among others, FET.

120. The Tribunal observes that the reference in paragraph 1 of Article 3 to "juste et equitable" after the word "traitement" cannot be merely considered a general adjective which describes the word "traitement." That grammatical inference is less than convincing. The ordinary meaning to be derived from paragraph 1 of Article 3 is that Egypt and France undertake to accord in their respective territories to the nationals and companies of the other a certain standard of treatment which is well known in international investment law and that standard of treatment is, in the view of the Tribunal, "fair and equitable treatment."

121. Thus, the words "juste et equitable" cannot be separated from the "traitement" which they describe because "fair and equitable treatment" is a legal term of art that is to be found in most bilateral investment treaties. Although there may be differences of opinion in the literature or in arbitral decisions as to the exact content and scope of the standard, the fact that the words "fair and equitable treatment" denote a specific standard of international law is well settled.

122. The Tribunal therefore considers that the words "ce traitement" in the second paragraph of Article 3 refer to the "traitement juste et equitable" which each of the Contracting Parties has undertaken to accord to the nationals and companies of the other. It cannot be read to refer in its plain and ordinary meaning to a generic type of treatment or to an undefined treatment. Rather, it operates a *renvoi* to the well-known standard of treatment stipulated in paragraph 1 of the provision, *i.e.*, the standard of FET. In this context, the MFN treatment is used as a determining factor of the level of protection for the FET.

123. To substantiate its own interpretation, the Claimant refers to four arbitral awards - *Maffezini v Spain*, *Gas Natural SDG SA v Argentina*, *Suez et al. v Argentina* and *Teinver S.A. et al. v Argentina* - construing a provision in the Argentina-Spain BIT. Article IV of that BIT, after guaranteeing FET for investors, provides the following in paragraph 2: "[i]n all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country."

124. It is true that the tribunals mentioned above did not suggest that the phrase "such treatment" in the second clause was limited to the "fair and equitable treatment" mentioned in the first clause. However, the tribunals in those cases were able to rely on the phrase "in all matters related to this Agreement," which was, to borrow the language of the tribunal in *Teinver*

S.A. et al. v Argentina, "unambiguously inclusive."[151] In *Mafezzini v Spain* also, the Tribunal noted that: "of all the Spanish treaties it has been able to examine, the only one that speaks of 'all matters subject to this Agreement' in its most favored nation clause is the one with Argentina. All other treaties, including those with Uruguay and Chile, omit this reference and merely provide that 'this treatment' shall be subject to the clause, which is of course a narrower formulation."[152]

125. It appears therefore that the formula used in the Spain-Argentine BIT (*i.e.*, "in all matters subject to this agreement") has a broader and more inclusive meaning than the wording used in Article 3(2) of the France-Egypt BIT, which is similar to the "narrower" formula used in the Spain-Uruguay BIT and Spain-Chile BIT. The France-Egypt BIT of 1974 does not contain an MFN clause entitling investors to avail themselves in generic terms of more favourable conditions found "in all matters" covered by other treaties. It establishes the right to enjoy at least the same level of FET treatment as that accorded to nationals or to investors of third States.

126. The Claimant argues that it does not make sense to speak of a right to enjoy a no less favourable level of FET. The Tribunal notes, however, that there are instances in treaty practice with regard to investment protection where it is explicitly stipulated that FET may be more or less favourable. Thus, Article 3(1) of the Russia-Denmark BIT provides as follows:

> Each Contracting Party shall accord investments made by investors of the other Contracting Party in its territory fair and equitable treatment no less favourable than that which it accords to investments of its own investors or to investments of investors of any third state, whichever treatment is more favourable.

127. Under this treaty, investors of either Contracting Party would be entitled to invoke the most favourable level of FET. Consequently, the existence of variable levels of FET in bilateral investment treaties cannot be excluded. As was noted by the tribunal in the *Quasar Valors v Russia* case (or *Renta 4 SVSA et al v The Russian Federation*):

> The proposition that FET should have a universal meaning has an undeniable cogency if one considers FET as part and parcel of a general minimum standard of international law. That standard may evolve over time. It is nevertheless a single

[151] *Teinver S.A. et al. v Argentina*, ¶186, CLA-171: "The broad 'all matters' language of the Article IV(2) MFN clause is unambiguously inclusive."
[152] *Mafezzini v Spain*, ¶ 60, CLA-168.

> standard. The notion of a "variable general standard" would be oxymoronic. Yet international legal standards may also be created by treaties that bind only the parties to that particular instrument. It is true that the use in individual treaties of heterogeneous ad hoc definitions of expressions which are also used elsewhere to denote a general principle may give birth to confusion and therefore be undesirable. But nothing can prevent its occurrence if States so decide. Indeed it has happened. [153]

128. With regard to the Claimant's argument that FET, being a concept of international law, does not apply to the treatment by a State of its own investors, and that the national treatment in paragraph 2 of Article 3 can only refer to "treatment" in general and not to FET, the Tribunal notes that State practice in the area of investment treaties appears to show a different picture.

129. Indeed, in Article 3(1) of the Russia-Denmark BIT quoted in paragraph 126 above, the Contracting Parties undertake to accord to each other's investors FET no less favourable than that granted to their own investors or to investors of third States. Similarly, Article 3(2) of the Denmark-Mongolia BIT provides as follows:

> Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investment, fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third state, whichever of these standards is the more favourable.

130. Turning now to paragraph 3 of Article 3, the Tribunal notes that this provision carves out an exception for each Contracting Party's participation in or association with a customs union, common market or free trade area so that the privileges they grant to nationals or companies of a third State in such a situation are not subjected to the operation of the MFN clause in paragraph 2. This is an REIO exception, but its formulation in bilateral investment treaties is not necessarily uniform.

131. According to the Claimant, since the privileges covered in the third paragraph of Article 3 are economic based, this clause would be superfluous if the MFN clause in the second paragraph was subordinated to FET in the first paragraph. In support of its position, the Claimant refers to the *Quasar de Valors v Russia* award on preliminary objections in which the majority stated the following with respect to the exception made for advantages created by

[153] *Quasar Valors v Russia*, ¶ 108, RLA-31.

membership in a free trade area or a customs union in sub-paragraph 3 of Article 5 of the Spain-Russia BIT:

> Yet, if MFN treatment is restricted to FET, sub-paragraph 3 was unnecessary. One should if possible avoid the conclusion that treaty provisions are superfluous. Therefore, the MFN clause should be understood in a broad sense. It captures investor-State arbitration. Thus, sub-paragraph 2 seems to envisage MFN treatment which is simultaneously restricted and broad. Something has to give. The choice is between an explicit stipulation and a revelation by grammatical deconstruction. The Tribunal naturally prefers the former.

132. The Respondent contests the Claimant's reliance on the premise that the word "privileges" in paragraph 3 only concerns economic provisions and notably customs and tax privileges that do not fall under the scope of FET. In its view, there is nothing in this paragraph that restricts the "privileges" *ratione materiae* to economic provisions related to tax or customs matters.

133. The Tribunal does not see any inconsistency between its finding in paragraph 122 above linking the MFN clause in paragraph 2 of Article 3 to the FET standard in paragraph 1 thereof and the inclusion of an REIO exception in paragraph 3 of the same provision. Nor does it consider paragraph 3 superfluous in the context of Article 3. It is true that there are certain advantages, such as a tariff rate set at x% that will not be covered by the FET standard, and are thus excluded from the operation of the MFN clause in paragraph 2. As will be discussed below, there might, however, be other "privileges" which might be covered by the FET standard and could consequently trigger the MFN clause so as to import a hypothetically more advantageous FET treatment accorded to a third party national under a comparator treaty unless blocked by the REIO exception. Thus, the existence of the exception does not invalidate the restriction of the treatment referred to in paragraph 2 to the FET standard in paragraph 1.

134. In this context, the Tribunal notes, in the first instance, and with regard to the *Quasar de Valors v Russia* decision on preliminary objections, that the circumstances underlying that decision substantially differ from those of the instant case. The Claimants in the *Quasar de Valors v Russia* case were trying to circumvent an explicit limitation of the jurisdiction of the tribunal under Article 10 of the Spain-Russia BIT by invoking the existence in the treaty of a general MFN clause that would allow them to import a more favourable dispute settlement clause. This is not the case here.

135. Secondly, the Tribunal finds the Respondent's reference to the dispute between the United States and Germany, on the one hand, and the European Commission, on the other hand, to be particularly relevant to the present case as an illustration of FET in a customs union context. The dispute arose following the enactment of Council Directive No. 90/531/EEC, Article 29(2) of which permitted public authorities of the Member States to reject tenders for the award of a supply contract where the proportion of the production originating in third countries exceeds 50 per cent of the value of the products constituting the tender.

136. Germany objected to the implementation of Article 29 of the Directive based on Article XVII(2) of the Germany-United States Friendship, Commerce and Navigation Agreement (the "FCN"), which provided *inter alia* that:

> Each Party shall accord to the nationals, companies and commerce of the other Party fair and equitable treatment, as compared with that accorded to the nationals, companies and commerce of any third country, with respect to: (a) the governmental purchase of supplies; (b) the awarding of concessions and other government contracts; and (c) the sale of any service sold by the government or by any monopoly or agency granted exclusive or special privileges.

137. The German Government's position in the above-mentioned dispute indicates that since United States suppliers and products have to be treated, under the terms of the FCN treaty, in a non-discriminatory manner at least as regards government purchases, they have the right to be treated in the same manner as non-German EU Member State enterprises and products. It follows that privileges, such as non-discriminatory treatment, may be covered by the FET standard unless they are excluded in a bilateral investment treaty such as the one concluded between Egypt and France by the REIO clause. Thus, paragraph 3 of Article 3 of the BIT is neither unnecessary nor superfluous despite the *renvoi* by the MFN clause in paragraph 2 to the FET standard in paragraph 1 and does not necessitate for its existence a broader and more general MFN clause in this particular context.

138. The Tribunal will now turn to the examination of the alternative argument by Veolia Propreté according to which even if the MFN clause in paragraph 2 of Article 3 is subordinated to the FET standard in paragraph 1, it still allows for the import of an umbrella clause and a FPS clause. In this context, the Claimant argues that the protections granted by the umbrella clause and the FPS clause are part of the FET standard. The Claimant does not therefore, according to this argument, try to extend the MFN clause beyond the FET contained

in the BIT; it only wishes to enjoy the most favourable FET possible, which, in its view, encompasses FPS and an umbrella clause.

139. The Respondent contends that a reference to MFN restricted to FET can only import a more favourable FET, not other protections such as umbrella clauses or FPS which are separate standards. The latter standards do not belong, according to the Respondent, to the same genus as FET as mandated by the *ejusdem generis* rule.

140. To substantiate its argument, the Claimant refers to some bilateral investment agreements concluded by France with other States as well as to the findings of some arbitral tribunals. With respect to those treaties and the case law, the Respondent argues that it is only in 3 per cent of French treaties that one can find FPS and FET in the same clause and in the same paragraph, while in 77 per cent of the treaties they are drafted as completely separate clauses. The Respondent also contests some of the conclusions that the Claimant draws from the findings of the arbitral tribunals cited by the latter.

141. It is important to recall that the specific question before this Tribunal with respect to the alternative argument by the Claimant is whether the Claimant is entitled to import through the MFN clause contained in Article 3(2) of the BIT, which, as concluded by the Tribunal in paragraph 122 above, is restricted to the FET standard in paragraph 3(1) of the BIT, a more robust and more favourable FET clause than the one in Article 3(1) in so far as it encompasses either an FPS clause or an umbrella clause or both. In this context, the Claimant affirms that it is entitled to import on the basis of the MFN clause in Article 3(2), even if it is subordinated to FET, the umbrella clause of Article 2(3) of the Egypt-Denmark BIT and the FPS clause of Article 2(2) of the Egypt-UK BIT.

142. What is at issue here is not the definition of the standard of FET, the meaning and scope of which will often depend on the specific circumstances of the case at hand. In the instant case, what constitutes FET will thus be examined in light of the facts of the case, and the Tribunal will deal with those facts in the merits phase of these proceedings. Rather, the issue at this stage of the proceedings is whether the MFN clause in Article 3(2) may be used to import other standards of international investment law because those standards are encompassed by the FET standard in Article 3(1).

143. Thus, the first issue to be addressed by the Tribunal is whether the Claimant has demonstrated to the satisfaction of the Tribunal that a treaty signed by Egypt, or more

specifically, that either of the two treaties mentioned in paragraph 141 above, define FET as encompassing protection given by the umbrella clause and the FPS clause. For the Claimant, there is at least one treaty concluded by Egypt that defines FET as encompassing protections given by the umbrella clause and the FPS clause. This treaty, according to Veolia, is the one between Egypt and the UK, Article 2(2) of which reads as follows:

> Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. [. . .] Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

144. The Tribunal observes that the first sentence of the paragraph refers to the two obligations undertaken by the contracting parties for the protection and promotion of the investments of their nationals in each other's territory as separate obligations connected by the coordinating conjunction "and." Thus, each contracting party's investors are to be "accorded fair and equitable treatment" **and** are to "enjoy full protection and security." It is therefore the view of the Tribunal that the plain and ordinary meaning of the sentence indicates that the two standards are dealt with separately and that neither of them can be considered to encompass the other. Moreover, as regards the second sentence, it is quite clear that the obligation specified therein does not in any way depend on the two previous ones, but is separately and individually undertaken as such by both of the contracting parties.

145. Article 2 of the Egypt- Denmark BIT is quite different and reads as follows:

> (1) Each Contracting Party shall admit investments by investors of the other Contracting Party in accordance with its legislation and administrative practice and encourage such investments including facilitating the establishment of representative offices.
>
> (2) Investments of investors of each Contracting Party shall at all times enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.
>
> (3) Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

146. It is true that Article 2(3) contains an umbrella clause, but there is nothing in the provision as a whole nor in this particular paragraph that indicates that such an umbrella clause is part and parcel of a broader standard of FET. The Tribunal does not therefore find persuasive the Claimant's argument that the Egypt-Denmark BIT provides for a more robust and more detailed FET standard encompassing an umbrella clause. The umbrella clause in Article 2(3) stands on its own and does not appear to be included in a wider FET standard.

147. Moreover, the Tribunal notes that Professor Alain Pellet in his expert opinion submitted on behalf of the Claimant seems to express some doubt in respect of the Claimant's argument that the umbrella clause is encompassed by the FET standard in the above-mentioned BIT between Egypt and Denmark when he states that: "[e]n conclusion, je considère que, vu le cafouillage jurisprudentiel qui existe en la matière, il est impossible de répondre de manière categorique à la question qui m'est posée en ce qui concerne l'importation dans la présente affaire de la clause parapluie du TBI de 1999 entre le Danemark et l'Egypte. Il me parait certain qu'une telle importation ne vas pas de soi, pas davantage qu'elle n'est exclue *ex principio*."

148. In light of the above, the Tribunal concludes on this first aspect of the Claimant's argument relating to the possibility of importing a more detailed FET encompassing FPS and an umbrella clause, from BITs concluded by Egypt, through the MFN clause, that the relevant provisions of the two treaties invoked by the Claimant for this purpose do not support its claim since neither of those provisions subsumes a FPS clause or an umbrella clause under the standard of FET.

149. The Tribunal will now take up the second aspect of the Claimant's argument according to which the FET standard in international investment law may be considered as a general standard which includes or covers more specific standards for the protection of investments such as the FPS standard and the umbrella clause. It is with respect to this assertion that the Claimant refers to the French practice in BITs and cites a number of treaties that contain such a general FET standard and invokes, at the same time, some arbitral awards that have interpreted the FET in that sense.

150. There are indeed a number of BITs concluded by France with other States such as Argentina, Morocco and Zaire in which FET is defined as encompassing full protection and security. The Claimant has not, however, given examples of French BITs in which the umbrella clause is subsumed under a general FET clause. As was noted by the Tribunal in the *Quasar*

Valors v Russia case in the passage quoted in paragraph 127 above, "international legal standards may also be created by treaties that bind only the parties to that particular instrument. It is true that the use in individual treaties of heterogeneous *ad hoc* definitions of expressions which are also used elsewhere to denote a general principle may give birth to confusion and therefore be undesirable. But nothing can prevent its occurrence if States so decide. Indeed it has happened."

151. In any case, it does not appear to this Tribunal that the examples cited by the Claimant with respect to the inclusion of the FPS clause under the FET standard in some investment treaties concluded by France with other States amount to a widespread and consistent practice with respect to all treaties concluded by France. Moreover, even if it were assumed that this was the case, it is the view of the Tribunal that this would not necessarily be sufficient to transform the FET standard in international investment law into a general standard which automatically covers other standards, such as the FPS clause or the umbrella clause, unless such a practice was accepted and applied by numerous other States and thus could be considered to have become of general usage.

152. The Claimant correctly refers to *MTD Equity v Chile* and *Noble Ventures v Romania* as examples of arbitral awards in which tribunals have accepted the proposition that the FET standard may encompass an FPS clause or an umbrella clause or both. However, those decisions were based on the provisions of the relevant BITs, which were not necessarily identical to those of the BIT under consideration in this case, and were dictated by the specific circumstances of those cases. That is the reason why the awards of arbitral tribunals, which are by nature *res judicata* only between the parties to the arbitration, are not considered to constitute a binding precedent for subsequent tribunals, but may only be taken into consideration particularly on the basis of the similarity or identity of the BITs to be interpreted or applied or in light of the similar circumstances of the cases under examination.

153. Moreover, while the reasoning in the two awards mentioned above, as well as the award in *Occidental v Ecuador*, may support the argument advanced by the Claimant, there are other awards which have not only treated those standards as separate and autonomous, but have actually rejected the contention that the FET standard subsumes other standards such as FSP and an umbrella clause. An example of the latter which the Respondent has invoked in this case is the *Paushok v Mongolia* award in which the Tribunal concluded that: "an investor could not use an FET-related MFN clause to 'introduce into the Treaty completely new substantive

rights, such as those granted under an umbrella clause."'[154] Similarly, the award of *Electrabel v Hungary*, with regard to the Energy Charter Treaty, noted that FET and FPS "must have, by application of the legal principle of 'effet utile,' a different scope and role."[155]

154. Thus, notwithstanding the contradictory conclusions arrived at by various arbitral awards as to whether the FET standard may be considered in international investment law to cover other standards such as FPS and an umbrella clause, this Tribunal is of the view that an MFN clause which is restricted to the standard of FET, such as the one in the France-Egypt BIT, cannot be used to introduce into the treaty other autonomous standards of international investment law such as the FPS clause or the umbrella clause. Indeed, each of these standards stands on its own and they should neither be conflated nor considered to belong to the same category or the same subject-matter under an MFN clause. Otherwise, their separate inclusion in most of the existing BITs in the world would become superfluous and would imply a repetition of the same type of standard, but with different appellations, in various clauses of investment treaties.

155. The Tribunal is also of the view that investment protection obligations do not cover exactly the same field and the investor does not have a bare discretion to select any obligation regardless of the nature of the prejudice that the investor alleges. If the investor's reasonable expectations have been frustrated by the host State, for instance, then the appropriate cause of action would be based upon the FET standard rather than the prohibition against uncompensated expropriation. Likewise, if the investor's property has been taken by the host State, the natural cause of action would be for expropriation rather than a breach of an umbrella clause.

156. These distinctions are important because the remedial consequences flowing from a breach of each investment treaty obligation will be different. The principles governing the assessment of damages for the taking of property are obviously different from those that apply to the assessment of damages for a breach of a sovereign undertaking, for instance. Compensation in respect of an unlawful taking of property is assessed on the basis of the value of the property immediately before the taking. In relation to breach of a sovereign undertaking,

[154] *Paushok v Mongolia*, ¶ 570, RLA-32.
[155] *Electrabel v Hungary*, ¶7.83, CLA-31; Resp. Rep., ¶ 296.

however, the compensatory objective is to put the innocent party into the position in which it would have been had the undertaking been complied with.

157. It is unnecessary for this Tribunal to embark upon an exhaustive analysis of the scope and role of each investment protection obligation. For the Claimant to prevail with this argument, it must persuade the Tribunal that the FPS standard and the umbrella clause would be superfluous in an investment treaty that also contains an FET obligation. The Tribunal is far from persuaded that this would be the case. The umbrella clause establishes a special regime of liability for the breach of sovereign undertakings given by the host State to an investor. The FPS standard creates a special regime of liability for the acts of third parties in circumstances where the host State has failed to exercise due diligence to prevent those acts. These special regimes are not subsumed wholesale into the FET standard.

158. In light of the above, the Tribunal concludes that the MFN clause contained in Article 3(2) of the BIT is subordinated to the FET standard in paragraph 3(1) of the treaty and may therefore be used to import more detailed or more favourable FET clauses in other treaties concluded by Egypt. It cannot, however, be used to import other standards of international investment law such as FPS or an umbrella clause which, in the view of this Tribunal, neither belong to the same subject or the same category as the FET standard nor are encapsulated in it.

VIII. DECISION OF THE TRIBUNAL

159. For the reasons set out above, the Tribunal decides that:

1) It has jurisdiction to hear this dispute on the basis of Article 7 of the BIT between France and Egypt;

2) The MFN clause in Article 3(2) of the BIT is restricted to the FET in Article 3(1) of the treaty, and consequently cannot be used to import other substantive standards into the treaty to expand the scope of jurisdiction of the Tribunal.

3) It will deal with costs in the further proceedings.

160. The Tribunal calls upon the Parties to confer and submit a joint proposal on a schedule for the merits phase to the Tribunal within 30 days of the issuance of this decision. If the Parties cannot reach an agreement, the Tribunal will decide in consultation with them.

[SIGNED]

Prof. Dr. Klaus M. Sachs
Arbitrator

[SIGNED]

Prof. Zachary Douglas QC
Arbitrator

[SIGNED]

Judge Abdulqawi Ahmed Yusuf
President of the Tribunal

1.4.2015

Date