

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 Elkhrahy
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; *second*, 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]haque 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 réglementation 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 différend” 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 provisions²⁸ 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 (“II”) 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 Valores 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.

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 Valores 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 Valores 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 “II” 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 principe 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]haque 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 provisions¹⁴⁰ and to academic commentary¹⁴¹ 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-Argentina 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 catégorique 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 paraît certain qu'une telle importation ne va 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