

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

TANTALUM INTERNATIONAL LTD.
AND
EMERGE GAMING LTD.
Claimants

and

ARAB REPUBLIC OF EGYPT
Respondent

ICSID Case No. ARB/18/22

**ORDER OF THE TRIBUNAL TAKING NOTE OF THE
DISCONTINUANCE OF THE PROCEEDING**

Members of the Tribunal

Prof. Nayla Comair-Obeid, President
Mr. Gordon Smith, Arbitrator
Prof. Bernardo M. Cremades, Arbitrator

Secretary of the Tribunal

Ms. Luisa Fernanda Torres

Date of dispatch to the Parties: 12 October 2021

REPRESENTATION OF THE PARTIES

Representing the Claimants:

Mr. Audley Sheppard QC
Clifford Chance LLP
10 Upper Bank Street
London E14 5JJ
United Kingdom

and

Dr. Sam Luttrell
Mr. Ben Luscombe
Mr. Sean Marriott
Mr. Nathan Eastwood
Mr. Matthew DiMarco
Clifford Chance
Level 7, 190 St. Georges Terrace
Perth, Western Australia, 6000
Australia

and

Dr. Romesh Weeramantry
Clifford Chance
12 Marina Boulevard
25th Floor, Tower 3
Marina Bay Financial Centre
Singapore 018982

and

Mr. Girgis Abd El Shahid
Ms. Inji Fathalla
Shahid Law Firm
20B Adly Street, Downtown
Cairo 11511
Arab Republic of Egypt

Representing the Respondent:

Counselor Abdel Hameed Nagashy
Counselor Lela Kassem
Counselor Mohamed Negm
Counselor Mohamed Bassiouny
Counselor Nariman Elfeky
Egyptian State Lawsuits Authority (“ESLA”)
42 Gameat El Dowal El Arabiya St.
P.O. Box 12311
Mohandeseen, Giza
Arab Republic of Egypt

and

Dr. Yas Banifatemi
Mr. Mohamed Shelbaya
Dr. Paschalis Paschalidis
Mr. Omar El-Sada
Ms. Chaymaa Shady
Gaillard Banifatemi Shelbaya Disputes
22 rue Londres
75009 Paris
France

TABLE OF CONTENTS

1.	INTRODUCTION AND PARTIES.....	1
2.	PROCEDURAL HISTORY	1
2.1	Registration and Constitution of the Tribunal.....	1
2.2	The First Session	2
2.3	The Parties Written Submissions and Procedural Applications	3
2.4	The Hearing on Jurisdiction	6
2.5	The Decision on Jurisdiction.....	7
2.6	The Procedure Following The Decision on Jurisdiction.....	8
3.	ORDER.....	11

1. INTRODUCTION AND PARTIES

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 Agreement between the Government of Australia and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments signed on 3 May 2001 and entered into force on 5 September 2002 (the “**BIT**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
2. The Claimants are:
 - (i) **Tantalum International Ltd.** (“**Tantalum International**”), a company incorporated in Australia with registration number 086 594 498 and a subsidiary of Emerge Gaming Ltd.; and
 - (ii) **Emerge Gaming Ltd.** (“**Emerge Gaming**”), formerly Gippsland Ltd. and Arrowhead Resources Ltd., a public company incorporated in Australia with registration number 004 766 376 and listed on the Australian Securities Exchange.
3. The Respondent is the Arab Republic of Egypt (“**Egypt**”).
4. The Claimants and the Respondent are collectively referred to as the “Parties.” The Parties’ representatives and their addresses are listed above on page (i).

2. PROCEDURAL HISTORY

2.1 REGISTRATION AND CONSTITUTION OF THE TRIBUNAL

5. On 29 May 2018, the Claimants filed their Request for Arbitration before the ICSID Secretariat, accompanied by Exhibits C-0001 to C-0029, and C-0031 to C-0048.
6. On 13 June 2018, the ICSID Secretariat wrote to the Claimants seeking additional information concerning the Request for Arbitration. On 21 June 2018, the Claimants filed a communication in response to the ICSID Secretariat’s letter, accompanied by Exhibits C-0001 and C-0008; and Legal Authorities CLA-0001 to CLA-0011.
7. On 27 June 2018, the Respondent wrote to the Secretary General of ICSID to oppose the registration of the Request for Arbitration.

8. On 28 June 2018, the Secretary General of ICSID registered the Request for Arbitration, as supplemented by letter of 21 June 2018, 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 ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "**ICSID Institution Rules**").
9. The Tribunal was constituted in accordance with Article 37(2)(a) of the ICSID Convention. On 31 August 2018, Mr. Gordon Smith, a national of New Zealand and the United Kingdom, accepted his appointment by the Claimants as arbitrator. On 5 September 2018, Prof. Bernardo M. Cremades, a national of Spain, accepted his appointment by the Respondent as arbitrator. On 7 November 2018, Prof. Nayla Comair-Obeid, a national of Lebanon and France, accepted her appointment by the co-arbitrators as presiding arbitrator.
10. On 8 November 2018, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**"), the Acting Secretary-General 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. Luisa Fernanda Torres, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

2.2 THE FIRST SESSION

11. On 17 December 2018, in accordance with Rule 13(1) of the ICSID Arbitration Rules, the Tribunal held its first session with the Parties by telephone conference.
12. On 6 February 2019, the Tribunal issued Procedural Order No. 1, embodying the Parties' agreements on procedural matters and the Tribunal's decisions on the disputed procedural issues. It established, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, that the place of proceeding would be Dubai, United Arab Emirates pursuant to the agreement of the Parties, and it also set out the Procedural Calendar for this arbitration.

2.3 THE PARTIES WRITTEN SUBMISSIONS AND PROCEDURAL APPLICATIONS

13. On 30 April 2019, the Claimants filed their Memorial of Claim (the “**Memorial on the Merits**”), accompanied by Exhibits C-0001 to C-0388;¹ Legal Authorities CLA-0001 to CLA-0092; two witness statements, by Mr. Ayman Ayyash and Mr. Michael Rosenstreich, respectively; and one expert report by Mr. Garrett Rush and Mr. Kiran Sequeira of Versant Partners, LLC, with Exhibits VP-001 to VP-0147.
14. On 8 May 2019, following agreement by the Parties, the Tribunal issued Procedural Order No. 2 modifying Sections 13.3 and 13.4 of Procedural Order No. 1 concerning administrative filing procedures.
15. On 14 June 2019, pursuant to the Procedural Calendar, the Respondent provided notice of its intent to submit a Memorial on Preliminary Objections.
16. On 31 July 2019, the Respondent submitted its Memorial on Preliminary Objections and Request for Bifurcation (the “**Memorial on Preliminary Objections**”), accompanied with Exhibits R-0001 to R-0028; and Legal Authorities RLA-0001 to RLA-0050.
17. On 31 October 2019, the Claimants filed their Observations on the Respondent’s Request for Bifurcation, accompanied by Exhibits C-0388 (bis) to C-0393; and Legal Authorities CLA-0093 to CLA-0136.
18. On 2 December 2019, the Tribunal issued Procedural Order No. 3 concerning the Respondent’s request to address its objections to jurisdiction as a preliminary question. The Tribunal granted the Respondent’s request to bifurcate its Preliminary Objection I that the Tribunal lacks jurisdiction *ratione voluntatis* because the Respondent has not given its consent to submit the present dispute to ICSID arbitration. The Tribunal also decided that all the other preliminary objections raised by the Respondent would be heard together with the merits phase, if any.
19. On 30 December 2019, following agreement by the Parties, the Tribunal amended the Procedural Calendar (Revision No. 1). The Tribunal also decided that a simplified

¹ Exhibits C-0001 to C-0048 had been previously submitted with the Request for Arbitration. A different set of Legal Authorities labeled CL-0001 to CL-0011 had been previously submitted on 21 June 2018, but a new set of authorities under the same nomenclature was filed with the Memorial on the Merits.

document production phase would take place in which each of the Parties “*shall voluntarily produce to the other Party all documents in their custody, possession or control that relate to the negotiations or intentions of the Australia-Egypt BIT.*”

20. On 24 January 2020, following agreement by the Parties, the Tribunal issued an amended Procedural Calendar (Revision No. 2).
21. On 3 March 2020, the Claimants filed their Counter-Memorial on Preliminary Objection I (the “**Counter-Memorial on Preliminary Objection I**”), accompanied by Exhibits C-0394 to C-0423; Legal Authorities CLA-0016, CLA-0137 to CLA-0204; and an expert opinion by Prof. Rudolf Dolzer.
22. On 23 March 2020, following agreement by the Parties, the Tribunal issued an amended Procedural Calendar (Revision No. 3).
23. On 10 April 2020, the Claimants informed the Tribunal of the passing of Prof. Rudolf Dolzer, the Claimants’ expert witness. The Tribunal sought the Parties’ proposals on procedural steps to follow as result of this sad development, and thereafter on 8 May 2020 it gave directions for submissions by the Parties on the issue of the weight to be given to Prof. Dolzer’s expert opinion.
24. On 17 April 2020, the Respondent filed its Reply on Preliminary Objection I (the “**Reply on Preliminary Objection I**”), accompanied by Exhibits R-0029 to R-0043; and Legal Authorities RLA-0051 to RLA-0100.
25. On 12 May 2020, the Tribunal advised the Parties that, in light of the current state of world affairs arising out of the COVID-19 crisis, the Tribunal considered that it would not be feasible to conduct the hearing on the bifurcated Preliminary Objection I (the “**Hearing**”) in person in London on 19 June 2020, as was initially planned. In an effort to preserve the Hearing date, the Tribunal invited the Parties to confer and inform the Tribunal whether they would be amenable to conducting the Hearing virtually.
26. On 19 May 2020, both Parties wrote to the Tribunal confirming their agreement to hold the Hearing by videoconference on 19 June 2020, and each Party provided its proposal for the structure of the Hearing.

27. On 25 May 2020, following agreement by the Parties, the Tribunal issued an amended Procedural Calendar (Revision No. 4). On the same day, the Tribunal confirmed that in light of the Parties' agreement, the Hearing would be held via videoconference. Having considered the Parties' proposals, the Tribunal also decided on the structure for the Hearing.
28. On 25 May 2020, the Claimants filed their Rejoinder on Preliminary Objection I (the "**Rejoinder on Preliminary Objection I**"), accompanied by Exhibits C-0424 to C-0468; and Legal Authorities CLA-0016, CLA-0188, CLA-0192, CLA-0205 to CLA-0251.
29. On 2 June 2020, the Respondent requested that the Claimants "*confirm that they have annexed to their Rejoinder all the documents that they have received from the Australian Government purportedly after the filing of their Counter-Memorial or, failing that, to produce the entirety of these documents to the Respondent [...].*"
30. On 3 June 2020, the Claimants confirmed that "*they have annexed to their Rejoinder all the documents that they have received from the Australian Government after the filing of their Counter-Memorial, save for nine documents received from the Australian Trade Commission on 20 April 2020 pursuant to the Freedom of Information Act (Cth), which were not annexed to the Claimants' Rejoinder because they are not relevant*" and that they would "*provide these nine documents to the State by separate email [...].*" The Claimants further invited Egypt to confirm that "*the State has not, prior to or since 10 March 2020, located any documents that relate to the negotiations or intentions of the Australia-Egypt BIT.*"
31. On 3 June 2020, the Respondent confirmed that it "*has not identified any documents that are responsive to the Tribunal's document production order.*"
32. On 29 May 2020, the Tribunal submitted for comments by the Parties an agenda and draft Procedural Order addressing matters pertaining to the organization of the Hearing. On 5 June 2020, the Parties submitted their joint comments, and their respective positions on a few areas of disagreement. On 6 June 2020, the Tribunal ruled on the areas of disagreement. Thereafter, on 8 June 2020, both Parties informed the Tribunal that they were content to forego the Pre-Hearing Conference Call that was scheduled for 9 June 2020.

33. On 10 June 2020, the Tribunal issued Procedural Order No. 4, concerning the organization of the Hearing.

2.4 THE HEARING ON JURISDICTION

34. On 19 June 2020, the Tribunal and the Parties held the Hearing on Preliminary Objection I via videoconference. The following persons were present:

Tribunal

Dr. Nayla Comair-Obeid	President
Mr. Bernardo Cremades	Co- Arbitrator
Mr. Gordon Smith	Co-Arbitrator

ICSID Secretariat

Ms. Luisa Fernanda Torres	Secretary of the Tribunal
---------------------------	---------------------------

For Claimants

Counsel:

Mr. Audley Sheppard QC	Clifford Chance
Dr. Sam Luttrell	Clifford Chance
Dr. Romesh Weeramantry	Clifford Chance
Mr. Sean Marriott	Clifford Chance
Mr. Nathan Eastwood	Clifford Chance
Mr. Matthew Di Marco	Clifford Chance
Ms. Ishbel McLachlan	Clifford Chance
Mr. Michael Dias	Clifford Chance
Ms. Amelia Hirst	Clifford Chance
Ms. Inji Fathalla	Shahid Law Firm
Mr. Mohamed El Mahdy	Shahid Law Firm

Parties:

Mr. Mike Rosenstreich	Director, Tantalum International Ltd.
Mr. Rowan Caren	Director, Tantalum International Ltd.

For Respondent

Counsel:

Prof. Emmanuel Gaillard	Shearman & Sterling LLP
Mr. Mohamed Shelbaya	Shearman & Sterling LLP
Dr. Paschalis Paschalidis	Shearman & Sterling LLP
Mr. Omar El Sada	Shearman & Sterling LLP
Ms. Arianna Rosato	Shearman & Sterling LLP

Parties:

Counselor Lela Kassem	Egyptian State Lawsuits Authority
Counselor Jihan El-Ansary	Egyptian State Lawsuits Authority
Counselor Sarah Mohamed	Egyptian State Lawsuits Authority
Counselor Ebtehal Ahmed	Egyptian State Lawsuits Authority
<i>IT Support Staff:</i>	
Mr. Kevin Bryant	Shearman & Sterling LLP
Mr. Benoît Arnauld	Shearman & Sterling LLP

Court Reporter

Mr. Trevor McGowan	Caerus Reporting Ltd.
--------------------	-----------------------

WBG IT Support

Mr. Brandon David Kolpak	WBG IT Support
Mr. Nayyar Iqbal	WBG IT Support
Mr. Jeremy Stephen Myers	WBG IT Support

35. During the Hearing on Preliminary Objection I, the Parties submitted various demonstrative exhibits, as follows:

- (i) Claimants: CD-001 (Opening Presentation) and CD-002 (video).
- (ii) Respondent: RD-001 (Opening Presentation) and RD-002 (Rebuttal Presentation).

36. On 2 July 2020, the Parties submitted their agreed corrections to the transcript of the Hearing on Preliminary Objection I.

37. On 6 July 2020, the Claimants submitted their Statement of Costs.

38. On 7 July 2020, the Respondent requested an extension of time until 9 July 2020 to submit its Statement of Costs. On 8 July 2020, the Tribunal granted the request extension. On 9 July 2020, the Respondent submitted its Statement of Costs.

2.5 THE DECISION ON JURISDICTION

39. On 8 October 2020, the Tribunal issued its Decision on Jurisdiction, concerning Preliminary Objection I. The Tribunal decided as follows:

- (i) *Jurisdiction racione voluntatis has been established under Article 13 of the BIT in relation to all the Claimants' claims in these proceedings;*

- (ii) *The Respondent's Preliminary Objection shall be dismissed in its entirety;*
- (iii) *The Claimants' request for an order for Egypt to perform its obligation under Article 13(3)(a) of the BIT within 30 days shall be dismissed;*
- (iv) *The Claimants' request for a stay of the proceedings shall be dismissed;*
- (v) *The Parties' request for the allocation of the costs and expenses of this arbitration shall be decided at a further stage of the proceedings; and*
- (vi) *All other requests are dismissed.*

40. On the same day, the Tribunal invited the Parties to confer in respect of the Procedural Calendar for the remainder of the proceeding and to provide a joint proposal, or their individual positions if the Parties were unable to reach an agreement.

2.6 THE PROCEDURE FOLLOWING THE DECISION ON JURISDICTION

41. On 12 October 2020, the Respondent wrote to the Tribunal taking note of the Tribunal's Decision on Jurisdiction, and observing that “[f]or the avoidance of any doubt, the Respondent maintains that it has never consented to the Tribunal's jurisdiction and respectfully reserves all of its rights in this respect.” The Respondent further informed that it did not consent to publication of the Decision on Jurisdiction.
42. On 16 October 2020, the Claimants filed their proposed Procedural Calendar for the remainder of the proceeding. The Respondent filed its proposed Procedural Calendar on 17 October 2020.
43. On 20 October 2020, having considered the Parties' proposals, the Tribunal issued an amended Procedural Calendar (Revision No. 5). It also invited the Parties to confer and inform the Tribunal of the estimated number of days required for the Hearing.
44. On 30 October 2020, the Claimants informed the Tribunal that the Parties had been unable to reach agreement on the number of days required for the Hearing, and filed its proposal in that regard. The Respondent provided its proposal on 1 November 2020.

45. On 10 November 2020, the Tribunal ruled on the duration of the Hearing, and proposed Hearing dates to the Parties.
46. On 23 November 2020, following consultation with the Parties regarding the Hearing dates, the Tribunal issued an amended Procedural Calendar (Revision No. 6), establishing the Hearing dates.
47. On 8 February 2021, the Respondent filed its Counter-Memorial on the Merits (the “**Counter-Memorial on the Merits**”), accompanied by Exhibits R-0044 to R-0083; and Legal Authorities RLA-0101 to RLA-0156; and one expert report by Dr. Daniel Flores and Mr. Jordan Heim of Quadrant Economics, accompanied by Exhibits QE-001 to QE-068.
48. On 9 February 2021, following a joint request by the Parties, the Tribunal modified Section 13.4 of Procedural Order No. 1 concerning administrative filing procedures.
49. On 24 February 2021, the Respondent communicated to the Tribunal that following the departure of its counsel team from the law firm of Shearman & Sterling, the Respondent would be represented by the Gaillard Banifatemi Shelbaya Disputes law firm. On 27 March 2021, the Egyptian State Lawsuits Authority (“**ESLA**”) filed with the Tribunal an updated formal counsel designation confirming the appointment of the Gaillard Banifatemi Shelbaya firm.
50. On 3 March 2021, following a joint request by the Parties, the Tribunal issued an amended Procedural Calendar (Revision No. 7).
51. On 19 May 2021, following a joint request by the Parties, the Tribunal issued an amended Procedural Calendar (Revision No. 8).
52. On 1 June 2021, following a joint request by the Parties, the Tribunal issued an amended Procedural Calendar (Revision No. 9).
53. On 7 June 2021, following a joint request by the Parties, the Tribunal issued an amended Procedural Calendar (Revision No. 10).
54. On 11 June 2021, following a joint request by the Parties, the Tribunal issued an amended Procedural Calendar (Revision No. 11).

55. On 18 June 2021, the Parties filed their respective complete Redfern Schedules for the Tribunal to decide on the production of documents.
56. On 9 July 2021, the Parties informed the Tribunal that they had agreed to adjust the timetable for the Tribunal's decision on production of documents, and the date for production of documents.
57. On 12 July 2021, following the joint request by the Parties, the Tribunal issued an amended Procedural Calendar (Revision No. 12).
58. On 23 July 2021, the Tribunal issued Procedural Order No. 5 concerning production of documents.
59. On 20 August 2021, the Parties informed the Tribunal that they had agreed to extend the date for production of documents until 3 September 2021.
60. On 20 August 2021, following the joint request by the Parties, the Tribunal issued an amended Procedural Calendar (Revision No. 13).
61. On 27 August 2021, the Parties communicated to the Tribunal that they had agreed to discontinue this arbitral proceeding. The Parties jointly informed the Tribunal as follows:

Pursuant to Rule 43(1) of the ICSID Rules of Procedure for Arbitration Proceedings (Rules), the Parties have agreed to discontinue ICSID Case No. ARB/18/22 (Notice of Discontinuance).

The Parties hereby jointly request that you take note of the Notice of Discontinuance in [a]ccordance with Rule 43(1) of the Rules and, except in relation to surplus funds, make no further orders, including with respect to costs.

The Parties thank the Tribunal for their service during the course of these proceedings.

62. On 27 August 2021, the Respondent further informed the Tribunal that “*the Parties agreed that the Claimants have sole entitlement and right to any surplus payments made by the Claimants to ICSID in accordance with Regulation 14(3) of the ICSID Administrative and Financial Regulations.*”

3. ORDER

63. Rule 43(1) of the ICSID Arbitration Rules provides:

If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.

64. Therefore, in accordance with the Parties’ request, and pursuant to Rule 43(1) of the ICSID Arbitration Rules, the Tribunal hereby takes note of the discontinuance of the proceeding.

65. The Tribunal further takes note of the Parties’ agreement that “*the Claimants have sole entitlement and right to any surplus payments made by the Claimants to ICSID in accordance with Regulation 14(3) of the ICSID Administrative and Financial Regulations.*” Accordingly, once all disbursements to meet the costs incurred in the proceeding have been completed, including the fees and expenses of the Tribunal, ICSID’s administrative fees and direct expenses, the remaining balance in the case fund administered by ICSID shall be reimbursed to the Claimants.

THE TRIBUNAL

[Signed]
Prof. Bernardo M. Cremades
Arbitrator

[Signed]
Mr. Gordon Smith
Arbitrator

[Signed]
Prof. Dr Nayla Comair-Obeid
President of the Tribunal