INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ayat Nizar Raja Sumrain and others

v.

State of Kuwait

(ICSID Case No. ARB/19/20)

PROCEDURAL ORDER NO. 2
Decision on Bifurcation

Members of the Tribunal
Prof. Zachary Douglas QC, President of the Tribunal
Mr. Fernando Piérola Castro, Arbitrator
Mr. Samuel Wordsworth QC, Arbitrator

Secretary of the Tribunal
Ms. Leah Waithira Njoroge

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1 February 2021

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I. PROCEDURAL HISTORY

1. On 12 June 2019, Ayat Nizar Raja Sumrain (the "**First Claimant**"), Eshraka Nizar Raja Sumrain (the "**Second Claimant**"), Alaa Nizar Raja Sumrain (the "**Third Claimant**"), and Mohamed Nizar Raja Sumrain (the "**Fourth Claimant**") (together, the "**Claimants**"), filed with the International Centre for Settlement of Investment Disputes ("**ICSID**") a Request for Arbitration against the State of Kuwait ("**Kuwait**" or the "**Respondent**") on the basis of the Agreement for the Promotion and Reciprocal Protection of Investments between the Government of the Arab Republic of Egypt and the Government of the State of Kuwait (the "**Kuwait-Egypt BIT**"). The ICSID Secretary-General registered the Request for Arbitration on 30 June 2019.

2. Following a first session held on 13 April 2020 and a case management meeting held on 26 June 2020, the Tribunal issued Procedural Order No. 1 ("**PO1**") on 30 June 2020. Annex A to PO1 sets forth the procedural calendar, including a separate briefing schedule for a potential request for bifurcation. Annex A was modified by agreement of the Parties on 22 July 2020 and further modified by the Parties' agreements of 6 and 28 October 2020.

3. Pursuant to the procedural calendar, on 10 December 2020, the Claimants filed a Memorial on the Merits (the "**Memorial**"), together with: (i) the Witness Statement of Ayat Nizar Raja Sumrain dated 10 December 2020; (ii) the Expert Report of Steve Harris and Glenn Brill of FTI Consulting dated 10 December 2020, with Appendices 1 through 10 and Exhibits FTI-001 through FTI-0077; and (iii) Exhibits C-0001 through C-0260 and Legal Authorities CL-0001 through CL-0054.

4. On 8 January 2021, the Respondent filed a Request for Bifurcation (the "**Request**"), together with: Exhibits R-0001 through R-0005 and Legal Authorities RL-0001 through RL-0048.

5. On 21 January 2021, the Claimants filed a Reply to Request for Bifurcation (the "**Reply**"), together with: Exhibit C-0261 and Legal Authorities CL-0055 through CL-0070.

II. THE RESPONDENT'S REQUEST FOR BIRFURCATION

6. The Respondent has requested that five objections to the Tribunal's jurisdiction and/or the admissibility of the Claimants' claims be determined in a preliminary phase of these proceedings, with a hearing scheduled for 18-19 May 2021 for this purpose.

7. Those five objections, as formulated by the Respondent in its Request, are as follows:

   a. The Tribunal does not have jurisdiction *ratione personae* because the Claimants have failed to discharge their burden of proving that they validly hold Egyptian nationality ("**First Objection**");

   b. The Tribunal does not have jurisdiction *ratione materiae* because the Claimants have failed to demonstrate that they have made an investment under the Kuwait-Egypt BIT and the ICSID Convention ("**Second Objection**");

   c. The Tribunal does not have jurisdiction *ratione temporis* and/or the Claimants have committed an abuse of process because the Claimants made their alleged investments after their claims and/or the dispute arose ("**Third Objection**");

   d. The Claimants' claims are inadmissible because as shareholders of Heritage Village Real Estate Company ("**HVREC**") they have no rights to the Heritage Village Project ("**Project**") or rights under the Build Operate and Transfer contract entered into between HVREC and the Ministry of Finance of Kuwait dated 24 November 2004 ("**Contract**") and/or the claims are purely contractual and/or there is an exclusive jurisdiction clause in the Contract in favour of the Kuwaiti courts ("**Fourth Objection**"); and

   e. The Claimants have failed to comply with the pre-conditions to jurisdiction in Article 10 of the Kuwait-Egypt BIT (written notification and six-month period to pursue amicable settlement) ("**Fifth Objection**").

III. THE TRIBUNAL'S ANALYSIS

A. THE TEST FOR BIFURCATION

8. It is common ground between the Parties that the Tribunal has a broad discretion under Article 41 of the ICSID Convention and Rule 41 of the ICSID Arbitration Rules to order the determination of certain preliminary objections in a separate or bifurcated phase of the arbiration.

9. The Parties have also cited various cases in which certain criteria have been enumerated for ruling upon an application for birfurcation. The test in *Philip Morris v. Australia* appears to be among the more prominent examples, and it sets out three criteria:

> 1) Is the objection *prima facie* serious and substantial?
>
> 2) Can the objection be examined without prejudging or entering the merits?
>
> 3) Could the objection, if successful, dispose of all or an essential part of the claims raised?[1]

10. There is a risk that a test, which is formulated to meet the exigencies of one case, becomes a box-ticking exercise in other cases when divorced from its original context.

11. The first limb of the test—"*whether the objection is prima facie serious and substantial*"—may be problematic. What exactly is the threshold that is envisaged by such a formulation? It is not helpful in this respect that the *Philip Morris* tribunal went on to apply a different standard to the one it had formulated at the outset ("*The Tribunal cannot prima facie exclude that this Objection might be successful.*"[2]) Nor is it helpful that some subsequent tribunals have interpreted "*prima facie serious and substantial*" to mean "*not frivolous or*

[1] RL-0036, *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No 2012-12, Procedural Order No. 8, 14 April 2014 ("*Philip Morris*"), §109.

[2] RL-0036, *Philip Morris*, §§111, 119, 125.

vexatious",[3] whereas others have nailed their colours to the notion that "*a higher threshold must be applied than merely requiring that the objection is not frivolous or vexatious*".[4]

12. At one end of the spectrum, the Tribunal has misgivings about any test that would require labelling a particular objection relating to its jurisdiction or the admissibility of claims as "*frivolous or vexatious*" at this early stage (which would follow by implication if bifurcation is not ordered) when the Parties' submissions on the substantive issues are limited to the Claimants' Memorial, the Respondent's Request for Bifurcation and the Claimants' Reply. It is by no means inconceivable that perceptions as to the merits of an objection presented for bifurcation may shift considerably by the time it is actually pleaded and heard by a tribunal: particularly negative labels should be avoided in this context as the risk of at least the appearance of prejudgment is not insignificant.

13. Nor, at the other end of the spectrum, would it be appropriate to apply a threshold as high as "*more likely than not to succeed*": that would be tantamount to giving a preliminary ruling on the very substance of the objection, which would be manifestly inappropriate in a procedural decision on bifurcation.

14. The Tribunal considers that a party requesting the determination of an objection to its jurisdiction or the admissibility of claims (or other issue) in a preliminary phase of the arbitration must demonstrate that such an objection raises a serious issue to be determined on the basis of the materials currently before the tribunal. This test is not a surogate for a bare assessment of the merits of the objection: for example, a serious issue may arise because it is an entirely novel point of law such that no guidance is available in the existing jurisprudence; whereas the absence of a serious issue to be determined may follow the inability of the party to make good certain factual allegations at the preliminary stage in support of the objection, even though it is quite conceivable that this might be rectified later in the proceedings.

15. The test in *Philip Morris* also makes no distinction between issues of jurisdiction, on the one hand, and all other issues that do not call into question the adjudicative authority of the

[3] E.g., *Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Procedural Order No. 2, 13 August 2020, §§39-40; available at: https://www.italaw.com/sites/default/files/case-documents/italaw11833.pdf.

[4] E.g., RL-0047, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2, 28 June 2018, §51.

tribunal (admissibility, liability and quantum), on the other.[5] That does not seem to be appropriate: there are by definition more compelling reasons for a tribunal to establish if it has adjudicative authority at all before it exercises that authority over the dispute in its entirety. There is no doubt that a tribunal has the power, on the basis of competence-competence, to adjudicate upon objections to its jurisdiction. The question is rather at what stage of the proceedings the tribunal should exercise this power of competence-competence. If a tribunal reserves its decision on jurisdiction until after a full examination of the merits of the case, then the tribunal will be acting throughout the proceedings on the assumption that it does have jurisdiction—every step that the tribunal takes in the arbitration presupposes that is properly vested with adjudicative authority over the parties and their dispute on the basis of a valid reference to arbitration. The same issue does not arise in respect of questions relating to admissibility, liability or quantum. The Tribunal is not advocating for a presumption that jurisdictional objections should be decided in a preliminary phase of the arbitration; it is simply opining that it is a relevant factor to take into consideration.

16. The Tribunal will thus consider whether it is fair and expedient to order that certain objections be determined in a preliminary phase of this arbitration by reference to the following factors:

a. Does the objection raise a serious issue to be determined on the basis of the materials currently before the Tribunal?

b. Does the objection raise an issue of jurisdiction as opposed to admissibility, liability or quantum?

c. If the objection is upheld, will this lead to the termination of the proceedings in their entirety or in significant part?

d. In ruling upon the objection, will it be necessary to consider issues that are intertwined with liability and/or quantum such that any potential savings in time and costs will not be consequential?

[5] This was not an oversight: the tribunal in stated that "*at least for the issue of bifurcation, it does not matter whether the* [objection] *is characterized as going to jurisdiction or admissibility*"; RL-0036, *Philip Morris*, §118.

17. The Tribunal further notes that adjudicating upon a request for bifurcation should not presage a mini-trial on the merits of the prospective objections; it is an application that should be decided without excessive delays and unreasonable costs. The Parties are to be commended in this case by agreeing to a tight schedule both for their own submissions and for the Tribunal's decision, which fell due within a week of the Claimants' Reply.

B. THE FIRST OBJECTION

18. The Respondent maintains that the Claimants have failed to "*discharge*[] *their burden of proving that they were Egyptian nationals at the relevant points in time*".[6]

19. If the Respondent were to succeed in demonstrating that the Claimants were not Egyptian nationals at the relevant points in time, then that would put an end to these proceedings as the Tribunal would be without jurisdiction *ratione personae* under the Kuwait-Egypt BIT. Moreover, questions of nationality are separate from issues relating to the merits and hence there would be no difficulty in determining this objection in a preliminary and bifurcated phase. The question is whether the Respondent has demonstrated that there is a serious issue to be determined in respect of this objection based on the materials available at this stage.

20. The Respondent says that the Claimants have the burden of proving that they were Egyptian nationals both at the date of the breach of the treaty obligations forming the basis of their claims and continuously thereafter until they filed their Request for Arbitration. The Claimants have relied upon copies of their Egyptian naturalization certificates and current Egyptian passports for this purpose. The question of nationality under the BIT and the ICSID Convention is governed by international law because what is at stake is access to a dispute resolution mechanism established by treaty, but there is a renvoi to national law in resolving this question even if existing status under national law is not conclusive in this context. Official documents issued by the responsible national authorities do raise a presumption before an international tribunal that nationality has been validly conferred upon the individuals concerned. The Claimants argue that once tendered before the Tribunal, the burden then shifts to the other party to rebut that presumption and establish

[6] R's Request, §3.10.

why they should not be accorded deference in applying the test for nationality under the applicable treaty.

21. In setting out its preliminary case on this objection, the Respondent makes three points. First, it says that an "*Egyptian national is required to obtain approval from the Minister of Interior before acquiring another foreign nationality*" and it points to the Egyptian Nationality Law No. 26/1975 and its amendment Law No. 154/2004 in this context,[7] but it does not cite to any particular provision. The Claimants reply to this argument by noting that Article 10 of the said law, which contains a requirement for prior approval from the Egyptian Minister of the Interior, applies to Egyptian nationals seeking to be naturalized as nationals of foreign countries and thus not to the situation concerning the Claimants, who say they were nationals of Jordan and Canada before obtaining Egyptian nationality in 2005.[8] Based upon the materials currently before the Tribunal, it cannot be said that there is a serious issue to be determined in relation to this part of the objection.

22. Second, the Respondent says that Egyptian nationality may be withdrawn if it was acquired by fraud or based on false information.[9] The Claimants note that, under Egyptian law, the time limit for revoking nationality on this basis expired more than five years ago.[10] (The relevance of this time limit for the question of whether a particular nationality is opposable to a State for the purposes of the test under the applicable treaties is not germane to the disposal of the present application and the Tribunal leaves it to one side.) The Respondent has advanced two points of "concern" at this stage: (i) the Claimants were children when they purported to obtain Canadian citizenship based upon their investments in Canada; and (ii) the Egyptian ministerial decrees alleged to have granted the Claimants Egyptian nationality do not mention that the Claimants had Canadian citizenship in addition to Jordanian citizenship.[11] As the Claimants' Canadian citizenship is not in issue, the Tribunal does not presently understand the relevance of the first point. As to the second point, the Respondent states that this is "*particularly material where the forms require the applicant to disclose the nationality s/he holds at the time of application*". But there is no citation to

[7] R's Request, §3.12 (emphasis in original). *See* C-0261, Arab Republic of Egypt, Law No. 26/1975 dated 29 May 1975; C-0014, Arab Republic of Egypt, Law No. 154/2004 (excerpts) in force as of 15 July 2004.

[8] Cs' Reply, §24.

[9] R's Request, §3.12.

[10] Cs' Reply, §25.

[11] R's Request, §3.13.

the forms in question or any analysis of the legal consequences for such an alleged omission under Egyptian law. These omissions may or may not be rectified in due course but the Tribunal cannot, at this stage, conclude that there is a serious issue to be determined on this basis.

23. Third, the Respondent has taken issue with the Claimants' reliance upon scanned copies of their naturalization cetificates, which "*are not valid evidence of their nationality*" "*unless they are legalised originals*".[12] The Claimants, in response, have invited the Respondent to "*inspect the originals at its convenience*" and enclosed a copy of Ayat Sumrain's original certificate of naturalization as certified by the Consul of the Egyptian Consulate in Kuwait (with the offer of producing certified copies for the other Claimants).[13] The Claimants thus appear to have answered the Respondent's concern about the authenticity of the documents in question and, at this stage, there is no serious issue to be determined.

24. The Tribunal declines to order the bifurcation of the First Objection.

C. THE SECOND OBJECTION

25. The Respondent argues that the Claimants have not made an investment in accordance with the terms of Article 1 of the BIT or Article 25 of the ICSID Convention. The Respondent's principal argument is that the Claimants have not paid consideration for their shares in HVREC and/or Thimar Kuwait Holding Company ("**Thimar**") and thus cannot demonstrate that they have made a contribution or have assumed any risk, which the Respondent maintains are essential elements for a qualifying investment under the treaties. The Respondent highlights the fact that the share acquisitions by the Claimants were made on the basis of loans provided by the Claimants' mother or the First Claimant, which are payable only on demand and do not envisage the payment of interest.[14] The Claimants maintain that direct contibutions were made[15] and, in any event, as a matter of law, it is not necessary for the Claimants to make personal contributions in order to have a qualifying investment under the BIT or the ICSID Convention.[16]

[12] R's Request, §3.14.
[13] Cs' Reply, §26.
[14] R's Request, §§3.34-3.36.
[15] Cs' Reply, §29.
[16] Cs' Reply, §31.

26. The question of law raised by this Second Objection is whether a contribution by the Claimants themselves is required at the time they acquired their shares. (The Respondent does not currently challenge the fact that contributions were originally made by the Claimants' mother in relation to the Project.)[17] The jurisprudence appears to be divided on this issue. On the one hand, some decisions have interpreted the text of the relevant investment treaty to require an "active contribution" from the claimant investor; whereas other decisions deny that this is a requirement and point to the ramifications of such an approach: it would mean that an investment acquired by an individual as a gift or through inheritance from a family member, for example, would be deprived of protection upon the transfer. It is not the time or place for the Tribunal to attempt to resolve this legal issue now but it is bound to acknowledge that it is a serious one.

27. Depending on how that question of law is resolved, the factual issue is whether the Claimants have personally advanced consideration for their shares in HVREC and/or Thimar (or personally advanced funds for increases in capital), even if there is no serious challenge at this stage to the fact that they acquired legal title to the shares. The Claimants' argument that the Claimants have made other contributions by taking on different roles in relation to the Project (e.g., as architect, chief financial officer, marketing and public relations manager, and so on)[18] does not, at this stage, appear to be relevant unless those contributions resulted in the acquisition of assets in the Project that would otherwise come within the definition in Article 1 of the BIT.

28. The Respondent raises two other points. The first rests upon its observation that "*the share transfer slips record the relevant share acquisitions at an undervalue compared to the loan agreements*"; [19] the Respondent maintains that "[i]*t is necessary to examine the documentation provided by the Claimants under Kuwaiti law to determine whether this inconsistency is in fact a breach of applicable laws, intended to conceal the true value and/or nature of the transactions from relevant Kuwaiti state authorities.*"[20] There is no particularization as to which laws may be at issue and why. On the basis of this bare allegation, the Tribunal cannot conclude that the Respondent's position that the

[17] R's Request, §3.49; Cs' Reply, §28.
[18] Cs' Reply, §29.
[19] R's Request, §3.44.
[20] R's Request, §3.45.

transactions "*are an unenforceable sham from a Kuwaiti law perspective*"[21] raises a serious issue to be determined at this stage.

29. The Respondent's second point is its submission that the Claimants do not "*own*" or "*have a majority interest*" in the Project, or HVREC or Thimar.[22] According to the Respondent, even if the Claimants own the shares that they say they own, it still only amounts to a 49% interest in HVREC (and the same applies to Thimar). The Respondent provides a chart setting out the alleged shareholdings.[23] The Claimants have responded to this point simply with the assertion that "[t]*he Claimants hold (directly or indirectly) 70.9% of HVREC's shares*".[24] No reference or further elaboration is provided. The difference between the Parties appears to be that the Claimants, to use the Respondent's expression, "*amalgamate all of their shareholdings*"[25] to reach their 70.9% figure.

30. The reason that this is potentially significant is that Article 1(1) of the BIT provides that "[t]*he term 'investment' means every kind of asset located in a Contracting State and that an investor of the other Contracting State owns, or has a majority interest in, directly or indirectly …*". Article 1(1) goes on to provide that "[t]*his term includes, in particular, but is not limited to … (b) a company or commercial enterprise or joint venture, or stakes, or shares, and other forms of equity participation …*".[26]

31. The Claimants say that their investments consist of shares in HVREC and rights in the Project (which are directly held by HVREC under its Contract (and the Addendum to the Contract dated December 2014)).[27] The Respondent appears to be raising the question as to whether it is necessary for the Claimants to demonstrate that they have a "*majority interest*" in HVREC (directly or indirectly) in order to claim the Project rights as their indirect investment.[28] The Tribunal considers that this is a serious issue to be determined.

[21] R's Request, §3.45.
[22] R's Request, §3.46
[23] R's Request, §§3.47-3.48.
[24] Cs' Reply, §33.
[25] R's Request, §3.48.
[26] CL-0012, Kuwait-Egypt BIT.
[27] Cs' Memorial, §§186-188.
[28] R's Request, §3.48.

32. There is no doubt that the Second Objection, relating to the existence of a qualifying investment under the BIT and the ICSID Convention, is a threshold jurisdictional question and hence the particular sensitivities that have already been discussed in relation to such objections apply.

33. Although the arguments for and against bifurcation are finely balanced, the Tribunal considers that a ruling on this objection as a preliminary issue would be fair and expedient in all the circumstances. Certain factual issues would be raised by this Second Objection but they would be limited in scope and would not overlap with the merits. If the objection were to be upheld in relation to all Claimants, then it would effectively dispose of the case, thus saving both Parties significant resources. But even if the objection were not upheld or upheld partially in respect of some but not all of the Claimants, then it would still be beneficial to have clarity at an early stage as to the nature and scope of the investments as this may assist in narrowing the issues for the subsequent consideration of the merits (and possibly quantum). This is reinforced in connection with the Tribunal's consideration of the Third Objection, to which it will now turn.

34. The Tribunal has thus resolved to adjudicate upon this Second Objection in a preliminary phase save in respect of the Respondent's allegation of illegality in relation to the acquisition of the investments, which will be joined to the merits phase (if jurisdiction is upheld and if the Respondent elects to pursue this argument at that stage).

D. THE THIRD OBJECTION

35. The Respondent argues that the Claimants acquired their alleged investments in respect of claims arising out of events that pre-date those investments, such that the Tribunal does not have jurisdiction *ratione temporis* over such claims,[29] or, alternatively, it may not exercise its jurisdiction because an acquisition of an investment when a dispute is foreseeable is an abuse of process.[30]

36. In their Memorial, the Claimants say this:

> [T]he Claimants first invested in Kuwait when Ayat Sumrain acquired a first tranche of shares in HVREC on 15 April 2013. The

[29] R's Request, §3.56.

[30] R's Request, §§3.59-3.60.

> Claimants acquired further shares in HVREC between 2013-2017. The dispute, which relates to Kuwait's treatment of these investments, particularly following the Addendum (concluded in December 2014), therefore falls within the jurisdiction of the Tribunal *ratione temporis*.[31]

37. From this brief summary, the Tribunal considers that there is at least a serious issue to be determined concerning the timing of each Claimant's investment and the timing of the elements of each claim for a breach of the BIT that are pleaded by the Claimants, as well as the timing of the dispute. The above-quoted paragraph suggests that the dispute arose at some point following the Addendum (signed in December 2014) and that some of the Claimants acquired their investments between 2013 and 2017. There may be overlap between these two critical dates. Moreover, the Claimants' Memorial also suggests that it is possible that some of the elements of the claims arose before some of the Claimants acquired their investments, as such elements are pleaded as "*starting in 2015*".[32]

38. On the other hand, the Tribunal finds that it is unlikely, based upon the materials before it, that the Third Objection would dispose of the entire dispute even if it were upheld on the terms pleaded by the Respondent given that, on the Claimants' pleaded case, the First Claimant acquired her investment well before the other Claimants and thus might be said to be in a different position in this respect. The Respondent contends that its Third Objection would also dispose of the First Claimant's claims, as it maintains that the dispute arose earlier than in 2014, but nonetheless opines that its objection is "stronger" in relation to the Second to Fourth Claimants.[33] The Tribunal would not have bifurcated this Third Objection in isolation but, given its decision in relation to the Second Objection, it considers that it would be expedient to determine the Third Objection as a preliminary issue alongside the Second Objection. The Second Objection focuses on the nature and scope of the alleged investments, whereas the Third Objection focuses on their timing. Once again, it would be useful to have clarity on these issues even if the objections were to be rejected because this may limit the scope of issues to be decided in a liability/quantum phase.

39. The Third Objection will require the Tribunal to consider carefully the formulation of the claims as presented by the Claimants in their Memorial to ascertain the points in time at at

[31] Cs' Memorial, §192.
[32] Cs' Memorial, §§216-217.
[33] R's Request, §3.65.

which the claims arose from a legal perspective, but that does not involve trespassing onto the merits of those claims at a preliminary stage. Likewise, the Tribunal may need to decide when the dispute actually arose in accordance with the objective legal criteria, but that does not entail venturing into the merits either.

40. For these reasons the Tribunal considers that it would be expedient to determine the Third Objection in a preliminary phase in conjunction with the Second Objection.

E. THE FOURTH OBJECTION

41. The Respondent's Fourth Objection is that "*claims for contractual breaches are inadmissible*". It argues that:

> The Claimants' claims are plainly claims for breaches of contract. While the Claimants attempt to shoehorn their contractual claims into treaty claims by alleging breach of legitimate expectations, breach of an umbrella clause and even expropriation, they fail to point to any conduct by the Respondent that affected their shareholding.[34]

42. The Respondent continues:

> [T]he investment the Claimants are seeking to protect are the *shares* they hold in HVREC, either directly or indirectly through Thimar. Their attempt at claiming that they hold a separate investment in the Contract or the Project is untenable.[35]

43. This submission needs to be addressed in segments. First, the question of whether the Claimants "*hold a separate investment in the Contract or the Project*" appears to depend, on the Respondent's case, on the resolution of the issue embedded in the Second Objection concerning whether the Claimants have a "*majority interest*" in HVREC (directly or indirectly) for the purposes of Article 1 of the BIT. This points to the expediency of deciding the Second Objection before addressing the Fourth Objection.

44. Second, the Respondent's characterization of the Claimants' claims as "*claims for breaches of contract*" will, as the Claimants argue, entail a detailed investigation into the

[34] R's Request, §3.77.

[35] R's Request, §3.78 (emphasis in original).

merits of the claims.[36] The Tribunal will have to consider, among other things, whether the Respondent's conduct remained within the four corners of the contractual relationship with HVREC or whether the Respondent exercised sovereign powers outside the contractual framework in a manner that undermined HVREC's contractual rights. This also points to the expediency of joining this objection to the merits.

45. Third, the Respondent characterizes the Fourth Objection as relating to the admissibility of claims. For the reasons previously discussed, the particular sensitivities in exercising jurisdiction in circumstances where the jurisdictional mandate is challenged do not arise here.

46. The Tribunal thus declines to order the bifurcation of the Fourth Objection.

F. THE FIFTH OBJECTION

47. The Respondent submits that the Claimants have failed to comply with the requirements for the submission of this dispute to arbitration under Article 10 of the BIT, which reads in relevant part:

> 1. Disputes which arise between a Contracting State and an investor of the other Contracting State, in relation to an investment of the latter in the territory of the first State, shall be settled, as far as possible, by amicable means.
>
> 2. If such dispute cannot be settled within six months of the date on which either of the two parties to the dispute requested an amicable settlement by notifying the other party in writing, then the dispute shall be referred for resolution by one of the following means, to be chosen by the investor who is a party to the dispute …[37]

48. According to the Respondent, the Claimants failed to deliver a written notice to the Respondent requesting the amicable settlement of the dispute and did not allow the six-month period to elapse before filing the Request for Arbitration.[38] The Respondent

[36] Cs' Reply, §51.

[37] CL-0012, Kuwait-Egypt BIT.

[38] R's Request, §3.89.

maintains that these failures deprive the Tribunal of jurisdiction.[39] The Claimants counter with evidence that they did satisfy the requirements of Article 10 of the BIT and they maintain that they are properly characterized as "*procedural and directory in nature, rather than jurisdictional and mandatory*".[40]

49. The Tribunal notes that the Claimants rely upon several letters relating to the dispute that were sent to the Respondent starting with a letter to the Prime Minister on 28 November 2018. That letter concludes with the following paragraph:

> Therefore, due to the damages incurred by the investment, the Investors are forced to resort to the international arbitration authorities before the investors' disputes settlement committee under the auspices of the World Bank in order to present their case and to seek compensation for the damage incurred due to the governmental authorities' arbitrary actions as to the ongoing obstacles to date. This is in case the existing and regularly emerging obstacles and problems facing the Project are not removed, so that we are able to implement the Project.[41]

50. The further letters are dated 28 November 2018, 15 January 2019 and 12 May 2019.[42] The final letter was sent within six months of the Request for Arbitration. There was no response from the Respondent to these letters save that the First Claimant has testified that she received a phone call from the Respondent proposing an amicable settlement on 4 July 2019 after the Request for Arbitration was filed.[43]

51. The Respondent takes certain points in relation to these letters: the Respondent says that they were printed on HVREC's letter head; not all the Claimants signed every letter; and the letters do not, in express terms, request an "*amicable settlement of the dispute*".[44]

52. As the Tribunal has elected to birfurcate the Second and Third Objection, it considers that the issues raised by the Fifth Objection are so narrow and self-contained that it would be

[39] R's Request, §§3.91-3.92.

[40] Cs' Reply, §60.

[41] C-0238, Letter from HVREC to Kuwaiti Prime Minister dated 28 November 2018, p. 5.

[42] C-0237, Letter from HVREC to Kuwaiti Ministry of Finance dated 28 November 2018; C-0246, Letter from HVREC to Kuwaiti Ministry of Finance dated 15 January 2019; C-0253, Letter from HVREC to Kuwaiti Prime Minister dated 12 May 2019.

[43] Witness Statement of Ayat Sumrain, §143.

[44] R's Request §3.90.

expedient to rule upon the Fifth Objection in the preliminary phase in conjunction with the Second and Third Objections.

IV. THE TRIBUNAL'S RULING

53. The Tribunal orders the bifurcation of the Second, Third and Fifth Objections raised by the Respondent. Given this ruling, the Claimants are invited to consider whether they would wish to include, at their discretion, any of the other objections raised by the Respondent in the preliminary phase (the Tribunal proceeds on the assumption that the Respondent, having requested that all its objections be heard in the preliminary phase has already consented to the same). The Claimants are requested to state their position on this issue on or before **5 February 2021**.

54. The Tribunal confirms that it has additional availability on 20 May 2021 should the Parties consider that a three-day hearing is required. The Parties are invited to state their position on this issue on or before **12 February 2021**.

For and on behalf of the Tribunal,

[signed]

Prof. Zachary Douglas QC
President of the Tribunal
Date: 1 February 2021