# ICSID TRIBUNAL DECLINES JURISDICTION IN EXPROPRIATION CLAIM

*National Gas SAE v Arab Republic of Egypt*, ICSID Case No. ARB/11/7

## Introduction

In a decision handed down on 3 April 2014 in the matter of *National Gas SAE v Arab Republic of Egypt*(ICSID Case No. ARB/11/7), an ICSID tribunal (comprising VV Veeder QC (President), The Honourable L Yves Fortier QC and Professor Brigitte Stern) ("the Tribunal") considered the Respondent's jurisdictional objections:

(1) that the Tribunal had no jurisdiction *ratione personae* (personal jurisdiction over the parties); and
(2) that the Tribunal had no jurisdiction *ratione temporis* (temporal jurisdiction over the proposed action in relation to a passage of time).

The Tribunal concluded that it did not have jurisdiction. The decision of the Tribunal provides further guidance on the approach to be taken by tribunals considering the limits of ICSID jurisdiction and the requirements of the "foreign control" test in Article 25(2)(b) of the ICSID Convention.

## Background Facts

National Gas SAE ("the Claimant") is a private joint stock company incorporated under the laws of the Arab Republic of Egypt ("the Respondent").

The underlying dispute arose out of a Concession Agreement between the Claimant and the Egyptian General Petroleum Corporation entered into on 6 January 1999. Subsequently, an arbitration award was rendered under the auspices of the Cairo Regional Centre for International Commercial Arbitration.

Since 2006, 90% of shares in the Claimant have been owned by CTIP Oil & Gas International Ltd ("CTIP"), an entity incorporated under the laws of the Jebel Ali Free Zone in Dubai, UAE. CTIP is wholly owned by another UAE-incorporated juridical person known in the arbitral proceedings as 'REGI'. REGI, in turn, is wholly owned by Mr Reda Ginena, an Egyptian-Canadian dual national. CTIP, REGI and Mr Ginena were not parties to the arbitration.

On 9 February 2011, the Claimant submitted a Request for Arbitration to ICSID on the basis of: (i) the 1997 Treaty between Egypt and the UAE on the Encouragement, Protection and Guarantee of Investments ("the Treaty"); and (ii) the ICSID Convention.

## Applicable Rules

Article 1(3) of the Treaty defines an "investor" as *"any of its natural or juristic persons that*

*are investing in the territory of the other Contracting State".*

Article 10(4) of the Treaty provided that an investor from the other Contracting State owning the majority of the shares in a juridical person established in accordance with the law of a territory subject to a Contracting State was to fall within the definition of an "investor".

Article 25(1) of the ICSID Convention provided that jurisdiction extended to any legal dispute, arising directly out of an investment, between a Contracting State and a national of another Contracting State.

Article 25(2)(b) provided:

*(2) "National of another Contracting State" means:*

*(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.*

**The Parties' Arguments**

In summary, the Respondent argued that:

(a) the Claimant was ultimately owned or controlled by Mr Ginena (who has Egyptian-Canadian nationality);
(b) the Claimant is therefore an Egyptian company and is not under foreign control;
(c) therefore the Claimant is prevented from commencing arbitration under the terms of the Treaty and the ICSID Convention.

The Respondent argued that the Claimant did not fall within the exception provided by Article 25(2)(b) of the ICSID Convention, and that this exception was a limited one that required the local company to be under foreign control and agreement by the parties to treat the local company as a national of the Contracting State.

The Respondent argued that the fact that Mr Ginena had dual nationality could not establish jurisdiction under the ICSID Convention, even if (which was denied) the Respondent had consented. In any event, Canada was not a party to the ICSID Convention.

In summary, the Claimant argued:

(a) that what constituted "foreign control" is primarily to be determined by the parties' agreement;
(b) that the Tribunal should give effect to the protection afforded by the Treaty to Egyptian companies whose shares are majority owned by UAE companies;
(c) that the Claimant was majority owned by CTIP, not Mr Ginena;
(d) alternatively, Mr Ginena could establish jurisdiction as both his own investments and the investments of CTIP in Egypt were recognised by Egyptian law as foreign investments.

**The Decision**

The Tribunal held:

(a) without prejudice to the principle that arbitration is a consensual process, consent may not suffice to establish jurisdiction before an ICSID Tribunal;
(b) that in considering the "foreign control" test, the correct approach was to look to the company's true controllers;
(c) that Article 25(2)(b) was a qualified exception to the general limitation to ICSID jurisdiction (*"a sardine cannot swallow a whale"*);
(d) notwithstanding that Mr Ginena had chosen his corporate structure for legitimate fiscal reasons and not as an exercise in forum shopping, CTIP and REGI were mere shell companies masking the fact that Mr Ginena was the Claimant's true controller,
(e) therefore the Claimant was not under "foreign control", and the Tribunal did not have jurisdiction over the Claimant.

**Concluding Remarks**

Tribunals have previously been alive to the issue of using shell companies for the purpose of forum shopping. This Award illustrates that tribunals may still decline jurisdiction, even where the corporate structure of shell companies was set up for a legitimate purpose, where the dispute did not involve parties from two different Contracting States to the ICSID Convention.

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